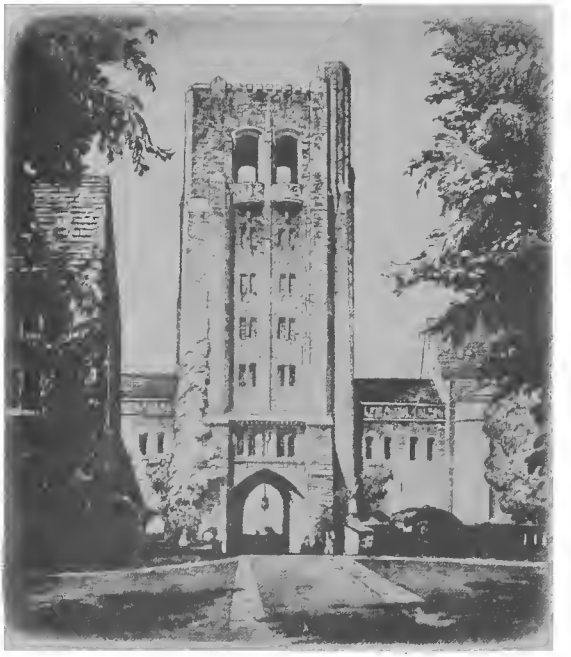

A TREATISE

ON THE LAW OF

SALE OF PERSONAL PROPERTY;

WITH REFERENCES TO THE

AMERICAN DECISIONS

AND TO THE

FRENCH CODE AND CIVIL LAW.

By J. P. BENJAMIN, Esq., Q. C.,
OF LINCOLN'S INN, BARRISTER-AT-LAW

THIRD AMERICAN FROM LATEST ENGLISH EDITION.

BY

EDMUND H. BENNETT.

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ADVERTISEMENT TO THE THIRD AMERICAN EDITION.

The second American edition of Benjamin on the Law of Sale, prepared with elaborate notes by the Hon. J. C. Perkins, since deceased, was published in 1877. Its rapid sale and the favorable comments upon it from all quarters prove it has no competitor in the same branch of the law. The subject is so prolific of litigation that every new edition must necessarily embrace much matter not contained in the preceding, and the present will be found to refer to over fifteen hundred cases not cited in any former edition. The Irish and Canadian Reports, not often referred to in any previous issue of the work, have been carefully examined, and many valuable cases cited therefrom. The undersigned desires to express his great obligation to George R. Swasey, Esq., of the Suffolk Bar, without whose valuable labors this edition could not have been so promptly and exhaustively prepared.

EDMUND H. BENNETT.

Boston, *July* 1, 1881.

PREFACE TO THE FIRST EDITION.

If the well known treatise of Mr. Justice Blackburn had been designed by its learned author to embrace the whole law on the subject of the sale of goods, nothing further would now be needed by the practitioner than a new edition of that admirable work, incorporating the later statutes and decisions, so as to afford a connected view of the modifications necessarily introduced by lapse of time into the law of a contract so perpetually recurring as that of sale. But, unfortunately for the Profession, Blackburn on Sales was intentionally restricted in its scope, and is confined to an examination of the effects of the contract only, and of the legal rights of property and possession in goods.

This treatise is an attempt to develop the principles applicable to all branches of the subject, while following Blackburn on Sales as a model for guidance in the treatment of such topics as are embraced in that work. An effort has been made to afford some compensation for the imperfections of the attempt, by references to American Decisions, and to the authorities in the Civil Law, not elsewhere so readily accessible.

Temple, *August*, 1868.

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SALE OF PERSONAL PROPERTY.

SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

AT COMMON LAW.

CHAPTER I.

OF THE CONTRACT OF SALE OF PERSONAL PROPERTY, ITS FORM, AND ESSENTIAL ELEMENTS.

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Definition of a bargain and sale of goods	1
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Parties	1
Mutual assent	1
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§ 1. By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*. (*a*) Hence it follows, Definition of a bargain and sale of goods.

(*a*) [Wittowsky *v.* Wasson, 71 N. Car. 451. A present transfer. Martin *v.* Adams, 104 Mass. 262; Smith *v.* Weaver, 90 Ill. 392.] Blackstone's definition is, "A transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "A contract for the transfer of property from one person to another for a valuable consideration." 2 Kent, 615, 11th ed. This definition would include barter, which, though in most respects analogous, is certainly not identical, with sale. [See the definition given by Wayne J. in Williamson *v.* Berry, 8 How. (U. S.) 544. In Gardner *v.* Lane, 12 Allen, 39, 43, Definitions of a sale.

that to constitute a valid sale, there must be a concurrence of the following elements, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing, the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or promised. That it requires, 1st, parties competent to contract, and 2d, mutual assent, in order to effect a sale, is manifest from the general principles which govern all contracts. The third essential is that there should be a transfer of the *absolute or general* property in the thing sold; for in law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing. An illustration of this is presented in the case of Jenkins *v.* Brown, (*b*) where a factor in New Orleans bought a cargo of corn with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own order, and indorsed and delivered them to a banker to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods. And in like manner when goods are delivered in pawn or pledge, the general property remains in the pawnor, and a special property is transferred to the pawnee. (*c*)

The elements of the contract.

Parties.

Mutual assent.

Transfer of *absolute* property.

Jenkins *v.* Brown.

§ 2. So in relation to the element of price. It must be *money*, paid or promised, accordingly as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in ex-

Price, must be money.

Bigelow C. J. said: "The ordinary definition of a sale, as a transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up a contract. A more complete enumeration of these would be, competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale and to the price to be paid therefor. A learned author adds to this summary the brief and significant remark, 'If any of these ingredients be wanting, there is no sale.' Atkinson on Sales, 5." Mackaness *v.* Long, 85 Penn. St. 158.]

(*b*) 14 Q. B. 496; 19 L. J. Q. B. 286.

(*c*) Halliday *v.* Holgate, L. R. 3 Ex. 299; Harper *v.* Goodsell, L. R. 5 Q. B. 424; [Jack *v.* Eagles, 2 Allen (N. B.), 95.]

change for goods it is a barter. So also goods may be given in consideration of work and labor done, or for rent, or for board and lodging, (*d*) or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties, are generally, but not always, the same as in the case of sales. (*e*) If no valuable consideration be given for the transfer, it is a gift, (*f*) not a sale. In Ex parte White, in re Nev-

(*d*) See an example in Keys *v.* Harwood, 2 C. B. 905.

(*e*) For cases showing distinction between sale and barter, see Harris *v.* Fowle, cited in Barbe *v.* Parker, 1 H. Bl. 287; Hands *v.* Burton, 9 East, 349; Harrison *v.* Luke, 14 M. & W. 139; Sheldon *v.* Cox, 3 B. & C. 420; Guerreiro *v.* Peile, 3 B. & Ald. 616; Forsyth *v.* Jervis, 1 Stark. 437; Read *v.* Hutchinson, 3 Camp. 352. [The difference between a *sale* and an *exchange* is this: that in the former the price is paid in *money;* whilst in the latter it is paid in *goods*, by way of barter. But the same rules of law apply to both. "The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or hy way of barter." Bigelow J. in Commonwealth *v.* Clark, 14 Gray, 372. See Howard *v.* Harris, 8 Allen, 297. But there is a difference between a contract of sale and an exchange, in the form of remedy to be adopted for a breach. The declaration for breach of an agreement for an exchange of goods should be special; a count for goods sold and delivered is not sufficient. Mitchell *v.* Gile, 12 N. H. 390; Vail *v.* Strong, 10 Vt. 457. See, also, Loomis *v.* Wainwright, 21 Ib. 520; 2 Bl. Com. 446, 447; Anon. 3 Salk. 157; Stevenson *v.* The State, 65 Ind. 409; Edwards *v.* Cottrell, 43 Iowa, 194; Williamson *v.* Berry, 8 How. 544.]

Difference between sale and exchange.

As to pleading.

(*f*) Parol gifts of personal chattels do not pass the property, if there be no actual delivery to the donee. Irons *v.* Smallpiece, 2 B. & A. 551; Shower *v.* Pilch, 4 Ex. 478; Douglas *v.* Douglas, 22 L. T. N. S. 127; [Hanson *v.* Millett, 55 Maine, 184; Dole *v.* Lincoln, 31 Ib. 422; Allen *v.* Polerczky, 31 Ib. 338; Wing *v.* Merchant, 57 Ib. 383; Trowbridge *v.* Holden, 58 Ib. 117; Marston *v.* Marston, 21 N. H. 491; Grover *v.* Grover, 24 Pick. 261; Huntington *v.* Gilmore, 14 Barb. 243; Brown *v.* Brown, 23 Ib. 565; Hunter *v.* Hunter, 19 Ib. 631; Brink *v.* Gould, 7 Lansing, 425; Whiting *v.* Barrett, 7 Ib. 106; Mahan *v.* United States, 16 Wallace, 143; Adams *v.* Hayes, 2 Ired. (Law) 366; Sims *v.* Sims, 2 Ala. 117; Hitch *v.* Davis, 3 Md. Ch. 266; People *v.* Johnson, 14 Ill. 342; Withers *v.* Weaver, 10 Barr, 391; In re Campbell's Estate, 7 Ib. 100; Carpenter *v.* Dodge, 20 Vt. 595; Camp's Appeal, 36 Conn. 88, 92; Dean *v.* Dean's Estate, 43 Vt. 337; Blanchard *v.* Sheldon, 43 Ib. 512; Reed *v.* Spaulding, 42 N. H. 114; 2 Kent, 438, 439; Wheeler *v.* Wheeler, 43 Conn. 503; White *v.* Atkins, 5 Low. Can. 420; Kimball *v.* Leland, 110 Mass. 325; Kingman *v.* Perkins, 105 Ib. 111; Foss *v.* Lowell Five Cents Sav. Bank, 111 Ib. 285; Davis *v.* Ney, 125 Ib. 590; Queen *v.* Carter, 13 U. C. C. P. 611; McCabe *v.* Robertson, 18 Ib. 471; Malone *v.* Reynolds, 2 Fox & Smith 59; Scott *v.* McAlpine, 6 U. C. C. P. 302; Rupert *v.* Johnston, 40 U. C. Q. B. 11; Taylor *v.* Henry, 48 Md. 550; In re Ward, 51 How. Pr. 316; Johnson *v.*

Delivery necessary in gift.

ille, (*g*) is an interesting exposition, by James and Mellish LL. JJ. of the principles by which to distinguish between a contract of "sale or return," and a contract of *del credere* agency; and in the South Australian Insurance Company *v.* Randell, (*h*) the distinction between a sale and a bailment is elucidated. (*i*)

Spies, 5 Hun, 468; Stevens *v.* Stevens, 2 Redf. 265; Curry *v.* Powers, 70 N. Y. 212; Vandermark *v.* Vandermark, 55 How. Pr. 408; Turner *v.* Brown, 6 Hun, 331; Martin *v.* Funk, 75 N. Y. 134; Simmons *v.* Cincinnati Sav. Soc. 31 O. St. 457. But an effectual gift may be made of a chattel already in the actual possession of the donee, without any renewed act of delivery. Champney *v.* Blanchard, 39 N. Y. 111; Wing *v.* Merchant, 57 Maine, 383; Dole *v.* Lincoln, 31 Ib. 422; Whiting *v.* Barrett, 7 Lansing, 106, 109; Shower *v.* Pilck, 4 Ex. 478; Huntington *v.* Gilmore, 14 Barb. 243, 247, 248. "A gift is strictly a contract." Hoar J. in Attorney General *v.* Merrimack Manuf. Co. 14 Gray, 603. Gifts *inter vivos*, "when made perfect by delivery of the things given, are executed contracts." Wilde J. in Grover *v.* Grover, 24 Pick. 264. Delivery in this, as in every other case, must be according to the nature of the thing. The donor must part not only with the possession, but with the dominion of the property; and when the gift is perfect, by delivery and acceptance, it is then irrevocable by the donor. 2 Kent, 439, 440; Noble *v.* Smith, 2 John. 52; Hooper *v.* Goodwin, 1 Swanst. 485; Picot *v.* Sanderson, 1 Dev. (N. Car.) 309; Tancred *v.* O'Mullin, 2 Oldright (N. S.), 145; Viet *v.* Viet, 34 U. C. Q. B. 104; Walker *v.* M'Bride, 2 Hnds. & Br. 215.] As to gifts of money by check, see Bromley *v.* Brunton, L. R. 6 Eq. 275, and cases there cited; [Jones *v.* Lock, L. R. 1 Ch. App. 25.] And as to gift of a bond without delivery, see Morgan *v.* Malleson, L. R. 10 Eq. 475, and cases there cited. [In Jones *v.* Lock, L. R. 1 Ch. App. 28, Lord Cranworth L. C. said: "No doubt a gift may be made by any person *sui juris* and *compos mentis*, by a conveyance of real estate or by delivery of a chattel; and there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary. If I give any chattel, that, of course, passes by delivery; and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration." As to voluntary gifts and settlements of personal property, including promissory notes and other choses in action, see Richardson *v.* Richardson, L. R. 3 Eq. 686; Kekewich *v.* Manning, 1 De G., M. & G. 176; In re Way's Trusts, 2 De G., J. & S. (Am. ed.) 365, and note (1); Wing *v.* Merchant, 57 Maine, 383; Reed *v.* Spaulding, 49 N. H. 114; Westerlo *v.* De Witt, 36 N. Y. 340; Connor *v.* Trawick, 37 Ala. 289, 295; 2 Kent, 438; Sir W. Page Wood V. C. in Penfold *v.* Mould, L. R. 4 Eq. 562, 564; Stone *v.* Hackett, 12 Gray, 227; Borneman *v.* Sidlinger, 15 Maine, 429. As to a gift *causa mortis* in trust, see Sheedy *v.* Roach, 124 Mass. 472, and cases cited.]

Delivery according to nature of thing.

Declarations of trust.

(*g*) L. R. 6 Ch. App. 397; [*post*, §§ 597 and note, 598.]

(*h*) L. R. 3 P. C. C. 101.

(*i*) [The distinction between a sale and a bailment is further illustrated in Hunt *v.* Wyman, 100 Mass. 198. This was an action for the price of a horse, as on a sale thereof. It appeared that the plaintiff had the horse for sale; that the defendant asked and was told the price and character of the horse; that the defendant expressed a desire to take the horse and try it, and proposed that "if the plaintiff would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it, the night of the day he took it;" and the plaintiff as-

Sale and bailment; distinction between.

§ 3. By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount of value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence,

Form at common law.

sented, and delivered the horse to the defendant's servant, from whom it escaped almost immediately without his fault, and was so injured that the defendant had no opportunity to try it, but did not return it within the time agreed, nor afterwards. The plaintiff testified that he did not expect that the defendant would finally take the horse until after he had tried it. The court decided that this evidence showed a bailment of the horse, but no sale. Wells J. said: "This contract, it is true, is silent as to what was to take place if the defendant should like the horse, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return. A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale." See, also, Fuller *v.* Buswell, 34 Vt. 107; Bulkley *v.* Andrews, 39 Conn. 70; Pritchett *v.* Cook, 62 Penn. St. 193; Walker *v.* Butterick, 105 Mass. 237. Where by a contract a person receives a chattel to keep for a certain time, and to become the owner of it then, if he has paid the stipulated price, but if otherwise, to pay for its use; he receives it as bailee, and the property is not changed until the price is paid. Enlow *v.* Klein, 79 Penn. St. 488. See Rose *v.* Story, 1 Penn. St. 190; Clark *v.* Jack, 7 Watts, 375; Becker *v.* Smith, 59 Penn. St. 469; Myers *v.* Harvey, 2 Penn. 479; Crist *v.* Kleber, 79 Penn. St. 240. It is said to be a recognized distinction between bailment and sale, that when the identical thing delivered is to be returned, though in an altered form, the contract is one of bailment, and the title to the property is not changed. When there is no obligation to return the specific article, and the receiver is at liberty to return another thing and of equal value, he becomes debtor to make the return, and the title to the property is changed; the transaction is a sale. Lonergan *v.* Stewart, 55 Ill. 45; Rahilly *v.* Wilson, 3 Dill. 420; Schlesinger *v.* Stratton, 9 R. I. 578; Tilt *v.* Silverthorne, 11 U. C. Q. B. 619; Rankin *v.* Mitchell, 1 Hannay (N. B.), 495; Graham *v.* Wiley, 16 U. C. Q. B. 265; Stephenson *v.* Ranney, 2 U. C. C. P. 196; Benedict *v.* Ker, 29 Ib. 410; Isaac *v.* Andrews, 28 Ib. 40; Good *v.* Winslow, 4 Allen (N. B.), 241; Des Brisay *v.* Mooney, 2 Ib. 53; Nelson *v.* Brown, 44 Iowa, 455; Johnston *v.* Browne, 37 Ib. 200; Hughes *v.* Stanley, 45 Ib. 622; Marks *v.* Cass Co. Mill & Elevator Co. 43 Ib. 146; Marsh *v.* Titus, 3 Hun, 550; Flander *v.* People, 4 Alb. L. J. 316; Frazer *v.* Bass, 66 Ind. 1; Grier *v.* Stout, 2 Bradwell (Ill.), 602; Dittmar *v.* Norman, 118 Mass. 319; Powder Co. *v.* Burkhardt, 97 U. S. 110. See Reed *v.* Abbey, 2 Thomp. & C. (N. Y.) 380. A deposit of grain with a warehouseman, with the understanding that he is to ship and sell it on his own account, and, when the depositor desires to sell, pay him the highest price or return a like quantity and quality, was held to constitute a sale and not a bailment. Johnston *v.* Browne, 37 Iowa, 200. — *Sale or consignment*, § 598, *post.* Where by the terms of a contract one party is to take goods of another and return monthly the amount of sales, at the

Criterion to distinguish sale from bailment.

Sale or consignment.

verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on both parties. (*k*) If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law "a bargain and sale of goods;" but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, — as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, — then the contract was called in the common law an executory agreement. The distinction between a bargain and sale of goods and an executory agreement is the subject of book II. of this treatise.

Statute of frauds.

§ 4. A very important modification of the common law in respect to a bargain and sale of goods, and to an executory contract, was introduced by the statute 29 Car. 2, c. 3, commonly called the statute of frauds, and an amendment thereof, the 9 Geo. 4, c. 14, s. 7, which are very fully considered, *post*, book I. part II.

prices charged by the latter, who will furnish the former with all goods in his line, it is to be regarded as a consignment of the goods for sale, and not a sale of them. Walker *v.* Butterick, 105 Mass. 237; Pam *v.* Vilmar, 54 How. Pr. 235; Converseville Co. *v.* Chambersburg Woollen Co. 14 Hun, 609; Dodds *v.* Durand, 5 U. C. Q. B. 623; Brothers *v.* Davis, 47 Iowa, 363; Bayliss *v.* Davis, Ib. 340; Conable *v.* Lynch, 45 Ib. 84; Albert *v.* Lindau, 46 Md. 334; Nutter *v.* Wheeler, 2 Low. 346; Ex parte White, L. R. 6 Ch. Ap. 397; In re Linforth, 4 Sawyer Circ. Ct. 370; Gooderham *v.* Marlatt, 14 U. C. Q. B. 228. See, as to sale with right to repurchase, Moore *v.* Sibbald, 29 U. C. Q. B. 487; Mahler *v.* Schloss, 7 Daly, 291; Slutz *v.* Desenberg, 28 O. St. 371.]

(*k*) [See Lincoln *v.* Johnson, 43 Vt. 74, 77; Darden *v.* Lovelace, 52 Ala. 290, 291. Audenreid *v.* Randall, 3 Cliff. 99.]

CHAPTER II.

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§ 5. So far as the general capacity to contract is concerned, and the rules of law relating to persons either totally incompetent to contract, or protected from liability by reason of infancy, coverture, and the like causes, the reader must be referred to treatises which embrace the subject of contracts in general. Such rules and principles as are specially applicable to sales of goods will be examined in this chapter.

SECTION I. — WHO MAY SELL.

§ 6. In general, no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet.* (*a*) A person

None but the owner.

(*a*) Peer *v.* Humphreys, 2 Ad. & E. 161; [Stanley *v.* Gaylord, 1 Cush. 536, 495; Whistler *v.* Foster, 32 L. J. C. P. 545; Parsons *v.* Webb, 8 Greenl. 38; Gal-

therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some special cases presently to be noticed); and even if, in ignorance of the fact that the goods were lost or stolen, he resell them to a third person, in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon. (*b*) But a man may make a valid *agreement to sell* a thing

vin *v.* Bacon, 2 Fairf. 28; Barrett *v.* Warren, 3 Hill, 348; Gilmore *v.* Newton, 9 Allen, 171; Riley *v.* Water Power Co. 11 Cush. 11; Bearce *v.* Bowker, 115 Mass. 129; Moody *v.* Blake, 117 Ib. 23, 26; Chapman *v.* Cole, 12 Gray, 141; Prime *v.* Cobb, 63 Maine, 200; Courtis *v.* Cane, 32 Vt. 232; Riford *v.* Montgomery, 7 Ib. 418; Williams *v.* Merle, 11 Wend. 80; Kinder *v.* Shaw, 2 Mass. 398; Wilson *v.* Crockett, 43 Mo. 218; Bryant *v.* Whitcher, 52 N. H. 158, 161; Klein *v.* Seibald, 89 Ill. 540.

Not necessary that goods should be in actual possession of vendor.

But it is not necessary that the goods should be in the actual possession of the vendor at the time of sale. The sale may be good, although the goods are in the possession of a third party tortiously withholding them. "I know of no principle of law," says Judge Story in the case of The Brig Sarah Ann, 2 Sumner, 211, "that establishes that a sale of personal goods is invalid, because they are not in the possession of the rightful owner; but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title against every person not holding the same under a *bonâ fide* title for a valuable consideration without notice; and *a fortiori*, against a wrong-doer." The same was held in Cartland *v.* Morrison, 32 Maine, 190; Webber *v.* Davis, 44 Ib. 147; Hubbard *v.* Bliss, 12 Allen, 590; Carpenter *v.* Hale, 8 Gray, 157. See Boynton *v.* Willard, 10 Pick. 166, 169; Hassell *v.* Borden, 1 Hilton (N. Y.), 128; Zabriskie *v.* Smith, 3 Kernan, 322; Tome *v.* Dubois, 6 Wallace, 554; First National Bank of Cairo *v.* Crocker, 111 Mass. 163, 169, 170.]

(*b*) Stone *v.* Marsh, 6 B. & C. 515; Marsh *v.* Keating, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; White *v.* Spettigue, 13 M. & W. 603; Lee *v.* Bayes, 18 C. B. 599; [Crane *v.* London Dock Co. 5 B. & S. 313; 2 Kent, 325; 1 Chitty Contr. (11th Am. ed.) 534; Beazley *v.* Mitchell, 9 Ala. 780; Hoffman *v.* Carow, 20 Wend. 21; 22 Ib. 285; Dame *v.* Baldwin, 8 Mass. 519; McGrew *v.* Browder, 14 Martin (La.), 17; Roland *v.* Gundy, 5 Ohio, 202; Browning *v.* Magill, 2 Harr. & J. 308; Heckle *v.* Lurvey, 101 Mass. 344; Gilmore *v.* Newton, 9 Allen, 171; Chapman *v.* Cole, 12 Gray, 141; Stanley *v.* Gaylord, 1 Cush. 536; Riley *v.* Boston Water Power Co. 11 Ib. 11. Breckenridge *v.* McAfee, 54 Ind. 141. Upon the principle stated in the text, an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen; and a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person; is liable to the rightful owner in trover without a previous demand. Hoffman *v.* Carow, 20 Wend. 21; S. C. 22 Ib. 285; Coles *v.* Clark, 3 Cush. 399; Gilmore *v.* Newton, 9 Allen, 171; Hills *v.* Snell, 104 Mass. 177; Williams *v.* Merle, 11 Wend. 80; Courtis *v.* Cane, 32 Vt. 232; Pease *v.* Smith, 61 N. Y. 477. In the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and, before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. Loring *v.* Mulcahy, 3 Allen,

Auctioneer liable to real owner if he sell stolen goods.

When naked bailee not liable.

not yet his, (*c*) and even a thing not yet in existence; this *executory* contract will be examined in the next chapter, which treats of the things sold.

§ 7. In general, also, any person competent to contract may sell goods of which he is owner, and convey a perfect title to the purchaser. But if the buyer has notice that any writ, by virtue of which the goods of the vendor might be seized or attached, has been delivered to and remains unexecuted in the hands of the sheriff, under-sheriff, or coroner, the goods purchased by him are liable to seizure in his hands under such writ, by virtue of the statutes 29 Car. 2, c. 3, and 19 & 20 Vict. c. 97, s. 1. The delivery of the writ to the sheriff binds the property from the date of delivery, but does not change the ownership; so that the vendor's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor. (*d*) If, however, the purchaser had no notice of the existence of the writ in the sheriff's hands, the first section of the act 19 & 20 Vict. c. 97, called the "Mercantile Law Amendment Act," protects him, by providing that no such writ "shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ." (*e*) The first and most impor-

Effect of outstanding writ against owner.

575. So in Spooner *v.* Holmes, 102 Mass. 503, it was held by a majority of the court that an action for the conversion of interest coupons of United States bonds cannot be maintained by the owner, from whom they have been stolen, against a person who has received them as an agent, for exchange in good faith and without gross negligence, from a party to the theft, and has transferred them by delivery and paid the proceeds to his employer, without benefit to himself, and without any demand or notice.]

(*c*) [See Bruce *v.* Bishop, 43 Vt. 161, 163.]

(*d*) Woodland *v.* Fuller, 11 Ad. & E. 859. [As to the sale and delivery of property under attachment, see *post*, § 696 in note (*b*). Hooker *v.* Jarvis, 6 U. C. Q. B. (O. S.) 439; Storey *v.* Agnew, 2 Bradwell (Ill.), 353. A. brought suit against B. and attached property, which was sold by the officer, and the proceeds came into his hands. The suit in which the property was attached did not proceed to judgment, but the entry of "neither party" was made in it. While the proceeds of the sale were in the hands of the deputy, and the suit was still pending, B. assigned the attached property and its proceeds to A. in these words: "I . . . . hereby ratify and confirm said sale by said sheriff . . . . and hereby sell, assign, and transfer to said A. all of said personal property attached and trusteed and the proceeds thereof." It was held that the instrument transferred to A. not merely a chose in action, enabling him to sue in B.'s name, but transferred to him the property in the proceeds, and that it was the deputy's official duty to deliver the proceeds to A. First Ward Nat. Bank *v.* Thomas, 125 Mass. 278.]

Transfer of proceeds of attached property.

(*e*) This section is not retrospective in its operation, and does not affect preëxist-

Exceptions to rule that owners only can sell.

tant exception to the rule, that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in *market overt.* (*f*)

Market overt.

§ 8. MARKET OVERT in the country is held on special days, provided by charter or prescription; (*g*) but in London every day except Sunday is market-day. (*h*) In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly to sale is market overt for such goods as the owner openly professes to trade in. (*i*) As a London shop is not a market overt for any goods except such as are usually sold there, it was held in the leading case, (*i*) that a scrivener's shop was not a market overt for plate, though a goldsmith's would have been. So Smithfield was held not to be a market overt for clothes, but only for horses and cattle; (*k*) and Cheapside not for horses; (*l*) and Aldridge's not for carriages. (*m*) A wharf is not a market overt, even in the city of London. (*n*) In a recent case in the queen's bench, the common law doctrine of market overt

ing rights. Williams *v.* Smith, [2 H. & N. 443;] 26 L. J. Ex. 371; and in error, [4 H. & N. 559;] 28 L. J. Ex. 286; Flood *v.* Patterson, 30 L. J. Ch. 486; and Jackson *v.* Woolley, 8 E. & B. 778, and 27 L. J. Q. B. 181, 448. The subsequent statutes of 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, furnish the rules on this subject, in respect of land, including leasehold titles to land.

American doctrine as to market overt.

(*f*) [The law of Massachusetts does not recognize the effect of the English sale in market overt. Dame *v.* Baldwin, 8 Mass. 521; Towne *v.* Collins, 14 Ib. 500; Southwick *v.* Harndell, 2 Dane Abr. 286. This is generally true of the law in all of the American States. 2 Kent, 344; Ventress *v.* Smith, 10 Peters, 176. In New York, Wheelwright *v.* Depeyster, 1 John. 480; Hoffman *v.* Carow, 22 Wend. 285; S. C. 20 Ib. 21; Mowrey *v.* Walsh, 8 Cowen, 238. In Pennsylvania, Easton *v.* Worthington, 5 Serg. & R. 130; Hosack *v.* Weaver, 1 Yeates, 478; Hardy *v.* Metzgar, 2 Ib. 347. In Vermont, Heacock *v.* Walker, 1 Tyler, 341; Griffith *v.* Fowler, 18 Vt. 390. In Ohio, Roland *v.* Gundy, 5 Ohio, 203. In Maryland, Browning *v.* Magill, 2 Harr. & J. 308. In New Hampshire, Bryant *v.* Whitcher, 52 N. H. 158; Nixon *v.* Brown, 57 Ib. 34. In Maine, Coombs *v.* Gorden, 59 Maine, 111, 112. See Fawcett *v.* Osborn, 32 Ill. 411; Robinson *v.* Skipworth, 23 Ind. 311.]

(*g*) See Benjamin *v.* Andrews, 5 C. B. N. S. 299; 27 L. J. M. C. 310.

(*h*) Case of market overt, 5 Rep. 83 b; L'Evesque de Worcester's case, Moore, 360; Poph. 84; Comyn's Dig. Market, E.; 2 Bl. Com. 449; Lyons *v.* De Pass, 11 Ad. & E. 326; Crane *v.* The London Dock Company, 33 L. J. Q. B. 224; S. C. 5 B. & S. 313; Anon. 12 Mod. 521.

(*i*) 5 Rep. 83 b.

(*k*) Moore, 360.

(*l*) Ib. See, also, Taylor *v.* Chambers, Cro. Jac. 68.

(*m*) Marner *v.* Banks, 17 L. T. 147.

(*n*) Wilkinson *v.* King, 2 Camp. 335.

was much discussed, and the chief justice expressed the opinion that a sale could not be considered as made in market overt "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold. (*o*)

§ 9. The exceptions to the validity of sales made in *market overt* by one who is not the owner, and the rules of law governing the subject, are fully treated by Lord Coke, in 2 Inst. 713, and have been the subject of numerous decisions. A sale in market overt does not give a good title to goods belonging to the sovereign; nor protect a buyer who knew that they were not the property of the seller, or was guilty of bad faith in the transaction. The purchaser is not protected if the sale be made in a covert place, as a back room, warehouse, or shop with closed windows; or between sunset and sunrise; or if the treaty for sale be begun out of market overt. The privilege of market overt does not extend to gifts, (*p*) nor to sales of pawns taken to any pawnbroker in London, or within two miles thereof; (*q*) and if the original vendor, who sold without title, come again into possession of the goods after any number of intervening sales, the right of the original owner revives. (*r*)

Sales in market overt that are not valid.

§ 10. A sale by sample is not a sale in market overt, and in

(*o*) Per Cockburn C. J. in Crane *v.* The London Dock Company, 5 B. & S. 313; 33 L. J. Q. B. 224. [The fact that the sale was made in market overt will not necessarily, or of itself, excuse the vendor, and relieve him of liability to the owner of the stolen property. In Ganly *v.* Ledwidge, Ir. R. 10 C. L. 33, Barry J. said: "To argue that the circumstance that the sale was made in market overt *per se* exempts the defendants from liability, seems to me to involve a curious confusion of ideas. The doctrine of sale in market overt in the case of stolen property exists in our law for the protection of the purchaser, of the man who innocently buys in the open public market. Thus applied, the rule exhibits all that reason and common sense which so largely pervade the fundamental rules of our law. But I suppose that until this case, it never was contended that the privilege of the market overt extended protection not alone to the purchaser but to the seller, — the innocent seller it may be, and in this case certainly was, — but still the seller, and as such seller the agent of the thief. Such a proposition . . . . 'capsizes the intellect.'"]

The vendor is not protected by a sale in market overt.

(*p*) 2 Inst. 713; 2 Bl. Com. 499; Hartop *v.* Hoare, 2 Str. 1187; Wilkinson *v.* King, 2 Camp. 335; Packer *v.* Gillies, 2 Camp. 336, note; cases cited in Crane *v.* The London Dock Company, 33 L. J. Q. B. 224; 5 B. & S. 363.

(*q*) Act 1 Jac. 1, c. 21, s. 5; Hartop *v.* Hoare, 3 Atk. 44.

(*r*) 2 Bl. Com. 450; 2 Inst. 713; and see per Best J. in Freeman *v.* East India Company, 5 B. & A. 624.

Hill *v.* Smith, (*s*) Sir James Mansfield C. J. said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market." This decision was approved and followed by the queen's bench in Crane *v.* The London Dock Company. (*t*) In Lyons *v.* De Pass, (*u*) a sale was held to be entitled to the privilege of market overt where made in a shop in the city of London TO the shopkeeper who dealt in such goods; but the point was not raised, and the existence of the privilege in such a case was strongly questioned by the judges in Crane *v.* The London Dock Company. (*x*)

Sale by sample, not a sale in market overt.

Hill *v.* Smith.

Purchase by shopkeeper in London.

Lyons *v.* De Pass.

§ 11. The security of a purchaser in market overt who innocently buys stolen goods is affected by the statute 24 & 25 Vict. c. 96, s. 100, which reënacts and adds to the 7 & 8 Geo. 4, c. 29, s. 57. (*y*) By the terms of this section, it is provided that "If any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." It has been settled that, on the true construction of this statute, the property in the chattel becomes revested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the court. (*z*) But an

Where true owner prosecutes felon.

(*s*) 4 Taunt. 532.

(*t*) 33 L. J. Q. B. 224; 5 B. & S. 313. See Bailiffs &c. of Tewkesbury *v.* Ditson, 6 East, 438. [Town Commissioners *v.* Woods, Ir. R. 11 C. L. 506.]

(*u*) 11 Ad. & E. 326.

(*x*) See note (*t*) above.

(*y*) See, also, 21 Henry 8, c. 11, and Parker *v.* Patrick, 5 T. R. 175. [Moyce *v.* Newington, L. R. 4 Q. B. D. 32; Lindsay *v.* Cundy, 1 Ib. 348; § 434, note (*k*), *post.*]

(*z*) Scattergood *v.* Sylvester, 15 Q. B. 506; 19 L. J. Q. B. 447. See, also, Peer *v.* Humphrey, 2 Ad. & E. 495; [Queen *v.* Horan, Ir. R. 6 C. L. 293; Reg. *v.* Stancliffe, 11 Cox C. C. 318.]

action was held not to be maintainable against an innocent purchaser in market overt, who had disposed of the stolen goods before the conviction of the thief; although he was, while the goods still remained in his possession, notified of the robbery by the original owner. (*a*)

Reimbursement to innocent purchaser.

§ 12. When an innocent purchaser of stolen goods has been forced to make restitution to the prosecutor of the thief, the 30 & 31 Vict. c. 35, s. 9, enacts that upon the conviction of the thief it shall be lawful for the court to order that any money taken from him on his apprehension shall be applied to reimbursing the purchaser the price paid by him.

Owner not bound to prosecute before recovering from innocent third person goods *not* sold in market overt.

§ 13. It was at one time supposed that where goods had been stolen, an owner could not recover them from an innocent vendee who had bought them, *not* in market overt, until he had done his duty in prosecuting the thief. But the cases of Gimson *v.* Woodfall (*b*) and Peer *v.* Humphreys (*c*) were overruled in White *v.* Spettigue, (*d*) where it was held, on the authority of Stone *v.* Marsh, (*e*) and Marsh *v.* Keating, (*f*) that the obligation of the plaintiff to prosecute the thief does not apply where the action is against a third party innocent of the felony. And in Lee *v.* Bayes, (*g*) the law was stated to be settled in conformity with the decision in White *v.* Spettigue. (*h*) In Wells *v.* Abraham, (*i*) on the trial of an action for trover, the evidence established a *primâ facie* case of felony, and after verdict for plaintiff a new trial was moved for on that ground, and on the further ground shown by affidavit, that since verdict the plaintiff had prosecuted the defendant criminally. But held that the judge was bound to try the cause on the record as it stood at nisi prius, and could not nonsuit the plaintiff — and the verdict was upheld.

Wells *v.* Abraham.

Sale, horses in market overt.

§ 14. For more than three centuries it has been found necessary to make special provision in relation to the sale of *horses* in market overt, on account of the peculiar facility with which these animals, when stolen, can be removed from the neighborhood of the owner and disposed of in markets and

(*a*) Horwood *v.* Smith, 2 T. R. 750. [See § 434 note (*k*), *post.*]
(*b*) 2 C. & P. 41.
(*c*) 2 Ad. & E. 495; 4 N. & M. 430.
(*d*) 13 M. & W. 603.
(*e*) 6 B. & C. 551.
(*f*) 1 Bing. N. C. 198.
(*g*) 18 C. B. 599.
(*h*) 13 M. & W. 603.
(*i*) L. R. 7 Q. B. 554.

fairs. (*k*) The statute of 2 & 3 P. & M. c. 7, passed in 1555, and that of 31 Eliz. c. 12, in 1589, contain the rules and regulations applicable to this subject. The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place; that the parties to the bargain shall be before him present when he takes the toll; and that he shall write in a book to be kept for that purpose, the names, surnames, and dwelling-places of the parties, and a full description of the animal sold. The property in the horse is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the vendor, and "of his true Christian name, surname, and place of dwelling or resiancy;" or that the vendor shall bring to the keeper one sufficient and creditable person that can testify that he knows the vendor; and in such case the name and residence of the person so testifying, as well as those of the vendor, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale is to be void. The act also provides that the original owner may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided the demand on the purchaser be made within six months from the date of the felony. The decisions on these two statutes are collected in Bacon's Abr. Fairs and Markets, and in Com. Dig. Market, E. Their provisions have been found so effective in putting an end to the mischief which they were intended to prevent, that there are very few modern cases on the subject. (*l*) In Lee *v.* Bayes, (*l*) it was held that the sale of a horse at auction in a re-

Horse repository outside of

(*k*) [See Browning *v.* Magill, 2 Harr. & J. 308.]

(*l*) See Joseph *v.* Adkins, 2 Stark. 76; Lee *v.* Bayes, 18 C. B. 599.

pository out of the city of London was not a sale in market overt, Jervis C. J. saying that market overt was "an open, public, and *legally constituted* market." On the question, What is a legally constituted market? the reader is referred to the case of Benjamin *v.* Andrews, (*m*) decided in the common pleas in 1858.

London not market overt.

What is a legally constituted market?

§ 15. The second exception to the rule, that one not the owner cannot make a valid sale of personal chattels, also arises out of the 24 & 25 Vict. c. 96, s. 100, already quoted, which directs that, "If it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: provided, also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against this act." This clause was intended to prevent the statute from operating in such manner as to interfere with a settled rule of the law merchant, namely, that one not the owner, even the thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin, according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case he would be forced to bear the loss. (*n*)

Sale of negotiable securities by one not owner.

(*m*) 5 C. B. N. S. 299; 27 L. J. M. C. 310.

(*n*) Grant *v.* Vaughan, 3 Burr. 1516; Lang *v.* Smith, 7 Bing. 284; Gagier *v.* Mieville, 3 B. & C. 35; Crook *v.* Jadis, 5 B. & Ad. 909; Blackhouse *v.* Harrison, 5 B. & Ad. 1105; Bank of Bengal *v.* McLeod, 7 Moore P. C. 35; Goodman *v.* Harvey, 4 Ad. & E. 870; Uther *v.* Rich, 10 Ad. & E. 784; Raphael *v.* Bank of England, 17 C. B. 161; 25 L. J. C. P. 33; Seal *v.* Dent, 8 Moore P. C. 319; Gill *v.* Cubitt, 3 B. & C. 466; Whistler *v.* Forster, 32 L. J. C. P. 161. See, also, numerous other cases cited in notes to Miller *v.* Race, 1 Sm. Lead. Cas. 468 (ed. 1867); Byles on Bills, p. 158 (9th ed.); [Cone *v.* Baldwin, 12 Pick. 545; Wheeler *v.* Guild,

§ 16. Another case, in which one not the owner of goods may make valid sale of them, is that of the pawnee. He has the legal power to sell goods pledged to him, if the pawnor make default in payment at the stipulated time; and this he may do without taking any legal proceedings against the pawnor. (*o*)

Sale by pawnee.

§ 17. The sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution, and confer a valid title on the purchaser; and this title will not be affected, although the writ of execution be afterwards set aside. (*p*) This protection, however, was held by the court of

By public officers.

20 Pick. 545; Matthews *v.* Poythress, 4 Ga. 287; Magee *v.* Badger, 30 Barb. 246; Pringle *v.* Phillips, 5 Sandf. 157; Merriam *v.* Granite Bank, 8 Gray, 254; Roth *v.* Colvin, 32 Vt. 125; Crosby *v.* Grant, 36 N. H. 273; Hall *v.* Hale, 8 Conn. 336; Sandford *v.* Norton, 14 Vt. 228; Greneaux *v.* Wheeler, 6 Texas, 515.]

(*o*) Pothonier *v.* Dawson, Holt, 385; Tucker *v.* Wilson, 1 P. Williams, 261; Lockwood *v.* Ewer, 9 Mod. 278; Martin *v.* Reid, 11 C. B. N. S. 730, and 31 L. J. C. P. 126; Johnston *v.* Stear, 15 C. B. N. S. 330, and 33 L. J. C. P. 130; Pigot *v.* Cubley, 15 C. B. N. S. 701, and 33 L. J. C. P. 134; 1 Smith's L. C. 201; Halliday *v.* Holgate, L. R. 3 Ex. 299. By the above case of Martin *v.* Reid, and by Reeves *v.* Capper, 5 Bing. N. C. 136, and Langton *v.* Waring, 18 C. B. N. S. 315, it appears that there may be a valid pledge, although the goods remain in, or are returned to, the actual possession of the pawnor as trustee for the pawnee.

(*p*) Anon. Dyer, 363 a, pl. 24; Turner *v.* Felgate, 1 Lev. 95; Manning's case, 8 Co. 91; Doe *dem.* Emmett *v.* Thorn, 1 M. & S. 425; Doe *v.* Mulrass, 6 M. & S. 110; Farrant *v.* Thompson, 5 B. & A. 826; Lock *v.* Sellwood, 1 Q. B. 736. [But a purchaser acquires no title to property which he buys at a sheriff's sale, unless it belonged to the judgment debtor. A purchaser of the goods of A. at a sale on execution against B. is liable to A. in trover, if he takes the goods. Champney *v.* Smith, 15 Gray, 512; Johnson *v.* Babcock, 8 Allen, 583; Buffum *v.* Deane, 8 Cush. 41; Stone *v.* Elberly, 1 Bay, 317; Bryant *v.* Whitcher, 52 N. H. 158; Shearick *v.* Huber, 6 Binn. 2; Griffith *v.* Fowler, 18 Vt. 390; Sanborn *v.* Kittredge, 20 Ib. 640; Symonds *v.* Hall, 37 Maine, 354, 357, 358; Coombs *v.* Gorden, 59 Ib. 111; Homesley *v.* Hogue, 4 Jones (Law), 481; Arendale *v.* Morgan, 5 Sneed, 703, Boggs *v.* Fowler, 16 Cal. 559; Williams *v.* Miller, 16 Conn. 144; Bartholomew *v.* Warren, 32 Ib. 102; Burke *v.* McWhirter, 35 U. C. Q. B. 1; Kirby *v.* Cahill, 6 U. C. Q. B. (O. S.) 510. To constitute a valid levy as against a creditor or vendee of the debtor, it is necessary, according to the weight of authority, that the sheriff should exercise dominion over the goods; that the goods should be under his control, or that he should do some act in relation to the goods for which he would be liable in trespass were it not for the process under which he acts. Forth *v.* Pursley, 82 Ill. 152; Techmeyer *v.* Waltz, 49 Iowa, 645; Cobb *v.* Cage, 7 Ala. 619; Cheshire National Bank *v.* Jewett, 119 Mass. 241; Shephard *v.* Butterfield, 4 Cush. 425; Butterfield *v.* Clemence, 10 Ib. 269; Hemmenway *v.* Wheeler, 14 Pick. 410; Rowan *v.* Refeld, 31 Ark. 648; Bryant *v.* Osgood, 52 N. H. 182; Harris *v.* Evans, 81 Ill. 419; Godfrey *v.* Brown, 86 Ib. 454; Taffts *v.* Manlove, 14 Cal. 47; Rives *v.* Porter, 7 Ired, 74; Pierce *v.* Shipps, 16

What necessary to constitute a levy by sheriff.

Title of purchaser at sheriff's sale.

queen's bench not to be available in favor of a purchaser of goods distrained under a warrant issued by two justices of the peace to the constable, *where the warrant was on the face of it illegal.* (*q*)

§ 18. Another instance of the power of one who is not owner to transfer the property in goods held in his possession is that of the master of a vessel, who is vested by law with authority to sell the goods of the shippers of the cargo in case of absolute necessity; as where there is a total inability to carry the goods to their destination, or otherwise to obtain money indispensable for repairs to complete the voyage. But the purchaser acquires no title, unless such necessity exists. (*r*) Masters of ships.

§ 19. By the factors' act (6 Geo. 4, c. 94, s. 2), "persons intrusted with, and in possession of, any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be *deemed and taken to be the true owner of the goods so far as to give validity to sales*" made by them to buyers without notice of the fact that such vendors are not owners. By the fourth section of the same act, purchasers from "any agent or agents intrusted with any goods, wares, or merchandise, or to whom the same may be Factors and consignees.

Barb. 585; Blades *v.* Arundale, 1 M. & S. 711; Ackland *v.* Pavnter, 8 Price, 95; Reynolds *v.* Ayres, 5 Allen (N. B.), 333; Murphy *v.* Swadener, 33 O. St. 85. But as against the debtor the rule is not so strict. Brooks *v.* Palmer, 1 Pugsley & Burbridge (N. B.), 615; Forth *v.* Pursley, *supra.* In Taffts *v.* Manlove, *supra*, Baldwin J. said: "It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ, when it would not be good as to third persons. But we apprehend that this distinction is not based upon any difference in the legal requisites of a levy, but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that that shall be a levy which, without such conduct, would not be sufficient." And the New Jersey cases would seem to indicate that there is no difference in principle between the two cases. Dean *v.* Thatcher, 32 N. J. Law, 470; Brewster *v.* Vail, Spencer, 56; Caldwell *v.* Fifield, 4 Zab. 161; Newell *v.* Sibley, 1 South. 381. A sheriff cannot buy at his own sale on execution. Perkins *v.* Thompson, 3 N. H. 144. But such a purchase was upheld on the facts presented in Smith *v.* Smith, 2 Oldright (N. S.), 303.] Sheriff cannot purchase at his own sale.

(*q*) Lock *v.* Sellwood, 1 Q. B. 736.

(*r*) The Gratitudine, 3 Rob. Adm. 259; Freeman *v.* East India Company, 5 B. & A. 621; Vlierboom *v.* Chapman, 13 M. & W. 239; Underwood *v.* Robertson, 4 Camp. 138; Cannan *v.* Meaburn, 1 Bing. 243; Tronson *v.* Dent, 8 Moore P. C. 419; Cammell *v.* Sewell, 3 H. & N. 617, and S. C. in 5 H. & N. 728; 29 L. J. Ex. 350; Maude & P. on Ship. 446; [Pope *v.* Nickerson, 3 Story, 465; The Ship Packet, 3 Mason, 255; Fontaine *v.* Col. Ins. Co. 9 John. 29; Jordan *v.* Warren Ins. Co. 1 Story, 342; The Joshua Barker, Abbott Adm. 215; Myers *v.* Baymore, 10 Penn. St. 114; Stillman *v.* Hurd, 10 Texas, 109; Gates *v.* Thompson, 57 Maine, 442.]

consigned," are protected in their purchases, *notwithstanding notice* that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice, at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment. And by the amendment act, 5 & 6 Vict. c. 39, the possession of the goods themselves is treated as having the same effect as that of bills of lading, or "other documents of title;" and a "document of title" is defined to be "any document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented." (*s*) These acts apply solely to persons intrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell. (*t*) The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandise, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire. A purchaser in good faith from such vendors would be liable in trover to the true owner. (*u*) Mr. Chitty, in his Treatise on Contracts, (*x*) has the following passage: "It is said, however, that if the real owner of goods suffer another to have possession thereof, or of those documents which are the indicia of property

Persons intrusted with possession by owners.

(*s*) [See 1 Chitty Contr. (11th Am. ed.) 298–300; Navulshaw *v.* Brownrigg, 2 De G., M. & G. (Am. ed.) 441, and notes, 445 and cases in note (1); Johnson *v.* The Crédit Lyonnais, 2 C. P. D. 224, and 3 C. P. D. 32; Nickerson *v.* Darrow, 5 Allen, 419, 422. The English statutes are the foundation of acts in several of the American States on the same subject; as in New York, Pennsylvania, Rhode Island, Ohio, Maine, Massachusetts, &c. See Smith Merct. Law (Am. ed.), 126, note; 2 Kent, 628, note (*b*); Bott *v.* McCoy, 20 Ala. 578; Michigan State Bank *v.* Gardner, 15 Gray, 362; De Wolf *v.* Gardner, 12 Cush. 19; Ullman *v.* Barnard, 7 Gray, 554; Jennings *v.* Merrill, 20 Wend. 9; Warner *v.* Martin, 11 How. 209; Consolidated Sts. of Can. c. 59 (1859); In re Coleman, 36 U. C. Q. B. 559; Cockburn *v.* Sylvester, 27 U. C. C. P. 34; Todd *v.* Liverpool & Lond. Globe Ins. Co., 20 Ib. 523.]

(*t*) Monk *v.* Wittenbury, 2 B. & Ad. 484.

(*u*) Loeschman *v.* Machin, 2 Stark. 311; Cooper *v.* Willomatt, 1 C. B. 672; [Stanley *v.* Gaylord, 1 Cush. 536; Gilmore *v.* Newton, 9 Allen, 171; Galvin *v.* Bacon, 2 Fairf. 28; Bearce *v.* Bowker, 115 Mass. 129, 132; Prime *v.* Cobb, 63 Maine, 200; Barker *v.* Dinsmore, 72 Penn. St. 427; Marshall *v.* Beeber, 53 Ind. 83; Porter *v.* Parks, 49 N. Y. 564.]

(*x*) Page 359, 8th ed.; [11th Am. ed. 534.]

therein, — thereby enabling him to hold himself forth to the world as having not the possession only but the property, — a sale by such person to a purchaser without notice will bind the true owner (per Abbott C. J. Dyer *v.* Pearson, 3 B. & C. 38; per Bayley J. Boyson *v.* Coles, 6 M. & S. 14). (x^1) But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken *primâ facie* to have had

Limitation of doctrine.

(x^1) [A case involving an inquiry into this point lately arose in New Hampshire. The plaintiff employed one M. to purchase a horse for him. M. bought the horse, paid for it with the plaintiff's money, and took a bill of sale in his own name. Afterwards he informed the plaintiff of what he had done, and showed him the bill of sale; but the plaintiff permitted him to go away with the horse and the bill of sale still in his possession. M. thereupon went to the defendant, who had no knowledge of the agency, showed him the bill of sale, sold him the horse for cash, and absconded; and it was held that the plaintiff could not recover in an action of trover for the horse. Nixon *v.* Brown, 57 N. H. 34. The court rely much upon the circumstance that the plaintiff had been informed that M. had taken the bill of sale of the horse in his own name, and with that knowledge permitted him to go forth clothed with all the indicia of ownership, and so completely armed for the commission of a fraud. So where the seller of a lot of butter delivered it at a railway station and authorized the railway agent to issue a bill of lading to the purchaser, under a verbal agreement with both that it should not be shipped until the balance of the price should be paid; but the purchaser, in violation of this agreement, pledged the bill to a third party, who advanced him the value of the butter, without any notice of the verbal agreement; it was held that a good title passed to such third party. Western Union R. R. Co. *v.* Wagner, 65 Ill. 197. See Michigan Central R. R. Co. *v.* Phillips, 60 Ill. 190; Western Transportation Co. *v.* Marshall, 4 Abb. (N. Y.) App. Dec. 575. The general principle, however, is, that the sale of goods by one who has tortiously obtained possession of them without the owner's consent vests in the purchaser no title to them as against the owner. This is clearly illustrated in the case of Barker *v.* Dinsmore, 72 Penn. St. 427, where a man, representing himself as connected with Barker & Co., contracted with Dinsmore for wool for them, to be consigned to Pittsburg and paid for there. The man, representing to Barker & Co. that he was Dinsmore's son, contracted to sell them wool; it arrived at Pittsburg before Dinsmore; was delivered to the man, and by him to Barker & Co., who paid him for the wool. The jury found that the sale was not to the man on his own responsibility, but as agent for Barker & Co.; it was held that the title to the wool remained in Dinsmore. Williams J. said: "The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it." See Quinn *v.* Davis, 78 Penn. St. 15; McMahon *v.* Sloan, 12 Ib. 229; Porter *v.* Parks, 49 N. Y. 564; Rawls *v.* Deshler, 4 Abb. (N. Y.) App. Dec. 12; Mechanics' &c. Bank *v.* Farmers' &c. Bank, 60 N. Y. 40.]

Sale by person intrusted with possession by owner.

Nixon *v.* Brown.

Barker *v.* Dinsmore.

the right to sell." (*y*) This limitation, suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges, was approved by the barons of the exchequer in Higgons *v.* Burton, (*z*) and when thus limited, the principle does not differ substantially from the provisions of the factors' act, as amended by the 5 & 6 Vict. c. 39.

§ 20. But the cases recently decided under the factors' act leave this statement open to grave doubt, and show the extreme difficulty of defining the subject-matter to which it applies. In Hayman *v.* Flewker, (*a*) a picture-dealer was held to be an "agent" intrusted with the goods under the act, whose ordinary business was not to sell pictures, but who was authorized to sell the particular pictures in controversy, and instead of so doing, pledged them. In Baines *v.* Swainson, (*b*) the circumstances were that one Emsley, who carried on business at Leeds, as factor and commission merchant, falsely represented to the plaintiffs that he could sell some of their goods to one Sykes. The plaintiffs thereupon sent to the premises of Emsley the goods, to be by him "perched," or stretched on poles, so that the purchaser could examine them, and then to deliver them. The goods were sent in several successive lots. Emsley sold them to the defendant at a less price than he represented he could get from Sykes. The plaintiffs brought trover, and Martin B. directed the jury to give them a verdict. The queen's bench directed a new trial, Wightman and Crompton JJ. holding Emsley to be an agent within the meaning of the act, and Blackburn J. thinking that at all events there was a case for the

Law doubtful under recent decisions.

Hayman *v.* Flewker.

Baines *v.* Swainson.

(*y*) [A commission merchant sold and delivered property intrusted to him for sale, after a sale of the same by the owner, but before notice to the commission merchant of the sale by the owner, or any other notice of revocation of his authority. The property was not delivered to the purchaser from the owner, nor was any actual possession taken by said purchaser. It was held by a majority of the court, that a good title passed to the purchaser from the commission merchant upon the sale and actual delivery to him; and that the commission merchant was not liable in trover to the purchaser from the owner for making the sale. Jones *v.* Hodgskins, 61 Maine, 480. But see Bohn *v.* Cleaver, 25 La. Ann. 421.]

Sale by commission merchant after sale by owner.

(*z*) 26 L. J. Ex. 342. See, also, Pickering *v.* Busk, 15 East, 38; [1 Chitty Contr. (11th Am. ed.) 277; Saltus *v.* Everett, 20 Wend. 267; Lobdell *v.* Baker, 1 Met. 202, 203; Crocker *v.* Crocker, 31 N. Y. 507; Wooster *v.* Sherwood, 25 Ib. 278; Western Transportation Co. *v.* Marshall, 37 Barb. 509; Folsom *v.* Batchelder, 22 N. H. 51.]

(*a*) 13 C. B. N. S. 519; 32 L. J. C. P. 132.

(*b*) 4 B. & S. 270.

jury to determine that fact, and also to decide whether the sale had taken place in the ordinary course of business. Crompton and Blackburn JJ. were of opinion that the agencies referred to by the act are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had previously been held by Vice Chancellor Wigram, in Wood *v.* Rowcliffe. (*c*) Crompton J. said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these acts of parliament the difficulty is immense." In Fuentes *v.* Montis. Fuentes *v.* Montis (*d*) the court of common pleas gave judgment (affirmed in exchequer chamber) in favor of the plaintiffs, wine merchants, in Spain, for certain casks of sherry, which they had consigned for sale to a London factor, who had pledged them as security for advances made by the defendant after revocation of the factor's authority, although the defendant was in good faith, and ignorant of the revocation, and although the wine remained in the factor's possession; the court holding that the words "intrusted with and in possession of" must be construed as referring to the time when the factor made the pledge, and that he was no longer "intrusted with" the goods after he had been ordered to deliver them to another factor for account of the consignor, although he had disobeyed the order, and remained "in possession." Under this decision, which the judges, Willes, Keating, and Smith, expressed regret at being constrained to deliver, the confidence felt by merchants in dealing with factors in relation to goods consigned to them, and in their possession, must be greatly shaken; and there seems certainly to be no mode of *making advances* safely to a factor on the security of goods on consignment, for a merchant or banker in London or Liverpool has no means of finding out whether the foreign consignor has or has not revoked the factor's authority. In this case also Willes J. expressed his entire concurrence in the following *dictum* of Blackburn J. reported in Baines *v.* Swainson: "I do not agree with the counsel for the defendant, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a

(*c*) 6 Hare, 183.

(*d*) L. R. 3 C. P. 268; 37 L. J. C. P. 137; L. R. 4 C. P. 93. See, also, Sheppard *v.* The Union Bank of London, 7 H. & N. 661; 31 L. J. Ex. 154.

business, amounts to an 'intrusting' him as agent; though I think that under that part of section 4 of stat. 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put in possession of goods calls upon the person who gave him possession to explain and show that it was not an intrusting." It would seem to result from this that a *purchaser*, even from a factor, would get no title to goods if the consignor could show that he had sent them to the factor merely to be kept in storage, or to be forwarded to another place, although the factor was in possession of them with the consent of the consignor, and was a person whose ordinary business consisted in selling goods sent to him on consignment. Although this case was affirmed in the exchequer chamber, the *dicta*, that the act has reference only to factors *for sale* of the goods, are disapproved by Lord Westbury in Vickers *v.* Hertz, (*e*) so that no one would venture, in the present state of the authorities, to give a positive opinion as to the true construction of this statute. The subject is further discussed *post*, book V. part I. ch. iv. on Lien.

SECTION II. — WHO MAY BUY.

§ 21. There are certain classes of persons incompetent to contract in general, but who under special circumstances may make valid purchases. Infants, insane persons, and married women are usually protected from liability on contracts, as also drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will, combined with that degree of reason and judgment, that can alone enable them to give the *assent* which is necessary to constitute a valid engagement. The exceptions to this general disability, so far as concerns the competency to purchase, will now be considered.

Infants.

§ 22. *Infants*, that is, persons under the age of twenty-one years, are protected by law from liability on purchases made by them, unless for *necessaries*. The purchase by an infant, however, is not absolutely void, but only voidable in his favor. (*f*) He may maintain an action (*g*) against the vendor

(*e*) L. R. 2 Sc. App. 113, 118.

(*f*) Gibbs *v.* Merrill, 3 Taunt. 307; Hunt *v.* Massey, 5 B. & Ad. 902; Holt *v.* Clarencieux, Str. 937; Zouch *v.* Parsons, 3 Burr. 1794; per Abbott C. J. in The King *v.* Inhabitants of Chillesford, 4 B. & C. at p. 100; [1 Chitty Contr. (11th Am. ed.) 215.]

(*g*) Warwick *v.* Bruce, 2 M. & S. 205; [1 Chitty Contr. (11th Am. ed.) 222.]

during infancy, and he may, on arriving at the age of twenty-one years, confirm his purchase. (*h*) An action at law will not lie against an infant for fraudulently representing himself of full age and thereby inducing the plaintiff to contract with him; (*i*) nor would these facts constitute at law a such representation and deceit, procuring credit on a contract which he subsequently avoids by plea of infancy. The cases are not uniform on this question. The earlier authorities are clear to the point that no such action can be maintained." A decision contrary to Fitts *v.* Hall was made in Brown *v.* McCune, 5 Sandf. 224, which, however, was an action sounding in contract. It is entirely clear that such false representations are no sufficient answer to a plea of infancy in an action on a contract. Burley *v.* Russell, 10 N. H. 184; Merriam *v.* Cunningham, 11 Cush. 40, 43; Stoolfoos *v.* Jenkins, 12 Serg. & R. 399. See West *v.* Moore, 14 Vt. 447; People *v.* Kendall, 25 Wend. 399; De Roo *v.* Foster, 12 C. B. N. S. 272; Wright *v.* Leonard, 11 Ib. 258; Heath *v.* Mahoney, 14 N. Y. Supreme Ct. 100.

False representations as to age.

All the cases agree that, where the false representations made by the infant are substantially a part of the contract, he cannot be held for a breach of his promise by merely changing the form of action. Thus infancy is a good defence to an action for deceit and false warranty in the sale of goods. Prescott *v.* Norris, 32 N. H. 101; Eaton *v.* Hill, 50 Ib. 235; West *v.* Moore, 14 Vt. 447; Morrill *v.* Aden, 19 Ib. 505; Gilson *v.* Spear, 38 Ib. 311. See Fitts *v.* Hall, 9 N. H. 441, 445; 2 Kent, 240, 241; Lewis *v.* Littlefield, 15 Maine, 235; Studwell *v.* Shapter, 54 N. Y. 249. An infant is liable for fraud or tort which is wholly independent of contract. Fitts *v.* Hall, 9 N. H. 441; Eaton *v.* Hill, 50 Ib. 235; Prescott *v.* Norris, 32 Ib. 101; Sikes *v.* Johnson, 16 Mass. 389; Wilt *v.* Welsh, 6 Watts, 9; 2 Kent, 241; Humphrey *v.* Douglass, 10 Vt. 71; Lewis *v.* Littlefield, 15 Maine,

Representations which are part of contract.

Liable for torts independent of contracts.

(*h*) Bac. Abr. Infancy, I. 3; Holt *v.* Ward, Str. 939; [Boyden *v.* Boyden, 9 Met. 521.]

(*i*) Price *v.* Hewett, 8 Ex. 146; Johnson *v.* Pye, 1 Sid. 258; S. C. 1 Lev. 169; S. C. 1 Keb. 913; [Adelphi Loan Association *v.* Fairhurst, 9 Ex. 422, 430. But it was decided in Fitts *v.* Hall, 9 N. H. 441 (overruling Johnson *v.* Pye, cited in support of the text), that an infant is liable for deceit in falsely representing himself to be of age, and thereby inducing the vendor to sell him goods on credit, and afterwards avoiding his promise to pay by pleading infancy. The decision in this case rests upon the ground that the false representations by the infant respecting his age, and his subsequent repudiation of the contract, may be treated as a separate and distinct wrong of themselves although connected with the contract of sale. See Towne *v.* Wiley, 23 Vt. 355; Eaton *v.* Hill, 50 N. H. 235; Prescott *v.* Norris, 32 Ib. 101; Eckstein *v.* Frank, 1 Daly, 334; Elwell *v.* Martin, 32 Vt. 217; Shaw *v.* Coffin, 58 Maine, 254. But the decision in Fitts *v.* Hall is declared to be unsound in 1 Am. Lead. Cas. (4th ed.) 262, where it is said: "In Fitts *v.* Hall, the representation, by itself, was not actionable, for it was not an injury, and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant." There is an allusion to this suggestion in Merriam *v.* Cunningham, 11 Cush. 43; but the court did not find it necessary to express any opinion upon the point. It was, however, remarked by Bigelow J. that "it is by no means clear that an action *ex delicto* can be maintained against an infant for fraudulently representing himself to be of age, and, by means of

New Hampshire decision.

Massachusetts dictum.]

good replication to a plea of infancy ; (*k*) nor suffice as the basis of a replication on equitable grounds. (*l*) But they would entitle the plaintiff to relief if made the subject of a bill in equity. (*m*)

Necessaries.

§ 23. But an infant is competent to purchase for cash or on credit a supply of *necessaries ;* and his purchase on credit will be valid even though it be shown that he had an income at the time sufficient to supply him with ready money to buy necessaries suitable to his condition. (*n*) The necessaries

233; Brown *v.* Maxwell, 6 Hill (N. Y.), 592; Baxter *v.* Bush, 29 Vt. 465; Bullock *v.* Babcock, 3 Wend. 391; Hartfield *v.* Roper, 21 Ib. 615; Walker *v.* Davis, 1 Gray, 506; Barham *v.* Turbeville, 1 Swan (Tenn.), 437; Mathews *v.* Cowan, 59 Ill. 341. This is really the principle which was applied to the facts in Fitts *v.* Hall, 9 N. H. 441, 449. The principle is certainly correct, though there may have been a misapplication of it in that instance. An infant is liable in tort for the conversion of goods which he has obtained by fraud, although he had sold them before any demand made upon him for them. Walker *v.* Davis, 1 Gray, 506. So it has been held that he is liable for tortiously converting goods which he has fraudulently obtained with an intention not to pay for them. Wallace *v.* Morss, 5 Hill (N. Y.), 391; 2 Kent, 241. Where an infant avails himself of the privilege of infancy to avoid payment for goods which have been sold to him on credit, the vendor may reclaim the goods (if they are atill in the possession of the infant), as having never parted with his property in them. Badger *v.* Phinney, 15 Mass. 359; Boyden *v.* Boyden, 9 Met. 521; Fitts *v.* Hall, 9 N. H. 446, 447; Strain *v.* Wright, 7 Ga. 568; Jeffords *v.* Ringgold, 6 Ala. 544; Boody *v.* McKenney, 23 Maine, 525. See Henry *v.* Root, 33 N. Y. 526; Walsh *v.* Powers, 44 Ib. 23, 26. But if the goods have been lost, used, wasted, sold, or otherwise parted with, no action will lie against the infant, upon avoiding the contract, for not redelivering them to the vendor. Fitts *v.* Hall, 9 N. H. 441, 445,

When vendor may retake the goods.

446; Shepley J. in Boody *v.* McKenney, 23 Maine, 525, 526; Burns *v.* Hill, 19 Ga. 22; Price *v.* Furman, 27 Vt. 268, 271; Manning *v.* Johnson, 26 Ala. 446, 452; Whitcomb *v.* Joslyn, 51 Vt. 79.]

(*k*) Johnson *v.* Pye, 1 Sid. 258; [Carpenter *v.* Carpenter, 45 Ind. 142.]

(*l*) Bartlett *v.* Wells, 31 L. J. Q. B. 57; [1 B. & S. 836; De Roo *v.* Foster, 12 C. B. N. S. 272.]

(*m*) Ex parte Unity Joint Stock Banking Association, 27 L. J. Bank. 33; [3 De G. & J. (Am. ed.) 63, 64;] Nelson *v.* Stocker, 28 L. J. Ch. 760; [4 De G. & J. (Am. ed.) 458, 464.]

(*n*) Burghart *v.* Hall, 4 M. & W. 727; Peters *v.* Fleming, 6 M. & W. 42. [An infant will be held only for a reasonable price for necessaries supplied to him. He can bind himself therefor only upon a contract, the consideration of which is open to inquiry. Stone *v.* Dennison, 13 Pick. 1; Earle *v.* Reed, 10 Met. 387, 389, 390; Breed *v.* Judd, 1 Gray, 455; Dubose *v.* Wheddon, 4 McCord, 221; Locke *v.* Smith, 41 N. H. 346; Vent *v.* Osgood, 19 Pick. 575; Hussey *v.* Jewett, 9 Mass. 100; M'Crillis *v.* How, 3 N. H. 348; Beeler *v.* Young, 1 Bibb, 519, 520; Bouchell *v.* Clary, 3 Brev. 194. In Earle *v.* Reed, 10 Met. 387, it was decided, that, in a suit by the promisee, on a negotiable note given by an infant, the plaintiff may show that it was given in whole or in part for necessaries, and may recover *thereon* as much as the necessaries, for which it was given, were reasonably worth, and no more. Bradley *v.* Pratt, 23 Vt. 378. See M'Minn *v.* Richmonds, 6

Massachusetts rule as to suing on instrument given for necessaries.

for which the infant may make a valid contract of purchase are stated in Co. Litt. 172, to be "his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But these are not the only articles that are comprehended by the term. (*o*) It includes also articles purchased for *real use*, although ornamental, as distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one; (*p*) and it was said by Alderson B., in delivering the judgment of the court in Chapple *v.* Cooper, (*q*) after advisement, that "articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. . . . . In all cases there must be *personal* advantage from the contract derived to the *infant himself*." (*r*) The word necessaries must therefore be regarded as a relative term, to be construed with reference to the infant's age, state, and degree. (*s*)

Yerger, 9; Dubose *v.* Wheddon, 4 McCord, 221; Guthrie *v.* Morris, 22 Ark. 411.]

(*o*) [Necessaries are not confined to those articles absolutely necessary to support life. Rundel *v.* Keeler, 7 Watts, 237; Watson *v.* Hensell, Ib. 344; Davis *v.* Caldwell, 12 Cush. 513; 1 Chitty Contr. (11th Am. ed.) 196; Strong *v.* Foote, 42 Conn. 203.]

(*p*) Peters *v.* Fleming, 6 M. & W. 42. [Articles, which are principally for mere ornament or amusement, cannot be necessaries, although they might possibly be turned to a useful purpose. Bramwell B. in Ryder *v.* Wombwell, L. R. 3 Ex. 90.]

(*q*) 13 M. & W. 256. See, also, per Bramwell B. in Ryder *v.* Wombwell, L. R. 3 Ex. 90; 37 L. J. Ex. 48.

(*r*) [The expenditures, or articles contracted for by an infant, for which he would be liable, are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper in the particular case; and this may present a question of fact. It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems "necessaries;" and unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor, as that is irrelevant. Dewey J. in Tupper, *v.* Cadwell, 12 Met. 563. See New Hampshire Fire Ins. Co. *v.* Noyes, 32 N. H. 345.]

Necessaries: what.

(*s*) 2 Stephens Com. 319; [Thomas J. in Breed *v.* Judd, 1 Gray, 458. As to the legal definition of "necessaries," and what is included in that term as applied to cases involving the liability of infants, see Phelps *v.* Worcester, 11 N. H. 51, 53; Tupper *v.* Cadwell, 12 Met. 562, 563; Lefils *v.* Sugg, 15 Ark. 137; Bradley *v.* Pratt, 23 Vt. 378. In Davis *v.* Caldwell, 12 Cush. 513, Shaw C. J. said: "The term 'necessaries,' in this rule of law, is not used in its strictest sense, nor limited to that which is required to sustain life. That which is proper and suitable to each

§ 24. The cases in which these principles have been applied are quite too numerous to be reviewed in detail, but some examples may be selected, before considering the question whether it is for the court or jury to determine in each case what are or are not necessaries for the infant. Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms, fruit, confectionery, &c. &c. were held not necessaries by the queen's bench in Wharton *v.* McKenzie; (*t*) and the exchequer of pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be nonsuited. (*u*) But where a jury had found that a purchase for the amount of 8*l.* 0*s.* 6*d.* for gold rings, a watch-chain, and a pair of breastpins, were "necessaries" for an undergraduate at Cambridge, the son of a gentleman of fortune and a member of parliament, the exchequer refused to set aside the verdict, holding the question to be one for the jury. (*x*) Where the defendant, a captain in the army, had ordered livery for his servant and cockades for some of his soldiers, the jury found both to be necessaries; but the court, on motion for new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessaries, Lord Kenyon observing that, as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and if so, the livery was necessary. (*y*) In perilous times, Lord Ellenborough held that regimentals sold to an infant as a member of a volunteer corps enrolled for the national defence were necessaries. (*z*) But a chronometer, costing 68*l.*, was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the royal navy. (*a*) A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician

Adjudications as to what are and are not necessaries.

individual, according to his circumstances and condition in life, are necessaries, if not supplied from some other source. But when suitable provision is made by a parent or guardian, or where, from any source, the wants of a minor are supplied, articles furnished by a trader to the minor on his own credit are not necessaries, and of this the trader must take notice and inform himself." See 2 Kent, 239; Strong *v.* Foote, 42 Conn. 203.]

(*t*) 5 Q. B. 606.

(*u*) Brooker *v.* Scott, 11 M. & W. 67.

(*x*) Peters *v.* Fleming, 6 M. & W. 42.

(*y*) Hands *v.* Slaney, 8 T. R. 578.

(*z*) Coates *v.* Wilson, 5 Esp. 152.

(*a*) Berolles *v.* Ramsay, Holt N. P. 77.

to ride for exercise; (*b*) but a purchase of cigars and tobacco by an infant was held not to bind him; (*c*) nor was the plaintiff allowed to recover the cost of a silver goblet sold to an infant for 15*l*. 15*s*., which the plaintiff knew when he supplied it to be intended by the infant for a present to a friend. (*d*) In the case of Ryder *v*. Wombwell, (*e*) it was finally settled, that the issue whether goods sold to an infant are necessaries is a question of fact, to be left to the jury; but that in this, as in all other like questions, the modern rule is, not as formerly, that a case must go to the jury if there be a scintilla of evidence, but that the judge is to determine (subject of course to review) whether there is evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established. The facts were that the defendant, the son of a deceased baronet, was in the enjoyment in his own right of an allowance of 500*l*. a year, during his minority, and entitled to 20,000*l*. on coming of age. He had no fixed residence, but lived, when in London, with his mother, and when in the country, with his elder brother, free of charge. The plaintiff sought to recover from him the following sums: 1st, 25*l*. for a pair of solitaires, or sleeve-buttons, with rubies and diamonds; 2d, 6*l*. 10*s*. for a smelling-bottle, ornamented with precious stones; 3d, 15*l*. 15*s*. for an antique silver goblet, with an inscription; 4th, 13*l*. 13*s*. for a pair of coral earrings. The goblet was wanted, as the plaintiff was told by the defendant, for a present to a friend, at whose house the defend-

Question of law or fact. Ryder *v*. Wombwell.

(*b*) Hart *v*. Prater, 1 Jur. 623. [In Merriam *v*. Cunningham, 11 Cush. 40, the question was on the liability of an infant, who was a married man and had a family, for the board of four horses for six months, the principal use of which was in the infant's business of a hackman, although occasionally and incidentally the horses were used to take his family out to ride, the court decided as matter of law that the subject of the claim was not within the class of necessaries for which an infant is liable. See, also, Mason *v*. Wright, 13 Met. 306. A horse has been held in South Carolina not to be within the denomination of "necessaries" for which an infant is liable. Rainwater *v*. Durham, 2 Nott & McC. 524. See, also, Grace *v*. Hale, 2 Humph. 27. As to the liability of a husband for a horse furnished to his wife whose health required her to ride out in pleasant weather, see Cornelia *v*. Ellis, 11 Ill. 584; 1 Chitty Contr. (11th Am. ed.) 234, note (*x*).]

Horses for business not necessaries.

(*c*) Bryant *v*. Richardson, 14 L. T. N. S. 24; L. R. 3 Ex. 93, in note.

(*d*) Ryder *v*. Wombwell, L. R. 3 Ex. 93; L. R. 4 Ex. 32. [In Watson *v*. Cross, 2 Duvall (Ky.), 147 it was determined that an infant was liable for his hotel bill, on the ground that it was the legal duty of the innkeeper to receive and entertain him.]

(*e*) L. R. 3 Ex. 93; 4 Ex. 32. [See Mohney *v*. Evans, 51 Penn. St. 80.]

ant had been frequently a guest. Kelly C. B. rejected evidence offered by the defendant to show that, at the time of the purchase of the solitaires, the infant had already purchased articles of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned chief baron refused to nonsuit, but left it to the jury to say whether all or any of the articles were necessaries, suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessaries, the other articles not. Leave was reserved to move for a nonsuit, or for reduction of damages, if the court should be of opinion that there was evidence for the jury that one of the two articles was necessary, and not the other. Bramwell B. was of opinion that the plaintiff ought to have been nonsuited, or a verdict given for the defendant; and that the evidence to show that the defendant was already supplied with similar articles ought to have been received. Kelly C. B. delivered the judgment, holding, — first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs* if he desired it, for the price of the solitaires. On the appeal, it was held unanimously that the plaintiff ought to have been nonsuited. In the opinion delivered by Willes J. he made the following important preliminary observations: "We must first observe that the question in such cases is not whether the expenditure is one which an infant in the defendant's position could not properly incur. There is no doubt that an infant may buy jewelry or plate if he has the money to pay, and pays for it; (*f*) but the question is, *whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge*

(*f*) ["If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot on attaining his majority recover the money back." Lord Justice Turner, in Ex parte Taylor, in re Burrows, 8 De G., M. & G. 254, 258. See Bailey *v.* Barnberger, 11 B. Mon. 113; Smith *v.* Evans, 5 Humph. 70; Cummings *v.* Powell, 8 Texas, 80; Robinson *v.* Weeks, 56 Maine, 102, 105, 106, and cases cited; Breed *v.* Judd, 1 Gray, 456, 457; Harney *v.* Owens, 4 Blackf. 337; Hill *v.* Anderson, 5 Sm. & M. 216. But it was held in Riley *v.* Mallory, 33 Conn. 201, that if an infant tenders back an article purchased by him, substantially the same in value as he bought it, he may recover the purchase-money. See, also, Price *v.* Furman, 27 Vt. 268.]

his credit for them as necessaries." In reference to this question the court held that judges know as well as juries what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things; (*g*) that if the state of things be unusual, new, or exceptional, then a question of fact arises to be decided by a jury under proper direction; *that the judge must determine whether the case is such as to cast on the vendor the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence to satisfy that onus.* In the application of these principles to the case before it, the court held that it was not bound to consider itself so ignorant of every usage of mankind as to be compelled, in the absence of all evidence on the subject, to take the opinion of a jury whether it is so necessary for a gentleman to wear solitaires of this description, that though an infant he must obtain them on credit rather than go without them. On the point as to the exclusion of the evidence on the trial, the court of error expressly refused to decide, reserving it "to be determined hereafter." (*h*)

(*g*) [In Merriam *v.* Cunningham, 11 Cush. 40, 44, Bigelow J. said: "It is the well-settled rule that it is the province of the court to determine whether the articles sued for are within the class of necessaries, and if so, it is the proper duty of the jury to pass upon the questions of the quantity, quality, and their adaptation to the condition and wants of the infant." See, also, Swift *v.* Bennett, 10 Cush. 436; Tupper *v.* Cadwell, 12 Met. 563; Johnson *v.* Lines, 6 Watts & S. 80, 84; Bent *v.* Manning, 10 Vt. 225; Grace *v.* Hale, 2 Humph. 27, 29; Stanton *v.* Willson, 3 Day, 37; Glover *v.* Ott, 1 McCord, 572; Beeler *v.* Young, 1 Bibb, 519; Hall *v.* Weir, 1 Allen, 261; Eames *v.* Sweetser, 101 Mass. 78, 81. But in Davis *v.* Caldwell, 12 Cush. 512–514, Chief Justice Shaw stated the law more clearly and distinctly in conformity with the rules laid down in the text. He there said, "that in most cases, whether necessaries or not is a question of fact for the jury, depending on the circumstances; and the two principal circumstances are, whether the articles are suitable to the minor's estate and condition, and whether he is, or not, without other means of supply." See Bonney *v.* Reardin, 6 Bush (Ky.), 34. And having referred to Peters *v.* Fleming, and Wharton *v.* McKenzie, noticed in the text, and to Cripps *v.* Hills, 5 Q. B. 606, the learned judge further observed: "In these cases, it is held, and we think this is the true view of the law on this subject, that whether the articles sued for were necessaries or not is a question of fact, to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively that some articles, as, for instance, diamonds or race-horses, cannot be necessaries for any minor."]

Province of court and jury.

(*h*) [See 1 Chitty Contr. (11th Am. ed.) 203. That the question, whether the infant had other means of supply, is a proper one in such cases, see Davis *v.* Caldwell, 12 Cush. 512, 513; Swift *v.* Bennett, 10 Ib. 436, 437; 2 Kent, 239. That an infant is not liable, even for neces-

§ 25. If an infant be married, his obligations as husband and father in supplying necessaries are the same as if he were of full age, and the things necessary for his wife and children are necessary for himself, and what is supplied to them on his express or implied credit is considered as purchased by him. (*i*) An illustration of the maxim, *Persona conjuncta æquiparatur interesse proprio*, is given in Broom's Maxims in these terms: "So if a man under the age of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition."

Married infant.

§ 26. An infant being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessaries, whether he be trading alone or in partnership with another. (*k*) But if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable for what is so used. (*l*) In Thornton *v.* Illingworth, (*m*) a purchase of goods by an infant for the purposes of trade was treated by the queen's bench as constituting an exception to the general rule that the contracts of infants are voidable only, not void. Bayley J. said: "In the case of an infant, a contract made for goods, for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts." Littledale J. concurred in this view. (*n*) But in the previous case of War-

Infant tradesman.

Thornton *v.* Illingworth.

saries, while he remains under the care of his father or guardian, and is supported by him, see, further, Angel *v.* M'Lellan, 16 Mass. 28; Wailing *v.* Toll, 9 John. 141; Johnson *v.* Lines, 6 Watts & S. 80, 83; Phelps *v.* Worcester, 11 N. H. 51, 53; Perrin *v.* Wilson, 10 Mo. 451; Kline *v.* L'Amoureaux, 2 Paige, 419; Hull *v.* Connolly, 3 McCord, 6; Simms *v.* Norris, 5 Ala. 42; Guthrie *v.* Murphy, 4 Watts, 80.]

(*i*) Turner *v.* Trisby, 1 Str. 168; Rainsford *v.* Fenwick, Carter, 215. [See per Dewey J. in Tupper *v.* Cadwell, 12 Met. 562; Davis *v.* Caldwell, 12 Cush. 512; Merriam *v.* Cunningham, 11 Ib. 40; Abell *v.* Warren, 4 Vt. 149; Bailies J. in Beeler *v.* Young, 1 Bibb, 519, 520.]

(*k*) Whywall *v.* Champion, Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480; [Mason *v.* Wright, 13 Met. 306; 1 Chitty Contr. (11th Am. ed.) 204, and note.]

(*l*) Tuberville *v.* Whitehouse, 1 C. & P. 94.

(*m*) 2 B. & C. 824. See, also, Belton *v.* Hodges, 9 Bing. 365.

(*n*) [In Williams *v.* Moor, 11 M. & W. 256, 258, Parke B., speaking with reference to Thornton *v.* Illingworth, said: "Holroyd J. does not adopt the distinction taken by Bayley J., that a promise to pay for goods not necessaries may be rat-

wick *v.* Bruce (*o*) (not cited in Thornton *v.* Illingworth), where the infant was plaintiff by his next friend, it appeared that the infant had paid 40*l.*, part of the total price of 87*l.* 10*s.* which he had agreed to give for a quantity of potatoes, and Lord Ellenborough nonsuited the plaintiff on the objection that the contract was a trading contract. A new trial was granted, Lord Ellenborough saying: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid 40*l.*, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do." This case is not reconcilable with the *dicta* of the judge in Thornton *v.* Illingworth, for it is plain that if a contract is *absolutely void*, no action can be maintained on it or for the breach of it by anybody. The facts and circumstances of the two cases are widely dissimilar, and the *decision* in the earlier case seems to be more in accordance with general principles than the *reasoning* in the later case. (*p*) The language of the learned judges in Thornton *v.* Ill-

Warwick *v.* Bruce.

ified, but that a promise to pay for goods purchased for the purposes of trade is void. *The promise is not void in any case unless the infant chooses to plead his infancy.*"]

(*o*) 2 M. & S. 205.

(*p*) [See 1 Chitty Contr. (11th Am. ed.) 215; Earle *v.* Reed, 10 Met. 387, 389. Although in many cases there has been quite an indiscriminate use of the terms "void" and "voidable" with reference to infants' contracts, yet the tendency of modern decisions is to hold the trading contracts of infants, which would be valid if made by an adult, to be voidable only and not absolutely void, in all cases. Hardy *v.* Waters, 38 Maine, 450; Weaver *v.* Jones, 24 Ala. 420, 424; Cummings *v.* Powell, 8 Texas, 80, 90; Mustard *v.* Wohlford, 15 Grattan, 329, 337; Guthrie *v.* Morris, 22 Ark. 411; Cole *v.* Pennoyer, 14 Ill. 158; Abell *v.* Warren, 4 Vt. 149, 152; Reed *v.* Batchelder, 1 Met. 559; Fetrow *v.* Wiseman, 40 Ind. 148; Kennedy *v.* Doyle, 10 Allen, 161; 2 Kent, 234, 235, 236. In Commonwealth *v.* Weiher, 3 Met. 445, 448, Wilde J. said: "The distinction between void and voidable acts seems to be this: That every act *malum in se*, or which is against public policy, is held to be void in the strictest sense — a mere nullity; but if the act is prejudicial only to an individual, then it is to be considered as voidable

Void and voidable contracts.

ingworth was wider than was required for the decision of the case before them, and another proposition contained in the same opinion has been overruled, as shown by Lord Denman in Bateman *v.* Pinder, (*q*) decided in 1842.

Ratification after majority.

§ 27. The infant may, on arriving at the age of twenty-one years, ratify and confirm a purchase made during infancy, (*r*) but only in writing. (*s*) By the 9 Geo. 4, c.

only by such individual." So upon the same matter, it was remarked in Allis *v.* Billings, 6 Met. 415, 417, by Dewey J., that "the distinction between the terms 'void' and 'voidable,' in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification." The opinion of Baron Parke given in Williams *v.* Moor, 11 M. & W. 256, will repay consideration in this connection.]

(*q*) 3 Q. B. 574.

(*r*) [The principle on which the law allows a party, who has attained his age of twenty-one years, to give validity to contracts entered into during his infancy is that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound. Parke B. in Williams *v.* Moor, 11 M. & W. 256, 264, 265. Resting upon this principle is the decision of Morse *v.* Wheeler, 4 Allen, 570, in which it was maintained that a person who has arrived at the age of twenty-one is presumed to know the law, and is not excused from performing his contract fairly and freely entered into, by reason of his ignorance of the law when he made it; and, consequently, that the ratification, by a person of full age, of his contract made while an infant, is binding upon him, although at the time of the ratification he did not know that the contract could not legally be enforced against him. See, also, Taft *v.* Sergeant, 18 Barb. 320. In the opinion given by Judge Metcalf, in the above case of Morse *v.* Wheeler, he reviews the *dicta* and rulings adverse to that decision; and it appears that the instances are numerous in which it is asserted that, to render the ratification by a person after he arrives at majority, of his contract made while an infant, valid and binding upon him, he must have known, at the time of the ratification, that he was not legally liable. The instances are, however, rare, in which this precise point has been distinctly in issue and necessary to the decision. The point was made in what Judge Metcalf terms the "unreasoned case of Hinely *v.* Margaritz, 3 Barr. 428, and it was decided that such knowledge was essential to the validity of the ratification. The following cases bear in the same direction: Harmer *v.* Killing, 5 Esp. 102; Smith *v.* Mayo, 9 Mass. 64; Ford *v.* Phillips, 1 Pick. 203; Thing *v.* Libbey, 16 Maine, 57; Curtin *v.* Patton, 11 Serg. & R. 311; Reed *v.* Boshears, 4 Sneed (Tenn.), 118; Norris *v.* Vance, 3 Rich. (S. Car.) 168. See 1 Chitty Contr. (11th Am. ed.) 218, note (d^3), and cases cited. In a case in Indiana, it was maintained by the court that in order to ratify a contract of suretyship made by an infant, he must not only acknowledge his liability

Whether knowledge of non-liability is requisite at time of ratification.

(*s*) [A writing in such case is not required generally, in the American States. It is, however, made essential by statute in some of the states, as in Maine, Thurlow *v.* Gilmore, 40 Maine, 378; and in Kentucky, Bonney *v.* Reardin, 6 Bush (Ky.), 34.]

14, s. 5 (usually called Lord Tenterden's act), it is provided, "that no action shall be maintained whereby to charge any person

after arriving at full age, but must make an express, voluntary, and deliberate promise with knowledge that he is not legally liable. Fetrow *v.* Wiseman, 40 Ind. 148. Many authorities are cited in support of the general proposition, but this precise point is not discussed, nor is the above important case of Morse *v.* Wheeler alluded to by the counsel or the court. See Conaway *v.* Shelton, 3 Ind. 334; Conklin *v.* Ogborn, 7 Ib. 553; Tyler Inf. & Cov. 86, 87. As to the meaning of the term "ratification," Parke B. in Mawson *v.* Blane, 10 Ex. 206, said that it seemed to him "that the meaning of 'ratification' is something different from 'promise.' It is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant." Martin B. said:

What constitutes a ratification.

"I apprehend a ratification to be a consent by a person after he becomes of full age to be liable for a debt contracted during infancy, expressing, to the effect, that he is willing to affirm it and treat it as valid." An infant's promise may be ratified by acts of recognition, acquiescence, or estoppel, as well as by express promises. But the ratification, whether by acts or words, should be equivalent to a new promise. Aldrich *v.* Grimes, 10 N. H. 194; Hoit *v.* Underhill, 9 Ib. 439; Merriam *v.* Wilkins, 6 Ib. 432; Orvis *v.* Kimball, 3 Ib. 314; Hale *v.* Gerrish, 8 Ib. 374; Morrill *v.* Aden, 19 Vt. 505; Millard *v.* Hewlett, 19 Wend. 301, 302; Bigelow *v.* Grannis, 2 Hill, 120; Hodges *v.* Hunt, 22 Barb. 150; Rogers *v.* Hurd, 4 Day, 57; Kline *v.* Bebee, 6 Conn. 494; Martin *v.* Mayo, 10 Mass. 137; Jackson *v.* Mayo, 11 Ib. 147; Ford *v.* Phillips, 1 Pick. 203; Thompson *v.* Lay, 4 Ib. 48; Proctor *v.* Sears, 4 Allen, 95; Peirce *v.* Tobey, 5 Met. 168; Wilcox *v.* Roath, 12 Conn. 550. If an infant purchaser of personal property, who has bought it on credit, retains and uses it for an unreasonabl length of time after he comes of age, without giving notice of an intention to avoid the contract, or if, after coming of age, he refuses to redeliver the property, or otherwise asserts his ownership of it by some unequivocal act, he may be taken to have ratified the contract, and thereby rendered himself liable for the price. If a negotiable note has been given for the price, the infant becomes liable to pay it, either to the payee, or to the holder if it has been negotiated. Lawson *v.* Lovejoy, 8 Greenl. 405; Boyden *v.* Boyden, 9 Met. 519; Boody *v.* McKenney, 23 Maine, 517; Aldrich *v.* Grimes, 10 N. H. 194; Thing *v.* Libbey, 16 Maine, 55; Robbins *v.* Eaton, 10 N. H. 561; Smith *v.* Kelley, 13 Met. 309; Deason *v.* Boyd, 1 Dana, 45; Alexander *v.* Heriot, 1 Bailey Eq. 223; Eubanks *v.* Peak, 2 Bailey, 497, 499; Cheshire *v.* Barrett, 4 McCord, 241. It has been held that if an infant disaffirms a sale that he has made, and reclaims the property sold, he must restore, or

As to restoring consideration when contract disaffirmed.

offer to restore, the purchase-money or other consideration received for it by him, before he can sustain an action. Carr *v.* Clough, 26 N. H. 280; Heath *v.* West, 28 Ib. 101; Badger *v.* Phinney, 15 Mass. 363; Bartlett *v.* Cowles, 15 Gray, 445; Hubbard *v.* Cummings, 1 Greenl. 13; Farr *v.* Sumner, 12 Vt. 28; Taft *v.* Pike, 14 Ib. 405; Bailey *v.* Barnberger, 11 B. Mon. 113; Hill *v.* Anderson, 5 Sm. & M. 216; Bartholomew *v.* Finnemore, 17 Barb. 430; Smith *v.* Evans, 5 Humph. 70. But in Chandler *v.* Simmons, 97 Mass. 508, it was determined that, if an infant has wasted or spent the money paid to him as the consideration for his conveyance of real estate, he may avoid the conveyance without repaying or tendering back the amount; and this was confirmed in Bartlett *v.* Drake, 100 Mass. 174, 177. See, also, Price *v.* Furman, 27 Vt. 268; Gibson *v.* Soper, 6 Gray, 279; Wells J. in

upon any *promise made after full age*, to pay any debt contracted during infancy, or *upon any ratification after full age, of any promise or simple contract made during infancy*, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." The legal interpretation of the words (also used in the statute of frauds), "some writing signed by the party to be charged therewith," is treated of in part II. ch. vi. of this book. On the question of the sufficiency of the words used in the written promise to satisfy the requirement of the statute, Rolfe B. in delivering the judgment of the exchequer of pleas, in Harris *v.* Wall, (*t*) held, that the act distinguished between a *new promise* and a *ratification;* and, in the case before the court, the defendant was held liable on the letters written by him, as amounting to a ratification, though not a new promise. And the test of a ratification was given in these words: "Any written instrument, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification." In the report of that case, the reader will find all the previous cases cited and reviewed in the arguments of the counsel. (*u*)

§ 28. But the writing must do more than merely acknowledge

Bassett *v.* Brown, 105 Mass. 551, 559. And so it was held in White *v.* Branch, 51 Ind. 210, that an infant may recover personal property sold or exchanged by him, without returning the money or property received therefor. So, also, in Carpenter *v.* Carpenter, 45 Ind. 142. An infant's right to avoid his sale of property may be exercised against *bonâ fide* purchasers from the grantee. Myers *v.* Sanders's Heirs, 7 Dana, 506; Hill *v.* Anderson, 5 Sm. & M. 216, 224; but see Carr *v.* Clough, 26 N. H. 280. In all cases the ratification must take place before action brought. Thornton *v.* Illingworth, 2 B. & C. 824; Merriam *v.* Wilkins, 6 N. H. 432; Hale *v.* Gerrish, 8 Ib. 374; Conn *v.* Coburn, 7 Ib. 372; Thing *v.* Libbey, 16 Maine, 55, 57; Aldrich *v.* Grimes, 10 N. H. 198; Goodridge *v.* Ross, 6 Met. 487, 490; Shaw C. J. in Smith *v.* Kelley, 13 Met. 310. As to avoiding or confirming an infant's sale or purchase of real estate, see 1 Chitty Contr. (11th Am. ed.) 218, note (*d*[3]), and cases cited and stated; Keil *v.* Healey, 84 Ill. 104. As to confirming deeds and transactions voidable by reason of fraud, breach of trust, &c. see De Montmorency *v.* Devereux, 7 Cl. & Fin. (Am. ed.) 188, and note (1), and cases cited; Kerr F. & M. 296, 297. See Void and Voidable Acts of Infants, 13 Am. L. Rev. 280.]

Avoidance as to third persons.

(*t*) 1 Ex. 122. [See Mawson *v.* Blane, 10 Ex. 206; *ante*, § 27, note (*r*).]

(*u*) Hartley *v.* Wharton, 11 Ad. & E. 934; Hunt *v.* Massey, 5 B. & Ad. 902; Lobb *v.* Stanley, 5 Q. B. 574; Williams *v.* Moor, 11 M. & W. 256; Cohen *v.* Armstrong, 1 M. & S. 724; Tanner *v.* Smart, 6 B. & C. 603; Whippey *v.* Hillary, 3 B. & Ad. 399; Routledge *v.* Ramsay, 8 Ad. & E. 221.

the correctness of an account as set forth, and the satisfaction of the party with the prices charged. It must further contain something to recognize the contract as an *existing liability*, in order to constitute a ratification. On this principle the queen's bench, in Rowe *v.* Hopwood, (*x*) held insufficient, to bind the defendant, his signature to a writing at the foot of the account in these words: "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.* I certify to be correct and satisfactory." Nothing in the words indicated the intention to pay the account, or to admit it as an existing liability. (*y*)

§ 29. As to *lunatics* and persons *non compotes mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which govern such contracts when made by infants. (*z*) There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase his mind was so deranged that he did not know nor understand what he was doing. (*a*) Still, if that state of mind, though really existent, be unknown to the other party, and no advantage be taken of the lunatic, the defence cannot prevail; especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position. In the case cited in the note, all the authorities will be found quoted and examined. (*b*) So far as relates to supplies of neces-

Lunatics.

Certain contracts with lunatics good.

(*x*) L. R. 4 Q. B. 1.

(*y*) [Where a promissory note is given by an infant, for articles not necessaries, which have been used or sold by him, an acknowledgment that he owes the debt, or a payment of a part of it, after he comes of age, will not ratify his promise to pay the note. Robbins *v.* Eaton, 10 N. H. 561. See Benham *v.* Bishop, 9 Conn. 330; Hinely *v.* Margaritz, 3 Penn. St. 428; Smith *v.* Kelley, 13 Met. 310.]

(*z*) [See Shaw C. J. in Hallett *v.* Oakes, 1 Cush. 298, 299; Kendall *v.* May, 10 Allen, 67.]

(*a*) Molton *v.* Camroux, 2 Ex. 487, and 4 Ex. 17, in error; [McCarty *v.* Kearnan, 86 Ill. 291; Titcomb *v.* Vantyle, 84 Ib. 371.]

(*b*) Molton *v.* Camroux, 2 Ex. 487. See, also, Niell *v.* Morley, 9 Ves. 478; Beavan *v.* M'Donnell, 9 Ex. 309; [Campbell *v.* Hill, 23 U. C. C. P. 473; Rusk *v.* Fenton, 14 Bush, 490; Barnes *v.* Hathaway, 66 Barb. 452; Mut. Life Ins. Co. *v.* Hunt, 14 Hun, 169. In Elliot *v.* Ince, 7 De G., M. & G. 475, 487, Lord Cranworth said: "The principle of the case of Molton *v.* Camroux was very sound; namely, that an executed contract, where parties have been dealing fairly and in ignorance of the lunacy, shall not afterwards be set aside. That was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe. How is a shopkeeper who sells his goods to know whether a customer is or is not of sound mind? The result of the authorities seems to be, that dealings of sale and purchase by a person apparently

Certain contracts with lunatics good.

saries to a person of unsound mind, there can be no question that where no advantage is taken of his condition by the vendor, the purchase will be held valid. (*c*)

sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." See Carr *v.* Holliday, 5 Ired. Eq. 167; Manning *v.* Gill, L. R. 13 Eq. 485; Lincoln *v.* Buckmaster, 32 Vt. 652; McCormick *v.* Littler, 85 Ill. 62. In Seaver *v.* Phelps, 11 Pick. 304, the action was trover for a promissory note, pledged by the plaintiff when he was insane, to the defendant; the defendant offered to show that at the time he took the pledge he had no knowledge of the plaintiff's insanity, and had no reason to suspect it, and that he did not overreach the plaintiff, nor practise any fraud or unfairness; the court held that these facts, if proved, would constitute no defence to the action. Wilde J. said: "The defendant's counsel rely principally on a distinction between contracts executed, and those which are executory. . . . But we do not consider the distinction at all material."]

(*c*) Manby *v.* Scott, 1 Sid. 112; Dane *v.* Kirkwall, 8 C. & P. 679; Wentworth *v.* Tubb, 1 Y. & C. C. C. 171; Nelson *v.* Duncombe, 9 Beav. 211; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170. [See McCrillis *v.* Bartlett, 8 N. H. 569; Hallett *v.* Oakes, 1 Cush. 296, 298; Seaver *v.* Phelps, 11 Pick. 304, 307; Fitzgerald *v.* Reed, 9 Sm. & M. 94; Sawyer *v.* Lufkin, 56 Maine, 308; Richardson *v.* Strong, 13 Ired. (Law) 106. In Kendall *v.* May, 10 Allen, 59, the action was brought against the defendant, an insane person, to recover for board furnished, services rendered, and expenses incurred on his behalf. It appeared that the defendant had property of the value of about $200,000, and that his yearly income was from $10,000 to $12,000; that he applied to the plaintiff to take him into his own house and furnish him with board; that the plaintiff did so, and afterwards, at the defendant's request, the plaintiff and his wife went with the defendant on a journey of several weeks to various places out of the commonwealth, and the expenses of this journey were included among the items of charge in suit. It did not appear that the plaintiff had any authority for what he did except the request of the defendant. A guardian had previously been appointed over the defendant, but he had been removed. Chapman J. said: "The judge properly refused to instruct the jury that the journey taken by the defendant out of the state was not reasonably necessary for him, and that the plaintiff could not properly take him on a journey for pleasure out of the state without the sanction of his former guardian, or of the courts, or of his relations. . . . . The plaintiff incurred the risk of being able to satisfy the jury that the charges were reasonable and proper. The fact that the former guardian had provided rooms and necessaries for the ward, was not material. . . . . If without harm to himself he could enjoy luxuries and gratify his tastes and fancies, he ought to be indulged in such enjoyments to a reasonable extent. If he enjoyed journeys, it was proper that he should be indulged in them. If he preferred the society of some persons over that of others, that preference should be reasonably regarded and indulged. . . . It appears that he is capable of enjoying, to some extent, many pleasures and luxuries, and that he has preferences as to the place of his residence and his associates. Humanity and his right to his own property require that he should not be restrained or thwarted in his preferences and enjoyments, more than is necessary for his own welfare. In re Persse, 3 Molloy, 94, the lord chancellor said: 'The maintenance of a lunatic is not limited as an infant's is, within the bounds of income. It is not limited except by the

Kendall *v.* May.

Liberal rule adopted as to necessaries for lunatic.

§ 30. A *drunkard*, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract in general, (*d*) but he would be liable for absolute necessaries supplied to him while in that condition; and Pollock C. B. put the ground of the liability as follows: "A contract may be implied by law in many cases, even where the party protested against any contract. The law says he did contract, because he ought to have done so. On that ground the creditor might recover against him when sober, for necessaries supplied to him when drunk." (*e*) Drunkards.

§ 31. A *married woman* is absolutely incompetent to enter into contracts during coverture, and has in contemplation of law no separate existence, her husband and herself forming but one person. (*f*) She cannot, even while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase on her own account, even for necessaries, and when credit is given to her there is no remedy but an appeal to her honor. (*g*) The contract with her is not, as in the case of an infant, voidable only, but it is absolutely void, and therefore incapable of ratification after her coverture has ceased. (*h*) Married women: 1. At common law.

§ 32. The common law exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser are well defined. The first is, when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment. (*i*) The disability of the wife in such cases is said to be suspended, for her own benefit, that she may be able to pro- When husband is *civiliter mortuus*.

fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and for solid enjoyments and substantial comforts the court will, if necessary, go beyond the limits of income.' In this commonwealth it is not thus limited in respect to an infant, and there is, therefore, less reason for limiting it in respect to a person of full age."]

(*d*) Molton *v.* Camroux, 4 Ex. 17; Pitt *v.* Smith, 3 Camp. 33; Fenton *v.* Holloway, 1 Stark. 126; Gore *v.* Gibson, 13 M. & W. 623; Cook *v.* Clayworth, 18 Ves. Jr. 12. [See 1 Chitty Contr. (11th Am. ed.) 192, and cases in note (*d*)[1].]

(*e*) Gore *v.* Gibson, 13 M. & W. 623; [McCrillis *v.* Bartlett, 8 N. H. 569; Richardson *v.* Strong, 13 Ired. (Law) 106.]

(*f*) Co. Littleton, 112 d.

(*g*) Marshall *v.* Rutton, 8 T. R. 545.

(*h*) Zouch *v.* Parsons, 3 Burr. 1794, 1805; Com. Dig. Baron & Feme, W.

(*i*) Ex parte Franks, 7 Bing. 762; Sparrow *v.* Caruthers, cited in note, 1 T. R. 6; De Gaillon *v.* L'Aigle, 1 B. & P. 357. [See 1 Chitty Contr. (11th Am. ed. 252, 253.]

cure a subsistence. She may therefore bind herself as purchaser when her husband, a convict sentenced to transportation, has not yet been sent away, (*k*) and also when he remains away after his sentence has expired. (*l*) But not if he abscond and go abroad in order to avoid a charge of felony. (*m*)

Husband, alien, resident abroad.

§ 33. It was held in some early cases, that where a woman's husband was an alien and resided abroad, and she lived in England and contracted debts here, she was liable; Lord Kenyon, in one case, putting the decision "on the principle of the old common law, where the husband had abjured the realm." (*n*) But this principle was held not to apply to the case of Englishmen who voluntarily abandoned the country. (*o*) More modern cases seem to throw very strong doubt on the earlier doctrine as regards the capacity of a woman, whose husband is an alien residing abroad, to contract debts for which she can be sued in England. In Kay *v.* Duchesse de Pienne, where Lord Ellenborough's ruling at nisi prius was confirmed by the court in banco (3 Camp. 123), his lordship confined the doctrine of Lord Kenyon to cases where the husband *has never been in the kingdom*, not simply residing abroad, separate from his wife. And in Boggett *v.* Frier, 11 East, 303, the court observed to counsel that all these old cases were, so far as opposed to Marshall *v.* Rutton, 8 T. R. 545, overruled by that case. In Barden *v.* Keverberg, where the defendant pleaded coverture, plaintiff replied, that defendant's husband was an alien residing abroad, and had never been within the United Kingdom; and that the debt was contracted by the defendant in England, where she was living separate and apart from her husband, as a *feme sole*, and that the plaintiff gave credit to her as a *feme sole;* and that she made the promise in the declaration mentioned as a *feme sole.* There was no demurrer, but the case was tried on the facts alleged by the replication, and denied by rejoinder, and the verdict for plaintiff was set aside by the court in banco. Parke B. said: "Supposing the replication good, *although I have a strong opinion that it is not* (because the cases in which the wife has been held liable,

(*k*) Ex parte Franks, 7 Bing. 762.

(*l*) Carroll *v.* Blencow, 4 Esp. 27.

(*m*) Williamson *v.* Dawes, 9 Bing. 292.

(*n*) Walford *v.* Duchess de Pienne, 2 Esp. 553; Franks *v.* De Pienne, 2 Esp. 587; Burfield *v.* De Pienne, 2 B. & P. N. R. 380; De Gaillon *v.* L'Aigle, 1 B. & P. 357.

(*o*) Farrar *v.* Countess of Granard, 1 B. & P. N. R. 80; Marsh *v.* Hutchinson, 2 B. & P. 226; Williamson *v.* Dawes, 9 Bing. 292.

her husband being abroad, apply only where he is *civiliter mortuus*), you are bound under it to make out that the husband was an alien, that he was resident abroad and never in this country, which facts are now admitted; and *also* that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her to be a *feme sole;* and the same learned judge threw doubt upon the report of what Lord Ellenborough said in Kay *v.* Duchesse de Pienne. (*p*)

§ 34. More recently the case of De Wahl *v.* Braune (*q*) came before the exchequer. The declaration was on an agreement to purchase the interest of the plaintiff in the benefit of a lease and school for young ladies. Plea in abatement, plaintiff's coverture. Replication, that her husband was an alien, born in Russia, did not reside in this country at the commencement of the action, was never a subject of this country; that the cause of action accrued to plaintiff in England, while she was a subject of our lady the queen, residing here separate and apart from her husband; that defendant became liable to her as a single woman, and that before and at the time of the commencement of the suit war existed between Russia and this country, and that her husband resided in Russia, and adhered to the said enemies of our lady the queen. On demurrer, held that the wife could not sue as a *feme sole;* that her husband was not *civiliter mortuus*, and that the contract made during coverture was the husband's. In this case the action was by the wife, but the reasoning of the court would have been equally applicable if her condition had been reversed, and she had been defendant instead of plaintiff.

De Wahl *v.* Braune.

§ 35. The only remaining exception to the absolute incapacity of a married woman to bind herself as purchaser during coverture is one which arises under the custom of London, and is confined to the city of London. By that custom, *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the city courts, in all matters arising out of her dealings in her trade in London. In the well-known case of Beard *v.* Webb, (*r*) where Lord Eldon C. J. delivered the judgment of Cam. Scacc. reversing that of the king's bench, this custom is elaborately considered, in connection

Married woman sole trader in city of London.

Beard *v.* Webb.

(*p*) Barden *v.* Keverberg, 2 M. & W. 61. [See 1 Chitty Contr. (11th Am. ed.) 253–255.]

(*q*) 1 H. & N. 178, and 25 L. J. Ex. 343.

(*r*) 2 B. & P. 93.

with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft." (*s*)

Married woman: 2. By statute.

§ 36. But recent legislation has made considerable changes in these rules of the common law. By the 20 & 21 Vict. c. 85, s. 21, a wife "deserted by her husband" may obtain an order to protect her earnings and property, the effect of which order during its continuance is to place her "in the like position in all respects with regard to property and contracts as she would be under this act if she obtained a decree of judicial separation." And the effect of such a decree is stated by the 26th section to be that "the wife shall while so separated be considered as a *feme sole for the purposes of contract*, and wrongs and injuries, and *suing and being sued* in any civil proceeding." Further provision is made by the 21 & 22 Vict. c. 108, ss. 8, 9, 10, for the protection of persons dealing with wives who have obtained the order above described. By the recent act, 33 & 34 Vict. c. 93 (married women's property act, 1870), the rights of married women to acquire property are greatly extended, and by the first section especially, her "wages and earnings acquired or gained in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money *or property so acquired by her* through the exercise of any literary, artistic, or scientific skill, and all *investments of such wages, earnings, money, or property*, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and *her receipt alone* shall be a good discharge for such wages, earnings, money, and *property*." (*t*)

Protection order.

Property act, 1870.

(*s*) [See 1 Chitty Contr. (11th Am. ed.) 255, and note (*m*).]

(*t*) [Changes similar to those stated in the text, and others even more extensive and important, in the prineiples and rules of the common law applicable to husband and wife, have been made by recent legislation in many of the American States. By Mass. Stat. 1869, c. 304, a married woman may make contracts for necessaries to be furnished to herself and family, and may sue and be sued thereon, in the same manner as if she were sole. See, also, Stat. 1874, c. 184; Gordon *v.* Dix, 106 Mass. 305; Labaree *v.* Colby, 99 Ib. 559. But ordinarily, if a married woman living with her husband purchases goods appropriate to common family use, of one who knows

Statute changes in Massachusetts.

§ 37. In equity, where a married woman has a separate estate, she is to a certain extent considered as a *feme sole* with respect to that property, and may so contract as to render it liable for the payment of her debts. In respect of her purchases, the law is, that if she, "having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which if she were a *feme sole* would constitute her a debtor, and in entering into such engagements she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable." (*u*)

Married women: 3. In equity.

she is married and so living with her husband, without any express agreement pledging her own credit, the natural as well as legal inference would be that she was buying on her husband's account and for the family use. Powers *v.* Russell, 26 Mich. 179. See Campbell *v.* White, 22 Ib. 178. By Mass. Statute 1879, c. 133, "The wearing apparel and articles of personal ornament of a married woman, and articles necessary for her personal use acquired by gift from her husband, not exceeding two thousand dollars in value, shall be and remain her sole and separate property," &c. See McGuire *v.* McGuire, 23 U. C. C. P. 123.

(*u*) Mrs. Matthewman's case, L. R. 3 Eq. 781. See, also, Shattock *v.* Shattock, L. R. 2 Eq. 182; 35 L. J. Ch. 509; 30 L. J. Ch. 298, and the conclusive settlement of the law in Picard *v.* Hine, L. R. 5 Ch. App. 274; [Johnson *v.* Gallagher, 3 De G., F. & J. 494, and note (2) and cases cited; Johnson *v.* Vail, 1 McCarter (N. J.), 423; Butler *v.* Cumpston, L. R. 7 Eq. 20, 21; Willard *v.* Eastham, 15 Gray, 328; Yale *v.* Dederer, 18 N. Y. 265; Manchester *v.* Sahler, 47 Barb. 155; Johnson *v.* Cummins, 1 C. E. Green (N. J.), 97; Hutchinson *v.* Underwood, 27 Texas, 255; La Touche *v.* La Touche, 3 H. & C. 576; Kelso *v.* Tabor, 52 Barb. 125; Wells *v.* Thorman, 37 Conn. 318; Craft *v.* Rolland, Ib. 491; Bogert *v.* Gulick, 65 Barb. 322; Lennox *v.* Eldred, Ib. 410; Gosman *v.* Cruger, 69 N. Y. 87; Yale *v.* Dederer, 68 Ib. 329; Bank of Watkins *v.* Miller, 63 Ib. 639; Conlin *v.* Cantrell, 64 Ib. 217; Downing *v.* O'Brien, 67 Barb. 582.]

CHAPTER III.

MUTUAL ASSENT.

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SECTION I. — OF MUTUAL ASSENT.

§ 38. THE assent of the parties to a sale need not be express. It may be implied from their language, (*a*) or from their conduct; (*a*[1]) may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as if a

Assent, express or implied.

(*a*) See a curious case of what one of the judges termed a "grumbling" assent, in Joyce *v.* Swan, 17 C. B. N. S. 84; [Evanson *v.* Parker, Ir. T. R. 283.]

(*a*[1]) [Barrett *v.* Rapelze, 4 U. C. Q. B. (O. S.) 175; Brown *v.* Shaw, 1 Ont. App. 293; Pickrel *v.* Rose, 87 Ill. 263; The West. Un. Tel. Co. *v.* The Chicago & Paducah R. R. Co. 86 Ib. 246; Tilt *v.* La Salle Silk M'f'g Co. 5 Daly, 19.]

customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods. (*b*)

§ 39. But the assent must, in order to constitute a valid contract, be *mutual, and intended to bind both sides.* (*c*) It must also *coexist at the same moment of time.* A mere

Must be mutual—

(*b*) Bl. Com. book ii. ch. 30, p. 443; Hoadley *v.* M'Laine, per Tindal C. J. 10 Bing. 482.

(*c*) [An assent, to be valid, must of course be such as to conclude an agreement or contract between the parties. And to effect this, it must in every respect meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. Potts *v.* Whitehead, 8 C. E. Green (N. J.), 512, 514; S. C. 5 Ib. 55; Carr *v.* Duval, 14 Peters, 77; McKibbin *v.* Brown, 1 McCarter, 13; S. C. 2 Ib. 498; Abbott *v.* Shepard, 48 N. H. 16; Chinnock *v.* Marchioness of Ely, 4 De G., J. & S. 638; Bruce *v.* Bishop, 43 Vt. 161, 163; Thurston *v.* Thornton, 1 Cush. 89; O'Fay *v.* Burke, 8 Ir. Ch. R. 225, 511; Eliason *v.* Henshaw, 4 Wheat. 225, 228; Heyward *v.* Barnes, 23 L. T. 68; Allcott *v.* Boston Steam Flour Mill, 9 Cush. 17; Smith *v.* Gowdy, 8 Allen, 566; Gowing *v.* Knowles, 118 Mass. 232, 233; Carter *v.* Bingham, 32 U. C. Q. B. 615; Plant Seed Co. *v.* Hall, 14 Kansas, 553; Jenness *v.* Mount Hope Iron Co. 53 Maine, 20, 23; Sanford J. in Crocker *v.* New London, Willimantic & Palmer R. R. Co. 24 Conn. 262, 263; Bruce *v.* Pearson, 3 John. 534; Tuttle *v.* Love, 7 Ib. 470; The Oriental Inland Steam Co. *v.* Briggs, 4 De G., F. & J. (Am. ed.) 191, note; Tucker *v.* Woods, 12 John. 190; McKinley *v.* Watkins, 13 Ill. 140; Kinghorne *v.* The Montreal Tel. Co. 18 U. C. Q. B. 60; Marshall *v.* Jamieson, 42 Ib. 115; McIntosh *v.* Brill, 20 U. C. C. P. 426; Thorne *v.* Barwick, 16 Ib. 369; Murphy *v.* Thompson, 28 Ib. 233; Johnston *v.* Wilson, Ib. 432; Bickford *v.* The Gt. West. R. W. Co. Ib. 516; Salomon *v.* Webster, 4 Col. 353; Fox *v.* Turner, 1 Bradwell (Ill.), 153; Maclay *v.* Harvey, 90 Ill. 525; McGrath *v.* Brown, 66 Barb. 481; Sourwine *v.* Truscott, 17 Hun, 432; Snow *v.* Miles, 3 Cliff. 608; Utley *v.* Donaldson, 94 U. S. 29. If the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement. Chinnock *v.* Marchioness of Ely, 4 De G., J. & S. 638; Rummens *v.* Robins, 3 De G., J. & S. 88; Potts *v.* Whitehead, 5 C. E. Green (N. J.), 55; S. C. 8 Ib. 512. The agreement is not completed until there is upon the face of the correspondence "a clear accession on both sides to one and the same set of terms." Chevely *v.* Fuller, 13 C. B. 122; Lyman *v.* Robinson, 14 Allen, 242; Ridgway *v.* Wharton, 6 H. L. Cas. 238, 268, 304; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80; Johnson *v.* Stephenson, 26 Mich. 63; McPherson *v.* Cameron, 15 U. C. Q. B. 48; Willing *v.* Currie, 36 Ib. 46; Pierce *v.* Small, 10 U. C. C. P. 161; Dana *v.* Shoot, 81 Ill. 468. The parties must assent to the same subject-matter in the same sense. Hazard *v.* New England Ins. Co. 1 Sumner, 218; Greene *v.* Bateman, 2 Wood. & M. 359, 361; Hartford & N. H. R. R. Co. *v.* Jackson, 24 Conn. 514. The acceptance by the person to whom the offer is made constitutes a sufficient legal consideration for the engagement of the party making the offer. Boston & Maine R. R. *v.* Bartlett, 3 Cush. 227. See Abbott *v.* Shepard, 48 N. H. 14. As soon as the fact is established of the final mutual assent of the

Acceptance must meet and correspond with offer.

Offer should leave nothing to future arrangement.

Force of acceptance.

proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional*. (*d*) If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, (*d*[1]) and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer. The cases are very numerous (*e*) in support of these principles, which

and unconditional.

parties to certain terms, and those terms are evidenced in a manner to satisfy the statute of frauds, there is a binding agreement, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. Lord Westbury L. C. in Chinnock *v.* Marchioness of Ely, 4 De G., J. & S. 646. Whether a mere compliance with the proposal of one party by another who had not previously agreed to it, will render the party who made the proposal liable upon it, is a question of intention, which depends upon the terms of the proposal and the subject-matter of it. See Johnston *v.* Nicholls, 1 C. B. 251; Boyd *v.* Moyle, 2 C. B. 644; Train *v.* Gold, 5 Pick. 380; Johnston *v.* Fessler, 7 Watts, 48; Eskridge *v.* Glover, 5 Stew. & Port. 264. If one person promises another to pay him a sum of money if he will do a particular act, and the latter does the act before the revocation of the promise, the promise may become binding, although the promisee does not, at the time, engage to do the act; the doing of the act being a good consideration for the previous promise, and the promise amounting to a request to do the act. Barnes *v.* Perine, 9 Barb. 202. These propositions are, of course, subject to the rule that the act of acceptance must take place within a reasonable time. *Post*, § 41, note (*g*). A public offer by advertisement of a reward for the performance of some service is, in certain cases, binding when accepted and acted on by any one; as, for information respecting a loss or crime, or for apprehension, &c. of a felon or other offender. 1 Chitty Contr. (11th Am. ed.) 11, note (*u*[1]); Loring *v.* Boston, 7 Met. 409; Crocker *v.* New Lond., Willimantie & Palmer R. R. Co. 24 Conn. 261, per Sanford J.; Leake Cont. 13; Eagle *v.* Smith, 4 Houston (Del.), 293; Co. of Montgomery *v.* Robinson, 85 Ill. 174; Grady *v.* Crook, 2 Abb. N. C. 53.]

Offer of reward.

(*d*) [Chinnock *v.* Marchioness of Ely, 4 De G., J. & S. 638.]

(*d*[1]) [Carter *v.* Bingham, 32 U. C. Q. B. 615; Webb *v.* Sharman, 34 Ib. 410; Fox *v.* Turner, 1 Bradwell (Ill.), 153.]

(*e*) Champion *v.* Short, 1 Camp. 53; Routledge *v.* Grant, 4 Bing. 653; Hutchinson *v.* Bowker, 5 M. & W. 535; Jordan *v.* Norton, 4 M. & W. 155; Wontner *v.* Shairp, 4 C. B. 404; Duke *v.* Andrews, 2 Ex. 290; Chaplin *v.* Clarke, 4 Ex. 403; Forster *v.* Rowland, 7 H. & N. 103, and 30 L. J. Ex. 376; Honeyman *v.* Marryat, 6 H. L. Cas. 112; Andrews *v.* Garrett, 6 C. B. N. S. 262; Proprietors Eng. & For. Cr. Co. *v.* Arduin, L. R. 5 Eng. App. 64; Addinel's case, L. R. 1 Eq. 225; aff. in H. L. *sub nom.* Jackson *v.* Turquand, L. R. 4 Eng. App. 305.

are common to all contracts. (*f*) A few only of those peculiarly illustrative of the rules as applied to contracts of sale need be specially noticed.

§ 40. In Hutchinson *v.* Bowker, (*g*) the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept, expecting you will give us *fine barley*, and *full weight*." The defendant wrote back: "You say you expect we shall give you 'fine barley.' Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury, although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The court held that it was for the jury to determine the meaning of the words, and for the court to decide whether there had been mutual assent to the contract; and the plaintiff was nonsuited, on the ground that he had not accepted the defendant's offer. In Hyde *v.* Wrench, (*h*) defendant offered to sell his farm to plaintiff for 1,000*l.* The plaintiff, thereupon, offered him 950*l.*, which defendant refused. Plaintiff then accepted the offer at 1,000*l.*, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally answered it by a counter-proposal to purchase at a lower price, "he thereby rejected the offer," and that no contract had ever become complete between the parties. In the Governor, Guardians &c. of the Poor of Kingston-upon-Hull *v.* Petch, (*i*) plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant tendered,

Hutchinson *v.* Bowker.

Hyde *v.* Wrench.

Governor &c. of Kingston-upon-Hull *v.* Petch.

(*f*) [A mere loose conversation by way of banter or jest, or without any definite intention to make an agreement, will not constitute one, although it may assume that shape. The question of intent in such case is for the jury. Bruce *v.* Bishop, 43 Vt. 161; Thurston *v.* Thornton, 1 Cush. 89. So a merely colorable sale of personal property, made with the intention that the title should not be transferred in reality, but only in appearance, conveys no title whatever to the apparent purchaser. Bradley *v.* Hale, 8 Allen, 59, Cox *v.* Jackson, 6 Allen, 108; Hyam's case, 1 De G., F. & J. 75; Bowes *v.* Foster, 2 H. & N. 779; § 490, note (*r*), *post*.]

Real intention necessary.

(*g*) 5 M. & W. 535.

(*h*) 3 Beav. 334.

(*i*) 10 Ex. 610, and 24 L. J. Ex. 23; [The New Brunswick & Canada Railway Co. *v.* Muggeridge, 4 H. & N. 160, 580; Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, 491.]

and received notice of the acceptance of his tender, and then wrote that he declined the contract. Held, that by the terms of the proposal, the contract was not complete till the terms were put in writing, and signed by the parties, and that the defendant had the right to retract. In Jordan *v.* Norton, (*k*) defendant offered to buy a mare, if warranted "sound, and quiet in harness." Plaintiff sent the mare, with warranty that she was "sound, and quiet in double harness." Held, no complete contract. In Felthouse *v.* Bindley, (*l*) a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered 30*l.* The uncle wrote back saying, "Your price I admit was thirty guineas, I offered 30*l.*, never offered more, and you said the horse was mine; however, as there may be a mistake about him I will split the difference, 30*l.* 15*s.*, I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at* 30*l.* 15*s.*" This letter was dated on the 2d of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. Held, that there had been no complete contract between the uncle and the nephew, because the latter had never communicated to the former any assent to the sale at 30*l.* 15*s.*; that the uncle had no right to put upon his nephew the burden of being bound by the offer unless rejected; and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was nonsuited, on the ground that he had no property in the horse at the date of the alleged conversion. (*m*) In Watts *v.* Ainsworth (*n*) will be found a good illustration by Bramwell B. of the mode of construing a correspondence when a contest arises as to the existence of mutual assent. (*o*) See, also, the opinions deliv-

Jordan *v.* Norton.

Felthouse *v.* Bindley.

Watts *v.* Ainsworth.

(*k*) 4 M. & W. 155.

(*l*) 11 C. B. N. S. 869; 31 L. J. C. P. 204.

(*m*) It was further held in this case that the nephew's acceptance of the offer after conversion, but before the action brought by plaintiff, did not relate back to the date of the offer, so as to enable the plaintiff to maintain the action.

(*n*) 1 H. & C. 83; 31 L. J. Ex. 448.

(*o*) [The letters of a correspondence constituting a bargain are one transaction; and so long as there is a proposal by either party accepted by the other, there

ered in the House of Lords in a recent case, in which the unanimous judgments of the exchequer of pleas, and of the exchequer chamber, were unanimously reversed. (*p*) [In Stevenson *v.* McLean, (*p*[1]) the defendant being possessed of iron warrants, wrote to the plaintiff that he would sell for 40*s.* nett cash, open all Monday. On Monday morning the plaintiff telegraphed to defendant, "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." It was held, that this was not a rejection of the defendant's offer, and that the plaintiff having subsequently accepted the defendant's offer, the defendant was bound. Lush J. said: "Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiff on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiff's part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation. Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it. . . . . Then, again, the form of the telegram is one of inquiry. It is not 'I offer forty for delivery over two months,' which would have likened the case to Hyde *v.* Wrench. . . . . Here there is no counter-proposal. . . . . There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer."]

Letter of inquiry not a rejection of an offer.

Stevenson *v.* McLean.

§ 41. It is a plain inference from these cases, that a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance, there is nothing by which the proposer *can* be bound; and the authorities quite support this inference. Even when on making the offer the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may nevertheless be retracted in the interval, if no con-

Proposal may be retracted before acceptance.

Promise to leave proposal open not binding if without consideration.

is a good contract in writing, because the letters testify the acceptance by each party of the terms agreed upon between them both. Willes J. in Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, 491.]

(*p*) Proprietors Eng. & For. Cred. Co. *v.* Arduin, L. R. 5 Eng. App. 64.

(*p*[1]) [L. R. 5 Q. B. Div. 346.]

sideration has been given for the promise. (*q*) Cooke *v.* Ox-

(*q*) [Craig *v.* Harper, 3 Cush. 158; Boston & Maine Railroad *v.* Bartlett, Ib. 224; Eskridge *v.* Glover, 5 Stew. & Port. 264; Martin *v.* Mitchell, 2 J. & W. 413, 428; Lucas *v.* James, 7 Hare, 410; Chinnock *v.* Marchioness of Ely, 4 De G., J. & S. 638; Faulkner *v.* Hebard, 26 Vt. 452; Falls *v.* Gaither, 9 Porter, 605; Potts *v.* Whitehead, 5 C. E. Green (N. J.), 59; S. C. 8 Ib. 512; 1 Sugden V. & P. (8th Am. ed.) 132; Abbott *v.* Shepard, 48 N. H. 16; Leake Contr. 20, 21; Burton *v.* Shotwell, 13 Bush, 271; Hochster *v.* Baruch, 5 Daly, 440; Dix *v.* Shaver, 14 Hun, 392. But on the other hand, where an offer is made in writing to sell land at a certain price, if taken within a certain time, and the person to whom the offer is made, before it is retracted, accepts it within the time, such offer and acceptance constitutes a valid contract. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224. Fletcher J. in this case said: "When the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. . . . . It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once." Before acceptance, however, the proposition was "but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance." Where a time for acceptance is stipulated, an acceptance after that time is not sufficient. Potts *v.* Whitehead, 5 C. E. Green (N. J.), 55; Leake Contr. 17; Farrell *v.* Hunt, 21 U. C. C. P. 117. Where no time is limited for acceptance of the offer, it should be accepted, if at all, within a reasonable time, and unless it is so accepted and the acceptance notified to the person making the offer, he will not be bound. Metcalf J. in Craig *v.* Harper, 3 Cush. 158, 160; Peru *v.* Turner, 1 Fairf. 185; Wilson *v.* Clements, 3 Mass. 1; Johnston *v.* Fessler, 7 Watts, 48; Martin *v.* Black, 21 Ala. 721; Leake Contr. 17, 18; Chicago &c. R. R. Co. *v.* Dane 43 N. Y. 240; Judd *v.* Day, 50 Iowa, 247. B., the owner of land, made an offer to the plaintiff, that he might take timber from the land upon paying for it in a certain way. The plaintiff said he would accept the offer if he could get his brother to assist him. B., the owner, told him that he need not give a decisive answer then, but might do so at some subsequent time. The plaintiff afterwards engaged his brother to assist him in cutting the timber, but did not notify B. that he had accepted the offer. B. afterwards made the same offer to the defendants, who entered upon the land, and cut and carried away the timber, and the plaintiff brought an action on the case against them. It was decided that what passed between the plaintiff and the owner did not constitute a contract. Beckwith *v.* Cheever, 21 N. H. 41. See The Navan Union *v.* M'Loughlin, 4 Ir. C. L. R. 451. Gilchrist C. J. in Beckwith *v.* Cheever, *supra*, referring to the fact that the plaintiff was to inform B. at some future day whether he would accept his offer, said: "This should have been done within a reasonable time; and the proper time would have been whenever the plaintiff should determine to accept the proposition. . . . . It cannot with propriety be said that (the fact that the plaintiff had engaged his brother to assist him), not brought home to the knowledge of B., can be regarded as an acceptance. Neither party did anything to make the proposition binding, and neither was bound." An offer is revoked by the death of the person proposing it. Blades *v.* Free, 9 B. & C. 167; Campanari *v.* Woodburn, 15 C. B. 400; Lee *v.* Griffin, 1 B. & S. 272. So, by the death of the person to whom it was made before acceptance.

Acceptance before retraction completes contract.

Beckwith *v.* Cheever.

Death of either party: effect of.

ley (*r*) is the leading case on this point. The declaration was that the defendant had proposed to sell and deliver to the plaintiff 266 hhds. of tobacco on certains terms, if the plaintiff would agree to purchase them on the terms aforesaid, *and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* Averment, plaintiff did agree, &c. and did give notice, &c. and requested delivery, and offered payment. Judgment arrested after verdict for the plaintiff. Kenyon C. J. delivering judgment, said: "Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side. The other party was not bound. It was, therefore, *nudum pactum.*" Buller J. said: "It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract (promise?) was first made. Then as to the subsequent time: the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale, from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." Grose J. said: "The agreement was not binding *on the plaintiff* before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise." This decision was afterwards affirmed in the exchequer chamber, M. 32, Geo. 3. (*s*)

Cooke *v.* Oxley.

§ 42. In Routledge *v.* Grant, (*t*) which was the case of an offer by defendant to purchase a house, and to give plaintiff six weeks for a definite answer, Best C. J. nonsuited the plaintiff, on proof that defendant had retracted his offer

Routledge *v.* Grant.

Leake Contr. 22; Werner *v.* Humphreys, 2 M. & G. 853. The force of a proposal is exhausted by a refusal of it. Leake Contr. 22; Sheffield Canal Co. *v.* Sheffield & Rotheram Ry. Co. 3 Ry. & Can. Cas. 121, 132; Hyde *v.* Wrench, 3 Beav. 334; Honeyman *v.* Marryat, 21 Beav. 14. The offer of a contract can be accepted only by the party to whom it is proposed, and cannot be assigned by him to another without the consent of the person making the offer. Meynell *v.* Surtees, 3 Sm. & Gif. 101, 117; Boulton *v.* Jones, 2 H. & N. 564. See §§ 58 *et seq.*, *post.*]

Rejection of proposal.

By whom acceptance must be made.

(*r*) 3 T. R. 653.

(*s*) So stated in note at the end of the Report, in 3 T. R. 653.

(*t*) 4 Bing. 653. See, also, Humphries *v.* Carvalho, 16 East, 45.

within the six weeks, and on the rule to set aside the nonsuit, said: "If six weeks are given on one side to accept an offer, the other has six weeks to put an end to it; one party cannot be bound without the other." The chief justice in this case cited Cooke *v.* Oxley with marked approval. In Payne *v.* Cave, (*u*) it was held that a bidder at an auction may retract his bidding any time before the hammer is down; and *per curiam*, "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed." (*u*[1])

Payne *v.* Cave.

§ 43. The latest case on this point is Head *v.* Diggon. (*x*) The defendant, on Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under wool, &c. &c. *with three days' grace from the above date.*" These words were put in by the defendant expressly as a promise to await three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before — Sunday. Holroyd J. nonsuited the plaintiff, on the authority of Cooke *v.* Oxley. In the course of the argument for new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley J. concurred on the ground that "unless both parties are bound, neither is." An illustration of the principle now under discussion is to be found in the recent case of Smith *v.* Hudson. (*y*) There, a quantity of barley had been verbally sold according to sample, and the goods had been actually delivered to the order of the vendee, at the railway station, so as to put an end to the right of stoppage *in transitu*. But the buyer had not yet accepted so as to make the contract valid under the

Head *v.* Diggon.

Smith *v.* Hudson.

(*u*) 3 T. R. 148.

(*u*[1]) [In connection with the doctrine of this case see Warlow *v.* Harrison, 1 El. & El. 295, stated § 471, *post.*]

(*x*) 3 M. & R. 97.

(*y*) 6 B. & S. 431; 34 L. J. Q. B. 145. See, also, Taylor *v.* Wakefield, 6 E. & B. 765.

statute of frauds, because it was still in his power to exercise the option of accepting or rejecting after examining the quality of the bulk, to see if it corresponded with the sample. The buyer became bankrupt, and the seller at once gave notice to the railway company to hold the barley, subject to his orders; and countermanded the order to convey it to the vendee. The assignees of the buyer insisted on their right to accept the goods in his place, on the ground of the actual delivery to him. But the court held that the withdrawal of the offer by the countermand of the vendor, before final acceptance, prevented the completion of the contract.

§ 44. Where parties living at different places are compelled to treat by correspondence through the post, there is a modification of the rule to this extent, that the party making the offer cannot retract after the acceptance by his correspondent has been duly posted, although it may not have reached him; (*z*) nor can the party accepting retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received. (*a*) In Adams

Assent by correspondence.

(*z*) Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Potter *v.* Saunders, 6 Hare, 1; [Thompson *v.* James, 18 Dunlop, 1; Stevenson *v.* McLean, 5 Q. B. D. 346; Byrne *v.* Van Tienhoven, 5 C. P. D. 344. In Byrne *v.* Van Tienhoven, Lindley J. said: "It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is complete the moment the letter accepting the offer is posted."]

(*a*) Duncan *v.* Topham, 8 C. B. 225; Potter *v.* Saunders, 6 Hare, 1. [In 1 Chitty Contr. (11th ed. 17) the rule is stated thus: "If an offer be made by letter to a party at a distance, it is *presumed* to be constantly repeated until the period for acceptance arrives, up to which period it is to be *inferred* that there is a continuation of the intention to contract, and that the acceptance of the exact terms proposed, within the precise time limited, shall, when received by him who made the offer, form a complete contract as from the date of such acceptance, provided the party making the offer had not, in the interim, withdrawn it." The conclusion drawn from the cases by Mr. Leake is, that "an offer by letter or other communication between distant parties continues open until the arrival of the letter or other communication in due course at its destination. If the delivery of the letter of offer is delayed, by the fault of the sender, the offer is extended until its arrival." On the other hand, "the acceptance is complete and the contract valid upon the due posting of the letter of acceptance, notwithstanding delay, or even entire failure in arriving at its destination, provided such delay or failure has not been occasioned by a wrong address of the letter, or other default in the party sending it." Leake Contr. 18, 19. The answer of acceptance must be placed in the post-office within the time limited, if any, or otherwise with reasonable dispatch, and before any intimation is received that the offer is withdrawn. Potts *v.* Whitehead, 5 C. E. Green (N. J.), 55; S. C. 8 Ib. 512; Abbott *v.* Shepard, 48 N. H. 14; Stockham *v.* Stockham, 32 Md. 196; Maclay

Chitty's statement of rule.

Leake's conclusion.

When acceptance must be mailed.

v. Lindsell, (*b*) the defendants wrote on the 2d of September to the plaintiff, offering to sell a quantity of wool on specified terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 7th. An answer was sent on the same evening accepting the offer. This answer was received by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants not having received the answer, which would have been due on Sunday, the 7th, according to the

Adams *v.* Lindsell.

v. Harvey, 90 Ill. 525. The transmission of the letter accepting an offer is sufficient to make a contract, because it is an overt act manifesting the intention of the acceptor, and thus consummating the *aggregatio mentium* which constitutes the contract. Trevor *v.* Wood, 36 N. Y. 307; Hallock *v.* Commercial Ins. Co. 2 Dutcher (N. J.), 268; Howard *v.* Daly, 61 N. Y. 362. If the letter of acceptance is duly posted, the writer is not responsible for any accident or delay in the post-office. Vassar *v.* Camp, 14 Barb. 341; S. C. 1 Kernan, 441; Duncan *v.* Topham, 8 C. B. 225; Adams *v.* Lindsell, 1 B. & Ald. 681. This subject is ably considered and discussed in Hallock *v.* Commercial Ins. Co. 2 Dutcher (N. J.), 268, where it is decided that a contract arises when an overt act is done intending to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not; and unless the proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time. Vredenburgh J. said (p. 281): "The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing, or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium;* at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph, his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer. . . . . There is no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air; in the other, written signs carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act." See Clarke *v.* Gardiner, 12 Ir. C. L. R. 472, stated *post*, § 253 *a*. A contract may be made and proved in court by telegraphic dispatches. Taylor *v.* Steamboat Robert Campbell, 20 Mo. 254; Leonard *v.* New York &c. Tel. Co. 41 N. Y. 544; Beach *v.* Raritan &c. R. R. Co. 37 Ib. 457; Durkee *v.* Vermont Central Railroad, 29 Vt. 127; Heakel *v.* Pape, L. R. 6 Ex. 7; Rommel *v.* Wingate, 103 Mass. 327. The same rules apply in determining whether a contract has been made by telegraphic dispatches as in cases of communications by letter. Trevor *v.* Wood, 36 N. Y. 307; Harty *v.* Gooderham, 31 U. C. Q. B. 18; Thorne *v.* Barwick, 16 U. C. C. P. 369; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Minnesota Oil Co. *v.* Collier Lead Co. 4 Dill. 431.]

Various forms of acceptance of an offer.

Contracts by telegraph.

(*b*) 1 B. & Ald. 681.

course of the post, if they had not misdirected their letter making the offer, sold the wool to another person. Action for non-delivery, and verdict for plaintiff. On motion for new trial, it was contended on behalf of the defendants, on the authority of Payne *v.* Cave, (*c*) and Cooke *v.* Oxley, (*d*) that they had a right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."(*e*) This case was cited with approval by Lord Cottenham in Dunlop *v.* Higgins (*e*[1]) as a leading case, his lordship remarking that "common sense tells us that transactions cannot go on without such a rule." In Dunlop *v.* Higgins, a proposal sent by mail on the 28th January was received on the 30th, and answered on the same day, but not by the first post of the day, so that it reached the proposer on the 1st of February, instead of the 31st of January. It was held that the answer was posted in time, and that the contract was complete by acceptance when the letter of acceptance was posted; the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of his letter of acceptance. (*f*)

Dunlop *v.* Higgins.

§ 45. The court of exchequer in The British & Amer. Tel. Co. *v.* Colson, (*g*) held, however, that where the defendant had applied for shares in the plaintiff's company, and a letter allotting the shares to him had been posted to his address, but not received by him, the contract was not complete,

British & Amer. Tel. Co. *v.* Colson.

(*c*) 3 T. R. 148.

(*d*) 3 T. R. 653.

(*e*) ["In construing a contract arising out of letters sent by post, the party making a proposal must be considered as renewing his offer every moment until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer." Richards J. in Thorne *v.* Barwick, 16 U. C. C. P. 369.]

Canadian rule.

(*e*[1]) 1 H. L. Cas. 381. See, also, Potter *v.* Saunders, 6 Hare, 1, V. C. Wigram's decision.

(*f*) On this point, see, also, Duncan *v.* Topham, 8 C. B. 225.

(*g*) L. R. 6 Ex. 108.

and the learned barons held that the cases cited *supra*, in support of the contrary proposition, do not warrant the inference that has been deduced from them. But this last case has in its turn been criticised by the lords justices in the case of In re The Imperial Land Co. of Marseilles — Harris's case, (*h*) in which their lordships intimate their inability to reconcile the decision of the barons of the exchequer with that of the House of Lords in Dunlop *v.* Higgins. (*i*)

In re Imperial Land Co. of Marseilles.

§ 45 *a*. [But the case of British & Am. Tel. Co. *v.* Colson was overruled in The Household Fire & Carriage Accident Ins. Co. *v.* Grant, 4 Ex. D. 216. It appeared that in 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares. On the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiffs' com-

Household Fire Ins. Co. *v.* Grant, overruling Br. & Am. Tel. Co. *v.* Colson.

(*h*) 7 L. R. Ch. App. 587. See, also, Wall's case, L. R. 15 Eq. 18.

(*i*) 1 H. L. Cas. 381. [In the recent case of Taylor *v.* Jones, 1 C. P. Div. 87, it appeared that the defendant, who carried on business in the city of London, posted a letter there containing an order for goods, addressed to the plaintiff at Southwark in the county of Surrey. No letter was sent accepting the offer; but the goods were taken by a servant of the plaintiff and delivered to the defendant in London; and it was held that the whole cause of action arose in the city. Lord Coleridge C. J. said: "The order for the goods was given by the buyer in the city, by means of a letter posted there addressed to the seller who resided in Southwark. There was no letter accepting the order; but the transaction was completed by the seller sending his servant with the goods and delivering them to the buyer at his place of business within the city. I say the order was given in the city, because I see no distinction in principle (and there is none in any of the authorities) between the case of a letter accepting an offer and a letter containing an order for goods." "No part of the cause of action, therefore, arose out of the jurisdiction of the mayor's court. Dunlop *v.* Higgins, in the House of Lords, binds us all. The decision of this court in Duncan *v.* Topham, 8 C. B. 225, and that of Lord Ellenborough in the court of queen's bench in Adams *v.* Lindsell, 1 B. & Ald. 681, were there reviewed and the principle adopted." Archibald J. said: "Here there was a complete order when the buyer posted the letter ordering the goods; and the acceptance of it was the sending the goods into the city and there delivering them to the buyer." Amphlett B. said: "The moment the defendant's letter containing the order was put into the post there was a good offer made. If the seller had posted in Surrey a letter accepting the offer, I should have thought that the contract was made at the place where the offer was accepted." See Evans *v.* Nicholson, 32 L. T. 778; Hurdle *v.* Waring, L. R. 9 C. P. 435; Wall's case, L. R. 15 Eq. 18. It was held in Alabama, in Boit *v.* Maybin, 52 Ala. 252, that where an order or proposal for the purchase of goods is sent by letter to dealers in Georgia, who, in compliance therewith, ship the goods on board the cars in that state consigned as directed to the purchaser in Alabama, the contract of sale is complete in the State of Georgia.]

Goods ordered by letter and sent in compliance: where is contract completed.

English decision.

Alabama decision.

pany. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company, on the 20th of October, made out the letter of allotment in favor of the defendant, which was posted addressed to the defendant at his residence 16 Herbert St., Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. But it was held that he was a stockholder In this case Bramwell L. J. delivered an able dissenting opinion.]

§ 46. In both the above cases of Adams *v.* Lindsell and Dunlop *v.* Higgins, it will be observed that the acceptance of the offer was complete by the posting of the answer *before* the offer was retracted, in accordance with the principle which makes the bargain complete at the moment when *mutual* and *reciprocal* assent has been given. But the language of the court in Adams *v.* Lindsell is broader than was needed for the decision of that case, for it would extend to an offer sent by mail, and retracted by posting a second letter, *before the first reached its destination.* This point has not yet been presented directly for decision by our courts; and it will be considered in connection with the American cases referred to at the end of the chapter. [But two recent English cases have passed upon the point involved in the discussion. In Stevenson *v.* McLean, (*i*[1]) the defendant being possessed of iron warrants, wrote to the plaintiff that he would sell for 40*s.*, nett cash, and would hold the offer open all Monday. On Monday morning, at 9.42, the plaintiff sent a dispatch to the defendant making certain inquiries, which the defendant did not answer. But after the receipt of this dispatch, the defendant sold the warrants, and at 1.25 sent a telegram to the plaintiff, saying: "Have sold all my warrants here for forty nett to-day." The defendant got this dispatch at about 1.46. But before it reached Middleborough, the place where the plaintiff resided, the plaintiff at 1.34 telegraphed to defendant: "Have secured your price for payments next Monday — write you fully by post," which was an acceptance. It was held that there was a completed contract in this case, and the court followed in its reasoning the case of Byrne *v.* Leon Van Tienhoven, L. J. 5 C. P. Div. 344. In this latter case, Lindley J. said in reference to this point: . . . . "I am aware that Pothier and some other writers of celebrity are of opin-

Proposal retracted before letter reaches destination.

Effect of revocation by letter or telegram uncommunicated to offeree.

(*i*[1]) [L. R. 5 Q. B. Div. 346.]

ion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes, and in point of law, no revocation at all. This is the view taken in the United States. . . . . This view, moreover, appears to me much more in accordance with the general principle of English law than the view maintained by Pothier. I pass, therefore, to the next question, namely, whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken as now settled, that where an offer is made, and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted. . . . . When, however, these authorities are looked at, it will be seen that they are based upon the principle, that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself; or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiff to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as a communication to the plaintiff on that day, or on any day before the 20th, when the letter reached him."]

Implied contracts of sale.

§ 47. Contracts of sale are implied under certain circumstances without any expression of the will or intention of the parties; as where, for example, an express contract has been made, and goods are sent, not in accordance with it, but are nevertheless retained by the purchaser. In such case a new contract is implied that the purchaser will pay for them their value;

as where the purchaser retained 130 bushels of wheat furnished on a contract to supply 250 bushels; (*k*) and where 152 tons of coal were delivered and retained on an order for 200 or 300 tons. (*l*) The rule was fully recognized by Parke J. in Read *v.* Rann, (*m*) and was well exemplified in the case of Hart *v.* Mills in the exchequer, in 1846. In Hart *v.* Mills, (*n*) the facts were that the defendant ordered *two* dozen of port and *two* of sherry, to be returned if not approved. Plaintiff delivered next day *four* dozen of each. Defendant, not being satisfied with the quality, sent back the whole except one bottle of port and one dozen of sherry, with a note, saying: "I should not have been particular about keeping the four dozen if the quality had suited me. I return the four dozen of port, minus one bottle which I tasted; also three dozen of sherry, as neither suit my palate." The plaintiff contended that the defendant was liable for two dozen of each kind, on the ground that the order was entire, and that he could not keep part and reject the rest. Alderson B. said: "The defendant orders two dozen and you send four; then he had a right to send back all; he sends back part. What is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?" Held, that the plaintiff could only recover for the thirteen bottles retained on the new contract resulting from his keeping them.

Hart *v.* Mills.

(*k*) Oxendale *v.* Wetherell, 9 B. & C. 386.

(*l*) Richardson *v.* Dunn, 2 Q. B. 222; [Wilson *v.* Wagar, 26 Mich. 452. See Starr Glass Co. *v.* Morey, 108 Mass. 570; Bowker *v.* Hoyt, 18 Pick. 555; but in this last case it was held that although the vendor might recover for the price of the part retained by the purchaser, yet the purchaser might reduce the vendor's claim by showing that he had sustained damage by the vendor's failure to fulfil his contract. So it was decided in Harralson *v.* Stein, 50 Ala. 347; Flanders *v.* Putney, 58 N. H. 358; Kelsea *v.* Haines, 41 Ib. 253; Horn *v.* Batchelder, Ib. 86; Bee Printing Co. *v.* Hichborn, 4 Allen, 63; Morse *v.* Brackett, 98 Mass. 205. See Sedgwick on Damages; Recoupment. But a doctrine at variance with that in the text prevails in New York. See Champlin *v.* Rowley, 18 Wend. 187; Mead *v.* De Golyer, 16 Ib. 632; McKnight *v.* Dunlop, 4 Barb. 36; Paige *v.* Ott, 5 Denio, 406; Oakley *v.* Morton, 1 Kernan, 25; Baker *v.* Higgins, 21 N. Y. 397; Tipton *v.* Feitner, 20 Ib. 423; Kein *v.* Tupper, 52 Ib. 550, where it is maintained, that if a party, contracting to deliver a quantity of goods, by a certain day, at a certain price, to be paid for on delivery and acceptance of the whole, delivers only a part, he cannot recover for the part so delivered, though it be used and enjoyed by the purchaser. See, also, Witherow *v.* Witherow, 16 Ohio, 238; Shields *v.* Pettee, 2 San f. 262.]

Recoupment.

Implied contracts: New York doctrine.

(*m*) 10 B. & C. 441; and see Morgan *v.* Gath, 34 L. J. Ex. 165; 3 H. & C. 748.

(*n*) 15 M. & W. 85.

Implied sale enforced against fraudulent third person.

§ 48. It has been held that a plaintiff may recover, as on an implied contract of sale, from a third person who fraudulently induced him to sell goods to an insolvent purchaser, and then obtained the goods for his own benefit from the purchaser. (*o*)

Sale implied by recovery in trover, and payment of judgment.

§ 49. There is also one special case, in which a sale takes place by the operation of certain principles of law rather than the mutual assent of the parties, either express or implied. The rule is thus stated in Jenkins, 4th Cent. Ca. 88: "A. in trespass against B. for taking a horse recovers damages: by this recovery and execution done thereon, the property in the horse is vested in B." Cooper *v.* Shepherd (*p*) was an action in trover for a bedstead. Plea, a former recovery by plaintiff in trover, of the same bedstead, in an action against C., and that the conversion by C. was not later than the conversion charged against the defendant, and that C., being possessed of the bedstead, sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The court held that this plea averred a *sale* of the bedstead from the plaintiff to C., the vendor of the defendant. On principle, however, it is plain that the recovery in trover would only have this effect in cases where the value of the thing converted is included in the damages recovered. (*q*) But an *unsatisfied* judgment in trover does not pass the property, and is a mere assessment of damages, on *payment* of which the property vests in the defendant. (*r*)

Cooper *v.* Shepherd.

Assent by mistake.

§ 50. From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different

(*o*) Hill *v.* Perrot, 3 Taunt. 274; Abbott *v.* Barry, 2 B. & B. 369; Corking *v.* Jarrard, 1 Camp. 37; Clarke *v.* Shee, Cowp. 197.

(*p*) 3 C. B. 266. See, also, Holmes *v.* Wilson, 10 Ad. & E. 503; Barnett *v.* Brandao, 6 M. & G. 640, note.

(*q*) See reasoning of the court in Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

(*r*) Brinsmead *v.* Harrison, L. R. 6 C. P. 584; [2 Kent, 388; Parker C. J. in Hyde *v* Noble, 13 N. H. 494, 502; Lovejoy *v.* Murray, 3 Wallace, 1, 16; Hepburn *v.* Sewell, 5 Harr. & J. 211; Osterhout *v.* Roberts, 8 Cowen, 43; Jones *v.* M'Neil, 2 Bailey (S. Car.), 466; Prentiss J. in Sanderson *v* Caldwell, 2 Aiken, 203; Sharp *v.* Gray, 5 B. Monr. 4; Putnam J. in Rotch *v.* Hawes, 12 Pick. 138; Carlisle *v.* Burley, 3 Greenl. 250, 255; Brady *v.* Whitney, 24 Mich. 154. But there are cases which hold the contrary, viz. that a judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff against another person, for taking the same goods. White *v.* Philbrick, 5 Greenl. 147; Floyd *v.* Browne, 1 Rawle, 121; Fox *v.* Northern Liberties, 3 Watts & S. 107.]

contract, there is no real valid agreement, notwithstanding the apparent mutual assent. Thus, in Thornton *v.* Kempster, (*s*) the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell St. Petersburg hemp, and by the buyer to purchase Riga Rhine hemp, a superior article. The broker had made a mistake in describing the hemp to the buyer, and the court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale. (*t*)

Mistake as to the thing sold. Thornton *v.* Kempster.

(*s*) 5 Taunt. 786. See, also, Keele *v.* Wheeler, 7 M. & G. 665.

(*t*) [No property passes by a negotiation for a sale where there is a mistake respecting the identity of the subject-matter intended to be sold; as where, in a negotiation for a sale, the seller has reference to one article, and the buyer to another. Sheldon *v.* Capron, 3 R. I. 171; Gardner *v.* Lane, 9 Allen, 499; S. C. 12 Ib. 44; Calverley *v.* Williams, 1 Ves. Jr. 210; Metcalf Contr. 31; Forbes J. in Rice *v.* Dwight Manuf. Co. 2 Cush. 80–86; Chapman *v.* Cole, 12 Gray, 141; Webb *v.* Odell, 49 N. Y. 583; Bowen *v.* Sullivan, 62 Ind. 281; Kyle *v.* Kavanagh, 103 Mass. 356, 359. In Harvey *v.* Harris, 112 Mass. 32, the defendants offered for sale at auction a quantity of damaged flour, divided in two classes; one, slightly damaged, was offered for sale in the original packages or barrels, and was to be sold by the barrel; the other, being more damaged, had been repacked, and was offered as repacked flour or "dough," and was to be sold by the pound. The flour was arranged in tiers or lots numbered from 1 to 16, a space of about ten feet being left between the flour to be sold by the barrel and the "dough," and was not in the room where the sale took place. After the auctioneers had sold the first eight tiers by the barrel, they stated to the company present that they now offered for sale the repacked flour, taken out of some 1,500 barrels, and that, owing to inequality of weights, they should sell it by the pound, with the privilege to the buyer of taking any number of the remaining tiers. The plaintiff was the highest bidder, and being asked what he would take under his bid, said he would take the two tiers numbered 9 and 10. The defendants then sold the remaining tiers to other buyers. Immediately after the sale, it was discovered that tiers numbered 9 and 10 did not consist of "repacked flour," but of flour in the original packages, which had been placed to tier No. 8 by the defendant's teamster, without the knowledge of the defendants or of the owner. It was held that there had been no sale, on the ground that the minds of the parties had not met as to the subject-matter of the sale. Here the mistake was much to the advantage of the purchaser; and he was, of course, ready to take the property. In Thornton *v.* Kempster, above cited, the buyer refused to receive and did not receive the hemp. In Gardner *v.* Lane, 9 Allen, 492, it appeared that the article, though not of the same description, nor of so much value as that negotiated for, was actually delivered to the purchaser, and he was willing to keep it as and for the property for which the bargain was made. It was held that the title did not pass, and that third parties claiming it as the property of the vendor might intervene, and take it from the purchaser. When the case again came before the court, in 12 Allen, 39, it appeared that the vendor knew the character of the article delivered, and intended to deceive the purchaser, and that the purchaser took the

Mistake as to identity.

Harvey *v.* Harris.

Rights of vendor's creditors where vendor is willing to keep the goods.

So in Raffles *v.* Wichelhaus, (*u*) there was a contract for the sale of "125 bales of Surat cotton, guarantied middling fair merchants' Dhollerah, to arrive ex *Peerless* from Bom-

Raffles *v.* Wichelhaus.

article, — never repudiated the sale, — and when he was undeceived claimed still to hold the article as his own under the sale. It was held that the property did not pass as against attaching creditors of the vendor who intervened before the purchaser had discovered that he had been deceived. But as there was an actual delivery of the property to the purchaser, and a retention of it by him, and no fraud chargeable to him, there was nothing that gave to attaching creditors any right superior to that of the vendor. Creditors had no greater right to attach than the vendor would have had to replevy the property; Parker *v.* Crittenden. 37 Conn. 148; and it raises the important question, whether the vendor, in such a case, could take the ground that the property had not passed in consequence of its having been received by the purchaser under a mistake caused by the vendor's fraud. The same case was again before the court, as reported in 98 Mass. 517, on another point, but Chapman J. therein said: "Indeed, it is an elementary principle of law that a fraudulent vendor cannot reclaim property sold by him because it is not what he represented it to be. And the vendee may keep it, if he will, and sue for the damages." See per Doe J. in Stewart *v.* Emerson, 52 N. H. 301, 318, 319; Davis *v.* Handy, 37 Ib. 65, 75. In Townsend *v.* Shepard, 64 Barb. 41, it was determined that a purchaser may waive an imperfection in goods sold to him, and offer to receive them and pay therefor the contract price, and upon such offer the seller is bound to deliver, and his refusal subjects him to the payment of damages. If the object of the contract be present, an error in the name does not vitiate it, *præsentia corporis tollit errorem nominis;* as if A. gives a horse to C. (D. being present), says to him (C.), "D., take this horse," the gift is good, notwithstanding a mistake in the name; for the presence of the grantee gives a higher degree of certainty to the identity of the person than the mention of his name. 2 Kent, 557. Nothing passes by a sale except the subject-matter of sale, though other property be delivered with it by mistake. Thus, where a party purchased at an administrator's sale a "drill-machine," which, unknown to all the parties, contained many and other valuables secreted there by the deceased, it was held that the sale passed to the purchaser the right to the machine and every constituent part of it, but not the money or other valuables contained in it. Huthmacher *v.* Harris, 38 Penn. St. 491. In Hills *v.* Snell, 104 Mass. 173, the plaintiffs had on storage, as warehousemen, two lots of flour, one belonging to A., the other and more valuable to B. A baker ordered twenty-eight barrels of flour from C.; and C., to fill the order, bought from A. twenty-eight barrels of his flour, and took from him an order on the plaintiffs for them. The plaintiffs, by mistake, delivered to C. twenty-eight barrels of B.'s flour, and the baker received this flour from C. and consumed it, not knowing, supposing, or believing that it was different from that which he ordered, and gained no benefit from the mistake; it was held that the baker was not liable to the plaintiffs in contract for the value of it, or any part of its value; nor in tort for its conversion. Wells J. said: "There is no privity of contract established between the plaintiffs and the defendant. Without such privity, the possession and use or conversion of the property will not sustain an implied assumpsit. . . . . That the flour was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it with knowledge of the mistake." Dalton *v.* Hamilton, 1 Hannay (N. B.), 422; Chapman *v.* Cole, 12 Gray, 141; Best *v.* Boice, 22 U. C. Q. B. 439.]

Subject-matter of sale alone passes.

Hills *v.* Snell.

(*u*) 2 H. & C. 906; 33 L. J. Ex. 160.

bay," and the defendant pleaded to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship *Peerless*, which sailed from Bombay in October, not that which arrived in a ship *Peerless* that sailed in December, the latter being the cotton that plaintiff had offered to deliver. On demurrer, held that on this state of facts there was no *consensus ad idem*, no contract at all between the parties. (*x*)

Mistake as to price. Phillips *v.* Bistolli.

§ 51. In Phillips *v.* Bistolli, (*x*[1]) the defendant, a foreigner, not understanding our language, was sued as a purchaser of some earrings, at auction, for the price of eighty-eight guineas, and alleged in defence that he thought the bid made by him was forty-eight guineas, and that there was a mistake in knocking down the articles to him at eighty-eight guineas, and Abbott C. J. left it to the jury to find whether the mistake had actually been made, as a test of the existence of a contract of sale. (*y*)

Unintelligible agreement. Guthing *v.* Lynn.

§ 52. And so if the parties have expressed themselves in language so vague and unintelligible that the court find it impossible to affix a definite meaning to their agreement, it cannot take effect. Thus, in Guthing *v.* Lynn, (*z*) the action was on an alleged warranty on the sale of a horse, and the declaration averred the sale to have been for "a certain price or sum of money, to wit, 63*l*." The proof was of a sale for sixty guineas, *and*, "if the horse was lucky to the plaintiff he was to give 5*l*. more, or the buying of another horse." This was insisted on as a variance. On motion for nonsuit according to leave reserved, the court refused to nonsuit on the ground that the additional clause was unintelligible; that no man could say under what circumstances a horse was to be considered "lucky," nor could any definite meaning be attached to the words "or the buying of another horse," as part of the price of the horse sold. The contract must therefore be considered as proven for the price of 63*l*., the remainder being looked on as some honorary understanding between the parties.

(*x*) [Riley *v.* Spotswood, 23 U. C. C. P. 318.]

(*x*[1]) 2 B. & C. 511. See, also, Cochrane *v.* Willis, L. R. 1 Ch. App. 58.

(*y*) [Greene *v.* Bateman, 2 Wood. & M. 359.]

(*z*) 2 B. & Ad. 232. See, also, Bourne *v.* Seymour, 24 L. J. C. P. 202; [1 Chitty Contr. (11th Am. ed.) 92, 93, and notes; Baker *v.* Lyman, 38 U. C. Q. B. 498; Robinson *v.* Bullock, 58 Ala. 618; Buckmaster *v.* Consumers' Ice Co. 5 Daly, 313.]

§ 53. But an agreement is not to be deemed unintelligible because of some error, omission, or mistake in drawing it up, if the real nature of the mistake can be shown so as to make the bargain intelligible. (*a*) Thus, in Coles *v.* Hulme, (*b*) a bond to pay 7,700 was allowed to be corrected by adding the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties. (*c*) So in Wilson *v.* Wilson, (*d*) Lord St. Leonards said that "both courts of law and courts of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty;" (*e*) and his lordship cited a case in Douglas (*f*) where the condition of a bond declared that it was to be void if the obligor did *not* pay what he promised, and the court struck out the word *not* as a palpable error. And the same principle was established in Lloyd *v.* Lord Say and Seale, (*g*) in the king's bench, and affirmed in House of Lords; and in Langdon *v.* Goole: (*h*) the omitted name of the grantor being supplied by the court in the first case, and that of the obligee in the second.

Mistake or error in written contract may be corrected.

Wilson *v.* Wilson.

§ 54. But care must be taken not to confound a common mistake as to the subject-matter of the sale, or the price, or the terms, which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact, or what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though it may be liable to be avoided for fraud, illegality, or other cause; or even though the buyer or the seller may be totally mistaken in the motive which induced the assent.

Mistake by one party as to collateral fact.

§ 55. And when the mistake is that of one party alone, it must

(*a*) [This is in conformity with the rule, that an agreement or contract shall have a reasonable construction according to the intent of the parties. 1 Chitty Contr. (11th. Am. ed.) 106 *et seq.* and notes.]

(*b*) 8 B. & C. 568. [See Elliott's case, 2 East P. C. 951; Waugh *v.* Bussell, 5 Taunt. 707; Cleaveland *v.* Smith, 2 Story, 278.]

(*c*) [See Boyd *v.* Brotherson, 10 Wend. 93; Burnham *v.* Allen, 1 Gray, 496. In these cases it was left to the jury to say what sum or word was intended to be inserted. See 1 Chitty Contr. (11th Am. ed.) 107, note (*d*).]

(*d*) 5 H. L. Cas. 40.

(*e*) At p. 66.

(*f*) Anonymous, per Buller J. in Bache *v.* Proctor, Doug. 384.

(*g*) 10 Mod. 46, and 4 Brown's P. C. 73.

(*h*) 3 Lev. 21.

be borne in mind that the general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention. (*i*) This point is treated under the subject of "Estoppel," *post*, book V. part I. ch. ii.

A party is estopped from denying that an intention *manifested* by him was his *real* intention.

§ 56. A mistake by the buyer in supposing that the article bought by him will answer a certain purpose, for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards to rescind it, if the vendor warranted its adaptability to the intended purpose. Thus, in Chanter *v.* Hopkins; (*k*) Ollivant *v.* Bayley, (*l*) and Prideau *v.* Bunnett, (*m*) the purchasers had ordered specific machines from the patentees, and attempted to justify their refusal to pay, on the ground that the machines had totally failed to answer the purpose intended; but it was held that in the absence of a warranty by the vendors, the contract was binding on the purchasers notwithstanding their mistaken belief that the machines would answer their purpose.

Mistake by buyer in motive.

§ 57. In Scott *v.* Littledale, (*n*) the vendor made a singular mistake. He sold a hundred chests of tea by a wrong sample. A sale by sample imports, as will be seen hereafter, a warranty by the vendor that the bulk equals the sample. On demurrer to a plea on equitable grounds,

Mistake in showing wrong sample. Scott *v.* Littledale.

(*i*) Per Lord Wensleydale, in Freeman *v.* Cooke, 2 Ex. 654; Doe *v.* Oliver, and cases in notes, 2 Smith's L. C. 671; Cornish *v.* Abington, 4 H. & N. 549; 28 L. J. Ex. 262; Alexander *v.* Worman, 6 H. & N. 100; 30 L. J. Ex. 198; Van Toll *v.* South Eastern Railway Company, 12 C. B. N. S. 75; 31 L. J. C. P. 241; [Zuchtmann *v.* Roberts, 109 Mass. 53, 54. The law decides as to an agreement between two persons exclusively from those expressions of their intention which are communicated between them; consequently an agreement cannot be affected by the mistake of either party, in expressing his intention or in his motives, of which the other party has no knowledge, and the party who has entered into an agreement under such mistake is bound by the agreement actually made, and cannot assert his mistake in avoidance of the agreement. Leake Contr. 8, 168, 169; 2 Chitty Contr. (11th Am. ed.) 1022, 1023; Hotson *v.* Browne, 9 C. B. N. S. 442; Powell *v.* Smith, L. R. 14 Eq. 85.]

Mistake of one party in expressing intention not fatal to contract.

(*k*) 4 M. & W. 399.

(*l*) 5 Q. B. 288.

(*m*) 1 C. B. N. S. 613.

(*n*) 8 E. & B. 815; 27 L. J. Q. B. 201.

setting up this mistake as rendering the contract void for want of mutual assent, the queen's bench held that the contract was not void; that if the quality of the bulk was inferior to the sample, the buyer had the right to waive the objection; and the court said: "Possibly a court of equity might have given the defendant some relief, but it certainly would not have set aside the contract." It is worth observing, that in this case the defendant made no mistake as to the subject-matter of the contract. He sold the very tea, for the very price, and on the very terms which he intended, but he made a mistake in *giving a warranty* that it was of a particular quality. Now a warranty of quality is not an essential element of a sale, but a collateral engagement attached to or omitted from it, at the pleasure of the parties. (*o*) The assent to the *sale* was complete; the assent to the *warranty* was given by *one* of the parties under a mistake, and this mistake might or might not give ground for other relief, but could not prevent the contract from coming into existence.

Mistake as to person contracted with.

§ 58. A mistake as to the *person* with whom the contract is made may or may not avoid the sale, according to circumstances. (*o*[1]) In the common case of a trader who sells for cash, it can make no possible difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract. But where the identity of the person is an important element in the sale, as if it be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor; or when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price; a mistake as to the person dealt with prevents the contract from coming into existence for want of assent. In Mitchell *v.* Lepage, (*p*) in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp, on the ground that he had not contracted with the plaintiff, but with other persons. The broker gave defendant a bought note stating the vendors to be Todd, Mitchell & Co. It turned out that, without the broker's knowledge, that firm had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plain-

Mitchell *v.* Lepage.

(*o*) Chanter *v.* Hopkins, 4 M. & W. 399; Mondell *v.* Steel, 8 M. & W. 858; Foster *v.* Smith, 18 C. B. 156.

(*o*[1]) [See Leake's Dig. Law of Contr. 334.]

(*p*) Holt N. P. 253.

tiff's firm of Mitchell, Armistead & Graabner, the last two taking the place of the withdrawn members of the old firm. Gibbs C. J. told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. . . . . If by this mistake the defendant was induced to think that he had entered into a contract with one set of men, and not with any other; and if, owing to the broker, he has been *prejudiced* or *excluded from a set-off*, it would be a good defence." Verdict for plaintiff.

§ 59. In Boulton *v.* Jones, (*r*) the plaintiff had bought out the stock in trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, the defendant refused, on the ground that he *had a set-off* against Brocklehurst, and had not contracted with the plaintiff. The barons of the exchequer were all of the opinion that the action was not maintainable. (*s*) Pollock C. B. said: "The rule of law is clear, that if you propose to make a contract with A., then B. cannot substitute himself for A. without your consent and *to your disadvantage*, securing to himself all the benefit of the contract." Martin B. said: "Where the facts prove that the defendant meant to contract with A. *alone*, B. can never force a contract upon him." (*s*[1]) Bramwell B. said: "It is clear that if the plaintiff

Boulton *v.* Jones.

(*r*) 2 H. & N. 564; 27 L. J. Ex. 117.

(*s*) [But in the case of Mudge *v.* Oliver, 1 Allen, 74, it was held that a person who bought goods at a shop which had been occupied by one who owed him, under the supposition that he was dealing with his debtor, but was informed before leaving the shop, although after the delivery of the goods, that another person had become owner of the stock of goods there and was selling them on his own account, and made no objection, but retained the goods, could not afterwards resist an action for the price brought by such other person. The cases are not inconsistent, but support each other. See Boston Ice Company *v.* Potter 123 Mass. 28.]

Mudge *v.* Oliver.

(*s*[1]) [D. sued H. in assumpsit for goods sold and delivered. X., a gas-fitter, was working on defendant's house, and certain articles being required for the work, he gave the defendant the following memorandum: "You will require to send to D., No. 19 Union Street, Boston, Mass., for the following goods for bath room. [Goods described]; (signed) X." This paper was addressed to defendant, but when produced at the trial, defendant's name had been torn off, though it did not appear by whom. H. gave this memorandum to T., who took it to the plaintiff,

were at liberty to sue, it would be *a prejudice to defendant*, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. *And upon that my judgment proceeds.* I do not lay it down, that because a contract was made in one person's name, another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to write a book, or paint a picture, or do any work of personal skill; or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with; that he has written the book, or painted the picture, or supplied the goods." Channell B. said: "The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant and owed him money, and upon which A. seeks to sue. Without saying that the plaintiff might not have had a *right of action on an implied contract, if the goods had been in existence*, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them." (*t*)

and he supposed it to be an order from X., who was a customer, and treated it as such, forwarding the goods named in the memorandum to X. by T., and sending him also an invoice of the goods in his name. X. refused to receive the goods, and repudiated all connection with them. T. then took them to H., and afterwards obtaining the invoice from X. obtained payment from H. of the amount and gave him a receipt. In due course of time D. called upon X. for payment, but he repudiated the liability. D. pressed his claim and refused to consider H. as his debtor, but subsequently finding that he had mistaken X.'s position, that he was not liable, and T. unable to pay, he called on H., who likewise repudiated any liability, alleging his dealing to have been with T., and that he had paid him. It was held, that though D. might have maintained trover against the defendant, yet, as he had elected to sue in assumpsit for goods sold and delivered, he waived the tort, ratified the sale by T. to defendant, and treated T. as his agent, and that, therefore, payment to him was conclusive. Dalton *v.* Hamilton, 1 Hannay (N. B.), 422. See Hills *v.* Snell, 104 Mass. 173, stated *ante*, § 50, note (*t*).]

Dalton *v.* Hamilton.

(*t*) See further observations on this case, *post*, book III. ch. i. [The case of Boston Ice Company *v.* Potter, 123 Mass. 28, resembles Boulton *v.* Jones. The action was brought for the price of certain quantities of ice delivered to the defendant from time to time, between April 1, 1874, and April 1, 1875. It appeared that the defendant was being supplied with ice by the plaintiff company in 1873; but, on account of some dissatisfaction with the manner of supply, had terminated his contract with them; and thereupon had made a contract with the Citizens' Ice Company

Boston Ice Co. *v.* Potter.

§ 60. Where a person passes himself off for another, (*u*) or falsely represents himself as agent for another, for whom he professes to buy, (*v*) and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the persons thus deceiving him. The contracts in the cases cited below were held void, on the ground of fraud, but they were equally void for mistake, or the absence of the assent necessary to bring them into existence. The effect of mistake in preventing the contract from coming into existence,

Mistake as to person caused by fraud.

to furnish him with ice. Some time before April, 1874, the Citizens' Ice Company sold their business to the plaintiff company, with the privilege of supplying ice to the customers of the Citizens' Ice Company. The plaintiff company afterwards delivered ice to the defendant for one year, viz. between the periods named in the action, without notifying the defendant that it had purchased the business of the Citizens' Ice Company until after the delivery and consumption of the ice in controversy. The defendant's contract with the Citizens' Ice Company covered the time of the delivery of the ice. It was held that the plaintiff could not recover. Endicott J. said: "To entitle the plaintiff to recover it must show some contract with the defendant. There was no express contract, and upon the facts stated, no contract is to be implied." "There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills *v.* Snell, 104 Mass. 173, 177. And no presumption of assent can arise from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed. A party has a right to select and determine the person with whom he will contract, and cannot have another person thrust upon him without his consent. As he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into." In the above case there was no suggestion that the defendant had any claim in set-off against the plaintiff's demand. But upon this point, the learned judge, referring to the case of Boulton *v.* Jones, said: "It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it. The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract, without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied *assumpsit* or privity between the parties." Nor will the non-existence of a set-off remove any burden from the plaintiff or aid him in making out his claim of an implied *assumpsit*. And it was added in the above case of Boston Ice Company *v.* Potter: "It is therefore immaterial, that the defendant had no claim in set-off against the Citizens' Ice Company."]

(*u*) Hardman *v.* Booth, 1 H. & C. 803; 32 L. J. Ex. 105. [This case was followed in Lindsay *v.* Cundy, 2 Q. B. Div. 96; S. C. 1 Q. B. Div. 348.]

(*v*) Higgons *v.* Burton, 26 L. J. Ex. 342.

and therefore from being enforced, is the only branch of the subject that appertains to the formation of the contract. The effect of mistake on the rights of the parties after the contract has been performed or executed will be considered *post*, book III. ch. i. "Of Mistake and Failure of Consideration."

Conditional assent.

§ 61. The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. If A. delivers his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse. (*x*) Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return," are all instances where the assent is conditional. Most of the reported cases, however, have arisen out of disputes as to the *performance* of the conditions, instead of the *formation* of the contract, and the subject can be more intelligibly treated as a whole. The reader is therefore referred to ch. i. of book IV. part I. *post*.

SECTION II. — CIVIL LAW.

Civil law.

§ 62. The principles of the common law upon the subject embraced in this chapter do not in general differ from those recognized in America and in countries governed by the civil law. There is, however, one striking exception. The civil law permits what are termed *quasi contracts*, and enforces obligations resulting from them. The *negotiorum gestor*, the man who voluntarily assumed to take charge of another's business in his absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorized interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the creditor's place. The *quasi contract*, in a word, produced the effect of creating obligations *ultro citroque*, in the language of the civilians. These principles of the Roman law still prevail unimpaired over continental Europe, and are found ex-

Quasi contracts.

(*x*) [See Hunt *v.* Wyman, 100 Mass. 198, cited and stated, *ante*, § 2, note (*i*).]

pressly sanctioned in the French Civil Code, articles 1570–1575. Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbor's inclosure, (*y*) or furnish food to his cattle, without request, he could maintain an action on the *quasi contract* implied by the law there. At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven. The principle in our law is invariable that no liability can be established against a man by the mere voluntary payment or expenditure of money in his behalf by a third person: that no man can become the creditor of another without the latter's knowledge or assent. It is of course otherwise where the payment is under compulsion or in discharge of a liability imposed on the party paying. (*z*)

§ 63. The text of the Institutes laying down the principles of the Roman law on this point was not an innovation but a condensation of the numerous texts of the preëxisting law. "Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones quæ appellantur negotiorum gestorum. Sed domino quidem rei gestæ adversus eum qui gessit, *directa* competit actio, negotiorum autem gestori, *contraria*. Quas ex nullo contractu proprie nasci, manifestum est, quippe ita nascuntur istæ actiones, si *sine mandato* quisque alienis negotiis gerendis se obtulerit; ex quâ causâ, ii quorum negotia gesta fuerint, *etiam ignorantes* obligantur." The equity of the law is then stated as follows: "Id que utilitatis causa receptum est, ne absentium qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quia sane nemo curaturus esset, si de eo quod quis impendisset, nullam habiturus esset actionem." (*a*) Our action for money had and received, to recover back what has been paid by mistake, is one of those that the Roman lawyers considered as arising *quasi ex contractu*. "Item is cui quis per errorem non debitum solvit, quasi ex contractu debere vide-

(*y*) Pothier Obl. sec. 114, 115.

(*z*) Stokes *v.* Lewis, 1 T. R. 20; Child *v.* Morley, 8 T. R. 610; Lord Gallway *v.* Mathew, 10 East, 264; Durnford *v.* Messiter, 5 M. & S. 446; 1 Wms. Saunders, 264, note (1); England *v.* Marsden, L. R. 1 C. P. 529; 35 L. J. C. P. 259. And see a very singular case, Johnson *v.* Royal Mail Steamboat Packet Co. L. R. 3 C. P. 38.

(*a*) Inst. lib. 3, tit. 27, § 1.

tur." (*b*) This action was termed *condictio indebiti.* "Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur; datur que agenti contra eum propter repititionem, condictitia actio." (*c*)

AMERICAN LAW.

American law. Criticisms on Cooke *v.* Oxley.

§ 64. In the text-books in America there has been a singular and almost unanimous attack upon the authority of Cooke *v.* Oxley, (*d*) and Professor Bell, in his Inquiries into the Contract of Sale, also disapproves it, as contrary to the principles of the civil law and of the law of Scotland. (*e*) This is the more remarkable, as it is hardly contested that the decisions accord, in the United States at least, with the principles established in the English courts. Mr. Story, in his Treatise on Sales, (*f*) while citing the American authorities, (*g*) which are perfectly in accord with the English law on this point, concurs with Professor Bell in the opinion that the rule in Cooke *v.* Oxley (*h*) is unjust and inequitable. In his strictures on the decision, he denies that the grant of time to accept the offer is made without consideration. He suggests, as one sufficient legal consideration, the expectation or hope that the offer will be accepted. This appears to be more fanciful than serious. The hope of A. that his offer will be accepted if he gives B. time to consider it is not a consideration moving from B. to A., but is the spontaneous emotion of A. arising out of his own act; for in the case supposed, B. is bound to nothing, does nothing, gives nothing, promises nothing, to raise this hope. The second consideration suggested by Mr. Story is, that "the making of such an offer might betray the other party into a loss of time and money, by inducing him to make examination and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer." This argument assumes as a fact the exact reverse of the facts alleged in the declaration. It takes for granted that "an inconvenience is *assumed*" by the party to whom the offer is made; and it is precisely on the absence of this consideration that the decision was put, Buller J. saying: "In order to sustain

Mr. Story's criticism on Cooke *v.* Oxley.

(*b*) Inst. 3, 27, 6.
(*c*) Inst. 3, 14, 1.
(*d*) 3 T. R. 653.
(*e*) Bell's Inq. 27.
(*f*) Story on Sales, § 127.
(*g*) Eskridge *v.* Glover, 5 Stew. & Port. 264; Faulkner *v.* Hebard, 26 Vt. 452; Beckwith *v.* Cheever, 21 N. H. 41.
(*h*) 3 T. R. 653.

a promise, there must be *either a damage to the plaintiff* or an advantage to the defendant, but here was neither."

§ 65. In Kent's Commentaries it is said, in the note to p. 631 (11th ed.), that the "criticisms which have been made upon the case of Cooke *v.* Oxley are sufficient to destroy its authority." (*i*) Mr. Duer, in his Treatise on Insurance, (*k*) goes still farther and says that Cooke *v.* Oxley decides "that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and has been accepted within the limited period. To constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted." If this were indeed the decision, nothing could be more surprising than to find it upheld as sound law by a series of eminent English judges. But Cooke *v.* Oxley has been totally misapprehended by those who have thus criticised it, and there is nothing to warrant the suggestion that it is misreported, or that Bayley J. stated it to be misreported in the observations made by him in Humphries *v.* Carvalho. (*l*) It is difficult to see how the case *could* be misreported, for it was a motion in arrest of judgment, which presents the question exactly as on a general demurrer, (*m*) and was decided on the ground that the declaration, which is copied in the report, showed no cause of action. An examination of it shows that the plaintiff alleged: First, an offer by the defendant to sell at a certain price; Second, a promise to leave the offer open till

Editor of Kent's Commentaries.

Mr. Duer.

Review of the criticisms.

(*i*) [In Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224, 228, Fletcher J., referring to Cooke *v.* Oxley, said: "That case has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly, in later cases, been entirely disregarded, and cannot now be considered as of any authority." Whether or not the author has vindicated the case of Cooke *v.* Oxley from both these imputations is for the reader to judge. Cooke *v.* Oxley was noticed by Parker C. J. in M'Culloch *v.* Eagle Ins. Co. 1 Pick. 281, where he said: "Both parties must be bound in order to make the contract binding upon either, unless time is given by one to the other, in which case, perhaps, he may be bound, although the other is not; at least we should think this reasonable in mercantile contracts, though it was decided otherwise in the case of Cooke *v.* Oxley, 3 T. R. 653." In Hallock *v.* Commercial Ins. Co. 2 Dutcher (N. J.), 268, 282, the case of Cooke *v.* Oxley is referred to as having been effectually overruled in the English courts.]

Observations upon Cooke *v.* Oxley.

(*k*) Vol. i. p. 118.

(*l*) 16 East, 45.

(*m*) Collins *v.* Gibbs, 2 Burr. 899; Bowdell *v.* Parsons, 10 East, 359.

four o'clock, *if plaintiff would agree to purchase, and would give notice to the defendant before the hour of four o'clock;* Third, that the plaintiff did agree, and did give notice *before four o'clock.* There was *no allegation that the defendant actually left the offer open till four o'clock, but* only that he *promised* to do so. The plaintiff's action was tested by the court on two theories: First, that it was for a breach of promise to leave the offer open; or, secondly, that it was for a breach of a contract, that became complete by the plaintiff's acceptance of an offer that had actually remained open. On the first theory it was held that the declaration was insufficient, because it alleged no consideration for the *promise.* On the second theory it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The court did not decide that the contract would not have been completed if the offer, *remaining open,* had been accepted; but that nothing showed that the offer was open when accepted. (*n*) Lord Kenyon C. J. construed the declaration as proceeding on the first theory, that is, breach of promise to keep the offer open, and he said that this promise was *nudum pactum.* Buller J. took both grounds, saying that the promise in the morning was without consideration; and that it was *not stated* that the defendant agreed afterwards, or even that the goods were kept; in other words, that the plaintiff had not *alleged* a binding legal promise in the morning, nor a complete contract in the afternoon; and Grose J. also said that the defendant was not bound before four o'clock, and *it is not stated* that they came to a subsequent agreement. That this was really the decision is shown by what was said by Mr. Justice Bayley in Humphries *v.* Carvalho, (*n*) which is strangely construed by Mr. Duer into an assertion that Cooke *v.* Oxley was misreported. This is the language: "The question in Cooke *v.* Oxley arose upon the record, and a writ of error was afterwards brought upon the judgment of this court, by which it appears that the objection made was that there was only a proposal of sale by the one party, and *no allegation* that the other party had acceded to the contract of sale."

§ 66. Both the learned American authors, Mr. Story and Mr.

(*n*) 16 East, 45. [A similar construction to Cooke *v.* Oxley is given in Leake Contr. 21.]

Duer, refer to Adams *v.* Lindsell (*o*) as overruling Cooke *v.* Oxley, the latter writer saying that "its authority is directly overthrown" by Adams *v.* Lindsell. Certainly the king's bench did not in this last case say a word in disparagement of Cooke *v.* Oxley; and when this very point was urged by counsel in Routlege *v.* Grant, (*p*) Best C. J. pointed out that there was no conflict between the cases, for Adams *v.* Lindsell proceeded expressly on the ground that a treaty by correspondence through the post rested on exceptional principles, because the separation of the parties prevented assent at the same instant, and *ex necessitate rei*, some point of time must be fixed when the contract should be considered complete; for otherwise, the interchange of letters would go on *ad infinitum*. The court was therefore driven to determine either that no contract was possible by correspondence between distant parties, or to fix some point at which the contract became perfect. The rule adopted was in entire accordance with sound principle, and declared that the offer by letter was a continuing offer in contemplation of law until it reached the other party, so that when an answer of acceptance was placed in the post, addressed to the party making the offer, the *aggregatio mentium*, the mutual assent was complete. But in Cooke *v.* Oxley it did not appear that this mutual assent ever took place. There was no *continuing offer* till four o'clock, but only a *promise* to continue it, not binding for want of consideration. The court held that Oxley had a right to retract up to the moment when Cooke announced his assent to the offer. So the court would no doubt have held in Adams *v.* Lindsell, that the latter had a right to retract up to the moment when Adams accepted; but Lindsell's withdrawal of his offer, and resale of the wool, occurred *after acceptance*, though he was ignorant of the fact of acceptance. In a word, Oxley withdrew his offer *before* acceptance, Lindsell *after* acceptance, and the contract was held incomplete in the former case and complete in the latter, both decisions being consistent applications of one and the same principle, namely, that a contract becomes complete only when the mutual assent of the parties concurs at the *same moment of time;* and that no number of *alternate* offers and withdrawals, refusals and acceptances, can ever suffice to conclude a bargain. To these remarks may be added the fact that in 1829 the king's bench decided Head *v.* Dig-

(*o*) 1 B. & Ald. 681. (*p*) 4 Bing. 653.

gon (*q*) on the authority of Cooke *v.* Oxley, without any intimation that it had been overruled, and in accordance with the point really decided in that case.

§ 67. In a recent American case (*r*) the principle under discussion received a further illustration. The defendant wrote an offer to carry for the plaintiffs "not exceeding 6,000 tons gross, in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified," and on the next day the plaintiffs answered, "We assent to your agreement, and will be bound by its terms." Held to be no binding contract, because the plaintiffs were not bound to furnish anything for carriage; that the offer was a mere promise of an *option* to them, for which promise no consideration was given; and that the defendant had the right to withdraw from his offer at any time before such an acceptance as imposed *some* obligation on the company as a consideration: the acceptance would have been good, if the company had agreed to furnish *any* specified quantity not exceeding the 6,000 tons, but not otherwise, because the defendant could not be bound while the plaintiffs were left free.

American decisions.

Mode of completing a bargain by correspondence.

Mactier *v.* Frifth.

§ 68. On the question of the mode of completing a bargain by correspondence, the American authorities are not only in accordance with the decisions of our own courts, but they have gone farther, and covered the point left undecided in Adams *v.* Lindsell, though included in the *dicta*. (*s*) In Mactier's Adm's *v.* Frifth, (*t*) the court of errors of New York decided, after a full review of the authorities, that where the dealing is by correspondence, "the acceptance of a written offer of a contract of sale con-

(*q*) 3 M. & R. 97.

(*r*) Chicago & Great Eastern Railway Co. *v.* Dana, 43 N. Y. 240.

(*s*) [In addition to the American authorities cited by the author, the reader is referred to Brishan *v.* Boyd, 4 Paige, 17; Vassar *v.* Camp, 14 Barb. 342; S. C. 1 Kernan, 441; Clark *v.* Dales, 20 Barb. 42; Myers *v.* Smith, 48 Ib. 614; Trevor *v.* Wood, 36 N. Y. 307; Abbott *v.* Shepard, 48 N. H. 14; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80; Chiles *v.* Nelson, 7 Dana, 282; The Palo Alto, Davies, 343; Hamilton *v.* Lycoming Ins. Co. 5 Penn. St. 339; Levy *v.* Cohen, 4 Ga. 1; Falls *v.* Gaither, 9 Porter, 613; Averill *v.* Hedge, 12 Conn. 436; Wheat *v.* Cross, 31 Md. 99; Potts *v.* Whitehead, 5 C. E. Green (N. J.), 55; S. C. 8 Ib. 512; Hallock *v.* Commercial Ins. Co. 2 Dutcher (N. J.), 268. See, also, Stocken *v.* Collin, 7 M. & W. 515; Hebb's case, L. R. 4 Eq. 9; In re Imperial Land Co. of Marseilles, Townsend's case, L. R. 13 Eq. 148; Bryant *v.* Booze, 55 Ga. 438; Maclay *v.* Harvey, 90 Ill. 525; Batterman *v.* Morford, 76 N. Y. 622.]

(*t*) 6 Wend. 104.

summates the bargain, *provided the offer is standing at the time of the acceptance.*" The point was still left open as to the effect of a revocation of the offer not communicated to the party accepting at the time of acceptance.

§ 69. In the more recent case of Tayloe *v.* Merchants' Fire Insurance Company, (*u*) the supreme court of the United States has closed this last point, in America, by holding that under such circumstances, "an offer prescribing the terms of insurance is intended and is to be deemed a valid undertaking by the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and *that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.*" Although this decision was given on an insurance contract, the reasoning of the court was quite applicable to all other bargains between parties. Nelson J., who delivered the opinion, said: "On the acceptance of the terms proposed, transmitted in due course of mail to the company, the minds of both parties have met on the subject, *in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for *their* approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would *defeat the object which both had in view in entering upon the correspondence.* . . . . The fallacy of the opposite argument, in our judgment, consists in the assumption that the contract cannot be consummated without a *knowledge* on the part of the company that the offer has been accepted. . . . . But a little reflection will show that in all cases of contracts entered into between parties at a distance by corre-

Tayloe *v.* Merchants' Fire Insurance Company.

(*u*) 9 How. (U. S.) 390.

spondence, it is impossible that both should have a knowledge of it the moment it becomes complete. . . . . The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor for the same reason can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of *some* interval of time, and if the process is to be carried farther, in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other." (u^1)

Civilians, on contracts by correspondence. Pothier.

§ 70. The civilians do not accord with these views. Pothier says: "If I write to a merchant of Leghorn a letter, in which I propose to purchase of him a certain quantity of merchandise at a certain price, and before my letter can have reached him I write a second letter withdrawing my proposal, although the merchant of Leghorn, in ignorance of the change of my intentions, answers that he accepts the proposed bargain, yet there is no contract of sale between us; for my intention not having continued until the time at which my letter was received, and my proposal accepted, the assent or concurrence of our wills necessary to form a contract of sale has not occurred. It must be observed, however, that if my letter causes the merchant to be at any expense in proceeding to execute the contract proposed, or if it occasion him any loss, as, for example, if in the intermediate time between the receipt of my first and that of my second letter the price of the merchandise falls, and my first letter has made him miss the opportunity to sell it before the fall of

(u^1) [In the Journal of Jurisprudence and Scottish Law Magazine, July, 1880, in a leading article, the true principle is said to be that laid down in Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390. The writer says: "The error which has led to so much difficulty in this class of cases lies in the metaphysical notion that there must be some moment at which the minds of the parties actually meet; that is to say, with a knowledge that they have met. The principle is applicable in cases where the contending parties are personally present, but it is not applicable in the case of contracts entered into where they are not, and cannot be, personally present, and where, consequently, the contract is entered into by correspondence. The principle of mutual assent took the form of its expression naturally enough from the circumstances in which the principle was originally applied. The old principle is still applicable to a new state of circumstances; the old expression of the principle, which is an accident and not of the essence of the principle, is not so applicable." See Thompson *v.* James, 18 Dunlop, 1.]

Suggestions as to cause of the conflicting decisions on assent by correspondence.

the price ; in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity that no person shall suffer for the act of another ; *nemo ex alterius facto prægravari debet.* I ought, therefore, to indemnify him for the expense and loss which I occasion by making him a proposition which I afterwards refused to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, ships for my account and forwards the merchandise, though in that case there has not properly been a contract of sale between us, yet he will have a right to compel me to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned."(*x*)

§ 71. It is impossible to read the reasoning of this eminent jurist in the passages just cited, without feeling that it fails to meet the difficulties of the case. He places the proposer in the instances suggested under all, and more than all, the obligations of a purchaser, while insisting that he has made no purchase. The ground suggested, that it is the act of the proposer which causes damage to the other, and thus imposes an equitable obligation to repair that damage, is a *petitio principii. Ex hypothesi*, the party receiving the offer knows that it may legally be retracted by a second letter dispatched to him before his acceptance, and he accepts subject to this risk. If, therefore, before waiting the time necessary to learn whether the offer had been actually retracted at the date of his acceptance, he incurs expense or loss in a premature attempt to execute a non-existent contract, surely it is his own precipitancy, and not his correspondent's conduct, which is the real cause of the damage. So, too, if there be a fall in the market, on what ground is he entitled to make his correspondent suffer the loss, when plainly in the contrary event the profit would accrue to himself ? To make a mere negotiation not resulting in a bargain operate so as to place the proposer *in duriori casu* than he would be if bound by a perfect contract; to render him liable for a fall in the market without the correlative chance of profit from a rise, is a proceeding which fails to awaken a response from that sense of equity to which Pothier

Not satisfactory.

(*x*) Pothier, Contrat de Vente, No. 32. See the language of Lindley J. in Byrne *v.* Van Tienhoven, L. R. 5 C. P. 344.

appeals; and notwithstanding the imposing authority of his name, it may be doubted whether the doctrine thus propounded would stand the test of discussion at the bar of a tribunal governed even by the civil law. (*y*)

Common and civil law as to order for purchase by correspondence.

§ 72. Both the common and the civil law, however, concur in relation to the case where an order for purchase or sale is transmitted by correspondence to an *agent* of the writer. If A., in Liverpool, order his correspondent, B., in New York, to purchase a cargo of flour for account of A., and B. execute the order before receiving a countermand, A. remains bound, even though he may have posted the countermand before the execution of the order. The civil law is express on this point: "Si mandassem tibi ut fundum emeres, postea scripsissem ne emeres, tu antequam scias me vetuisse, emisses, mandati tibi obligatus ero, ne damno afficiatur is qui mandatum suscepit." Dig. l. 17, tit. 1, sec. 15. The contract here is one of agency, not of sale, and is governed by totally different principles; for in agencies, a revocation of authority by the principal cannot take effect till it reaches the agent. (*z*)

§ 73. But although this is a different contract, the analogy is very strong between it and a bargain and sale by correspondence. If A. send an agent to B. with a proposal for sale, even the civilians admit that A. cannot revoke the authority of the agent to make the offer until the revocation reaches him. So that if A. dispatched C. with an order recalling the authority, even before the agent had made the offer, A. would still remain bound by a bargain made before C.'s arrival with the countermand. Why should there be any difference when the proposer sends his proposal by the public post, which he authorizes to deliver it? A., by sending a letter from London, addressed to B. in Manchester, really gives to the public post authority to hand to B. a written

(*y*) Mr. Story is of a contrary opinion, and lauds this doctrine as "by far the fairest and most intelligible rule that can be found." Story on Sales, § 130, note 1.

(*z*) Story on Agency, § 470, 6th edit. Per Bayley J. in Salte *v.* Field, 5 T. R. 215. A revocation by the death of the principal operates instantly at common law. See cases in note to Smart *v.* Sandars, 5 C. B. 917. By the civil law, acts done by the agent while ignorant of the principal's death are valid, unless the other contracting party knew of the death. Dig. l. 17, t. 1, l. 26, 58. The French Code is to the same effect. Acts 2008, 2009. The Bank of England protects itself against the risk resulting from the common law rule by special clauses in its forms for powers of attorney. Kiddill *v.* Farnell, 26 L. J. Ch. 818.

Revocation by death of principal: common law; civil law.

offer, and to receive an answer in behalf of A. Even on the doctrines of the civil law, it would seem to be permissible under such circumstances to hold that A.'s revocation comes too late, if it only arrives after the completion of the bargain thus authorized to be made in his behalf. In reality, the true theory of the case seems to be, that an offer sent by mail is an authority to the party to whom it is sent to bind the sender by acceptance, and includes an implied promise that no revocation is to take effect till received by the agent.

§ 74. The cases that arise in attempts to contract by correspondence present at times very singular complexity. In Dunmore *v.* Alexander. Dunmore *v.* Alexander, (*a*) the party to whom the proposal was made wrote and posted a letter of acceptance; and then wrote and posted a letter recalling the acceptance, and *both letters reached the proposer at the same time.* The majority of the court of sessions in Scotland held that there was no contract, reversing the judgment of the lower court; and a very similar case is cited by Merlin, Repert. tit. Vente, sec. 1, art, 3, no. 11, where an offer was sent by letter to buy goods on certain conditions. The offer was accepted by letter, but by a subsequent letter the unconditional acceptance was recalled, the writer proposing some modification in the conditions. Both letters reached the original proposer together, and he declined to execute the contract. It was held that the proposer could not be forced to perform the bargain, the second answer to his proposal authorizing him to consider the acceptance as withdrawn. (*b*)

§ 75. In the case of M'Culloch *v.* The Eagle Insurance Company, (*c*) A. wrote to ask B. on what terms he would insure a vessel. B. wrote on the 1st January that he would insure at a specified rate, and on the 2d January wrote a letter retracting his offer. A. had written an acceptance M'Culloch *v.* Eagle Insurance Company.

(*a*) 9 Shaw & Dunlop, 190.

(*b*) [See In re Constantinople & Alexandria Hotels Co., Reidpath's case, L. R. 11 Eq. 86; Finucane's case, 17 W. R. 813.]

(*c*) 1 Pick. 283. [In Hallock *v.* Commercial Ins. Co. 2 Dutcher, 268, 283, Vredenburgh J., referring to M'Culloch *v.* The Eagle Ins. Co., says: "This case is against the whole current of authorities, both in England and in this country, and appears to me requires for the creation of a contract a fact without significance, or a condition that would render its creation impossible." The principle of M'Culloch *v.* Eagle Ins. Co. is certainly most positively controverted in the recent cases of Byrne *v.* Leon Van Tienhoven, L. R. 5 C. P. 344, and Stevenson *v.* McLean, L. R. 5 Q. B. Div. 346.]

of the offer before receiving the second letter, *but after B. had posted the second letter*, and it was held that there was no contract; but this case is disapproved by the American text-writers, and is in conflict with the decision of the supreme court of the United States in Tayloe *v.* Merchants' Fire Insurance Company, cited *ante*, § 69.

CHAPTER IV.

OF THE THING SOLD.

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§ 76. As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows, that if at the time of the contract the thing *has ceased to exist*, the sale is void. In Strickland *v.* Turner, (*a*) a sale was made of an annuity dependent upon a life. It was afterwards ascertained that the life had already expired at the date of the contract, and not only was the sale held void, but *assumpsit* by the purchaser to recover back the price paid as money had and received was maintained. In Hastie *v.* Couturier, (*b*) a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn, having become heated, had been discharged by the master at an intermediate port, and sold on the 21st of the preceding month of April. Held, that the sale of the 15th of May was properly repudiated by the purchaser.

A thing which has ceased to exist.

Strickland *v.* Turner.

Hastie *v.* Couturier.

§ 77. These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold: sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather, that there has been no contract at all; for the assent of the parties, being founded on a mutual mistake of fact, was really no assent, there was no subject-matter for a con-

(*a*) 7 Ex. 208. See, also, Cochrane *v.* Willis, L. R. 1 Ch. App. 58; 35 L. J. Ch. 36; Smith *v.* Myers, L. R. 5 Q. B. 429; 7 Q. B. 139, in error.

(*b*) 9 Ex. 102, and 5 H. L. Cas. 673, reversing the judgment in 8 Ex. 40. See, also, Barr *v.* Gibson, 3 M. & W. 390.

tract, and the contract was therefore never completed. (*c*) This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase turned out to be for six years instead of eight and a half, and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than that offered by the vendor. (*d*) This is also the opinion of the civilians. Pothier (*e*) says: "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words, "There is no valid assent, where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

Things not yet in existence, or not yet acquired by vendor.

§ 78. In relation to things *not yet in existence*, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be *sold*, while the other can only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor.(e^1) A man may sell the crop of hay to be grown on his field, (e^2) the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, (*f*) and the sale is valid. (*g*)

(*c*) [Forbes J. in Rice *v.* Dwight Manuf. Co. 2 Cush. 80, 86; McLean J. in Allen *v.* Hammond, 11 Peters, 63, 71, 72; 2 Kent, 468, 469; Hitchcock *v.* Giddings, 4 Price, 135; Bigelow C. J. in Gardner *v.* Lane, 9 Allen, 492, 499; Franklin *v.* Long, 7 Gill & J. 407; Wilde J. in Thompson *v.* Gould, 20 Pick. 139.]

(*d*) Farrar *v.* Nightingal, 2 Esp. 139.

(*e*) Contrat de Vente, No. 4.

(e^1) [Heald *v.* Builders' Ins. Co. 111 Mass. 38; Lewis *v.* Lyman, 22 Pick. 437, 442, 443; Smith *v.* Atkins, 18 Vt. 461.]

(e^2) [Or a certain quantity of corn, where the corn is growing in the field, at a stipulated price, to be delivered in the future. Sanborn *v.* Benedict, 78 Ill. 309. See Gittings *v.* Nelson, 86 Ill. 591.]

(*f*) 14 Viner's Ab. tit. Grant, p. 50; Shep. Touch. Grant, 241; Perk. §§ 65, 90; Grantham *v.* Hawley, Hob. 132; Wood & Foster's case, 1 Leon. 42; Robinson *v.* Macdonnell, 5 M. & S. 228; [Sanborn *v.* Benedict, 78 Ill. 309.]

(*g*) [See Low *v.* Pew, 108 Mass. 350. An assignment of goods at sea, and their proceeds, is sufficient to pass a legal title

Assignment of goods at sea, and their proceeds.

But he can only make a *valid agreement to sell, not an actual sale*, where the subject of the contract is something to be afterwards acquired, (*h*) as the wool of any sheep, or the milk of any cows, that he may buy within the year, or any goods to which he may obtain title within the next six months. This distinction involves very important consequences, as will be pointed out hereafter. (Book II.) For the present it suffices to say, that in an actual sale the property passes, and the risk of loss is in the purchaser, while in the agreement to sell, or executory contract, the risk remains in the vendor.

§ 79. The leading modern case on the subject is Lunn *v.* Thornton, (*i*) decided in 1845. The action was *trover* for bread, flour, &c. The plaintiff, in consideration of a sum lent to him, had by deed-poll covenanted that he "sold and *delivered* unto the defendant all and singular his goods, household furniture, &c. then remaining and being, or *which should at any time thereafter remain and be in his dwelling-house*," &c. Tindal C. J., in delivering the opinion of the court, said: "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or at all events, which are not belonging to the grantor at the time of executing the deed." Held in the negative. Subsequent cases are to the same effect.(*k*) Lunn *v.* Thornton.

to the proceeds. Hodges *v.* Harris, 6 Pick. 360. Parker C. J. said: "It is very clear that the transfer of an invoice of an outward cargo, after the sailing of the vessel, operates upon the proceeds so as to make them the property of the purchaser." The goods, being the proceeds, were, in fact, delivered to the purchaser when they arrived in port.]

(*h*) Per Mansfield C. J. in Reed *v.* Blades, 5 Taunt. 212, 222. [See Low *v.* Pew, 108 Mass. 347. In Thrall *v.* Hill, 110 Mass. 330, Morton J. said: "It is true that a man cannot sell personal property in which he has no interest. A mere possibility, coupled with no interest, is not the subject of sale, and would not pass by bill of sale. But if he has a present interest in the property sold, a sale of it is valid."]

(*i*) 1 C. B. 379.

(*k*) Gale *v.* Burnell, 7 Q. B. 850; Congreve *v.* Evetts, 10 Ex. 298, and 23 L. J. Ex. 273; Hope *v.* Hayley, 5 E. & B. 830, and 25 L. J. Q. B. 155; Chidell *v.* Galsworthy, 6 C. B. N. S. 471; Allatt *v.* Carr, 27 L. J. Ex. 385. See, also, Moakes *v.* Nicholson, 34 L. J. C. P. 273;

§ 80. But though the actual *sale* is void, the agreement will take effect if the vendor, by some act done after his acquisition of the goods, clearly shows his intention of giving effect to the original agreement, or if the vendee obtains possession under authority to seize them. This modification of the rule is recognized in the cases just cited, and rests originally on the authority of the fourteenth rule in Bacon's Maxims: "Licet dispositio de interesse fu-

19 C. B. N. S. 290. [The same principle is adopted in the American decisions upon this subject. Head *v.* Goodwin, 37 Maine, 181, 187 *et seq.*; Jones *v.* Richardson, 10 Met. 481; Barnard *v.* Eaton, 2 Cush. 294, 303; Winslow *v.* Merchants' Ins. Co. 4 Met. 306; Codman *v.* Freeman, 3 Cush. 306, 309; Rice *v.* Stone, 1 Allen, 566, 569; Moody *v.* Wright, 13 Met. 17; Henshaw *v.* Bank of Bellows Falls, 10 Gray, 571, 572; Pierce *v.* Emery, 32 N. H. 484, 505; Pennock *v.* Coe, 23 How. (U. S.) 117; Noyes *v.* Jenkins, 55 Ga. 586; Phelps *v.* Murray, 2 Tenn. Ch. R. 746; Brown *v.* Combs, 63 N. Y. 598; Cressey *v.* Sabre, 17 Hun, 120. A lessee put furniture and fixtures into the demised premises, under an agreement with the lessor that they should become the property of the lessor at the expiration of the lease. During the term, the lessor gave a bill of sale of his interest in them to a third person. It was held that the lessor's right in them passed to such person by the bill of sale, and that he could maintain an action for their conversion after the expiration of the lease. Thrall *v.* Hill, 110 Mass. 328. This subject was very ably discussed and the cases reviewed in Hamilton *v.* Rogers, 8 Md. 301; and by Chancellor Cooper in Phelps *v.* Murray, 2 Tenn. Ch. R. 746, where it was held that a mortgage, made to secure debts maturing at a future day, which conveys a stock of goods in a particular store, and any other goods which may from time to time, during the existence of the mortgage, be purchased by the grantors and put into that store to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is *per se* void. Such is the law in New York. Mittracht *v.* Kelly, 3 Keyes, 407; Spies *v.* Boyd, 1 E. D. Smith, 445; Otis *v.* Sill, 8 Barb. 102. But a valid chattel mortgage may be made in New York upon the future products of property in which the mortgagor has then an interest. Van Hoozer *v.* Corey, 34 Barb. 9; Conderman *v.* Smith, 41 Ib. 404. See Holroyd *v.* Marshall, 2 De G., F. & J. (Am. ed.) 596, note (1); Wilson *v.* Wilson, 37 Md. 1, 11; Pettis *v.* Kellogg, 7 Cush. 456, 461; Low *v.* Pew, 108 Mass. 347, 349; Bellows *v.* Wells, 36 Vt. 599; Robinson *v.* Elliott, 22 Wallace, 513; Collins *v.* Myers, 16 Ohio, 547; Tennessee National Bank *v.* Ebbert, 9 Heiskell (Tenn.) 153; Short *v.* Ruttan, 12 U. C. Q. B. 79; Cummings *v.* Morgan, Ib. 567; Mason *v.* MacDonald, 25 U. C. C. P. 435; Meyer *v.* Johnston, 53 Ala. 237; Gittings *v.* Nelson, 86 Ill. 591. This principle, as to future acquired property, was recognized in New Brunswick in the case of Lloyd *v.* The European & N. Am. R. W. Co. 2 Pugsley & Burbridge (N. B.), 194. The California doctrine is that a valid mortgage may be made of a crop to be grown, even before the seed is sown, if the mortgagor is in possession of the land at the time of sale. Arques *v.* Wasson, 51 Cal. 620. The Indiana doctrine seems to be that even at law subsequently acquired property may be mortgaged, though the only authority cited for the decision is an equity case. Headrick *v.* Brattain, 63 Ind. 438; and see the earlier case of Chissom *v.* Hawkins, 11 Ind. 316.]

American decisions follow the English rule.

Thrall *v.* Hill.

Mortgage of shifting stock in trade.

New York doctrine.

California doctrine.

Indiana doctrine.

turo sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu."(*l*) See Brown *v.* Bateman (L. R. 2 C. P. 272), where the bargain was in relation to such materials as might be subsequently brought upon the premises under a building contract.

§ 81. It is well to observe that in equity a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee (*m*) The whole doctrine with its incidents, both at com-

Rule different in equity.

(*l*) [If the vendor of goods which did not belong to him at the time of sale subsequently acquires title to such goods, it requires some *new act* on his part, evincing the purpose of carrying this sale into effect, in order to transfer the title to the purchaser. Head *v.* Goodwin, 37 Maine, 182; Jones *v.* Richardson, 10 Met. 481; Calkins *v.* Lockwood, 16 Conn. 276; Mitchell *v.* Winslow, 2 Story, 636.]

Novus actus interveniens.

(*m*) [See Langton *v.* Horton, 1 Hare, 549; Calkins *v.* Lockwood, 16 Conn. 276; Mitchell *v.* Winslow, 2 Story, 636; Wilson *v.* Wilson, 37 Md. 1; Pennock *v.* Coe, 23 How. (U. S.) 117; Philadelphia &c. R. R. Co. *v.* Woelpper, 64 Penn. St. 366; Phillips *v.* Winslow, 18 B. Monroe, 431; Butt *v.* Ellett, 19 Wall. 544; Pennock *v.* Coe, 23 How. 128; Beall *v.* White, 94 U. S. 382; Shaw *v.* Bill, 95 Ib. 10; Booker *v.* Jones, 55 Ala. 266. In Moody *v.* Wright, 13 Met. 17, it was said that there is no difference between the rule at law and in equity. In Alabama this subject, as relates to advances to make crops, is regulated by statute. Code of Ala. (1876) § 3286; Abraham *v.* Carter, 53 Ala. 8; McKeithen *v.* Pratt, Ib. 116; McLester *v.* Somerville, 54 Ib. 670; Baswell *v.* Carlisle, Ib. 554; Stearns *v.* Gafford, 56 Ib. 544; Griel *v.* Lehman, 59 Ib. 419; Carter *v.* Wilson, 61 Ib. 434. Also in Georgia. See Code of Ga. § 1978; Stallings *v.* Harrold, 60 Ga. 478; Lewis *v.* Lofley, Ib. 559; Lee *v.* Clark, Ib. 639; Hardwick *v.* Burtz, 59 Ib. 773; Stephens *v.* Tucker, 55 Ib. 543; Stephens *v.* Tucker, 58 Ib. 391; Burrus *v.* Kyle, 56 Ib. 24; Ball *v.* Vason, Ib. 264; Powell *v.* Weaver, Ib. 288; Story *v.* Flournay, 55 Ib. 56; Ware *v.* Simmons, Ib. 94. But in Georgia, apart from statute, the general principle prevails. See Code, § 1954; Reed *v.* Burrus, 58 Ga. 574; Stephens *v.* Tucker, 55 Ib. 543. The equity doctrine is recognized in Arkansas; Apperson *v.* Moore, 30 Ark. 56; Driver *v.* Jenkins, Ib. 120; Hamlett *v.* Tallman, Ib. 505; and the common law doctrine is regulated as to certain points by statute. Tomlinson *v.* Greenfield, 31 Ark. 557; Jarratt *v.* McDaniel, 32 Ib. 598. This subject was very carefully considered in Brett *v.* Carter, 2 Low. 458. A bill in equity was filed by the assignee in bankruptcy of one Sargent against the mortgagee of a stock of stationery and other like goods. It appeared that Sargent purchased the stock in trade of the defendant in 1874, and on the day of purchase gave a mortgage back to secure the payment of the purchase-money. The mortgage bill of sale conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." It was contended that the mortgage was void as to the subsequently acquired goods. Lowell J. said: "It is undoubtedly the law of courts of equity . . . that after-

Massachusetts rule.

Alabama.

Georgia.

Arkansas.

Brett *v.* Carter.

Equity doctrine stated.

mon law and in equity, was twice argued, and thoroughly discussed and settled, in the case of Holroyd *v.* Marshall, (*n*) where Lord Westbury and Lord Chelmsford gave elaborate opinions, concurred in by Lord Wensleydale, although his lordship's first impressions had been adverse to their conclusions. The barons of the exchequer held, however, in Belding *v.* Reed (3 H. & C. 955; 34 L. J. Ex. 212), that the doctrine of Holroyd *v.* Marshall only applies to subsequently acquired property when so specifically described as to be identified.

Holroyd *v.* Marshall.

Belding *v.* Reed.

§ 82. In relation to executory contracts for the sale of goods not yet belonging to the vendor, Lord Tenterden held, in an early case (*o*) at nisi prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract but a mere wager on the price of the commodity. But this doctrine is quite exploded, and Bryan *v.* Lewis was expressly overruled by the exchequer of pleas in Hibblewhite *v.* McMorine, (*p*) and Mortimer *v.* McCallan, (*q*) after being questioned in the common pleas in Wells *v.* Porter. (*r*) The law in relation to time bargains for the sale of chattels not belonging to the vendor, when merely colorable devices for gambling in the rise and fall of prices, is treated *post*, book III. ch. iii. §§ 541 *et seq.* (*s*)

Goods not yet belonging to vendor.

acquired chattels definitely pointed out, as for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land, or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens*, after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old." Judge Lowell then alludes to Moody *v.* Wright, 13 Met. 17, and intimates that it is not good law, and that the case will be reversed by the Supreme Court of Massachusetts should opportunity arise.]

Moody *v.* Wright criticised.

(*n*) 10 H. L. Cas. 191; [S. C. 2 De G., F. & J. (Am. ed.) 596, note (l); Language of Gwynne, J., in Mason *v.* MacDonald, 25 U. C. C. P. 435; Brett *v.* Carter, 2 Low. 458.] And see judgment in Reeve *v.* Whitmore, 33 L. J. Ch. 63, as to distinction between a present transfer of future property and a mere power to seize it.

(*o*) Bryan *v.* Lewis, Ry. & Moo. 386, in 1826.

(*p*) 5 M. & W. 462; [Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Cole *v.* Milmine, 88 Ill. 349; The Bank of Toronto *v.* McDougall, 28 U. C. C. P. 345; Clarke *v.* Foss, 7 Biss. 540.]

(*q*) 6 M. & W. 58.

(*r*) 2 Bing. N. C. 722, and 3 Scott, 141.

(*s*) [By statute in Massachusetts, agree-

§ 83. In America it has been decided that if a vendor sell a thing not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser. (*t*) So in a contract of "sale or return," where the vendor had no title at the time of sale, but acquired one afterwards, before the time limited for the return; held, that the buyer, who had allowed the time to elapse without returning the thing sold, could not set up the failure of consideration in the original contract as a defence in an action for the price. (*u*) American decisions.

§ 84. The civilians held that an expectation dependent on a chance may be sold, and the illustration usually given is that of the fisherman who agrees to sell a cast of his nets for a given price; (*x*) and this is adopted by Mr. Story. (*y*) The illustration is perhaps not very well chosen. The case supposed is rather one of work and labor done than of sale. The fisherman owns nothing but the tools of his trade, *i. e.* his net. What is in the sea is as much the property of anybody else as of himself. If a third person gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labor in fishing for an employer. It is no more a contract of sale when he is paid by the job or piece, for a Sale of a hope dependent on a chance. *Venditio spei.*

ments for the sale of stock, and certain certificates and evidences of debt, are made void, unless the party contracting to sell is at the time the owner or assignee, or authorized by the owner or assignee, or his agent, to sell or transfer the same. Genl. Sts. c. 105, § 6. See Barrett *v.* Hyde, 7 Gray, 160; Wyman *v.* Fiske, 3 Allen, 238; Barrett *v.* Mead, 10 Ib. 337; Brown *v.* Phelps, 103 Mass. 313. The object of this statute was to prohibit gambling in stocks. Chapman J. in Brigham *v.* Mead, 10 Allen, 245, 246.]

(*t*) Frazer *v.* Hilliard, 2 Strobh. 309; Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439. [It is not to be inferred from what is stated in the text that the American doctrine is different from the English, for the prevailing American rule. American doctrine is essentially the same as the English, as the cases cited *ante*, §§ 79–81, show.]

(*u*) Hotchkiss *v.* Oliver, 5 Denio, 314.

(*x*) Dig. l. 8, § 1, de Contr. empt.; Pothier, Vente, No. 6.

(*y*) Story on Sales, § 185. [In Low *v.* Pew, 108 Mass. 347, the question was directly raised, whether a sale of fish afterwards to be caught has the effect to pass to the purchaser the property in the fish when caught; and it was decided in the negative.]

single cast, than when he is paid by the month for all his cast. (*z*) But though the illustration may be questioned, the rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the purchaser to pay the price, even if no pearls were found; for as was said by Lord Chief Baron Richards, in Hitchcock *v.* Giddings, (*a*) "if a man will make a purchase of a chance, he must abide by the consequences." (*b*) The rules of law applicable to the sale of things immoral, noxious, or illegal, are discussed *post*, book III. ch. iii. on "Illegality."

(*z*) The vexed subject of the true test by which to determine whether certain contracts are in their nature contracts of sale, or contracts for work and labor, and materials furnished, is discussed *post*, part II. ch. i. §§ 94 *et seq.*

(*a*) 4 Price, 135.

(*b*) See, also, observations of Lord Campbell C. J. in Hanks *v.* Palling, 6 E. & B. 659; 25 L. J. Q. B. 375.

CHAPTER V.

OF THE PRICE.

	Section		Section
Where no price has been fixed	85	Valuation is not arbitration	88
What is meant by "a reasonable price"	86	Responsibility of valuers	88
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§ 85. It has already been stated that the price must consist of *money*, paid or promised. The payment of the price in sales for cash or on credit will be the subject of future consideration, when the performance of the contract is discussed. We are now concerned solely with the agreement to make a contract of sale. Where the price has been expressly agreed on, there can arise no question; but the price of goods sold may be determined by other means. (*a*) If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In Acebal *v.* Levy, (*a*[1]) the court of common pleas, while deciding this to be the rule of law in cases of *executed* contracts, expressly declined to determine whether it was also applicable to *executory* agreements. But in the subsequent case of Hoadly *v.* McLaine, (*b*) the same court decided that in an executory contract, where no price had been fixed, the vendor could recover in an action against the buyer, for not accepting the goods, the reasonable value of them; (*b*[1]) and this is the unquestionable rule of law. (*c*)

When no price has been fixed, reasonable price implied.

(*a*) [If there be conflicting evidence as to the price agreed upon, the real value may be shown as tending to prove which party is right. Johnson *v.* Harder, 45 Iowa, 677; Bradbury *v.* Dwight, 3 Met. 31; Rennell *v.* Kimball, 5 Allen 365; Saunders *v.* Clark, 106 Mass. 331; Brewer *v.* Housatonic R. R. Co. 107 Ib. 277.]

(*a*[1]) 10 Bing. 376.

(*b*) 10 Bing. 482.

(*b*[1]) [McBride *v.* Silverthorne, 11 U. C. Q. B. 545.]

(*c*) Valpy *v.* Gibson, 4 C. B. 837; 2 Saund. 121 e, note (2), by Williams Serj. to Webber *v.* Tivill; [Joyce *v.* Swann, 17 C. B. N. S. 84; James *v.* Muir, 33 Mich. 223, 227. The law implies a contract in such cases to pay the market price at the

§ 86. In Acebal *v.* Levy, the court further declared that where the contract is implied to be at a reasonable price, this means, "Such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the *current price* of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, (c^1) as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

What is meant by a reasonable price.

Acebal *v.* Levy.

§ 87. It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by the valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much part of the contract as if fixed by themselves. (d) But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement, and if the persons appointed as val-

Price to be fixed by valuers.

time and place of delivery. McEwen *v.* Morey, 60 Ill. 32. The fact that the price has not been fixed will not necessarily prevent the title from passing, but is merely a fact to be considered by the jury in determining whether or not the title has passed. Callaghan *v.* Myers, 89 Ill. 566.]

(c^1) [See Kountz *v.* Kirkpatrick, 72 Penn. St. 376, cited *post*, § 870, in note (a).]

(d) [See Brown *v.* Bellows, 4 Pick. 189; Fuller *v.* Bean, 34 N. H. 301, 304; Cunningham *v.* Ashbrook, 20 Mo. 553; McCandlish *v.* Newman, 22 Penn. St. 460; Nutting *v.* Dickinson, 8 Allen, 540; Newlan *v.* Dunham, 60 Ill. 233. A sale was made of a quantity of wheat, at a price ten cents per bushel less than the Milwaukee price should be on a day thereafter, which the seller should name, and the wheat was delivered in pursuance of such contract, and was destroyed by fire before the seller had named the day with reference to which the price should be determined. It was held that the property in the wheat was in the purchaser, and the seller, having afterwards named such day, was entitled to the payment of the price, as thus fixed. McConnell *v.* Hughes, 29 Wis. 537; Easterlin *v.* Rylander, 59 Ga. 292; Ames *v.* Quimby, 96 U. S. 324. When the price of goods sold is to be fixed by a referee, the contract of sale is not perfect until the price is so fixed. Hutton *v.* Moore, 26 Ark. 382; Vickers *v.* Vickers, L. R. 4 Eq. 529; Scott *v.* The Corporation of Liverpool, 3 De G. & J. 334. A sale was made of 183 hogsheads of molasses at 31 cents a gallon, the number of gallons to be determined by the gauge-mark already placed upon the hogsheads by a customs officer. The plaintiffs paid for the molasses, the amounts paid being determined by the above method. As a matter of fact, there was not so much molasses as indicated by the gauge. It was held that the plaintiffs could not recover for the deficiency. McLea *v.* Robinson, 2 Pugsley & Burbridge (N. B.), 83; Brown *v.* Cole, 45 Iowa, 601.]

McConnell *v.* Hughes.

McLea *v.* Robinson.

uers fail, or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation. (*e*) But if the agreement has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in Clarke *v.* Westrope, (*f*) where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant thereupon consumed the goods, so that a valuation became impossible.

Valuation is not arbitration.

§ 88. Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to "arbitration," within the common law procedure act (*g*) (17 & 18 Vict. c. 125, s. 12), and it was therefore held in Bos *v.* Helsham, (*h*) that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the 13th section of the act did not apply, so as to authorize the valuer appointed to act by himself as a sole arbitrator. It has been held, however, that if the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties. (*i*)

Responsibility of valuers.

Civil law as to price.

§ 89. In the civil law it was a settled rule that there could be no sale without a price certain. (*k*) "Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest; sed et certum esse debet," was the language of the Insti-

(*e*) Thurnell *v.* Balbirnie, 2 M. & W. 786; Cooper *v.* Shuttleworth, 25 L. J. Ex. 114; Vickers *v.* Vickers, L. R. 4 Eq. 529; Milnes *v.* Gery, 14 Ves. 400; Wilks *v.* Davis, 3 Mer. 507; [Wittowsky *v.* Wasson, 71 N. Car. 451. See Fuller *v.* Bean, 34 N. H. 304; De Cew *v.* Clark, 19 U. C. C. P. 155.]

(*f*) 18 C. B. 765; [Wittkowsky *v.* Wasson, 71 N. Car. 456.]

(*g*) Collins *v.* Collins, 26 Beav. 306; 28 L. J. Ch. 184; Vickers *v.* Vickers, L. R. 4 Eq. 529.

(*h*) L. R. 2 Ex. 72. But see Re Hopper, L. R. 2 Q. B. 367; Re Anglo-Italian Bank, L. R. 2 Q. B. 452.

(*i*) Jenkins *v.* Betham, 15 C. B. 189; 24 L. J. C. P. 94; Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

(*k*) ["The language of the civil law upon this subject is the language of common sense." Story J. in Flagg *v.* Mann, 2 Sumner, 538. "But if the price can be made certain, it is sufficient." Bell J. in Fuller *v.* Bean, 34 N. H. 304. See Maddock *v.* Stock, 4 U. C. Q. B. 118. In Eldridge *v.* Richardson, 3 U. C. Q. B. 149, it was held that in an action on the common counts for goods bargained and sold, the plaintiff must show a certain price agreed upon.]

tutes. (*l*) And it was a subject of long contest among the earlier jurisconsults whether the necessity for a *certain* price did not render invalid an agreement that the price should be fixed by a third person; but Justinian put an end to the question by positive legislation: "Alioquin si inter aliquos ita convenerit, ut quanti Titius rem æstimaverit tanti sit empta, inter veteres satis abundeque hoc dubitabatur sive constat venditio, sive non. Sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio, *quanti ille æstimaverit*, sub hac conditione staret contractus; ut si quidem ipse qui nominatus est pretium definíerit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, et venditio ad effectum perducatur, emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere." (*l*) These rules have been adopted into the Code Napoleon. Art. 1591: "Le prix de la vente doit être déterminé et désigné par les parties." 1592: "Il peut cependant être laissé à l'arbitrage d'un tiers; si le tiers ne veut ou ne peut faire l' estimation, il n'y a point de vente."

(*l*) Lib. iii. tit. xxiii. s. 1.

PART II.

SALES UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

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§ 90. THE common law which recognized the validity of verbal contracts of sale of chattels, for any amount, and however proven, was greatly modified by the statute of 29 Charles 2, c. 3. This celebrated enactment, familiarly known as the "Statute of Frauds," is now in force not only in England and most of our colonies, but exists, with some slight variations, in almost every state of the American Union. Its history was but imperfectly known till the year 1823, when Lord Eldon gave to Mr. Swanston, the reporter of his decisions, the MSS. of Lord Nottingham, (*a*) among which was his lordship's report of the case of Ash *v.* Abdy, (*b*) in which he said, on the 13th June, 1678, less than

History of the statute.

(*a*) See note to Crowley's case, 2 Swans. 83.

(*b*) 3 Swans. 664, Appendix. In North's Life of Lord Keeper Guilford, vol. i. p. 108, he states of his lordship: "He had a great hand in the statute of frauds and perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Justice Hale had the preëminence, and was chief in the fixing of that law, although the urging part lay upon him, and I have reason to think it had the first spring from his lordship's notice." [In Wyndham *v.* Chetwynd, 1 Burr. 418, Lord Mansfield said: "It has been said 'that this act of 29 C. 2, c. 3, was drawn by Ld. Ch. J. Hale.' But this is scarce probable. It was not passed till after his death; and it was brought in in the common way, and not upon any reference to the judges."]

two years after the passage of the law, that he overruled a demurrer to a bill which "was to execute a parol agreement, before the late act, for prevention of frauds and perjuries, but the bill itself was exhibited since the act." The ground of the decision was, that the statute was intended to be prospective solely, and not retrospective, "and I said, that I had some reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and the civilians." (*c*)

The 17th section.

§ 91. The section of the statute which is specially applicable to the subject of this treatise is the 17th. In the examination of its provisions, and of the rules for its construction and application, the arrangement of Mr. Justice Blackburn will be followed, as not susceptible of improvement. The language of this 17th section is as follows: "And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandises, for the *price* (*d*) of ten pound sterling, or upwards, (*e*) shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (*f*)

(*c*) As to the traditions of the aid and coöperation of Lord Hale and Sir Leoline Jenkins, see Wain *v.* Warlters, 5 East, 17; Wyndham *v.* Chetwynd, 1 Burr. 419; Wynn's Life of Sir Leoline Jenkins, vol. i. p. 3.

(*d*) This word changed to "value," *post*, § 93.

(*e*) [The statutes of frauds of the different American States differ from each other and from the English statute in regard to the amount necessary to bring a contract within them. In New Hampshire it is fixed at $33.33; in Maine at $30; in Vermont at $40; in New York, Connecticut, Massachusetts, and most other states, $50; in Rhode Island, this provision has never been adopted.]

(*f*) [In Townsend *v.* Hargraves, 118 Mass. 334, Colt J., referring to the statute of frauds, said: "The purpose of this celebrated enactment, as declared in the preamble, and gathered from its provisions, is to prevent fraud and falsehood, by requiring a party, who seeks to enforce an oral contract in court, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare it shall be void or illegal, unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is

Purpose and requirements of the statute.

§ 92. The first question that obviously presents itself under this enactment is, what contracts are embraced under the words "contracts for the sale of any goods," &c. A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general estate of the other in case of default, but having no effect to

What contracts embraced in it.

not changed, and the consideration may be recovered. Stone *v.* Dennison, 13 Pick. 1; Basford *v.* Pearson, 9 Allen, 387; Nutting *v.* Dickinson, 8 Ib. 540. (1) The memorandum required is the memorandum of only one of the parties; the alternative acts of the seventeenth section proceed from one only; they presuppose a contract, and are in affirmance or partial execution of it; they are not essential to its existence; need not be contemporaneous, and are not prescribed elements in its formation. It is declared in the fourth section, that no action shall be brought upon the promises therein named, unless some memorandum of the agreement shall be in writing; and in the seventeenth, that no contract for the sale of goods 'shall be allowed to be good,' or, as in our statute [Massachusetts], 'shall be good and valid,' unless the buyer accepts and receives part or gives earnest, or there is some memorandum signed by the parties to be charged, or, as in our statute, by the party to be charged. It is true there is difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the force and effect of the two sections. 'Allowed to be good,' means good for the purpose of a recovery under it; and the clause in the last part of the latter section, which requires the memorandum to be signed by the party or parties to be charged, implies that the validity intended is that which will support an action on the contract. We find no case in which it is distinctly and authoritatively held otherwise. See Leroux *v.* Brown, 12 C. B. 810; Carrington *v.* Roots, 2 M. & W. 248; Reade *v.* Lamb, 6 Ex. 130; Browne St. Frauds, §§ 115, 136. In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished; if acceptance and actual receipt of part be shown; then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and rights of stoppage *in transitu*." And upon these considerations, it was held in the above case of Townsend *v.* Hargraves, that the statute of frauds affects the remedy only and not the validity of the contract, and if there is a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt take place after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. See Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140; *post*, § 208, note (*g*). The defence of the statute of frauds can be made only by the parties to the contract, or their privies. Chicago Dock Co. *v.* Kenzie, 49 Ill. 289.]

(1) Wood *v.* Shultis, 4 Hun, 309; Rosepaugh *v.* Vredenburgh, 16 Ib. 60; King *v.* Brown, 2 Hill, 485; Day *v.* N. Y. Cent. R. R. Co. 51 N. Y. 583; Boyden *v.* Crane, 7 Alb. L. J. 203; Towsley *v.* Moore, 30 O. St. 184; Jellison *v.* Jordan, 68 Me. 373

transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities, of an owner; and this is an "executory agreement." Or it may be a perfect sale, as already defined, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves, independently of any personal remedy against the vendor for breach of contract, and rendering him liable to the risk of loss in case of their destruction; and this is a "bargain and sale of goods."

Lord Tenterden's act.

§ 93. The distinction between these two agreements will be more fully considered hereafter; but for the present it suffices to remark, that until the year 1828 the decisions were somewhat contradictory, and perhaps irreconcilable, on the question whether the words "contracts for the sale of any goods," &c. in this section, were applicable to agreements for future delivery, that is to say, to executory agreements, or only to such as were equivalent to the common law contract, known as a bargain and sale. (*g*) The decisions excluding such contracts from the operation of the statute were principally, Towers *v.* Osborne, (*h*) in 1724, Clayton *v.* Andrews, (*i*) in 1767, and Groves *v.* Buck, (*k*) in 1814. Those which upheld the contrary rule were Rondeau *v.* Wyatt, (*l*) in 1792, Cooper *v.* Elston, (*m*) in 1796, and Garbutt *v.* Watson, (*n*) in 1822. The question is no longer open, for the legislature intervened, and in 9 Geo. 4, c. 14, s. 7, known as "Lord Tenterden's act," recited, that "it has been held that the said recited enactments" (*i. e.* the 17th sect. of the statute of frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeded to enact that the provisions of the 17th section "shall extend to all con-

(*g*) [In Hight *v.* Ripley, 19 Maine, 137, 139, Shepley J. said: "It may be considered as now settled, that the statute of frauds embraces executory as well as executed contracts for the sale of goods. Kent J. in Edwards *v.* Grand Trunk Railway Co. 48 Maine, 379; Shaw C. J. in Mixer *v.* Howarth, 21 Pick. 207; Bellows J. in Pitkin *v.* Noyes, 48 N. H. 297; Gilman *v.* Hill, 36 Ib. 318; Sewall *v.* Fitch, 8 Cowen, 215; 2 Kent, 511, note (*d*); Bennett *v.* Hull, 10 John. 364; Cason *v.* Cheely, 6 Ga. 554; Downs *v.* Ross, 23 Wend. 270. See the language of Robinson C. J. in Lane *v.* Melville, 3 U. C. Q. B. (O. S.) 124, p. 127.]

(*h*) 1 Strange, 506.

(*i*) 4 Burr. 2101.

(*k*) 3 M. & S. 178.

(*l*) 2 H. Bl. 63.

(*m*) 7 T. R. 14.

(*n*) 5 B. & Ald. 613.

tracts for the sale of goods of the *value* of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." (n^1) It is settled in Scott *v.* Eastern Counties Railway Company, (o) and in Harman *v.* Reeve, (p) that this enactment must be construed as incorporated with the statute of frauds, and that its effect is to substitute the word "value" for "price" in the 17th section.

"Value" and "price."

§ 94. There have been numerous decisions, and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale," &c. under the 17th section, or contracts for work and labor done and materials furnished. A review of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent judges. Towers *v.* Osborne (q) was on an agreement to make and furnish a chariot. Held not within the statute. But the ground of decision in this case was, that the 17th section did not apply to executory agreements, and on this point the case is met by Lord Tenterden's act. In Clayton *v.* Andrews, (r) a contract for the future delivery of wheat not yet threshed was held not within the statute, under the authority of the preceding case.

Distinction between "sales" and "work and labor done, and materials furnished."

Towers *v.* Osborne.

Clayton *v.* Andrews.

§ 95. In Groves *v.* Buck, (s) the agreement was for the purchase by defendant of a quantity of oak pins, *not then in existence*, but that were to be cut by plaintiff out of slabs owned by him, and to be delivered at a future time. This agree-

Groves *v.* Buck.

(n^1) [Cameron *v.* Morrison, Arms., Macartn. & Ogl. 128.]

(o) 12 M. & W. 33.

(p) 18 C. B. 587, and 25 L. J. C. P. 257.

(q) 1 Strange, 506.

(r) 4 Burr. 2101. [The court of appeals in Maryland, in Eichelberger *v.* M'Cauley, 5 Harr. & J. 213, followed, with some reluctance, the case of Clayton *v.* Andrews, and declared that it was to be extended only to cases where the work and labor to be done may be considered as essential parts of such contracts. See Cason *v.* Cheely, 6 Ga. 554; Sewall *v.* Fitch, 8 Cowen, 215; Downs *v.* Ross, 23 Wend. 270; Courtright *v.* Stewart, 19 Barb. 455; Jackson *v.* Covert, 5 Wend. 139; Gorham *v.* Fisher, 30 Vt. 428; Higgins *v.* Murray, 73 N. Y. 252.]

(s) 3 M. & S. 178. [See Gilman *v.* Hill, 36 N. H. 317, 318; Cummings *v.* Dennett, 26 Maine, 397; Abbott *v.* Gilchrist, 38 Ib. 260.]

ment was held not to be embraced in the 17th section of the statute of frauds. Lord Ellenborough put his opinion on the ground that the "*subject-matter of this contract did not exist in rerum naturâ:* it was incapable of delivery and of part acceptance, and where that is the case, the contract has been considered not within the statute." (*t*) This ground is again met by the 9 Geo. 4, c. 14, s. 7, but Dampier J., in declining to apply the case of Rondeau *v.* Wyatt (presently noticed), said that this last-mentioned case was distinguishable, because in the other cases cited "some work was to be performed."

Rondeau v. Wyatt.

§ 96. In Rondeau *v.* Wyatt, (*u*) where an executory contract was held to be within the statute, Lord Loughborough said that "the case of Towers *v.* Sir John Osborne was plainly out of the statute, not because it was an executory contract, as has been said, but because it was *for work and labor to be done, and materials and other necessary things to be found*, which is different from a mere contract of sale, to which alone the statute is applicable." (*x*) His lordship also disposed of the case of Clayton *v.* Andrews (*y*) (subsequently overruled in Garbutt *v.* Watson), (*z*) by saying, that in that case also "there was some work to be performed, for it was necessary that the corn should be threshed before the delivery."

Garbutt v. Watson.

§ 97. In Garbutt *v.* Watson, (*z*) where a sale of flour, to be manufactured out of wheat yet unground, was held to be within the statute, Abbott C. J. said that in Towers *v.* Osborne "the chariot, which was ordered to be made, *would never, but for that order, have had any existence.*" This expression, as well as the similar one by Lord Ellenborough in Groves *v.* Buck (*ante* § 95), would imply that the distinction between a "contract for sale" and one for "work, labor, and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order

(*t*) [It is very clearly settled, by the more recent English and American cases, that it is not essential that the goods be capable of delivery at the time of making the contract, to bring it within the statute of frauds. Pitkin *v.* Noyes, 48 N. H. 298; Prescott *v.* Locke, 51 Ib. 97; Finney *v.* Apgar, 31 N. J. (2 Vroom) 266; Wegg *v.* Drake, 16 U. C. Q. B. 252.]

(*u*) 2 H. Bl. 63.

(*x*) [In Hight *v.* Ripley, 19 Maine, 139, Shepley J. said: "The decision in the case of Towers *v.* Osborne is esteemed to have been correct, while the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order.]

(*y*) 4 Burr. 2101.

(*z*) 5 B. & A. 613.

of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. Bayley J., however, put his opinion on the ground that "this was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labor and materials found. I think it was the former, and if so, it falls within the statute of frauds."(*a*) Holroyd J. concurred, "that this was a contract for the sale of goods," but neither of the judges gave a reason for this opinion (undoubtedly correct), and thus no aid is afforded by their language in furnishing a test for distinguishing the two contracts from each other.

§ 98. In Smith *v.* Surman (*b*) an action was brought to recover the value of certain timber, under a verbal contract, by which plaintiff agreed to sell to defendant at so much per foot the timber contained in certain trees then growing on plaintiff's land. Bayley J. was of opinion that "this was a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, *was doing work for himself, and not for the defendant.*" Smith *v.* Surman.

§ 99. In Atkinson *v.* Bell (*c*) the whole subject was much discussed. The action was in assumpsit for goods sold and delivered, goods bargained and sold, work and labor done, and materials found and provided. The facts were, that one Kay had patented a certain machine, and the defendants, thread manufacturers, desiring to try it, wrote him *an order to procure to be made for them as soon as possible* some spinning-frames, in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames, and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Atkinson *v.* Bell.

(*a*) [See Edwards *v.* Grand Trunk Railway Co. 54 Maine, 105, 110.]

(*b*) 9 B. & C. 568. [See Pitkin *v.* Noyes, 48 N. H. 298; Prescott *v.* Locke, 51 Ib. 97.]

(*c*) 8 B. & C. 277.

Sleddon's premises. On the 23d June, Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action brought. The judges were all of opinion that the property in the goods had not vested in the defendants, (*d*) and that a count for goods bargained and sold could not be maintained; but Bayley and Holroyd JJ. expressed the opinion that a count for not accepting would have supported the verdict in the plaintiff's favor. On the count for work and labor and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendants', that is to say, that the contract was an executory agreement for sale, and not one for work, &c. Bayley J. said: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor done. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; (*d*[1]) or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labor, *because his labor was bestowed on his own materials*, and for himself, and not for the person who employed him." The concluding passage of this opinion is no doubt too broadly expressed, for although true generally, it is not universally the case that an action for work and labor will not lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of Atkinson *v.* Bell, (*e*) subjecting it to the criticism of Maule and

(*d*) On this subject see *post*, book II.; [Halterline *v.* Rice, 62 Barb. 593, 598; Mixer *v.* Howarth, 21 Pick. 205, 207.]

(*d*[1]) [Gooderham *v.* Dash, 9 U. C. C. P. 413.]

(*e*) See remarks on another point decided in Bell *v.* Atkinson, *post*, book II. ch. v.

Erle JJ. in Grafton *v.* Armitage, (*f*) and of Pollock C. B. in Clay *v.* Yates, (*g*) but it was fully recognized in the subsequent case of Lee *v.* Griffin. (*h*)

§ 100. Grafton *v.* Armitage (*f*) was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for work, labor, and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan-drawing of, a machine, &c. engaged three days, at one guinea per day, 3*l.* 3*s.*; for workman's time in making, &c. and experimenting therewith, 1*l.* 5*s.*; for use of lathe for one week, 12*s.*; for wood and iron to make the drum, and for brass tubing for the experiments, 5*s.*" Defendant insisted, on the authority of Atkinson *v.* Bell, that the action should have been case for not accepting the goods, not debt for work and labor, &c. citing the *dictum* at the close of Bayley J.'s opinion. But Maule J. said: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the *plaintiff* (*sic* plainly meaning *defendant*), or that are to be handed over to him." Erle J. said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink: might he not maintain an action for work and labor in preparing it?" In delivering the decision, Tindal C. J. pointed out as the distinction, that in Atkinson *v.* Bell the substance of the contract was that the machines to be manufactured were to be sold to the defendant, but that in the case before the court the substance of the contract was not that plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labor, and materials in devising for the use of defendant a mode of attaining a given object. Coltman J. concurred, and said that the opinion of Bayley J. was on "precisely the same ground as the lord chief justice puts this case. The claim of a tailor or a

Grafton *v.* Armitage.

(*f*) 2 C. B. 336; 15 L. J. C. P. 20.
(*g*) 1 H. & N. 73; 25 L. J. Ex. 237.
(*h*) 1 B. & S. 272; 30 L. J. Q. B. 252.

shoemaker is for the price of goods when delivered, and not for the work or labor bestowed by him in the fabrication of them."

§ 101. In Clay *v.* Yates, (*i*) the subject was treated by Pollock C. B. in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the defendant a second edition of a work previously published by the defendant, the plaintiff to find the materials, including the paper. Held, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor, furnishing the materials; and that the case was not governed by Lord Tenterden's act. Pollock C. B. said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing, within the 17th section of the statute of frauds, I am of opinion that this is properly an action for work and labor, and materials found. I believe it is laid down in the commencement of Chitty on Pleading, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing. The point made in the case cited, in which Bayley J. gave an opinion (Atkinson *v.* Bell), I think may be answered by the opinion of Maule J. in the court of common pleas (Grafton *v.* Armitage); and then we have to decide the matter as if it were now without any authority at all. It may be that in all these cases part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me *the true rule is this, whether the work and labor is of the essence of the contract, or whether it is the materials that are found.* My impression is, that in a case of work of art, whether it be silver or gold, or marble or common plaster, that is a case of the application of labor of the highest description, and the material is of no sort of importance as compared with the labor, and therefore that all this would be recoverable as work and labor, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. No doubt

Clay *v.* Yates.

(*i*) 1 H. & N. 73; 25 L. J. Ex. 237.

it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered; but still it would not prevent the price being recovered as work and labor, and materials found. It appears to me, therefore, that this was properly sued for as work and labor, and materials found, and that the statute of frauds does not apply; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the act of Lord Tenterden applies;* and one of the reasons why you find no cases on this subject in the books is, that before Lord Tenterden's act passed, the statute of frauds did not apply to the case of a thing begun, whatever it might be." Alderson B. concurred, and Martin B. said: "There are three matters of charge well known in the law: for labor simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that he shall print the work on paper, and that the paper shall be submitted to the author; that the author shall correct it and send it back to the printer, and then the latter shall exercise labor again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labor, and supply materials for it, and he is to be paid for it, and it really seems to me *that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered*, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to be paid for his work and labor, and for the materials he had used upon the work; and, therefore, this is a case of work, labor, and materials, done and provided by the printer for the defendant." The learned baron also put this case: "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it worth 10*s*., surely he might recover on a count for work and labor."

§ 102. In Lee *v.* Griffin, (*k*) the last reported case, the foregoing *opinions* of the chief baron and Baron Martin were questioned, and not followed, though the *decision* was approved. This action was brought by a dentist, to recover 21*l.* for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. When Clay *v.* Yates was quoted by the plaintiff in support of the position that the skill of the dentist was the thing really contracted for, that the materials were only auxiliary, and that the count for work and labor was therefore maintainable, Hill J. said: "Clay *v.* Yates is a case *sui generis*. The printer, the plaintiff there, in effect does work chiefly on the materials which the defendant supplied; although, to a certain extent, the plaintiff may be said to supply materials; *moreover, the printer could not sell the book to any one else.*" Crompton J. said: "*When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.* The case of Clay *v.* Yates turned, as my brother Hill pointed out, upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision, but we should be bound by it in a case precisely similar in its circumstances, which the present is not. *I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labor, and not for the sale of a chattel.* It may be, the cause of action is for work and labor when the materials supplied are merely auxiliary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, viz. *the teeth, are the principal subject-matter;* and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted." Hill J. said: "I think the decision in Clay *v.* Yates perfectly correct, according to the particular subject-matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one and afterwards to be delivered to the other; but *when the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor.* In my opinion, Atkinson *v.* Bell is good law, subject only to the objection to the dictum of Bayley J., which has been repudiated by Maule J. and Erle J. in

Lee *v.* Griffin.

(*k*) 1 B. & S. 272; 30 L. J. Q. B. 252. [See Prescott *v.* Locke, 51 N. H. 96, 97.]

Grafton *v.* Armitage." Blackburn J. said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But *if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy.* In Clay *v.* Yates the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel. . . . . I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been [none] the less for the sale of a chattel." (*l*)

§ 103. In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in Lee *v.* Griffin, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough, in 1814, and closing with Pollock C. B. in 1856. From the very definition of a sale, the rule would seem to be at once deducible, *that if the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel*, and unless that be the case, there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley J. in Atkinson *v.* Bell, and Tindal C. J. in Grafton *v.* Armitage; but it was not clearly and distinctly brought into view before the decision in Lee *v.* Griffin. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result, as will subsequently appear. Remarks on the cases.

§ 104. The principles suggested as affording a test on this sub-

(*l*) [A. ordered from B. a tombstone to be put up at the grave of her husband. The order was verbal. Work upon the tomb-stone was begun before A.'s death, and the monument was put up after her death. It was held that this was a contract for the sale of a chattel, and not one for work and labor, and that it was within the statute. Wolfenden *v.* Wilson, 33 U. C. Q. B. 442.] Manufacture of tombstone.

ject prior to the case of Lee *v.* Griffin were the following: 1st. That if the subject-matter of the contract was not in existence, not *in rerum naturâ*, as Lord Ellenborough expressed it, the contract was not "for the sale of goods." This was the opinion of Lord Ellenborough in Groves *v.* Buck; (*l*) of Abbott C. J. as shown by his comment on Towers *v.* Osborne, in the opinion delivered in Garbutt *v.* Watson; (*m*) and may be inferred from Rondeau *v.* Wyatt (*n*) to have been the opinion of Lord Loughborough. That the decision in Towers *v.* Osborne was wrong, if it went upon the ground that Lord Loughborough states, viz. that the order for the chariot was not a contract or agreement for the sale of a chattel, is no longer questionable. (*o*) The familiar example put by the judges in several of the cases, of an order to a tailor or shoemaker for a garment or pair of shoes, both of which are treated as undoubted cases of contracts for the sale of chattels, is exactly the same as the order in Towers *v.* Osborne. The intention of the parties was that the result should be a transfer for a price, by Towers to Sir John Osborne, of a chattel in which Sir John had no previous property, and this was clearly a contract for a sale.

Principles suggested prior to Lee *v.* Griffin.

First.

§ 105. 2d. The second principle suggested as the true test was by Bayley J., first in Smith *v.* Surman, (*p*) afterwards more fully developed in Atkinson *v.* Bell, (*q*) viz. that if the materials be furnished by the employer, the contract is for work and labor, not for a sale; but if the materials be furnished by the workman who makes up a chattel, he cannot maintain "work and labor," because his labor was bestowed on his own materials and for himself, and not for the person who employed him. The first branch of this rule is undoubtedly correct, as shown by the principles settled in Lee *v.* Griffin; because where the materials are furnished by the employer, there can be no transfer to

Second.

(*l*) 3 M. & S. 178.

(*m*) 5 B. & A. 613.

(*n*) 2 H. Bl. 63.

(*o*) [There are several leading American decisions based upon the ground on which Towers *v.* Osborne went, as stated by Lord Loughborough, and which the author declares to be unquestionably wrong. Such were Mixer *v.* Howarth, 21 Pick. 205; Spencer *v.* Cone, 1 Met. 283; Hight *v.* Ripley, 19 Maine, 137; Cummings *v.* Dennett, 26 Ib. 397; Abbott *v.* Gilchrist, 38 Ib. 260; Crookshank *v.* Burrell, 18 John. 58; Sewall *v.* Fitch, 8 Cowen, 215; Robertson *v.* Vaughn, 5 Sandf. 1; Donovan *v.* Willson, 26 Barb. 138; Mead *v.* Case, 33 Ib. 202, all cited and stated *post*, § 109, note (*y*). See Goddard *v.* Binney, 115 Mass. 450.]

(*p*) 9 B. & C. 568.

(*q*) 8 B. & C. 277.

him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing *can* be due from him save compensation for labor; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labor done, and materials furnished. But the second part of the rule is inaccurate, as, pointed out in Grafton *v.* Armitage and Lee *v.* Griffin. A man may be responsible for damage done to another's chattel, as, for example, to a coachmaker's vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labor done, and materials furnished by the coach-builder, although bestowed on a thing which is his, and is to remain his after being repaired at another's expense.

§ 106. 3d. The third attempt to supply the true test on this matter, previously to its satisfactory settlement in Lee *v.* Griffin, was made by Pollock C. B. in Clay *v.* Yates. (*r*) The proper rule, in his opinion, is this: "Whether the work and labor is of the essence of the contract, or whether it is the materials that are found." This test was decisively rejected by Crompton and Blackburn JJ. in Lee *v.* Griffin. (*s*) It cannot be supported, even in the extreme case put by Martin B. of a portrait worth 300 guineas on a canvas worth 10*s*. If the employer owned nothing whatever that went into the composition of the picture; if neither materials, nor skill, nor labor were supplied by him, it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided; it is not the less true, that none of these elements were owned by the employer before the contract, and that the chattel composed of them is by the terms of the contract to be transferred for a price by the former owner to the employer. (*s*[1]) The test

Third.

(*r*) 1 H. & N. 73; 25 L. J. Ex. 237.

(*s*) [This test has been approved and applied in several important American cases. See Pitkin *v.* Noyes, 48 N. H. 294, 303, 304; Edwards *v.* Grand Trunk Railway Co. 48 Maine, 379; S. C. 54 Ib. 105; Rentch *v.* Long, 27 Md. 188. See, also, Prescott *v.* Locke, 51 N. H. 94, 97, 98; Passaic Manuf. Co. *v.* Hoffman, 3 Daly (N. Y.), 495.]

(*s*[1]) [See Wright *v.* O'Brien, *post*, p. 114.]

suggested by Martin B. in his opinion, as found in the Law Journal Report, is accurate as far as it goes, but it does not cover more than the point in the case before the court. The learned baron said: "Suppose the plaintiff had brought an action to recover the value of that which he had delivered, would that be the value of the book? I apprehend not, for the book might not be worth half the value of the paper it was written on." This is true, and why? Because a part of the materials of the book, — its chief materials, indeed, — to wit, the composition, had been furnished by the employer, belonged to him already, and therefore could not be sold to him by the printer. The only remedy then remaining was an action for work and labor, and materials.

De minimis non curat lex.

§ 107. Cases are sometimes put, as a test of principles, that are so extreme as to be best disposed of by the application of the familiar rule, *de minimis non curat lex*. Thus the example of an attorney employed to draw a deed is dismissed by Blackburn J. in Lee *v.* Griffin with the simple remark that it is an abuse of language to say that the paper or parchment are goods sold and delivered. So, if a man send a button or a skein of silk to be used in making a coat, it would be mere trifling to say that he was part owner of the materials, and that an action for goods sold would not therefore lie in favor of the tailor who furnished the garment. Such matters cannot be considered as having entered into the contemplation of parties when contracting, nor as forming any real part of the consideration for the mutual stipulations.

A chattel intended for a fixture to a freehold.

§ 108. Where a contract is made for furnishing a machine or a movable thing of any kind *and fixing it to the freehold*, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land. (*t*)

Law in America.

§ 109. In America, as before observed, the same perplexity has been exhibited as marks the history of the subject in our own law; and in Lamb *v.* Crafts, (*u*) Chief Justice

(*t*) Cotterell *v.* Apsley, 6 Taunt. 322; Tripp *v.* Armitage, 4 M & W. 687; Clark *v.* Bulmer, 11 M. & W. 243.

(*u*) 12 Met. 356. See, also, the case of Smith *v.* The N. Y. Central Rail. Co. 4

Shaw said: "The distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement." This opinion seems to have been deduced from some observations of Abbott C. J. in Garbutt *v.* Watson, and rests on no satisfactory principle. Mr. Story, whose treatise in the last edition of 1862 contains no reference to the then recent case of Lee *v.* Griffin, avows his difficulty, and suggests that it would probably be held "that where the labor and service were the essential considerations, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute; where the labor and service were only incidental to a subject-matter *in esse*, the statute would apply." (*x*) This is the rule suggested by Pollock C. B. in Clay *v.* Yates, and rejected in Lee *v.* Griffin. (*y*) In Mr. Hilliard's

Keyes, 180, in which all the authorities are reviewed.

(*x*) Story on Sales, § 260 c.

(*y*) [One of the earliest American cases on this subject is Mixer *v.* Howarth, 21 Pick. 205, decided in 1838. Howarth, the defendant, went to Mixer's shop, and selected a lining for a carriage. Mixer had on hand the body of a carriage nearly finished, but not lined, and upon a conversation between the parties it was agreed that Mixer should finish a carriage for Howarth in a fortnight, and the unfinished carriage was finished accordingly. Howarth had notice of the fact, and was requested to take the carriage away. Shaw C. J. said: "It is very clear, we think, that by this contract no property passed to the defendant. The carriage contemplated to be sold by the plaintiff to the defendant did not then exist. It was to be constructed from materials, partly wrought indeed, but not put together. It was, therefore, essentially an agreement by the defendant with the plaintiff to build a carriage for him, and on his part to take it when finished and pay for it, at an agreed or at the reasonable value. This is a valid contract, and made on a good consideration, and therefore binding on the defendant. But it was not a contract of sale, within the meaning of the statute of frauds, and therefore need not be proved by a note in writing. When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed in future, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement." Compare with this case the case of Flint *v.* Corbitt, 6 Daly, 429, *post*, p. 114. It will be observed that the distinction between the contract in this case, which is held not to be within the statute, and an ordinary executory agreement for the sale of chattels, which is held to be within the statute, is not very clearly marked, — most of the distinguishing suggestions

Massachusetts decisions.

Mixer *v.* Howarth.

Treatise on Sales, the contradictory decisions are given without any attempt on the part of the learned author to reconcile them

would apply to the one as well as to the other. In the subsequent case of Spencer *v.* Cone, 1 Met. 283, it was decided, on the authority of Mixer *v.* Howarth, that an agreement to make machines for a specified price, and to find the materials therefor, is not within the statute. The court said: "The agreement was, in substance, for the furnishing of labor and materials, and not a contract of sale." In the later case of Gardner *v.* Joy, 9 Met. 177, it appeared that the plaintiff, Gardner, asked the defendant what he would take for candles; the defendant said he would take twenty-one cents per pound; the plaintiff replied he would take one hundred boxes; the defendant answered the candles were not manufactured, but he would manufacture and deliver them in the course of the summer. Held, that this was a contract of sale. Shaw C. J. said: "If it is a contract to sell and deliver goods, whether they are completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute." "The case," says the learned judge, "seems not to be distinguishable from that of Garbutt *v.* Watson." In Clark *v.* Nichols, 107 Mass. 547, the parties entered into an oral agreement under which the defendants agreed to deliver to the plaintiff a quantity of ash bending-stuff, and a quantity of ash plank, for a price amounting to more than fifty dollars, and it also appeared that the bending-stuff was the butts of trees, sawed so as to render them suitable to be manufactured into wagon shafts, and that the defendant was to saw all the logs not suitable for bending-stuff into plank of various dimensions, under the direction of the plaintiff. Chapman C. J. said: "We think this was a contract to sell and deliver the bending-stuff and plank, and not a contract for labor in manufacturing the articles. It is not like the cases of Mixer *v.* Howarth, 21 Pick. 205, and Spencer *v.* Cone, 1 Met. 283, but like Gardner *v.* Joy, 9 Met. 177, Lamb *v.* Crafts, 12 Met. 353, and Waterman *v.* Meigs, 4 Cush. 497, and was within the statute of frauds." The distinction between a contract to sell and deliver goods, and a contract to manufacture them, was again discussed in Goddard *v.* Binney, 115 Mass. 450, by Ames J., who said that the rule established in Mixer *v.* Howarth, 21 Pick. 205, "has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. We see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter." In this case of Goddard *v.* Binney, *supra*, it appeared that the plaintiff agreed to build a buggy for the defendant, and to deliver it at a time certain. The defendant gave directions as to the style and finish of the buggy, and it was built in conformity with his directions, and marked with his monogram. Before the buggy was finished the defendant called to see it; and in answer to an inquiry of the plaintiff, asking if he might sell the buggy, replied that he would keep it; when the buggy was finished, the plaintiff notified the defendant of the fact, and sent him a bill of it. The defendant retained the bill and promised "to see" the plaintiff "about it." The buggy was after-

Gardner *v.* Joy.

Clark *v.* Nichols.

Massachusetts criterion.

Goddard *v.* Binney.

or deduce any general principle applicable to the controverted question. (*z*)

wards destroyed by fire while in the plaintiff's possession; and it was held, in a suit by the plaintiff for the price, that the agreement was not a contract of sale within the statute of frauds; and that the property in the buggy had passed to the defendant and he was liable. Ames J. said: "It is proper to say also that the present case is a much stronger one than Mixer *v.* Howarth. In this case the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action." In Hight *v.* Ripley, 19 Maine, 137, decided in Maine (1841), it appeared that the parties had entered into a contract in which the defendants promised, on terms agreed, to furnish "as soon as practicable," 1,000 to 1,200 lbs. malleable hoe-shanks, agreeable to patterns left with them by the plaintiff, — and to furnish a larger amount, if required, at a diminished price; and it was decided that this must be considered a contract for the manufacture of the articles referred to, and so not within the statute of frauds. Shepley J. said: "A contract for the manufacture of an article differs from a contract of sale in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party combined with the materials for which he contracted, and to which he is entitled. In Crookshank *v.* Burrell, 18 John. 58, the contract was, that the defendant should make the wood-work of a wagon for the plaintiff by a certain time; and it was decided not to be a contract for a sale." The court also rely on Mixer *v.* Howarth, above cited; and in the case of Cummings *v.* Dennett, 26 Maine, 397, 401, the same court, on the authority of Mixer *v.* Howarth and Spencer *v.* Cone, *supra*, say: "It is very clear that if application is made to a mechanic or manufacturer for articles in his line of business, and he undertakes to prepare and furnish them in a given time, such a contract, though not in writing, is not affected by the statute." In Abbott *v.* Gilchrist, 38 Maine, 260, it was decided upon the distinction above quoted from the decision in Hight *v.* Ripley, between contracts for the manufacture of articles and contracts of sale, that an oral agreement to procure and deliver, at a time and place fixed, a vessel frame, to be hewn and prepared according to certain moulds, was not affected by the statute of frauds, but binding. In a later case of Edwards *v.* The Grand Trunk Railway Co. 48 Maine, 379, the defendants contracted "to take all the wood the plaintiff would put on the line of their road during the season, at the same price they had paid him before for wood, or more, if the wood was better." This was held to be a sale within the statute of frauds. The court maintained the distinctions taken in their former decisions, but said: "The fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute. It must also appear that the particular person who is to manufacture it, or the mode and manner, or materials, enter into and make part of the contract. Hight *v.* Ripley; Fickett *v.* Swift, 41 Maine, 68, 69. . . . . A test, in some cases, is whether the person contracting to take the article is bound to receive one which

Maine decisions.

Hight *v.* Ripley.

Abbott *v.* Gilchrist.

Edwards *v.* Grand Trunk Ry.

Maine rule.

(*z*) Hilliard on Sales, pp. 464–467.

§ 110. It was at one time questioned whether sales of goods by public auction were embraced within the statute. Lord Ellenborough's strong *dicta* in Hinde *v.* Whitehouse, (*a*)

Auction sales.

may be bought or procured by the other party after the contract. If he is, then it is a case of sale." The case of Edwards *v.* Grand Trunk Railway Co. was again before the same court, in 54 Maine, 105, and they maintained the ground taken in their former decision. This last test was suggested by Mr. Justice Hubbard, in his charge to the jury, in the case of Gardner *v.* Joy, 9 Met. 178. In Crockett *v.* Scribner, 64 Maine, 447, the court held it to be a well-established doctrine, that a contract to manufacture and deliver an article to be made out of a particular lot of timber already cut for the purpose and belonging to the manufacturer, is not within the statute of frauds, and is valid though not in writing. This subject was thoroughly discussed, and the English and American cases ably and extensively examined and reviewed, by Bellows J. in Pitkin *v.* Noyes, 48 N. H. 294. The learned judge said: "If a person contract to manufacture and deliver at a future time certain goods, at prices then fixed, or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute. If, on the other hand, the bargain be to deliver goods of a certain description at a future time, and they are not existing at the time of the contract, but the seller does not stipulate to manufacture them himself, or procure a particular person to do so, the contract is within the statute. The distinction is, that in the one case the party stipulates that he will himself manufacture the article, and the buyer has the right to require him to do it, and cannot be compelled to take one as good, or even better, if made by another, while in the other case the seller only agrees to sell and deliver the article, and is under no obligation to make it himself, but may purchase it of another." In this case the doctrine was held to apply to an agreement by the defendant to raise three acres of potatoes, and deliver them to the plaintiffs, who were manufacturers of starch, at a fixed price per bushel. And it was deemed proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them, or whether it was substantially a sale of potatoes, which he might raise himself, or procure by purchase or otherwise. See the remarks of Foster J. upon this, in Prescott *v.* Locke, 51 N. H. 98. In the previous case, in New Hampshire, of Gilman *v.* Hill, 36 N. H. 311, where there was a contract made in August to sell to the plaintiff all the sheep pelts taken off by the seller, who was a butcher, between the first of July and the first of October, it was held that, in respect to all, as well those not then taken off as those that were ready for delivery, it was a contract of sale of goods, and not for work and labor, and was within the statute. The case of Prescott *v.* Locke, 51 N. H. 94, disclosed a contract for the purchase of such walnut spokes as the plaintiff should saw at his mill, not exceeding 100,000 at $40 per 1,000 to be delivered at the mill in lots of 10,000 each, subject to the defendant's selection. The court, adopting substantially the principles stated in the two preceding cases, held that this was not a contract for the plaintiff's labor, but for the sale of merchandise to be subsequently manufactured. The decision of Lee *v.* Griffin, cited and stated at length by the author in the text, was noticed both in Pitkin *v.* Noyes and Prescott *v.*

Crockett *v.* Scribner.

New Hampshire decisions.

Pitkin *v.* Noyes.

New Hampshire rule.

Gilman *v.* Hill.

Prescott *v.* Locke.

(*a*) 7 East, 558.

in 1806, seem to have put an end to the doubt, and the authority of that case was recognized in Kenworthy *v.* Schofield, (*b*) so that

Locke, *supra*, particularly in the latter case, where Mr. Justice Foster has stated, and apparently adopted, the rule of distinction in this class of cases laid down by Mr. Justice Blackburn, and quoted by the author, *ante*, § 102. Foster J. said: "Where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. In such case, the party supplying the chattel cannot recover for his labor in making it. If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for labor; but if the result of the contract is that the party has done work and labor which end in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. Illustrations of the former proposition are: Where a carriage was ordered to be made, which would never, but for the order, have had an existence, but when made becomes the subject of sale. This principle has been applied even to a contract for the making of a coat, a statue, a set of artificial teeth, from materials provided by the maker, even where the peculiar skill of the maker is considered to be an important element in the consideration of the contract; *for the value of the skill and labor, as compared with that of the material supplied, is not a criterion to determine what the contract is.* The true construction in this case is, that the contract was for the future sale of the spokes, when they should be in a state fit for delivery. The vendor, so long as he was sawing the timber and doing any other work preparing it for delivery in the form of spokes, was doing work for himself upon his own materials, and not for the defendants. The plaintiff was to convert the timber into spokes, and, when so converted, the delivery and acceptance thereof were to occur. Until that time the contract would remain executory, and the title to the property would continue to be in the plaintiff. If the plaintiff had caused or permitted the spokes to be improperly or imperfectly manufactured, or to be made from other than good walnut timber, the defendants would not have been bound to accept or pay for them. Gorham *v.* Fisher, 30 Vt. 428." In Connecticut it was held that an agreement to deliver to a party one hundred sewing-machines of a certain description, at a time and place designated, on condition that a part of them, not then completed, were finished in season by a third person, who worked in the seller's shop, and with his materials, was a contract of sale, and not for the manufacture of the machines; but even if it were otherwise as to the part not completed, sixty-four in number, still, as the contract was entire, and as it was clear that in respect to the thirty-six it was a sale, the whole, it was said, must be regarded as within the statute. Atwater *v.* Hough, 29 Conn. 508. See Allen *v.* Jarvis, 20 Conn. 38. In New York the distinction is said to be fully recognized between an agreement for the sale and delivery at a future day of articles then existing, and an agreement to sell and deliver articles not then manufactured, but to be made afterwards, holding that the latter are contracts for work and labor and materials found, and not within the statute. Bellows J. in Pitkin *v.* Noyes, 48 N. H. 299. In Crookshank *v.* Burrell, 18 John. 58, the contract was, that the defendant should make the wood-work of a wagon for the plaintiff by a certain time, and it was decided not to be a contract for a sale. In Sewall *v.* Fitch, 8 Cowen, 215, a contract for nails of a particular manufacture, but not then made, was held not to be within the statute; so, a contract to make and deliver one thousand molasses shooks, at a fixed price. Robertson *v.* Vaughn, 5 Sandf. 1. So, in Bronson *v.* Wiman, 10 Barb. 406,

Connecticut decision.

New York rule.

New York decisions.

(*b*) 2 B. & C. 945.

the question suggested on this point by Lord Mansfield, in Simon *v.* Motivos, (*c*) has long been at rest. (*d*)

a contract for flour to be ground from wheat, bargained for, but not then received, was decided not to be within the statute. See, also, to the same effect, Donovan *v.* Willson, 26 Barb. 138; Parker *v.* Schenck, 28 Ib. 38; Mead *v.* Case, 33 Ib. 202; Higgins *v.* Murray, 73 N. Y. 252. But in Downs *v.* Ross, 23 Wend. 270, this subject was discussed with great ability by Bronson J., and the English and some American cases reviewed; and the court decided that a sale of seven hundred bushels of wheat, part of which was yet to be threshed, and the rest to be cleaned more thoroughly, and all to be delivered in six days, at a price fixed, was a sale of goods, and within the statute. Cowen J. dissented, upon the ground that the question was closed by the early English and New York decisions; but said that, were it an open question, he would not deny that a contract to manufacture and sell would more correctly be considered a sale within the statute. In Wright *v.* O'Brien, 5 Daly, 54, the plaintiff employed an artist to copy in crayon, from a small photograph, a likeness of the plaintiff's child. Of the contract Daly C. J. said: "This was not a contract for the sale and delivery of goods, wares, and merchandise, in which both delivery and acceptance are essential to the validity of the contract under the statute of frauds. It was the employment of an artist to copy in crayons a photograph, for which he was to be paid a specified sum — an agreement for the performance of work and labor, in which almost the sole ingredient was his labor and skill; the materials, which consisted of the canvas upon which the work was executed, and the crayon pencils with which it was done, being unimportant and merely ancillary to his contract for skill, work, and labor."

Wright *v.* O'Brien.

In Flint *v.* Corbitt, 6 Daly, 429, the plaintiff kept a large warehouse for the sale of furniture, which he manufactured at another place in New York city, and finished at the warehouse. The defendant went to the warehouse and selected a sofa, two arm-chairs, and four other chairs, from patterns shown there, which were not covered, or only covered in part, the plaintiff having a large number of the like articles already manufactured and in the warehouse ready to be covered according to the taste of customers. The defendant chose brocatelle for the covering, this not being a usual covering. All that remained to be done to the furniture was to cover and varnish it. The articles were covered, varnished, and sent to the defendant's house, but he refused to receive them. Daly C. J. said: "This was a contract of sale. . . . . When the contract is for the purchase of an article which the vendor usually has for sale in the course of his business, which he keeps in his warehouse substantially made, but not entirely finished, that the taste or wish of the purchaser may be consulted as to the final finish, the finishing of it in the way that the purchaser prefers does not change it from a contract of sale into a contract for work and labor. What is in contemplation of the parties is the purchase and sale of an article which is examined and selected, but upon which something more is to be done, which, as a matter of taste, choice, or expense, is left to the purchaser." See Rentch *v.* Long, 27 Md. 188; 2 Kent, 511, note (*d*); Phipps *v.* M'Farlane, 3 Minn. 109; Seymour *v.* Davis, 2 Sandf. 239; O'Neil *v.* N. Y. Mining Co. 3 Nev. 141; Cooke *v.* Millard, 5 Lansing, 243; S. C. 65 N. Y. 352; Passaic Manuf. Co. *v.* Hoffman, 3 Daly (N. Y.), 495; Bates *v.* Coster, 1 Hun, 400; Kellogg *v.* Witherhead, 4 Ib. 273; Smith *v.* N. Y. Cent. Ry. 4 Keyes, 180; Parsons *v.* Loucks, 48 N. Y. 17; Deal *v.* Maxwell, 51 Ib. 652; Courtwright *v.* Stewart, 19 Barb. 455.]

Flint *v.* Corbitt.

(*c*) 3 Burr. 1921, and 1 W. Bl. 599.

(*d*) [Davis *v.* Rowell, 2 Pick. 63; Pike *v.* Balch, 38 Maine, 302, 310; O'Donnell *v.* Leeman, 43 Ib. 158, 160; Morton *v.* Dean, 13 Met. 385; People *v.* White, 6 Cal. 75; Talman *v.* Franklin, 3 Duer (N. Y.), 395; 2 Kent, 539.]

CHAPTER II.

WHAT ARE GOODS, WARES, AND MERCHANDISE.

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§ 111. THE 17th section of the statute applies to contracts for the sale of "goods, wares, and merchandise," words which comprehend all corporeal movable property. The statute, therefore, does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights and property. (*a*) The following cases have been decided on

Choses in action not within the statute.

(*a*) [In some of the American States the same construction of the corresponding provision of their statute of frauds has been adopted. In Indiana the word "goods" alone is used in the seventh section of the statute of frauds, which corresponds to the seventeenth section of the English statute; but it is held that the legal effect of the section remains the same and that it does not apply to contracts for the sale of shares, notes, checks, bonds, or evidences of value. Vawter *v.* Griffin, 40 Ind. 593. So in New Hampshire, it was held that promissory notes are not embraced in the terms "goods, wares, and merchandise," as used in the statute of frauds. Whittemore *v.* Gibbs, 24 N. H. 484. See Hudson *v.* Weir, 29 Ala. 294. In Beers *v.* Crowell, Dudley (Ga.), 28, it was decided that treasury checks on the Bank of the United States were not within the statute. But in Baldwin *v.* Williams, 3 Met. 367, it was decided in Massachusetts that a sale of promissory notes is within the statute. So of shares in a manufacturing corporation. Tisdale *v.* Harris, 20 Pick. 9; North *v.* Forest, 15 Conn. 404; Pray *v.* Mitchell, 60 Maine, 430; Colvin *v.* Williams, 3 Harr. & J. 38; Thompson *v.* Alger, 12 Met. 428; Ross J.

"Goods," &c.

Indiana.

New Hampshire.

Georgia.

Massachusetts.

Connecticut.

Maine.

Maryland.

this point: The statute does not apply to a sale of shares in a joint stock banking company, Humble *v.* Mitchell; (*b*) nor to a sale of stock of a foreign state, Heseltine *v.* Siggers; (*c*) nor to a sale of railway shares, Tempest *v.* Kilner, (*d*) Bowlby *v.* Bell, (*e*) Bradley *v.* Holdsworth, (*f*) and Duncroft *v.* Albrecht; (*g*) nor of shares in a mining company on the cost-book principle, Watson *v.* Spratley, (*h*) Powell *v.* Jessop. (*i*)

§ 112. Most of the foregoing decisions went upon the ground

in Fay *v.* Wheeler, 44 Vt. 292, 293. A sale of bank bills was held within the statute of frauds in Maine. Gooch *v.* Holmes, 41 Maine, 523; Riggs *v.* Magruder, 2 Cranch C. C. 143. In Somerby *v.* Buntin, 118 Mass. 279, 285, Gray C. J. said: "It was held by the court of chancery in England, before the American Revolution, that shares in a corporation were goods, wares, and merchandise within the statute of frauds. Mussel *v.* Cooke, Pre. Ch 533; Crull *v.* Dodson, Sel. Cas. in Ch. 41." In Florida the statute of frauds contains the expression "personal property," in addition to the words used in the 17th section of the English statute; and it has been held in that state that shares are included in the statute. Southern Life Ins. & Trust Co. *v.* Cole, 4 Florida, 359. See Gadsden *v.* Lance, 1 McMullan Eq. 87. In New York choses in action are expressly named as requiring a writing for the sale of them, and the cases below will help to show the effect of the enactment. People *v.* Beebe, 1 Barb. 379; Allen *v.* Aguirre, 3 Selden, 543; S. C. 10 Barb. 74; Thompson *v.* Alger, 12 Met. 436; Artcher *v.* Zeh, 5 Hill, 200; Peabody *v.* Speyers, 56 N. Y. 230; Hagar *v.* King, 38 Barb. 200; Kessel *v.* Albetis, 56 Ib. 362. In a case where the question arose whether an oral agreement for the sale of an interest in an invention, before letters patent are obtained, is a contract within the statute of frauds, Gray C. J. said: "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right or franchise, granted by the government, securing to the inventor and his assigns the exclusive right to make, use, and vend the article patented; or a share in that right, which has no separate or distinct existence at law until created by the instrument of assignment; would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough." Somerby *v.* Buntin, 118 Mass. 279, 285. Chanter *v.* Dickinson, 5 M. & G. 253, was cited in support. In Galpin *v.* Atwater, 29 Conn. 93, p. 98, Ellsworth J. expressed an opinion to the contrary, but the point was not necessarily involved in the decision. The point is rendered somewhat unimportant as regards the statute of frauds by virtue of Congressional enactments. R. S. of U. S. § 4898. Jordan *v.* Dobson, 4 Fisher, 232; Dalgleish *v.* Conboy, 26 U. C. C. P. 254. See Blakeney *v.* Goode, 30 O. St. 350. In Springfield *v.* Drake, 58 N. H. 19, Bingham J. said: "A patent is personal property . . and, if it were not for the law of Congress, could be conveyed by parol." Burke *v.* Partridge, 58 N. H. 349, p. 353.]

Florida.

New York.

As to sale of an interest in an invention before and after letters patent granted.

(*b*) 11 A. & E. 205.

(*c*) 1 Ex. 856.

(*d*) 3 C. B. 249.

(*e*) 3 C. B. 284.

(*f*) 3 M. & W. 422.

(*g*) 12 Sim. 189.

(*h*) 10 Ex. 222, and 24 L. J. Ex. 53.

(*i*) 18 C. B. 336, and 25 L. J. C. P. 199.

that the sales were of choses in action not properly embraced in the words "goods, wares, and merchandise," but some turned upon other enactments, to which it will now be convenient to refer. These are, first, the 4th section of the statute of frauds; and secondly, the exemption in the stamp act, of agreements relating to the sale of goods, wares, and merchandise.

4th section of statute of frauds.

§ 113. The 4th section (*l*) of the act of 29 Car. 2, c. 23, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; *or upon any contract or sale of lands*, tenements, or hereditaments, *or any interest in or concerning them;* or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The stamp act, 55 Geo. 3, c. 184, in the schedule (reënacted in the stamp act, 1870), title "Agreements," exempts from stamp duties every "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandise."

Stamp laws.

Difference between 4th and 17th sections.

§ 114. It is often important to determine whether a sale of certain articles attached to the soil, such as fixtures and growing crops, is governed by the 17th section as being a sale of "goods, wares, and merchandise," or by the 4th section, as a sale of an "interest in or concerning land." Though these two sections, on a cursory perusal, might seem to be substantially the same, both requiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under the 4th section require a written note or memorandum, under all circumstances, and for any amount or value. But under the 17th section, the necessity for the writing does not exist when the value is under 10*l*., and it may be dispensed with

(*l*) It was held in Leroux *v.* Brown, 12 C. B. 801, and 22 L. J. C. P. 1, that this section is applicable to a contract made in a foreign country. See remarks on the case by Willes J. in Gibson *v.* Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 5.

in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under the 17th section is exempt from stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

What is an interest in land under the 4th section.

§ 115. Complaint has been made at different times of the unsatisfactory character of the decisions in which the courts have sought to establish rules distinguishing with accuracy and certainty whether a contract for the sale of things attached to the soil be or not a sale of an interest in land within the 4th section. Lord Abinger, in 1842, gave expression to this complaint in a somewhat exaggerated form when he said, "It must be admitted, taking the cases altogether, that no general rule is laid down by any one of them that is not contradicted by some other. (*m*)

§ 116. Before entering upon an examination of the decisions, it will conduce to a proper understanding of the subject to transcribe in full the remarks of Mr. Justice Blackburn on the general principles of law involved in the question. "The statutes are now applicable to all contracts for the sale of 'goods, wares, and merchandise,' words which, as has been already said, comprehended all tangible movable property; I say movable property, for things attached to the soil are not goods, though when severed from it they are; thus, growing trees are part of the land, but the cut logs are goods; and so, too, bricks or stones, which are goods, cease to be so when built into a wall, — they then become a part of the soil. Fixtures, and those crops which are included amongst emblements, though attached to the soil, are not for all purposes part of the freehold.

§ 117. "It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. 4, c. 14, (*n*) if not of the 29 Car. 2, c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold; it is an executory agreement for the sale of

(*m*) Rodwell *v.* Phillips, 9 M. & W. 505. (*n*) Lord Tenterden's act, *ante*, § 93.

goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, When do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. 4, c. 14, a contract for the sale of goods, wares, and merchandise, within the 17th section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the 17th section of the statute of frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the 4th section, which may, however, be the case, though it is not a sale of goods, wares, and merchandise, within the seventeenth." (*o*) Nothing is to be found in the cases reported since this perspicuous exposition was published to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities then extant. There can be little hazard, therefore, in laying down the rules that govern this subject, supporting them by the appropriate decisions, and calling attention to such cases as seem to conflict with the general current of authority.

§ 118. *The first principle then is*, that an agreement to transfer the property in anything attached to the soil at the time of the agreement, *but which is to be severed from the soil, and converted into goods*, BEFORE *the property is transferred to the purchaser*, is an agreement for the sale of goods, an executory agreement, governed by Lord Tenterden's act, and therefore within the 17th section. (*p*) In Smith *v.* Surman (*q*) the agreement was to sell stand-

First principle. Where growing crop is to be severed before property passes. Smith *v.* Surman.

(*o*) Blackburn on Sales, 9–10.

(*p*) [See *post*, § 126, note (*y*), and cases cited.]

(*q*) 9 B. & C. 561.

ing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. Held to be within the 17th section. Bayley B., in referring to this case, in Earl of Falmouth *v.* Thomas, (*r*) lays stress on the fact, "that the *seller* was to cut down; the timber was to be made a chattel by the *seller*." (*s*) In Parker *v.* Staniland (*t*) the sale was by the plaintiff of all the potatoes on a close of two acres, at 4*s.* 6*d.* a sack, and the defendant was to get them immediately. Here, also, it was held that there was a sale of chattels, and no transfer of any interest in the land; but both Lord Ellenborough and Mr. Justice Bayley put the case on the ground that the potatoes were to be taken away *immediately*, and to gain nothing by further growth in the soil; (*u*) and they made this fact the ground for distinguishing the case from Crosby *v.* Wadsworth, (*x*) and Waddington *v.* Bristow, (*y*) where the sales of growing crops of grass had been held to come under the 4th section. In Warwick *v.* Bruce, (*z*) decided by the king's bench in 1813, which was followed by Sainsbury *v.* Matthews, (*a*) in the exchequer, in 1838, the sale was of potatoes *not mature*, and that were to be dug by the *purchasers* when ripe, in the former case for a gross sum, and in the latter at 2*s.* per sack; and in both cases the distinctions suggested in Smith *v.* Surman and Parker *v.* Staniland were disregarded; and the sale in Warwick *v.* Bruce was held not to be of an interest in land under the 4th section, while the decision in the exchequer case went the full length of deciding that the sale was one of goods and chattels, governed by the 17th section. The distinction between crops of mature and immature *fructus industriales*

Parker *v.* Staniland.

Warwick *v.* Bruce.

Sainsbury *v.* Matthews.

(*r*) 1 C. & M. 105.

(*s*) [See *post*, § 126, note (*y*), and cases cited. In Marshall *v.* Green, 1 C. P. Div. 40, Lord Coleridge C. J., referring to the case of Smith *v.* Surman, said: "The only distinction that I can see between that and the present case is, that there the trees were to be cut by the vendor; but Littledale J. held that, 'if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in the land within the meaning of the statute.'" It was decided in the above case of Marshall *v.* Green, that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract for the sale of land or any interest therein, within the 4th section of the statute of frauds.]

(*t*) 11 East, 362.

(*u*) [*Post*, § 126, note (*y*); Byasse *v.* Reese, 4 Metc. (Ky.) 372; Huff *v.* McCauley, 53 Penn. St. 206; Marshall *v.* Green, 1 C. P. Div. 35.]

(*x*) 6 East, 602.

(*y*) 2 B. & P. 452.

(*z*) 2 M. & S. 205.

(*a*) 4 M. & W. 343.

was also expressly repudiated by Littledale J. in Evans *v.* Roberts. (*b*) In Washbourn *v.* Burrows, (*c*) where the pleadings averred that certain crops of grass, growing on a particular estate, were assigned as security, it became necessary to inquire whether this averment necessarily implied the transfer of an interest in land. The court, after taking time to consider, intimated that this plea would be satisfied by proving that the grass was to be severed from the soil, and delivered as a chattel. Rolfe B., in delivering the judgment, said: "Certainly, where the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel." (*d*)

Washbourn *v.* Burrows.

§ 119. In most of the foregoing cases it will be observed, that under the contracts the property in the thing sold remained in the vendor till after severance. In Smith *v.* Surman the price depended on the measurement of the timber after cutting it, for it was sold at so much a foot; and in Parker *v.* Staniland and Sainsbury *v.* Matthews the potatoes were also to be measured after being gathered, in order to determine the price. If the thing sold had been destroyed before measurement, the loss would have fallen on the vendor, because the property remained in him. (*Post*, book II. ch. iii.) The bargain therefore was simply that the things sold were to be severed and converted into chattels before the sale took effect, and fell under the first principle above stated. (*e*) But Warwick *v.* Bruce is governed by the rule next to be stated.

§ 120. The second principle on this subject is, that where there is a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, as grass, timber, fruit on trees, &c. &c. which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labor of man, in sowing and reaping, planting and

Second principle. Where property passes before severance.

(*b*) 5 B. & C. 836.

(*c*) 1 Ex. 107.

(*d*) [See *post*, § 124, note (*p*); Grove J. in Marshall *v.* Green, 1 C. P. Div. 44.]

(*e*) [*Post*, § 126, note (*y*).]

gathering. The former are an interest in land, embraced in the 4th section; (*f*) the latter are chattels, for at common law a growing crop, produced by the labor and expense of the occupier of lands, was, as the representative of that labor and expense, considered an independent chattel. (*g*)

If *fructus naturales*, 4th section applies.

§ 121. The first and leading case in which this distinction was fully considered was Evans *v.* Roberts. (*g*) A verbal contract was made, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid one shilling earnest. The action was assumpsit "for crops of potatoes bargained and sold," and it was objected that this was a contract of sale of an interest in or concerning land, within the meaning of the 4th section of the statute of frauds. Bayley J. said: "I am of opinion that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale or delivery of things, which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; *the vendor was to raise the potatoes from the ground*, at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument to show that this contract gave the vendee an interest in the land, within the meaning of the 4th section of the statute of frauds, are distinguishable from the present case. In Crosby *v.* Wadsworth, (*h*) the buyer did acquire an interest in the land, for by the terms of the contract, *he* was to mow the grass, and must therefore have had possession of the land for that purpose. Besides, in that case the contract was for the growing

If *fructus industriales*, 17th section applies.

Evans *v.* Roberts.

(*f*) [If the parties to a contract for the sale of growing trees intend that the property in the trees shall pass presently before severance from the soil, the contract comes within the statute, and must be in writing. Colt J. in White *v.* Foster, 102 Mass. 378; Owens *v.* Lewis, 46 Ind. 488. See *post*, § 126, note (*y*).]

(*g*) Per Bayley J. in Evans *v.* Roberts, 5 B. & C. 836; [Kingsley *v.* Holbrook, 45 N. H. 313, 318, 319; Dunne *v.* Ferguson, Hayes Ir. R. 542; Haydon *v.* Crawford, 3 U. C. Q. B. (O. S.) 583; Brown *v.* Stanclift, 20 Alb. L. J. 55; Killmore *v.* Howlett, 48 N. Y. 569.]

(*h*) 6 East, 602.

grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*; it goes to the heir and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold, (*i*) and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant; and if a growing crop of potatoes be chattels, then they are not within the provisions of the 4th section of the statute of frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them." And again, at p. 835: "It has been insisted that the right to have the potatoes remain in the ground is an interest in the land, but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice, 1039, it is laid down, that under a *fieri facias* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executor, or fixtures, which may be removed by the tenant; but not furnaces, apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the heir. The former may be seized and sold under the *fi. fa.*, the latter cannot. *The former must, therefore, in contemplation of law, be considered chattels.*" At the close of his opinion, the learned judge said: "I am of opinion that there was not in this case any contract or sale of lands, &c. *but that there was a contract for the sale of goods, wares, and merchandise, within the meaning of the 17th section*, though not to the amount which makes a written note or memorandum of the bargain necessary." Holroyd J. said: "The contract, being for the sale of the *produce* of a given quantity of land, was a contract to render what afterwards would become a chattel." Littledale J. was as explicit as Bayley J. in taking the distinction above pointed out. He said, p. 840: "This contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute

(*i*) Com. Dig. tit. Biens, G.

part of the realty. . . . . Lord Coke in all cases distinguishes between the land and the growing produce of the land; he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labor and expense), in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land within the meaning of the 4th section of the statute of frauds; *but a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute.*"

Jones v. Flint.

§ 122. In Jones *v.* Flint, (*l*) decided in 1839, Evans *v.* Roberts was followed and approved, on the ground of the distinction between *fructus industriales*, which are chattels, and the natural growth of grass, &c. which are part of the freehold; and any distinction between crops mature and immature, as well as between cases where the buyer or the seller is to take the crop out of the ground, was expressly rejected. In both cases, also, the earlier *dictum* of Sir James Mansfield, in Emmerson *v.* Heelis, (*m*) is practically overruled. The two cases of Evans *v.* Roberts and Jones *v.* Flint have remained unquestioned to the present time as authority for the rule that *fructus industriales*, even when growing in the soil, are chattels; while another series of decisions have maintained the principle that the natural growth of the land is part of the freehold, and that contracts for the sale of it, transferring the property before severance, are governed by the 4th section.

Rodwell v. Phillips.

§ 123. In Rodwell *v.* Phillips, (*n*) a written sale of "all the crops of fruits and vegetables of the upper portion of the garden, from the large pear trees, for the sum of 30*l.*," the purchaser having paid down 1*l.* as deposit, was held by Lord Abinger to be the sale of an interest in land; but the *ratio decidendi* was that it certainly was not such a contract for the sale of goods, wares, and merchandise as under the stamp act was exempted, and the plaintiff was nonsuited, the agreement not being stamped.

§ 124. In Carrington *v.* Roots, (*o*) plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain

(*l*) 10 Ad. & E. 753.
(*m*) 2 Taunt. 38.
(*n*) 9 M. & W. 502; [Brown *v.* Stanclift, 20 Alb. L. J. 55.]
(*o*) 2 M. & W. 248.

close, to be cleared by the end of September, at 5*l.* 10*s.* per acre: half the price to be paid down before any of the grass was cut. Held by all the judges, to be void under the 4th section. This case is in entire conformity with Crosby *v.* Wadsworth, (*q*) where Lord Ellenborough held a similar contract to be an agreement for the sale of an interest in land, "conferring an exclusive right to the vesture of the land during a limited time and for given purposes." In Scorell *v.* Boxall, (*r*) a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in Teal *v.* Auty, (*s*) an unstamped agreement for the sale of growing poles, were held to be agreements for the sale of an interest in land. (*t*) In the former case, Hullock B. cited with approval, and recognized as authority, the case of Evans *v.* Roberts. (*u*)

Carrington *v.* Roots.

Crosby *v.* Wadsworth.

Scorell *v.* Boxall.

Teal *v.* Auty.

§ 125. In all of these cases it will be remarked that the distinction pointed out by Mr. Justice Blackburn in his treatise is found to prevail. In Rodwell *v.* Phillips, the whole crop of fruit on the trees; in Carrington *v.* Roots, and Crosby *v.* Wadsworth, the whole growth of grass on the land; and in Scovell *v.* Boxall, and Teal *v.* Auty, the standing undergrowth, and the growing poles, were all transferred to the purchasers *before severance* from the soil.

§ 126. From all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz.: Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the statute of frauds. (*x*) Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement,

General proposition as to growing crops.

(*q*) 6 East, 602.

(*r*) 1 Y. & Jerv. 396.

(*s*) 2 B. & B. 101.

(*t*) [See, to the same effect, Kingsley *v.* Holbrook, 45 N. H. 313, 319.]

(*u*) 5 B. & C. 836.

(*x*) [See Kingsley *v.* Holbrook, 45 N. H. 313, 318, 319; Howe *v.* Batchelder, 49 Ib. 204, 208; Buck *v.* Pickwell, 27 Vt. 157; Dunne *v.* Ferguson, Hayes Ir. R. 541; Bryant *v.* Crosby, 40 Maine, 9, 21–23; Cutler *v.* Pope, 13 Ib. 377; Bricker *v.* Hughes, 4 Ind. 146; Sherry *v.* Picken, 10 Ib. 375; Marshall *v.* Ferguson, 23 Cal. 65; Austin *v.* Sawyer, 9 Cowen, 39; Whipple *v.* Foot, 2 John. 422; Stewart *v.* Doughty, 9 Ib. 112; Miller *v.* State, 39 Ind. 267; Britain *v.* McKay, 1 Ired. 265; Bull *v.* Griswold, 19 Ill. 631; Ross *v.* Welch, 11 Gray, 235; Purner *v.* Piercy, 40 Md. 212; Moreland *v.* Myall, 14 Bush, 474.]

therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; (x^1) but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th, and not by the 4th section of the statute. (y)

(x^1) [See Lord Coleridge C. J. in Marshall *v.* Green, 1 C. P. Div. 38–40; Slocum *v.* Seymour, 7 Vroom, 138; Ellis *v.* Grubb, 3 U. C. Q. B. (O. S.) 611.]

(y) [In sales of growing timber, the distinction between cases where it is to be severed by the vendor and where it is to be severed by the purchaser has not always been regarded. Thus, where cases have arisen under parol or simple contracts, for the sale of growing timber, or other products of the soil, to be cut and severed from the freehold by the vendee, such agreements, with reference to the statute of frauds, and in order to give effect to them, have been construed as not intended by the parties to convey any interest in land, and therefore not within the statute of frauds respecting the sale of such interest. Such contracts are held to be, at least, executory contracts for the sale of chattels as they shall be thereafterwards severed from the real estate. Colt J. in White *v.* Foster, 102 Mass. 375, 378; Wilde J. in Claflin *v.* Carpenter, 4 Met. 583; Drake *v.* Wells, 11 Allen, 141; Delaney *v.* Root, 99 Mass. 546; Parsons *v.* Smith, 5 Allen, 578; Nelson *v.* Nelson, 6 Gray, 385; Douglas *v.* Shumway, 13 Ib. 498; Nettleton *v.* Sikes, 8 Met. 34; Whitmarsh *v.* Walker, 1 Ib. 313; Giles *v.* Simonds, 15 Gray, 441; 1 Chitty Contr. (11 h Am. ed.) 415, 416; Killmore *v.* Howlett, 48 N. Y. 569; Boyce *v.* Washburn, 4 Hun, 792; Bostwick *v.* Leach, 3 Day, 484; Erskine *v.* Plummer, 7 Greenl. 447; Byasse *v.* Reese, 4 Metc. (Ky.) 372; Cain *v.* M'Guire, 13 B. Mon. 340; Edwards *v.* Grand Trunk R. R. 54 Maine, 105; Mumford *v.* Whitney, 15 Wend. 380; Marshall *v.* Green, 1 C. P. Div. 35; Slocum *v.* Seymour, 7 Vroom, 138; Murray *v.* Gilbert, 1 Hannay (N. B.), 545; The New Brunswick and Nova Scotia Land Co. *v.* Kirk, 1 Allen (N. B.), 443; Chamberlain *v.* Smith, 21 U. C. Q. B. 103; Hamilton *v.* McDonell, 5 U. C. Q. B. (O. S.), 720. "It may be difficult in many cases," as Colt J. remarks in White *v.* Foster, 102 Mass. 378, "to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing, or only a right, either definite or unlimited as to time, to enter and cut, with a title to the property when it becomes a chattel. If the former be the true construction, then the contract comes within the statute, and must be in writing; if the latter, then, though wholly oral, it may be enforced. . . A simple oral contract for the sale of trees, to be removed in a definite time, would be construed as not intended to convey an interest in the land, because the parties must have known that such could not be its effect." See Grove J. in Marshall *v.* Green, 1 C. P. Div. 44. Whenever the timber or other growth of the soil is severed from the freehold under the contract, it becomes personal property, the title to which is vested in the vendee absolutely; and the rule applies, that where chattels belonging to one person are placed or left on the land of another, with the permission of the latter, the owner of the chattels has an implied irrevocable license to enter and remove them. Drake *v.* Wells, 11 Allen, 141–143; Giles *v.* Simonds, 15 Gray, 441; Nettleton *v.* Sikes, 8 Met. 34; Heath *v.* Randall, 4 Cush. 195; Russell *v.* Richards, 1 Fairf. 429; S. C. 2 Ib. 371; McNeal *v.* Emerson, 15 Gray, 384; Smith *v.* Benson, 1 Hill (N. Y.),

Sales of growing timber.

Right in land or right to enter and cut, with title when property becomes chattel.

Rights of vendee after trees cut.

§ 127. Whether *fructus industriales* while still growing are not only chattels, but "goods, wares, and merchandise," has not, it is believed, been directly decided. (*z*) Both Bayley J. and Littledale J. expressed an opinion in the affirmative in Evans *v.* Roberts (*supra*, § 121), and

Are *fructus industriales* goods &c. while growing?

176; Barnes *v.* Barnes, 6 Vt. 388; Mumford *v.* Whitney, 15 Wend. 380; Pierrepont *v.* Barnard, 5 Barb. 364; 2 Selden, 279; 2 Am. Lead. Cas. (4th Am. ed.) 739, 740, 746, 752; Owens *v.* Lewis, 46 Ind. 488. But so long as the timber, trees, or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title passes to the vendee. A revocation of the license to enter on the land does not defeat any valid title; the contract being still executory, no title has passed to the vendee, and the refusal of the vendor to permit the vendee to enter on the land for the purpose of disconnecting from the freehold the property agreed to be sold is only a breach of contract, the remedy for which is an action for damages, as in the common case of a failure or refusal to deliver ordinary chattels in pursuance of a contract of sale. Drake *v.* Wells, 11 Allen, 143; Giles *v.* Simonds, 15 Gray, 444; Whitmarsh *v.* Walker, 1 Met. 316; Owens *v.* Lewis, 46 Ind. 488; Kern *v.* Connell, Barton (N. B.), 151; McCarthy *v.* Oliver, 14 U. C. C. P. 290. But it has been recently decided in New Hampshire, upon careful consideration of the conflicting decisions both in England and the United States, that an agreement for the sale of growing trees, with a right at any future time, whether fixed or indefinite, to enter upon the land and remove them, does purport to convey an interest in land, and is within the statute of frauds, and therefore must be in writing. Howe *v.* Batchelder, 49 N. H. 204; Kingsley *v.* Holbrook, 45 Ib. 313, 318, 319; Putney *v.* Day, 6 Ib. 430; Olmstead *v.* Niles, 7 Ib. 522; Ockington *v.* Richey, 41 Ib. 275. So in Vermont, in the case of Buck *v.* Pickwell, 27 Vt. 157, it was determined that no action can be maintained on such an agreement; nor can it in any way be made available, as a contract, so long as it remains executory. See, to same effect, Green *v.* Armstrong, 1 Denio, 550; Warren *v.* Leland, 2 Barb. 614, 618; Dubois *v.* Kelly, 10 Ib. 496; Pierrepont *v.* Barnard, 5 Ib. 364; Yeakle *v.* Jacob, 33 Penn. St. 376; Huff *v.* McCauley, 53 Ib. 206; Pattison's Appeal, 61 Ib. 294; Ellison *v.* Brigham, 38 Vt. 64; Sterling *v.* Baldwin, 42 Ib. 306; Harrell *v.* Miller, 35 Miss. 700; Vorebeck *v.* Roe, 50 Barb. 302; McGregor *v.* Brown, 6 Selden, 114. But it was conceded by Bennett J., giving the opinion of the court in Buck *v.* Pickwell, 27 Vt. 157, 166, that "if the contract is for a valuable consideration, and has been executed by the vendee, by his actually severing the trees from the freehold under the contract, the property in the trees would, doubtless, when cut, vest in the vendee, and become his." See, also, Yale *v.* Seely, 15 Vt. 221; McCarthy *v.* Oliver, 14 U. C. C. P. 290. A. obtained a license from V., by which A. was authorized to cut a quantity of timber on V.'s land. A. subsequently contracted with S. to go upon this land and make the timber for him at a certain rate per ton. The timber made on A.'s ground was marked by S. with certain figures to distinguish it. A.'s own mark was not put on the timber, but S. went upon the timber with A. when it was

Effect of revocation of license to enter before severance.

In New Hampshire a sale with right to enter is within § 4.

Vermont.

Segee *v.* Perley.

(*z*) See Glover *v.* Coles, 1 Bing. 6; and Owen *v.* Legh, 3 B. & Ald. 470, both being cases of distress for rent. [See, also, Pitkin *v.* Noyes, 48 N. H. 294, cited and stated, *ante*, § 121, note (*k*).]

Mr. Taylor, in his Treatise on Evidence, (*a*) treats the proposition as being perfectly clear in the same sense. Blackburn J., on the contrary, (*b*) says that the proposition is "exceedingly questionable," and that no authority was given for it in Evans *v.* Roberts. Mr. Taylor cites no authority for his opinion. The cases bearing on this point are Mayfield *v.* Wadsley (*c*) and Hallen *v.* Runder. (*d*) In the former, an outgoing tenant obtained a verdict, which was upheld, on a count for crops bargained and sold, against an incoming tenant, who had agreed to take them at valuation; and in the latter, counts for fixtures bargained and sold were held sufficient; but Blackburn J. observes on these cases, first, that in Hallen *v.* Runder the court expressly decided that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of *goods*, either within the statute of frauds, or the meaning of a count for goods sold and delivered; and secondly, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor's right to diminish the value of the land than a sale of anything. The learned author, in another passage, (*e*) says that "they are certainly chattels, but

Mayfield *v.* Wadsley.

Hallen *v.* Runder.

in the lake, and pointed out the marked timber as that which belonged to A. S. subsequently delivered this timber to P., who sold it. It was held that A. might maintain trover against P., as the property in the timber vested in him the moment the trees were cut. Segee *v.* Perley, 1 Kerr (N. B.), 439. A distinction is sometimes made between those cases where the contract for the sale of growing trees is made with a view to immediate severance, and those where the trees are to remain standing for a long or uncertain time. See Byasse *v.* Reese, 4 Mete. (Ky.) 372; Huff *v.* McCauley, 53 Penn. St. 206, and cases cited above; Parker *v.* Staniland, 11 East, 362; *ante*, § 118. See 1 Sugden V. & P. (8th Am. ed.) 126, note (*a*); 1 Chitty Contr. (11th Am. ed.) 415, 416, and note (*j*). In Marshall *v.* Green, 1 C. P. Div. 35, 40, Lord Coleridge C. J. said: "Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber." Grove J. said: "Here the trees were to be cut as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period." See, further, on the point of intention, Littledale J. and Park J. in Smith *v.* Surman, 9 B. & C. 561. In Kennedy *v.* Robinson, 2 Cr. & Dix, 113, Pennefather B. said: "This is a contract for the sale of growing timber, which is a contract for the sale of an interest in land." Rhodes *v.* Baker, 1 Ir. C. L. R. 488.]

(*a*) Taylor on Ev. 891, s. 953, ed. 1864.

(*b*) Blackburn on Sales, pp. 19, 20.

(*c*) 3 B. & C. 357. [See Knight *v.* The New England Worsted Co. 2 Cush. 289, 290.]

(*d*) 1 C., M. & R. 267; [Strong *v.* Doyle, 110 Mass. 93.]

(*e*) Blackburn, p. 17.

they are not *goods*, but are so far a part of the soil that larceny at common law could not be committed on them," and Lord Ellenborough was also of this opinion. (*f*) This point must, it is apprehended, be considered as still undetermined.

§ 128. It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil, not annual, as emblements, not permanent as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, &c. The only reported case on this subject is Graves *v.* Weld, (*g*) which was urged by very able counsel, and decided, after consideration, by Lord Denman, who delivered the unanimous judgment of the court, consisting of himself and Littledale, Park, and Patterson JJ. The facts were that the plaintiff was possessed of a close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th July, 1830, the reversion being then in defendant. In January, 1831, the plaintiff delivered up the close to the defendant, but in the mean time had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June *of the following year*. The clover in question was cut by defendant about the end of May, 1831, more than a twelvemonth after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st. That the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2d. That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with

Intermediate class of crops.

Graves *v.* Weld.

(*f*) See his decision in Parker *v.* Staniland, 11 East, 365.

(*g*) 5 B. & Ad. 105.

his barley in the spring, where there was no covenant that he should do so; and would not, in the long run and on the average, repay himself in the autumn for the extra cost he had incurred in the spring. The case was argued by Follett for plaintiff, and Gambier for defendant, and Lord Denman, in delivering the judgment of the whole court, said: "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law.*

§ 129. Again, "The principal authorities upon which the law of emblements depends are Littleton, sec. 68, and Coke's Commentary on that passage. The former is as follows: 'If the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord Coke says (Co. Litt. 55 a), 'The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he sets rootes or sow hempe or flax or any other *annuall* profit, if *after the same be planted*, the lessor oust the lessee, or if

the lessee dieth, yet he or his executors shall have *that yeare's crop.* But if he plant young fruit trees or young oaks, ashes, elms, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yield *no present annuall profit.*' These authorities are strongly in favor of the rule contended for by defendant's counsel; they confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In Latham *v.* Atwood, (*h*) they were held to be *like* emblements, because they were 'such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:' that labor and expense, without which they would not grow at all, seem to have been deemed equivalent to the sowing and planting of other vegetables."

§ 130. According to the principles here established, it would *seem* that the crop of the first year in such cases would be *fructus industriales*, but that of subsequent years, like fruit on trees planted by tenants, would be *fructus naturales*, unless requiring cultivation, labor, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted. But the law as to the application of the statute of frauds to sales of growing crops of this character, especially of crops subsequent to the first gathered, cannot be considered as settled.

§ 131. A singular case of the sale of crop not yet sown was determined in Watts *v.* Friend. (*i*) The bargain was, that the plaintiff should furnish the defendant with turnip-seed to be sown by the latter on his own land, and that the defendant should then sell to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the 17th section of the statute of frauds. The amount of the seed produced turned out to be 240 bushels, and as the agreement was that the crop should be severed before the property was transferred, it was clearly not a sale of an interest in land; but the reporter, in a note to the case, calls attention to a point not discussed in it, viz. that when the bargain was made, it was *uncertain* whether the value of the seed

Crop not yet sown. Watts *v.* Friend.

(*h*) 1 Cro. Car. 515.

(*i*) 10 B. & C. 446. [See Pitkin *v.* Noyes, 48 N. H. 294, 303.]

to be produced would reach 10*l.*, and that under the 4th section it has been held, that cases depending on contingencies which may or may not happen within the year are not within that section, though the event does not in fact happen within the year.

Crops when mere accessories to the land.

Earl of Falmouth *v.* Thomas.

§ 132. In the Earl of Falmouth *v.* Thomas, (*k*) where a farm was leased, and the tenant agreed to take the growing crops and the labor and materials expended, according to a valuation, it was held that the whole was a contract for an interest in land under the 4th section, and that plaintiff could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation. Littledale J. expressed the same opinion in Mayfield *v.* Wadsley, (*l*) saying that "where the land is agreed to be sold, the vendee takes from the vendor the growing crops, the latter are considered part of the land." This rule seems founded on sound principles, for in such cases the fact of his having acquired an interest in the land is part of the consideration which moves the purchaser to buy the crops; or, as it is put in Blackburn on Sales, (*m*) the purchaser pays for an abandonment by the lessor or vendor of the right to injure the freehold. He buys an interest "*concerning* land," and that is covered by the language of the 4th section.

Waddington *v.* Bristow.

§ 133. In the early case of Waddington *v.* Bristow, (*n*) in 1801, an agreement for the purchase of growing hops at 10*l.* per cwt., to be put in pockets and delivered by seller, was held to require a stamp, and not to come within the exemption of agreements for the sale of goods, wares, and merchandise. The case is quite irreconcilable with the principles settled in the more modern decisions; and in Rodwell *v.* Phillips, (*o*) Parke B. said of it: "Hops are *fructus industriales*. That case would now probably be decided differently." It may therefore be considered as overruled.

(*k*) 1 Cr. & M. 89.
(*l*) 3 B. & C. 366.
(*m*) Page 20.
(*n*) 2 B. & P. 452.
(*o*) 9 M. & W. 503.

CHAPTER III.

WHAT IS A CONTRACT FOR THE *PRICE*, OR OF THE *VALUE*, OF 10*l*.

	Section		Section
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§ 134. In several cases, questions have been raised as to the construction of the words, "for the price of 10*l*. and upwards," and "of the value of ten pounds and upwards," as used in the 17th section of the statute of frauds, and in Lord Tenterden's act. In Baldey *v.* Parker, (*a*) the plaintiffs were linen-drapers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of 10*l*. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to 70*l*., and he demanded a discount of 20*l*. per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. Held, that this was one entire contract within the 17th section. (*b*) All the judges, Abbott C. J., Bayley, Holroyd, and Best JJ., gave separate opinions. Abbott C. J. said: "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley J. said: "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l*.

Several articles sold at same time. Baldey *v.* Parker.

(*a*) 2 B. & C. 37. See Price *v.* Lea, 1 B. & C. 156.

(*b*) [Jenness *v.* Wendell, 51 N. H. 63; Gilman *v.* Hill, 36 Ib. 311; Allard *v.* Greasert, 61 N. Y. 1. It was decided in Jenness *v.* Wendell, *supra*, that a delivery and acceptance of a part of the goods sold in such case will take the entire contract out of the operation of the statute. See Gault *v.* Brown, 48 N. H. 183, 185; Mills *v.* Hunt, 17 Wend. 333; S. C. 20 Ib. 431.]

Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the 17th section ; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd J. said : "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the statute of frauds, *it being the intention of that statute, that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of* 10*l.*, it should not bind, unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount." Best J. said : "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."

Auction sales of several lots.

§ 135. But where at an auction the same person buys several successive lots as they are offered, a distinct contract arises for each lot, and the decision to this effect in Emmerson *v.* Heelis (*c*) was not questioned in Baldey *v.* Parker. (*d*)

Uncertain value.

§ 136. Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of 10*l.* according to the terms of the contract, yet, if in the result it turn out that the value actually exceeds 10*l.*, the statute ap-

(*c*) 2 Taunt. 38. Also per Le Blanc J. in Rugg *v.* Minett, 11 East, 218 ; Roots *v.* Lord Dormer, 4 B. & Ad. 77, and per the Law Lords in Couston *v.* Chapman, L. R. 2 Scotch App. 250 ; [Wells *v.* Day, 124 Mass. 38.]

(*d*) [See 1 Chitty Contr. (11th Am. ed.) 532, 533 ; Messer *v.* Woodman, 22 N. H. 172, 176, 177. In Jenness *v.* Wendell, 51 N. H. 63, 67, Sargent J. said : "But in this country, where the household furniture, farming tools, and such like articles about a farm or a hotel are sold, or where the sale also includes the stable stock, as in this case, or the farm stock and produce, we think there is ordinarily very little difference in fact between sales at an auction and a sale at any other place, or contracted in any other way, of several articles at an agreed price, which are all put together in one account." See Coffman *v.* Hampton, 2 Watts & S. 377 Tompkins *v.* Haas, 2 Penn. St. 74.]

Said to be no difference between auction and ordinary sales.

plies. This point was involved in the decision in Watts *v.* Friend, (*e*) where the sale was of a future crop of turnip-seed which might or might not amount to 10*l.*, the price stipulated being a guinea a bushel. But the point was not argued nor mentioned by counsel or by the court.

§ 137. Where a contract includes a sale of goods, and other matters not within the statute, if the goods included in the contract be of the value of 10*l.*, the 17th section of the statute will apply. In Harman *v.* Reeve, (*f*) the plaintiff had sold a mare and foal to defendant, with the obligation to agist them at his own expense till Michaelmas, and also to agist another mare and foal belonging to defendant, the whole for 30*l.* Averment of full performance by plaintiff, and breach by defendant. It was admitted that the mare and foal agreed to be sold were above the value of 10*l.* Held, that the contract for the sale was within the 17th section of the statute. *Semble*, however, that although the contract was entire, and the price indivisible, plaintiff might have recovered the value of the agistment of defendant's mare and foal. Per Jervis C. J. and Williams J. (*g*)

Different stipulations for one consideration; if not enforcible can any part be enforced?

Harman *v.* Reeve.

(*e*) 10 B. & C. 446.

(*f*) 18 C. B. 586; 25 L. J. C. P. 257.

(*g*) See, also, Wood *v.* Benson, 2 Cr. & J. 95; and Astey *v.* Emery, 4 M. & S. 263; Cobbold *v.* Caston, 1 Bing. 399; 8 Moore, 456. [In Irvine *v.* Stone, 6 Cush. 508, the defendant made an oral contract for the purchase of coal of the plaintiff, at Philadelphia, at a certain price per ton, and to pay the freight of the same to Boston, and the coal was sent to the defendant at Boston, and he declined to receive it. The action was brought to recover the price of the coal, together with the freight for the same. The plaintiff admitted that he could not recover for the price of the coal, because the contract for the sale of it was not in writing, but claimed that the contract for the coal and for transporting it could be severed, so that he could recover pay for the transportation; an oral contract for that being valid in law. Metcalf J. said: "The question is whether the good part of the contract before us can be separated from the bad, so that the plaintiff can enforce the part which is good, in his general counts. And we are of opinion that, from the nature of the contract, this cannot be done. It is, in its nature, entire. The part which respects the transportation stands wholly on the other part which respects the sale, and which is invalid; and both must fall together. The good part of the contract cannot practically be severed from the bad and separately enforced." See Page *v.* Monks, 5 Gray, 492, 496; Robinson *v.* Green, 3 Met. 159, 161; Hite *v.* Wells, 17 Ill. 88; Noyes *v.* Humphreys, 11 Grattan, 636; Collins *v.* Merrell, 2 Metc. (Ky.) 163; Thayer *v.* Rock, 13 Wend. 53; Mechelen *v.* Wallace, 7 Ad. & E. 49; Hodgson *v.* Johnson, El., Bl. & El. 685; Smith *v.* Smith, 14 Vt. 440; Dock *v.* Hart, 7 Watts & S. 172; Duncan *v.* Blair, 5 Denio, 196; 1 Sugden V. & P. (8th Am. ed.) 127; Hobbs *v.* Wetherwax, 38 How. (N. Y.) Pr. 385; Fuller *v.* Reed, 38 Cal. 99. If an entire agreement

Irvine *v.* Stone.

Depends upon entirety of contract.

be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it. Cooke *v.* Tombs, 2 Anst. 420; Lea *v.* Barber, Ib. 425; Hodgson *v.* Johnson, El., Bl. & El. 685; Mechelen *v.* Wallace, 7 Ad. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766; Falmouth *v.* Thomas, 1 Cr. & M. 89; Smith *v.* Smith, 14 Vt. 440; Gould *v.* Mansfield, 103 Mass. 408; Duncan *v.* Blair, 5 Denio, 196; Dock *v.* Hart, 7 Watts & S. 172; Thayer *v.* Rock, 13 Wend. 53; Van Alstine *v.* Wimple, 5 Cowen, 162; Crawford *v.* Morrell, 8 John. 253. But "if any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not either expressly, or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant." Metcalf J. in Rand *v.* Mather, 11 Cush. 1, 7. See Page *v.* Monks, 5 Gray, 492; Haynes *v.* Nice, 100 Mass. 327; Allen *v.* Leonard, 16 Gray, 202; 1 Chitty Contr. (11th Am. ed.) 420, 421; Walker *v.* Lovell, 28 N. H. 138; Carlton *v.* Woods, Ib. 290; Boyd *v.* Eaton, 44 Maine, 51; Pecker *v.* Kennison, 46 N. H. 488.]

CHAPTER IV.

OF ACCEPTANCE AND RECEIPT.

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OF THE CONSTRUCTION OF THE WORDS "EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME."

§ 138. HAVING considered the meaning of the words "no contract for the sale of any goods, wares, or merchandise for the price of 10*l.* or upwards," so as to ascertain what contracts are within the 17th section, the next step in the investigation is to inquire into the several conditions required by the law before such contracts "shall be allowed to be good." The language is that they shall not be allowed to be good "except —

1. "The buyer shall accept part of the goods so sold, and actually receive the same;"
2. "Or give something in earnest to bind the bargain, or in part payment;"

3. "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The first of these exceptions is the subject of the present chapter.

SECTION I. — WHAT IS AN ACCEPTANCE.

General observations.

§ 139. In commenting on this clause, Mr. Justice Blackburn makes the following remarks: (*a*) "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt. (*b*) In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. (*c*) The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts.

§ 140. "The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing

(*a*) Blackburn on Sales, 22, 23.

(*b*) [See Prescott *v.* Locke, 51 N. H. 94, 100, Foster J.; Grover *v.* Cameron, 6 U. C. Q. B. (O. S.) 196.]

(*c*) [See Gibbs *v.* Benjamin, 45 Vt. 124, 131, Redfield J.; Endicott J. in Knight *v.* Mann, 118 Mass. 143, 145.]

whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods." (*d*) And this is also the law in the United States. Caulkins *v.* Hellman, 47 N. Y. 449.

American law the same.

§ 141. The decisions upon the same question, what constitutes an acceptance, have been numerous. In a leading case, Hinde *v.* Whitehouse, (*e*) where sugar had been sold by auction, the defendant, as highest bidder, had received the sample of sugar knocked down to him, and it was proved that at such sales the samples were always delivered to the purchasers as part of their purchase to make up the quantity. This was held to be an acceptance of part of the goods sold, Lord Ellenborough saying, "Inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting *a part of the bulk actually weighed out to the buyer;* and to be allowed for specifically if he should choose to have the commodity weighed; I cannot but consider it as *a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer.* (*d*) And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, *as soon as, in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly.*"

Acceptance of sample as part.

Hinde *v.* Whitehouse.

§ 142. In Phillips *v.* Bistolli, (*f*) where a purchaser of some

(*d*) [See Maxwell *v.* Brown, 39 Maine, 98, a case of delivery to a carrier employed by the vendor. So Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 115; Rodgers *v.* Phillips, 40 N. Y. 519.]

(*e*) 7 East, 558; [McNeil *v.* Keleher, 15 U. C. C. P. 470.]

(*f*) 2 B. & C. 511. See, also, Klinitz *v.* Surry, 5 Esp. 267.

jewelry at an auction sale held it in his hands a few minutes and tendered it back to the auctioneer, saying there had been a mistake, the court set aside a verdict for plaintiff, and ordered a new trial, saying, "To satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, *with an intention of taking to the possession as owner.*" (*g*)

Phillips *v.* Bistolli.

§ 143. In Gardner *v.* Grout, (*h*) *after* the sale agreed on, the buyer went to the vendor's warehouse and got samples of the goods sold, which he promised to pay for when he took away the bulk; and the samples so taken were weighed and

Gardner *v.* Grout.

(*g*) [Endicott J. in Knight *v.* Mann, 118 Mass. 143, 145; Morton J. in Safford *v.* McDonough, 120 Ib. 290, 291; Devens J. in Remick *v.* Sandford, 120 Ib. 316; Alvey J. in Hewes *v.* Jordan, 39 Md. 479; Clarke *v.* Marriott, 9 Gill, 331; Jones *v.* Mechanics' Bank, 29 Md. 293; Stone *v.* Brown ng, 51 N. Y. 211; Shepherd *v.* Pressey, 32 N. H. 49, 55; Shindler *v.* Houston, 1 Comst. 261; Young *v.* Blaisdell, 60 Maine, 272; Gray *v.* Davis, 10 N. Y. 285; Brand *v.* Foeht, 3 Keyes, 409; Marsh *v.* Rouse, 44 N. Y. 643; Dole *v.* Stimpson, 21 Pick. 384. "No act of the vendor alone, in however strict conformity to the terms of the contract, will satisfy the statute. There must be acts of the buyer, of accepting and actually receiving part of the goods sold, beyond the mere fact of entering into the contract, to bind the latter." Bell J. in Shepherd *v.* Pressey, 32 N. H. 55; Messer *v.* Woodman, 22 Ib. 172, 182; Hawley *v.* Keeler, 53 N. Y. 114. Something more than mere words is necessary. Shindler *v.* Houston, 1 Comst. 261; Dole *v.* Stimpson, 21 Pick. 384; Artcher *v.* Zeh, 5 Hill, 205; Denny *v.* Williams, 5 Allen, 3; Howard *v.* Borden, 13 Ib. 299; Edwards *v.* Grand Trunk Railway Co. 54 Maine, 111; Brabin *v.* Hyde, 32 N. Y. 519; Marsh *v.* Rouse, 44 Ib. 643; O'Brien *v.* Credit Valley Ry. Co. 25 U. C. C. P. 275; Brewster *v.* Taylor, 63 N. Y. 587; Ham *v.* Van Orden, 4 Hun, 709; Moore *v.* Bixby, Ib. 802. And "as mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words afterwards used, looking to the future, to acts afterwards to be done by the purchaser towards carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." Bell J. in Shepherd *v.* Pressey, 32 N. H. 57; Bowers *v.* Anderson, 49 Ga. 143. See § 155, note (*o*), *post*. A mere delivery is not sufficient; there must further be an acceptance and receipt by the purchaser, else he will not be bound. Appleton J. in Maxwell *v.* Brown, 39 Maine, 101; Denny *v.* Williams, 5 Allen, 3; Shindler *v.* Houston, 1 Comst. 261; Gibbs *v.* Benjamin, 45 Vt. 124, 130, 131; Johnson *v.* Cuttle, 105 Mass. 449; Edwards *v.* Grand Trunk Railway Co. 54 Maine, 111; S. C. 48 Ib. 379; Hewes *v.* Jordan, 39 Md. 472, cited *post*, § 152, note (k^1); Hawley *v.* Keeler, 53 N. Y. 114. In truth, "the statute is silent as to the delivery of goods sold, which is the act of the sell r. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer." Foster J. in Boardman *v.* Spooner, 13 Allen, 357; Prescott *v.* Locke, 51 N. H. 94.]

No act of vendor enough.

Words not enough.

Mere delivery not enough.

(*h*) 2 C. B. N. S. 340. See, also, Klinitz *v.* Surry, 5 Esp. 267; Talver *v.* West, Holt, 178.

entered against him in the vendor's book. The vendor then refused to complete the sale, but held that there had been a part acceptance making the bargain complete. In this case the defendant cited Simonds *v.* Fisher, not reported, in which Wightman J. had nonsuited the plaintiff, the facts being that plaintiff showed defendant samples of wine which the latter agreed to buy, and after the bargain was concluded, (*i*) the buyer asked for the samples and wrote on the labels the prices agreed on; and this taking of the samples was relied on as a part acceptance, so as to take the case out of the statute. But the court, in deciding Gardner *v.* Grout, distinguished it from Simonds *v.* Fisher, saying, "There the buyer never saw the bulk: the things handed to him really were mere samples. (*k*) But here the plaintiff receives part of the very things which he has already bought." (*l*) So, in Foster *v.* Frampton, (*m*) the drawing of samples by a vendee from hogsheads of sugar forwarded to him by the vendor, when the sugar was in the carrier's warehouse at the place of destination, was held to be a taking possession of part of the goods, "a complete act of ownership" (per Littledale J.), putting an end to the vendor's right of stoppage *in transitu*. In Gilliat *v.* Roberts, (*n*) the defendant having

Simonds *v.* Fisher.

Foster *v.* Frampton.

Gilliat *v.* Roberts.

(*i*) [The acceptance and receipt need not be simultaneous with the verbal contract of sale; it is sufficient if they take place within a reasonable time afterwards. Bush *v.* Holmes, 53 Maine, 417; Marsh *v.* Hyde, 3 Gray, 331; Damon *v.* Osborn, 1 Pick. 480; Davis *v.* Moore, 13 Maine, 424; McKnight *v.* Dunlop, 1 Selden, 537; Richardson *v.* Squires, 37 Vt. 640; Danforth *v.* Walker, Ib. 239; Vincent *v.* Germond, 11 John. 283; Thompson *v.* Alger, 12 Met. 435; Chapin *v.* Potter, 1 Hilton (N. Y.), 366; Sale *v.* Darragh, 2 Ib. 184; Sprague *v.* Blake, 20 Wend. 61; McCarthy *v.* Nash, 14 Minn. 127; Ladd J. in Pinkham *v.* Mattox, 53 N. H. 604; Alvey J. in Hewes *v.* Jordan, 39 Md. 484; Amson *v.* Dreher, 35 Wis. 615; Phillips *v.* Ocmulgee Mills, 55 Ga. 633. Morse *v.* Chisholm, 7 U. C. C. P. 131; Buckingham *v.* Osborne, 44 Conn. 133; Van Woert *v.* Albany & Susquehanna R. R. Co. 67 N. Y. 538.]

Acceptance and receipt need not be simultaneous.

(*k*) See, also, Cooper *v.* Elston, 7 T. R. 14, where the sample was not part of the bulk.

(*l*) [The acceptance and receipt of a sample will be sufficient to satisfy the statute, if it is considered and treated by both parties as part of the goods bargained for, and diminishes the bulk thereof to be finally delivered; otherwise if the sample is considered only a specimen, and forms no portion of the goods sold; and which it is to be considered is a question of fact for the jury, the burden being upon the party alleging the validity of the contract. Davis *v.* Eastman, 1 Allen, 422; Bush *v.* Holmes, 53 Maine, 417, 418; Pratt *v.* Chase, 40 Ib. 269; Danforth *v.* Walker, 40 Vt. 257; Atwood *v.* Lucas, 53 Maine, 508.]

Acceptance and receipt of sample.

(*m*) 6 B. & C. 107.

(*n*) 19 L. J. Ex. 410.

purchased 100 quarters of wheat, sent his servant for three sacks of it, which were delivered, but the contract was for wheat "not to weigh less than nine and a half stone neat imperial measure, to be made up eighteen stone neat," and the sacks sent had not been tested according to imperial measure, nor had the wheat received the usual final dressing before delivery. On these facts, the defendant, who had not returned the three sacks, maintained that he had kept them under a new implied contract to pay for their value, and not as part of the 100 bushels bought, with which the three sacks did not correspond in description. But held that there was but one contract, and that the buyer had actually received and accepted part of the goods sold, so as to take the case out of the statute.

§ 144. It is quite well settled that the acceptance of the goods or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the court." (*o*) The acceptance must be clear and unequivocal, (*p*) but

Acceptance may be constructive.

Question of fact, not of law.

(*o*) Per Denman C. J. in Eden *v.* Dudfield, 1 Q. B. 302; [Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 118 Ladd J. in Pinkham *v.* Mattox, 53 N. H. 605.]

(*p*) [See Prescott *v.* Locke, 51 N. H. 94; Snow *v.* Warner, 10 Met. 136; Chapman J. in Denny *v.* Williams, 5 Allen, 3; Dole *v.* Stimpson, 21 Pick. 384; Boynton *v.* Veazie, 24 Maine, 286; Gibson *v.* Stevens, 8 How. (U. S.) 384; Carver *v.* Lane, 4 E. D. Smith (N. Y.), 168. In Snow *v.* Warner, 10 Met 132, Mr. Justice Hubbard said: "We are fully of opinion that the acceptance must be proved by some clear and unequivocal act of the party to be charged. The statute, by its language, requires it, and the construction it has received gives full force to that language. But we cannot say that, to bind the purchaser, the acceptance can only be by him personally. The statute, in terms, provides that an agent may bind his principal by a memorandum in writing. If, then, an agent can purchase, we think it clearly follows — there being no prohibitory clause — that an agent duly authorized may also receive purchased property, and thus bind the principal. It is in accordance with the rights and duties of principals and agents in other cases, and for the furtherance of trade and commerce." See Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 115; Outwater *v.* Dodge, 6 Wend. 400; Barney *v.* Brown, 2 Vt. 374; Vincent *v.* Germond, 11 John. 283; Spencer *v.* Hale, 30 Vt. 314; Gibbs *v.* Benjamin, 45 Ib. 130; Quintard *v.* Bacon, 99 Mass. 185; Gray J. in Johnson *v.* Cuttle, 105 Ib. 449; Endicott J. in Knight *v.* Mann, 118 Ib. 146; S. C. 120 Ib. 219, 220; Morton J. in Safford *v.* McDonough, Ib. 290, 291; Devens J. in Remick *v.* Sandford, Ib. 309, 316; Barkley *v.* The Rensselaer R. R. Co. 71 N. Y. 205; Rogers *v.* Gould, 6 Hun, 229. The plaintiff sold wine to the defendant, the liability of the defendant depending upon whether there had been an acceptance and receipt by him within the meaning of the statute. The sale was made by one Gordon as agent

Acceptance need not be by vendee personally.

Caulkins *v.* Hellman.

"it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance." (*q*) All the cases proceed on this principle.

§ 145. The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as owner, when he does an act which he would have authority to do as owner, but not otherwise. (*q*[1]) In the language of an eminent judge, (*r*) "if the vendee does any act to the goods, — of wrong if he is not the owner of the goods, and of right if he is owner of the goods, — the doing of that act is evidence that he has accepted them." Thus, in Chaplin *v.* Rogers, (*s*) where the purchaser of a stack of hay resold for the plaintiff, and it also appeared that Gordon had been employed by the defendant to see to the shipping of the wine to the defendant after the plaintiff had delivered it at a certain place, and that the defendant had told Gordon that he wanted him to be very particular to see that the wine corresponded with the sample. It was held that an acceptance by Gordon did not bind the defendant, as he could not be the agent of both parties, and make an acceptance which would conclude the defendants. Caulkins *v.* Hellman, 14 Hun, 330.]

When buyer does an act of ownership.

Chaplin *v.* Rogers.

Agent of both parties cannot make valid acceptance so as to bind defendant.

(*q*) Per Coleridge J. in Bushel *v.* Wheeler, 15 Q. B. 442, quoted and approved by Campbell C. J. in Tibbett *v.* Morton, 15 Q. B. 428, and 19 L. J. Q. B. 382; [Borrowscale *v.* Bosworth, 99 Mass. 381; Rappleye *v.* Adee, 65 Barb. 589; Sawyer *v.* Nichols, 40 Maine, 212; Bailey *v.* Ogden, 3 John. 399, 420; Wartman *v.* Breed, 117 Mass. 18; Clark *v.* Wright, 11 Ir. C. L. R. 402. See, also, Parker *v.* Wallis, 5 E. & B. 21. But where the facts in relation to a contract of sale, alleged to be within the statute of frauds, are not in dispute, it is said to belong to the court to determine their legal effect. Shepherd *v.* Pressey, 32 N. H. 56, 57. It is the province of the court "to determine whether the evidence of a constructive delivery of goods is sufficient to satisfy the statute of frauds." Kealy *v.* Tenant, 13 Ir. C. L. R. 394. And so "it is for the court to withhold the facts from the jury, when they are not such as can in law warrant finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence." Browne St. Frauds, § 321, adopted in Denney *v.* Williams, 5 Allen, 5; Howard *v.* Borden, 13 Allen, 299. See the remarks of Ladd J. in Pinkham *v.* Mattox, 53 N. H. 604, 605.]

Province of court.

(*q*[1]) [Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Marshall *v.* Green, 1 C. P. Div. 41, 43; Phillips *v.* Merritt, 2 U. C. C. P. 513; Tower *v.* Tudhope, 37 U. C. Q. B. 200; Dallard *v.* Potts, 6 Allen (N. B.), 443. In Pinkham *v.* Mattox, 53 N. H. 604, 606, Ladd J. said: "Doubtless the act of assuming dominion over the property, as owner, generally furnishes conclusive evidence of an acceptance;" but "it is sufficiently obvious, we think, that acts of ownership by the buyer are nothing more than evidence (generally very strong and conclusive) of acceptance. The conclusion by no means follows that an acceptance in fact cannot be shown in any other way."]

Force of acts of dominion.

(*r*) Erle J. in Parker *v.* Wallis, 5 E. & B. 21.

(*s*) 1 East, 195. [In Clarkson *v.* Noble, 2 U. C. Q. B. 361, the court expressed the opinion that an offer by a purchaser at an auction sale

Offer to sell.

part of it, and in Blenkinsop *v.* Clayton, (*t*) where the purchaser of a horse took a third person to the vendor's stable, and offered to resell the horse to the third person at a profit, the buyer was held in both instances to have done an act inconsistent with the continuance of a right of property in his vendor, and to have accepted within the meaning of the statute. (*t*[1])

Blenkinsop *v.* Clayton.

§ 146. In Beaumont *v.* Brengeri, (*u*) where the defendant bought a carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, held that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop. But in Maberley *v.* Sheppard (*x*) the action was for goods sold *and delivered*, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the progress of the work furnished the iron work and sent it to plaintiff, and sent a man to help plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the de-

Beaumont *v.* Brengeri.

Maberley *v.* Sheppard.

to sell to another party was not sufficient to constitute an acceptance within the statute. Walker *v.* Boulton, 3 U. C. Q. B. (O. S.) 252.]

(*t*) 7 Taunt. 597. See, also, Lillywhite *v.* Devereux, 15 M. & W. 285, and Baines *v.* Jevons, 7 C. & P. 288.

(*t*[1]) [In Marshall *v.* Green 1 C. P. Div. 35, the defendant by word of mouth purchased certain growing trees for 26*l.* of the plaintiff, on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away; and it was held that there was an acceptance and actual receipt of part of the goods sold within the statute, before the sale was countermanded. Brett J. said: "If the sub-sale stood alone, I should have doubted whether it would have been evidence of an actual receipt, but here he did something to the things themselves. I should be inclined to say that, where there is no actual removal of the things sold, the question depends on this proposition, viz. that where there has been, during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves by the buyer which could only properly be done by an absolute owner, there is evidence to go to a jury of an actual receipt of the things."]

Marshall *v.* Green.

(*u*) 5 C. B. 301.

(*x*) 10 Bing. 99; [Wegg *v.* Drake, 16 U. C. Q. B. 252.]

fendant had thereby exercised such dominion over the goods sold as amounted to acceptance. The court took time to consider, and Tindal C. J. delivered the decision that the plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in plaintiff's yard for further work till it was finished. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance."(*y*)

§ 147. In Parker *v.* Wallis (*z*) the defendants received some turnip-seed under a verbal contract of sale, but sent word at once to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags, and laid it out thin, alleging that it was hot and mouldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was nonsuited by Wightman J., and leave reserved to enter a verdict for 140*l.*, the price of the seed, if the evidence sufficed to show acceptance and actual receipt of any part of the goods. The court made the rule absolute for a new trial, but refused to enter verdict for plaintiff. Held, that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff had authorized it. But, as the evidence stood, when the nonsuit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a wrongful act, if the defendants had not accepted as owners. This was a question for the jury. In Kent *v.* Huskinson (*a*) there was an actual receipt, but no acceptance. The buyer gave an order for sponge, at 11*s.* per pound. On arrival of the package it was examined, and judged to be worth not more than 6*s.* per pound. He at once returned it by the same carrier. Held, no acceptance.

Parker *v.* Wallis.

Kent *v.* Huskinson.

§ 148. A dealing with goods, so as to justify a jury in finding a constructive acceptance, may take place as effectively with the

(*y*) [See Halterline *v.* Rice, 62 Barb. 593; Flintoft *v.* Elmore, 18 U. C. C. P. 274.]

(*z*) 5 E. & B. 21.

(*a*) 3 B. & P. 233.

Dealing with bill of lading.

bill of lading, which represents the goods as with the goods themselves. (*b*)

§ 149. Very deliberate consideration was given to the whole subject by the queen's bench, in the important case of Morton *v.* Tibbett. (*c*) The facts were, that on the 25th August the defendant made a verbal agreement with plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a certain specified weight. Defendant, by agreement, sent a general carrier next morning to a place named, and the wheat was then and there received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the mean time, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier, who had received it without its being weighed, and neither defendant, nor any one in his behalf, had seen it weighed. The action was debt for goods sold and delivered and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for nonsuit. The judgment of the court was unanimous, after taking time for consideration, the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods, and actually received the same, so as to render him liable as buyer. Lord Campbell said that it would be very difficult to reconcile the cases on the subject, and that the exact words of the 17th section had not always been kept in recollection. After referring to the language, he added: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to

Morton *v.* Tibbett.

(*b*) Currie *v.* Anderson, 2 E. & E. 592; 29 L. J. Q. B. 87; Meredith *v.* Meigh, 2 E. & B. 364; 22 L. J. Q. B. 401. [See Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 118; Quintard *v.* Bacon, 99 Mass. 185.]

(*c*) 15 Q. B. 428, and 19 L. J. Q. B. 382.

object, at all events, to the quantity and quality of the *residue;* and even where the sale is by sample, that the residue offered does not correspond with the sample." His lordship then continued by announcing that: "We are of opinion that there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. *The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*" (c^1)

§ 150. The distinction pointed out in this last clause is important, and should not be lost sight of. The question presented to the court may be, whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half-pound of sugar, in Hinde *v.* Whitehouse), (d) in order that the contract may "be allowed to be good;" and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the vendor fails to comply with the contract as proven. The decision of Lord Campbell then closed with declaring, "We are therefore of opinion, that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." (d^1)

Distinction between formation and performance of the contract.

(c^1) [Alvey J. in Hewes *v.* Jordan, 39 Md. 483, 484; McMaster *v.* Gordon, 20 U. C. C. P. 16.]

(d) 7 East, 558.

(d^1) [In Remick *v.* Sandford, 120 Mass. 309, 316, Devens J. said: "There may undoubtedly be an acceptance, which will not afford conclusive evidence that the contract has been fulfilled and its terms complied with, and which will yet satisfy the statute and let in evidence of those terms, which otherwise could only be proved by writing. If the buyer accepts the goods as those which he purchased, he may afterwards reject them, if they were not what they were warranted to be, but the statute is satisfied. But, while such an acceptance satisfies the statute, in order to have that effect it must be by some unequivocal act done on the part of the buyer, with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not

Difference between formation and performance of contract.

§ 151. There was very plain evidence that the defendant *received* it, but the only proof of *acceptance* was the fact of the resale before examination. The decision, therefore, goes no farther, it would seem, than to determine that this was such an exercise of dominion over goods bought as is inconsistent with a continuance of the right of property in the vendor, and therefore evidence to justify a jury in finding acceptance, as well as actual receipt by the buyer. (d^2) Martin B., in Hunt *v.* Hecht, (e) declared that this was the whole scope of the decision; and again, in Coombs *v.* Bristol & Exeter Railway Company, (f) expressed his dissent from the principles maintained in the opinion pronounced by Lord Campbell. In Castle *v.* Sworder, (g) Cockburn C. J. said: "It must not be assumed that I assent to the decision in Morton *v.* Tibbett."

Remarks of different judges on Morton *v.* Tibbett.

Martin B.

Cockburn C. J.

§ 152. On the other hand, Blackburn J. in delivering the opinion of the court in Cusack *v.* Robinson, (h) on the 25th May, 1861, just ten days after this observation of the chief justice in Castle *v.* Sworder, cites Morton *v.* Tibbett as authority for the proposition, "that the acceptance is to be something which is to precede, or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined." The court, on this occasion, was composed of only two judges, Blackburn and Hill JJ. In the same court, in February, 1860, Crompton J. had stated, in the case of Currie *v.* Anderson, (i) that "before the case of Morton *v.* Tibbett there was authority for saying that there could

Blackburn J.

Crompton J.

correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner, is to be proved by the party setting up the contract. It cannot be inferred, as matter of law, merely from the circumstance that the goods have come into the possession of the buyer." And so it was held in the above case that in an action for goods sold and delivered, if the goods were sold by sample, and the seller relies on an acceptance by the buyer to take the case out of the statute of frauds, it is not enough for him to show merely that the goods came into the possession of the buyer, and that they corresponded with the sample. McMaster *v.* Gordon, 20 U. C. C. P. 16; Tower *v.* Tudhope, 37 U. C. Q. B. 200, p. 211.]

Mere possession by vendee not enough.

(d^2) [Devens J. in Remick *v.* Sandford, 120 Mass. 316.]

(e) 8 Ex. 814.

(f) 3 H. & N. 510; 27 L. J. Ex. 401.

(g) 6 H. & N. 832; 30 L. J. Ex. 310.

(h) 1 B. & S. 299, and 30 L. J. Q. B. 261.

(i) 2 E. & E. 592; 29 L. J. Q. B. 87.

have been no acceptance and receipt within the statute of frauds until the vendee had been placed in such connection with the goods that he could not object to them on account of their quantity and quality; (*k*) and in that case Lord Campbell says, if that is the law, it would be decisive against the plaintiff, but after a careful review of the cases, the court came to the conclusion (which, in this court, must be considered to be the law of the land), that in order to make an acceptance and receipt within the statute of frauds, *it is not necessary that the vendee should have done anything to preclude himself from objecting to the goods.* (*k*[1]) That was the decision in Morton *v.* Tibbett, and from the discussion to-day I have more reason that ever to be satisfied with it."

§ 153. It is fair to assume, from the foregoing review, that notwithstanding the observation of Cockburn C. J. in Castle *v.* Sworder, the law is considered to be settled in the court of queen's bench in conformity with the decision in Morton *v.* Tibbett, and that the authority of that case remains unshaken in that court.

§ 154. In the exchequer, however, the leaning of the judges is evidently adverse to the construction placed in the queen's bench upon this clause of the statute, though in no case has there been a decided rejection of the authority of Morton *v.* Tibbett. Hunt *v.* Hecht (*l*) was decided in 1853, and, therefore, prior to the recent cases in which the judges of the queen's bench have shown what is, in the opinion of that court, the full extent of the decision in Morton *v.* Tibbett. The facts were, that a number of bags of bone were sent by defendant's order to his wharfinger, in compliance with a verbal contract with plaintiff. The defendant went to plaintiff's warehouse, and there inspected a heap of ox-bones mixed with others inferior in quality. Defendant objected to the latter, but verbally agreed to purchase a quantity of the others, to be separated from the rest, and ordered

Hunt *v.* Hecht.

(*k*) [See Maxwell *v.* Brown, 39 Maine, 98, 103; Shepherd *v.* Pressey, 32 N. H. 55; Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 115, 118, 119; Edwards *v.* Grand Trunk Railway Co. 54 Maine, 111; S. C. 48 Ib. 379.]

(*k*[1]) [In Hewes *v.* Jordan, 39 Md. 472, it was held that the delivery of the goods to the intended purchaser, and the unpacking of them by him, are not a sufficient acceptance, if it appear that he has taken them into his possession and kept them for no greater time than was reasonably necessary to enable him to examine their quantity and quality, and to declare his approval or his disapproval of them. See Stone *v.* Browning, 51 N. Y. 211; Heermance *v.* Taylor, 14 Hun, 149.]

Vendee is allowed time to examine.

(*l*) 8 Ex. 814; 22 L. J. Ex. 293.

them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, as soon as he heard of their being sent to the wharf, and he at once refused to accept them. Held, no acceptance. All the judges put the case on the ground of the goods sold having been mixed in bulk with others, so that no acceptance was possible till after separation, and there was no pretence that there had been an acceptance after separation, otherwise than by the wharfinger's receipt, which was insufficient for that purpose, but Martin B. said: "There are various authorities to show that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the articles sent. Morton *v.* Tibbett has been cited as an authority to the contrary, but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court, indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But, in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; *it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.*" (*m*)

Coombs *v.* Bristol & Exeter Railway Company.

§ 155. In the case of Coombs *v.* The Bristol & Exeter Railway Company, (*n*) decided in 1858, the same court had occasion to review the subject, and Pollock C. B. said that Hunt *v.* Hecht had decided "that the vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance." Martin B. said: "No doubt in Morton *v.* Tibbett the court of queen's bench carried out the principle of constructive acceptance to an extent which in that case was correct: but I adhere to that which I said in

(*m*) [Eastman J. in Gilman *v.* Hill, 36 N. H. 311, 320, 321. "There is no acceptance, unless the purchaser has exercised his option to receive the goods sold, or not, or has done something to deprive him of his option." Bell J. in Shepherd *v.* Pressey, 32 N. H. 55; Messer *v.* Woodman, 22 Ib. 181, 182; Belt *v.* Marriott, 9 Gill, 331; Gorham *v.* Fisher, 30 Vt. 428; Clark *v.* Tucker, 2 Sandf. 157.]

(*n*) 3 H. & N. 510; 27 L. J. Ex. 401.

Hunt *v.* Hecht, that much that was there said is doubtful, and that acceptance to satisfy the statute must be after the opportunity of exercising an option, or after the doing of some act waiving it." Bramwell B. said without qualification, "The cases establish that there can be no acceptance where there has been no opportunity of rejecting." Watson B. concurred. (*o*)

(*o*) [In Big Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, 489, Willes J. said: "It may be that, in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can properly be said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller. But where the contract is for a specific ascertained chattel, the reasoning is altogether different. Equally where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the consent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel. And, indeed, it has been expressly decided, that in this latter case the statute of frauds may be satisfied by an acceptance preceding the delivery. Cusack *v.* Robinson, 1 B. & S. 299." In United States Reflector Co. *v.* Rushton, 7 Daly, 410, Daly C. J. said: "If a man goes into a store and selects a particular article of household furniture at a certain price, which he agrees to pay when it is delivered, and the proof is that that particular article was delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article within the meaning of the statute." In Knight *v.* Mann, 118 Mass. 143, the plaintiff had a large number of rough calf-skins for sale which were in bales at his store. The defendant went to the store to purchase, examined thirty or forty skins, and entered into an oral agreement for six hundred and thirty-nine skins, at so much per pound. These he directed the plaintiff to count out, weigh, and set apart for him, from the skins then lying in bales, but did not himself afterwards see them. The sale was on time, and the defendant was to send for the skins and take them from the store. The plaintiff at once, but in the defendant's absence, counted out, weighed, and set apart the required number of skins, corresponding in quality and value to those seen by the defendant; and, according to the usage of trade, selected one in twenty as "trials," the weight of which before and after exposure to the air determined the percentage of shrinkage to be deducted from the gross weight, and thus fix the number of pounds to be paid for by the purchaser. The defendant afterwards called at the plaintiff's store and asked if the skins he had bought were ready, and the plaintiff replied, "Yes, all but weighing the trials." The defendant said he would send for them immediately. The trials were then weighed, the

Vendee has right to opportunity for rejection.

How in case of specific article.

Evidence of acceptance in sale of specific ascertained article.

Knight *v.* Mann.

§ 156. The latest case in which the subject of acceptance under the statute has arisen is Smith *v.* Hudson, (*p*) decided in the queen's bench in Easter Term, 1865. All the

Smith *v.* Hudson.

nett weight of the six hundred and thirty-nine skins ascertained, and they were placed in a doorway of the store ready to be taken away by the defendant. The defendant returned later in the day for a bill of the skins, which was given him, and he was told that the skins were ready for delivery and were lying in the doorway. He then left, but did not send for the skins, and they were destroyed the following night by fire. There was no evidence that the defendant said anything, or did any act, in relation to the skins after he took the bill and received the notice that they were ready for delivery. The defendant never saw the skins after he bargained for them when they were lying in bales with others of a like description. The plaintiff had done all that he was required to do by the agreement. Endicott J. said: "In this case the contract was not for the purchase of a specific ascertained chattel which the buyer inspected and examined at the time of the agreement, but for the purchase of skins to be selected by the seller from a larger number of similar skins lying in bales, and to be set aside and sent for by the buyer. In such case there can be no acceptance before the goods are delivered and the buyer has an opportunity to examine. Cusack *v.* Robinson, 1 B. & S. 299; Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 480. To hold the defendant liable, such an acceptance must therefore be found to have been made by him after the delivery of the skins by the plaintiff. Till that time the defendant was not called upon to exercise his option, and that time did not arrive till after the weighing of the 'trials,' the delivery of the bills, and the placing of the goods in the doorway, of which he had notice. Before that, the defendant had no opportunity of rejecting the goods, as they had not been delivered. Coombs *v.* Bristol & Exeter Railway, 3 H. & N. 510. Everything, therefore, that happened previously, related to the oral agreement for a sale, which could only be completed when the goods were ready for delivery. In examining the evidence reported, we find no clear and unequivocal acts on the part of the defendant indicating an acceptance after the plaintiff had performed what his oral agreement called for. The clear and unequivocal acts, showing an acceptance, or from which an acceptance may be inferred, must relate to some dealing with the property itself by the buyer or his authorized agent after the delivery of the whole or part of it. There is no evidence that the defendant did anything in relation to the property after the delivery. Nor does it appear that the defendant made the plaintiff his bailee. If he did, it would be evidence that he had accepted the goods, or had waived his right to reject. To establish this fact, there must be some evidence of a change in the relations of the parties to each other; as in Weld *v.* Came, 98 Mass. 152." The case of Knight *v.* Mann is again reported in 120 Mass. 219, where it appears that on a new trial the additional fact was proved that the purchaser went to the store of the seller, took the bill of parcels of the skins, asked if they were ready, and was told that they were, and the skins were pointed out to him lying in the doorway of the store. He said he would send for them; but it was held that these facts did not necessarily show an acceptance and receipt of the goods within the statute of frauds. Endicott J. said: "As it was part of the contract that the defendant should send for the skins, the fact that he said he would do so, when he left the store, does not add to the effect of the evidence." In Kellogg *v.* Witherhead, 6 Sup. Ct. Rep. (N Y.), or 6 Th. & Cook, 525, it appeared that

(*p*) 6 B. & S. 431; 34 L. J. Q. B. 145.

cases were reviewed by able counsel, and commented on by the judges in the course of the argument. The plaintiffs were assignees of Willden, a bankrupt. The defendant, on 3d November, 1863, sold to Willden by verbal contract a quantity of barley, according to sample. The bulk was conveyed by the vendor in his own wagons to the railway station, on the 7th November, and he gave orders to convey and deliver it to the purchaser. It was admitted that by the custom of the trade the purchaser, notwithstanding the delivery of the bulk at the station, had the power of rejecting the goods if found not equal to sample. On the 9th November, Willden was adjudicated a bankrupt on his own petition, without having given any orders or directions about the barley, which still remained at the railway station, nor had he examined it or given any notice whether he accepted or declined it. Nothing had been paid on account of the price, and on the 11th November the vendor gave notice to the railway company not to deliver the goods to any one but himself. The corn was given up to the vendor by the company, and the assignees of Willden claimed it as the property of the bankrupt. On the question whether there had been an acceptance under the statute of frauds, held by all the judges, Cockburn C. J., Blackburn, Mellor, and Shee JJ., that the contract could not be allowed to be good. The chief justice held

the defendant agreed to purchase some hams, which the plaintiffs were smoking, and gave directions as to the manner of smoking. After the smoking was completed the plaintiffs weighed the hams and piled them up on their own premises. The defendant called soon after, and said, "I suppose these are my hams;" and one of the plaintiffs said, "Yes, they are all weighed and ready for you to take away," in reply to which the defendant bowed his head. It was held that these acts did not consti ute a receipt and acceptance of the hams. See Marshall *v.* Green, 1 C. P. Div. 35. The plaintiff and defendant went into the cellar of the plaintiff's store, in New York, where several firkins of butter were bored into and examined by the plaintiff and defendant, and the defendant then said that he would take twenty firkins out of the lot of forty from which the firkins examined had been taken, and directed them to be sent to him. The firkins actually examined and enough more to make up twenty, were taken from the lot of forty and delivered to a carman who delivered them at a boat. The butter was received and placed in the defendant's cellar in a pile by itself, the defendant being away at the time. He returned two or three days afterwards, and on the morning following his return, having an application for the purchase of butter, he took the customer into the cellar and showed him this lot. He bored into one of the firkins, but upon examination said that it would not suit. Within half an hour he shipped the butter back to New York, and gave the plaintiff notice that he should not accept the same. It was held that there had been no acceptance. Heermance *v.* Taylor, 14 Hun, 149.]

Heermance *v.* Taylor.

Hunt *v.* Hecht to be binding on the court as an authority, that where the buyer has a right to inspect the articles sold to see whether they are in accordance with the contract, there is no acceptance till he has time to make the inspection. Blackburn J. said: "There must be both acceptance and receipt to bind both purchaser and vendor under the statute." And in all the opinions it was held that the countermand of the vendor before the goods had been delivered according to his order, and before acceptance, put an end to the contract, and deprived the assignees of the power to accept, on behalf of the bankrupt. This case is worthy of note, also, on another ground. It clearly recognizes and maintains the long-established doctrine that the acceptance and actual receipt are distinct things, both of which are essential to the validity of the contract. This would seem sufficiently clear from the language of the statute, but on more than one recent occasion remarks had been made by eminent judges, suggesting doubt upon the question. Thus, in Castle *v.* Sworder, (*q*) Crompton J. said: "I have sometimes doubted whether there is much distinction between receipt and acceptance;" and Cockburn C. J. said: "I think those terms (*i. e.* acceptance and receipt) are equivalent." In Marvin *v.* Wallis, (*r*) also, Erle J. said, according to one report, "I believe that the party who inserted the words had no idea what he meant by acceptance. (*r*[1]) That opinion I found on the everlasting discussion which has gone on, as if possession according to law could mean only manual prehension." It is probable, however, both from the context and from the point in dispute, that his lordship is more correctly represented in another report as saying, "I believe that the persons who framed the statute, and inserted the words 'actually received the same,' had no clear idea of their meaning," &c. It may confidently be assumed, however, that the construction which attributes distinct meanings to the two expressions, "acceptance" and "actual receipt," is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in Smith *v.* Hudson.

Acceptance may precede receipt.

§ 157. Acceptance by the vendee may be prior to the actual receipt of the goods, as, for instance, when he has inspected and approved the specific goods at or be-

(*q*) 6 H. & N. 832; 30 L. J. Ex. 310.
(*r*) 6 E. & B. 726; 25 L. J. Q. B. 369.
(*r*[1]) [See Ladd J. in Pinkham *v.* Mattox, 53 N. H. 605, 606.]

fore the time of purchasing. Thus, in Cusack *v.* Robinson, (*s*) where the buyer was shown a lot of 156 firkins of butter in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the goods were then forwarded to the purchaser by a carrier according to his directions; it was held that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded was a compliance with the statute. This question was raised, but not decided, in Saunders *v.* Topp, (*t*) which is referred to by Blackburn J. in delivering the opinion of the court in Cusack *v.* Robinson.

Cusack *v.* Robinson.

§ 158. In deciding Cusack *v.* Robinson, the court distinguished it from Nicholson *v.* Bower, (*u*) because in the latter case there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of about 140 quarters of wheat, by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and after inspecting it, told him not to cart the wheat home at present. The purchasers were really in insolvent circumstances, and immediately after the interview with the carman determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. All the judges held that there had been no acceptance in fact, and the assignees of the purchasers were not allowed to retain a verdict in their favor. In Saunders *v.* Topp (*t*) the defendant had selected forty-five couples of ewes and lambs at the plaintiff's farm, and ordered them to be sent to his own farm, where they were received by his agent. (*v*) He then ordered them to be sent to another place, where he saw them and counted them over, and said, "It is all right." The court declined to decide whether the previous selection was equivalent to an acceptance (a point subsequently decided in the affirmative in Cusack *v.* Robinson, *ut supra*), but held that the subsequent action of the defendant was sufficient to justify the jury in finding an acceptance after delivery.

Nicholson *v.* Bower.

Saunders *v.* Topp.

(*s*) 1 B. & S. 299; 30 L. J. Q. B. 261.
(*t*) 4 Ex. 390.
(*u*) 1 E. & E. 172; 28 L. J. Q. B. 97.
(*v*) [See Snow *v.* Warner, 10 Met. 132, per Hubbard J., *ante*, § 144, note (*p*).]

§ 159. In one case, (*x*) Maule J. seems to have been strongly of opinion that it was sufficient to prove acceptance of part of the goods by the buyer, *after action brought*, but the court declined to decide the point without further argument, and the case was settled. All the recent authorities are adverse to this *dictum*, which rested upon the assumption that the fact of acceptance was a mere question of evidence, whereas the statute makes it essential to the validity of the contract in a court of justice. (*y*) The report of the case shows that the judges had not the language of the statute before them. The point is also ruled adversely to this opinion of Maule J. in Bill *v.* Bament. (*z*)

Acceptance after action brought.

§ 160. It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers. (*a*)

Carrier has no authority to accept.

(*x*) Fricker *v.* Tomlinson, 1 Man. & G. 772.

(*y*) [Until acceptance and receipt no binding contract exists; and when they take place, the act of the parties unites with their previous verbal agreement to create a full, complete, and obligatory contract. In all cases of this sort, a single inquiry operates as a test by which to ascertain whether a contract is binding upon the parties under the statute of frauds. It is whether the acceptance and receipt, whenever they took place, were in pursuance of a previous agreement. If the verbal contract is proved, and an acceptance and receipt in pursuance of it are shown, the requisites of the statutes are fulfilled. See per Bigelow J. in Marsh *v.* Hyde, 3 Gray, 333; Endicott J. in Knight *v.* Mann, 118 Mass. 145.]

Acceptance and receipt must be in pursuance of previous agreement.

(*z*) 9 M. & W. 36. ["Except that the statute provides that no action *shall be brought*, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient." Colt J. in Townsend *v.* Hargraves, 118 Mass. 336.]

(*a*) Astey *v.* Emery, 4 M. & S. 262; Hanson *v.* Armitage, 5 B. & A. 557; Johnson *v.* Dodgson, 2 M. & W. 656; Norman *v.* Phillips, 14 M. & W. 277; Hunt *v.* Hecht, 8 Ex. 814; Acebal *v.* Levy, 10 Bing. 376; Meredith *v.* Meigh, 2 E. & B. 370, and 22 L. J. Q. B. 401, in which Hart *v.* Sattley, 3 Camp. 528, is overruled; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 361; Hart *v.* Bush, E., B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431, and 34 L. J. Q. B. 145; [Johnson *v.* Cuttle, 105 Mass. 447, 449; Boardman *v.* Spooner, 13 Allen, 353; Grimes *v.* Van Vechten, 20 Mich. 410; Rodgers *v.* Phillips, 40 N. Y. 519; Denmead *v.* Glass, 30 Ga. 637; Jones *v.* Mechanics' Bank, 29 Md. 287; Shepherd *v.* Pressey, 32 N. H. 49, 55, 56; Maxwell *v.* Brown, 39 Maine, 98; Frostburg Mining Co. *v.* New England Glass Co 9 Cush. 115; Spencer *v.* Hale, 30 Vt. 315; Cross *v.* O'Donnell, 44 N. Y. 661; Quintard *v.* Bacon, 99 Mass. 185, 186; Snow *v.* Warner, 10 Met. 1 2; Nicholson *v.* Bower, 1 E. & E. 172; Allard *v.* Greasert, 61 N. Y. 1; Atherton *v.* Newhall, 123 Mass. 141; Tower *v.* Tudhope, 37 U. C. Q. B. 200, 210; Hausman *v.* Nye, 62 Ind. 485; Lloyd *v.* Wright, 25 Ga. 215. But it is held that if after

§ 161. Among the numerous cases in which the courts have set aside verdicts on the ground that the jury had found acceptance by the buyer without sufficient evidence, some may be found which are not readily reconcilable with the principle that a dealing with the article in a manner inconsistent with the continuance of the right of property in the vendor is a constructive acceptance. Curtis *v.* Pugh (*b*) is an instance of this class. The action was debt, for goods sold and delivered. The purchaser had given a verbal order for three hogsheads of Scotch glue, to be of the description called "Cox's best." The plaintiff, the vendor, sent two hogsheads, all that he was able to deliver at the time, to a wharf in London. Defendant removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior to the quality ordered, and so informed plaintiff's agent on the next day. The plaintiff's brother admitted, on inspection two days later, that part of the glue, but not an unusual proportion, was inferior, and offered to make an allowance, but refused to take it back because it had been unpacked and put into bags, which was not necessary for the purpose of examination, and because the glue, when once unpacked, could not be replaced in the same condition in the hogsheads. Lord Denman C. J. was of opinion that the defendant had not in fact intended to accept the glue, but told the jury that "if the defendant had done any act *altering the condition of the article*, that was an acceptance, and that the question for them was whether or not the act of putting the glue into the bags had altered its condition." The lord chief justice then left it to the jury to say "whether the glue was 'Cox's best,' and whether the defendant *had dealt with it so as to make it his own*," or had done no more than was necessary to examine the quality. All these questions were decided in plaintiff's favor by the jury, but the court, on motion, pursuant to leave reserved, directed a nonsuit, Lord Denman saying, "In what I stated, I certainly carried the doctrine, as to acceptance, a step farther than I ought." Patteson, J. said: "My lord chief justice went a step farther in his ruling than the authorities warrant," and Coleridge and Wightman JJ. concurred. This case

Curtis *v.* Pugh reviewed.

acceptance the vendor delivers the goods to a carrier named by the purchaser, the receipt of them by the carrier is a receipt by the purchaser. Cross *v.* O'Donnell, 44 N. Y. 661.]

(*b*) 10 Q. B. 111.

appears to be identical in principle with Parker *v.* Wallis (5 E. & B. 21), and the two decisions to be irreconcilable. The jury having found the facts in favor of plaintiff, there was ample evidence of a dealing with the goods which was wrongful unless the buyer was owner, and the constructive acceptance was therefore complete, according to the more recent decisions.

Silence and delay as proofs of acceptance.

§ 162. The cases are not entirely consistent on the point whether mere silence and delay of the purchaser in notifying refusal of goods forwarded by his order suffice to constitute constructive acceptance. The fair deduction from the authorities seems to be that this is a question of degree, that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter time would merely constitute *some* evidence to be taken into consideration with the other circumstances of the case.

Bushel *v.* Wheeler.

§ 163. In Bushel *v.* Wheeler, (*c*) in the court of queen's bench defendant ordered certain machinery to be sent to him at Hereford by the Hereford sloop. It was sent on the 23d April, and an invoice for the goods at three months' credit was forwarded in a letter of advice to defendant on 25th April. The carrier placed the goods in a warehouse on his own wharf on their arrival at Hereford, and notice was given to defendant. No communication on the subject of the goods was made by defendant till the 7th October, when they were rejected. The defendant proved, however, that after the arrival of the goods at the warehouse, he had seen them, and informed the warehouseman that he did not intend to take them. Erskine J. directed a verdict for the defendant, with leave to move to enter a verdict for plaintiff. The court refused to enter a verdict for plaintiff, but held that there was evidence of acceptance to go to the jury, and ordered a new trial. Lord Denman said that the "lapse of time, connected with the other circumstances, might show an *acceptance*, and this was a question of fact for the jury." Williams J. said that there might be a constructive *receipt* as well as delivery; and "it being once established that there may be an *actual receipt* by acquiescence, wherever such a case is set up, it becomes a question for the jury." (*d*) Coleridge J. said that the goods were carried by vendee's orders within a reasonable time to a particular warehouse.

(*c*) 15 Q. B. 445.

(*d*) [See Borrowscale *v.* Bosworth, 99 Mass. 381, per Hoar J.]

"That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods and return them if they did not correspond to order. But here the vendee took no notice of the arrival, and makes no communication to the party to whom alone the communication was necessary."

§ 164. In Norman *v.* Phillips, (*e*) in the exchequer, the court felt bound by Bushel *v.* Wheeler, but declined to apply it to the case before them. Defendant ordered from plaintiff certain yellow deals, with directions to send them to a specified station of the Great Western Railway, to be forwarded to him as on previous occasions. The order was given on the 17th April, the deals arrived at the station on the 19th, on which day the defendant was informed of the arrival by the railway clerk, and said he would not take them. An invoice was sent on 27th April, which defendant received and kept, but it did not appear that he had ever seen the deals. On the 28th May, defendant informed plaintiff that he declined to take the goods. Pollock C. B. refused to nonsuit, and directed the jury to find for plaintiff, with leave reserved to defendant to move for nonsuit or verdict for him. All the judges concurred in making the rule absolute. Alderson B. remarked during the argument that it was difficult to distinguish the case from Bushel *v.* Wheeler, and it is perceptible, from the language of all the judges, that they did not yield entire assent to that case. Bushel *v.* Wheeler was, however, mentioned as a "well-considered case" in Morton *v.* Tibbett (*ante*, § 149); and in Parker *v.* Wallis (*f*) Lord Campbell said *arguendo*, that detention of the goods for a long and unreasonable time by the vendee is evidence that he has accepted them." In Smith *v.* Hudson (34 L. J. Q. B. 145) Blackburn J. refers to Morton *v.* Tibbett as establishing that lapse of time is *some* evidence of acceptance; and observations to a similar effect are to be found in the opinion delivered by Parke B. in Cunliffe *v.* Harrison, 6 Ex. 906.

Norman *v.* Phillips.

§ 165. In Nicholle *v.* Plume (*g*) a quantity of cider was sent to defendant, who had ordered it verbally, but he refused to receive it, and caused it to be lodged in a warehouse

Nicholle *v.* Plume.

(*e*) 14 M. & W. 277.
(*f*) 5 E. & B. 21.
(*g*) 1 C & P. 272.

in the neighborhood not belonging to him. The cider was not returned to plaintiff, nor did defendant send him any notice of his intention not to use it. Best C. J. held that there had been no acceptance under the statute. The report does not show the length of the delay which elapsed, nor was the question raised whether there had been constructive acceptance by unreasonable delay.

Marking the goods.

§ 166. When goods are marked with the name of the purchaser, by his consent, this constitutes an acceptance of the goods, if all the terms of the contract have been agreed on, but not an actual receipt, and the sale cannot be allowed to be good, without further proof of delivery. (*h*)

Where some of the goods not yet in existence.

§ 167. The acceptance of part of the goods bought makes the contract good for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured. (*i*) In Scott *v.* The Eastern Counties Railway Company, (*k*) the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, was of a very peculiar construction, and was not ready for delivery until nearly two years after the order. In the mean time, and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was ob-

Scott *v.* Eastern Counties Railway Company.

(*h*) Bill *v.* Bament, 9 M. & W. 36; Baldey *v.* Parker, 2 B. & C. 37; Proctor *v.* Jones, 2 C. & P. 532; Hodgson *v.* Le Bret, 1 Camp. 233; Boulter *v.* Arnott, 1 C. & M. 334; [Rappleye *v.* Adee, 65 Barb. 589; S. C. 1 N. Y. Sup. Ct. 126; Dyer *v.* Libby, 61 Maine, 45;] Anderson *v.* Scott, in note to Hodgson *v.* Le Bret, 1 Camp. 235, in which Lord Ellenborough held that the cutting off the pegs by which the wine in casks was tasted, and the marking of defendant's initials on the cask in his presence, was an incipient *delivery*, sufficient to take the case out of the statute. But this case was disapproved by Best C. J. in Proctor *v.* Jones, 2 C. & P. 532, and by Alderson B. in Saunders *v.* Topp, 4 Ex. 390. In Mr. Chitty's valuable Treatise on Contracts, he cites the foregoing authorities in support of the principle, that, "in no case can the marking of goods with the name of the purchaser by his consent, constitute an acceptance within the act, unless it appear from the evidence that the goods have been delivered to the purchaser." P. 558, 11th Am. ed. It is submitted that a thorough examination of the cases will show the true principle to be more accurately stated in the text above than in the Treatise on Contracts.

Effect of marking goods.

(*i*) [Gault *v.* Brown, 48 N. H. 183; Marsh *v.* Hyde, 3 Gray, 331, 334; McKnight *v.* Dunlop, 1 Selden, 537; Ross *v.* Welch, 11 Gray, 235; 1 Chitty Contr. (11th Am. ed.) 563. See Gilman *v.* Hill, 36 N. H. 311, 321; Phelps *v.* Cutler, 4 Gray, 137; Robinson *v.* Gordon, 23 U. C. Q. B. 143; Sloan Saw Mill & Lumber Co. *v.* Guttshall, 3 Col. 8.]

(*k*) 12 M. & W. 33.

jected on action brought that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of that lamp. The court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them made the contract good for all. (*l*)

§ 168. In Elliott *v.* Thomas (*m*) there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke B., in giving the decision, explained Thompson *v.* Maceroni, (*n*) in which the language of the opinion seemed adverse to the view taken by the court, by showing that this last named case turned entirely on the form of the action, which was for goods *sold and delivered*, an action clearly not maintainable for such part of the goods as had not been actually delivered to the buyer. (*o*)

Where goods are of different kinds.

Elliott *v.* Thomas.

§ 169. So where there was a verbal contract of sale, by the terms of which the thing was to be resold to the vendor at a fixed price in a particular event, the acceptance by the purchaser in the first instance takes the whole agreement, as an entire contract, out of the statute, and he cannot object, when afterwards sued on the stipulation for the resale, that this contract was not in writing, and that there had been no acceptance nor actual receipt. (*p*)

Bargain for sale and resale.

§ 170. The effect of the acceptance and actual receipt of the goods, or part of them, is to prove that there was a contract of

(*l*) [See Ross *v.* Welch, 11 Gray, 235.]

(*m*) 3 M. & W. 176.

(*n*) 3 B. & C. 1. See, also, Bigg *v.* Whisking, 14 C. B. 195.

(*o*) [See Atwood *v.* Lucas, 53 Maine, 508, and the remarks upon it in Morse *v.* Sherman, 106 Mass. 433. See, also, Ross *v.* Welch, 11 Gray, 235; Dyer *v.* Libby, 61 Maine, 45.]

(*p*) Williams *v.* Burgess, 10 A. & E. 499. [See Fay *v.* Wheeler, 44 Vt. 292; Dickinson *v.* Dickinson, 29 Conn. 600; Wooster *v.* Sage, 67 N. Y. 67. "But it may be necessary to distinguish between such a case as this (viz. a stipulation that the subject of the sale may be returned in a certain event), where the stipulation to return is annexed to the original sale by way of condition, and the case of a stipulation to resell at a future time for the same or a different price, although made contemporaneously with the original sale. It must depend, it seems, upon whether the latter is a complete transaction of itself, and in some degree, upon the language used by the parties." Browne on St. of Frauds, § 293 a; Hogar *v.* King, 38 Barb. 200; Paige *v.* Clough, 1 Alb. L. J. 162.]

sale, (*q*) and this effect is produced, although there may be a dispute between the parties as to the terms of the contract. Such dispute is to be determined on the parol evidence, as all other questions of fact are, by the jury. Where the goods have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptances were to be given, &c. This point may not only be inferred from the decisions already referred to, especially that in Morton *v.* Tibbett, but was expressly decided in Tomkinson *v.* Staight. (*r*) The defendant in that case was alleged to have bought a piano for the plaintiff, which was delivered to him at his house, and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiffs. The defendant refused to let the plaintiff take back the piano, and kept it. Held, that the acceptance being fully proven, the statute was satisfied, and that the dispute about the terms of the contract thus proven to exist was matter of fact for decision by the jury on the parol evidence which was properly let in at the trial.

Effect of the proof of acceptance and receipt.

Tomkinson *v.* Staight.

§ 171. An acceptance by the purchaser can have no effect to satisfy the statute after the vendor has disaffirmed the parol contract. In Taylor *v.* Wakefield (*s*) there was a verbal agreement between the owner of goods and his tenant, who had possession of them, that the latter might purchase them at the expiration of his tenancy, but was not to take them till the money was paid. At the termination of the tenancy, the buyer tendered the price, but the vendor refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the vendor prevented him. *Trover* by the buyer against the vendor. Held, no

Acceptance after disaffirmance of the contract by vendor.

Taylor *v.* Wakefield.

(*q*) [See Marsh *v.* Hyde, 3 Gray, 331, 332, 333, per Bigelow J. In Townsend *v.* Hargraves, 118 Mass. 325, 333, Colt J. remarked that the acceptance which the statute requires to give validity to the contract "must be with intention to perform the whole contract and assert the buyer's ownership under it, but it is sufficient if it be of part of the goods only." Atherton *v.* Newhall, 123 Mass. 141. See Grover *v.* Cameron, 6 U. C. Q. B. (O. S.) 196. "Such an acceptance implies the existence of a completed contract, sufficient to pass the title, which is not to be confounded with that actual transfer of possession necessary to defeat the vendor's lien or right of stoppage *in transitu*, or to show an actual receipt under the statute." Colt J. *ut supra*.]

Acceptance of part of goods sufficient to satisfy statute.

(*r*) 17 C. B. 697, and 25 L. J. C. P. 85.

(*s*) 6 E. & B. 765.

evidence for the jury of acceptance and delivery, because the vendor had disaffirmed the contract before the buyer took to the goods.

SECTION II. — WHAT IS AN ACTUAL RECEIPT.

§ 172. This question is not free from difficulty, nor have the cases always been consistent. The circumstances in which the goods happen to be at the time of the contract afford the basis of a convenient arrangement for reviewing the authorities. The goods sold may be in possession —

1st. Of the buyer, as bailee or agent of the vendor;

2d. Of a third person, whether or not bailee or agent of the vendor;

3d. Of the vendor himself, and this is the most usual case.

§ 173. 1st. When the goods at the time of the contract are already in possession of the purchaser, it may be difficult to prove actual receipt. But wherever it can be shown that the purchaser has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner. The principle is illustrated in the case of Edan *v.* Dudfield. (*t*) In that case the defendant, agent of plaintiff, had in his possession goods which he had entered at the custom house in his own name, but which belonged to the plaintiff. He agreed to buy them at a discount on the invoice cost, and afterwards sold them. On action for the price it was strenuously maintained by Sir Fitzroy Kelly, that where the goods, exceeding 10*l.* in value, were already in possession of the alleged buyer, there could be no valid sale under the statute of frauds, without a writing; because, although there might be a *virtual*, there could not possibly be an *actual* receipt. But the court, after time to consider, held that there was evidence to justify the jury in finding an actual receipt, saying, "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (receipt?). And the effect of such acts, necessarily to be proven by parol evidence, must be submitted to a jury." In Lil-

Goods already in possession of buyer.

Edan *v.* Dudfield.

(*t*) 1 Q. B. 306. [See Markham *v.* Jaudon, 41 N. Y. 235, 242.]

lywhite *v.* Devereux (*u*) the exchequer court observed: "No doubt can be entertained after the case of Edan *v.* Dudfield, which was well decided by the court of queen's bench, that this is a question of fact for the jury: and that, if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds: as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like." In this case, however, the court disagreed with the jury, and set aside their verdict, as not justified by the evidence.

Lillywhite *v.* Devereux.

§ 174. 2d. When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself. (*x*) But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order, or recognizes it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor. (*y*)

Goods in possession of a third person as bailee for vendor.

(*u*) 15 M. & W. 285.

(*x*) Blackburn on Sales, 28.

(*y*) [See per Foster J. in Boardman *v.* Spooner, 13 Allen, 357; Tuxworth *v.* Moore, 9 Pick. 347; Carter *v.* Willard, 19 Ib. 1; Burge *v.* Cone, 6 Allen, 412; Bullard *v.* Wait, 16 Gray, 55; Linton *v.* Butz, 7 Barr, 89; Chapman *v.* Searle, 3 Pick. 38; Appleton *v.* Bancroft, 10 Met. 236; 1 Chitty Contr. (11th Am. ed.) 555, 556, and cases in notes; Rourke *v.* Bullens, 8 Gray, 549; Deady *v.* Goodenough, 5 U. C. C. P. 163. But if the wharfinger or other bailee on whom the order is drawn accepts the order, and agrees to hold

Acceptance of order by bailee; effect of.

§ 175. In Bentall *v.* Burn (*z*) the king's bench held that a delivery order given to the purchaser of wine did not amount to an actual acceptance (receipt?) by him, until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as agents of the vendee." A distinction was suggested in the case, because the warehousemen were the dock company, bound by law to transfer goods from buyer to seller when required to do so, but the court said: "This may be true, and they might render themselves liable to an action for refusing to do so: but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them." Bentall *v.* Burn.

§ 176. In Farina *v.* Home (*a*) the foregoing case was followed by the exchequer of pleas. There the wharfinger gave the vendor a delivery warrant making the goods deliverable to him or to his assignee by indorsement on payment of rent Farina *v.* Home.

the goods on account of the vendee, the possession is thereby absolutely changed, so as to satisfy the statute. A. had certain logs in the possession of the M. Boom Company. He agreed verbally with B. to transfer the lumber to him, and that it should be sold to pay certain creditors of A. A. and B. went together to the office of the secretary of the Boom Company, and looked over the books of the company, and A wrote the following order: "L., July 3d, 1861. The agent of the M. Boom Company will deliver to order of B. all lumber belonging to me in said Boom of the different marks rendered by me, of the date of 8th, 15th, and 16th May last, and oblige. A." Some conversation took place between the secretary and A., and the secretary said it would be all right, and B. accepted his declaration. There was no entry made in the books of the company, nor any delivery symbolical or otherwise, nor any dealing with the lumber by B. *Held*, that no property passed to B. Allan *v.* Ferguson, 1 Hannay (N. B.), 149. See Hollingsworth *v.* Napier, 3 Caines, 185; Wilkes *v.* Ferris, 5 John. 335; Tuxworth *v.* Moore, 9 Pick. 349; Boardman *v.* Spooner, 13 Allen, 357; Chase *v.* Willard, 57 Maine, 157; Hatch *v.* Lincoln, 12 Cush. 31; Cushing *v.* Breed, 14 Allen, 376; Warren *v.* Milliken, 57 Maine, 97; Hatch *v.* Bayley, 12 Cush. 27; Townsend *v.* Hargraves, 118 Mass. 325. The acceptance, in Massachusetts, of a bill of goods which are in a warehouse in New York, with an order on the warehouseman for their delivery, without notice to him, is not an acceptance or receipt of the goods, which will take the sale out of the operation of the statute of frauds. Boardman *v.* Spooner, 13 Allen, 353. Whether such sale would be taken out of the statute under similar circumstances, with notice to the warehouseman, was not decided, but the cases of Bentall *v.* Burn and Farina *v.* Home were noticed as "well considered English cases." Ib.] Allan *v.* Ferguson.

(*z*) 3 B. & C. 423. See, also, Lackington *v.* Atherton, 7 M. & G. 360; Bill *v.* Bament, 9 M. & W. 36; Lucas *v.* Dorrien, 7 Taunt. 278; Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. Ex. 185; Harman *v.* Anderson, 2 Camp. 243.

(*a*) 16 M. & W. 119.

and charges. The vendor forthwith indorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. Held, to be no actual receipt, but sufficient evidence of acceptance to go to the jury.

Godts v. Rose.

§ 177. In Godts *v.* Rose (*b*) the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer and asked for a check for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again, but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman: but the purchaser had already got part of the goods, and the warehouseman, thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the court held that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a check; that the actual receipt, therefore, had not taken place, the tripartite contract not being complete.

Goods on premises of third persons not bailees.

§ 178. But the goods may be lying on the premises of third persons, who are not bailees of them, as timber cut down and lying, at the disposal of the vendor, on the land of the person from whom he bought it, or lying, at his disposal, at a free wharf; and in such cases the delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them, as in the cases of Tansley *v.* Turner (*c*) and Cooper *v.* Bill, (*d*) *post*, book II. ch. iii.

Law in America.

§ 179. In America the language of the decisions is, that in such cases there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged

(*b*) 17 C. B. 229, and 25 L. J. C. P. 61.
(*c*) 2 Bing. N. C. 151.
(*d*) 3 H. & C. 722; 34 L. J. Ex. 161.

of all lien for the price," in order to take the contract out of the operation of the statute. Marsh *v.* Rouse, 44 N. Y. 643. (*e*)

§ 180. 3d. Usually at the time of the sale the goods are in possession of the vendor himself, and the dealings of men are so infinitely diversified, circumstances vary so much, and the acts of parties so frequently admit of more than one construction, that it is extremely difficult to point out *a priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the vendee. Of course, if the purchaser remove the goods from the vendor's possession and take them to his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to the *validity* not the *performance* of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase, (*f*) is an actual receipt sufficient to make the contract good, although a serious question may and often does arise at a later period, whether there has been an actual receipt of the bulk.

Goods in possession of vendor.

§ 181. It is well settled that the delivery of goods to a common carrier, *a fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose. (*g*) It must not be forgotten that the carrier only

Delivery to common carrier.

(*e*) [See French *v.* Freeman, 43 Vt. 93, 97; Yale *v.* Seely, 15 Ib. 221.]

(*f*) Klinitz *v.* Surry, 5 Esp. 267.

(*g*) Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364, and 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E., B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145; [Magruder *v.* Gage, 33 Md. 344; Foster *v.* Rockwell, 104 Mass. 167, 172; Cobb *v.* Arundell, 26 Wis. 553; Everett *v.* Parks, 62 Barb. 9. "A delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to the purchaser himself. Putnam *v.* Tillotson, 13 Met. 517; Orcutt *v.* Nelson, 1 Gray, 536; Merchant *v.* Chapman, 4 Allen, 362; Strong *v.* Dodds, 47 Vt. 348. It is not necessary that the purchaser should employ the carrier personally, or by some other agent, than the vendor. We see no reason why a delivery to a warehouseman should not have the same effect." Chapman J. in Hunter *v.* Wright, 12 Allen, 548, 550.]

Delivery to carrier.

represents the purchaser for the purpose of *receiving*, not *accepting* the goods. (*h*) The law in the United States is the same. Cross *v.* O'Donnell, 44 N. Y. 661; Caulkins *v.* Hellmann, 47 N. Y. 449.

Decisions in America.

§ 182. It is also now finally determined, that the goods may remain in the possession of the vendor, *if he assume a changed character*, and yet be actually received by the vendee. It may be agreed that the vendor shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the vendor into that of the vendee through his agent. (*i*) The first case was that of Chaplin *v.* Rogers, (*k*) in 1800, where a stack of hay remaining on the vendor's premises was held to have been actually received by the purchaser, on the ground that he had resold part of it to a sub-vendee, who had taken away the part so purchased by him.

Vendor may become bailee of purchaser.

Chaplin *v.* Rogers.

§ 183. But the case usually cited as the leading one on this point is Elmore *v.* Stone, (*l*) where the purchaser of horses from a dealer left them with the dealer to be kept at livery for him, the purchaser. Sir James Mansfield delivered the judgment of the common bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held, not as owner, but as any other livery-stable keeper might have done.

Elmore *v.* Stone.

§ 184. Nearly half a century later, in 1856, the case of Marvin *v.* Wallis, (*m*) on facts almost identical with those in Elmore *v.* Stone, was decided by the queen's bench on the authority of the latter. The facts as found by the jury were, that after the completion of the bargain the vendor borrowed the horse for a short time, and, with the purchaser's assent, retained it as a borrowed horse. Held, that there had been an actual receipt by vendee; that there had been a *change of character* in the

Marvin *v.* Wallis.

(*h*) *Supra*, § 160.

(*i*) [See Weld *v.* Came, 98 Mass. 152, 154; Janvrin *v.* Maxwell, 23 Wis. 51; Barrett *v.* Goddard, 3 Mason, 107, 113, 114; but see Kirkby *v.* Johnson, 22 Mo. 354.]

(*k*) 1 East, 192.

(*l*) 1 Taunt. 458; [Rappleye *v.* Adee, 65 Barb. 589, was a very similar case.]

(*m*) 6 E. & B. 726; 25 L. J. Q. B. 369. [See Bullard *v.* Wait, 16 Gray, 55; Tuxworth *v.* Moore, 9 Pick. 347; Whipple *v.* Thayer, 16 Ib. 28; Carter *v.* Willard, 19 Ib. 1; Appleton *v.* Bancroft, 10 Met. 236; Olyphant *v.* Baker, 5 Denio, 379; Ely *v.* Ormsby, 12 Barb. 570; Green *v.* Merriam, 28 Vt. 801; Vincent *v.* Germond, 11 John. 283.]

vendor, from owner to bailee and agent of the purchaser. The bench on this occasion was composed of Campbell C. J. and Coleridge and Erle JJ. So, in Beaumont *v.* Brengeri, (*n*) the carriage bought by the defendant remained in the shop of the plaintiff, the vendor, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for account of the vendee. Held, an actual receipt. Beaumont *v.* Brengeri.

§ 185. Two cases decided in the king's bench, in 1820 and 1821, may seem at first sight to trench upon the doctrine established in Elmore *v.* Stone and Marvin *v.* Wallis. In the first, Tempest *v.* Fitzgerald, (*o*) the purchaser of a horse agreed, in August, to give forty-five guineas for it, and to take it away in September. *The parties understood it to be a ready-money bargain.* The purchaser returned on the 20th September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plaintiff's son to keep it for another week, which was assented to as a favor. The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. Held, that there was no actual receipt. The ground of the decision was that defendant had no right of property in the horse *until the price was paid;* that if he had gone away with the horse, vendor might have maintained trover: and the case was distinguished by the judges from Chaplin *v.* Rogers, (*p*) and Blenkinsop *v.* Clayton, (*q*) on this basis. Tempest *v.* Fitzgerald.

In the second case, Carter *v.* Toussaint, (*r*) the plaintiffs, who were farriers, sold defendant a race-horse which required firing, and this was done in defendant's presence and with his approbation. It was agreed that the horse should be kept by plaintiffs for twenty days without charge. At the end of that time, by defendant's orders, the horse was taken by plaintiffs to a park to be turned out to grass. It was entered in plaintiff's name, and this was also done by the direction of defendant, who was anxious that it should not be known that he kept a race-horse. *No time was specified in the bargain for the payment of the price.* Carter *v.* Toussaint.

(*n*) 5 C. B. 301.
(*o*) 3 B. & A. 680.
(*p*) 1 East, 192.
(*q*) 7 Taunt. 597.
(*r*) 5 B. & A. 855.

Held, that there had been no actual receipt, because the seller was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of defendant and by his request, that would have amounted to an actual receipt of it by the purchaser: but, on the facts, the purchaser could not have maintained trover against the park-keeper on tendering the keep. It is apparent, from the reasoning of the judges in both the above cases, that there is nothing irreconcilable between the principles on which they were decided and those which have been sanctioned in the cases previously quoted. Both these cases went distinctly upon the ground that in a cash sale the vendor has a right to demand payment of the price concurrently with delivery of possession; and that as nothing had been assented to by the vendors which impaired this right, there had been no actual receipt by the vendees. (*s*)

§ 186. In Cusack *v.* Robinson (*t*) the court treats the rule as settled, that, "though the goods remain in the personal possession of the vendor, yet it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute." (*t*[1]) The subject was very thoroughly discussed in Castle *v.* Sworder, (*u*) in which an unanimous decision

Cusack *v.* Robinson.

Castle *v.* Sworder.

(*s*) See, also, Holmes, *v.* Hoskins, 9 Ex. 753.

(*t*) 1 B. & S. 299; 30 L. J. Q. B. 261.

(*t*[1]) [In relation to the law laid down in the language quoted in the text from Cusack *v.* Robinson, as to the loss of lien, see §§ 770, 771, and 801 *et seq.* In Safford *v.* McDonough, 120 Mass. 290, 291, Morton J. said: "It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed." Endicott J. in Knight *v.* Mann, 118 Mass. 143, 146; Chapman J. in Weld *v.* Came, 98 Mass. 152, 154. It appeared that the defendant wished to buy a chaise which was owned by the plaintiff. The chaise was in a stable attached to plaintiff's house. The parties went out to look at it, and soon returned to the plaintiff's store and had a conversation as to the price and manner of payment. The price was fixed at $3,000, to be paid for in wood, to be delivered by the defendant. The defendant spoke of not having at that time a proper place to keep the chaise, and said he should have to build a shed. The witness also stated that the substance of the conversation was that

Goods remaining in possession of vendor; whether there may be acceptance and receipt.

Means *v.* Williamson.

(*u*) 29 L. J. Ex. 235; 6 H. & N. 832, and 30 L. J. Ex. 310.

of the exchequer of pleas, composed of Martin, Channell, and Bramwell BB., was reversed by a decision, also unanimous, of the exchequer chamber, composed of Cockburn C. J. and Crompton J. of the queen's bench, and Willes, Byles, and Keating JJ. of the common pleas. This was an action to recover 80*l.* 2*s.* 2*d.*, the price of some rum and brandy, for which the defendant gave a verbal order at a price agreed on, *with six months' credit.* The plaintiffs' clerk wrote off, and transferred into the defendant's name, in the books kept in plaintiffs' bonded warehouse, two specific puncheons of rum and a hogshead of brandy, marked and described in an invoice sent by post to defendant. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the custom-house officers another. This was the usual mode of selling in bond in Bristol, where plaintiffs were carrying on business as spirit merchants. An invoice, describing the marks of the packages, the ships by which they had been imported, and the contents, was inclosed to defendant in a letter, saying: "The above remain in bond, and which you will find of a very good quality, and hope will merit the continuance of your favors." After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked plaintiffs' traveller to sell the goods for him. He was referred to plaintiffs, and wrote to them saying: "You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it." On these facts, Bramwell B. directed a nonsuit, with leave to plaintiffs to move, the defendant having objected that there was no delivery nor acceptance to satisfy the statute of frauds. Held, by the court of exchequer, that there had been no delivery nor actual receipt; that as the

the chaise was to remain where it was until the defendant should build his shed. The defendant never delivered any wood or removed the chaise. Shepley C. J. said: "The witness appears to have stated, without objection, 'the substance of the conversation was that the chaise was to remain where it was until the defendant should build his shed.' It was to remain, not as security for the payment, but at the pleasure of the defendant, and for his accommodation. Nothing further remaining to be done, the sale was completed, if there was a legal delivery. For that purpose it is not necessary that the property should pass into the actual possession of the vendee. When it was so situated that he is entitled to, and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires, although it may by his request have continued in the custody of the vendor." Means *v.* Williamson, 37 Me. 556.]

goods remained under control of the vendors, and in their possession till after the credit had expired, their lien had revived; and that in the interval, while the credit was running, there had been nothing done to constitute actual receipt by the purchaser. On the appeal to the exchequer chamber, Cockburn C. J. in giving his opinion said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises whether the possession, which actually remained in the sellers, was a possession in the sellers *by virtue of their original property in the goods*, or *whether it had become a possession as agents and bailees of the buyers.*" The learned chief justice then went on to point out that there was sufficient evidence of a change of character in the possession to go to the jury, in the facts proven, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and failing in that request, in asking the plaintiffs to sell the goods for him." Crompton J. pointed out that the court did not differ from the court of exchequer save on one point, namely, that "there was some evidence that the character of plaintiffs was changed to that of warehousemen," and said that "according to the authorities there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own." (*x*)

[In Falls *v.* Miller (*x*[1]) it appeared that on Saturday the defend-

(*x*) [In Barrett *v.* Goddard, 3 Mason, 107, it was decided that, where goods were sold, lying in the vendor's warehouse, on a credit of six months, for which a note was given, and the goods were sold by marks and numbers, and it was a part of the consideration of the purchase that they might lie, rent free, in the warehouse, at the option of the purchaser, and for his benefit, until the vendor should want the room, there was a complete delivery of the goods, so that, on the insolvency of the purchaser, they would not be stopped by the vendor. Story J. said: "If the warehouse had belonged to a third person, there would be no pretence to say, after notice and assent by the warehouseman, that the delivery was not complete in construction of law. For such a purpose no manual actual possession is necessary. It is sufficient if, in the intent of all the parties, the one parts with, and the other receives the property, although there is no change of place. There is nothing in reason or principle to make the present case different, simply because the bales of cotton remained in the plaintiff's own warehouse. It was a part of the bargain that they should so remain, and a part of the consideration of the purchase. The warehouse must be deemed, after the purchase, to be virtually the warehouse of the purchaser, for this purpose, or so much storage as actually hired by him." See Chase *v.* Willard, 57 Maine, 157; Hatch *v.* Lincoln, 12 Cush. 31; Means *v.* Williamson, 37 Maine, 556.]

Vendor the warehouseman of vendee; effect of.

(*x*[1]) 2 Cr. & Dix, 416.

ant bought a number of pigs from the plaintiff at a certain price agreed upon. The defendant at the time of sale said he had no change about him and could not pay any earnest, but he wished the plaintiff's servant to keep the pigs without any food from Saturday until the following Monday, when he would call for them and take them away. The pigs were accordingly kept in the plaintiff's house in pursuance of the defendant's directions, but he never took them away, and the plaintiff afterwards sold them and brought suit for the difference between what the sale realized and the contract price. The defence was that the statute had not been complied with. The cases of Carter *v.* Toussaint and Tempest *v.* Fitzgerald, *ante*, § 185, were referred to, but Burton J. said: "I feel myself bound by the cases which have been cited on the part of the respondent, and must hold that there was no such delivery here as would prevent the necessity of a memorandum or note in writing as required by the statute."]

§ 187. It will already have been perceived that in many of the cases the test for determining whether there has been an actual receipt by the purchaser has been to inquire whether the vendor has lost his lien. (*y*) Receipt implies delivery, (*z*) and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee. (*a*) The subject was placed in a very clear light by Holroyd J. in his decision in Baldey *v.* Parker: (*b*) "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." (*b*[1]) No exception is known in the whole series of

Actual receipt tested by loss of vendor's lien.

(*y*) See *post*, book V. part I. ch. iv. on Lien of Vendor, §§ 801 *et seq.*

(*z*) Per Parke B. in Saunders *v.* Topp, 4 Ex. 394.

(*a*) [In Shindler *v.* Houston, 1 Comst. 261, Gardner J. said: "The language of the act is unequivocal and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance." See, also, Young *v.* Blaisdell, 60 Maine, 272, 275.

Acceptance implies delivery.

Knowledge by a subsequent purchaser that a previous verbal contract of sale, invalid under the statute of frauds, had been made of the same property, does not affect the validity of his purchase. Young *v.* Blaisdell, 60 Maine, 272.]

Subsequent purchaser with knowledge of previous invalid contract.

(*b*) 2 B. & C. 37.

(*b*[1]) [Safford *v.* McDonough, 120 Mass. 290. See Townsend *v.* Hargraves, 118 Mass. 325, 333, cited *ante* § 170, note (*q*). See §§ 770, 771, and 801, *post*.]

decisions to the propositions here enounced, and it is safe to assume, as a general rule, that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note. (*c*)

Dodsley *v.* Varley.

§ 188. It may be useful here to advert to one case in which the circumstances were very peculiar. In Dodsley *v.* Varley (*d*) wool was bought by the defendant from the plaintiff. The price was agreed on, but the wool would have to be weighed. It was sent to the warehouse of a person employed by the defendant, was weighed, and packed up with other wools in sheeting provided by the defendant. It was the usual course for the wool to remain at this warehouse till paid for, and this wool had not been paid for. The defendant insisted that the vendor's lien remained, and that the wool therefore had not been actually received by him as purchaser. But the court held that the property had passed, that the goods had been delivered, and were at the risk of the purchaser. In relation to the vendor's right, the court said: "The plaintiff had not what it called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the

(*c*) Howe *v.* Palmer, 3 B. & A. 321; Tempest *v.* Fitzgerald, 3 B. & A. 680; Carter *v.* Toussaint, 5 B. & A. 855; Baldey *v.* Parker, 2 B. & C. 37; Smith *v.* Surman, 9 B. & C. 561; Bill *v.* Bament, 9 M. & W. 37; Phillips *v.* Bistolli, 2 B. & C. 511; Hawes *v.* Watson, 2 B. & C. 540; Maberley *v.* Sheppard, 10 Bing. 101; Holmes *v.* Hoskins, 9 Ex. 753; Cusack, *v.* Robinson, 1 B. & S. 299; Castle *v.* Sworder, 29 L. J. Ex. 235; S. C. 30 L. J. Ex. 310, and 6 H. & N. 832; Morton *v.* Tibbett, 15 Q. B. 428, and 19 L. J. Q. B. 382; [Russell *v.* Minor, 22 Wend. 659; Rathbun *v.* Rathbun, 6 Barb. 98; Brand *v.* Focht, 3 Keyes, 409; Bailey *v.* Ogden, 3 John. 399; Jackson *v.* Watts, 1 McCord, 288; Marsh *v.* Rouse, 44 N. Y. 643. Upon an agreement for the sale of merchandise and payment therefor by a satisfactory note, the purchaser examined the merchandise, had it weighed, marked with his initials, and piled up by itself in the seller's warehouse, to be taken away upon payment for it or giving a satisfactory note for its price. The purchaser never complied with these terms, and the seller refused to allow him to take the merchandise away, claiming a lien upon it for its price. After remaining for several months it was destroyed in the warehouse by fire. It was held that there was no such delivery of the goods as to constitute the seller a bailee for the purchaser. Safford *v.* McDonough, 120 Mass. 290.] Safford *v.* McDonough.

(*d*) 12 Ad. & E. 632; [Spencer *v.* Hale, 30 Vt. 314; Dows *v.* Montgomery, 5 Robertson, 445.]

goods should not be removed to their ultimate place of destination before payment." (d^1) It is plain that there is nothing in this case which conflicts with the rule, that there can be no actual receipt by purchaser while vendor's lien continues, for the court held that the lien was gone. It may, however, be remarked, that the effect attributed by the court to the special agreement, that the goods should remain in the defendant's warehouse without removal till paid for, is much greater than was accorded to a similar stipulation in the case of Howes *v.* Ball, (e) where the question was raised in a more direct form than in Dodsley *v.* Varley. In this last mentioned case, where the litigation was between the vendor and the administrator of the deceased purchaser, the court held that the property had passed in the thing sold, and that the special stipulation between the parties might, perhaps, amount to a personal license in favor of the vendor to retake the thing sold, if not paid for at the expiration of the credit allowed ; but that such license could not be available against a transferee of the thing, as a sub-vendee, or the administrator of the vendee. (f)

Howes *v.* Ball.

(d^1) [Ladd J. in Pinkham *v.* Mattox, 53 N. H. 600.]

(e) 7 B. & C. 484.

(f) [In Pinkham *v.* Mattox, 53 N. H. 600, it was maintained that if there is a contract for sale, although upon condition that the property shall not pass until the price is paid, and the purchaser receives and accepts the goods upon the terms of such contract, his acceptance will be sufficient to answer the requirement of the statute of frauds. In this case the plaintiff sold to the defendant a sewing-machine for eighty dollars, to be paid in monthly instalments of from five to ten dollars, at the option of the buyer; and it was agreed that the machine should remain the property of the plaintiff until paid for. The machine was delivered and accepted on these terms at the time of the contract. The defendant made no payment, but suffered forty-five dollars to become due at the rate of five dollars per month; and thereupon the plaintiff brought an action to recover this sum, and in this action it was held that the acceptance of the machine by the defendant was a sufficient acceptance under the statute of frauds. This case was very fully considered by Ladd J., but no case was cited more nearly resembling it than Dodsley *v.* Varley, *supra*.]

Acceptance and receipt upon conditional contracts as to title.

CHAPTER V.

OF EARNEST OR PART PAYMENT.

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§ 189. THE giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the statute, "giving something in earnest" and "giving something in part payment," are often treated as meaning the same thing, (*a*) although the language clearly intimates that the earnest is "*something*" that "binds the bargain," whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed. (*b*) Earnest may be money, or some gift or token (among the Romans usually a ring) given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England. (*c*) Examples are found in Bach *v.* Owen, (*d*) in 1793, and Goodall *v.* Skelton, (*e*) in 1794, in the former of which a halfpenny, and in the latter a shilling, was given in earnest of the bargain.

Earnest and part payment distinct.

(*a*) ["As used in the statute of frauds, 'earnest' is regarded as a part payment of the price." Howe *v.* Hayward, 108 Mass. 54, 55, Chapman C. J.]

(*b*) [See Bissell *v.* Balcom, 39 N. Y. 275.]

(*c*) Bracton, 1, 2, c. 26. [Mr. Browne says: "It seems to be agreed that the earnest must be money or money's worth; in other words, something of *value*, though the amount be immaterial." Browne St. Frauds, § 341; Artcher *v.* Zeh, 5 Hill (N. Y.), 200.]

(*d*) 5 T. R. 409.

(*e*) 2 H. Bl. 316.

§ 190. Whether giving earnest has the effect of passing the property in the thing sold from vendor to vendee will be considered in a subsequent part of this treatise, (*f*) but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The giving of earnest, and the part payment of the price, are two facts independent of the bargain, capable of proof by parol, and the framers of the statute have said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing. (*g*)

Either suffices to make the contract good.

§ 191. The former of these facts, that of giving something in earnest to "bind the bargain," has been the subject of only one reported case, that of Blenkinsop *v.* Clayton, (*h*) in which the buyer drew a shilling across the vendor's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to the vendor, the court necessarily held that the statute had not been satisfied. There is another case, (*i*) in which the plaintiff was nonsuited in an action on a contract of sale, where a shilling earnest-money was actually given by the buyer to bind the bargain, but the case turned entirely on the form of action, which was for goods *sold and delivered*, under

Something must be actually given to constitute earnest. Blenkinsop *v.* Clayton.

Goodall *v.* Skelton.

(*f*) *Post*, book II. ch. iv.

(*g*) [A verbal stipulation to give and to receive something in earnest to bind the bargain, or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute as is the agreement or contract, taken as a whole; and a note or memorandum in relation to giving something in earnest to bind the bargain, or in part payment, which is insufficient in itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party. Thus it may be stated as a general proposition, that where the parties in making a contract omit to do anything which the statute of frauds requires, the consent of both is necessary to supply the part omitted. Edgerton *v.* Hodge, 41 Vt. 676, 680, 681. It is not sufficient to bind the bargain for the purchaser to *offer* or *tender* something in earnest or in part payment; the vendor must accept and receive it. Edgerton *v.* Hodge, 41 Vt. 676, 679; Andrews J. in Hawley *v.* Keeler, 53 N. Y. 114, 119; Hicks *v.* Cleveland, 48 Ib. 84. Payment to an agent of the vendor of a portion of the purchase-money is as effectual as payment to the principal. Resort cannot be had to the verbal agreement, however, to establish the agency. But the agency may be proved by a subsequent ratification of the act of an assumed agent in receiving the payment. Hawley *v.* Keeler, 53 N. Y. 114.]

Verbal stipulation to give earnest.

Payment to agent good.

(*h*) 7 Taunt. 597.

(*i*) Goodall *v.* Skelton, 2 H. Bl. 316.

circumstances where the court was of opinion that there had been no delivery. A count for goods bargained and sold would no doubt have been sustained.

Part payment.

§ 192. On the subject of part payment, there is but one important decision under this clause of the statute; but the cases which have arisen under analogous clauses in the statutes of limitations and the bankruptcy acts may be considered with advantage in this connection. (*g*)

Agreement to set off a debt due to the buyer.

§ 193. An agreement for the purchase of goods exceeding 10*l.* in value was made with the understanding, and as part of the contract, that the vendor should deduct from the price the amount of a debt previously due by him to the purchaser. The vendor then sent the goods to the purchaser with an invoice charging him with the price, 20*l.* 18*s.* 11*d.*, under which was written, "By your account against me, 4*l.* 14*s.* 11*d.*" The purchaser returned the goods as inferior to sample. It was contended, on behalf of the vendor, who brought an action for goods sold and delivered, that this credit of 4*l.* 14*s.* 11*d.* was a part payment of the price of the goods, sufficient to take the case out of the statute. Held, not to be so. Platt B. said: "You rely on part of the contract itself, as being part performance of it." Pollock C. B. said: "Here was nothing but one contract, whereas the statute requires a contract, and if it be not in writing, something besides." Parke B. said: "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part payment then or subsequently." Alderson B. said: "The 17th section of the statute of frauds implies that to bind a buyer of goods of 10*l.* value without writing he must have done *two* things: first, made

(*g*) [A. agreed to sell B. 500 cords of wood at 3 shillings 9 pence per cord. M. had contracted to cut this wood for A. at 2*s.* 6*d.* per cord, and B. was to pay M. the 2*s.* 6*d.* and the plaintiff A. 1*s.* 3*d.*, as owner of the trees. Held, that a payment on account to M. by B. took the contract out of the statute of frauds. Brady *v.* Harrahy, 21 U. C. Q. B. 340; Furniss *v.* Sawers, 3 Ib. 77.]

a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment." (*k*) From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the statute, if made subsequently to the sale, (*l*) or by an *independent* contract at the time of the sale, such as the giving of a receipt by the buyer for the debt previously due to him; but the decision is express on the point that such an agreement when part of the bargain for the purchase, one of the terms of the contract of sale itself, is not such a part payment as is required to make a parol sale valid for an amount exceeding 10*l*. (*m*)

(*k*) Walker *v.* Nussey 16 M. & W. 302. [See Teed *v.* Teed, 44 Barb. 96; Mattice *v.* Allen, 3 Keyes (N. Y.), 492; Brabin *v.* Hyde, 32 N. Y. 519.]

(*l*) [It is not necessary in most states that part payment should be made at the time of the sale; it may be made afterwards. Thompson *v.* Alger, 12 Met. 435, 436; Davis *v.* Moore, 13 Maine 424; Gault *v.* Brown, 48 N. H. 183, 189; Vincent *v.* Germond, 11 John. 283; Sprague *v.* Blake, 20 Wend. 61. But see now Bissell *v.* Balcom, 39 N. Y. 275; Allis *v.* Read, 45 Ib. 142; and see Hunter *v.* Wetsell, 57 Ib. 375, where it was held by the court, after reviewing many of the authorities, that a payment upon a parol contract for the sale of personal property for a price of $50 or more, made at a time subsequent to that of the making of the contract, does not, of itself, take the contract out of the operation of the statute. To have that effect the subsequent payment must be made and received for the express purpose of thus complying with the statute and rendering the contract valid; or when payment is made, the parties must reaffirm or restate the terms of the contract; in which case the payment is made "at the time" of making the contract, within the meaning of the statute. Hawley *v.* Keeler, 53 N. Y. 114. The part payment must be a payment of a part of the purchase money of the goods thus contracted to be sold. Organ *v.* Stewart, 60 N. Y. 413.]

Part payment may be subsequent to time of sale.

(*m*) [When, by the oral agreement of sale, the price is to be paid by crediting the amount against an indebtedness of the vendor to the purchaser, and no act is done to carry it out, it is not to be regarded as payment. Until an application of the payment is actually made by indorsement, receipt, or otherwise, it goes "no farther than the mere contract to pay in that mode; and, so far as the statute is concerned, it no more aids to prove the contract valid than does the agreement to pay the price in an ordinary sale, where actual payment is expected." Clark *v.* Tucker, 2 Sandf. 157, 164. See Gilman *v.* Hill, 36 N. H. 319; Brabin *v.* Hyde, 32 N. Y. 519; Mattice *v.* Allen, 3 Keyes, 492; S. C. 3 Abb. App. Dec. 248; Walrath *v.* Ingles, 64 Barb. 265. But a promise by the purchaser to pay the price to a creditor of the vendor, which promise is accepted by the creditor, who thereupon discharges the vendor, is a part payment sufficient to satisfy the statute. Cotterill *v.* Stevens, 10 Wis. 442. But where the purchaser of a lot of logs, at the time of the

If part payment is made by crediting the amount on an indebtedness, some act must be done.

Acts in nature of novation good.

§ 194. Under the statute of limitations, it has been held that where goods are supplied by agreement "on account" of a debt, this is part payment of the debt. The decision to this effect given by the exchequer in Hart *v.* Nash (*n*) was followed by the queen's bench in Hooper *v.* Stephens. (*o*) And the decisions under the bankruptcy acts have been to the same effect. (*p*) So, also, in Blair *v.* Ormond, (*q*) it was held, under the statute of limitations, that an agreement by the debtor to board and lodge the creditor at a fixed price per week in deduction of the debt was a part payment constituting a sufficient acknowledgment of the debt to take it out of the statute. There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller, "on account" or in part satisfaction of the price, will be equivalent to part payment. The transfer to the vendor of a bill or note "on account" or in part payment would seem also to suffice to render the bargain valid. (*r*) In Maber *v.* Maber (*s*) a gift of the interest due was held to be a part payment. (*s*[1])

Analogous decisions under statute of limitations.

Goods "on account" of a debt.

Blair *v.* Ormond.

Board and lodging supplied in part payment.

Bill or note transferred in part payment.

Maber *v.* Maber.

§ 195. The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood unless careful discrimination be observed. Earnest was of two kinds: one was an independent contract anterior to the agreement of sale; the other was accessory to the contract of sale after it had been agreed on, and was, like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractûs facti.*

Civil law.

purchase and as a part of the price, agreed to pay, and afterwards did pay, a debt of the seller, the creditor not knowing or consenting to the agreement, it was decided that this did not take the sale out of the statute; there being no payment down of the purchase-money, no memorandum of sale, and no delivery. Paine *v.* Fulton, 34 Wis. 83. The part payment required by the statute may be made by a settlement for, and an actual transfer of the title to, property previously delivered by the purchaser to the vendor. Dow *v.* Worthen, 37 Vt. 108.]

(*n*) 2 Cr., M. & R. 337.

(*o*) 4 Ad. & E. 71.

(*p*) Wilkins *v.* Casey, 7 T. R. 711; Cannan *v.* Wood, 2 M. & W. 465.

(*q*) 17 Q. B. 423, and 20 L. J. Q. B. 444.

(*r*) Chamberlyn *v.* Delarive, 2 Wils. 353; Kearslake *v.* Morgan, 5 T. R. 513; Griffiths *v.* Owen, 13 M. & W. 58.

(*s*) L. R. 2 Ex. 153.

(*s*[1]) [Part payment may be made by check, if it be received in payment. Hunter *v.* Wetsell, 17 Hun, 135.]

§ 196. The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. If the sale afterwards took place, the earnest-money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest-money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest-money and an equivalent amount by way of forfeiture for disappointing the other in his option. (*t*)

§ 197. The other species of earnest of the Roman law was the same as that of the common law. It might consist of a thing, as a ring, *annulus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the conclusion of the bargain (*u*) — and when money was given in earnest it was considered as being in part payment of the price. (*x*) Varro gives this as the etymology of the word: (*y*) "Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum à Græco arrabon, reliquum, ex eo quod debitum reliquit;" and the Institutes of Gaius (*z*) give its true nature, "Quod sæpe arrhæ nomine pro emptione datur, non eo pertinet quasi sine arrha conventio nihil proficiat; sed *ut evidentius probari possit convenisse de pretio.*"

§ 198. At a later date, however, the Emperor Justinian made by statute an important change in the law of earnest, by providing that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest-money. The whole text is a remarkable one, giving full rules as to *form of the sale*, the *assent*, the *giving of earnest*, and the *right of rescission.* "Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arrha quidem data fuerit; nam quod arrhæ nomine datur argumentum est emptionis et venditionis contractæ. Sed hæc

(*t*) L. 17, Cod. de Fid. Instr.; Pothier, Vente, Nos. 497, 8, 9. [But money deposited with a third person, "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so," was held not to be given in earnest to bind the bargain, within the statute of frauds, in Howe *v.* Hayward, 108 Mass. 54.]

(*u*) Dig. 19, 1, de Act. Emp. et Vend. 11, § 6, Ulp.

(*x*) Dig. 18, 3, de Lege Commissoria, 8 Scæv.; [Chapman C. J. in Howe *v.* Hayward, 108 Mass. 55, quoted *ante*, § 189, note (*a*).]

(*y*) De Lingua Latina, lib. 5, § 175.

(*z*) Com. 3, § 139.

quidem de emptionibus et venditionibus quæ *sine scriptura* consistunt obtinere opertet, nam nihil à nobis *in hujusmodi venditionibus* innovatum est. In his autem quæ *scriptura conficiuntur*, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, à contrahentibus autem subscripta; et si per tabelliones fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor, sine pœna recedere ab emptione. Ita tamen *impune eis recedere concedimus*, nisi jam arrharum nomine aliquid fuerit datum. Hoc etenim subsecuto, *sive in scriptis*, *sive sine scriptis* venditio celebrata est, is qui recusat adimplere contractum, si quidem est *emptor*, *perdit quod dedit:* si vero *venditor*, *duplum restituere* compellitur, *licet super arrhis nihil expressum est.*" (*a*) This text not only changed the antecedent law, by allowing either party to rescind the bargain by forfeiting the value of the earnest, but it made a further innovation by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been finally completed; in derogation of the ante-Justinian law, which made the contract perfect by mutual assent before the writings were drawn up. (*b*)

Pothier.

§ 199. Pothier struggles, on the authority of Vinnius, to escape from the apparently plain meaning of this text of the Institutes, and maintains the old distinction, that after earnest given to bind the bargain, neither party can escape from his obligations as vendor or purchaser, by the sacrifice of the amount of the earnest. (*c*) But his reasoning is scarcely satisfactory, and later authors consider the language of the text too absolute to be explained away. (*d*)

French Code.

§ 200. The French civil code seems to reject Pothier's doctrine, and provides, art. 1590, "Si la promesse de vente a été faite avec des arrhes, chacun des contractants est maître de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double." Singularly enough, however, the same discussion has sprung up under this text as under

(*a*) Inst. lib. iii. tit. xxiii. 1.

(*b*) Dig. 18, 1, de Contrah. Empt. 2, § 1, Paul; Gaius, Comm. 3, § 139.

(*c*) Pothier, Vente, No. 508.

(*d*) Ortolan, Explication Hist. des Inst. vol. 3, p. 269.

that of Justinian, and the commentators are divided; Toullier, Maleville, Duranton, and some others, taking the side of Pothier, while Duvergier, Coulon, Devilleneuve, and Ortolan, are of the contrary opinion. (*e*)

(*e*) The references are given in Sirey & Gilbert, Code Annoté, art. 1590.

CHAPTER VI.

OF THE MEMORANDUM OR NOTE IN WRITING.

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§ 201. THIS clause of the statute is as follows: "Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorized." For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the statute have in no way interfered with these principles. They have simply said that if the parties to be charged have signed some written note or memorandum of the contract, it shall be allowed to be good. What the legal effect of such a note or memorandum is to be in all other respects is left entirely as it was at common law.

Law of evidence as to written contracts not changed by the statute.

§ 202. Now at common law parties entering into any contract may either reduce its terms to writing, or may refer to some other writing already in existence, as containing the terms of their agreement, and when they do so, they are bound by what is written, whether signed by them or not; (*a*) and they are not allowed to say that there was a mistake in the writing, and that they intended to agree to something different from its contents, for the very object of putting the agreement in writing is to prevent disputes about what they intended. This rule of law is very inflexible. If, by the agreement, the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a preëxisting writing, neither party is allowed to offer proof that any additional terms were agreed to, (a^1) although of course,

Common law principles.

(*a*) [The Bank of Br. N. Am. *v.* Simpson, 24 U. C. C. P. 354.]

(a^1) [Whatever may have been the previous conversations and verbal communications between the parties, if they at last reduce their agreement to writing, this will be looked upon to contain all that the parties intended should form any part of their bargain; and everything said respecting the transaction in the previous conversations, and not incorporated into the written agreement, will be considered as intentionally rejected. 1 Chitty Contr. (11th Am. ed.) 153, and note (*u*); Carter *v.* Hamilton, 11 Barb. 147; Ridgway *v.* Bowman, 7 Cush. 268; Hakes *v.* Hotchkiss, 23 Vt. 231; Pitcher *v.*

Written contract excludes previous communications.

whenever a duty or obligation of any sort results by virtue of the law, or of local customs, or the usages of particular trades, from the written stipulations, such duty or obligation may not only be enforced, as though it were expressly included among the written terms, but is as carefully guarded by the rule now under consideration as if expressed in the written paper, and cannot be contradicted or qualified by parol evidence. (*b*)

§ 203. But the common law does not prohibit parties from making contracts of which only part is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing and the price may be agreed on by parol, or *vice versa*, or the parties may say in substance, "We agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth," and there is no legal objection to this. Parol evidence may be used to show what were the additions and exceptions, and the writing is conclusive as to the rest. (b^1)

§ 204. When either a part, or the whole of an agreement, is thus made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. (b^2) But this result only takes place when the writing is by the consent of both parties agreed to be that which settles and contains their contract in whole or in part. The case is different, if one of the parties chooses to write down for himself without the concurrence and assent of the other, or if a by-stander, without the authority of both, should write out what they said. The writing of the by-stander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be

Hennessy, 48 N. Y. 415; Small *v.* Quincy, 4 Grecnl. 497; Tayloe *v.* Riggs, 1 Peters (U. S.), 591; Clark *v.* New York Life Ins. & Trust Co. 7 Lansing, 322; Eden *v.* Blake, 13 M. & W. 614, 617, 618; Stoops *v.* Smith, 100 Mass. 63, 65; Groot *v.* Story, 44 Vt. 200; Henderson *v.* Cotter, 15 U. C. Q. B. 345; Mason *v.* Brunskill, Ib. 300.]

(*b*) Per Blackburn J. in Burges *v.* Wickham, 3 B. & S. 669; 33 L. J. Q. B. 17. But see the language of Williams J. in Clapham *v.* Langton, 34 L. J. Q. B. 46. See, also, Fawkes *v.* Lamb, 31 L. J. Q. B. 98.

(b^1) [McBride *v.* Silverthorne, 11 U. C. Q. B. 545.]

(b^2) [Caldwell *v.* Green, 8 U. C. Q. B. 327.]

receivable in evidence against him as an admission, and the same would be the case as to what one party had written down for himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

§ 205. The statute of frauds leaves all this law quite as it was before. If the contract be in writing, in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment or of part acceptance and receipt to establish the validity of the contract. (*c*) The writing in such a case is as indispensable in contracts for the sale of goods of less value than 10*l.* as in those above that limit, and is as conclusive in settling what the terms of the bargain are as if the statute of frauds had never been passed. And where a party has signed a paper which is not a writing agreed upon between the two, as containing the terms of their agreements, his adversary may use the paper, if he please, as an admission made in his favor; but he is not bound to offer it any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written, any greater than that of a verbal, admission. In a word, it is always necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one*. (*c*[1])

§ 206. The two cases of Ford *v.* Yates (*d*) and Lockett *v.* Nicklin (*e*) afford an illustration of the effect of the statute of frauds, taken in connection with the common law rules of evidence on this subject. In Ford *v.* Yates the memorandum of the sale made between the parties said nothing as to credit; it was a sale of two parcels of hops, one of thirty-nine pockets, and the other of five pockets, both at seventy-eight shillings. The vendor delivered the smaller parcel, but refused to deliver the thirty-nine pockets without payment; and the court held parol evidence inadmissible to show that the hops were sold at six months' credit, and that this had been the usual course of dealing

Ford *v.* Yates.

(*c*) [As to effect of loss of memorandum, see Ryan *v.* Salt, 3 U. C. C. P. 83.]

(*c*[1]) The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Blackburn J.

(*d*) 2 M. & G. 549.

(*e*) 2 Ex. 93.

between the parties. But in Lockett *v.* Nicklin where the goods were ordered in a letter containing a reference to a conversation between the parties, and were supplied with an invoice, nothing being said either in the letter or the invoice about the terms of payment, parol evidence was received of an agreement to give six months' credit. The distinction made was, that in Ford *v.* Yates the action was based on a *written contract* contained in the memorandum which could not be varied by parol evidence, while in Lockett *v.* Nicklin the *sale was really by parol*, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods; so that the purchaser was at liberty to supplement the proof of the bargain by showing that there was an additional stipulation, namely, an agreement for six months' credit.

Lockett *v.* Nicklin.

§ 207. It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but the examination of this clause of the statute would be very incomplete without some reference to the decisions which determine in what cases, for what purposes, and to what extent, parol evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing of the bargain sufficient to satisfy the 17th section.

Parol evidence, when admissible where there is written note of the bargain.

§ 208. It must be steadily borne in mind that the statute was not enacted for cases where the parties, either in person or by agents, have signed a written contract; for in those cases the common law affords by its rules quite a sufficient guaranty against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some* written *note* or *memorandum* of the bargain — not to the bargain itself — could be shown. (*f*) The existence of the note or memorandum presup-

True theory of this clause of the statute.

(*f*) See the remarks of Erle J. in Sievewright *v.* Archibald, 17 Q. B. 104; 20 L. J. Q. B. 529; of Williams J. in Bailey *v.* Sweeting, 9 C. B. N. S. 843; 30 L. J. C. P. 150; and of Lord Wensleydale in Ridgway *v.* Wharton, 6 H. L. Cas. 305. The statement in the text is to be found *passim* in the cases on this subject.

poses an antecedent contract by parol, of which the writing is a note or memorandum. (*g*)

§ 209. It is a very simple deduction from this theory of the statute, that parol evidence is admissible for the purpose of showing that the written paper is *not* a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view. Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and the writing is thus shown not to be a note of the agreement, but only of some of its terms. (*h*) So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was ad-

Parol evidence is admissible to show that the writing is not a note of the *whole* bargain.

(*g*) ["It must be observed that the contract itself, and the memorandum which is necessary to its validity under the statute of frauds, are, in their nature, distinct things. The statute presupposes a contract by parol. Marsh *v.* Hyde, 3 Gray, 333. The contract may be made at one time, and the note or memorandum of it at a subsequent time. The contract may be proved by parol, and the memorandum may be supplied by documents and letters, written at various times, if they all appear to have relation to it, and, if coupled together, they contain by statement or reference all the essential parts of the bargain, signed by the party to be charged, or his agent. Williams *v.* Bacon, 2 Gray, 387, 391." Hoar J. in Lerned *v.* Wannemacher, 9 Allen, 412, 416; Gale *v.* Nixon, 6 Cowen, 445; 1 Sugden V. & P. (8th Am. ed.) 129; Thompson *v.* Menck, 4 Abb. (N. Y.) App. Dec. 400. "I make a distinction between the contract and the memorandum of the contract; the latter may be made long after the terms have been agreed to; and the making of the one is entirely distinct from the other." Erle C. J. in Parton *v.* Crofts, 16 C. B. N. S. 11, 21. See Ide *v.* Stanton, 15 Vt. 690; Webster *v.* Zielly, 52 Barb. 482; Davis *v.* Moore, 13 Maine, 424; *ante*, § 143, note (*i*); Hunter *v.* Giddings, 97 Mass. 41, 44; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Bird *v.* Monroe, 66 Me. 337; Richey *v.* Garvey, 10 Ir. L. R. 544. So where a parol contract of sale, originally void under the statute of frauds, is made valid by performance and delivery of property, it creates no new contract. It only makes binding the original agreement, which thereupon becomes valid and effectual as to both parties, to be enforced and carried out according to its original terms. Lawton *v.* Keil, 61 Barb. 558. In a recent case in the queen's bench, a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken in the case of the fact that the goods were not in existence when the memorandum was furnished. Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140. See Townsend *v.* Hargraves, 118 Mass. 325, cited *ante*, § 91, note (*f*).]

Contract and memorandum distinct.

Memorandum may be made after goods destroyed.

(*h*) Elmore *v.* Kingscote, 5 B. & C. 583; Goodman *v.* Griffiths, 1 H. & N. 574; S. C. 26 L. J. Ex. 145; Acebal *v.* Levy, 10 Bing. 376.

mitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation. (*i*)

Inadmissible to supplement an imperfect note.

§ 210. And the same principle which permits the defendant to offer parol evidence, showing that the written note is imperfect, and therefore *not* such a note as satisfies the statute, forbids him who sets up the writing for the purpose of binding the other from supplementing the writing by parol proof of terms or stipulations not contained in it; (*k*) for it is manifest, that by offering such proof, he admits that the writing does not contain a note of the bargain, but only of part of it. (*l*)

Inadmissible to connect separate written papers.

§ 211. It is also on this principle that when the bargain is to be made out by separate written papers, parol evidence is not allowed to connect them, but they must either be physically attached together, (l^1) so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other, (*m*) as will be fully seen *infra*, §§ 242–248.

(*i*) Pitts *v.* Beckett, 13 M. & W. 743. [So it may be shown that it was one of the terms of an oral contract of sale that the goods sold were to be subject to the purchaser's approval, in order to establish the insufficiency of a broker's note in writing of the sale, which omitted that portion of the oral contract, to take the case out of the statute. Boardman *v.* Spooner, 13 Allen, 353, 358, 359. And in Coddington *v.* Goddard, 16 Gray, 436, it was held that if the broker, in his entry, omitted any essential element of the contract, it would be an insufficient note or memorandum of it. See Davis *v.* Shield, 26 Wend. 341.]

(*k*) [See Jenness *v.* Mount Hope Iron Co. 53 Maine, 20; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; O'Donnell *v.* Leeman, 43 Maine, 158; Dana *v.* Hancock, 30 Vt. 616. In Lee *v.* Hills, 66 Ind. 474, the memorandum was in the following form: "Terre Haute, Ind., —— 187 , — A. P. Lee & Bro. (then followed a list of the articles contracted for) Freight. Ship Emp. Line, 60 days acceptance. (Signed) Hills Bros." It was held that this was an incomplete memorandum, and that the vendees could not show that the word "sold" was omitted before A. P. Lee & Bro. by mistake.]

As to supplying omissions in memorandum.

(*l*) Boydell *v.* Drummond, 11 East, 142; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78; Holmes *v.* Mitchell, 7 C. B. N. S. 361, and 28 L. J. C. P. 201; Harnor *v.* Groves, 15 C. B. 667; 24 L. J. C. P. 53. [See 1 Sugden V. & P. (8th Am. ed.) 140, note (*d*).]

(l^1) [Kaitling *v.* Parkin, 23 U. C. C. P. 569.]

(*m*) Hinde *v.* Whitehouse, 7 East, 558; Kenworthy *v.* Schofield, 2 B. & C. 945; [Freeport *v.* Bartol, 3 Greenl. 340; Morton *v.* Dean, 13 Met. 385; Lerned *v.* Wannemacher, 9 Allen, 417; Smith *v.* Arnold, 5 Mason, 416; O'Donnell *v.* Leeman, 43 Maine, 158; Fowler *v.* Redican, 52 Ill. 405; Kurtz *v.* Cummings, 24 Penn. St. 35; Adams *v.* McMillan, 7 Porter, 73; Moale *v.* Buchanan, 11 Gill & J. 314; Price *v.* Griffith, 1 De G., M. & G. 80; Peek *v.* North Staffordshire Railway Co. 10 H. L. Cas. 473, 568; Williams *v.* Bacon, 2 Gray, 391; Johnson *v.* Buck, 6 Vroom (N. J.), 344; Knox *v.* King, 36 Ala. 367;

§ 212. But where a purchaser agreed to pay by a check on his brother, the court held that this was not one of the terms which need appear in the writing; and further, that parol proof that under the contract certain candlesticks were to be made with a gallery to receive a shade did not affect the sufficiency of the writing which described them as "candlesticks complete." (*n*)

§ 213. Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers. (*o*) Thus, where the written letter contained an

Admissible to identify the subject-matter.

Ridgway *v.* Ingram, 50 Ind. 145, 148; Peirce *v.* Corf, L. R. 9 Q. B. 210. In Ridgway *v.* Wharton, 6 H. L. Cas. 238, "instructions" were referred to, and it was held that it might be shown by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document, which was produced. Lord Cranworth said: "The authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the statute of frauds." 6 H. L. Cas. 257; Baumann *v.* James, L. R. 3 Ch. Ap. 508, was similar. See Jackson *v.* Oglander, 2 H. & M. 465; Lee *v.* Mahony, 9 Iowa, 344; Ide *v.* Stanton, 15 Vt. 685; Rhoades *v.* Castner, 12 Allen, 130; Spear *v.* Hart, 3 Rob. 420; Phippen *v.* Hyland, 19 U. C. C. P. 416; Beckwith *v.* Talbot, 2 Col. 639; Boyce *v.* Greene, Batty (Ir.), 608.]

Lord Cranworth's rule as to parol evidence.

(*n*) Sarl *v.* Bourdillon, 26 L. J. C. P. 78; 1 C. B. N. S. 188. [See Coddington *v.* Goddard, 16 Gray, 436.]

(*o*) Bateman *v.* Phillips, 15 East, 272; Shortrede *v.* Cheek, 1 Ad. & E. 57; Mumford *v.* Gething, 7 C. B. N. S. 305, and 29 L. J. C. P. 105; [Caulkins *v.* Hellman, 14 Hun, 330; Waldron *v.* Jacob, Ir. R. 5 Eq. 131. Wells J. in Stoops *v.* Smith, 100 Mass. 63, 66, and cases cited; Colt J. in Sweet *v.* Shumway, 102 Mass. 367, 368; Miller *v.* Stevens, 100 Ib. 518, 522. Such evidence must be confined to the question of identity in kind, and must not be extended to comparisons in degree or quality. It is admissible only when the writing does not distinctly define the article to be delivered, so as to enable its identity to be seen upon the face of the transaction. Wells J. in Pike *v.* Fay, 101 Mass. 134, 137. Where an action was brought for breach of a written agreement to receive "white willow cuttings," and pay for them, parol evidence was held admissible to show that the sale was by sample, and that the cuttings tendered did not correspond with the sample, and were not identical in kind with those described by the vendor, and which he undertook to deliver. Pike *v.* Fay, 101 Mass. 134. See Hart *v.* Hammett, 18 Vt. 127; Gray *v.* Harper, 1 Story, 574; Hill *v.* Rewee, 11 Met. 268; Miller *v.* Stevens, 100 Mass. 518, 522, and cases. Parol evidence has been admitted to explain or show the meaning of the following terms and phrases employed in written contracts: "Consigned 6 ms." at the bottom of a bill of parcels of goods sold. George *v.* Joy, 19 N. H. 544. "Terms cash," upon a bill of parcels. George *v.* Joy, *supra*. "Their freight," in a contract to transport. Noyes *v.* Canfield, 27 Vt. 79. The "12¼" in a memorandum "bought 150 tons of madder, 12¼, 6 ms."

Parol evidence to identify subject-matter.

To explain phrases.

agreement to purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool." (*p*) Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances; (*q*) to explain the language, as for instance, to show that the bought and sold note have the same meaning among merchants, though the language seems to vary; (*r*) and to show the date when the bargain was made. (*s*) Parol evidence was likewise admitted to show that a sale of "fourteen pockets of Kent hops, at 100*s*., meant 100*s*. per cwt., according to the usage of the hop trade. (*t*) Also to show a mistake in drawing up the bought and sold notes (whereby certain goods were omitted), in an action of trover by the vendors against the purchaser for the goods so omitted after they had been paid for, and taken into possession by the purchaser. (*u*)

Also to show situation of parties.

Also the meaning of words according to trade usages.

Also mistake in omitting goods in bought and sold notes.

§ 214. Parol evidence is also admissible to show that a written document, purporting to be an agreement, and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a

Also to show that writing was only to take effect conditionally.

Dana *v.* Fielder, 2 Kernan, 40. "Cash," in a contract, to mean a credit of a few days, by custom. Steward *v.* Scudder, 4 Zabr. (N. J.) 96. But see Foley *v.* Mason, 6 Md. 37. "Horn chains," Sweet *v.* Shumway, 102 Mass. 365. In an action on a written contract for the delivery of a cargo of coal, "water nine and one half feet," parol evidence is competent to show what number of tons of coal usually constituted the cargo of a vessel drawing that depth of water. Rhoades *v.* Castner, 12 Allen, 130. If goods are sold with "all faults," parol evidence is admissible to show that these words have a well established meaning in the trade in such goods, and what that meaning is. Whitney *v.* Boardman, 118 Mass. 242, 247. Devens J. said in this case: "It is not necessary that terms should be technical, scientific, or ambiguous in themselves, in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract. Whitmarsh *v.* Conway Ins. Co. 16 Gray, 359."]

(*p*) Macdonald *v.* Longbottom, 28 L. J. Q. B. 293; S. C. on appeal, 1 E. & E. 977, and 29 L. J. Q. B. 256.

(*q*) Per Tindal C. J. in Sweet *v.* Lee, 3 M. & G. 466; [Wells J. in Stoops *v.* Smith, 100 Mass. 63, 66, and cases.]

(*r*) Bold *v.* Rayner, 1 M. & W. 343; and per Erle C. J. in Sievewright *v.* Archibald, 17 Q. B. 124; 20 L. J. Q. B. 529.

(*s*) Edmunds *v.* Downs, 2 C. & M. 459; Hartley *v.* Wharton, 11 Ad. & E. 934; Lobb *v.* Stanley, 5 Q. B. 574.

(*t*) Spicer *v.* Cooper, 1 Q. B. 424; [Nelson J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 455.]

(*u*) Steele *v.* Haddock, 10 Ex. 643; 24 L. J. Ex. 78.

future event; (*x*) or was even to be modified upon some future contingency. (*y*) Parol evidence is also admissible to explain a latent ambiguity in a contract of sale, as where a bargain was made for the sale of cotton, "to arrive ex *Peerless* from Bombay," parol evidence was held admissible to show that there were two ships *Peerless* from Bombay, and that the ship *Peerless* intended by the vendor was a different ship *Peerless* from that intended by the buyer, so as to establish a mistake defeating the contract for want of a *consensus ad idem*. (*z*)

To explain latent ambiguity.

§ 215. The admissibility of parol evidence of particular *commercial usages* to engraft terms into the bargain, or even to introduce conditions apparently at variance with the implication resulting from the written stipulations (as was done in Field *v.* Lelean, (*a*) where evidence was admitted of a usage in the sale of mining shares, not to make delivery before payment, although the written terms were for a price payable *in futuro*), is too large a branch of the subject to be here treated in detail, and the reader must be referred to the decisions which are collected and classed in the notes to Wigglesworth *v.* Dallison, in the first volume of Smith's Leading Cases. (*b*)

As to particular commercial usages.

Field *v.* Lelean.

(*x*) Pym *v.* Campbell, 6 E. & B. 370; 25 L. J. Q. B. 277; Furness *v.* Meek, 27 L. J. Ex. 34.

(*y*) Rogers *v.* Hadley, 2 H. & C. 227; 32 L. J. Ex. 241.

(*z*) Raffles *v.* Wichelhaus, 2 H. & C. 906; 33 L. J. Ex. 160.

(*a*) 6 H. & N. 617; 30 L. J. Ex. 168.

(*b*) Vol. i. p. 546 *et seq.*; [Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446, 454; Boardman *v.* Spooner, 13 Allen, 353, 359, 360; Morse *v.* Brackett, 98 Mass. 209; Clark *v.* Baker, 11 Met. 186. In Haskins *v.* Warren, 115 Mass. 535, Wells J. said: "Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusions and inferences as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the character or force of the usage. Neither is it competent for them to testify what is the understanding of others in regard to its effect. The effect is to be determined by the court, or by the jury under its direction. Like other facts and circumstances attending a transaction, usage serves to aid in interpreting and applying the words and acts or conduct of parties in their dealings with each other, when the words and acts themselves are equivocal or not explicit and decisive. Their dealings are supposed to be conducted with reference to, or at least in accordance with, the usage, and it may therefore be resorted to for aid in supplying the unexpressed terms of their agreements, on the ground of presumed intention and mutual understanding In this way it may modify the application of general rules of law. But it cannot be allowed to control the express intention of

Usage: what it is, and its effect.

§ 216. After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the statute, the question often arises as to the admissibility of parol proof of a subsequent agreement to change or annul it. At common law it is competent to the parties at any time after an agreement (not under seal) has

Parol evidence as to subsequent agreement to alter or annul the written note.

the parties to an agreement; nor the interpretation and effect which result from an established rule of law applicable to it; nor to engraft on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the same subject." Dickinson *v.* Gay, 7 Allen, 29; Dodd *v.* Farlow, 11 Ib. 426; Boardman *v.* Spooner, 13 Ib. 353; Reed *v.* Richardson, 98 Mass. 216; Odiorne *v.* New England Ins. Co. 101 Ib. 551; Snelling *v.* Hall, 107 Ib. 134; Carkin *v.* Savory, 14 Gray, 528; Read *v.* Pres. &c., of Hud. & Del. Canal Co. 2 Alb. L. J. 392; Brown *v.* Browne, 9 U. C. Q. B. 312; Hayes *v.* Nesbitt, 25 U. C. C. P. 101; Polhemus *v.* Heiman, 50 Cal. 438; Mears *v.* Waples, 4 Houston (Del.), 62; Coffman *v.* Campbell, 87 Ill. 98; The Chicago Packing & Provision Co. *v.* Tilton, Ib. 547; Lyon *v.* Culbertson, 83 Ib. 33; Corbett *v.* Underwood, Ib. 324; Doane *v.* Dunham, 79 Ib. 131; Smyth *v.* Exr's of Ward, 46 Iowa, 339; Barker *v.* Borzone, 48 Md. 474; Farmers' & Mechanics' Bank *v.* Erie R. W. Co. 72 N. Y. 188; Marshall *v.* Perry, 67 Me. 78; Malcomson *v.* Morton, 11 Ir. L. R. 230; Page *v.* Myers, 6 Ir. Jur. N. S. 364. "The understanding of a community or of a class, as to a legal effect or an implication of law, is not a valid usage; and evidence to prove it is not competent to determine legal rights under contracts. So, too, the intent or understanding with which parties enter into a particular contract, or conduct in its execution, is not properly shown by evidence of the intent or understanding with which others perform like transactions, although the evidence is sufficiently comprehensive to establish a custom or usage, if its nature would admit of it." Wells J. in Haskins *v.* Warren, 115 Mass. 536. And in this case it was decided that, if goods sold are delivered to the purchaser, and there is evidence that the delivery was for the purpose of examination or other special and limited purpose, and not for the purpose of giving absolute possession to the purchaser, evidence is admissible that it was in the usual course of dealing to give opportunity for examination in that mode. But if goods sold are delivered for the purpose of completing the sale, evidence of a usage that the sale is not completed is inadmissible. So a usage that no title passes upon an ordinary sale and delivery, without actual payment of the consideration within a certain number of days, is unreasonable and invalid. Evidence of usage is inadmissible to contradict the terms of an express contract. Brown *v.* Foster, 113 Mass. 136. In Bailey *v.* Bensley, 87 Ill. 556, Sheldon J. said: "A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not." White *v.* Fuller, 67 Barb. 267. In Swift *v.* Gifford, 2 Low. 110, it appeared that there was a custom among Massachusetts whalemen, by which a whale captured by the joint labors of two or more vessels' crews belonged to that vessel whose crew first harpooned the whale, provided the harpoon remained in the whale, and claim was made before cutting in.

Knowledge of usage; actual knowledge not necessary.

Custom in whale fishery as to property in whale.

been reduced to writing and signed, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or qualify its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement. (*c*) But this principle of the common law is not applicable to a contract for the sale of goods under the statute of frauds. No verbal agreement to abandon it in part, or to add to, or omit, or modify any of its terms, is admissible. (*d*) Thus parol evidence is not admissible

It was decided that this was a good custom, though it was recognized that the usage of English and Scotch whalemen was that the iron held the whale only so long as the harpoon line remained fast to the boat.]

(*c*) Per Denman C. J. in Goss *v.* Lord Nugent, 5 B. & Ad. 65; [Clifford J. in Swain *v.* Seamens, 9 Wallace, 254, 271; Miles *v.* Roberts, 34 N. H. 245; Richardson *v.* Cooper, 25 Maine, 450, 452; Cummings *v.* Putnam, 19 N. H. 569; Goodrich *v.* Longley, 4 Gray, 383; Richardson *v.* Hooper, 13 Pick. 446; Munroe *v.* Perkins, 9 Ib. 298; Franklin *v.* Long, 7 Gill & J. 407; Coates *v.* Sangston, 5 Md. 121; Cummings *v.* Arnold, 3 Met. 489; Vicary *v.* Moore, 2 Watts, 456, 457; Heatherly *v.* Record, 12 Texas, 49; McGrann *v.* New Lebanon R. R. Co. 29 Penn. St. 82; Haynes *v.* Fuller, 40 Maine, 162; 1 Sugden V. & P. (8th Am. ed.) 158, and note (*e*), and cases cited; Allen *v.* Sowerby, 37 Md. 411.]

(*d*) [In Tyers *v.* Rosedale & Ferryhill Iron Co. L. R. 8 Ex. 315, Kelly C. B. said: "It is now established that a new verbal contract cannot be substituted for the original contract, where by the statute of frauds such original contract must be in writing." In Plevins *v.* Downing, 1 C. P. Div. 220, 225, Brett J. said: "Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be the result of the cases as summed up in Hickman *v.* Haynes." L. R. 10 C. P. 598. In Swain *v.* Seamens, 9 Wallace, 254, 272, it was said by Clifford J. to be "the better opinion, that a written contract falling within the statute of frauds cannot be varied by

Contract within statute cannot be varied by subsequent parol agreement.

to change the place of delivery fixed in the writing, (*e*) nor the time for the delivery; (*f*) nor to prove a partial waiver of a promise to furnish a good title; (*g*) nor a modification of a stipulation for a valuation; (*h*) nor a change in any of the terms; for the courts can draw no distinctions between stipulations that are material and those that are not. (*i*)

Alterations ordered by buyer in chattel manufactured for him.

Brady *v.* Oastler.

§ 217. But where there was an executory contract for the building of a landaulet described in the agreement, parol evidence was admitted of alterations and additions ordered by the purchaser from time to time, Gaselee J. saying that "otherwise every building contract would be avoided by every addition." (*k*) In Brady *v.* Oastler (*l*) the action was for damages for breach of contract in not delivering certain goods within the time fixed by a written contract, and the plaintiff offered parol evidence to prove, as an element of consideration for the jury in estimating damages, that the price fixed in the contract was above the market price, and that he had assented to pay this extra price because of the short term allowed for delivery; but the evidence was rejected by Bramwell B. at nisi prius, and his ruling was approved by Pollock C. B. and Chan-

any subsequent agreement of the parties, unless such new agreement is also in writing." See, also, Ladd *v.* King, 1 R. I. 224; Espy *v.* Anderson, 14 Penn. St. 308; Dana *v.* Hancock, 30 Vt. 616; Emmet *v.* Dewhurst, 3 Mac. & G. 587; Gault *v.* Brown, 48 N. H. 183, 186. But the law is settled otherwise in Massachusetts, where it is held that parol evidence may be admitted to prove a subsequent oral agreement enlarging the time of performance of a simple contract, or varying its terms, or to show a waiver or discharge, although the original contract was required by the statute of frauds to be, and was, in writing. Stearns *v.* Hall, 9 Cush. 31; Cummings *v.* Arnold, 3 Met. 486; Norton *v.* Simonds, 124 Mass. 19. The decisions in New Hampshire, Maine, and Maryland bear in the same direction. Richardson *v.* Cooper, 25 Maine, 450; Blood *v.* Hardy, 15 Ib. 61; Franklin *v.* Long, 7 Gill & J. 407; Watkins *v.* Hodges, 6 Harr. & J. 38; Kribs *v.* Jones, 44 Md. 396; Gault *v.* Brown, 48 N. H. 183, 186; Buell *v.* Miller, 4 Ib. 196; 1 Sugden V. & P. (8th Am. ed.) 165, and note (m^1). Also in Ohio, Bever *v.* Butler, Wright, 367; Reed *v.* McGrew, 5 Ohio, 376; Negley *v.* Jeffers, 28 Ohio St. 90.]

Aliter in Massachusetts.

(*e*) Moore *v.* Campbell, 10 Ex. 323, and 23 L. J. Ex. 310; Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 Ad. & E. 57.

(*f*) Noble *v.* Ward, L. R. 1 Ex. 117; 35 L. J. Ex. 81.

(*g*) Goss *v.* Lord Nugent, 5 B. & Ad. 65.

(*h*) Harvey *v.* Grabham, 5 Ad. & E. 61.

(*i*) Per Parke B. in Marshall *v.* Lynn, 6 M. & W. 116. See, also, Emmett *v.* Dewhirst, 21 L. J. Ch. 497. The cases in the notes to this paragraph overrule Cuff *v.* Penn, 1 M. & S. 21; Warren *v.* Stagg, cited in Littler *v.* Holland, 3 T. R. 591, and Thresh *v.* Rake, 1 Esp. 53.

(*k*) Hoadley *v.* McLain, 10 Bing. 489.

(*l*) 3 H. & C. 112; 33 L. J. Ex. 300.

nell B.; a strong dissenting opinion, however, was delivered by Martin B.

Parol evidence to show abandonment of contract.

§ 218. Whether or not parol evidence is admissible to show a subsequent agreement for a waiver and abandonment of the *whole* contract, proven by a written note or memorandum under the statute, has not been decided, and the dicta on the subject are uncertain and contradictory. (*m*) Where, however, the agreement to rescind the first contract forms part of or results from a new parol agreement which itself is invalid, and cannot be enforced under the statute, it is held that the new parol agreement cannot have the effect of rescinding the first bargain. (*n*)

Where note is signed by agent in his own name.

§ 219. Parol evidence may be offered to show that a signature to a note or memorandum, though made by A. in his own name, was really made in behalf of B., his principal, when the action is brought for the purpose of charging B.; (*o*) but it is not admissible in behalf of A. in such a contract, for the purpose of showing that he is not personally bound, and had acted only as agent of B. (*p*) Where the paper was signed by "D. M. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was held admissible, of a usage in such cases, that the brokers became personally liable. (*q*) And in

(*m*) Dicta of Lord Denman in Goss *v.* Lord Nugent, 5 B. & Ad. 65, and in Harvey *v.* Grabham, 5 Ad. & E. 61; of Sir Wm. Grant in Price *v.* Dyer, 17 Ves. 356; and of Lord Hardwicke in Bell *v.* Howard, 9 Mod. 305; [*ante*, § 216, note (*d*).]

(*n*) Moore *v.* Campbell, 10 Ex. 323, and 23 L. J. Ex. 310; Noble *v.* Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135; in error, 35 L. J. Ex. 81.

(*o*) Trueman *v.* Loder, 11 Ad. & E. 589; [Sanborn *v.* Flagler, 9 Allen, 477; Salmon Falls Manuf. Co. *v.* Stoddard, 14 How. (U. S.) 446, 454, 455; Williams *v.* Bacon, 2 Gray, 387, 393; Dykers *v.* Townsend, 24 N. Y. 57; Eastern Railroad Co. *v.* Benedict, 5 Gray, 561; Hunter *v.* Giddings, 97 Mass. 41; Winchester *v.* Howard, Ib. 303, 305; Lerned *v.* Johns, 9 Allen, 419; Hubbert *v.* Borden, 6 Whart. 79; 1 Chitty Contr. (11th Am. ed.) 149, 303, note (*o*); Huntington *v.* Knox, 7 Cush. 371, 374; Fuller *v.* Hooper, 3 Gray, 341; Baldwin *v.* Bank of Newbury, 1 Wallace, 234.]

(*p*) Higgins *v.* Senior, 8 M. & W. 834; Cropper *v.* Cook, L. R. 3 C. P. 194; Fawkes *v.* Lamb, 31 L. J. Q. B. 98; Calder *v.* Dobell, L. R. 6 C. P. 486; [Huntington *v.* Knox, 7 Cush. 371, 374; Hancock *v.* Fairfield, 30 Maine, 299; Chappell *v.* Dann, 21 Barb. 17; Williams *v.* Christie, 4 Duer, 29.]

(*q*) Humfrey *v.* Dale, 7 E. & B. 266, and 26 L. J. Q. B. 137; E., B. & E. 1004; 27 L. J. Q. B. 390; Mollett *v.* Robinson, L. R. 5 C. P. 646; Fleet *v.* Murton, L. R. 7 Q. B. 126; [Southwell *v.* Bowditch, 1 C. P. D. 100, 374; Gadd *v.* Houghton, 1 Ex. D. 357.] And see 2 Smith's L. C. 6th ed. 349, for the authorities on this subject.

Wake v. Harrop. Wake *v.* Harrop (*r*) (not under statute of frauds), it was held that parol evidence was admissible to show that by *mistake* the written contract described the agent as principal, contrary to express agreement between the parties.

§ 220. We may now proceed to the examination of this clause of the statute, dividing the inquiry into two sections: —

1. What is a note or memorandum in writing?
2. When is it a sufficient note of the bargain made?

SECTION I. — WHAT IS A NOTE OR MEMORANDUM IN WRITING?

Must be made before action brought. § 221. It may be premised that the note or memorandum must be one made and signed before the action brought. To satisfy the statute, there must be a *good contract* in existence at the time of action brought. (*s*)

Need not be written at one time nor on one piece of paper. § 222. But the statute does not require that the whole of the terms of the contract should be agreed to at one time, nor that they should be written down at one time, nor on one piece of paper; and accordingly it is settled, that where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the *signed* paper make such reference to the other written paper or papers, as to enable the court to construe the whole of them together as constituting all the terms of the bargain. (*t*) And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*.

Separate papers cannot be connected by parol. But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute. (*u*)

(*r*) 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

(*s*) Bill *v.* Bament, 9 M. & W. 36. See remarks of Willes J. in Gibson *v.* Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 5; [*ante*, § 91, note (*f*), § 208, note (*g*); Kent J. in Horton *v.* McCarty, 53 Maine, 394; Phillips *v.* The Ocmulgee Mills, 55 Ga. 633; Bird *v.* Munroe, 66 Maine, 337.]

(*t*) [See Rhoades *v.* Castner, 12 Allen, 130, 132; Johnson *v.* Buck, 6 Vroom, 338, 344, 345; Phippen *v.* Hyland, 19 U. C. C. P. 416.]

(*u*) [*Ante*, § 211, and note (*m*); Ridg-

§ 223. Further, in order to satisfy the statute, when the memorandum relied on consists of separate papers, which it is attempted to connect by showing from their contents that they refer to the same agreement, these separate papers must be consistent and not contradictory in their statement of the terms, for otherwise it would be impossible to determine what the bargain was without the introduction of parol testimony to show which of the papers stated it correctly.

Separate papers must be consistent.

§ 224. The authorities are believed to be quite consistent in maintaining these principles. In citing them, it will be observed that some of the cases were under the 4th section of the statute, the language of which is, on this subject, almost identical with that of the 17th. The two clauses are here placed in juxtaposition for comparison. *Fourth section.* "Unless the *agreement* on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the *party* to be charged therewith, or some other person thereunto by him lawfully authorized." *Seventeenth section.* "Except that some note or memorandum in writing of the said *bargain* be made, and signed by the *parties* to be charged with such contract, or their agents thereunto lawfully authorized." It will be noticed hereafter that the question, whether there is any distinction in meaning between the respective words quoted in italics, viz. "agreement" and "bargain," on the one hand, and "party" and "parties," on the other hand, has been mooted on several occasions.

4th and 17th sections compared.

§ 225. The leading case in which it was held that the intention of the signer to connect two written papers, not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the present century. Hinde *v.* Whitehouse (*x*) in 1806, was the case of a sale by auction. The auctioneer, who, as will be shown hereafter (*post*, ch. viii.), is by law an agent authorized to sign for both parties, had a catalogue, headed "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a sepa-

Cases reviewed.

Hinde *v.* Whitehouse.

way *v.* Ingram, 50 Ind. 145; Peirce *v.* Corf, L. R. 9 Q. B. 210.] But see Baumann *v.* James, L. R. 3 Ch. App. 508.

(*x*) 7 East, 558.

rate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to the catalogue was not sufficient to satisfy the statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms. (*y*) Kenworthy *v.* Schofield, (*z*) in the king's bench in 1824, was decided in the same way, on circumstances precisely the same. Lord Westbury recently stated the general principle, in a case which arose under a similar clause in the railway and canal traffic act, in these words: "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that, by force of the reference, the writing itself becomes part of the instrument it refers to." (*a*)

Kenworthy *v.* Schofield.

Peek *v.* North Staff. Railway Company.

§ 226. The first reported case decided in banc, in which a signed paper referring to another writing was deemed sufficient to satisfy the statute, was that of Saunderson *v.* Jackson, (*b*) in 1800; but the case does not state how this connection between the two papers was made apparent, and can, therefore, give little aid in construing the clause of the statute, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper. In Allen *v.* Bennett, (*c*) decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently, the defendant wrote to his agent, mentioning the plaintiff's name, and authorizing his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." Held, that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain. In 1812 Cooper

Saunderson *v.* Jackson.

Allen *v.* Bennett.

Cooper *v.* Smith.

(*y*) [Peirce *v.* Corf, L. R. 9 Q. B. 210.]

(*z*) 2 B. & C. 945.

(*a*) Peek *v.* North Staffordshire Railway Company, 10 H. L. Cas. 472–569; [Johnson *v.* Buck, 6 Vroom, 338, 344, 345.]

(*b*) 2 B. & P. 238.

(*c*) 3 Taunt. 169; [Townsend *v.* Hargraves, 118 Mass. 335, 336.]

v. Smith (*d*) was distinguished from the foregoing case, because the letter offered to prove the contract, as entered on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. Le Blanc J. tersely said: "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case." (*d*[1]) In Jackson *v.* Lowe & Lynam, (*e*) the common pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters: the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality; and the second from the defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month.

Jackson *v.* Lowe.

§ 227. Richards *v.* Porter (*f*) was decided in the king's bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers. A month later, on 27th February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23d of last month are not yet arrived, nor have I ever heard of them. *I received the invoice.* The last was much longer than they ought to have been on the road. However, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The plaintiff was nonsuited, and the king's bench held the nonsuit right, Lord Tenterden saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the statute of frauds. Even

Richards *v.* Porter.

(*d*) 15 East, 103.

(*d*[1]) [Haughton *v.* Morton, 5 Ir. C. L. R. 329].

(*e*) 1 Bing. 9.

(*f*) 6 B. & C. 437.

connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the contract sufficient to satisfy the statute." The facts as reported certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plaintiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In the recent case of Wilkinson *v.* Evans (*g*) the judgment in Richards *v.* Porter is said to be reconcilable with the current of decisions, by Erle C. J., on the ground "that the letter stated that the contract contained a term, not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned chief justice to be contained in it. The decision in Richards *v.* Porter seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee. (*h*)

§ 228. The case of Smith *v.* Surman (*i*) followed in the king's bench, in 1829. The written memorandum was contained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased of him. . . . . The value, at 1*s.* 6*d.* per foot, amounts to the sum of 17*l.* 3*s.* 6*d.* I understand your objection to complete your contract is on the ground that the timber is faulty and un-

Smith *v.* Surman.

(*g*) L. R. 1 C. P. 407; 35 L. J. C. P. 224.

(*h*) Richards *v.* Porter seems also irreconcilable with the opinion of the court as expressed by Erle C. J. in Bailey *v.* Swecting, *infra*, § 252.

(*i*) 9 B. & C. 561. See also, Archer *v.* Baynes, 5 Ex. 625; 20 L. J. Ex. 54.

sound, but there is sufficient evidence to show that the same timber is very kind and superior," &c. &c. The defendant replied, "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, *to be sound and good*, which I have some doubts whether it is or not, but he promised to make it so, *and now denies it.*" Held, that the letters were not consistent, and did not satisfy the statute. Bayley J. said: "What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by defendant's letter." The other judges concurred. (*k*)

§ 229. The leading case under the *fourth* section of the statute of frauds, usually cited in all disputes as to the construction of the words now under consideration, is Boydell *v.* Drummond, (*l*) decided in the king's bench in 1809. The defendant was sued as one of the subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled Shakespeare's Subscribers, their Signatures. But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain, without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was nonsuited at nisi prius, and the nonsuit was confirmed by the unanimous opinion of the judges, Lord Ellenborough C. J., Grose, Le Blanc, and Bayley JJ. In Dobell *v.* Hutchinson, (*m*) in 1835, the king's bench held, under the 4th section of the act, that in a sale at auction where the letters of the defendants, the purchasers, referred distinctly to the conditions of sale signed by the plaintiff, and which they had in their hands, the clause of the statute was completely satisfied, because no parol evidence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases. So in Laythoarp *v.* Bryant, (*n*) in 1836, the

Boydell *v.* Drummond.

Dobell *v.* Hutchinson.

Laythoarp *v.* Bryant.

(*k*) See Buxton *v.* Rust, L. R. 7 Ex. 1, 279.

(*l*) 11 East, 142. See, also, Fitzmauriee *v.* Bayley, 9 H. L. Cas. 78, and Crane *v.* Powell, L. R. 4 C. P. 123.

(*m*) 3 Ad. & E. 370.

(*n*) 2 Bing. N. C. 735.

exchequer of pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, the agreement having been written on the back of a paper containing the terms and conditions.

Note in writing may be addressed to a third person.

Gibson *v.* Holland.

§ 230. It was held in a recent case in the common pleas that the note or memorandum required by the statute need not be addressed to or pass between the parties, but may be addressed *to a third person.* In Gibson *v.* Holland, (*o*) decided in 1865, one of the pieces of paper relied on as constituting the written note of the bargain was a letter written by the defendant to his own agent. Held to be sufficient by Erle C. J. and Willes and Keating JJ. This case was decided principally upon the authority of Sir Edward Sugden's Treatise on Vendors and Purchasers, (*p*) in which he says: "A note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will (subject to the before mentioned rules) be a sufficient agreement to take a case out of the statute," and on the authorities in the Chancery Reports there cited. (*q*)

Writing in pencil.

§ 231. No case has arisen under the statute on the question whether the writing is required to be in ink, but there seems no reason to doubt that the common law rule would apply, and that a writing in pencil would be held sufficient to satisfy the 17th section. (*r*)

(*o*) L. R. 1 C. P. 1; 35 L. J. C. P. 5.

(*p*) At p. 139, par. 39, in 14th ed. See, also, 1 Smith's Leading Cases, 284, notes to Birkmyr *v.* Darnell.

(*q*) [See Fugate *v.* Hanford, 3 Litt. 262; Buck *v.* Pickwell, 27 Vt. 167; Clark *v.* Tucker, 2 Sandf. 157; Kinloch *v.* Savage, Speer's Eq. 470; Leroux *v.* Brown, 12 C. B. 801; Goodwin *v.* Fielding, 4 De G., M. & G. 90; Bradford *v.* Roulston, 8 Ir. C. L. Rep. 473. Colt J. in Townsend *v.* Hargraves, 118 Mass. 335, 336, said: "The memorandum is sufficient if it be only a letter written by the party to his own agent; or an entry or record in his own books, or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make the contract. Gibson *v.* Holland, L. R. 1 C. P. 1; Buxton *v.* Rust, L. R. 7 Ex. 1, 279; Allen *v.* Bennet, 3 Taunt. 169; Tufts *v.* Plymouth Gold Mining Co. 14 Allen, 407; Argus Co. *v.* Albany, 55 N. Y. 495."]

(*r*) See Geary *v.* Physic, 5 B. & C. 234; [Clason *v.* Bailey, 14 John. 484; Merritt *v.* Clason, 12 Ib. 102; McDowel *v.* Chambers, 1 Strobh. Eq. 347; Draper *v.* Pattina, 2 Speers, 292; Ryan *v.* Salt, 3 U. C. C. P. 83.]

SECTION II. — WHAT IS A SUFFICIENT NOTE OR MEMORANDUM OF THE BARGAIN MADE.

§ 232. After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is whether the contents of the writing so proven form a sufficient note "of the bargain made." So far as the 4th section of the statute is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In Wain *v.* Warlters, (*s*) which was the case of a promise in writing to pay the debt of a third person, but where the consideration for the promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the statute, and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties had to do, not the mere "promise" of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the statute required the whole "agreement," or some note or memorandum of it, to be in writing, the court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient to satisfy the statute. The judges were Lord Ellenborough C. J., and Grose, Lawrence, and Le Blanc JJ. Although this case was strongly controverted, chiefly in the courts of equity, as will be seen by reference to the argument of Taunton in the case of Phillips *v.* Bateman, (*t*) where he sums up all the objections to the decision, it was upheld and followed in subsequent cases, (*u*) and the law now remains settled as pro-

4th section rigorously construed.

Wain *v.* Warlters.

(*s*) 5 East, 10.

(*t*) 16 East, 356-370.

(*u*) Saunders *v.* Wakefield, 4 B. & A. 595; Jenkins *v.* Reynolds, 3 B. & B. 14, and Lyon *v.* Lamb, there cited at p. 22; Morley *v.* Boothby, 3 Bing. 107; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 79. And see the authorities under the 4th section collected in Sugden's Vendors and Purchasers, p. 134, 14th ed. [In some of the American states the courts have adopted the English doctrine, that it is necessary that the consideration of the agreement should appear in the memorandum. In New York, Sears *v.* Brink, 3 John. 210; Leonard *v.* Vredenburgh, 8 Ib. 37; Kerr *v.* Shaw, 13 Ib. 236; Gates

The American rule as to consideration appearing.

pounded in Wain *v.* Warlters, except so far as guaranties are concerned in relation to which the legislature intervened and made special provision in 19 & 20 Vict. c. 97, s. 3 (Mercantile Law Amendment Act, 1856).

17th section more liberally construed.

§ 233. But under the 17th section of the statute the decisions have not maintained so rigorous a construction, and the judges have repeatedly referred to the distinction between the word "agreement" in the 4th section and "bargain" in the seventeenth. The cases will now be considered with reference exclusively to the contract of sale under the latter

v. McKee, 3 Kernan, 232; Bennett *v.* Pratt, 4 Denio, 278; Rogers *v.* Kneeland, 10 Wend. 218, 256; Newbery *v.* Wall, 65 N. Y. 484; Stone *v.* Browning, 68 Ib. 598; Castle *v.* Beardsley, 10 Hun, 343; D'Wolf *v.* Rabaud, 1 Peters, 501. In New Jersey, Laing *v.* Lee, Spencer, 337; but see Buckley *v.* Beardsley, 2 South. 570. In Maryland, Wyman *v.* Gray, 7 Harr. & J. 409; Elliott *v.* Giese, Ib. 457; Edelen *v.* Gough, 5 Gill, 103. In Georgia, Henderson *v.* Johnson, 6 Ga. 390. In South Carolina, Meadows *v.* Meadows, 3 McCord, 458; Stephens *v.* Winn, 2 Nott & McC. 372, note. In Wisconsin, Reynolds *v.* Carpenter, 3 Chand. 31; Taylor *v.* Pratt, 3 Wis. 674. In Michigan, Jones *v.* Palmer, 1 Doug. 379. In New Hampshire, Neelson *v.* Sanborne, 2 N. H. 414; Underwood *v.* Campbell, 14 Ib. 393. In Pennsylvania, Soles *v.* Hickman, 20 Penn. St. 180. In Delaware, Weldin *v.* Porter, 4 Houst. 236. In Minnesota, Nichols *v.* Allen, 23 Minn. 542. In Indiana, before the present statute fixed the rule, Gregory *v.* Logan, 7 Blackf. 112; R. S. of Ind. (1852) c. 42, § 2. Such is now the statute law of New York. See 2 Rev. St. pt. 2, c. 7, tit. 2, § 2; Parker *v.* Wilson, 15 Wend. 346; Miller *v.* Cook, 23 N. Y. 495. In other states the courts have rejected the English rule upon a judicial construction of the same language in their statutes. Such appears to be the current of decisions in Maine. Cummings *v.* Dennett, 26 Maine, 399, 400; Levy *v.* Merrill, 4 Greenl. 189; Gilligan *v.* Boardman, 29 Maine, 81. In Connecticut, Sage *v.* Wilcox, 6 Conn. 81. In North Carolina, Miller *v.* Irvine, 1 Dev. & Bat. 103; Ashford *v.* Robinson, 8 Ired. 114. In Massachusetts, Packard *v.* Richardson, 17 Mass. 122, confirmed by statute; Gen. Sts. c. 105, § 2. In Texas, Adkins *v.* Watson, 12 Texas, 199. In Ohio, Reed *v.* Evans, 17 Ohio, 128. In Missouri, Halsa *v.* Halsa, 2 Misson. 103. By statute in Indiana the considertaion may be proved by parol. Rev. St. Ind. 1852, c. 42, § 2. In some states where the word "promise" or some like term has been substituted for the word "agreement," or has been coupled with it in their statutes, a statement of the consideration has been deemed unnecessary. See Violet *v.* Patton, 5 Cranch, 151; Wren *v.* Pearce, 4 Sm. & M. 91; Taylor *v.* Ross, 3 Yerger, 330; Gilman *v.* Kibler, 5 Humph. 19; Campbell *v.* Findley, 3 Ib. 330; Thompson *v.* Hall, 16 Ala. 204; Ratliff *v.* Trout, 6 J. J. Marsh. 606; Dorman *v.* Bigelow, 1 Florida, 281. Even where it is held necessary that a consideration should be stated, it is sufficient if it can be collected from the whole instrument. The words "value received" sufficiently expresses it. Howard *v.* Holbroke, 9 Bosw. 237; Douglas *v.* Howland, 24 Wend. 35; Edelen *v.* Gough, 5 Gill, 103; Watson *v.* McLaren, 19 Wend. 557; Cooper *v.* Dedrick, 22 Barb. 516; Day *v.* Elmore, 4 Wis. 190; Rogers *v.* Kneeland, 10 Wend. 218; Waterbury *v.* Graham, 4 Sandf. 215; Laing *v.* Lee, Spencer, 337; Castle *v.* Beardsley, 10 Hun, 343.]

section, and to the inquiry whether, and to what extent, it is necessary that the writing should show, 1st, the names of the parties to the sale; 2dly, the terms and subject-matter of the contract.

Names or descriptions of parties must be shown.

§ 234. On the first point it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him, save to the person to whom the promise is made, and until that person's name is shown it is impossible to say that the writing contains a memorandum of the bargain. (*x*)

Champion v. Plummer.

§ 235. In Champion *v.* Plummer (*y*) the plaintiff, by his agent, wrote down in a memorandum-book the terms of a verbal sale to him by the defendant, and the defendant signed the writing; but the words were simply, "Bought of W. Plummer," &c. with no name of the person who bought. Sir James Mansfield C. J. said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. *It would prove a sale to any other person as well as to the plaintiffs.*" In Allen *v.* Bennett (*z*) the agreement was written in a book belonging to the plaintiff, and was signed by the defendant's agent. But the

Allen v. Bennett.

(*x*) [Coddington *v.* Goddard, 16 Gray, 442, 443; Sanborn *v.* Flagler, 9 Allen, 476; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Bailey *v.* Ogden, 3 John. 399; Nichols *v.* Johnson, 10 Conn. 198; Osborne *v.* Phelps, 19 Ib. 73; Waterman *v.* Meigs, 4 Cush. 497; Webster *v.* Ela, 5 N. H. 540; Barry *v.* Law, 1 Cranch C. C. 77; Harvey *v.* Stevens, 43 Vt. 653; Johnson *v.* Buck, 6 Vroom, 338, 343; Brown *v.* Whipple, 58 N. H. 229. The written memorandum should not only show who were the contracting parties, but should also distinguish between the buyer and the seller. See Bailey *v.* Ogden, 3 John. 399; Nichols *v.* Johnson, 10 Conn. 198; Curtis J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Osborne *v.* Phelps, 19 Conn. 73; Calkins *v.* Falk, 1 Abbott N. Y. App. Dec. 291; S. C. 38 How. (N. Y.) Pr. 62; Flintoft *v.* Elmore, 18 U. C. C. P. 274.]

(*y*) 1 B. & P. N. R. 252.

(*z*) 3 Taunt. 169. See, also, Cooper *v.* Smith, 15 East, 103, and Jacob *v.* Kirke, 2 M. & R. 222.

plaintiff's name was not in the book, and was not mentioned in the written memorandum. This was considered insufficient, but the defect was afterwards supplied by other writings showing the plaintiff to be the person with whom the bargain was made. In Williams *v.* Lake, (*a*) which was under the 4th section, the defendant wrote a note binding himself as guarantor, and gave it to a third person for delivery. But the name of the person to whom the note was addressed was not written in the note. Held, by all the judges, insufficient to satisfy the statute, and this decision was approved and followed in Williams *v.* Byrnes, 1 Moore P. C. C. N. S. 154. In Sarl *v.* Bourdillon, (*b*) under the 17th section, the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient under the statute. (*c*)

Williams *v.* Lake.

Sarl *v.* Bourdillon.

§ 236. Vandenbergh *v.* Spooner (*d*) was a case in which the facts were peculiar. The plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than 10*l.* The defendant signed this memorandum: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot." After the defendant had signed this document, he wrote out what he alleged to be a copy of it, which, at his request, the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month." Held, that the note signed by the purchaser, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods so as to identify them, but did not mention the plaintiff as *seller* of the goods, and that the memorandum was therefore insufficient. The latest case (*e*) was in the common pleas on these facts. The defendant was a flour dealer, and the plaintiff a baker. The defendant's agent entered in the plaintiff's book the following words: "Mr. Newell, 32 sacks culasses, at 39*s.* 280 lbs. To await orders. John Williams." The defendant insisted, on the

Vandenbergh *v.* Spooner.

Newell *v.* Radford.

(*a*) 2 E. & E. 349; 29 L. J. Q. B. 1.
(*b*) 1 C. B. N. S. 188; 26 L. J. C. P. 78.
(*c*) [See Harvey *v.* Stevens, 43 Vt. 653.]
(*d*) L. R. 1 Ex. 316; 35 L. J. Ex. 201.
(*e*) Newell *v.* Radford, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

authority of Vanderbergh *v.* Spooner, that as it was im
tell from this memorandum which was buyer and which was seller, the memorandum was insufficient, but the court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the baker was the buyer of the flour. There was also some correspondence referred to, showing who was the buyer and who the seller. (*f*)

§ 237. But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the statute. But if the writing shows by description with whom the bargain was made, then the statute is satisfied, and parol evidence is admissible to *apply the description:* that is, not to show with whom the bargain is made, but who is the person described, so as to enable the court to understand the description. This is no infringement of the statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject-matter in controversy. The cases in which this principle has been most clearly illustrated are those which arise in a very common course of mercantile dealing, where an agent signs a contract in his own name and without mentioning his principal.

Description of parties suffices instead of name.

§ 238. It is settled that though in dealings of this kind it is not competent for the agent thus contracting to introduce parol proof to show that he did not intend to bind himself, because this would be to contradict what he had written, it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name. (*f*[1]) In Trueman *v.* Loder (*g*) the defendant was sued on a broker's sold note in these words: "London, 28th April,

Where agent signs his own name instead of principal's.

Trueman *v.* Loder.

(*f*) [Coate *v.* Terry, 24 U. C. C. P. 571.]

(*f*[1]) [Sanborn *v.* Flagler, 9 Allen, 477, per Bigelow C. J.; Williams *v.* Bacon, 2 Gray, 387, 393; *ante*, § 219, and cases in note (*o*).]

(*g*) 11 Ad. & E. 587.

1835. Sold for Mr. Edward Higginbotham," &c. &c. The proof was, that in 1832 the defendant, a merchant of St. Petersburg, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit, under his instructions. The case was argued by very able counsel in Michaelmas Term, 1838, and the judges took time to consider till the ensuing term, when Lord Denman delivered the opinion of the court, composed of himself and Patterson, Williams, and Coleridge JJ. On the question made, that the name of the defendant was not in the written contract, the court said: "Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he has sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." (*h*)

When agent is personally responsible. Higgins *v.* Senior.

§ 239. The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving that he did not intend to bind himself, but only his principal, is Higgins *v.* Senior, (*i*) decided in the exchequer in 1841, in which also the judges took time to consider until the ensuing term, when Parke B. delivered the judgment of the court, composed of himself and Alderson, Gurney, and Rolfe BB. The opinion states the question submitted to be, "Whether in an action or an agreement in writing purporting on the face of it to be made by the defendant, and to be sub-

(*h*) See, also, 2 Smith's Leading Cases, ed. 1867, in notes to Thomson *v.* Davenport, 352 *et seq.*; and Calder *v.* Dobell, L. R. 6 C. P. 486, 499.

(*i*) 8 M. & W. 834.

scribed by him, for the sale and delivery by him of goods above the value of 10*l.*, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit* by proving the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when this agreement was made and signed." Held in the negative. The learned baron then proceeded to lay down the principles on which this conclusion was reached, as follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing, by the statute of frauds; (*k*) and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." (*l*)

§ 240. Where the broker bought expressly for his principals but without disclosing their names in the sold note, he was held liable to the vendor on evidence of usage that the broker was liable personally when the name of the principal was not disclosed at the time of the contract. (*m*) In Fleet *v.* Murton (*n*) the contract note was, "We have this day sold for your account to our principal," (Signed) M. &

Humfrey *v.* Dale.

Fleet *v.* Murton.

(*k*) [1 Chitty Contr. (11th Am. ed.) 149, 303, and note (*o*); *ante*, § 219, and note (*o*); Williams *v.* Bacon, 2 Gray, 387, 393; Fuller *v.* Hooper, 3 Ib. 341; Dykers *v.* Townsend, 24 N. Y. 57; Eastern Railroad *v.* Benedict, 5 Gray, 561; The Havana, Rantoul & East. R. R. Co. *v.* Walsh, 85 Ill. 58; Bank *v.* Raymond, 57 N. H. 144.]

(*l*) [Indianapolis, Peru & Chicago R. R. Co. *v.* Tyng, 63 N. Y. 653, 655.] See 2 Smith's Leading Cases, 349, in notes to Thomson *v.* Davenport, where the whole subject is more fully treated than comports with the design of the present treatise.

(*m*) Humfrey *v.* Dale, 7 E. & B. 266, E., B. & E. 1004; 26 L. J. Q. B. 137; 27 L. J. Q. B. 390. See, also, Tetley *v.* Shand, 20 W. R. 206.

(*n*) L. R. 7 Q. B. 126.

W., Brokers; and the brokers were held personally liable, on proof of usage of the trade to the same effect as that given in Humfrey *v.* Dale.

Mollett *v.* Robinson.

§ 241. But in Mollett *v.* Robinson (*o*) the plaintiff obtained a verdict which he succeeded in holding, because, on the motion to set it aside, the judges were equally divided, both in the common pleas and the exchequer chamber, so that the rule dropped. The circumstances were that the plaintiffs, tallow brokers, were employed by the defendant to purchase fifty tons of tallow in the London market; and had like orders from other purchasers. The plaintiffs bought in their own names, without disclosing their principals, tallow enough for all the orders which they had received, and divided it among the principals who had employed them, — sending to the defendant a bought note, signed by themselves as "sworn brokers," stating fifty tons of tallow to have been bought "for his account," with quality, price, &c. but no vendor's name given. There was no corresponding sold note delivered to any one, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage of the London market; but the defendant was not aware of the usage, and refused to accept the tallow when he learned how the business had been conducted. Held, in the common pleas, by Bovill C. J. and Montague Smith J. that the defendant was bound to accept; by Willes and Keating JJ. that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale to the defendant without the latter's consent, and there was no other principal than the plaintiffs. In the exchequer chamber, Kelly C. B., Channell B., and Blackburn J. agreed in opinion with Bovill C. J. and Smith J., while Mellor and Hannen JJ. and Cleasby B. were of the opposite opinion.

In what cases broker can sue or be sued personally.

§ 242. Where a broker gives a contract note describing himself as acting for a named principal, he cannot sue personally on the contract. (*p*) And *semble*, not even if principal was undisclosed, (*q*) unless in case of such usage as was proved in Mollett *v.* Robinson, *supra*. But if the

(*o*) L. R. 5 C. P. 648; 7 C. P. 84.

(*p*) Fawkes *v.* Lamb, 31 L. J. Q. B. 98; Fisher *v.* Marsh, 6 B. & S. 416, per Blackburn J.; 34 L. J. Q. B. 178; Bramwell *v.* Spiller, 21 L. T. N. S. 672; Fairlie *v.* Fenton, L. R. 5 Ex. 169.

(*q*) Sharman *v.* Brandt, L. R. 6 Q. B. 720, in exchequer chamber.

broker contract in his own name, even though he is known to be an agent, he may sue or be sued on the contract. (*r*) And the same rules apply to auctioneers. (*s*) And if the broker, though signing as broker, be really the principal, his signature will not bind the opposite party, (*q*) and he cannot sue on the contract, (*q*) unless perhaps when he can prove a trade usage to justify him, as in Mollett *v.* Robinson, *supra.* Where a person describes himself as agent in the body of the contract but signs his own name, he is personally liable on the contract. (*t*)

§ 243. An extremely able discussion of the subject of a broker's responsibility is found in the remarkable case of Fowler *v.* Hollins, (*u*) recently decided in the exchequer chamber by a divided court, in affirmance of a judgment (not reported) of the queen's bench. The facts were that the plaintiffs, after refusing to sell to a broker personally, sold thirteen bales of cotton to him on his stating that he was acting for a principal, and the sale note was made to the principal. This was a fraud of the broker, who had no authority from the principal, and the broker immediately resold the cotton for cash to the defendants, who were also brokers, and were really acting for principals, but who took a purchase note in their own names, addressed to themselves as follows: "We sell you," &c. The defendants on the same day sent a delivery order for the cotton

Fowler *v.* Hollins.

(*r*) Short *v.* Spakeman, 2 B & Ad. 962; Jones *v.* Littledale, 6 A. & E. 486; Reid *v.* Draper, 6 H. & N. 813; 30 L. J. Ex. 268.

(*s*) Franklyn *v.* Lamond, 4 C. B. 637; Fisher *v.* Marsh, 6 B. & S. 411; 34 L. J. Q. B. 177; [Woolfe *v.* Horne, 2 Q. B. Div. 355.]

(*t*) Paice *v.* Walker, L. R. 5 Ex. 173, and cases there cited. [Paice *v.* Walker was commented on in Gadd *v.* Houghton, 1 Ex. D. 357;] Thomson *v.* Davenport, 2 Smith's L. C. 352; [Cabot Bank *v.* Morton, 4 Gray, 156; Raymond *v.* Crown & Eagle Mills, 2 Met. 319; Royce *v.* Allen, 28 Vt. 234; Merrill *v.* Wilson, 6 Ind. 426; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287; Taintor *v.* Prendergast, 3 Ib. 72; Wilder *v.* Cowles, 100 Mass. 487; Sumner *v.* Williams, 8 Ib. 198; Torry *v.* Holmes, 10 Conn. 500; Cunningham *v.* Soules, 7 Wend. 106; Bebee *v.* Robert, 12 Ib. 413; Mauri *v.* Heffernan, 13 John. 58; M'Comb *v.* Wright, 4 John. Ch. 669; Waring *v.* Mason, 18 Wend. 425; Mills *v.* Hunt, 20 Ib. 434; Allen *v.* Rostain, 11 Serg. & R. 362; Bacon *v.* Sondley, 3 Strobh. 542; Keen *v.* Sprague, 3 Greenl. 77, 80; Scott *v.* Messick, 4 Monroe, 535; Wilkins *v.* Duncan, 2 Litt. 168. Where an agent enters in his own name into an agreement in writing, he cannot relieve himself from his liability thereon, even by showing that, at the time such agreement was made and signed, the other contracting party knew that he was only an agent in the transaction. 1 Chitty Contr. (11th Am. ed.) 309, and note (*h*) and cases cited; Taber *v.* Cannon, 8 Met. 460.]

Agent liable on contract entered into in own name.

(*u*) L. R. 7 Q. B. 616.

in favor of their principals, whom they named in the order, and paid for it. They were reimbursed the price by their principals, together with their commissions and charges. All these transactions took place on the 23d of December, 1869. The cotton was at once sent by the defendants to the railway station, whence it was taken to the mills of the principals at Stockport, and there manufactured into yarn. On the 10th January, 1870, the defendants received a letter from the plaintiffs stating the fraud that had been committed on them, and demanding delivery back to themselves of the cotton. This was the first intimation to the defendants that any fraud had been committed on the plaintiffs, and they replied to the plaintiffs' demand, saying: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your clients any assistance." The plaintiffs thereupon brought trover, and it was left to the jury by Willes J. to say whether the defendants had acted only as agents in the course of the business, and whether they had dealt with the goods only as agents for their principals. The jury found these facts in favor of the defendants, and a verdict was entered for them, with leave reserved to the plaintiffs to move to enter a verdict for the value of the thirteen bales. The rule was made absolute in the queen's bench (Mellor, Lush, and Hannen JJ.); and in the exchequer chamber, the judgment was affirmed by Martin, Channell, and Cleasby BB. (dis. Kelly C. B. and Byles and Brett JJ.) The reason given for affirming the judgment was, that although the defendants had acted as brokers, they had assumed the responsibility of principals by dealing in their own names for an undisclosed principal; Martin and Channell BB. being also of opinion that the plaintiffs were entitled to recover, whether the defendants had acted as principals or agents, and that the "facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley [the fraudulent broker], whether it was to the defendants or to Micholls. I think they are entitled to treat the defendants as wrong-doers, wrongfully intermeddling with their cotton, which they had no legal right to touch: and that when they removed the cotton from the warehouse where it was deposited to the railway station, to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a conversion." Per Martin B. pp. 634, 635. Brett J., on the other

hand, delivered a powerful judgment, which the chief baron characterized as "logical and exhaustive," and in which both he and Byles J. concurred. The following passages are extracted as a very instructive exposition of the subject under consideration: "The true definition of the broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as *his*, but only because it is in contemplation of law the signature of *one or both of the principals*. No effect passes *out of the broker* to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing, he still does no more than act as a mere intervenor between the principals. He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other. He throughout merely the negotiator between the parties; and, therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there was some fraud on their part. Story on Agency, sec. 30. And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any

breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a document [*i. e.* the delivery order], without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf, or on behalf of any one else. Obedience or disobedience to the contract, and its effects upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and is no way within his cognizance. Under such circumstances, and so far, it seems to me clear that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say that for such a delivery he could be held liable by the real owner of the goods for a wrongful conversion. But then, in some cases, a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so, also, may his undisclosed principal; and although the agent *may be liable upon the contract*, yet I apprehend *nothing passes to him by the contract.* The goods do not become his. He could not hold them even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable *as a contractor on the contract*, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor — even though the contract should be in a form which passes property in goods by the contract itself,

— by a *third person*, as if he, the broker, were the owner of the goods; as if, for instance, the goods were a nuisance or an obstruction, or as it were trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal till then undisclosed. If he could not be sued *for any other tort*, merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely *on that ground* by the real owner of the goods as for a wrongful conversion of the goods to his own use." The learned judge then, after a review of the authorities upon the subject of conversion, (*x*) further held that the mere *asportation* of the goods through the agency of the defendants *before knowledge* of the plaintiff's claim or rights was not sufficient to constitute a conversion, because unaccompanied with any *intention* to deprive the plaintiff of the goods, though that asportation would have been a conversion if made *after* notice of the plaintiff's claim.

§ 244. Where a party contracts in writing as agent for a non-existent principal he will be personally bound, and no subsequent ratification by the principal afterwards coming into existence can change this liability, nor is evidence admissible to show that a personal liability was not intended. Thus, in Kelner *v.* Baxter (*y*) the plaintiff wrote to the three defendants, addressing them "on behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited," proposing to sell certain goods for 900*l.*, which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandra Hotel Company Limited," and the goods were thereupon delivered and consumed by the company, which was not incorporated till after the date of the contract, and which ratified the purchase made on its behalf. It was held that the defendants were personally liable, because there was no principal existing at the date of the contract, for whom they could by possibility be agents, and that for the same reason no ratification was possible: that the company might have bound itself by a *new* contract to buy and pay for the goods, but such new contract would require the assent of the vendor, who could not be deprived of his recourse against those who dealt with him by any action of

Agents for non-existing principals. Kelner *v.* Baxter.

(*x*) See on Conversion, case of England *v.* Cowley, L. R. 8 Ex. 126; [*ante*, § 6, and note (*b*).]

(*y*) L. R. 2 C. P. 174. See, also, Scott *v.* Lord Ebury, L. R. 2 C. P. 255.

the company to which he was no party: and that parol evidence was not admissible to affect the inferences legally resulting from the written contract.

What written note of the *terms* of the contract suffices.

§ 245. We now come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject-matter of the contract, in order to be deemed a sufficient note or memorandum "of the bargain." (*z*) It has already been seen that the decisions establish the necessity under the 4th section of proving the whole "agreement" in writing, in order to satisfy the statute. Independently of authority, one would think that "bargain" and "agreement" are words so identical in meaning, when applied to a contract for the sale of goods, as to admit of no possible distinction; but the authorities do nevertheless distinguish them in a manner too plain to permit a doubt as to the law. (*a*)

Distinction between "agreement" and "bargain."

Egerton *v.* Mathews.

§ 246. In Egerton *v.* Mathews (*b*) the plaintiff had been nonsuited at Guildhall, by Lord Ellenborough, on the authority of Wain *v.* Warlters. (*c*) The writing was:

(*z*) [It is not necessary that the note or memorandum should be drawn up in any particular form; no technical precision is required; nor need it be drawn up for the express purpose of authenticating the agreement; if it recognizes the bargain and is delivered and accepted, it will be sufficient. De Beil *v.* Thompson, 3 Beav. 469; Tallman *v.* Franklin, 4 Kernan, 584; 1 Sugden V. & P. 140, note (*d*); Ellis *v.* Deadman, 4 Bibb, 467; Barry *v.* Coombe, 1 Peters (U. S.), 651; Smith *v.* Arnold, 5 Mason, 416; Reeves *v.* Pye, 1 Cranch C. C. 219; Bailey *v.* Ogden, 3 John. 399; Curtis J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Hurley *v.* Brown, 98 Mass. 546; Coddington *v.* Goddard, 16 Gray, 443, 444. The memorandum must show the terms and conditions of the sale; Norris *v.* Blair, 39 Ind. 90, 94; Ridgway *v.* Ingram, 50 Ib. 145; but it need not contain a detail of all the particulars; Ives *v.* Hazard, 4 R. I. 14; McConnell *v.* Brillhart, 17 Ill. 354; Chase *v.* Lowell, 7 Gray, 33; Shaw C. J. in Atwood *v.* Cobb, 16 Pick. 230; Coddington *v.* Goddard, 16 Gray, 442, 443, 444; Johnson *v.* Buck, 6 Vroom, 343; Sanborn *v.* Flagler, 9 Allen, 476, 477; Barickman *v.* Kuydendall, 6 Blackf. 21; Kay *v.* Curd, 6 B. Mon. 100; Davis *v.* Shields, 26 Wend. 341; McLean *v.* Nicolle, 4 L. T. N. S. 863; Parker C. J. in Packard *v.* Richardson, 17 Mass. 122, 130, 131; Mingaye *v.* Corbett, 14 U. C. C. P. 557; Mahalen *v.* Dublin & Chapelizod Distillery Co. Ir. R. 11 C. L. 83. It is not necessary that the note or memorandum should state independent and collateral stipulations which formed no part of the sale, nor any matters concerning which the verbal agreement made no provision. Coddington *v.* Goddard, 16 Gray, 436, 443.]

Memorandum need not be in any particular form.

It must show terms and conditions.

(*a*) [See the remarks of Chief Justice Parsons upon the suggested distinction between "bargain" and "agreement," in Hunt *v.* Adams, 5 Mass. 360, 361; Parker C. J. in Packard *v.* Richardson, 17 Mass. 131, 132.]

(*b*) 6 East, 307.

(*c*) 5 East, 10.

"We agree to give Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent. as soon as our certificate is complete." It was signed and dated. Lord Ellenborough is reported, when granting a rule *nisi*, to have assented to a distinction between the two cases, and to have said on cause shown: "This was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires." This last expression would seem to indicate that the difficulty in his lordship's mind was, that the bargain was not complete because the plaintiff had not signed (a point not fully settled by authority till 1836, in Laythoarp *v.* Bryant, (*d*) as will be seen hereafter). (*e*) But Lawrence J. said: "The case of Wain *v.* Warlters proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing, which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* made by, the party to be so charged." The learned judge, however, did not explain why the word "bargain" does not also include the terms on both sides, as was observed by Holroyd J. when he said, "It appears to me that you cannot call that a memorandum of a bargain, which does not contain the terms of it;" and by Bayley J. when he held in the same case (*f*) that the language of the two sections of the statute was in substance the same, and that the word "*bargain*" means "the terms upon which parties contract." (*g*) In Hinde *v.* Whitehouse (*h*) the memorandum consisted of the auctioneer's catalogue, signed by him as agent of both parties, showing the goods sold, their marks, weight, and price; but the court held this insufficient, because there was another paper containing the conditions of the sale, which had been read, but was not made a part of the written note of the bargain by internal evidence contained in the signed paper. In Laythoarp *v.* Bryant, (*i*) in 1836, which was on the 4th section, Tindal C. J. said: "Wain *v.* Warlters was decided on the express ground that an agreement under the 4th section imports more than a bargain under the 17th." Park J. said: "The cases

Hinde *v.* Whitehouse.

Laythoarp *v.* Bryant.

(*d*) 2 Bing. N. C. 735.

(*e*) *Post*, ch. vii.

(*f*) Kenworthy *v.* Schofield, 2 B. & C. 948.

(*g*) [Nelson J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446, 454.]

(*h*) 7 East, 558.

(*i*) 2 Bing. N. C. 735.

on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the 4th." In Sarl *v.* Bourdillon (*k*) the written note was for the sale of "candlesticks complete." It was proven that the parol bargain was that the candlesticks should be furnished with a gallery to carry a shade, and defendant insisted that the written note was insufficient; but after time to consider, the decision of the court was delivered by Cresswell J., who said: "We do not feel obliged to yield to this argument. The memorandum states all that *was to be done by the person charged*, viz. the defendant, and, according to the case of Egerton *v.* Mathews, (*l*) that is *sufficient to satisfy the* 17*th* section of the statute of frauds, though *not to make a valid agreement in cases within the* 4*th section*."

Sarl *v.* Bourdillon.

§ 247. In Elmore *v.* Kingscote (*m*) there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from defendant to plaintiff, in the following words: "Mr. Kingscote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him: and if not most clearly proved Mr. K. will most decidedly have nothing to do with him." The court held this insufficient, saying, "The price agreed to be paid constituted a material part of the bargain." In Ashcroft *v.* Morrin (*n*) defendant ordered certain goods to be sent him, saying, "Let the quality be fresh and good, and on moderate terms." On objection made that the price was not stated, the court said: "The order is to send certain quantities of porter and other malt liquor, on moderate terms. Why is not that sufficient? That is the contract between the parties:" and set aside the nonsuit according to leave reserved. In Acebal *v.* Levy (*o*) there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. Plaintiff not being successful in establishing the validity of the contract by satisfactory proof of delivery and acceptance, then attempted to support his case by a letter which did not state

Price not stated where agreed on. Elmore *v.* Kingscote.

Ashcroft *v.* Morrin.

Acebal *v.* Levy.

(*k*) 26 L. J. C. P. 78; 1 C. B. N. S. 188.
(*l*) 6 East, 307.
(*m*) 5 B. & C. 583.
(*n*) 4 M. & G. 450.
(*o*) 10 Bing. 376.

the price, and by insisting that a contract of sale was valid without statement of price, because the law would imply a promise to pay a reasonable price. But the court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient to satisfy the statute. (o^1) [Jeffcott *v.* No. Br. Oil Co. Ir. R. 8 C. L. 17, was an action for the non-delivery, according to contract, of paraffin oil sold by the defendant to the plaintiff. The contract was for 100 barrels, to be delivered as wanted. The plaintiff proved a parol contract, and in order to take the contract out of the statute gave in evidence a memorandum of the alleged contract signed by the defendant's agent. The memorandum was silent as to price, which had been agreed on. Some ten casks of oil were delivered to the plaintiff after the contract was made, and were accepted and paid for, and it was held that though the memorandum was insufficient, parol evidence was admissible to show the price, as the statute was satisfied by the part performance.]

Though the memorandum is fatally defective, the contract may be enforcible by reason of compliance with other requirements of the statute.

§ 248. In Hoadley *v.* McLaine, (p) the same court was called on to decide, in the ensuing term, the very point which had been left undetermined in Acebal *v.* Levy. The defendant gave plaintiff an order in these words: "Sir Archibald McLaine orders Mr. Hoadley to build a new, fashionable, and handsome landaulet, with the following appointments, &c. . . . . the whole to be ready by the 1st March, 1833." Nothing was said about price. The judges were all of opinion that as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal C. J. said: "This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park J. said: "It is only necessary that price should be mentioned, *when price is one of the ingredients of the bargain*, ... and it is admitted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient." In Goodman *v.* Griffiths (q) the plaintiff showed defendant an

Price not stated where it had not been agreed on. Hoadley *v.* McLaine.

Goodman *v.* Griffiths.

(o^1) [James *v.* Muir, 33 Mich. 223; Mahalen *v.* Dublin & Chapelizod Distillery Co. Ir. R. 11 C. L. 83.]

(p) 10 Bing. 582.

(q) 26 L. J. Ex. 145, and 1 H. & N. 574.

invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote an order: "Please to put to my account four mechanical binders," and signed it. Held, that as there had been a parol agreement as to price, which was not included in the note of the bargain, the statute was not satisfied.

General rule as to price.

§ 249. It is plainly deducible from the foregoing decisions, that so far as price is concerned the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the statute, (*r*)

(*r*) [See Smith *v.* Arnold, 5 Mason, 416 (a case of contract for sale of real estate); Ide *v.* Stanton, 15 Vt. 685, 691 (contract for sale of wool); Kay *v.* Curd, 6 B. Mon. 103; Kinloch *v.* Savage, Speers Eq. 472; Adams *v.* M'Millan, 7 Porter, 73; Waul *v.* Kirkman, 27 Mo. 823; Ellis *v.* Deadman, 4 Bibb, 467; Soles *v.* Hickman, 20 Penn. St. 180; Mahalen *v.* Dublin & Chapelizod Distillery Co. Ir. R. 11 C. L. 83. In Gowen *v.* Klous, 101 Mass. 449, 454, it was said that the price may be stated in the memorandum in any words or figures which clearly indicate, as applied to the subject, what that price is. If the figures or letters, or both, used in the memorandum, do in fact, and in the light of a prevailing usage, afford this information, the memorandum, to that extent, is sufficient. Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Spicer *v.* Cooper, 1 Q. B. 424. See Smith *v.* Arnold, *supra*; Carr *v.* The Passaic Land Imp. & Building Co. 4 C. E. Green (N. J.), 424; 1 Sugden V. & P. (8th Am. ed.) 134, and note (*u*); Bird *v.* Richardson, 8 Pick. 252; Atwood *v.* Cobb, 16 Ib. 227; 1 Chitty Contr. (11th Am. ed.) 91, note (*a*) and cases. It is provided by the 3d section of the Massachusetts statute of frauds, that the consideration of the contract need not be set forth in the memorandum made necessary by the 1st section of that statute, but may be proved by any other legal evidence. Gen. Sts. c. 105, §§ 1, 2. The 1st section of the Massachusetts statute, above referred to, corresponds with the 4th section of the English statute. To this extent it would seem that, even where the price or consideration has been expressly agreed upon in the verbal contract, the memorandum of that contract need not contain a statement of it. It is to be observed, however, that the 2d section of the Massachusetts statute, above referred to, is not made expressly applicable to cases arising under the 5th section, which corresponds with the 17th section of the English statute. But there is no doubt that the same rule would be applied to cases under the 5th section. See Packard *v.* Richardson, 17 Mass. 122. A distinction is to be observed between cases where the only evidence introduced is a memorandum containing the entire agreement, but disclosing no consideration, and those where the evidence consists of a verbal agreement containing a stipulation of a price or consideration, and a memorandum of it which omits to state such consideration. It was held in James *v.* Muir, 33 Mich. 223, that the memorandum of a

Price may be indicated in any way.

Observations on Massachusetts statute.

No price fixed, no price need be mentioned in memorandum.

and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price. (*s*)

Other terms of the contract must be so expressed as to be intelligible.

§ 250. As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the court to understand what they actually were, in order to satisfy the statute. (*t*)

§ 251. It has already been shown that where these terms are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not contradictory. (*u*) In Jackson *v.* Lowe (*x*) and Allen *v.* Bennett (*y*) the different writings were held consistent, so as to form a sufficient memorandum, while the reverse was held as to the written evidence offered in Cooper *v.* Smith, (*z*) Richards *v.* Porter, (*a*) Smith *v.* Surman, (*b*) and Archer *v.* Baynes. (*c*) In Thornton *v.* Kempster (*d*) the broker's bought note described the article bought as "sound and merchantable Riga Rhine hemp," and the sold note as "St. Petersburg Clean hemp," the former description being of an article materially different in quality and value from the latter. Held that the *substance of the contract* was not shown by the written bargain evidenced by two papers that materially varied from each other. In Archer *v.* Baynes (*c*) the court held the corre-

on v. Kemp-

Archer v. Baynes.

contract which is within the statute of frauds and is executory must name the price, as well where a reasonable price is agreed upon as where any other is.]

(*s*) See *ante*, § 209, and note (*i*).

(*t*) [See Sanborn *v.* Flagler, 9 Allen, 474; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446, 455; Johnson *v.* Buck, 6 Vroom, 338, 343. The memorandum should contain the substantial terms of the contract expressed with such certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without resorting to parol evidence. Buck *v.* Pickwell, 27 Vt. 167; 1 Sugden V. & P. (8th Am. ed.) 134, and note (o^1) and cases cited; *ante*, § 245, note (*z*) and cases cited; Bailey *v.* Ogden, 3 John. 399; Johnson *v.* Buck, 6 Vroom, 338, 343; Curtis J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Waterman *v.* Meigs, 4 Cush. 497; Kay *v.* Curd, 6 B. Mon. 100; Morton *v.* Dean, 13 Met. 385; Nichols *v.* Johnson, 10 Conn. 192; Tallman *v.* Franklin, 4 Kernan, 584; O'Donnell *v.* Leeman, 43 Maine, 158, 160; Washington Ice Company *v.* Webster, 62 Ib. 341; Harvey *v.* Stevens, 43 Vt. 656; Sale *v.* Darragh, 2 Hilton (N. Y.), 184; Norris *v.* Blair, 39 Ind. 90; Soles *v.* Hickman, 20 Penn. St. 180, 183; 2 Kent, 511; Carroll *v.* Cowell, 1 Jebb & Sym. 43; McMullen *v.* Helberg, 4 L. R. Ir. 94.]

(*u*) *Ante*, § 223.

(*x*) 1 Bing. 9.

(*y*) 3 Taunt. 169.

(*z*) 15 East, 103.

(*a*) 6 B. & C. 437.

(*b*) 9 B. & C. 561.

(*c*) 5 Ex. 625; 20 L. J. Ex. 54; [Houghton *v.* Morton, 5 Ir. C. L. R. 329.]

(*d*) 5 Taunt. 786.

spondence between the parties an insufficient note of the bargain, because not containing all the terms of the contract. The court say of the defendant: "It is clear, from the letters, that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing." In Valpy *v.* Gibson, (*e*) in which the statute of frauds was not in question, it was contended, on behalf of the plaintiffs, that the terms of the contract did not appear, because the mode and time of payment had not been specified. But the court said: "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." (*f*) And the court held in the case before it, that the contract between the parties was one of the nature above described, and was valid.

Valpy *v.* Gibson.

§ 252. A recent decision of the common pleas has decided, in opposition to the intimation of opinion in Blackburn on Sales, (*g*) that a letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain to satisfy the 17th section. In Bailey *v.* Sweeting (*h*) the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of

A letter repudiating a cont act may be a sufficient note of it.

Bailey *v.* Sweeting.

(*e*) 4 C. B. 835.

(*f*) [1 Chitty Contr. (11th Am. ed.) 160, and note (*h*) and cases cited. So where there is not in the memorandum any specified time or place of delivery, the law will supply the omission, namely, a reasonable time after the goods are called for, and the usual place of business of the purchaser, or his customary place for the delivery of goods of the description. Nelson J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446, 455, 456; Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530; 1 Chitty Contr. (11th Amer. ed.) 160, and note (*h*) and cases cited.]

No time or place mentioned in memorandum: consequence.

(*g*) Page 66.

(*h*) 30 L. J. C. P. 150; 9 C. B. N. S. 843; [Townsend *v.* Hargraves, 118 Mass. 335, 336.]

goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known by you at the time," &c. &c. Erle C. J., in his opinion, said the letter "in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney-glasses at the sum of 38*l.* 10*s.* 6*d.*, but I declined to have them because the carrier broke them.' Now, the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned chief justice then referred to the passage from Blackburn on Sales, and declared his inability to assent to it, and in this the other judges, Williams, Willes, and Keating, concurred. (*i*) In Wilkinson *v.* Evans (*k*) the defendant also refused the goods, writing on the back of the invoice: "The cheese came today, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." Held, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Nonsuit set aside.

Wilkinson *v.* Evans.

§ 253. A note or memorandum of the bargain is sufficient, although it contain a mere proposal, if supplemented by parol proof of acceptance. (*l*) This had been held by Kindersley V. C. in Warner *v.* Willington, (*m*) and that case was followed by the court of common pleas, in

Parol proof of acceptance of written proposal sufficient

(*i*) See *ante*, § 227, remarks on Richards *v.* Porter.

(*k*) L. R. 1 C. P. 407; 35 L. J. C. P. 224. [To the same effect was Buxton *v.* Rust, L. R. 7 Ex. 279, in which Blackburn J. concurred. See Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140.]

(*l*) [In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell. Bigelow C. J. in Sanborn *v.* Flagler, 9 Allen, 474, 475. See Smith *v.* Gowdy, 8 Allen, 566. But a verbal offer, though sufficiently full and explicit, is not taken out of the statute by a written acceptance which does not contain its terms. Washington Ice Co. *v.* Webster, 62 Maine, 341.]

Written offer orally accepted may bind offerer.

Oral offer not taken out by written acceptance not containing terms.

(*m*) 3 Drew. 523, and 25 L. J. Ch. 662.

to bind signer of proposal.

Smith *v.* Neale, (*n*) and by the exchequer, in Liverpool Borough Bank *v.* Eccles. (*o*) The question came before the exchequer chamber in Reuss *v.* Picksley, (*p*) and after full argument, the judges, six in number, unanimously confirmed the cases just cited, and expressed their approval of the reasoning of the vice chancellor in Warner *v.* Willington.

§ 253 *a*. [In Clarke *v.* Gardiner, 12 Ir. C. L. R. 472, the defendant was a Londonderry merchant and employed an agent in Liverpool named Galliland to sell some guano which was on a quay in Liverpool. Galliland communicated with Clarke about the matter, the result of which was that the defendant sent Clarke a letter, the substance of which was that he accepted Clarke's offer of 12*l.* 5*s.* for the guano, but instead of taking ten or more tons of some guano belonging to the plaintiff, as the plaintiff had proposed, he would take only five tons at the specified price, this to be paid for by a bill at three or four months, while Clarke was to make his payment in cash. This letter was received by the plaintiff on the 7th of June, and it appeared that the plaintiff immediately on receipt of the letter shipped on board the steamers for Londonderry the five tons of guano which he was to furnish. On the same day, but after the sailing of the vessel, Galliland called on Clarke and told him that the guano could not be had except on new terms. Monahan C. J. said: "The question therefore arises, whether the fact that before he was aware of the receipt of the letter from Gardiner, Clarke had, in pursuance of the proposal, put on board five tons of guano, and by the post of that day apprised Gardiner that he had done so, was, in itself, a complete acceptance, so as to prevent Gardiner having the power to withdraw his offer, and render him liable for the non-performance thereof? There are many decisions of both the equity and common law courts in England to the effect that, although, according to the statute of frauds, a memorandum in writing is required to evidence a sale of land, it need only be signed by the party sought to be charged thereby, and that the other party may accept by parol, and that, if he do so, he may maintain an action at law or a suit in equity, to enforce the contract, though there be a want of mutuality, and though no cross action can be maintained by the opposite party.

Parol acceptance of written offer.

Clarke *v.* Gardiner.

(*n*) 2 C. B. N. S. 67, and 26 L. J. C. P. 143.

(*o*) 4 H. & N. 139; 28 L. J. Ex. 123.

(*p*) L. R. 1 Ex. 342; 35 L. J. Ex. 218.

It was admitted during the argument, and we are of opinion, that though there was some difference in the wording of the respective clauses relating to the sale of land and of goods, one speaking of the 'parties' and the other the 'party' chargeable, that variance is of no consequence; and that, according to the true construction of the statute of frauds in England, and the corresponding statute in this country, that if one of the parties signs a proposal, the acceptance by the other may be by parol. Therefore the question arises, whether the fact of the goods having been put on board the vessel amounts to such an acceptance, though not immediately communicated to the other party, as renders it a complete contract?" It was held that the shipping of the guano completed the contract. See the opinion of Christian J.]

§ 254. In the United States it has been held that if terms of credit have been agreed on, or a time for performance fixed by the bargain, the memorandum will be insufficient if these parts of the bargain be omitted. (*q*)

Decisions in America.

(*q*) Davis *v.* Shields, 26 Wend. 341; Salmon Falls Company *v.* Goddard, 14 How. (U. S.) 446; Morton *v.* Dean, 13 Met. 388; Soles *v.* Hickman, 20 Penn. St. 180; Buck *v.* Pickwell, 27 Vt. 167; Elfe *v.* Gadsden, 2 Rich. (S. Car.) 373; [Coddington *v.* Goddard, 16 Gray, 436; Boardman *v.* Spooner, 13 Allen, 353; Norris *v.* Blair, 39 Ind. 90; M'Farson's Appeal, 11 Penn. St. 503; Mingaye *v.* Corbett, 14 U C. C. P. 557; Fisher *v.* Kuhn, 54 Miss. 480; Johnson *v.* Granger, 57 Texaa, 42; O'Neil *v.* Crain, 67 Mo. 250 McElroy *v.* Buck, 35 Mich. 434.]

CHAPTER VII.

OF THE SIGNATURE OF THE PARTY.

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§ 255. THE 17th section requires the writing to be "signed by the *parties* to be charged," &c. and the 4th section, "by the *party* to be charged," &c. Under both sections it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed. (*a*) In Allen *v.* Bennett, (*b*) in 1810, the court of common pleas considered the question as already settled under the 17th section by authority and practice. And in Thornton *v.* Kempster (*c*) the same court declared that contracts

Signature of the party to be charged alone is sufficient.

Contract good or not at election of party who has not signed.

Allen *v.* Bennett.

(*a*) [Shirley *v.* Shirley, 7 Blackf. 452; Smith *v.* Smith, 8 Ib. 208; Newby *v.* Rogers, 40 Ind. 9, 11, 12; Barstow *v.* Gray, 3 Greenl. 409; Old Colony R. R. Co. *v.* Evans, 6 Gray, 25; Hawkins *v.* Chace, 19 Pick. 502; Penniman *v.* Hartshorn, 13 Mass. 87; Getchell *v.* Jewett, 4 Greenl. 350; Higdon *v.* Thomas, 1 Harr. & G. 139; Clason *v.* Bailey, 14 John. 484; Dresel *v.* Jordan, 104 Mass. 412; Hunter *v.* Giddings, 97 Ib. 41; Cook *v.* Anderson, 20 Ind. 15; Davis v. Shields, 26 Wend. 340; Lent *v.* Padelford, 10 Mass. 236; Ivory *v.* Murphy, 36 Mo. 534; Worrall *v.* Munn, 1 Selden, 229; Fenley *v.* Stewart, 5 Sandf. 101; Lowry *v.* Mehaffey, 10 Watts, 387; M'Farson's Appeal, 11 Penn. St. 503; De Cordova *v.* Smith, 9 Texas, 129; Laning *v.* Cole, 3 Green Ch. 229; Young *v.* Paul, 2 Stockt. Ch. 402; Ide *v.* Stanton, 15 Vt. 687; Douglass *v.* Spears, 2 Nott & McC. 207; Adams *v.* McMillan, 7 Port. 73; Ballard *v.* Walker, 3 John. Cas. 60; Justice *v.* Lang, 52 N. Y. 323; Justice *v.* Lang, 42 Ib. 494; Justice *v.* Lang, 7 J. & Sp. 283; Mason *v.* Decker, 72 N. Y. 595.]

(*b*) 3 Taunt. 169.

(*c*) 5 Taunt. 786.

may subsist which, by reason of the statute of frauds, could be enforced by one party, though not by the other. In Laythoarp *v.* Bryant (*d*) the point was decided under the 4th section, after full argument. The foregoing decisions have never since been questioned, and the law on the subject is settled, not only by them, but by the very recent case of Reuss *v.* Picksley, (*e*) in Cam. Scacc., and the decisions quoted, *ante* § 253, in which it was held that a written proposal, signed by the party to be charged, was a sufficient note of the bargain, if supplemented by parol proof of acceptance by the other party.

Laythoarp *v.* Bryant.

§ 256. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged. Thus, a mark made by a party as his signature is sufficient, if so intended. (*f*) And in Baker *v.* Dening, (*g*) where the question arose under the 5th section of the statute, which relates to wills and devises, the court held that it was not necessary to show that the party signing by a mark was unable to write his name; and the judges expressed the opinion, that a mark would be a good signature even if the party signing was able to write his name. In Helshaw *v.* Langley (*h*) the signature of a party was decided to be sufficient, when he, being unable to write, held the top of the pen, while another person wrote his signature.

Actual subscription not necessary.

Mark sufficient, or pen held by a third person.

Baker *v.* Dening.

Helshaw *v.* Langley.

§ 257. But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is insufficient. Thus, a letter by a mother to a son, beginning "My dear Robert," and ending "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother. (*i*) Whether a signature by initials would suffice seems not to have been decided expressly. (*k*) In Hubert *v.* Moreau (*l*) the question was raised under the act 6 Geo. 4, c. 16, s. 131, which made void a promise by a bankrupt to pay a debt from which he

Description of the writer insufficient.

Initials.

Hubert *v.* Moreau.

(*d*) 2 Bing. N. C. 735, and 3 Scott, 238.

(*e*) L. R. 1 Ex. 342; 35 L. J. Ex. 218.

(*f*) 2 Kent, 511; [Bickley *v.* Keenan, 60 Ala. 293.]

(*g*) 8 Ad. & E. 94. See, also, Harrison *v.* Elvin, 3 Q. B. 117.

(*h*) 11 L. J. Ch. 17.

(*i*) Selby *v.* Selby, 3 Mer. 2.

(*k*) See *post*, § 258, note (*n*).

(*l*) 2 C. & P. 528.

had been discharged, unless the promise was made in writing, "signed by the bankrupt." The report states that the letter had no name attached to it, but something that looked like an M. Best C. J. said, on looking at it, "It may be an M., or it may be a waving line; but if it be an M., I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject." His lordship refused the plaintiff permission to prove by parol that the defendant usually signed in that way. Afterwards a witness was called, who stated as his opinion that the mark which was taken to be an M. was nothing but a flourish, and the plaintiff was thereupon nonsuited. The court in banc afterwards refused a rule to set aside the nonsuit, the rule being taken on the ground that the M. was a sufficient signing, because it was the sign used by the party to denote that the instrument was his. In the report of the same case, as given in 12 Moore C. P. 216, the language of the court, in refusing the new trial, would indicate that as a question of *fact* there was no mark appended to the writing, and placed there by the writer with the intention of making it his signature. The chief justice put the case as follows: "Undoubtedly the signing by a mark would satisfy the meaning of the statute, *but here there is nothing intended to denote a signature*, nor does the name of the defendant appear in any part of the letter."

Sweet v. Lee.

§ 258. In Sweet *v.* Lee (*m*) the writing was signed with the initials T. L., but in the writing were the words "Mr. Lee," in the handwriting of defendant, and nothing was decided as to the sufficiency of the signature. And the same observations apply to the nisi prius cases of Phillimore *v.* Barry, 1 Campb. 513, and Jacob *v.* Kirk, 2 Mood. & Rob. 221. There seems to be no doubt that if the initials are intended as a signature by the party who writes them, this shall suffice, but not otherwise. (*n*)

Signature may be in print, or

§ 259. The signature may be in writing or in print (and the writing may be in pencil, Geary *v.* Physic, 5 B. & C. 234, (*o*) or by stamping the name, Bennett *v.* Brumfitt,

(*m*) 3 M. & G. 452.

(*n*) See remarks of Lord Westbury in Caton *v.* Caton, L. R. 2 H. L. 127, 143; Chichester *v.* Cobb, 14 L. T. N. S. 433; Sugden V. & P. 144 (ed. 1862);

[Sanborn *v.* Flagler, 9 Allen, 474, 478; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446; Barry *v.* Coombe, 1 Peters (U. S.), 640.]

(*o*) [Clason *v.* Bailey, 14 John. 484;

L. R. 3 C. P. 28), (*p*) and it may be in the body of the writing, or at the beginning or end of it. (*q*) But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.

by stamp, and in the body of the paper, or at beginning or end.

When not subscribed, a question of fact.

§ 260. In Saunderson *v.* Jackson, (*r*) the plaintiff, on giving to

Merritt *v.* Clason, 12 Ib. 102; McDowel *v.* Chambers, 1 Strobh. Eq. 347; Draper *v.* Pattina, 2 Speers, 292.]

(*p*) [On the trial of an action to recover of the purchaser the price of goods sold and delivered, the purchaser produced, on notice, the vendor's bill of sale of the goods, bearing the purchaser's name stamped thereon while in the possession of the purchaser, and there was no evidence to show when, or under what circumstances, it was so stamped; it was held that this was not sufficient proof to authorize the jury to find that the purchaser had made and signed a note or memorandum in writing of the bargain. Boardman *v.* Spooner, 13 Allen, 353.]

Vendee's name stamped on bill of parcels in his possession; evidence must explain.

(*q*) [It is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some persons duly authorized to authenticate the document. Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract by which one agrees to sell, and the other to buy the goods or merchandise specified, upon the terms therein expressed. It is the substance, and not the form of the memorandum, which the law regards. The great purpose of the statute is answered if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof. Bigelow C. J. in Coddington *v.* Goddard, 16 Gray, 444, and cases there cited; Fessenden *v.* Mussey, 11 Cush. 127; Penniman *v.* Hartshorn, 13 Mass. 87; M'Comb *v.* Wright, 4 John. Ch. 663; Anderson *v.* Harold, 10 Ohio, 399; Argenbright *v.* Campbell, 3 H. & Munf. 144, 198; Higdon *v.* Thomas, 1 H. & Gill, 139. In Hawkins *v.* Chace, 19 Pick. 502, it was held that a bill of parcels, in the usual form, written by a third person, by the direction of the vendor, is a sufficient note or memorandum of the contract, within the meaning of the statute, as against the vendor, although it do not state when the articles are to be delivered, or when the price is to be paid, and be not signed at the bottom by the vendor. See Nelson J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 446, 456, 457; Foster J. in Boardman *v.* Spooner, 13 Allen, 357; Batturs *v.* Sellers, 5 Harr. & J. 117. In some of the American states the statute requires that the memorandum shall be "subscribed;" and where this word is used it is said that the signature must be at the end. See Davis *v.* Shields, 24 Wend. 322; S. C. 26 Ib. 341; Vielie *v.* Osgood, 8 Barb. 130. In New York a contract for the sale of land is void, unless the note or memorandum of it in writing is signed by the party who makes the sale. Burrell *v.* Root, 40 N. Y. 498.]

Location of names immaterial.

Some statutes require "subscription."

(*r*) 2 B. & P. 238. [See Per Nelson J. in Salmon Falls Manuf. Co. *v.* Goddard, 14 How. (U. S.) 456.]

the defendants an order for goods, received from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson & Hanson, distillers, No. 8 Oxford Street," and then followed in writing, "1,000 gallons of gin, 1 in 5 gin, 7*s*., 350*l*." There was also a letter, signed by the defendants, in which they wrote to the plaintiff, about a month later, "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds." Thus far the case would not amount to much as an authority on the point under discussion. His lordship went on to say: "It has been decided, (*s*) that if a man draw up an agreement in his own handwriting, beginning 'I, A. B., agree,' and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. (*t*) And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument, that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of Lens Serjt. who admitted that the printed name might have amounted to a signature, if the bill of parcels had been intended to express the contract, *quâ* contract, but contended that this was not the intention.

Saunderson *v.* Jackson.

(*s*) The case referred to by his lordship is Knight *v.* Crockford, 1 Esp. 190. See, also, Lobb *v.* Stanley, 5 Q. B. 574; Durrell *v.* Evans, 1 H. & C. 174, and 31 L. J. Ex. 337.

(*t*) [In Hawkins *v.* Chace, 19 Pick. 505, 506, the court said: "We know of no case in which such a signature has been deemed good, unless where it appears from the paper that the name was introduced by the party to be charged, in his own handwriting, as in Knight *v.* Crockford, and Penniman *v.* Hartshorn, 13 Mass. 87, or where the party making the memorandum has stood in such relation as to give effect to his act, to bind his principal or employer. We think there is no doubt that if one is specially requested to sign or authenticate a paper for another, and he puts the name of his principal to any part of the paper for that purpose, it would be good, though we are not aware that any case cited is precisely to that point."]

Signature in body of memorandum.

§ 261. In Schneider *v.* Norris (*u*) the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own handwriting, and all the judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. (*x*) Lord Ellenborough said: "If this case had rested merely on the printed name, unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract." Le Blanc J. compared the case to one where a party should stamp his name on a bill of parcels. Bayley J. put his opinion on the ground that the defendant had signed the plaintiffs' names as purchasers, and thereby recognized his own printed name as that of the seller. And Dampier J. on much the same idea, that is, that the defendant, by writing the name of the buyer on a paper in which he himself was named as the seller, recognized his name sufficiently to make it a signature. Schneider *v.* Norris.

§ 262. In Johnson *v.* Dodgson (*y*) the defendant wrote the terms of the bargain in his own book, beginning with the words: "Sold John Dodgson," and required the vendor to sign the entry. The court held this to be a signature by Dodgson, Lord Abinger saying that "The cases have decided that though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or Johnson *v.* Dodgson.

(*u*) 2 M. & S. 286.
(*x*) [*Ante*, § 259, and notes.]
(*y*) 2 M. & W. 653.

whether it was left so unsigned because he refused to complete it." Parke B. concurred, on the authority of Saunderson *v.* Jackson and Schneider *v.* Norris, which he recognized and approved. In Durrell *v.* Evans, in Cam. Scac. (*z*) (*post*, § 267), the cases of Saunderson *v.* Jackson, Schneider *v.* Norris, and Johnson *v.* Dodgson, were approved and followed. (*z*[1])

Hubert *v.* Treherne.

§ 263. In Hubert *v.* Treherne, (*a*) which arose under the 4th section, it appeared that an unincorporated company, called The Equitable Gas Light Company, accepted a tender from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, &c. was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, &c. of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, showed that the intention was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. Maule J. said: "The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the statute of frauds, no one could have entertained a doubt upon that point. Since the statute, the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. . . . . If a party writes, 'I, A. B., agree,' &c. with no such conclusion as is found here, 'as witness our hands,' it may be that this is a sufficient signature within the statute to bind A. B. . . . . But it would be going a great deal farther than any of the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A. B. that he *would* sign a particular paper."

(*z*) 1 H. & C. 174; 31 L. J. Ex. 337.

(*z*[1]) [Beckwith *v.* Talbot, 95 U. S. 289.]

(*a*) 3 M. & G. 743.

§ 264. The most full and authoritative exposition of the law on this subject is to be found in Caton *v.* Caton, (*b*) decided in the House of Lords in May, 1867. The paper there relied on was a memorandum of the terms of a marriage settlement, drawn up in the handwriting of the future husband, and taken to a solicitor's for execution, but the settlement was waived by the parties, and the memorandum was subsequently set up as containing the agreement. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials. It was held that although to satisfy the statute of frauds it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the court, the name of the party, when found in the instrument, appeared in such a way that it referred in each instance only to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury, whose opinion on this particular point was the most comprehensive of those delivered in the case, was as follows: "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of Stokes *v.* Moore (1 Cox, 219), the language of the learned judge is that the signature must authenticate every part of the instrument; or, again, that it must give authenticity to every part of the instrument. Probably the phrases 'authentic' and 'authenticity' are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir William Grant, in Ogilvie *v.* Foljambe (3 Mer. 53), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having

Caton *v.* Caton.

(*b*) L. R. 2 H. L. 127.

relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum. His lordship then criticised the different clauses of the memorandum for the purpose of showing the insufficiency of the signature when tested by these rules, and proceeded: "Now an ingenious attempt has been made at the bar to supply that defect by fastening on the antecedent words 'In the event of marriage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My lords, if we adopted that device, we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a different signification and effect from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which, by virtue of that reference, is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature not only to the thing (writing?) originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply. The effect of these principles seems to be substantially that the reference to connect two papers or two clauses, so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse. [If the signature is affixed to a paper which is an acceptance, and which by its terms refers to another document containing the terms of the contract, it is a good signature.] (b^1)

Signature may be referred, from what is signed to what is unsigned; not the reverse.

Signature in acceptance.

(b^1) [West. Union Tel. Co. *v.* Chicago & Paducah R. R. Co. 86 Ill. 246; Cossitt *v.* Hobbs, 56 Ib. 231. See Beckwith *v.* Talbot, 95 U. S. 289; § 222 *ante*.]

CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

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§ 265. It is not within the scope of this treatise to enter into the general subject of the law of agency, which is in no way altered by the statute. The agency may be proven by parol as at

common law, (*a*) and may be shown by subsequent ratification as well as by antecedent delegation of authority. (*b*) But such ratification is only possible in the case of a principal in existence when the contract was made (*ante*, § 244). It is necessary that the agent be a third person, and not the other contracting party. (*c*)

Agent must be a third person, not the other contracting party.

§ 266. The decisions as to the sufficiency of the evidence to prove authority for the agent's signature have not been numerous under the 17th section. In Graham *v.* Musson, (*d*) the plaintiff's traveller, Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Maurs. at 71*s.*; cash, two months. Fenning's Wharf. (Signed) Joseph Dyson." It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing; but the court held on the evidence that Dyson was the agent of the vendor, and that the request by the purchaser that the vendor's agent should sign a memorandum of the bargain was no proof of agency to sign the purchaser's name; that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name. This case was decided by Tindal C. J., Vaughan, Coltman, and Erskine JJ., in 1839, and was followed by the same court in 1841, in Graham *v.* Fret-

What evidence sufficient to prove authority.

Graham *v.* Musson.

Graham *v.* Fretwell.

(*a*) [See Graham *v.* Musson, 7 Scott, 769; Rucker *v.* Cammeyer, 1 Esp. 105; Harrison *v.* Jackson, 7 T. R. 207; Johnson *v.* Dodge, 17 Ill. 433; McWhorter *v.* McMahan, 10 Paige, 386; Alna *v.* Plummer, 4 Greenl. 258; Worrall *v.* Munn, 1 Selden, 229; Doty *v.* Wilder, 15 Ill. 407; Long *v.* Hartwell, 5 Vroom (N. J.), 116; Blacknall *v.* Parish, 6 Jones Eq. 70; Heard *v.* Pilley, L. R. 4 Ch. Ap. 548; Yourt *v.* Hopkins, 24 Ill. 326; 1 Sugden V. & P. (8th Am. ed.) 145, note (*a*); Hawkins *v.* Chace, 19 Pick. 502, 506; Shaw *v.* Nudd, 8 Ib. 9; Blood *v.* Hardy, 15 Maine, 61; Champlin *v.* Parish, 11 Paige, 405; Lawrence *v.* Taylor, 5 Hill, 107, 112; Tomlinson *v.* Miller, Sheld. 197.]

(*b*) Maclean *v.* Dunn, 4 Bing. 722; Gosbell *v.* Archer, 2 Ad. & E. 500; Acebal *v.* Levy, 10 Bing. 378; Fitzmaurice *v.* Bayley, 6 E. & B. 868; afterwards reversed, 9 H. L. Cas. 78, but not on the point stated in the text; Sugden V. & P. 145. [See Hawkins *v.* Chace, 19 Pick. 502, 506. A letter signed by the principal referring to his agent's unauthorized contract and adopting it, will render the contract valid under the statute of frauds as if made originally by him. Newton *v.* Bronson, 3 Kernan, 587.]

(*c*) Sharman *v.* Brandt, in Ex. Ch. L. R. 6 Q. B. 720. [See Bent *v.* Cobb, 9 Gray, 387; Smith *v.* Arnold, 5 Mason, 414; Johnson *v.* Buck, 6 Vroom (N. J.), 338, 342.]

(*d*) 5 Bing. N. C. 603.

well, (*e*) with the concurrence of Maule J., who had succeeded Vaughan J. on the bench.

§ 267. The whole subject was fully discussed in Durrell *v.* Evans, decided in the exchequer by Pollock C. B. and Bramwell and Wilde BB. in 1861, (*f*) and reversed by the unanimous opinions of Crompton, Willes, Byles, Blackburn, Keating, and Mellor JJ. in the exchequer chamber in 1862. (*g*) The facts were these: The plaintiff, Durrell, had hops for sale, in the hands of his factor, Noakes, and the defendant failed in an attempt to bargain for them with Noakes. Afterwards, the plaintiff and the defendant went together to Noakes's premises, and there concluded a bargain in his presence. Noakes made a memorandum of the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away. Before taking away the memorandum, the defendant requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit), and the plaintiff and Noakes assented to this, and the alteration was accordingly made. The memorandum was in the following words: — Durrell *v.* Evans.

"Messrs. Evans.

"Bought of J. T. & W. Noakes.

"Bags.	Pockets.	T. Durrell Ryarsh & Addington.	16*l.* 16*s.*
	33		

"Oct. ~~19th~~ 20th, 1860."

The entry on the counterfoil was as follows: —

"Sold to Messrs. Evans.

"Bags.	Pockets.	T. Durrell Ryarsh & Addington.	16*l.* 16*s.*
	33		

"Oct ~~19th~~ 20th, 1860."

On the trial, before Pollock C. B., the defendant contended that he had never signed or authorized the signature of his name as required by the 17th section to bind the bargain. The plaintiff contended that the name "Messrs. Evans" written on the coun-

(*e*) 3 M. & G. 368.

(*f*) 30 L. J. Ex. 254; S. C. *nom.* Darrell *v.* Evans, 6 H. & N. 660.

(*g*) 1 H. & C. 174; 31 L. J. Ex. 337.

terfoil was so written by Noakes as the defendant's agent; that if written by himself, it would have been a sufficient signature according to the authority of Johnson *v.* Dodgson (*ante*, § 262), and that he was as much bound by the act of his agent in placing the signature there as if done by himself. The court of exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the vendor, and that the request of the defendant that the memorandum should be changed from the 19th to the 20th was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They therefore made absolute a rule for a nonsuit, for which leave had been reserved at the trial. The court of exchequer chamber, with equal unanimity, distinguished the case from Graham *v.* Musson (*ante*, § 266), and held that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and, if so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole current of authority. The grounds for distinguishing the case from Graham *v.* Musson were stated by the different judges. Crompton J.: "I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice, and that all that the defendant did was simply taking an invoice and asking to have it altered; and if the jury had found that, a nonsuit would have been right. But, on the contrary, I think that there was plenty of evidence to go to the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence for the jury that Noakes was the agent of both parties. Byles J.: "What does the defendant do? First of all, he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant." Blackburn J.: "The case in the

court below proceeded on what was thrown out by my brother Wilde, and I agree with the decision of that court, if this document were a bill of parcels, or an invoice in the strict sense, viz. a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance I cannot as a matter of course look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps I should draw the inference that it was, but it is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides. . . . . In Graham *v.* Musson, the name of the defendant, the buyer, did not appear on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and unless the name of Dyson was used as equivalent to Musson, there was no signature by the defendant: but in point of fact, 'J. Dyson' was equivalent to 'for or per pro North & Co., J. Dyson.'"

§ 267 *a.* [In Murphy *v.* Boese, L. R. 10 Ex. 126, it appeared that the plaintiff brought an action for the price of clocks sold by him to the defendant; and the plaintiff's traveller, when he took the order for the goods, wrote out in the presence of the defendant, upon printed forms, two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it; and it was held (distinguishing Durrell *v.* Evans) that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within § 17 of the statute of frauds. Pollock B. said: "I think Durrell *v.* Evans can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes, the factor, to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go farther and say that, from the nature of the transaction, and the meeting of the parties at the office, it might be thought that there Murphy *v.* Boese.

was evidence that it was meant that Noakes should act as the scribe of both parties in drawing up a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent." Bramwell B. said: "We are, no doubt, bound by the decision of the exchequer chamber in Durrell *v.* Evans, but this case is distinguishable from it, and when I remember that my brother Crompton took part in that decision, I am bound to speak of it with the utmost respect."]

Auctioneer is agent of both parties at a public sale for signing the note.

§ 268. It will have been observed that, in some of the cases already referred to, it is taken for granted that an auctioneer is an agent for both parties *at a public sale*, for the purpose of signing. (*h*) This has long been established law. (*i*) Sir James Mansfield, in Emmerson *v.* Heelis, (*i*) thus gave the reason for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser." It follows from this reasoning that the rule does not apply in a case where the auction-

But of vendor alone at private sale.

(*h*) [Hart *v.* Woods, 7 Blackf. 568; Jenkins *v.* Hogg, 2 Treadway, 821; Bent *v.* Cobb, 9 Gray, 397; Gordon *v.* Sims, 2 McCord Ch. 164; Pugh *v.* Chesseldine, 11 Ohio, 109; Burke *v.* Haley, 2 Gilm. 614; M'Comb *v.* Wright, 4 John. Ch. 659; Johnson *v.* Buck, 6 Vroom (N. J.), 338, 342; Hathaway J. in Pike *v.* Balch, 38 Maine, 302, 311; Harvey *v.* Stevens, 43 Vt. 655, 656; Brent *v.* Green, 6 Leigh, 16; White *v.* Crew, 16 Ga. 416; Anderson *v.* Chick, 1 Bailey Eq. 118; Adams *v.* M'Millan, 7 Porter, 73; Smith *v.* Arnold, 5 Mason, 414; Morton *v.* Dean, 13 Met. 388; Cleaves *v.* Foss, 4 Greenl. 1; Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush, 463. The auctioneer does not bind the purchaser by his signature, unless the memorandum be made at the time of the sale. Horton *v.* McCarty, 53 Maine, 394; Gill *v.* Bicknell, 2 Cush. 355; Alna *v.* Plummer, 4 Greenl. 258; O'Donnell *v.* Leeman, 43 Maine, 158, 160; Smith *v.* Arnold, 5 Mason, 414; Flintoft *v.* Elmore, 18 U. C. C. P. 274. As to memorandums made by officers, and persons acting in fiduciary capacities, see 1 Sugden V. & P. (8th Am. ed.) 147, and notes (*r*) and (*u*); Flintoft *v.* Elmore, 18 U. C. C. P. 274. When on a sale of real estate a deposit is made in advance with the auctioneer, he is regarded as stakeholder, and should not pay to either party without the consent of the other. Ellison *v.* Kenn, 86 Ill. 427; Early *v.* Smyth, 7 Ir. C. L. R. 397.]

Auctioneer must act at sale to bind purchaser.

Stakeholder of deposits in advance.

(*i*) Hinde *v.* Whitehouse, 7 East, 558; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 B. & C. 945; Walker *v.* Constable, 1 B. & P. 306; Farebrother *v.* Simmons, 5 B. & A. 333; Durell *v.* Evans, 1 H. & C. 174; 31 L. J. Ex. 337; [Clarkson *v.* Noble, 2 U. C. Q. B. 361.]

eer sells the goods of his principal at private sale, for then he is the agent of the vendor alone, and in no sense that of the purchaser. And such was accordingly the decision of the exchequer court in Mews *v.* Carr. (*k*)

Mews *v.* Carr.

§ 269. And on the same principle it has been held, that the circumstances of the case may be used to rebut the general inference that the auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions of the sale. Thus, in Bartlett *v.* Purnell, (*l*) the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy of 200*l.*, to which the defendant was entitled under the will of the deceased. The conditions of the sale were that the purchasers were to pay a certain percentage at the sale, and the rest on delivery. The auctioneer put the defendant's name, like that of all other purchasers, on his catalogue as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions of the sale. But the court held that the real purchase was not a purchase at auction; that the sale was made before the auction, and that the public bidding was only used for the purpose of settling the price at which the purchaser was to take the goods under the antecedent bargain: and that the auctioneer was not the agent of the purchaser. Denman C. J. saying, "We do not overrule the former cases, but we consider them inapplicable."

His agency for purchaser at public sale may be disproved.

Bartlett *v.* Purnell.

§ 270. But the agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the vendor exclusively. It is only when the bidder has become the purchaser, that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the vendor. (*m*) In Bird

Auctioneer's agency for buyer only begins when the goods are knocked down to buyer.

(*k*) 1 H. & N. 484; 26 L. J. Ex. 39.

(*l*) 4 Ad. & E. 792.

(*m*) Warlow *v.* Harrison, 1 E. & E. 295; 28 L. J. Q. B. 18. [But when the sale is over, the auctioneer is agent for the seller only. Horton *v.* McCarty, 53 Maine, 394, 398; *ante*, § 268, note (*h*).]

Bird *v.* Boulter. Auctioneer's clerk.

v. Boulter (*n*) the person who signed the purchaser's name was not the auctioneer, but his clerk. Held to be sufficient.

Clerk of telegraph company. Godwin *v.* Francis.

§ 271. The signature of a clerk of a telegraph company to a dispatch was held to be sufficient where the original instructions had been signed by the party, in Godwin *v.* Francis, L. R. 5 C. P. 295. (*o*)

Signature by an agent as a witness. Auctioneer's clerk as witness. Gosbell *v.* Archer.

§ 272. The signature required by the statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *quâ* agent, but only in the capacity of witness to the writing, it will not suffice. In Gosbell *v.* Archer (*p*) the clerk of the auctioneer, who had authority to act for his master, signed a memorandum of the sale, as witness to the signature of the buyer, and an attempt was made to set up the clerk's signature as that of a duly authorized agent of the vendor. The attempt was unsuccessful, and a dictum of Lord Eldon (*q*) to the contrary was said by Denman C. J. to be open to much observation. The *dictum* of Lord Eldon was, that "where a party or principal or person to be bound signs as, *what he cannot be*, a witness, he cannot be understood to sign otherwise than as principal."

Brokers.

§ 273. There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers. These persons, as a general rule, are agents for both parties, and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute. (*r*) The authority of a broker to bind his principals may by special agreement be carried

Their general authority.

(*n*) 4 B. & Ad. 443; [Smith *v.* Jones, 7 Leigh, 165. See Fiske *v.* McGregory, 34 N. H. 414, 418, 419; Alna *v.* Plummer, 4 Greenl. 258; Meadows *v.* Meadows, 3 McCord, 458; Gill *v.* Bicknell, 2 Cush. 355; Cathcart *v.* Keirnaghan, 5 Strobh. 129; Johnson *v.* Buck, 6 Vroom, 338, 342, 343; Norris *v.* Blair, 39 Ind. 90; Coate *v.* Terry, 24 U. C. C. P. 571.]

(*o*) [See Bundy *v.* Johnson, 6 U. C. C. P. 221.]

(*p*) 2 Ad. & E. 500.

(*q*) In Coles *v.* Trecothick, 9 Ves. 251; and see the observations of Sir Edward Sugden, V. & P. 143.

(*r*) [Bigelow C. J. in Coddington *v.* Goddard, 16 Gray, 442; Hinckley *v.* Arey, 27 Maine, 362; Story Agency, §§ 28, 31; Lawrence *v.* Gallagher, 10 Jones & S. 309. See Shaw *v.* Finney, 13 Met. 453, 456. A memorandum of a contract of sale signed by one who is agent of both the buyer and the seller, expressing that certain property has been sold at a certain

to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law-merchant, or the custom of merchants. There are still, however, some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties. (*s*)

§ 274. Before entering into an examination of the authorities, it will be convenient to give a short summary of the statutes in relation to brokers in the city of London, as many of the cases turn upon their dealings. Until the year 1870, the brokers of London had from very early times been under the control of the corporation of the city. The statutes of 6 Anne, c. 16, 10 Anne, c. 19, s. 121, and 57 Geo. 3, c. 60, (*t*) contain provisions for the regulation of brokers, and for defining the power of the corporation. Under these acts the city formerly required a bond and an oath, the form of which, prior to the year 1818, may be found given in Kemble *v.* Atkins, 7 Taunt. 260; S. C. Holt N. P. 431. The regulations imposed, and form of the bond as altered in 1818, are printed at length in the appendix to Russell on Factors and Brokers. It is imposed as a duty on the broker that he shall "keep a book or register, intituled The Broker's Book, and therein truly and fairly enter all such contracts, bargains, and agreements, on the day of the making thereof, together with the Christian and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively, containing therein a true copy of such entry; and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements." But by the

Brokers in city of London.

price, necessarily imports that it has been purchased at that price, and both parties are bound by it. Butler *v.* Thompson, 2 Otto, 412.]

(*s*) See, for example, Dickinson *v.* Lillwall, 4 Camp. 279; Baines *v.* Ewing, L. R. 1 Ex. 320; 35 L. J. Ex. 194.

(*t*) These statutes will be found in the notes at p. 426 of vol. i. Chitty's Collection of Statutes, ed. 1865; that of 6 Anne is in the text, at p. 424 of the same.

London brokers' relief act, 1870, most of these powers were taken away, the bonds are no longer required, the rules and regulations are no longer to be enforced by the corporation, and now brokers are only required to be admitted by the corporation, and a list of brokers is kept, from which any broker may be removed for fraud or other offences in the manner specified in the act.

Brokers' relief act, 1870.

§ 275. Mr. Justice Blackburn (*u*) warns his readers not to confound the contract notes here mentioned, which are a copy of the entry, with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as, or before it is entered in the book, and he remarks that no mention is made of the bought and sold notes in the bonds or regulations. But Lord Ellenborough expressly says, in Hinde *v.* Whitehouse, (*x*) and Heyman *v.* Neale, (*y*) that the bought and sold notes are "transcribed from the book," are "copies of the entry," and this may be found repeated *passim* in the reported cases, although no doubt these notes are very frequently made in the manner stated by Blackburn J., as is also apparent in the reported cases. The brokers in London are bound by the customs of trade, just as all other brokers are, and such customs are valid in spite of anything to the contrary in the bonds and regulations, which are purely municipal. (*z*)

Contract notes.

Brokers in London bound by customs of trade.

§ 276. When a broker has succeeded in making a contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note: to the buyer, the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice. The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then, in substance, says, "Sold for A. B. to C. D.," and sets out the terms of the bargain: the bought note begins, "Bought for C. D. of A. B.," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker. The *second* form is where the broker does not disclose in the bought

Bought and sold notes.

(*u*) P. 98.
(*x*) 7 East, 559.
(*y*) 2 Camp. 337.
(*z*) Ex parte Dyster, 2 Rose, 349.

note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, "Bought for C. D." and "Sold for A. B." The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving only to the buyer a note, "Bought for you by me," he gives it in this form: "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible (*ante*, §§ 239–241). The *fourth* form is where the broker professes to sign as a broker, but is really a principal, as in the cases of Sharman *v.* Brandt and Mollett *v.* Robinson (*ante*, §§ 241, 242), in which case his signature does not bind the other party, and he cannot sue on the contract, except perhaps on proof of such usage as was shown to exist in Mollett *v.* Robinson.

§ 277. According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect: "I have bought for you, or I have sold for you," plainly admits that the broker acted by his authority, and as his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note (z^1); but according to the third form, the broker says, in effect: "I myself sell to you," and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note: and by the fourth form, the language of the written contract is at variance with the real truth of the matter, unless understood as qualified by the usage proved to exist in Mollett *v.* Robinson. These observations (many of which are extracted from Blackburn on Sales) have a direct bearing on points long in dispute, and some of which are yet vexed questions, as will abundantly appear on a review of the authorities.

§ 278. Where the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought

(z^1) [Thompson *v.* Gardiner, 1 C. P. D. 777.]

and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of the courts, but sometimes great change in the opinions of the same judge. As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract between the parties: (*a*) and it has also been held that it was not even admissible in evidence, or, at all events, not without proof, that the entry was either seen by the parties when they contracted, or was assented to by them. The most convenient method of reviewing the decisions will be to follow the leading cases in order of time, and then educe the propositions fairly embraced in them.

Entry in broker's book — conflict of opinion as to its effect.

§ 279. In 1806 there was this *dictum* of Lord Ellenborough in Hinde *v.* Whitehouse (*b*) on the subject: "In all sales made by brokers acting between the parties buying and selling, *the memorandum in the broker's book, and the bought and sold notes transcribed therefrom*, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute." His lordship here speaks of bought and sold notes as mere copies of the book, and the inference would be that he considered the book, as the original, to be of more weight than copies from it.

Review of the cases.

Hinde *v.* Whitehouse.

§ 280. In 1807 he gave this opinion expressly in Heyman *v.* Neale, (*c*) saying: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. *The bought and sold note is not sent on approbation, nor does it constitute the contract.* The entry made and signed by the broker, who is the agent of both parties, *is alone the binding contract.* What is called the bought and sold note *is only a copy of the other*, which would be valid and binding, although no bought or sold note was ever sent to the vendor and purchaser." In this case the bought and sold notes were sworn by the broker to be copies of the entry in his book, and the buyer had, soon after receiving the bought note, objected and said he would not be bound by it.

Heyman *v.* Neale.

(*a*) [See Coddington *v.* Goddard, 16 Gray, 442, Bigelow C. J.; Remick *v.* Sandford, 118 Mass. 106, 107.]

(*b*) 7 East, 558.

(*c*) 2 Camp. 337.

§ 281. In 1810, in Hodgson *v.* Davies, (*d*) the sale was through a broker who rendered bought and sold notes, showing that payment was to be by bill at two and four months. Five days afterwards the defendant, being called on for delivery of the goods sold, objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, *unless his authority was limited by writing of which the purchaser had notice.* But the gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed this to be a valid and reasonable usage, but left it to the jury whether the delay of five days in objecting was not unreasonable according to the usual commercial practice, and the jury found that it was. Hodgson *v.* Davies.

§ 282. In 1814, the court of common pleas decided the case of Thornton *v.* Kempster (*e*) (*ante*, § 251), where the broker's sold note described a sale of St. Petersburg hemp, and the bought note described the goods as Riga Rhine hemp, a different and superior article. The court considered the case as though no broker had intervened, and the parties had personally exchanged the notes, holding that there never had been any agreement as to the subject-matter of the contract, and therefore no contract at all between the parties. In 1816 Cumming *v.* Roebuck (*f*) was tried before Gibbs C. J. at nisi prius, and it appeared that the bought and sold notes differed. The learned chief justice said: "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted." It has been surmised that the case alluded to was that of Heyman *v.* Neale, (*g*) but no case has been found in the Reports justifying the assertion of the chief justice that Heyman *v.* Neale had been contradicted. Thornton *v.* Kempster. Cumming *v.* Roebuck.

§ 283. In 1826 the subject first came before the full court in the queen's bench in two cases. In the first, Grant *v.* Fletch-

(*d*) 2 Camp. 530.
(*e*) 5 Taunt. 786.
(*f*) Holt, 172.
(*g*) 2 Camp. 337.

er, (*h*) there was a material variance between the bought and sold notes, and the broker had made an unsigned entry in his "memorandum book," which entry was incomplete, not naming the vendor. The plaintiff was nonsuited at the assizes, on the ground that there was no valid contract between the parties. Abbott C. J. delivered the opinion of the court on the motion for a new trial. "The broker is the agent of both parties, and as such may bind them by signing the *same contract* on behalf of buyer and seller; but if he does not sign the *same* contract for both parties, neither will be bound. . . . . The entry in the broker's book is, *properly speaking, the original, and ought to be signed by him.* The bought and sold notes delivered to the parties *ought to be copies of it.* A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed; but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

Grant *v.* Fletcher.

§ 284. In Goom *v.* Aflalo, (*i*) the other case, the decision was express that the bought and sold notes suffice to satisfy the statute, if otherwise unobjectionable, even though the entry in the broker's book be unsigned. The broker in this case made his entry complete in its terms on the 23d of February, as soon as he had concluded the contract, but did not sign it. On the same evening he sent to the parties bought and sold notes signed by him, copied from the entry in his books. Next morning the defendant objected to, and returned the sold note, and refused to deliver the goods. The court held the contract binding, notwithstanding the absence of signature to the entry in the book, Abbott C. J. saying, "The entry in the book has been called the original, and the notes copies: but there is not *any actual decision that a valid contract may not be made by notes duly signed, if the entry be unsigned.* . . . . We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But *if we were to hold such a signature essential to the validity of a contract, we should go farther than the courts have hitherto gone,* and might possibly lay down a rule that would be followed by serious inconvenience, *because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed,* and thereby place it in

Goom *v.* Aflalo.

(*h*) 5 B. & C. 436. (*i*) 6 B. & C. 117.

the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure."

§ 285. In Thornton *v.* Meux, (*k*) in 1827, tried before Chief Justice Abbott, at Guildhall, there was a variance between the bought and sold notes, and plaintiff offered in evidence the entry in the broker's book to show which of the two was correct, but on objection the evidence was excluded, the chief justice saying: "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the rest of the court, that the copies delivered to the parties were the evidence of the contract they entered into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion, and refuse the evidence." Thornton *v.* Meux.

§ 286. It will be apparent from the foregoing cases how completely the opinion of the learned chief justice had been changed; his view being *first*, in Grant *v.* Fletcher, that the book was the original, though *probably*, if the bought and sold notes were perfect, the book might be dispensed with; *secondly*, in Goom *v.* Aflalo, that the broker's signature in his book was *not essential* to the validity of the contract; and *thirdly*, in Thornton *v.* Meux, that the signed entry was not even admissible in evidence, and that the bought and sold notes were the *sole* evidence of the contract between the parties.

§ 287. Hawes *v.* Forster (*l*) was twice tried: first in 1832, and again in 1834. On the first trial, the plaintiff put in the bought note, and proved by the broker that he had made the contract, entered it in his book, signed the entry, and sent the bought and sold notes to the parties on the same evening; but the broker could not tell which was first written, the entry or the notes. Plaintiff closed his evidence without calling for the sold note, and thereupon the defendant moved for nonsuit, but Lord Denman held that the plaintiff was not bound to give any evidence of the sold note. The defendant then offered to prove by the broker's book a variance from the bought note put in, contending that the entry was the original contract; but this was objected to on the authority of Thornton *v.* Meux (*supra*, § 285), and the evidence was rejected, Lord Denman saying: "I am of opinion that the plaintiffs have proved a contract by pro- Hawes *v.* Forster.

(*k*) Moody & M. 43. (*l*) 1 Mood. & Rob. 368.

ducing the bought note. . . . . It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs ; had that been the case, it would have been very material. But in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, *and to that alone*, as the evidence of the terms of the contract." The defendants afterwards moved for a nonsuit before the court in banc, on the ground of the non-production of the sold note, but failed. They also moved for a new trial, on the ground of the exclusion of the broker's book, and succeeded, the lord chief justice saying, "that the court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz. how the broker's book was treated by those who dealt with him." On the second trial the sold note was produced, and corresponded with the bought note, and proof was given by merchants that the broker's book was never referred to, and that they always looked to the bought and sold notes as the contract. The broker's book showed a material variance from the bought and sold notes, and Lord Denman put the question to the jury, "Whether the bought and sold notes constituted the contract, or whether the entry in the broker's book, which in this instance differed from the bought and sold notes, constituted it ? " His lordship intimated his own opinion to be that in law the note delivered by the broker was the real contract ; (*m*) but said that it had been thought better to take the opinion of the jury as to the usage of trade as a matter of fact, and told them : "If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract, then you will find a verdict for the plaintiffs." The jury found for the plaintiffs, and the defendants at first indicated the intention of carrying the case to a higher court, but afterwards submitted to the verdict.

§ 288. In 1842 the exchequer court had the subject, together with the decision in Hawes *v.* Forster, under consideration in the case of Thornton *v.* Charles. (*n*) Parke B. and Lord Abinger held opposite opinions. Parke B. said: "I apprehend it has never been decided that the note entered by the broker in his book, and signed by him, would not be good evidence of the contract so as to satisfy the statute of frauds, there

Thornton *v.* Charles.

(*m*) See *dictum* of Denman C. J., also, in Trueman *v.* Loder, 11 Ad. & E. 589.

(*n*) 9 M. & W. 802.

being no other. The case of Hawes *v.* Forster underwent much discussion in the court of king's bench when I was a member of that court, and there was some difference of opinion among the judges; but ultimately it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. . . . . *Certainly it was the impression of part of the court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract.* The jury found that the bought and sold notes were evidence of the contract; but, on the ground that these documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a *new* contract, made between the parties on the footing of those notes. (*o*) That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (and?) there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the statute of frauds." Lord Abinger said: "I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other, there is no contract, unless it be shown that the broker's book was known to the parties."

§ 289. In Pitts *v.* Beckett, (*p*) in 1845, the plaintiff, who had wool for sale in the hands of a wool-broker, took the defendant to the broker's office, and there sold the wool by sample in the broker's presence, it being part of the bargain that the wool was to be *in good dry condition.* In the afternoon of the same day the broker wrote to the plaintiff: "Dear Sir, — We have this day sold on your account, Messrs. Beckett & Brothers" (here followed a description of the terms) "brokerage 1 per cent. Hughes & Ronald." A machine copy of this communication was made in the broker's book. The broker did not write at all to the purchasers, nor send them any note of the contract. The note to the plaintiff said nothing about the stipulation that the bulk should be in good dry condition. The defendants rejected the wool when sent to them, on the ground that it was not in good condition, and the jury found this to be true. The evidence offered was the note written to the plaintiff, and the machine copy

Pitts *v.* Beckett.

(*o*) See statement of Patteson J. to same effect, *infra*, § 291.

(*p*) 13 M. & W. 743.

of it as being the entry in the broker's book. Held, that the authority given to the broker by the defendant was, not to make a bargain for him, but to reduce to writing and sign the bargain actually made; that the broker, therefore, was without authority from the defendant to sign a bargain which omitted one of the material stipulations, viz. that the wool should be in good dry condition; and that the paper offered in evidence against defendants was therefore not signed by them or their agent. The judges also intimated very strongly the opinion, that the broker's signature was not intended by him to represent the buyer's signature, and that the paper was a mere letter of advice, written in his character of agent of the plaintiff, copied by machine into his letter book, and not intended as one of the bought and sold notes usually delivered by brokers.

§ 290. In 1851 the subject was elaborately considered in the queen's bench, in the case of Sievewright *v.* Archibald, (*q*) before Lord Campbell C. J. and Erle, Patteson, and Wightman JJ. The case was tried at Guildhall before the chief justice, and there was a verdict for the plaintiff, with leave reserved to move to set it aside, and enter a verdict for the defendant. The declaration set out an alleged "sold note," and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought and sold notes, and an amendment alleging the bought note was allowed, on its being stated to the learned chief justice that the plaintiff could give evidence of a subsequent ratification of the bought note by the defendant. The sold note was for a sale to the defendant of "500 tons *Messrs. Dunlop, Wilson & Co.'s* pig iron." The bought note was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop, Wilson & Co.'s iron: that their iron was Scotch iron, and that they were manufacturers of iron in Scotland; and that the agreement with the defendant was, that he purchased from the broker 500 tons of *Dunlop, Wilson & Co.'s* iron. The name of the sellers was given to the purchaser. The bought and sold notes were complete in every respect, and corresponded, save in the variance between the words "Scotch iron" and "Dunlop, Wilson & Co.'s iron." *There was no entry in the broker's book signed by him.*

Sievewright *v.* Archibald.

§ 291. The views of the judges differed so widely, and their ob-

(*q*) 17 Q. B. 115; 20 L. J. Q. B. 529; [Jeffcott *v.* No. Br. Oil Co. Ir. R. 8 C. L. 17.]

servations on every branch of this vexed subject are so important, that it is necessary to transcribe them at considerable length. Lord Campbell's judgment was concurred in entirely by Wightman J. who heard the argument in April, but was unable to be present at the decision in the following June. His lordship first held that there was not sufficient evidence to justify the verdict of the jury that the defendant had ratified the contract expressed in the bought note. Next, that there was no parol agreement shown by the evidence, antecedent to the bought note, and of which that bought note could properly be said to be a memorandum, but that *the agreement itself was intended to be in writing, and was understood by the parties to have been reduced to writing when made:* and his lordship then continued his reasoning on the supposition that this view was erroneous, and that there had been an antecedent parol agreement, in these words: "Can this (the bought note) be said to be a true memorandum of the agreement? We are here again met by the question of the *variance*, which is as strong between the parol agreement and the bought note, as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected to, and the declaration was amended. I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract; circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold without hesitation, notwithstanding some *dicta* and a supposed ruling by Lord Tenterden, in Thornton *v.* Meux, to the contrary, *that this entry is the binding contract between the parties*, and that a mistake made by him when sending a copy of it in the shape of a bought or sold note would not affect its validity. Being authorized by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both according to the statute of frauds, as if both had signed it with their own hands. The duty of the broker requires him to do so, and until recent times this duty was scrupulously performed by every broker. What are called the bought and sold notes are sent by

Lord Campbell's opinion.

him to his principals, by way of information that he has acted upon their instructions, *but not as the actual contract which was to be binding on them.* This clearly appears from the practice still followed, of sending the bought note to the buyer and the sold note to the seller, whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; *if there be any material variance between them, they are both nullities, and there is no binding contract.* This last proposition, though combated by the plaintiff's counsel, had been laid down and acted upon in such a long series of cases, that I could not venture to contravene it if I did not assent to it. . . . . In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient mention of it in writing, nor any part acceptance or part payment, the statute of frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict."

Patteson J. Opinion.

Patteson J. said that the sole question was whether there was a note or memorandum in writing of the bargain signed by the defendant or his agent, it being quite immaterial whether there was one signed by the plaintiff; that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made embodying the contract, and signed by one party or his agent, he being the party to be charged, the statute was satisfied. Still, if the original contract was in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. The learned judge considered that in the case before the court the contract was not in writing; that it was made by the broker, acting for both parties, but was not signed by him or them, and that the statute therefore could not be satisfied unless there was some *subsequent* memorandum, signed by the defendant or his agent. His lordship then continued: "There are subsequent memoranda signed by the broker,

namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant: the sold note to the seller, the plaintiff. Each of them in the language used purports to be a representation by the broker to the person to whom it is delivered of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract, signed by the buyer's agent, in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer, and *vice versâ* as to the sold note. Can, then, the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his books and sign all contracts made by him; and if the broker had made such signed entry, *I cannot doubt, notwithstanding the cases and dicta apparently to the contrary, that such memorandum would be the binding contract on both parties.*" The learned judge then went on to say that he had been one of the judges of the court that granted the new trial in Hawes *v.* Forster, and he confirmed the account given of that case by Parke B. in Thornton *v.* Charles (*supra*, § 288). He then continued: "However, in the present case there was no signed memorandum in the broker's book. Therefore, the bought and sold notes together, or one of them, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. The court cannot possibly say, nor can a jury say, which of them is to prevail over the other. Read together, they are inconsistent; assuming the variance between them to be material, and if one prevails over the other, that one will be the memorandum, and not the two together. If, on the other hand, one only of these notes is to be considered as the memorandum in writing signed by the defendant's agent, and binding the defendant, which of them is to be so considered, — the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them by itself can be so treated. . . . . If this were *res integra*, I am strongly disposed

to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the statute of frauds, but I considered the point to be too well settled to admit of discussion. Yet there is no case in which they have varied in which the court has upheld the contract, plainly showing that the two together have been considered to be the memorandum binding both parties, the reason of which is, I confess, to my mind, quite unsatisfactory, but I yield to authority." Erle J. stated the question raised in the case as follows: "The defendant contends, first, that in cases where a contract is made by a broker, and bought and sold notes have been delivered, they alone constitute the contract; that all other evidence of the contract is excluded; and that if they vary a contract is disproved." The learned judge held that the defendant had failed to establish this proposition, and then observed: "The question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes, which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and *that the point is whether such evidence is inadmissible, because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing. I think they are not.* If bought and sold notes, which agree, are delivered and accepted without objection, such acceptance, without objection, is evidence for the jury of mutual assent to the terms of the notes; but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof, if they constituted a contract in writing. . . . . The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done in his behalf. . . . . No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. . . . . It seems to me, therefore, that, upon principle, *the mere delivery of bought and sold notes does not prove an intention to contract in writing, and*

Erle J. Opinion.

does not exclude other evidence of the contract in case they disagree." The learned judge then pointed out the distinction between proof of a contract and proof of a compliance with the statute, saying: "The question of a compliance with the statute does not arise till the contract is in proof. In case of a written contract, the statute has no application. In case of other contracts, the compliance may be proved by part payment or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing; in that it may be made at any time after the contract, if before the action commenced, and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement." His lordship then held, that upon a review of the evidence in the case there was sufficient parol proof to show that the bought note was a correct statement of the terms of the bargain, and that defendant had acquiesced in and was satisfied with it.

§ 292. The next case was Parton *v.* Crofts, (*r*) in 1864, where the contract note delivered to the vendor was alone produced in evidence, and it was held that it sufficed to prove the contract between the two parties, and that the presumption was that the bought and sold notes did not vary; if they did, it was for the defendant to prove the variance by producing his own note. In Heyworth *v.* Knight (*s*) the same court decided in the same year that where the contract appears in a correspondence to have been completed between the brokers, and the bought and sold notes show a variance from that contract, the parties are bound by the agreement contained in the correspondence; that the bought and sold notes are to be disregarded; and that the purchaser was bound by the agreement made in the correspondence in accordance with the authority given to his broker, although the broker had signed without authority a different contract in the bought and sold notes. In this case the decision of the privy council in Cowie *v.* Remfry, 5 Moore P. C. C. 232, was very strongly disapproved by Willes J.

Parton *v.* Crofts.

Heyworth *v.* Knight.

Cowie *v.* Remfry.

(*r*) 16 C. B. N. S. 11; 33 L. J. C. P. 189.

(*s*) 17 C. B. N. S. 298; 33 L. J. C. P. 298.

§ 293. The last case, in 1868, was Cropper *v.* Cook. (*t*) It decides that it is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold note states, "Sold to our principals," &c. without naming the buyers. It was proven in the case that a special usage exists in the wool trade in Liverpool, that the buyer's broker may contract in the name of the principal, or at his discretion, without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the vendor; and that the broker may do this, without communicating the fact to the buyer. The court held this usage reasonable and valid.

No variance that principals are *named* in one note and not in the other.

§ 294. The following propositions are submitted as fairly deducible from the authorities just reviewed, and others quoted in the notes, though some of these points cannot be considered as finally settled. First. The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. (*u*) This proposition rests on the authority of Lord Ellenborough in Heyman *v.* Neale, (*x*) of Parke B. in Thornton *v.* Charles, (*y*) and of Lord Campbell C. J. and Wightman and Patteson JJ. in Sievewright *v.* Archibald. (*z*) Gibbs C. J. in Cumming *v.* Roebuck; (*a*) Abbott C. J. in Thornton *v.* Meux; (*b*) Denman C. J. in Townend *v.* Drakeford; (*c*) and Lord Abinger in Thornton *v.* Charles, (*y*) are authorities to the contrary, but they seem to have been overruled in Sievewright *v.* Archibald. (*z*)

General propositions deduced from the authorities.

Broker's signed entry constitutes the contract.

§ 295. Secondly. The bought and sold notes do not *constitute* the contract. This is the opinion of Parke B. in Thornton *v.* Charles; (*y*) of Lord Ellenborough in Heyman *v.* Neale, (*x*) and was the unanimous opinion of the four judges in Sievewright *v.* Archibald. (*z*) The decision to the con-

The bought and sold notes do not.

(*t*) L. R. 3 C. P. 194.

(*u*) [Thompson *v.* Gardiner, 1 C. P. D. 777. *Ante*, § 273, and note (*r*); 1 Chitty Contr. (11th Am. ed.) 551, and note (*x*).

Entry in broker's book may be shown to be in excess of authority.

But it should be remembered that if the broker be a special agent for either party, such party may show that the entry in the broker's book is not such a contract as the broker was authorized to make, and that therefore it is not binding on the principal. This was recognized in Coddington *v.* Goddard, 16 Gray, 436. Megaw *v.* Molloy, 2 L. R. Ir. 530; M'Mullen *v.* Helberg, 4 L. R. Ir. 94.]

(*x*) 2 Camp. 337.

(*y*) 9 M. & W. 802.

(*z*) 17 Q. B. 115; 20 L. J. Q. B. 529.

(*a*) Holt, 172.

(*b*) M. & M. 43.

(*c*) 1 Car. & K. 20.

trary, in the nisi prius case of Thornton *v.* Meux, (*c*[1]) and the *dicta* in Goom *v.* Aflalo, (*d*) and Trueman *v.* Loder, (*e*) are pointedly disapproved in the case of Sievewright *v.* Archibald. (*e*[1])

§ 296. Thirdly. But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. This was first settled by Goom *v.* Aflalo, (*d*) and reluctantly admitted to be no longer questionable in Sievewright *v.* Archibald. (*e*[1])

But they suffice to satisfy the statute when they correspond.

§ 297. Fourthly. Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in Hawes *v.* Forster, (*f*) and of the common pleas in Parton *v.* Crofts. (*g*)

Either note will suffice unless variance shown.

§ 298. Fifthly. Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. Hawes *v.* Forster (*f*) is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in Parton *v.* Crofts, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

Where plaintiff offers one note defendant may offer the other to show variance.

§ 299. Sixthly. As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions that this entry will in general control the case, because it constitutes the contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties

When there is variance between the signed entry and the bought and sold notes.

(*c*[1]) M. & M. 43.
(*d*) 6 B. & C. 117.
(*e*) 11 Ad. & E. 589.
(*e*[1]) 17 Q. B. 115; 20 L. J. Q. B. 529.
(*f*) 1 Mood. & Rob. 368.
(*g*) 16 C. B. N. S. 11; 33 L. J. C. P. 189.

of the bought and sold notes constitutes evidence of a *new* contract modifying that which was entered in the book. This is the point established by Hawes *v.* Forster (*h*) according to the explanation of that case first given by Parke B. in Thornton *v.* Charles, (*i*) afterwards by Patteson J. in Sievewright *v.* Archibald, (*k*) and adopted by the other judges in this last named case.

Variance between a written correspondence and bought and sold notes.

§ 300. Seventhly. If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes, as decided in Heyworth *v.* Knight. (*l*)

Variance between bought and sold notes where there is no signed entry.

§ 301. Eighthly. If the bought and sold notes vary, and there is no signed entry in the broker's book nor other writing showing the terms of the bargain, there is no valid contract. (*m*) This is settled by Thornton *v.* Kempster, (*n*) Cumming *v.* Roebuck, (*o*) Thornton *v.* Meux, (*p*) Grant *v.* Fletcher, (*q*) Gregson *v.* Rucks, (*r*) and Sievewright *v.* Archibald. (*s*) The only opinion to the contrary is that of Erle J. in the last named case. In one case, however, at nisi prius, Rowe *v.* Osborne, (*t*) Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor, which did not correspond with the note signed by the broker and sent to the defendant.

Where note signed by party varied from note by broker.

In sale by broker on credit, vendor may retract, if purchaser's name is unsatisfactory.

§ 302. Lastly. If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. This was decided in Hodgson *v.* Davies, (*u*) and as the special jury spontaneously intervened in that case, and the usage was held good without proof of

(*h*) 1 Mood. & R. 368.
(*i*) 9 M. & W. 802.
(*k*) 17 Q. B. 115; 20 L. J. Q. B. 529.
(*l*) 17 C. B. N. S. 298; 33 L. J. C. P. 298.
(*m*) [1 Chitty Contr. (11th Am. ed.) 551; Suydam *v.* Clark, 5 Sandf. 133; Butters *v.* Glass, 31 U. C. Q. B. 379.]
(*n*) 5 Taunt. 786.
(*o*) Holt, 172.
(*p*) 1 M. & M. 43.
(*q*) 5 B. & C. 436.
(*r*) 4 Q. B. 747.
(*s*) 17 Q. B. 115; 20 L. J. Q. B. 529.
(*t*) 1 Stark. 140.
(*u*) 2 Camp. 531.

it, it is not improbable that the custom might now be considered as judiciously recognized by that decision, and as requiring no proof, (*x*) but it would certainly be more prudent to offer evidence of the usage.

§ 303. A singular point was decided in Moore *v.* Campbell. (*y*) A broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing: "I have this day sold through you to Mr. Moore," &c. &c. The terms stated in this letter varied from those in the sold note sent to the defendant. The court held that these were not bought and sold notes by a broker of both parties, and that the broker was acting for the plaintiff alone. The plaintiff's counsel contended that the defendant's letter was sufficient proof of the contract to bind him, and must be taken to be his own correction of the sold note made by the broker, and binding on him. But the court held that although this was true if the intention of the parties was that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff was also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury.

Sold note of broker employed by buyer only.

Moore *v.* Campbell.

§ 304. A mere difference in the *language* of the bought and sold notes will not constitute a variance if the *meaning* be the same, and evidence of mercantile usage is admissible to explain the language and to show that the meanings of the two instruments correspond. The cases in illustration are collected in the note. (*z*) And where the contract made by the broker was one for the exchange or barter of goods, and he wrote out the contract in the shape of bought and sold notes, giving to each party on a single sheet a bought note for the goods he was to receive, and a sold note for the goods he was to deliver, it was held no variance that the day of pay-

Difference in language no variance, if meaning is the same.

Maclean *v.* Dunn.

(*x*) See Brandao *v.* Barnett, 3 C. B. 519, on appeal to H. of L.; S. C. 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, 1 Smith's L. C. 549, ed. 1867.

(*y*) 10 Ex. 323; 23 L. J. Ex. 310.

(*z*) Bold *v.* Rayner, 1 M. & W. 343; and per Erle J. in Sievewright *v.* Archibald, 17 Q. B. 115; 20 L. J. Q. B. 529; Rogers *v.* Hadley, 2 H. & C. 227; 32 L. J. Ex. 227; Kempson *v.* Boyle, 3 H. & C. 763; 34 L. J. Ex. 191.

ment was specified at the end of both notes on one sheet and at the end of the bought note only on the other. (*a*)

Revocation of broker's authority.

§ 305. The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed in behalf of the party so revoking, (*b*) but after the signature of the duly authorized broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be that mentioned *supra*, § 302, where a credit sale has been made to an unnamed purchaser, in which event custom allows the vendor to retract if on inquiry within reasonable time after being informed of the name he disapproves the sufficiency of the purchaser.

Subsequent alteration of sold note.

§ 306. And where a broker had, reluctantly and after urgent persuasion by the vendor, made an addition to the sold note after both the bought and sold notes had been delivered to the parties and taken away, the vendor's contention that this addition was simply inoperative was overruled, and the court held that the fraudulent alteration of the note destroyed its effect, so that the vendor could not recover on it. (*c*) And the effect would be the same in the case of a material alteration even not fraudulent. (*d*)

Broker's clerk.

§ 307. In Henderson *v.* Barnewall, (*e*) where the parties contracted in person in presence of the broker's clerk, who had brought them together on the Exchange, and one, in the hearing of the other, dictated to him the terms of the agreement, it was held by all the barons of the exchequer that the agency of the clerk was *personal*, and that neither an entry of the bargain in the broker's books nor a sale note signed by him would satisfy the statute, because the clerk could not delegate the agency to his employer.

(*a*) Maclean *v.* Dunn, 4 Bing. 722–724.

(*b*) Farmer *v.* Robinson, 2 Camp. 339, note; Warwick *v.* Slade, 3 Camp. 127.

(*c*) Powell *v.* Divett, 15 East, 29.

(*d*) Mollett *v.* Wackerbarth, 5 C. B. 181; 17 L. J. C. P. 47.

(*e*) 1 Y. & J. 387.

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

	Section		Section
Preliminary remarks . . .	. 308	Division of the subject . .	. 312

§ 308. AFTER a contract of sale has been formed, the first question which suggests itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement? We have already seen (*a*) that the distinction between the two contracts consists in this: that in a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor; (*b*) whereas in the executory agreement the goods remain the property of the vendor till the contract is executed. (*b*[1]) In the one case A. sells to B.: in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods themselves

Preliminary remarks.

(*a*) *Ante*, §§ 3, 78.

(*b*) [In Meyerstein *v.* Barber, L. R. 2 C. P. 38, 51, Willes J. said: "Since the judgment of Lord Wensleydale (then Justice Parke) in Dixon *v.* Yates, 5 B. & Ad. 313, it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee, without delivery." See S. C. L. R. 4 H. L. 317, 326; Webber *v.* Davis, 44 Maine, 147; Bailey *v.* Smith, 43 N. H. 143; Tome *v.* Dubois, 6 Wallace, 548; Dexter *v.* Norton, 55 Barb. 272; Crill *v.* Doyle, 53 Cal. 713.]

(*b*[1]) [Lester *v.* East, 49 Ind. 588, 592; Straus *v.* Ross, 25 Ib. 300; The Elgee Cotton Cases, 22 Wallace, 180; Leigh *v.* Mobile & Ohio R. R. Co. 58 Ala. 165; Cardinell *v.* Bennett, 52 Cal. 476; Olney *v.* Howe, 89 Ill. 556.]

as soon as the contract is completed by mutual assent, if they are lost or destroyed he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has at common law no other remedy for breach of the contract than an action for damages.

§ 309. Both these contracts being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio.* But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case, the courts have applied certain rules of construction, which in most instances furnish conclusive tests for determining the controversy.

§ 310. When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract:* that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B. and to have become the property of A.

§ 311. But, on the other hand, the goods sold may be specific, as if there be in the case supposed only ten sheep in a flock, and A. agrees to buy them all. In such case there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the vendor's right to take the wool, or to his

obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions, because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done as a condition precedent. Of course, these presumptions yield to proof of a contrary intent; and it must be repeated that nothing prevents the parties from agreeing that the property is a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel. (*c*)

(*c*) [In Riddle *v.* Varnum, 20 Pick. 283, 284, Dewey J. said: "In the case of sales where the property to be sold is in a state ready for delivery, and the payment of money, or giving security therefor, is not a condition precedent to the transfer, it may well be the understanding of the parties, that the sale is perfected and the interest passes immediately to the vendee, although the weight or measure of the article sold remains yet to be ascertained.

Whether title passes is always question of intention.

Such a case presents a question of the intention of the parties to the contract. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the rate agreed upon." Barrows J. in Bethel Steam Mill Co. *v.* Brown, 57 Maine, 18, says: "The question of transfer to, and vesting of title in, the purchaser, always involves an inquiry into the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts are evincive of an intention on the part of the seller to relinquish all further claim or control as owner, and on the part of the buyer to assume such control with its consequent liabilities." Chapman J. in Denny *v.* Williams, 5 Allen, 3, 4; Story J. in Barrett *v.* Goddard, 3 Mason, 113. Whether the title to

§ 311 *a*. [The general principles governing this branch of the subject cannot be better stated than in the clear and concise language of Chief Justice Bovill in the case of Heilbutt *v.* Hickson, L. R. 7 C. P. 449. "Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done: such as, for instance, in most cases, delivery; in some cases, actual payment of the price; and in other cases, weighing

Heilbutt *v.* Hickson.

the property, upon an agreement for a sale thereof, passes or not, depends upon the intention of the parties to the agreement. See Macomber *v.* Parker, 13 Pick. 182, 183; Shaw C. J. in Sumner *v.* Hamlet, 12 Ib. 76, 82; Fuller *v.* Bean, 34 N. H. 290; Prescott *v.* Locke, 51 Ib. 101, 102, 103; Russell *v.* Carrington, 42 N. Y. 118; Bellows J. in Ockinton *v.* Rickey, 41 N. H. 279, 280; Kelsea *v.* Haines, Ib. 246, 353; Cunningham *v.* Ashbrook, 20 Mo. 553; Fitch*v.* Burk, 38 Vt. 689; Stone *v.* Peacock, 35 Maine, 388; Bellows *v.* Wells, 36 Vt. 599; Morse *v.* Sherman, 106 Mass. 433; Dugan *v.* Nichols, 125 Ib. 43; Gleason *v.* Knapp, 26 U. C. C. P. 553; Ross *v.* Eby, 28 Ib. 316; Gibson *v.* McKeau, 3 Pugsley (N. B.), 299; Sprague *v.* King, 1 Pugsley & Burbridge (N. B.) 241; Hurd *v.* Cook, 75 N. Y. 454; Chapman *v.* Shepard, 39 Conn. 413; Dyer *v.* Libby, 61 Maine, 45; Lester *v.* East, 49 Ind. 588, and cases cited; Cooley C. J. in Wilkinson *v.* Holiday, 33 Mich. 386, cited *post*, § 319, note (*c*); Lord Coleridge C. J. in Ogg *v.* Shuter, L. R. 10 C. P. 159, 162, 163. It is clear that the rule in regard to something remaining to be done does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that their intention must be looked at in every case. Channell B. in Turley *v.* Bates, 2 H. & C. 200, 211; Logan *v.* Le Mesurier, 11 Moore P. C. C. 116; Cooley C. J. in Wilkinson *v.* Holiday, 33 Mich. 386. This intent is to be determined by the jury; De Kidder *v.* McKnight, 13 John. 294; McClung *v.* Kelley, 21 Iowa, 508; Riddle *v.* Varnum, 20 Pick. 283; George *v.* Stubbs, 26 Maine, 250; Marble *v.* Moore, 102 Mass. 443; Merchants' National Bank *v.* Bangs, 102 Ib. 291; Kelsea *v.* Haines, 41 N. H. 253; Fuller *v.* Bean, 34 Ib. 290; Dyer *v.* Libby, 61 Maine, 45; unless it is plain as matter of law that the evidence will justify a finding but one way. Merchants' National Bank *v.* Bangs, 102 Mass. 291, 296. But this intention, as to the time when the title is to pass, can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. Foster *v.* Ropes, 111 Mass. 10; Cooley J. in Lingham *v.* Eggleston, 27 Mich. 326, 327. Where the purchaser had paid the vendor for the articles purchased, and was to remove them when he pleased, and nothing more was to be done between the parties to complete the sale, it was held to be a reasonable inference that the parties intended an executed sale. Chapman *v.* Shepard, 39 Conn. 413.]

or measuring in order to ascertain the price, or marking, packing, coopering, filling up the casks, or the like. In the case of executory contracts, where the goods are not ascertained, or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific and ascertained goods."] (*d*) When property passes.

§ 312. The authorities which justify these preliminary observations will now be reviewed, thus placing before the reader the means of arriving at an accurate knowledge of this important branch of the law relating to the sale of personal property. They will be considered in five chapters, having reference to cases. Division of the subject.

1. Where the sale is of a specific chattel, unconditionally.
2. Where the chattels are specific, but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

The effect of obtaining goods by fraud, upon the transfer of the property in them, will be considered in book III. ch. ii. on Fraud.

(*d*) [The American cases are very numerous, and generally uniform in support of these propositions.]

CHAPTER II.

SALE OF SPECIFIC CHATTELS UNCONDITIONALLY.

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§ 313. SHEPHERD'S Touchstone, p. 224, gives the common law rules as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, first, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or, secondly, all; or, thirdly, part of the money is paid in hand; or, fourthly, I give earnest-money, albeit it be but a penny, to the seller; or, lastly, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is *a good bargain and sale of the thing to alter the property thereof.* In the first case I may have an action for the thing, and the seller for his money; in the second case, I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case, the seller may sue for his money."

Common law rules in Shep. Touch.

§ 314. In Noy's Maxims (*a*) the rules are given thus: "In all agreements there must be *quid pro quo presently*, except a day be expressly given for the payment, or else *it is nothing but communication.* . . . . If the bargain be that you shall give me 10*l.* for my horse, and you give me one penny, in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action

In Noy's Maxims.

(*a*) Pages 87–89.

of debt. If I say the price of a cow is 4*l.* and you say you will give me 4*l.* and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract;* but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. . . . . If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, *yet the property of the horse is by the bargain in the bargainee or buyer;* but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue, and if the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because *by the bargain the property was in the buyer.* (*b*)

§ 315. The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy, that unless the money be paid "presently" there is no sale except a day be *expressly* given for payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days, the actual payment of the price, but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention. In Simmons *v.* Swift, (*c*) Bayley J. said: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." (*d*) So, in Dixon *v.* Yates, (*e*)

Modern rules the same with one exception.

Consideration for transfer is the promise to pay, not the actual payment of price.

On sale of specific chattel, title vests in buyer immediately.

(*b*) [It is well settled that under a contract of sale where nothing remains to be done on the part of the seller in the way of ascertaining, appropriating, or delivering the property sold, the title to it, independently of the statute of frauds, immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Colt J. in Townsend *v.* Hargraves, 118 Mass. 325, 332; Morse *v.* Sherman, 106 Ib. 430; Foster *v.* Ropes, 111 Ib. 10; Wells J. in Haskins *v.* Warren, 115 Ib. 533; Ames J. in Goddard *v.* Binney, Ib. 456; Lester *v.* East, 49 Ind. 588; Jenkins *v.* Jarrett, 70 N. Car. 255; Hanauer *v.* Bartels, 2 Col. 514. Essentially modified in certain cases in Alabama. See Code of Ala. (1876) § 1415; Lehman *v.* Warren, 53 Ala. 535.]

(*c*) 5 B. & C. 862.

(*d*) [Arnold *v.* Delano, 4 Cush. 33; Willis *v.* Willis, 6 Dana, 48; Hall *v.* Richardson, 16 Md. 396. It is said that this rule does not apply to a sale of stock in an incorporated company. Currie *v.* White, 1 Sweeny, 166.]

(*e*) 5 B. & Ad 313, 340.

Park J. said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. . . . . Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained, But where by the contract itself *the vendor appropriates to the vendee a specific chattel*, and *the latter thereby agrees to take that specific chattel* and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is *equivalent to delivery by the vendor*, *and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract*, *therefore*, *is to vest the property in the bargainee*."(*f*)

(*f*) [Webber *v.* Davis, 44 Maine, 147; Morse *v.* Sherman, 106 Mass. 430, 432, 433; Barrett *v.* Goddard, 3 Mason, 107, 110; Hotchkiss *v.* Hunt, 49 Maine, 213; Martin *v.* Adams, 104 Mass. 262; Colt J. in Merchants' National Bank *v.* Bangs, 102 Ib. 295; Foster J. in Thayer *v.* Lapham, 13 Allen, 28; Page *v.* Carpenter, 10 N. H. 77; Buffington *v.* Ulen, 7 Bush (Ky.), 231; Means *v.* Williamson, 37 Maine, 556; Waldron *v.* Chase, Ib. 414; Merrill *v.* Parker, 24 Ib. 89; Wing *v.* Clark, Ib. 366; Hoobaa *v.* Bidwell, 16 Ohio, 509; Frazer *v.* Hilliard, 2 Strobh. 309; Willis *v.* Willis, 6 Dana, 48; Crawford *v.* Smith, 7 Ib. 59, 60; Hurlburt *v.* Simpson, 3 Ired. (Law) 233; Olyphant *v.* Baker, 5 Denio, 379; Sweeney *v.* Ousley, 14 B. Mon. (Ky.) 413; Terry *v.* Wheeler, 25 N. Y. 520, 524, 525; Warden *v.* Marshall, 99 Mass. 305; Bigelow C. J. in Gardner *v.* Lane, 9 Allen, 498; Marble *v.* Moore, 102 Mass. 443; Chase *v.* Willard, 57 Maine, 157; Bailey *v.* Smith, 43 N. H. 143; Felton *v.* Fuller, 29 Ib. 121; Rice *v.* Codman, 1 Allen, 377; Lester *v.* East, 49 Ind. 588; Bigler *v.* Hull, 54 N. Y. 167. Where, on a sale of lumber then in the vendor's yard, the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, it was held that this act to be done by the vendor did not prevent the passing of the title to the purchaser by a sale otherwise complete. Terry *v.* Wheeler, 25 N. Y. 520. So it was held that a survey of a large quantity of logs, landed on a stream preparatory to driving, by a person mutually agreed upon by the parties to a sale, and the putting thereon, by the vendor, the purchaser's mark as they were thus landed, would constitute a sufficient delivery to pass the title, even as against subsequent purchasers, although by the terms of the contract of sale the vendor was bound to deliver the logs at a specified place many miles below the landiag. Bethel Steam Mill Co. *v.* Brown, 57 Maine, 9. See Walden *v.* Murdock, 23 Cal. 540; Dyer *v.* Libby, 61 Maine, 45; Cummings *v.* Griggs, 2 Duvall, 87; Russell *v.* Carrington, 42 N. Y. 118; Filkins *v.* Whyland, 24 Ib. 341. Where the evidence showed that A. "bargained a hog to B. before it was altered, with an agreemeat that A was to alter the hog and keep it until it fully recovered from the operation, if it did successfully recover therefrom, and if it did not so recover, then A. was to pay B. forty dollars," it was held that it would warrant, if it did not require, a finding that the sale to B. was unconditional and passed the title. Marble *v.*

Fact that vendor agrees to do something in relation to the property does not necessarily prevent title passing.

§ 316. The principles so clearly stated by these two eminent judges are the undoubted law at the present time. (*g*) Thus, in Tarling *v.* Baxter, (*g*) the defendant agreed to sell to the plaintiff a certain stack of hay for 145*l.* payable on the ensuing 4th of February, and to allow it to stand on the premises until the 1st day of May. This was held to be an immediate, not a prospective sale, although there was also a stipulation that the hay was not to be cut till paid for. Bayley J. said: "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, *the property in the thing sold vests in the vendee.*" This case was followed by one presenting very similar features, in the queen's bench, in 1841. (*h*)

Tarling *v.* Baxter.

§ 317. In Gilmour *v.* Supple, (*i*) Sir Cresswell Cresswell in giving an elaborate judgment of the privy council, says: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." And in The Calcutta Company *v.* De Mattos, (*k*) in 1863, Blackburn J. pronounced this to be "a very accurate statement of the law." (*l*)

Gilmour *v.* Supple.

Moore, 102 Mass. 443. So, in Thorndike *v.* Bath, 114 Ib. 116, it was held that evidence that a person offered to purchase an unfinished piano at the shop of the maker, if he would finish it; that the offer was thereupon accepted, and a bill of sale made; and that the price was paid on a subsequent day, the piano being left to be finished, will authorize a jury to find a delivery of the piano sufficient to pass the title as against a subsequent purchaser. See Bates *v.* Coster, 3 Thomp. & C. (N. Y.) 580. The risk of property, which is the subject of a sale, attends the title. Willis *v.* Willis, 6 Dana, 49; Joyce *v.* Adams, 4 Selden, 296; Terry *v.* Wheeler, 25 N. Y. 520; Taylor *v.* Lapham, 13 Allen, 26; Smith *v.* Dallas, 35 Ind. 255; Whitcomb *v.* Whitney, 24 Mich. 486. See § 334, note (*t*), *post.*]

(*g*) Hinde *v.* Whitehouse, 7 East, 558; Tarling *v.* Baxter, 6 B. & C. 360; Martindale *v.* Smith, 1 Q. B. 389; Spartali *v.* Benecke, 10 C. B. 212; Gilmour *v.* Supple, 11 Moore P. C. 551; The Calcutta Company *v.* De Mattos, 32 L. J. Q. B. 322; Wood *v.* Bell, 6 E. & B. 355, and 25 L. J. Q. B. 148, and in Cam. Scacc. 321; Chambers *v.* Miller, 10 C. B. N. S. 125; 32 L. J. C. P. 30; Turley *v.* Bates, 2 H. & C. 200, and 33 L. J. Ex. 43; Joyce *v.* Swan, 17 C. B. N. S. 84.

(*h*) Martindale *v.* Smith, 1 Q. B. 389. See, also, Chinery *v.* Vial, 5 H. & N. 288, and 29 L. J. Ex 180; Sweeting *v.* Turner, L. R. 7 Q. B. 310.

(*i*) 11 Moore P. C. 566.

(*k*) 32 L. J. Q. B. 322, 328.

(*l*) [If the goods are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as, if there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified, though not separated. Shaw C. J. in Ar-

If by the contract the goods are identified that will enable the title to pass, though they be mingled with other goods.

nold *v.* Delano, 4 Cush, 40. "A designation by some visible mark is a sufficient separation. It is not necessary that an artificial mark should be made for this sole purpose. If the barrels have been inspected and marked as of different qualities, *e. g.* No. 1, No. 2, No. 3, and the whole of that which is marked No. 1 is sold, a bill of sale given, and a formal delivery made, the property will pass without any further separation or designation, and the delivery will have been perfected, though the barrels No. 1 are left intermingled with the other barrels, which have different marks. So if there are one hundred barrels marked No. 1, and the owner makes a contract to sell one hundred and fifty barrels of that mark, and makes his bill of sale and formal delivery, affirming that there are that number of barrels in the lot, the property in the one hundred barrels will pass to the vendee." Chapman J. in Ropes *v.* Lane, 9 Allen, 502, 510.]

CHAPTER III.

SALE OF SPECIFIC CHATTELS CONDITIONALLY.

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§ 318. Two rules on this subject are stated by Blackburn J. (*a*) as follows: First. Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. (*b*)

Two rules on this subject given by Blackburn J.

Where vendor is to do anything to goods before delivery, property does not pass.

§ 319. Secondly. Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where

Where goods are to be tested, weighed,

(*a*) On Sales, 151, 152.

(*b*) [See Bailey *v.* Smith, 43 N. H. 141; Strauss *v.* Ross, 25 Ind. 300; McClung *v.* Kelley, 21 Iowa, 508; Foster *v.* Ropes, 111 Mass. 10; Paton *v.* Currie, 19 U. C. Q. B. 388; Gilbert *v.* N. Y. Cent. R. R. Co. 4 Hun, 378.]

or measured, property does not pass.

the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted. (*c*)

(*c*) [Although these rules have been generally adopted in the American decisions, they have been variously interpreted and applied. They were recognized and quoted by Judge Story, and the authorities maintaining or recognizing them were reviewed by him, in Barrett *v.* Goddard, 3 Mason, 107. See § 334, note (*t*), *post*. They were referred to by Chief Justice Shaw in Sumner *v.* Hamlet, 12 Pick. 82, 83 as rules applicable only "to cases of constructive delivery and constructive possession, and resorted to for the purpose of determining when the contract of sale is so far complete as to pass the property, according to the *intent of the parties in their contract.*" Again, in Arnold *v.* Delano, 4 Cush. 40, the same learned judge, said: "The reason why marking, measuring, weighing, &c. are necessary, is, that the particular goods may be identified. If ten barrels of oil are sold, lying in a tank of thirty barrels, the buyer can identify no part of it as his until it is measured. So if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes." And the same view seems to have been entertained by Chancellor Kent when he said: "If the goods be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specified property be separated and identified." 2 Kent, 496. So, Strong J. in Crofoot *v.* Bennett, 2 Comst. 260, said: "But if the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete." This opinion is quoted more at length, *post*, § 346. See Lockhart *v.* Pannell, 22 U. C. C. P. 597. In Dennis *v.* Alexander, 3 Barr, 50, the court say: "It is not the law, that the right of property in a chattel cannot pass by a sale, so long as the quantity of the thing sold remains to be ascertained. It is only when something is to be done for the ascertainment of the quantity *by the very terms of the contract*, that it is incomplete." See, also, Adams Mining Co. *v.* Senter, 26 Mich. 73, 79, 80; Hyde *v*, Lathrop, 2 Abb. (N. Y.) App. Decis. 436.

In America these rules variously interpreted.

MASSACHUSETTS. A contract was made to sell the vendor's "fare of fish," then at Newburyport, at a certain sum per quintal, and a certain other sum per quintal for carrying them to Boston, the fish to be properly dried for shipping, the wharfage to be paid by the purchaser, and all other incidental charges to be paid by the vendor, the fish to be at the purchaser's risk when on board the vessel. It was held that the property in the fish was not changed. "The fish were agreed to be sold, not sold." Shaw *v.* Nudd, 8 Pick. 9, 13. "When a bargain is made for a chattel, and the price is paid, the contract is executed, so that the vendee may maintain trover for the chattel against the vendor, upon demand and refusal to deliver. But if, at the time of the contract, it is understood and intended that some after act is to be done to complete the sale, such as a formal delivery or a bill of sale, the transfer is not complete until such act is done." Parker C. J. in Higgins *v.*

Massachusetts decisions.

Shaw *v.* Nudd.

Chessman, 9 Pick. 7, 10. In Macomber v. Parker, 13 Pick. 175, 183, Wilde J. said: "The general principle is, that where any operation of weight, measurement, counting, or the like, remains to be performed, in order to ascertain the price, the quantity, or the particular commodity to be delivered, *and to put it in a deliverable state*, the contract is incomplete until such operation is performed. Brown on Sales, 44." This branch of the case, however, turned on a question of delivery. In Mason v. Thompson, 18 Pick. 305, it appeared that one T. being indebted to one B., a contract was made between them, in the month of September, as follows: "I, B., agree to purchase and do hereby purchase of T." a certain quantity of cheese, "if he makes as much," and certain cattle, at fixed prices, "T. to keep the cattle on his farm free of expense until foddering time, if there cannot be any sale made that will answer before; the cheese to be kept until the 1st of November next, unless called for sooner; and for the payment of the amount of these articles, B. is to discharge all the claims he may have against T., and the balance he is to pay in cash whenever demanded." It was held that this did not constitute a complete sale, but that, as the articles were from time to time delivered, the contract was *pro tanto* executed; but the property in the articles not delivered remained in T. Morton J. said: "There must at any rate be a perfect contract of sale. *The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point;* and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." This seems to put the point upon the true ground of inquiry — the *aggregatio mentium* of the parties. What has been done or left undone respecting the property is mere matter of evidence, by which their intent is to be determined by the court or jury as the inquiry falls within the province of the one or the other. *Ante*, § 311.

Language of Wilde J.

Mason v. Thompson.

In Riddle v. Varnum, 20 Pick. 280, one point of inquiry was whether there had been a completed sale of certain timber and plank lying in a mill-pond at the termination of a canal. In pursuance of the negotiation for the purchase of the property, the purchaser had signed a writing in which he acknowledged that he had "Received of the vendor four shots of white oak plank, &c. for which I promise to pay him twenty-six dollars per thousand, board measure. The above timber delivered in the mill-pond," &c. and the vendor at the same time executed a writing by which he acknowledged that he had received of the purchaser two hundred dollars in part pay for "the timber in question. Remainder to be paid in ninety days from surveying. The canalage to be paid by the purchaser, when he takes the plank and timber from the pond." The vendor further agreed that the purchaser might procure the timber to be measured by the superintendent of the canal, and that he would abide by the measurement. Before the timber was measured it was attached by one of the creditors of the purchaser. Dewey J. said: "The leading objection to the alleged transfer of the property is founded upon the fact that the timber and plank were contracted for at a certain price by the thousand feet, and that at the time of the attachment they had not been surveyed and the measure of them ascertained. The general doctrine on this subject is, undoubtedly, that when some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to the consummation of the contract; and until it is performed the property does not pass to the vendee. But in the cases of sales where the property to be sold is in a state ready for delivery, and the payment of the money, or giving security therefor, is not a consideration precedent to the transfer, it may well be the understanding of

Riddle v. Varnum.

the parties that the sale is perfected, and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a case presents a question of the intent of the parties to the contract. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold, at the rate agreed upon. The court are of opinion that upon a proper application of these principles to the present case, the jury would have been warranted from the testimony to find that it was the intention of the parties here contracting to make the sale of the articles complete and absolute before the measure of them was ascertained." See Ropes *v.* Lane, 11 Allen, 591. The rule laid down in Riddle *v.* Varnum, *supra*, was referred to with approbation by Tenney J. in Stone *v.* Peacock, 35 Maine, 385, 388, which, however, was a case of sale of fifteen tons of hay out of a larger mass, and not separated.

Marble *v.* Moore.

In Marble *v.* Moore, 102 Mass. 443, the case was submitted to the jury on the evidence that the vendor "bargained a hog to the purchaser before it was altered, with an agreement that the vendor was to alter the hog and keep it until it fully recovered from the operation, if it did successfully recover therefrom; and if it did not so recover, then the vendor was to pay the purchaser forty dollars;" and it was held that this evidence warranted, if it did not require, a finding of the jury that the sale to the purchaser was unconditional. The case does not show for what sum the hog was sold, nor whether the price was paid. It appears that there was no actual delivery. It must have been understood that the leaving the hog in the possession of the vendor operated as a bailment for the purpose named. As a bailment it must have been *nudum pactum* for want of consideration, unless it derived its aliment of consideration from the contract of sale and was a part of it. It is clear that the entire agreement embraced the purchase of the altered hog, and that he was not in a deliverable state, as such, at the time of the purchase. The learned judge of the superior court, at the trial before the jury, instructed them in accordance with the principles of law stated in Riddle *v.* Varnum, above cited. The jury having found the sale to be unconditional, the case went to the full bench of the supreme court on exceptions. The rulings were sustained; but the supreme court added: "We think the finding is in conformity with the legal effect of the contract as stated." This seems to us to decide that a contract of sale of a specific ascertained chattel, without evidence of payment or delivery, but with an important act to be done to put the property in a deliverable state, that is, the state in which by the agreement the purchaser is bound to receive it, may, in point of law, be a complete sale to pass the title; that upon such a sale the vendor may hold the property as bailee to do the act agreed upon. The next important case in Massachusetts is Foster *v.* Ropes, 111 Mass. 10,

Foster *v.* Ropes.

in which there was a sale of a fare of fish, lying in two piles, one pile in each of two of vendor's fish-houses, in all about 800 quintals, at a certain price per quintal, to be paid for, cash in thirty days from delivery, "one half to be thrown, that is, put on the flakes to be dried, for half a day or more, at once, or on the first fair day, and weighed at Beverly, and there received by purchaser, and by him carted to Salem; the other half to be thrown in the course of ten days, and then to be weighed and carted as the others." This sale was in the spring of 1870. These fish, according to the course of the cod-fishing business, had been caught and cured the preceding fall, and had been piled in the fish-houses and there kept during the winter. Both piles had been examined by the purchaser before he purchased, and were in a marketable state; but they were not in the particular state of dryness in which the purchaser wished to have them and stipulated they should

be put. The exact purpose of throwing the fish does not appear. Probably it was either to prepare them for the particular use of shipping, or to give the purchaser an advantage on the weight; or, possibly, for both these purposes; but, at any rate, it seems to have been for the benefit of the purchaser. It seems to have been conceded that the title to the fish would have passed, and the sale been complete, had there been no stipulation as to the throwing and weighing. The case was put to the jury upon the evidence of the intention of the parties that the title should pass by the sale notwithstanding the acts to be done before the purchaser took the fish. The case was clear of any question under the statute of frauds. The jury found that it was the intention of the parties to pass the title at the time of the sale. The case went to the court of law on exceptions to the effect that the evidence, which is not here stated, was not sufficient to sustain the verdict, and so the court of law held. But in deciding the case, the court, by Mr. Justice Colt, who delivered the opinion, said: "In the sale of personal property, the general rule of law is, that where, by the terms of the contract, the seller agrees to do anything for the purpose of putting the property into a state in which the buyer is bound to accept it, or into a condition to be delivered, the title will remain in him until he has performed the agreement in this respect." The learned judge then cites and states the case of Rugg *v.* Minett, 11 East, 210, and adds: "This general rule will not prevail, where, by the terms of the agreement, the title is to vest immediately in the buyer, notwithstanding something remains to be done to the goods by the seller before delivery." "In all cases, however, the intention of the parties as to the time when the title is to pass can be ascertained only *from the terms of the agreement, as expressed in the language and conduct of the parties*, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. The rights of the parties under the contract cannot be affected by their undisclosed purposes, or by their understanding of its legal effect." After stating the facts bearing upon the point as understood by the court, the learned judge adds: "By the general sale, therefore, the property, not actually taken away by the defendant, remained in the plaintiff, unless there is evidence which would justify the jury in finding that, by further agreement, notwithstanding this feature of the contract, the title was to pass immediately to the defendant." From this case it follows, that upon the sale of a specific ascertained chattel, if things such as those stated in this case remain to be done before the purchaser is actually to take the property, the burden is on the vendor, if he alleges the intent of the parties that the title shall pass notwithstanding, to establish the fact affirmatively. This seems to be in accordance with the ruling in Riddle *v.* Varnum, and approved in Stone *v.* Peacock, 35 Maine, 385, 388. Compare the case of Marble *v.* Moore, *supra*.

Language of Colt J.

VERMONT. In the case of Gibbs *v.* Benjamin, 45 Vt. 124, it appeared that the defendant agreed to purchase all the wood piled on the plaintiff's farm on the margin of Lake Champlain at $3.50 per cord. It was part of the contract that the parties should measure the wood and ascertain the quantity. They met for that purpose, and disagreed. The plaintiff insisted that it was agreed, and part of the contract, that defendant should take the wood at "running measure;" the defendant claimed that he purchased solid cords, and that issue grew into controversy, but was never settled. In the mean time the wood was carried away by a flood on the lake and lost. It was assumed by the court that the price was to be paid on delivery. The action was brought to recover for the price of the wood. Redfield J. said: "The principle is well settled, and uniform in all cases, that when anything remains to be done by *either or both of the parties*, precedent to the delivery, the title does not pass. And

Vermont decision. Gibbs *v.* Benjamin.

so inflexible is the rule, that when the property has been delivered, if anything remains to be done by the terms of the contract, before the sale is completed, the property still remains in the vendor. The contract must be executed, to effect a completed sale, 'and nothing further to be done to ascertain the quantity, quality, or value of the property.' Bennett J. in Hutchins *v.* Gilchrist, 23 Vt. 88. 'The general rule in relation to the sale of personal property is, that if anything remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties.' Poland J. in Hale *v.* Huntley, 21 Vt. 147. This rule applied to the facts as reported in this case, retains the wood in the plaintiff, and leaves the contract executory, and, as a sale, incomplete." Several equally stringent applications of the rule have been made in NEW HAMPSHIRE. In Fuller *v.* Bean, 34 N. H. 290, 300, 301, Bell J. said: "If the goods are sold by number, weight, or measure, the sale is *primâ facie* not complete till their quantity is ascertained, and if they are mixed with others, not until they are separated and designated. There are many other cases where, as there is the same reason, the same rule of law applies. In some of the cases we find at common law the language used is capable of being understood as importing that if an act remains to be done between the parties, it must be an act to be done by the seller, and one necessary to designate and identify the goods to be sold, and not an act to be done by the buyer, or merely to ascertain the price to be paid, in order to render the sale imperfect and to prevent the property from passing. But we think there is no such limitation of the rule, and that it is indifferent whether the act to be done to render the sale complete is to be done by the buyer or by the seller, or by a third person, and that it is equally indifferent whether it is to be done to ascertain the goods to be sold by their designation or measurement, or their quality, by the buyer or the public inspector; or merely to ascertain the price to be paid by the appraisal of a third person, or by counting, weighing, or the like; or to do any other act necessary to enable the property to pass in conformity to the agreement, such as might be the payment of duties on goods imported, or their transportation to a different place." In Prescott *v.* Locke, 51 N. H. 94, it appeared that the defendant had orally agreed to purchase of the plaintiff such walnut spokes as the plaintiff should saw at his mill, not exceeding 100,000, to be delivered at the mill in lots of about 10,000 each, as soon as sawed by the plaintiff; subject to the defendant's culling and selection; each lot to be paid for on delivery at $40 per thousand. Nothing was said about counting the spokes, but the vendor understood that he was to count each lot selected by the purchaser, and the purchaser understood that he was to count each lot selected before it was taken from the mill; and it appeared that upon a sale of spokes between the parties on a previous occasion, each party had counted them. On January 14, 1869, after the vendor had sawed a lot of 10,000 to 12,000, the purchaser culled them, handling every spoke, throwing aside those rejected, and laying those selected in a pile by themselves. The purchaser was to send and take away the selected pile with his own team on January 18, 1869, and to pay for them on the first of February. The vendor himself, on January 16th and 18th, counted the selected pile, found the number to be 9,130, and then, on the said 18th January, charged that number of spokes to the defendant on his books. The purchaser did not send for the spokes until January 22, when they were burned with the mill. There was sufficient reason for the delay. The purchaser never counted the spokes nor accepted the plaintiff's count of them, though he made no question of its correctness. The question made, as the court stated it, was, whether there was such a delivery and acceptance of the spokes as transferred the property and title from

New Hampshire. Fuller *v.* Bean.

Prescott *v.* Locke.

the vendor to the purchaser. The case was discussed by the court, as involving both a question of acceptance and receipt to satisfy the statute of frauds, and also a question whether at common law, or under the civil law, the facts showed a sale so complete as to transfer the title; and it was held that the sale was not perfected, and the title to the property remained in the plaintiff at the time of its destruction, on the ground that the counting of the spokes was a material act, in which both parties were equally interested, and the defendant had not counted them nor verified the plaintiff's count. The court said: "The culling of the spokes was not an acceptance of quantity, but only of quality, — for at the time of culling, the quantity and price of the quantity were indeterminate; still there was a manual caption of the spokes by the buyer at the place of delivery. Such delivery and reception were not enough to transfer the title and risk, without the acceptance of the property as a determined quantity; for such an acceptance depended upon a counting of the spokes. If a sale is not complete, if anything remains to be done concerning the property by either party, a present right of property does not vest in the buyer. If any condition precedent, such as the ascertainment of the quantity, and thereby the gross price, is not performed or waived, the sale is not complete; such is the rule of the common law. In the present case the spokes were to be taken by the defendant from the mill, and they were deposited in the place from which the defendant might remove them on the completion of the contract. But this fact alone would not constitute a delivery in law. The defendant had no right to remove them before the quantity and the price regulated by the quantity were ascertained. An important act, the act of counting the spokes, remained to be done, in which both parties had the right to participate, unless that right was waived by the defendant." See Messer *v.* Woodman, 22 N. H. 172; Gilman *v.* Hill, 36 Ib. 311, 320; Smart *v.* Batchelder, 57 Ib. 140; Jones *v.* Pearce, 25 Ark. 545; Abat *v.* Atkinson, 21 La. Ann. 414; Bailey *v.* Smith, 43 N. H. 141, 143; Kaufman *v.* Stone, 25 Ark. 336; Strauss *v.* Ross, 25 Ind. 300; McClung *v.* Kelley, 21 Iowa, 508. MICHIGAN. One of the most satisfactory discussions of this subject will be found in the opinion of the court given by that eminent and distinguished jurist, Judge Cooley, in Lingham *v.* Eggleston, 27 Mich. 324. The contest in this case related to a sale of lumber by Eggleston, the defendant in error, to Lingham & Osborn, the plaintiffs in error, and the question involved was, whether the contract between the parties amounted to a sale *in presenti* and passed the title, or merely to an executory contract of sale. The lumber, subsequently to the contract and before actual delivery to the purchasers, was accidentally destroyed by fire, and the purchasers refused to pay for it on the ground that it never became their property. The action was brought by Eggleston, the defendant in error, for goods bargained and sold. It appeared that the lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber Eggleston had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000, excluding Robinson's share in the four or five piles. Lingham & Osborne went to the mill yard September 23, 1871, and proposed to buy the lumber. Eggleston went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After Lingham & Osborne had examined the whole to their satisfaction, they agreed upon a purchase, and the following written contract was entered into: "Flint, September 23d, 1871. Lingham & Osborne bought from C. Eg-

Michigan.

Lingham *v.* Eggleston.

gleston this day, all the pine lumber in his yard at Birch Run at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid for as follows: Five hundred dollars to-day, and five hundred dollars on the 10th of October next, the balance, one half on first day of January, A. D. 1872, and the rest on the first day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham & Osborne, which shall not be later than 10th of November next. Also some shingles at two dollars per M. for No. 2 and four dollars for No. 1.

(Signed) "LINGHAM & OSBORNE.

"CHAUNCEY EGGLESTON, JR."

The sum of five hundred dollars mentioned in this contract to be paid at the time of its execution was paid. A few days later Lingham & Osborne went to the mill yard in Eggleston's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected, or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber, Lingham & Osborne claiming that they had. On the ninth day of October, 1871, Lingham met Eggleston on the cars at Flint and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; Eggleston took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham: "Holly. Mr. Eggleston, you may load, say ten thousand on each car, and we can have it inspected as it is unloaded. I will try and come up to-morrow." When Eggleston reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Cooley J. said: "Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory must usually be determined upon the intent of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, where the price depends upon either or both, should be determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive." Having quoted the rule stated in Blackburn on Sales, p. 120, and the doctrine laid down in the text of this work, *ante*, §§ 310, 311, the learned judge added: "Upon this principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting, and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights. The most important fact indicative of an intent that the title shall pass is generally that of delivery. If the goods are completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. So, if the goods are specified, and all that was to be done by the

Language of Cooley J.

vendor in respect thereto has been done, the title may pass, though the quantity and quality, and, consequently, the price to be paid, are still to be determined by the vendee. Turley *v.* Bates, 2 H. & C. 200; Kohl *v.* Lindley, 39 Ill. 195. And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, loading the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding. Whitcomb *v.* Whitney, 24 Mich. 486; Terry *v.* Wheeler, 25 N. Y. 520. But the authorities are too numerous and too uniform to justify citation, which hold that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods; the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted." In conclusion the learned judge said, with regard to the case before him: "Neither the quality nor the quantity was determined; and the evidence in the case shows that, as to these, there might very well be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate, and we must suppose such was the intent, unless something clearly appears in the case to show the contrary. It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transferrence of the title, — nothing to the contrary appearing, — the court should so have instructed the jury." See Ortman *v.* Green, 26 Mich. 209; First National Bank of Marquette *v.* Crowley, 24 Ib. 492; Hahn *v.* Fredericks, 30 Ib. 223. And again, in Wilkinson *v.* Holiday, 33 Mich. 386, 387, 388, Cooley C. J. said: "Where, under a contract for the purchase of personal property something remains to be done to identify the property, or to put it in condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that by the understanding of the parties the title was not to pass until such act had been fully done and accomplished. But the presumption is by no means conclusive. If one bargains with another for the purchase of property, and that is done in respect to it which the parties agree shall pass the title, nothing more is generally requisite. The question is only one of mutual assent; whether the minds of the parties have met, and by their understanding the purchaser has now become the owner. This is the general rule where the case is not within the statute of frauds. If one purchases gold bullion by weight and receives delivery before it has become convenient to weigh it, and on the understanding that the weighing shall be done afterwards, there can be no reasonable doubt, unless there are some qualifying circumstances in the case, that the bullion has now become his property and is at his risk. Lingham *v.* Eggleston, 27 Mich. 324." On the other hand, in the case of Adams Mining Co. *v.* Senter, 26 Mich. 73, 79, 80, it appeared that there was a sale of a lot of timber at a fixed price per foot, and the same person acting as agent for seller and purchaser. The agent and purchaser directed the person in charge of the timber to hold it for the purchaser, and that person engaged to do so. Campbell J. said: "The delivery was complete. The whole property being identified and sold, at a fixed price per foot, the process of ascertaining the amount was not essential to passing the title, as it might have been if less than the whole amount delivered was to be sold and separated by measurement. In that case the measure-

Adams Mining Co. *v.* Senter.

ment might be necessary to fix the identity of the property sold. But when all is sold, no such process is needed to pass title. The ascertainment of the price was a mere mathematical computation, involving no further action to bring the minds of the parties together." See Begole *v.* McKenzie, 26 Mich. 470; Whitcomb *v.* Whitney, 24 Ib. 486; Wilkinson *v.* Holiday, 33 Ib. 386; Southwestern Freight &c. Co. *v.* Stanard, 44 Mo. 71. NEW YORK. In Hyde *v.* Lathrop, 2 Abb. (N. Y.) App. Decis. 436, it was held that, under a contract for the sale of thirty thousand barrel staves, at a specified rate per thousand, to be delivered at a specified railroad depot, the delivery of seven thousand at the depot was sufficient to pass the title to the purchaser in the staves that were so delivered, although he had not seen them, and no count had been made to ascertain the amount to be paid. The cases of Crofoot *v.* Bennett, 2 Comst. 258, and Tyler *v.* Strang, 21 Barb. 198, were relied upon as authority for this decision. See Comfort *v.* Kiersted, 26 Barb. 472; Southwestern Freight &c. Co. *v.* Stanard, 44 Mo. 71; Dexter *v.* Norton, 55 Barb. 272; Bradley *v.* Wheeler, 44 N. Y. 495. A case very recently decided in MAINE, Dyer *v.* Libby, 61 Maine, 45, was an action to recover for the price of a lot of hay upon a count for goods sold and delivered. The plaintiff sold the defendant a quantity of hay to be taken from the plaintiff's mow. The defendant was to furnish the press, press the hay, and pay for it a certain price per ton. The plaintiff was to furnish withes and binders and haul the hay to the railroad depot. The defendant afterwards sent his men and they took the hay from the plaintiff's mow, pressed it, put it in bands, weighed and branded it with the defendant's name. After some considerable delay, the plaintiff hauled the hay, and stored it for the defendant at a place near the depot, informed the defendant that he had done so, and demanded payment for the hay, which was refused. The court considered the case mainly on the question whether the acts done previously to the hauling of the hay to the depot were sufficient to satisfy the statute of frauds, and show a delivery on which the action for goods sold and delivered might be sustained, and said: "These acts were sufficient to constitute a delivery if accompanied by the requisite intention of both parties that the property should then pass, and the question was, whether the evidence was sufficient to warrant the jury in finding such to be their intention. The fact that it was one of the conditions of the sale, that the plaintiff should haul the hay to the depot, is not inconsistent with the proposition that it might have been delivered so as to become the property of the defendant at the barn." As to the transfer of title by sale, see, further, McDonald *v.* Hewett, 15 John. 349; Rapelye *v.* Mackie, 6 Cowen, 250; Russell *v.* Nicholl, 3 Wend. 112; Outwater *v.* Dodge, 7 Cowen, 85; Downer *v.* Thompson, 2 Hill, 137; Damon *v.* Osborn, 1 Pick. 476; Pothier Cont. of Sales, by Cushing, §§ 309, 311; Houdlette *v.* Tallman, 14 Maine, 400; Craig *v.* Smith, Sup. Ct. of Penn. 5 Law R. 112; Davis *v.* Hill, 3 N. H. 382; Woods *v.* McGee, 7 Ohio, 128; Jewett *v.* Warren, 12 Mass. 300; Decker *v.* Furniss, Hill & Denio, 611; Kein *v.* Tupper, 52 N. Y. 550; McCrae *v.* Young, 43 Ala. 622; Kaufman *v.* Stone, 25 Ark. 336; Abat *v.* Atkinson, 21 La. Ann. 414; Browning *v.* Hamilton, 42 Ala. 484; Chase *v.* Willard, 57 Maine, 157; Frost *v.* Woodruff, 54 Ill. 155; Morse *v.* Sherman, 106 Mass. 430; Keeler *v.* Vandervere, 5 Lansing (N. Y.), 313; Ormsby *v.* Machir, 20 Ohio St. 295; Lester *v.* East, 49 Ind. 588; Morrison *v.* Dingley, 63 Maine. 553; Townsend *v.* Hargraves, 118 Mass. 325, 332; Allingham *v.* O'Mahoney, 1 Pugsley (N. B.) 326; Hanington *v.* Cormier, 3 Ib. 212; Gibson *v.* McKean, Ib. 299; Reynolds *v.* Ayres, 5 Allen (N. B.), 333; Sprague *v.* King, 1 Pugsley & Burbridge (N. B.), 241; Leigh *v.* Mobile & Ohio R. R. Co. 58 Ala. 165; Gravett *v.* Mugge, 89 Ill. 218; Burns *v.* Mays, 88 Ib. 233; Burrows *v.* Whittaker, 71 N. Y. 291; Johnson *v.* Lancashire R. W. Co. 3 C.

New York.

Maine.

Dyer *v.* Libby.

§ 320 Third Rule. To these may be added, thirdly, where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. (*d*) The authorities in support of these propositions will now be considered.

Where buyer bound to a condition, property does not pass, even by actual delivery, till performance of condition.

P. D. 499. See § 334, note (*t*), *post.*

Cases not harmonious.

An examination of the authorities shows that neither the English nor the American cases are entirely harmonious on the question of passing the title by a sale of specific ascertained chattels, while anything remains to be done by way of counting, measuring, or weighing them. Now it is very apparent that the acts enumerated can have no effect upon the quantity or quality of the chattels sold, either by way of increasing or diminishing, improving or impairing, the one or the other. To say, therefore, that the quantity of a specific ascertained chattel is not determined until it is weighed or measured, that till that is done the quantity is indeterminate, is quite unphilosophical. The quantity is as much determined before weighing as afterwards. And it would, in most cases, be quite as fair to assume that the weighing is to be done on the purchaser's property as on the vendor's. The case is entirely different where the goods are not ascertained. The only rule which can be considered as settled is, that it depends upon the intent of the parties in such cases whether the title should pass or not. But the question immediately arises, How shall that intent be determined? by the evidence untrammelled by technical rules? or by rules that may impose upon the parties an intent they never entertained?]

(*d*) [Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the purchaser on delivery, nor until he performs the condition, or the seller waives it; and the right continues in the vendor, even against creditors and subsequent purchasers of the vendee. 2 Kent, 497; Barrett *v.* Pritchard, 2 Pick. 512; Whitwell *v.* Vincent, 4 Ib. 449; Strong *v.* Taylor, 2 Hill (N. Y.), 326; Morris *v.* Rexford, 18 N. Y. 552; Dannefelser *v.* Weigel, 27 Mo. 45; Bauendahl *v.* Horr, 7 Blatchf. 548; Benner *v.* Puffer, 114 Mass, 376; Ridgeway *v.* Kennedy, 52 Mo. 24; Cole *v.* Mann, 3 Thomp. & C. (N. Y.) 380; Powell *v.* Preston, Ib. 644; Weeks *v.* Lalor, 8 U. C. C. P. 239; Stevenson *v.* Rice, 24 Ib. 245; Black *v.* Drouillard, 28 Ib. 107; Tufts *v.* Mottashed, 29 Ib. 539; Walker *v.* Hyman, 1 Ont. App. 345; Mason *v.* Bickle, 2 Ib. 291; Nordheimer *v.* Robinson, Ib. 305; Chase *v.* Pike, 125 Mass. 117; Drury *v.* Hervey, 126 Ib. 519; Carroll *v.* Wiggins, 30 Ark. 402; Cardinell *v.* Bennett, 52 Cal. 476; Hegler *v.* Eddy, 53 Ib. 597; Brown *v.* Fitch, 43 Conn. 512; Jowers *v.* Blandy, 58 Ga. 379; Flanders *v.* Maynard, Ib. 56; Chissom *v.* Hawkins, 11 Ind. 316; Thomas *v.* Winters, 12 Ib. 322; Shireman *v.* Jackson, 14 Ib. 459; Plummer *v.* Shirley, 16 Ib. 380; Dunbar *v.* Rawles, 28 Ib. 225; Sims *v.* Wilson, 47 Ib. 226; Bradshaw *v.* Warner, 54 Ib. 58; Domestic Sewing Machine Co. *v.* Arthurhultz, 63 Ib. 322; Hadson *v.* Warner, 60 Ib. 214; Moseley *v.* Shattuck, 43 Iowa, 540; Boon *v.* Moss, 70 N. Y. 465; Wright *v.* Pierce, 4 Hun, 351; Sanders *v.* Keber, 28 Ohio St. 630; Sage *v.* Sleutz, 23 Ib. 1; Holt *v.* Holt, 58 N. H. 276; King *v.* Bates, 57 Ib. 446; Truman *v.* Hardin, 5 Sawyer (Circ. Ct.), 115; Re Binford, 3 Hughes (Circ. Ct.), 295; Rogers Locomotive Works *v.* Lewis, 4 Dill. 158 (as to Missouri law); Fosdick *v.* Car Co. 99 U. S. 256; Preston *v.* Whitney, 23 Mich. 260; Waters *v.* Cox, 2 Bradwell

Condition precedent; no title passes until performed.

§ 321. In Hanson *v.* Meyer (*e*) the defendant sold a parcel of starch at 6*l.* per cwt., and directed the warehousman to weigh and deliver it. Part was weighed and deliv-

Hanson *v.* Meyer.

(Ill.) 129; Bateman *v.* Green, Ir. R. 2 C. L. 166; and the title to the natural increase of the property remains in the vendor until the condition is performed by the vendee. Buckmaster *v.* Smith, 22 Vt. 203; Clark *v.* Hayward, 51 Ib. 14; Allen *v.* Delano, 55 Maine, 113; Bunker *v.* McKenney, 63 Ib. 529, 531. Where goods are sold at a fixed price, to be paid on a certain day, and delivery is made upon an agreement, express or implied, that until the price is paid the title is to remain in the vendor, payment is a condition precedent, and until performance the property is not vested in the purchaser. Blanchard *v.* Child, 7 Gray, 155; Burbank *v.* Crooker, Ib. 158; Fifield *v.* Elmer, 25 Mich. 48; Deshon *v.* Bigelow, 8 Gray, 159; Porter *v.* Pettengill, 12 N. H. 299, a strong case on this point; Luey *v.* Bundy, 9 Ib. 298; Davis *v.* Emery, 11 Ib. 230; Gambling *v.* Read, 1 Meigs, 281, 284, 286; Heath *v.* Randall, 4 Cush. 195; Bennett *v.* Simms, 1 Rice, 421; West *v.* Bolton, 4 Vt. 558; Smith *v.* Foster, 18 Ib. 182; Davis *v.* Bradley, 24 Ib. 55; Tibbets *v.* Towle, 3 Fairf. 341; George *v.* Stubbs, 26 Maine, 243; Sawyer *v.* Fisher, 32 Ib. 28; Brown *v.* Haynes, 52 Ib. 578; Everett *v.* Hall, 67 Ib. 497; Parris *v.* Roberts, 12 Ired. 268; Copeland *v.* Bosquet, 4 Wash. C. C. 588; Sewall *v.* Henry, 9 Ala. 24; Herring *v.* Hoppock, 15 N. Y. 409; Hasbrouck *v.* Loundsbury, 26 Ib. 598; Hirschorn *v.* Canney, 98 Mass. 149, 150; Buckmaster *v.* Smith, 22 Vt. 203; Root *v.* Lord, 23 Ib. 568; Buson *v.* Dougherty, 11 Humph. 50; Lees *v.* Richardson, 2 Hilton (N. Y.), 164; Hotchkiss *v.* Hunt, 49 Maine, 219; Bunker *v.* McKenney, 63 Ib. 529; Wood. M. & R. Co *v.* Brookes, 2 Sawyer, 576; Bigelow *v.* Huntley, 8 Vt. 151; Duncan *v.* Stone, 45 Ib. 118; Little *v.* Page, 44 Mo. 412; Armington *v.* Houston, 38 Vt. 448; Whitney *v.* Eaton, 15 Gray, 225; Sage *v.* Sleutz, 23 Ohio St. 1; Booraem *v.* Crane, 103 Mass. 522; Shaffer *v.* Sawyer, 123 Ib. 294; Henry *v.* Cook, 8 U. C. C. P. 29; Mason *v.* Johnson, 27 Ib. 208. And such agreement is valid, though the goods were not in existence so as to be a subject of bargain and sale when the agreement was made, if, when delivered, they were delivered under the agreement. Benner *v.* Puffer, 114 Mass. 376. The vendor in such case, if guilty of no laches, may reclaim the goods, where the price has not been paid, even from one who has purchased them or taken a mortgage of them from his vendee in good faith and without notice. Hirschorn *v.* Canney, 98 Mass. 149; Coggill *v.* Hartford & New Haven R. R. Co. 3 Gray, 545; Benner *v.* Puffer, 114 Mass. 376; Zuchtmann *v.* Roberts, 109 Ib. 53; Sumner *v.* McFarlan, 15 Kansas, 600; Hallowell *v.* Milne, 16 Ib. 65; Enlow *v.* Klein, 79 Penn. St. 488; Clark *v.* Wells, 45 Vt. 4; Kent *v.* Buck, Ib. 18; Duncan *v.* Stone, Ib. 118; Hotchkiss *v.* Hunt, 49 Maine, 219; Sargent *v.* Metcalf, 5 Gray, 306; Ballard *v.* Burgett, 40 N. Y. 314; McNeil *v.* Tenth Nat. Bank of N. York, 55 Barb. 59, 68; Baker *v.* Hall, 15 Iowa, 277; Hart *v.* Carpenter, 24 Conn. 427; Hunter *v.* Warner, 1 Wis. 141; Gibbs *v.* Jones, 46 Ill. 319; Shireman *v.* Jackson, 14 Ind. 459; Dunbar *v.* Rawles, 28 Ib. 225; Fifield *v.* Elmer, 25 Mich. 48; Couse *v.* Tregent, 11 Ib. 65; Lacker *v.* Rhoades, 45 Barb. 499; Herring *v.* Willard, 2 Sandf. 418; Price *v.* Joaes, 3 Head (Tenn.), 84; Riddle *v.* Coburn, 8 Gray, 241; Crocker *v.* Gullifer, 44 Maine,

Title to the increase of the property.

Where no title is to pass till price is paid.

Such agreement valid though goods not then in existence.

On breach vendor may retake from purchaser in good faith.

(*e*) 6 East, 614.

ered, and then the purchaser became bankrupt, whereupon the vendor countermanded the order for delivery of the remainder,

491; Duncan *v.* Stone, 45 Vt. 122; Little *v.* Page, 44 Mo. 412; Griffin *v.* Pugh, Ib. 326. Good faith does not aid the purchasers from the vendees in such cases, because their vendors having no title to the property could convey none. Such purchasers hold the same legal condition as do *bonâ fide* purchasers of stolen goods. Metcalf J. in Deshon *v.* Bigelow, 8 Gray, 159, 160. In Forbes *v.* Marsh, 15 Conn. 384, 397, 398, Williams C. J. said: "In this class of cases the vendee comes into possession of property which was known to belong to another man. Whether, therefore, the vendee had borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly, we find that all these cases of conditional sales made *bonâ fide* have been held good as against attaching creditors, as well as between the parties. In the cases above cited from New York and Massachusetts (Strong *v.* Taylor, 2 Hill, 326; Hussey *v.* Thornton, 4 Mass. 405; Barrett *v.* Pritchard, 2 Pick. 512), the claim was made by creditors. So, too, in the case of Vincent *v.* Cornell, 13 Pick. 294; Fairbanks *v.* Phelps, 22 Ib. 535; Patten *v.* Smith, 5 Conn. 201, the same principle was recognized, though the cases may have been determined upon other points." See Hart *v.* Carpenter, 24 Conn. 427; Gilbert *v.* Thompson, 3 Gray, 550, in note; Ballard *v.* Burgett, 40 N. Y. 314; Chase *v.* Ingalls, 122 Mass, 381; Jordan *v.* Easter, 2 Bradwell (Ill.), 73. In Devlin *v.* O'Neil, 6 Daly, 305, where goods were sold to be disposed of at retail by the vendee, it was held that a stipulation, that the goods should remain the property of the vendor until paid for, was fraudulent and void as to the creditors of the vendee. See Brett *v.* Carter, 2 Low. 458. In Zuchtmann *v.* Roberts, 109 Mass. 53, it appeared that the plaintiff, who had sold a piano to a third person on condition that it should remain the property of the plaintiff until it was paid for, and had given him a receipted bill of parcels therefor, omitting, at the request of the third person, any statement of the condition, told the defendant, in reply to an inquiry respecting the title to the piano, that he had sold it to the third person, and the defendant thereupon having seen the bill from the plaintiff, loaned a sum of money to the third person and received from him the piano, together with the bill from the plaintiff, without notice, express or implied, of the condition of sale of it by the plaintiff to the third person, who had not paid the plaintiff for it; it was held, that, in the absence of fraud, the plaintiff was not estopped to claim the piano from the defendant. Still, it seems that where property is sold on condition, to one who is allowed to assume possession and the apparent ownership, third persons have a right to consider it as his, and it is incumbent on the vendor, who would claim the ownership adversely to the rights of such third persons, to prove that the condition has not been performed. Leighton *v.* Stevens, 19 Maine, 154; Walker *v.* Hyman, 1 Ont. App. 345; Mason *v.* Bickle, 2 Ib. 291. See Leigh *v.* Mobile & Ohio R. R. Co. 58 Ala. 165; Van Duzor *v.* Allen, 90 Ill. 499; Rawls *v.* Deshler, 3 Keyes, 572; Batcman *v.* Green, Ir. R. 2 C. L. 166. The seller has an implied irrevocable license to enter the vendee's land upon breach of the condition and remove the goods. Heath *v.* Randall, 4 Cush. 195. And he may maintain replevin upon breach without a previous demand

Why vendor is protected against purchasers.

Where goods are to be disposed of at retail by the vendee.

Zuchtmann *v.* Roberts.

If vendee allowed to assume dominion as against third persons, vendor must show that condition has not been fulfilled.

Vendor has license to enter on land, upon breach.

And may maintain replevin without demand.

and took it away. In an action for trover, brought by the as-

upon the vendee. Hill *v.* Freeman, 3 Cush, 257. It has been suggested that this class of contracts may be treated either as conditional sales, by which the property was not to vest in the purchasers until they should pay or give security for the price, or as executory contracts of sale, to be completed on the performance of the same condition. Upon either construction the property in the goods is not changed. See Wilde J. in Dresser Manufacturing Co. *v.* Waterston, 3 Met. 9, 17; Grover J. in Ballard *v.* Burgett, 40 N. Y. 314; Ferguson *v.* Clifford, 37 N. H. 86; Adams *v.* O'Connor, 100 Mass. 515, 518. In Day *v.* Bassett, 102 Mass, 445, it appeared that the purchaser of machinery, who held it on condition that it should remain the property of the vendor until the price was paid, sold it to a third person, and afterwards tendered the price to his vendor, who had never demanded payment, and it was held that upon the tender, although it was refused, the title passed to the third person. Currier *v.* Knapp, 117 Mass. 324; Cushman *v.* Jewell, 7 Hun, 525; Smith *v.* Newland, 9 Ib. 553. See Sage *v.* Sleutz, 23 Ohio St. 1. As to the rights of the purchaser in such case, where he has paid part of the price, and the vendor has taken back the goods, see Preston *v.* Whitney, 23 Mich. 260; Latham *v.* Sumner, 89 Ill. 233; Howe Machine Co. *v.* Willie, 85 Ib. 333; where part of the property is destroyed, part taken back, and the rest paid for, see Swallow *v.* Emery, 111 Mass. 355.

Price payable on demand.

Where payment and delivery are agreed to be simultaneous, and payment is omitted, evaded, or refused by the purchaser, upon getting possession of the goods, the seller may immediately reclaim them. See Leedom *v.* Phillips, 1 Yeates, 529; Harris *v.* Smith, 3 Serg. & R. 20; Palmer *v.* Hand, 13 John. 434; Marston *v.* Baldwin, 17 Mass. 606; Leven *v.* Smith, 1 Denio, 571; Conway *v.* Bush, 4 Barb. 564; Henderson *v.* Lauck, 21 Penn. St. 359; Deshon *v.* Bigelow, 8 Gray, 159; Ferguson *v.* Clifford, 37 N. H. 86; Paul *v.* Reed, 52 Ib. 136; Adams *v.* O'Conner, 100 Mass. 515, 518; Tyler *v.* Freeman, 3 Cush. 261; Allen *v.* Hartfield, 76 Ill. 358; Harding *v.* Meitz, 1 Ten. Ch. 610; Hill *v.* McKenzie, 3 Thomp. & C. (N. Y.) 122; Miller *v.* Jones, 66 Barb. 147; Smith *v.* Hamilton, 29 U. C. Q. B. 394; Kinzey *v.* Leggett, 71 N. Y. 387. And where nothing is said about payment at the time of purchase, the law presumes that the sale is for cash, and in such case payment and delivery are concurrent acts. Southwestern Freight &c. Co. *v.* Plant, 45 Mo. 517. See Scudder *v.* Bradbury, 106 Mass. 422; Goldsmith *v.* Bryant, 26 Wis. 34; Talmage *v.* White, 35 N. Y. Superior Ct. 219. So when goods are sold on time, and delivered to the purchaser under a contract of sale, in which it is stipulated that they are to be paid for by the negotiable note of the purchaser, such payment is a condition precedent to the sale, and the title to the goods will not vest unless such payment is made or waived. Whitney *v.* Eaton, 15 Gray, 225; Farlow *v.* Ellis, Ib. 229; Stone *v.* Perry, 60 Maine, 48; Paul *v.* Reed, 52 N. H. 136, 138; Russell *v* Minor, 22 Wend. 659; Osborn *v.* Gantz, 38 N. Y. Superior Ct. 148; Michigan Central R. R. Co. *v.* Phillips, 60 Ill. 190; Furniss *v.* Sawers, 3 U. C. Q. B. 76; Osborn *v.* Gantz, 60 N. Y. 540; Seed *v.* Lord, 66 Maine, 580; Van Duzon *v.* Allen, 90 Ill. 499; Salomon *v.* Hathaway, 126 Mass. 482; Smith *v.* Hobson, 16 U. C. Q. B. 368; New Brunswick R. W. Co. *v.* McLeod, 1 Pugsley & Burbridge (N. B.), 257; but if the vendee in such case obtains possession of the goods fraudulently without giving the security agreed upon, this does not enable the vendor to sue for goods sold and delivered before the expiration of the term of credit. His immediate remedy is by an ac-

When nothing said about payment, presumption.

Payment to be made by note.

Where payment and delivery are to be simultaneous.

Goods obtained by vendee without giving security, vendor's remedy.

signees of the bankrupt purchaser, Lord Ellenborough said that

tion for breach of the special agreement or in tort. Magrath *v.* Tinning, 6 U. C. Q. B. (O. S.) 484; Silliman *v.* McLean, 13 U. C. Q. B. 544; Wakefield *v.* Gorrie, 5 Ib. 159; Ferguson *v.* Carrington, 9 B. & C. 59. See §§ 765 and 763, *post.* In Hirschorn *v.* Canney, 98 Mass. 149, a merchant in New York sold goods to a merchant in Boston, on condition that he should send his notes in payment therefor, and shipped the goods to Boston, mailing a bill of lading to the purchaser, and requesting him to send his notes in payment, which was never done. It was held that no title passed to the conditional purchaser. Armour *v.* Pecker, 123 Mass. 143. In Adams *v.* O'Conner, 100 Mass. 515, 518, Gray J. said: "The sale to the defendants, having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers until the terms of sale had been complied with." Wabash Elevator Co. *v.* First National Bank of Toledo, 23 Ohio St. 311. So where the plaintiffs shipped from Boston to a person in New York certain goods to be paid for "on arrival," and they were not paid for. Clark *v.* Lynch, 4 Daly (N. Y.), 83. Where there is a delivery of a part of a larger amount of goods sold under an entire agreement that the price for the whole quantity shall be secured on the delivery of the residue at a future day, the delivery of the first parcel will be regarded as conditional; and on refusal of the purchaser to give the security agreed upon on the delivery of the residue, or to deliver up the first parcel on demand, the vendor may sustain replevin for them. Russell *v.* Minor, 22 Wend. 659. See Whipple *v.* Gilpatrick, 19 Maine, 427; Hussey *v.* Thornton, 4 Mass. 405; Riley *v.* Wheeler, 42 Vt. 528; Talmadge *v.* White, 35 N. Y. Superior Ct. 219. But payment cannot be demanded in such case until the whole of the goods are delivered. Timmons *v.* Nelson, 66 Barb. 594. But an agreement for security to be given or payment to be made for the price of goods at the time of delivery may be waived by the express understanding, or by implication from the acts of the parties. If the goods are delivered without any objection on the part of the vendor that the condition of the sale has not been complied with, and under circumstances indicating an intent and purpose not to insist upon this condition, they may be treated as the property of the purchaser, and held liable to attachment as his. Carlton *v.* Sumner, 4 Pick. 516; Dresser Manuf. Co. *v.* Waterston, 3 Met. 18; Mixer *v.* Cook, 31 Maine, 340; Smith *v.* Lynes, 3 Sandf. 203; Bowen *v.* Burke, 13 Penn. St. 146; Scudder *v.* Bradbury, 106 Mass. 427; Farlow *v.* Ellis, 15 Gray, 229; Haskins *v.* Warren, 115 Mass. 533; Goodwin *v.* Boston & Lowell R. R. Co. 111 Ib. 487; Freeman *v.* Nichols, 116 Ib. 309; Upton *v.* Sturbridge Cotton Mills, 111 Ib. 446; Hennequin *v.* Sands, 25 Wend. 640; Smith *v.* Dennie, 6 Pick. 262; Lupin *v.* Marie, 6 Wend. 77; Barry *v.* Palmer, 19 Maine, 303; Fuller *v.* Bean, 34 N. H. 290, 303. The fact, however, that the goods were actually forwarded or delivered to the purchaser before a compliance with the terms of sale is not necessarily a waiver of the conditions of sale. Farlow *v.* Ellis, 15 Gray, 229; Smith *v.* Milliken, 7 Lansing, 336; Litterel *v.* St. John, 4 Blackf. 326. It is enough to enable the vendor to retain his title to the goods, if it appears that it was the understanding of the parties, at the time of the delivery, that the condition of payment or security was not waived, though there was no express declaration to that effect at the time. Whitwell *v.* Vincent, 4 Pick. 451, 452; Dresser Manuf. Co. *v.* Waterston, 3 Met. 18; Corlies *v.* Gardner, 2 Hall, 345; D'Wolf *v.* Babbett, 4 Mason, 294; Reeves *v.* Harris, 1 Bailey, 563; Marston *v.* Baldwin, 17 Mass. 606; Hill *v.* Freeman, 3 Cush. 257; Tyler *v.* Freeman, 3 Ib. 261; Hammett *v.* Linneman, 48 N. Y. 399; Adams *v.* O'Conner, 100 Mass. 515; Farlow *v.* Ellis, 15 Gray, 229; Draper *v.*

Delivery in parcels, price to be secured on delivery of last parcel.

As to waiver of condition.

the act of weighing was in the nature of a condition precedent to

Jones, 11 Barb. 263. But a secret understanding or intent of the seller merely that the title should not pass by the delivery, will not prevent its passing. Scudder *v.* Bradbury, 106 Mass. 422; Taft *v.* Dickinson, 6 Allen, 553; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446, 453, 454. Where a note for *eighty* dollars was to be given for goods sold, and a note for only *eight* dollars was, in fact, delivered through mistake, the property was held not to pass. Litterel *v.* St. John, 4 Blatchf. 326.

Stone *v.* Perry.

In Stone *v.* Perry, 60 Maine, 48, it appeared that a merchant in Boston, on July 5th, sold for cash a lot of flour to a merchant in Portland, and shipped the flour to the purchaser in Portland two days after, and on the 8th of July the vendor forwarded a bill with "terms cash" printed thereon. The sale was effected through a broker at Boston. On the 10th of July, the vendor went to Portland, and having ascertained that the purchaser had failed, and that the flour had been attached, replevied it from the attaching officer. It was held that the contract was governed by the law of Massachusetts, and by that law, the sale being upon the condition of payment in cash upon delivery, and no payment being made, the title of the vendor remained in him, both as between him and the purchaser, and as between him and the attaching creditors of the purchaser. See Smith *v.* Milliken, 7 Lansing, 336; Farlow *v.* Ellis, 15 Gray, 229. Bauendahl *v.* Horr, 7 Blatchf. 548. But see Scudder *v.* Bradbury, 106 Mass. 422, in which it was ruled that a cash sale was not necessarily a conditional sale, and the ruling was sustained, on the circumstances.

Whether delivery absolute or conditional is question of intention.

Whether a delivery under an agreement for the sale of chattels is absolute or conditional depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms, at the time of delivery. It is sufficient, if the intent of the parties can be inferred from their acts or the circumstances of the case. Hammett *v.* Linneman, 48 N. Y. 399; Wilde J. in Dresser Manuf. Co. *v.* Waterston, 3 Met. 17. See Crompton *v.* Pratt, 105 Mass. 255; Day *v.* Bassett, 102 Ib. 445. The question of intent, in such case, is for the jury. Scudder *v.* Bradbury, 106 Mass. 422. By statute in Vermont (1854) a creditor of a purchaser, under a contract of conditional sale, is authorized, by attachment of the property, to take the place of such conditional purchaser in respect to the property, and extinguish the right of the vendor to it, by making payment, or tender of payment, within the time provided by the statute. Duncan *v.* Stone, 45 Vt. 123; Heflin *v.* Bell, 30 Ib. 134; Fales *v.* Roberts, 38 Ib. 503. A later statute in Vermont (1870) provides that no lien, reserved on personal property sold conditionally and passing into the hands of a conditional purchaser, shall be valid against attaching creditors or subsequent purchasers, unless a written memorandum, signed by the purchaser, witnessing such lien and the sum due thereon, shall be recorded in the town clerk's office. Phelps *v.* Hubbard, 51 Vt. 489; Towner *v.* Bliss, Ib. 59. In Maine, by R. S. c. 111, § 5, it is provided that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when it is so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property." Under the above statute in Maine it was decided, in a case where the plaintiff sold a wagon for ninety dollars, and was paid twenty-five dollars in cash at the time of the sale, with an agreement that the wagon was to remain his property till the price was fully paid, and afterwards asked for and received his vendee's unconditional note in ordinary form for the balance of the purchase-

Statute enactment in Vermont.

In Maine.

the passing of the property by the terms of the contract, because "the price is made to depend upon the weight." (*f*)

money, that the vendor no longer had any title to the wagon. Boynton *v.* Libby, 62 Maine, 253; Drew *v.* Smith, 59 Ib. 393; Rawson *v.* Tuel, 47 Ib. 506. The note containing the stipulation is known locally as a "Holmes note." Under the Vermont statute (1870) actual notice of the lien has the same effect as the record thereby required would have if regularly made. Kelsey *v.* Kendall, 48 Vt. 24. The aim of the above statutes, in Maine and Vermont, is certainly in the direction of safety, and to that extent their provisions are founded in obvious wisdom. Something of the kind is clearly a measure of prudence to notify the public of the relation of the parties to such sales. There is a statute provision in Iowa which is substantially the same. Code of Iowa (1873), § 1922. In Alabama it was held, in the case of Dudley *v.* Abner, 52 Ala. 572, that where the owner delivers a mare to another to keep and work her, with the understanding "that the mare is to belong to the owner until the price is paid, when the owner is to give a receipt or bill of sale," the transaction constitutes a conditional sale, void as against *bonâ fide* purchasers without reference to the registration laws. Manning J. thought the transaction should be viewed in the light of a parol chattel mortgage, and that it was void as to *bonâ fide* purchasers and creditors of the vendee under the influence of §§ 1561, 1562 of the Revised Code of Alabama. The New York cases, Wait *v.* Green, 36 N. Y. 556, and Ballard *v.* Burgett, 40 Ib. 314, and the Michigan case of Preston *v.* Whitney, 23 Mich. 267, were relied upon in support of the above decision in Alabama. See Sumner *v.* Woods, 52 Ala. 94; Weaver *v.* Lapsley, 42 Ib. 601. See Martin *v.* Mathiot, 14 Serg. & R. 214, as to the doctrine as to personalty in Pennsylvania; and Christie and Scott's Appeal, 85 Penn. St. 463, as to chattels real. As to personalty, conditional sales such as have here been treated of are declared void as to the creditors of the vendee, but as to real estate a different principle is said to apply. As a matter of fact the last case cited *supra*, and which lays down this doctrine as to real estate, was a case of a lease of real estate and not a sale. The Illinois doctrine is that *bonâ fide* purchasers, and even attaching creditors, without notice, of the conditional vendee acquire a right superior to that of the vendor. In March *v.* Wright, 46 Ill. 487, Lawrence J. said: "It was a conditional sale, with a right of rescission on the part of the vendor, in case the purchaser should fail in payments of his instalments — a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of losing his lien, in case the property should be levied upon by creditors of the purchaser while in possession of the latter." Jennings *v.* Gage, 13 Ill. 610; Brundage *v.* Camp, 21 Ib. 330; McCormick *v.* Hadden, 37 Ib. 370; Lucas *v.* Campbell, 88 Ib. 447; Van Duzor *v.* Allen, 90 Ib. 499; Waters *v.* Cox, 2 Bradwell (Ill.) 129; Fosdick *v.* Schall, 99 U. S. 235. The Kentucky doctrine is, that as between vendor and vendee the condition as to title is good, but as to innocent purchasers the condition is inoperative. Vaugh *v.* Hopson, 10 Bush, 337; Greer *v.* Church, 13 Ib. 430. See as to difference between a conditional sale and sale with right to repurchase, Mahler *v.* Schloss, 7 Daly, 291.]

Iowa.

Alabama.

Pennsylvania doctrine.

Illinois doctrine.

Kentucky doctrine.

(*f*) [In this case, Lord Ellenborough said that, by the terms of the contract, two things in the nature of conditions or preliminary acts, on the part of the vendee, necessarily preceded the absolute vesting in him of the property contracted for: the first was, the payment of the agreed price; the second was, the act of *weighing*, which, from the terms of the contract, was

§ 322. In Rugg *v.* Minett (*g*) a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the vendors, out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity by weight, and the last two lots were then to be weighed and paid for according to the actual weight. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but a few remained unfilled, and the last two lots had not been weighed, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The court held that the property had passed in those lots only which had been filled up, because, as Lord Ellenborough said, "Everything had been done by the sellers which lay upon them the means of ascertaining the amount of the price. The weight must, therefore, be ascertained, in order that the price might be known and paid; and unless the weighing preceded the delivery, it could never, for these purposes, effectually take place at all. And he proceeded to lay down the general doctrine, that "if anything remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer." Story J. in Barrett *v.* Goddard, 3 Mason, 111, 112. But the general rule thus stated by Lord Ellenborough is much broader than the case before him required. The only point which called for a decision, and which was decided in the case, was that the sale, being for cash, the payment of it was a condition precedent to the passing of the title to the property. The weighing was necessary to the ascertainment of the amount to be paid — an incident to the payment — but not of itself a substantive requisite to the passing of the title. The case of Hanson *v.* Meyer does not decide that if the sale in that case had been on credit, the weighing of the starch must have preceded the vesting of the title in the purchaser. But the inference from the case so put, as it stands on the facts, is, that if the payment had not been considered a condition of passing the title, the weighing, to ascertain the amount to be paid, would not have been. In Simmons *v.* Swift, 5 B. & C. 857, Littledale J. said: "The question in Hanson *v.* Meyer was, whether the assignees of the purchaser had a right to call for *delivery* of the goods sold. Lord Ellenborough said: 'Payment of the price and the weighing of the goods necessarily preceded the absolute vesting of the property;' which expression I take to have been used with reference to the then question, viz. whether the property had so vested in the purchaser as to entitle his assignees to claim the delivery. So, in this case, although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained, and the price paid."]

Rugg *v.* Minett.

Hanson *v.* Meyer, observations on.

(*g*) 11 East, 210; [McNeil *v.* Kelcher, 15 U. C. C. P. 470, in which the principle of Rugg *v.* Minett was applied to a sale of an unmeasured mass of wood, cut and lying on the vendor's premises.]

to perform in order to put the goods in a deliverable state." And Bayley J. said that it was incumbent on the buyer "to make out that something remained to be done to the goods by the sellers at the time when the loss happened." (*h*)

§ 323. In Zagury *v.* Furnell (*i*) the property was held not to have passed, in a sale of "289 bales of goat skins, from Magadore, per *Commerce*, containing five dozen in each bale, at the rate of 57*s.* 6*d.* per doz.," (*k*) because, by the usage

Zagury *v.* Furnell.

(*h*) [One of the conditions of sale in Rugg *v.* Minett was: "25*l.* per cent. is to be paid to the auctioneer, as a deposit, immediately after the sale, and the remainder in thirty days. *The remainder of the purchase-money is to be paid on the goods being delivered.*" This was not then a sale on credit. Le Blanc J. said: "The turpentine was purchased as so much per cwt., and it was to be taken according to the weight marked on each lot; but the casks were to be filled up by the sellers out of turpentine *belonging to them*, in order to make the weights agree with the marks. I say *belonging to the sellers*, because the last two casks were only sold according as their actual weights should turn out to be, after filling up the rest; and if more turpentine had been wanted than those casks could have supplied for filling up the rest, *it must have been settled which of the respective purchasers was to take less than his calculated quantity.*" In Simmons *v.* Swift, 5 B. & C. 857, Bayley J. said: "In Rugg *v.* Minett, and Wallace *v.* Breeds, the thing which remained to be done was to vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases the thing sold was to be separated from a larger quantity of the same commodity. *This case was different; the subject-matter of the sale was clearly ascertained.*" This remark, made by one of the learned judges who participated in the decision of Rugg *v.* Minett, is very significant, and suggestive that the court in that case were impressed with the idea that the subject-matter of the sale was not clearly ascertained. The fact that it is coupled with the case of Wallace *v.* Breeds, in which the sale was of fifty, being an unsevered part of ninety tons of oil, renders the suggestion still more important. Blackburn J. however, thinks that the subject-matter in Rugg *v.* Minett was ascertained. Sales, 156.]

Rugg *v.* Minett, observations on.

(*i*) 2 Camp. 240.

(*k*) [It should be added, that the skins were "to be taken as they now lie, with all faults, paid for by good bills, at five months." In this respect the case stands the same as if the contract had been for payment of cash. It presents the converse proposition to that stated by Judge Story, in Barrett *v.* Goddard, 3 Mason, 111, where he says: "Therefore, where goods are sold to be paid for by a note on time, and the note is given to the vendor, the property in the goods passes to the vendee in the same manner and under the same circumstances as it would if the contract were for cash, and the cash were paid." Now, if in Zagury *v.* Furnell the sale had been for cash, the number of skins must have been ascertained in order to know how much money was to be paid; and so the number must have been ascertained in order to know the amount for which the note was to be given or the bills drawn; not necessarily as a condition precedent to the passing of the property, but as a prerequisite to the ascertainment of the price to be paid; which, in a case of a sale for cash or note, in distinction from a sale on credit, must necessarily precede the passing of the title to the purchaser.]

Zagury *v.* Furnell, observations on.

of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, and this had not been done when the goods were destroyed by fire. This was a decision of Lord Ellenborough at nisi prius, and the reporter states that, after the plaintiff's nonsuit, he brought another action in the common pleas, and was again nonsuited by Sir James Mansfield C. J. who concurred in opinion with Lord Ellenborough. In Simmons *v.* Swift (*l*) the sale was of a specified stack of bark, at 9*l.* 5*s.* per ton, and a part was weighed and taken away, and paid for. Bayley J. and the majority of the court held that the property had not passed in the unweighed residue, (*m*) although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary." (*n*)

Simmons *v.* Swift.

§ 324. In Logan *v.* Le Mesurier (*o*) the sale was on the 3d of December, 1834, of a quantity of red pine timber, then lying above the rapids, Ottawa River, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes at ninety days from the date of sale, at the rate of 9½*d.* per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at 9½*d.*, and if it fell short, the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet before delivery, according to the con-

Logan *v.* Le Mesurier.

(*l*) 5 B. & C. 857.

(*m*) [Although there was originally a period of credit given for the bark, yet the day of payment was passed at the time when the part taken was paid for, and when the plaintiff required the defendant to take and pay for the rest of the bark. The action was for bark sold and delivered, and all the judges agreed that there had been no delivery, and consequently the action could not be maintained. The decision of the point respecting the transfer of title was not called for, and was made by a divided court.]

Simmons *v.* Swift, observations on.

(*n*) [See Prescott *v* Locke, 51 N. H. 94, 103, 104; Stevens *v.* Eno, 10 Barb. 95; Dixon *v.* Myers, 7 Grattan, 240; Waldo *v.* Belcher, 11 Ired. 609; Messer *v.* Woodman, 22 N. H. 178. A sale was made of a large pile of slate, at a certain price per ton, to be paid for as parcels of it should from time to time be taken away, and the purchaser, having paid the price of fourteen tons, was held entitled to have that quantity weighed and separated for him, but that until such separation he had no property in any specific fourteen tons, and could not maintain trover therefor. Young *v.* Austin, 6 Pick. 280.]

Young *v.* Austin.

(*o*) 6 Moore P. C. 116. See, also, Wallace *v.* Breeds, 13 East, 522; Rusk *v.* Davis, 2 M. & S. 397; Austen *v.* Craven, 4 Taunt. 644; Shepley *v.* Davis, 5 Taunt. 617; Withers *v.* Lyss, 4 Camp. 237; Boswell *v.* Kilborn, 15 Moore P. C. 309; [Hutchinson *v.* Hunter, 7 Penn. St. 140.]

tract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive, the raft was broken up by a storm, and a great part of the timber lost, before it was measured and delivered. Held that the property was not transferred until measured, (*p*) and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

§ 325. In Gilmour *v.* Supple, (*q*) where the facts were identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were: "Sold Allan, Gilmour & Co a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole 7¼*d.* per foot." The raft *was delivered* to the buyer's servant at the appointed place, and broken up by a storm the same night. The court held, in this case, that the property had passed, because it was proven that the raft *had been measured before delivery*, by a public officer, and it was not to be *measured again by the vendor*. The buyer was at liberty to measure it for his own satisfaction, as in Swanwick *v.* Sothern, (*r*) but the vendor had lost all claim on the timber, and all lien for price, and there was nothing further for him to do, either alone, or concurrently with the purchaser. (*s*)

Gilmour *v.* Supple.

Goods measured for buyer's satisfaction only.

Swanwick *v.* Sothern.

§ 326. In Acraman *v.* Morrice, (*t*) the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions that he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own expense, conveying them from Monmouth to Chepstow. The timber in controversy had been bought, measured, and paid for, but the rejected portions had not yet been severed by Swift, when he became bankrupt, and the felled trees then lay on his premises. Defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover,

Acraman *v.* Morrice.

(*p*) [Prescott *v.* Locke, 51 N. H. 94; Gibbs *v.* Benjamin, 45 Vt. 124.]

(*q*) 11 Moore P. C. 551; [and 5 U. C. C. P. 318.]

(*r*) 9 Ad. & E. 895.

(*s*) [See Prescott *v.* Locke, 51 N. H. 94; Gibbs *v.* Benjamin, 45 Vt. 124; Bethel Steam Mill Co. *v.* Brown, 57 Maine, 9; Cooper *v.* Bill, 3 H. & C. 722.]

(*t*) 8 C. B. 449.

by the assignees of bankrupt. Held, property had not passed to buyer, Wilde C. J. saying, that "several things remained to be done by the seller; . . . . it was his duty to sever the selected parts from the rest, and convey them to Chepstow, and deliver them at the purchaser's wharf. (*u*)

§ 327. But in Tansley *v.* Turner (*x*) the sale by the plaintiff was as follows: "1833. Dec. 26 Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, say 1*s.* 7½*d.* Payment on or before 29 Sept. 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled;" and some trees were measured and taken away the same day. The remaining trees were marked and measured some time afterwards, and the number of cubic feet in the several trees were taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement and send it to Jenkins. This was not done, but it was held that the property had passed, nothing remaining to be done by the vendor (*y*) to the thing sold. (*z*)

Tansley *v.* Turner.

Cooper *v.* Bill (*a*) was very similar to the above case in the facts, and was decided in the same way, Tansley *v.* Turner, however, not being cited by the counsel or the court.

Cooper *v.* Bill.

§ 328. In Castle *v.* Playford (*b*) the contract was for the sale of a cargo of ice to be shipped, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser *takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever*, and the said Playford to *buy and receive the said ice on its arrival at ordered port* . . . . and to pay for the same in cash *on delivery* at 20*s. per ton, weighed on board during delivery.*" Decla-

Castle *v.* Playford

(*u*) [See Prescott *v.* Locke, 51 N. H. 94; Bethel Steam Mill Co. *v.* Brown, 57 Maine, 9; Boynton *v.* Veazie, 24 Ib. 286; Terry *v.* Wheeler, 25 N. Y. 520; Kelsea *v.* Haines, 41 N. H. 246, 255; Hale *v.* Huntley, 21 Vt. 147; Brewer *v.* Salisbury, 9 Barb. 511; Olyphant *v.* Baker, 5 Denio, 379; Birge *v.* Edgerton, 28 Vt. 291; Hutchins *v* Gilchrist, 23 Ib. 88; Mills *v.* Camp, 14 Conn. 219; Bradley *v.* Wheeler, 44 N. Y. 495.]

(*x*) 2 Scott, 238; 2 Bing. N. C. 151.

(*y*) [That it is indifferent whether the thing is to be done by the vendor or purchaser, see Fuller *v.* Bean, 34 N. H. 300, 301; Prescott *v.* Locke, 51 Ib. 94, cited *ante*, § 319, note (*c*); Gibbs *v.* Benjamin, 45 Vt. 124, 128.]

(*z*) [See Cunningham *v.* Ashbrook, 20 Mo. 553; Birge *v.* Edgerton, 28 Vt. 291; Hyde *v.* Lathrop, 3 Keyes, 600; Mills *v.* Camp, 14 Conn. 219.]

(*a*) 3 H. & C. 722; 34 L. J. Ex. 161.

(*b*) L. R. 5 Ex. 165; 7 Ex. 98.

ration for the price by the vendor, and plea that the cargo did not arrive at the ordered port, and the plaintiffs were not willing and ready to deliver. On demurrers to the declaration and the plea, Martin and Channell BB. were of opinion (Cleasby B. dis.) that the property did not pass by the terms of the contract, that the time for payment had not arrived, and that the defendant was not liable: but in the exchequer chamber the judgment was unanimous for the plaintiff, Cockburn C. J. and Blackburn J. expressing a very decided opinion that the property passed by the agreement, but the case was not decided on that point, but on the ground that whether the property passed or not, the defendant undertook to pay for it if delivery was prevented by dangers of the sea; and that in cases where property is to be paid for on delivery, and where the risk of delivery is assumed by the purchaser, if the destruction of the property prevents the delivery, the payment is still due, as decided in the cases below cited. (*c*)

Where buyer assumes risk of delivery price must be paid, even if property does not pass, if goods destroyed before delivery.

§ 329. Similar questions were involved in Martineau *v.* Kitching, (*d*) where sugars were sold by the manufacturer to a broker. The terms were, "Prompt at one month: goods at seller's risk for two months." The goods had been marked, and paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitely adjusted and settled when the goods came to be weighed, on delivery; and part of them had been taken away by the purchaser. The residue was destroyed by fire after the lapse of the two months, and before being weighed. Held by Cockburn C. J. that the property had passed to the purchaser: and the other members of the court seemed to agree with him, but the case was decided on the same ground as that of Castle *v.* Playford, *supra*.

Martineau *v.* Kitching.

(*c*) Alexander *v.* Gardner, 1 Bing. N. C. 671; Fragano *v.* Long, 4 B. & C. 219.

Ascertainment of price after goods destroyed.

[Where the payment for specific goods sold on credit is to be made at so much by the pound, or bushel, or the like, and the price if not ascertained, and cannot be ascertained with precision, in consequence of the goods being lost or destroyed, the seller may, nevertheless, recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as may be, by evidence competent for that purpose. Blackburn J. in Martineau *v.* Kitching, L. R. 7 Q. B. 455, 456; Alexander *v.* Gardner, 1 Bing. N. C. 671; Turley *v.* Bates, 2 H. & C. 200; Castle *v.* Playford, L. R. 7 Ex. 98; McConnell *v.* Hughes, 29 Wis. 537.]

(*d*) L. R. 7 Q. B. 436.

§ 330. A statement is made by the learned editors of Smith's Leading Cases, vol. i. p. 148, that "it was held in a modern case in the court of exchequer (which seems not to have been reported) that the property in a specified chattel bought in a shop to be paid for upon being sent home did not pass before delivery;" and in accordance with this is the *dictum* of Cockburn C. J. in the Calcutta Company *v.* De Mattos, (*e*) that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that *the thing sold was to be in the mean time at the risk of the buyer*, the contract is not fulfilled by the seller unless he delivers it accordingly." In both these instances, as in Acraman *v.* Morrice, (*f*) something remained to be done by the seller to the thing sold in order to make the agreement an executed contract. In Langton *v.* Higgins (*g*) it was held that where the buyer had purchased in advance *all* the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him.

Goods sold to be paid for on delivery at a particular place.

Langton *v.* Higgins.

Goods put in buyer's packages.

§ 331. But the property in goods will pass, even though something remain to be done by the vendor, in relation to the goods sold, *after their delivery to the vendee.* (*h*) Thus, where by the custom of the trade, if the goods sold continued to lie at the wharf after the sale, the vendor was bound to pay for the warehousing during

Where something is to be done to the goods by vendor *after* delivery.

(*e*) 32 L. J. Q. B. 322, 355.

(*f*) 8 C. B. 449; 19 L. J. C. P. 57.

(*g*) 4 H. & N. 402; 28 L. J. Ex. 252.

(*h*) [See *post*, § 334, *note* (*t*); Nesmith J. in Kelsea *v.* Haines, 41 N. H. 254, 255; Richmond Iron Works *v.* Woodruff, 8 Gray, 447; Wells J. in Odell *v.* Boston & Maine Railroad, 109 Mass. 50, 52; Scudder *v.* Bradbury, 106 Ib. 422. In Macomber *v.* Parker, 13 Pick. 175, 183, Wilde J. said: "Where the goods are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit, before the actual payment of the price." Lingham *v.* Eggleston, 27 Mich. 324; Cooley C. J. in Wilkinson *v.* Holiday, 33 Ib. 388. See per Shaw C. J. in Orcutt *v.* Nelson, 1 Gray, 543, and in Sumner *v.* Hamlet, 12 Pick. 82, 83, where it was said that the rule that the property does not pass when anything remains to be done, &c. applies to cases of constructive delivery and constructive possession, and not to cases where there is an actual delivery. The same is said by Nesmith J. in Kelsea *v.* Haines, *supra*.]

Actual delivery important as to intention as to title.

fourteen days: held that this did not prevent the property from passing from the moment of the delivery. (*i*) And the same point was held in Greaves *v.* Hepke, (*k*) where by the usage at Liverpool the vendor was bound to pay warehouse rent for two months after the sale, and the goods were distrained during the interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser. The decision would no doubt be the same in other familiar cases, as if a vendor should engage to keep in good order for a certain time after the sale a watch or clock sold; or to do certain repairs to a ship after the sale and delivery. (*l*)

§ 332. In Turley *v.* Bates (*m*) (also reported *sub nom.* Furley *v.* Bates), (*n*) the jury found that the bargain between the parties was for an entire heap of fire-clay, at 2*s.* per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not by the seller, but by the buyer.* (*o*) Without determining this point, the conclusion was drawn that from the terms of the contract as established by the verdict of the jury, the intention of the parties was that the property should pass, and this was what the court must look to in every case. (*p*)

Turley *v.* Bates. Where something is to be done to the goods by the buyer.

§ 333. In Kershaw *v.* Ogden (*q*) the facts as found by the jury were that the defendants purchased four specific stacks of cotton waste, at 1*s.* 9*d.* per pound, the defendants to send their own packer and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the eighty-one

Kershaw *v.* Ogden.

(*i*) Hammond *v.* Anderson, 1 B. & P. N. R. 69.

(*k*) 2 B. & A. 131.

(*l*) [See Marble *v.* Moore, 102 Mass. 443.]

(*m*) 2 H. & C. 200.

(*n*) 33 L. J. Ex. 43.

(*o*) [In Fuller *v.* Bean, 34 N. H. 290, 301, Bell J. said: "We think it is indifferent whether the act to be done to render the sale complete is to be done by the buyer, or by the sellor, or by a third person." Prescott *v.* Locke, 51 N. H. 102; Gibbs *v.* Benjamin, 45 Vt. 124, 128.]

(*p*) Logan *v.* Le Mesurier, 6 Moore P. C. 116, and Hinde *v.* Whitehouse, 7 East, 558. [As to the effect to be given to intention in such cases, see *ante*, § 311, and note (*c*).]

(*q*) 3 H. & C. 717, and 34 L. J. Ex. 159.

sacks. Two days afterwards twenty-one of the sacks were weighed and taken to defendant's premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the quality. The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent its spoiling. Held, in an action on counts for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiffs were entitled to recover, Pollock C. B. saying the case was not distinguishable in principle from Furley *v.* Bates, and Martin B. saying that on the finding "the property in the four stacks *became the property of the buyers*, and the plaintiff became entitled to the price in an action for *goods bargained and sold*." This *dictum* was not necessary to the decision, because there was a special count for non-accepting, under which the recovery could be supported, even if the contract was executory. The *dicta* of the two learned barons in this case may, perhaps, be reconciled with the decision in Simmons *v.* Swift, (*r*) on the ground that the purchasers, by their return of the sacks weighed, and refusal to take any, had waived the condition that the remainder should be weighed by the vendor.

Young *v.* Matthews.

§ 334. In Young *v.* Matthews (*s*) a purchaser of 1,300,000 bricks sent his agent to the vendor's brick-field to take delivery, and the vendor's foreman said that the bricks were under restraint for rent, but if the man in possession were paid out, he would be ready to deliver the bricks; and he pointed out three clumps *from which* he should make the delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded, but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; the court however, laying stress on some other circumstances to show that this was the intention of the parties. This case is only reconcilable with the authorities on the ground that as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule. (*t*)

(*r*) 5 B. & C. 857; *ante* § 323.

(*s*) L. R. 2 C. P. 127; 37 L. J. C. P.

(*t*) [*Ante*, § 311, note (c); Waldron *v.* Chase, 37 Maine, 414. It has been held in many American cases that a contract for the sale of specific goods, and of goods identified and appropriated to the purchaser with his consent, will, if such appears to be the intent of the

Fact that something remains to be done to goods not conclusive

§ 335. Another class of cases illustrative of the rules now under consideration are those in which the subject of the contract is an unfinished or incomplete thing, a chattel

Where the chattel is unfinished

parties, express or implied, from the circumstances, pass to the purchaser the title to the property without delivery, although something may remain to be done by the seller to put the property into the condition in which it is finally to be delivered to the purchaser. See Marble *v.* Moore, 102 Mass. 443; Bemis *v.* Morrill, 38 Vt. 153; Bethel Steam Mill Co. *v.* Brown, 57 Maine, 9; Terry *v.* Wheeler, 25 N. Y. 520; Fuller *v.* Bean, 34 N. H. 302; Riddle *v.* Varnum, 20 Pick. 280; Ford *v.* Chambers, 28 Cal. 13; Burr *v.* Williams, 23 Ark. 244. See § 315, note (*f*), *ante*. So although something remains to be done for the purpose of testing the property, or to fix the amount to be paid, by weighing, measuring, counting, or the like. Fitch *v.* Burk, 38 Vt. 683, 689; Riddle *v.* Varnum, 20 Pick, 283, 284; Chapman J. in Denny *v.* Williams, 5 Allen, 3, 4; Wilde J. in Macomber *v.* Parker, 13 Pick. 182, 183; Cushman *v.* Holyoke, 34 Maine, 289; Farnum *v.* Perry, 4 Law Rep. (Boston) 276; Williams *v.* Adams, 3 Sneed (Tenn.), 359; Ford *v.* Chambers, 28 Cal. 13; Filkins *v.* Whyland, 24 N. Y. 341; Russell *v.* Carrington, 42 Ib. 118; Terry *v.* Wheeler, 25 Ib. 525; Bellows J. in Ockington *v.* Richey, 41 N. H. 279; Hyde *v.* Lathrop, 3 Tr. App. (N. Y.) 320; Cummins *v.* Griggs, 2 Duvall, 87; Burr *v.* Williams, 23 Ark. 244; Kelsea *v.* Haines, 41 N. H. 246, 255; Boswell *v.* Green, 1 Dutcher (N. J.), 390, 398; Sewell *v.* Eaton, 6 Wis. 490; Warren *v.* Milliken, 57 Maine, 97; Cushing *v.* Breed, 14 Allen, 376; Dennis *v.* Alexander, 3 Penn. St. 50; McCandlish *v.* Newman, 22 Ib. 465; Stone *v.* Peacock, 35 Maine, 385; Butterworth *v.* McKinly, 11 Humph. 206; Watts *v.* Hendry, 13 Florida, 523; Wilkinson *v.* Holiday, 33 Mich. 386; Shelton *v.* Franklin, 68 Ill. 333; Woodruff *v.* United States, 7 Ct. of Cl. 605; Graff *v.* Fitch, 58 Ill. 373; Groat *v.* Gile, 51 N. Y. 431; Morrow *v.* Reed, 30 Wis. 81; Morrow *v.* Campbell, Ib. 90; Straus *v.* Minzesheimer, 78 Ill. 492; The Bank of Montreal *v.* McWhirter, 17 U. C. C. P. 506. But, on the other hand, where by the intent of the parties anything remains to be done before the sale is to be considered by them as complete, whether to be done by the vendor or purchaser, or by a third person, the right of property does not pass; Prescott *v.* Locke, 51 N. H. 94; Foster *v.* Ropes, 111 Mass. 10; Walrath *v.* Ingles, 64 Barb. 265; Darden *v.* Lovelace, 52 Ala. 289; Pike *v.* Vaughan, 39 Wis. 499; Levey *v.* Lowndes, 2 Low. C. 257; Flanders *v.* Maynard, 58 Ga. 56; although the property itself may be placed in the hands of the purchaser. See Ward *v.* Shaw, 7 Wend. 404; Fuller *v.* Bean, 34 N. H. 290; Parker *v.* Mitchell, 5 Ib. 165; Stone *v.* Peacock, 35 Maine, 385; Messer *v.* Woodman, 22 N. H. 181, 182; Ockington *v.* Richey, 41 Ib. 275, 281; Field *v.* Moore, Hill & Denio, 418, 421; Kein *v.* Tupper, 52 N. Y. 550. Delivery to the purchaser is, however, regarded as very strong evidence of a completed sale, generally decisive, as against any presumption arising from the mere fact that the goods sold have not been counted, weighed, measured, or the like. Kelsea *v.* Haines, 41 N. H. 246, 254, 255; Macomber *v.* Parker, 13 Pick. 175; Scudder *v.* Bradbury, 106 Mass. 422; Odell *v.* Boston & Maine Railroad, 109 Ib. 50; Wilkinson *v.* Holiday, 33 Mich. 386; Toledo &c. R. R. Co. *v.* Chew, 67 Ill. 378; Cooley J. in Lingham *v.* Eggleston, 27 Mich. 328; Ober *v.* Carson, 62 Mo. 209; Pike *v.* Vaughan, 39 Wis. 499; *ante*, § 331, note (*h*). In Halterline *v.* Rice, 62 Barb. 597, 598, Mullin J. said: "So long as courts permit intention to enter into the determination of questions of this kind, so long will cases be left to be determined by their own peculiar facts and circumstances; and while that is the case the law of sales will be involved in doubt, and the parties to them in litigation."]

Delivery to purchaser generally decisive.

or incomplete, property does not pass unless contrary intention be shown.

not in a deliverable state, as a partly built carriage or ship. Leaving out of view the cases (*u*) where no specific chattel has been appropriated (to be considered *post*, ch. v.), it will be found that the courts have held it necessary to show an express intention in the parties that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule that governs where goods are not in a deliverable state. (*x*)

(*u*) Mucklow *v.* Mangles, 1 Taunt. 318; Bishop *v.* Crawshay, 3 B. & C. 418; Atkinson *v.* Bell, 8 B. & C. 277.

(*x*) [Thorndike *v.* Bath, 114 Mass. 116. The rule that the title to property does not pass while anything remains to be done to ascertain either the quantity or price applies as well to property thereafter to be manufactured as to that already *in esse*. Halterine *v.* Rice, 62 Barb. 593. The general rule of law is that under a contract for supplying labor and materials, and making a ship or other chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This rule must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract. Bigelow C. J. in Williams *v.* Jackman, 16 Gray, 517; Elliott *v.* Edwards, 6 Vroom, 265; Wright *v.* O'Brien, 5 Daly, 54. Where a party contracts to repair a house and furnish the materials, the title to the materials does not pass until they are affixed to the house. Johnson *v.* Hunt, 11 Wend. 135; Abbott *v.* Blossom, 66 Barb. 353. It has been held that neither the manufacture of an article, pursuant to the order of a customer, nor the tender of the article, when manufactured, is sufficient to transfer the title. Moody *v.* Brown, 34 Maine, 107. See Pettingill *v.* Merrill, 47 Ib. 109. There must be an acceptance of the article, either express or implied, before the title will pass. Moody *v.* Brown, *supra;* Andrews *v.* Durant, 1 Kernan (N. Y.), 35; Blaisdell *v.* Souther, 6 Gray, 149, 152; Mixer *v.* Howarth, 21 Pick. 205; Gamage *v.* Alexander, 14 Texas, 414; Johnson *v.* Hunt, 11 Wend. 139; Bennett *v.* Platt, 9 Pick. 558; Veazie *v.* Holmes, 40 Maine, 69; Elliott *v.* Edwards, 6 Vroom (N. J.), 265; Merritt *v.* Johnson, 7 John. 473; Gregory *v.* Stryker, 2 Denio, 628; Sutton *v.* Campbell, 2 Thomp. & C. (N. Y.) 595; The West Jersey R. R. Co. *v.* The Trenton Car Works, 3 Vroom, 517; Middlesex Co. *v.* Osgood, 4 Gray, 447; Rider *v.* Kelley, 32 Vt. 268; McIntyre *v.* Kline, 30 Miss. 361; Brown *v.* Foster, 113 Mass. 136; Zaleski *v.* Clark, 44 Conn. 218; Gowans *v.* Consolidated Bank of Can. 43 U. C. Q. B. 318; Powers *v.* Barber, 7 Alb. L. J. 170; Higgins *v.* Murray, 73 N. Y. 252; Hubbard *v.* O'Brien, 8 Hun, 244; § 351, note (*m*), *post*. But in Goddard *v.* Binney, 115 Mass. 450, the facts of which are stated *ante*, § 109, note (*y*), it was held that when the seller has done everything he was to do under an executory agreement for the manufacture and sale of a specific chattel, which was to be manufactured in conformity with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk. On this point Ames J. said: "In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it else-

In case of goods to be manufactured, strong presumption that title is not to pass until completion.

Title to materials used in repair of building.

But actual delivery by manufacturer not always necessary.

§ 336. In the case of Woods *v.* Russell, (*y*) decided in 1822, the ship-builder had contracted with defendant to build a ship for him and to complete her in April, 1819; the defendant was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched; the ship was measured *with the builder's privity* while yet unfinished, *in order that defendant might get her registered in his name;* the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third instalment. On the 30th the builder committed an act of bankruptcy, and on the 2d of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the shipbuilder's privity*, for a voyage. An action in trover was brought by the assignees of the bankrupt, and it was held that the property had passed, "because the ship-builder signed the certificate to enable the defendant to have the ship registered in the defendant's name, and by that act consented, as it seems to us, that the general property in the ship could be considered *from that time* as being in the defendant." It is thus clearly intimated that, in the absence of some special evidence of intention, the property would have remained in the builder. Woods *v.* Russell.

§ 337. In Clarke *v.* Spence (*z*) the defendants were the assignees of a bankrupt ship-builder named Brunton. In February, 1832, Brunton had agreed to build a ship Clarke *v.* Spence.

where than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within the statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession." See Higgins *v.* Murray, 4 Hun (N. Y.), 565; Pratt *v.* Maynard, 116 Mass. 388; Shawhan *v.* Van Nest, 25 Ohio St. 490, cited and stated *post*, § 763, in note (*s*).]

(*y*) 5 B. & Ald. 942. [This case was followed with approval in Sandford *v.* Wiggins Ferry Co. 27 Ind. 522. See Anglo-Egyptian Navigation Co. *v.* Rennie, L. R. 10 C. P. 271, 282.]

(*z*) 4 A. & E. 448. See, also, Reid *v.* Fairbanks, 13 C. B. 692; 22 L. J. C. P. 206; [Anglo-Egyptian Navigation Co. *v.* Rennie, L. R. 10 C. P. 271, 281.]

(not the one in question in the action) for the plaintiff, according to certain specifications, under the superintendence of an agent appointed by plaintiff, for 3,250*l.* payable as follows: 400*l.* when the ship was rammed, 400*l.* when timbered, 400*l.* when decked, 500*l.* when launched, the residue, 1,500*l.*, half at four and half at six months. In July he agreed to build another vessel, of specified dimensions, for 3,400*l.*, to be finished like the previous ship, and "the vessel to be launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Howard (plaintiff's agent) to superintend the building and to be paid 40*l.* for the same." Brunton proceeded to build the vessel, and before his bankruptcy she was rammed and timbered, and two instalments paid accordingly. 200*l.* were also paid by anticipation on account of the third instalment. When Brunton became bankrupt, 1,002*l.* 11*s.* had been paid him on account, and the frame of the vessel was then worth 1,601*l.* 13*s.* 7*d.*, that being the value of the timber and work done on her. The case was elaborately argued in November, 1835, and held under advisement till the ensuing February, when Williams J. delivered the judgment. Much stress had been laid, in argument, on a passage in the opinion delivered by Bayley J. in Atkinson *v.* Bell, (*a*) in which he said that "the foundation of the decision in Woods *v.* Russell (*b*) was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price *the ship was irrevocably appropriated to the person paying the money;* that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams J. showed that in Woods *v.* Russell (*c*) the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful. . . . . Until the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel not for parts of a vessel, and we have not been able to find any authority

(*a*) 8 B. & C. 277, 282.
(*b*) 5 B. & A. 942.
(*c*) Ibid.

for saying that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of Woods *v.* Russell." The court, however, held that the passage cited from Woods *v.* Russell was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and *is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser.*" The court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this *dictum* from Woods *v.* Russell as a *rule of construction*, by which, in similar ship-building contracts, the parties are held to have by implication evinced *an intention that the property shall pass*, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time. (*d*)

Where contract for building a ship provides for payment by instalments.

§ 338. The next case was Laidler *v.* Burlinson, (*e*) in the exchequer, in 1837, in which the court recognized the authority of Woods *v.* Russell and Clarke *v.* Spence, but held those cases not applicable to the contract before it. A ship-builder having a vessel in his yard about one third completed, a paper was drawn up describing her build and materials, ending with the words: "for the sum of 1,750*l.*, and payment as follows, opposite to each respective name." This was signed by James Laing, the ship-builder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing simply, "Thomas Laidler, one fourth." The whole number of shares was not made up till after the ship-builder had com-

Laidler *v.* Burlinson.

(*d*) [See Elliott *v.* Edwards, 6 Vroom, 265; Sandford *v.* Wiggins Ferry Co. 27 Ind. 522; Briggs *v.* A Light Boat, 7 Allen, 287; Williams *v.* Jackman, 16 Gray, 514; Andrews *v.* Durant, 1 Kernan, 35.]

(*e*) 2 M. & W. 602.

mitted an act of bankruptcy. The plaintiff proved some payments made on account, and the ship-builder became a bankrupt while the vessel was still unfinished. Held, that there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in Woods *v.* Russell or Clarke *v.* Spence. I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The court held that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. Suppose the builder had died after the first instalment was paid, the ship in its then state would have become the property of the purchaser, and not of the executor. A party may agree to purchase a ship when finished, or as she stands." Parke B. said: "If a man bargain for a special chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (Langfort *v.* Tiler, 1 Salk. 113). But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. . . . . Is this a contract for an article to be finished? In that case, the article must be finished before the property vests."

Wood *v.* Bell.

§ 339. In Wood *v.* Bell, (*f*) in 1856, the plaintiffs contracted with Joyce, a ship-builder, for a steamer to be built by the latter for 16,000*l.* The contract was in March, 1854, and the price was payable, 4,000*l.*, in four equal parts, on days named in March, April, May, and June; 3,000*l.* on the 10th August, 1854, "providing the vessel is plated and decks laid;" 3,000*l.* on the 10th October, "providing the vessel is ready for trial;" 3,000*l.* on the 10th January, 1855, "providing the vessel is according to contract, and properly completed;" and 3,000*l.* on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame, not decked, and about two thirds plated. The instalments contracted for were paid by the plaintiff, in advance.

(*f*) 5 E. & B. 772, and 25 L. J. Q. B. 148, and S. C. in Cam. Scacc. 6 E. & B. 355, and 25 L. J. Q. B. 321.

The plaintiff had a superintendent, who supervised the building, objected to materials, and ordered alterations, which were submitted to by Joyce. In July, the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the plaintiff's name was, at his own instance, punched on a plate riveted to the keel of the ship. It also appeared that in November the plaintiff urged Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of everything he possessed;" but during the discussion he admitted that the ship was the property of the plaintiff. On these facts, the court of queen's bench, and the exchequer chamber on writ of error, held that the property in the vessel had passed to the plaintiff, Lord Campbell saying, when giving the judgment of the court, that the terms which made the payments dependent on the vessel's being built to certain specific stages on the days appointed were, "as an indication of intention, substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." The case was determined mainly on the authority of Woods *v.* Russell (*g*) and Clarke *v.* Spence. (*h*)

§ 339 *a*. [In Anglo-Egyptian Navigation Co. *v.* Rennie, L. R. 10 C. P. 271, it appeared that the defendants entered into an engagement with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing engines, according to a specification. The engines, boilers, and connections were, by the contract, to be completed in every way ready for sea, so far as specified, and tried under steam by the engineers (the defendants) previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector. The price of the work was to be 5,800*l*., and was to be paid as the work progressed, in the following manner, viz. 2,000*l*. when the boilers were plated, and 2,000*l*. when the whole of the work was ready for fixing on board, and the balance, 1,800*l*., when the work was

Anglo-Egyptian Nav. Co *v.* Rennie.

(*g*) 5 B. & A. 942.

(*h*) 4 Ad. & El. 468; [The Bank of U. C. *v.* Killaly, 21 U. C. Q. B. 9.]

fully completed and tried under steam. These payments were to be made only on the certificate of the plaintiff's inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of 2,000*l.* had been paid under the contract, when the ship was lost by perils of the sea. The value of the work actually done by the defendants under the contract amounted to 4,118*l.* The second instalment of 2,000*l.* was subsequently paid. At the time of this payment the plaintiffs knew of the loss of the ship, but the defendants did not. The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the 4,000*l.* paid by them to the defendants; but it was held that the contract was an entire and indivisible contract for work to be done upon the plaintiff's ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the 4,000*l.* already paid as upon a failure of consideration.] ([h1])

When property passes in materials provided for completing unfinished chattel.

Woods *v.* Russell.

§ 340. It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel. In Woods *v.* Russell ([h2]) the builder became bankrupt on the 30th June, and on the 2d July the purchaser of the ship took from the builder's yard and warehouse a rudder and cordage, "which the builder had bought for the ship." All that the court said was: "As to the rudder and cordage; as they were bought by Paton specifically for the ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand on the same footing as the ship; and that if the defendant was entitled to take the ship, he was also entitled to take

([h1]) [See *post*, § 570, and notes.] ([h2]) 5 B. & A. 942.

the rudder and cordage as parts thereof." This point did not arise in Clarke *v.* Spence, but in 1839 Tripp *v.* Armitage (*i*) was decided in the exchequer. In that case there was a contract for building a hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys belonging to the hotel owners, with directions to fit the pulleys into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builder became bankrupt. The court held that the property in the frames had not passed out of the builder. Lord Abinger put it on the ground "that there had been no contract for the sale and purchase of goods as movable chattels, but a contract to make up materials and fix them, and until they are fixed, by the nature of the contract the property will not pass." (*k*) His lordship put as a test, that if the sashes had been destroyed by fire the builder would have lost them, for the hotel owners were *not bound to pay for anything till put up and fixed.* Parke B. said, also: "In this case there is no contract at all with respect to these particular chattels: *it is merely parcel of a larger contract.*" Tripp *v.* Armitage.

§ 341. In Goss *v.* Quinton, (*l*) in 1842, an unfinished ship, which the builder had contracted to deliver, was conveyed to the purchaser and registered in his name, but the rudder intended for the ship remained in the builder's yard, incomplete, when he became bankrupt. The court held that proof that the builder *intended* the rudder for the ship, coupled with proof of the buyer's approval of this purpose, *though not given till after the bankruptcy*, was evidence for the jury that the rudder was part of the ship, and the right of property would be governed by the same considerations as would apply to the body of the ship. But this decision is much questioned, as will presently appear, and could not have been made if the test suggested by Lord Abinger in Tripp *v.* Armitage had been applied; for it is manifest that the incomplete rudder in the builder's yard was at his own risk, and if he had remained solvent there would have been no pretext, in case of its destruction by fire, to call on the ship-owner to supply another rudder at his own expense. Goss *v.* Quinton.

(*i*) 4 M. & W. 687.
(*k*) See *ante*, § 108.
(*l*) 3 M. & G. 825.

§ 342. In Wood *v.* Bell (*m*) the contest turned upon valuable materials as well as upon the frame of the ship, and the decision of the queen's bench on this part of the case was reversed in Cam. Scacc. The facts were, that steam-engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam-engines, were spoken of constantly by the builder, before his bankruptcy, as belonging to the *Britannia* engines, that being the name of the ship. There was also a quantity of iron plates and iron angles specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured, and prepared expressly for the ship, but not yet fixed or attached to her. The queen's bench, after holding that the property in the ship had passed, simply added, "and if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and planking designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in Woods *v.* Russell." But in the exchequer chamber (*n*) the decision was reversed, Jervis C. J. giving the judgment of the court, composed of himself, Pollock C. B., Alderson and Bramwell BB., and Cresswell, Crowder, and Willes JJ. It was held that it did not at all follow because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The chief justice said: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that *those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel.* But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. *Nothing that has not gone through the ordeal of being approved as part of the ship passed in my opinion under the contract.*" The other judges concurred, and the case was sent back to the arbitrator for a new award on these principles, which must

Wood *v.* Bell.

(*m*) 5 E. & B 772; 6 E. & B. 355; 25 L. J. Q. B. 148, 321.

(*n*) 6 E. & B. 355, and 25 L. J. Q. B. 321.

now be taken to be the settled law on the point under consideration. (*o*) In the opinion delivered by Jervis C. J., Woods *v.* Russell was doubted on the question of the rudder and cordage, and Goss *v.* Quinton was not only doubted by the learned chief justice, but was unfavorably mentioned by other judges during the argument. Cresswell J. also said: "I am not now better satisfied with the ruling respecting the rudder and cordage in Woods *v.* Russell than I was years ago."

Woods *v.* Russell and Goss *v.* Quinton doubted on this point.

§ 343. Upon the third proposition stated at the beginning of this chapter, the reported case most directly in point is Bishop *v.* Shillito. (*p*) It was trover for iron that was to be delivered under a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery and brought trover for what had been delivered. Abbott C. J. left it to the jury to say whether the delivery of the iron and the redelivery of the bills were to be contemporary, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. Held, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Bayley J. added: "If a tradesman sold goods, to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser." (*q*)

Authorities for third rule.

Bishop *v.* Shillito.

§ 344. The principle of this decision is fully recognized by the judges in Brandt *v.* Bowlby, (*r*) when holding that the property in a cargo ordered by one Berkeley did not pass to him because by the terms of the bargain he was to accept bills for the price as a condition concurrent with the delivery, and had refused to perform this condition. (*s*) So, in Swain *v.* Shepherd, (*t*) it was held by Parke B. that if goods are

Brandt *v.* Bowlby.

Swain *v.* Shepherd.

(*o*) See Baker *v.* Gray, 17 C. B. 462; 25 L. J. C. P. 161; Brown *v.* Bateman, L. R. 2 C. P. 272; [Fairfield Bridge Co. *v.* Nye, 60 Maine, 372.]

(*p*) 2 B. & A. 329, note (*a*).

(*q*) [*Ante*, § 320, note (*d*).]

(*r*) 2 B. & Ad. 932. And see Shepherd *v.* Harrison, L. R. 4 Q. B. 196, 493; 5 Eng. & Ir. App. 116; more fully referred to, *post*, ch. vi.

(*s*) See, also, 2 Williams's Saunders, 47 u, note; [*ante*, § 320, note (*d*).]

(*t*) 1 Mood. & Rob. 223.

sent on an order, to be returned if not approved, the property remains in the vendor till approval.

Barrow v. Coles.

§ 345. To the same effect was the judgment of Lord Ellenborough in Barrow *v.* Coles. (*u*) This was trover for 100 bags of coffee shipped by Norton & Fitzgerald of Demerara. They drew for the value upon one Voss, in favor of Barrow the plaintiff, and sent to the latter the bill of lading attached to the bill of exchange. The bill of lading was indorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. When the bill of exchange was sent with the bill of lading to Voss, he accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he indorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the indorsement on the bill of lading, and that by the dishonor of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns. In a very old case, Mires *v.* Solebay, (*x*) the agreement was that one Alston should take home some sheep and pasture them for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase. (*y*)

Mires v. Solebay.

American cases on the subject of this chapter.

§ 346. The cases in America upon this subject are not in all respects identical with those decided in our courts. In Crofoot *v.* Bennett (*z*) a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee, that he might take the quantity bought. Held, that the property had passed in the number sold. Strong J., in delivering the opinion, said: "It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while

(*u*) 3 Camp. 92.
(*x*) 2 Mod. 243.
(*y*) [See *ante*, § 320, note (*d*).]
(*z*) 2 Comst. (N. Y.) 258.

mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. . . . . The reason is that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular bricks belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, *as upon the object which is to be effected by it.* If that is specification, the property is not changed: if it is merely to ascertain the total value at designated rates, the change of title is effected." (*a*)

(*a*) [The same distinction was maintained in Groat *v.* Gile, 51 N. Y. 431, and the cases of Crofoot *v.* Bennett and Kimberly *v.* Patchin, cited below, and, also, Bradley *v.* Wheeler, 44 N. Y. 495, were cited with approbation. See Hyde *v.* Lathrop, 2 Abb. N. Y. App. Decis. 436.

Groat *v.* Gile. In Groat *v.* Gile it appeared that the vendor contracted to sell to the purchaser two flocks of sheep except "two bucks and a lame ewe" at four dollars per head; the flocks had been examined by the purchaser, and the animals excepted were identified. The purchaser paid twenty-five dollars upon the purchase, and was to take the sheep and pay the balance at a subsequent specified time; the vendor meanwhile was to pasture them. Within the specified time the purchaser paid the balance of the purchase-money and took the sheep; but before this the vendor had sheared the sheep and appropriated the wool. The action was for the conversion of the wool; and the vendor was held liable. The court said: "Under such circumstances, when the terms of the sale were agreed upon and the payment of twenty-five dollars was made to the defendant on account of the purchase-money by the plaintiff, his liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiff was to *take* them

§ 347. In Kimberly *v.* Patchin, (*b*) the owner of a large mass of wheat lying in bulk gave the vendee a receipt acknowledging himself to hold 6,000 bushels, sold for a specified price, subject to the vendee's order: and the title was held to have passed by the sale. (*c*) Whitehouse *v.* Frost (*post*, § 354) was followed and approved. In Russell *v.* Carrington (*d*) the court of appeals of New York applied the same principle to similar facts.

§ 348. In Olyphant *v.* Baker (*e*) the vendor sold barley in bulk at a certain price per bushel, the quantity to be afterwards ascertained. The barley being in the vendor's storehouse, which was to be surrendered to another person at a future day, it was agreed that the barley should be allowed to remain in the store-

without any agency in delivering them on the part of the defendant, and from the time the agreement was made the plaintiff became the owner thereof. . . . . The sale in question was in fact of a particular lot of sheep and lambs, and not of a certain undesignated number to be selected and delivered at a future time, and the postponement of the time for taking them away did not prevent the title passing to the plaintiff." This case was discussed very fully on the evidence of intention. In Arnold *v.* Delano, 4 Cush. 33, 40, Shaw C. J. said: "The reason why marking, measuring, weighing, &c. are necessary is, that the particular goods may be identified." To the same effect is the language of Chancellor Kent, that if the goods "be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified." 2 Kent, 496.]

(*b*) 19 N. Y. 330.

(*c*) [The case of Kimberly *v.* Patchin was distinguished in Foot *v.* Marsh, 51 N. Y. 288, in which it appeared that the defendant executed to the plaintiff a receipted bill of sale of 100 barrels and 4,000 gallons of oil, "to be delivered when called for, subject to twenty shillings per month storage, the quality of the oil to be like the sample delivered." The oil was understood to be a portion of 150 barrels, averaging forty gallons each, consisting of three different qualities, sixty-eight barrels corresponding with the sample, forty-six of a superior quality, and the residue inferior. When the plaintiff called for the oil the defendant delivered 100 barrels, containing but 1,821 gallons. The diminution in quantity occurred by leakage, after the execution of the bill of sale. The action was brought to recover for the deficiency, and it was held that the contract was an executory, not an executed one, and the plaintiff was bound to deliver the quantity specified in the contract. The court (Gray C.) said: "In order to substitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or, as the assignee of the purchaser did in Kimberly *v.* Patchin, maintain replevin for it." A similar case was Hutchinson *v.* Hunter, 7 Penn. St. 140; so Woods *v.* McGee, 7 Ohio, 467, and Warren *v.* Buckminster, 24 N. H. 336. See Clark *v.* Griffith, 24 N. Y. 595; Russell *v.* Carringtoa, 42 Ib. 118; Hall *v.* Boston & Worcester R. R. 14 Allen, 439, 443; Waldron *v.* Chase, 37 Maine, 414; Young *v.* Miles, 20 Wis. 615; Keeler *v.* Goodwin, 111 Mass. 490, cited and stated *post*, § 354, note (*o*).] Foot *v.* Marsh.

(*d*) 42 N. Y. 118.

(*e*) 5 Denio, 379.

house till the vendor transferred the possession of the building: and the purchaser agreed with the transferee of the building to pay storage after that time. The goods were destroyed by fire before being measured, but after the building had passed out of the possession of the vendor. Held, that the facts showed an intention to pass the property in the barley notwithstanding it had not yet been measured, and that the loss must fall on the buyer.

§ 349. In Rourke *v.* Bullens (*f*) the vendor sold a hog on credit, the hog to be kept and fattened till the buyer called for it, and then to be paid for at the current market price according to its weight when called for, and this was held to be a contract purely executory, not passing the property to the buyer. (*g*)

§ 350. In Cushman *v.* Holyoke, (*h*) where the property had actually passed to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to the removal according to the common course of conveyance.

§ 351. The cases of Woods *v.* Russell and Clarke *v.* Spence have not met with universal acceptance in America. Thus, in Andrews *v.* Durant, (*i*) the New York court of appeals held, in a case where the facts were similar to those in the above cases, that the property did not pass to the party ordering the goods till the completion of the work; and the same decision was given in Massachusetts in Williams *v.* Jackman, decided in the supreme judicial court in January, 1861. (*k*) In these two cases the decision of the exchequer chamber in Wood *v.* Bell (*l*) was not before the courts, not being cited in the latter case, and the former case bearing date in 1853, three years before the decision in the exchequer chamber. (*m*)

(*f*) 8 Gray, 549.

(*g*) [See Marble *v.* Moore, 102 Mass. 443.]

(*h*) 34 Maine, 289.

(*i*) 1 Kernan (N. Y.), 35.

(*k*) [16 Gray, 514.]

(*l*) 6 E. & B. 355; 25 L. J. Q. B. 321.

(*m*) [In Briggs *v.* A Light Boat, 7 Allen, 287, 292, Bigelow C. J. said: "The general rule of law is well settled and familiar, that, under a contract for building a ship, or making any other chattel, not subsisting in specie at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, founded for the most part on express stipulations in contracts, by which the property is held to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular

In contract to manufacture chattels, payment in instalments and overseeing the work, not decisive as to title passing.

agreement in a contract concerning the mode or time of making payment of the purchase-money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text writers, that an agreement to pay the purchase-money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant, as indicating the intention of the parties, but they are not in all cases decisive. Both of them may coexist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction under a contract passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him. It is a question of intent, arising on the interpretation of the entire contract in each case." And it was held in the case that, under a contract to build three light vessels for the United States, and to deliver them completed within a fixed time, the builder to be governed during the progress of the building of them by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion, with a provision that the United States may at any time declare the contract null, no title to the vessels passes to the United States until their completion and delivery. The opinion given by Mr. Chief Justice Bigelow in the above case is one of great value and importance. See Wright *v.* Tetlow, 99 Mass. 397; Holderness *v.* Rankin, 2 De G., F. & J. 258; Williams *v.* Jackman, 16 Gray, 514; Sanford *v.* Wiggins Ferry Co. 27 Ind. 522; Elliott *v.* Edwards, 6 Vroom, 265; M'Conihe *v.* N. York & Erie R. R. 20 N. Y. 495; The U. S. Revenue Cutter, Pac. Law Rep. January 23, 1877, 4 Am. Law Times Rep. N. S. 39; Derbyshire Estate, Lang's Appeal, 81 Penn. St. 18; Scull *v.* Shakespear, 75 Penn. St. 297; Coursin's Appeal, 79 Ib. St. 220; § 335, note (*x*), *ante*. In Mount Hope Iron Co. *v.* Buffington, 103 Mass. 62, it was shown that an engine was built by A. for B. under a contract which provided that it should be paid for as the work in it progressed, reserving a margin of twenty per cent. until it should "be started in a satisfactory manner;" that it should be delivered at B.'s dock, and transported at B.'s expense to his works; that B. should prepare a foundation for it, and add to it materials and work of his own; and that A. should be required to furnish at B.'s works only the skilled labor required to set up and start it. The engine was delivered at the wharf, transported to the works, and the whole price paid except the twenty per cent., when it was attached as the property of A. It was held that the title in the property had passed to B. as against A. and his creditors. See Phelps *v.* Willard, 16 Pick. 29.]

Mount Hope Iron Co. *v.* Buffington.

CHAPTER IV.

SALE OF CHATTEL NOT SPECIFIC.

	Section		Section
This is an executory agreement	. 355	Submitted that it does not .	. 357
Does giving of earnest alter property ?	355		

§ 352. WHEN the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass. (*a*) [Until the parties are agreed on the specific individual goods the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold. It can make no difference, although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies; the parties did not intend to transfer the property in one portion of the stock more than in another, and the law, which only gives effect to their intention, does not transfer the property in any individual portion.] (*b*)

This is an executory agreement.

(*a*) [Browning *v.* Hamilton, 42 Ala. 484.]

(*b*) [Blackburn Sales, 122, 128; Warren *v.* Buckminster, 24 N. H. 336; O'Neil *v.* McIlmoyle, 34 U. C. Q. B. 236; Robertson *v.* Strickland, 28 Ib. 221; Middlebrook *v.* Thompson, 19 Ib. 307; McDougall *v.* Elliott, 20 Ib. 299; Cox *v.* Jones, 24 Ib. 81; Dunning *v.* Gordon, 4 Ib. 399; Levey *v.* Lowndes, 2 Low. Can. 257; Pew *v.* Lawrence, 27 U. C. C. P. 402; Indianapolis R. W. Co. *v.* Maguire, 62 Ind. 140; Smyth *v.* Exeer's of Ward, 46 Iowa, 339. Thus in Seudder *v.* Worcester, 11 Cush. 573, A. sold B 250 barrels of pork, part of a larger lot, all of the same quality, having the same marks, and all stored in

Separation. Massachusetts.

There is but little difficulty in the application of this rule. In

the same cellar of A., but no separation was made. B. sold and delivered to C. 100 barrels of the same pork, and afterwards sold D. the remaining 150 barrels, and gave him an order on A. therefor, which, being presented to A., he assented to hold the same on storage for D., but nothing was done to distinguish or separate the 150 barrels from the other pork of similar brand still in A.'s cellar. While the pork remained so stored, B. became insolvent, and A. then refused to deliver the 150 barrels to D. on said order. D. thereupon brought an action of replevin against A. for the 150 barrels of pork, but the court held that the action could not be sustained. See Ropes *v.* Lane, 9 Allen, 502; Golder *v.* Ogden, 15 Penn. St. 528; Waldo *v.* Belcher, 11 Ired. 609; Field *v.* Moore, Hill & Denio, 418; Merrill *v.* Hunnewell, 13 Pick. 215, 218; Gardner *v.* Dutch, 9 Mass. 427; Messer *v.* Woodman, 22 N. H. 172; Bailey *v.* Smith, 43 Ib. 141; Hutchinson *v.* Hunter, 7 Penn. St. 140; Bell *v.* Farrar, 41 Ill. 400; Rodee *v.* Wade, 47 Barb. 63; Tompkins *v.* Tibbits, 1 Hannay (N. B.), 317; Pollock *v.* Fisher, 1 Allen (N. B.), 515; Rigney *v.* Mitchell, 2 U. C. C. P. 266; Stephens *v.* Tucker, 55 Ga. 543; Morrison *v.* Woodley, 84 Ill. 192. The decisions upon this subject, however, are not harmonious. In Chapman *v.* Shepard, 39 Conn. 413, a decision was made entirely at variance with the above case of Scudder *v.* Worcester. There A. sold to B. a mass of bags of meal, of uncertain numbers, on board a vessel, at a certain price per bag, to be paid in cash. B. without paying A., and before the bags had been counted, sold C. five hundred of them, C. giving his promissory note therefor, which he paid at maturity. C. informed A. of his purchase, who told him he could remove the bags when he pleased, but after he had removed a part he requested him to let the rest remain as a bulkhead for some corn, until the corn was discharged. In trover afterwards brought by C. against A. for the remainder of the five hundred bags, it was held that A. was estopped from claiming, either that the title had not passed to B. or that he had a lien on the bags for the price which B. was to have paid. Seymour J. said: "The case depends upon the inquiry whether it be, as the defendant's counsel contend, an absolute rule of law that, upon the sale of a portion of a larger bulk, the contract remains in judgment of law executory until the portion sold is severed and separated for the purchaser from the mass. It must be conceded that this question is not free from difficulty, and that in regard to it respectable authorities differ. In regard to a large class of cases the law is indisputably as the defendant claims. If I sell ten out of a drove of one hundred horses, to be selected, whether by myself or by the vendee, no title can pass until the selection is made. This rule prevails wherever the nature of the article sold is such that a selection is required, whether expressly provided for or not by the terms of the contract. If the articles differ from each other in quantity or quality or value, the necessity of a selection is clearly implied. In all such cases the subject-matter of the contract cannot be identified until severance, and the severance is necessary in order that the subject-matter of the contract may be made certain and definite. But where the subject-matter of the sale is part of an ascertained mass of uniform quality and value, no selection is required, and in this class of cases it is affirmed by authorities of the highest character, that severance is not, as matter of law, necessary in order to vest the legal title in the vendee, to the part sold. The title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title." Phillips *v.* Ocmulgee Mills, 55 Ga. 633. The English cases relied on by the learned court were Whitehouse *v.* Frost, and Busk *v.* Davis, stated in the text; and the de-

Scudder *v.* Worcester.

Connecticut.

Chapman *v.* Shepard.

Wallace *v.* Breeds, (*c*) the sale was of fifty tons of Greenland oil, "allowance for foot-dirt and water as custom- Wallace *v.* Breeds.

cision was "based upon the fact that the bags of meal did not appear to have been in any respect different one from another." In Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, it appeared that the sale was of a certain number of barrels of flour, part of a larger parcel of such barrels, of the same brand and of equal value. The contract was complete in every respect except the separation of the barrels sold. The court held that the title passed, one of the judges saying, "These are not portions of a larger mass to be separated by weighing and measuring, but consist of divers separate and individual things, all precisely of the same kind and value, mixed with other separate and individual things of the same kind and between which there is no difference." The case of Kimberly *v.* Patchin, 19 N. Y. 330, stated *ante*, § 347, points in the same direction; so do Cushing *v.* Breed, 14 Allen, 380, stated *post*, § 354, note (*o*); Warren *v.* Milliken, 57 Maine, 97; and Hall *v.* Boston & Worcester R. R. Co. 14 Allen, 439. In Waldron *v.* Chase, 37 Maine, 414, it was decided that where the owner of a large quantity of corn in bulk sells a certain number of bushels therefrom and receives his pay, and the purchaser takes away a part, the property in the part sold vests in the purchaser, although it is not measured or separated from the heap. But the cases in which the title to goods sold, a part of a larger mass, has been held to pass before severance, are confined to those in which the mass itself is ascertained and of a uniform quality and value. Appleton C. J. in Morrison *v.* Dingley, 63 Maine, 553, 556, 557. This was conceded in Chapman *v.* Shepard, *supra*. In Morrison *v.* Dingley, *supra*, it appeared that Wallace & Co. contracted with the plaintiff to sell him one hundred and twenty-five tons gross of coal, parcel of a cargo of about double that number of tons. The rest of the coal was sold to the defendants. After the plaintiff's teamster had taken from the wharf, upon which the whole cargo had been discharged in an undistinguishable mass, one hundred and twenty-five tons net, the defendants interposed and prevented the removal of any more of it, claiming that they should first take therefrom the same quantity that the plaintiff had received, and that the balance, if any, then remaining should be divided between the parties. It was held (Dickerson J. dissenting) that the plaintiff had acquired no such title to any portion of the coal remaining unweighed upon the wharf as to enable him to maintain trover against the defendants. See Cumberland Bone Co. *v.* Andes Ins. Co. 64 Me. 466. In Hutchinson *v.* Hunter, 7 Penn. St. 140, it appeared that A. the vendor, being the owner of one hundred and twenty-five barrels of molasses, varying somewhat in quantity, sold one hundred barrels to B., but permitted them to remain in the cellar with the others at the purchaser's request. The barrels were not separated or marked, nor were any particular barrels agreed upon. B. sold one hundred barrels to C. and offered to turn them out and gauge them, but they were allowed to remain in the cellar at C.'s request. The molasses having been destroyed by fire before delivery or specification of the particular barrels, it was held, upon full consideration, that B. could not recover from C. the agreed price. See, also, Woods *v.* McGee, 7 Ohio, 466. The case of Foot *v.* Marsh, 51 N. Y. 288, stated *ante*, § 347, note (*c*), was similar. In Warren *v.* Buckminster, 24 N. H. 336, the case showed that the plaintiff bargained with the defendant for fifteen of the best sheep of the defendant's flock, but they were not selected. It

Virginia. Pleasants *v.* Pendleton.

Maine. Waldron *v.* Chase.

Morrison *v.* Dingley.

Pennsylvania. Hutchinson *v.* Hunter.

New Hampshire. Warren *v.* Buckminster.

(*c*) 13 East, 522.

ary." The vendors gave an order on the wharfingers for delivery to

was held that the sale was incomplete until the sheep were selected and designated by marking, or separating from the flock; and that the property did not pass to the plaintiff. Smart *v.* Batchelder, 57 N. H. 140. See Kein *v.* Tupper, 52 N. Y. 550; Southwell *v.* Beezley, 5 Oregon, 143. But see Phillips *v.* Ocmulgee Mills, 55 Ga. 633, in which it was held that, where, out of five or six hundred bales of cotton stored in a warehouse, 125,000 pounds were bargained and sold for the purpose of being used in a factory near thereto, and the purchaser, after the bargain and sale to him, sold one half to his partner in the factory, and a portion of that first bought was consumed in the factory by the firm, and the first purchaser received from his partner full payment for his half in another lot of cotton of the same quantity in another place, such use and acts and circumstances show the intention of the parties to treat the entire 125,000 pounds as delivered for consumption in the factory, to be weighed as needed from time to time, and altogether amount to a sufficient delivery thereof, though the whole quantity sold was not weighed and severed from the bulk. The question of delivery or non-delivery was considered as dependent on the intention of the parties. The leading case in New Jersey on this point is Hurff *v.* Hires, 11 Vroom, 581. In this case Hurff, the plaintiff in error, in the fall of 1873, bought of Heritage two hundred bushels of corn from a lot of four or five hundred bushels which Heritage had in his crib-house. Hurff examined and approved of the grain before he bought it, and paid cash for it at the time of the purchase. The agreement was that the corn should remain in the crib-house until it should become hard enough to keep well in bulk, at which time the vendor was to deliver it. Early in 1874 Hires, as sheriff, by virtue of an execution against Heritage, levied on the entire lot of grain as the property of Heritage. Notwithstanding this fact Heritage subsequently delivered two hundred bushels of the corn to Hurff, whereupon Hires brought trover against Hurff. At the trial it was ruled that as the corn was in bulk, and not separated at the time of the sale, no property passed to Hurff. Upon error Depue J. said: "If the property had remained in bulk — the quantity purchased never having been separated from the mass — the purchaser might not have been able to maintain replevin, for the reason that in replevin the plaintiff must be the owner of the specific chattels he sues for, and must describe them in his writ (citing Scudder *v.* Worcester, 11 Cush. 573.) But that does not solve the question involved in this case. . . . . It is undoubtedly the doctrine of the English courts that, 'where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver what he thinks fit, there the right to them does not pass to the vendee until the vendor has made his selection.' . . . This doctrine is founded on correct principles where the gross bulk is variable in kind or quality, and the selection from it of that part which shall be delivered is of benefit to the vendor. . . . . In my judgment this principle should not be applied where the bulk, from which the quantity purchased is to be separated, is uniform in kind and quality, and has been approved by the purchaser and the full contract price has been paid. . . . In this case, the sale, in all material respects, was complete. The corn had been inspected and approved, and the price agreed on and paid. All these things had been done before the levy of the execution. . . . . The defence was a meritorious one, and no legal principle is in the way of permitting it to be made, if, in fact, the parties intended that the property should pass. That question should have been submitted to the jury." See Hires *v.* Hurff, 10 Vroom, 4. The Kentucky doctrine is well stated in Ferguson *v.* Louisville City National Bank,

Phillips *v.* Ocmulgee Mills.

Hurff *v.* Hires.

New Jersey doctrine.

the purchasers of "fifty tons of our Greenland oil, *ex* ninety tons."

14 Bush, 555. The firm of Krauth, Ferguson & Co., being in embarrassed circumstances, made an assignment of all the firm property to the appellant, John Ferguson. By virtue of the assignment the assignee took possession of and sold a large quantity of bacon, which, at the time of the assignment, was in the warehouse of the firm at Louisville. After the sale the appellees filed a petition asserting a claim to several thousand of the sugar-cured hams that had been sold by the appellant. The claim of the appellees as to title rested on warehouse receipts given to them by the firm prior to the assignment to the appellant. The firm was indebted to the bank, and when the note matured it was renewed by another note, and the following warehouse receipt given to the bank as collateral security: "Received of the Louisville City National Bank thirty-six hundred sugar-cured canvased hams, weighing fifty thousand four hundred pounds, on storage in our pork house, which we will deliver on return of this receipt properly indorsed. These hams are to be packed on delivery without cost, and are marked 'Krauth, Ferguson & Co. Eclipse.'

"KRAUTH, FERGUSON & Co."

Ferguson v. Louisville City Bank.

It appeared that there were many thousand hams in the building having upon them the same trade-mark, "Krauth, Ferguson & Co. Eclipse," at the time the receipts were given, of different weights and value, and that no hams had been separated, set apart, or marked, except as above stated. The statute of March 6, 1869, authorized a warehouseman to give receipts for goods received, and provided that such receipts should be negotiable and transferable by indorsement, "with like liability as bills of exchange now are, and with like remedy thereon." The warehouseman was also authorized to execute a receipt on his own goods for money loaned, and in either case if the receipt is delivered or pledged by the owner for a loan, it operates as a symbolical delivery, and is equivalent to an actual delivery, if there is an absolute sale, so as to protect the vendee against subsequent creditors and purchasers. The statute also requires that "the receipt shall set forth the quality, quantity, kind, and description thereof, and which shall be designated by some mark, and which receipt shall be evidence in any action against said warehouseman." Pryor C. J. said: "The elementary doctrine that there must be some means of designating the property sold or pledged, and to distinguish it from property of a like kind and description, seems not to have been lost sight of, and such a mark or description is made indispensable, in order to give such paper its negotiable or commercial character. The indorsement of a warehouse receipt and its delivery operated to vest the purchaser with the title and possession at common law; but if not for a specific chattel, and the property it represented was a part of a large bulk or mass of articles that required separation, no title passed until separation was had. The doctrine of the common law as to the identification of the property is not changed by this statute; on the contrary, it is maintained, and such particularity required in the descriptive part of the receipt as makes the right of property certain in the holder. The fact that the hams are branded 'Krauth, Ferguson & Co. Eclipse,' the usual and known trademark of the firm, and found on all the hams in the warehouse, is not the mark or distinguishing feature required. It must be such as will enable the party to identify the property and to distinguish it from a similar kind and quality. . . . . While the sale of a specific chattel passes the property to the vendee, although no delivery is made, the doctrine established by all the elementary writers on the subject . . . . is, that, where the subject-matter of the sale is in bulk, and a certain quantity is sold, to be taken from a greater

Kentucky doctrine.

The purchasers became insolvent on the day after this order was sent to the wharfinger, and the order was then countermanded by the vendors, nothing having been done on it. Held that the property had not passed. So, in Busk *v.* Davis (*d*) the vendor had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and sold ten tons of it, giving an order to the purchaser on defendant for "ten tons Riga PDR. flax, *ex Vrow Maria*." In order to ascertain what portion of the flax was to be appropriated to this order, it was necessary to weigh the mats, and this had not been done, when the buyer became insolvent, and the vendor thereupon countermanded the order. Held that the property had not passed.

Busk *v.* Davis.

§ 353. In White *v.* Wilks (*e*) the sale was of twenty tons of oil, out of the vendor's stock in his cisterns. In Austen *v.* Craven (*f*) the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In Shepley *v.* Davis, (*g*) of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing. In Gillett *v.* Hill (*h*) Bayley J. stated the law very perspicuously in the following words: "The cases may be divided into two classes: one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable till that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quan-

White *v.* Wilks.

Austen *v.* Craven.

Shepley *v.* Davis.

Gillett *v.* Hill.

quantity, no title passes until the separation is made. . . . . The English cases sustain the doctrine laid down in the text-books with scarcely an exception. . . The innovation on the rule of the common law has been made by the courts of this country. The leading case of Kimberly *v.* Patchin, 19 N. Y. 303, averse to this doctrine, or rather its reasoning, has been followed by subsequent decisions, until it may be said there is much conflict in the American authorities on the point." Further Kentucky cases are: Moss *v.* Meshew, 8 Bush, 187; May *v.* Hoaglan, 9 Ib. 171; Crawford *v.* Smith, 7 Dana, 59; Newcomb *v.* Cabell, 10 Bush, 460.]

(*d*) 2 M. & S. 397.

(*e*) 5 Taunt. 176.

(*f*) 4 Taunt. 644.

(*g*) 5 Taunt. 617.

(*h*) 2 C. & M. 530.

tity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided.*" (*i*)

§ 354. The only case to be found in the reports, in apparent contradiction to this principle of the law of sale, is Whitehouse *v.* Frost, (*k*) which, notwithstanding explanations by the judges in subsequent cases, is scarcely ever mentioned, without suggestion of doubt or disapproval. In that case the contract was as follows: "Mr. J. Townsend bought of J. & L. Frost ten tons of Greenland oil, in Mr. Stainforth's cisterns, *at your risk*, at 39*l.* = 390*l.*" There were then in the cistern forty tons of oil, which had belonged to Dutton & Bancroft, and they had sold ten tons of it to Frost & Co., and these were the

Whitehouse *v.* Frost.

(*i*) See, also, Campbell *v.* Mersey Docks Company, 14 C. B. N. S. 412; [Hutchinson *v.* Hunter, 7 Penn. St. 140; Young *v.* Austin, 6 Pick. 280; Merill *v.* Hunnewell, 13 Ib. 213, 215; Rapelye *v.* Mackie, 6 Cowen, 250; Downer *v.* Thompson, 2 Hill, 137; Field *v.* Moore, Hill & Denio, 418; Warren *v.* Buckminster, 24 N. H. 336; Fuller *v.* Bean, 34 Ib. 300; Ropes *v.* Lane, 9 Allen, 502; Gardner *v.* Lane, Ib. 498, 499; Colt J. in Merchants' National Bank *v.* Bangs, 102 Mass. 295; Seudder *v.* Worster, 11 Cush. 573; Mason *v.* Thompson, 18 Pick. 305; Keeler *v.* Goodwin, 111 Mass. 490; Davis *v.* Hill, 3 N. H. 382; Messer *v.* Woodman, 22 Ib. 172; Ockington *v.* Richey, 41 Ib. 275; Bailey *v.* Smith, 43 Ib. 143; Stone *v.* Peacock, 35 Maine, 385; Claflin *v.* Boston & Lowell R. R. Co. 7 Allen, 341. Where it appeared that there was a bargain for two thousand telegraph poles, and the vendor had at the time and place of delivery two thousand one hundred and thirty poles, and he notified the purchaser that he was ready to deliver them and receive the price, to which the purchaser made a reply admitting that the vendor had the poles and promising to settle for them soon, but before anything else was done, the poles were carried away by a freshet, it was held, upon the ground that the two thousand poles had not been separated from the entire lot, that the title to them had not vested in the purchaser.

No title passes till goods specified.

Bailey *v.* Smith, 43 N. H. 141. Bellows J. in this case said: "If by the agreement of the parties nothing had remained to be done before the title passed, but the whole had actually been delivered, with proper stipulations for the return of the surplus beyond the two thousand, the case would have been different, as was held in Page *v.* Carpenter, 10 N. H. 77." That is, the title would have passed, as has since been expressly decided in Lamprey *v.* Sargent, 58 N. H. 241. See Crofoot *v.* Bennett, 2 Comst. 258, *ante*, § 346; Macomber *v.* Parker 13 Pick. 175; Weld *v.* Cutler, 2 Gray, 195, 198. That the purchaser has the right of selection, see Call *v.* Gray, 37 N. H. 428, 432. In Hutchinson *v.* Hunter, 7 Penn. St. 145, Mr. Justice Rogers said: "The rule, I take it, is now too well settled to be shaken, that the goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass to the purchaser; until this is done it remains the property of the vendor and not of the vendee." See, also, to the same effect, Haldeman *v.* Duncan, 51 Penn. St. 66, 70; First National Bank *v.* Crowley, 24 Mich. 492; but see Chapman *v.* Shepard, 39 Conn. 413; Pleasants *v.* Pendleton, 6 Rand. (Va.) 473; Waldron *v.* Chase, 37 Maine, 414; *ante*, § 352, note (*b*); note (o), below; Hahn *v.* Fredericks, 30 Mich. 223; Home Ins. Co. *v.* Heck, 65 Ill. 111.]

(*k*) 12 East, 614.

ten tons which the latter sold to Townsend, giving Townsend an order on Dutton & Bancroft for "the ten tons of oil we purchased from you, 8th Nov. last." The order was taken to Dutton & Bancroft by the purchaser, and accepted by them in writing, on the face of the order. Townsend left the oil in the custody of Dutton & Bancroft, and it was not severed from the bulk in the cisterns. It was held that the property had passed, as between Frost and Townsend. Lord Ellenborough put it on the ground that all right in the seller was gone by the acceptance of his delivery order, in favor of Townsend, the seller never having had himself possession, but only a right to demand possession from the bailees, which right he had assigned to Townsend, just as it had been asssigned to himself by his vendors. Grose J. was of opinion that as the *risk was in the buyer*, and the delivery complete so far as the *vendor was concerned*, the property had passed. It was the *purchaser's* business to act with Dutton & Bancroft in drawing off the ten tons of oil. Le Blanc J. put it on the ground that the sale was complete between Frost and Townsend, because nothing remained to be done *between them*. The vendor had given to the purchaser the only possession that the vendor ever had, and the purchaser had accepted this, and Dutton & Bancroft were bailees of the oil for the purchaser's use. All that remained to be done was between the purchaser and *his* bailees. Bayley J. was very much of the same opinion, considering the purchaser's acceptance of an order on Dutton & Bancroft, his presentation of it to them, and obtaining their assent to be his bailees, as equivalent to a consent that the goods should be deemed to have been delivered to him. This case was much questioned in subsequent decisions. (*l*) In Wallace *v.* Breeds (*m*) Lord Ellenborough again said of Whitehouse *v.* Frost, "There nothing remained to be done by the seller to complete the sale between him and the buyer." And in the subsequent case of Busk *v.* Davis, (*n*) where three of the judges (Lord Ellenborough, and Le Blanc and Bayley JJ.) who decided Whitehouse *v.* Frost were still on the bench, they adhered to the decision, both Le Blanc and Bayley saying, however, that the sale was of an "undivided quantity," and that delivery had been made of that undivided quan-

(*l*) See White *v.* Wilks, 5 Taunt. 176; Austen *v.* Craven, 4 Taunt. 644; Campbell *v.* Mersey Company, 14 C. B. N. S. 412; Blackburn on Sales, 125.

(*m*) 13 East, 252.

(*n*) 2 M. & S. 397.

tity so far as in the nature of things it was possible for the vendor to deliver it. (*o*) The cases in which these contracts are consid-

(*o*) [In Cushing *v.* Breed, 14 Allen, 380, Chapman J. said: "When several parties have stored various parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. . . . . This is not like the case of sales where the vendor retains the possession, because there is something further for him to do, such as measuring, or weighing, or marking, as in Scudder *v.* Worster, 11 Cush. 753; nor like the case of Weld *v.* Cutler, 2 Gray, 195, where the whole of a pile of coal was delivered to the vendee, in order that he might make the separation. But the property is in the hands of an agent, and the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal. Hatch *v.* Bayley, 12 Cush. 27, and cases cited. The tenancy in common results from the method of storage agreed upon, and supersedes the necessity of measuring, weighing, or separating the part sold." In Ferguson *v.* Louisville City Nat. Bank, 14 Bush, 555, Pryor C. J.: "One may acquire an interest in property owned by another by purchasing an interest in the whole, as the one fifth, or the one half of a given quantity of bacon or grain. He then becomes a tenant in common with an interest that affects the title to the whole. This illustrates the distinction between tenants in common and the interest acquired by a sale of a chattel or a sale of a quantity of grain to be delivered by the owner. To support an action of detinue or replevin, if the interests in the property wrongfully taken are separate and distinct, the parties cannot join, but must institute separate actions, and if joint tenants or tenants in common they must join." Warren *v.* Milliken, 57 Maine, 97; Hatch *v.* Lincoln, 12 Cush. 31; Hall *v.* Boston & Worcester R. R. Corporation, 14 Allen, 439; Waldron *v.* Chase, 37 Maine, 414; Appleton C. J. in Morrison *v.* Dingley, 63 Ib. 556, 557; Kimberly *v.* Patchin, 19 N. Y. 330; Russell *v.* Carrington, 42 Ib. 118; Chase *v.* Washburn, 1 Ohio St. 244; Wilson *v.* Cooper, 10 Iowa, 565; South Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101; Morrison *v.* Woodley, 84 Ill. 192. In Chapman *v.* Shepard, 39 Conn. 413, the court expressed a doubt whether the title passing in cases like the above is one in severalty or in common; but held that, if it be in common, it is only so in a qualified sense, and the purchaser could maintain trover for his share of the merchandise upon demand made on the vendor and a refusal to deliver. See Gardner *v.* Dutch, 9 Mass. 427; Kimberly *v.* Patchin, 19 N. Y. 330, per Comstock J.; Burton *v.* Curyea, 40 Ill. 320, 329; McPherson *v.* Gale, Ib. 368; Spence *v.* Union Marine Ins. Co. L. R. 3 C. P. 427; Morgan *v.* Gregg, 46 Barb. 183; Channon *v.* Lusk, 2 Lansing, 211; Buckley *v.* Gross, 3 B. & S. 566, 575; Wood *v.* Fales, 24 Penn. St. 246, 248; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; 6 Am. Law Rev. 450 *et seq.* In some cases, it is assumed that persons who deposit their grain in these public elevators retain their title; see Cushing *v.* Breed, 14 Allen, 376; Keeler *v.* Goodwin, 111 Mass. 490; Dole *v.* Olmstead, 36 Ill. 150; 41 Ib. 344; Warren *v.* Milliken, 57 Maine, 97; Young *v.* Miles, 20 Wis. 615; 23 Ib. 643; and, of course, if such be

Sale of interest in property: tenants in common.

Language of Chapman J.

Language of Pryor C. J.

ered, by which the vendor agrees to make and deliver a chattel, are reviewed in the next chapter, on "Subsequent Appropriation."

the intention, they may transfer their title and substitute their vendees in their own places; and, in such cases, it would be a very ready and fair inference that the vendor, by a sale, intended to transfer his entire interest, unless the sale was subject to some condition. Usage has made the possession of the warehouse receipts for grain equivalent to the possession of the property itself. The law makes no distinction in regard to grain purchased by the holder of such receipts from others and those acquired from the warehouseman himself. Broadwell *v.* Howard, 77 Ill. 305. The case of Keeler *v.* Goodwin, 111 Mass. 490, is important to be considered in this connection. It appeared that A. sold B. a thousand bushels of grain, part of a larger quantity lying in bulk on storage in a warehouse, and gave him an order on the warehouseman therefor. B. did not pay for the grain, but, for a valuable consideration, indorsed and delivered the order to C., who did not know that B. had not paid for the grain. Before the order was presented to the warehouseman B. had become insolvent, and A. had countermanded the order, and afterwards A. removed the grain; it was held that C. could not maintain an action against A. for conversion of the grain, although there was a usage in the grain trade to consider an order on a warehouseman as a delivery. Wells J. said: "Here was a contract of sale of 1,000 bushels of corn, 'parcel of a larger quantity lying in bulk.' Until separation in some form no title could pass. That it was on storage with a third party, as warehouseman, would make no difference in this respect. Delivery of the order upon the warehouseman authorized him to make the separation or appropriation necessary to complete the sale, by giving to the contract its intended effect upon the specific property covered by it. If that had been accomplished, either by actual separation, or by appropriation to the use or credit of the purchaser, in the usual mode of transacting the business of the warehouse, he would have acquired title, right of possession, and constructive possession of the grain so purchased. Cushing *v.* Breed, 14 Allen, 376; (see *post*, § 358 *a*.) But until some act takes place by which the relations of the warehouseman, in respect to the property in his custody, are modified in accordance with the contract of sale, so that he may be considered as bailee for the seller and purchaser respectively, according to their several interests, and thus released *pro tanto* from his original liability to the seller alone, there is no such appropriation of the grain sold as will ripen the interest of the purchaser into title and right to the possession of any specific portion of the bulk. Whether the assent of the warehouseman is necessary to the imposition of this twofold relation upon him, or whether presentation of the order alone, or notice of the sale, would be sufficient, we need not now determine, because there was neither in this case, until after the authority of the warehouseman to make the appropriation had been revoked. The purchaser, therefore, never acquired any title or right of possession, and could transfer none, and consequently no right of action to the plaintiff." It was provided in Massachusetts in 1878 (St. of 1878, ch. 93, § 3) that "where grain or other property is stored in a public warehouse in such a manner that different lots or parcels are mixed together, so that the identity of the same cannot be accurately preserved, the warehouseman's receipt for any portion of such grain or property shall be deemed a valid title to so much thereof as is designated in said receipt, without regard to any separation or identification." See R. S. Ill. (1880) ch. 114, §§ 120 *et seq*; Bailey *v.* Bensley, 87 Ill. 556, §§ 560, 561.]

Keeler *v.* Goodwin.

Statute provision in Massachusetts as to warehouseman's receipt for unascertained property.

§ 355. This seems to be an appropriate occasion for considering the question whether earnest has any, and what, effect in altering the property in the goods which are the subject-matter of the contract. In former times, when the dealings between men were few and simple, and consisted for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest the property passed. Thus we have seen in the second chapter of this book, that Shepherd's Touchstone contains this rule: (*p*) "If one sell me his horse, or any other thing for money, ... and I give earnest money, albeit it be but a penny, to the seller, ... there is a good bargain and sale of the thing to alter the property thereof." And Noy says (*ante*, § 314): "If the bargain be that you shall give me 10*l.* for my horse, and you give me one penny in earnest, which I accept, this *is a perfect bargain;* you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows very plainly that the authors were considering the subject of the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A. to buy and B. to sell did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, *in whatever form*, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale. So, in Bach *v.* Owen, (*q*) the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered to deliver the colt; but Buller J. said: "The payment of the halfpenny vested the property of the colt in the defendant," and the tender was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which

Does giving of earnest alter property?

Bach *v.* Owen.

(*p*) *Ante*, § 313. (*q*) 5 T. R. 409.

altered the property as soon as the earnest given prevented either party from retracting.

Hinde v. Whitehouse.

§ 356. In Hinde *v.* Whitehouse (*r*) Lord Ellenborough, in considering the mode of passing the property in the sugar sold, rejected a defence founded on the fact that the goods were not ready for delivery because the duties had not yet been paid, and said, *arguendo:* "Besides, after earnest given, the vendor cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His lordship, after quoting this *dictum* from Holt C. J. in Langford *v.* Administratrix of Tyler, Salk. 113, and Noy's Maxims, as above, continued: "On this latter ground, therefore, *I do not think that the sale is incomplete.*" This, again, was the sale of a specific chattel, and the mind of that great judge was plainly intent on the question whether there had been a "*complete* sale," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also, (*s*) if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain, and thus furnishing proof of such a complete contract of sale as suffices to pass property in a specific chattel.

§ 357. No case, however, has been found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing or any other sufficient manner, would not equally have altered the property. It is difficult to conceive on what principle it could be contended that the giving of earnest would pass the property, for example, in fifty bushels of wheat, to be measured out of a larger bulk. In the cases of Logan *v.* Le Mesurier, (*t*) and Acraman *v.* Morrice, (*u*) it was held, as we have already seen (*ante*, §§ 324, 326), that where the *whole purchase-money* had been paid at the time of the contract, the property did not pass in the timber, which was afterwards to be measured on delivery; and it is scarcely conceivable that a penny, delivered under the name

(*r*) 7 East, 558.
(*s*) 2 Black. Com. 447–449.
(*t*) 6 Moore P. C. 116.
(*u*) 8 C. B. 449.

of "earnest," could be more effective in altering the property than the payment of the entire price. It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest. (x)

Submitted that it does not.

(x) [See Groat *v.* Gile, 51 N. Y. 431; *v.* Adams, 4 Selden, 291; Jennings *v.* Flanagan, 5 Dana, 217.] Nesbit *v.* Burry, 25 Penn. St. 208; Joyce

CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

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§ 358. AFTER an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd J. in Rohde *v.* Thwaites, (*a*) "The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes." (*b*)

Executory agreement converted into bargain and sale by subsequent appropriation.

(*a*) 6 B. & C. 388.

(*b*) [In Claflin *v.* Boston & Low. R. R. 7 Allen, 341, the evidence showed that the plaintiffs agreed to buy a quantity of oil, not precisely determined, but within certain limits at a fixed price, to be delivered in Boston; and the owners of the oil agreed to sell it to them. The specific quantity not being settled, nor the oil itself separated and distinguished, this did not constitute a complete sale, but only a contract to sell. But in pursuance of this contract the owners of the oil sent a quantity by railroad to Boston, consigned to themselves, a part of it being also directed to the care of A. Cushman. They notified the plaintiffs that they had sent it, and gave an order for its delivery to the order of one of them, and the plaintiffs paid for

Claflin *v.* Boston & Lowell R. R. Co.

The only difficulty that can arise on this question is, in cases where the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor is, by the express or implied terms of the contract, entitled to make the selection. A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty to *appropriate the goods to the contract.* The difficulty is to determine what constitutes the appropriation; to find out at what precise point the vendor is no longer at liberty to change his intention. It is plain that the vendor's act in simply selecting such goods as he *intends* to send cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him, and no longer revocable.

When vendor is to appropriate the goods.

§ 358 *a.* [A. and B. stored grain in C.'s warehouse, and by the warehouse receipts each was entitled to get a given quantity of wheat, but not the identical wheat delivered. The grain of different owners was mixed in the warehouse. A. and B. agreed to load D.'s vessel with grain, and gave proper orders to that effect to C. C. told the captain that he was shipping all of A.'s wheat first. It was held that this amounted to

Waddell *v.* Macbride.

it. Hoar, J. said: "There was thus an agreement of the parties that this oil should be the property of the plaintiffs; it was sent to the place at which, by the contract, it was to be delivered, and the order upon the freight-bill entitled the plaintiffs to the possession. Nothing more was to be done by the vendors. They had made the delivery which the contract required, and we can have no doubt that it completed the sale, and vested the property in the vendees." Hyde *v.* Lathrop, 2 Abb. N. Y. App. Decis. 436. See Thompson *v.* Conover, 3 Vroom (N. J.), 466; Crawford *v.* Smith, 7 Dana, 55, 61; Gough *v.* Edelen, 5 Gill, 101; Chapman *v.* Searle, 3 Pick, 38; Colt J. in Merchants' National Bank *v.* Bangs, 102 Mass. 291, 295; Coleman *v.* McDermot, 5 U. C. C. P. 303; Macpherson *v.* Fredericton Boom Co. 1 Hannay (N. B.), 337.]

an appropriation by C. and that the property in the grain so first shipped passed to A.(*b*[1])]

Rule as to determination of election.

§ 359. The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind. (*c*) For example, suppose A. sell out of a stack of bricks one thousand to B., who is to send his cart and fetch them away. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind, until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A. should load the bricks into B.'s carts, A.'s election would be determined as soon as that act was done and not before.

Point of time at which property passes.

§ 360. It follows from this, says Blackburn J., that where from the terms of an executory agreement to sell unspecified goods the vendor is to *dispatch* the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the dispatch or other act has commenced*, for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language, "the certainty, and thereby the property, begins by election." (Heyward's case, 2 Coke, 36.) (*d*) But however clearly the vendor may have expressed an

(*b*[1]) [Waddell *v.* Macbride, 7 U. C. C. P. 382; Coffey *v.* Quebec Bank, 20 U. C. C. P. 110, 555.]

(*c*) Heyward's case, 2 Co. 36; Com. Dig. Election; Blackburn on Sales, 128; [Lynch *v.* O'Donnell, 127 Mass. 311.]

d) [In Merchants' National Bank *v.* Bangs, 102 Mass. 291, 295, Colt J. said:

When title vests where vendor is to appropriate.

"When, from the nature of the agreement, the vendor is to make the appropriation, then, as soon as any act is done by him identifying the property, and it is set apart with the intention unconditionally to apply it in fulfilment of the contract, the title vests, and the sale is complete. Thus the delivery of goods to the buyer, or his agent, or to a common carrier, consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be sufficient. If the bill of lading, or

intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not yet final, for it is not made by the authority of the other party nor binding on him. (*e*)

§ 361. A review of the authorities will show the subtle distinction to which this subject gives rise, and the infinite diversity of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the vendor, although appropriating the goods to the contract by dispatching them, still retains control by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the vendor, although appropriating the goods, has reserved expressly or by implication a special property in them, will be separately examined, after disposing of those which are free from this element of controversy.

Review of the authorities.

§ 362. In 1803, in the case of Dutton *v.* Solomonson, (*f*) it was treated as already settled law that where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and *the property vests immediately*. And in the United States the law is established to the same effect. (*g*)

Dutton *v.* Solomonson.

Delivery to carrier.

Law in the United States.

other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee." See Hatch *v.* Lincoln, 12 Cush. 31, 33–35. It was agreed between Ferguson and Wilson that Ferguson should make certain timber for Wilson and mark it as it was made, and that it should be delivered as fast as it was made to the agent of Wilson; and that when so marked and delivered it should become the property of Wilson. The timber was all made for Wilson and was marked for him; part of it was delivered, and all brought out of the woods and taken possession of by Wilson, and sold to a third party. It was held that the failure of Wilson to send out an agent to accept every part as it was made did not prevent the passage of the title as fast as the timber was made and marked. Dunning *v.* Gordon, 4 U. C. Q. B. 399.]

Dunning *v.* Gordon.

(*e*) Blackburn on Sales, p. 128. The accuracy of this statement of the law was attested by Erle J. in Aldridge *v.* Johnson, 7 E. & B. 885, 901; 26 L. J. Q. B. 296; [Coffey *v.* Quebec Bank, 20 U. C. C. P. 110, 555.]

(*f*) 3 B. & P. 582, per Lord Alvanley C. J.

(*g*) Krulder *v.* Ellison, 47 N. Y. 36; [Arnold *v.* Prout, 51 N. H. 587, 589; Garland *v.* Lane, 46 Ib. 245, 248; Woolsey *v.* Bailey, 27 Ib. 217; Smith *v.* Smith, Ib. 244, 252; Putnam *v.* Tillotson, 13 Met. 517; Stanton *v.* Eager, 16 Pick.

§ 363. In 1825 Fragano *v.* Long (*h*) was decided in the king's bench. The plaintiff sent an order from Naples to M. & Sons at Birmingham, for merchandise "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the vendors in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier by being allowed to fall into the water while loading them, and the action was assumpsit against the carrier. It was contended by the defendant that the property had not passed because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the vendors, and they would therefore have been entitled to the bill of lading. But the court held that the property had passed to the plaintiff from the time *the goods left the vendor's warehouse.* Holroyd J. said the principle was that "when goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off." The words above printed in italics suggest that where the vendor pays the charges, it is presumed that he retains the property in the goods. On this point the reader will find a very full exposition of the law in the elaborate opinion of Lord Cottenham, delivering the judgment of the House of Lords in Dunlop *v.* Lambert. (*i*)

Fragano *v.* Long.

Where vendor pays for the carriage.

§ 364. In Rohde *v.* Thwaites (*k*) the appropriation by the vendor was assented to by the purchaser. The purchaser bought twenty hogsheads of sugar out of a lot of

Rohde *v.* Thwaites.

467; Johnson *v.* Stoddard, 100 Mass. 306, 308; Torrey *v.* Corliss, 33 Maine, 336; Barry *v.* Palmer, 19 Ib. 303; Wing *v.* Clark, 24 Ib. 366; Odell *v.* Boston & Maine Railroad, 109 Mass. 50; Rodgers *v.* Phillips, 40 N. Y. 519; Stafford *v.* Walter, 67 Ill. 83; Strong *v.* Dodds, 47 Vt. 348; Morton J. in Suit *v.* Woodhall, 113 Mass. 394; Kline *v.* Baker, 99 Ib. 253, 254; Armentrout *v.* St. Louis Ry Co. 1 Mo. App. 158.]

(*h*) 4 B. & C. 219.

(*i*) 6 Cl. & Fin. 600. [The vendors agreed to load for their vendees and to deliver at the vendee's wharf two barges of coal from the vendor's mines at a certain price. The terms were cash when delivered, free of all charge. The barges were furnished by the vendees and were loaded by the vendors, but could not be returned to the place of delivery of the coal by the vendors by reason of the low state of the water. While the barges were lying at the vendor's works the coal was attached by certain creditors of the vendors, and it was held that the vendees could not maintain replevin for the coal, as the title was still in the vendors. Sneathen *v.* Grubbs, 88 Penn. St. 147.]

Sneathen *v.* Grubbs.

Vendors to load coal and deliver at vendee's wharf; effect of loading alone.

(*k*) 6 B. & C. 388.

sugar in bulk belonging to the vendor. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated to the contract by the vendor, who gave notice to the purchaser to take them away, which the latter promised to do. Held that this was an assent to the appropriation, that the contract was thereby converted into a bargain and sale, and that the property passed.

§ 365. In Alexander *v.* Gardner, (*l*) decided in 1835, the property in a parcel of butter was held to have passed from the plaintiff to the defendant by subsequent appropriation with mutual assent under the following circumstances. The original contract was for "200 firkins Murphy & Co.'s Sligo butter, at 71*s.* 6*d.* per cwt. free on board; payment, bill at two months from the date of lading; to be shipped this month. 11 Oct. 1833." On the 11th November the plaintiff received from Murphy an invoice and bill of lading for these butters, which had not been shipped till 6th November. Defendant waived the delay, and consented to take the invoice and bill of lading, which described the butter, the weights and marks of the casks, &c. The butter was afterwards lost by shipwreck. Held that the subsequent appropriation was complete by mutual assent; that the property had passed, and the buyer must suffer the loss. The case was decided directly on the authority of Fragano *v.* Long and Rohde *v.* Thwaites. Alexander *v.* Gardner.

§ 366. The same principle governed Sparkes *v.* Marshall, (*m*) decided by the same court in the following year (1836). Bamford, a corn merchant, sold to plaintiff "500 to 700 barrels of prepared black oats, at 11*s.* 9*d.* per barrel, to be shipped by Thomas John & Son of Youghall." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiffs that Messrs. John & Son had engaged "room in the schooner *Gibraltar Packet*, of Dartmouth, to take about 600 barrels of black oats on your account." Plaintiff next day ordered insurance, "400*l.* on oats per the *Gibraltar Packet*, of Dartmouth," &c. In this action against the underwriters it was contended by them that the property had not passed, but the court held the contrary. Tindal C. J. said that Bamford's letter to the plaintiff Sparkes *v.* Marshall.

(*l*) 1 Bing. N. C. 671. See, also, Wilkins *v.* Bromhead, 6 M. & G. 963; S. C. 7 Scott N. R. 921.

(*m*) 2 Bing. N. C. 761.

"was an unequivocal appropriation of the oats on board the *Gibraltar Packet*," and "this appropriation is assented to and adopted by the plaintiff, who, on the following day, gives instructions to his agent in London to effect the policy on oats per *Gibraltar Packet*."

Bryans v. Nix.

§ 367. In Bryans *v.* Nix, (*n*) decided in the exchequer in 1839, the facts were, that one Tempany, in Longford, drew a bill of exchange on the plaintiff at Liverpool, against two cargoes of oats, per boats Nos. 604 and 54, represented by two boat receipts or bills of lading, whereby the masters of the boats acknowledged to have received the oats on board, deliverable in Dublin to the plaintiff's agents, for shipment thence to the plaintiff at Liverpool. The plaintiff received, on the 7th February, a letter from Tempany, dated the 2d, containing these two boat receipts, dated the 31st January, and thereupon accepted the bill of exchange which Tempany stated in a letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its cargo, but although the master's receipt for boat 54 was dated on 31st January, the loading of it was only begun on the 1st February, and on the 6th it had received only about 400 barrels out of the 530 barrels called for by the receipt. On that day, the 6th, Tempany, pressed by the importunity of the defendant, to whom he was largely indebted, gave to the defendant an order for both the boat loads, addressed to Tempany's agent in Dublin, and the latter accepted the order and agreed to forward the cargoes to the defendant in London. The defendant obtained possession of the oats in Dublin, and the plaintiff demanded them from him, and brought action on his refusal to deliver them. The loading of the boat No. 54 was completed on the 9th February. On these facts, after elaborate argument and time for advisement, Parke B. delivered the judgment of the exchequer of pleas, holding that the property in the cargo No. 604 had vested in the plaintiff, but not the cargo No. 54. In relation to the first cargo, the decision was on the ground that "the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier, and the case resembles that of Haille *v.* Smith (1 B. & P. 563), where the bill of lading being transmitted for a valua-

(*n*) 4 M & W. 775. [See Prince *v.* Boston & Lowell R. R. Corp. 101 Mass. 542, 547; De Wolf *v.* Gardner, 12 Cush. 26; First National Bank of Green Bay *v.* Dearborn, 115 Mass. 219, 222, 223.]

ble consideration, operated as a change of property *instanter* when the goods were shipped; and it is also governed by the same principle upon which I know that of Anderson *v.* Clark (*o*) was decided, where a bill of lading making the goods deliverable to a factor was, upon proof from correspondence of the intention of the principal to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery." In relation to the cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case is submitted in full, because it does not seem altogether reconcilable with the subsequent case of Aldridge *v.* Johnson, *post*, so far as regards the 400 barrels that had actually been put on board, destined for the plaintiff, *before* Tempany was persuaded to give an order for them in favor of the defendant. The learned baron said (p. 792): "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no specific chattels which were held for them. The undertaking of the boat master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to be put on board, those oats still remained his property; he might have altered their destination and sold them to any one else; the master's receipt no more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should probably have held that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property.

(*o*) 2 Bing. 20. [See Prince *v.* Boston & Lowell R. R. Corp. 101 Mass. 542, 547.]

But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded, (*p*) and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him, for such is the effect of the delivery order of the 6th, and the agreement with Walker of the same date, to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory; on the 9th this appropriation took place by the boat receipt for the 550 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading *on account of the plaintiffs*, but he did not do so."

Remarks on Bryans *v.* Nix.

§ 368. The difficulty felt in receiving this decision as satisfactory arises chiefly from the difference between the facts as stated by the reporter and found by the jury, and the facts as assumed in the opinion of the court. The trial at nisi prius was before Williams J. who told the jury to consider, as regards the cargo of No. 54, "whether, although the loading was not complete, the oats to be put on board were *designated and appropriated to the plaintiff*, as, if they were, he was of opinion that they were entitled to recover that cargo also." The jury found for the plaintiff, finding also, as a fact, "that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete." But in the opinion of Parke B. the quantity loaded at the time when Tempany assumed the power of diverting it to a new consignee, is treated as a trifle, "only a small quantity," instead of about three fourths of the whole as stated by the reporter, and no notice is taken of the ruling of Williams J. or the finding of the jury, although in some earlier passages of the opinion it is expressly stated to be the law, that "if the intention of the parties to pass the property, *whether*

(*p*) The reporter's statement, p. 778, is that on the 6th of February, when defendant's agent first pressed Tempany for security, "boat 54 was still in the canal harbor at Longford, partly loaded, the loading having begun on the 1st February, and about 400 barrels being then on board."

absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or shipmaster, *employed by the consignor* or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough ; and it matters not by what documents this is effected ; nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." The court, however, drew the *legal inference*, notwithstanding the verdict of the jury, that the oats which had been prepared for shipment on No. 54, for which the master had given a receipt in advance, agreeing to deliver them to the plaintiff's agent, and of which about three fourths had actually been put on board before the defendant made his appearance in Longford, *were not received on account of the plaintiff*, and *had not been appropriated to the plaintiff in whole or in part.* In the case of Aldridge *v.* Johnson, (*q*) as will presently be seen, it was held that where the vendor had filled 155 out of 200 sacks of grain for the vendee, in the vendor's own warehouse, and then emptied them again into the bulk, his election was determined as soon as he had filled each sack, and that the property had passed so far as regarded the 155 sacks. But it is remarkable that in Bryans *v.* Nix there is no suggestion, in the argument or in the decision, that there was any difference in the consignee's rights to the 400 barrels already loaded into the boat and the residue which had not been received by the master in fulfillment of the agreement that he was to deliver them to the plaintiff's agent in Dublin ; nor was Bryans *v.* Nix quoted or referred to in Aldridge *v.* Johnson.

§ 369. In Godts *v.* Rose, (*r*) in 1854, there was a conditional appropriation, which was held not to pass the property, because the vendee had not complied with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, who was the vendor, sent to his wharfinger an order to transfer eleven specified pipes to the purchaser, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment

Godts *v.* Rose. Conditional appropriation.

(*q*) 7 E. & B. 885, and 26 L. J. Q. B. 296.

(*r*) 17 C. B. 229, and 25 L. J. C. P. 61.

to the buyer, by a clerk, who also took an invoice of the oils, and asked for a check in payment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned to him, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest, the vendor countermanded his order on the wharfinger. The latter, however, thinking that the property had passed, delivered the whole to the purchaser, against whom the action was then brought in trover. All the judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the check, and that he said so at the time.

§ 370 Aldridge *v.* Johnson (*s*) was decided by the queen's bench, in 1857. The plaintiffs agreed to take from one Knight 100 quarters of barley, out of the bulk in Knight's granary, at 2*l.* 3*s.* a quarter, in exchange for thirty-two bullocks, at 6*l.* apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which Knight was to fill, to take to the railway for conveyance to the plaintiff, and to place upon trucks, free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent 200 sacks to be filled, some of them with his name marked on them. Knight filled 155 of the sacks, leaving in the bulk more than enough to fill the other forty-five sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. The plaintiff afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight, finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again, so as to make it undistinguishable. (*s*[1]) The action was

Aldridge *v.* Johnson.

(*s*) 7 E. & B. 885, and 26 L. J. Q. B. 296.

(*s*[1]) [See Rappleye *v.* Adee, 1 Thomp. & C. (N. Y.) 127. In a case where oats, then in stacks, were purchased and paid for, but were to be threshed and measured by the seller, and then and there delivered to the purchaser, who was to furnish sacks for them, and if he did not furnish enough sacks the balance was to be stored by the seller, it was held that the title passed to the purchaser when the oats were threshed and measured, and the fact that the seller mixed the oats, for which no sacks were furnished, with his own oats, did not divest

Groff *v.* Belche

detinue and trover, against the assignees of Knight, for the barley and the sacks. Held that the property in the barley, in the 155 sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. (*t*) Campbell C. J. said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in plaintiff. I conceive there was here an *a priori* assent; not only was there a sale of barley, but it was a sale of part of a specific bulk, which the plaintiff had seen and he sends the sacks to be filled out of that bulk, and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle J. said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the *election rested with Knight alone:* he had to fill the sacks, which were to be sent to him for that purpose by the vendee, and *as soon as he had done an outward act, indicating his election*, viz, by filling the sacks, and directing them to be sent to the railway, *the property passed.*" (*u*) The decision in Aldridge *v.* Johnson was followed by the exchequer of pleas, in 1857, in Langton *v.* Higgins (*x*) (*ante*, § 330).

Langton *v.* Higgins

§ 371. In 1863, Campbell *v.* The Mersey Docks (*y*) was decided in the common pleas. A cargo of cotton, ex *Bosphorus*, consisting of 500 bales, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought 250 bales, and sold the remainder to other parties. All had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the *13th* September, a certificate or warehouse warrant was sent to the plaintiff for 250 bales, "numbered from 1 to 250, entered by J. P. Campbell, on the 10th September, 1862; rent pay-

Campbell *v.* The Mersey Docks.

the title of the purchaser, but he might maintain replevin therefor. Groff *v.* Belche, 62 Mo. 400.]

(*t*) [See Ropes *v.* Lane, 9 Allen, 509, 510; Mason *v.* Thompson, 18 Pick. 305; Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453.]

(*u*) [See Rappleye *v.* Adee, 1 Thomp. & C. (N. Y.) 127. There was, however, in the above case of Aldridge *v.* Johnson evidence of a subsequent assent of the purchaser, by sending for the barley after it has been put into the sacks. See Butters *v.* Stanley, 21 U C. C. P. 402.]

(*x*) 4 H. & N. 402, and 28 L. J. Ex. 252.

(*y*) 14 C. B. N. S. 412.

able from the 15th September." The plaintiff thereupon paid for the 250 bales, getting the warrant indorsed to him with a delivery order, "for the above mentioned goods," dated 15th September. On 7th October, the plaintiff resold the cotton, and sent the warrant, indorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the samples. The plaintiff then demanded back the warrant, and was told by the defendants, for the first time, that 200 of the bales, numbered from 1 to 250, had been inadvertently delivered on the *11th* and *13th* of September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought suit for the value of the 250 bales. On the trial, the defendants insisted that the appropriation by the company, of the 250 bales, out of the larger number, was not sufficient to vest the property in those specific bales in the plaintiff, without his assent, and Keating J. sustained this view. One of the jury then asked his lordship if the plaintiff's indorsement of the warrant (on the resale) did not amount to such assent, and the learned judge said it was not conclusive, but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and the court refused to order a new trial. Erle C. J. said: "There certainly was some evidence of appropriation, and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question." Willes J. also said: "The real question was whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found that it was. No property in the goods, therefore, ever vested in the plaintiff." But both the learned judges expressed an extra-judicial opinion upon a point, confessedly "not material," to which attention must be directed. Erle J. said: "It has been established by a long series of cases, of which it will be enough to refer to Hanson *v.* Meyer, 6 East, 614, Rugg *v.* Minett, 11 East, 210, and Rohde *v.* Thwaites, 6 B. & C. 688, that the purchaser of an *unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there has been an assent, express or implied, on the part of the vendee.*"

Observations on *dicta.*

Willes J. assented to this statement of the law, and said: "Perhaps the case of Godts *v.* Rose, 17 C. B. 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor. (*z*) It may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance." Care must be taken not to misconceive the true sense of these *dicta*. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the vendor is necessary. Willes J. states this plainly, and Erle J. says that there must be an assent of the vendee express or implied. This assent is implied, as shown by the language of Erle J. himself in Aldridge *v.* Johnson, and in several of the cases already quoted, where by the terms of the contract the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made. That this is the real signification of these *dicta* is also fully shown in the strongly contested case of Brown *v.* Hare, (*a*) in which the unanimous decision of the exchequer chamber was likewise delivered by Erle J.

§ 372. In this case the defendant, at Bristol, bought from the plaintiffs, merchants of Rotterdam, through their broker, residing at Bristol, "twenty tons of best oil, at 47*s*. The plaintiffs wrote to the broker on 19th of April, that they had secured ten tons for the defendant, deliverable in September, and the defendant wrote back "send them by next steamer." The oil was to be shipped "free on board." On the 7th of September the plaintiffs from Rotterdam wrote to the broker to inform the defendant, which he did, that they had shipped "five tons of rape oil for defendant," and on the 8th they forwarded the invoices and bill of lading. The bill of lading was for delivery to the plaintiffs' Brown *v.* Hare.

(*z*) [The sufficiency of a prior assent is involved in the proposition stated by Colt J. in Merchants' National Bank *v.* Bangs, 102 Mass. 291, where he says: "When, from the nature of the agreement, the vendor is to make the appropriation, then as soon as the act is done by him identifying the property, and it is set apart with the intention unconditionally to apply it in fulfilment of the contract, the title vests, and the sale is complete." The purchaser hereby makes the seller his agent, to the extent of the appropriation and assent.]

(*a*) 3 H. &. N. 484, and 27. L. J. Ex. 372, afterwards in Cam. Scacc. 4 H. & N. 822, and 29 L. J. Ex. 6.

"order or assigns," and was indorsed by them on the 8th of September "Deliver the goods to the order of Hare & Co." (the defendants). The invoices specified the casks by marks and numbers; and the bill of lading also identified them in the same way. The letter to the broker containing the invoices and bill of lading thus indorsed reached him on the 10th, after business hours, and on the 11th he sent them to the defendant. The ship was actually lost before the documents were received by the broker, and he knew it, but the defendant did not bear of the loss till about two hours after receiving the bill of lading, and he then immediately returned it to the broker. Bramwell B. dissented from the majority of the court, thinking that there had been no appropriation to pass the property, but Pollock C. B. delivered the judgment, holding that the property had passed, and that the buyer must bear the loss; on the ground, first, that the contract to deliver "free on board" meant that it was to be for account of the defendant as soon as delivered on board; (a^1) secondly, that taking the bill of lading to the shippers' own order, and then indorsing it to the defendant, was precisely the same in effect as taking the bill of lading to the order of the defendant; thirdly, that the bill of lading having been forwarded to the broker only that he might get the defendant's acceptance on handing it over, as provided in the contract, this did not prevent the property from passing, the goods represented by the bill of lading being in the same legal state as if in a warehouse, subject to the purchaser's order, but not to be taken by him without payment of the price. In error to exchequer chamber, this judgment was unanimously affirmed, the court consisting of Erle, Williams, Crompton, Crowder, and Willes, JJ. Erle J. in giving the opinion, said, that "The contract was for the purchase of un-

"Free on board."

(a^1) [In Coleman *v.* McDermot, 5 U. C. C. P. 303 a contract was made to sell flour and deliver it free on board, cash on delivery, or on warehouse receipts. It was said that the stipulation as to the delivery free on board did not constitute a condition precedent to the passing of the title, the goods not being specified at the time of the contract, but was a collateral and superadded undertaking to be performed afterwards. In Howland *v.* Brown, 13 U. C. Q. B. 199, A. sold B. flour to be delivered in May f. o. b. vessels which were to transport it from H. The flour was delivered at H. in May according to contract, but B. had no vessels ready to take it. The flour was put into C.'s warehouse subject to B.'s order and A. paid all charges on the flour up to May 31st. It was held that B. was liable to C. for subsequent warehouse charges up to the time of shipment. Wilmot *v.* Wadsworth, 10 U. C. Q. B. 594; Clark *v.* Rose, 29 Ib. 168, 302; Marshall *v.* Jamieson, 42 Ib. 115; George *v.* Glass, 14 Ib. 514; Butters *v.* Stanley, 21 U. C. C. P. 402.]

ascertained goods, and the question has been when the property passed. For the answer the contract must be resorted to, and under that we think *the property passed when the goods were placed free on board in performance of the contract.* In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, *or on the act of the vendor alone.* If the bill of lading had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion, it did not, under the circumstances."(a^2)

§ 373. In Tregelles *v.* Sewell, (b) in 1863, both buyer and seller were residents of London, and the contract was made there. The purchaser bought "300 tons of Old Bridge rails, at 5*l.* 14*s.* 6*d.* per ton, delivered at Harburg, cost, freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." Held, by all the judges in the exchequer, and afterwards in Cam. Scacc., that by the true construction of this sale the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser. Tregelles *v.* Sewell.

§ 374. The difficulty that sometimes exists in construing con-

(a^2) [See Ogg *v.* Shuter, L.R. 10 C. P. 159, and 1 C. P. D. 47; Coleman *v.* McDermot, 5 U. C. C. P. 303.]

(b) 7 H. & N. 571.

tracts involving the subject now under consideration could hardly be illustrated by a more striking example than the recent case of

The Calcutta Company *v.* De Mattos.

The Calcutta Company *v.* De Mattos, (*c*) argued by very eminent counsel in the queen's bench in Michaelmas Term, 1862, and held under advisement till the 4th July, 1863, when the judges were equally divided in opinion: Cockburn C. J. and Wightman J. differing from Blackburn and Mellor JJ. When the cause was heard in error in the exchequer chamber, (*d*) the diversity of opinion was still more marked; for while three judges (Erle C. J., Willes J., and Channell B.) concurred in opinion with Blackburn and Mellor JJ., and one judge (Williams J.) agreed with Cockburn C. J. and Wightman J., two other judges (Martin and Pigott BB.) differed from both. The facts were these. On the 1st May, 1860, defendant wrote to the company, proposing to supply them with "1,000 tons of any of the first-class steam-coals on the admiralty list, at my option, delivered over the ship's side at Rangoon at 45*s.* per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer. Payment of one half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, the balance by like payment on delivery," &c. &c. The reply of the 4th May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option, ... half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month, ... payment one half of each invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash under discount at the rate of 5*l.* per centum per annum, at your option, and the balance in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and defendant in performance of it chartered the ship *Waban* for Rangoon, the company being no party to the charter, and loaded her with 1,166 tons of coal, taking a bill of lading which expressed that the coal was shipped by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid by the charterer as per charter-party. The charter-party stipulated that the freight was

Diversity of opinion.

(*c*) 32 L. J. Q. B. 322.

(*d*) 33 L. J. Q. B. 214, in Cam. Scacc.

"to be paid in London on unloading and right delivery of the cargo at 40*l.* per ton on the quantity delivered. . . . . one quarter by freighter's acceptance at three months, and one quarter by like acceptance at six months from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination; and the remainder by a bill at three months from the date of the delivery at the freighter's office in London of the certificate of the right delivery of the cargo." The defendant also effected insurance for 1,400*l.* and handed the bill of lading and policy to the company, in pursuance of the contract, together with this letter: "5th July, 1860. Herewith I hand you Ocean Marine policy for 1,400*l.* for this ship, as collateral security against the amount payable by you on account of the invoice order, say 1,311*l.* 15*s.*, receipt of which please own." The answer acknowledged the receipt of the policy "to be held as collateral security for the payment to you of 1,311*l.* 15*s.* on account of the invoice of that shipment." The invoice value of the coals was 2,623*l.* 10*s.*, of which the company paid half to defendant on the 5th July, and the vessel sailed on the 8th, but never arrived at her destination, nor were the coals delivered in conformity with the contract. On these facts it became necessary to decide what was the effect of the contract on the property in the goods, and the right to the price from the time of the handing over the shipping documents and paying half the invoice value. The opinion of Blackburn J. was the basis of the final judgment, and was approved by the majority of the judges. It is so instructive on the whole subject as to justify copious extracts. The learned judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the vendor is discharged, and the purchaser is bound to pay him the price. See Dunlop *v.* Lambert (6 Cl. & Fin. 600).

If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See Dunlop *v.* Lambert. But the parties may intend an intermediate state of things ; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." Referring to the terms of the contract under consideration, the learned judge proceeded to remark : " It is clear that the coals are to be shipped in this country, on board a vessel to be engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as De Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. After this he could never have been required nor would he have had the right to ship another cargo for the company ; so that from that time, what had originally been an agreement to supply *any* coals answering the description, became an agreement relating to those coals only, just as much as if the coals had been specified from the first. . . . . In construing this contract the *primâ facie* construction is that the parties intended the *property in the coals vested in the company*, and the right to the price in De Mattos, *as soon as it came to relate to specific ascertained goods*, that is, on

the handing over of the documents; and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one half of the price, the intention that it should be paid only 'on completion of the delivery at Rangoon,' seems to me as clearly declared as words could possibly declare it; and consequently I think as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos, so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that *the goods were sold and delivered*, though the payment of half the price was contingent on the delivery at Rangoon, and this I think is the true legal construction of the contract." Wightman J. was of opinion that on the true construction of the contract the *whole cargo remained the property of the vendor and at his risk;* that he was bound to deliver the whole at Rangoon; and that the transfer of the policy and bill of lading to the company was a security to protect the company in recovering back their advance of one half the price in the event of De Mattos's failure to make delivery at Rangoon. Cockburn C. J. thought that the *property in the coals passed to the company*, subject to the vendor's lien for the payment of the price; that the coals, when shipped, were *specifically appropriated* to the company; and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure. But that De Mattos remained bound to make delivery in Rangoon, and by breach of that contract was bound to return the half of the price already paid, and to lose his claim for the remainder. In the exchequer chamber, Erle C. J. expressed his concurrence with the opinion of Blackburn J. as to the true meaning and effect of the contract, and Willes J. and Channell B. did the same. Williams J. merely expressed his assent to the views of Cockburn C. J. Martin B. gave his view of the true intention of the parties, without declaring whether and when, if at all, the property passed, but remarked: "I cannot say that I agree with my brother Blackburn's judgment:" and Pigott B. expressed his concurrence with the interpretation of the contract by Martin B.

Jenner v. Smith

§ 375. In Jenner *v.* Smith, (*e*) where the sale was made by sample, and was of two pockets of hops out of three that were lying at a specified warehouse, the vendor instructed the warehouseman to set apart two out of the three pockets for the purchaser, and the warehouseman thereupon placed on two of them a "wait-order card," that is, a card on which was written, "to wait orders," and the name of the vendee; but no alteration was made in the warehouseman's books, and the vendor remained liable for the storage. The vendor then sent an invoice with the numbers and weights to the buyer of these two pockets with a note at the foot, "The two pockets are lying to your order." Held that the property had not passed, because the buyer had not made the vendor his agent for appropriating the goods to the contract, nor abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation. (*f*) In Ex parte Pearson, re Wiltshire Iron Company, (*g*) the purchaser had ordered and paid for the goods, and the company loaded the goods on a railway to his address, and sent him the invoice *after* the presentation of a petition for winding up the company, but *before* order made, and it was held that the property had passed to the purchaser and could not be taken by the official liquidator as assets of the company.

Ex parte Pearson.

Vendor's election must be in conformity with the contract.

Cannot elect more than contract requires, and leave buyer to select.

§ 376. Before leaving this branch of the subject, it is well to notice that the property does not pass even when the vendor has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods than those ordered and throw the selection on the purchaser. (*g*[1]) Thus, in Cunliffe *v.* Harrison, (*h*) it was held that where an order was given for ten hogsheads of claret, and the vendor sent

(*e*) L. R. 4 C. P. 270.

(*f*) [It seems to be a clear inference from this case, that, on a sale of unascertained goods, the purchaser may authorize the seller to make a selection and appropriation, which shall pass the title and bind the purchaser, without any further assent on his part. The remarks of Willes J. in Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 488, 490, quoted *ante*, § 155, note (*o*), are worthy of attention in this connection. See Hyde *v.* Lathrop, 2 Abb. N. Y. App. Decis. 436; Burnett *v.* McBean, 16 U. C. Q. B. 466; Coffey *v.* The Quebec Bank, 20 U. C. C. P. 110, 555; Lynch *v.* O'Donnell, 127 Mass. 311.]

(*g*) L. R. 3 Ch. App. 443.

(*g*[1]) [See Croninger *v.* Crocker, 62 N. Y. 151.]

(*h*) 6 Ex. 903. See, also, Hart *v.* Mills, 15 M. & W. 85, and Dixon *v.* Fletcher, 3 M. & W. 145.

fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract, and thus no property had passed. And in Levy *v.* Green, (*i*) the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware teapots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. In the court below (*k*) there was an equal division of the judges: Lord Campbell and Wightman J. holding that the defendant had a right to reject the whole on account of the articles sent in excess, and Coleridge and Erle JJ. being of a different opinion; but in the exchequer chamber, Martin, Bramwell, and Watson BB. and Willes and Byles JJ. were unanimous in holding, with Lord Campbell and Wightman J., that the property had not passed, and that the purchaser had the right to reject the whole. (*l*)

Cunliffe *v.* Harrison.

Levy *v.* Green.

§ 377. The decisions as to subsequent appropriation in cases where the agreement was for the delivery of a chattel to be manufactured begin with Mucklow *v.* Mangles, (*m*) in 1803. Pocock ordered a barge from one Royland, a barge builder, and advanced him some money on account, and paid more as the work proceeded, to the whole value of the barge. When nearly finished, Pocock's name was painted on the stern, but by whom and under

Subsequent appropriation of chattel to be manufactured.

Mucklow *v.* Mangles.

(*i*) 1 E. & E. 969, and 28 L. J. Q. B. 319.

(*k*) 27 L. J. Q. B. 111.

(*l*) [Tarling *v.* O'Riordan, 2 L. R. Ir. 82; Shannon *v.* Barlow, 9 Ir. Jur. N. S. 229. In Rommel *v.* Wingate, 103 Mass. 327, the plaintiff in New York wrote to the defendants in Boston, offering to sell them coal, and stating that he had a vessel of 375 tons which he could load "on Monday." The defendants telegraphed in reply, on the Monday next after the date of the letter, "Ship that cargo, 375 tons, immediately." The plaintiff did not begin to load till nine days afterwards, and then shipped a cargo of 392 tons. Morton J. said: "This bound the defendants to receive a cargo of 375 tons, to be loaded at once. It did not bind them to take a larger cargo, or one which could not be shipped substantially as speedily as proposed by the plaintiff in his letter. If, by a change of circumstances, the plaintiff was unable to comply with this order of the defendants, he should have so informed them. He had no right to substitute a larger cargo, deliverable at a more remote time, in place of the cargo ordered by the defendants, and the defendants were not obliged to receive the substituted cargo upon its arrival in Boston." See Barrowman *v.* Free, L. R. 4 Q. B. D. 500.]

Election by vendor must conform to contract.

(*m*) 1 Taunt. 318; [Dempsey *v.* Carson, 11 U. C. C. P. 462.]

what circumstances is not stated in the report. The barge was finished and seized on execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. Held that the property had not passed, Heath J. saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of the goods so sold."

Bishop *v.* Crawshay.

§ 378. In Bishop *v.* Crawshay, (*n*) it was held by the queen's bench, in 1824, that no property passed to the defendant in goods which he had ordered from a manufacturer in the country, and on account of which he had accepted a bill of exchange for 400*l*. The manufacturer had received the order on the 26th January, had committed an act of bankruptcy not known to the defendant on the 5th February, and on the 6th drew the above mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and on the 15th a commission issued against the bankrupt, by whose assignees the action of trover was brought. Holroyd J. said: "The goods were made, but until the money paid was appropriated to these particular goods the defendant could not have maintained trover for them, if they had been even sold to another person." (*n*[1])

Atkinson *v.* Bell.

§ 379. In Atkinson *v.* Bell, (*o*) already fully explained (*ante*, § 99), the purchaser had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the vendor had written to ask the purchaser by what conveyance they were

(*n*) 3 B. & C. 415.

(*n*[1]) [Where a bill of exchange attached to bills of lading is discounted by a party on the faith of the bills of lading, this constitutes an appropriation of the goods mentioned in the bills of lading, and the consignee therein named cannot, having notice of the above facts, sell the goods to a third person to satisfy an antecedent debt of his. Holmes *v.* German Security Bank, 87 Penn. St. 525; First Nat. Bank *v.* Pettit, 9 Heiskell (Tenn.), 447.]

Discounting bills attached to bills of lading constitutes an appropriation of the goods.

(*o*) 8 B. & C. 277. [Note to Shawhan *v.* Van Nest, 15 Am. Law Reg. (N. S.) 153, 160.]

to be sent, but had received no answer, when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods *bargained and sold*, this form of action not being maintainable where the property has not passed. (*p*) Held that the form of action was misconceived; it should have been for not accepting the goods; the property had not passed, for although the vendor *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another at any time before the buyer assented to the appropriation. (*p*[1]) This is perhaps the strongest case in the books on this subject, for the conduct of the vendor was as near an approximation to a determination of election, without actually becoming so, as one can well conceive. It is distinguishable from Fragano *v.* Long (*q*) only on the ground that in this latter case the order was to *dispatch* the goods for the buyer's account, and when the goods were dispatched it was really the act of the buyer through his agent the seller, and this act of the buyer constituted an implied assent to the appropriation made by the seller, which then became no longer revocable. In Atkinson *v.* Bell this element was deficient. But there was another circumstance in that case, adverted to in the judgment of the court, which renders it almost impossible to distinguish it from Rohde *v.* Thwaites. (*r*) The defendant had made Kay his agent to *procure the machines;* and the report states that they were altered so as to suit Kay, and then packed up by *Kay's directions*, which is equivalent to their being packed up by the buyer's own directions; and surely if the buyer, after goods have been completed on his order, is informed by the seller that they are ready for him, and then examines and directs them to be packed up for him, this constitutes as strong an assent to the appropriation as was given by the purchaser in Rohde *v.* Thwaites, when he said, without seeing the sugar that had been packed up for him, that he would send for it. Many attempts have been

Remarks on this case.

(*p*) [Sargent J. in Gordon *v.* Norris, 49 N. H. 376, 382; Bailey *v.* Smith, 43 Ib. 143, 144; Thompson *v.* Alger, 12 Met. 428, 443, 444; Jenness *v.* Wendell, 51 N. H. 63; Spicers *v.* Harvey, 9 R. I. 582.]

(*p*[1]) [Gowans *v.* Consolidated Bank of Canada, 43 U. C. Q. B. 318; Gooderham *v.* Dash, 9 U. C. C. P. 413; Coleman *v.* McDermot, 5 Ib. 303; *ante*, § 335, note (*x*); Robertson *v.* Strickland, 28 U. C. Q. B. 221; O'Neil *v.* McIlmoyle, 34 Ib. 236; Bank of Up. Can. *v.* Killaly, 21 Ib. 9.]

(*q*) 4 B. & C. 219.

(*r*) 6 B. & C. 388.

made to reconcile Atkinson *v.* Bell with the principles recognized in the other cases on the subject, but it is very difficult to avoid the conclusion that a conflict really exists, and that if correctly reported, the case would not *on this particular point* be now decided as it was in 1828.

§ 379 *a.* [The plaintiffs were dealers in glass ware. They made a contract with the G. glass company by which the company was to manufacture a quantity of glass chimneys. Some of the chimneys were to be of special shapes made only for the plaintiffs and according to shapes furnished by them. Others were of ordinary shapes. Such goods as were not immediately needed were to be stored by the company and shipped as directed. They were to be stored subject to the plaintiffs' orders, the company to pay the storage. The plaintiffs ordered various packages, and the company from time to time invoiced the packages as made, and drew for the price. The goods were stored by the company, and the company told the plaintiffs that the goods were stored for them and at their risk; but such was not the fact. The goods were received by the warehouseman as the goods of the company, and he had no knowledge that such was not the fact. Receipts were given each week for goods then in store and not covered by previous receipts. The greater part of these receipts were transferred to the defendant as collateral security for negotiable paper discounted by it for the company. The company having failed, the plaintiffs made a demand on the warehouseman for the property covered by the above mentioned receipts. On an interpleader to try title a verdict was found for the defendant, and a rule for the defendant to show cause why the verdict should not be set aside was discharged. Harrison C. J. said: "The reading of these cases satisfies us, that in order to the passing of property, either manufactured to order or bought from a larger quantity of the same class of goods, there must, as a general rule, not only be an appropriation on the part of the seller, but an assent to the appropriation on the part of the purchaser. . . . . If the manufacturers in this case had delivered the goods to the warehouseman as and being the goods of the plaintiffs, and the warehouseman so accepted them, there would, we apprehend, be a sufficient delivery to pass the property in the goods to the plaintiffs, but the fact is,

Gowans *v.* Consolidated Bank of Canada.

Buyer must assent to appropriation by vendor.

that the delivery of the goods to the warehouseman was as and being the goods of the manufacturers." (r^1)]

§ 380. In Elliott *v.* Pybus, (s) in 1834, a machine was ordered by defendant, and he deposited with plaintiff 4*l.* on account of the price. When completed, he saw it, paid 2*l.* more on account, but made no final settlement. In reply to a demand for 10*l.* 19*s.* 8*d.*, the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. This was held an assent to the appropriation, and a count for goods bargained and sold was maintained. The cases in relation to the appropriation of an unfinished chattel, paid for by instalments during the progress of the work, have already been examined in chapter iii. of this book, § 335 *et seq.*

Elliott *v.* Pybus.

Appropriation of chattel during progress of manufacture.

(r^1) [Gowans *v.* Consolidated Bank of Canada, 43 U. C. Q. B. 318.]

(s) 10 Bing. 512; [Shawhan *v.* Van Nest, 15 Am. Law Reg. (N. S.) 153, 162.]

CHAPTER VI.

RESERVATION OF THE JUS DISPONENDI.

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Preliminary observations on this subject.

§ 381. It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser are general rules of *construction* adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules from their very nature cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

§ 382. The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A., in New York, orders goods from B., in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods,

to be delivered to A. on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B. had the least idea of passing the property to A. at the time of appropriating the goods to the contract. (*a*) So that although he may write to A., and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B., or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to A. These are the most simple forms in which the question is generally presented; but we shall see that in this class of cases, as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*. (*a*[1])

Walley *v.* Montgomery.

§ 383. In Walley *v.* Montgomery (*b*) the plaintiff had ordered a cargo of timber from S. & Co., and they informed him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading and invoice, advising that they had drawn on him at three months, "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight," &c. S. & Co. sent at the same time

(*a*) [Mason *v.* The Great Western Railway Co. 31 U. C. Q. B. 73.]

(*a*[1]) [The vendor may retain his hold upon the goods to secure payment of the price, although he puts them in course of transportation to the place of destination, by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading, or carrier's receipt, in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement, to the purchaser, and in all cases where he manifests an intention to retain this *jus disponendi* the property will not pass to the vendee. Practically, the difficulty is to ascertain, where the evidence is meagre or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way. Colt J. in Merchants' National Bank *v.* Bangs, 102 Mass. 295, 296; Allen *v.* Williams, 12 Pick. 297; Stanton *v.* Eager, 16 Ib. 473; Stevens *v.* Boston & Worcester R. R. Co. 8 Gray, 262; Coggill *v.* Hartford & New Haven R. R. Co. 3 Ib. 545; Farmers' & Mechanics' Bank *v.* Logan, 74 N. Y. 568; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360; Sprague *v.* King, 1 Pugsley & Burbridge (N. B.), 241; The New Brunswick Ry. Co. *v.* McLeod, Ib. 257.]

Vendor may retain hold on goods though they be put in transportation.

(*b*) 3 East, 585.

another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant for the cargo, offering to accept the bills of exchange, but the latter insisted on immediate payment; and on the plaintiff's refusal, sold the cargo, under direction of S. & Co. Trover was brought, and Lord Ellenborough at first nonsuited the plaintiff, who did not prove a tender of the freight, but afterwards joined the other judges in setting aside the nonsuit, on the ground that the property passed by the invoice and bill of lading, and that the vendor had lost all rights over the goods, save that of stoppage *in transitu* (as to which see *post*, book V. ch. v.).

§ 383 *a*. [One Fisler bought of Spaulding, of Elmira, certain goods, which were to be paid for by the paper of Wireman indorsed by Fisler. The goods were to be delivered at Elmira, the consignee to pay the freight. Spaulding delivered the goods to the Lehigh Valley R. R. Co. at Elmira, his order being to forward them to Wireman at Philadelphia. At the same time Spaulding wrote to Fisler sending him a bill for the goods, the receipt of the railroad, and a draft for Wireman's acceptance and Fisler's indorsement. On the day the goods were sent, Spaulding received information which led him to believe that neither Wireman nor Fisler was good for the amount of the bill for the goods. Spaulding then had another receipt made out by the railroad company, by which the goods were made deliverable to his order. The next morning additional security was demanded from Wireman and Fisler, which they refused to give. Spaulding then ordered the railroad company to deliver the goods to certain third parties. The Lehigh Valley road subsequently delivered the goods to the plaintiff, at the junction of the two roads. The way bill contained this language: "J. Wireman, ... Philadelphia. Deliver only on the order of H. C. Spaulding." The car containing the goods was forwarded to Philadelphia with this restriction contained in the way bill. Fisler, after having heard of the arrival of the goods, sold them to Wireman, receiving $500 on account, and gave Wireman the memorandum of shipment, the invoice of Spaulding, and the Lehigh Valley R. R.'s receipt. Wireman upon presenting these and paying the freight received the goods. Spaulding having returned the note of Wireman brought suit against the present plaintiff for the

Philadelphia & Reading R. R. Co. v. Wireman.

value of the goods and recovered judgment, which the company paid. The company then instituted this suit to recover the value of the goods. There was no evidence tending to establish the insolvency of Fisler at the time of the purchase. Sterrett J. said: "The testimony fairly justified the inference that after Spaulding had taken the receipt of the Lehigh Valley Railroad Company, and mailed it to Fisler, he doubted the solvency of Wireman and Fisler, and induced the company to restrict the delivery to the consignee, by adding to the bill of lading the words above quoted, and when the goods were transferred to the plaintiff company .... the same direction was inserted in its way bill. But neither Fisler nor Wireman was a party to this change in the terms of shipment, and were not bound by it. If the goods were purchased and delivered at Elmira, as contended by the defendant, the title had passed from Spaulding and vested in the purchaser. After an unqualified delivery to the carrier at Elmira, they were no longer at the risk or under the control of Spaulding, and he had no right to say that, on reaching their destination, they should not be delivered to the consignee without his order."(b^1)]

§ 384. In Coxe *v.* Harden (c) the property was held to have passed under somewhat singular circumstances. Oddy & Co. of London ordered a purchase of flax, from Browne & Co. of Rotterdam, who executed the order, and sent an invoice to Oddy & Co., and a bill of lading, *unindorsed*, by which the goods were made deliverable to Browne & Co., and a letter, stating, "We have drawn on you at two usances in favor of Lucas, Fisher & Co., &c. We close this account in course." Browne & Co. then sent another bill of lading of the same set to the plaintiff, *indorsed, for the purpose of securing the amount of their bill upon Oddy & Co.* Oddy & Co. transferred their unindorsed bill to the defendant, in payment of an antecedent debt, and the defendant got delivery of the flax on that bill, and sold it, notwithstanding plaintiff's warning and demand for the goods under his indorsed bill. The action was trover, and the court held, that even assuming the plaintiff to have all the rights of the vendor, he could not succeed, because the property in the goods had passed by the shipment for the buyer's account, and no right remained in the vendor, save that of stoppage *in transitu*. No notice was taken of the vendor's purpose to retain a *jus dispo-*

Coxe *v.* Harden.

(b^1) [Philadelphia R. R. Co. *v.* Wireman, 88 Penn. St. 264.]

(c) 4 East, 211.

nendi, Lord Ellenborough saying, that *the only thing* which stood between Oddy & Co. and their right to possession was "the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns." It is to be remarked of this case, that the date at which the bill of lading was indorsed by Browne & Co. to the plaintiff was not shown; that it was perhaps not so indorsed till after the goods had got into possession of the defendant, and stress was laid on this by one of the judges. At the same time no one of them adverted to the fact as having any influence on the decision, although printed in italics in the report, that the indorsed bill of lading was sent to the plaintiff by Browne & Co. expressly "for the purpose of securing the amount of their bill upon Oddy & Co." See Moakes *v.* Nicholson, (*d*) and Brandt *v.* Bowlby, (*e*) *infra*.

Remarks on this case.

§ 385. In Ogle *v.* Atkinson (*f*) it was again held that the property had passed, notwithstanding the vendor's attempted reservation of a *jus disponendi*, but the attempt was fraudulent. The plaintiff ordered goods from Smidt & Co., at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of plaintiff, and as being plaintiff's own goods, according to the statement of Smidt & Co. themselves. They afterwards obtained from the captain, by fraudulent misrepresentation, bills of lading in blank, for the goods so shipped, and sent them to their agent, with orders to transfer them to a third person, unless plaintiff would accept certain bills of exchange which Smidt & Co. drew in favor of that third person. Held that the property had passed by the delivery to the plaintiff's agent, and was not divested or affected by the subsequent acts of Smidt & Co. (*f*[1])

Ogle *v.* Atkinson.

§ 386. In Craven *v.* Ryder (*g*) the vendor maintained his right. The plaintiffs agreed to sell to French & Co. twenty-four hogsheads of sugar, free on board a British ship,

Craven *v.* Ryder.

(*d*) 19 C. B. N. S. 290; 34 L. J. C. P. 273; *post*, § 396.

(*e*) 2 B. & Ad. 932; *post*, § 387.

(*f*) 5 Taunt. 759. [See Gebarron *v.* Kreeft, L. R. 10 Ex. 274.]

(*f*[1]) [Nelson *v.* The Chicago R. R. Co. 2 Bradwell (Ill.), 180.]

(*g*) 6 Taunt. 433.

two months being the usual credit. They sent it by a lighter, taking a receipt from the ship, "for and on account of the plaintiffs," which was proven to be *for the purpose of giving the shipper command of the goods* till exchanged for the bill of lading. French & Co. sold the goods, and the defendant gave a bill of lading for them to the vendee of French & Co. without the plaintiffs' privity. French & Co. stopped payment without paying the price of the sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill of lading already signed for it in favor of the buyer from French & Co. had been assigned to another vendee, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs for the sugar was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The court held, that without regard to the form of the receipt, the plaintiffs had the right "to refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and had exercised that right. This seems to be another mode of describing what, in more recent cases, is termed a reservation of the *jus disponendi*. Ruck *v.* Hatfield, (*h*) on similar facts, was decided in conformity with Craven *v.* Ryder.

§ 387. In Brandt v. Bowlby, (*i*) the vendor was again successful. The facts were that one Berkeley of Newcastle ordered wheat from the plaintiffs, Brandt & Co. of St. Petersburg, through their agent, E. H. Brandt of London. A dispute arose between Berkeley and E. H. Brandt, and the former countermanded all his orders. In the mean time, however, the plaintiffs had bought a cargo for him, and they put it on board the defendant's ship *Helena*, which Berkeley had chartered and sent for the wheat. They wrote, requesting Berkeley's approval, and inclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*. . . . . An *indorsed* bill of lading we have this day forwarded to Messrs. Harris & Co. of London, at the same time drawing upon them for 673*l*. 15*s*., and for the balance remaining in our favor, viz. 136*l*. 9*s*. 5*d*., we value on you," &c. &c. An *unindorsed* bill of lading was inclosed to Berkeley, together with an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London to the address of R. Harris & Brandt *v.* Bowlby.

(*h*) 5 B. & Ald. 632. (*i*) 2 B. & Ald. 932.

Sons there per the *Helena*." The indorsed bill of lading was forwarded by the plaintiffs to E. H. Brandt, their agent. Berkeley refused to accept, and ordered Harris & Co. not to accept. Thereupon E. H. Brandt gave Harris & Co. the *indorsed* bill of lading, and desired them to accept for *his* account, which they did. Berkeley then confirmed his revocation, and was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris & Co., as required by the bill of lading, and when sued in assumpsit, sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The court held the contrary, Parke B. saying: "That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they *intended that the property should not vest in Berkeley unless the bills were accepted*."

§ 388. In Wilmshurst *v.* Bowker (*k*) the plaintiffs bought wheat from defendant on a contract by which they promised to pay for it in a banker's draft, *on receipt of invoice and bill of lading*. The wheat was shipped, and the invoice and bill of lading properly made out and *indorsed to the plaintiffs* were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. Plantiffs remitted a draft, which was not a banker's draft, and defendant sent it back by return of post, as being contrary to the agreement, and kept back the cargo and disposed of it. The plaintiffs had already failed in an action in trover, (*l*) and the present action was case for breach of contract. The judgment of the lower court was again for defendant, Tindal C. J. saying: "There is no doubt that the *property* in the wheat passed to the plaintiffs, ... but the question is as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties under this contract was that the consignors should *retain the power of withholding the actual delivery* of the wheat in case

Wilmshurst *v.* Bowker.

(*k*) 2 M. & G. 792. (*l*) 5 Bing. N. C. 541.

the consignee failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the delivery of the bill of lading, ... and we think the object could have been no other than to afford security to the consignors." But on error to the exchequer chamber this decision was unanimously reversed, (*m*) the court, composed of Lord Abinger C. B., Parke, Alderson, and Rolfe BB., and Patteson, Coleridge, and Wightman JJ., saying that they acceded to the general principle of the judgment of the common pleas, but could not agree with it in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property in the plaintiffs. "The delivery of the bill of lading and remitting the banker's draft *could not* be simultaneous acts: the plaintiffs *must* have received the bill of lading and invoice *before* they could send the draft."

§ 388 *a*. [In Wise *v.* M'Mahon (*m*[1]) one Chambers went to the office of the plaintiffs in Cork, and as the agent of the defendant, who resided in Tralee, contracted to sell to the plaintiffs a certain amount of barley. The sold note was as follows: "I have sold to Messrs. Wise, for account of Charles M'Mahon, of Tralee, about 1,200 barrels of barley, equal to sample, free on board the *Darling*, now in the port of Tralee, at 18*s*. 8*d*. per barrel of 16 stone, payment cash, on receipt of bill of lading and invoice. James Chambers for C. M'Mahon." Wise met Chambers soon after and got him to write on the note: "The freight agreed on is 15*s*. per ton." On the 9th November, 1839, the barley was shipped on the *Darling*, at Tralee; on the night of the 12th the vessel was lost with all her cargo. On the 16th of November, before Messrs. Wise knew of the loss, Chambers went to Cork, having with him the following bill of lading, dated November 9th: "Shipped in good order and well conditioned by Charles M'Mahon . . . . a full cargo of screened and kiln dried barley, 131 tons; being marked and numbered as in the margin; and to be delivered in the like good order and well conditioned at the aforesaid port of Cork . . . . unto shippers' orders, he or they paying freight, after due delivery of said goods, 15*s*. per ton." Chambers indorsed this bill in the office of the Messrs. Wise, told T. Wise that he might insure the cargo, and demanded payment

Wise *v.* M'Mahon.

(*m*) Wilmshurst *v.* Bowker, 7 M. & G. 882. (*m*[1]) [Longf. & Towns. (Ir.) 192.]

of the amount, or something on account. This was refused. Chambers left the bill of lading in the office, and on the following Monday F. Wise, who was not present when the first demand was made, gave Chambers a check for £800, to recover which amount this action was commenced. It was held that the plaintiffs could not recover, as the property in the grain vested in the plaintiffs when it was delivered on board the vessel. Brady C. B. said: "The first question then is, whether the goods were put on board the *Darling* in pursuance of the contract. I will assume the fact to be so; and that when the barley was put into the ship, it was shipped by M'Mahon pursuant to his contract, so that if the ship had taken fire the loss would have fallen on Wise. No authority has been produced to show that it is the duty of the vendor of goods not paid for to have a bill of lading made out and delivered to the vendee. The vendor is entitled, in my opinion, to retain his authority over the goods, and may countermand the delivery of them, before their arrival at their place of destination, in case of the bankruptcy or insolvency of the consignee. . . . . On these grounds I assume that the goods were put on board in pursuance of the contract, and I think the keeping of the bill of lading was not adverse to the right of Wise to receive them."]

As to whether vendor is bound to forward bill of lading for goods not paid for.

§ 389. In Wait *v.* Baker, (*n*) which is a leading case, decided in 1848, the facts were that the defendant at Bristol bought from one Lethbridge 500 quarters of barley free on board at Kingsbridge, and in answer to an inquiry about the shipment wrote to Lethbridge: "I took it for granted that you would get a vessel for the barley I bought from you f. o. b., and therefore did not instruct you to seek one. . . . . Please advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly." By further correspondence, Lethbridge forwarded copy of the charter-party which he had taken in his own name; advised the commencement of the loading; and on the 1st January, 1847, wrote: "I hope to be able to send you invoice and bill of lading on Tuesday or Wednesday." And again on the 6th: "I expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying

Wait *v.* Baker.

(*n*) 2 Ex. 1.

the freight as per charter." Lethbridge took them to Bristol, called on the defendant, and left at his counting-house, early in the morning, an *unindorsed* bill of lading. At an interview with defendant at a later hour on the same day, the defendant made objections to the quality of the cargo, saying that it was inferior to sample, offered to take the cargo, and tendered the amount in money, but said that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to indorse the bill of lading, but took it up from the counter and went to the plaintiffs, from whom he obtained an advance on indorsing the bill of lading to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by defendant. There was a verdict for the plaintiff at nisi prius, and on the motion for new trial, Parke B. gave the reasons on which the rule was discharged: "It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action — the action being for the recovery of the property — that at some subsequent time the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on shipboard is equivalent to the delivery I have mentioned, because the

ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, *but a delivery to the captain of the vessel to be carried under a bill of lading*, and that bill of lading *indicated the person for whom they were to be carried.* By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. . . . . It is admitted by the learned counsel for defendant that the property does not pass unless there is a subsequent appropriation of the goods. . . . . Appropriation may be used in another sense, viz. where both parties agreed upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. . . . . The vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that at the time when the unindorsed bill of lading was left there was no agreement between the two parties that that specific cargo should become the property of the defendant. . . . . There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation, in the sense of that term which alone would pass the property.*" This conclusion of the learned judge is substantially a statement that, though the determination of election by the vendor was com-

plete, and the appropriation therefore perfect in one sense, yet the reservation of the *jus disponendi* prevented it from being complete "in that sense of the term which alone would pass the property." The case is quite in harmony with all the later decisions on the subject.

§ 390. Van Casteel *v.* Booker (*o*) was decided by the same court in the same year. The goods in that case had been placed by the vendor on board of a vessel sent for them by the vendees, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of lading was indorsed in blank by the vendor and sent to the vendees. On the different questions arising in the case, which were numerous, it was held: First, that the decisions in Ellershaw *v.* Magniac (*p*) and Wait *v.* Baker (*q*) had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor was decisive to show *that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act.* Second, that notwithstanding the *form* of the bill of lading, the contract may be really made by the consignor as agent of the vendee and in his behalf, and *it was a question for the jury*, (q^1) in the case before the court, what, under all the circumstances, was the real intention of the consignors or vendors. On the new trial, the jury found that the goods were put on board for, and on account of, and at the risk of, the buyer, and the court refused to set aside the general verdict for the defendants which had been entered on this finding of the jury. Van Casteel *v.* Booker.

§ 391. In 1850 the case of Jenkyns *v.* Brown (*r*) was decided in the queen's bench. Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of plaintiffs, and taken a bill of lading for it deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a New Orleans banker, to whom he also indorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. Held that the property did not Jenkyns *v.* Brown.

(*o*) 2 Ex. 691.

(*p*) 6 Ex. 570. The case was not reported till some years after it had been decided.

(*q*) 2 Ex. 1.

(q^1) [See Ogg *v.* Shuter, L. R. 10 C. P. 159, 163, 165, and 1 C. P. D. 47.]

(*r*) 14 Q. B. 496, and 19 L. J. Q. B. 286.

pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the indorsed bill of lading to the buyer of the bills of exchange, he had conveyed to them "a special property" in the cargo; and by the invoice and letter of advice to the plaintiffs he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' right to the goods would not arise till the bills of exchange were paid by them. (r^1)

Turner *v.* Trustees of Liverpool Docks.

§ 392. The case of Turner *v.* Trustees of Liverpool Docks (*s*) was decided in the exchequer chamber in 1851, the court being composed of Patteson, Coleridge, Wightman, Erle, Williams, and Talfourd JJ. A cargo of cotton had been purchased in Charleston, on the order of Higginson & Dean of Liverpool, and put on board their own vessel, which had been sent for it. Bills of exchange for the price were drawn by Menlove & Co. on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading, which had been signed by the master. The bills of lading made the goods deliverable "to order, or to our (Menlove & Co.'s) assigns, he or they paying freight, *nothing*, *being owner's property*." The question was, whether by delivery on board the purchaser's own vessel, and by the statement in the bill of lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to the Charleston bankers. The court took time to consider, and the decision was given by Patteson J., who said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still *reserved to themselves*, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged,

(r^1) [Farmers' Bank of Buffalo *v.* Brown, 10 J. & Sp. 522; Farmers' Bank of Buffalo *v.* Atkinson, 74 N. Y. 587; Farmers' Bank of Buffalo *v.* Logan, Ib. 568.]

(*s*) 6 Ex. 543. See, also, Schotsman *v.* Lancashire & Yorkshire Railway Company, L. R. 2 Ch. App. 332, and other cases cited *post*, book V. ch. v. on "Stoppage in Transitu."

and without which it may be assumed that the vendors would not have delivered them at all. . . . . The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading that the cotton is free of freight, being owner's property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove & Co. of the 23d October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts."

§ 392 *a*. [In Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, Colton L. J. said, p. 172: "Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein. . . . . So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional

Observations of Colton L. J. as to what indicates a reservation of *jus disponendi*.

only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner *v.* Trustees of Liverpool Docks. . . . . But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser."]

Ellershaw *v.* Magniac.

§ 393. Ellershaw *v.* Magniac (*t*) was decided prior to Van Casteel *v.* Booker, (*u*) and is referred to in that case, but was not reported till 1851. There the plaintiff had contracted with C. & Co. of London and Odessa for the purchase of 1,700 quarters of Odessa linseed, had paid half the price, and had sent the *Woodhouse*, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1,700 quarters of linseed, in bulk;" and a quantity of linseed was put on board the vessel at Odessa, the partner there writing to the London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the *Woodhouse;*" and again, "by Friday's post you shall have the bill of lading of the linseed, by the *Woodhouse*." The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and, being in difficulties, got advances by transferring the bills of lading to the defendant. Held, by the court (Lord Abinger C. B. and Parke and Alderson BB.), that the shippers, by making the linseed deliverable to order by the bill of lading, clearly showed *the intention to preserve the right of property and possession in themselves*, until they had made an assignment of the bill of lading to some other person: and the property, therefore, had not passed to the plaintiff.

Joyce *v.* Swan.

§ 394. In Joyce *v.* Swan, (*x*) a decision was rendered in 1864, by the common pleas, on the following facts: McCarter, of Londonderry, on the 14th February, 1863, ordered

(*t*) 6 Ex. 570.
(*u*) 2 Ex. 691, 702.
(*x*) 17 C. B. N. S. 84.

one hundred tons of guano from Seagrave & Co. of Liverpool, with whom he had been in the habit of dealing, and was on very intimate terms. On the 26th he was informed that the *Anne and Isabella* had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at 10*l.* per ton. . . . . Please say if you purpose effecting insurance at your end." On the 2d March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him "1,200*l.* on guano, valued at 1,200*l.*, per *Anne and Isabella*, from Liverpool to Derry." Then on the 3d March, McCarter wrote to Seagrave & Co., in relation to the price of 10*l.*: "I really cannot understand this, when I know that Mr. Lawson supplies your guano, in Scotland, at 9*l.* 15*s.* net, there to dealers; besides, I look for the special allowance made to me at the origin of our transactions, and now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry, indeed, to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you." The letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave & Co. received this letter on the 4th March, and fearing from its tenor that McCarter would not accept the cargo, insured it in their own name, on that day, and took a bill of lading, "to order of Seagrave & Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter, by Seagrave & Co., per *Anne and Isabella*. The invoice and bill of lading were forwarded in a letter to the senior partner of Seagrave & Co., who was then in Ireland, and on the evening of Saturday, the 7th of March, he went on a friendly visit to McCarter's private house near Londonderry, and there told him that he had received these papers from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning they went into town together, and at McCarter's office Seagrave indorsed the bill of lading to McCarter and obtained from him an acceptance for the price, which he at once inclosed to his firm at Liverpool. After this and on the same day, they heard that the *Anne and Isabella* had been wrecked on the *evening of Saturday the 7th.* The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that

the property had not passed to the purchaser, and that he had therefore no insurable interest. Erle J. charged the jury that it was not a necessary condition of the passing of the property that the price should be agreed on; that there might be a contract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave & Co. with the intention of passing the property, they must find for plaintiff; but *if they intended to keep it in their own hands* and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the court. The letter of McCarter was construed by the judges as a "grumbling" assent to the price.

Observations on this case.

§ 395. It is to be remarked that this case is not at all in conflict with Turner *v.* Liverpool Docks, or Wait *v.* Baker, in holding that although the shipper took the bill of lading to his own order, yet the property had passed when the goods were put on board. The distinction is a plain one. In the former cases the shipper had taken the bill of lading to his own order for the purpose of *retaining control* of the goods for his own security; but in Joyce *v.* Swan the shippers and vendors had no purpose nor desire to keep any control of the goods, but, on the contrary, wished the buyer to take them. They were doubtful of the buyer's meaning, and therefore took a precaution against leaving the property uninsured and uncared for if his letter meant that he refused the purchase; but they were acting as his agents and intended to *reserve nothing*, *no jus disponendi*, if his meaning was that he assented to the price. The buyer interpreted his own language just as the court did; he had meant to take the goods even at the price of 10*l.*, and that being so, the vendors were his agents in taking the bills of lading; and the case is exactly in accord with Van Casteel *v.* Booker (*y*) where it was left to the jury to decide, as a question of fact, what was the intention of the vendor under all the circumstances of the case; and with Browne *v.* Hare, (*z*) where it was held that the question of intention must be considered as having been disposed of by the verdict of the jury, because it was one of the facts for their decision on the trial.

(*y*) 2 Ex. 691.

(*z*) In Cam. Scacc. 4 H. & N. 822; 29 L. J. Ex. 6.

§ 396. In Moakes *v.* Nicolson, (*a*) the facts were, that a sale was made by one Josse to Pope for cash, of a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on board of a vessel chartered by Pope in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th December, and received by him on the 20th. Josse, being unable to get the price from Pope, sent the stamped bill to his agent, the defendant. In the mean time, on the 13th December, Pope had sold the coal on the London Exchange, but before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coal before action brought. The defendant induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. Held, first, that the plaintiff had no better right than his vendor, Pope, because at the time of his purchase the goods were not ascertained, and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title; secondly, that no title had passed to Pope from Josse, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the *jus disponendi;* thirdly, that the intention of Josse was a fact to be determined by the jury. (*b*) But *semble*, per Byles and Keating JJ., that if Pope's sale had been made after his receipt of the bill of lading by indorsing it over, although unstamped, to a *bonâ fide* purchaser, the result might have been different. The *ratio decidendi* of the case was clearly that Pope's sale was of a thing not yet his, of property not yet acquired, and therefore inoperative to pass the property. *Ante*, § 78.

Moakes *v.* Nicolson.

§ 397. In Falk *v.* Fletcher, (*c*) the plaintiff, a merchant of Liverpool, acting in behalf of De Mattos of London, had chartered from the defendant a vessel to load a complete cargo of salt, for Calcutta. The plaintiff had put on board about 1,000 tons of salt, for which he took receipts in his own name, when De Mattos failed, and the plaintiff declined to continue

Falk *v.* Fletcher.

(*a*) 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*b*) [Merchants' National Bank *v.* Bangs, 102 Mass. 291.]

(*c*) 18 C. B. N. S. 403; 34 L. J. C. P. 146.

loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1,000 tons, on the ground that they belonged to De Mattos. It was proven that the plaintiff was in the habit of buying such cargoes for De Mattos, and charged him no commission, but an advance on the cost of the salt to remunerate himself for his trouble; that the plaintiff always paid for the salt and loaded it at his own expense, and when the cargo was completed sent invoices to De Mattos and received the acceptances of the latter for the cost. Held, under these circumstances, a question of intention for the jury, whether the plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favor of the plaintiff that he had not parted with the goods was maintained.

Shepherd v. Harrison.

§ 398. In Shepherd *v.* Harrison (*d*) the facts were that Paton, Nash & Co., merchants of Pernambuco, bought for the plaintiff, a merchant of Manchester, certain cotton, shipped it on the defendant's steamship *Olinda*, taking a bill of lading. They then wrote to the plaintiff, saying, "Inclosed please find invoice *and bill of lading* of 200 bales cotton shipped per *Olinda*, costing 851*l.* 2*s.* 7*d.*" The letter also announced that a draft had been drawn for the price in favor of George Paton & Co., the agents in Liverpool of Paton, Nash & Co., "to which we beg your protection." The invoice was headed, "Invoice, &c. on account and risk of Messrs. John Shepherd & Co. (the purchaser)." The bill of lading, however, was *not* inclosed in the letter to the plaintiff, but was, together with the bill of exchange, inclosed to George Paton & Co. of Liverpool, who at once sent a letter to the plaintiff inclosing the bill of lading and the bill of exchange drawn on him, and stating, "We beg to inclose bill of lading for 200 bales cotton shipped by Paton, Nash & Co., per *Olinda*, s. s. on your account. We hand also their draft on your good selves for cost of the cotton, to which we beg your protection." The plaintiff refused to accept the bill of exchange, but retained the bill of lading, and demanded the cotton from the master of the ship, who, however, delivered the goods to George Paton & Co., on a duplicate bill of lading held by them, and on receiving an indemnity against the plaintiff's claim. The plaintiff's action was trover against the master, but all the courts were

(*d*) L. R. 4 Q. B. 197, 493; L. R. 5 H. L. 116.

unanimous in favor of the defendant, and it was held in the House of Lords: first, that the *jus disponendi* had been reserved by the vendors; secondly, that where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading which is the symbol of the property in the goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange; that if he does so retain it, he thereby acquires no right to the bill of lading or the goods. (d^1)

§ 399. The following seem to be the principles established by the foregoing authorities: First. Where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee. (e) Secondly. Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. (e^1) This principle runs through all the cases, and is clearly

Rules deduced from the review of the authorities.

(d^1) [First National Bank of Cairo *v.* Crocker, 111 Mass. 166, 167; De Wolf *v.* Gardner, 12 Cush. 19, 23; Allen *v.* Williams, 12 Pick. 297.]

(e) Wait, *v.* Baker, 2 Ex. 1. See, also, Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; London & North Western Railway Company *v.* Bartlett, 7 H. & N. 400, and 31 L. J. Ex. 92; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; [Putnam *v.* Tillotson, 13 Met. 517; Stanton *v.* Eager, 16 Pick. 467; Ludlow *v.* Bowne, 1 John. 15; Johnson *v.* Stoddard, 100 Mass. 306; Orcutt *v.* Nelson, 1 Gray, 536; Merchant *v.* Chapman, 4 Allen, 362; Hunter *v.* Wright, 12 Ib. 548; Woolsey *v.* Bailey, 27 N. H. 217; Arnold *v.* Prout, 51 Ib. 587, 589; Garland *v.* Lane, 46 Ib. 245; Goodwyn *v.* Douglas, Cheves L. & Eq. (S. Car.) 174; Waldron *v.* Romaine, 22 N. Y. 368; Summeril *v.* Elder, 1 Binney, 106; Griffith *v.* Ingledew, 6 Serg. & R. 429; Rodgers *v.* Phillips, 40 N. Y. 519; Magruder *v.* Gage, 33 Md. 344; *ante*, § 362; First National Bank of Cairo *v.* Crocker, 111 Mass. 166. To produce the effect stated in the text it is not necessary that any particular carrier should be designated by the buyer; Garland *v.* Lane, 46 N. H. 245, 248; Arnold *v.* Prout, 51 Ib. 587, 589; Watkins *v.* Paine, 57 Ga. 50; nor does it make any difference which party is to pay the freight for the goods. Dutton *v.* Solomonson, 3 B. & P. 584; Vale *v.* Bayle, 1 Cowp. 294; Ranny *v.* Higby, 5 Wis. 62. A delivery of an article sold to a person appointed by the vendee to receive it is a delivery to the vendee. Wing *v.* Clark, 24 Maine, 366, 373; Hunter *v.* Wright, 12 Allen, 548. So a delivery at the place agreed, nothing remaining to be done by the vendor. Nichols *v.* Morse, 100 Mass. 523.]

(e^1) [Gabarron *v.* Kreeft, L. R. 10 Ex. 274, 281.]

enunciated by Parke B. in Wait *v.* Baker, (*f*) and by Byles J. in Moakes *v.* Nicolson. (*g*) And the above two points were approved as an accurate statement of the law by Lord Chelmsford in Shepherd *v.* Harrison, *supra.* Thirdly. The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. (*h*) Fourthly. The *primâ facie* conclusion that the vendor reserves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine, as a question of fact, what the real intention was. (*i*) Fifthly. That although as a general rule the delivery of goods by the vendor on board the purchaser's own ship is a delivery to the purchaser, and passes the property, yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of freight, because owner's property. (*k*) Sixthly. That where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the

(*f*) 2 Ex. 1.

(*g*) 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*h*) Wilmshurst *v.* Bowker, 2 M. & G. 792; Ellershaw *v.* Magniac, 6 Ex. 570; Wait *v.* Baker, 2 Ex. 1; Van Casteel *v.* Booker, 2 Ex. 691; Jenkyns *v.* Brown, 14 Q. B. 496, and 19 L. J. Q. B. 286; Shepherd *v.* Harrison, L. R. 4 Q. B. 196, 493; 5 Eng. App. 116; [Mason *v.* The Great Western Railway Co. 31 U. C. Q. B. 73; Merchants' National Bank *v.* Bangs, 102 Mass. 295, 296, stated *ante*, § 382, note (*a*); Ames J. in First National Bank of Cairo *v.* Crocker, 111 Ib. 167. Where an unpaid vendor, shipping goods under a contract of sale, takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in the payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. Ogg *v.* Shuter, 1 C. P. Div. 47.]

Reservation of *jus disponendi* is more than lien.

(*i*) Van Casteel *v.* Booker, 2 Ex. 691; Brown *v.* Hare, 4 H. & N. 822, and 29 L. J. Ex. 6; Joyce *v.* Swan, 17 C. B. N. S. 84; Moakes *v.* Nicolson, 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*k*) Turner *v.* Liverpool Dock Trustees, 6 Ex. 543; Ellershaw *v.* Magniac, 6 Ex. 570; Brandt *v.* Bowlby, 2 B. & Ad. 932; Van Casteel *v.* Booker, 2 Ex. 691; Moakes *v.* Nicolson, 19 C. B. N. S. 290; 34 L. J. C. P. 273; Falk *v.* Fletcher, 18 C. B. N. S. 403; 34 L. J. C. P. 146; Schotsman *v.* Lancashire & Yorkshire Railway Company, L. R. 2 Ch. App. 332; Gumm *v* Tyrie, L. J. 33 Q. B. 97; in error, 34 Q. B. 124.

bill of exchange: and if he refuse acceptance he acquires no right to the bill of lading or the goods of which it is the symbol. (*l*)

(*l*) Shepherd *v.* Harrison, *supra*, § 398; [Bank of Rochester *v.* Jones, 4 Comst. 497, 502; Winter *v.* Coit, 3 Selden, 288; Marine Bank of Chicago *v.* Wright, 48 N. Y. 1; Fifth National Bank of Chicago *v.* Bayley, 115 Mass. 228, 230; Alderman *v.* Eastern R. R. Co. Ib. 233; Ames J. in First National Bank of Green Bay *v.* Dearborn, Ib. 222; Millar *v.* Sav. Ass'n, 3 W. N. Cas. 480; Cobb *v.* The Ill. Cent. R. R. Co. 88 Ill. 394; Taylor *v.* Turner, 87 Ib. 296. In First National Bank of Cairo *v.* Crocker, 111 Mass. 163, A., in Illinois, being indebted to the defendants, who were commission merchants in Boston, for advances, promised that he would "make it right" at the next shipment. He afterwards shipped goods to Boston, taking a bill of lading stating that the goods were "consigned to shipper's order," but containing under the heading "consignees" the name of the the defendants. He drew on the defendants, attached the bill of lading to the draft, and had the draft discounted; the defendants refused to accept the draft, and it was taken up by A. The goods afterwards arrived and were delivered to the defendants. Subsequently A. drew a draft against the goods on B. in Boston, and delivered it, with the bill of lading attached, to the plaintiff, who discounted it and presented it to B., who accepted and paid it. Between the time when this second draft was discounted and the time when it was accepted, the defendants sold the goods; it was held that the act of the defendants in taking possession of the goods was wholly unauthorized, and gave them neither valid title nor lawful possession; and in proceeding afterwards to sell them as if they were their own, and appropriating the proceeds, they were guilty of a wrongful conversion; and it was also held that it was immaterial whether the bill of lading, when delivered to the plaintiff, was indorsed by A. in blank or to the order of B. See De Wolf *v.* Gardner, 12 Cush. 19; Bank of Rochester *v* Jones, 4 Comst. 497. "When bills of lading to shipper's order, or to —— or order, indorsed, or by which goods are made deliverable to a consignee by name, are transmitted to him as security for antecedent advances, ... they are evidence of such a destination and appropriation to him of the specific goods as will vest in him a property, absolute or special, in them, at the time of their delivery on board." Abbott on Shipping (5th Am. ed.) p. 410. The American cases seem to support this statement. Schumacher *v.* Eby, 24 Penn. St. 521; Grosvenor *v.* Phillips, 2 Hill, 147; Strans *v.* Wessel, 30 O. St. 211; Bailey *v.* The Hudson R. R. Co. 49 N. Y. 70; Nelson *v.* Chicago &c. R. R. Co. 2 Bradwell (Ill.), 180. But if the consignor be simply generally indebted to the consignee, there is a recognized distinction. Bank of Rochester *v.* Jones, 4 N. Y. 497; Grosvenor *v.* Phillips, 2 Hill, 147; Elliot *v.* Bradley, 23 Vt. 217; Hodges *v.* Kimball, 49 Iowa, 577; Redd *v.* Burrus, 58 Ga. 574; Nelson *v.* Chicago &c. R R. Co. 2 Bradwell (Ill.), 180; Saunders *v.* Bartlett, 12 Heiskell (Tenn.), 316; Oliver *v.* Moore, Ib. 482. In Frechette *v.* Corbet, 5 Low. Can. 211, Meredith J., after quoting the above passage from Abbott, said, "Ce passage ne prouve pas qu'en aucun temps, suivant les lois anglaises, le droit de propriété dans des marchandises mentionnées dans un connaissement, doit passer au consignataire au préjudice des autres créanciers du consignateur; et quelle que soit à cet égard la loi en Angleterre, suivant notre droit, un débiteur ne peut pas transporter, de la manière mentionnée dans le passage cité d'Abbott, tous les biens à l'un de ses créanciers au préjudice des autres." See Marine Bank of Chicago *v.* Wright, 48 N. Y. 1; Grosvenor *v.* Phillips, 2 Hill, 147.

First Nat. Bank *v.* Crocker.

Transmission of bills to one as security for antecedent advances.

CHAPTER VII.

EFFECT OF A SALE BY THE CIVIL, FRENCH, AND SCOTCH LAW.

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§ 400. An attempt must now be made to give a summary, necessarily very imperfect, of the principles of the Civil Law, in regard to the nature of the contract of sale and its effect in passing the property in the thing sold. The subject is the more difficult, because there is a marked distinction between the modern Civil Law and the Roman Law, and because the doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods in their history.

Discovery of Institutes of Gaius.

§ 401. The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and D'Aguesseau, Cujas and Vinnius, Domat and Dumoulins. The Digest, Code, and Institutes of Justinian, compiled in the sixth century, during the reign of that emperor (A. D. 527–565), formed, prior to the year 1816, the almost exclusive source from which was derived a knowledge of Roman jurisprudence; and in that famous *corpus juris civilis*, the

name of Gaius was confounded with those of the other eminent jurists whose responses (or, as we should call them, opinions on cases submitted) were adopted by the imperial law-giver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modelled on those of Gaius, who lived nearly four centuries earlier, during the reigns of Antoninus Pius and Marcus Aurelius. But the works of Gaius were believed to be irretrievably lost till the year 1816, when Niebuhr discovered in a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers of the fifth century. (*a*) Savigny recognized the old writing to be the text of Gaius, and, after several months of patient labor, the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century of our era. By means of this invaluable addition to former sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure, and it is from their works that the following summary is chiefly extracted.

§ 402. Sale was considered as the offspring of exchange, and for many centuries it was disputed whether there was any difference in the nature of these contracts. "Origo emendi, vendendique a permutationibus cæpit, olim enim non ita erat nummus; neque aliud *merx*, aliud *pretium* vocabatur." (*b*) And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the things were either exchanged by the *permutatio*, or *given* for a price by the venum-*datio*.

Sale the offspring of exchange.

§ 403. Afterwards, when the idea of binding one party to another by consent, and thus forming an obligation (*juris vinculum*), was entertained, the whole body of possible engagements between man and man was included in the three expressions, *dare*, *facere*, *præstare*: *dare*, to give, that is *to trans-*

Dare, facere, præstare.

(*a*) See a very interesting account of this discovery in the preface to the first edition of Gaius.

(*b*) Dig. 18, 1. De Contrah. Emptione.

fer ownership ; facere, to do, or even abstain from doing, an act; *præstare*, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of obligation were: *civil* obligations, which gave a right of action at law; *prætorian* or *honorary* obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the prætor; (*c*) and *natural* obligations, for which there was no action at law in or equity, but which might be used in defence, as in *compensatio* or set-off. "Etiam quod natura debetur, venit in compensationem." (*d*) The vendee then, like all other contracting parties, had certain actions (*e*) which alone he was permitted to institute against the vendor. The Institutes of Gaius give us the form of declaration in an action *in personam*. "In personam actio est, quotiens cum aliquo agimus, qui nobis ex contractu, vel ex delicto obligatus est: id est, cum intendimus, *dare*, *facere*, *præstare* oportere."

Civil, prætorian, and natural obligations.

§ 404. Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange from hand to hand. 1st. The *nexum*, which was effected *per æs et libram*, and consisted in weighing out a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when man had not learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*, all of which had fallen into disuse and derision long before the time of Gaius, (*f*) who says, "in odium venerunt." 2d. The sale by certain sacramental words alone, and dispensing with the *æs et libram:* this was the *stipulation*, (*g*) which bound only *one side*, from its very nature,

Four stages in mode of making sales in Rome.

Nexum.

Stipulatio.

(*c*) For these two classes giving rights of action, see Inst. 3, 13, 1.

(*d*) Dig. 16, 2, 6, Ulp.

(*e*) Com. 4, § 2.

(*f*) Gai. 4, 30.

(*g*) The etymology of this word is doubtful: Paulus derives it from Stipulum, an old word, meaning firm. Sent. 5, 7, § 1. Festus, in his abridgment of Valerius Flaccus, says: "Stipem esse nummum signatum, testimonio est et id, quod datur stipendium militi, et quum spondetur pecunia, quod stipulari dicitur;" and Isidor of Seville (lib. 4, Orig. c. 24) says: "Dicta stipulatio a stipula. Veteres enim quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum jungentes, sponsiones suas agnoscebant." This last etymology seems to be merely an invention, as the French

because it consisted in a promise made in response to the stipulator. A stipulation, therefore, might bind the vendor or the vendee; it required *two* stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites were upheld with strictness by the patricians and priests, so that, by an exaggerated technicality, the words "*spondes? spondeo*," forming a stipulation, were not allowed to be used by any but Roman citizens, (*h*) foreigners and barbarians being compelled to adopt other words, as "*promittis*," "*dabis*," "*facies*," for the same purpose, these latter expressions being deemed *juris gentium*. But Justinian tells us that this form of contract was obsolete in his day. (*i*) 3d. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register or account-book (*tabulæ*, *codex accepti et depensi*). The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should constitute, not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month from a diary or blotter (*adversaria*), and was treated as a proof of the highest character, Cicero saying of the *tabulæ*, that they are "*æternæ*, *sanctæ*, *quæ perpetuæ existimationis fidem et religionem amplectuntur*." (*k*) This contract was said also to be an *expensilatio*, from the entries in these books, the party who paid money entering it under this head as *pecunia expensa lata*, and the one who received it as *pecunia accepta relata*. 4th. The fourth and last stage was the contract by mutual consent alone; and it is again a remarkable instance of the strict technicality of the Roman law, (*l*) that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are sale (*emptio-venditio*), letting for hire (*locatio-con-*

Literarum obligatio, or *expensilatio*.

Mutual consent.

Four contracts *juris gentium*.

say, *apres coup*. Such a mode of contracting, and such a derivation, if true, could scarcely have been unknown to Paulus and Festus.

(*h*) Gai. Com. 3, 93.

(*i*) Inst. 3, 15, 1.

(*k*) Pro. Roscio, 3, § 2.

(*l*) Gaius thus complains: "Namque ex nimia subtilitate veterum qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem perderet." L. 4, § 30.

ductio), partnership (*societas*), and agency or mandate (*mandatum*). They are also the only contracts of the Roman law that were termed bilateral, or synallagmatic, or reciprocal: that is, binding the parties *mutually* (*ultro-citroque*), every other form of contract being unilateral, *i. e.* binding one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.

Bilateral or synallagmatic.

§ 405. The sale being at last permitted by mutual consent, its elements were the same as at the common law, with the exceptions now to be considered. 1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos;* or for what it cost you, *quantum tu id emisti;* or for what money I have in my coffer, *quantum pretii in arca habeo.* (*m*) The common law rule, that in the absence of express agreement a reasonable price is implied, did not exist in the Roman law.

Distinction between sale in Rome and at common law.

Price must be certain.

2dly. It was a received maxim in the Roman law that the vendor did not bind himself to transfer to the buyer the property in the thing sold; his contract was not *rem dare*, but *præstare emptori rem habere licere.* The texts abound in support of this statement. "Qui vendidit, necesse non habet fundum emptoris facere," unless he made a special and unusual stipulation to that effect, for the text goes on to say, "ut cogitur qui fundum stipulanti spopondit." (*n*) If the vendor was owner, the property passed by virtue of his promise to guaranty possession and enjoyment, but if not, the sale was still a good one, and its effect was simply to bind the vendor to indemnify the buyer, if the latter was "evicted," that is, dispossessed *judicially* at the suit of the true owner. Ulpian's explanation is entirely lucid. "Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum." (*o*) It resulted, therefore, that on the completion of a contract of sale, the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred was something more than the

Sale was not a transfer of ownership.

Vendor was bound only to deliver possession.

(*m*) Dig. 18, 1, De Contrah. Empt. 7, §§ 1 & 2.

(*n*) Dig. 18, 1, 25, § 1, Ulp.

(*o*) Dig. 19, 1, 11, § 1, Ulp.

mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; "vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fideive commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet vacui appellatio." (*p*) And if the vendor knew that he was not the owner and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorized to bring an equitable suit, *ex empto*, without waiting for the eviction. "Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur, utiliter (*q*) me ex empto acturum putavit [Africanus] in id, quanti meâ intersit, meam esse factam. Quamvis enim alioquin verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat; quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignoranti vendidit." (*r*)

Where vendor knew he was not owner.

§ 406. The eviction against which the vendor was bound to warrant the buyer was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed. (*r*[1]) In Pothier's edition of the Pandects, he thus states the rule and cites a response of Gaius: "Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel abductum rem sine successore decesserit, ita ut neque ad fiscum bona pervenire

What was meant by eviction.

(*p*) Dig. 19, 1, 2, § 1, Paulus.

(*q*) *Utiliter*, that is, in equity, before the prætor.

(*r*) Dig. 19, 1, 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law: "If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that, even before eviction, an equitable suit *ex empto* might be maintained by me for damages (literally, for as much interest as I had, that the thing should become mine). For, although it would otherwise be true that the vendor is only bound to guaranty possession to the buyer, not also that the thing should become the buyer's, yet because he ought also to warrant the absence of fraud, a man is held responsible, who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

(*r*[1]) [As to the common law rule see § 627, note (*i*), and § 628, *post*.]

possint, neque privatim a creditoribus distrahi, tunc enim nulla competit, emptori ex stipulatu actio: quia rem habere ei licet. L. 57, Gaius, lib. 2, ad Ed. Ædil.-Curul." (*s*)

Remedies of evicted purchaser—

§ 407. The evicted purchaser had two actions, one *ex empto*, which was the *actio directa*, resulting from the very nature of the contract, and in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it; the true principle in this action being to restore the buyer to the condition in which he would have been, not if he had never bought, but if he had not been dispossessed. (*t*)

1st. *Actio ex empto.*

2d. *Actio de stipulatione duplæ.*

§ 408. The second action was *de stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given. This stipulation became so general that, under an Edictum Ædilium-Curulium, it was considered to be implied in all sales, unless expressly excluded: "Quia assidua est duplæ stipulatio, idcirco placuit ex empto agi posse si duplam venditor mancipii non caveat. EA ENIM QUÆ SUNT MORIS ET CONSUETUDINIS, IN BONÆ FIDEI JUDICIIS DEBENT VENIRE." (*u*) The whole of the second title of the 21st book of the Digest is devoted to this subject, "De Evictionibus et Duplæ Stipulatione."

Vendor was bound as *auctor* to make good his warranty.

§ 409. In consequence of the peculiar obligations of the vendor as warrantor against eviction, he was called the *auctor*, who was bound, *auctoritatem præstare*, to make good his warranty; and the form of procedure was, that whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his vendor, and make him party to the action, so as to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare*; or *auctorem laudare; auctorem interpellare:* and the buyer who failed to cite in warranty his vendor, without a legal excuse for his default, lost his remedy. "Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio, neque

(*s*) Pothier, Pandectæ Justinianæ, lib. 21, tit. 2. De Evict. Pars 2, No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise. Ib. No. XVI.

(*t*) The texts are collected in Pothier, Pand. Just. lib. 19, tit. 1, ch. 1, Nos. 43 to 47, under the head "Quanti teneatur venditor emptori, evictionis nomine, hac actione ex empto."

(*u*) Dig. lib. 21, tit. 2. l. 31, § 20, Ulp. De Ædil. Edict.

ex stipulatu, neque ex dupla, neque ex empto actionem contra venditorem vel fidejussorem ejus habet." (*x*)

§ 410. It would seem the natural consequence of these principles, that a vendor who did not even profess to transfer title must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But, on the contrary, the rule was explicitly laid down in conformity with that of the common law as exemplified in Rugg *v.* Minett, (*y*) where the buyer of the turpentine was held bound to suffer the loss of the goods destroyed before delivery, on the ground that the ownership had vested in him. The reasoning by which this result was reached in the Roman law is thus explained by an eminent French jurist. After citing the text of the Institutes, (*z*) which is in these words: "Cum autem emptio et venditio contracta sit, quod effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur, periculum rei venditæ statim ad emptorem pertinet tametsi adhuc ea res emptori tradita non sit;" the commentator says: "Quels sont les effets de la vente? C'est de produire des obligations: le vendeur est obligé de livrer et de faire avoir la chose à l'acheteur. Eh bien! si depuis la vente il y a eu des fruits, des accroissements, il sera obligé de même de livrer et de faire avoir, ces fruits, ces accroissements. (Dig. 19, 1, de Action. Empt. 13; §§ 10, 13, et 18, Ulp.) Si la chose a diminuée, s'est détériorée sans sa faute, il ne sera obligé de la livrer, de la faire avoir, qu'ainsi diminuée, ainsi détériorée; et si la chose a péri sans sa faute, son obligation aura cessé d'exister. Voilà tout ce que signifie cette maxime, que la chose, du moment de la vente, est aux risques de l'acheteur. C'est à dire que l'obligation du vendeur de livrer et de faire avoir, s'appliquera a la chose telle qu'elle se trouvera par suite des changements qu'elle aura pu éprouver. Il ne s'agit dans tout ceci que de l'obligation du vendeur. Et s'il y a perte totale nous ne ferons qu'appliquer cette règle commune de l'extinction des obligations, que le débiteur d'un corps certain (*species*) est libéré lorsque ce corps a péri sans son fait ou sans sa faute. (Dig. 45, 1, de Verb. Oblig. 93, Pomp.) Mais que deviendra l'obligation de l'acheteur relativement au prix? Le prix convenu devra t-il être augmenté ou diminué selon que la chose aura reçu des ac-

Thing sold was at buyer's risk before delivery, although the property had not passed.

(*x*) Code, tit. De Evic. et Dup. Stip. l. 8.

(*y*) 11 East, 210, *ante*, § 322.

(*z*) Inst. 3, 23, 3.

croissements ou subi des détériorations? En aucune manière: le prix restera toujours le même. Et si la chose vendue a péri totalement, de sorte que le vendeur se trouve libéré de l'obligation de la livrer, l'acheteur le sera-t-il aussi de celle de payer le prix? Pas davantage. Les deux obligations une fois contractées ont une existence indépendante: la première peut se modifier ou s'éteindre dans son objet par les variations de la chose vendue — la seconde n'en continue pas moins de subsister, toujours la même. (Dig. 18, 5, de Rescind. Vend. 5, § 2.) Tel était le système Romain — et c'est pour cela qu'il est vrai de dire que du moment de la vente, l'acheteur court les risques de la chose vendue, bien que le vendeur en soit encore propriétaire." (*a*)

Vendor was bound *præstare custodiam.*

§ 411. But although the risk of loss before delivery was thus imposed on the buyer, it was on condition that the vendor should be guilty of no default in taking care of the thing till he transferred it into the buyer's possession, for an accessory obligation of the vendor was *præstare custodiam.* "Et sane periculum rei ad emptorem pertinet, dummodo custodiam venditor ante traditionem præstet." (*b*)

French law.

§ 412. Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe, wherever based on the civil law, till the adoption and spread of the Code Napoleon, first among the Latin races, and more recently among the nations of Central and Northern Europe. The French code says in a few emphatic words, "La vente de la chose d'autrui est nulle" (Art. 1599); and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the contract in the Arts. 1582 and 1583 gave some countenance to the idea that such was not the intention of the authors. Instead of defining a sale to be a transfer of the property or ownership, the language is, in Art. 1582: "La vente est une convention par laquelle l'un s'oblige à *livrer* une chose, et l'autre à la payer;" and in 1583: "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur, *à l'égard du vendeur*, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé." The conse-

(*a*) Ortolan, Explic. Hist. des Inst. tome 3, p. 282.

(*b*) Dig. 47, 2, de Furtis, 14, Ulp.

quence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the court of cassation itself, will be found to furnish authority for the position that a sale transfers only a right of possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion; (*c*) and there is a decision of the highest court in France in conformity with it. (*d*) But this view seems to be now exploded, and all the recent writers, including such great authorities as Duranton, Zachariæ, and Troplong, insist that the modern idea of the transfer of ownership is what was really intended by the authors of the civil code. (*e*) M. Frémery gives the following clear exposition of the origin of the difficulty, and adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the *corpus juris civilis:* "The fragments preserved in the Digest conclusively prove that custom had consecrated at Rome an habitual formula for contracts of sale, subject to special clauses, which were to be added to suit the circumstances. According to this formula, it was the vendor who spoke, *legem dicebat.* It was customary according to this formula for the vendor, in expressing the engagements which he agreed to assume, to use these words: *præstare emptori rem habere licere;* terms which, strictly construed, are not as wide in their import as the words *rem dare.* The jurists decided, on this state of facts, that every ambiguous clause was to be interpreted against the vendor, whose fault it was not to have expressed himself more clearly. They further decided that he was not bound to transfer ownership. Justinian inserted these decisions in his Digest, and made them the law; so that, deriving their authority from legislation, and not from the special circumstance of fact, on which the jurisconsults had reasoned, they became applicable to every contract of sale by its nature, as recognized by the law. If, then, the old formula is abandoned, and the vendor uses the words *rem dare*, and no longer *rem habere licere*, how can one explain a law which declares that the vendor does not bind himself to transfer the ownership? And if using neither locution, he simply says, 'I sell,' and leaves it to usage to

(*c*) Tome 14, Nos. 240 *et seq.*

(*d*) Sirey, 32, 1, 623.

(*e*) Favart, Vo. Vente; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4 *et seq.*; tit. 2, add. au même No.; Duvergier, tit. 1, Nos. 10 *et seq.*; Championnière et Rigaud, Dr. d'Eureg, t. 3, No. 1745; Zachariæ, t. 2, § 349.

determine the meaning which it has attached to these words, what is to be done if it be manifest that all who use these words attach to them the idea that the vendor binds himself to transfer the ownership? This is precisely what has happened. For many centuries it has been taught in our schools that it is of the nature of the contract of sale that the vendor is not bound to make the purchaser the owner of the thing sold: *ipse dixit!* And yet for many centuries, also, the words 'I sell' are no longer paraphrased by the Roman formula which determined their meaning; the man who utters them, or hears them, understands unhesitatingly that he who sells is to make the purchaser owner of the thing sold; and every one is asking how it is that by the nature of the contract of sale the vendor is not bound to transfer the ownership to the purchaser. Since the civil code has appeared, however, and has declared in the Art. 1599, 'the sale of another's thing is null,' many persons have inferred that this must be because the two parties have the intention, one of transferring, the other of acquiring, the property in the thing sold: so that the nature of the contract of sale, which, according to the Roman law, did not impose on the vendor the obligation of transferring the ownership to the purchaser, does, on the contrary, according to the French law, comprehend this obligation." (*f*)

In Scotland.

§ 413. In Scotland the property in goods never passes until delivery, and the law was stated by Lord President Inglis in December, 1867, in the case of Black *v.* Bakers of Glasgow (40 Jurist, 77), as follows: "There could be no stoppage *in transitu* in this case, simply because the goods never were in a state of *transitus*. No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitu* to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer. Unless the seller has parted with the possession his remedy is not stoppage *in transitu*, but in Scotland *retention*, and in England an exercise of the seller's right of lien. I should think it almost unnecessary at this time of day to point out the important distinctions which exist between the laws of Scotland and England, as regards the seller's rights in goods sold and not delivered. The seller of goods in Scotland (notwithstanding the personal contract of sale) *remains the undivested owner of the*

(*f*) Frémery, Etudes du Droit Commercial, p. 5.

goods, whether the price be paid or not, provided the goods be not delivered, and the property of the goods cannot pass without delivery actual or constructive; the necessary consequence is, that the seller can never be asked to part with the goods until the price be paid. Nay, he is entitled to *retain them against the buyer and his assignees till every debt due and payable to him by the buyer is paid or satisfied.* The seller's right of retention being thus grounded on an undivested right of property, cannot possibly be of the nature of a lien, for one can have a lien only on the property of another. In England, on the other hand, the property of the goods passes to the buyer by the personal contract of sale, and the seller's rights thereafter in relation to the undelivered subject of sale, whatever else they may be, cannot be rights of an undivested owner. English jurists are not agreed as to the true foundation in principle of the seller's lien. I shall only say, that if it be not an equitable remedy like stoppage *in transitu*, it is certainly not the assertion of a legal right of ownership like the right of *retention* in Scotland." In Couston *v.* Chapman (*g*) will be found an exposition of the difference between the law of England and that of Scotland in a sale by sample.

(*g*) L. R. 2 Sc. App. 250.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

MISTAKE, AND FAILURE OF CONSIDERATION.

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§ 414. It has already been shown that a party who has given an apparent assent to a contract of sale may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject-matter of the sale, the price, and, in some instances, the identity of the other contracting party. (*a*) The contract in such case has never come into existence for want of a valid assent. We enter now on the consideration of cases where the contract has been carried into effect under a continuance of mistake, and when the party who contracted through error is no longer passive, declining to execute, but active, seeking to set it aside. (*b*) The

(*a*) [*Ante*, §§ 50 *et seq.*; Byers *v.* Chapin, 28 Oh. St. 300.]

(*b*) [In Gardner *v.* Lane, 9 Allen, 492, 499, Bigelow C. J. said: "Where parties

mistake alleged as a reason for avoiding a contract may be that of both parties, or of one alone; it may be a mistake of law or of fact; and when the mistake is that of one party alone, that fact may be known or unknown to the other contracting party.

Common mistake.

§ 415. When there has been a common mistake as to some essential fact, forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable. If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of the other side, a restoration to the condition in which he was before the contract was made. If that be not possible, the deceived party must be content with a compensation in damages. (*c*) And this rule is applicable to cases even where the mistake of the com-

Contract cannot be rescinded where *restitutio in integrum* impossible.

Even when mistake was caused by fraud.

to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished, or set apart, and subsequently a delivery is made by mistake of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery.

Mistake as to subject-matter.

They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them, the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete. Delivery, of itself, can pass no title; it can be effective and operate only when made as incidental to and in pursuance of a previous contract of sale. Such a case seems clearly to fall within that class in which, through mistake, a contract which the parties intended to make fails of effect; as where, in a negotiation for a sale of property, the seller has reference to one article and the buyer to another, or where the parties suppose the property to be in existence, when in fact it had been destroyed. In such cases the contract is ineffectual, because the parties did not in fact agree as to the subject-matter, or because it had no existence." See the reference to this case, and other decisions upon this point, *ante*, § 50, note (*t*); Chapman *v.* Cole, 12 Gray, 141; Wheat *v.* Cross, 31 Md. 99, 104; Gardiner *v.* Tate, Ir. R. 10 C. L. 460; Megaw *v.* Molloy, L. R. 2 Ir. 530.]

(*c*) Holtz *v.* Schmidt, 59 N. Y. 253; Wooster *v.* Sage, 67 Ib. 67; Hunt *v.* Silk, 5 East, 449; Blackburn *v.* Smith, 2 Ex. 783; Sully *v.* Frean, 10 Ex. 535; Clarke *v.* Dickson, E., B. & E. 148; 27 L. J. Q. B. 223; Savage *v.* Canning, 16 W. R. 133; Irish R. 1 C. L. 434; [2 Chitty Contr. (11th Am. ed.) 1092, and note (*a*); Foster J. in Morse *v.* Brackett, 98 Mass. 209; Lyon *v.* Bertram, 20 How. (U. S.) 149, 154, 155; Bartlett *v.* Drake, 100 Mass. 176; Coolidge *v.* Brigham, 1 Met. 547; Stevens *v.* Austin, Ib. 557; Kimball *v.* Cunningham, 4 Mass. 502; Conner *v.* Henderson, 15 Ib. 319; Thayer *v.* Turner, 8 Met. 550; Martin *v.* Roberts, 5 Cush. 126; Shepherd *v.* Temple, 3 N. H. 455; Wiggin *v.* Foss, 4 Ib. 294; Luey *v.* Bundy, 9 Ib. 298; Cook *v.* Gilman, 34 Ib. 556, 560; Webb *v.* Stone, 24 Ib. 282; Manahan *v.*

plaining party was caused by the fraud of the other. In Strickland v. Turner (*d*) the sale was of an annuity, dependent on a life that had ceased without the knowledge of either party, and the purchaser paid his money. Held that he could recover it back as money had and received. In Cox *v.* Prentice (*e*) the plaintiff bought a bar of silver, and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver was much less than was stated in the report. Held to be a common mistake, and that the plaintiff, on offer to return the bar, could recover the price paid in assumpsit, Lord Ellenborough saying it was just as if an article is sold by weigbt, and there is an accidental misreckoning of the weight.

Strickland v. Turner.

Cox v. Prentice.

Noyes, 52 Ib. 232; Burton *v.* Stewart, 3 Wend. 236; Johnson *v.* Titus, 2 Hill, 606; Hammond *v.* Buckmaster, 22 Vt. 375; Fay *v.* Oliver, 20 Ib. 118; Allen *v.* Edgarton, 3 Ib. 442; Howard *v.* Cadwalader, 5 Blackf. 225; Peters *v.* Gooch, 4 Ib. 516; Newell *v.* Turner, 9 Porter, 420; Bacon *v.* Brown, 4 Bibb, 91; Reed *v.* McGrew, 5 Ham. 386; Potter *v.* Titcomb, 22 Maine, 300; The Armstrong Furniture Co. *v.* Kosure, 66 Ind. 545; Montgomery Co. *v.* American Emigrant Co. 47 Iowa, 91; Royce *v.* Watrous, 7 Daly, 87. The purchaser of a chattel cannot rescind the sale without returning it to the vendor, unless it be entirely worthless to both parties. If it be of any value to *the vendor*, or if its loss would be any injury to him, it must be returned. Perley *v.* Balch, 23 Pick. 283; Shepherd *v.* Temple, 3 N. H. 455; Cook *v.* Gilman, 34 Ib. 561; Sandford *v.* Dodd, 2 Day, 437; Tisdale *v.* Buckmore, 33 Maine, 461; Dorr *v.* Fisher, 1 Cush. 271, 274; Moyer *v.* Shoemaker, 5 Barb. 319; Getchell *v.* Chase, 37 N. H. 110; Babcock *v.* Case, 61 Penn. St. 427; Mahone *v.* Reeves, 11 Ala. 345; Smith *v.* Smith, 30 Vt. 139; Dill *v.* O'Ferrell, 45 Ind. 268; Wells J. in Bassett *v.* Brown, 105 Mass. 551, 558, 559; Morse *v.* Brackett, 98 Ib. 205; S. C. 104 Ib. 494; Conner *v.* Henderson, 15 Ib. 319. In Brewster *v.* Burnett, 125 Mass. 68, it was held that the purchaser of counterfeit bonds of the United States, in whose possession they are, need not return them before bringing suit to recover the money he paid for them. Hess *v.* Young, 59 Ind. 379; Haase *v.* Mitchell, 58 Ib. 213. This general rule as to restoring the consideration applies as well to a rescission on the ground of misrepresentation and fraud as to other cases. Kimball *v.* Cunningham, 4 Mass. 502; Thurston *v.* Blanchard, 22 Pick. 18; Thayer *v.* Turner, 8 Met. 550; Cook *v.* Gilman, 34 N. H. 556; Bartlett *v.* Drake, 100 Mass. 176; Masson *v.* Bovet, 1 Denio, 74; Hoopes *v.* Strasburger, 37 Md. 390. There are exceptions to the general rule which grow out of and are founded upon the deficient capacity of the party who seeks to be relieved from the contract. Bartlett *v.* Drake, 100 Mass. 176; Chandler *v.* Simmons, 97 Ib. 508, 514; Bartlett *v.* Cowles, 15 Gray, 445; Gibson *v.* Soper, 6 Ib. 279; Boody *v.* McKenney, 23 Me. 517; *ante*, § 27, in note (*r*).]

If contract rescinded, consideration must be returned.

(*d*) 7 Ex. 208. See a similar case in equity, Cochrane *v.* Willis, L. R. 1 Ch. Ap. 58.

(*e*) 3 M. & S. 344.

§ 416. The case of Boulton *v.* Jones (*f*) was a very singular case of mutual mistake, and is well worth consideration. The facts have already been stated at length (*ante*, § 59), and were substantially these: One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop and business to the plaintiff Boulton. On the same day, Jones, ignorant of this sale, sent a written order for goods to the shop, addressed to Brocklehurst, and Boulton supplied them. Jones consumed the goods, still ignorant that they were supplied by Boulton, and when payment was asked for, declined, on the ground that he had a set-off against Brocklehurst, with whom *alone* he had assented to deal. The action was for goods sold, and the court held that there was no contract by Jones with the plaintiff, and that inasmuch as he had a set-off against Brocklehurst, the mistake as to the person was sufficient to entitle him to refuse payment. (*g*) So far the case was in accordance with the rule laid down by Gibbs C. J. in Mitchell *v.* Lapage (*h*) (not cited in Boulton *v.* Jones), and the plaintiff could not be permitted to recover. But on the principles governing contracts in general, it is submitted that the plaintiff was not wholly without remedy. For aught that appears in the report, there was a clear case of mutual mistake. The plaintiff, who had just bought out the shop and business of Brocklehurst, did nothing wrong, nothing out of the usual course of trade in supplying goods on a written order sent by a customer to a shop, addressed to the man whose business he had just bought, and in ignorance of the fact that it could be at all material to the buyer whether the goods were supplied by himself or by his predecessor in business. Plaintiff's mistake was his ignorance that the defendant wished to buy *quâ* creditor of Brocklehurst, so as to pay for the goods by a set-off. Defendant's mistake was in consuming the goods of the plaintiff, in the belief that they were the goods of Brocklehurst. It can hardly be doubted that if the goods had not been consumed before the discovery of the mistake, the defendant would have been bound on demand to return the goods if he did not choose to pay for them. The very basis of the decision was that there had been *no contract* between the parties, and if so, on no conceivable ground could the defendant have kept without

Boulton *v.* Jones.

Observations on Boulton *v.* Jones.

(*f*) 2 H. & N. 564; 27 L. J. Ex. 117.
(*g*) [See Mudge *v.* Oliver, 1 Allen, 74.]
(*h*) Holt N. P. 253.

payment another man's goods sent to his house by mistake. The consumption of the goods prevented the possibility of a simple avoidance of the contract on the ground of mutual mistake. That mistake was in relation to the *mode of payment*. The vendor thought he was to be paid in money; the buyer intended to pay in his claim against Brocklehurst. The real question under the circumstances then was this: Is the buyer to pay as *he* intended, or as the *vendor* intended? for both had intended that the property in the goods should pass, at the price fixed in the invoice. Now, in determining this, which was the real dispute, a controlling circumstance is that the buyer was wholly blameless, whereas the seller had been guilty of some slight negligence. If the seller had sent an invoice or bill of parcels with the goods, showing that *he* was the vendor, the buyer would have been at once informed of the mistake, and might have rejected the goods; but the vendor delayed sending his invoice till the goods were consumed. The true result, therefore, of the whole transaction, it is submitted, is in principle this, that the buyer was bound to pay for the goods in the manner in which he had assented to pay, and the vendor was bound to accept payment in that mode. The buyer was therefore responsible, not at law (for courts of law have no means nor machinery for reforming contracts nor rendering conditional judgments), but in equity, either to make an equitable assignment to the vendor of his claim against Brocklehurst for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against Brocklehurst. He would have no right to retain the whole of his claim against Brocklehurst while refusing to pay for the goods. (*i*) The case is manifestly quite distinct from that of a mutual mistake, where a party has consumed what he did not intend to buy. If A. sends a case of wine to B., intending to sell it, but fails to communicate his intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price, either in law or equity, if he be blameless for the mistake.

Mistake of one party not communicated to the other.

§ 417. Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A. and B.

(*i*) See, for illustration of equitable principles in such cases, Harris *v.* Pepperell, L. R. 5 Eq. 1.

contract for the sale of the cargo per ship *Peerless* and there be two ships of that name, and A. mean one ship and B. intend the other ship, there is no contract. (*k*) But if there be but one ship *Peerless*, and A. sell the cargo of that ship to B., the latter would not be permitted to excuse himself on the ground that he had in his mind the ship *Peeress*, and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A.'s proposal were unmistakable, as if it were made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel. For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention. (*l*)

General rule of law where a party does not manifest his real intention.

§ 418. When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud, which is the subject of the next chapter. In the case just supposed of a ship *Peerless* and a ship *Peeress*, there can be little doubt that if the vendor *knew* that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of law just stated, the vendor would not be in a position to show that he had been *induced* to act by a manifestation of the buyer's intention different from his real intention. And if he not only knew the buyer's mistake, but caused it, his conduct would be fraudulent. But, as a general rule, in sales the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mis-

Mistake of one party known to the other.

(*k*) Raffles *v.* Wichelhaus, 2 H. & C. 906; 33 L. J. Ex. 160.

(*l*) Per Lord Wensleydale in Freeman *v.* Cooke, 2 Ex. 654; Doe *v.* Oliver, and cases collected in notes to it, 2 Sm. L. C. 671; Cornish *v.* Abington, 4 H. & N. 549; 28 L. J. Ex. 262; Alexander *v.* Worman, 6 H. & N. 100; 30 L. J. Ex. 198; Van Toll *v.* South Eastern Railway Company, 12 C. B. N. S. 75; 31 L. J. C. P. 241; In re Bahia & San Francisco Railway Company, L. R. 3 Q. B. 585.

taken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract made under the supposed error or mistake. The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other. This topic is more fully considered in the next chapter on fraud.

§ 419. The mistake which will justify a party in seeking to avoid his contract must be one of fact, not of law. The universal rule is *Ignorantia juris neminem excusat.* The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note. (*m*) But in Wake *v.* Harrop (*m*) it was held, both in the exchequer of pleas and in the exchequer chamber, that where a party had specially stipulated that he was acting only as agent for another, and had signed as such agent for his absent principal named in the signature, he was at liberty to show, by way of equitable defence, that the agreement, which had been drawn up in such terms as to make him personally liable at law, was so written by mistake, that it did not express the real contract, and that he was not liable as principal. Some of the judges thought the plea a good defence, even at law, but this point, not being raised, was not decided. In Cooper *v.* Phibbs (*n*) Lord Westbury gave the following very lucid statement of the true meaning of the maxim just quoted: "It is said *ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may also be the result of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having pro-

Mistake must be of fact, not law.

Wake *v.* Harrop.

Cooper *v.* Phibbs.

(*m*) Bilbie *v.* Lumley, 2 East, 471; Stevens *v.* Lynch, 12 East, 38; East India Company *v.* Tritton, 3 B. & C. 280; Milnes *v.* Duncan, 6 B. & C. 671; Stewart *v.* Stewart, 6 Cl. & F. 966; Teed *v.* Johnson, 11 Ex. 840; Platt *v.* Bromage, 24 L. J. Ex. 63; Wake *v.* Harrop, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451; [2 Chitty Contr. (11th Am. ed.) 934, and note (*n*) and cases cited.]

(*n*) L. R. 2 Eng. & Ir. App. 148–170.

ceeded upon a common mistake. Now that was the case with these parties: the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it; the mistake is discovered and the agreement cannot stand." The case was that of a party, the real owner of a property, agreeing, in ignorance of his right, to take a lease of it from the supposed owners, who were equally ignorant that they had no title to it.

§ 420. An innocent misrepresentation of fact or law may give rise to a contract, and thus involve the question, whether the party deceived by such innocent misrepresentation is entitled on that ground to avoid the contract. The law as to misrepresentation of fact was thus stated by Blackburn J. in delivering the judgment of the court in Kennedy *v.* Panama Mail Co. (*o*) "There is a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show *that there is a complete difference in substance* between what was supposed to be and what was taken, *so as to constitute a failure of consideration.* For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an *honest misrepresentation* as to its soundness, *though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error*, yet the purchaser *must pay the whole price*, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract. Street *v.* Blay." (*p*) The learned judge then quotes the authorities from

Innocent misrepresentation causing mistake.

1st. Of fact.

Kennedy *v.* Panama Mail Co.

(*o*) L. R. 2 Q. B. 580–587.

(*p*) 2 B. & Ad. 456. [In some American states it has been held that the warranty may be treated as a condition subsequent, and upon breach thereof the purchaser may return the goods bought and recover back

the civil law to the same effect, and concludes the passage by saying: "And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is, to determine whether the mistake or misapprehension is *as to the substance of the whole consideration*, going as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." (p^1)

Torrance *v.* Bolton.

§ 421. In Torrance *v.* Bolton (q) it was held, that where a bidder at auction was misled by the particulars advertised, as to the property exposed for sale, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe that he was buying the absolute reversion of the freehold, and not an equity of redemption. No fraud was shown, but the court said that the description in the particulars was "improper, insufficient, and not very fair." (Per James L. J. 123.) (r) This subject is further treated in the chapter on Warranty, book IV. part II. ch. i.

2d. Of law.

§ 422. As to mistake or failure of consideration in a contract which was induced by an innocent misrepresentation of

the price. See *post*, Remedies of the Buyer, book V. part II. § 888, note (a); 1 Chitty Contr. (11th Am. ed.), 648, note (q^1).]

(p^1) [See Bird *v.* Forceman, 62 Ill. 212.]

(q) L. R. 14 Eq. 124; 8 Ch. 118.

(r) [A bargain founded on material misrepresentations of matters of fact, even though they are inadvertently made through a mutual mistake of the parties, or by mistake of one of them alone, will be annulled in equity. Mistake, as well as fraud, in any representation of a fact material to the contract, furnishes a sufficient ground, in equity, to set it aside, and declare it a nullity. Daniel *v.* Mitchell, 1 Story, 172; Doggett *v.* Emerson, 3 Ib. 700; Hough *v.* Richardson, Ib. 659; Warren *v.* Daniels, 1 Wood. & M. 90; Smith *v.* Babcock, 2 Ib. 246; Tuthill *v.* Babcock, Ib. 299; Mason *v.* Crosby, 1 Ib. 342; Ferson *v.* Sanger, Ib. 138; Smith *v.* Richards, 13 Peters, 26; Pearson *v.* Morgan, 2 Bro. C. C. 388; Roosevelt *v.* Dale, 2 Cowen, 134; S. C. 5 Johns. Ch. 174; Champlin *v.* Laytin, 6 Paige, 189; S. C. 13 Wend. 407; Lewis *v.* M'Lemore, 10 Yerger, 206; Parham *v.* Randolph, 4 How. (Miss.) 435; Brooks *v.* Stolley, 3 McLean, 523; Sherwood *v.* Salmon, 5 Day, 439; Coe *v.* Turner, 5 Conn. 86; Spurr *v.* Benedict, 99 Mass. 463; Jennings *v.* Boughton, 5 De G., M. & G. (Am. ed.) 126, note (2); Clapham *v.* Shillito, 7 Beav. 149; Kyle *v.* Kavanagh, 103 Mass. 356; Walker *v.* Denison, 86 Ill. 142; Bigelow on Torts, p. 23, note 1. "The whole doctrine turns upon this, that he who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not his victim." Story J. in Doggett *v.* Emerson, 3 Story, 733.]

Innocent material misrepresentation, ground for setting aside in equity.

law, it was carefully considered by the common pleas in the two cases of Southall *v.* Rigg and Forman *v.* Wright, (*s*) and held to form a valid ground for avoiding a contract. It is to be observed, however, that in both those cases the mistake went, in the above quoted language of Mr. Justice Blackburn, "to the substance of the whole consideration," and it is apprehended that the right of rescinding a contract, on the ground of mistake of law induced by innocent misrepresentations, is subject to the same qualification and limitation as where there is a mistake of fact induced by the same cause, as explained in Kennedy *v.* The Panama Mail Co. *supra.* In Stevens *v.* Lynch, (*t*) the drawer of a bill of exchange, knowing that time had been given to the acceptor without his, the drawer's, assent, but ignorant that in law he was thereby discharged, promised to pay the bill, and he was held bound. (*u*) This case was cited in Forman *v.* Wright, but Williams J. simply said, "That is a very different case" (20 L. J. at p. 149); the difference being apparently this, that in the case of Forman *v.* Wright the defendant had never owed the money at all, so that his error went "to the substance of the *whole* consideration," whereas, in Stevens *v.* Lynch, the defendant had been indebted to the plaintiff for a good consideration; and although the law discharges a surety where time is given to the principal debtor without the surety's assent, yet this is done on the ground that the condition of the surety is generally thereby altered; and *non constat* that in Stevens *v.* Lynch the defendant's condition was really altered. Certainly the *whole* consideration of his promise to pay was not the mistake of law, inasmuch as the promise was manifestly based in part on the original consideration received when the bill was drawn. In the recent case of Beattie *v.* Lord Ebury, (*x*) there is an elaborate discussion of the law on this subject in its application to the case of an agent honestly representing himself to have an authority which he does not possess, and Lord J. Mellish, in delivering the judgment of the court, expressed a very strong opinion, that if in such a case

Southall *v.* Rigg. Forman *v.* Wright.

Stevens *v.* Lynch.

Beattie *v.* Lord Ebury.

(*s*) Both reported in 11 C. B. 481; 20 L. J. C. P. 145. See, also, Rushdall *v.* Ford, L. R. 2 Eq. 750.

(*t*) 12 East, 38.

(*u*) [1 Chitty Contr. (11th Am. ed.) 54, note (*t*), and cases cited to this point; 3 Kent, 113; Loose *v.* Loose, 36 Penn. St. 538, 545.]

(*x*) L. R. 7 Ch. 777.

the written power was shown by the agent, he would not be responsible for the innocent misrepresentation of its legal effect.

Failure of consideration.

§ 423. As early as 1797, it was held by the king's bench to be settled law, that a man who had advanced money on a contract of sale had a right to put an end to this contract for failure of consideration, and recover in an action for money had and received, if the vendor failed to comply with his entire contract. (*y*) A buyer may recover, on the same ground, the price paid to the seller who has warranted title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to deliver them up to the true owner. (*z*) And, even without such warranty, it has been said to be the undoubted right of a buyer to recover back his money paid on the ordinary purchase of a chattel, where the purchaser does not get that for which he paid (*a*) but this subject of failure of title is more elaborately treated *post*, book IV. part II. ch. i. sec. 2, on Implied Warranty of Title. And the same right exists in favor of the buyer where he has paid money for forged scrip in a railway ; (*b*) or for forged bills or notes ; (*c*) or for an article different from that which was described in the sale, as is shown *post*, in book IV. part I. on Conditions. (*d*)

Where vendor fails to complete contract.

Where title fails after warranty by vendor.

Or even without warranty in sale of chattel.

Where forged securities have been bought.

§ 424. Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed. (*e*) So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration ; (*f*) or for an unstamped bill of exchange which purports to be a foreign bill, and turns out to be worthless because really a do-

Purchase of shares in a projected company.

Invalid bill. Unstamped security.

(*y*) Giles *v.* Edwards, 7 T. R. 181; [Phippen *v.* Hyland, 19 U. C. C. P. 416; The Home Machine Co. *v.* Willie, 85 Ill. 333.]

(*z*) Eichholtz *v.* Banister, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

(*a*) *Per Cur.* in Chapman *v.* Speller, 14 Q. B. 621, and 19 L. J. Q. B. 241.

(*b*) Westropp *v.* Solomon, 8 C. B. 345.

(*c*) Jones *v.* Ryder, 5 Taunt. 488; Gurney *v.* Womersley, 4 E. & B. 133; 24 L. J. Q. B. 46; Woodland *v.* Fear, 7 E. & B. 519; 26 L. J. Q. B. 202; [2 Chitty Contr. (11th Am. ed.) 931, and note (*t*) and cases cited.]

(*d*) See notes to Chandelor *v.* Lopus, 2 Sm. L. C. 176; [2 Chitty Contr. (11th Am. ed.) 920 *et seq.* and notes.]

(*e*) Kempson *v.* Saunders, 4 Bing. 5.

(*f*) Burchfield *v.* Moore, 3 E. & B. 683; 23 L. J. Q. B. 261.

mestic bill, invalid without a stamp, (*g*) he may rescind the contract for failure of consideration.

§ 425. But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out worthless. (*h*) Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority; upon proof offered that the scrip was the only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, held, that the buyer had got what he really intended to buy, and could not rescind the contract on the ground of a failure of consideration. (*i*)

No failure of consideration where buyer gets what he really intended to buy, even if it turn out worthless.

§ 426. Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, as in Giles *v.* Edwards, (*k*) and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek

Partial failure of consideration.

Where contract is entire, buyer may reject the whole. But not if he has accepted part.

(*g*) Gompertz *v.* Bartlett, 2 E. & B. 849; 23 L. J. Q. B. 65.

(*h*) [Gray *v.* Billington, 21 U. C. C. P. 288. It is held in Massachusetts that the grant of an interest in a void patent is not a valid consideration for a promise by the grantee. Harlow *v.* Putnam, 124 Mass. 553; Bliss *v.* Negus, 8 Ib. 46; Dickinson *v.* Hall, 14 Pick. 217; Lester *v.* Palmer, 4 Allen, 145; Harrington *v.* Reynolds, 2 Russell & Chesley (N. S.) 283. See Green *v.* Stuart, 7 Baxter (Tenn.), 418. If an article purchased is rendered worthless by reason of a defect as to which the purchaser takes the risk, there is no want or failure of consideration resulting therefrom in the legal sense of the rule; because the buyer, in such case, gets and retains what he bought, that is, the property at his own risk as to such defect. Bryant *v.* Pember, 45 Vt. 487, 491, Peck J.]

(*i*) Lamert *v.* Heath, 15 M. & W. 487. See, also, Lawes *v.* Purser, 6 E. & B. 930; 26 L. J. Q. B. 25.

(*k*) 7 T. R. 181; *ante*, § 443. See Whincup *v.* Hughes, L. R. 6 C. P. 78; [Miner *v.* Bradley, 22 Pick. 457; 1 Chitty Contr. (11th Am. ed.) 533, and note (*f*[1]); Jenness *v.* Wendell, 51 N. H. 63, 66–70; Gault *v.* Brown, 48 Ib. 183. A., a retail dealer, agreed with B., a wholesale dealer, to purchase of him a lot of clothing, to be shipped to A. A portion of the goods consisted of suits of clothing of a particular kind, quality, and price. A part of those sent by B. were not of the kind, quality, and price contracted for. A. refused to accept any portion of the goods, and immediately returned them to B. It was held that the contract of A. was an entire contract for the whole of the goods, and he was not obliged to accept a part without the whole. Smith *v.* Lewis, 40 Ind. 98; Bruce *v.* Pearson, 3 John. 534.]

Smith *v.* Lewis.

his remedy in some other form of action. Thus, in Harnor *v.* Groves, (*l*) a purchaser of fifteen sacks of flour having, after its delivery to him, used half a sack, and then two sacks more, was held not entitled to rescind the contract, on the ground of a failure of consideration, and to return the remainder, although he had made complaint of the quality as not equal to that bargained for as soon as he had tried the first half sack. (*m*) So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration

Harnor *v.* Groves.

(*l*) 15 C. B. 667; 24 L. J. C. P. 53.

(*m*) [In Morse *v.* Brackett, 98 Mass. 205; S. C. 104 Mass. 494, it appeared that several bags of wool, all bearing the same distinctive mark, were shown as one lot of a particular kind of wool to a person who proposed to purchase them. After opening some of the bags and making such other examination as he saw fit, he said he would take the whole lot, and it was sold to him, all at one time, and for one price per pound, and was delivered to him together under a single bill of parcels. It was held that the contract of sale was an entire contract, which the purchaser could not rescind in part on discovering that the wool in one of the bags was of a different kind. See Carpenter *v.* Minturn, 65 Barb. 297. So in Mansfield *v.* Trigg, 113 Mass. 350, it was held that a sale of a specific number of packages of an article, at a given price a package, is an entire contract; a purchaser cannot rescind it as to some packages, and affirm it as to others. Wells J. said: "The rejection and return of articles of a different kind or description, not answering to the terms of the contract, do not stand upon the ground of rescission; nor does the right to return them depend upon the existence of a warranty." See Miner *v.* Bradley, 22 Pick. 457; Clark *v.* Baker, 5 Met. 452; Mingaye *v.* White, 34 U. C. Q. B. 82. But when many different articles are bought at the same time for distinct prices, even if they are articles of the same general description, so that a warranty that they are all of a particular quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold; and as to each article there is a right to rescind, if the warranty in regard to it is broken. The Young & Conant Manuf. Co. *v.* Wakefield, 121 Mass. 91. In this case the articles sold differed each from the other, although all were of india rubber goods manufactured by the plaintiff. To each article a separate price was affixed, and the sale of it in no way depended upon that of the others, so that they were not united in a single sale as one lot. A number of separate contracts were shown by the same order and bill of parcels, but these were held not to make of them a single transaction only. See Johnson *v.* Johnson, 3 B. & P. 162.]

Whether vendee can return part of goods or must rescind *in toto*.

Morse *v.* Brackett.

Mansfield *v.* Trigg.

Young M'nf g. Co. *v.* Wakefield.

for part of the price paid; (*n*) not, as in the case of the flour, a *partial* failure of the whole. This was held in Devaux *v.* Connolly, (*o*) where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons, and the other of 150 tons, and the parcels turned out to be only 24 tons and 132¾ tons respectively. (*o*[1])

Devaux *v.* Connolly.

§ 427. On the other hand, if the thing sold is such in its nature as not to be severable, and the buyer has enjoyed any part of the consideration for which the price was paid, he is no longer at liberty to rescind the contract. (*p*) Thus, in Taylor *v.* Hare, (*q*) where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that he could not maintain an action for rescission of the contract and return of the price, on the ground of failure of consideration; and this case was followed by the king's bench half a century later, in Lawes *v.* Purser, (*r*) where the facts as pleaded were almost identical with those in Taylor *v.* Hare. In Chanter *v.* Leese, (*s*) the exchequer chamber, in a case of sale of six patents for one consideration, five of which were valid and one void, held that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore, that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely;* and it follows that no action can be maintained for the money." The court further stated, that even if the five patents had been enjoyed, they were of opinion that no action could be maintained *on the agreement*, though possibly a remedy might exist in some form of action.

Where thing sold is not severable, and buyer has enjoyed part of the consideration.

Taylor *v.* Hare.

Lawes *v.* Purser.

Chanter *v.* Leese.

(*n*) [See 2 Chitty Contr. (11th Am. ed.) 922, 923; Wright *v.* Cook, 9 U. C. Q. B. 605.]

(*o*) 8 C. B. 640.

(*o*[1]) [Snarr *v.* Small, 13 U. C. Q. B. 125; Clarke *v.* White, 28 U. C. C. P. 293.]

(*p*) [See 2 Chitty Contr. (11th Am. ed.) 923; Morse *v.* Brackett, 98 Mass. 205, 270.]

(*q*) 1 B. & P. N. R. 260.

(*r*) 6 E. & B. 930; 26 L. J. Q. B. 25.

(*s*) 5 M. & W. 698.

CHAPTER II.

FRAUD.

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SECTION I. — IN GENERAL.

§ 428. FRAUD renders all contracts *voidable* (*a*) *ab initio* both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent. Although fraud has been said to be "every kind of artifice employed by one person for the purpose of deceiving another," courts and law-givers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade. (*a*[1]) The Roman jurisconsults attempted definitions, two of which are here given: "Dolum malum SERVIUS quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. LABEO autem, posse et sine simulatione id agi ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena: Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est." Dig. l. iv. t. 3, l. 1, § 2. The Civil Code of France, without giving a definition, provides, in Art. 1116: "Fraud is a ground for avoiding a contract when the devices (les manœuvres) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

Fraud renders contracts voidable.

Definitions of fraud.

(*a*) [Adams *v.* Nelson, 22 U. C. Q. B. 199.]

(*a*[1]) [See the valuable suggestions of Mr. Justice Doe upon this subject in Stewart *v.* Emerson, 52 N. H. 313, 314.]

§ 429. However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said at common law to have been defrauded. In the first place, it is essential that the means used should be successful in *deceiving*. (*b*) However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and sees through the artifices or devices. (*c*) *Haud enim decipitur qui scit se decipi*. (*d*) If a contract is made under such circumstances, the inducement or motive for making it is *ex concessis*, not the false or fraudulent representations, which are not believed, but some other independent motive. (*e*) Next, it is now

No fraud unless party is deceived.

(*b*) [Doggett *v.* Emerson, 3 Story, 732, 733; Bowman *v.* Carithers, 40 Ind. 90; Hagee *v.* Grossman, 31 Ib. 223; Mason *v.* Crosby, 1 Wood. & M. 342 Clark *v.* Everhart, 63 Penn. St. 347; Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 233, and note (2) and cases cited, 444; Vigers *v.* Pike, 8 Ib. (Am. ed.) 562, 650; Vandewalker *v.* Osmer, 65 Barb. 556; Taylor *v.* Fleet, 1 Ib. 471; Phipps *v.* Buckman, 30 Penn. St. 402; Morris Canal Co. *v.* Everett, 9 Paige, 168; Stebbins *v.* Eddy, 4 Mason, 414; 2 Chitty Contr. (11th Am. ed.) 1036, 1039, and note (*z*); Smith *v.* Newton, 59 Ga. 113; Gunby *v.* Sluter, 44 Md. 237; Bruce *v.* Burr, 67 N. Y. 237. But it is not necessary that the fraudulent means used should have been the sole inducement to the contract. Shaw *v.* Stine, 8 Bosw. 157; Clarke *v.* Dixon, 6 C. B. N. S. 453; Smith *v.* Kay, 7 H. L. Cas. 750, 775; Rawlins *v.* Wickham, 3 De G. & J. 304; Traill *v.* Baring, 33 L. J. Ch. 521, 527; Reynell *v.* Sprye, 1 De G., M. & G. 660; Kerr F. & M. (1st Am. ed.) 74, 75; Hersey *v.* Benedict, 15 Hun, 282; Morgan *v.* Skiddy, 62 N. Y. 319. The presumption, in the absence of evidence to the contrary, would be that false representations made by one party were relied upon by the other. Holbrook *v.* Burt, 22 Pick. 546. But see Taylor *v.* Guest, 58 N. Y. 262; Sims *v.* Eiland, 57 Miss. 607; Merriam *v.* Pine-City Lumber Co. 23 Minn. 314; Jackson *v.* Collins, 39 Mich. 557.]

Need not have been the sole inducement.

(*c*) [Where a man has received the positive representation or assurance of another as to a material fact, he has a right to rely upon it, so far as that other is concerned, and is not bound to make any further inquiry. Vigers *v.* Pike, 8 Cl. & Fin. 562, 650; Kisch *v.* Central Venezuela Railway Co. 3 De G., J. & S. 122; S. C. L. R. 2 Ch. Ap. 114; S. C. L. R. 2 H. L. 99, 120, 121; Kerr F. & M. (1st Am. ed.) 79, 255; Kerr Inj. 39; Wilson *v.* Short, 6 Hare, 366, 375; Reynell *v.* Sprye, 1 De G., M. & G. 710; Rawlins *v.* Wickham, 3 De G. & J. 319; Smith's case, L. R. 2 Ch. Ap. 614; Perfect *v.* Lane, 3 De G., F. & J. 369; Conybéare *v.* The New Brunswick & Canada Railway Co. 1 Ib. 578, and notes; S. C. 9 H. L. Cas. 711; Boyce *v.* Grundy, 3 Peters, 210; Young *v.* Harris, 2 Ala. 108; Clopton *v.* Cozart, 13 Sm. & M. 363; Beau *v.* Herrick, 12 Maine, 262; Vandewalker *v.* Osmer, 65 Barb. 556; Rose *v.* Hurley, 39 Ind. 82, 83; Mead *v.* Bunn, 32 N. Y. 275; Deveber *v.* Roop, 3 Pugsley (N. B.), 295; Thome *v.* Prentiss, 83 Ill. 99; Merchants' Bank *v.* Sells, 3 Mo. App. 85.]

Right to rely upon positive representation of another.

(*d*) [See Morse *v.* Rathbun, 48 Mo. 91; Howell *v.* Biddlecomb, 62 Barb. 131.]

(*e*) [In order that a misrepresentation may support an action at law, or be a

well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud*. Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no ground for avoiding it *as obtained by fraud*, if the party making the representation honestly believed it to be true, (*f*) although other remedies are sometimes available

No fraud without dishonest intention; no *legal* fraud in sales.

ground for relief in equity, it is essential that it should be material in its nature, and should be a determining ground of the transaction. Lapp *v.* Firstbrook, 24 U. C. C. P. 239; Winter *v.* Bandel, 30 Ark. 362; Cooper *v.* Merritt, Ib. 686; Bond *v.* Ramsey, 89 Ill. 29; Race *v.* Weston, 86 Ib. 91; Hanna *v.* Rayburn, 84 Ib. 533; Noel *v.* Horton, 50 Iowa, 687; Dawson *v.* Graham, 48 Ib. 378; Mason *v.* Raplee, 66 Barb. 180; Miller *v.* Barber, 66 N. Y. 558; Rice *v.* Manley, Ib. 82; Duffany *v.* Ferguson, Ib. 482; Brown *v.* Tuttle, 66 Barb. 169; Swikehard *v.* Russell, Ib. 560; Sanders *v.* Lyon, 2 McArthur (D. C.), 452; Rawson *v.* Harger, 48 Iowa, 269; Teague *v.* Irwin, 127 Mass. 217; Blair *v.* Laflin, Ib. 518; Stevens *v.* Rainwater, 4 Mo. App. 292; Jennings *v.* Broughton, 5 De G., M. & G. 126; Smith *v.* Richards, 13 Peters, 26. A misrepresentation to be material must be one materially influencing and inducing the transaction; In re Reese River Silver Mining Co., Smith's case, L. R. 2 Ch. Ap. 611; and affecting and going to its very essence and substance; Hallows *v.* Fernie, L. R. 3 Eq. 536. Misrepresentations which, if true, would add substantially to the value of property; Smith *v.* Countryman, 30 N. Y. 655; or are calculated to increase substantially its apparent value, are material; Kerr F. & M. (1st Am. ed.) 73, 74; Nolan *v.* Cain, 3 Allen, 263; Miller *v.* Young, 33 Ill. 355; Melendy *v.* Keen, 89 Ib. 395; Higgins *v.* Bicknell, 82 Ib. 502; Welshbillig *v.* Dienhart, 65 Ind. 94; Mather *v.* Robinson, 47 Iowa, 403.]

Representation must be material.

(*f*) [See Cooper *v.* Lovering, 106 Mass. 78, 79; Brown *v.* Castles, 11 Cush. 348–351; McDonald *v.* Trafton, 15 Maine, 225; Beach *v.* Bemis, 107 Mass. 498; King *v.* Eagle Mills, 10 Allen, 548; Stone *v.* Denny, 4 Met. 151, 155, and cases cited; Salem India Rubber Co. *v.* Adams, 23 Pick. 256; Hanson *v.* Edgerly, 29 N. H. 343; Page *v.* Bent, 2 Met. 371; Tryon *v.* Whitmarsh, 1 Ib. 1; Page *v.* Parker, 40 N. H. 47, 69; Pettigrew *v.* Chellis, 41 Ib. 95; Fisher *v.* Mellen, 103 Mass. 503; 2 Chitty Contr. (11th Am. ed.) 1044, 1045, and notes; Russell *v.* Clark, 7 Cranch, 69; Young *v.* Covell, 8 John. 25; Boyd *v.* Browne, 6 Barr, 310; Lord *v.* Goddard, 13 How. (U. S.) 198; Weeks *v.* Burton, 7 Vt. 67; French *v.* Vining, 102 Mass. 132; Barrett *v.* Western, 66 Barb. 205; Marshall *v.* Fowler, 7 Hun, 237; Westcott *v.* Ainsworth, 9 Ib. 53; Frisbie *v.* Fitzsimmons, 3 Ib. 674; Babcock *v.* Libbey, 53 How. Pr. 255; Stilt *v.* Little, 63 N. Y. 427; Moorehorse *v.* Yeager, 9 J. & Sp. 135; Dilworth *v.* Bradner, 85 Penn. St. 238; Duff *v.* Williams, Ib. 490; Righter *v.* Roller, 31 Ark. 170; Sellar *v.* Clelland, 2 Col. 532; Kimball *v.* Moreland, 55 Ga. 164; Wharf *v.* Roberts, 88 Ill. 426; St. Louis & Southeastern Railroad Co. *v.* Rice, 85 Ib. 406; Tone *v.* Wilson, 81 Ib. 529; Merwin *v.* Arbuckle, Ib. 501; Mitchell *v.* McDougall, 62 Ib. 498, explained in Merwin *v.* Arbuckle, *supra;* Josselyn *v.* Edwards, 57 Ind. 212. "If, to induce the plaintiff to make the purchase, the defendant stated, as of his own knowledge, material facts susceptible of knowledge, which were false, and the plaintiff, relying upon his statements so made, was thereby induced to purchase the goods, the defendant is liable, notwithstanding proof that he was himself misinformed as to the facts. Such evidence would not

Fact that defendant was misinformed not always justification.

to the deceived party, *ante*, §§ 420 *et seq.*; *post*, Warranty. Lastly, there must be damage to the party deceived, even when there is a knowingly false representation, before a right of action can arise. "Fraud without damage, or damage without fraud, gives no cause of action," was the maxim laid down by Croke J. in 3 Bulst. 95, and quoted with approval by Buller J. in the great leading case of Pasley *v.* Freeman, (*g*) to which more particular attention will presently be drawn. The whole doctrine on the subject was very much discussed in the House of Lords, in the celebrated case of Attwood *v.* Small; (*h*) and in Lord Brougham's opinion, the principles unanimously conceded to be true by their lordships are carefully laid down. (*i*)

Fraud without damage gives no right of action.

Attwood *v.* Small.

§ 430. The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception. (*k*) In general, where an article is offered for sale,

Mistaken belief may be caused actively or passively.

Caveat emptor is general rule.

disprove the fraud, which consists in representing the statements to be true as of his own knowledge." Wells J. in Fisher *v.* Mellen, 103 Mass. 506; Hazard *v.* Irwin, 18 Pick. 95; Page *v.* Bent, 2 Met. 371, 374; Stone *v.* Denny, 4 Ib. 151; Hammatt *v.* Emerson, 27 Maine, 308; Doggett *v.* Emerson, 3 Story, 733; Hough *v.* Richardson, Ib. 691; Mitchell *v.* Zimmerman, 4 Texas, 75; Grim *v.* Byrd, Reporter (Boston), vol. ix. p. 662; Savage *v.* Stevens, 126 Mass. 207; Graham *v.* Nowlin, 54 Ind. 389; Rawson *v.* Harger, 48 Iowa, 269; Foard *v.* McComb, 12 Bush, 723; Gumby *v.* Sluter, 44 Md. 237; The Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283; Parmlee *v.* Adolph, 28 Ib. 10; Doyle *v.* Hart, 4 L. R. Ir. 661. The design to deceive must be proved by other evidence than the mere fact that the representations were not true. McDonald *v.* Trafton, 15 Maine, 225; McKown *v.* Furgason, 47 Iowa, 636. But see McBean *v.* Fox, 1 Bradwell (Ill.), 177.]

(*g*) 3 T. R. 51; 2 Sm. L. C. 71. ["The gravamen of the charge is, that the plaintiff has been deceived to his hurt; not that the defendant has gained an advantage." Wells J. in Fisher *v.* Mellen, 103 Mass. 505; Medbury *v.* Watson, 6 Met. 246; Stiles *v.* White, 11 Ib. 356; Page *v.* Bent, 2 Ib. 371, 374; Hanson *v.* Edgerly, 29 N. H. 357; Adams *v.* Paige, 7 Pick. 542; Milliken *v.* Thorndike, 103 Mass. 385; Newell *v.* Horn, 45 N. H. 422; Randall *v.* Hazelton, 12 Allen, 414; White *v.* Wheaton, 3 Selden, 352; Hart *v.* Tallmadge, 2 Day, 382; Young *v.* Hall, 4 Ga. 95; Weatherford *v.* Fishback, 3 Scam. 170; Hughes *v.* Sloan, 3 Eng. 146; Phipps *v.* Buckman, 30 Penn. St. 402; Castleman *v.* Griffin, 13 Wis. 535; Hagee *v.* Grossman, 31 Ind. 223; McMaster *v.* Geddes, 19 U. C. Q. B. 216; Bartlett *v.* Blaine, 83 Ill. 25.]

(*h*) 6 Cl. & Fin. 232.

(*i*) 6 Cl. & Fin. 443–447. See, also, per Lord Wensleydale, in Smith *v.* Kay, 7 H L. Cas. 774.

(*k*) Smith *v.* Hughes, L. R. 6 Q. B. 597. [Whenever a person conceals a ma-

and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. (*l*) The rules are *Caveat*

terial fact which it was his duty to communicate; Irvine *v.* Kirkpatrick, 7 Bell S. C. Ap. 186; Otis *v.* Raymond, 3 Conn. 413; Van Arsdale *v.* Howard, 5 Ala. 596; Matthews *v.* Bliss, 22 Pick. 48; Paddock *v.* Strobridge, 29 Vt. 470; Brown *v.* Montgomery, 20 N. Y. 287; Sides *v.* Hilleary, 6 Harr. & J. 86; Nickley *v.* Thomas, 22 Barb. 652; Hanson *v.* Edgerly, 29 N. H. 343; Emmons *v.* Moore, 85 Ill. 304; March *v.* First Nat. Bank of Mobile, 4 Hun, 466; Atwood *v.* Chapman, 68 Maine, 38; Maynard *v.* Maynard, 49 Vt. 297; or uses any device which is calculated to in-

Concealment or silence may constitute fraud.

duce the other party to forego inquiry into a material fact upon which the former has information, although such information be not exclusively within his reach; and it is shown that the concealment or other deception was practised with respect to the particular transaction; such transaction will be voidable on the ground of fraud. Tindal C. J. in Green *v.* Gosden, 3 M. & G. 446, 450; 2 Chitty Contr. (11th Am. ed.) 1042, 1043; Prentiss *v.* Russ, 16 Maine, 30; Smith *v.* Richards, 13 Peters 26; Howell *v.* Biddlecom, 62 Barb. 131; Coddington *v.* Goddard, 16 Gray, 436; Roseman *v.* Canovan, 43 Cal. 110; Cassel *v.* Herron, 5 Pa. Law J. Rep. 250; Roper *v.* The Trs. of Sangamon Lodge, 91 Ill. 518. In French *v.* Vining, 102 Mass. 135, Ames J. said: "It is sometimes rather loosely said that mere silence on the part of the vendor as to a known defect does not amount to a fraud. But this is far from being universally true. Deceit may sometimes take a negative form, and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation." In this case it was held that if a person sells, for the purpose of being fed to a cow, part of a lot of hay on which he knows white lead to have been spilt, and does not inform the purchaser of that fact, and the cow dies from the effect of the lead in the hay, the vendor of the hay is liable for the loss of the cow, although he carefully endeavored to separate and remove the damaged hay, and thought he had succeeded. §§ 478 *et seq.*, *post*. The owner of a horse which had the heaves, and was worth nothing, in the course of a negotiation for an exchange, concealed the defect, and affirmed that the horse was worth $100; and the other party, having no knowledge of the defect, was thereby induced to make the exchange. This was held to constitute good ground for an action for deceit. Stevens *v.* Fuller, 8 N. H. 463.]

(*l*) [See Vigers *v.* Pike, 8 Cl. & Fin. 650; Attwood *v.* Small, 6 Ib. (Am. ed.) 233, and note (2) and cases cited; Hoitt *v.* Holcomb, 32 N. H. 185, 202–205; Dickinson *v.* Lee, 106 Mass. 557, 558, 559; Veasey *v.* Doton, 3 Allen, 380; Brown *v.* Castles, 11 Cush. 350; Aberaman Iron Works *v.* Wickens, L. R. 4 Ch. Ap. 101; S. C. L. R. 5 Eq. 485; Stephens *v.* Orman, 10 Florida, 9; Kerr F. & M. (1st Am. ed.) 78; Lytle *v.* Bird, 3 Jones, 222; Hough *v.* Richardson, 3 Story, 659; Warner *v.* Daniels, 1 Wood. & M. 90, 101, 102; Smith *v.* Babcock, 2 Ib. 246; Tuthill *v.* Babcock, Ib. 298; Port *v.* Williams, 6 Ind. 219. In Mooney *v.* Miller, 102 Mass. 220, Chapman J. said, if the false representations "relate to material facts, not within the observation of the opposite party, and they are made with intent to deceive, they are actionable; but if the truth can be ascertained with ordinary vigilance, they are not actionable." See Brown *v.* Castles, 11 Cush. 348; Prescott *v.* Wright, 4 Gray, 461; Cooper *v.* Lovering, 106 Mass. 77, 79; Dickinson *v.* Lee, Ib. 557; Attwood *v.* Small, 6 Cl. & Fin. 233; James *v.* Lichfield, L. R. 9 Eq. 51; 1 Sugden V. & P. (8th Am. ed.) 331, and cases in note (x^1); Newell *v.* Horn, 45 N.

Reasonable diligence must be used by party to whom representation is made.

emptor and *Simplex commendatio non obligat.* The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects. (*m*) If

H. 422; Hess *v.* Young, 59 Ind. 379; Long *v.* Warren, 68 N. Y. 426; Furman *v.* Tufts, 8 J. & Sp. 284; Sparmann *v.* Keim, 12 Ib. 163; Chamberlain *v.* Rankin, 49 Vt. 133. But it has been held that a contract for the sale of land may be rescinded in favor of the purchaser for fraud in the sale, although he had an opportunity to examine the land before the purchase, and did examine it, but did not go into details, and confided for these in the false statements of the person negotiating with him, and of his agents. Tuthill *v.* Babcock, 2 Wood. & M. 299; Mason *v.* Crosby, 1 Ib. 342; 1 Story Eq. Jur. § 203*f*, in note; Estell *v.* Myers, 54 Miss. 174; Thompson *v.* Guy, 7 Ir. L. R. 6; Bacon *v.* Frisbie, 15 Hun, 26; High *v.* Kistner, 44 Iowa, 79; Savage *v.* Stevens, 126 Mass. 207; Campbell *v.* Frankem, 65 Ind. 591; Norris *v.* Tharp, Ib. 47; Carmichael *v.* Vandebur, 50 Iowa, 651; Nowlin *v.* Snow, 40 Mich. 699.]

Application in sales of land.

(*m*) [In Manning *v.* Albee, 11 Allen, 522, Gray J. said: "This court has repeatedly recognized and acted upon the rule of the common law, by which the mere statements of a vendor, either of real or of personal property, not being in the form of a warranty as to its value, or the price which he has given or been offered for it, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive. Medbury *v.* Watson, 6 Met. 259, 260; Brown *v.* Castles, 11 Cush. 350; Veasey *v.* Doton, 3 Allen, 381; Hemmer *v.* Cooper, 8 Ib. 334; Cooper *v.* Lovering, 106 Mass. 79; Mooney *v.* Miller, 102 Ib. 217; Gordon *v.* Parmelee, 2 Allen, 212; Willard *v.* Randall, 65 Maine, 81, 86; Bishop *v.* Small, 63 Ib. 12; Holbrook *v.* Connor, 60 Ib. 578, 582, 583; Wolcott *v.* Mount, 38 N. J. Law (9 Vroom), 496, 499; Comer *v.* Perkins, 124 Mass. 431; Righter *v.* Roller, 31 Ark. 170; Merwin *v.* Arbuckle, 81 Ill. 501. But the utmost limit of this rule has been reached in applying it to statements of the price paid by the person making them; and in the leading case, in this commonwealth, of Medbury *v.* Watson, an action was maintained for false and fraudulent representations as to the price paid by a third person for the property in question. See, also, Sandford *v.* Handy, 23 Wend. 269." Simar *v.* Canaday, 53 N. Y. 306, 307; McClellan *v.* Scott, 24 Wis. 81; Ives *v.* Carter, 24 Conn. 403; Somers *v.* Richards, 46 Vt. 170; Kenner *v.* Harding, 85 Ill. 264; Cowles *v.* Watson, 14 Hun, 41; Miller *v.* Barber, 66 N. Y. 558. In Brown *v.* Leach, 107 Mass. 364, 368, it was again ruled that if the vendor, by words or acts, deceives the purchaser as to the quality or value of the goods sold, yet the purchaser cannot maintain an action of deceit, if the goods were open to his observation, and he could by the use of ordinary diligence and prudence ascertain their quality. He should use reasonable diligence to ascertain their quality, or protect himself by a warranty. The same principle applies when the purchaser seeks to avail

Statements by vendor as to value or price of property not material.

Not so as to price paid by third person.

Caveat emptor.

the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the vendor a warranty of any matters, the risk of which he is unwilling to take on himself. But the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself. (*n*)

Buyer can exact warranty if unwilling to deal on the general rule.

§ 431. The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided, for convenience, into three parts: 1st, fraud on the vendor; 2d, on the purchaser; 3d, on creditors, including the law on bills of sale. But it will be useful first to point out that a man may make himself liable in an *action, founded on tort*, for fraud or deceit or negligence (*o*) in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence. (*p*) The case usually

Action of deceit on *tort* may exist in favor of third persons, not parties to the contract.

himself of the deceit in defence of a suit for the price of the goods, or in reduction of damages. Morton, J. See Henshaw *v.* Robins, 9 Met. 83, 88, per Wilde J.; Tyre *v.* Causey, 4 Harring. 425; Hawkins *v.* Berry, 5 Gilman, 36; Hazard *v.* Irwin, 18 Pick. 95, 105; 1 Sugden V. & P. (8th Am. ed.) 2, 3, and notes.]

(*n*) [2 Chitty Contr. (8th Am. ed.) 1042, 1043.]

(*o*) George *v.* Skivington, L. R. 5 Ex 1.

(*p*) [It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other, who is not himself in fault. Thus, a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier to whom it is delivered by the first, in the ordinary course of business, to be carried to its destination. Farrant *v.* Barnes, 11 C. B. N. S. 553. So a druggist who negligently labels a deadly poison as a harmless medicine, and sells it so labelled to dealers in such articles, is liable for an injury to any one who afterwards purchases and uses it, if there is no negligence on the part of the intermediate sellers or of the person injured. Thomas *v.* Winchester, 2 Selden, 397; Davidson *v.* Nichols, 11 Allen, 519, 520; McDonald *v.* Snelling, 14 Ib. 290, 295; Hayes *v.* Porter, 22 Me. 371; Corry *v.* Lucas, Ir. R. 3 C. L. 208; Wellington *v.* Downer Kerosene Oil Co. 104 Mass. 64; Norton *v.* Sewall, 106 Ib. 143; French *v.* Vining, 102 Mass. 132, falls within the same principle. See Carter *v.* Towne, 98 Mass. 567, and 103 Ib. 507.]

Torts arising from breaches of duty not founded on privity of contract.

Farrant *v.* Barnes.

Thomas *v.* Winchester.

cited as the leading one on this point is Langridge *v.* Levy, (*q*) where the defendant offered for sale a gun, on which he put a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV.: cost 60 guineas; only 25 guineas." The gun was sold to the plaintiff's father, who told the defendant that it was wanted "for the use of himself and his sons." It was warranted to be a good, safe, and secure gun, and to have been made by Nock. The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock's make. Parke B. delivered the judgment of the court, after time taken for consideration. He said: "If the instrument in question . . . . had been delivered by the defendant *to the plaintiff* for the purpose of being used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that of Pasley *v.* Freeman; (*r*) which principle is that *a mere naked falsehood is not enough to give a right of action;* but if it be a *falsehood told with the intention that it should be acted upon by the party injured that act must produce damage to him;* if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the *intermediate person to be communicated* to the plaintiff, and the plaintiff had

Langridge *v.* Levy.

Pasley *v.* Freeman.

(*q*) 2 M. & W. 519; in error, 4 M. & W. 337.

(*r*) 3 T. R. 51, and 2 Sm. L. C. 71, where all the authorities are collected.

Remarks of Hubbard J. on Pasley *v.* Freeman.

["The leading case in modern times, on the subject of false affirmations made with intent to deceive, is that of Pasley *v.* Freeman, 3 T. R. 51, in which it was decided that a false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff received damage, was the ground of an action upon the case in the nature of deceit; and that it was not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. This case, though much contested, and though often attempted to be shaken, has received the sanction of successive decisions in Westminster Hall and in the courts of different states in this country. The great principle on which that case rests has not been disturbed, but is, indeed, sanctioned by the very limitations and statute provisions which have been made in respect to it." Hubbard J. in Medbury *v.* Watson, 6 Met. 259.]

acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have his remedy for the deceit." In the exchequer chamber the judgment was affirmed, on the ground "that as there is fraud; and damage the result of that fraud; not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." (*s*) In George *v.* Skivington, (*t*) the plaintiff, Joseph George, and Emma his wife, claimed damages of the defendant, a chemist, for selling to the husband a bottle of a chemical compound to be used by the wife, as the defendant then knew, for washing her hair. The declaration charged negligence and unskilfulness of the defendant in making the said compound, and alleged personal injury to the wife resulting from the use of it. Demurrer and joinder. Held a good cause of action on the authority of Langridge *v.* Levy.

George *v.* Skivington.

§ 432. But no action growing *out of the contract* can be maintained in such cases, except by parties or proxies. (*u*) The distinction was clearly illustrated in a case in the queen's bench, where there were two counts in the declaration: the first on contract, which was held bad; the second in *tort*, which was sustained. The fraud charged was issuing to the public a false and fraudulent prospectus for a company, whereby the plaintiff was deceived into taking shares. (*x*) This principle, that the liability in an action of *tort* may be enforced against a party guilty of fraudulent representations, publicly given out and intended to deceive the public at large, by any person who has suffered damages in consequence of them, has since been frequently enforced by the courts. (*y*) The following ac-

But no such action can be maintained on contract.

Gerhard *v.* Bates.

Any one of the public, if injured, may bring an action in *tort* for deceit, where fraudulent representa-

(*s*) [See Randall *v.* Hazelton, 12 Allen, 414, 415. See Carter *v.* Towne, 103 Mass. 507.]

(*t*) L. R. 5 Ex. 1; 39 L. J. Ex. 8.

(*u*) Winterbottom *v.* Wright, 10 M. & W. 109; Longmeid *v.* Holiday, 6 Ex. 761; Howard *v.* Shepherd, 9 C. B. 297; 19 L. J. C. P. 249; Playford *v.* United Kingdom Telegraph Company, L. R. 4 Q. B. 706.

(*x*) Gerhard *v.* Bates, 2 E. & B. 476; 22 L. J. Q. B. 364.

(*y*) Scott *v.* Dixon, reported in note, 29 L. J. Ex. 62; decided by the queen's bench in 1859; Bagshawe *v.* Seymour, in note, 29 L. J. Ex. 62, and 18 C. B. 903; Bedford *v.* Bagshawe, 4 H. & N. 538; 29 L. J. Ex. 59. See also, North Brunswick Railway Company *v.* Conybeare, 9 H. L. Cas. 712; Western Bank of Scotland *v.* Addie, L. R. 1 Scotch Ap. 145; Henderson *v.* Lacon, L. R. 5 Eq. 249 (V. C. W.).

tions are published.

Case decided in New York in action for deceit

tion was held to be maintainable in the State of New York. A. had agreed to bring certain animals for sale and delivery to B., at a specified place. A third person, desirous of making a sale to B., falsely represented to him that A. had abandoned all intention of fulfilling his contract, thereby inducing B. to supply himself by buying from that third person. A. was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A., it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A. and B. was one that could not have been enforced. (*z*) We will now revert to the subject of fraud as specially applied in cases of sale.

SECTION II. — FRAUD ON THE VENDOR.

Effect of fraud on the vendor in passing property.

§ 433. It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The recent cases of Stevenson *v.* Newnham, (*a*) in Cam. Scacc., and of Pease *v.* Gloahec, (*b*) in the privy council, confirming the principles asserted by the exchequer in Kingsford *v.* Merry, (*c*) taken in connection with the decision of the House of Lords in Oakes *v.* Turquand, (*d*) leave no room for further question. By the rules established in these cases, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession* induced by fraudulent devices on his part. (*e*) In other words, we must ask whether the owner intended to transfer both the property in and the possession of the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of

Depends on vendor's intention to transfer possession and ownership, or possession only.

(*z*) Benton *v.* Pratt, 2 Wend. 385. [See notice of this case by Colt J. in Randall *v.* Hazelton, 12 Allen, 417.]

(*a*) 13 C. B. 285, and 22 L. J. C. P. 10.

(*b*) L. R. 1 Priv. C. 220; 3 Moore P. C. N. S. 556.

(*c*) 11 Ex. 577, and 25 L. J. Ex. 166.

(*d*) L. R. 2 Eng. Ap. 325. See, also, In re Reese Silver Mining Company, Smith's case, L. R. 2 Ch. App. 604, and 4 Eng. & Ir. App. 64; and Clough *v.* The Lond. & N. W. Ry. Co. *post*, § 441.

(*e*) [See Barker *v.* Dinsmore, 72 Penn. St. 427.]

sale, however fraudulent the device, and the property passes; (*f*) but not in the latter case. This contract is *voidable* at the election of the vendor, not void *ab initio*. (*g*) It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, (*h*) or he may sue in trover for the goods or their value, and this disaffirms it. (*h*[1]) But in the mean time, and until he elects, *if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.* (*i*) If, on the contrary, the intention of

Contract not *void ab initio*, but *voidable*.

Rights of *bonâ fide* third persons protected, if acquired before avoidance.

(*f*) [Rowley *v* Bigelow, 12 Pick. 312.]

(*g*) [Titcomb *v*. Wood, 38 Maine, 561–563; Rowley *v*. Bigelow, 12 Pick. 307, 312; Hewitt *v*. Clark, 91 Ill. 605.]

(*h*) [Butler *v*. Hildreth, 5 Met. 49; Stewart *v*. Emerson, 52 N. H. 301. But the plaintiff, in a suit for the price of goods fraudulently purchased by the defendant, may reply to the defendant's plea of a discharge under the bankrupt act, "that the debt sought to be recovered in the suit was created by the fraud of the defendant," and thereby obtain the benefit of the provision of that act, that no debt created by the fraud of the bankrupt shall be discharged under that act, but the debt may be proved, and the dividend therein shall be a payment on account of said debt. Stewart *v*. Emerson, 52 N. H. 301, 310, 311. In McBean *v*. Fox, 1 Bradwell (Ill.), 177, the appellant took from the appellees their note, the appellees making fraudulent representations at the time of the contract. The appellees subsequently became bankrupt, and the appellant proved his claim against them and received a dividend. It was held that this did not defeat his right to maintain an action for the fraud.]

Bankruptcy of party making representations; effect of.

(*h*[1]) [If credit has been given the vendor must sue on the express contract, or in tort. He cannot maintain an action on the common counts until the term of credit has expired. In Kellogg *v*. Turpie, 2 Bradwell (Ill.), 55, Pillsbury J. said: "The action of assumpsit is based upon a contract between the parties and a breach thereof by the defendant. In the bringing of the action, therefore, the plaintiffs admit that at that time there was a contract of some kind for the sale of the goods existing between the parties, and they seek to recover the value of the goods upon an implied contract to pay upon request, when they show upon the face of their special count that the only contract between them was one to pay a certain price at a future day. If they rescinded the contract there was no sale, and the goods are still theirs; if they did not rescind, the contract is still in force, and they are therefore bound by its terms. By bringing the action of assumpsit we are of the opinion that they have thereby created a conclusive presumption of affirmance of the contract of sale on their part." See the cases cited in Kellogg *v*. Turpie, *supra*: Magrath *v*. Tinning, 6 U. C. Q. B. (O. S.); 484; Moriarty *v*. Stofferan, 89 Ill. 528; § 765 *post*, and § 320, note (*d*), *ante*.]

Vendor must sue on the express contract, or in tort.

(*i*) [This doctrine is well established in the American courts. Titcomb *v*. Wood, 38 Maine, 561; Hall *v*. Hinks, 21 Md. 406; Malcom *v*. Loveridge, 13 Barb. 372;

the vendor was not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such *possession* by fraud can convey no property in them to any third person, however

Not protected where vendor only transferred possession.

Dows *v.* Greene, 32 Ib. 490; Sinclair *v.* Healy, 40 Penn. St. 417; Chicago Dock Co. *v.* Foster, 48 Ill. 507; Keyser *v.* Harbeck, 3 Duer, 373; Paddon *v.* Taylor, 44 N. Y. 371; Devoe *v.* Brandt, 53 Ib. 462; Barnard *v.* Campbell, 65 Barb. 286; S. C. 58 N. Y. 73; Williamson *v.* Russell, 39 Conn. 406; Mears *v.* Waples, 3 Houst. (Del.) 581; Wilson *v.* Fuller, 9 Kansas, 176; Rowley *v.* Bigelow, 12 Pick. 307, 312, 313; Moody *v.* Blake, 117 Mass. 23, 26; Cochran *v.* Stewart, 21 Minn. 435; Dean *v.* Yates, 22 Ohio St. 388; Williams *v.* Given, 6 Grattan, 268; Ohio & M. R R. *v.* Kerr, 49 Ill. 458; Kern *v.* Thurber, 57 Ga. 172; Nichol *v.* Crittenden, 55 Ib. 497; Cockburn C. J. in Moyce *v.* Newington, L. R. 4 Q. B. D. 32; Babcock *v.* Lawson, Ib. 394; Dickerson *v.* Evans, 84 Ill. 451; Henson *v.* Westcott, 82 Ib. 224; McNab *v.* Young, 81 Ib. 11; Gregory *v.* Schoenell, 55 Ind. 101; Williamson *v.* Mason, 12 Hun, 97; Meacham *v.* Colignon, 7 Daly, 402; Old Dom. Steamship Co. *v.* Burckhardt, 31 Gratt. 664; Hawkins *v.* Davis, 5 Baxter (Tenn.), 698. See Jennings *v.* Gage, 13 Ill. 610; Caldwell *v.* Bartlett, 3 Duer, 341; Crocker *v.* Crocker, 31 N. Y. 507; Shufeldt *v.* Pease, 16 Wis. 659; Hutchinson *v.* Watkins, 17 Iowa, 475; Craig *v.* Marsb, 2 Daly (N. Y.), 61; Western Transportation Co. *v.* Marshall, 4 Abb. (N. Y.) App. Dec. 575. In Barnard *v.* Campbell, 65 Barb. 286, 292, it was said that "tbe principle of law in such cases is this, that when the owner of personal property makes an unconditional delivery to his vendee, with the intent to transfer the title, a *subsequent bonâ fide* purchaser from such vendee acquires a valid title, although the owner was induced to sell by the fraud of bis vendee; and it is only *after* actual delivery to the fraudulent vendee that a *bonâ fide* purchaser could rely upon the apparent ownership which the possession of the fraudulent vendee indicates, and thereby get a good title from him. Smith *v.* Lynes, 1 Selden (5 N. Y.), 46; Beaver *v.* Lane, 6 Duer, 232. It is only upon the principle that the rightful owner is estopped from asserting his right when his act of conferring upon his vendee the possession has led to the payment by an innocent purchaser, that a *bonâ fide* purchaser can be protected. The doctrine has never been so far extended as to protect a purchaser when advancing the consideration to some one who did not at the time hold the property, or the *indicia* of its title." Holbrook *v.* Vose, 6 Bosw. 104, 111. The principle, or process, by which the defrauded vendor is divested of his title, and it becomes established in the *bonâ fide* purchaser from the fraudulent vendee, is not fully agreed. See Morton J. in George *v.* Kimball, 24 Pick. 241. In some cases, it is assumed that when a sale of goods is procured by fraud of the vendee, no title passes to him, but the vendor still retains the legal right in the goods, and hence it is concluded that a person who has no title to property can convey none. But, at the same time, it is agreed that a third person may acquire a good title from a fraudulent vendee, by giving him value for the property, or incurring some responsibility upon the credit of it, without notice of the fraud. In such a case, it is said, the *superior equity* of the honest purchaser is allowed to overcome the legal rights of the owner; "and it is said to be the single instance in which our law divests the title to property without the owner's consent or default." Fancher J. in Barnard *v.* Campbell, 65 Barb. 288, 289; S. C. 58 N. Y. 73; Root *v.* French, 13 Wend. 570; Mowrey *v.* Walsh, 8 Cowen, 238; Hoffman *v.* Carow, 22 Wend. 318; Ash *v.* Putnam, 1 Hill (N. Y.), 307; Hunter *v.* Hudson River Iron & Machine Co. 20

Rights of *bonâ fide* purchasers from fraudulent vendee.

innocent, for no property has passed to himself from the true owner.

Exception where true owner

§ 434. To these common law rules there is one statutory exception. Where the fraud by which the goods are obtained from the vendor is such as to enable him to succeed in

Barb. 493; Williams *v.* Birch, 6 Bosw. 299. The difficulty consists in tracing the title and reconciling the right of the defrauded vendor to reclaim his property in the hands of his fraudulent vendee, with the vesting of the title in such purchaser. This difficulty is obviated, however, by adopting the doctrine of the text, — that the contract is not void *ab initio*, but is voidable at the option of the vendor, as between him and the vendee, and those claiming under him, without consideration, or with notice of the fraud. The rule is well stated by Shaw C. J. in Rowley *v.* Bigelow, 12 Pick. 312, 313. See, also, Titcomb *v.* Wood, 38 Maine, 562, 563. In Hoffman *v.* Noble, 6 Met. 73, Shaw C. J. said: "It is a well-established rule, that goods obtained by fraud in the sale, as by false representations, may be reclaimed by the vendor. This does not proceed on the ground that the property in the goods does not pass by the sale, but that the dishonest purchaser shall not hold it against the deceived vendor." In cases of sales of goods in fraud of creditors, an innocent purchaser from the fraudulent vendee in possession thereof obtains a good title against the creditors of the fraudulent vendor. Neal *v.* Williams, 18 Maine, 391; Hoffman *v.* Noble, 6 Met. 68; Bradley *v.* Obear, 10 N. H. 477; Ash *v.* Putnam, 1 Hill (N. Y.), 302, 306, 307; Rowley *v.* Bigelow, 12 Pick. 307; Somes *v.* Brewer, 2 Ib. 184; Anderson *v.* Roberts, 18 John. 515; Mowrey *v.* Walsh, 8 Cowen, 238; George *v.* Kimball, 24 Pick. 241; Ditson *v.* Randall, 33 Maine, 202; 1 Chitty Contr. (11th Amer. ed.) 567. But a person who has obtained goods by a fraudulent purchase cannot secure his title by selling them to a *bonâ fide* purchaser, and then repurchasing them. Schutt *v.* Large, 6 Barb. 373. The burden of proof is upon one claiming to be a *bonâ fide* purchaser to show that he is so. Devoe *v.* Brandt, 53 N. Y. 462. As to the circumstances necessary to be proved by one claiming to be a *bonâ fide* purchaser, see Barnard *v.* Campbell, 65 Barb. 286; Devoe *v.* Brandt, 53 N. Y. 462; Lynch *v.* Beecher, 38 Conn. 490; Lloyd *v.* Brewster, 4 Paige, 537; Hyde *v.* Ellery, 18 Md. 496; McLeod *v.* National Bank, 42 Miss. 99; Joslin *v.* Cowee, 60 Barb. 48; S. C. 52 N. Y. 90; Kinsey *v.* Leggett, 71 N. Y. 387; Weiss *v.* Brennan, 9 J. & Sp. 177. An execution creditor of the fraudulent vendee does not become a *bonâ fide* purchaser by purchasing the goods at a sale upon his execution, which were fraudulently purchased by the judgment debtor. Devoe *v.* Brandt, 53 N. Y. 462. An attaching creditor of the fraudulent vendee cannot hold the property as a *bonâ fide* purchaser against the defrauded vendor. Wiggin *v.* Day, 9 Gray, 97; Field *v.* Stearns, 42 Vt. 106; Fitzsimmons *v.* Joslin, 21 Ib. 129; Poor *v.* Woodburn, 25 Ib. 234; Hackett *v.* Callender, 32 Ib. 97; Buffington *v.* Gerrish, 15 Mass. 156; Jordan *v.* Parker, 56 Maine, 557; Whitman *v.* Merrill, 125 Mass. 127; Am. Merchants' Union Express Co. *v.* Willsie, 79 Ill. 92. It has been held that one, to whom the property has been delivered by the fraudulent vendee in payment of a precedent debt, or in performance of an executory contract of sale made prior to the acquiring possession thereof, or of some evidence of title thereto by the latter, although a consideration was paid at the time of the contract, is not a *bonâ fide* purchaser for value, and cannot hold the property against the defrauded vendor. Barnard *v.* Campbell, 58 N. Y. 73.]

Rights of the vendor against the vendee as regards the goods themselves.

Who is a *bonâ fide* purchaser.

prosecuting to conviction the fraudulent buyer, as having been guilty of obtaining the goods by false and fraudulent pretences, he will be entitled, after such conviction, to recover his goods even from a third person, who is a *bonâ fide* purchaser from the party committing the fraud. The statute and cases under it have already been reviewed, *ante*, book I. part I. ch. ii. §§ 11–13. (*k*) The early cases are not universally in accord with the principles above stated, and in more than one of them the property was held not to have passed, although it was very plainly the intention of the vendor to transfer the title, as well as the possession, of the goods. In Martin *v.* Pewtress, (*k*[1]) decided in 1769; Read *v.* Hutchinson, (*l*) in 1813; Gladstone *v.* Hadwen, (*m*) in the same year; Noble *v.* Adams, (*n*) in 1816; and The Earl of Bristol *v.* Wilsmore, (*o*) in 1823, *dicta* are to be found as to the effect of fraud in preventing the property from passing to the purchaser, which are quite in opposition to the later authorities, though in most if not all of these cases the decisions were quite correct. The last-mentioned case was one in which a check had been given by the buyer on a bank in which he had no funds, and was decided on the authority of Read *v.* Hutchinson, Noble *v.* Adams, *supra;* and of Rex *v.* Jackson, (*p*) in which a conviction for obtaining goods under false pretences (under the 30 Geo. 2, ch. 24) was upheld, on proof that the accused had obtained the goods by giving in payment a check on a banker with whom he had no cash, and which he knew would not be paid.

prosecutes to conviction a person guilty of false pretences.

Earlier cases reviewed.

§ 435. Duff *v.* Budd (*q*) was an action by a vendor against a common carrier to whom he had delivered goods, to be forwarded to Mr. James Parker, High Street, Oxford. The goods had been ordered by an unknown person, and there was no *James* Parker in that street, but there was a *William*

Duff *v.* Budd.

(*k*) [The case of Horwood *v.* Smith, 2 T. R. 750, referred to in § 11, *ante*, has been followed in Lindsay *v.* Cundy, 1 Q. B. Div. 348, and in Moyce *v.* Newington, 4 Ib. 32. The latter case holds that where goods have been purchased by means of false pretences, and have been sold by the vendee, before his conviction, to an innocent party, the innocent party cannot be deprived of the same by the original owner, as the statute does not extend to such a case. See Babcock *v.* Lawson, L. R. 4 Q. B. D. 394; Cundy *v.* Lindsay, L. R. 3 App. Cas. 459.]

(*k*[1]) 4 Burr. 2478.

(*l*) 3 Camp. 352.

(*m*) 1 M. & S. 517.

(*n*) 7 Taunt. 59.

(*o*) 1 B. & C. 514.

(*p*) 3 Camp. 370.

(*q*) 3 B. & B. 177.

Parker, a solvent tradesman, who refused the parcel. Soon after a person came to the defendant's office and claimed the parcel as his own, and on paying the carriage it was delivered to him. He had on previous occasions received goods from the same office, directed to Mr. Parker, Oxford, to be left till called for. One of the grounds of defence taken by Pell Serjt. was that the property in the goods had passed out of the plaintiff to the consignee. Dallas C. J. and Burrough J. did not notice the point, but Park J. said that the ground taken did "not apply to a case bottomed in fraud in which there had been no sale;" and Richardson J. said, "there was clearly a property in the plaintiffs entitling them to sue, as they had been imposed on by a gross fraud."

§ 436. A few years later, a case almost identical in its features came before the same court. Stephenson *v.* Hart (*r*) was, again, an action by a vendor against a common carrier. A purchaser bought goods from the plaintiff, and ordered them to be sent to J. West, 27 Great Winchester Street, London, and gave a spurious bill of exchange in payment. The vendor delivered the goods to the carrier to be forwarded to the above address. No person was found at the address, but a few days after the carrier received a letter signed "J. West," stating that a box had been addressed to him by mistake to Great Winchester Street, and asking that it should be forwarded to him at the Pea Hen, a public-house at St. Alban's. The box was so forwarded, and the person who had sent for it said it was for him, and stated its contents before opening it, thus showing that *the box had reached the person to whom it was addressed.* One ground of defence, again, was, that upon the delivery to the carriers the property ceased to be in the vendor, and was vested in the consignee. Park J. held that the property had not passed, because West had never meant to pay for the goods, and the true question was, "not what the *seller* meant to do, but what are the intentions of the *customer*. Did *he* mean to buy?" Burrough J. said that the property had never passed out of the consignor, giving no reason except that the transaction of West was a gross fraud; but Gaselee J. doubted strongly whether trover could lie when the carrier had delivered the goods to the person to whom they had been really consigned by the vendor.

Stephenson *v.* Hart.

(*r*) 4 Bing. 476.

§ 437. It is submitted that both these cases against the carriers are very doubtful authorities under the modern doctrine, which clearly holds that the property does pass, when the *vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention. (*s*) In Heugh *v.* The London & North Western Railway Company, (*t*) where the same question was involved under very similar circumstances, it was held that it was a question of fact for the jury, whether the carrier had acted with reasonable care and caution with respect to the goods after their refusal at the consignee's address, and the court refused to set aside a verdict for the defendant on that issue. In McKean *v.* McIvor (*u*) the decision was also in favor of the carriers, and Bramwell B. expressed concurrence in the opinion of Gaselee J. who dissented in Stephenson *v.* Hart, (*x*) *supra.*

Doubt submitted as to these two cases. Heugh *v.* The London & N. W. Ry. Co.

McKean *v.* McIvor.

§ 438. In Irving *v.* Motley (*y*) the facts were, that one Dunn and a firm of Wallington & Co. had been engaged in a series of transactions, in which Dunn, as agent, purchased for them goods, on credit, and immediately resold them at a loss, the purpose being to raise money for the business of Wallington & Co. Dunn was also an agent for the defendant Motley, who was entirely innocent of any knowledge of, or participation in, the transactions of Wallington & Co. Under these circumstances, Dunn, in behalf of Wallington & Co., applied to the defendant for an advance, which the latter agreed to make if secured by a consignment of goods. Thereupon Dunn, as agent of Wallington & Co., bought a parcel of wool from the plaintiff, on credit, and at once transferred it to Motley, as security for the advance. Wallington & Co. became bankrupt a few days after this transaction, and the plaintiffs brought trover against Motley for the wool. A verdict was given for the plaintiff, the jury finding that the transaction was fraudulent, and that Motley knew nothing of the fraud, but that Dunn was his agent as well as that of Wallington & Co. The court refused to set aside the verdict, but the judges were

Irving *v.* Motley.

(*s*) This expression of doubt is not withdrawn in the second edition of this treatise. It seems to be further justified by the three cases since decided in the exchequer, in all of which the defence of the carriers was successful, though the only one in which the point here suggested was taken into consideration was Clough *v.* The London & North Western Railway Company, L. R. 7 Ex. 26; *post*, § 442.

(*t*) L. R. 5 Ex. 51.

(*u*) L. R. 6 Ex. 36.

(*x*) 4 Bing. 676.

(*y*) 7 Bing. 543.

not in accord as to the grounds. Tindal C. J. said: "The ground set up here is, that there was an *acting and an appearance of purchase* given to the transfer of these goods, which in truth and justice it did not really possess. Whether Dunn, as the agent of Wallington & Co., went into the market and got these goods into his possession, under such representation as may amount to obtaining goods under false pretences, it is not necessary to say, but it comes very near the case; it is under circumstances that place him and Messrs. Wallington in the light of conspirators to obtain possession of the goods. . . . . At all events, it was left to a jury of merchants, and though they have acquitted the defendants of fraud, yet they involve them in the legal consequences, as it was a fraud *committed by their agent with a view to benefit them.*" Park J. agreed with the chief justice, but he expressed anxiety to explain Noble *v.* Adams, (*z*) saying that the court did not hold, nor mean to hold in that case, that obtaining goods under false pretences was the *only* ground upon which the transaction could be held void. Gaselee J. was careful to confine the doctrine of the case before the court to the special circumstances, saying that it was "maintainable against the defendants, because they had constituted Dunn their agent, for the purpose of securing themselves, by getting a consignment of wool made to them from Wallington & Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the defendants may have acted, they cannot take any benefit from the misconduct of that agent." (*a*) Alderson J., however, thought that the case was confused by treating it as one of principal and agent; that Dunn and Wallington were principals in a conspiracy to get the goods from the plaintiff, and therefore *no property passed out of Messrs. Irving.*

Ferguson *v.* Carrington.

§ 439. In Ferguson *v.* Carrington, (*b*) goods were sold to defendant on credit, whereupon he immediately resold them at lower prices, and the vendor brought *assumpsit* for the price before the maturity of the credit, on the ground that the defendant had manifestly purchased with the preconceived design of not paying for them. Lord Tenterden C. J. nonsuited the plaintiff, on the ground that, by bringing an action on the

(*z*) 7 Taunt. 59. [Loughnan *v.* Barry, Ir. R. 5 C. L. 538; S. C. Ir. R. 6 C. L. 457.]

(*a*) [See Barnes *v.* Bartlett, 15 Pick. 71; March *v.* Wright, 46 Ill. 487.]

(*b*) 9 B. & C. 59.

contract, he affirmed it, (b^1) and was therefore bound to wait till the end of the credit; but that "if the defendant had obtained the goods with the *preconceived design of not paying for them, no property passed to him* by the contract of sale, and it was competent for the plaintiff to bring trover, and treat the contract as a nullity, and the defendant not as a purchaser of the goods, but as a person who had obtained tortious possession of them." Parke J. concurred in this view. (c) It should not be overlooked that in this, as in several of the preceding cases, the action was between the true owner and the fraudulent buyer; that the language of the judges was intended to apply only to the case before them, and was not therefore so guarded in relation to the effect of the contract in transferring the property, as it would doubtless have been if the rights of innocent third parties had been in question.

Observations on this case.

§ 440. In Load *v.* Green (d) the buyer purchased the goods on the 1st July, they were delivered on the 4th, and a *fiat* in bankruptcy issued on the 8th. It was uncertain whether the act of bankruptcy had been committed prior to the purchase. The jury found that the buyer purchased with the fraudulent intention of not paying for the goods; and it was held, that even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt." (e) In the early case of Parker *v.* Patrick, (f) the king's bench held, in 1793, that

Load *v.* Green.

Parker *v.* Patrick.

(b^1) [Dibblee *v.* Sheldon, 10 Blatchf. 178.]

(c) [See cases in note (e) below.]

(d) 15 M. & W. 216; [Buckley *v.* James, 1 Cr. & Dix Circ. R. 138, Greene, Serjt. p. 139.]

(e) [It is settled in the American courts, by a vast weight of authority, that a purchase of goods by one who, at the time, intends not to pay for them, is such a fraud as will entitle the vendor to avoid the sale, although there were no fraudulent misrepresentations or false pretences. Barnard *v.* Campbell, 65 Barb. 286; King *v.* Phillips, 8 Bosw. 603; Wiggin *v.* Day, 9 Gray, 97; Dow *v.* Sanborn, 3 Allen, 181, 182; Thompson *v.* Rose, 16 Conn. 71, 81; Powell *v.* Bradlee, 9 Gill & J. 220, 248, 278; Peters *v.* Hilles, 48 Md. 506; Dellone *v.* Hull, 47 Ib. 112; Foot *v.* Jones, 1 Alb. L. J. 123; Meacham *v.* Collignon, 7 Daly, 402; Talcott *v.* Henderson, 31 Oh. St. 162; Bidault *v.* Wales, 19 Mo. 36; S. C. 20 Ib. 546; Redington *v.* Roberts, 25 Vt. 694, 695; Kline *v.* Baker, 99 Mass. 253, 255; Nichols *v.* Michael, 23 N. Y. 264; Hennequin *v.* Naylor, 24 Ib. 139; Ash *v.* Putnam, 1 Hill (N. Y.), 302; Cary *v.* Hotailing, Ib. 311; Bigelow *v.*

Purchase of goods with intention not to pay for them, fraudulent.

(f) 5 T. R. 175.

where goods had been obtained on false pretences, and *the guilty party had been convicted*, the title of the original owner could not

Heaton, 6 Ib. 43; Stewart *v.* Emerson, 52 N. H. 301; Rowley *v.* Bigelow, 12 Pick. 307, 311, 312; Nichols *v.* Pinner, 18 N. Y. 295; Hall *v.* Naylor, 18 Ib. 588, 589; Mitchell *v.* Worden, 20 Barb. 253; Buckley *v.* Artcher, 21 Ib. 585; Parker *v.* Byrnes, 1 Lowell, 539, 542; Biggs *v.* Barry, 2 Curtis, 262; Fox *v.* Webster, 46 Mo. 181; Davis *v.* McWhirter, 40 U. C. Q. B. 598. To show that these authorities are founded upon correct principle, nothing need be added to the logical and exhaustive judicial argument of Mr. Justice Doe, in Stewart *v.* Emerson, 52 N. H. 301. Opposed to the above doctrine are the cases of Smith *v.* Smith, 21 Penn. St. 367, and Backentoss *v.* Speicher, 31 Ib. 324, by which, in the opinion of the supreme court of Pennsylvania, there must be "artifice intended and fitted to deceive, practised by the buyer upon the seller," in order to constitute such a fraud as will make the sale void; and that the buyer's intention not to pay for the goods, and concealment of his own insolvency, are not such a fraud. But to avoid a sale upon the ground that the vendee did not intend to pay for the goods, it is not enough to show that he knew himself to be insolvent, and had no reasonable expectation of being able to pay for them when purchased. Biggs *v.* Barry, 2 Curtis, 259; Rowley *v.* Bigelow, 12 Pick. 307; Hodgeden *v.* Hubbard, 18 Vt. 504; Lloyd *v.* Brewster, 4 Paige, 537; Andrew *v.* Dieterich, 14 Wend. 31; Cross *v.* Peters, 1 Greenl. 378; Powell *v.* Bradlee, 9 Gill & J. 220; Redington *v.* Roberts, 25 Vt. 694, 695; Garbutt *v.* Bank of Prairie &c. 22 Wis. 384; Hennequin *v.* Naylor, 24 N. Y. 139; Conyers *v.* Ennis, 2 Mason, 236; Johnson *v.* Monell, 2 Abb. (N. Y.) App. Dec. 470; Rodman *v.* Thalheimer, 75 Penn. St. 232, and cases cited; Byrd *v.* Hall, 2 Keyes, 646; Morrill *v.* Blackman, 42 Conn. 324; Fish *v.* Payne, 7 Hun, 586; Talcott *v.* Henderson, 31 Oh. St. 162; Shipman *v.* Seymour, 40 Mich. 274; Klein *v.* Rector, 57 Miss. 538. In Ex parte Whittaker, In re Shackleton, L. R. 10 Ch. Ap. 446, it appeared that on December 1st S. committed an act of bankruptcy; and, on December 3d, a petition for adjudication was filed and served. On December 5th, S. purchased wool at auction, and was allowed to take the wool without paying for it, as the seller supposed S. to be solvent. December 14th S. was adjudicated a bankrupt; and on December 21st the seller, who had first heard of the bankruptcy proceedings on December 19th, gave notice that he rescinded the contract on the ground of fraud, and demanded to have the wool returned; but it was held that, as it did not appear that S. purchased the wool without any intention of paying for it, the trustee in bankruptcy was entitled to the wool. In Morse *v.* Shaw, 124 Mass. 59, A. went to B. to buy wool, and after some conversation as to his business condition and credit, agreed to go home and prepare a statement of his affairs. Soon after he called upon B. again, took out a memorandum book, apparently read it, and said: "I want to tell you how I stand. I could pay every dollar of indebtedness of mine, including the mortgages on my real estate, and not owe on that real estate more than $15,000 or $20,000." Morton J. said: "Such a representation may be susceptible of either of two interpretations. It may be intended as a wilfully false statement of a fact, and may be understood as a statement of a fact. Or it may be intended as the expression of the opinion or estimate which the owner has of the value of his property, and may be so understood. . . . In such cases, it is for the jury to determine whether the representations were intended and understood as statements of facts, or mere expressions

Pennsylvania doctrine *aliter.*

Not enough that vendee knew himself to be insolvent.

Vendee's statement of his financial condition may be statement of fact or of opinion.

prevail against the rights of a pawnbroker, who had made *bonâ fide* advances on them to the fraudulent possessor. This case has been much questioned, but the only difficulty in it may be overcome by adopting the suggestion made by Parke B. in Load *v.* Green, namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the judges made remarks on the case, in White *v.* Garden, (*g*) and it was cited by the court as one of the acknowledged authorities on this subject in Stevenson *v.* Newnham. (*h*)

Remarks on it.

§ 441. In Powell *v.* Hoyland, (*i*) decided in 1851, Parke B. expressed a strong impression that trespass would not lie for goods obtained by fraud, "because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested." (*k*) In White *v.* Garden (*l*) the innocent purchaser from a fraudulent vendee was protected against the vendor, and all the judges expressed approval of the opinion given by Parke B. in Load *v.* Green. In Stevenson *v.* Newnham, (*m*) in 1853, Parke B. again gave the unanimous opinion of the exchequer chamber, that the effect of fraud "is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind.* In the first instance, *the property passes* in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it though it is *voidable* between the original parties." (*n*) This decision was not impugned, when the exchequer chamber, in Kingsford *v.* Merry, (*o*) in 1856, held that the defendant, an innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods to himself by

Powell *v.* Hoyland.

White *v.* Garden.

Stevenson *v.* Newnham.

Kingsford *v.* Merry.

of opinion or judgment." Gregory *v.* Schoenell, 55 Ind. 101; Stubbs *v.* Johnson, 127 Mass. 219; Morse *v.* Dearborn, 109 Ib. 593.]

(*g*) 10 C. B. 919, and 20 L. J. C. P. 167.

(*h*) 13 C. B. 285, and 22 L. J. C. P. 110.

(*i*) 6 Ex. 67–72.

(*k*) [*Ante*, § 433, note (*i*).]

(*l*) 10 C. B. 919, and 20 L. J. C. P. 167.

(*m*) [*Ante*, § 433, note (*i*).]

(*n*) 13 C. B. 301, and 22 L. J. C. P. 110.

(*o*) 1 H. & N. 503; 26 L. J. Ex. 83.

falsely representing that a sale had been made to him by the owner's agents, the court saying on these facts that the parties "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." (*p*) This decision reversed the judgment of the exchequer of pleas, (*q*) but it was explained by Bramwell B. in Higgins *v.* Burton, *infra*, and by Lord Chelmsford in Pease *v.* Gloahec, *infra*, that this was only by reason of a changed state of facts, and that the principles on which both courts proceeded were really the same.

Clough *v.* The Lond. & N. W. Ry. Co.

§ 442. In Clough *v.* The London & North Western Railway Company, (*r*) the exchequer chamber gave an important decision upon several questions involved in the subject now under examination. The decision was prepared by Blackburn J., though delivered by Mellor J. (*s*) The facts were, that the London Pianoforte Company sold certain goods to one Adams, on the 18th May, 1866, for which he paid 68*l.* in cash, and gave his acceptance at four months for 137*l.* 8*s.*, the whole residue of the price. He directed the vendors to forward the goods by the defendants' railway to the address of the plaintiff at Liverpool, whom he represented to be his shipping agent. On the arrival of the goods in Liverpool the defendants could not find Clough at the address given by Adams, and in a letter to the vendors, the Pianoforte Company, the defendants stated this fact, and asked for instructions. Almost at the same time the vendors learned that Adams was a bankrupt, and at 9.30 A. M. on the 22d May they sent notice to the defendants *in London*, to stop the goods *in transitu*; but before this notice reached *Liverpool*, the plaintiff had *there* demanded the goods, and the defendants had agreed to hold them as warehousemen for him, thus putting an end to the transitus. The vendors nevertheless gave an indemnity to the defendants, and obtained delivery of the goods to themselves, so that they were the real defendants in the case. The plaintiff demanded the goods of the defendants, and on hearing that they had been returned to the vendors, brought his action on the 2d June, in three counts: 1. trover; 2. against them as

(*p*) [Barker *v.* Dinsmore, 72 Penn. St. 427.]

(*q*) 11 Ex. 577; 25 L. J. Ex. 166.

(*r*) L. R. 7 Ex. 26.

(*s*) So stated to the author recently by Mellor J. in the presence of Blackburn J. on the argument of a cause in the exchequer chamber.

warehousemen ; 3. as carriers. Up to the date of the trial, the vendors were *treating the contract as subsisting*, and relying on the right to stop *in transitu ;* but on the cross-examination of the plaintiff and Adams at the trial, the defendants elicited sufficient facts to show a strong case of concerted fraud between the two to get possession of the goods, in order to sell them at auction, and retain the proceeds without paying for them. They were allowed to file a plea to that effect, and the jury found that the fraud was proved. The exchequer of pleas decided in favor of the plaintiff, on the ground that the vendors had not elected to set aside the contract, nor offered to return the cash and acceptance, before delivering the plea of fraud at the trial after the cross-examination, and had up to that time treated the contract as subsisting ; and further, on the ground that the rescission came too late after the plaintiff had acquired a vested cause of action against the defendants. On these facts it was held : 1st. That the property in the goods passed by the contract of sale ; that the contract was not void, but only voidable, at the election of the defrauded vendor. 2d. That the defrauded vendor has the right to this election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts. 3d. That the vendor *may keep the question open* as long as he does nothing to affirm the contract ; and that so long as he has made no election he retains the right to avoid it, subject to this, that if while he is deliberating an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, he will lose his right to rescind. 4th. That the vendor's election was properly made by a plea claiming the goods on the ground that he had been induced to part with them by fraud, and there was no necessity for any antecedent declaration or act *in pais*. 5th. That the vendor was not bound in his plea to tender the return of the money and acceptance, because they had been received, not from the plaintiff, but from Adams, who was no party to the action. And finally, that on the whole case the defendants were entitled to the verdict. (*t*)

§ 443. It is not necessary that there should be a judgment of

(*t*) These principles have been reaffirmed by the exchequer chamber in Morrison *v.* The Universal Marine Ins. Co. L. R. 8 Ex. 197, reversing the judgment reported in L. R. 8 Ex. 40. [See Webb *v.* Odell, 49 N. Y. 583.]

court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party. Thus, in Reese River Silver Mining Co. *v.* Smith, (*u*) the House of Lords held the defendant entitled to have his name removed from the list of contributory shareholders in the plaintiff's company, although his name was on the register when the company was ordered to be wound up; on the ground that he had, prior to the winding-up order, notified his rejection of the shares, and commenced proceedings to have his name removed. On this ground the case was distinguished from Oakes *v.* Turquand. (*x*) In Higgons *v.* Burton, (*y*) a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs goods in the name and as being for the account of the customer, and sent them at once to defendant, an auctioneer, for sale. Held that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences, that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer. In Hardman *v.* Booth (*z*) the plaintiff went to the premises of Gandell & Co., a firm not previously known to him, but of high credit, to make a sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell & Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he was selling to "Gandell & Co." The goods were pledged by Gandell & Todd with the defendant, an auctioneer, who made *bonâ fide* advances on them. The plaintiff's action was trover, and was maintained, all the judges holding that there had been no contract, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for the conversion. (*z*[1]) In 1866,

No judgment necessary to effect a rescission.

Silver Mining Co. *v.* Smith.

Higgons *v.* Burton.

Hardman *v.* Booth.

(*u*) L. R. 4 Eng. Ap. 64; 2 Ch. Ap. 604.

(*x*) L. R. 2 Eng. Ap. 325.

(*y*) 26 L. J. Ex. 342.

(*z*) 1 H. & C. 803; 32 L. J. Ex. 105.

(*z*[1]) [The case of Hardman *v.* Booth was followed in Lindsay *v.* Cundy, 2 Q. B. Div. 96, in which it appeared that one Alfred Blenkarn, in 1873, hired a third floor at No. 37 Wood Street and 5 Little

Pease *v.* Gloahec, (*a*) on appeal from the admiralty court, was twice argued by very able counsel. After advisement, the privy council, composed of Lord Chelmsford, Knight Bruce, and Turner, Lords JJ., Sir J. T. Coleridge, and Sir E. V. Williams, delivered a unanimous decision. The principle laid down in Kingsford *v.* Merry, as stated by the court of exchequer (and not affected by the reversal of their judgment in the exchequer chamber), was affirmed to be the true rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor." (*b*)

Pease *v.* Gloahec.

§ 444. It is a fraud on the vendor to prevent other persons

Love Lane, Cheapside. There was a well-known firm of William Blenkiron & Sons, which had for many years carried on business at No. 123 Wood Street. Blenkarn wrote letters at the end of 1873 to the plaintiffs, by the first proposing to order, and by the others ordering, a large quantity of handkerchiefs from the plaintiffs. Those letters had a printed heading, "37 Wood Street, Cheapside, London, entrance, second door in Little Love Lane," and were signed "A. Blenkarn & Co.," written in such a way that it was evidently intended to be read, "A. Blenkiron & Co." One of the plaintiffs had known the firm of Blenkiron & Sons several years before, and knew they were respectable. The plaintiffs wrote several letters addressed to "Messrs. Blenkiron & Co., 37 Wood Street," and they forwarded several lots of handkerchiefs to the same address, heading the invoices, "Messrs. Blenkiron & Co., London." The fraud was afterwards discovered, and Blankarn was indicted and convicted of obtaining the goods by false pretence of being Blenkiron & Sons. In the meantime the defendants had bought of Blenkarn 250 dozen cambric handkerchiefs, and had resold them all to different persons before the fraud of Blenkarn was discovered. The jury found that the defendants were *bonâ fide* purchasers of the handkerchiefs, and that they were part of the handkerchiefs sold by the plaintiffs to Blenkarn. The plaintiffs having brought an action for the conversion of the goods, it was held in the court of appeals, reversing the decision of the queen's bench division, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action. Affirmed in the House of Lords, L. R. 3 App. Cas. 459.]

Lindsay *v.* Cundy.

(*a*) L. R. 1 P. C. 220; 3 Moore P. C. N. S. 566. And see Oakes *v.* Turquand, L. R. 2 H. L. Eng. App. 325.

(*b*) [*Ante*, § 433, note (*i*); Shaw C. J. in Rowley *v.* Bigelow, 12 Pick. 307, 312; Titcomb *v.* Wood, 38 Maine, 561–563.]

from bidding at an auction of the goods sold, and where the buyer had, by an address to the company assembled at the auction, persuaded them that he had been wronged by the vendor, and that they ought not to bid against the buyer, the purchase by him was held to be fraudulent and void. (*c*)

It is a fraud on vendor to prevent others from bidding at auction sale.

(*c*) Fuller *v.* Abrahams, 3 B. & B. 116; [Raynes *v.* Crowder, 14 U. C. C. P. 111; People *v.* Lord, 6 Hun, 390; Jackson *v.* Morter, 82 Penn. St. 291. As, on the one hand, a seller cannot appoint puffers to delude the purchaser, so, on the other, if a purchaser, by his conduct, deter other persons from bidding, the sale will not be binding. But one person may legally bind himself not to bid against another. Galton *v.* Emus, 1 Collyer, 243. And such an agreement has been held valid where the sale was made by order of the court. Re Carew's Estate, 4 Jur. N. S. 1290; 26 Beav. 187. The law, however, generally discountenances combinations or agreements on the part of purchasers, the objects and effects of which are to chill a sale at auction, and stifle competition, by denying to any party to such agreement or combination any benefit from the sale. Hamilton *v.* Hamilton, 2 Rich. Eq. 355; Woods *v.* Hudson, 5 Munf. 423; Troup *v.* Wood, 4 John. Ch. 228, 254; Meech *v.* Bennett, Hill & Denio, 192; Phippen *v.* Stickney, 3 Met. 387, 388; Jones *v.* Caswell, 3 John. Cas. 29; Doolin *v.* Ward, 6 John. 194; Wilbur *v.* How, 8 Ib. 444; Thompson *v.* Davies, 13 Ib. 112; Gardiner *v.* Morse, 25 Maine, 140; Pike *v.* Balch, 38 Ib. 302; Haynes *v.* Crutchfield, 7 Ala. 189; Slingluff *v.* Eckel, 24 Penn. St. 472; Newman *v.* Meek, 1 Freem. Ch. 441; Johnston *v.* La Motte, 6 Rich. Eq. 347; Hook *v.* Turner, 22 Mo. (1 Jones) 333; Wooton *v.* Hinkle, 20 Ib. 290; Loyd *v.* Malone, 23 Ill. 43; Trust *v.* Delaplaine, 3 E. D. Smith, 219; Dudley *v.* Little, 2 Ham. (Ohio) 505; Piatt *v.* Oliver, 1 McLean, 295; Gulick *v.* Ward, 5 Halst. 87; Dick *v.* Lindsay, 2 Grant, 431; Fenner *v.* Tucker, 6 R. I. 551; Martin *v.* Ranlett, 5 Rich. 541; Cocks *v.* Izard, 7 Wall. 559.

Purchaser cannot deter others from bidding.

The court of North Carolina, in Smith *v.* Greenlee, 2 Dev. 126, while sustaining the general doctrine that a sale may be avoided when made to one in behalf of an association of bidders designed to stifle competition, at the same time concede that this rule would not apply to an association shown to be formed for honest and just purposes, as in the case of a union of several persons, formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeded the amount which any one individual might wish to purchase on his own account. In Phippen *v.* Stickney, 3 Met. 387, 388, which was decided on similar principles, it was held that an agreement by two or more persons that one of them only will bid at an auction of property, and will become the purchaser for the benefit of them all, is illegal, if it be made for the purpose of preventing competition at the biddings, and depressing the price of the property below the fair market value; but that such an agreement is not illegal, if the purpose of it be to enable each of the parties to become a purchaser, when he desires a part of the property offered for sale, and not the whole lot, or if the agreement be for any other honest and reasonable purpose. See Small *v.* Jones, 1 Watts & S. 128; Wolfe *v.* Luyster, 1 Hall, 146; Jenkins *v.* Hogg, 2 Const. Ct. (S. Car.) 821; Gardiner *v.* Morse, 25 Maine, 140; Switzer *v.* Skiles, 3 Gilman, 529; McMinn *v.* Phipps, 3 Sneed (Tenn.), 196; Jenkins *v.* Frink, 30 Cal. 586; Allen *v.* Stephanes, 18 Texas, 658; Dick *v.* Cooper, 24 Penn. St. 217; Kearney *v.* Taylor, 15 How. (U. S.) 519-521; Slater *v.* Maxwell, 6 Wall. 268.]

But honest agreement among several that one only shall bid may be valid.

§ 445. Where the fraud on the vendor consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from that third person, the price may be recovered from the defendant as though he had bought directly in his own name, for his possession of the vendor's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence. (*d*) In Biddle *v.* Levy (*e*) the defendant told plaintiff that he was about to retire from business in favor of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiffs, who sold to the son goods to the value of 800*l*. The representations were false and fraudulent, and Gibbs C. J. held an action *for goods sold and delivered* to be maintainable against the father. These two cases probably rest on the principle that the nominal purchasers were secret agents buying for the parties committing the fraud, who were really the undisclosed principals. (Thompson *v.* Davenport, 2 Smith's L. C. 347.)

Where vendor is induced by fraud to sell to an insolvent third person.

Hill *v.* Perrott.

Biddle *v.* Levy.

§ 446. Where, however, the fraud on the vendor is effected by means of assurances given by a third person of the buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by the 6th section of Lord Tenterden's act (9 Geo. 4, c. 14), which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon, (*f*) unless such representation or assurance be made in writing, signed by the party to be charged therewith." (*g*) The construction of this section was much debated in the case of Lyde *v.*

Fraud by means of false representations of buyer's solvency by third person must be proven by written evidence.

Lyde *v.* Barnard.

(*d*) Hill *v.* Perrott, 3 Taunt. 274. [See Phelan *v.* Crosby, 2 Gill, 462.]

(*e*) 1 Stark. 20.

(*f*) This word "upon" is, perhaps, a mistake for "thereupon;" perhaps the words ought to be "money or goods upon credit." See remarks of the judges in Lyde *v.* Barnard, 1 M. & W. 101.

(*g*) [Statutes similar to this have been enacted in several of the American states. See 1 Chitty Contr. (11th Amer. ed.) 581, and note (*b*); Browne St. of Frauds, §§ 181 *et seq.*; 2 Kent, 488 *et seq.*]

Barnard, (*h*) in which the judges of the exchequer were equally divided, but the case had no reference to a sale of goods.

Haslock *v.* Ferguson.

In Haslock *v.* Ferguson, (*h*[1]) the action was against the defendant for an alleged fraudulent declaration to the plaintiff that one Barnes was of fair character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The court held that parol evidence of the alleged representation was inadmissible, overruling a distinction which Sir John Campbell, for the plaintiff, attempted to support, "that the gist of the action was not the misrepresentation of character, but the wrongful acquisition of property by the defendant." In Devaux *v.* Steinkeller (*i*) it was held that a representation made by a partner of the credit of his firm was a representation of the credit of "another person" within the meaning of this statute; and in Wade *v.* Tatton, (*k*) in the exchequer chamber, that where there were both verbal and written representations, an action will lie if the written representations were a material part of the inducement to give credit.

Devaux *v.* Steinkeller.

Representation by partner of credit of his firm.

Wade *v.* Tatton.

§ 447. The effect of concealment or false representations made by the buyer, with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the courts. Chancellor Kent carries the doctrine on the subject of fraud much farther than could be shown to be maintainable by decided cases, and states it in broader terms than are deemed tenable by the later editors of his Commentaries. (*l*) Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them and they be not open and naked, or equally within the reach of his observation." (*m*)

False representations by buyer in order to get goods cheaper.

(*h*) M. & W. 101.

(*h*[1]) 7 Ad. & E. 86.

(*i*) 6 Bing. N. C. 84.

(*k*) 25 L. J. C. P. 240. See, also, Swan *v.* Phillips, 8 Ad. & E. 457; Turnley *v.* McGregor, 6 M. & G. 46; Pasley *v.* Freeman, 3 T. R. 51.

(*l*) 2 Kent, 482.

(*m*) [See Brown *v.* Montgomery, 20 N. Y. 287; Fisher *v.* Budlong, 10 R. I. 527, 528.]

§ 448. The courts of equity even fall far short of this principle, and both Lord Thurlow and Lord Eldon held that a *purchaser* was not bound to acquaint the vendor with any latent advantage in the estate. In Fox *v.* Mackreth, (*n*) Lord Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, of *which he knew the seller was ignorant*, and that a court of equity could not set aside the sale, though the estate was purchased for a price of which the mine formed no ingredient. (*o*) Lord Eldon approved this ruling in Turner *v.* Harvey. (*p*) But in the latter case Lord Eldon also held, that if the least word be dropped by the purchaser to *mislead* the vendor in such a case, the latter will be relieved; and his lordship accordingly decided that the agreement for the sale in that case should be given up to be cancelled. The facts were that the purchaser of a reversionary interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

In equity purchaser not bound to acquaint vendor with latent advantages of thing sold.

Fox *v.* Mackreth.

Turner *v.* Harvey.

But purchaser must not *mislead* vendor in such a case.

§ 449. At common law, the only case decided in banco, that has been found on this point, is Vernon *v.* Keys, (*q*) in which the declaration was in case, and a verdict was given for the plaintiff on the third count, which alleged that the plaintiff, being desirous of selling his interest in the business, stock-in-trade, &c. in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale; that the defendant was about to enter into partnership to carry on the business with other persons *whose names defendant refused to disclose*, and that *these persons* would not consent to give plaintiff a larger price than 4,500*l.* for his share, while the truth was that these persons were willing that the defendant should give as much as 5,291*l.* 8*s.* 6*d.* The judgment in favor of plaintiff was arrested, Lord Ellen-

At common law, Vernon *v.* Keys the only case in banc.

(*n*) 2 Bro. Ch. 420.

(*o*) [The same was held in Harris *v.* Tyson, 24 Penn. St. 347; 2 Kent, 484, 490; Kintzing *v.* McElrath, 5 Penn. St. 467; Butler's Appeal, 26 Ib. 63; Livingston *v.* Pern Iron Co. 2 Paige, 390; Smith *v.* Beatty, 2 Ired. Eq. 456. See Laidlaw *v.* Organ, 2 Wheat. 178; Stevens *v.* Fuller, 8 N. H. 463; Howard *v.* Gould, 28 Vt. 523; Paddock *v.* Strobridge, 29 Ib. 470; Fisher *v.* Budlong, 10 R. I. 525, 527.]

(*p*) Jacob, 178.

(*q*) 12 East, 632, and in Cam. Scacc. 4 Taunt. 488.

borough giving the opinion of the court after advisement. His lordship said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer, and that this could not maintain the verdict, unless it was shown "that in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A *seller* is unquestionably liable to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars which *the buyer has not equal means with himself of knowing*, or if he do so in such manner as to *induce the buyer to forbear making the inquiries* which, for his own security and advantage, he would otherwise have made. But is a *buyer* liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognized principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum*, by the bidder, in respect to which the bidder was under *no legal pledge or obligation to the seller* for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance, therefore, he can maintain no action." (*r*) When the case came before the exchequer chamber, (*s*) Puller, in argument, insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*, and that there was no case in which it had been held that an action would not lie under such circumstances; but the court would hear no reply, and at once confirmed the judgment, Sir James Mansfield C. J. simply saying: "The question is, whether the defendant is bound to disclose the highest price he chooses to give, or whether he be not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase."

§ 450. In Jones *v.* Franklin, (*t*) *coram* Rolfe B. at nisi prius,

(*r*) [See Prescott *v.* Wright, 4 Gray, 461.]

(*s*) 4 Taunt. 488.

(*t*) 2 Mood. & R. 348.

the action was *trover*, and the circumstances were that the plaintiffs, assignees of a bankrupt, were owners of a policy for 999*l*., on the life of one George Laing, and early in 1840 had endeavored, through their attorney, to sell it for 40*l*., but could find no purchaser. Defendant knew this fact. On the 15th August, Laing became suddenly very ill, and he died on the 20th. On the 18th defendant employed one Cook to buy the policy for the defendant, and to give as much as sixty guineas for it. The vendor asked Cook when he applied to buy it what he thought it would be worth, and Cook said about sixty guineas. Cook and the defendant both knew that Laing was in imminent danger, but did not inform the vendor, who was ignorant of it, and sold the policy at that price, supposing Laing to be in good health. Rolfe B. said "there could be no doubt such conduct was grossly dishonorable. But he had no difficulty in going farther than this, and telling the jury that if they believed the facts as stated on the part of the plaintiffs the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired." It does not seem possible to reconcile this case with Vernon *v.* Keys. In both cases the purchasers made a false representation. But in Vernon *v.* Keys the falsehood was *volunteered*, and misrepresented a *fact;* whereas in Jones *v.* Franklin the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the vendor as to his *opinion*, and, according to Lord Ellenborough, the buyer was "under no legal duty or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for "the consequences of his own indiscretion in relying on it." There was, perhaps, enough in the case to bring it within the *equity* principle laid down by Lord Eldon in Turner *v.* Harvey; (*u*) but dishonorable and unfair as was the conduct of the buyer, it would be difficult to show, on authority, that it was in law such a fraud as vitiated the sale.

Jones *v.* Franklin.

Case not reconcilable with Vernon *v.* Keys.

§ 451. In America it has been held, that if a purchaser make false and fraudulent representations as to his own solvency and means of payment, and thereby induces the vendor to sell to him on credit, no right either of property or possession is acquired by the purchaser,

Decisions in America, that neither property nor possession pass to buyer who

(*u*) Jac. 169.

has defrauded vendor.

and the vendor would be justifiable in retaking the property, provided he could do so without violence. (*x*)

SECTION III. — FRAUD ON THE BUYER.

Buyer defrauded by vendor may avoid the sale.

§ 452. In every case where a buyer has been imposed on by the fraud of the vendor, he has a right to repudiate the contract, a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. The buyer under such circumstances may refuse to accept the goods, if he discover the fraud before delivery, or return them, if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods in the same state in which he received them. (*a*) And

Before or after delivery.

(*x*) Hodgeden *v.* Hubbard, 18 Vt. 504; Johnson *v.* Peck, 1 Wood. & M. 334; Mason *v.* Crosby, 1 Wood. & M. 342. [See *ante*, § 444, note (*e*), and cases cited.]

(*a*) Clarke *v.* Dickson, E., B. & E. 148, and 27 L. J. Q. B. 223; Murray *v.* Mann, 2 Ex. 538; Street *v.* Blay, 2 B. & Ad. 456; [*ante*, § 415, and note (*c*); Kerr F. & M. (1st Am. ed.) 328, 329; Queen *v.* Saddlers' Co. 10 H. L. Cas. 420, 421, per Blackburn J.; Downer *v.* Smith, 32 Vt. 1; Poor *v.* Woodburn, 25 Ib. 234; Manahan *v.* Noyes, 52 N. H. 232; Kinney *v.* Kiernan, 2 Lansing, 492; Pierce *v.* Wilson, 34 Ala. 596; Jemison *v.* Woodruff, Ib. 143; Buchanan *v.* Horney, 12 Ill. 336; Shaw *v.* Barnhart, 17 Ind. 183; Blen *v.* Bear River &c. Co. 20 Cal. 602; Getchell *v.* Chase, 37 N. H. 110; Gates *v.* Bliss, 43 Vt. 299; Wheaton *v.* Baker, 14 Barb. 594; Gatling *v.* Newell, 9 Ind. 572, 577 *et seq.* per Perkins J.; Hoopes *v.* Strasburger, 37 Md. 390, 391; Farris *v.* Ware, 60 Maine, 482; Butler *v.* Northumberland, 50 N. H. 39, 49; Perkins *v.* Bailey, 99 Mass. 61, 62; King *v.* Eagle Mills, 10 Allen, 551; Farrell *v.* Corbett, 4 Hun, 128; Van Liew *v.* Johnson, Ib. 415; Dows *v.* Griswold, Ib. 550; Anthony *v.* Day, 52 How. Pr. R. 35. A party having an election to rescind an entire contract must rescind it wholly or in no part. Miner *v.* Bradley, 22 Pick. 457; Voorhees *v.* Earl, 2 Hill (N. Y.), 292, 293. He cannot avoid it to retain his property, and at the same time enforce it to recover damages. Junkins *v.* Simpson, 14 Maine, 364; Weeks *v.* Robie, 42 N. H. 316. The contract cannot be rescinded as to one party, and be kept in force as to the other. Coolidge *v.* Brigham, 1 Met. 550; Fullager *v.* Reville, 3 Hun, 600. A party cannot rescind a contract and at the same time retain the consideration, in whole or in part, which he has received under it. Jennings *v.* Gage, 13 Ill. 610; Coolidge *v.* Brigham, 1 Met. 550; Miner *v.* Bradley, 22 Pick. 457; Perley *v.* Balch, 23 Ib. 286; Norton *v.* Young, 3 Greenl. 30; Cushman *v.* Marshall, 21 Maine, 122; Sumner *v.* Parker, 36 N. H. 449; Weeks *v.* Robie, 42 Ib. 316; Willoughby *v.* Moulton, 47 Ib. 205. Where the vendor would rescind a contract of sale on account of the fraud of the purchaser, it is his duty to restore what he has received in payment, before he can sustain an action to recover the goods sold. Norton *v.* Young 3 Greenl. 30; Cushing *v.* Wyman, 38 Maine, 589; Cook *v.* Gilman, 34 N. H. 556; Evans *v.* Gale, 21 Ib. 240; 2 Chitty Contr. (11th Am. ed.) 1092, note (*a*); Pope *v.* Pictou Steamboat Co. 2 Oldright (N. S.), 18; Warren *v.* Tyler, 81 Ill. 15; Haase *v.* Mitchell, 58 Ind. 213; Heaton *v.* Knowlton, 53 Ib. 357; Wood

Contract must be rescinded *in toto*.

this ability to restore the thing purchased unchanged in condition is indispensable to the exercise of the right to rescind, so that if the purchaser has innocently changed that condition while ignorant of the fraud he cannot rescind. (*b*) But the contract is *only voidable, not void*, and if after discovery of the fraud he acquiesces in the sale by express words or by any unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property. (*c*) Mere delay also may have the same effect, if, while deliberating, the position of the vendor has been altered; (*d*) and the result will not be affected by the buyer's subsequent discovery of a new incident in the fraud, for this would not confer a new right to

Election by buyer.

v. Garland, 58 N. H. 154; Spencer *v.* St. Clair, 57 Ib. 9. But although it may be no longer open to the party defrauded, from the change of circumstances which has taken place in the mean time, to avoid the contract upon the discovery of the fraud, he has a remedy by actior of deceit for the damages against the party by whose misrepresentations he has been misled to his injury. Clarke *v.* Dickson, E., B. & E. 148; The Queen *v.* Saddlers' Co. 10 H. L. Cas. 421, per Blackburn J.; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. Ap. Cas. 167. So the party defrauded may, instead of rescinding the contract, stand to the bargain, even after he has discovered the fraud, and recover damages for the fraud, or he may recoup in damages, if sued by the vendor for the price. The affirmance of a contract by the vendee after discovery of the fraud merely extinguishes his right to rescind. His other remedies remain unimpaired. Whitney *v.* Allaire, 4 Denio, 554; Rice J. in Herrin *v.* Libbey, 36 Maine, 357; Peck *v.* Brewer, 48 Ill. 55; Weimer *v.* Clement, 37 Penn. St. 147; Van Epps *v.* Harrison, 5 Hill, 68; Foulk *v.* Eckart, 61 Ill. 318; Lilley *v.* Randall, 3 Col. 298; Miller *v.* Barber, 66 N. Y. 558; Johnson *v.* Luxton, 9 J. & Sp. 481; Lexow *v.* Julian, 14 Hun, 152; Ranney *v.* Warren, 17 Ib. 111. But in Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317, it was laid down that this principle does not apply to a purchase of shares in a joint-stock company. The vendee's only remedy is by reseission.]

Though contract not rescinded, action for deceit may lie.

(*b*) West Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145; cases *ante*, at § 415. [See cases in next preceding note; Mixer's case, 4 De G. & J. (Am. ed.) 586, and note (1); Rawlins *v.* Wickham, 3 Ib. 322; 2 Chitty Contr. (11th Am. ed.) 1092, and cases in note (*a*); Manahan *v.* Noyes, 52 N. H. 232; Sanborn *v.* Batchelder, 51 Ib. 426; Butler *v.* Northumberland, 50 Ib. 39, 40; Weeks *v.* Robie, 42 Ib. 316.]

(*c*) [2 Chitty Contr. (11th Am. ed.) 1037; Ormes *v.* Beadel, 2 De G., F. & J. 336; Evans *v.* Montgomery, 50 Iowa, 325.]

(*d*) Clough *v.* The London & N. W. Ry. Co. L. R. 7 Ex. 26; [Baker *v.* Lever, 67 N. Y. 304. A right to rescind must be exercised at the earliest practicable moment after the discovery of the ground therefor. Matteson *v.* Holt, 45 Vt. 336; Perkins J. in Gatling *v.* Newell, 9 Ind. 572, 578 *et seq.*; Central Railway Co. *v.* Kisch, L. R. 2 H. L. 99; Smith's case, L. R. 2 Ch. Ap. 604; Heymann *v.* European Central Railway Co. L. R. 7 Eq. 154; Willoughby *v.* Moulton, 47 N. H. 205; Weeks *v.* Robie, 42 Ib. 316; Hammond *v.* Pennock, 61 N. Y. 145; Ross *v.* Titterton, 6 Hun, 280; Parmlee *v.* Adolph, 28 Oh. St. 10; Pence *v.* Langdon, 99 U. S. 578.]

rescind, but would merely confirm the previous knowledge of the fraud. (*e*)

§ 453. These principles are well illustrated in the case of Campbell *v.* Fleming. (*f*) The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. After the purchase he discovered the fraud, and that the whole scheme of the company was a deception. The action was brought to recover the purchase-money that he had paid. But it appeared that subsequently to the discovery of the fraud the plaintiff had treated the shares as his own, by consolidating them with other property in the formation of a new company, in which he sold shares, and realized a considerable sum. The plaintiff then endeavored to get rid of the effect of the confirmation of the contract, resulting from his dealing with the shares as his own, by showing that at a still later period he had discovered another fact, namely, that only 5,000*l.* had been paid for the purchase of property by the mining company, although it was falsely represented to the plaintiff when he took the shares that the outlay had been 35,000*l.* The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the judges held

Campbell *v.* Fleming.

(*e*) [In Matteson *v.* Holt, 45 Vt. 336, the action was for the price of a yoke of oxen. In negotiating for the purchase, it appeared that the defendant told the plaintiff that he wanted "to purchase a yoke of oxen not under five nor over seven years of age; what work he wished them to perform; where they were to work, and that they must have good feet to hold shoes." The plaintiff replied that "his oxen were only seven that spring; that they could do as much work as any other yoke of oxen, and that the foot with the broken claw was all right, and only required a peculiar shaped shoe." On these representations the defendant purchased and took the oxen. It was proved that the broken claw was spongy, and would not hold a shoe; that the oxen were incapable of performing the work for which they were purchased; that they were over seven years old — at least eight — and that known to the plaintiff at the time of the sale. On the seventh day after the sale, they were returned to the plaintiff, with notice that they were not as represented. On the second day after the purchase, the defendant became aware of the fact that the feet of the oxen would not hold shoes, and at the same time the defendant was informed by his blacksmith that, in his (the blacksmith's) judgment, the oxen were nine years old. The defendant continued to use the oxen for five days after that. It was found that the plaintiff knowingly misrepresented the age of the oxen. Judgment was rendered for the defendant. See Gatling *v.* Newell, 9 Ind. 572, 578; Central Railway Co. *v.* Kisch, L. R. 2 H. L. Cas. 99; Smith's case, L. R. 2 Ch. Ap. 604; Heymann *v.* European Central Railway Co. L. R. 7 Eq. 154; Boughton *v.* Standish, 48 Vt. 594; Hall *v.* Fullerton, 69 Ill. 448. The same representation cannot be both a warranty and a fraud. Rose *v.* Hurley, 39 Ind. 77.]

Delay after discovery of fraud bars rescission.

Matteson *v.* Holt.

(*f*) 1 Ad. & E. 40; [Patterson *v.* Irwin, 21 U. C. C. P. 132.]

the nonsuit right. Littledale J. said: "After the plaintiff learned that an imposition had been practised on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained, *he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.*" Park J. said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; *and the fraud could do no more than entitle him to rescind.*" Patteson J. concurred, and said: "Long afterwards he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and *it cannot revive the right of repudiation which has been once waived.*" Lord Denman C. J. said: "There is no authority for saying that a party must know *all the incidents of a fraud before he deprives himself of the right of rescinding.*" (*g*)

§ 454. The rules of law defining the elements which are essential to constitute such fraud as will enable a purchaser to avoid a sale were long in doubt, and there was specially a marked conflict of opinion between the court of queen's bench and the exchequer, until the decisions of the exchequer chamber, in Collins *v.* Evans, (*h*) in 1844, and Ormrod *v.* Huth, (*i*) in 1845, established the true principle to be that a *representation, false in fact*, gives no right of action if *innocently made* by a party who believes the truth of what he asserts; and that, in order to constitute fraud, there must be a false representation *knowingly made*, *i. e.* a *concurrence of fraudulent intent and false representation.* (*k*) And a false representation is *knowingly* made, when a

What elements are necessary to entitle buyer to rescind sale on ground of fraud.

False representation not sufficient if innocently made.

(*g*) See *ante*, § 442, as to election, and the case of Clough *v.* The London & North Western Railway Company (L. R. 7 Ex. 26), there cited. [And see Matteson *v.* Holt, 45 Vt. 336, cited and stated *ante*, § 452, note (*e*).]

(*h*) 5 Q. B. 820.

(*i*) 14 M. & W. 651.

(*k*) [See Weimer *v.* Clement, 37 Penn. St. 147; M'Farland *v.* Newman, 9 Watts, 55; Da Lee *v.* Blackburn, 11 Kansas, 190. In King *v.* Eagle Mills, 10 Allen, 551, Bigelow C. J. said: "There can be no doubt that a vendee may rescind a contract for the sale of chattels, and refuse to receive or accept them, if the vendor has been guilty of deceit in inducing the former to enter into the bargain. But to maintain a defence to an action for the price of goods on this ground, the same facts must be proved which would be necessary to maintain an action for damages for deceit in the sale of goods."]

party for a fraudulent purpose states what he does not *believe* to be true, even though he may have no *knowledge* on the subject. (k^1) These decisions bring back the law almost exactly to the point at which it was left by the king's bench in the great leading cases of Pasley *v.* Freeman (*l*) and Haycraft *v.* Creasy, (*m*) decided in 1789 and 1801. The effect of innocent misrepresentation as causing mistake or failure of consideration has been treated *ante*, §§ 420 *et seq.* In the former of these cases it was held that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. Pasley *v.* Freeman was an action brought against a party for damages, for falsely representing a third person to be one whom the plaintiff could safely trust, the *defendant well knowing* that this was not true. In the latter case, Haycraft *v.* Creasy, it was held that an action of deceit would *not* lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if *the representations were made bonâ fide with a belief in their truth.* After a series of intervening cases, that of Foster *v.* Charles (*n*) came twice before the common pleas in 1830 and 1831, and was deliberately approved and followed by the queen's bench in Polhill *v.* Walter, (*o*) in 1832. It was held in these cases unnecessary to prove "a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. (*p*) It is enough if a representation is made which the party making it *knows to be un-*

Pasley *v.* Freeman.

Haycraft *v.* Creasy.

Foster *v.* Charles.

Polhill *v.* Walter.

(k^1) [In Sledge *v.* Scott, 56 Ala. 202, Brickell J. said: "The law as settled in this state is, that a misrepresentation by a vendor of chattels, of a material fact made at the time of or pending the negotiation for the sale, on which the purchaser has the right to rely, and in fact relies, is a fraud, furnishing a cause of action to the purchaser, or a ground of defence to an action for the purchase-money. If the representation is not a mere expression of opinion, but the affirmation of a fact, it is not material whether the vendor knew or had means of knowing it to be untrue, or that he made it in ignorance of the facts. The affirmation of that which he does not know to be true produces the same injury, and is as indefensible . . . . as the assertion of what he knows to be false."]

Alabama rule.

Vendor bound to know truth of representation.

(*l*) 3 T. R. 51; 2 Sm. L. C. 71, 6th ed.

(*m*) 2 East, 92.

(*n*) 6 Bing. 396, and 7 Bing. 105.

(*o*) 3 B. & Ad. 122.

(*p*) [*Ante*, § 429, note (*g*), and cases cited.]

true, and which is intended by him, or which, from the mode in which it is made, *is calculated to induce another to act on the faith of it* in such a way as that he may incur damage, and that damage is actually incurred. (*q*) A wilful falsehood of such a nature is, in the legal sense of the word, a *fraud*."

§ 455. While the authorities stood in this condition, the cases of Cornfoot *v.* Fowke (*r*) and Fuller *v.* Wilson (*s*) were decided, the former in the exchequer, in 1840, and the latter in the queen's bench, in 1842, the judges in the latter case expressly declining to follow the ruling in the former, and adopting in preference the dissenting opinion of Lord Abinger. Cornfoot *v.* Fowke (*r*) was a case in which the defendant refused to comply with an agreement to take a furnished house, on the ground that he had been defrauded by the plaintiff and others in collusion with him. The house had been represented to the defendant by plaintiff's agent as being entirely unobjectionable, whereas the adjoining house was a brothel and a nuisance, which was compelling people in the neighborhood to leave their houses. This fact was *known to the plaintiff*, but was *not known to his agent*, who made the representation, and the *plaintiff did not know* that the representation had been made. All the cases, from the leading one of Pasley *v.* Freeman, (*t*) were cited in argument, and the majority of the court, Rolfe, Alderson, and Parke BB., held the defence unavailing; while Lord Abinger C. B. said that the opposite conclusion was so plain as not to admit a doubt in his mind, but for the dissent of his brethren. Rolfe B. held the question to be one as to the power of an agent "to affect his principal by a representation *collateral to the contract*. To do this, it is essential . . . . *to bring home fraud to the principal*, and . . . . all the facts are consistent with the hypothesis that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself."

Cornfoot *v.* Fowke.

(*q*) [Statements, known by the vendor to be false, which induce the vendee to make a purchase to his injury, may fairly be presumed to have been made to induce the purchase. Collins *v.* Dennison, 12 Met. 549; *ante*, § 429, note (*b*). See Boyd *v.* Browne, 6 Barr, 310; Taylor *v.* Fleet, 1 Barb. 471; Hunt *v.* Moore, 2 Barr, 105; Hammatt *v.* Emerson, 27 Me. 308; Doggett *v.* Emerson, 3 Story, 700; Lewis *v.* M'Lemore, 10 Yerger, 206; Stevens *v.* Giddings, 45 Conn. 507.]

(*r*) 6 M. & W. 358. [See Fitzsimmons *v.* Joslin, 21 Vt. 129–141; Story Agency, § 139, note (2); Coddington *v.* Goddard, 16 Gray, 431, 432, 436.]

(*s*) 3 Q. B. 58.

(*t*) 3 T. R. 51.

Alderson B. said: "Here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud. . . . . It is said that the knowledge on the part of the principal is sufficient to establish the fraud. If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit; but this fact also fails. . . . . I think it impossible to sustain a charge of fraud when neither principal nor agent has committed any: the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*." Parke B. pointed out that the representation was no part of the contract, which was in writing, and therefore it could not affect the rights of the parties, except on the ground that it was fraudulent. On the simple facts, each person was innocent, because the plaintiff made no false representation himself, and although his agent did, the agent did it innocently, not knowing it to be false; and the proposition seemed untenable that if each was innocent, the act of either or both could be a fraud. It was conceded that an innocent principal would be bound if his agent committed a fraud, but in the case presented the agent acted without fraudulent intent. It was also conceded that, "If the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and at the same time suspecting or believing that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud." His lordship deemed it immaterial whether the making of such representations as were made by the agent was within the scope of his authority or not, as they could not affect the contract unless *fraudulent*. Lord Abinger C. B. gave an elaborate dissenting opinion, in which he held "that it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude; . . . . the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said, in the language of the law, to be fraudulent, although the party making them suppose them to be correct;" that there was not a total absence of moral turpitude in the agent, even upon the

presumption that he was wholly ignorant of the matter: that "nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation;" that it did not follow because the plaintiff was not bound by the representation of the agent, even if made without authority, that "he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. *It is one thing to say* that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and *another to say that he may enforce a contract obtained by means of a false representation made by his agent*, because the agent had no authority." (*u*) See observations on this case, *post*, § 462.

(*u*) [See 2 Kent, 621, note (*c*); Fitzsimmons *v.* Joslin, 21 Vt. 129; Story Agency, § 139; 1 Sugden V. & P. (8th Am. ed.) 250; Bartlett *v.* Salmon, 6 De G., M. & G. 33, 39, 40, and note (*a*); 2 Chitty Contr. (11th Am. ed.) 1036; Attwood *v.* Small, 6 Cl. & Fin. 414, note (1). Where an agent makes a false representation, or in any other manner commits a fraud in a purchase or sale, with or without the privity, or knowledge, or assent, of his principal, and the principal adopts the bargain and attempts to reap an advantage from it, he will be held bound by the fraud of the agent, and relief will be given to the other party to the transaction. The principle is, that fraud by an agent is fraud by the principal; that the principal should be bound by the fraud or misconduct of his own agent, rather than that another should suffer; that the principal cannot take the benefits of a trade by his agent without taking its burdens; and, finally, that the principal cannot adopt part and repudiate the rest, where the transaction is a unit, and he claims the benefit of the whole. Woodbury J. in Ferson *v.* Sanger, 1 Wood. & M. 147; Warner *v.* Daniels, Ib. 90; Bowers *v.* Johnson, 10 Sm. & M. 169; Lawrence *v.* Hand, 23 Miss. 103; Craig *v.* Ward, 3 Keyes, 393; Griswold *v.* Haven, 25 N. Y. 595; Sharp *v.* New York, 40 Barb. 257; Graves *v.* Spier, 58 Ib. 349; Fitzsimmons *v.* Joslin, 21 Vt. 129; Mundorf *v.* Wickersham, 63 Penn. St. 87; Bennett *v.* Judson, 21 N. Y. 238; Abell *v.* Howe, 43 Vt. 403; 11 Am. Law Reg. N. S. 144, 149, 150; Concord Bank *v.* Gregg, 14 N. H. 331; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 14 N. Y. 623, 631; 16 Ib. 125, 143; North River Bank *v.* Aymar, 3 Hill (N. Y.), 262; Westfield Bank *v.* Cornen, 37 N. Y. 320, 322; Madison & Ind. R. R. *v.* Norwich Saving So. 24 Ind. 457; De Voss *v.* Richmond, 18 Grattan, 338; Kibbe *v.* Hamilton Ins. Co. 11 Gray, 163; Veazie *v.* Williams, 8 How. (U. S.) 134; Elwell *v.* Chamberlin, 31 N. Y. 611; Allerton *v.* Allerton, 50 Ib. 670; Chester *v.* Dickerson, 52 Barb. 349; Durant *v.* Rogers, 87 Ill. 508; Reed *v.* Peterson, 91 Ib. 288; Indianapolis &c. Ry. Co. *v.* Tyng, 63 N. Y. 653; Brett *v.* Clowser, 5 C. P. D. 376; Lamm *v.* The Port Deposit Homestead Ass. 49 Md. 233; Am. Ins. Co. *v.* Kuhlman, 6 Mo. App. 522; Tagg *v.* Tenn. Nat. Bank, 9 Heisk. (Tenn.) 479. When the principal ratifies a sale made by an agent, he is bound by the representations made by the agent at the time of the sale. Doggett *v.* Emerson, 3 Story, 700; Kibbe *v.* Hamilton Ins. Co. 11 Gray, 163.]

Liability of principal for fraud of agent.

Fuller *v.* Wilson.

§ 456. In Fuller *v.* Wilson, (*x*) which was an action on the case for a false representation, the queen's bench, through Lord Denman C. J., declined to take any ground other than the broad proposition of Lord Abinger, which they adopted, "that whether there was a moral fraud or not, if *the purchaser was actually deceived in his bargain, the law will relieve him from it.* We think the principal and his agent are for this purpose completely identified, and that the question is not what was passing in the mind of either, but *whether the purchaser was in fact deceived by them or either of them.*" (*y*) The conflict of opinion cannot be more plainly stated. The queen's bench thought the sole test was whether the *purchaser was deceived by an untrue statement into making the bargain.* The court of exchequer thought it further necessary that the party making the untrue statement *should know it to be untrue.* Fuller *v.* Wilson was reversed in error, (*z*) solely on the ground that the facts of the case did not show any misrepresentation on the part of the vendor, but only the purchaser's own misapprehension; and Tindal C. J., in delivering the opinion, stated that the court did "not enter into the question discussed in Cornfoot *v.* Fowke."

Conflict of opinion between the queen's bench and exchequer

Moens *v.* Heyworth.

§ 457. In Moens *v.* Heyworth, (*a*) in 1842, the question again came before the exchequer of pleas (the case of Fuller *v.* Wilson not being yet reported), and Lord Abinger renewed the expression of his dissent from Parke B. and Alderson B., repeating that "the fraud which vitiates a contract . . . . does not in all cases necessarily imply moral turpitude." His lordship instanced the sale of a public house, and an untrue statement by the seller that the receipts of the house were larger than was the fact, but the untrue statement might be made without dishonest intent, as if proper books had not been kept. In such case his lordship insisted that the purchaser might maintain an action on the false representation, even though the vendor did not know that it was false when made. The other judges held the contrary, Parke B. saying distinctly that, in such cases, "it is essential that there should be moral fraud."

Taylor *v.* Ashton.

§ 458. In the next year, 1843, Taylor *v.* Ashton (*b*) came before the same court, and the judgment of the

(*x*) 3 Q. B. 58.

(*y*) [See White *v.* Sawyer, 16 Gray, 586.]

(*z*) Wilson *v.* Fuller, 3 Q. B. 1009.

(*a*) 10 M. & W. 147.

(*b*) 11 M. & W. 401.

queen's bench in Fuller *v.* Wilson was relied on by the plaintiff; but Parke B. said, when it was cited, "I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud, and Lord Denman seems to admit that to be so. If the party *bonâ fide believes* the representation he made to be true, though he does not *know* it, it is not actionable." The learned baron afterwards delivered the judgment of the court, *holding* that "it was not necessary, in order to constitute fraud, to show that the defendants *knew* the fact to be untrue; it was enough that the fact was untrue *if they communicated that fact for a deceitful purpose;* . . . . if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud." (*c*)

§ 459. In 1843 the queen's bench had before them the case of Evans *v.* Collins, (*d*) which was an action by a sheriff to recover damages against an attorney for falsely representing a certain person to be the person against whom a *ca. sa.* had been sued out by the attorney, so that the sheriff had been induced to take the wrong person into custody, and had thereby incurred damage. The jury found that the defendant had probable reason for believing that the person pointed out to the sheriff was really the person against whom the *ca. sa.* was issued, so that there was clearly a total absence of moral turpitude. It had, however, been previously held, in Humphrys *v.* Pratt, (*e*) in the House of Lords, that an execution creditor was bound to indemnify a sheriff who had seized goods pointed out by the creditor, and upon his requisition and false representation that they belonged to his debtor, although the counts in the declaration did not aver any knowledge or belief on the part of the execution creditor that his representation was false. On the authority chiefly of this decision in the House of Lords, Lord Denman C. J. held the action in Evans *v.* Collins maintainable, but he added: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame: but the party who caused his

Evans *v.* Collins.

(*c*) [See 2 Chitty Contr. (11th Am. ed.) 1044; Maule J. in Evans *v.* Edmonds, 13 C. B. 777, 786; Lord Cairns in Reese River Silver Mining Co. *v.* Smith, L. R. 4 H. L. Cas. 64, 79; Howard *v.* Gould, 28 Vt. 523, 526. The mere fact that a representation is literally true affords no excuse to the party making it, if made with the intention to deceive another, and he is thereby deceived to his injury. Denny *v.* Gilman, 26 Me. 149.]

(*d*) 5 Q. B. 804.

(*e*) 5 Bligh N. S. 154.

loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation *that the defendant knew his representation to be false is therefore immaterial:* without it, the declaration discloses enough to maintain the action." This case was reversed in the exchequer chamber, (*f*) after time taken for consideration, by the unanimous judgment of Tindal C. J. Coltman, Erskine, and Maule JJ., and Parke, Alderson, Gurney, and Rolfe BB. The court stated the question to be distinctly "whether a statement or representation which is *false in fact, but not known to be so by the party making it*, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action." The court held that, on the whole current of authority, "*fraud* must concur *with the false statement* in order to give a ground of action." The court explained the decision in Humphrys *v.* Pratt, (*g*) in which no reasons were assigned for the judgment, as having proceeded on the ground that the execution creditor in that case had made the sheriff his agent, and was bound to indemnify him for the consequences of acts done under the principal's instructions.

Reversed in exchequer chamber.

§ 460. The next case was Ormrod *v.* Huth, (*h*) in the exchequer chamber, in 1845, on error from the exchequer of pleas, so that the judges of the queen's bench must have taken part in the judgment. Tindal C. J. laid down the rule, which he said was supported both by the early and later cases, so clearly as to render it unnecessary to review them, in the following words: "Where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false *to the knowledge of the party making it*, this would in general be *conclusive evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, *we think this does not*

Ormrod *v.* Huth.

(*f*) 5 Q. B. 820.
(*g*) 5 Bligh N. S. 154.
(*h*) 14 M. & W. 650.

amount to fraud in law." (*i*) Finally the queen's bench abandoned their former doctrine in express terms in 1846, Lord Denman C. J. delivering the opinion in Barley *v.* Walford (*k*) in these words: "The judgment which was given in this court in Evans *v.* Collins (5 Q. B. 804) affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the court of exchequer chamber (5 Q. B. 829); . . . . and we must admit the reasonableness of the doctrine there at length laid down." Barley *v.* Walford.

§ 461. The law thus settled has since remained unshaken, and in 1860 the queen's bench held that it was established by Collins *v.* Evans, and numerous other authorities, that, "to support an action for false representation, the representation must *not only have been false in fact* but *must also have been made fraudulently.*" (*l*) In Western Bank of Scotland *v.* Addie (*m*) the charge to the jury was, that "if the directors took upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which *they did not believe or had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." In the House of Lords, the lord chancellor approved this direction, saying: "Suppose a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief of its truth, how can the *bonâ fide* be tested, except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." But Lord Cranworth thought this was going rather too far, and said: "I confess that my opinion was that in what his lordship thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they *bonâ fide* Western Bank of Scotland *v.* Addie.

(*i*) [Howell *v.* Biddlecom, 62 Barb. 131; Cooper *v.* Lovering, 106 Mass. 77, 79; Pike *v.* Fay, 101 Ib. 134, 137.]

(*k*) 9 Q. B. 197.

(*l*) Childers *v.* Wooler, 2 E. & E. 287, and 29 L. J. Q. B. 129. See, also, judgment of Lord Campbell, in Wilde *v.* Gibson, 1 H. L. Cas. 633.

(*m*) L. R. 1 Sc. App. 145.

believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." In Reese Silver Mining Co. *v.* Smith (L. R. 4 Eng. App. 64), it was said by Lord Cairns that the settled rule of law was, "that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." (*n*) In this Lords Hatherley and Colonsay concurred.

Reese Silver Mining Co. *v.* Smith.

§ 462. It is necessary to guard the reader against concluding that the case of Cornfoot *v.* Fowke (*o*) has remained unquestioned upon the point that the principal will not be liable for the consequences of false representations made by his agent, with full belief in their truth, when the principal himself has a knowledge of the real facts. In National Exchange Company of Glasgow *v.* Drew, (*p*) it was commented on by Lords Cranworth and St. Leonards, the latter learned lord saying distinctly: "I should feel no hesitation, if I had myself to decide that case, in saying that although the representation was not fraudulent, — the agent not knowing that it was false, — yet that as it in fact was false, and false to the knowledge of the principal, it ought to *vitiate the contract*." Lord Campbell, also, in Wheelton *v.* Hardisty, (*q*) said: "As to Cornfoot *v.* Fowke, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether that case was well decided by the majority of the judges in the exchequer, although the voice of Westmin-

Settled point in Cornfoot *v.* Fowke has been questioned, as to liability of principal for false representations by agent.

(*n*) [But see King *v.* Eagle Mills, 10 Allen, 548; Binnard *v.* Spring, 42 Barb. 470; Bondurant *v.* Crawford, 22 Iowa, 40.]

(*o*) 6 M. & W. 358.

(*p*) 2 Macqueen H. L. Cas. 103.

(*q*) 8 E. & B. 270; 26 L. J. Q. B. 265, 275.

ster Hall was, I believe, rather in favor of the dissentient chief baron." And in Barwick *v.* The English Joint Stock Bank, (*r*) Willes J. said: "I should be sorry to have it supposed that Cornfoot *v.* Fowke turned upon anything but a point of pleading."

§ 463. The subject was much discussed in Udell *v.* Atherton, (*s*) which, it is submitted, has been misunderstood to some extent. (*t*) The facts were these: The defendant's traveller sold a log of mahogany to the plaintiff, and warranted it sound without authority, and *knowing that it was defective.* The buyer gave two bills of exchange for the price, at four and six months. The first bill was paid; before the maturity of the second bill, the plaintiff, who had been in possession of the log from the time of the sale, ordered it to be cut up, and then discovered that there was a defect, which reduced its value one half. This defect was patent on inspection, for it had been pointed out to the traveller on a previous occasion, when he attempted to sell the log to another person. The defendant was wholly innocent, knowing nothing, either of the defect or of the fraudulent representation of the traveller. The purchaser, on the defendant's refusal to make an allowance, brought an action *for deceit.* The court was equally divided; Pollock C. B. and Wilde B. holding the action to be maintainable, and Bramwell and Martin BB. holding the contrary. But the two last-named judges dissented solely on the ground that the defendant was not liable *in that form of action;* and Martin B. very distinctly admitted that the buyer would have had the right to *rescind the contract*, on the ground of fraud committed by the agent, (*u*) if the plaintiff had not deprived himself of this remedy by cutting up and using the log so that he could not restore it. All the judges were of opinion that the fraud of the agent would affect the validity of the contract; but Martin B. pointed out, as the true distinction, that "in an action *upon the contract*, the representation of the agent is the representation of the principal, but in an *action on the case for deceit* the misrepresentation or concealment must be proved against the principal."

Udell *v.* Atherton.

§ 464. In the year 1857 two decisions, apparently not recon-

(*r*) L. R. 2 Ex. 259; 36 L. J. Ex. 247.
(*s*) 7 H. & N. 172; 30 L. J. Ex. 337.
(*t*) See note at p. 761 of Broom's Leg. Max. 4th ed. and 2 Smith's L. C. 96, 6th ed.
(*u*) [See *ante*, § 445, note (*u*).]

cilable, were rendered at about the same time by appellate courts, each being ignorant of the case pending in the other. In Barwick *v.* The English Joint Stock Bank, (*x*) the case was argued in the exchequer chamber on the 8th February, and the judgment rendered on the 18th May by Willes J., in behalf of himself and Blackburn, Keating, Mellor, Montague Smith, and Lush JJ. In the Western Bank of Scotland *v.* Addie (*y*) the case was argued in the House of Lords in the beginning of March, and judgment was rendered on the 20th May, just two days after the decision in the exchequer chamber.

Barwick *v.* The English Joint Stock Bank.

§ 465. In Barwick *v.* The English Joint Stock Bank, the fraud was committed by the manager of the defendant's bank acting in the course of his business, and the third count in the declaration was for fraud and deceit by the defendants, to which they pleaded not guilty. Held, that the fraud committed by the manager was properly charged in the declaration as the fraud of the defendants, and that the defendants were liable for the fraud of their agents. The fraud committed was the giving of a guaranty by the manager, in behalf of the bank, *he* knowing and intending that the guaranty should be unavailing, and fraudulently concealing from the plaintiff the facts which would make it so. Willes J., in delivering the judgment, declared that, in so deciding, " we conceive that we are in no respect overruling the opinions of my brothers Martin and Bramwell in Udell *v.* Atherton, (*z*) the case most relied on for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the court of exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, a question which was settled as early as Lord Holt's time (Hern *v.* Nichols, 1 Salk. 280), (*a*) but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their *general* agent

(*x*) L. R. 2 Ex. 259; 36 L. J. Ex. 147.
(*y*) L. R. 1 Sc. App. 146.
(*z*) 7 H. & N. 172; 30 L. J. Ex. 337.
(*a*) [See Jeffrey *v.* Bigelow, 13 Wend. 518; Locke *v.* Stearns, 1 Met. 560; White *v.* Sawyer, 16 Gray, 586; Bennett *v.* Judson, 21 N. Y. 238.]

in business as the manager of a bank is." As to the distinction here pointed out between the responsibility of the principal for the fraud of an agent employed to effect *one* sale, and that of an agent to do business *generally*, it is not easy to appreciate how the principle can differ in the two cases, if in each the agent is acting in the business for which he was employed by the principal; but the observation of the learned judge on this point is of course no part of the decision in the cause.

§ 466. On the other hand, in The Western Bank of Scotland *v.* Addie, (*b*) at the close of the argument on the 12th March, the lords intimated that, "as the decisions conflicted, they would take time to consider the case, *with a view to the laying down of some general rules*," and it was not till the 20th May that the decision was given. The plaintiff's action was based on the allegation that he had been induced to buy *from the company* a number of its shares, by the fraudulent representations of its *agents*, *the directors*. The demand, according to the forms of the Scotch law, was in the alternative for a *restitutio in integrum*, or for damages. The principles governing the case were laid down by the lord chancellor (Lord Chelmsford), and by Lord Cranworth, in entire conformity with the opinion of Martin B. in Udell *v.* Atherton. Lord Chelmsford said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to *enforce that contract*, or the person who has been deceived institutes a suit against the company to *rescind the contract* on the ground of fraud, the misrepresentations are *imputable to the company*, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers *to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.*" . . . . "It may seem a hardship on the pursuer that he should be compelled to keep the shares, because, in ignorance of the fraud practised on him, he retained them until

The Western Bank of Scotland *v.* Addie.

(*b*) L. R. 1 Sc. App. 146.

an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares, he may still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they were responsible." Lord Cranworth first concurred in deciding that the plaintiff had lost his right to rescind the contract, because he was unable to put the adverse parties in the same situation in which they stood when the contract was entered into. On the other point, his lordship said: "The appellants *are not the persons who were guilty of the fraud*. . . . . An incorporated company cannot in its corporate character be called on to answer *in an action for deceit*. But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed from what I said when the case of Ranger *v.* Great Western Railroad Company (*c*) was decided in this house I meant to give as my opinion that the company could in that case have been made to *answer as for a tort in an action for deceit*, I can only say I had no such meaning. . . . . In what I said, I merely wished to guard against its being supposed that I assented to the argument, that there would be *no means of reaching the company* if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion. An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to *the extent to which the companies have profited from these frauds; but that they cannot be used as wrong-doers, by imputing to them the misconduct of those whom they have employed.* (*d*) A person de-

(*c*) 5 H. L. Cas. 72.

(*d*) [See Craig *v.* Ward, 3 Keyes, 393; Elwell *v.* Chamberlin, 31 N. Y. 619; Allerton *v.* Allerton, 50 Ib. 670; Davis *v.* Bemis, 40 Ib. 453, note; Hunter *v.* Hudson River Iron Co. 20 Barb. 493; Sharp *v.* New York, 40 Ib. 257; Chester *v.* Dickerson, 52 Ib. 349; Graves *v.* Spier, 58 Ib. 387; Sandford *v.* Handy, 23 Wend. 260; Durst *v.* Burton, 2 Lansing, 137; S. C. 47 N. Y. 167; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; L. R. 9 Q. B. 301, *nom.* Swift *v.* Jewsbury; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394. See Weir *v.* Barnett, 3 Ex. D. 32, 238, as to the personal liability of directors for

frauded by *directors*, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, *must seek his remedy against the directors personally*." The plaintiff was therefore held not entitled to recover on either ground.

§ 467. It is submitted that this being the tribunal of the last resort, this case must be considered as settling conclusively, that where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may, 1st, rescind the contract, if he can return the thing bought in the condition in which he received it, but not otherwise; or he may, 2dly, maintain an action for deceit against the agent personally; but 3dly, cannot maintain that, or any action in *tort*, against the innocent principal. Further, that though he would have a claim against the principal for a return of the price to the extent to which the latter has profited by the fraud of his agent, his remedy would be in equity; for it was admitted on all sides, in Udell *v.* Atherton, that if the action for deceit would not lie, the purchaser was remediless at law, when not in a condition to sue for a rescission, there being no form of action at law applicable to the case. (*e*) It must not be concluded from this review of the authorities that the purchaser, who has been induced by false representations to make the contract, is always without remedy because the vendor believed the statements to be true, and was innocent of any fraudulent intent. These cases only establish that the vendor has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on *tort*. But, in very many instances a representation made by the vendor amounts in law to a *warranty*, and when this is the case, the purchaser has remedies on the *contract* for breach of the warranty. The rules of law by which to determine when a representation is a war-

Prineiples established in cases where a buyer has been defrauded by agent of vendor.

Rights of buyer.

Further remedy in equity.

A buyer may have a remedy for false representation by innocent vendor when representation amounts to warranty.

fraudulent statements made in a prospectus issued by brokers employed by the directors to place debentures of the company, the directors deriving no pecuniary advantage from the representations. Sullivan *v.* Mitcalfe, 5 C. P. D. 455.]

(*e*) In a case decided in the queen's bench (by Cockburn C. J. and Quain J.) the court followed Barwick *v.* English Joint Stock Bank, and held a banking company liable for a false representation by the manager as to the credit and solvency of a customer of the bank. Swift *v.* Winterbotham, L. R. 8 Q. B. 244.

ranty, and what are the rights of a buyer for a breach of this warranty when the representation is false, are treated *post*, book IV. part II. ch. i. on Warranty. The law as to the effect of innocent misrepresentation of law or of fact has been discussed *ante*, § 420.

Feret *v.* Hill.

Converse of Cornfoot *v.* Fowke.

§ 468. The case of Feret *v.* Hill (*f*) has been omitted in the foregoing review, in order not to interrupt the exposition of the point directly under discussion, but the case well deserves consideration. It was in its facts the converse of Cornfoot *v.* Fowke. The defendant Hill was the owner of a tenement, and the plaintiff sent an agent to him to give assurances of the plaintiff's good character and reputation, in order to induce the defendant to let the premises to the plaintiff. The agent was innocent, and was honest in his assurances of the plaintiff's good character, but in point of fact the plaintiff, who pretended that he wanted the premises for carrying on business as a perfumer, intended to convert them into a brothel. The plaintiff was let into possession, and used the premises as a brothel, and the defendant discovered the fraud practised on him, ejected the plaintiff forcibly from the apartments, after having given him a notice to quit, which he disregarded. The plaintiff then brought ejectment to recover possession of the apartments, and the jury found, first, that the plaintiff, at the time he entered into the agreement, intended to use the premises for a brothel; and secondly, that he had induced the defendant to enter into the agreement *by fraudulent misrepresentation as to his character and as to the purpose for which he wanted the premises.* The verdict was for the defendant, and Crowder J. reserved leave to the plaintiff to move to enter the verdict in his favor, if the court should be of opinion that the agreement, notwithstanding this finding, was valid. The motion prevailed, and the plaintiff was held entitled to enforce the agreement, on the ground that the misrepresentation was of a fact *collateral to the agreement*, Jervis C. J. saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing when in fact he was doing another." The other judges also put the case upon the ground that the court was not called on to enforce any agreement at all, but to replace premises in the possession of

(*f*) 15 C. B. 207; 23 L. J. C. P. 183.

a man who had an executed legal title to the possession: that it was impossible to say that nothing passed under the demise, simply because it was obtained by fraudulent misrepresentation. The effect of this decision seems to be, that a defrauded lessor who has actually executed a demise cannot treat it as a nullity, but must proceed to have it rescinded on the ground of the fraud by an appropriate tribunal, before treating it as non-existent: such appropriate tribunal not being a court of law but one of equity.

Defrauded lessor.

§ 469. In further illustration of the effect of fraudulent representations to the prejudice of the purchaser, the reader is referred to the series of decisions rendered in cases where shareholders in companies have attempted to relieve themselves from responsibility by showing that they had been induced to take the shares through fraudulent representations of the directors. These cases are all reviewed in Oakes *v.* Turquand, (*g*) decided in the House of Lords in August, 1867, in which it was settled that such contracts are voidable only, not void, and that the defrauded shareholders cannot relieve themselves from responsibility to creditors by disaffirming the contract after the company has failed, and has been ordered to be liquidated in chancery.

Shareholders defrauded by prospectus.

§ 470. It would be an onerous and scarcely a useful task to enumerate the various devices which, in adjudicated cases, have been held by the courts to be frauds on purchasers. The principles stated in this chapter have been illustrated in numerous decisions. (*h*) Some of those which have most frequently occurred in practice will be presented as examples. In Bexwell *v.* Christie (*i*) it was held to be fraudulent in the vendor to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield also in that case held it to be a fraud on the public, and therefore on the buyer, for the vendor falsely

Devices which have been held fraudulent against buyer.

Puffers at auction. Bexwell *v.* Christie.

(*g*) L. R. 2 Eng. & Ir. App. 325.

(*h*) Early *v.* Garret, 9 B. & C. 928; Duke of Norfolk *v.* Worthy, 1 Camp. 340; Hill *v.* Gray, 1 Stark. 434; Jones *v.* Bowden, 4 Taunt. 847; Barber *v.* Morris, 1 Mood. & R. 62; Tapp *v.* Lee, 3 B. & P. 367; Corbett *v.* Brown, 8 Bing. 33; Hill *v.* Perrott, 3 Taunt. 274; Abbotts *v.* Barry, 2 B. & B. 369.

(*i*) 1 Cowp. 395.

to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor." The foregoing case was highly eulogized, and followed by Lord Kenyon and the king's bench in Howard *v.* Castle; (*k*) and the employment of "puffers," as they are termed, that is, persons engaged to bid in behalf of the vendor, in order to force up the price against the public, has ever since been held fraudulent. (*k*)

Howard *v.* Castle.

§ 471. In the case of Warlow *v.* Harrison, decided in queen's bench, (*l*) and afterwards in the exchequer chamber, (*m*) the law on the subject of the auctioneer's responsibility in

Warlow *v.* Harrison.

(*k*) 6 T. R. 642. See, also, Wheeler *v.* Collier, M. & M. 123; Crowder *v.* Austin, 3 Bing. 368; Rex *v.* Marsh, 3 Y. & J. 331; Thornett *v.* Haines, 15 M. & W. 367; Green *v.* Baverstock, 14 C. B. N. S. 204, and 32 L. J. C. P. 180; [Towle *v.* Leavitt, 23 N. H. 360; 2 Kent, 537–539; 1 Story Eq. Jur. § 293; Veazie *v.* Williams, 3 Story, 611; S. C. 8 How. (U. S.) 134; Moncrieff *v.* Goldsborough, 4 Har. & M'H. 282; Donaldson *v.* McRoy, 1 Browne, 346; Baham *v.* Bach, 13 La. 287; Latham *v.* Morrow, 6 B. Mon. 630; National Fire Ins. Co. *v.* Loomis, 11 Paige, 431; Staines *v.* Shore, 16 Penn. St. 200; Pennock's Appeal, 14 Ib. 446; Trust *v.* Delaplaine, 3 E. D. Smith, 219; McDowell *v.* Simms, 6 Ired. Eq. 278; Gilliat *v.* Gilliat, L. R. 9 Eq. 60; Woods *v.* Hall, 1 Dev. Eq. 411; Wolfe *v.* Luyster, 1 Hall, 146; Darst *v.* Thomas, 87 Ill. 222; Fisher *v.* Hersey, 17 Hun, 370. Exceptions have been made in cases where it did not appear that the purchaser was induced by the puffing to bid more than the value of the property, or more than he had previously determined to bid; see Jennings *v.* Hart, 1 Russell & Chesley (N. S.), 15; Tomlinson *v.* Savage, 6 Ired. Eq. 430; and so, where it appeared that there were real as well as sham bidders, and the last bid before the purchaser's was a real one, and the judgment of the real bidders and the purchaser had not been misled by the sham bidders. Veazie *v.* Williams, 3 Story, 611. The rules against puffing apply as well to sales under an order of court as to ordinary sales; Dimmock *v.* Hallett, L. R. 2 Ch. Ap. 21, 29; but see Shimmin *v.* Bellew, Ir. R. 1 Eq. 289; and to sheriffs' sales; Donaldson *v.* McRoy, 1 Browne, 346; Lee *v.* Lee, 19 Mo. 420. The vendor should be cautious not to make any secret arrangement by which any one wishing to purchase shall have an advantage over another, such as concerting with a purchaser to make his bid by a private signal, not understood by other purchasers. Conover *v.* Walling, 2 McCarter (N. J.), 173. Where a sale is vitiated by the employment of a puffer, it is said to be the duty of the purchaser wishing to avoid the sale to restore the property purchased as soon as the fraud is discovered; Staines *v.* Shore, 16 Penn. St. 200; McDowell *v.* Simms, 6 Ired. Eq. 278; Tomlinson *v.* Savage, Ib. 430; otherwise he confirms the sale; Backentoss *v.* Stahler, 33 Penn. St. 251; Veazie *v.* Williams, 3 Story, 611, 631. It has been made a question whether, if a private warranty, with a view to a sale by auction, be given to an individual by the owner of goods, which are afterward put up at auction without a warranty, and the person to whom the warranty is given buys them, such a warranty could be enforced; or if he should bid for them, and a third person buy, the third person would be bound. Maule J. in Hopkins *v.* Tanqueray, 15 C. B. 130, 136.]

Puffers: not always fraudulent.

Secret arrangement with bidder.

(*l*) 28 L. J. Q. B. 18.

(*m*) 1 E. & E. 295; 29 L. J. Q. B. 14; [1 Sugden V. & P. (8th Am. ed.) 11, 12.]

such cases was examined on the following state of facts: The defendant was an auctioneer, having a horse repository, and he advertised for sale a mare, "the property of a gentleman, *without reserve.*" The plaintiff attended the sale and bid sixty guineas, and another person bid sixty-one guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at sixty-one guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bonâ fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, sixty guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following: "First. The highest bidder to be the buyer, and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser. Third. The purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5*s.* in the pound on account of his purchase, and pay the remainder before such lot is delivered. Eighth. Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of 2*l.* per cent." As the judgment of the exchequer chamber turned much upon the pleadings, it is necessary to state that the plaintiff's declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, "and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract;*" and then charged a breach of the defendant's duty to the plaintiff *as the plaintiff's agent* in failing to complete the contract in behalf of the plaintiff. The defendant pleaded: First, not guilty. Secondly, that the plaintiff was not the highest bidder. Thirdly, that the defendant did not become the plaintiff's agent as alleged. In the plaintiff's argument the following civil law authorities were cited: Cicero de Officiis, lib. 3, s. 15: "Tollendum est igitur ex rebus contrahendis omne mendacium, non licitatorem venditor, nec qui contra se liceatur, emptor apponet;" and Huberus, lib. 18, tit. 2, s. 7, Prælectiones: "Sed hoc facile constabit, si venditor falsum

Auctioneer responsible for fraud on buyer.

emptorem inde ab initio subornet, qui plus aliis offerat, ut veris emptoribus præmium maximæ licitationis, vulgo *Struyckgelt*, quo nil usitatius, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia hoc est contra fidem conventionis perfectæ quâ statutum est ut maximo licitatori præmium daretur." Lord Campbell C. J. delivered the unanimous judgment of the queen's bench, holding: First, that it was not true in point of law that the auctioneer is the agent of the purchaser until the acceptance of his bid as being the highest, which acceptance is shown by knocking down the hammer; and that till then the auctioneer is exclusively the agent of the vendor. (*n*) Secondly, that both parties may retract till the hammer is knocked down; that no contract takes place between them till that is done; (*o*) and that the auctioneer cannot be bound when both the vendor and bidder remain free. The learned chief justice then said, in the name of the court: Thirdly, "We are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down."

§ 472. Although this judgment of the queen's bench was not reversed in the exchequer chamber, because approved on the pleadings as they stood, the third proposition above quoted was not affirmed, and the court of error gave leave to the plaintiff to amend, so as to enforce a liability against the auctioneer. The exchequer chamber, composed of Martin, Bramwell, and Watson BB., and Willes and Byles JJ., were unanimous in holding the auctioneer liable, and in giving leave to amend; but Willes J. and Bramwell B., without dissenting from the opinion of the majority, as delivered by Martin B., preferred putting their judgment on a different ground, on which they felt themselves more clearly justified in their conclusions. Martin B. first declared that the judgment of the queen's bench was right upon the pleadings, but that the court of appeal being now vested with power to amend, and the object of the law being to determine the real question in controversy, the power ought to be "largely exercised" for that purpose; and that upon the facts the plaintiff was entitled to recover. The learned baron then proceeded as follows: "In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who

(*n*) [See *ante*, §§ 268–270.] (*o*) [*Ante*, § 270.]

attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed; he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be '*without reserve.*' This, according to all the cases, both at law and in equity, means that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. (*p*) For this position see the case of Thornett *v.* Haines, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Denton *v.* The Great Northern Railway Company, 5 E. & B. 860; 25 L. J. Q. B. 129. Upon the same principle, it seems to us *that the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve.* We think that the auctioneer who puts property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that *this contract is made with the highest bonâ fide bidder, and in case of a breach of it he has a right of action against the auctioneer.* (*p*[1]) . . . . We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

Auctioneer in sale "without reserve" contracts with the highest *bonâ fide* bidder that he shall become purchaser.

(*p*) [See Towle *v.* Leavitt, 23 N. H. 360, an important and well considered case, in which it was held that the highest bidder at an auction sale is entitled to the property.]

(*p*[1]) [An auctioneer has a right to exercise a discretion as to whether he will *receive* a bid from a certain person, and if he declines to receive the bid, acting with due regard to the circumstances, the party thus affected has no remedy. Holder *v.* Jackson, 11 U. C. C. P. 543. Thus he may decline to receive the bid of a minor. Kinney *v.* Showdy, 1 Hill (N. Y.), 544. And see Den *v.* Zellers, 2 Halst, 153, that the bid of an irresponsible party may be properly declined by the auctioneer.

Auctioneer may refuse to *receive* bid.

§ 473. In reference to the conditions of the sale, the learned baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a reason, that the sale was without reserve; and that the court were inclined to differ with the queen's bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that if the owner acted contrary to the conditions of the sale, he must pay the usual commissions. The court was therefore ready to give judgment for the plaintiff if he chose to amend his declaration. Willes J. and Bramwell B. preferred putting their assent to the judgment on the ground that the facts furnished strong evidence to show that the auctioneer had received no authority from the owner to advertise a sale "without reserve;" and that the plaintiff ought to be allowed to amend by adding a count, alleging an undertaking by the auctioneer that he had such authority, and a breach of that undertaking.

Distinction between law and equity as to puffing at auction.

§ 474. It was said at one time that the rule in equity differs from that at common law on the subject of puffers to this extent: that in equity it is allowable to employ one puffer, but no more, for the purpose only of preventing the property from being sold below a limit fixed by the vendor. Willes J., in Green *v.* Baverstock, (*q*) however, expressed the opinion that the rule in equity was confined to sales under the order of the court, in conformity with "an inveterate practice." But the existence of any such rule in equity appears to have been still a moot point, even in 1865, as is shown in the opinion of Lord Cranworth in Mortimer *v.* Bell. (*r*) By the new

(*q*) 14 C. B. N. S. 204; 32 L. J. C. P. 180.

(*r*) L. R. 1 Ch. Ap. 10. [It seems to be settled by many cases in the American states that the owner may employ a bidder, if he does it *bonâ fide*, to prevent a sacrifice of the property under a given price. See Morehead *v.* Hunt, 1 Dev. Eq. 35; Woods *v.* Hall, Ib. 411; Wolfe *v.* Luyster, 1 Hall, 146; Steele *v.* Ellmaker, 11 Serg. & R. 86; Phippen *v.* Stickney, 3 Met. 387; Veazie *v.* Williams, 3 Story, 622, 623; Moncrieff *v.* Goldsborough, 4 H. & M'Hen. 282; Latham *v.* Morrow, 6 B. Mon. 630; Reynolds *v.* Dechaums, 24 Tex. 174; Lee *v.* Lee, 19 Mo. 420; Pennock's Appeal, 14 Penn. St. 446; Walsh *v.* Barton, 24 Ohio St. 28. On this point Chancellor Kent says: "It would seem to be the conclusion, from the later cases, that the employment of a bidder by the owner would or would not be a fraud, according to the circumstances tending to show innocence of intention or a fraudulent design. If he was employed *bonâ fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a

Cases decide that owner may *bonâ fide* employ a bidder to prevent sacrifice of property.

act, however, 30 & 31 Vict. c. 48, passed at the instance of Lord St. Leonards (but applicable only to sale of land), it is provided in the fourth section, that "whereas there is at present a conflict between her majesty's courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled; and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, that from and after the passing of this act, whenever a sale by

Act. 30 & 31 Vict. c. 48.

number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale." 2 Kent, 538, 539. And Mr. Justice Story, in Veazie *v.* Williams, 3 Story, 623, approves of the above remarks, and suggests that they furnish "the true and just and satisfactory result." This case furnishes many valuable suggestions, both as reported in 3 Story, 611, and in 8 How. (U. S.) 134. See, also, National Fire Ins. Co. *v.* Loomis, 11 Paige, 431; Baham *v.* Bach, 13 La. 287; Troughton *v.* Johnson, 2 Hayw. 28; Jenkins *v.* Hogg, 2 Const. Rep. 821; Tomlinson *v.* Savage, 6 Ired. Eq. 430. Chancellor Kent (2 Kent, 539), notwithstanding the conclusion above stated by him as the result of the cases, declares that "the original doctrine of the king's bench is the most just and salutary doctrine. In sound policy no person ought, in any case, to be employed secretly to bid for the owner, against a *bonâ fide* bidder, at a public auction. It is a fraud in law, on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of sale, and such a doctrine has been recently declared at Westminster Hall. Crowder *v.* Austin, 3 Bing. 368.

Chancellor Kent declares original doctrine of king's bench the true one.

The language of the supreme court of Louisiana is strongly in favor of the doctrine of Lord Mansfield. Baham *v.* Bach, 13 La. 287. Mr. Justice Ware, in his dissenting and very learned opinion in the above case of Veazie *v.* Williams, 3 Story, 632, 637, 638, approves of the original doctrine of the king's bench." In this case of Veazie *v.* Williams it appeared that false bids had been made, but by the auctioneer, who had no authority to make them from the seller. Upon this Mr. Justice Story said: "Be the general doctrine upon this subject as it may, no case has fallen under my notice in which it has been held that the act of the auctioneer in receiving or making false bids, unknown and unauthorized by the seller, would avoid the sale. And, upon principle, it is very difficult to see why it should avoid the sale, since there is no fraud, connivance, or aid given by the seller to the false bids. If the purchaser is misled by the false bids of the auctioneer to suppose them to be real, he may have an action against the auctioneer for the injury sustained thereby." The decision of Judge Story in this case was, however, reversed in the supreme court of the United States, 8 How. 134. The seller having adopted the transaction, and taken the benefit gained by the false bids, was held chargeable with the fraudulent acts of the auctioneer. Taney C. J., McLean and Grier JJ., dissented.]

Effects of false bids made by the auctioneer without authority from seller.

auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." (*s*)

§ 475. The statute further directs that where land is stated to be sold without reserve it shall not be lawful for the seller to bid, or the auctioneer to accept a bid from him or any one employed by him; and where the sale is subject to the right of a seller to bid it shall be lawful for the seller or any *one* person in his behalf to bid. (*s*[1]) The act also forbids the courts of equity from continuing the practice of opening biddings in sales made under their orders; so that in future the highest *bonâ fide* bidder at such sales shall be the purchaser, in the absence of fraud or improper conduct in the management of the sale. In a case (*t*) just before the passing of this act, it was announced that the sale was "without reserve," *and* that the parties interested had liberty to bid. It was held by Lords Justices Turner and Cairns that on these terms a purchaser was bound by his bid for 19,000*l*., the only bids higher than 14,000*l*. having been made by the purchaser and a mortgagee in possession of the estate.

Dimmock *v.* Hallett.

§ 476. In The Queen *v.* Kenrick, (*u*) the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady deceased, were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable; all these statements being false, and the vendor knowing that nothing but a belief in their truth would induce the buyer to make the purchase. In Dobell *v.* Stevens (*x*) the fraud consisted in falsely telling the buyer that the receipts of a public house were 160*l*. per month, and the quantity of porter sold seven butts per month, and that the tap was let for 82*l*. per annum, and two rooms for 27*l*. per annum, whereby the plaintiff was induced to buy; and similar deceits were employed in Lysney *v.* Selby (*y*) and Fuller *v.* Wilson. (*z*)

Telling falsehoods to buyer about ownership of horses and their qualities, and the reasons for selling them.

The Queen *v.* Kenrick.

False statement, exaggerating receipts of a public house.

Dobell *v.* Stevens.

(*s*) Jones *v.* Quinn, 2 L. R. Ir. 516.

(*s*[1]) See Gilliat *v.* Gilliat, L. R. 9 Eq. 60, as to the construction of this clause.

(*t*) Dimmock *v.* Hallett, L. R. 2 Ch. Ap. 21.

(*u*) 5 Q. B. 49.

(*x*) 3 B. & C. 623. [See Brown *v.* Castles, 11 Cush. 348, 350; Boynton *v.* Hazleboom, 14 Allen, 107; Newell *v.* Horn, 45 N. H. 421.]

(*y*) 2 Lord Raymond, 1118.

(*z*) 3 Q. B. 58.

§ 477. In Schneider *v.* Heath (*a*) a vessel was sold, "hull, masts, yards, standing and running rigging, *with all faults*, as they now lie." There was, however, a false statement, that "the hull was nearly as good as when launched," and means were taken to conceal the defects that the vendor knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser; but in Baglehole *v.* Walters (*b*) Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale of a vessel under exactly the same description, "with all faults," where the seller, although knowing the latent defects, used no means for concealing them from the purchaser. In this decision Lord Ellenborough expressly overruled Mellish *v.* Motteux; (*c*) and in Pickering *v.* Dowson (*d*) the common pleas followed Lord Ellenborough's decision, as one "never questioned at the bar;" and concurred in overruling Mellish *v.* Motteux. Baglehole *v.* Walters was also followed by the king's bench in deciding Baywater *v.* Richardson, (*e*) in 1831. (*f*)

Vessel sold with "all faults" — means used to conceal defects.

Schneider *v.* Heath.

Baglehole *v.* Walters.

Pickering *v.* Dowson.

§ 477 *a*. [A. sent pigs to a public market for sale by auction, and they were purchased by B. The pigs were part of a herd which had had the typhoid fever, and there was evidence that A. knew that the pigs sent to market were infected with the disease. At the time of sale the pigs showed no outward symptoms of disease. The sale was subject to this condition: "No warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue." The pigs were in fact infected. It was held, that A. impliedly represented that so far as he knew the pigs were not infected with any dangerous disease, and the fact that the sale was with all faults did not qualify the representation. (Ward *v.* Hobbs, L. R. 2 Q. B. D. 331.) But on appeal the decision was reversed (3 Q. B. D. 150), and it was said that before a man can complain of a fraud he must show something done intentionally to deceive him.]

Ward *v.* Hobbs.

(*a*) 3 Camp. 506. [See Whitney *v.* Boardman, 118 Mass. 247, 248.]

(*b*) 3 Camp. 154.

(*c*) Peake, 156.

(*d*) 4 Taunt. 779.

(*e*) 1 Ad. & E. 508. See, also, Freeman *v.* Baker, 5 B. & Ad. 797.

(*f*) [See Pearce *v.* Blackwell, 12 Ired. 49; Hanson *v.* Edgerly, 29 N. H. 343; 1 Sugden V. & P. (8th Am. ed.) 333 *et seq.*; Taylor *v.* Fleet, 4 Barb. 102; 1 Chitty Contr. (11th Am. ed.) 645, 646.]

Concealing defect, where buyer neglected to inspect.

Horsfall v. Thomas.

§ 478. In Horsfall *v.* Thomas, (*g*) the defence to an action on a bill of exchange was that the buyer had been defrauded in the purchase of a steel gun, for which the bill was given. The gun was made by defendant's order, and he was informed when it was ready, but made no examination of it, and sent the bill of exchange in part payment. There was a defect in the gun, and a metal plug was inserted which would have concealed the defect from any person inspecting the gun. It was received by the defendant, fired several times, answered the purpose as long as it was entire, but afterwards burst in consequence of the defect. Held, that the defendant had not been influenced in his acceptance of the gun by the artifice used, for he had never examined it; that the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of a defect which would make the gun worthless, and failed to inform him of it, was not a fraud. The learned judge, Bramwell B., who delivered the judgment of the court, said, that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true and which it is the duty of the party to make known." In the case before the court there was no affirmance; and there is no duty on the part of the maker to point out a defect where the buyer has an opportunity for inspection and does not choose to avail himself of it. (*h*) This decision is questioned and disapproved by Cockburn C. J. in Smith *v.* Hughes (L. R. 6 Q. B. 597), and it certainly seems that the artifice used to conceal the defect comes within the definition usually given of fraud.

Cogel v. Knisely.

§ 478 *a*. [The appellants bought a second hand engine from the appellee. At the time of the sale the engine was set upon a stone foundation. The day was cloudy, and the engine-room indifferently lighted by a window and door. The engine had been in the great Chicago fire, and had three cracks in its bottom. The appellee knew of the existence of the cracks, and supposed that the appellants were ignorant of the same. At the time of the sale the appellee made the following instrument: "Chicago, January 10, 1874. The Elms engine at

(*g*) 1 H. & C. 90, and 31 L. J. Ex. 322. [See Howell *v.* Biddlecom, 62 Barb. 131.]

(*h*) See Keates *v.* Earl Cadogan, 10 C. B. 591, and 20 L. J. C. P. 76; also, Hill *v.* Gray, 1 Stark. 434; [Howell *v.* Biddlecom, 62 Barb. 131; § 430, note (*k*), *ante*.]

Austin is all complete as shown ; it is made in a workmanlike manner, and will perform well, with proper care and attention on the part of the users of the same, if erected in a workmanlike manner on good foundations." It was held that the appellee was guilty of no fraud in failing to make known the existence of the cracks. Walker J. said: "It is only concealed defects, known to the seller, that the seller is bound to disclose to the buyer. If the seller has no knowledge of defects that are latent, he can not be held to have committed a fraud because he did not make them known to the buyer. Here, there is nothing to show that the engine was injured by the fire, or that it would not last as long or perform as much labor as if it had never been subjected to the fire. . . . If the engine was not, in fact, injured by the heat, then there was no latent defect to disclose. Appellee supposed there were none. . . . Nor does the fact that the appellants would not have purchased had they known of the cracks prove fraud. The appellee was not bound to know their choice in such matters." (h^1)]

Nature of defects which vendor is bound to disclose.

§ 479. The case of Hill *v.* Gray, (i) decided by Lord Ellenborough at nisi prius in 1816, would seem to conflict with the general rule in relation to concealment. The facts were that the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was; the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant labored under this delusion, but did not remove it." The price was 1,000*l.*, the picture being said to be a Claude, and proof was offered that it was genuine, and that after the defendant knew that it was not one of Sir Felix Agar's pictures he had objected to paying on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and *not to have let in a suspicion on*

Hill *v.* Gray.

Sale of a picture.

(h^1) [Cogel *v.* Kniseley, 89 Ill. 598; (i) 1 Stark. 434.
Morris *v.* Thompson, 85 Ib. 16.]

the part of the purchaser *which he knew enhanced the price.* He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. . . . . This case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point *which he thought material to influence his judgment.*" This judgment, on a first perusal, seems certainly not reconcilable with the received principles on the subject, but in Keates *v.* Earl Cadogan (*k*) the case was explained by the common pleas by construing the language of Lord Ellenborough in the italicized passages as intimating that there "had been a positive aggressive deceit." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived and did not remove.

Jones *v.* Bowden.

Where usage required damage to be declared.

§ 480. In the earlier case of Jones *v.* Bowden (*l*) an action upon the case for deceit in a sale was maintained under the following circumstances: The defendant bought pimento at an auction sale, as sea damaged. *It is usual in such sales of this article to declare it to be sea damaged*, and when nothing is said, it is supposed to be sound. Defendant then repacked it, and it was included in a catalogue of the auction sale, as "187 bags pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36 Camomile Street." Defendant drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition nor comment on what was stated in the catalogue, and the plaintiff became the purchaser at thirteen pence per pound, which was *not more than a reasonable price, after taking into consideration the fact that it had been sea damaged and repacked.* The jury said "that the state of the goods *ought* to have been communicated by the defendant to the plaintiff," and found a verdict for him, subject to the point whether the action was maintainable. A rule to set aside the verdict was discharged.

(*k*) 10 C. B. 591; 20 L. J. C. P. 76. (*l*) 4 Taunt. 847.

The grounds are not very intelligibly given, but it may be fairly inferred from the language of Mansfield C. J. that he considered the verdict of the jury as establishing a usage which imposed on the vendor the duty of disclosing the defect, thus bringing the case within the general principle stated by Bramwell J. in Horsfall *v.* Thomas. (*m*)

§ 481. In Smith *v.* Hughes (*n*) the action was by the plaintiff, a farmer, to recover the price of certain oats sold to the defendant, an owner and trainer of race-horses. The plaintiff's account of the transaction was that he took a sample of the oats to the defendant and asked if he wished to buy oats, to which the latter answered, "I am always a buyer of good oats." The plaintiff asked thirty-five shillings a quarter, and *left the sample* with the defendant, who was to give an answer next day. The defendant wrote to say he would take the oats at thirty-four shillings a quarter, and they were sent to him by the plaintiff. But the defendant's account was that, to the plaintiff's question he answered, "I am always a buyer of good *old* oats;" and that the plaintiff then said, "I have some good *old* oats for sale." There was no difference of testimony as to the other facts; and it was further sworn by the defendant that as soon as he discovered that the oats were new, he sent them back; that trainers use old oats for their horses, and never buy new when they can get old. There was also evidence to the effect that thirty-four shillings a quarter was a very high price for new oats, more than a prudent business man would have given, and that old oats were then very scarce. The judge told the jury that the question was whether the word "old" had been used in the bargain as stated by the defendant, and if so the verdict must be for him; but if they thought the word "old" had not been used, then the second question would be "whether the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats." If so, the verdict would also be for the defendant. The jury found for the defendant. The question for the queen's bench was, whether the second direction to the jury was right, for they had not answered the questions separately, and it was not possible to say on which of the two grounds they had based their verdict. In testing the second question, it was plainly necessary to assume

Smith *v.* Hughes.

(*m*) [1 H. & C. 90; 31 L. J. Ex. 322. (*n*) L. R. 6 Q. B. 597.
See, also, Parkinson *v.* Lee, 2 East, 314.]

that the word "old" had not been used, and on that assumption the court ordered a new trial. Cockburn C. J. said, that assuming the vendor to know that the buyer believed the oats to be old oats, but that he had done nothing directly or indirectly to bring about that belief, but simply offered his oats and exhibited his sample, the passive acquiescence of the vendor in the *self-deception* of the buyer did not entitle the latter to rescind the sale. Blackburn J. concurred, saying that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." The learned judge further doubted whether the jury had been made to understand the difference between agreeing to take the oats under the belief that they were old (for in that case there would be no defence), and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old, for in this case the parties would not be *ad idem* as to their bargain, and there would therefore be no contract. (*o*) Hannen J. also thought that the second question was probably misunderstood by the jury, and concurred with Blackburn J. in the distinction above pointed out. He said that to justify a verdict for the defendant it was not enough for the jury to find that "the plaintiff believed the defendant to believe that he was buying old oats," but that what was necessary was, to find that "the plaintiff believed that the defendant believed that the plaintiff was *contracting* to sell old oats." In the following very exceptional case, where the fraud of the vendor was committed, not on the buyer but by collusion with the buyer against another person, the vendor was not permitted to recover against the buyer.

Fraud by collusion between vendor and buyer against third person; vendor prevented from recovering against buyer.

§ 482. In Jackson *v.* Duchaire (*o*[1]) the facts were that the plaintiff sold the goods in a house to the defendant for 100*l.*, but she could not raise the money; she applied to one Walsh to aid her in the purchase, and he at her request agreed to buy them from the plaintiff for 70*l.*, which he did, taking a bill of sale to himself. By agreement between the plaintiff and the defendant she was to pay the deficiency of 30*l.* to him, in two notes of 15*l.* each, and this was concealed from Walsh. On action brought by plaintiff on one of the two notes, Lord Kenyon at nisi prius, and the court in banc afterwards, held the

Jackson *v.* Duchaire.

(*o*) [Riley *v.* Spotswood, 23 U. C. C. P. 318.] (*o*[1]) 3 T. R. 551.

transaction to be fraud on Walsh, and that plaintiff could not recover. The principle was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency are held fraudulent and void. (*p*) In the supreme court of the state of Vermont it was held to be fraudulent in a vendor to sell a horse having an internal malady of a secret and fatal character, not apparent by any external indications, but known to the seller, and known by him to be unknown to the buyer, if the malady was such as to render the horse of *no value*. (*q*)

Case decided in the supreme court of Vermont of fraud on buyer.

SECTION IV. — FRAUD ON CREDITORS; BILLS OF SALE.

§ 483. Sales made by debtors in fraud of creditors are usually considered as being governed by the statute 13 Eliz. c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in Cadogan *v.* Kennett (*r*) Lord Mansfield said that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proprosed by the statutes 13 Eliz. c. 5 and 27 Eliz. c. 4. The former of these statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud." The 13 Eliz. c. 5 was intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, *alienations*, &c. &c. as well of lands and tenements as of *goods and chattels* . . . . devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to *delay*, *hinder*, *or defraud creditors* (r^1) . . . . to the over-

Statute of Elizabeth.

(*p*) Dauglish *v.* Tennent, L. R. 2 Q. B. 49.

(*q*) Paddock *v.* Strohridge, 29 Vt. 470. [A mere unintentional concealment or omission, on the part of the vendor, to disclose material facts which are known to himself but not to the purchaser, and to the knowledge of which he has not equal means of access, is not sufficient to sustain an action for deceit against the vendor for the damage suffered by the purchaser. Such concealment must be accompanied with an intention to deceive, in order to be the proper foundation for an action for deceit. Hanson *v.* Edgerly, 29 N. H. 343; Stevens *v.* Fuller, 8 Ib. 463; Howard *v.* Gould, 28 Vt. 523; Harris *v.* Tyson, 24 Penn. St. 347; Kintzing *v.* McElrath, 5 Ib. 467; Laidlaw *v.* Organ, 2 Wheat. 178; 2 Kent, 484, 490. See the remarks of Potter J. in Fisher *v.* Budlong, 10 R. I. 527, 528.]

Unintentional concealment not fraudulent.

(*r*) Cowp. 432.

(r^1) [Westmoreland *v.* Powell, 59 Ga. 256.]

throw of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued." The statute, therefore, provides that all alienations, bargains, and conveyances of lands and tenements, or goods and chattels, made for any such intent and purpose as is above expressed, shall be "deemed and taken (only against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate, and of none effect." This statute was confirmed by 14 Eliz. c. 11, s. 1, and made perpetual by 29 Eliz. c. 5, s. 2. And it *seems* that it protects, against fraudulent sales, subsequent creditors, as well as those having claims at the date of the fraudulent conveyance. (*s*)

Semble, protects future creditors.

§ 484. In Twyne's case, (*t*) the celebrated leading case on this subject, the debtor had made a secret conveyance to Twyne by general deed of all his goods and chattels, worth 300*l*., in satisfaction of a debt of 400*l*., pending an action brought by another creditor for a debt of 200*l*. The debtor continued in possession of the goods, and sold some of them; and sheared the sheep and marked them with his own mark. The second creditor took the goods in execution, but Twyne resisted the sheriff, and Coke, the queen's attorney general, thereupon filed an information against him in the star chamber. The learned author says in his report that "In this case divers points were resolved: 1. That this gift had the signs and marks of fraud, because the gift is general without exception of his apparel, or of anything of necessity, for it is commonly said *quod dolosus versatur in generalibus*. 2. The donor continued in possession, and used them as his own; and by reason thereof he traded and

Twyne's case.

(*s*) Graham *v.* Furber, 14 C. B. 410, and 23 L. J. C. B. 51; [McLane *v.* Johnson, 43 Vt. 48; Carter *v.* Grimshaw, 49 N. H. 100. The English doctrine upon this subject will be found clearly stated by Lord Westbury, in Spirett *v.* Willows, 3 De G., J. & S. 293. The notes to this case of Spirett *v.* Willows, in the American edition, contain a full citation of the most important later American authorities. The subject will be found treated at considerable length in 2 Sugden V. & P. (8th Am. ed.) 714, note (*t*). Bonacina *v.* Seed, 3 Low. Can. 446.]

(*t*) 3 Coke, 80; 1 Smith's L. C. 1.

trafficked with others, and defrauded and deceived them. 3. It was made in secret, *et dona clandestina sunt semper suspiciosa.* 4. It was made pending the writ. 5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud. (*u*) 6. The deed contains that the gift was made honestly, truly, and *bonâ fide; et clausulæ inconsuetæ semper inducunt suspicionem.* Secondly, it was resolved that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, ... yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* . . . . which is accompanied with any trust." Lord Coke therefore advises: "Reader, when any gift shall be made to you in satisfaction of debt, by one who is indebted to others also; 1. Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gifts, take the possession of them, for continuance of possession in the donor is the sign of trust. . . . . And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, *that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud:*

> 'Quæritur, ut crescunt tot magna volumina legis
> In promptu causa est, crescit in orbe dolus.'"

§ 485. In the application of the statute, a question of fact for the jury is constantly presented; namely, whether the transfer of the goods was *bonâ fide*, or fraudulent, that is, "with the end, purpose, and intent to delay, hinder, or defraud creditors," as the act expresses it. (u^1) It

Conveyance fraudulent or not, question of fact for jury.

(*u*) [Young *v.* Heermans, 66 N. Y. 374; Edwards *v.* Stinson, 59 Ga. 443; Jones *v.* King, 86 Ill. 225; Franklin *v.* Claflin, 49 Md. 24.]

(u^1) [Wight *v.* Moody, 6 U. C. C. P. 502; Fowler *v.* Hendry, 7 Ib. 350; Cook *v.* Hendry, Ib. 354; Harris *v.* Burnes, 50 Cal. 140; O'Brien *v.* Chamberlain, Ib. 285; Nichol *v.* Crittenden, 55 Ga. 497; Mattingley *v.* Wulke, 2 Bradwell (Ill.), 169; Sibley *v.* Tie, 88 Ill. 287; Bradley *v.* Coolbaugh, 91 Ib. 148; Nimmo *v.* Kuykendall, 85 Ib. 476; Bushnell *v.* Wood, Ib. 88; Hollacher *v.* O'Brien, 5 Hun, 277; Brooks *v.* Weaver, 3 Alb. L. J. 283; McDonalds *v.* Titus, 6 Ib. 127; Stacy *v.* Deshaw, 7 Hun, 449; Johnson *v.* Carley, 53 How. Pr. 326; Powell *v.* Powell, 71 N. Y. 71; Holden *v.* Burnham, 63 Ib. 74; Ferris *v.* Irons, 83 Penn. St. 179. The burden of proving the fraud in such case is upon the party alleging it. Elliott *v.*

was, indeed, held in some early cases, of which the leading one is Edwards *v.* Harben (*x*) that under certain circumstances this was a question of law for the court. The decision was given in that case by Buller J., who said: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; *that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent.*" (*y*) As this case does not appear ever to have been overruled, (*z*) though frequently mentioned unfavorably, it may be assumed that the law would be held to be the same at the present time; but it is to be observed that, in the guarded form in which the principle is announced, a case could scarcely arise in which it would be applicable, for it is difficult to suppose that an action would be tried where *nothing* would be shown beyond a bare conveyance without possession; where something of the relations of the parties, and the circumstances of their dealings, would not appear. Apart from this very exceptional case, the authorities are all in accordance in treating the question of *fraus vel non* as one of fact for the jury, even where the vendor remains in possession.

Edwards *v.* Harben.

§ 486. In Latimer *v.* Batson (*a*) an execution had been levied on the household furniture, wine, &c. of the Duke of Marlborough, at Blenheim, and an officer remained in possession some time, and then executed a bill of sale to the execution creditor, but the duke prevailed on the latter to leave him in possession. The execution creditor afterwards sold the goods to the plaintiff Latimer for 700*l.*, and the plaintiff put a man-servant into the house. The duke also remained there, and used the goods as if no execution had been put in; but the execution was known in the neighborhood. The goods were then seized by a second creditor, and carried away. On these facts, Jervis contended that

Latimer *v.* Batson.

Stoddard, 98 Mass. 145; Tompkins *v.* Nichols, 53 Ala. 197; Hamilton's Adm. *v.* Blackwell, 60 Ib. 545; Ebb *v.* Cole, 31 Ark. 554; Jewett *v.* Cook, 81 Ill. 260; Morgan *v.* Olvey, 53 Ind. 6.]

(*x*) 2 T. R. 587.

(*y*) See, also, Paget *v.* Perchard, 1 Esp. 205; Martin *v.* Podger, 2 W. Bl. 702; [Bellows C. J. in Putnam *v.* Osgood, 52 N. H. 154; Coolidge *v.* Melvin, 42 Ib. 510; Ingalls *v.* Herrick, 108 Mass. 351, 354; Rothchild *v.* Rowe, 44 Vt. 389; Garman *v.* Cooper, 72 Penn. St. 32; Young *v.* McClure, 2 Watts & S. 147.]

(*z*) It was said to be good law by Lawrence J. in Steel *v.* Brown, 1 Taunt. 382.

(*a*) 4 B. & C. 652.

the judge ought to have directed the jury that if they thought the duke remained in possession the sale was void, citing Wordall *v.* Smith, (*b*) where Lord Ellenborough said that "to defeat an execution by a bill of sale there must appear to have been a *bonâ fide*, substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable. (*b*[1]) There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors." But the court refused a new trial, affirming the propriety of the judge's charge, he having told the jury that if they thought the sale to the plaintiff was *bonâ fide*, and the purchase-money really paid by him, he was entitled to a verdict; but if the purchase-money was really paid by the duke, and the sale to the plaintiff colorable, they should find for defendant. Bayley J. also held, in conformity with Leonard *v.* Baker, (*c*) Watkins *v.* Birch, (*d*) and Jezeph *v.* Ingram, (*e*) that "*if goods seized under an execution are bonâ fide sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighborhood.*" In Martindale *v.* Booth (*f*) all the judges were of opinion that the continuance of possession in the vendor is not of itself sufficient to render void a sale of goods as fraudulent, especially where the possession is consistent with the deed which provides only for the future entry into possession by the purchaser, conditioned on the vendor's default; and in addition to the numerous cases there cited, those in the note (*g*) sufficiently establish the proposition that the *continued possession by the vendor of goods sold is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se.* (*h*)

Martindale *v.* Booth.

(*b*) 1 Camp. 332.

(*b*[1]) [Ranney *v.* Moody, 6 U. C. C. P. 471.]

(*c*) 1 M. & S. 251.

(*d*) 4 Taunt. 823.

(*e*) 8 Taunt. 838.

(*f*) 3 B. & Ad. 498.

(*g*) Lady Arundel *v.* Phipps, 10 Ves. Jr. 145; per Buller J. in Hazelinton *v.* Gill, 3 T. R. 620, note (*a*); Lindon *v.* Sharp, 6 M. & G. 895–898; Pennell *v.* Dawson, 18 C. B. 355.

(*h*) [Such is the law generally in the American states. See 1 Chitty Cõntr. (11th Am. ed.) 571, and note (*y*[1]), where many of the cases are cited; 2 Kent, 515 *et seq.*; Ingalls *v.* Herrick, 108 Mass. 351; *post*, § 502, and cases cited in notes; Putnam *v.* Osgood, 52 N. H. 146, 154; Coburn *v.* Pickering, 3 Ib. 415–425; Coolidge *v.* Melvin, 42 Ib. 510; Page *v.* Carpenter, 10 Ib. 77; Shaw *v.* Thompson, 43 Ib. 130; Morse *v.* Powers, 17 Ib. 296; Scrvos *v.* Tobin, 2 U. C. Q. B. 530;

§ 487. That the notoriety of the sale is a strong circumstance to rebut the presumption of fraud, even where the vendor retains possession, is shown by the cases quoted in the above opinion, delivered by Bayley J. in Latimer *v.* Batson, to which may be added Kidd *v.* Rawlinson (*i*) and Cole *v.* Davies. (*k*) In Hale *v.* Metropolitan Omnibus Company, (*l*) Vice Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a valuable consideration." (*l*[1])

Notoriety of the sale rebuts presumption of fraud.

No general rule.

Every case decided on its own circumstances.

§ 488. It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bonâ fide* for a valuable consideration. (*m*) Nor is it a fraud to mortgage personal property for

Mere intent to defeat execution.

Meade *v.* Smith, 16 Conn. 346; Mead *v.* Noyes, 44 Ib. 487; Primrose *v.* Browning, 59 Ga. 69; Collins *v.* Taggart, 57 Ib. 355. See § 502 *post.* Such is the Irish rule. Macdona *v.* Swiney, 8 Ir. C. L. 73. In Tilson *v.* Terwilliger, 56 N. Y. 273, it was held, that although a sale of personal property is accompanied by immediate delivery and followed by actual change of possession, yet, if thereafter, at however long an interval, it comes again into the possession of the vendor by the act, or with the knowledge and assent of the vendee, with no intermediate change of title, the presumption of fraud arises, and it devolves upon the vendee to show that the transaction was in good faith and without intent to defraud. *Post,* § 502, note (*m*).]

(*i*) 2 Bos. & P. 59.

(*k*) 1 Ld. Raym. 724.

(*l*) 28 L. J. Ch. 777.

(*l*[1]) [Jones *v.* Nevers, 2 Pugsley & Burbridge (N. B.) 627; Solomon *v.* Moral, 53 How. Pr. 342. It was decided in Cutting *v.* Jackson, 56 N. H. 253, that where the possession of chattels is retained by the seller after an absolute sale, it is not a sufficient explanation to show that the sale was made in the presence of a witness, where it was not attended with such publicity as would naturally give notoriety to the transaction, and when there was no change in the possession or use of the chattels to indicate that any change in the ownership had taken place. In Lang *v.* Stockwell, 55 N. H. 561, it appeared that upon the sale of a chattel it was agreed as part of the bargain that the seller should still have the right to use the thing sold in and about his business; and it was held that such reservation, being inconsistent with an absolute sale, constituted a secret trust, from which fraud as to the creditors of the seller was an inference of law; and that the actual intention of the parties would not be inquired into.]

(*m*) Wood *v.* Dixie, 7 Q. B. 892; Riches *v.* Evans, 9 C. & P. 640; Hale *v.* Metropolitan Omnibus Company, 28 L. J. Ch. 777; [Hauselt *v.* Vilmar, 2 Abb. N. C. 222; Ford *v.* Johnston, 7 Hun, 563; Stacey *v.* Deshaw, Ib. 449; Archer *v.* O'Brien, Ib. 591; Bostwick *v.* Burnett, 74 N. Y. 317; Dudley *v.* Danforth, 61 Ib. 626; Kinnear *v.* White, 2 Kerr (N. B.), 235; Hayward *v.* White, Ib. 304; Doak *v.* Johnson, Ib. 319; Connell *v.* Miller, 1 Ib. 302; Clark *v.* Morrell, 21 U. C. Q. B. 596; Farish *v.* McKay, 5 Ib. 461; Hooker

money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor; (*n*) nor to confess a judgment in favor of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained. (*o*)

Confession of judgment, with intent to give preference.

§ 489. The statute of 17 & 18 Vict. c. 36, called the "Bills of Sale Act, 1854" (as amended by 29 & 30 Vict. c. 96), [amended and consolidated by 41 & 42 Vict. c. 31 (*o*[1])], has rendered obsolete a part of the law under the statute of 13 Eliz. c. 5, so far as relates to the transfer of chattels. (*o*[2]) The first of these acts is entitled "An Act for Preventing Frauds upon Creditors, by Secret Bills of Sale of Personal Chattels;" and it provides that "every bill of sale of personal chattels (*o*[3]) made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such a bill of sale or at any future time, to seize and take possession of any property and effects comprised in or made subject to such bill of sale; and every schedule or inventory which shall be therein annexed or therein referred to, or a true copy thereof, and of every attestation of the due execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in execution of any process, then a

Bills of sale act 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

v. Jarvis, 6 U. C. Q. B. (O. S.) 439; Armstrong *v.* Moodie, Ib. 538; Ingraham *v.* Wheeler, 6 Conn. 277; Nimmo *v.* Kuykendall, 85 Ill. 476; Francis *v.* Rankin, 84 Ib. 169; Morris *v.* Tilson, 81 Ib. 607; Storey *v.* Agnew, 2 Bradwell (Ill.), 353; Matthews *v.* Jordan, 88 Ill. 602; Gray *v.* McCallister, 50 Iowa, 497; Alton *v.* Harrison, L. R. 4 Ch. App. 622; Spencer *v.* Slater, L. R. 4 Q. B. D. 13; Boldero *v.* London Loan & Discount Co. 5 Ex. Div. 47.]

(*n*) Darvill *v.* Terry, 6 H. & N. 807, and 30 L. J. Ex. 355.

(*o*) Holbird *v.* Anderson, 5 T. R. 235; [Evans *v.* Hamilton, 56 Ind. 34; Beards *v.* Wheeler, 11 Hun, 539; Frazer *v.* Thatcher, 49 Texas, 26.]

(*o*[1]) [Davis *v.* Goodman, 5 C. P. D. 20, 128; Hill *v.* Kirkwood, 28 Weekly Rep. 358; In re Haynes, Ib. 399; Hamlyn *v.* Betteley, 5 C. P. D. 327.]

(*o*[2]) [See "An Act for the Registration of Bills of Sale in Ireland," 17 & 18 Vict. c. 55.]

(*o*[3]) [Brantom *v.* Griffits, 1 C. P. D. 349; Brantom *v.* Griffits, 2 Ib. 212; Ex parte Cooper, 10 Ch. Div. 313, commented on in Woodgate *v.* Godfrey, 5 Ex. Div. 24; Sheridan *v.* McCartney, 11 Ir. C. L. 506.]

description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the dockets and judgments in the court of queen's bench within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by the trader is now by law required to be filed)." The section then goes on to declare that in default of such registry the bill of sale shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right of possession of the goods sold which remained in the apparent possession (*p*) of the vendor, against: 1st, his assignees in bankruptcy or insolvency; (*q*) 2d, his assignees in any assignment for the benefit of creditors; 3d, sheriff's officers and others seizing under execution; and 4th, all persons in whose behalf process of execution has issued. The act makes further provisions for the registry of such bills of sale, and for the delivery of copies and extracts. The bills of sale act, 1866 (29 & 30 Vict. c. 96), requires a renewal of the registration every five years, in default of which the registration ceases to be of any effect. (*q*[1])

Contract not voidable between the parties.

§ 490. Neither the statute of Elizabeth nor the bills of sale act renders the contract void *between the parties*, (*r*) and the latter act carefully enumerates those third persons who shall remain unaffected by the contract, where the forms and requisites rendered necessary by the act have

(*p*) As to apparent possession, see Robinson *v.* Briggs, L. R. 6 Ex. 1; Ex parte Lewis, re Henderson, L. R. 6 Ch. 626; [Ex parte Cooper, L. R. 10 Ch. Div. 313; Sheridan *v.* McCartney, 11 Ir. C. L. 506; Ancona *v.* Rogers, 1 Ex. D. 285.]

(*q*) The liquidator of a company is not comprehended in these provisions as being an assignee in bankruptcy or insolvency. Re Marine Mansions Co. L. R. 4 Eq. 601.

(*q*[1]) [The following are some of the cases under the Canadian act on this subject of registration of bills of sale: Taylor *v.* Commercial Bank, 4 U. C. C. P. 447; Wakefield *v.* Lynn, 5 Ib. 410; Porter *v.* Flintoff, 6 Ib. 335; Kissock *v.* Jarvis, Ib. 393; Boynton *v.* Boyd, 12 Ib. 334; Feehan *v.* Bank of Toronto, 10 Ib. 32; Turner *v.* Mills, 11 Ib. 366; Perrin *v.* Davis, 9 Ib. 147; Grand Trunk Ry. Co. *v.* Lees, Ib. 249; Patton *v.* Foy, Ib. 512; Burnham *v.* Waddell, 28 Ib. 263; Kissock *v.* Jarvis, 9 Ib. 156; Shaw *v.* Gault, 10 Ib. 236; Bank of Toronto *v.* Eccles, Ib. 282; Fraser *v.* Gladstone, 11 Ib. 125; Ross *v.* Elliott, Ib. 221; Haight *v.* McInnis, Ib. 518; Heward *v.* Mitchell, 11 U. C. Q. B. 625; Howell *v.* McFarlane, 16 Ib. 469.]

(*r*) [A conveyance to defeat creditors is good as between the parties and their representatives. 2 Sugden V. & P. (8th Am. ed.) 713, and note (*l*) and cases cited; Reichart *v.* Castator, 5 Binney, 109; Dyer *v.* Homer, 22 Pick. 253; Nichols *v.* Patten, 18 Maine, 231; Thompson *v.* Moore, 36 Ib. 47; Randall *v.* Phillips, 3 Mason, 378, 388; Dearman *v.* Radcliffe, 5 Ala. 192; Den *v.* Monjoy, 2 Halst. 173; Gil-

not been complied with. Without these provisions, however, it would not be competent to either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors, (*s*) for the general principle of law, that no man shall set up his own fraud as the basis of a right or claim for his own benefit, would clearly apply. (*t*) But even as to creditors such conveyances are not *void*, but *voidable*, and the creditors must, as in all analogous cases, elect whether they will treat their debtor's conveyance as valid or defeasible. If the transferee makes a conveyance to a *bonâ fide* third person for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such *bonâ fide* third person will not be disturbed. (*u*) Under the statute of Elizabeth

Voidable, not void as to creditors.

Title of *bonâ fide* third person acquired from transferee good against creditors.

lespie *v.* Gillespie, 2 Bibb, 89, 91; Sherk *v.* Endress, 3 Watts & S. 255; Worth *v.* Northam, 4 Ired. (Law) 102; Harvey *v.* Varney, 98 Mass. 118; Byrd *v.* Curlin, 1 Humph. 466; Lassiter *v.* Cole, 8 Ib. 621; Chapin *v.* Pease, 10 Conn. 69; Neely *v.* Wood, 10 Yerger, 486; Douglas *v.* Dunlap, 10 Ohio, 162; Horner *v.* Zimmerman, 45 Ill. 14; Stevens *v.* Harrow, 26 Iowa, 458; Hill *v.* Pine River Bank, 45 N. H. 300; Jones *v.* Bryant, 13 Ib. 57; Stanton *v.* Green, 34 Miss. 576; Lockerson *v.* Stillwell, 2 Beasley (N. J.), 347; Moore *v.* Meek, 20 Ind. 484; Robinson *v.* Stewart, 10 N. Y. 189; 1 Chitty Contr. (11th Am. ed.) 575; Hall *v.* Gaylor, 37 Conn. 550, 554; Scoble *v.* Henson, 12 U. C. C. P. 65; Anonymous, 10 L. Can. 340; Garner *v.* Graves, 54 Ind. 188; Deutsch *v.* Reilly, 57 How. Pr. 75; Ybarra *v.* Lorenzara, 53 Cal. 197; Beebe *v.* Saulter, 87 Ill. 518; Gary *v.* Jacobson, 55 Miss. 204. In Knowles *v.* Adams, 5 Allen (N. B.), 445, the plaintiff brought trespass for the taking of hay and oats, and claimed the goods as having been transferred by the defendant to him, before the time of the trespass, in payment of arrears of wages. He introduced in evidence a receipt signed by the defendant, purporting to be an acknowledgment of the receipt of 40*l.* in payment for the hay and oats. The defendant wished to show that the receipt was made out merely to protect the goods from an execution against the defendant during his temporary absence from home, and that this was the understanding of both plaintiff and defendant. The court held that the defendant might show such fact, basing its decision largely on Bowes *v.* Foster, 2 H. & N. 779, in which case it was held that where goods had been transferred to the defendant to avoid anticipated execution, and the defendant had sold them, the plaintiff might maintain trover for the same, as no property had passed to the defendant by the contract. See Mr. Hare's note to Bowes *v.* Foster. Heineman *v.* Newman, 55 Ga. 262; Bradley *v.* Hale, 8 Allen, 59; Cox *v.* Jackson, 6 Ib. 108; Hyam's case, 1 De G., F. & J. 75; § 39 note (*f*), *ante*.]

Knowles *v.* Adams.

(*s*) Bessey *v.* Windham, 6 Q. B. 166; Doe dem. Roberts *v.* Roberts, 2 B. & A. 367.

(*t*) Philpotts *v.* Philpotts, 10 C. B. 85; 20 L. J. C. P. 11; [White *v.* Hunter, 23 N. H. 128; Ayers *v.* Hewett, 19 Maine, 281; Taylor *v.* Weld, 5 Mass. 116. See Woods *v.* Kirk, 28 N. H. 324.]

(*u*) Moorewood *v.* South Yorkshire Railway Company, 3 H. & N. 799; 28 L. J. Ex. 114; [Neal *v.* Williams, 18 Maine, 391; Hoffman *v.* Noble, 6 Met. 68; Bradley *v.* Obear, 10 N. H. 477; Ash *v.* Put-

Sheriff liable as trespasser unless he show both judgment and writ.

White *v.* Morris.

Bessey *v.* Windham.

it was held in various cases that as the transfer was good, not only between the parties, but as against strangers not creditors, the sheriff would be held liable as a trespasser if he seized the goods on execution against the vendor, unless he put in evidence the writ to show that he was acting for a creditor; (*x*) and in White *v.* Morris (*y*) it was held, overruling Bessey *v.* Windham, (*x*) that it was necessary for the sheriff to produce in evidence the judgment as well as the writ, in order to defend himself in such cases. (*z*)

Second section, as to declarations of trust, applies to vendor and vendee, not to vendee and stranger.

Robinson *v.* Collingwood.

Discharge in bankruptcy avoids bill of sale.

§ 491. The second section of the bills of sale act provides that every defeasance, or condition, or declaration of trust, when not contained in the body of the bill of sale, must be written on the same paper, in default whereof the bill of sale will be void, as provided in the first section. In Robinson *v.* Collingwood (*a*) it was held that this section applied only to declarations of trust between the vendor and the vendee, not to one between the vendee and a stranger to the vendor. A bill of sale, being a security for a debt, becomes void when the debtor has been released by a discharge in bankruptcy. (*b*)

Object of the statute.

§ 492. The decisions upon this statute have established that the object of the forms and requisites prescribed in it was to afford to creditors and parties interested a true idea of the position in life of the vendor, and to give such a description of the residence and occupation of the vendor and witnesses as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the *bona*

Description of vendor and witnesses.

nam, 1 Hill, 302, 306, 307; George *v.* Kimball, 24 Pick. 241; Rowley *v.* Bigelow, 12 Ib. 312, 313; Grout *v.* Hill, 4 Gray, 361, 368, 369; Trull *v.* Bigelow, 16 Mass. 406; Union Bank *v.* Warner, 12 Hun, 306; Carroll *v.* Hayward, 124 Mass. 120; Sleeper *v.* Chapman, 121 Ib. 404; Gould *v.* Steinburg, 84 Ill. 170; Johnston *v.* Field, 62 Ind. 377; Pinnell *v.* Steinger, 59 Ib. 555; Moss *v.* Dearing, 45 Iowa, 530; Jones *v.* Hetherington, Ib. 681; Farmers' National Bank *v.* Teeters, 31 O. St. 36.]

(*x*) Doe dem. Roberts *v.* Roberts, 2 B. & A. 367; Bessey *v.* Windham, 6 Q. B. 166; Glave *v.* Wentworth, 6 Q. B. 173, note; [Cook *v.* Jarvis, 4 U. C. Q. B. (O. S.) 250.]

(*y*) 11 C. B. 1015, and 21 L. J. C. P. 185.

(*z*) [In Massachusetts, the writ, in such a case, must have been returned and entered in court in order to justify an attachment by the sheriff. Russ *v.* Butterfield, 6 Cush. 242.]

(*a*) 34 L. J. C. P. 18.

(*b*) Thompson *v.* Cohen, L. R. 7 Q. B. 527; Cole *v.* Kernot, L. R. 7 Q. B. 534.

fides of the transaction. (*c*) Any misdescription or non-description in these particulars will, therefore, vitiate the bill of sale. (*c*[1]) Among the very numerous cases which have been decided on this point, the following are selected as fair examples: It has been held insufficient to describe as "gentleman" only, a clerk in the audit office, (*d*) or an attorney's clerk, (*e*) or silk-buyer, (*f*) but such a description was held sufficient where the party had no occupation. (*g*) And it will not be sufficient for the affidavit to refer to the bill of sale for the necessary description of the vendor's residence and occupation, but they must be repeated in the affidavit, (*h*) so that where the affidavit described the deponent as "the said J. B. of No. 9 George Street, in the said bill of sale mentioned," it was held insufficient, because not stating his occupation of hotel-keeper. (*i*)

Description of occupation.

Must be repeated in affidavit.

§ 493. The residence of the witness has been held sufficiently indicated by giving his place of business, without describing the place where he sleeps. (*k*) A residence described as "New Street, Blackfriars, in the County of Middlesex," without adding the "City of London," was held sufficient: (*l*) and in Briggs *v.* Boss (*m*) the attesting witness stated: "I reside at Hanley, in the County of Stafford, and am

Description of residence.

Briggs *v.* Boss.

(*c*) Per Blackburn J. in Briggs *v.* Boss, L. R. 3 Q. B. 268–270.

(*c*[1]) [Pickard *v.* Marriage, 1 Ex. D. 364.]

(*d*) Allen *v.* Thomson, 1 H & N. 15; 25 L. J. Ex. 249.

(*e*) Tuton *v.* Sanoner, 3 H. & N. 280; 27 L. J. Ex. 293; Beales *v.* Tennant, 29 L. J. Q. B. 188.

(*f*) Adams *v.* Graham, 33 L. J. Q. B. 71.

(*g*) Moorewood *v.* South Yorkshire Railway Company, 3 H. & N. 798; 28 L. J. Ex. 114; Sutton *v.* Bath, 3 H. & N. 382; 27 L. J. Ex. 388; Nicholson *v.* Cooper, 3 H. & N. 384; Grant *v.* Shaw, L. R. 7 Q. B. 700; Broderick *v.* Scalé, L. R. 6 C. P. 98; [Castle *v.* Downton, 5 C. P. Div. 56; In re Symonds, 28 Weekly Rep. 924; In re Haynes, Ib. 848; Smith *v.* Cheese, 1 C. P. D. 60; Trousdale *v.* Shepperd, 7 Ir. Jur. N. S. 275; London Loan Co. *v.* Chace, 12 C. B. N. S. 730. This last case was disapproved of in Button *v.* O'Neill, 4 C. P. D. 354.]

(*h*) Hatton *v.* English, 7 E. & B. 94; 26 L. J. Q. B. 161.

(*i*) Pickard *v.* Bretz, 5 H. & N. 9; 29 L. J. Ex. 18. See, also, Foulger *v.* Taylor, 5 H. & N. 202; 29 L. J. Ex, 154. But see Jones *v.* Harris, L. R. 7 Q. B. 157; [Fonblanque *v.* Lee, 7 Ir. C. L. 550; Trousdale *v.* Shepperd, 7 Ir. Jur. N. S. 275.]

(*k*) Attenborough *v.* Thompson, 2 H. & N. 559; 27 L. J. Ex. 23; Blackwell *v.* England, 8 E. & B. 541; 27 L. J. Q. B. 124.

(*l*) Hewer *v.* Cox, 3 E. & E. 428; 30 L. J. Q. B. 73; [Blount *v.* Harris, L. R. 4 Q. B. D. 603.]

(*m*) L. R. 3 Q. B. 268; 37 L. J. Q. B. 101. See, also, Blackwell *v.* England, 8 E. & B. 541; 27 L. J. Q. B. 124; Re Hams, 10 Ir. Ch. Rep. 100; 1 L. T. N. S. 467.

an accountant," and this was held sufficient both as to residence and occupation, although it was proven that Hanley was a borough containing 40,000 inhabitants, and although the deponent was a clerk of an accountant residing in Manchester, whose name was over the door of the place of business in Hanley; these facts being overcome by proof, first, that hundreds of letters reached the deponent addressed Hanley only; and, secondly, that although he was only a clerk at Hanley for the Manchester accountant, he was allowed by his employer to do business occasionally on his own account. An affidavit describing the vendor's residence and occupation to the "best of the belief" of the witness was held sufficient by the exchequer of pleas, in Roe *v.* Bradshaw. (*n*) In Shears *v.* Jacobs (*o*) it was held that a trading company is competent to give a bill of sale, and that an affidavit describing the company as "The Glucose Sugar and Coloring Company," and giving the address of its principal office, was a sufficient compliance with the act. It was further held in this case, and in Deffell *v.* White (L. R. 2 C. P. 144), that directors attesting the seal of the company were not witnesses within the meaning of the act, whose residences it is necessary to state.

Affidavit to "best of belief."

Trading company may give bill of sale

Directors attesting seal, not witnesses under the act.

§ 494. In Marples *v.* Hartley (*p*) the facts were that a bill of sale was given on the 27th June, and a creditor's execution levied on the 5th July, within the twenty-one days allowed for registration. The purchaser did not register at all. Held that his title under the bill of sale was good; the court declaring that "two things are required before the requirements of the statute need be complied with: the apparent possession of the goods, and the lapse of the twenty-one days. The assignee has the period of twenty-one days within which he may complete his title by registering the bill of sale; but if he takes possession under it in the mean time, he need not register at all. Here it was not invalidated at the time the goods were received by the sheriff. It therefore gave the claimant a good title to the goods till he had so seized them, or had registered it within the twenty-one days."

Registry not necessary where goods have been taken by creditor in execution within twenty-one days.

Marples *v.* Hartley.

(*n*) L. R. 1 Ex. 106; 35 L. J. Ex. 71.

(*o*) L. R. 1 C. P. 513; 35 L. J. C. P. 241.

(*p*) 1 B. & S. 1; 30 L. J. Q. B. 92. See, also, Banbury *v.* White, 2 H. & C. 300; 31 L. J. Ex. 258.

§ 495. In Richards *v.* James (*q*) the vendor had executed, at different dates, two bills of sale, each for 150*l.*, to two different vendees, for the same goods. The first purchaser had failed to register in time, but the second had made proper registry and was ignorant of the prior bill of sale. The sheriff then levied on the goods (which had remained in possession of the vendor) in behalf of execution creditors. On this state of facts it was held that, although in the absence of an execution the first vendee would have been preferred, because there is nothing in the act which makes it necessary to register a bill of sale *as against the holders of a second bill of sale*, whether the latter be registered or not, yet the execution in this case had defeated the first bill of sale, which, being unregistered, was declared by the law to be "null and void to all intents and purposes whatsoever," when opposed to the execution creditors; that it was the second registered bill of sale which had prevailed against the execution creditors, and that the second vendee was therefore entitled to priority over the first, the creditors having waived their claim to any surplus that might exist after satisfying the second vendee. In Ex parte Allen (L. R. 11 Eq. 209) will be found a decision as to the relative rights of two holders of a bill of sale after the bankruptcy of the debtor, where the second purchaser took possession in ignorance that the first purchaser had registered his bill of sale.

Richards *v.* James.

Effect of registry of second bill of sale when first is unregistered.

Ex parte Allen.

§ 496. The bills of sale act does not include transfers of ships or parts thereof, *transfers in the ordinary course of trade or calling*, *sales of goods at sea* or in foreign ports, bills of lading, India warrants, warehousemen's certificates, warrants for delivery of goods, or any document used in the ordinary course of business as proof of the possession or control of goods, or authorizing the holder to transfer or receive the goods thereby represented, or shares in public stocks, or in joint stock or incorporated companies, or choses in action. (*r*) The decisions on the validity of transfers of *future property* under bills of sale have already been considered, book I. part I. ch. iv., Of the Thing Sold. Where machinery on land is mortgaged together with the land, this does not constitute a bill of sale of the machinery;

Act not applicable to ships, nor sales in usual course of business, nor goods at sea, bills of lading, &c.

Machinery.

(*q*) L. R. 2 Q. B. 285.

(*r*) 17 & 18 Vict. c. 36, s. 7.

but where machinery is only trade fixtures, and is conveyed by bill of sale distinct from the land mortgaged, the bills of sale act applies. (*s*) A receipt for money by a husband to the trustees of his wife's settlement, "for the purchase of my household goods contained in the inclosed inventory," was held not to be a bill of sale in the case of Allsop *v.* Day. (*t*)

Receipt by husband for money of his wife for purchase of household goods.

§ 497. Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles on which the bankrupt and insolvent laws of the country are based, the object of these laws being to secure an equal ratable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *pari passu;* and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share. (*u*)

Sale for purpose of disturbing equality among creditors.

§ 498. In this connection it may be useful to refer to a class of cases which will again come under consideration in the chapter treating of "Stoppage in Transitu." The equity in favor of returning goods to an unpaid vendor by a buyer who finds that he is insolvent, and will be unable to pay for them, is so strong in its appeal to the conscience of honest men, that cases have frequently arisen where the buyer, on becoming insolvent, has attempted to prevent the goods from

Return of goods to unpaid vendor by an insolvent.

(*s*) Mather *v.* Fraser, 25 L. J. Ch. 361; Waterfall *v.* Penistone, 6 E. & B. 876, and 26 L. J. Q. B. 100.

(*t*) 7 H. & N. 457, and 31 L. J. Ex. 105. See, also, Byerley *v.* Prevost, L. R. 6 C. P. 144.

(*u*) Dauglish *v.* Tennent, L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; Howden *v.* Haigh, 11 A. & E. 1033; Higgins *v.* Pitts, 4 Ex. 312; Wilson *v.* Ray, 10 A. & E. 82; Leicester *v.* Rose, 4 East, 372; Mallalieu *v.* Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339; Britten *v.* Hughes, 5 Bing. 460; Coleman *v.* Waller, 3 Y. & J. 212; Wells *v.* Girling, 1 B. & B. 447; Elliott *v.* Richardson, L. R. 5 C. P. 744. See, also, Jackson *v.* Duchaire, 3 T. R. 551, and Nunes *v.* Carter, L. R. 1 P. C. 342, for an instructive opinion of Lord Westbury, on the construction of statutes setting aside sales made in contemplation of bankruptcy. [Hersee *v.* White, 29 U. C. Q. B. 232; Armour *v.* Phillips, 4 Ib. 152; Kerr *v.* Coleman, 6 Ib. 218; Bank of Toronto *v.* McDougall, 15 U. C. C. P. 475; Tuer *v.* Harrison, 14 Ib. 449; Gottwalls *v.* Mulholland, 15 Ib. 62; Feehan *v.* Lee, 10 Ib. 385; Ross *v.* Elliott, 11 Ib. 221; In re Caton, 26 Ib. 308; Brooks *v.* Taylor, Ib. 443; Kalus *v.* Hergert, 1 Ont. Ap. 75; Sharing *v.* Meunier, 7 Low. Can. 250; Withall *v.* Young, 10 Ib. 149.]

being fused into the common mass of assets by rejecting them, or rescinding the sale, and returning the goods.

§ 499. In some early cases, before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy. The earliest case on the subject was Atkin *v.* Barwick, (*x*) variously reported, and of which a full account was given by Lord Abinger in his dissenting opinion in James *v.* Griffin. (*y*) But although this case subsequently received countenance in Alderson *v.* Temple, (*z*) in Harman *v.* Fisher, (*a*) and various other cases, and was made the basis of the decision in Salte *v.* Field, (*b*) yet the *ratio decidendi* was constantly questioned, and it is now perfectly well settled that if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraudulent preference in favor of the vendor. This was first distinctly held by Lord Kenyon and the king's bench, in Barnes *v.* Freeland, (*c*) almost immediately after the decision given by them in Salte *v.* Field, (*b*) and the question now always turns upon the point whether, first, the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or, secondly, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods.

Early cases sanctioned rescission of sales after delivery to buyer, if before an act of bankruptcy.

Overruled in later cases.

Now only permissible if, 1st, the property has not completely passed; or, 2dly, possession has not been taken by buyer.

§ 500. An instance of the first kind is given in Nicholson *v.* Bower,(*d*) where wheat was purchased by sample, and forwarded

(*x*) 1 Stra. 165; 10 Mod. 432; Fortes. 353.

(*y*) 2 M. & W. 623–639.

(*z*) 4 Burr. 2235.

(*a*) Cowp. 117.

(*b*) 5 T. R. 211.

(*c*) 6 T. R. 80. See, also, Neate *v.* Ball, 2 East, 123; Richardson *v.* Goss, 3 B. & P. 119; Heineckey *v.* Erle, in Cam. Scacc. 8 E. & B. 410; 28 L. J. Q. B. 79.

(*d*) 1 E. & E. 172; 28 L. J. Q. B. 97; and see Richardson *v.* Goss, 3 B. & P. 119.

to the purchaser by railway, and on arrival at the railway warehouse, a bulk sample was taken to the purchaser by his orders, and found to correspond, but the purchaser, knowing himself to be insolvent, told his carman, "Don't cart it home at present." The sale was by parol, and the impression of the judges evidently was, that the transit was at an end, so that the vendor's right of stoppage was gone; but the value being over 10*l*., the sale was incomplete under the statute of frauds, unless the vendor had *accepted* as well as received the goods, and although it might be his duty to accept when he found that the bulk accorded with the sample according to his verbal agreement, yet if he chose not to accept, the sale was incomplete, and his object of returning the goods to his vendor would thus be accomplished. In the language of Erle J., in commenting on the buyer's action, "The meaning of all this seems to be this: 'I will hold my hand: in honesty the wheat ought to go back as I cannot pay for it;' and he sends the next day a notice to the vendor, and is willing that it should get back to him, if by law it might. The bankrupt broke his contract, mayhap, by not accepting, but that does not show that there *was* an acceptance." But even if the *property* had passed, it may be that the *possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others. The different cases in which buyers have adopted this course and thus kept unimpaired the vendor's right of stoppage *in transitu* are referred to in the note. (*e*)

Nicholson v. Bower.

§ 501. The reader is also referred to a very singular case, that of Dixon *v.* Baldwen, (*f*) where the king's bench decided that, although the transit was at an end, and although both the property and possession were confessedly in the vendee, yet under the special circumstances of the case the buyer had not laid himself open to a charge of fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of his intention to do so, made to his creditors

Dixon v. Baldwen.

(*e*) Atkins *v.* Barwick, 1 Str. 165; 10 Mod. 432: Fortes. 353; Salte *v.* Field, 5 T. R. 211; Bartram *v.* Farebrother, 4 Bing. 579; Smith *v.* Field, 5 T. R. 402; James *v.* Griffin, 2 M. & W. 623; Siffken *v.* Wray, 6 East, 371; Heineckey *v.* Erle, 28 L. J. Q. B. 79, and 8 E. & B. 410; Bolton *v.* Lancashire & York. Railway Company, L. R. 1 C. P. 431; 35 L. J. C. P. 137; Whitehead *v.* Anderson, 9 M. & W. 529. See remarks of Parke B. in Van Casteel *v.* Booker, at p. 14; 18 L. J. Ex. 9; [Grout *v.* Hill, 4 Gray, 361, 367.]

(*f*) 5 East, 175.

at a meeting called by him, and not done with the voluntary intention of giving an undue advantage. The judges were not unanimous, and the question was considered by the majority rather as one of fact than of law.

§ 502. In America, it is somewhat remarkable that the ruling of the king's bench, in Edwards *v.* Harben, (*g*) has not only been followed to its full extent, but the doctrine has been pushed even beyond the principle there established. Chancellor Kent erroneously supposes the English law to be unsettled on the question, (*h*) but he states it to be the established law in the federal courts of the United States, that an absolute bill of sale is *itself* a fraud in law unless possession accompanies and follows the deed; and in a recent case (*i*) it was even decided that the *bona fides* of the transaction between the parties, and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid. This seems also to be the doctrine of the state courts in Virginia, (*k*) South Carolina, (*l*) Pennsylvania, (*m*) Illinois, (*n*)

Decisions in America.

Edwards *v.* Harben followed.

(*g*) 2 T. R. 587.

(*h*) 2 Kent, 521.

(*i*) The Romp, Olcott's Adm. 196, cited in note at p. 697, 2 Kent, 11th ed. [See Hamilton *v.* Russell, 1 Cranch, 309; Conard *v.* Atlantic Ins. Co. 1 Peters, 386.]

(*k*) [The doctrine and cases were thoroughly reviewed in Davis *v.* Turner, 4 Gratt. 422, and substantially the English doctrine was established in Virginia. See Forkner *v.* Stewart, 6 Gratt. 198, 204; Baltimore & Ohio R. R. Co. *v.* Glenn, 28 Md. 287, 324, 325; Curd *v.* Miller, 7 Gratt. 185.]

(*l*) [See Terry *v.* Belcher, 1 Bailey, 568; Smith *v.* Henry, 2 Ib. 118.]

(*m*) [See Born *v.* Shaw, 29 Penn. St. 288; Dawes *v.* Cope, 4 Binn. 258; Babb *v.* Clemson, 10 Serg. & R. 419; Shaw *v.* Levy, 17 Ib. 99; Davis *v.* Bigler, 62 Penn. St. 242; Maynes *v.* Atwater, 88 Ib. 496. It is held in Pennsylvania that, as against creditors, if the possession does not follow as well as accompany a sale, it is a fraud in law, without regard to the intent of the parties, and becomes a question for the court and not for the jury. Young *v.* McClure, 2 Watts & S. 147, and cases cited. In Garman *v.* Cooper, 72 Penn. St. 37, Thompson C. J. said: "On a sale of goods and chattels they must either pass out of the seller to the buyer, or the seller must pass away from them, leaving them in the exclusive possession of the buyer. The transfer must be actual, continuing, and exclusive in him. In all cases where the delivery of possession has been but temporary, and followed by a return to the seller, the law regards it as colorable and fraudulent in law." See Tilson *v.* Terwilliger, 56 N. Y. 273; Worman *v.* Kramer, 73 Penn. St. 378; Gray *v.* Sullivan, 10 Nev. 416.]

(*n*) [See Thornton *v.* Davenport, 1 Scam. 296; Simmons *v.* Jenkins, 76 Ill. 479; Johnson *v.* Holloway, 82 Ib. 334; Ticknor *v.* McClelland, 84 Ib. 471; Goodheart *v.* Johnson, 88 Ib. 58; Dunlap *v.* Epler, Ib. 82; Greenebaum *v.* Wheeler, 90 Ib. 296; Dunning *v.* Mead, Ib. 376.]

New Jersey, (*o*) Vermont, (*p*) and Connecticut, (*q*) while the English rule pervades the other states. (*r*)

(*o*) [See Sterling *v.* Van Cleve, 7 Halst. 285; Mount *v.* Hendricks, 2 South. 738; Cumberland Bank *v.* Hann, 4 Harr. (N. J.) 166.]

(*p*) [Houston *v.* Howard, 39 Vt. 54; Barrett J. in Daniels *v.* Nelson, 41 Ib. 161. In cases where the evidence is doubtful or conflicting, the question of possession is left to the jury in Vermont. Rothchild *v.* Rowe, 44 Vt. 389. Taking possession of land under a lease is good possession of the personal property upon it and sold with it. Rothchild *v.* Rowe, *supra*.]

(*q*) [See Norton *v.* Doolittle, 32 Conn. 405; Wells *v.* Camp, 14 Ib. 219; Crouch *v.* Carrier, 16 Ib. 505; Carter *v.* Watkins, 14 Ib. 240; Hall *v.* Gaylor, 37 Ib. 550, 554; Webster *v.* Peck, 31 Ib. 496, 500; Hatstat *v.* Blakeslee, 41 Ib. 301; Kirtland *v.* Snow, 20 Ib. 23; Mead *v.* Noyes, 44 Ib. 487. In Capron *v.* Porter, 43 Conn. 383, Loomis J. said: "That the retention of the possession of personal property by the vendor after a sale raises a presumption of fraud which cannot be repelled by any evidence that the transaction was *bonâ fide* and for a valuable consideration, is still adhered to and enforced by the courts in this state with undiminished vigor, as a most important rule of public policy."]

(*r*) [Moog *v.* Benedicks, 49 Ala. 512; Phillips *v.* Reitz, 16 Kans. 396. But see, as to California, Chenery *v.* Palmer, 6 Cal. 119; as to Florida, Gibson *v.* Love, 4 Fla. 217; as to Iowa, Prather *v.* Parker, 24 Iowa, 26; Woodworth *v.* Byerly, 43 Ib. 106; as to Missouri, King *v.* Bailey, 6 Mo. 575; Foster *v.* Wallace, 2 Ib. 231. The doctrines of the different states on this subject are well stated in Hare & Wallace's note to Twyne's case, 1 Smith's L. C. 1, to which the reader is referred. Some of the more recent cases not there referred to are cited *supra* and *infra*. Burnham *v.* Brennan, 10 J. & Sp. 49; Burnham *v.* Brennan, 74 N. Y. 597; Stout *v.* Rappelhagen, 51 How. Pr. 75; Einstein *v.* Chapman, 10 J. & Sp. 144; Southard *v.* Benner, 72 N. Y. 424; Hollacher *v.* O'Brien, 5 Hun, 277; Inglehart *v.* Haberstro, 19 Alb. L. J. 400; Dutcher *v.* Swartwood, 15 Hun, 31; Southard *v.* Pinckney, 5 Abb. N. C. 184; City Bank *v.* Westbury, 16 Hun, 458; Schoonmaker *v.* Vervalen, 9 Ib. 138; Price *v.* Pitzer, 44 Md. 521; Kreuzer *v.* Cooney, 45 Ib. 582; Brett *v.* Carter, 2 Low. 458; Re Rawson, Ib. 519; Shaw *v.* Wilshire, 65 Me. 485; New Albany Ins. Co. *v.* Wilcoxson, 21 Ind. 355; Mobley *v.* Letts, 61 Ib. 11; Goodrich *v.* Michael, 3 Cal. 77; Danby *v.* Sharp, 2 McArthur, 435; Bosse *v.* Thomas, 3 Mo. App. 472; State *v.* Bell, 2 Ib. 102; Wright *v.* McCormick, 67 Mo. 426; Molitor *v.* Robinson, 40 Mich. 200; Webster *v.* Bailey, Ib. 641; Wheeler *v.* Konst, 46 Wis. 398; Blakeslee *v.* Rossman, 43 Ib. 116; Orton *v.* Orton, 7 Oreg. 478; McCully *v.* Swackhamer, 6 Ib. 438. In New Hampshire the doctrine of Twyne's case is quite strictly maintained. Coburn *v.* Pickering, 3 N. H. 424; Coolidge *v.* Melvin, 42 Ib. 522; Lang *v.* Stockwell, 55 Ib. 561; Plaisted *v.* Holmes, 58 Ib. 293; Sumner *v.* Dalton, Ib. 295. See Wilson *v.* Sullivan, 58 N. H. 260; Clark *v.* Tarbell, 57 Ib. 328. See, as to the California doctrine, Stevens *v.* Irwin, 15 Cal. 503; Chevey *v.* Palmer, 6 Ib. 119; Engles *v.* Marshall, 19 Ib. 320; Godchaux *v.* Mulford, 26 Ib. 316; Woods *v.* Bugbey, 29 Ib. 466; Watson *v.* Rodgers, 53 Ib. 401. See Hestal *v.* Myles, 53 Cal. 623, in which, under a statute which provides that every transfer of personal property "is conclusively presumed" to be fraudulent and void as against creditors of the vendor while he remains in possession, if it be not accompanied by an immediate delivery and followed by an actual and continued change of possession, it was held that the mere fact that the vendee had assumed control

was not conclusive, but that it was for the jury to determine whether there was an actual and continued possession, and whether there was such a change of the apparent custody of the goods as to put one dealing with the vendor in respect to the goods upon inquiry.]

CHAPTER III.

ILLEGALITY.

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SECTION I. — AT COMMON LAW.

Sale void when entered into for illegal purpose.

§ 503. THE contract of sale, like all other contracts, is void when entered into for an illegal consideration, or for purposes violative of good morals or prohibited by the lawgiver. The thing sold may be such as in its nature cannot form the subject of a valid contract of sale, as an

obscene book or an indecent picture, which are deemed by the common law to be evil and noxious things. The article sold may be in its nature an innocent and proper subject of commercial dealings as a drug, but may be knowingly sold for the purpose, prohibited by law, of adulterating food or drink. Or the sale may be prohibited by statute for revenue purposes, or other motive of public policy. In all these cases the law permits neither party to maintain an action on such a sale.

§ 504. The subject will be considered in two parts: 1st, with reference to the common law; 2d, the acts of parliament. At common law the rule is invariable: *Ex turpi causâ non oritur actio.* And this rule is as applicable to a plea as to a declaration; for, as was said by Lord Mansfield in Montefiori *v.* Montefiori, (*a*) "no man shall set up his own iniquity as a defence any more than as a cause of action." (*b*) Sales are therefore void, and neither party can maintain an action on them, if the thing sold be contrary to good morals or public decency. (*c*) Sales of an obscene book, (*d*) and of indecent prints or pictures, (*e*) have been held illegal and void at common law.

Illegal act unavailable for defence as well as for action.

(*a*) 1 W. Bl. 363; and see, also, Doe dem. Roberts *v.* Roberts, 2 B. & A. 367.

(*b*) See the authorities collected in the notes to the leading case of Collins *v.* Blantern, in 1 Sm. L. C. 325.

(*c*) [In such cases, the law leaves the parties where it finds them. See Roll *v.* Raguet, 4 Ohio, 400; S. C. 7 Ib. 76; Moore *v.* Adams, 8 Ib. 372; Rowan *v.* Adams, 8 Sm. & M. 624; Dixon *v.* Olmstead, 9 Vt. 310; Foote *v.* Emerson, 10 Ib. 338; Buck *v.* Albee, 26 Ib. 184; Ochse *v.* Wood, 5 Centr. Law Journ. 217, 218. "The defence of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff." Wells J. in Myers *v.* Meinrath, 101 Mass. 367. "The policy of the law is to leave the parties in all such cases without remedy against each other." Ames J. in Horton *v.* Buffington, 101 Mass. 400. See Sampson *v.* Shaw, 105 Mass. 149. When a party has sold and delivered goods under a contract of sale void for illegality, he can neither recover the price agreed to be paid, nor reclaim the goods from the purchaser. This disability on the part of the seller to reclaim the goods will avail the purchaser holding them as a sufficient title. Ames J. in Horton *v.* Buffington, *supra;* Myers *v.* Meinrath, 101 Mass. 366; King *v.* Green, 6 Allen, 139. In Forster *v.* Thurston, 11 Cush. 323, Bigelow J. said: "The well settled principle of law is, that no one, knowingly participating in a transaction intended to accomplish a purpose forbidden by law, can bring an action for any cause directly connected with that illegality. The unconscientious nature of the defence is not a valid answer to it. It is allowed, not out of consideration or favor to a guilty participator, but from motives of public policy." Lord Mansfield in Holman *v.* Johnson, Cowp. 341, 343; Parsons C. J. in Greenwood *v.* Curtis, 6 Mass. 380; Hoover *v.* Pierce, 26 Miss. 627; Ochse *v.* Wood, 5 Centr. Law

In pari delicto potior est conditio possidentis.

(*d*) Poplett *v.* Stockdale, Ry. & Moo. 337.

(*e*) Fores *v.* Johnes, 4 Esp. 97.

§ 505. Even where part only of the consideration of a contract is illegal, the whole contract is void and cannot be enforced. This was treated as established law by Tindal C. J. in Waite *v.* Jones, (*f*) on the authority of Featherston *v.* Hutchison ; (*g*) and was affirmed by all the judges who delivered opinions in the exchequer chamber in Jones *v.* Waite. (*h*) So, in Scott *v.* Gillmore, (*i*) a bill of exchange was held void where part of the consideration was for spirits sold in violation of the tippling acts. But in Crookshank *v.* Rose, (*k*) where the action was brought on a promissory

Consideration illegal in part.

Jones *v.* Waite.

Scott *v.* Gillmore.

Crookshank *v.* Rose.

Journ. 217, 218. Although usually in practice the application of the maxim, *in pari delicto melior est conditio possidentis*, is insisted upon by the defendant in answer to a *primâ facie* case, it does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings. Ames J. in Shaw *v.* Sampson, 101 Mass. 145, 152. *Cases of illegality where parties are not in pari delicto.* In Lowell *v.* Boston & Lowell R. R. Co. 23 Pick. 32, Wilde J. said: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." See Sampson *v.* Shaw, 101 Mass, 150; Butler *v.* Northumberland, 50 N. H. 33, 39; White *v.* Franklin Bank, 22 Pick. 181; Concord *v.* Delaney, 58 Maine, 309; Cameron *v.* Peck, 37 Conn. 555. So in Tracy *v.* Talmage, 4 Kernan, 162, and in Curtis *v.* Leavitt, 1 Smith (N. Y.), 9, it was held that where a contract, otherwise unobjectionable, is prohibited by a statute, which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and, upon disaffirming the contract, may recover, as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract. See Schermerhorn *v.* Talman, 4 Kernan, 93, 124; Walan *v.* Kerby, 99 Mass. 1. In the case of Prescott *v.* Norris, 32 N. H. 101, it was maintained that the purchaser of spirituous liquors sold without a license, in violation of a statute inflicting a penalty on the seller, may recover for a deceit and false warranty in the sale, if, at the time when he bought, he had no notice that the sale was made without a license. See and consider the opinion of Perley C. J. in this case. See Watrous *v.* Blair, 32 Iowa, 58.]

In certain cases relative delinquency of parties inquired into.

(*f*) 1 Bing. N. C. 656.

(*g*) Cro. Eliz. 199.

(*h*) 5 Bing. N. C. 341. See, also, Shackell *v.* Rosier, 2 Bing. N. C. 634, and Hopkins *v.* Prescott, 4 C. B. 578; [Ladd *v.* Dillingham, 34 Me. 316; Deering *v.* Chapman, 22 Ib. 488; Clark *v.* Ricker, 14 N. H. 44; Prescott *v.* Norris, 32 Ib. 101, 104; Coburn *v.* Odell, 30 Ib. 540; Carleton *v.* Woods, 28 Ib. 290; Rose *v.* Truax, 21 Barb. 361; Woodruff *v.* Hinman, 11 Vt. 592; Hinde *v.* Chamberlain, 6 N. H. 225; Hineshurgh *v.* Sumner, 9 Vt. 23; Armstrong *v.* Toler, 11 Wheat. 258; S. C. 4 Wash. C. C. 297; Carlton *v.* Whitcher, 5 N. H. 196; Donallen *v.* Lenox, 6 Dana, 91; Raguet *v.* Roll, 7 Ohio, 77; Thayer *v.* Rock, 13 Wend. 53; Roby *v.* West, 4 N. H. 285; Jarvis *v.* Peck, 1 Hoff. 479; Dixie *v.* Abbott, 7 Cush. 610; Filson *v.* Himes, 5 Penn. St. 452; Chandler *v.* Johnson, 39 Ga. 85; Kottwitz *v.* Alexander, 34 Tex. 689.]

(*i*) 3 Taunt. 226.

(*k*) 5 C. & P. 19.

note and a bill of exchange given at the same time in payment of a sailor's bill to his landlord, in which were items for spirits sold illegally, it appeared that the whole amount of the charge for spirits was *less than either of the two securities;* and Lord Tenterden held that one security might be recovered, because the plaintiff had the right to appropriate the other to all the illegal charges, which it was more than sufficient to cover. (*l*) And the principle does not apply to cases in which the court determines covenants in restraint of trade to be illegal because unreasonable; for in such cases the courts will enforce the covenant so far as reasonable, and reject only the excess. (*m*)

§ 506. The sale of a thing in itself an innocent and proper ar-

(*l*) [Where the consideration is tainted by no illegality, and some of the promises only are illegal, the illegality of these does not communicate itself to or taint the others, except when, owing to some peculiarity in the contract, its parts are inseparable. Tindal C. J. in Shackell *v.* Rosier, 3 Scott, 59; M'Allen *v.* Churchill, 11 Moore, 483; Hook *v.* Gray, 6 Barb. 398; Leavitt *v.* Blatchford, 5 Ib. 9; Leavitt *v.* Palmer, 3 Comst. 19; Curtis *v.* Leavitt, 1 Smith (N. Y.), 9; Tracy *v.* Talmage, 4 Kernan (N. Y.), 162; Goodwin *v.* Clark, 65 Me. 280. In Carlton *v.* Woods, 28 N. H. 290, it appeared that A. agreed to sell B. his stock of goods and groceries. The price to be paid was the cost and freight of the articles. In order to ascertain the cost, a schedule of the articles was made, and the cost of each article was separately carried out. For the sum total of the prices, which was divided into several parts, B. gave several promissory notes. Among the articles was a quantity of spirituous liquors, sold contrary to law, the price of which formed a part of the consideration of the notes. The declaration contained a count on each of the promissory notes, and also a count for goods sold and delivered. Woods J. said: "The counts upon the notes are not sustained. The consideration of the notes was, in part, illegal." "But the case in relation to the count for goods sold and delivered stands differently. The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract, each article was to be separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was, in effect, a contract to pay for each article a price to be determined in manner before stated." See Walker *v.* Lovell, 28 N. H. 138; Robinson *v.* Green, 3 Met. 159; Fackler *v.* Ford, McCahon (Kans.), 21; Hanauer *v.* Gray, 25 Ark. 350. But in a case where there was a written contract for the sale of all the stock of goods in an apothecary's store, which contained spirituous liquors belonging to the vendor, but which he had no license to sell, it was held that the contract could not be enforced by the vendor against the purchaser; although, upon invoicing the goods, a separate schedule of the liquors was made by direction of both parties, if such separate schedule was designed as an evasion of the statute "restricting the sale of intoxicating liquors." The contract could not thus be made effectual as to the other goods. Ladd *v.* Dillingham, 34 Maine, 316; Murray *v.* Walsh, 1 Cr. & Dix, 93; M'Neece *v.* Gibson, 2 Ih. 388.]

There being several separable promises with a good consideration, though some of the promises are illegal, others may be enforced.

Carlton *v.* Woods.

Ladd *v.* Dillingham.

(*m*) See the cases of Mallan *v.* May, Green *v.* Price, and others cited *post*, "Restraint of Trade," § 527.

ticle of commerce is void when the vendor sells it, knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose, or profit by the immoral act. The later decisions overrule this doctrine, as will appear by the authorities now to be reviewed. (*n*)

Sale of thing innocent in itself, when vendor knows it is intended for illegal purpose.

In Faikney *v.* Reynous, (*o*) which came before the king's bench in 1767, a party had paid, at the request of another, money on a contract which was illegal, and sued for its recovery. Judgment was given for the plaintiff, Lord Mansfield saying: "One of these two persons has paid money for the other, and on his account, and he gives him his bond to secure the *repayment* of it. *This* is not prohibited. *He is not concerned in the use which the other makes of the money.*" (*p*) This case was followed, in 1789, by the judges in Petrie *v.* Hannay, (*q*) but with evident reluctance, and many expressions of hesitation, especially by Lord Kenyon. Much stress was laid in both decisions upon a supposed distinction between the law applicable to the case of a contract which was *malum in se*, and one which was *malum prohibitum*. These two cases were repeatedly questioned and disapproved, as will be seen by reference to Booth *v.* Hodgson, (*r*) Aubert *v.* Maze, (*s*) Mitchell *v.* Cockburne, (*t*) Webb *v.* Brooke, (*u*) and Langton *v.* Hughes; (*x*) and in these, as well as in many subsequent cases, the distinction drawn between a thing *malum in se* and *malum prohibitum* was overruled. (*y*)

Faikney *v.* Reynous.

Petrie *v.* Hannay.

Malum in se.

Malum prohibitum.

§ 507. In 1803 the case of Bowry *v.* Bennet (*z*) was tried before Lord Ellenborough. A prostitute was sued for the value of

(*n*) [See *post*, § 511, note (*u*).]

(*o*) 4 Burr. 2070.

(*p*) [See Planters' Bank *v.* Union Bank, 16 Wallace, 483, 500; Armstrong *v.* Toler, 11 Wheat. 258; McBlair *v.* Gibbes, 17 How. (U. S.) 236; Lestapies *v.* Ingraham, 5 Barr, 71; Brooks *v.* Martin, 2 Wallace, 70.]

(*q*) 3 T. R. 418.

(*r*) 6 T. R. 405.

(*s*) 2 B. & P. 371.

(*t*) 2 H. Bl. 380.

(*u*) 3 Taunt. 6.

(*x*) 1 M. & S. 594.

(*y*) [*Post*, § 508, note (*h*).]

(*z*) 1 Camp. 348. See, also, Lloyd *v.* Johnson, 1 B. & P. 340, and Crisp *v.* Churchill, there cited in argument; Girardey *v.* Richardson, 1 Esp. 13; Jennings *v.* Throgmorton, Ry. & Moo. 251; Appleton *v.* Campbell, 2 C. & P. 347; and Smith *v.* White, L. R. 1 Eq. 626; 35 L. J. Ch. 454.

clothes furnished, and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. His lordship said: "It must not only be shown that he had notice of this, *but that he expected to be paid from the profits of the defendant's prostitution*, and that he sold the clothes to enable her to carry it on, *so that he might appear to have done something in furtherance of it.*" (*a*) In 1813, Hodgson *v.* Temple (*b*) was decided. There the action was for the price of spirits, sold with the knowledge that defendant intended to use them illegally. There was a verdict for plaintiff, and a motion for new trial was refused by the court, Sir James Mansfield saying: "This would be carrying the law much farther than it has ever yet been carried. The *merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment*, but to effect that, it is *necessary that the vendor should be a sharer in the illegal transaction.*" (*c*) This decision was given in November, 1813, and is the more remarkable because the case of Langton *v.* Hughes (*d*) had been decided exactly to the contrary, in the king's bench, in the month of June in the same year, and was not noticed by the counsel or the court in Hodgson *v.* Temple. Langton *v.* Hughes was first tried before Lord Ellenborough at nisi prius. It was an action for the price of drugs sold to the defendants, who were brewers, the plaintiffs knowing that defendants intended to use the drugs for mixing with beer, a use prohibited by statute. His lordship charged the jury that the plaintiffs, in *selling drugs to the defendants, knowing that they were to be used contrary to the statute, were aiding them in the breach of that act*, and therefore not entitled to recover. He, however, reserved the point. The ruling was maintained by all the judges, and it was distinctly asserted as the true principle, that "parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which *were sold with a knowledge that they were to be used for a purpose which is prohibited by law*, are not entitled to recover." (*e*)

Bowry *v.* Bennet.

Hodgson *v.* Temple.

Langton *v.* Hughes.

(*a*) [Foster J. in Hill *v.* Spear, 50 N. H. 253, 273.]

(*b*) 5 Taunt. 181

(*c*) [See *post*, § 511, note (*u*); Curtis J. in Sortwell *v.* Hughes, 1 Curtis, 245; Skiff *v.* Johnson, 57 N. H. 475; Stanley *v.* Chamberlin, 10 Vroom, 565; Green *v.* Collins, 3 Cliff. 494; Curran *v.* Downs, 3 Mo. App. 468.]

(*d*) 1 M. & S. 593.

(*e*) Per Le Blanc J.; and see the strong observations of Eyre C. J. in Lightfoot *v.*

§ 508. The leading case of Cannan *v.* Bryce (*f*) was decided in the king's bench in 1819. The question was, whether money lent for the purpose of enabling a party to pay for losses and compounding differences on illegal stock transactions could be recovered. All the previous cases were reviewed, and the court took time to consider. The opinion was delivered by Abbott C. J., and the principle was stated as follows: "The statute in question has absolutely prohibited the payment of money for compounding differences (*i. e.* in stock-bargains); it is impossible to say that making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a *full knowledge of the object to which they were to be applied*, and *for the express purpose of accomplishing that object*." (*g*) The money lent was, therefore, held not recoverable. The case of Langton *v.* Hughes was approved and followed, while Faikney *v.* Reynous and Petrie *v.* Hannay were practically overruled, and the distinction between *malum prohibitum* and *malum in se* pointedly repudiated. (*h*) In McKinnell *v.* Robinson, (*i*) in the exchequer, in 1838, it was held that

Cannan *v.* Bryce.

McKinnell *v.* Robinson.

Tennant, 1 B. & P. 551; [Milner *v.* Patton, 49 Ala. 423; Shepherd *v.* Reese, 42 Ib. 548; Hanauer *v.* Doane, 12 Wall. 342; Arnott *v.* Pittston & Elmira Coal Co. 68 N. Y. 558; Clements *v.* Yturria, 14 Hun, 151; Laing *v.* McCall, 50 Vt. 657.]

(*f*) 3 B. & A. 179.

(*g*) [See McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34; Tatum *v.* Kelley, 25 Ark. 209.]

(*h*) [In Hill *v.* Spear, 50 N. H. 253, 277, Foster J. said: "There is no valid distinction in the application of the law upon this subject between *mala prohibita* and *mala in se*; and if it were ever regarded, it has now been wholly laid aside in the decision of the later English cases." White *v.* Buss, 3 Cush. 448, 450, per Shaw C. J.; Bank of United States *v.* Owens, 2 Peters, 527, 539; Greenough *v.* Balch, 7 Greenl. 462; Utica Ins. Co. *v.* Kipp, 8 Cowen, 20; Clark *v.* Protection Ins. Co. 1 Story, 109. So far as regards the effect of a statute upon a matter prohibited under a penalty, there is no distinction between *mala prohibita* and *mala in se*. Lewis *v.* Welch, 14 N. H. 294. "Every statute imposing a penalty imports a prohibition and makes the prohibited act illegal." Story J. in Clark *v.* Protection Ins. Co. 1 Story, 122.]

Malum in se; malum prohibitum.

(*i*) 3 M. & W. 435; [White *v.* Buss, 3 Cush. 448, 450; Cutler *v.* Welsh, 43 N. H. 497, 498, and cases; Peck *v.* Briggs, 3 Denio, 107; Ruckman *v.* Bryan, 3 Denio, 340. But it has been held that the mere knowledge on the part of a person lending money that the borrower intends to make an illegal use of it is not sufficient to render the transaction illegal. McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34. But a recovery cannot be had if anything is done in aid of the illegal purpose. Kottwitz *v.* Alexander, 34 Texas, 689.]

money knowingly lent for gambling at a game prohibited by law could not be recovered, the case of Cannan *v.* Bryce being referred to by the court as the decisive authority on this subject.

§ 509. The latest case, that of Pearce *v.* Brooks, (*k*) was decided in the same court in 1866. The plaintiff had supplied a brougham to a prostitute. The evidence showed that the plaintiff knew the defendant to be a prostitute, but there was no *direct* evidence that plaintiff knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was *no* evidence that plaintiff expected to be paid out of the wages of prostitution. The jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff *knew it was supplied for that purpose.* It was held, first, not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; secondly, that the *knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorized in inferring that the plaintiff also knew the purpose for which she wanted an ornamental brougham;* and thirdly, that *this knowledge was sufficient to render the contract void*, on the authority of Cannan *v.* Bryce, which was recognized as the leading case on the subject. (*l*)

Pearce *v.* Brooks.

§ 510. By the common law, a sale to an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the sovereign. (*m*) Smuggling contracts are also illegal, and where a party in England sent an order to Guernsey for goods, which were to be smuggled into this country, the court held that the plaintiffs, who were Englishmen, residing here, and partners of the vendor in Guernsey, were not entitled to recover. (*n*) This case was followed in Clugas *v.* Penaluna. (*o*) But where the plaintiff, a foreigner, sold goods abroad to the defendant, knowing his intention to smuggle them, but having no concern in the smuggling scheme itself, the court of king's bench held that the sale was complete abroad, was governed by foreign law, (*p*) was not immoral nor

Sale to an alien enemy.

Smuggling contracts.

Biggs *v.* Lawrence.

Sale completed abroad.

Holman *v.* Johnson.

(*k*) L. R. 1 Ex. 213. See, also, Taylor *v.* Chester, L. R. 4 Q. B. 309; [Bagot *v.* Arnott, Ir. R. 2 C. L. 1.]

(*l*) [See McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34.]

(*m*) Brandon *v.* Nesbitt, 6 T. R. 23.

(*n*) Biggs *v.* Lawrence, 3 T. R. 454.

(*o*) 4 T. R. 466.

(*p*) [As to the influence of comity in such cases, see Foster J. in Hill *v.* Spear, 50 N. H. 273, 274.]

illegal *there*, because no country takes notice of the revenue laws of another; that the goods were not sold to be delivered in England, but were actually delivered in the foreign country, and that the plaintiff was therefore entitled to recover. (*q*)

Waymell *v.* Reed.

Sale abroad where vendor assists the smuggler.

Pellecat *v.* Angell.

Distinction in sales made in foreign countries, when vendor does or does not aid the smuggler.

§ 511. In Waymell *v.* Reed (*r*) the goods were sold abroad, and plaintiff invoked the decision in Holman *v.* Johnson, but was not permitted to recover, because he had aided the purchaser in his smuggling purposes, by packing the goods in a particular manner, so as to evade the revenue. (*s*) In Pellecat *v.* Angell (*t*) the subject again came before the exchequer court, and the previous decisions were followed, the court pointing out that the true distinction was this: Where the foreigner takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into this country, is not illegal and may be enforced. (*u*)

(*q*) Holman *v.* Johnson, 1 Cowp. 341; [Hill *v.* Spear, 50 N. H. 253, 273, 274; The New Br. Oil Works Co. *v.* Parsons, 20 U. C. Q. B. 531; Walbridge *v.* Follett, 2 Ib. 280; Sawyer *v.* Manahan, Taylor, (U. C.) 315; Sewell *v.* Richmond, Ib. 423]

(*r*) 5 T. R. 599.

(*s*) [See Gaylord *v.* Soragen, 32 Vt. 110; Aiken *v.* Blaisdell, 41 Ib. 656; Sortwell *v.* Hughes, 1 Curtis, 245.]

(*t*) 2 C., M. & R. 311.

(*u*) [Tuttle *v.* Holland, 43 Vt. 542; Hill *v.* Spear, 50 N. H. 253. It appeared in this case that Emerson, the purchaser, in a contract for the sale of spirituous liquors, kept a saloon in Manchester, New Hampshire, where he was accustomed to retail spirituous liquors contrary to law. Stewart, the vendor, was a dealer in spirituous liquors in the state of New York, where such traffic was not prohibited. Stewart had visited Emerson's saloon in Manchester, and, on one occasion, had solicited orders for liquors from Emerson. Subsequently, Stewart sold to Emerson a quantity of spirituous liquors. The contract of sale was made and completed, and the goods were delivered in New York. Stewart had no interest nor concern in the disposition of the liquors by Emerson, and did no act beyond the sale to Emerson in furtherance of Emerson's purpose to sell the liquors in New Hampshire; but there was evidence tending to show that Stewart, when he solicited orders from Emerson, and sold him the liquors, had reasonable cause to believe, and did believe, that Emerson intended to resell those liquors at his saloon in New Hampshire. It was held by a majority of the court, that the contract of sale, being valid by the laws of New York, should be enforced by the court in New Hampshire. The propositions on which the majority of the court relied in support of their decision in the above case were: 1. That the validity of a vendor's claim to recover the price of goods sold with knowledge that the purchaser intends to make

Cases on sales of spirituous liquors by inhabitants of another state.

New Hampshire: Hill *v.* Spear.

§ 512. At common law, also, certain contracts are prohibited as being against public policy. (*x*) Most of these are not properly within the scope of this treatise, such as contracts in restraint of marriage; marriage brokerage con- Contracts against public policy.

an unlawful use of them, depends upon the question whether or not the original vendor participated actively, to a greater or less extent, in the subsequent unlawful disposition of the goods; or whether the expectation of advantage and profit to him, growing out of the unlawful disposition of the goods by the purchaser, entered into and constituted a part of the inducement and consideration of the original sale. 2. If such expectation of advantage to the vendor was an ingredient in the consideration for the original sale, or if the original vendor participated in the subsequent unlawful disposition of the goods, he could not recover the price of them in New Hampshire. 3. Mere belief, on the part of the seller of the goods, that the purchaser buys for the purpose of carrying them into another state, to be there resold in violation of law, does not invalidate the sale. 4. The mere solicitation, by a dealer in liquors, of orders in the future for such goods, even though the person soliciting such orders may have had reason to believe, and did believe, that if such liquors should be ordered and purchased they would be resold by the purchaser in violation of law, is not such a circumstance as will affect the validity of a subsequent sale of such goods in a state where such sale is not prohibited by law. See Hoar J. in Finch *v.* Mansfield, 97 Mass. 89, 92; Corning *v.* Abbott, 54 N. H. 469; Webber *v.* Donnelly, 33 Mich. 469. The law in Vermont is very similar. In Gaylord *v.* Soragen, 32 Vt. 110, the plaintiff, residing in New York, and being authorized to sell spirituous liquors there, sold some there to the defendant, who resided in Vermont, where the sale of such liquors was unlawful, the plaintiff, at the time of sale, knowing that the defendant intended to sell them in Vermont, contrary to law. The liquors were delivered in New York to a carrier designated by the defendant, to be transported to Vermont at the defendant's risk. But, at the defendant's request, and to prevent the seizure of the liquors in Vermont, the plaintiff marked the casks in a peculiar way, omitting the defendant's name. Aldis J. said: "Although mere knowledge of the unlawful intent of the vendee by the vendor will not bar him from enforcing his contract to recover for the goods in our courts, yet it is well settled that if he in any way aid the vendee in his unlawful design to violate our laws, such participation in the illegal enterprise will disqualify him from maintaining an action on his contract in this state. The participation by the vendor must be active, to some extent; he must do something, though indirectly, in furtherance of the vendee's design to violate our laws; mere omission to act is not enough; but positive acts in aid of the unlawful purpose, however slight, are sufficient. As the evidence tended to prove that the plaintiff, by his acts done in connection with the sale and delivery of the liquors, aided the defendant to escape the vigilance of the officers, and so to have and sell the liquors in violation of law, it should have been admitted." A like decision was made in Aiken *v.* Blaisdell, 41 Vt. 656, affirming the doctrine of Gaylord *v.* Soragen. See, also, Territt *v.* Bartlett, 21 Vt. 184; Howe *v.* Stewart, 40 Ib. 145; McConihe *v.* McMann, 27 Ib. 95; Tuttle

Vermont: Gaylord *v.* Soragen.

(*x*) [See Fuller *v.* Dame, 18 Pick. 472; Frost *v.* Belmont, 6 Allen, 152; Sedgwick *v.* Stanton, 4 Kernan, 289; Clippinger *v.* Hepbaugh, 5 Watts & S. 315; Gulick *v.* Ward, 5 Halst. 87; Foote *v.* Emerson, 10 Vt. 344; Union Bridge Co. *v.* Troy & Lansingburgh R. R. Co. 7 Lansing, 240.]

tracts; contracts compounding felonies, &c. (*y*) Confining our attention to sales illegal at common law, because contravening or

v. Holland, 43 Ib. 542. The subject under consideration was discussed by Clifford J. in the case of Green *v.* Collins, 3 Cliff. 494. In the case of Adams *v.* Coulliard, 102 Mass. 167, it was found that the liquors, the price of which the plaintiff sought to recover, were sold to the defendant in New York; and that the plaintiff had reasonable cause to believe, but had no knowledge, that they were to be brought to Massachusetts for the purpose of being there sold in violation of law. Colt J. said: "It is claimed, on the part of the defendant, that the contract originated in the purpose to violate a known law of this state; and that our courts will not lend their aid and afford a remedy thereon. To do this, it is said, would violate an elementary principle of the common law. In order to make the plaintiff, under any circumstances, a participant in such unlawful sale at common law, it is necessary that he should, at least, have knowledge of the unlawful purpose. In some early cases, it was held that mere knowledge of the unlawful purpose of the buyer, on the part of the seller, without further act, where the illegal use to be made of the goods was no inducement in the mind of the seller, would not vitiate the sale, so as to deprive the seller of his remedy. Clearly, it is not enough, if he has only reasonable cause to believe that a violation of law is intended. It was held in McIntyre *v.* Parks, 3 Met. 207, that a sale of lottery tickets made in another state, where such sale is lawful, to a citizen in this state, is a lawful transaction, although the seller knows that the purchaser buys for the purpose of illegal sale here. In Webster *v.* Munger, 8 Gray, 587, the plaintiff sued to recover the price of intoxicating liquors. Both plaintiff and defendant were citizens of this commonwealth; but the sale was made in another state, and the defence was, that they were sold in violation of a statute of Massachusetts. The validity of the sale was determined at common law; and the jury were instructed, in substance, that if the sale was made on the part of the plaintiff 'with a view' to a resale contrary to the laws of this commonwealth, the action could not be maintained. This instruction was approved, and Thomas J., who delivered the opinion, says of the rule in McIntyre *v.* Parks, that, if rightly laid down, it is not to be extended, but that the distinction is sound between a case where a seller simply has knowledge of the illegal design, — no more, — and where he makes a sale with a view to such design, and for the purpose of enahling the purchaser to effect it. No case can be found where anything short of actual knowledge, on the part of the seller, of the illegal purpose, has been held to affect his rights under a contract of sale." See Finch *v.* Mansfield, 97 Mass. 89, 91, 92; Webster *v.* Munger, 8 Gray, 587; Ely *v.* Webster, 102 Mass. 304; Tracy *v.* Webster, Ib. 307, note; Abberger *v.* Marrin, Ib. 70; Foster *v.* Thurston, 11 Cush. 322; Hotchkiss *v.* Finan, 105 Mass. 86; Corning *v.* Abbott, 54 N. H. 469; Dolan *v.* Green, 110 Mass. 322; Webber *v.* Donnelly, 33 Mich. 469. The very elaborate and exhaustive opinion of Mr. Justice Clifford, in Green *v.* Collins, 3 Cliff. 494, contains a summary and review of the authorities here referred to. And the learned judge remarks concerning them: "Cases very nearly allied, it must be admitted, have been differently decided; but if they are carefully examined and compared one with another, the particular features by which they were distinguished are, with few exceptions, plain to be seen." And he points out, by way

Massachusetts: Adams *v.* Coulliard.

Webster *v.* Munger.

(*y*) [On the general subject, see Chitty Contr. (11th Am. ed.) 982 *et seq.* and notes.]

supposed to contravene considerations of public policy, it is impossible not to be impressed with the force of the observations made by the judges in Richardson *v.* Mellish, (*z*) and by Lord Campbell in Hilton *v.* Eckersley, (*a*) as well as the striking illustrations presented in the reports of the justice of their strictures. Best C. J. said: "I am not much disposed to yield to arguments of public policy; I think the courts of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak, of the judgments of those who have gone before me) have gone much farther than they were warranted in going, on questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger of so doing, because courts of law look only at the particular case,

of illustration, certain expressions in Webster *v.* Munger, *supra*, indicating that the very able judge who spoke for the court on that occasion was of the opinion that a sale made with knowledge of the seller that the purchaser intended to use the thing sold in violation of law was illegal and void, irrespective of the question whether it was an ingredient of the contract that the goods should be so sold, or that the seller should do any act to assist or facilitate the intended illegal use or sale; but he observes, "the expression of such views was not necessary to the decision of the case; as the statement shows not merely that the plaintiff had knowledge of the illegal purpose of the defendant, but that he sold with reference to it, and for the purpose of enabling the purchaser to effect it; and the court here agrees with that court in the conclusion that the instructions given in that case, if *viewed in that light*, were thoroughly sound in principle, and that they do not conflict with the cases decided. Unless viewed in that light, the decision is directly opposed to the rule laid down in the case of Sortwell *v.* Hughes, 1 Curtis, 245, decided by Judge Curtis, and which is an authority in this circuit, and in the judgment of this court expresses the true rule upon the subject." See, also, Curtis *v.* Leavitt, 15 N. Y. 15, 47; Tracy *v.* Talmage, 14 Ib. 173; White *v.* Buss, 3 Cush. 448; Peck *v.* Briggs, 3 Denio, 107; Cheney *v.* Duke, 10 Gill & J. 11; Jameson *v.* Gregory, 4 Met. (Ky.) 363; Harris *v.* Runnels, 12 How. (U. S.) 79; Smith *v.* Godfrey, 28 N. H. 379; Bligh *v.* James, 6 Allen, 570; Kreiss *v.* Seligman, 8 Barb. 439; Dater *v.* Earl, 3 Gray, 482; Case *v.* Riker, 10 Vt. 482; Bishop *v.* Honey, 34 Texas, 245; Rindskopf *v.* De Ruyter, 39 Mich. 1. In Wilson *v.* Stratton, 47 Maine, 120, it was held, in the state of Maine, that a sale of intoxicating liquors in that state, by a Massachusetts dealer, who knows that they are intended by the purchaser to be sold in violation of the laws of Maine, is illegal and void. So, where the Massachusetts dealer, well knowing the law and policy of the state of Maine, prohibiting the indiscriminate sale of intoxicating liquors, sends his agent to solicit orders for liquors to be sold in Maine, in violation of law, even if the sale is completed in Massachusetts, is in fraud of the laws of Maine, and cannot be upheld on any sound principle of comity. See Torrey *v.* Corliss, 33 Maine, 333; Banchor *v.* Mansels, 47 Ib. 58; Barnard *v.* Field, 46 Ib. 526; Meservey *v.* Gray, 55 Ib. 540; Orcutt *v.* Nelson, 1 Gray, 536; Suit *v.* Woodhall, 113 Mass. 391.]

Maine: Wilson *v.* Stratton.

(*z*) 2 Bing. 242.

(*a*) 6 E. & B. 47; 24 L. J. Q. B. 353.

and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of policy. . . . . I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed: but it must be unquestionable: there must be no doubt." Burroughs J. joined in the protest of the chief justice "against arguing too strongly upon public policy: it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

§ 513. In Hilton *v.* Eckersley (*a*) the judges differed in opinion as to what public policy really was in the case before them; and Lord Campbell said: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy, and other topics connected with the adjudication of such cases; and I cannot help thinking that where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them, unless where they are avoided by act of parliament." (*b*)

§ 514. An illustration of the justice of these remarks is to be

(*a*) 6 E. & B. 47; 24 L. J. Q. B. 353.

(*b*) [In Hill *v.* Spear, 50 N. H. 274, Mr. Justice Foster says: "This court will and ought to be reluctant to enforce contracts manifestly against public policy; but when the public policy of the country is not uniform, but different in neighboring localities, and variable in all, it would seem to be assuming rather too much to hold and insist that our own notions of public policy are and must be infallible, to the exclusion of the opinions and views of other enlightened communities, and the subversion of commercial comity." And so, although under the laws of New Hampshire, a sale of intoxicating liquor, if made in that state, will be presumed to be illegal and void until the seller's authority to sell is shown, yet, if such sale is made in another state, the presumption will be that the sale is legal until it is shown to be otherwise. Corning *v.* Abbott, 54 N. H. 469; Bliss *v.* Brainard, 41 Ib. 256; Ferguson *v.* Clifford, 37 Ib. 98; Doolittle *v.* Lyman, 44 Ib. 611. But in Bliss *v.* Brainard, *supra*, it was held that where the sale of liquors, except by persons licensed and for particular uses, is prohibited, it is incumbent upon the plaintiff, in an action to recover the price of liquors sold, or the amount of a note given for such price, to show affirmatively that he was duly licensed to sell them, and that they were sold for a lawful use; although the illegal sale was made in another state, where it was held incumbent on the defendant in such an action to show that the plaintiff had no license. See Wilson *v.* Melvin, 13 Gray, 73; Trott *v.* Irish, 1 Allen, 481; Pratt *v.* Langdon, 97 Mass. 97.]

Public policy of different communities not always the same.

found in the radical change of public opinion, and of the law upon the subjects of forestalling, regrating, and engrossing, which were reprobated by the common law as against public policy, and punished as crimes. *Forestalling* was the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price there. *Regrating* was the buying of corn or any other dead victual in any market and selling it again in the same market, or within four miles of the place. *Engrossing* was the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again. (*c*) In The King *v.* Waddington (*d*) the defendant was sentenced to a fine of 500*l.*, and four months' imprisonment (*i. e.* a further term of one month in addition to his previous confinement of three months), for the offence of trying to raise the price of hops in the market by telling sellers that hops were too cheap, and planters that they had not a fair price for their hops; and contracting for one fifth of the produce of two counties when he had a stock in hand, and did not want to buy, but merely to speculate how he would enhance the price. Lord Kenyon made many observations on the subject of public policy, discussed the doctrine of free trade, referred to his study of Smith's Wealth of Nations and other writings on political economy, and declared that the defendant's was "an offence of the greatest magnitude;" that "no defence could be made for such conduct;" that the policy of the common law, which he declared to be still in force on this subject, was "to provide for the wants of the poor laboring classes of the country: and if humanity alone cannot operate to this end, interest and policy must compel our attention to it." The passing of sentence was postponed to the next term, and Grose J., in delivering the opinion of the court, said: "It would be a *precedent of most awful moment* for this court to declare that hops, which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article, the price of which it is a crime, by undue means, to enhance."

Forestalling, regrating, and engrossing.

§ 515. The common law rules on the subject of those offences

(*c*) 4 Black. Com. 158; and Mr. Chitty's note, ed. 1844.

(*d*) 1 East, 143.

were abolished by the statute 7 & 8 Vict. c. 24, and although no legislation on the subject has taken place in America, Mr. Story says: (*e*) "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy." Notwithstanding these observations, it is quite beyond doubt that there are various well-defined cases where contracts of sale are still held illegal at common law as being violative of public policy and the interests of the state. These are chiefly: 1st. Contracts for the sale of offices, or the fees or emoluments of office; 2d. Contracts of sale in restraint of trade; and 3d. Contracts for the sale of lawsuits, or interests in litigation.

Common law rules abolished, 7 & 8 Vict. c. 24.

Law in America.

§ 516. Contracts for the sale or transfer of public offices or appointments, or the salary, fees, or emoluments of office, have in many cases been prohibited by statute, as will presently be shown; but by common law antecedent to these enactments such sales were held to be subversive of public policy, as opposed to the interests of the people and to the proper administration of government. (*f*) "Nulla aliâ re magis Romana respublica interiit, quam quod magistratûs officia venalia erant." Co. Litt. 234 a. The courts have reprobated every species of traffic in public office, and of bargains in relation to the profits derived from them. Thus, in Garforth *v.* Fearon, (*g*) the common pleas held, in 1787, that an agreement, whereby the defendant promised to hold a public office in the customs in trust for the plaintiff, and to permit the plaintiff to appoint the deputies and receive all the emoluments of the place, was illegal and void; Lord Loughborough observing that the effect was to make the plaintiff "the real officer, but not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, may exercise inconsistent trades, may act as a magistrate in affairs concerning the reve-

Contract for sale of offices.

Garforth *v.* Fearon.

(*e*) Story on Sales, p. 647, § 490.

(*f*) [See Duke *v.* Asbee, 11 Ired. 112; Gray *v.* Hook, 4 Comst. 449; Outon *v.* Rodes, 3 Marsh. 432; Lewis *v.* Knox, 2 Bibb, 453; Grant *v.* McLester, 8 Ga. 553; Carlton *v.* Whitcher, 5 N. H. 196; Cardigan *v.* Page, 6 Ib. 183; Meredith *v.* Ladd, 2 Ib. 517; Swayze *v.* Hull, 3 Halst. 54.]

(*g*) 1 H. Bl. 327.

nue, may sit in parliament, and he will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for, not being the acting officer, he does not appear upon the records of the exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to revenue. Whether a trust can be created in such an office is for the consideration of the court in which the suit was originally brought. The only question in this court is, whether the agreement springing out of such a transaction can support an action?" In Parsons v. Thompson, (*h*) in 1790, the same court held illegal a bargain by which the plaintiff, a master joiner in his majesty's dockyard at Chatham, agreed to apply for superannuation on condition that the defendant, if successful in obtaining his place, would share the profits with the plaintiff. In this case stress was laid on the fact that the bargain was unknown to the person having the power to appoint. Parsons v. Thompson.

§ 517. In equity a perpetual injunction was granted against enforcing a bond for the purchase of an office, as opposed to public policy, although the sale was not within the prohibitions of the statutes. (*i*) And in Law v. Law (*k*) a bond was held illegal by which a party covenanted to pay 10*l*. per annum, as long as he enjoyed an office in the excise, to a person who by his interest with the commissioners had obtained the office for him. Law v. Law.

§ 518. In Blachford v. Preston (*l*) the sale by the owner of a ship in the East India Company's service, of the place of master of the vessel, was held illegal, as being in violation of the laws and regulations of the company, and of public policy, and Lord Kenyon said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori;* on principles of public policy, no money consideration ought to influence the appointment to such offices." In Card v. Hope (*m*) the court went farther, and not only affirmed the doctrine of Blach- Blachford v. Preston. Card v. Hope.

(*h*) 1 H. Bl. 322. See, also, Waldo v. Martin, 4 B. & C. 318, case of a contract relative to an appointment in the Petty Bag Office.

(*i*) Harrington v. Du Chastel, 1 Bro. C. C. 124; Methwold v. Walbank, 2 Ves. Sen. 238.

(*k*) 3 P. Wms. 391.

(*l*) 8 T. R. 89.

(*m*) 2 B. & C. 661.

ford *v.* Preston, but expressed a strong opinion that the majority of the owners of any ship, whether in public or private service, who had the right to appoint the officers, could not make sale of an appointment, because public policy gives every encouragement to shipping in this country, and the power of appointing the officer without the consent of the minority carries with it the duty of exercising impartial judgment in regard to the office, *ut dctur digniori*. In Harrington *v.* Du Chastel (*n*) Lord Thurlow held illegal a bargain by which an officer in the king's houshold recommended a person to another office in the household in consideration of an annuity to be paid to a third person. In Corporation of Liverpool *v.* Wright (*o*) the defendant was appointed clerk of the peace by the plaintiffs, under the municipal corporations act, which made the tenure of the office dependent only on good behavior, and fixed the fees attached to the office. The municipal council agreed to appoint, and the defendant to accept, under an arrangement which in substance bound the defendant to pay over to the borough fund all his fees in excess of a certain annual amount. On demurrer to a bill, filed to enforce this agreement, Vice Chancellor Wood held it void, as against public policy, on two grounds: First, because a person accepting an office of trust can make no bargain in respect of such office. Secondly, because where the law assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office; and the policy of the law will not permit the officer to bargain away a portion of those fees to the appointer or to anybody else. In Palmer *v.* Bate (*p*) the court of common pleas certified to the vice chancellor that an assignment of the income, emolument, produce, and profits of the office of the clerk of the peace for Westminster (after deducting the salary of the deputy for the time being), is not a good or effectual assignment, nor valid in the law.

Harrington *v.* Du Chastel.

Corporation of Liverpool *v.* Wright.

Palmer *v.* Bate.

§ 519. The pay or half-pay of a military officer is not a legal subject of sale. (*q*) Nor a pension or annuity to a civil officer, unless exclusively for past services, as was held

Sale of pension illegal, un-

(*n*) 1 Bro. C. C. 124.
(*o*) 28 L. J. Ch. 868.
(*p*) 2 Br. & B. 673.
(*q*) Flarty *v.* Odlum, 3 T. R. 681; Liderdale *v.* Montrose, 4 T. R. 248; Barwick *v.* Reade, 1 H. Bl. 627.

in Wells *v.* Foster (*r*) where Parke B. explained the principle of the cases as follows: "The correct distinction made in the cases is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the assignee acquires a title to it, both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

less exclusively for past services. Wells *v.* Foster.

§ 520. A contract of sale, by the terms of which the vendor is restrained *generally* in the carrying on of his trade, is against public policy, and is void. (*s*) These cases arise usually where tradesmen or mechanics sell out their business, including the good-will, and where the buyer desires to guard himself against the competition in trade of the person whose business he is purchasing. The leading case on this subject is Mitchell *v.* Reynolds, (*t*) in the queen's bench, in 1711, and republished in Smith's Leading Cases. (*u*) The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messuage and bakehouse in Liquorpond Street, parish of St. Andrew's, for five years, and the defendant covenanted that he would not exercise the trade of a baker within that parish during the said term under penalty of 50*l*. The defendant pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus*, the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*. Demurrer in law. Held a valid bond. In a very elaborate judgment, Parker C. J. laid down, as settled rules, that voluntary restraints of trade

Restraint of trade. When vendor is restrained *generally*, sale is void. Mitchell *v.* Reynolds.

(*r*) 8 M. & W. 149.

(*s*) [In Alger *v.* Thacher, 19 Pick. 51, Morton J. goes extensively into a consideration of the foundation and reasons of the doctrine stated in the text. See, also, Whitney *v.* Slayton, 40 Maine, 224; Lange *v.* Werk, 2 Ohio St. 519; Davis *v.* Barney, 2 Gill & J. 382; Dakin *v.* Williams, 11 Wend: 67; Jenkins *v.* Temples, 39 Ga. 655; More *v.* Bonnet, 40 Cal. 251; Gale *v.* Kalamazoo, 23 Mich. 344; Perkins *v.* Clay, 54 N. H. 518, 519; Craft *v.* McConoughy, 79 Ill. 346; Collins *v.* Locke, 28 Weekly Rep. 189.]

(*t*) 1 P. Wms. 181.

(*u*) 6th ed. p. 356 of Vol. 2.

by agreement of parties were either, first, general, and in such cases void, whether by bond, covenant, or promise; whether with or without consideration, and whether of the party's own trade or not; or, second, particular, and these latter were either without consideration, in which case they are void, by what sort soever of contract created; or with consideration. In this latter class they are valid, when made upon a good and adequate (*x*) consideration, so as to make them proper and useful contracts. This doctrine, with some modification, has been maintained in many subsequent cases as the settled rule of law. (*y*)

Homer *v.* Ashford. Restraint as to particular place.

§ 521. In Homer *v.* Ashford (*z*) Best C. J. said: "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade or to act in a profession *in a particular place*, proper. (*a*) In accord-

(*x*) Overruled as to adequacy of consideration, *post*, § 526.

(*y*) Master &c. of Gunmakers *v.* Fell, Willes, 384; Cheesman *v.* Nainby, 2 Str. 739, and 1 Bro. P. C. 234; Gale *v.* Reed, 8 East, 83; Stuart *v.* Nicholson, 3 Bing. N. C. 113; Young *v.* Timmins, 1 C. & J. 331. [The doctrine maintained in Mitchell *v.* Reynolds, cited in the text, is fully established in Massachusetts. Taylor *v.* Blanchard, 13 Allen, 370, 373.]

(*z*) 3 Bing. 322.

(*a*) [Guerand *v.* Dendelet, 32 Md. 561; Jenkins *v.* Temple, 39 Ga. 655; Treat *v.* Shoninger Melodeon Co. 35 Conn. 543; Pierce *v.* Woodward, 6 Pick. 206; Stearns *v.* Barrett, 1 Ib. 443; Palmer *v.* Stebbins, 3 Ib. 188; Mott *v.* Mott, 11 Barb. 127; Bowser *v.* Bliss, 7 Blackf. 344; McMarter *v.* Babcock, 23 Barb. 633; Heichew *v.* Hamilton, 3 Iowa, 396; Jenkins *v.* Temple, 39 Ga. 655; Perkins *v.* Lyman, 9 Mass. 522; Thompson *v.* Means, 11 Sm. & M. 604; Perkins *v.* Clay, 54 N. H. 518, 519; Dwight *v.* Hamilton, 113 Mass. 175; Ellis *v.* Jones, 56 Ga. 504; Hedge *v.* Lowe, 47 Iowa, 137; Lander *v.* Hoffman, 64 N. Y. 248. Where it appeared that the defendant sold to the plaintiff an iron foundry in Calais, in the state of Maine, and agreed not to engage in the business of iron casting within sixty miles of that place for ten years, and that the territory within that sixty miles was not densely inhabited, and contained but few places of business, it was held that the agreement was valid. Whitney *v.* Slayton, 40 Maine, 224. The defendant sold to the plaintiff all his "apparatus for making soap — all ashes and soap on hand," &c. "*also all his trade and customers.*" The legal interpretation of this was held to be, that the defendant would not interfere with the plaintiff within the circuit of his usual custom. Such a contract was pronounced not to be against the policy of the law. At all events, the defendant was not entitled to the defence while he retained the consideration paid. Warren *v.* Jones, 51 Maine, 146. An agreement not to use

Contracts in restraint of trade.

Whitney *v.* Slayton.

ance with these principles, covenants have been held legal not to carry on business as a surgeon for fourteen years

Examples.

certain machines in any of the United States except two was held good in Stearns *v.* Barrett, 1 Pick. 443. An agreement not to manufacture a particular article is not "in restraint of trade." Gillis *v.* Hall, 2 Brewst. (Penn.) 342. In Taylor *v.* Blanchard, 13 Allen, 370, 372, Chapman J. said: "The question presented in this case is, whether a contract made between citizens of this state, upon good consideration, by which one of them agrees 'not to set up, exercise, or carry on the trade or business of manufacturing shoe cutters within the commonwealth of Massachusetts,' is valid, or is to be regarded as void on the ground that it is contrary to the policy of the law. . . . . This court has adopted the English doctrines so far as it has had occasion to consider them. In Alger *v.* Thacher, 19 Pick. 51, it was held that a bond conditioned that the obligor shall never carry on or be engaged in the business of founding iron is void. But the restriction in that case was not limited to the commonwealth. In that respect it differs from the present case. On the other hand, it has been held that an agreement not to carry on a trade within a particular town or city is valid, and that such a restriction may extend to the whole of a particular stage route extending from Boston to Providence, or the navigation of the whole length of Connecticut River. Pierce *v.* Fuller, 8 Mass. 223; Palmer *v.* Stebbins, 3 Pick. 188; Pierce *v.* Woodward, 6 Pick. 206; Gilman *v.* Dwight, 13 Gray, 356. It is also held that one may lawfully sell the right to carry on a secret trade, and bind himself not to carry it on nor to divulge the secret. Vickery *v.* Welch, 19 Pick. 523; (Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Peabody *v.* Norfolk, 98 Mass. 452; Morse Twist Drill & Machine Co. *v.* Morse, 103 Ib. 73, 75.) So of the use of a machine protected by a patent. Stearns *v.* Barrett, 1 Pick. 443; (Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass. 73, 74.) So of a business which is carried on out of the country. Perkins *v.* Lyman, 9 Mass. 522. In several of the states, contracts for the partial and limited restraint of trade have been upheld. In New York, it is held by the court of appeals that a restraint extending throughout the state is void. Dunlap *v.* Gregory, 6 Selden, 241. And the supreme court has held that a restraint extending through all the territory west of Albany is void. Lawrence *v.* Kidder, 10 Barb. 641. The plaintiff contends that in this country a restraint ought not to be held void unless it extends throughout the United States, because they are one country in respect to trade and business, and the power to grant patents and copyrights and to regulate trade is vested in the United States government. But we cannot regard this view as just. A monopoly extending throughout the state may be as really injurious to the people of the state as if it extended through the whole country. . . . . The plaintiff also contends that the restriction in this case is reasonable, because the territory of Massachusetts is comparatively small, and the business is the manufacture of an article which is used only by manufacturers of shoes. But we do not think the extent of territory embraced in a state affects the principle. Whatever may be the extent of the state, the monopoly restricts the citizen from pursuing his business unless he transfers his residence and his allegiance to some state or country. Its tendency is to drive business and citizens who are skilled in business from this to other states. The disposition to obtain monopolies which formerly prevailed is by no means extinct at the present day, nor is it confined to corporations. Combinations of men in business sometime accomplish such an object, and they often succeed in obtaining exorbitant profits from the public. With regard to the present

Taylor *v.* Blanchard.

Contract not to trade within Massachusetts held void by Massachusetts court.

within ten miles of a particular place; (*b*) not to practise as an attorney within London and 150 miles from thence; (*c*) not to practise as attorneys or solicitors *in Great Britain* for twenty years, without the consent of the vendee to whom the business was sold; (*d*) not to carry on trade as a horsehair manufacturer within 200 miles of Birmingham; (*e*) not to carry on trade as a milkman for twenty-four months within five miles from Northampton Square; (*f*) not to supply bread to the customers of a baker's shop, of which the lease and good-will were sold; (*g*) not to travel for any other commercial firm than that of the employers, within the district for which the traveller was employed; (*h*) not to run a coach within certain specified hours upon a particular road. (*i*)

Mode of measuring the space.

§ 522. Where there is a partial restraint as to *space*, the distance is to be measured from the place designated in a straight line on the map, (*k*) in the absence of any expressions indicating the intention of the parties to adopt a different mode of measurement. (*l*)

Where restraint general as to *place*, sale void. Examples. Hitchcock *v.* Coker.

523. On the other hand, where the restraint was general, as to *place*, the agreements have been held void; as in a covenant not to be employed in the business of a coal merchant for nine months. (*m*) In this case Parke B. said that he could not express the rule more clearly than was done by Tindal C. J. in Hitchcock *v.* Coker (6 Ad. & E. 456), when he said: "We agree in the general principle adopted by the court of king's bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can pos-

contract, the court are of opinion that it is contrary to the well established policy of the law and void." See More *v.* Bonnet, 40 Cal. 251.]

(*b*) Davis *v.* Mason, 5 T. R. 118.

(*c*) Bunn *v.* Guy, 4 East, 190.

(*d*) Whittaker *v.* Howe, 3 Beav. 383; this was on the ground of limitation of time (*sed quære?*), *post*, § 525.

(*e*) Harms *v.* Parsons, 32 L. J. Ch. 247.

(*f*) Procter *v.* Sargent, 2 M. & G. 20.

(*g*) Rannie *v.* Irvine, 7 M. & G. 969.

(*h*) Mumford *v.* Gething, 7 C. B. N. S. 305, and 29 L. J. C. P. 105.

(*i*) Leighton *v.* Wales, 3 M. & W. 545. [But a contract between the lessor and the lessee of a coal mine that the lessee should not give or accept any order for goods and merchandise on any other store than the lessor's was held an unlawful restraint of trade. Crawford *v.* Wick, 18 Ohio St. 190.]

(*k*) Mouflet *v.* Cole, L. R. 7 Ex. 70; L. R. 8 Ex. 32, in exchequer chamber.

(*l*) Atkyns *v.* Kinnier, 4 Ex. 776; Leigh *v.* Hind, 9 B. & C. 774; [Hoyt *v.* Holly, 39 Conn. 326.]

(*m*) Ward *v.* Byrne, 5 M. & W. 548.

sibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void." (*n*) In Hinde *v.* Gray (*o*) a covenant in a demise by a brewer, of his premises and business in Sheffield for ten years, that he would not during the continuance of the demise carry on the business of a brewer, or merchant, or agent, for the sale of ale, beer, or porter, in Sheffield, *or elsewhere*, was held void. But in the later cases, as will presently appear, such stipulations have been held *divisible;* and valid, so far as the particular place was concerned, although illegal as to the general restraint.

Hinde *v.* Gray. Not to trade in S. *or elsewhere* for ten years.

§ 524. The restraint may be general or limited as to *time* as well as *space*. In Ward *v.* Byrne (*p*) the covenant was that "the said Thomas Byrne shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he shall have left the employment of the said W. Ward." There was a verdict for plaintiff, and motion in arrest of judgment, on the ground that the agreement was void in law as against public policy. Parke B., commenting on the limitation of time, said: "When a *general* restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a *total* restriction in trade, limited only as to *time*." All the judges concurred in this view of the subject. In Hitchcock *v.* Coker (*q*) the exchequer chamber held that the restraint might be indefinite as to time, might extend to the whole lifetime of the party, when the restriction was otherwise reasonable; and the judges considered this point as settled law in Mumford *v.* Gething, (*r*) Erle C. J. saying: "I argued most strenuously in Hitchcock *v.* Coker, that a restriction indefinite in point of time avoided the contract, but the court of error decided against me."

Restraint as to time. Ward *v.* Byrne.

Hitchcock *v.* Coker.

Mumford *v.* Gething.

(*n*) [See Chappel *v.* Brockway, 21 Wend. 158; Lawrence *v.* Kidder, 10 Barb. 641; Hubbard *v.* Miller, 27 Mich. 15.]

(*o*) 1 M. & G. 195.

(*p*) 5 M. & W. 548.

(*q*) 6 Ad. & E. 438. See, also, Pemberton *v.* Vaughan, 10 Q. B. 87.

(*r*) 7 C. B. N. S. 305, and 29 L. J. C. P. 104. See Jones *v.* Lees, 26 L. J. Ex. 9.

§ 525. It would appear from these cases that the question of time is unimportant in determining whether a contract is void as being in restraint of trade. If the restraint be *general* as to *space*, a limitation as to *time* will not cure the illegality: if *partial* as to *space*, the absence of a limit as to *time* will not taint the contract with illegality. The decision of the master of the rolls, therefore, in Whittaker *v.* Howe (*s*) (*ante*, § 521), has been practically overruled in the later cases. (*t*)

Restraint as to time unimportant.

§ 526. It has already been seen that, in the leading case of Mitchell *v.* Reynolds, (*u*) Parker C. J. laid down the proposition that to render a particular or partial restraint legal, it was necessary that the contract should be made "upon a good and adequate consideration, so as to make it a proper and useful contract." The earlier cases went upon this doctrine, and the courts took into contemplation the *adequacy* of the consideration for the restraint. In Young *v.* Timmins (*x*) Lord Lyndhurst C. B. and Bayley and Vaughan BB. held the contract void, on the express ground that the consideration was inadequate, though no doubt the contract was also entirely unreasonable for want of mutuality, as pointed out by Bolland B., inasmuch as the agreement bound the workman to work for no one but his employers, and left them at liberty to employ him or not at their discretion. In Wallis *v.* Day (*y*) a contract was held valid as being of sufficient consideration, and not in general restraint of trade, where a carrier sold his business under an agreement, by which he entered into the vendee's service for life, at a stipulated weekly payment. Here there was mutuality and adequacy of consideration. But in Pilkington *v.* Scott, (*z*) in 1846, on a contract of the same nature, Alderson B. said: "The question in this case simply is, whether the rule ought to be made absolute, on the ground that this is a contract in restraint of trade, and has no adequate consideration to support it. If it be an unreasonable restraint of trade, it is void altogether; but if not it is lawful, the only question being whether there is a consideration to support it, (*z*[1]) *and the adequacy of the*

Courts will not inquire into *adequacy* of consideration.

Mitchell *v.* Reynolds overruled on this point.

Young *v.* Timmins.

Wallis *v.* Day.

Pilkington *v.* Scott.

(*s*) 3 Beav. 383.

(*t*) See remark of Patterson J. in Nicholls *v.* Stretton, 10 Q. B. 353. [But see Am. Law Reg. for Dec. 1880, p. 761.]

(*u*) 1 P. Wms. 181.

(*x*) 1 Cr. & J. 331.

(*y*) 2 M. & W. 273.

(*z*) 15 M. & W. 657.

(*z*[1]) [Weller *v.* Hersee, 10 Hun, 431.]

consideration the court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of Hitchcock *v.* Coker, (*a*) a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." The learned baron had himself been a member of the court in exchequer chamber, in 1837, which reversed the judgment of the king's bench, in Hitchcock *v.* Coker, and in that case Tindal C. J. delivered the unanimous opinion of the court of error. Upon the point now under consideration, the language of the opinion is as follows: "Undoubtedly in most, if not all the decided cases, the judges in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, *such consideration as is essential to support any contract not under seal*, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, *we feel ourselves bound to differ from that doctrine.* A duty would thereby be imposed on the court in every particular case which it has no means whatever to execute." This decision was held in Archer *v.* Marsh (*b*) to have settled the law on the principle that the parties must act on their own views as to the adequacy of the compensation. (*c*)

Hitchcock *v.* Coker.

Archer *v.* Marsh.

(*a*) 6 Ad. & E. 438.

(*b*) 6 Ad. & E. 966. See, also, Sainter *v.* Ferguson, 7 C. B. 716, and Hartly *v.* Cummings, 5 C. B. 247.

(*c*) [Guerand *v.* Dandelet, 32 Md. 561. In Perkins *v.* Clay, 54 N. H. 518, it appeared that one C. sold to H. his cart and business as a butcher for the sum of ninety dollars, and agreed not to carry on the same business

Perkins *v.* Clay.

Even if restraint be partial, and for good consideration, sale not valid if contract is unreasonable.

Mallan *v.* May.

§ 527. But even though the restraint be partial, and founded upon good consideration, the courts will refuse to enforce the contract if unreasonable, — and this is a question of law for the court, not of fact for the jury. (*d*) The whole doctrine on the subject, and the authorities, were reviewed in Mallan *v.* May, (*e*) where the promise was not to carry on, as principal, assistant, or agent, the profession of surgeon-dentist, or any branch thereof, in London, *or in any of the towns or places in England or Scotland*, where the other parties may have been practising, &c. &c. The principles of law were declared by Parke B., who gave the opinion of the court, after time for consideration, to be as follows: "If there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without

over the same route which he had formerly travelled, so long as H. should want to carry on the business. Subsequently H. sold to P. the cart and business as butcher for the sum of ninety dollars; and C., in consideration that H. released him from his former agreement, entered into a parol agreement with P. that he would not carry on the same business over the same route for a period of two years; it was held that there was a sufficient consideration for the promise from C. to P., and that the agreement was not within the statute of frauds. As to the statute of frauds, in this connection,

If by its terms the contract can be performed within a year, it is not within § iv. of the st. of frauds.

the rule is well established by the decisions, that the statute does not apply to any contract, unless by its express terms, or by reasonable construction, it is not to be performed, that is, is incapable in any event of being performed, within one year from the time it is made. If by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen; such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary. Though either of the parties may have it in his power to put an end to a contract within the year, yet, if independent of the exercise of such a power, the agreement cannot be performed within a year, it must be in writing. If the agreement can be fully performed by either of the parties within the year, and it is so performed, the agreement of the other party is not within the statute, though it may be impossible to perform it within a year. Blanding *v.* Sargent, 33 N. H. 239. In this case Bell J., referring to the decisions maintaining the above doctrines, said: "These decisions are almost equivalent to a repeal of this clause of the statute; but as they met the approval of the courts generally, and may be regarded as the settled construction of the statute, they may properly be considered as adopted by our legislature when the statute was re-enacted." See Lyon *v.* King, 11 Met. 411; Worthy *v.* Jones, 11 Gray, 168; Doyle *v.* Dixon, 97 Mass. 211; 1 Chitty Contr. (11th Am. ed.) 101, note (*y*), 102; Somerby *v.* Buntin, 118 Mass. 279, 286; Blake *v.* Cole, 22 Pick. 97; Packet Co. *v.* Sickles, 5 Wallace, 580.]

(*d*) [See Kellogg *v.* Larkin, 3 Chand. (Wis.) 133.]

(*e*) 13 M. & W. 511, and 11 M. & W. 653.

out any averment showing *circumstances which rendered such a contract reasonable*, the instrument is void. But if there are circumstances recited in the instrument (or probably if they appear by averment), *it is for the court to determine whether the contract be a fair and reasonable one or not.* And the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry." The learned baron discussed the question whether the limits assigned by the covenant before the court were reasonable, and adopted as safe law the proposition of Tindal C. J. in Horner *v.* Graves, (*f*) that "*whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void.*" (*g*) Applying this rule, the court then held that for such a profession as that of a dentist, the limit of London was not too large: (*h*) that the further restraint was unreasonable, and that the *contract was not illegal as a whole, because illegal in part;* that the stipulation as to not practising in London (*i*) was *valid, and was not affected by the illegality of the other part.* (*i*) This decision was followed in Green *v.* Price, (*k*) where an agreement not to carry on business

Restraint larger than necessary for protection of vendee renders contract void as to excess.

Green *v.* Price.

(*f*) 7 Bing. 743.

(*g*) [See per James V. C. in Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 354; Lawrence *v.* Kidder, 10 Barb. 641; Lange *v.* Werk, 2 Ohio St. 519; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133. As to the burden of proof in such cases, Chappel *v.* Brockway, 21 Wend. 158; Ross *v.* Sadgbeer, Ib. 166; Beard *v.* Dennis, 6 Ind. 200; Lord Campbell C. J. in Tallis *v.* Tallis, 1 E. & B. 404, 405. See the late and well considered case of Roussillon *v.* Roussillon, L. R. 14 Ch. Div. 351; 28 Weekly Rep. 623.]

(*h*) [See Warfield *v.* Booth, 33 Md. 63.]

(*i*) The court held that "London" meant the city of London, and did not include Great Russell Street, Middlesex. 13 M. & W. 517.

(*k*) 13 M. & W. 699.

as perfumers within the cities of London and Westminster, or the distance of 600 miles from the same respectively, was held valid as to London and Westminster, but void as to the 600 miles; and this was affirmed in Cam. Scacc. (*l*) It has also been held that where the contract is reasonable at the time when it is made, subsequent change of circumstances will not affect its validity. (*m*)

Contract valid if good when made.

§ 528. Contracts for the sale of lawsuits or interests in litigation are, in certain cases, also void at common law, as being against public policy. *Champerty* is a contract for the purchase of another's suit or right of action; or a bargain by which a person agrees to carry on a suit at his own expense for the recovery of another's property on condition of dividing the proceeds. This, as well as *maintenance*, is an offence at common law, and cannot, therefore, form the subject of a valid contract. Maintenance, according to Lord Coke, (*n*) "is derived of the verb *manutenere*, and signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right."

Sales of lawsuits.

Champerty and maintenance.

§ 529. In Stanley *v.* Jones (*o*) an agreement by a man who had evidence in his possession respecting a matter in dispute between third persons, and who professed to be able to procure more, to purchase from one of the contending parties, at the price of this evidence, a share of the money to be recovered by it, was held to be champertous; and champerty was defined to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute or some profit out of it. "The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation as the purchase or assignment of a matter in litigation for the purpose of maintaining the action." And the court held that in this restricted sense the offence of champerty remains the same as for-

Stanley *v.* Jones.

(*l*) 16 M. & W. 346. See, also, Nicholls *v.* Stretton, 10 Q. B. 346, and Tallis *v.* Tallis, 1 E. & B. 392; 22 L. J. Q. B. 185. But see Alsopp *v.* Wheatcroft, L. R. 15 Eq. 59; [Erie Railway Co. *v.* Union Locomotive & Express Co. 6 Vroom, 240; Dean *v.* Emerson, 102 Mass. 480.]

(*m*) Elves *v.* Crofts, 10 C. B. 241; Jones *v.* Lees, 1 H. & N. 189.

(*n*) Co. Lit. 368 b; 4 Black. Com. 135; Elliott *v.* Richardson, L. R. 5 C. P. 744.

(*o*) 7 Bing. 369; and see Sprye *v.* Porter, 7 E. & B. 58; 26 L. J. Q. B. 64. [But see Sedgwick *v.* Stanton, 4 Kernan, 289.]

merely. (*p*) In Hutley *v.* Hutley (*q*) it was held that mere relationship between the parties, or even some collateral interest, could not render valid an agreement otherwise champertous for dividing the proceeds of an action. Taking a transfer of an interest in litigation as a security is not champertous, and is a valid contract. (*r*)

Hutley *v.* Hutley.

Taking an interest in litigation as a security not champertous.

SECTION II. — CONTRACTS ILLEGAL BY STATUTE.

§ 530. When contracts are prohibited by statute, the prohibition is sometimes express, and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced. Of this there is no doubt. (*s*)

Prohibition express or implied.

Implied whenever penalty is imposed.

(*p*) See, further, as to maintenance and champerty, Re Masters, 4 Dowl. 18; Findon *v.* Parker, 11 M. & W. 675; Simpson *v.* Lamb, 7 E. & B. 84, and 26 L. J. Q. B. 121; Flight *v.* Leman, 4 Q. B. 883; Cook *v.* Field, 15 Q. B. 460; Bell *v.* Smith, 5 B. & C. 188; Williamson *v.* Henley, 6 Bing. 299; Pechell *v.* Watson, 8 M. & W. 691; Shackell *v.* Rosier, 2 Bing. N. C. 634; Williams *v.* Protheroe, 3 Y. & J. 129, in Cam. Scacc.; S. C. 5 Bing. 309; Earle *v.* Hopwood, 9 C. B. N. S. 566; 30 L. J. C. P. 217; Pince *v.* Beattie, 32 L. J. Ch. 734; Prosser *v.* Edmonds, 1 Y. & C. 481; Knight *v.* Bowyer, 27 L. J. Ch. 521; Bainbridge *v.* Moss, 3 Jur. N. S. 58; [Sandford Ch. in Thallhimer *v.* Brinckerhoff, 3 Cowen, 623, 643 *et seq.* In Peck *v.* Briggs, 3 Denio, 107, Bronson C. J. said: "In the late revision of the laws [of New York], nothing was left of the old doctrine of maintenance beyond a prohibition against taking a conveyance of lands in suit, buying or selling pretended titles, and conspiracies falsely to move or maintain suits." And in Sedgwick *v.* Stanton, 4 Kernan, 301, Selden J. said: "I still think, in view of the manifest tendency of modern judicial opinions, as well as of the plain scope and intent of our legislation upon the subject, that not a vestige of the law of maintenance, including that of champerty, now remains in this state, except what is contained in the Revised Statutes." See Whitaker *v.* Cone, 2 John. Cas. 58; Belden *v.* Pitkin, 2 Caines, 147; Sweet *v.* Poor, 11 Mass. 549; Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489; Allen *v.* Hawks, 13 Pick. 79; Smith *v.* Thompson, 7 B. Mon. 305; Caldwell *v.* Shepherd, 6 Mon. 392; Redman *v.* Sanders, 2 Dana, 70; Key *v.* Vattier, 1 Ohio, 132.]

In New York maintenance is now solely a statute offence.

(*q*) L. R. 8 Q. B. 112.

(*r*) Anderson *v.* Radcliffe, E., B. & E. 806–819; 28 L. J. Q. B. 32; in error, 29 L. J. Q. B. 128.

(*s*) Bensley *v.* Bignold, 5 B. & Ald. 335; Forster *v.* Taylor, 5 B. & Ad. 887; Cope *v.* Rowlands, 2 M. & W. 149; Chambers *v.* Manchester & Milford Railway Co. 5 B. & S. 588; 32 L. J. Q. B. 268; In re Cork & Youghal Railway Co. L. R. 4 Ch. Ap. 748; [Woods *v.* Armstrong, 54 Ala. 150; Wadleigh *v.* Develling, 1 Bradwell (Ill.), 596; Caldwell *v.* Bridal, 48 Iowa, 15; Durgin *v.* Dyer, 68 Me. 143; James *v.* Josselyn, 65 Ib. 138. No action lies in Massachusetts to recover for the price of milk sold by the can, at

§ 531. But the question frequently arises, whether, on the true construction of a statute, the contract under consideration has really been prohibited, and in determining this point much weight has been attributed to a distinction held to exist between two classes of statutes, those passed merely for revenue purposes, and those

Distinction between statutes passed for revenue purposes and others.

wholesale, in cans not sealed according to the requirements of the statute of that state, although the state sealer refused to seal them for the statute price. Miller *v.* Post, 1 Allen, 434. Hoar J. in this case said: "The English decisions are numerous and clear, which establish the doctrine that where a contract is made in a manner prohibited by a statute passed for the protection of a buyer, no action can be maintained upon it; and that, where the statute directs the mode in which the contract shall be made, not following the direction is equivalent to disobeying a prohibition. And, if the statute imposes a penalty upon the act done, this will make the contract void in like manner as if it were in terms prohibited, because a penalty implies a prohibition. The same principles have been frequently recognized by this court. Wheeler *v.* Russell, 17 Mass. 258; Allen *v.* Hawks, 13 Pick. 82; Pattee *v.* Greely, 13 Met. 284; Libbey *v.* Downey, 5 Allen, 299; Smith *v.* Arnold, 106 Mass. 269; Sawyer *v.* Smith, 109 Ib. 220; Prescott *v.* Battershy, 119 Ib. 285. The contract upon which the plaintiff declares was made in direct contravention of the requirements of the statute. He sold his milk by the can, as a measure, and his cans were not sealed. The statute required all cans used in the sale of milk to be sealed, and imposed a penalty for a failure to comply with its provisions. This made a sale of milk in cans which were not sealed an unlawful and prohibited sale." See Springfield Bank *v.* Merrick, 14 Mass. 322; Russell *v.* Degrand, 15 Ib. 35; Shaw C. J. in White *v.* Buss, 3 Cush. 449, 450; Coombs *v.* Emery, 14 Me. 404; Seidenbender *v.* Charles, 4 Serg. & R. 159; Mitchell *v.* Smith, 1 Binn. 118; S. C. 4 Dall. 269; Sharp *v.* Teese, 4 Halst. 352; Bank of Rutland *v.* Parsons, 21 Vt. 199; Territt *v.* Bartlett, Ib. 184; Bancroft *v.* Dumas, Ib. 456; Pray *v.* Burbank, 10 N. H. 377; White *v.* Franklin, 22 Pick. 181; Atlas Bank *v.* Nahant Bank, 3 Met. 581; Harris *v.* Runnels, 12 How. (U. S.) 80. The validity of a contract is to be determined by the law of the place where it is made. Bliss *v.* Brainard, 41 N. H. 256, 261. In this case Fowler J. said: "Generally speaking, the validity or invalidity of a contract is to be determined by the law of the place where it is made. If valid there, it is, by the general law of nations, held to be valid everywhere, by the tacit or implied consent of the parties; if void or illegal there, as a general rule, it is held void and illegal everywhere. The exception to this rule as to the validity of contracts is, that contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; which are against good morals, or against religion, or against public rights; and those opposed to national policy or national institutions; are deemed nullities in every country affected by such considerations, though they may be valid by the laws of the place where they are made. But if a contract is void in its origin, it seems difficult to find any principle upon which any subsequent validity can be given to it in any other country." Whitney *v.* Whiting, 35 N. H. 457; Backman *v.* Jenks, 1 Alb. L. J. 123. As to the acts and circumstances which indicate that a contract of sale has been made at a particular place, or in a particular state, see Boothbay *v.* Plaisted, 51 N. H. 437; Cor-

When contract is made in manner prohibited by statute, no action lies upon it.

Generally validity depends on law of place where contract made.

which have in contemplation, wholly or in part, the protection of the public, or the promotion of some object of public policy. (*t*) It is necessary to review the cases, as the principles established by them seem to be imperfectly stated in some of the text-books.

§ 532. The leading case on this point is Johnson *v.* Hudson,(*t*[1]) decided by the king's bench in 1809. Different statutes had provided, 1st, that all persons dealing in tobacco should, before dealing therein, take out a license under penalty of 50*l.*; and 2d, that no tobacco should be imported, either wholly or in part manufactured, under penalty of forfeiture of the tobacco, the package, and the ship. In this state of the law, the plaintiffs, who had never before dealt in that article, received a consignment of tobacco manufactured into cigars, *which they duly entered at the custom-house*, and then sold to defendant without taking out a license. The court held that the action was maintainable, observing "that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; *nor any clause making the contract of sale illegal*, but at most it was *the breach of a mere revenue regulation* which was protected by a specific penalty; and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the act." Johnson *v.* Hudson.

§ 533. Next, in 1829, Brown *v.* Duncan (*u*) came before the same court. The statutes provided, 1st, that no distiller should, under penalty, deal in the retail sale of spirits within two miles of the distillery; and 2d, that in taking out a license for distilling, the names of the persons taking out the license should be inserted. One of five partners in a distillery was engaged in the retail trade within two miles of the distillery, and his name was, it seems, intentionally omitted in taking out the distillers' license. The partners then appointed an agent to sell their whiskey in London, and the defendant guarantied the Brown *v.* Duncan.

ning *v.* Abbott, 54 Ib. 469, 470; Hill *v.* Spear, 50 Ib. 253; Finch *v.* Mansfield, 97 Mass. 89; Dolan *v.* Green, 110 Ib. 322; Backman *v.* Jenks, 1 Alb. L. J. 123.]

(*t*) [New Brunswick Oil Works Co. *v.* Parsons, 20 U. C. Q. B. 531; Mullen *v.* Kerr, 6 U. C. Q. B. (O. S.) 171. As to the effect of a non-compliance with the U. S. Internal Rev. St. in relation to stamping certain instruments, see Campbell *v.* Wilcox, 10 Wall. 421; Harper *v.* Clark, 17 Ohio St. 190; Stewart *v.* Hopkins, 30 Ib. 502; Hitchcock *v.* Sawyer, 39 Vt. 412; Desmond *v.* Norris, 10 Allen, 250.]

(*t*[1]) 11 East, 180.

(*u*) 10 B. & C. 93. See, also, Wetherell *v.* Jones, 3 B. & Ad. 221.

fidelity of the agent. In the action by the partners to enforce this contract, its illegality was pleaded. The court held that the plaintiffs could recover on the authority of Johnson *v.* Hudson, saying "there has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt in order to secure, as far as may be, the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. . . . . These cases are very different from those where the provisions of acts of parliament have had for their *object the protection of the public*, such as the acts against stock-jobbing and the acts against usury. It is different, also, from the case where a sale of bricks required by act of parliament to be of a certain size was held to be void because they were under that size. There the act of parliament operated as a *protection to the public as well as to the revenue*, securing to them bricks of particular dimensions. Here the clauses of the act of parliament had *not for their object to protect the public, but the revenue only.*"

Cope *v.* Rowlands.

§ 534. In 1836 Cope *v.* Rowlands (*x*) was decided in the exchequer, and it was held that a city of London broker could not maintain an action for his commissions in buying and selling stock, unless duly licensed according to the 6 Anne, c. 16, s. 4, which provides that if any person should act as a broker in making sales, &c. without such license, he shall forfeit 25*l.* "for every such offence." In the course of the argument, Parke B. said: "Very considerable doubt was thrown on the distinction which has been taken between breaches of laws passed for revenue purposes and others, in the case of Brown *v.* Duncan, and when it comes to be considered, I think that distinction will be overruled." The court took the case under consideration, and the decision was delivered by the same learned baron, who again said: "It may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is whether the statute *means to prohibit the contract.*" Notwithstanding this statement, the learned baron went on to say that the question before the court was whether the stat-

(*x*) 2 M. & W. 149; and see Ferguson *v.* Norman, 5 Bing. N. C. 76, approving Cope *v.* Rowlands.

ute under discussion "is meant *merely* to secure a revenue to the city, ... or whether *one* of the *objects be the protection of the public. . . . . On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; in the latter it is.*" The court then decided that the benefit and security of the public formed *one* object of the statute, and that the plaintiffs were not entitled to recover.

§ 535. Again, in 1845 the same point was discussed in the same court, in Smith *v.* Mawhood, (*y*) where the defence in an action for goods sold and delivered was based on the allegation that the goods were tobacco, and that the plaintiff had not complied with the law requiring him to have his name painted on the house in which he carried on his business, in the manner specified in the law, under penalty that the person so offending should forfeit 200*l.* Held that the plaintiff could maintain his action. Parke B. said: "I think the object of the legislature was not to *prohibit a contract* of sale by dealers who have not taken out a license pursuant to the act of parliament. If it was, they certainly could not recover, although the prohibition were *merely* for the purpose of revenue. But, looking to the act of parliament, I think its object was not to vitiate the contract itself, but only to *impose a penalty on the party offending, for the purpose of the revenue.*" The other judges concurred, and Alderson B. pointed out, as a controlling circumstance in construing the statute, that the penalty was "for carrying on the trade in a house in which the requisites were not complied with: and that there is no addition to his criminality if he makes fifty sales of tobacco in such a house." (*z*) This distinction seems to be as sound as it is acute. In Cope *v.* Rowland the broker was not allowed to recover, because, by the law, *each sale was an offence, punished by a separate penalty;* but in Smith *v.* Mawhood there was but one offence, punished by but one penalty, viz. the *offence of failing to paint a proper sign on the house in which the business was done.* Making a sale in such a house was not declared by the law to be an offence.

Smith *v.* Mawhood.

§ 536. In the court of common pleas, in 1847, all the foregoing cases were cited and considered in Cundell *v.* Dawson. (*a*) At the close of the argument, Wilde C. J.

Cundell *v.* Dawson.

(*y*) 14 M. & W. 463.

(*z*) [A similar decision was made in Larned *v.* Andrews, 106 Mass. 435. So, also, in Aiken *v.* Blaisdell, 41 Vt. 655, 666; Pope *v.* Beals, 108 Mass. 561.]

(*a*) 4 C. B. 376.

said, that considering the diversity of *dicta* and decisions on the subject, the court would not pronounce any judgment without looking into the cases more carefully, and the matter was therefore held under advisement from the 23d April to 8th May, when the chief justice delivered the opinion of the court. The action was for the price of coals, and the defence was that the plaintiff had violated the statute 1 & 2 Vict. c 101, by failing to deliver to the defendant a ticket as required by that statute, stating the quantity and description of the coals delivered. The statute directed such delivery, under penalty, in case of default of 20*l.* "for every such offence." The chief justice said: "The statutes which have given rise to the question of the right to recover the price of goods by sellers who have not complied with the terms of such statutes are of two classes: the one class of statutes having for their *object the raising and protection of the revenue;* the other class of statutes being directed either to the *protection of buyers* and consumers, or to some *object of public policy.* The present case arises upon a statute included in the latter class. . . . . The class of statutes enacted simply for the security of the revenue do not apply to the present case; and various determinations which are contained in the books, upon the construction of those statutes, and the effect of a non-compliance with their enactments by the seller of goods, rest upon principles not applicable to the present case." The court then held, on the authority of Little *v.* Pool, (*b*) that the coal acts (*c*) were intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

§ 537. In 1848 the same court adverted to the same distinction in Ritchie *v.* Smith. (*d*) The case was a very clear one. It was a bargain between parties, by which the buyer was to be enabled to carry on a retail trade in spirits on part of the vendor's premises, under the vendor's license, so as to make one license cover both trades. The statute 9 Geo. 4, c. 61, inflicted a penalty when liquor was sold to be drunk on the premises, without such license, of not more than 20*l.* nor less than 5*l.*, "for every such offence." Wilde C. J. said that "it is impossible to look at this agreement without seeing that the parties

Ritchie *v.* Smith.

(*b*) 9 B. & C. 192.

(*c*) The coal act, 1 & 2 Vict. c. 101, does not apply where coals are unloaded directly from the vessel in which they were shipped on to the wharf of the purchaser. Blanford *v.* Morrison, 15 Q. B. 724, and 19 L. J. Q. B. 533.

(*d*) 6 C. B. 462.

contemplated doing an illegal thing, in the infraction of a law enacted *not simply for revenue purposes*, but for the safety and protection of the public morals." All the judges, Coltman, Maule, and Williams, put the judgment on the same ground, that the law was made *not merely for revenue purposes*, but for the protection of the public morals. (*e*)

General rules on the distinction between the two classes of statutes.

§ 538. The propositions that seem fairly deducible from the foregoing authorities are the following: First. That where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that parliament has prohibited it, and it is therefore void. (*f*) Secondly. That when the question is *whether* a contract has been prohibited by statute, it *is* material, in *construing the statute*, to ascertain whether the legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter that it was. Thirdly. That in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, on the offence of failing to comply with the requirement of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to *prevent the dealing*, to *prohibit the contract*, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced. (*g*)

Acts relative to printers.

§ 539. It is quite in accordance with these principles that in Bensley *v.* Bignold (*h*) it was held by the common pleas that a printer who had omitted to affix his name to a

(*e*) It is not a fraud on the revenue, nor illegal, to sell to an unlicensed person beer which is to be retailed by a licensed person at a public house. Brooker *v.* Wood, 5 B. & Ad. 1052.

(*f*) [*Ante*, § 530, note (*s*).]

(*g*) [Larned *v.* Andrews, 106 Mass. 435; Aiken *v.* Blaisdell, 41 Vt. 655, 666. There is an important distinction between statutes which impose a penalty for the purpose of prohibiting a contract, and those where the penalty is imposed for some other purpose than that of making the contract illegal. Lewis *v.* Welch, 14 N. H. 294; Favor *v.* Philbrick, 7 Ib. 340. See, also, the remarks of Wilde J. in White *v.* Franklin Bank, 22 Pick. 184; and in Lowell *v.* Boston & Lowell R. R. Co. 23 Ib. 32; Schermerhorn *v.* Tolman, 4 Kernan (N. Y.), 93, 124, 125.]

(*h*) 5 B. & A. 335.

Bensley v. Bignold.

book, in violation of 39 Geo. 3, c. 79, s. 27, which punishes such omission by a penalty of 20*l.* *for every copy published*, could not recover for work and labor done, and materials furnished. The statute was declared to have been enacted for public purposes. So, also, in Forster *v.* Taylor, (*i*) a farmer was held not entitled to recover the price of butter sold because he had packed it in firkins, not marked, in violation of the prohibition of the statute, 36 Geo. 3, c. 88; and in Law *v.* Hodson (*k*) a vendor failed in his action because his bricks had been sold of smaller dimensions than was permitted by the statute 17 Geo. 3, c. 42. In both these statutes a penalty was imposed *for every offence*. In Lightfoot *v.* Tenant (*l*) the sale was of lawful goods, but they were sold knowingly for the purpose of being shipped on board of foreign ships trading to the East Indies, and by the 7 Geo. 1, c. 21, s. 2, all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

Acts relative to sales of butter.

Forster v. Taylor.

Acts relative to the sale of bricks.

Law v. Hodson.

East India trade acts.

Lightfoot v. Tenant.

§ 540. There have been numerous decisions, also, under the various statutes which have been passed, modified, and repealed from time to time, for ascertaining and establishing uniformity of weights and measures, all of which are quite in accordance with those above reviewed. (*m*) The statute 1 & 2 W. 4, c. 32, prohibits the sale of birds of game after the expiration of ten days from the respective days in each year on which it becomes unlawful under the act to kill or take such birds. This act includes live game. (*n*) The 17th section authorizes every person who shall have obtained a game certificate to sell game to a licensed dealer, with a proviso that no gamekeeper shall sell any game, except for account and on the written authority of his master, whenever his game certificate has

Weights and measures acts.

Game laws.

(*i*) 5 B. & Ad. 887.

(*k*) 11 East. 300; and see a case on the game laws, Helps *v.* Glenister, 8 B. & C. 553.

(*l*) 1 B. & P. 551.

(*m*) See Rex *v.* Major, 4 T. R. 750; Rex *v.* Arnold, 5 T. R. 353; Tyson *v.* Thomas, 1 M'Cl. & Y. 119; Owens *v.* Denton, 1 C., M. & R. 711; Hughes *v.* Humphreys, 3 E. & B. 954, and 23 L. J. Q. B. 356; Jones *v.* Giles, 10 Ex. 119, and 23 L. J. Ex. 292; and in Cam. Scacc. 24 L. J. Ex. 259, and 11 Ex. 393; Watts *v.* Friend, 10 B. & C. 446; [Miller *v.* Post, 1 Allen, 434; Smith *v.* Arnold, 106 Mass. 269.]

(*n*) Loome *v.* Bayly, 30 L. J. M. C. 31; but see, also, Porritt *v.* Baker, 10 Ex. 759.

cost less than 3*l.* 13*s.* 6*d.* The 25th section prohibits, under penalty of not more than 2*l.* for each head of game, the offence of selling game by an unlicensed person, who has not obtained a game certificate, or of selling, even when possessed of a game certificate, to any other person than a licensed dealer; but, by the 26th section, the prohibition does not extend to an innkeeper or tavern-keeper who sells to his guests, for consumption in his house, game bought from a licensed dealer. The 27th section imposes penalties on the buyer of game who buys from one not a licensed dealer, unless the purchase be made *bonâ fide* at a shop or house where a board is affixed to the front, purporting to be the board of a licensed dealer in game.

Gaming, by means of time bargains for sale of goods.

§ 541. The statute of 8 & 9 Vict. c. 109, s. 18, provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

§ 542. At common law, wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy were not prohibited. (*o*) Since the passage of the above

(*o*) Sherborn *v.* Colebach, 2 Vent. 175; Johnson *v.* Lansley, 12 C. B. 468; Dalby *v.* India Life Assurance Co. 15 C. B. 365; 24 L. J. C. P. 2, 6. [A wager is not a valid contract in New Hampshire; Winchester *n.* Nutter, 52 N. H. 507; Perkins *v.* Eaton, 3 Ib. 152; Hoit *v.* Hodge, 6 Ib. 104; Clark *v.* Gibson, 12 Ib. 386; nor in Maine; Lewis *v.* Littlefield, 15 Maine, 233. Judicial opinions in Massachusetts have been adverse to an action on a wager; Shaw C. J. in Ball *v.* Gilbert, 12 Met. 399; Sampson *v.* Shaw, 101 Mass. 150; Amory *v.* Gilman, 2 Ib. 1; Babcock *v.* Thompson, 3 Pick. 446. But if the money is demanded of the stakeholder before he pays it to the winner, the depositor can recover from the stakeholder or the winner, if the money has been paid to him. Morgan *v.* Beaumont, 121 Mass. 7; McKee *v.* Manice, 11 Cush. 357; Patterson *v.* Clark, 126 Mass. 531; so in Vermont; Collamer *v.* Day, 2 Vt. 144; Tarleton *v.* Baker, 18 Ib. 9. See Carrier *v.* Brannan, 3 Cal. 328; Bun *v.* Riker, 4 John. 426; Phillips *v.* Ives, 1 Rawle, 37. See, further, on this subject, 1 Chitty Contr. (11th Am. ed.) 735–738, and cases in notes; Hasket *v.* Wootan, 1 Nott & Mc. 180; Martin *v.* Terrell, 12 Sm. & M. 571; Ryerson *v.* Derby, 1 Russell & Chesley (N. S.), 13; Doxey *v.* Miller, 2 Bradwell (Ill.), 30; Perkins *v.* Eaton, 3 N. H. 155; Whitwell *v.* Carter, 4 Mich. 329; Wilkinson *v.* Tousley, 16 Minn. 299; Petillon *v.* Hipple, 90 Ill. 420; Richardson *v.* Kelley, 85 Ib. 491; Brown *v.* Thompson, 14 Bush, 538; Gilmore *v.* Woodcock, 69 Me. 118; McDonough *v.* Webster, 68 Ib. 530; Grabam *v.* Thompson, Ir. R. 2 C. L. 64; Diggle *v.* Higgs, 2 Ex. D. 422; Bailey *v.* McDuf-

Wagers.

statute, however, cases have arisen which present the question whether an executory contract for the sale of goods is not a device for indulging in the spirit of gaming which the statute was intended to repress. It has already been shown (*ante*, §§ 82, 83) that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them. But such a contract is only valid where the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute. (*p*) In Grizewood *v.* Blane, (*p*[1]) where the contract was for the future delivery of railway shares, Jervis C. J. left it to the jury to say "what was the plaintiff's intention, and what was the defendant's intention at the time of making the contracts, whether either party really meant to purchase or to sell the shares in question, telling them that if they did not the contract was, in his opinion, a gambling transaction, and void." The ruling was held to be correct. (*q*) In the case of Rourke *v.* Short (*r*) the plaintiff and defendant, while discussing the terms of a bargain for the sale of a parcel of rags, differed as to their recollection of the price at which a parcel

Grizewood *v.* Blane.

Rourke *v.* Short.

fee, 2 Pugsley & Burbridge (N. B.), 26; M'Elwaine *v.* Mercer, 9 Ir. C. L. R. 13. In Alvord *v.* Smith, 63 Ind. 58, it was decided that offering a premium to the owner of the horse that could make the best time did not constitute a bet or wager, was not unlawful or against public policy, and that the sum promised could be recovered by the owner of the horse making such best time.]

(*p*) [Kirkpatrick *v.* Bonsall, 72 Penn. St. 155; Bigelow *v.* Benedict, 70 N. Y. 202; Parsons *v.* Taylor, 12 Hun, 252; Yerkes *v.* Salomon, 11 Ib. 471; Story *v.* Salomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 20 Alb. L. J. 14; Re Green, 7 Biss. 338; Clarke *v.* Foss, Ib. 540; Rumsey *v.* Berry, 65 Me. 570; Byers *v.* Beattie, Ir. R. 2 C. L. 220; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685; Williams *v.* Tiedeman, 6 Mo. App. 269; Waterman *v.* Buckland, 1 Ib. 45; Gregory *v.* Wendell, 39 Mich. 337; 40 Ib. 432; Marshall *v.* Thurston, 3 Lea (Tenn.), 740.]

(*p*[1]) 11 C. B. 536. See the same case as to the pleadings in 21 L. J. C. P. 46; also, Knight *v.* Cambers, and Knight *v.* Fitch, 15 C. B. 562, 566; Jessopp *v.* Lutwyche, 11 Ex. 614.

(*q*) [*Ante*, § 82, note (*s*).]

(*r*) 5 E. & B. 904; 25 L. J. Q. B. 196.

had been previously invoiced by the plaintiff to the defendant, and then agreed to a sale on these terms, viz. that the rags should be paid for at six shillings a cwt. if the plaintiff's, but only three shillings a cwt. if the defendant's statement as to the former sale should turn out to be correct, six shillings being more and three shillings being less than the value of the goods per cwt. It was held that although the goods were really to be delivered and the price to be paid, yet the terms of the bargain included a wager that rendered it illegal.

§ 542 *a*. [There is the following provision in Illinois: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, ... shall be fined, &c. . . . . and all contracts made in violation of this section shall be considered gambling contracts and shall be void." R. S. of Ill. (1874), c. 38, § 130. In Lyon *v.* Culbertson (r^1) the facts were as follows: The appellees brought suit against the appellants to recover damages for a failure to perform a contract for the purchase of a certain quantity of wheat. The contract was embodied in the following instrument: "Chicago, August 14, 1872. We have this day bought of Culbertson, Blair & Co., 10,000 bushels of No. 2 Spring wheat in store, at $\$1.57\frac{1}{2}$ per bushel, to be delivered at seller's option, during August, 1872. This contract is subject in all respects, to the rules and regulations of the board of trade of the city of Chicago.

J. B. LYON & Co."

Lyon *v.* Culbertson.

The rules and regulations were as follows: "Rule IX. Margins on Time Contracts. Section 1. On all time contracts, made between members of the association, deposits for security and margin may be demanded by either or both parties. . . . . When margins are demanded, the party called upon shall be entitled to deduct from the margin called any difference there may be in his favor between the market price and the contract price of the property bought or sold. Any deposit made to equalize the contract price with the market price shall be considered as a deposit for security, and not margin. Sec. 2. Should the party called upon, as herein provided for, fail to respond within the next banking hour, it shall thereafter be optional with the party making such call, by giving notice to the delinquent, to consider the contract

(r^1) [83 Ill. 33.]

filled at the market value of the article at the time of giving such notice; and all differences between said market value and the contract price shall be settled the same as though the time of said contract had fully expired." On the 20th of August the appellees demanded further margins, but Lyon failed to respond within the hour allowed. Culbertson therefore elected to consider the contract filled, and charged the appellants with the difference between the purchase price and the market price at time of notice. The difference was the matter in dispute. The jury found for the plaintiffs. A motion for a new trial was overruled, and judgment entered for the plaintiffs, from which the defendants appealed, and on the appeal the judgment below was reversed. Walker J. said: . . . . "But the parties having incorporated the rules of the board of trade into their agreement, the question arises as to its effect on the contract. It in terms provides that when either party shall be in default in putting up margins, after notice and within the next banking hour, the party calling for them shall thereupon have the right to consider the contracts filled at the market value at the time of giving such notice, and all differences between such market value and the contract price shall be settled the same as though the time for fulfilling the contract had fully expired. This, in terms, does not require an offer, or an ability or willingness to perform on either part. It only, in terms, requires a mental operation, unaccompanied with any physical act. Until the expiration of the hour, and for a period of time afterwards, the party claiming a default has by the terms of the rule the option to consider the contract filled or not, as he may choose. Had the agreement required the party, before he exercised the option, to have made an offer, or at least to have shown that he had the ability to fulfil his part of the agreement, and was willing to do so, then the contract would have conformed to legal principles; but, under the terms of this contract, the appellees were not required to have a bushel of grain they could have delivered at the place of performance. It is true the contract speaks of wheat 'in store,' but neither wheat nor warehouse receipts were offered, nor was it shown that the appellees had any wheat in Chicago, and it could not have been in the contemplation of the parties to deliver or receive it elsewhere, or it would have been so stated in the contract. . . . . The fact that no wheat was offered on demand shows, we think, that neither

party expected the delivery of any wheat, but in case of default in keeping margins good or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions should be permitted, it must eventually lead to what are called corners, which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to the trade. A contract, to be then settled, is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is in all but name a gambling on the price of the commodity, and the change of name never changes the quality or nature of things. It has never been the policy of the law to encourage, or even sanction, gaming transactions, or such as are injurious to trade or are immoral in their tendency; and the old maxim, that courts will always suppress new and subtile inventions in derogation of the common law would be applicable to such contracts." In Logan *v.* Brown, (r^2) Craig J. said: . . . . "The statute does not prohibit a party from selling or buying grain for future delivery; such was not the purpose of the statute; nor can it make any difference, as to the legality of the contract, whether the party who sells for future delivery, at the time the sale is made, has on hand the grain; a party may sell to-day a certain quantity of grain for delivery in a week or a month hence, and then go upon the market and buy the grain to fill the contract. (r^3) In Sawyer *v.* Taggart (r^4) the Kentucky court passed upon this point. Hamilton & Bros. were commission merchants in Louisville, and Sawyer & Co. were commission merchants in New York. In December, 1875, and frequently thereafter, the Hamiltons ordered Sawyer & Co. to buy for their account for future delivery certain quantities of cotton, pork, and lard. It was understood that the purchases would be made according to the regu-

The parties must contemplate the actual delivery and receipt of the goods.

Logan *v.* Brown.

Sawyer *v.* Taggart.

(r^2) [81 Ill. 415.]

(r^3) [Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Cease, Ib. 328; § 82, *ante*.]

(r^4) [14 Bush, 727.]

lations of trade in New York. When the time approached for the delivery of the goods Hamilton & Bros. ordered the same to be sold and other goods purchased for delivery at certain designated times. The purchases were made in the name of Sawyer & Co., as principals, because Hamilton Bros. were not members of the exchange, and when Sawyer & Co. made sales, as above indicated, at less than the purchase price, they advanced the amount necessary to cover the loss and advances and brokerage. The recovery of the sums so paid was the chief object of the suit. The claim was resisted on the ground that the transactions were mere illegal wagers on the market prices of cotton, pork, and lard, and that it was not intended that the goods should be delivered, but was only a contract to pay differences. It appeared that Sawyer & Co. in each instance when directed to buy went upon the exchange and entered into valid contracts with third persons for the delivery of such goods as had been ordered. One of the members of the firm of Hamilton Bros. testified that his firm never intended to receive the goods, but that they desired to have made on their account contracts which they could enforce if they chose to do so; that their intention was to resell the goods before the time arrived for delivery, and that this latter intention was known to Sawyer & Co. It also appeared that Sawyer & Co. had sold for Hamilton & Bros. goods corresponding to those contracted for before the maturity of the contracts by which Hamilton Bros. were to acquire property in the goods. By rules of exchange the delivery of goods sold for future delivery was fixed as follows: "The seller shall give written notice to the buyer that he will deliver on a named day. If the seller has resold the goods, he passes the notice to his vendee, and so on until it reaches a vendee who has not sold. The seller must then deliver to the buyer a transferable order, or an order on a warehouse or place of delivery, before 12 M. of the day preceding that on which the delivery is due. If the buyer has not resold, he is bound to present the order and receive and pay for the goods. If he has sold he passes the order to his vendee, and so on until it reaches a vendee who has not sold, and he is bound to receive and pay for the goods at the original contract price, the difference between that price and the price of each subsequent sale being settled by the immediate parties to such sales." It appeared that in every instance notice of delivery and the usual

delivery orders were received by Sawyer & Co. from the seller and were passed by them to those to whom they had sold by direction of the Hamiltons. The court held the contracts unobjectionable, and Cofer J. said: "Sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there cannot, in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when by the rules of trade and the terms of his contract the person to whom he sells will be bound to receive the goods from the original seller, and pay him the contract price. The objection to commercial gambling is that men enter into fictitious contracts, and buy and sell upon contracts never intended to be performed by themselves or any one else, but the character of their transactions being unknown to the public, they are regarded as real, and so affect prices and trade without having any legitimate connection in fact with either. But if A., desiring to engage in trade, enters into a contract with B. for the purchase of an article for future delivery and becomes bound to receive and pay for it, that is a real transaction, and is valid whether made in the country or on change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it and thereby procure another to receive and pay for it in his stead?"]

But it is not necessary that the parties should deliver and receive in person.

§ 543. By the statute 24 Geo. 2, c. 40, s. 12 (usually termed the Tippling Act), as amended by the 25 & 26 Vict. c. 38, no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bonâ fide*, to the amount of 20*s.* or upwards, except in cases when sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser, in quantities not less at one time than a reputed quart. And now by 30 & 31 Vict. c. 142, s. 4, "No action shall henceforth be brought or be maintainable in any court to recover any debt or sum of money, alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, consumed on the premises where sold or supplied, or in

Tippling acts.

Act 30 & 31 Vict. c. 142, s. 4.

respect of any money or goods lent or supplied, or of any security given " for obtaining said articles.

Decisions under tippling acts.

§ 544. In construing the tippling acts it has been held that the prohibition extends to sales made to a retail dealer who bought for the purpose of selling again to his customers; (*s*) but in Spencer *v.* Smith, (*t*) Lord Ellenborough would not allow this defence to prevail where a bill of exchange for 6*l.* had been given by a lieutenant in the recruiting service for spirits supplied to him at different times, not for consumption at the house of vendor, but for use by recruits and others under the officer's command. In Burnyeat *v.* Hutchinson, (*u*) the queen's bench, in 1821, refused to except from the operation of the statute a sale made to one who was not himself the consumer, and where the spirits formed part of an entertainment given at the buyer's expense to third persons, the court holding that the " prohibition was general and absolute." This decision was not brought to the notice of Lord Abinger, in 1835, when he held, in Proctor *v.* Nicholson, (*x*) that the enactment did not apply to the case of spirits supplied to a guest lodging in the house, and Proctor *v.* Nicholson can hardly be considered an authority after the observations of the court in Hughes *v.* Done. (*y*) If quantities of spirits of different kinds be sold, the quantity of each being less than 20*s.* in value, but the whole amounting to more than that sum, the sale is legal. (*z*) Some cases (*a*) in which the price of spirits sold in contravention of the tippling acts formed only part of the consideration of the contract sued on are cited in the note. See, also, *ante*, § 426, as to consideration partly illegal.

Spencer *v.* Smith.

Burnyeat *v.* Hutchinson.

Cattle salesmen in London.

§ 545. By the 31 George 2, c. 40, s. 11, cattle salesmen in London, and others who sell cattle there on commission, are forbidden to buy live cattle, sheep, or swine, either in London, or while on the road to London (except for actual use by themselves and family), or to sell in London, or within the weekly bills of mortality, any live cattle, sheep, or swine. This statute is said in the preamble to be intended to prevent abuses by cattle salesmen to the prejudice of their employers.

(*s*) Hughes *v* Done, 1 Q. B. 294, overruling Jackson *v.* Attrill, Peake, 181.

(*t*) 3 Camp. 9.

(*u*) 5 B. & A. 241.

(*x*) 7 C. & P. 67.

(*y*) 1 Q. B. 294.

(*z*) Owens *v.* Porter, 4 C. & P. 367.

(*a*) Scott *v.* Gillmore, 3 Taunt. 226; Crookshank *v.* Rose, 5 C. & P. 19; Philpott *v.* Jones, 2 Ad. & E. 41; Gaitskill *v.* Greathead, 1 Dow. & Ry. 359; Dawson *v.* Remnant, 6 Esp. 24.

§ 546. The statutes passed in relation to the sale of offices are the 5 & 6 Edw. 6, c. 16, and the 49 Geo. 3, c. 126, amending and enlarging the provisions of the first act. These statutes are declared to extend to Scotland and Ireland, by the first section of the latter act. The principal provisions of these statutes prohibit the sale of any office, or deputation, or part of an office which "shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's highness' treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the king's majesty's honors, castles, manors, lands, tenements, woods, or hereditaments; *or any of the king's majesty's customs, or any other administration or necessary attendance to be had, done, or executed in any of the king's majesty's custom-house or houses,* (*b*) or the keeping of any of the king's majesty's towns, castles, or fortresses being used, occupied, or appointed for a place of strength and defence: or which shall touch or concern any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered" (5 & 6 Edw. 6, c. 16, s. 2): and "all offices in the gift of the crown or of any office appointed by the crown, and all commissions civil, naval, or military, and all places and employments, and all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer, or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master general, and principal officers of his majesty's ordnance, the commander-in-chief, the secretary of war, the paymaster general of his majesty's forces, the commissioners for the affairs of India, the commissioners of excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary general, the storekeeper general, and also the principal officers of any other public department or office of his majesty's government in any part of the United Kingdom, or in any of his majesty's dominions, colonies, or plantations which now belong, or may hereafter belong, to his majesty, and also to all offices, commissions, places, and employ-

Sales of office.

Acts 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126.

(*b*) The clause in italics seems to be repealed by the 6 Geo. 4, c. 104. See the Statutes Revised, vol. 1, p. 559.

ments belonging to or under the appointment or control of the United Company of Merchants of England trading to the East Indies." (49 Geo. 3, c. 126, s. 1.)

§ 547. The exceptions to these prohibitions provide that they shall not be applicable "to any office or offices whereof any person or persons is or shall be seized of any estate of inheritance: or to any office of parkership or the keeping of any park, house, manor, garden, chase, or forest, or to any of them." (*c*) And it is provided that the act "shall not in any wise extend or be prejudicial or hurtful to any of the chief justices of the king's courts, commonly called the king's bench or common pleas, or to any of the justices of assize, that now be, or hereafter shall be, but that they and every of them may do in every behalf touching or concerning any office or offices to be given or granted by them or any of them, as they or any of them might have done before the making of this act." (*d*) It was also provided that "nothing in this act contained shall extend or be construed to extend to any purchases, sales, or exchanges of any commissions or appointments in the honorable band of gentlemen pensioners, or in his majesty's yeoman guard, or in the Marshalsea, and the court of the king of the palace of the king at Westminster, or to extend to any purchases, sales, or exchanges of any commission in his majesty's forces, for such prices as shall be regulated and fixed by any regulation made or to be made by his majesty in that behalf," (*e*) but this section is repealed by the statute law revision act, 1872 (No. 2). Another section (*f*) excludes from the operation of the act of 49 Geo. 3 "any office which was legally salable before the passing of this act, and in the gift of any person by virtue of any office of which such person is or shall be possessed, under any patent or appointment for his life." The act, also, shall not "extend or be construed to extend to prevent or make void any deputation to any office in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance lawfully made in respect of any allowance, salary, or payment, made or agreed to be made by or to such principal or deputy respectively out of the fees or profits of such office" (49 Geo. 3, c. 126, s. 10); nor "to any actual reservation, charge, or payment made or required to

Exceptions to the prohibition.

Further exceptions.

Repealed in 1872.

(*c*) Stat. 5 & 6 Edw. 6, c. 16, s. 4.
(*d*) Ib. s. 7.
(*e*) 49 Geo. 3, c. 126, s. 7.
(*f*) Ib. s. 9.

be made out of the fees, perquisites, or profits of any office to any person who shall have held such office in any commission or appointment of any person succeeding to such office, or to any agreement, contract, bond, or other assurance made for securing such reservation, charge, or payment; provided always, that the amount of such reservation, charge, or payment, and the circumstances and reasons under which the same shall have been permitted, shall be stated in the commission, patent, warrant, or instrument of appointment of the person so succeeding to and holding such office and paying or securing such money as aforesaid." (Ib. s. 11.)

Contract that A. shall resign with intent that B. shall get the office, void.

§ 548. On these statutes it has been held that a contract by A. to resign an office, with the intent of B.'s obtaining the appointment, was void. In Sir Arthur Ingram's case (*g*) the report in Coke is as follows: "Sir Robert Vernon, knight, being coferer (*h*) of the king's house of the king's gift, and having the receipt of a great summe of money yearly of the king's revenue, did for a certaine summe of money bargain and sell the same to Sir A. I., and agreed to surrender the said office to the king *to the entent a grant might be made to Sir A.*, who surrendered it accordingly: and thereupon Sir A. was, by the king's appointment, admitted and sworne coferer. And it was resolved by Sir Thomas Egerton, lord chancellour, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute (5 & 6 Edw. 6, c. 16), and that Sir A. was disabled to have or to take the said office." It was also held in the case of Godolphin *v.* Tudor, (*i*) in the queen's bench, and affirmed in Dom. Proc., (*k*) that where the salary of an office within the statute 5 & 6 Edw. 6 was certain, a deputation by the principal, reserving to himself a certain lesser sum out of the salary, is good. And even where the profits arising from fees are uncertain, a deputation by principal, with a reservation of a certain sum, *out of the profits*, is good, for the deputy will not be obliged to pay anything beyond the amount of the profits received. But if the reservation is to pay absolutely a certain sum, without reference to the profits, the agreement is void. (*l*) And the case was not affected by the fact

Sir Arthur Ingram's case.

Godolphin *v.* Tudor.

Deputation of an office for price "out of the profits."

(*g*) Co. Litt. 234 a. See, also, Huggins *v.* Bambridge, Willes, 241.

(*h*) Coferer, or treasurer, from "eofer."

(*i*) 2 Salk. 468, and 6 Mod. 234; also, Willes, p. 575, note.

(*k*) 1 Bro. P. C. 135.

(*l*) See, also, Gulliford *v.* De Cardonell,

that it appeared on the record that the payment was to be 200*l.* a year, and that the profits of the office had amounted to 329*l.* 10*s.* a year. See the comments of Lord Loughborough in Garforth *v.* Fearon in 1 H. Bl. 327. See, also, the cases of Juxton *v.* Morris and Law *v.* Law, as reported in the same opinion of Lord Loughborough.

Decisions applicable to the latter statute.

Aston *v.* Gwinnell.

§ 549. The principles established in these decisions under the 5 & 6 Edw. 6 were held by the queen's bench, in Greville *v.* Attkins, (*m*) to be applicable also to the enactments in 49 Geo. 3, c. 126. In the case of Aston *v.* Gwinnell, (*n*) in Cam. Scacc. in equity, the statute was held not to apply to a covenant in a deed by which the grantor, a clerk to the deputy registrar in the prerogative court of Canterbury, authorized and permitted his deputy to pay a yearly sum to trustees of an annuity constituted by the deed. The court also held that the agreement was not void as against public policy because the situation held by the grantor was not an office, Sir William Alexander, lord chief baron, saying that "he was a mere clerk, assisting the deputy registrars, receiving emoluments for business done at the pleasure of his superiors." (*o*) In Hopkins *v.* Prescott (*p*) an agreement for the sale of a law-stationer's business, he being also *sub-distributor of stamps* and *collector of assessed taxes*, coupled with a stipulation that the vendor should not do business as a law-stationer within ten miles, *nor collect any of the assessed taxes*, but would do his best to introduce the purchaser to the said business *and offices*, was held void under these statutes.

Hopkins *v.* Prescott.

What offices are within the statute.

§ 550. In Harrison *v.* Kloprogge (*q*) it was held that the office of private secretary was not within the statutes. The following offices have been held to come within its provisions: officers of spiritual courts, as chancellor, registrar, and commissary, (*r*) clerk of the fines to a justice in Wales, (*s*) surrogate, (*t*) gaolers, (*u*) under-sheriffs, (*x*) stewards

2 Salk. 466; [Tappan *v.* Brown, 9 Wend. 175; Gray *v.* Hook, 4 Comst. 449.]

(*m*) 9 B. & C. 462.

(*n*) 3 Y. & J. 136.

(*o*) But see Palmer *v.* Bate, 2 Br. & B. 673; *ante*, § 518.

(*p*) 4 C. B. 578.

(*q*) 2 Br. & B. 678.

(*r*) Dr. Trevor's case, Cro. Jac. 269; Robotham *v.* Trevor, 2 Brownl. 11.

(*s*) Walter *v.* Walter, Golds. 180.

(*t*) Juxton *v.* Morris, 2 Ch. Ca. 42, corrected rep. in 1 H. Bl. 332; Woodward *v.* Foxe, 3 Lev. 289; Layng *v.* Paine, Willes, 571.

(*u*) Stockwith *v.* North, Moore, 781; Huggins *v.* Bambridge, Willes, 241.

(*x*) Browning *v.* Halford, Free. 19; and see stat. 3 Geo. 1, c. 15.

of court-leets, (*y*) but not the bailiff of a hundred, (*z*) or the under-marshal of the city of London. (*a*) In a case under the 49 Geo. 3 it was held that a cadetship in the East India service was embraced within the law, and that receiving money for procuring the appointment was an indictable offence. (*b*) In Graeme *v.* Wroughton (*c*) a bargain, by which the officers of a regiment subscribed a sum to induce the major to retire, and thus create a step for promotion in the regiment, was held to be a sale of his office by the major, and void under the statute.

Cadetships in East India service.

Paying money to the officer of a regiment to induce his retirement.

§ 551. By the 2 W. 4, c. 16, s. 7, the buyer may resist payment of the price of goods (spirits), for the removal of which a permit is required by that statute, by pleading and proving that the goods were delivered without a permit. (*d*)

Goods delivered without permit.

§ 552. At common law, a sale made on Sunday was not void. In Drury *v.* Defontaine (*e*) Sir James Mansfield delivered the judgment of the common pleas, that such a sale was not illegal, until made so by statute. By the 29 Charles 2, c. 7, it is enacted that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of five shillings; and that no persons or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruits, herbs, goods, or chattels whatsoever upon the Lord's day, or any part thereof, upon pain that every one so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale." (*f*)

Sales on Sunday not void at common law.

29 Car. 2, c. 7.

(*y*) Williamson *v.* Barnsley, 1 Brownl. 70.

(*z*) Godbolt's case, 4 Leon. 33.

(*a*) Ex parte Butler, 1 Atk. 210.

(*b*) Rex *v.* Charretie, 13 Q. B. 447, and 18 L. J. M. C. 100.

(*c*) 11 Ex. 146, and 24 L. J. Ex. 265.

(*d*) See a decision on the construction of this statute, Nicholson *v.* Hood, 9 M. & W. 365.

(*e*) 1 Taunt. 131.

(*f*) [For the law and cases respecting the general subject of the invalidity of contracts made on Sunday, see 1 Chitty Contr. (11th Am. ed.) 588 *et seq.* and notes; 2 Ib. 1017–1019, and notes. In the case of Allen *v.* Duffy the supreme court of Michigan has recently given an important opinion in relation to Sunday contracts. The action was brought to recover

§ 553. The first reported case under this statute seems to have been Drury *v.* Defontaine, (*g*) in 1808, more than 130 years after its passage. There the private sale of a horse on a Sunday, made by a horse auctioneer, was held valid, as not within the ordinary calling of the vendor, his business being to sell at public, not private sale. Next, in 1824, in Bloxsome *v.* Williams, (*h*) Bayley J. expressed his entire concurrence in the above decision of the common pleas, but decided the case on two grounds: 1st, that in the case before him the sale was not complete on the Sunday; and, 2dly, that it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own

Decisions under this statute.

Drury *v.* Defontaine.

Bloxsome *v.* Williams.

a sum subscribed on Sunday, during the regular church service, the object of the subscription being to purchase a church already built. The statute provided as follows: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity," &c. Cooley J. said: . . . "What, then, are works of charity? Charity is active goodness. It is doing good to our fellow-men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind. As the term 'charity' is made use of in our law, it no doubt takes shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which furnish what the Christian regards as the desecration of the first day of the week. It was never doubted, so far as we know, that all the necessary or usual work connected with religious worship was work of charity. If it were not so the minister who preaches, the organist and precentor who furnish the music, and the sexton who cares for the building on Sunday, would be violating the law every day they performed service for their religious society; and not only would he precluded from recovering compensation, but might be punished for services which are proper in themselves, and for which the day is specially set apart. But their work is not illegal, because it is, in a true sense, and, indeed, in the very highest sense, charitable. Religious societies are formed to do good to mankind. . . . Now, it is matter of common observation that religious societies solicit moneys for their needs and take subscriptions at their regular meetings on the first day of the week. The custom is from time immemorial. . . . . Nobody has ever asserted, so far as we are aware, that the taking up of these Sabbath offerings was illegal and punishable under the statute. On the contrary, the custom is considered fitting and proper to the occasion, and the congregation gives, no doubt, with a devotional spirit that is fully in harmony with the purpose for which they are assembled; and if small sums may be gathered on Sunday for the support of public worship, and for providing buildings for the purpose and keeping them in repair, why not large sums? . . . . We have no doubt whatever that the support of public worship is a work of charity within the meaning of the statute, and that promises like the one now in question may be sustained on that ground." The above case may be found in the Northwestern Rep. vol. 4, N. S. No. 6. See Catlett *v.* Trs. of the M. E. Church of Sweetser Station, 62 Ind. 365; Lai *v.* Stall, 6 U. C. Q. B. 506.]

Allen *v.* Duffy.

What are works of charity.

(*g*) 1 Taunt. 131.

(*h*) 3 B. & C. 232.

ordinary calling of a horse dealer on Sunday, to set up his own contravention of the law against the plaintiff, an innocent person, *who was ignorant of the fact that the defendant was a horse dealer.* Holroyd and Littledale JJ. concurred. In 1829, Fennell v. Ridler (*i*) was decided by the same judges. Plaintiffs were horse dealers, who bought a horse, with warranty, on Sunday; and the action was for breach of warranty. The plaintiffs were nonsuited, Bayley J. again delivering the opinion, and saying that he had given too narrow a construction to the act in the previous case, and that it was intended to regulate private conduct as well as to promote public decency. (*k*) Next, in 1827, came Smith *v.* Sparrow, (*l*) in the common pleas. The plaintiff's broker made an agreement on Sunday for a sale to defendant, and at first refused to deliver a written note of the sale (without which it would not have been complete under the statute of frauds) until the next day, but finally yielded to defendant's importunity, and gave him a bought note in which the vendor's name was not mentioned. The broker also entered the sale on his book on Sunday, with a blank for the vendor's name. On Monday the blank was filled up with the vendor's name, before the broker had seen the vendor, or informed him of the sale. The plaintiff's action was for damages, for breach of this contract, and he was held not entitled to recover. Best C. J. expressed a doubt about the decision in Bloxsome *v.* Williams, and warmly eulogized Fennell *v.* Ridler. Park J. joined in the commendation of the last mentioned case, and said he did "not think this court was right in the decision of Drury *v.* Defontaine." (*m*)

Fennell *v.* Ridler.

Smith *v.* Sparrow.

(*i*) 5 B. & C. 406.

(*k*) [It is well settled that no action can be maintained on a warranty made on the sale or exchange of horses, or other property, on Sunday; Robeson *v.* French, 12 Met. 24; Hulet *v.* Stratton, 5 Cush. 539; Bradley *v.* Rea, 14 Allen, 20; Lyon *v.* Strong, 6 Vt. 219; Murphy *v.* Simpson, 14 B. Mon. 419; Finley *v.* Quirk, 9 Minn. 194; Smith *v.* Bean, 15 N. H. 577, 578; nor for deceit practised in exchange of horses on that day; Robeson *v.* French, 12 Met. 24. See Northrup *v.* Foote, 14 Wend. 248; Way *v.* Foster, 1 Allen, 408; Gregg *v.* Wyman, 4 Cush. 322; Frost *v.* Plumb, Supreme Court, Conn. 13 Am. Law Reg. N. S. 537, and note; Plaisted *v.* Palmer, 63 Maine, 576.]

(*l*) 4 Bing. 84.

(*m*) [The statute of Rhode Island prohibits any one from doing on the Lord's day "any labor or business, or work of his ordinary calling." In Hazard *v.* Day, 14 Allen, 487, 496, which raised a question under the Rhode Island statute, Gray J. said: "A man who follows his ordinary calling as agent for others is not less within the words of the statute, or the evils it was intended to prevent, than one who follows his ordinary calling on his own account."]

§ 554. In Williams *v.* Paul, (*n*) decided in 1830, it was held that where a sale was made on Sunday, and the buyer retained the thing bought, and afterwards made a new promise to pay, he was liable, not for the price agreed on in the void bargain, but for a *quantum meruit* on the new promise. But in Simpson *v.* Nicholls, (*o*) Parke B. expressed the opinion that the decision in Williams *v.* Paul could not be supported in law. (*p*) In Simpson *v.* Nicholls the defendant pleaded the nullity of the sale made on Sunday, and plaintiff replied "*precludi non*, because although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defendant, *after the sale and delivery of the said goods, kept and retained the same*, and hath ever since kept and retained the same *without in any manner returning or offering to return the same to the plaintiff*, and thereby hath become liable," &c. Replication held bad on demurrer, because, even on the authority of Williams *v.* Paul, which was doubted, a fresh promise was necessary, and this was not alleged in the replication. (*q*) In Scarfe *v.* Morgan (*r*) the defendant pleaded illegality under the statute against a claim by a farmer for the services of his stallion in covering the defendant's mare on Sunday, but the defence was overruled.

Williams *v.* Paul.

Simpson *v.* Nicholls.

Scarfe *v.* Morgan.

§ 555. The statute 27 & 28 Vict. c. 27, s. 11, amended by 34 & 35 Vict. c. 101, prohibits the sale for the use of a vessel, by

(*n*) 6 Bing. 653.

(*o*) 3 M. & W. 240, and S. C. corrected report in 5 M. & W. 702.

(*p*) See the American cases referred to, *post*, §§ 557, 558.

(*q*) ["If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied." Gray J. in Cranson *v.* Goss, 107 Mass. 441. See Myers *v.* Meinrath, 101 Mass. 366, 368; Ladd *v.* Rogers, 11 Allen, 209. In Bradley *v.* Rea, 14 Allen, 20; S. C. 103 Mass. 188, it was held that if a bargain is made on the Lord's day for the sale of chattels (which is of itself void and incapable of ratification), and the chattels are delivered and accepted on the following day, with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither party can be permitted to prove the terms, either as to price or warranty, agreed between them on the Lord's day. See Cranson *v.* Goss, 107 Mass. 442; Dickinson *v.* Richmond, 97 Ib. 45; Tuckerman *v.* Hinkley, 9 Allen, 452; Bustin *v.* Rogers, 11 Cush. 346.]

Chattel sold and delivered on Sunday, price cannot be recovered

Aliter if delivered on day following.

(*r*) 4 M. & W. 270. [See Allen *v.* Gardiner, 7 R. I. 22; Hazard *v.* Day, 14 Allen, 487.]

any maker of, or dealer in, chain cables or anchors, of any chain cables whatever, or any anchor exceeding in weight 168 pounds, not previously tested and duly stamped according to the provisions of the act. Sale of chain cables and anchors.

§ 556. In America, the law in general upon the subjects embraced in this chapter is in accordance with the English law. The cases in our courts upon contracts of sale where the thing sold was intended by both parties for illegal purposes, or was transferred with a knowledge on the part of the vendor that the buyer intended to use it for illegal purposes, were elaborately reviewed and discussed in the supreme court of the United States in two cases, Armstrong *v.* Toler, reported in 11 Wheaton, 258, and McBlair *v.* Gibbes, 17 Howard, 232. The principles established by these two cases may be summed up as follows: First. No action lies on any contract, the consideration of which is either wicked in itself or prohibited by law. Second. A collateral contract, made in aid of one tainted by illegality, cannot be enforced. Third. A collateral contract, disconnected from the illegal transaction which was the basis of the first contract, is not illegal, and may be enforced. Cases in America.

§ 557. In relation to sales made on Sunday, nearly if not all the states have passed laws substantially in accordance with the 29 Charles 2, c. 7, and there is a very great diversity of opinion on the questions which have arisen under these statutes. (*s*) In many of the states the law makes no distinction between sales made by a party in his ordinary calling and any other sale, but forbids all secular business on Sunday. A note given for property sold on Sunday is held of course to be invalid in the hands

(*s*) [But it has been pretty generally held in the American states, that a contract for the sale or exchange of goods or chattels made and completed on Sunday, in violation of the statutes for the observance of that day, is void. Lyon *v.* Strong, 6 Vt. 219; Sumner *v.* Jones, 24 Ib. 317; Reynolds *v.* Stevenson, 4 Ind. 619; Link *v.* Clemmens, 7 Blackf. 479; Allen *v.* Deming, 14 N. H. 133; Smith *v.* Bean, 15 Ib. 577; Varney *v.* French, 19 Ib. 233; Murphy *v.* Simpson, 14 B. Mon. 419; O'Donnell *v.* Sweney, 5 Ala. 467; Hussey *v.* Roquemore, 27 Ib. 281; Dodson *v.* Harris, 10 Ib. 566; Saltmarsh *v.* Tuthill, 13 Ib. 390; Sellers *v.* Dugan, 18 Ohio, 489; Towle *v.* Larrabee, 26 Maine, 464; Adams *v.* Hamell, 2 Doug. (Mich.) 73; Robeson *v.* French, 12 Met. 24; Day *v.* McAllister, 15 Gray, 433; Allen *v.* Gardiner, 7 R. I. 24, 25; George *v.* George, 47 N. H. 27 (in which the subject is fully examined by Bellows J.); Cameron *v.* Peck, 37 Conn. 555, 557; Sayre *v.* Wheeler, 32 Iowa, 559; S. C. 31 Ib. 112; Tucker *v.* West, 29 Ark. 386; Ellis *v.* Hammond, 57 Ga. 179; Peake *v.* Conlan, 43 Iowa, 297; Meader *v.* White, 66 Me. 90; Block *v.* McMurry, 56 Miss. 217.] Sunday contracts are void.

of the payee, (*t*) but it is not settled whether such a note is void in the hands of an innocent indorsee. (*u*) A sale is there held not to be invalid although commenced on Sunday, if not completed till another day, nor if it merely grow out of a transaction which took place on Sunday. (*x*) And a note, though signed on

(*t*) [Towle *v.* Larrabee, 26 Maine, 464; Adams *v.* Hamell, 2 Doug. (Mich.) 73; Goss *v.* Whitney, 27 Vt. 272; Lovejoy *v.* Whipple, 18 Ib. 379; Cranson *v.* Goss, 107 Mass. 440, 441; Pattee *v.* Greeley, 13 Met. 284; Pope *v.* Linn, 50 Maine, 83; Benson *v.* Drake, 55 Ib. 555; Hilton *v.* Houghton, 35 Ib. 143; Rainey *v.* Capps, 22 Ala. 288.]

(*u*) Allen *v.* Deming, 14 N. H. 133; Saltmarsh *v.* Tuthill, 13 Ala. 390. [In Cranson *v.* Goss, 107 Mass. 439, which was an action on a promissory note by an indorsee against the maker, it appeared that the plaintiff was a *bonâ fide* holder of the note in suit, for a valuable consideration, and that he obtained it before it was due, without notice of any defect, illegality, or other infirmity in it. It also appeared that the contract, upon which the note itself was based, was made upon Sunday; and that the note was made, signed, and fully delivered upon Sunday, to the original payee. The note bore date of the succeeding Wednesday. Gray J., delivering the judgment of the court, said: "The plaintiff, therefore, not having participated in any violation of law, and having taken the note before its maturity, for good consideration and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of the law, to set up his own illegal act as a defence to the suit of an innocent party." This view is supported by the judgments of all the courts, English and American, that have considered the question. Beghie *v.* Levi, 1 C. & J. 180; S. C. 1 Tyrwh. 130; Houliston *v.* Parsons, 9 Upper Canada, 681; Crombie *v.* Overholtzer, 11 Ib. 55; Bank of Cumberland *v.* Mayberry, 48 Maine, 198; State Capital Bank *v.* Thompson, 42 N. H. 369; Vinton *v.* Peck, 14 Mich. 287; Saltmarsh *v.* Tuthill, 13 Ala. 390, 406; Clark *v.* Pease, 41 N. H. 414; Clinton Nat. Bank *v.* Graves, 48 Iowa, 228; Johns *v.* Bailey, 45 Ib. 241. See the case of Stevens *v.* Wood, 127 Mass. 123. But the indorsee of a note otherwise valid cannot maintain an action on it in his own name against the maker, if he procured it to be indorsed by the payee on the Lord's day, because in the prosecution of his suit he would be obliged to rely on an "illegal transaction," *i. e.* an indorsement made on the Lord's day. Benson *v.* Drake, 55 Maine, 555.]

Cranson *v.* Goss.

Rights of indorsee of note made on Sunday.

How if note indorsed on Sunday.

(*x*) Staekpole *v.* Simonds, 23 N. H. 229; Smith *v.* Bean, 15 Ib. 577; Sumner *v.* Jones, 24 Vt. 317; Goss *v.* Whitney, Ib. 187; Butler *v.* Lee, 11 Ala. 885; [Merrill *v.* Downs, 41 N. H. 72; Adams *v.* Gay, 19 Vt. 358; Barron *v.* Pettes, 18 Ib. 385; Lovejoy *v.* Whipple, Ib. 379; Cameron *v.* Peck, 37 Conn. 555; Sayles *v.* Wellman, 10 R. I. 465. But where the sale is made and the property is delivered, so far as the vendor is concerned, on Sunday, the contract will be void, although the property purchased is actually taken by the purchaser into his possession, on some subsequent day. Smith *v.* Bean, 15 N. H. 577; Allen *v.* Deming, 14 Ib. 133. Where stipulations for a sale of chattels were made on a secular day, but the contract was afterwards completed by delivery on Sunday, the contract was held to be illegal. Smith *v.* Foster, 41 N. H. 215. The subject is very fully discussed by Sargent J. in this case. And so it would seem the contract will not be enforced unless it can be car-

If contract is completed on Sunday it is void; *aliter*, if not so completed.

Sunday, may be enforced if delivered on some other day; (*y*) and when the vendee has obtained possession of the property sold to him on Sunday, with the assent of the vendor, it is held that the title has passed, and that he may maintain his possession under the void contract as against both the vendor and his creditors. (*z*)

§ 558. There is great conflict of decisions on the question whether the vendee becomes liable (either under a new contract, or by reason of a ratification of the old one) when he takes pos-

ried out without invoking the aid of any of the terms agreed upon the Lord's day, although the contract may, in other respects, have been made on a secular day. See Bradley *v.* Rea, 14 Allen, 20; Day *v.* McAllister, 15 Gray, 433; Cranson *v.* Goss, 107 Mass. 441; Pope *v.* Linn, 50 Maine, 83; Tillock *v.* Webb, 56 Ib. 100; Plaisted *v.* Palmer, 63 Ib. 576; Morgan *v.* Bailey, 59 Ga. 683; Bryant *v.* Booze, 55 Ib. 438. Where goods are sold and delivered to two persons on the Lord's day, the sale being induced by the false representations of one of them on a previous day, and, on a subsequent day, not being on the Lord's day, the seller demands the price of the latter, and he promises to pay it, this amounts to a sale to him, and he is liable for the price. Winchell *v.* Carey, 115 Mass. 560. So where a party sold and delivered to another on Sunday a pair of horses for $340, and on the following Tuesday the purchaser paid $200, and gave a note for $140, on which the seller afterwards brought an action, it was held that, although the contract was originally made on Sunday, the plaintiff was entitled to recover by reason of its subsequent ratification, and also by reason of a new promise, for which the retention of the property was a sufficient consideration. Sayles *v.* Wellman, 10 R. I. 465.]

(*y*) Hilton *v.* Houghton, 35 Maine, 143; Lovejoy *v.* Whipple, 18 Vt. 379; Clough *v.* Davis, 9 N. H. 500; Hill *v.* Dunham, 7 Gray, 543.

(*z*) Smith *v.* Bean, 15 N. H. 577; Allen *v.* Deming, 14 Ib. 133; [Myers *v.* Meinrath, 101 Mass. 368; King *v.* Green, 6 Allen, 139; Hall *v.* Corcoran, 107 Mass. 259; Horton *v.* Buffington, 105 Ib. 399; Gray J. in Cranson *v.* Goss, 107 Ib. 441; Ladd *v.* Rogers, 11 Allen, 209. "The disability on the part of the seller to reclaim the goods will avail the purchaser holding them as a sufficient title." Ames J. in Horton *v.* Buffington, 105 Mass. 400; Myers *v.* Meinrath, 101 Ib. 366; King *v.* Green, 6 Allen, 139. In Myers *v.* Meinrath, 101 Mass. 369, it was decided by the court, and clearly and forcibly maintained by Wells J. in delivering the opinion, that an action will not lie in Massachusetts for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel, on the Lord's day, and retained by the defendant afterwards, notwithstanding the plaintiff returns the chattel for which it was exchanged, and demands a corresponding return by the defendant. Where the owner of a wagon sold it on the Lord's day to one who resold it to a third person, who was ignorant that his vendor had bought it on the Lord's day, it was held that it was not liable to be taken for a debt against the original owner. Horton *v.* Buffington, *supra*. The property passes by a sale though made on Sunday, and the contract being thus executed will not be disturbed on the ground of illegality. Green *v.* Godfrey, 44 Maine, 25, 27; Levet *v.* Creditors, 22 Louis. Ann. 105; Hall *v.* Costello, 48 N. H. 176; Beauchamp *v.* Comfort, 42 Miss. 94; Frazer *v.* Robinson, Ib. 121; Thompson *v.* Williams, 58 N. H. 248.]

Sunday contract being fully executed, law leaves parties where it finds them.

sesssion of the thing sold on some other day, after making a purchase of it on Sunday. The case of Williams *v.* Paul, (*a*) and the observations of Parke B. seriously questioning its authority, (*b*) have been much discussed in the American courts. In the case of Adams *v.* Gay (*c*) the purchaser refused, at the request of the vendor, to rescind the contract and return the thing sold, and this was held to be an affirmation of the Sunday bargain, and to render the purchaser liable; and in Sargent *v.* Butts (*d*) the same court held that a subsequent promise ratified an award made on Sunday, so that an action would lie on the award. So in Sumner *v.* Jones (*e*) where a note was given on Sunday for the price of a horse sold that day, and the buyer afterwards made payments on account of the note, it was held that these payments, coupled with his retaining the horse in his possession, were a ratification of the contract, entitling the vendor to recover the sum remaining due on the note. In Alabama, (*f*) however, and in New Hampshire (*g*) the courts have rather been inclined to follow the opinion of Parke B. than the decision in Williams *v.* Paul. In the case of Boutelle *v.* Melendy, (*g*) the New Hampshire court expressly held that an illegal contract is incapable of ratification or of forming a good consideration for a subsequent promise. (*h*)

§ 559. The French Civil Code, art. 1133, provides that "the

(*a*) 6 Bing. 653.

(*b*) *Ante*, § 554.

(*c*) 19 Vt. 358.

(*d*) 21 Vt. 99.

(*e*) 24 Vt. 317. [See Harrison *v.* Colton, 31 Iowa, 16.]

(*f*) Butler *v.* Lee, 11 Ala. 885.

(*g*) Allen *v.* Deming, 14 N. H. 133, and Boutelle *v.* Melendy, 19 Ib. 196.

(*h*) [A contract made in violation of the Lord's day in Massachusetts is absolutely void and incapable of ratification. Day *v.* McAllister, 15 Gray, 433; Ladd *v.* Rogers, 11 Allen, 209; Bradley *v.* Rea, 14 Ib. 22; Hazard *v.* Day, Ib. 487; Cranson *v.* Goss, 107 Mass. 440, 441. In Tuckerman *v.* Hinkley, 7 Allen, 454, 455, Chapman J. said: "The case of Williams *v.* Paul is not to be relied on, because Parke B. afterwards expressed a doubt whether it could be supported in law." Simpson *v.* Nicholls, 3 M. & W. 240, 244, note (*a*); Reeves *v.* Butcher, 2 Vroom (N. J.), 224; Myers *v.* Meinrath, 101 Mass. 368; Ryno *v.* Darby, 20 N. J. Eq. (5 C. E. Green) 231; Finn *v.* Donahue, 35 Conn. 216; Pate *v.* Wright, 30 Ind. 476. But see Sayles *v.* Wellman, 10 R. I. 467, 468. As to cases arising in states where the hours of the Lord's day are fixed by statute at less than twenty-four, and being affected by that provision, see Nason *v.* Dinsmore, 34 Maine, 391; Bryant *v.* Biddeford, 39 Ib. 193; Merriam *v.* Stearns, 10 Cush. 257; Hiller *v.* English, 4 Strobh. 486. As to the effect of the fact that a contract is dated on Sunday, see Nason *v.* Dinsmore, 34 Maine, 391; Bustin *v.* Rogers, 11 Cush. 346; Hill *v.* Dunham, 7 Gray, 543; Hilton *v.* Houghton, 35 Maine, 143; Cranson *v.* Goss, 107 Mass. 443.]

Statute sometimes fixes what is Lord's day.

consideration (*la cause*) of a contract is unlawful, when prohibited by law, or contrary to good morals or public order." Under this article the decisions are very much the same as those in our own reports, and they are collected by Sirey in his Code Civil Annoté, (*i*) under arts. 902 and 1133. One of the cases establishes the illegality of a bargain not likely to occur in England: that by which an organizer of dramatic successes (*un entrepreneur de succès dramatiques*) engages to insure, by means of hired applauders (*claqueurs*), the success of actors or of pieces performed by them. (*i*)

French Code.

(*i*) Sirey, V. 41, 1, 625; D. P. 41, 1, 128.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS.

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§ 560. THE rules of law on the subject of conditions in contracts are very subtle and perplexing. Whether a promise made or an obligation assumed by one party to a contract is dependent on, or independent of, the promise made by the other; whether it be a condition to be performed before or concurrently with any demand on the other party for a compliance with his promise; or whether it may be neglected, at the peril indeed of a cross action, but without affecting the right to sue the other party, are questions on which the decisions have been so numerous (and in many instances so contradictory), and the distinctions so refined, that no attempt can here be made to do more than enunciate a few general principles. An examination of the cases will be restricted to such as have special reference to sales of goods. (*a*)

Preliminary remarks.

§ 561. The subjects of representation, warranty, conditions, and fraud run so closely together, and are so frequently intertwined, (*a*[1]) that it is very difficult to treat each separately; and it will be convenient here, although these different topics need independent consideration, to give an outline of the general principles applicable to the whole subject as recognized in the most recent decisions. A *representation* is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. A representation, even though contained in a written instrument, is *not an integral part of the contract.* (*a*[2]) Hence it follows, that even if it be untrue, the contract in general is not broken, nor is the untruth any cause of action, unless made fraudulently. To this general rule there is a special exception, in the case of marine policies of insurance, founded on reasons which need not be here discussed. (*b*) The false *representation* becomes a *fraud*, as has been already explained (book III. ch. ii,), when the untrue statement was made with a knowledge of its untruth, or dishonestly, or with reckless ignorance whether it was true or false; (*c*) or when it differs from the truth

General principles and definitions.

Representation.

(*a*) For the general subject, see the notes to Pordage *v.* Cole, 1 Wms. Saund. 320, and to Peeters *v.* Opie, 2 Wms. Saunders, 352; Cutter *v.* Powell, 2 Smith's L. C. 1, and the numerous authorities in the notes; Leake on Contracts, ch. 3, s. 2.

(*a*[1]) [Larey *v.* Taliaferro, 57 Ga. 443.]

(*a*[2]) [Wilson Sewing Machine Co. *v.* Sloan, 50 Iowa, 367.]

(*b*) [See 2 Chitty Contr. (11th Am. ed.) 1045, 1046, and note (*q*).]

(*c*) Elliott *v.* Von Glehn, 13 Q. B. 632; 18 L. J. Q. B. 221; Wheelton *v.* Hardisty,

so grossly and unreasonably as to evince a dishonest purpose. (*d*) When the representation is made in writing, instead of words, it is plain that its *nature* is not thereby altered, and in either case a question may arise whether the statement be not something more than a mere representation, whether it be not *part of the contract*. On a written instrument this is a question of construction, one of law for the court, not one of fact for the jury. Whenever it is determined that a statement is really a substantial part of the contract, then comes the nice and difficult question, Is it a *condition precedent*? or is it an *independent agreement*? a breach of which will not justify a repudiation of the contract, but only a cross action for damages. The cases show distinctions of extreme nicety on this point, of which a striking example is afforded in charter-parties, where a statement that a vessel is to sail or to be ready to receive cargo on a given day has been decided to be a condition, (*e*) but a stipulation that she shall sail with all convenient speed, or within a reasonable time, is held to be an independent agreement. (*f*) In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield in Jones *v.* Barkley (*g*) remains unchanged, "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. (*h*) And the rules for discovering the intention are mainly these:

8 E. & B. 232; 27 L. J. Q. B. 241; Reese Silver Mining Co. *v.* Smith, L. R. 4 Eng. Ap. 64.

(*d*) Barker *v.* Windle, 6 E. & B. 675; S. C. 25 L. J. Q. B. 349.

(*e*) Glaholm *v.* Hays, 2 M. & G. 257; Oliver *v.* Fielden, 4 Ex. 135; Croockewit *v.* Fletcher, 1 H. & N. 893; 26 L. J. Ex. 153; Seeger *v.* Duthie, 8 C. B. N. S. 45; 29 L. J. C. P. 253.

(*f*) Tarrabochia *v.* Hickie, 1 H. & N. 183; 26 L. J. Ex. 26; Dimech *v.* Corlett, 12 Moore P. C. C. 199; Clipsham *v.* Vertue, 5 Q. B. 265; M'Andrew *v.* Chapple, L. R. 1 C. P. 643; 35 L. J. C. P. 281.

(*g*) 2 Doug. 684–691.

(*h*) [The question, whether covenants are dependent or independent, depends upon the intention of the parties, and the nature of the acts to be performed. Howland *v.* Leach, 11 Pick. 151; Shaw C. J. in Knight *v.* New England Worsted Co. 2 Cush. 287; Leonard *v.* Dyer, 26 Conn. 176, 177; Johnson *v.* Reed, 9 Mass. 78; Brokenbrough *v.* Ward, 4 Rand. 352; Gardner *v.* Corson, 15 Mass. 500; Bean *v.* Atwater, 4 Conn. 3; Kane *v.* Hood, 13 Pick. 281, 282; Mill Dam Foundry *v.* Hovey, 21 Ib. 439; Elliott *v.* Hewitt, 11 U. C. Q. B. 292; James *v.* Burchell, 7 Daly, 531; Phillips *v.* Alleghany Car Co. 82 Penn. St. 368; Malcomson *v.* Morton, 11 Ir. L. R. 230; King

Whether covenants are dependent or independent, question of intention.

§ 562. 1. Where a day is appointed for doing any act, and the day *is* to happen or *may* happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent: *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed a condition precedent. (*i*) 2. When a covenant or promise goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is an independent covenant, not a condition. (*i*[1]) 3. Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent: formerly called dependent conditions. (*k*) 4. Where each party is to do an act at the same

Rules of construction for discovering intention.

Philip Mills *v.* Slater, 12 R. I. 82; Phelps *v.* Hubbard, 51 Vt. 489; Moore *v.* Waldo, 69 Mo. 277. "In construing a mutual agreement, in which there are several stipulations on both sides, the question, whether one is absolute and independent, or conditional, and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done, to decide correctly the order in which they are to be done." "When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment, sufficiently distant to have the work done in the mean time." Shaw C. J. in Cadwell *v.* Blake, 6 Gray, 407, 409. Some of the stipulations of an entire contract may be dependent and others independent, according to their nature and the order of performance. Shaw C. J. in Knight *v.* New England Worsted Co. 2 Cush. 287; Couch *v.* Ingersoll, 2 Pick. 292; Kane *v.* Hood, 13 Ib. 281. Where A. agrees to supply certain machines, according to a model to be furnished by B., the furnishing of the model is a condition precedent. Savage Manuf. Co. *v.* Armstrong, 19 Maine, 147; Shaw C. J. in Mill Dam Foundry *v.* Hovey, 21 Pick. 439. So where, by the terms of a contract, goods are to be delivered at a particular place, they must be delivered at that place before a recovery can be had for the price of them. Savage Manuf. Co. *v.* Armstrong, *supra*. Where one agrees to perform labor on articles to be furnished by another, the furnishing of the articles is a condition precedent to the performance of the labor. Clement *v.* Clement, 8 N. H. 210; Thomas *v.* Cadwallader, Willes, 496; Knight *v.* New England Worsted Co. 2 Cush. 286; Hill *v.* Hovey, 26 Vt. 109.]

(*i*) [Eastman J. in Sumner *v.* Parker, 36 N. H. 454; Putnam *v.* Mellen, 34 Ib. 71, 79; Rice J. in Allard *v.* Belfast, 40 Maine, 376; Elliott *v.* Hewitt, 11 U. C. Q. B. 292; Murphy *v.* Scarth, 16 Ib. 48; Driscall *v.* Barker, 2 Pugsley & Burbridge (N. B.), 407; Sheeren *v.* Moses, 84 Ill. 448.]

(*i*[1]) [Tate *v.* The Port Hope &c. Railway Co. 17 U. C. Q. B. 354; Auchterlonie *v.* Aems, 25 U. C. C. P. 403.]

(*k*) See Glazebrook *v.* Woodrow, 8 T. R. 366; [Shaw C. J. in Mill Dam Foundry *v.* Hovey, 21 Pick. 439; and in Knight *v.* New England Worsted Co. 2 Cush. 285–287; Hopkins *v.* Young. 11 Mass. 302; Tileston *v.* Newell, 13 Ib. 406; Dox *v.* Dey, 3 Wend. 356; Willington *v.* West Boylston. 4 Pick. 101, 103; Cole *v.*

time as the other, as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer; these are concurrent conditions, and neither party can maintain an action for breach of contract, without averring that he performed or offered to perform what he himself was bound to do. (*l*) 5. Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent. (*m*)

§ 563. In applying these rules of construction, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration. The same statement may, under certain circumstances, be merely a description or representation, and under others, the most substantial stipulation in the contract; as, for instance, if a vessel were described in a charter-party as a "French vessel," these words would be merely a description in time of peace; but if England were at war, and France at peace, with America, they would form a condition precedent of the most vital importance. (*n*)

Conditions precedent may be changed into warranty by acceptance of partial performance.

§ 564. Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part of that which was to be performed in his favor, the *condition precedent changes its character*, and *becomes a warranty or independent agreement*, affording no defence to an action, but giving right to a cross action for dam-

Hester, 9 Ired. 23; Brown *v.* Cannon, 5 Gilman, 174.]

(*l*) [Baker *v.* Booth, Draper (U. C.), 65; Walsh *v.* Brown, 18 U. C. C. P. 60; Koster *v.* Holden, 16 Ib. 331; Clark *v.* Weis, 87 Ill. 438.] These rules are (in substance) given in 1 Wms. Saunders, 320 b; and adopted in the notes to Cutter *v.* Powell, 2 Sm. L. C. 1. The general statement of the law applicable to conditions in the preliminary remarks in this chapter is mainly based on the judgment of the exchequer chamber in Behn *v.* Burness, 3 B. & S. 751; 32 L. J. Q. B. 204; [Sweeny *v.* Godard, 4 Allen, (N. B.) 300.]

(*m*) Per Jervis C. J. in Roberts *v.* Brett, 18 C. B. 561; 25 L. J. C. P. 280; and see the opinions of the lords in this case in 11 H. L. Cas. 337; [*ante*, § 561, and cases in note (*h*). "Where time is given for the performance on one side, and payments are to be made by the other within such time, it is certain that the making of the payments cannot depend upon a full and complete performance." Shaw C. J. in Lord *v.* Belknap, 1 Cush. 279, 284.]

(*n*) Behn *v.* Burness, 3 B. & S. 751, per Williams J. [and note at the end].

ages. (*o*) The reason is, that it would be unjust, under such circumstances, that a party who has received a part of the consideration for which he bargained should keep it and pay nothing, because he did not receive the *whole*. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action of damages against the other side for the imperfect performance of the condition. It is in the application of this rule that the cases have not been harmonious, and the practitioner is often embarrassed in advising ; for the courts draw a distinction between what is and what is not a substantial part of the contract, in determining whether the original condition precedent has become converted *ex post facto* into an independent agreement. Some cases are referred to in the note. (*p*)

§ 565. Apart from this modification of the principle, in cases where one of the parties had accepted a portion of the benefit of the condition, which was stipulated in his favor, and has thus *ex post facto* changed its nature, the rule is very general and uniform that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise. (*q*)

Condition precedent must be strictly performed before the party bound to fulfil it can demand compliance from the other.

§ 566. But the necessity for performing the condition

(*o*) Ellen *v.* Topp, 6 Ex. 424; Behn *v.* Burness, 3 B. & S. 751, and note; 32 L. J. Q. B. 204. [See Dwinel *v.* Howard, 30 Maine, 258; Holden Steam Mill Co. *v.* Westervelt, 67 Ib. 446.]

(*p*) Jonassohn *v.* Young, 4 B. & S. 296; 32 L. J. Q. B. 385; Graves *v.* Legg, 9 Ex. 709; 23 L. J. Ex. 228; White *v.* Beeton, 7 H. & N. 42; 30 L. J. Ex. 373; Hoare *v.* Rennie, 5 H. & N. 19; 29 L. J. Ex. 73; Pust *v.* Dowie, 5 B. & S. 20; 32 L. J. Q. B. 179; Ellen *v.* Topp, 6 Ex. 424; Behn *v.* Burness, 3 B. & S. 751; 32 L. J. Q. B. 204; Dimech *v.* Corlett, 12 Moore P. C. 199; Bradford *v.* Williams, L. R. 7 Ex. 260; Stanton *v.* Richardson, L. R. 7 C. P. 421–436, per Brett J.; Heilbutt *v.* Hickson, L. R. 7 C. P. 450, 451, per Bovill C. J.; Wms. Saunders, ed. 1871, vol. 1, p. 554; [Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218.]

(*q*) [See Hunt *v.* Livermore, 5 Pick. 395; Dana *v.* King, 2 Ib. 155; Seymour *v.* Bennett, 14 Mass. 266; Mazoue *v.* Caze, 18 La. An. 13; Shaw *v.* Turnpike Co. 2 Penn. 454; Albany Dutch Church *v.* Bradford, 8 Cowen, 457; Sutherland *v.* Gilmour, 2 Allen (N. B.), 481; Tanner *v.* D'Everado, 3 U. C. Q. B. 154; Levy *v.* Burgess, 64 N. Y. 390; Downey *v.* O'Donnell, 86 Ill. 49; Murray *v.* Baker, 6 Hun, 264; Schenke *v.* Rowell, 7 Daly, 286; Jones *v.* United States, 96 U. S. 24; Sullivan *v.* Byrne, 10 So. Car. 122. If a person contract to make an article to the satisfaction of a certain person, there can be no recovery unless that person is satisfied, no matter how unreasonable his dissatisfaction may be. Brown *v.* Foster, 113 Mass. 136; Hoffman *v.* Gallaher, 6 Daly, 42; Zaleski *v.* Clark, 44 Conn. 218; Gray *v.* Central R. R. Co. 11 Hun, 70; Gibson *v.* Cranage, 39 Mich. 49. See Daggett *v.* Johnson, 49 Vt. 345.]

Agreement to make article to satisfaction of vendee.

precedent may be *waived* by the party in whose favor it is stipulated, either expressly or by the implication resulting from his acts or conduct. (q^1) This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the *other party* in fulfilling the condition, (q^2) or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition. No authority is needed, of course, for the proposition that the party in whose favor the condition has been imposed may expressly waive it. The cases, however, are numerous to establish the propositions above stated, in relation to the *implied* waiver.

Performance may be waived.

Waiver implied in certain cases.

§ 567. If a man offer to perform a condition precedent in favor of another, and the latter refuse to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashhurst J., in delivering the opinion of the king's bench, in Hotham *v.* East India Company, (r) said that it was evident from common sense, and therefore needed no authority to prove it, that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, "it is equal to performance." (s) On the same principle, a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent: (t) as if A. en-

Performance obstructed.

Positive refusal by the other party to fulfil contract.

(q^1) [Aitcheson *v.* Cook, 37 U. C. Q. B. 490; Haden *v.* Coleman, 73 N. Y. 567; International Steamship Co. *v.* United States, 13 Ct. of Claims, 209.]

(q^2) [Peck *v.* United States, 14 Ct. of Claims, 84.]

(r) 1 T. R. 645.

(s) See, also, Pontifex *v.* Wilkinson, 1 C. B. 75; Holme *v.* Guppy, 3 M. & W. 387; Armitage *v.* Insole, 14 Q. B. 728; Ellen *v.* Topp, 6 Ex. 424; Laird *v.* Pim, 7 M. & W. 474; Cort *v.* Ambergate Railway Company, 17 Q. B. 127; 20 L. J. Q. B. 460; Russell *v.* Bandeira, 13 C. B. N. S. 149; 32 L. J. C. P. 68; [Lord *v.* Belknap, 1 Cush. 279; Smith *v.* Lewis, 26 Conn. 110; Mill Dam Foundry *v.* Hovey, 21 Pick. 437; Borden *v.* Borden, 5 Mass. 67; Shaw *v.* Hurd, 3 Bibb, 372; Grove *v.* Donaldson, 15 Penn. St. 128; Kugler *v.* Wiseman, 20 Ohio, 361; Follansbee *v.* Adams, 86 Ill. 13; Taylor *v.* United States, 14 Ct. of Claims, 453.]

(t) [In Sumner *v.* Parker, 36 N. H. 449, 454, Eastman J. said: "When a party to a contract refuses to execute any substantial part of his agreement, he thereby gives to the other party the option to rescind the entire contract, by offering

Refusal or failure to perform justifies rescission.

gage B. to write articles for a specified term in a periodical publication belonging to A., and before the end of the term A. should discontinue the publication; or if he agree to sell to B. a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should send them abroad on a different vessel, it is plain that it would be futile for B., in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit.* (*u*)

Mere assertion that a party will be unable or unwilling to comply, no waiver.

§ 568. But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand com-

to restore what he has received, and replacing the parties in their original situation, provided the offer to do this is made in a reasonable time, and the situation of the parties remains so far unchanged that they can be restored to their first position." Webb *v.* Stone, 24 N. H. 282, 288; Luey *v.* Bundy, 9 Ib. 298. So, in Hill *v.* Hovey, 26 Vt. 109, it was held that where a party, who is to do the precedent act, fails in the performance, the other party may abandon the contract, and recover for what he has done; he is not bound to make a special demand for the performance of the precedent act. See 2 Chitty Contr. (11th Am. ed.) 1090, and note (*p*); Dodge *v.* Greely, 31 Maine, 343. Where a purchase has been made of chattels to be received at a future day, at a fixed price, payable at a specified time, the seller may rescind the contract, after a failure by the purchaser to pay the full purchase-money at the stipulated time. Dwinel *v.* Howard, 30 Maine, 258; Preble *v.* Bottom, 27 Vt. 249; Smith *v.* Foster, 18 Ib. 182.]

(*u*) Cort *v.* The Ambergate Railway Company, 17 Q. B. 127; 20 L. J. Q. B. 460; Bodwell *v.* Parsons, 10 East, 359; Amory *v.* Broderick, 5 B. & A. 712; Short *v.* Stone, 8 Q. B. 358; Caines *v.* Smith, 15 M. & W. 189; Reid *v.* Hoskins, 4 E. & B. 979; 25 L. J. Q. B. 55, and 26 L. J. Q. B. 5; Avery *v.* Boden, 5 E. & B. 714; 6 E. & B. 953; 25 L. J. Q. B. 49, and 26 L. J. Q. B. 3; Bartholomew *v.* Marwick, 15 C. B. N. S. 710; 33 L. J. C. P. 145; Franklin *v.* Miller, 4 Ad. & E. 599; Planché *v.* Colburn, 8 Bing. 14; Robson *v.* Drummond, 2 B. & Ad. 303; Inchbald *v.* The Western Neilgherry Coffee Company, 17 C. B. N. S. 733; 34 L. J. C. P. 15; [Heard *v.* Lodge, 20 Pick. 53, 60, 61; Law *v.* Henry, 39 Ind. 414; Bruce *v.* Tilson, 25 N. Y. 194; Newcomb *v.* Brackett, 16 Mass. 161; Buttrick *v.* Holden, 8 Cush. 233, 235, 236; Bannister *v.* Weatherford, 7 B. Mon. 271; Clark *v.* Crandall, 3 Barb. 612; Harris *v.* Williams, 3 Jones (N. Car.) Law, 483; Haines *v.* Tucker, 50 N. H. 307, 310. A refusal, by one of the parties to a contract founded on mutual and concurrent conditions, to perform his covenants, will excuse a want of entire and absolute preparation by the other. Smith *v.* Lewis, 24 Conn. 624; S. C. 26 Conn. 110.]

pliance with the contract, it is plain that he does not understand it to be at an end. (*x*) The authorities will be found collected and considered in the notes to Cutter *v.* Powell, 2 Smith's Leading Cases, 1. The supreme court of the United States has cited the foregoing passage with approval as a correct statement of the law. (*y*)

Frost *v.* Knight.

§ 569. The whole law on this subject has been reëxamined and conclusively settled in the exchequer chamber, in Frost *v.* Knight (L. R. 5 Ex. 322; 7 Ex. 111), in which the doubts intimated by the lower court as to the principle of Hochster *v.* De La Tour were held to be ill-founded, and the decision of that court reversed by an unanimous judgment. In New York, also,

Case in New York.

the court of appeals, in the case of Burtis *v.* Thompson (42 N. Y. 246), which, like Frost *v.* Knight, was an action based on a positive refusal to fulfil a promise of marriage, the action being brought in advance of the time fixed for the marriage, decided in favor of the plaintiff; and the case of Hochster *v.* De La Tour was cited in the judgment. (*z*)

Impossibility as an excuse.

§ 570. It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfil it, if the performance be in its nature possible. But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God, as if A. agree to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at end. (*a*) In Tay-

(*x*) Barwick *v.* Buba, 2 C. B. N. S. 563; 26 L. J. C. P. 280; Ripley *v.* McClure, 4 Ex. 345; Hochster *v.* De La Tour, 2 E. & B. 678; 22 L. J. Q. B. 455; Avery *v.* Boden, 5 E. & B. 714; 6 E. & B. 953; 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; The Danube Railway Co. *v.* Xenos, 11 C. B. N. S. 152; 13 C. B. N. S. 825; 31 L. J. C. P. 84, 284; Philpots *v.* Evans, 5 M. & W. 475. [See De Peyster *v.* Pulver, 3 Barb. 284; Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 444, 445; Smith *v.* Lewis, 24 Conn. 624; S. C. 26 Ib. 110; Haines *v.* Tucker, 50 N. H. 311; Leeson *v.* No. British Oil Co. Ir. R. 8 C. L. 309.]

(*y*) Smoot *v.* The United States, 15 Wall. 36.

(*z*) [See Holloway *v.* Griffith, 32 Iowa, 409.]

(*a*) Shep. Touch. 173, 382; Co. Lit. 206 a; Faulkner *v.* Lowe, 2 Ex. 595; Williams *v.* Hide, Palm. 548; Laughter's case, 5 Rep. 21 b; Hall *v.* Wright, E., B. & E. 746; 27 L. J. Q. B. 145; 2 Wms. Saund. 420; Tasker *v.* Shepherd, 6 H. & N. 575; 30 L. J. Ex. 207. [If the contract be for the performance of an act, which the party promising to do it alone is competent to perform, and he is prevented by the act of God from performing it, the obligation is discharged. Knight *v.* Bean, 22 Maine, 531; Dickey *v.* Linscott, 20 Ib. 453; Quain J. in Howell *v.* Coupland, L. R. 9 Q. B. 467; *post*, § 570 *a*; Leitrim *v.* Stewart, Ir. R. 5 C. L. 27. This rule does not prevail when the essential

Act of God excuses where the contract was in nature of agreement for personal service.

lor *v.* Caldwell (*b*) the whole law on this subject was reviewed by Blackburn J., who gave the unanimous decision of the court after advisement. It was an action for breach of a promise to give to the plaintiff the use of a certain music-hall for four specified days, and the defence was that the hall had been burnt down before the appointed days, so that it was impossible to fulfil the condition. This excuse was held valid. The learned

Taylor *v.* Caldwell.

purpose of the contract may be accomplished. Shepley J. in White *v.* Mann, 26 Maine, 361, 368. See Leonard *v.* Dyer, 26 Conn. 177, 179. In School District No. 1 *v.* Dauchy, 25 Conn. 530, 535, 536, it appeared that a party agreed to build and complete a schoolhouse by a certain time, and before that time arrived, and when he had nearly completed the building, it was destroyed by lightning, whereby alone he was prevented from performing his contract, which was absolute in its terms. This destruction of the building was held not to excuse the non-performance of the contract. Ellsworth J., who delivered the opinion of the court, said: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event to take place, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the promise before that time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that, at first view, appear to be of this character) will be found, we think, to grow out of the mode of construing the contract, or of affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself. It is said, however, that there is one real exception to the rule, viz. where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case, which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what He renders impossible of performance, but it allows people to enter into contracts, as they please, provided they do not violate the law." Shaw C. J. in Mill Dam Foundry *v.* Hovey, 21 Pick. 441. See per Storrs J. in Ryan *v.* Dayton, 25 Conn. 194; Adams *v.* Nichols, 19 Pick. 275; Boyle *v.* Agawam Canal Co. 22 Ib. 381; Lord *v.* Wheeler, 1 Gray, 282; Phillips *v.* Stevens, 16 Mass. 238; Beebe *v.* Johnson, 19 Wend. 500; Kribs *v.* Jones, 44 Md. 396; Delaware &c. R. R. Co. *v.* Bowns, 58 N. Y. 573; Kemp *v.* Knickerbocker Ice Co. 69 Ib. 45; Booth *v.* Spuyten Duyvil Rolling Mill Co. 60 Ib. 487. In Harmony *v.* Bingham, 2 Kernan, 106, the same principle is laid down, that, "where a party engages unconditionally, by express contract, to do an act, performance is not excused by inevitable accident, or other unforeseen contingency, not within his control." See Clark *v.* Franklin, 7 Leigh, 1; Wilson *v.* Knott, 3 Humph. 473; Brumby *v.* Smith, 3 Ala. N. S. 123; Wareham Bank *v.* Burt, 5 Allen, 112; M'Connell *v.* Kilgallon, 2 L. R. Ir. 119; Dewey *v.* Union Sch. Dist. 1 Am. L. Rev. N. S. 535.]

School District *v.* Dauchy.

Distinction between duty fixed by law and by parties.

(*b*) 3 B. & S. 826; 32 L. J. Q. B. 164.

judge there stated as an example, that "where a contract of sale is made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of English law, is established by the case of Rugg *v.* Minet."(*c*) After some further illustrations, the rule was laid down as follows: "The principle seems to us to be, that in contracts in which the *performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility arising from the perishing of the person or thing shall excuse the performance.*" (*d*) This case was followed in Appleby *v.* Meyers, in Cam. Scacc. (*e*) And in Robinson *v.* Davison (*e*) the same principle was applied to excuse the defendant, a lady, for breach of a promise to play upon the piano at a concert, when she was too ill to perform; the court holding that the promise was upon the implied condition that she should be well enough to play. In Dexter *v.* Norton (47 N. Y. 62) it was held, upon the authority of Taylor *v.* Caldwell, as well as upon the American cases, that in an executory agreement for the sale and delivery of specified goods, the vendor is excused from performance, if the goods perish without his fault, so as to render delivery impossible.

Vendor excused from delivery if goods perish without his fault.

Robinson *v.* Davison.

Dexter *v.* Norton.

American law.

§ 570 *a*. [The rule laid down in Taylor *v.* Caldwell was followed in Howell *v.* Coupland, L. R. 9 Q. B. 462. In this case it appeared that the plaintiff and defendant, in the month of March, entered into an agreement, whereby the defendant agreed to sell, and the plaintiff to purchase, "200 tons of regent potatoes grown on land belonging to the defendant in Whaplode, at the rate 3*l*. 10*s*. 0*d*. per ton, to be delivered in September or

Howell *v.* Coupland.

(*c*) 11 East, 210.

(*d*) [See note (*g*), *post*, § 571; Lovering *v.* Buck Mountain Coal Co. 54 Penn. St. 291; Stewart *v.* Loring, 5 Allen, 306; Tilt *v.* Silverthorne, 11 U. C. Q. B. 619.]

(*e*) Appleby *v.* Meyers, L. R. 1 C. P. 615; 35 L. J. C. P. 295, reversed in Cam. Scacc. L. R. 2 C. P. 651; 36 L. J. C. P. 331. See, also, Boast *v.* Firth, L. R. 4 C. P. 1; Clifford *v.* Watts, L. R. 5 C. P. 577; Whincup *v.* Hughes, L. R. 6 C. P. 78; Robinson *v.* Davison, L. R. 6 Ex. 269; [Spalding *v.* Rosa, 71 N. Y. 40.]

October, and paid for as taken away." At the time of the agreement the defendant had sixty-eight acres ready for potatoes, twenty-five acres having been already sown, the other forty-three acres being afterwards sown ; and the acreage was amply sufficient to grow more than 200 tons in an average year. In July the crop promised well ; but in August the potato blight appeared, and the crop failed, so that the defendant was able to deliver only 80 tons. The plaintiff brought an action for the non-delivery of the other 120 tons. It was held that the contract was for a portion of a specific crop, and was within the principle of Taylor *v.* Caldwell, and the contract must be taken to be subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible from the perishing of the thing without default in the contractor. This decision was affirmed on appeal, 1 Q. B. Div. 258. In Russell *v.* Levy, 2 Low. Can. 457, the court went even farther than the court of queen's bench in England. The action was for recovery of money paid in advance upon the contract, and for damages for the non-delivery of certain timber. Levy was to pay Lowndes a certain sum per foot for the timber, the timber to be collected from the country north of Quebec, and piled on wharves of Lowndes at Quebec, and to be delivered as required by Levy. While so piled on Lowndes' wharf, and before the property had passed to Levy, the timber was burned. The court held that Levy might recover his money back, but as to damages for non-delivery Sir James Stuart, Baronet, C. J. said: . . . " The sale was not a sale of birch timber generally, but of a specific determined quality of timber, to be collected north of Quebec, to be piled on a wharf during the winter, measured and delivered according to contract; and it having been destroyed by fire it could not be replaced by any other description of timber. Now this timber was destroyed by *vis major*, without any fault or neglect on part of Lowndes, who was thereby prevented from fulfilling his contract, and in such case no liability attaches by law upon the party for damages by reason of the non-execution of the contract."] Russell *v.* Levy.

§ 571. And a party is equally excused from the performance of his promise when a *legal impossibility* supervenes. If, after promise made, an act of parliament is passed rendering the performance illegal, the promise is at an end, and Legal impossibility.

the obligor no longer bound. (*f*) But if the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfil a promise, when he might have guarded himself by the terms of his contract. (*g*) Thus, in Kearon *v.* Pearson, (*h*) the defendant undertook to deliver a cargo of coals on board of a vessel with the usual dispatch. The defendant commenced the delivery, but a sudden frost occurred, so that no more coal could be brought from the colliery by the "flats" navigating the canal. The delivery was thus delayed about thirty days, and the court was unanimous in holding that the defendant was not excused from performing his promise. So in Barker *v.* Hodgson, (*i*) the defendant attempted to excuse himself for not furnishing a cargo in a foreign

Thing possible in itself.

Kearon *v.* Pearson.

Barker *v.* Hodgson.

(*f*) Brewster *v.* Kitchell, 1 Salk. 198; Davis *v.* Cary, 15 Q. B. 418; Doe *v.* Rugely, 6 Q. B. 107; Wynn *v.* Shrop. Un. Railway & Canal Co. 5 Ex. 420; Brown *v.* Mayor of London, 9 C. B. N. S. 726, and 31 L. J. C. P. 280; and see the whole subject elaborately discussed in the decision of the queen's bench, delivered by Hannen J. in Baily *v.* De Crespigny, L. R. 4 Q. B. 180; [Clancy *v.* Overman, 1 Dev. & Bat. 402; Stone *v.* Dennis, 3 Porter, 231; Jones *v.* Judd, 4 Comst. 412; Brick Pres. Church *v.* New York, 5 Cowen, 538; Baylies *v.* Fettyplace, 7 Mass. 325; Amer. Jur. Oct. 1833, art. iii. p. 251.]

(*g*) [Wareham Bank *v.* Burt, 5 Allen, 113; Eddy *v.* Clement, 38 Vt. 486; Lloyd *v.* Guibert, L. R. 1 Q. B. 121; Wells *v.* Calnan, 107 Mass. 514; Lovering *v.* Buck M. Coal Co. 54 Penn. St. 291; Oakley *v.* Morton, 1 Kernan, 25; Harmony *v.* Bingham, 2 Ib. 107, 108; School Dist. No. 1 *v.* Dauchy, 25 Conn. 530; Ryan *v.* Dayton, Ib. 194; Lord *v.* Wheeler, 1 Gray, 282; Davis *v.* Smith, 15 Mo. 467; Huling *v.* Craig, Addis. (Penn.) 342; Goddard *v.* Bebout, 40 Ind. 114; Thomas *v.* Knowles, 128 Mass. 22. It is not a valid excuse for not performing an agreement to deliver goods of a certain quality, that goods of that kind were not to be had at the particular season when the contract was to be executed. Youqua *v.* Nixon, 1 Peters C. C. 221; Gilpins *v.* Consequa, Ib. 91. As to the effect of the death, sickness, or other inability of the party for whom or by whom labor is to be performed in excusing performance, see Alexander *v.* Smith, 4 Dev. 364; Fuller *v.* Brown, 11 Met. 440; Knight *v.* Bean, 22 Me. 531, 536; Dickey *v.* Linscott, 20 Ib. 453; Lakeman *v.* Pollard, 43 Ib. 463; Ryan *v.* Dayton, 25 Conn. 188; Hubbard *v.* Belden, 27 Vt. 645; Ryan *v.* Dayton, 25 Conn. 188; Willington *v.* West Boylston, 4 Pick. 101; Stewart *v.* Loring, 5 Allen, 306; Farrow *v.* Wilson, L. R. 4 C. P. 744; Yerrington *v.* Greene, 7 R. I. 589; Hughes *v.* Wamsutta Mills, 11 Allen, 201; Wolfe *v.* Howes, 20 N. Y. 197; Green *v.* Gilbert, 21 Wis. 395. But a mere naked promise to return in good order, and at a specified time, a thing hired, does not, as matter of law, import a contract on the part of the hirer to insure it against loss accruing without his fault. Field *v.* Brackett, 56 Me. 121.]

In agreement to sell goods not specific, no excuse that goods of that kind cannot be had.

(*h*) 7 H. & N. 386; 31 L. J. Ex. 1.

(*i*) 3 M. & S. 267; but see Ford *v.* Cotesworth, L. R. 4 Q. B. 127; 5 Q. B. 544, in error.

port, on the ground that a pestilence broke out in the port, and all communication between the vessel and the shore was interdicted by the authorities, so that it was unlawful and impracticable to send the cargo on board, and Lord Ellenborough said: "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable upon his covenant? . . . . If, indeed, the performance of this contract had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." (*k*) So, in Kirk *v.* Gibbs, (*l*) the charterers of a vessel agreed to furnish to the captain, at Pisco, in Peru, the pass necessary to enable him to load a cargo of guano "free of expense, within twenty-four hours of his application." The charterers having loaded an insufficient cargo, pleaded in an action against them for this breach of the charter-party, that by the laws of the republic of Peru no guano could be loaded without a pass from the government, and that on inspection of the vessel the government refused a pass, and that on the plaintiff's repairing the vessel, a pass was granted for only a limited quantity, which was loaded, and that no more could be loaded without exposing both vessel and cargo to seizure. On demurrer, this plea was held bad. But the insufficiency of the plea consisted in this, that it did not allege that the owners of the vessel were in default, or that the vessel was not really fit to carry a full cargo, but only that the government officers refused the permit; and the charterer had made an absolute promise to furnish one, from which nothing could excuse him unless hindered by some act or default of the other party.

Kirk *v.* Gibbs.

§ 572. There are two old cases in which the vendors took advantage of the buyers' ignorance of arithmetic to impose on them conditions practically impossible. In Thornborow *v.* Whitacre (*m*) the declaration was in case, and alleged

Thornborow *v.* Whitacre.

(*k*) [See Knowles *v.* Dabney, 105 Mass. 437, 442.]

(*l*) 1 H. & N. 810; 26 L. J. Ex. 209.

(*m*) 2 Lord Raym. 1164.

that the defendant, in consideration of 2*s.* 6*d.* paid, and of 4*l.* 17*s.* 6*d.* promised to be paid on the defendant's performance, agreed to deliver to the plaintiff two grains of rye-corn on the following Monday, four grains on the Monday after, eight grains on the Monday after "et progressu sic deliberaret quolibet alio die Lunæ successive infrà unum annum ab eodem 29 Martii bis tot grana Secalis quot die Lunæ proximo præcedente respective deliberanda forent." The defendant demurred on the ground that the performance was impossible, Salkeld saying all the rye in the world would not make so much, and arguing that there were three impossibilities that would excuse an obligor, *impossibilitas legis*, as a promise to murder a man; *impossibilitas rei*, as a promise to do a thing in its own nature impossible; and *impossibilitas facti*, where though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day. But Holt C. J. said that *impossibilitas rei et facti* were all one: that the defendant's promise was only impossible with respect to his inability to perform it, and that the words *quolibet alio die Lunæ* must be construed as if written in English, every other Monday, *i. e.* every next Monday but one, which would bring the obligation much nearer the defendant's ability to perform it. After some further argument, Salkeld, perceiving the opinion of the court to be adverse to the defendant, offered the plaintiff to return the half-crown and give him his costs, which was accepted, and no judgment was delivered. The reporter says that in arguing this case, the old case of James *v.* Morgan (*n*) was remembered. The report is so concise that it is given entire. "K. B. Mich. 15 Car. 2. Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail: and avers that there were thirty-two nails in the shoes of the horse, which, being doubled every nail, came to 400 quarters of barley: and on non-assumpsit pleaded, the cause being tried before Hyde, at Hereford, he directed the jury to give the value of the horse in damages; and so they did, and it was afterwards moved in arrest of judgment, (*o*) for a small fault in the declaration, which was overruled, and judgment given for the plaintiff." The Hyde here mentioned was not the well-known Sir Nicholas Hyde, *temp.* Charles I., but Sir Robert Hyde, the chief justice, who had just been placed on the bench, and only remained in office two years (Foss' Tab. Cur. 66). The

James *v.* Morgan.

(*n*) 1 Levinz, 111.

(*o*) 1 Keble, 569.

ground of his decision nowhere appears. For further authorities upon this subject of impossible conditions, the reader is referred to the cases in the note. (*p*)

§ 573. A strong illustration of the rigor of the rule by which parties are bound to the performance of a promise deliberately made is furnished by the case of Jones *v.* St. John's College, (*q*) where a builder had contracted to do certain works by a specified time, as well as any alterations ordered by named persons within the same time, and the plaintiff attempted to excuse himself for delay by averring that the alterations ordered were such, and the orders given for them were received at so late a time, that it was impossible for him to complete them within the period specified in the contract, *as the defendant well knew when he gave the order;* but the court held that if he chose to bind himself by his promise to do, unconditionally, a thing which he could not possibly perform, under a penalty for not doing it, he was bound by the bargain and liable to the penalties stipulated for the breach of it.

Jones *v.* St. John's College.

§ 574. The conditions most frequently occurring in contracts of sale will now be considered. It is not uncommon to make the performance of a sale dependent on an act to be done by a third person. Such conditions must be complied with before rights dependent on them can be enforced, (*q*[1]) and if the third party refuse, even unreasonably, to perform the act, this will not dispense with it. Thus, in Brogden *v.* Marriott, (*r*) the vendor sold a horse for one shilling cash, and a further payment of 200*l.*, provided the horse should trot eighteen miles within one hour, the task to be performed within one month, and "J. N. to be the judge of the performance." It was held to be no defence to the buyer's action for the delivery of the horse that J. N. refused to be present at the trial, and Tindal C. J. said it was a "condition which the de-

Sale dependent on an act to be done by third person.

Brogden *v.* Marriott.

(*p*) Reid *v.* Hoskins, 6 E. & B. 953; 26 L. J. Q. B. 5; Eposito *v.* Bowden, 4 E. & B. 963; 7 E. & B. 763; 27 L. J. Q. B. 17; Pole *v.* Cetcovitch, 9 C. B. N. S. 430; 30 L. J. C. P. 102; Mayor of Berwick *v.* Oswald, 3 E. & B. 665, and 5 H. L. Cas. 856; Atkinson *v.* Ritchie, 10 East, 530; Adams *v.* Royal Mail Company, 5 C. B. N. S. 492; Mills *v.* Auriol, 1 H. Bl. 433, and 4 T. R. 94, in error; Jervis *v.* Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41; Paradine *v.* Jane, Aleyn, 27; Chitty on Cont. 646; Leake on Cont. c. iii. s. 111; Broom's Leg. Max. 245.

(*q*) L. R. 6 Q. B. 115.

(*q*[1]) [Aitcheson *v.* Cook, 37 U. C. Q. B. 490; Read *v.* Decker, 67 N. Y. 182.]

(*r*) 2 Bing. N. C. 473.

fendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party." So, in Thurnell *v.* Balbirnie (*s*) the declaration averred an agreement that defendant should purchase the plaintiff's goods "at a valuation to be made by certain persons, viz. Mr. Newton and Mr. Matthews, or their umpire," the former in behalf of the plaintiff, and the latter in behalf of the defendant: that Newton was ready and willing to value the goods, and that the defendant and Matthews, though notified and requested to proceed with the valuation, and to meet Newton for that purpose, continually neglected and refused to do so; and that the defendant was notified that Newton would meet Matthews or *any other person whom the defendant might nominate for the purpose of making the valuation*, but the defendant wholly neglected, &c. To this declaration there was a special demurrer, for want of an allegation that the defendant *hindered or prevented* Matthews from making the valuation, and the demurrer was sustained.

Thurnell *v.* Balbirnie.

§ 575. On the same principle it has been held, in other contracts on conditions of this kind, that the party who claims must show the performance of the condition on which his claim depends, or that the opposite party prevented or waived the performance. On an agreement to do work which is to be settled for according to the measurement of a named person, the measurement by that person is a condition precedent to the claim for payment; (*t*) on an insurance where the claim for payment was made to depend on a certificate from the minister of the parish, that the insured was of good character, and his claim for loss *bonâ fide*, it was held that the insured could not recover without the certificate, even though the minister unreasonably refused to give it: (*u*) and where building work was to be paid for on a certificate in writing by an architect, that he approved the work, no recovery could be had until the certificate was given. (*x*)

The party who claims must show performance of condition.

(*s*) 2 M. & W. 786.

(*t*) Mills *v.* Bayley, 2 H. & C. 36; 32 L. J. Ex. 179.

(*u*) Worsley *v.* Wood, 6 T. R. 720.

(*x*) [Ferguson *v.* Corp. of the Town of Galt, 23 U. C. C. P. 66; De Cew *v.* Clark, 19 Ib. 155; Lull *v.* Korf, 84 Ill. 225; Richardson *v.* Mahon, 4 L. R. Ir. 486;] Morgan *v.* Birnie, 9 Bing. 672; Clarke *v.* Watson, 18 C. B. N. S. 278; 34 L. J. C. P. 148; Roberts *v.* Watkins, 14 C. B. N. S. 592; 32 L. J. C. P. 291; Goodyear *v.* Mayor of Weymouth, 35 L. J. C. P. 12.

§ 576. If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in Clarke *v.* Westrope, (*y*) where the outgoing tenant sold the straw on a farm to the incomer at a valuation to be made by two different persons, but pending the valuation the buyer consumed the straw. In like manner, where an employer colluded with an architect, upon whose certificate the builder's claim for payment depended, so that the builder was prevented from getting the certificate, a declaration setting forth that fact in terms sufficient to aver fraud was held maintainable by all the barons of the exchequer. (*z*)

If condition rendered impossible by vendee, vendor may recover *quantum valebat*.

Clarke *v.* Westrope.

§ 577. The condition on which a sale depends may be the happening of some event, and then the question arises as to the duty of the obligee to give notice that the event has happened. As a general rule, a man who binds himself to do anything on the happening of a particular event is bound to take notice, at his own peril, and to comply with his promise when the event happens. (*a*) But there are cases in which, from the very nature of the transaction, the party bound on a condition of this sort is entitled to notice from the other of the happening of the event on which the liability depends. Thus, in Haule *v.* Hemyng (*b*) it was held that the vendor, who had sold certain weys of barley, to be paid for at as much as he should sell for to any other man, could not maintain an action against the purchaser before giving him notice of the price at which he had sold to others, the reason being that the persons to whom the plaintiff might sell were perfectly indefinite, and at his own option. But no notice is necessary where the particular person whose action is made a condition of the bargain is named, as if in Haule *v.* Hemyng the bargain had been that the purchaser would pay as much as the

Sale dependent on happening of event.

Duty to give notice.

General rule of law.

Haule *v.* Hemyng.

(*y*) 18 C. B. 765; 25 L. J. C. P. 287.

(*z*) Batterbury *v.* Vyse, 2 H. & C. 42; 32 L. J. Ex. 177; [De Cew *v.* Clark, 19 U. C. C. P. 155.]

(*a*) 2 Wms. Saunders, 62 a, note (4).

(*b*) Cited in 6 M. & W. 454, in the opinion delivered by Parke B. in Vyse *v.* Wakefield, from which the doctrine in the text is chiefly extracted. [Stinson *v.* Branigan, 10 U. C. Q. B. 210; Russell *v.* Rowe, 7 Ib. 484; Nickerson *v.* Gardiner, 12 Ib. 219; Robertson *v.* Hayes, 15 Ib. 293.]

vendor should get for the barley from J. S., (*c*) for the party bound in this event is sufficiently notified by the terms of his contract that a sale is or will be made for J. S., and agrees to take notice of it; there is a particular individual specified, and no option to be exercised by the vendor. And it seems that this is the true test, viz. that if the obligee has reserved any option to himself, by which he can control the event on which the duty of the obligor depends, then he must give notice of his own act before he can call upon the obligor to comply with his engagement. (*c*[1]) Therefore, in Vyse *v.* Wakefield, (*d*) where the defendant had covenanted to appear at any time or times thereafter, at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c. in order to enable the plaintiff to insure his life, and *would not afterwards do any act to prejudice the insurance*, the declaration alleged that the defendant did, in part performance of his covenant, appear at a certain insurance office, and that plaintiff insured the defendant's life, and that the policy contained a proviso by which it was to become void if the defendant went beyond the limits of Europe. Breach: that the defendant went beyond the limits of Europe, to wit, to Canada. Special demurrer, for want of averment that the plaintiff had given notice to the defendant that he had effected an insurance on the life of the defendant, and that the policy contained the proviso alleged in the declaration. Held that the declaration was bad. (*e*)

True test of the necessity of notice.

Vyse *v.* Wakefield.

(*c*) Viner's Ab. Condition, A, d, pl. 15.

(*c*[1]) [De Mill *v.* Hartford Ins. Co. 4 Allen (N. B.), 341, 351.]

(*d*) 6 M. & W. 442. See Makin *v.* Watkinson, L. R. 6 Ex. 25; Stanton *v.* Austin, L. R. 7 C. P. 651; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Armitage *v.* Insole, 14 Q. B. 728; 19 L. J. Q. B. 202.

(*e*) [In Watson *v.* Walker, 23 N. H. 471, 491, Eastman J. said: "In relation to notice, the rule is, that whenever the fact, upon which the defendant's liability is incurred, lies peculiarly within the knowledge and privity of the plaintiff, notice thereof must be stated to have been given to the defendant. But where the matter lies as much within the cognizance of the one party as the other, notice is not necessary. When, however, notice is necessary, either by the terms or nature of the contract, it is of the gist of the action, and must be specially averred in the declaration, for without such averment no complete right of action can appear." See Lent *v.* Padelford, 10 Mass. 230, 235; Clough *v.* Hoffman, 5 Wend. 500; Tasker *v.* Bartlett, 5 Cush. 359, 364, where Mr. Justice Wilde says it is a well known principle, "that where one party has knowledge of a material fact, not known to the other party, he is bound to give notice." Where a contract is to be performed "upon notice," it is necessary to give such notice.

When notice must be given by plaintiff and when averred.

§ 578. A very frequent contract among merchants is a sale of goods "to arrive." It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at nisi prius, but in recent times these contracts have been multiplied to a great extent. In Boyd *v.* Siffkin (*f*) the sale was of "thirty-two tons, more or less, of Riga Rhine hemp *on arrival per Fanny and Elmira*," &c. and the vessel arrived, but without the hemp. Held that the sale was conditional on the arrival, not of the vessel but of the hemp. And the same conclusion was adopted by the court in Hawes *v.* Humble, (*g*) where the sale was thus expressed: "I have this day sold for and by your order *on arrival* 100 tons," &c. In Idle *v.* Thornton (*h*) the contract was for "200 casks first sort yellow candle tallow, at 68*s.* per cwt. *on arrival:* if it should not arrive on or before the 31st December next, the bargain to be void: to be taken from the king's landing scale, &c. ex *Catherina*, Evers." The vessel with the tallow on board was wrecked off Montrose, but the greater part of the tallow was saved, and might have been forwarded to London by the 31st December, but was not so forwarded, and was sold at Leith. Lord Ellenborough held that the contract was conditional on the arrival of the tallow in London *in the ordinary course of navigation*, and that the vendor was not bound, after the shipwreck, to forward it to London: at all events, not without a request and offer of indemnity by the purchaser. In Lovatt *v.* Hamilton (*i*) the contract was, "We have sold you fifty tons of palm oil, *to arrive* per *Mansfield*, &c. In case of non-arrival,

Sale of goods "to arrive."

Boyd *v.* Siffkin.

Hawes *v.* Humble.

Idle *v.* Thornton.

Lovatt *v.* Hamilton.

As where it was agreed between the plaintiff and defendant, that the defendant should deliver to the plaintiff one thousand barrels of flour, at a certain rate per barrel, at any time within six months from the date of the contract, and give him six days' notice prior to the time of such delivery, and that the plaintiff should pay the stipulated price therefor on delivery. It was held, in an action by the plaintiff against the defendant for not delivering the flour within the six months, that under the provisions of the contract it was incumbent on the defendant to do the first act, by giving notice of his readiness to deliver the flour. Quarles *v.* George, 23 Pick. 400. So if a person has contracted to do a thing on demand or on notice, he will be entitled to a reasonable time in which to do the thing, after a demand made or notice given. See Baker *v.* Mair, 12 Mass. 121; Newcomb *v.* Brackett, 16 Ib. 161; Eames *v.* Savage, 14 Ib. 425. See Topping *v.* Root, 5 Cowen, 404; Watson *v.* Gorren, 6 U. C. Q. B. 542.]

(*f*) 2 Camp. 326.

(*g*) 2 Camp. 327, n.; [Shields *v.* Pettee, 2 Sandf. 262.]

(*h*) 3 Camp. 274.

(*i*) 5 M. & W. 639.

or the vessel's not having so much in, after delivery of former contracts, this contract to be void." During the voyage a part of the cargo of the *Mansfield* was transshipped by an agent of the vendors into another vessel belonging to the vendors, but without their knowledge, and the oil arrived safely on *that* vessel. The *Mansfield* also arrived safely. The question was whether the arrival of the oil *in the Mansfield* was a condition precedent to buyer's right to claim the delivery, and the court, without hearing the vendors' counsel, held the affirmative to be quite clear. (*k*)

Alewyn v. Pryor.

§ 579. In Alewyn *v.* Pryor (*l*) the sale was of "all the oil on board the *Thomas* . . . . *on arrival* in Great Britain: to be delivered by sellers on a wharf in Great Britain to be appointed by the buyers, with all convenient speed, *but not to exceed the* 30*th day of June next*," &c. The vessel did not arrive till the 4th July, and the purchaser refused to take the oil. Held that the arrival *by the* 30*th June* was a condition precedent, and not a warranty by the seller.

Johnson v. Macdonald.

In Johnson *v.* Macdonald (*m*) the sale was of 100 tons of nitrate of soda, "to arrive ex *Daniel Grant*," and there was a memorandum at foot, "should the *vessel* be lost, this contract to be void." The vessel arrived without any nitrate of soda, and it was strenuously contended that the expression "to arrive," when coupled with the stipulation in the memorandum, showed the meaning to be an undertaking by the vendor that the soda should arrive, and that he would deliver it if the *vessel* arrived safely. But all the judges were of opinion that there was a *double condition precedent*, and that the contract was to take effect only if the vessel arrived, *and* if on arrival the soda was on board.

Gorrisen v. Perrin.

§ 580. In Gorrisen *v.* Perrin (*n*) the sale was of "1,170 bales of gambier, *now on passage from Singapore*, and *expected to arrive* in London, viz. per *Ravenscraig* 805

(*k*) [See Shields *v.* Pettee, 2 Sandf. 262. A lot of scrap iron was sold, to arrive by the *Christopher*. In fact it arrived by the *St. Christopher*. It was held that without showing that there was in fact a misunderstanding as to the vessel, and that the misnomer was of some consequence, the vendee was not justified in refusing to receive the goods. Smith *v.* Pettee, 70 N. Y. 13. As to when a vessel has "arrived" see Montgomery *v.* Middleton, 13 Ir. C. L. 173. On a sale "to arrive," the title does not pass until the goods arrive and are delivered; the sale is, in its nature, executory. Benedict *v.* Fields, 16 N. Y. 597; Reimers *v.* Ridner, 2 Rob. 11; Neldon *v.* Smith, 7 Vroom (N. J.), 148, 154.]

(*l*) Ry. & M. 406.

(*m*) 9 M. & W. 600.

(*n*) 2 C. B. N. S. 681; 27 L. J. C. P. 29.

bales, per *Lady Agnes Duff* 365 bales." Both vessels arrived with the specific number of *packages*, but it was proven that the contents were far short of the agreed number of *bales*, the latter word meaning in the trade a compressed package of two hundred weight. There was also on board the vessels a quantity of gambier consigned to other parties, sufficient to make up the whole quantity sold. The plaintiff, who had bought the goods, claimed in two counts: the first, on the theory that the words of the contract imported a *warranty* that there were 1,170 *bales* actually on the passage; the second count, on the theory that even if it was a double condition precedent that the vessels should arrive with that quantity on board, the condition had been fulfilled, although part of the goods belonged to third persons and not to the vendor. The court held, on the first count, that the language of the contract was plainly an absolute assurance, a warranty, that the goods were on the passage. On the second point, which was not necessary to the decision, the court, reviewing Fischel *v.* Scott, (*o*) distinguished it from the case before them. In that case a party sold oil expected to arrive, and which did arrive, but he had supposed it would come consigned to him, whereas it turned out that it had been consigned to some one else, — and inasmuch as he had intended and contracted to sell the very oil which arrived, he must bear the consequences, and the court could not add to the contract a further condition, viz. that the goods on arrival should prove to be his: a very different thing from saying that when a man sells his own specific goods contingent on their arrival, and they do not arrive, the arrival of other similar goods with which he never affected to deal shall operate to fix him with the same consequences as if his own goods had arrived. (*p*)

Fischel *v.* Scott.

§ 581. In Vernede *v.* Weber (*q*) the contract was for a sale of "the cargo of 400 tons, provided the same be shipped for seller's account, more or less *Aracan Necrensie rice*, ... per British vessel *Minna*, ... at 11*s.* 6*d.* per cwt. for Necrensie, or at 11*s.* for *Larong*, the latter quantity not to exceed fifty tons, or else at the option of buyers to reject any excess," &c.

Vernede *v.* Weber.

(*o*) 15 C. B. 69.

(*p*) See, on this point, Lord Ellenborough's remarks in Hayward *v.* Scougall, 2 Camp. 56.

(*q*) 1 H. & N. 311; 25 L. J. Ex. 326. See Simond *v.* Braddon, 2 C. B. N. S. 324; 26 L. J. C. P. 198.

By the pleadings it appeared that the vessel arrived without any Aracan Necrensie rice at all, but with 285 tons of Larong rice, and 159 tons of *Latoorie* rice. The buyer sued for delivery of this cargo. It was held by the court, first, that the contract did not contain a warranty that any particular rice should be put on board, but that the sale was conditional on such a cargo as was described being shipped; secondly, that the purchaser was not entitled to the entire cargo that arrived, because no *Latoorie* rice had been sold, no price was fixed for that quality, and the parties plainly intended to fix their own price for what was sold, and not to leave it for a jury to determine; and thirdly, though with some hesitation, (*r*) that the buyer had no right to the *Larong* rice, because the contract was entire: it contemplated the sale of the whole cargo of *Necrensie* rice; the *Larong* rice was to be a mere subsidiary portion of the cargo, which was described as one of *Necrensie* rice; that the vendor could not have compelled the buyer to take a cargo of which no part corresponded with the description in the contract, in which there was no *Necrensie* rice at all, and that he could not be bound to deliver what he could not have compelled the buyer to take, for the contract must bind both or neither.

Simond *v.* Braddon.

§ 582. In Simond *v.* Braddon (*s*) the sale was "of the following cargo of Aracan rice, per *Severn*, Captain Prynn, now on her way to Akyab (where the cargo was to be taken on board), *viâ* Australia. The cargo to consist of fair average Nicranzi rice, the price of which is to be 11*s*. 6*d*. per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account, and in conformity with his invoice," &c. The word "only" was improperly inserted before the word "engages," after the sold note was signed, and was not in the bought note. This was held to be a *warranty* by the defendant to ship a cargo of fair average Nicranzi rice and he was held liable for a breach of it, the cargo proving to be Nicranzi rice of inferior quality.

Hale *v.* Rawson.

§ 583. In Hale *v.* Rawson (*t*) the declaration alleged an agreement by the defendant to sell to the plaintiff fifty cases of East India tallow, "to be paid for *in fourteen days*

(*r*) This third point, notwithstanding the expression of hesitation by the learned judge who delivered the opinion, seems to rest on grounds quite as solid and indisputable as the two preceding.

(*s*) 2 C. B. N. S. 324; 26 L. J. C. P. 198.

(*t*) 4 C. B. N. S. 85; 27 L. J. C. P. 189.

after the landing thereof, to be delivered by the defendant to the plaintiff, *on safe arrival of a certain ship* or vessel called the *Countess of Elgin*, then alleged to be on her passage from Calcutta to London ; " that the sale was by sample, that the vessel had arrived, &c. &c., and that the defendant refused to deliver. Plea, that neither the tallow nor any part thereof arrived by the *Countess of Elgin*, whereby, &c. Demurrer and joinder. Held that the contract for the sale was conditional on the arrival of the *vessel* only, notwithstanding the stipulation for payment after the landing of the tallow. In this case the language of the contract plainly imported an assurance of warranty that the tallow was on board the ship.

§ 584. In Smith *v.* Myers (*u*) the contract was for the sale of " about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s.* 9*d.* per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." The vendors (the defendants), when this contract was made on the 8th September, had been informed by their Valparaiso correspondents of the purchase of 600 tons nitrate, and of the charter of the *Precursor*, on account of the vendors. Before the date of the contract, to wit, on the 13th August, an earthquake had destroyed the greater part of the nitrate while lying at the port of lading, and on the 2d September, after it had been decided in Valparaiso that the firm there was not bound to ship another cargo on the *Precursor*, the charter of that vessel had been cancelled by the Valparaiso house ; the vendors in England being ignorant of these facts when they made the contract with the plaintiff on the 8th September. Afterwards the Valparaiso correspondents, hearing of the contract made by the defendants, and not knowing what its precise terms were, determined as a measure of precaution to buy for them another cargo of 600 tons, and obtained an assignment of the charter of the same *Precursor* from another house which had taken up the vessel, and on the 23d December this second cargo was shipped to the defendants, who, in January, sold it " to arrive " to other parties. On the arrival of the cargo, in May, the plaintiffs claimed it, and on refusal of delivery by the defendants brought their action. It was held that the contract referred to a specific

Smith *v.* Myers.

(*u*) L. R. 5 Q. B. 429 ; 7 Q. B. 139, in exchequer chamber.

cargo "*expected* to arrive per *Precursor*," under the information the vendors had received when they made the bargain, and that the destruction of *that* expected cargo, under the terms of the contract was provided for, in the stipulation that the contract in such event should "be void." It was a mere accident, a mere coincidence, that the second cargo bought had come on the *Precursor*, and there would have been no pretext for the plaintiff's demand, if it had come on a vessel of a different name.

Covas *v.* Bingham.

Sale of cargo to arrive "as it stands."

§ 585. In Covas *v.* Bingham (*x*) a sale was made of a cargo not yet arrived "as it stands," and it was said by counsel, in argument, that such contracts are not now uncommon, instead of, as formerly, "to arrive." The sale was made in Liverpool of "the cargo per *Prima Donna* now at Queenstown *as it stands*, consisting of 1,300 quarters Ibraila Indian corn, at the price of 30*s.* per imperial quarter, *the quantity to be taken from the bill of lading*, and measure calculated 220 quarters equal to 100 kilos., payment cash *on handing shipping documents and policy of insurance.*" The contract was made on 16th November, the ship being then at Queenstown awaiting orders. The bill of lading and policy of insurance were not then in Liverpool, but were received on the 19th November, and the bill of lading then appeared to be for 758 kilos., with a memorandum at foot signed by the master, "quantity and quality unknown to me." The defendants sent plaintiff an invoice for 1,667$\frac{3}{5}$ quarters, being the proper number, calculated according to the terms of the contract as applied to the bill of lading, and plaintiff paid the price thus calculated. The ship was ordered by the plaintiff to Drogheda, and the cargo on delivery there was found to measure only 1,614$\frac{1}{2}$ quarters, leaving a deficiency of 53$\frac{1}{10}$ quarters, and the action was brought to recover back the excess of price paid for this deficiency in quantity. It does not appear in the report how the deficiency arose, *nor whether there were really* 758 *kilos. on board, in which case there would have been no deficiency* according to the basis of calculation agreed on by the parties, but this point does not seem to have been suggested in argument, nor adverted to in the decision. It was held that there was no condition nor warranty as to quantity, and that the true effect of the contract was to put the purchaser in place of the vendor as owner of the cargo according to the face of the bill of

(*x*) 2 E. & B. 836; 23 L. J. Q. B. 26.

lading, with all the chances of excess or deficiency in the quantity that might be on board.

§ 586. It appears from this review of the decisions that contracts of this character may be classified as follows: First. Where the language is that goods are sold "*on arrival* per ship A. or ex ship A.," or "*to arrive* per ship A. or ex ship A." (for these two expressions mean precisely the same thing), (*y*) it imports a *double condition precedent*, viz. that the ship named shall arrive, *and* that the goods sold shall be on board on her arrival. Secondly. Where the language asserts the goods to be on board of the vessel named, as "1,170 bales *now on passage*, and expected to arrive per ship A.," or other terms of like import, there is a *warranty* that the goods are on board, and a *single condition precedent*, to wit, the arrival of the *vessel*. Thirdly. The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him. Fourthly. Where the sale describes the expected cargo to be of a particular description, as "400 tons *Aracan Necrensie* rice," and the cargo turns out on arrival to be rice of a different description, (*z*) the condition precedent is not fulfilled, and neither party is bound by the bargain.

Result of the decisions in sales "to arrive."

§ 587. In a recent case (*a*) an attempt was made to convert a stipulation introduced in the vendor's favor into a condition precedent which he was bound to fulfil. A sale was made of cotton, "to arrive in Liverpool," and a clause was inserted: "*The cotton to be taken from the quay;* customary allowance of tare and draft, and the invoice to be dated from date of delivery of last bale." This was construed to be a stipulation *against* the buyer, not a condition in his *favor;* the purpose being probably to save warehouse charges, as it was shown that by the dock regulations in Liverpool goods must be removed

Neill *v.* Whitworth.

(*y*) Per Parke B. in Johnson *v.* M'Donald, 9 M. & W. 600–604.

(*z*) See *post*, part II. ch. i. Warranty, for the effect of a *description* of the thing sold.

(*a*) Neill *v.* Whitworth, 18 C. B. N. S. 435; 34 L. J. C. P. 155.

from the quay within twenty-four hours, in default whereof they are removed and warehoused by the dock authorities.

Vendor to give notice in sales "to arrive."

§ 588. In sales of goods "to arrive," it is quite a usual condition that the vendor shall give notice of the name of the ship on which the goods are expected, as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract. In Busk *v.* Spence, (*b*) decided in 1815, the seller agreed to sell certain flax, to be shipped from St. Petersburg, "and as soon as he knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer." The vendor received the advice on the 12th September, in London, and did not communicate it to the defendant, who resided at Hull, till the 20th. The vessel arrived in October, and the defendant refused to accept the flax. Held by Gibbs C. J. that this was a condition precedent; that it had not been complied with; and that the question whether or not the communication made eight days after receiving the information was a compliance with the condition was one of law, not of fact. The plaintiff was therefore nonsuited. This point seems not to have occurred again till 1854, when it was carefully considered as a new question, and determined in the same way, in the exchequer, in Graves *v.* Legg, (*c*) the decision of Gibbs C. J. in Busk *v.* Spence having escaped the notice of the counsel and the court, as no reference is made to it in the report. In this case, after the decision on the demurrer to the above effect, there was a trial on the merits, in which it was proven that the vessel was named to the buyer's broker, who had made the contract, in Liverpool; and that by the usage of that market such notice to the broker was equivalent to notice to his principal, and the court of exchequer, as well as the exchequer chamber, held that this was a compliance with the condition. (*d*)

Busk *v.* Spence.

Graves *v.* Legg.

What is meant by "a cargo."

§ 589. There is not an entire concordance in the authorities as to the true construction of a contract for the sale of "a cargo." In Kreuger *v.* Blanck (*e*) the defendants, in Liverpool, sent an order to the plaintiffs, at Mauritius, on the 25th July, for "a small cargo (of lathwood) of

Kreuger *v.* Blanck.

(*b*) 4 Camp. 329.

(*c*) 9 Ex. 709; 23 L. J. Ex. 228.

(*d*) 11 Ex. 642; 26 L. J. Ex. 316. See, also, Gilkes *v.* Leonino, 4 C. B. N. S. 485.

(*e*) L. R. 5 Ex. 179.

about the following lengths, &c. &c., in all about sixty cubic fathoms, which you will please to effect on opportunity for my account, at 6*l.* 15*s.* c. f. and i. (*f*) per cubic fathom, discharged to the Bristol Channel." The plaintiffs being unable to get a vessel of the exact size for such a cargo, chartered a ship and loaded her with eighty-three fathoms, and on the arrival of the vessel the plaintiff's agent unloaded the cargo and measured and set apart the amount of the defendant's order and tendered him a bill of lading for that quantity, but the defendant declined to accept on the ground that "the cargo" was in excess of the order. Held by Kelly C. B. and Cleasby B. (Martin B. diss.), that "cargo" meant a whole cargo, and that plaintiffs had not complied with the order and could not maintain the action. (*f*[1])

§ 590. But this case was referred to with marked doubt by Blackburn J., in the opinion given by him in Ireland *v.* Livingston, (*g*) in the House of Lords. The contract in that case was in a letter in the following words: "My opinion is that should the beet crop prove less than usual there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say 26*s.* 9*d.* for Nos. 10 and 12, and you may ship me 500 tons to cover cost, freight, and insurance, — fifty tons more or less of no moment if it enables you to get *a suitable vessel.* You will please to provide insurance and draw on me for the cost thereof as customary, attaching documents, and I engage to give the same due protection on presentation. I should prefer the *option of sending vessel* to London, Liverpool, or the Clyde, but if that is not compassable you may ship to either Liverpool or London." And a telegram was sent the next day to say that "the insurance is to be done with average, and if possible, *the ship* to call for orders for a good port in the United Kingdom." The plaintiff answered on the 6th September: "We are in receipt of your esteemed favor of 25th July, and take due note that you authorize us to purchase and ship on your account *a cargo of about* 500 *tons*, provided we can obtain Nos. 10 to 12 D S, at a cost not exceeding 26*s.* 9*d.* per cwt. free on board, including cost, freight, and insurance; and

Ireland *v.* Livingston.

(*f*) The initials mean, "cost, freight, and insurance."

(*f*[1]) [In Barrowman *v.* Drayton, 2 Ex. D. 15, it was decided that "cargo" meant the entire load of the vessel, and the vendee was not bound to accept anything less.]

(*g*) L. R. 2 Q. B. 99; 5 Q. B. 516; 5 Eng. App. 395–410.

your remarks regarding the *destination of the vessel* have also our attention. . . . . If prices come within your limits, and we can lay in a *good cargo*, we shall not fail to operate for you." At the date of this letter, the market at the Mauritius was too high to enable the plaintiffs to make the purchase at the defendants' limit, freight ranging from 2*l.* 15*s.* to 3*l.* per ton. In the course of September the plaintiff received an offer from a partly loaded vessel, to take 7,000 or 8,000 bags of sugar at a freight of 2*l.* 10*s.* per ton for a voyage direct to London, and ascertained that at this rate of freight the sugar could be purchased so as to bring the cost, freight, and insurance within the limit. It was impossible to purchase the sugar in one lot from the same person, and the plaintiffs purchased from several brokers fourteen distinct parcels of the specified quality. The plaintiffs used due diligence, but could not obtain more than 5,778 bags, weighing about 392 tons, within the limits, and reduced their own commissions by a sum of 163*l.* 19*s.* 4½*d.*, in order not to exceed the limit. They shipped this quantity to the defendants, and being unable to fill up the vessel with any further quantity on the defendant's account, they shipped on their own account about 150 tons of inferior quality, and the ship sailed on the 29th September with the cargo above described. The plaintiffs continued to watch the market for the purpose of completing the defendants' order for "about 500 tons," without success, till the 26th October, when they received from the defendants a countermand of the order. The defendants refused to accept the 392 tons shipped to them as aforesaid, and the plaintiffs brought their action. In the queen's bench, it was held (by Cockburn C. J., Mellor and Shee JJ.) that the true construction of the order was to buy sugar for the defendants, according to the usage of the market at the Mauritius, where the sugar could only be bought in several parcels from different persons, and that as fast as the plaintiffs bought each lot, in pursuance of the order, the lot so bought was appropriated to the order, and that the defendants were bound to accept what was so bought, and had, themselves, by countermanding the order, prevented its execution for the entire quantity ordered. The question as to the shipment being *part of a cargo* and not *a cargo* was not mooted. In the exchequer chamber, the judgment of the queen's bench was reversed, by Kelly C. B., Martin and Channel BB., and Keating J. (Montague Smith J. and Cleasby B. diss.), on the

ground that the order was for a single shipment of one cargo by a single vessel. The dissenting judges did not consider that the fulfilment of the order was made conditional upon its being so executed as to send the whole order as one cargo. In the House of Lords, Martin and Cleasby BB. adhered to their opinions expressed in the exchequer chamber, and Blackburn, Hannen, and Byles JJ. were all of opinion that the case was one of principal and agent, not of vendor and vendee (as held by Martin B.), and that the true construction of the order did not impose the condition of shipment as one cargo in one vessel. Although the case, as decided by the lords, did not involve all the considerations upon which the judgment of Blackburn J. (in behalf of himself and Hannen J.) was based, the exposition by that eminent judge of the principles which distinguish different contracts with commission merchants or agents, and of their rights and duties, is so instructive as to justify a very full extract from his opinion. "The terms, at a price 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premium of insurance and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay the ship-owner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept, if the shipment be in conformity with his contract, on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered, in consequence of the perils of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners not covered by the policy, he will recover it from the ship-owner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the

Order for goods at price to cover cost, freight, and insurance.

Vendor's obligations on such order.

amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is obvious, that if freight is high, the consignor gets the less for the goods he supplies; if low, he gets the more. But inasmuch as he has contracted to supply the goods at this price, he is bound to do so, though owing to the rise in prices at the port of shipment, making him pay more for the goods, or of freight causing him to receive less himself because the ship-owner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices at the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party *binds himself absolutely* to supply the goods in a vessel such as is stipulated for *at a fixed price*, to be paid in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party *binds himself to pay that fixed price*. Each party there takes upon himself the risk of the rise or fall in price, and there is no *contract of agency or trust* between them, and therefore no commission is charged.

Commission agent's duty on such order.

But it is also very common for a consignor to be an agent who does not bind himself absolutely to supply the goods, but merely accepts an order by which he *binds himself to use due diligence to fulfil the order*. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the *actual cost* and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be *a positive fraud*, if having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit. The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering, the freight being in no way an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. If, by due exertions,

he can execute the order within those limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission, because *there is a contract of agency*. . . . . It is quite true that the agent who in thus executing an order ships goods to his principal *is a vendor to him*. The persons who supply goods to a commission agent sell them to *him* and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. . . . . The property in the goods passes from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the *legal effect* of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently *the commission merchant is a vendor*, and has the right of one as to stoppage *in transitu*. I therefore perfectly agree with the opinion expressed by Baron Martin in the court below, that the present is a *contract between vendor and vendee;* but I think he *falls into a fallacy when he concludes therefore that it is not a contract as between principal and agent*. My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered, at or below the limit given, to be followed up by the transfer of the property at the actual cost, with the addition of the commission; but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered, as much below the limit as they could." The learned judge then went on to show that the question of usage of the market did not really arise; that the commission merchant as an agent must use reasonable exertions to buy *as cheaply as he can*, and to buy them either in small parcels or one large lot, according to the advantage which would be gained in price by the one or the other mode of purchase. It is very remarkable that after the thorough discussion of this case the only point upon which the judges had given opinions that was decided in the

lords (*h*) was that the contract was one of agency, as explained by Blackburn J. The case was decided upon a totally new point not taken in the argument nor suggested by the judges. It was determined in favor of the plaintiffs, on the ground that the divergence of opinion among the judges as to the construction of the order was conclusive proof that the language was ambiguous and admitted of either construction; and the very important rule was laid down, "*that when a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent* bonâ fide *adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in the other sense, of which it is equally capable.*" (*i*)

If order capable of two constructions, principal bound by either if adopted *bonâ fide* by agent.

§ 591. Sometimes the sale of a cargo is made by bill of lading, and the condition imposed by the contract on the vendor must be strictly complied with, in order to enable him to enforce the bargain. In 1859 the two cases of Tamvaco *v.* Lucas were decided, both in favor of the purchaser, on the ground that the vendors' proffer of delivery was not in accordance with the conditions of the contract. In the first case, (*k*) the sale was of a cargo of wheat "of about 2,000 quarters, say from 1,800 to 2,200 quarters, ... to be shipped between 1st September and 12th October: . . . . sellers guaranty delivery of invoice weights, sea accidents excepted. *Buyers to pay for any excess of weight*, unless it be the result of sea damage or heating. The measure for the sake of invoice to be calculated at the rate of 100 chetwerts equal to seventy-two quarters . . . . Payment cash in London *in exchange for usual shipping documents*," &c. In an action for non-acceptance, the declaration alleged that the plaintiffs offered to deliver "the usual shipping documents according to the contract, ... in exchange for the invoice price, according to the contract." The defendants pleaded in substance that the shipping documents offered to them were for a cargo of wheat, amounting to 2,215 quarters, and that the plaintiffs had wrongly stated in the invoice that the cargo was only 2,200 quarters: that when the bill of lading was tendered

Sale of cargo by bill of lading. Tamvaco *v.* Lucas.

(*h*) The lords present were Chelmsford, Westbury, and Colonsay.

(*i*) [See Foster *v.* Rockwell, 104 Mass. 167.]

(*k*) 1 E. & E. 581; 28 L. J. Q. B. 150.

and the invoice made out, the vessel was at sea, and neither party knew what quantity was on board, except from the shipping documents, and that the defendants were therefore entitled to reject the offer, as they had done, as not being in conformity with the contract. The plaintiff replied that the cargo offered was really a cargo of more than 1,800 and less than 2,000 quarters, as shown by the number of quarters *delivered* from the ship when actually discharged. On demurrer to this replication, the court held, after advisement, that the purchaser was not bound to accept the offer made on the tender of the usual shipping documents; that he had no power to accept the part he agreed to purchase, and reject the rest; that if he had accepted he would have been *bound to pay for the surplus*, if any, and that the vendor had no right to make out an invoice otherwise than in accordance with the bill of lading, that is, counting 100 chetwerts equal to seventy-two quarters, according to the terms of the contract. The plaintiffs had failed to show that they were ready and willing to perform their part of the contract, and could not force the purchaser to accept. The second case, (*l*) on a contract similar to the first, presented the converse of the facts. The bill of lading represented a cargo which was in conformity with the contract, but the defendants' plea alleged that the quantity of wheat actually on board was less than 1,800 quarters, and this plea was held good on demurrer. The contracts in the two cases were held to mean substantially that the vendors were to supply in each case a cargo of "about 2,000 quarters," that an excess or deficiency of 200 quarters should form no objection; that the purchaser's promise to pay for any excess of weight applied to such excess as might occur within the stipulated limits; and that the vendor was in default if he either tendered shipping documents for a cargo not in accordance with the contract, or shipping documents erroneously describing a cargo as being within the contract, when in fact and truth it was not.

Rule in executory agreement; conditions concurrent.

§ 592. The general rule in executory agreements for the sale of goods is that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, (*m*) or offer to perform, or averring

(*l*) Tamvaco *v.* Lucas, 1 E. & E. 592; 28 L. J. Q. B. 301.

(*m*) Morton *v.* Lamb, 7 T. R. 125; Waterhouse *v.* Skinner, 2 B. & P. 447;

readiness and willingness to perform his own promise. (*n*). In Atkinson *v.* Smith (*o*) there was a *mutual* agreement for cross sales as follows: "Bought of A. & Co. about thirty packs of Cheviot fleeces, and agreed to take the undermentioned noils (coarse woollen cloths, so called); also agreed to draw for 250*l.* on account, at three months. 16 packs No. 5 noils, at 10¾*d.*; 8 packs No. 4 noils, at 12*d.*" The defendant had bargained with the plaintiff for the purchase of the fleeces, and had agreed to sell him the noils. The noils rose in price, and the defendant refused to deliver them. Plaintiff brought action, averring *independent agreements*, but he was nonsuited, all the judges holding that he should have alleged his offer to deliver the fleeces, which was a condition precedent to his right to claim the noils. In Withers *v.* Reynolds (*p*) the defendant agreed to furnish plaintiff with wheat straw, sufficient for his use as stable-keeper, from 20th October, 1829, till 24th June, at the rate of three loads in a fortnight, at 33*s.* per load, and the plaintiff agreed "to pay to the said J. R. 33*s.* per load for each load of straw so delivered on his premises from this day till the 24th June, 1830." The plaintiff insisted that these were two independent agreements, that no time was fixed for payment, and that he could maintain his action against the defendant for not delivering, leaving the latter to his cross action for payment; but all the judges held that the plaintiff's right was dependent on his readiness to pay for each load on delivery, and it being proven that he had expressly refused to execute the contract according to this interpretation of it, he was nonsuited. (*p*[1]) In Bankart *v.* Bowers (*q*) there was a

Atkinson *v.* Smith. Mutual agreement for cross sale.

Withers *v.* Reynolds.

Bankart *v.* Bowers.

Rawson *v.* Johnson, 1 East, 203; Withers *v.* Reynolds, 2 B. & Ad. 882; Jackson *v.* Allaway, 6 M. & G. 942.

(*n*) Rawson *v.* Johnson; Jackson *v.* Allaway, *supra;* Boyd *v.* Lett, 1 C. B. 222; [Dana *v.* King, 2 Pick. 155; Lord *v.* Belknap, 1 Cush. 279; Howland *v.* Leach, 11 Pick. 151; Swan *v.* Drury, 22 Ib. 485; Warren *v.* Wheeler, 21 Maine, 484; Howe *v.* Huntington, 15 Ib. 350; Smith *v.* Lewis, 26 Conn. 110; Williams *v.* Healey, 3 Denio, 363; Gazley *v.* Price, 16 John. 267; Cornwall *v.* Haight, 8 Barb. 327; Jones *v.* Marsh. 22 Vt. 144; Campbell *v.* Gittings, 19 Ohio, 347; Shaw *v.* Turnpike Co. 2 Penn. 454; Grandy *v.* McCleese, 2 Jones (N. Car.) Law, 142; Barbee *v.* Willard, 4 McLean, 356; Hough *v.* Rawson, 17 Ill. 588; Smith *v.* Lipscomb, 13 Texas, 532; Taylor *v.* Travis, 3 Allen (N. B.), 445; M'Cann *v.* Kirlin, Ib. 345; Leonard *v.* Wall, 5 U. C. C. P. 9; Reid *v.* Robertson, 25 Ib. 568.]

(*o*) 14 M. & W. 695.

(*p*) 2 B. & Ad. 882.

(*p*[1]) [Buchanan *v.* Anderson, 16 U. C. Q. B. 331.]

(*q*) L. R. 1 C. P. 484.

written agreement, containing eight covenants, by which the plaintiff agreed to purchase certain land and coal mines from the defendant; and the latter, by the seventh of these covenants, agreed to purchase from the plaintiff all coal that he might require from time to time, at a fair market rate, and the action was for damages against the defendant for refusing to buy the coal, to which it was pleaded that the plaintiff had refused to buy the land; and on *demurrer* by plaintiff to this plea, held that these were not independent agreements, but concurring stipulations, and there was judgment for the defendant on the demurrer. (q^1)

§ 593. In determining whether stipulations as to the *time* of performing a contract of sale are conditions precedent, the court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. In Hoare *v.* Rennie (*r*) the defendant agreed to buy from the plaintiff 667 tons of iron, to be shipped from Sweden, *in about equal portions*, in each of the months of June, July, August, and September. The plaintiff shipped only twenty-one tons in June, which the defendant refused to accept as part compliance with the contract, and it was held that the delivery at the time specified was a condition precedent, and that plaintiff could not on these facts maintain an action against the defendant for not accepting. (r^1) But this case has been much questioned, particularly in Simpson *v.* Crippin, *infra*. In Jonassohn *v.* Young (*s*) the agreement was for a supply of coal by the plaintiff to the defendant, as much as one steam vessel could convey in nine months, plying between Sunderland and London, the coals to be equal to a previous cargo supplied on trial, and the defendant to send the steamer for them. In an action for breach of this agreement, the defendant, among other defences, pleaded that the plaintiff had first broken the contract by detaining the vessel on divers occasions an unreasonable time, *far beyond that permitted by the contract*, before loading her,

Stipulations as to *time*.

Hoare *v.* Rennie.

Jonassohn *v.* Young.

(q^1) [Leonard *v.* Wall, 5 U. C. C. P. 9.]

(*r*) 5 H. & N. 19; 29 L. J. Ex. 73.

(r^1) [Rouse *v.* Lewis, 4 Abb. (N. Y.) App. Dec. 121; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Freeth *v.* Burr, Ib. 208; Shand *v.* Bowes, 1 Q. B. Div. 470; Bowes *v.* Shand, 2 App. Cas. 455; Shand *v.* Bowes, 2 Q. B. D. 112; The Elting Woollen Co. *v.* Martin, 5 Daly, 417.]

(*s*) 4 B. & S. 296; 32 L. J. Q. B. 385.

wherefore the defendant immediately, on notice of the plaintiff's default, refused to go on with the execution of the contract. A demurrer to this plea was held good. In Simpson *v.* Crippin (*t*) the defendants had agreed to supply the plaintiff with 6,000 to 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendants' colliery, "in equal monthly quantities during the period of twelve months from the first July next." During the first month, July, the plaintiff sent wagons for 158 tons only, and on the 1st August, the defendants wrote that the contract was cancelled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be cancelled, and the action was brought on the defendants' refusal to go on with it. Held that although the plaintiff had committed a breach of the contract by failing to send wagons in sufficient number the first month, the breach was a good ground for compensation, but did not justify the defendant in rescinding the contract, under the rule established by Pordage *v.* Cole. (*u*) Two of the judges (Blackburn and Lush) declared that they could not understand Hoare *v.* Rennie, and declined to follow it. (*x*)

Simpson *v.* Crippin.

§ 594. In a sale of goods by sample, it is a condition implied by law that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this is a breach which justifies the purchaser in rejecting the contract. In Lorymer *v.* Smith (*y*) the purchaser asked to look at the bulk of 1,400 bushels of wheat, which he had bought by sample, and on a refusal by the vendor to show it, said he would not take it. A few days afterwards the vendor communicated to the buyer his readiness then to show the bulk, and to make delivery on payment of the price. Held, by the king's bench, that the buyer's request having been made at a proper and convenient time, and refused, he had a right to reject the sale. In this case a usage was shown, that the buyer had the right of inspection when demanded, but Abbott C.

Sale by sample is conditional that buyer shall have a fair opportunity to compare the bulk.

Lorymer *v.* Smith.

(*t*) L. R. 8 Q. B. 14; [Haines *v.* Tucker, 50 N. H. 307, a similar case.]

(*u*) 1 Wms. Saund. 319; [Haines *v.* Tucker, 50 N. H. 307; Brandt *v.* Lawrence, 1 Q. B. Div. 344; Auchterlonie *v.* Orms, 25 U. C. C. P. 403.]

(*x*) [See Sumner *v.* Parker, 36 N. H. 449, 454, cited *ante*, § 567, note (*t*); Dwinel *v.* Howard, 30 Maine, 258; Higgins *v.* Del. &c. R. R. Co. 60 N. Y. 553; Per Lee *v.* Beebe, 13 Hun, 89.]

(*y*) 1 B & C. 1.

J. said, that even without the usage the law would give him that right. The mutual rights and obligations of the parties in a sale by sample are discussed *post*, book IV. part II. ch. i. sec. 3, Implied Warranty of Quality.

§ 595. Other instances of sales dependent on conditions precedent are afforded by "sales on trial," or "approval," and by the bargain known as "sale or return." In the former class of cases there is no sale till the approval is given, either expressly or by implication resulting from keeping the goods beyond the time allowed for trial. (y^1) In the latter case the sale becomes absolute, and the property passes only after a reasonable time has elapsed without the return of the goods. In sales "on trial," the mere failure to return the goods within the time specified for trial makes the sale absolute, (z) but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term, and this right is not affected by his telling the vendor in the interval that the price does not suit him, if he still retains possession of the thing. (a)

Sales "on trial," "on approval," "sale or return."

Failure to return goods in reasonable time makes "sale on trial" absolute.

§ 596. Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, for if so, the sale will have become absolute by the approval implied from thus accepting a part of the goods. (b) This was ruled by Parke B. in Elliott *v.* Thomas (c) and approved by the court in banc, in that case, as well as by Martin and Bramwell BB. in Lucy *v.* Mouflet. (d) In Okell *v.* Smith (e) Bayley J. also held, that where certain copper pans had been used five or six times by the defendant in trials, which showed them not to answer the purpose intended, it was a question for the jury whether

Where trial involves consumption of what is tried.

Question for jury, if goods used more than is necessary for trial.

(y^1) [Mowbray *v.* Cady, 40 Iowa, 604; McCormick *v.* Basal, 50 Ib. 523; Delamater *v.* Chappell, 48 Md. 244.]

(z) Humphries *v.* Carvalho, 16 East, 45; [Johnson *v.* McLane, 7 Blackf. 501; Spickler *v.* Marsh, 36 Md. 222; Dewey *v.* Erie Borough, 14 Penn. St. 211; Aultman *v.* Theirer, 34 Iowa, 272; Prairie Farmer Co. *v.* Taylor, 69 Ill. 440; Waters Heater Co. *v.* Mansfield, 48 Vt. 378.]

(a) Ellis *v.* Mortimer, 1 B. & P. N. R. 257. [See Aiken *v.* Hyde, 99 Mass. 183; Hartford Sorghum Manuf. Co. *v.* Brush, 43 Vt. 528.]

(b) [See Smith *v.* Love, 64 N. C. 439.]

(c) 3 M. & W. 170.

(d) 5 H. & N. 229; 29 L. J. Ex. 110.

(e) 1 Starkie, 107; and see Street *v.* Blay, 2 B. & Ad. 456.

Okell v. Smith.

the defendant had used them more than was necessary for a fair trial.

"Sale or return."

Moss v. Sweet.

§ 597. The bargain called "sale or return" was explained by the queen's bench, in Moss *v.* Sweet, (*f*) to mean a sale with a right on the part of the buyer to return the goods at his option, within a reasonable time, and it was held in that case that the property passes, and an action for goods sold and delivered will lie if the goods are not returned to the seller within a reasonable time. (*g*) In this case, Iley *v.* Frankenstein (*h*) was overruled, and Lyons *v.* Barnes (*i*) was said by Patterson J. not to be "very

Iley v. Frankenstein overruled.

(*f*) 16 Q. B. 493; 20 L. J. Q. B. 167. See Swain *v.* Shepherd, 1 M. & Rob. 223.

(*g*) [See Dearborn *v.* Turner, 16 Maine, 17; Buswell *v.* Bicknell, 17 Ib. 344; Perkins *v.* Douglass, 20 Ib. 317; Holbrook *v.* Armstrong, 10 Ib. 31; Walker *v.* Blake, 37 Ib. 373, 375; Crocker *v.* Gullifer, 44 Ib. 491, 493; Schlesinger *v.* Stratton, 9 R. I. 578; Buffum *v.* Merry, 3 Mason, 478; Ray *v.* Thompson, 12 Cush. 281; Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Chamberlain *v.* Smith, 44 Penn. St. 431; Witherby *v.* Sleeper, 101 Mass. 138; Sargent *v.* Gile, 8 N. H. 325, 328; Porter *v.* Pettengill, 12 Ib. 300, 301; Hurd *v.* West, 7 Cowen, 752; Washington *v.* Johnson, 7 Humph. 468; Johnson *v.* McLane, 7 Blackf. 501; Moore *v.* Piercy, 1 Jones (Law) N. Car. 131; Wolf *v.* Dietzsch, 75 Ill. 205; Haase *v.* Nonnemacher, 21 Minn. 486; Cahen *v.* Platt, 40 N. Y. Sup. Ct. 483; *ante*, § 2; Wooster *v.* Sage, 6 Hun, 285; Waters' Patent Heater Co. *v.* Tompkins, 14 Ib. 219; Harvie *v.* Clarkson, 6 U. C. Q. B. 27; Sykes *v.* Parks, 1 Baxter (Tenn.), 460; Elphick *v.* Barnes, L. R. 5 C. P. D. 321. In Martin *v.* Adams, 104 Mass. 262, it appeared that A. agreed in writing to sell to B. chattels of A. then being, and described as being, in B.'s possession, for a stipulated sum, payable on or before a certain day, and B. agreed to purchase the chattels and pay for the same as fast as he could, and pay the agreed sum before the specified day, or return the chattels in good condition, free from any debts contracted by him; and it was held, that as the property was already in the possession of B., and nothing remained to be done by the sellers, and nothing appeared to indicate that the title was not to pass till the happening of a future event, upon a fair interpretation, the agreement was a present sale. The court said: "The agreement of B., to make the payment at the stipulated time, or return the property in good condition, free from debts contracted by him, is executory, and does not imply that he is to have no title in the mean time." In a subsequent case, where it appeared that the plaintiff sold and delivered a horse to another, and the purchaser paid a part of the price in cash, and gave a promise in writing that he would pay the balance at a specified future day or return the horse, it was held that the title passed unconditionally to the purchaser. McKinney *v.* Bradlee, 117 Mass. 321. Under a written contract for the sale of two horses, which was signed by both the seller and the purchaser, and stated that "the latter has this day bought a pair of bay horses, conditionally, for the sum of $500 — $300 to be paid down in cash, and the other two hundred when the purchaser is satisfied the horses are sound;" it was held that the purchaser is not bound to pay the $200, if one of the horses is proved to

Sale or return.

Martin v. Adams.

Thompson v. Russey.

(*h*) 8 Scott N. R. 839.

(*i*) 2 Starkie, 39.

good law," as had been previously intimated by Lord Abinger C. B. in Bianchi *v.* Nash. (*k*)

Lyons *v.* Barnes disapproved.

§ 598. In a case before the lords justices, Ex parte White, In re Nevill, (*l*) the facts were that Alfred Nevill was a partner in a firm of Nevill & Co. He also did business *on his individual account* with Towle & Co., cotton manufacturers. His dealings with Towle & Co. were conducted as follows: they consigned goods to him accompanied by a price list, and he sent to them monthly an account of the goods which he had sold, debiting himself *with the price given in the price list*, giving no particulars whatever as to his sales; and in the next month he paid according to his accounts thus rendered. He frequently had the goods received from Towle & Co. dyed or bleached before selling them, but he gave no account of this to Towle & Co., and did not charge them with the expense. By an arrangement between Nevill and his partners he paid to the credit of the firm's general account the money received by him from the sale of Towle & Co.'s goods, and when he made payments to Towle & Co. he sent them either bills received from the purchasers of the goods, subject to a discount which Towle & Co. charged against them in their books, or checks, or both; and when checks were sent they were always drawn by

Ex parte White, In re Nevill.

Sale or return of goods consigned *del credere* agency.

have been unsound at the time of the sale, nor is he bound to notify the seller of the discovery of the unsoundness, nor to offer to return the horses, nor to rescind the contract in part or in whole. Thompson *v.* Russey, 50 Ala. 329. See Hunt *v.* Wyman, 100 Mass. 198, which was an action for the price of a horse. It appeared that the plaintiff had the horse for sale, and the defendant, after asking and learning the price of it, proposed that "if the plaintiff would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it, the night of the day he took it," and the plaintiff assented and delivered the horse to the defendant's servant, from whom it escaped almost immediately, without his fault, and was so injured that the defendant had no chance to try it, but did not return it within the time agreed, nor afterwards. Wells J. said: "It may perhaps be fairly inferred that the intent was that if the defendant did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the effect of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return." The court decided that the facts showed a bailment of the horse but not a sale.]

Hunt *v.* Wyman.

Distinction between option to purchase and to return.

(*k*) 1 M. & W. 546; and see Bailey *v.* Gouldsmith, Peake, 56, 78; Beverly *v.* Lincoln Gaslight Company, 6 Ad. & E. 829.

(*l*) L. R. 6 Ch. App. 397.

the firm of Nevill & Co. Nevill dealt with his own firm as *his* bankers; he had a private account with them of all moneys paid in and drawn out in matters not relating to the partnership, and this account included many entries not at all connected with the goods of Towle & Co. Nevill & Co. became bankrupt, and there was a balance in favor of Alfred Nevill on their books in the above mentioned private account, and Towle & Co. claimed that this was trust-money improperly paid by Nevill to his firm, with knowledge by the latter of the trust; and it was not disputed that the balance in Nevill's favor on the private account arose chiefly from the proceeds of the goods received from Towle & Co. On these facts both the lords justices (James and Mellish) decided that the true contract between Nevill and Towle & Co. was not an agency, by which the former on a *del credere* commission sold goods on behalf of the latter, but that it was one of "sale or return," that the money received by Nevill for the goods was his own money arising out of the sale of his own goods, the property in the goods passing to himself as soon as by his sale he put it out of his power to return them. Lord Justice James said that Nevill's unquestioned authority to deal with the goods as above described, "was quite inconsistent with the notion that he was acting in a fiduciary character in respect to those goods. If he was entitled to alter them, to manipulate them, to sell them at any price he thought fit after such manipulation, and was still only liable to pay for them *at a price fixed beforehand without any reference to the price at which he had sold them*, or to anything else than the fact that he had sold them in a particular month, it seems to me impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of vendor and purchaser existed between Towle & Co. and the different persons to whom Nevill sold the goods. . . . . It appears to me, therefore, to be the necessary conclusion, that as regards these transactions Mr. Nevill was in the position of a person having goods 'on sale or return.'" Mellish L. J. was of the same opinion, and after having stated the fact that Nevill's purchase was at a fixed price and a fixed time for payment, said: "Now if it had been his duty to sell to his customers at that price, payable at that time, then the course of dealing would have been consistent with his being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell

according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guaranties that those persons to whom he sells shall perform the contract which he makes with them; and therefore if he sells at the price and upon the credit authorized by his principal, and the customer pays him according to his contract, then no doubt he is bound like any other agent, as soon as he receives the money, to hand it over to his principal. But if the consignee is at liberty to sell at any price he likes, and receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent, ... and in point of law the alleged agent in such a case *is making on his own account a purchase from his alleged principal and is again reselling.*" (*m*) Leave was granted to appeal from this decision, but not from any distrust as to its correctness (see Rep. p. 405); and it is now (April, 1873) pending in Dom Proc.

Head *v.* Tattersall.

"Sale or return of a horse" injured while in possession of buyer.

§ 599. In Head *v.* Tattersall, (*n*) the plaintiff on Monday, the 13th March, bought at the defendant's auction a horse described in the catalogue as "having hunted with the Bicester and Duke of Grafton hounds," and learned after the sale that this was not true. A condition of the sale was, "horses not answering the description must be returned before five o'clock on Wednesday evening next, otherwise the purchaser shall be obliged to keep the lot with all faults." Although the plaintiff had heard of the above stated misdescription, he took away the horse on trial, as he did not buy it for hunting, and the horse, while on its way to the plaintiff's premises, in charge of the plaintiff's servant, took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before five o'clock on Wednesday evening, and the action was brought to recover back the price paid to the auctioneer. The jury found that the injury to the horse *was not caused by any default of plaintiff.* Held that

(*m*) [See Blood *v.* Palmer, 2 Fairf. 414; Eldridge *v.* Benson, 7 Cush. 483; Meldrum *v.* Snow, 9 Pick. 441; Sutton *v.* Crosby, 54 Barb. 80; Walker *v.* Butterick, 105 Mass. 237; Nutter *v.* Wheeler, 2 Low. 346; In re Linforth, 4 Sawyer Circ. Ct. 370; *ante*, § 2, note (*i*).]

(*n*) L. R. 7 Ex. 7.

the injury to the horse did not deprive the plaintiff of the right of return, and that the special contract in the case made it an exception to the general rule, that a contract of sale cannot be rescinded if the party claiming the rescission has altered the condition of the thing sold. (*o*)

§ 599 *a*. [In the recent case of Hinchcliffe *v.* Barwick 5 Ex. Div. 177, the plaintiff bought a horse of the defendant at public auction, subject to the following condition: "Horses warranted quiet in harness, or quiet to ride, or good workers, or in any other respect, not answering such warranty must be returned before five o'clock the day after the sale, shall then be tried by a competent person to be appointed by the proprietors of the establishment, and the decision of such person shall be final." The plaintiff did not return the horse, which was warranted to be a good worker, within the stipulated time. In an action on the warranty, it was held that the plaintiff's only remedy was under the condition, and that he could not maintain his action on the warranty. Thesiger L. J. said: "It is well established at law that, where a warranty has been given, the only remedy, if the horse prove unsound, is an action for breach of warranty. A buyer cannot return the horse unless there is some special bargain between the parties. But at public sales by auction at a repository, sales are made between parties unknown to one another, and it is an object at such sales that the dealings should be carried out in such a way as to insure as little litigation as possible. The mode in which this object is carried out at all horse repositories is, that where a warranty is given, which is not complied with, the horse is to be returned within a certain time. . . . . The consequence of this mode of dealing is that few disputes occur. Bearing in mind this practical view of the matter, what have these parties agreed to? The condition is one framed by the auctioneer as the condition on which one man buys and another sells — the buyer and seller stand on equal terms within it. The words are not clear, but they are sufficiently intelligible. They do not say that the horse *may*, but that he *must* be returned within a certain time; he *shall* be tried by a person to be appointed by the auctioneer, whose decision *shall* be final. I think that these words mean that the purchaser agrees that the re-

Hinchcliffe *v.* Barwick.

Conditions for return of horses not answering warranty.

(*o*) [See Hunt *v.* Wyman, 100 Mass. 198.]

turn of the horse in the manner provided for is his only remedy." (o^1)]

§ 600. When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of some thing which a party undertakes shall be part of a contract, and though part of the contract, *collateral to the express object of it.* But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; (p)

Sale by description involves condition precedent.

Description is not *warranty*, but *condition.*

(o^1) [In the Solicitors' Journal and Reporter for Oct. 23, 1880, in an article on Conditions for Return of Horses, the writer says, in speaking of Hinchcliffe *v.* Barwick, *supra:* "It is not necessarily an authority for the proposition that a mere condition that any horse not answering to a warranty must be returned before a specified time, will, in case the horse is not returned before that time, have the effect of shutting out the purchaser's remedy by an action for breach of warranty. Such a condition may perhaps be held to amount to a limitation of the time for objections to the horse on the ground that it does not answer to the warranty; in which case, as Mr. Justice Littledale said in Bywater *v.* Richardson, 1 A. & E. 508, it is, 'as if the vendor had said "after so many hours or days I do not warrant."' But unless the warranty is held to be thus limited, it is difficult to see how a mere provision that any horse not answering to warranty must be returned within a certain time can be held to restrict the remedy of the purchaser for breach of warranty to that one mode of redress. To hold that an unlimited specific warranty given with a horse may be cut down by ambiguous general expressions with conditions of sale to a warranty for only a very limited time, is to afford direct encouragement to unfair practice." See Lewis *v.* Hubbard, 1 Lea (Tenn.), 436; Marshall *v.* Perry, 67 Me. 78; *post*, § 900, note (u).]

(p) [In Hogins *v.* Plympton, 11 Pick. 99, 100, Shaw C. J. said: "There is no doubt that, in a contract of sale, words of description are held to constitute a warranty, that the articles sold are of the species and quality so described." See, also, Lamb *v.* Crafts, 12 Met. 355; Bradford *v.* Manly, 13 Mass. 139; Hastings *v.* Lovering, 2 Pick. 214; Morrill *v.* Wallace, 9 N. H. 114, 115; Winsor *v.* Lombard, 18 Pick. 60; Wolcott *v.* Mount, 7 Vroom, 262, 266; S. C. 9 Vroom (38 N. J. Law), 496; Bunnell *v.* Whitlaw, 14 U. C. Q. B. 241; Foos *v.* Sabin, 84 Ill. 564; Bryant *v.* Sears, 49 Iowa, 373; Baker *v.* Lyman, 38 U. C. Q. B. 498; Harpell *v.* Collard, 6 U. C. Law J. 212. Again in Winsor *v.* Lombard, 18 Pick. 60, the same learned judge said: "It is now held that, without express warranty or actual fraud, every person who sells goods of a certain denomination or

American cases decide that words of description in a sale constitute a warranty.

but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if

description undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality thus expressed in the contract of sale." Wilde J. reasserts the same doctrine in Henshaw *v.* Robins, 9 Met. 87, and cites Osgood *v.* Lewis, 2 H. & Gill, 495, and Borrekins *v.* Bevan, 3 Rawle, 23, in support of it, and adds: "The principle maintained by these cases is, that the description, contained in a bill of parcels of goods sold, is evidence of the terms of the contract of sale, and so imports a warranty that the goods are the goods described, and that they substantially agree with the terms of the description." See Batturs *v.* Sellers, 5 H. & John. 117; 6 Ib. 249; Hawkins *v.* Pemberton, 51 N. Y. 204; Wolcott *v.* Mount, 7 Vroom, 262; Beals *v.* Olmstead, 24 Vt. 114; The Richmond Trading & Manuf. Co. *v.* Farquar, 8 Blackf. 89; Wier *v.* Bissett, 2 Thompson (N. S.), 178; Mader *v.* Jones, 1 Russell & Chesley (N. S.), 82; Hardy *v.* Fairbanks, James (N. S.), 432. The words of the writing relied upon as a warranty in Hastings *v.* Lovering, *supra*, were, "Sold E. T. Hastings two thousand gallons prime quality winter oil." These words were held to amount to a warranty that the articles sold agreed with the description. So, in Dounce *v.* Dow, 64 N. Y. 411, the article ordered was "XX. pipe iron." The article sent in compliance with the order was billed as such. This was held to be a warranty of the character of the article. In Henshaw *v.* Robins, *supra*, the bill of sale was: "H. & Co. bought of T. W. S. & Co. two cases of indigo, $272.35." The article sold was in fact not indigo, but a different substance, so prepared as to deceive skilful dealers in indigo. The question was distinctly made whether the bill of sale constituted a warranty that the article was as represented. The court held that it did. The words of the description in Osgood *v.* Lewis, *supra*, were "winter pressed sperm oil." This was treated as a warranty that the oil was winter pressed. See Flint *v.* Lyon, 4 Cal. 17. So where wool, sold in sacks, was described as of a particular quality, the vendor was held to warrant thereby that the wool was of that quality, in The Richmond Trading & Manuf. Co. *v.* Farquar, 8 Blackf. 89. It is held to be sufficient in Pennsylvania if the goods are *in specie*, that for which they are sold, and are merchantable under the denomination affixed to them by the vendor. Jennings *v.* Gratz, 3 Rawle, 168. See Borrekins *v.* Bevan, 3 Rawle, 23; Carson *v.* Baillie, 19 Penn. St. 375. But in Fraley Bispham, 10 Penn. St. 320, where the bill of sale described the property sold as "superior sweet-scented Kentucky leaf tobacco," the vendor was held not liable on a warranty, if the tobacco was Kentucky leaf, though of a very low quality, ill-flavored, unfit for the market, and not sweet-scented. See Jennings *v.* Gratz, 3 Rawle, 168; Carson *v.* Baillie, 19 Penn. St. 375; Wetherill *v.* Neilson, 20 Ib. 448; Borrekins *v.* Bevan, 3 Rawle, 23; Daily *v.* Green, 15 Penn. St. 118, 126; Ender *v.* Scott, 11 Ill. 35; Hyatt *v.* Boyle, 5 Gill & J. 110; Hawkins *v.* Pemberton, 6 Rob. 42; S. C. 51 N. Y. 198. So a mere description of the property sold as "certain lots of boards and dimension stuff now at and about the mills at P." does not amount to a warranty that the property was merchantable; Whitman *v.* Freese, 23 Maine, 212; but only that it was such as would be known in the market, and among those conversant with the trade therein, as property of the description under which it was sold. Mixer *v.* Coburn, 11 Met. 559; Dollard *v.* Potts, 6 Allen (N. B), 443. So, on a sale of "Manilla sugar," if there be no express warranty nor price, the purchaser has no ground to complain that he has not received what he bought, if the article delivered be what is usually called in com-

Decisions on the point.

a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there

merce by that name, although it may contain more impurities than sugar of that name usually does. Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331. See Whitney *v.* Boardman, 118 Mass. 242, 248. In Swett *v.* Shumway, 102 Mass. 365, 368, Colt J. said: "The plaintiffs had contracted with the defendant for the manufacture of articles described as "all the horn chains they manufacture." There was no express warranty as to quality or description, and the inquiry at the trial was, what article the words "horn chains manufactured" by the plaintiffs were understood by the parties to mean. The defendant contended that the words implied a warranty that the chains should be made wholly of horn, and that there was a failure to comply if part of the links were made of hoof; hut the ruling of the court was, that if there was an article called and known in the market as horn chains, made partly of horn and partly of hoof, and the parties intended this article when they entered into the contract, it was sufficient. This ruling was right. There are many articles which are named from one of several different materials of which they are made. A contract, for example, to furnish gold watches or mahogany furniture would not be construed to require the whole watch to be gold, or the whole piece of furniture to be mahogany." A contract for an article described as "good fine wine" was held too vague and indefinite to import a warranty, in Hogins *v.* Plympton, 11 Pick. 97; Coate *v.* Terry, 26 U. C. C. P. 35. So a bill of sale describing an article as "tallow" gives to the purchaser no assurance that it shall be of good quality or color. Lamb *v.* Crafts, 12 Met. 353. There are some American cases in which it was held that a description of an article in a bill of sale, or other documents used in the sale thereof, is neither an affirmation nor a warranty. See Seixas *v.* Wood, 2 Caines, 48; Carley *v.* Wilkins, 6 Barb. 557; Swett *v.* Colgate, 20 John. 196; Hotchkiss *v.* Gage, 26 Barb. 141; Barrett *v.* Hall, 1 Aiken, 269; Hastings *v.* Lovering, 2 Pick. 220; Carondelet Iron Works *v.* Moore, 78 Ill. 65. The decisions in Seixas *v.* Wood, and Swett *v.* Colgate, *supra*, were modified, to some extent, by the decision in Hawkins *v.* Pemberton, *supra*, and overruled in White *v.* Miller, 71 N. Y. 118; Church C. J. in Dounce *v.* Dow, 64 Ib. 415; Van Wyck *v.* Allen, 69 Ib. 61; Beasley C. J. in Wolcott *v.* Mount, 38 N. J. (Law) 496. In Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515, 519, it was decided that, in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property, and afterwards sue or counter-claim for damages, under pretence that it was not of the character and quality or description called for by the agreement. See Dutchess Co. *v.* Harding, 49 N. Y. 321; Reed *v.* Randall, 29 Ib. 358; (distinguished in Dounce *v.* Dow, 57 Ib. 16); Dounce *v.* Dow, 64 Ib. 411; Brown *v.* Burhans, 4 Hun (N Y.), 227; McCormick *v.* Sarson, 45 N. Y. 265; Good *v.* Harper, 3 U. C. Q. B. 67; Heydecker *v.* Lombard, 7 Daly, 19; Greenthal *v.* Schneider, 52 How. Pr. 133; Morehouse *v.* Comstock, 42 Wis. 626. But as to quantity the rule does not apply if the contract be severable. Visscher *v.* Greenbank Alkali Co. 11 How. 159. See Howie *v.* Rea, 70 N. Car. 559. So, in Gilson *v.* Bingham, 43 Vt. 410, it was held that if the purchaser of an article manufactured for him under a special executory contract, there being no warranty or fraud, accept it, though defective, he becomes thereby bound to pay the contract price; hut if he reject it and give notice of the

is no *warranty* that he should sell him peas; the *contract* is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it." (*q*) There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, (q^1) or, if he has paid for it, to recover the price as money had and received for his use, (*r*) whereas, in case of warranty, the rules are different, as will appear *post*, book V. part II. ch. ii. There is no controversy as to this principle, and a few only of the more modern cases need be referred to, as affording illustrations of its application.

Nichol *v.* Godts.

§ 601. In Nichol *v.* Godts (*s*) the sale was of "foreign refined rape oil, warranted only equal to samples." *The oil tendered corresponded with sample*, but the jury found it was not "foreign refined rape oil." Held that a sale by sample has reference only to *quality;* that the purchaser was not bound to receive what was not the article described; Pollock C. B. saying, in answer to the argument that there was no warranty the oil should be refined rape oil: "it is not exactly a warranty, but

non-acceptance, he can bring his action for the non-performance of the contract; but he cannot accept it and bring such action both; nor can he accept it and impose conditions and sue the vendor for non-compliance with the conditions imposed. But the article may be returned within a reasonable time after it has been ascertained that it does not satisfy the contract, although the contract contains no stipulation for such return. Freeman *v.* Clute, 3 Barb. 424; Park *v.* Morris &c. Co. 4 Lansing, 103. But where the purchaser takes an *express* warranty at the time of the purchase, that the goods when delivered shall be of a certain quality, he may relieve himself from the obligation to return them on discovering that they are not of that quality, and may still hold the vendor responsible for the deficiency. Wadley *v.* Davis, 63 Barb. 500.]

(*q*) In Chanter *v.* Hopkins, 4 M. & W. 399. [See Reed *v.* Randall, 29 N. Y. 358; Dounce *v.* Dow, 57 N. Y. 21; Malcomson *v.* Morton, 11 Ir. L. R. 230; Kirkpatrick *v.* Gowan, Ir. R. 9 C. L. 521.]

(q^1) ["The rejection and return of articles of a different kind and description, not answering to the terms of the contract, does not stand upon the ground of rescission; nor does the right to return them depend upon the existence of a warranty." Wells J. in Mansfield *v.* Trigg, 113 Mass. 354, 355.]

(*r*) [See Smith *v.* Lewis, 40 Ind. 98; Doane *v.* Dunham, 65 Ill. 512. So, if a person purchases articles which are to be delivered by a certain time, and are promised to be of a certain good quality, and after payment for the same, and when it is too late to return them without prejudice to himself, he finds out that they are of inferior quality, he may sustain an action for damages, although he has taken the articles and used them. Cox *v.* Long, 69 N. Car. 7.]

(*s*) 10 Ex. 191; 23 L. J. Ex. 314.

if a man contracts to buy a thing, he ought not to have something else delivered to him." (s^1)

§ 602. In Shepherd *v.* Kain (t) a vessel was advertised for sale as a "copper-fastened vessel," on the terms that she was to be "taken with all faults without allowance for any defects whatsoever." She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. Held that the vendor was liable for the misdescription, the court saying that the words "with all faults," meant all faults which the vessel might have "consistently with its being the thing described," *i. e.* a copper-fastened vessel. (t^1) But in the very similar case of Taylor *v.* Bullen, (u) where the vessel was described as "teak-built," and the terms were "with all faults, ... and without allowance for any defect or *error* whatever," it was held that the addition of the word "error" distinguished the case from Shepherd *v.* Kain, and covered an unintentional misdescription, so as to shield the vendor, in the absence of fraud, from any responsibility for error in describing the vessel as teak-built. In Allan *v.* Lake (x) it was held that a sale of turnip-seed as "Skirving's Swedes" was not a sale with warranty of quality, but with a description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's Swedes." (x^1) In Wieler *v.* Schilizzi, (y) the sale was of "Calcutta linseed, *tale quale*," and the article delivered contained an admixture of fifteen per cent. of mustard, but it came from Calcutta, and there was a conflict of testimony. It was left to the jury to say whether the article had lost "its distinctive character," so as not to be salable as Calcutta linseed. (z) The jury so found, and the purchaser succeeded in

Shepherd *v.* Kain.

Taylor *v.* Bullen.

Allan *v.* Lake.

Wieler *v.* Schilizzi.

(s^1) [Edgar *v.* The Canadian Oil Co. 23 U. C. Q. B. 333.]

(t) 5 B. & A. 240; and see Kain *v.* Old, 2 B. & C. 627.

(t^1) [In Whitney *v.* Boardman, 118 Mass. 247, Devens J. said: "The meaning of the phrase, 'with all faults,' is such faults or defects as the article might have, retaining still its character and identity as the article described."]

(u) 5 Ex. 779.

(x) 18 Q. B. 560.

(x^1) [A., a nursery and seedsman, sold B. certain seeds put up in small parcels, and labelled with the name of the seeds contained therein. Held, that there was no implied warranty that the seeds were fresh or otherwise good or fit for growing, and that they would grow, but merely that the packages contained such seeds as the labels indicated, and that the maxim *caveat emptor* applied. Snelgrove *v.* Bruce, 16 U. C. C. P. 561. See § 661, note (u), *post*.]

Snelgrove *v.* Bruce.

(y) 17 C. B. 619; 25 L. J. C. P. 89.

(z) [Chisholm *v.* Proudfoot, 15 U.C. Q. B. 203.]

his action. This was an action for breach of warranty, but although maintained as such, it is plain that on principle the purchaser might have rejected the contract *in toto*.

Hopkins *v.* Hitchcock.

§ 603. In Hopkins *v.* Hitchcock (z^1) the plaintiffs, H. & Co., had succeeded to the firm of S. & H., iron manufacturers, who were in the habit of stamping their iron "S. & H." with a crown. The defendants applied to purchase "S. & H." iron through a broker, and were informed that all iron made by the firm was now marked "H. & Co." The defendants then ordered sixty-seven tons of the iron, and the broker made the bought note for "sixty-seven tons S. & H. Crown common bars." The iron on delivery was marked H. & Co., and rejected by the defendants. The jury found the variation in the brand to be of no consequence, and gave a verdict for the plaintiffs. On motion for new trial, the court refused to set aside the verdict, holding that under the special facts and circumstances of the case, and the jury having negatived that the mark was of any consequence, the plaintiffs had delivered the goods in conformity with the description in the contract.

Bannerman *v.* White.

§ 604. In Bannerman *v.* White (*a*) the sale was of hops, and there was a known objectionable practice of using sulphur in their growth, and both parties knew that the merchants had notified the growers of their objection to buy such hops. At the time of the sale the buyers inquired, before asking the price, if sulphur had been used, and the seller answered, "No." The sale was then made by sample, and the delivery corresponded, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. It was uncontroverted that the defendant would not have bought if the fact had been known to him, and that he could not sell the hops as they were, in his usual dealings with his customers. The jury found that the misrepresentation as to the use of sulphur was not wilful, thus repelling fraud, but that "the affirmation that no sulphur had been used was intended between the parties as a part of the contract of sale, and a warranty by the plaintiff." Erle C. J. in delivering the decision of the court, said that in deciding the effect of this finding, "We avoid the term 'warranty,' because it is used in two senses, and the term 'condition,' because the

(z^1) 14 C. B. N. S. 65; 32 L. J. C. P. 154.

(a) 10 C. B. N. S. 844; 31 L. J. C. P.

question is, whether the term is applicable. Then the effect is that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation, and if it had not been given, the defendant would not have gone on with the treaty, which resulted in the sale. In this sense, it was the condition upon which the defendant contracted." Held that plaintiff had not fulfilled the condition, and could not enforce the sale.

§ 605. In Josling *v.* Kingsford (*b*) the sale was of oxalic acid, and it had been examined and approved, and a great part of it used by the purchaser, and the vendor did not warrant quality. On analysis, it was afterwards found to be chemically impure, from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid," the other for breach of warranty that the goods delivered were "oxalic acid." Erle C. J. told the jury that there was no evidence of a warranty, and that the question was whether the article delivered came under the denomination of oxalic acid in commercial language. The jury found for the plaintiff. Held, in banc, that the direction was right. Josling *v.* Kingsford.

§ 606. In Azémar *v.* Casella, (*c*) the plaintiff sold cotton to the defendant through a broker, by what was known as a certified London contract, in the following words: "Sold, by order and for account of Messrs. J. C. Azémar & Co., to Messrs. A. Casella & Co., the following cotton, viz. $\frac{D\,C}{C}$ 128 bales at 25*d.* per pound, expected to arrive in London per *Cheviot*, from Madras. The cotton *guarantied equal to sealed sample in our possession*," &c. The sealed sample was a sample of "Long-staple Salem cotton;" the cotton turned out, when landed, to be not in accordance with the sample, being "Western Madras." The contract contained a clause: "Should the quality prove inferior to the guaranty, a fair allowance to be made." It was admitted that Western Madras cotton is inferior to Long-staple Salem, *and requires machinery for its manufacture different from that used for the latter.* Held that this was not a case of inferiority of Azémar *v.* Casella.

(*b*) 13 C. B. N. S. 447; 32 L. J. C. P. 94.

(*c*) L. R. 2 C. P. 431–677 in error; 36 L. J. C. P. 124. [Compare Lyon *v.* Bertram, 20 How. (U. S.) 149, 153.]

quality, but difference of *kind;* that there was a condition precedent, and not simply a warranty, and that the defendant was not bound to accept. On error, to the exchequer chamber, the judgment of the court below was unanimously confirmed, without hearing the defendant's counsel.

Books and maps sold according to prospectus.

Sale of securities implied condition that they are genuine.

§ 607. Lord Tenterden held, in two cases, (*d*) at nisi prius, that a vendor could not recover for books or maps sold by a description or prospectus, if there were any material difference between the book or map furnished and that described in the prospectus. Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates, and other securities is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it. (*e*) Thus, in Jones *v.* Ryde, (*f*) it was held that the

Jones v. Ryde.

(*d*) Paton *v.* Duncan, 3 C. & P. 336, and Teesdale *v.* Anderson, 4 C. & P. 198.

(*e*) [In many American cases this liability has been regarded as founded on an implied warranty. Thus it is held that on the sale of a promissory note, the law implies a warranty that the signatures and indorsement upon it are made by persons who have capacity to make a valid contract, and are genuine. Thrall *v.* Newell, 19 Vt. 202; Lobdell *v.* Baker, 1 Met. 193; S. C. 3 Ib. 469; Terry *v.* Bissell, 26 Conn. 23; Cabot Bank *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258; Worthington *v.* Cowles, 112 Mass. 30; Markle *v.* Hatfield, 2 John. 455; Herrick *v.* Whitney, 15 Ib. 240; Shaver *v.* Ehle, 16 Ib. 201; Murray *v.* Judah, 6 Cowen, 484; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287; Aldrich *v.* Jackson, 5 R. I. 218; Ledwich *v.* McKim, 53 N. Y. 307; Ross *v.* Terry, 63 Ib. 613; Webb *v.* Odell, 49 Ib. 583; Ellis *v.* Grooms, 1 Stewart, 47; Wilder *v.* Cowles, 100 Mass. 487. A distinction has sometimes been made between cases where an innocent holder of negotiable paper parts with it by delivery without indorsing it, in payment of a debt due or then created, and the paper proves to have been forged, and cases where no debt is due or created at the time, but the paper is sold as other goods and effects are, holding that in the former class there is and in the latter class there is not an implied warranty of genuineness. See Baxter *v.* Duren, 29 Maine, 434, 440; Fisher *v.* Rieman, 12 Md. 497; Ellis *v.* Wild, 6 Mass. 321. But Baxter *v.* Duren, was doubted in Hussey *v.* Sibley, 66 Me. 192, and Ellis *v.* Ward, in Merriam *v.* Wolcott, 3 Allen, 258. In Littauer *v.* Goldman, 72 N. Y. 506, it was held that where a promissory note is void by being tainted with usury, no warranty against such defect will be implied upon a transfer of such note without indorsement, without representations as to its legality, and without knowledge on the part of the transferor of the defect.]

In America implied warranty in sale of securities.

Transfer for debt, and sale; alleged distinction.

Note void for usury, no implied warranty against.

(*f*) 5 Taunt. 488.

vendor of a forged navy-bill was bound to return the money received for it. (*g*) In Young *v.* Cole, (*h*) the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds, in April, 1836, and it was shown that in 1829 unstamped Guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the stock exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. Held that the defendant was bound to restore the price received; Tindal C. J. saying that the contract was for real Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters instead. "It is not a question of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, is of no value." In Westropp *v.* Solomon (*i*) the same rule was recognized; and it was also held that in such cases nothing further was recoverable from the vendor than the purchase-money he had received, and that he was not responsible for the value of genuine shares.

Young *v.* Cole.

Westropp *v.* Solomon.

§ 608. In Gompertz *v.* Bartlett (*k*) the sale was of a foreign bill of exchange: it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described in the sale. But in Pooley *v.* Brown, (*l*) where the plaintiff bought foreign bills from the defendant, and by the Stamp Act (*m*) it was the duty of the seller to cancel the stamp before he delivers, and of the buyer to see that this is done before he receives, and both parties neglected this duty, so that the buyer was unable to recover on the bills, Erle C. J. and Keating J. were of opinion that the buyer, who was equally in fault with the vendor under the law, could not avail himself of the principle laid down in Gompertz *v.* Bartlett; but Williams J. dissented on that point, though the court was unanimous in holding that the purchaser

Gompertz *v.* Bartlett.

Pooley *v.* Brown.

(*g*) [See Terry *v.* Bissell, 26 Conn. 23; Cabot Bank *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258.]

(*h*) 3 Bing. N. C. 724.

(*i*) 8 C. B. 345.

(*k*) 2 E. & B. 849; 23 L. J. Q. B. 65.

(*l*) 11 C. B. N. S. 566; 31 L. J. C. P. 134.

(*m*) 17 & 18 Vict. c. 83, s. 5.

had by his own laches and delay lost all right to complain, under the special circumstance. In Gurney *v.* Womersley (*n*) a bill of exchange was sold to the plaintiffs, on which all the signatures were forged except that of the last indorser, who had forged all the preceding names, and Bramwell, for defendant, made a strenuous effort to distinguish the case, on the ground that in Jones *v.* Ryde and Young *v.* Cole, *supra*, the thing sold was *entirely* false and valueless; whereas in this case the last indorsers's signature was genuine, and the bill therefore of *some* value. But it was held that a party offering a bill for sale, offers in effect an instrument drawn, accepted, and indorsed according to its purport.

Gurney *v.* Womersley.

§ 609. But it is a question for the jury, whether the thing delivered be what was really intended by both parties as the subject-matter of the sale, although not very accurately described. Thus, in Mitchell *v.* Newhall, (*o*) the sale was of "fifty shares," in a foreign railway company. The buyer refused to receive from the plaintiff, his stock-broker, delivery of a *letter of allotment* for fifty shares. Held that he was bound by his bargain, proof having been made to the satisfaction of the jury, that no shares in the railway had yet been issued, and that letters of allotment were commonly bought and sold as shares in this company on the stock exchange. And in Lamert *v.* Heath (*p*) it appeared that the defendant, a stock-broker, had bought for the plaintiff scrip certificates of shares in the Kentish Coast Railway Company. These scrip certificates were signed by the secretary, and issued from the offices of the company, and were the subject of sale and purchase in the market for several months, when the scheme was abandoned, and the company repudiated the scrip as not genuine, on the allegation that it was issued without authority. The plaintiff then sought to recover back the price from the stock-broker, on the ground that the latter had not delivered genuine scrip. But the court, without hearing argument on the other side, held the buyer bound by his bargain, the court saying: "If this was the only Kentish Coast

Question of fact whether thing delivered is really what was intended by both parties.

Mitchell *v.* Newhall.

Lamert *v.* Heath.

(*n*) 4 E. & B. 133; 24 L. J. Q. B. 46; and see, also, Woodland *v.* Fear, 7 E. & B. 519; 26 L. J. Q. B. 202; and the remarks of Blackburn J. on the principle of the decisions in these cases, in Kennedy *v.* Panama &c. Mail Co. L. R. 2 Q. B. 580.

(*o*) 15 M. & W. 308.

(*p*) 15 M. & W. 487.

Railway scrip in the market, ... and one person chooses to sell and the other to buy that, then the latter has got all that he contracted to buy." In Lamond *v.* Davall (*q*) it was held that a sale was conditional, where the vendor had reserved power to resell on the buyer's default; that a resale on such default was a rescission of the original sale; and that the vendor could not, therefore, maintain *assumpsit* on it, his proper remedy being an action for damages for the loss and expenses of the resale.

Reservation of power to resell on buyer's default renders sale conditional.

(*q*) 9 Q. B. 1030.

PART II.

VENDOR'S DUTIES.

CHAPTER I.

WARRANTY.

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SECTION I. — EXPRESS WARRANTY.

§ 610. A WARRANTY in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, *forming part of the contract* by the agreement of the parties express or implied. (*a*) It follows, therefore, that antecedent representation, made by the vendor as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties. It is not, indeed, necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing, which leads to the bargain, and should then enter into the bargain as part of it. Of the general principle, a good illustration is given in Hopkins *v.* Tanqueray, (*b*) where the plaintiff bought a horse, sold at auction, without warranty. On the day before the sale, while the plaintiff was examining the horse at Tattersall's stables, the defendant entered, and they being acquainted with each other, he said to plaintiff, "You have nothing to look for; I assure you he is perfectly sound in every respect;" to which the plaintiff replied: "If you say so, I am satisfied," and

What is a warranty.

Antecedent representations.

Hopkins *v.* Tanqueray.

(*a*) Foster *v.* Smith, 18 C. B. 156; Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Chanter *v.* Hopkins, 4 M. & W. 399; [Magrane *v.* Loy, 1 Cr. & Dix, 286. A warranty is an incident only of a consummated and completed sale. Osborn *v.* Gantz, 60 N. Y. 540.]

(*b*) 15 C. B. 130; 23 L. J. C. P. 162; and see per Martin B. in Stucley *v.* Bailey, 1 H. & C. 405; 31 L. J. Ex. 483; and Camac *v.* Warriner, 1 C. B. 356.

desisted from the examination. The horse turned out to be unsound, but the vendor did not know it when he made the representation, so that there was no pretence for a charge of fraud; which was indeed disclaimed by the buyer, who stood simply on the point that the conversation was a private warranty to *him*, although the auctioneer put up the horse without warranty. But all the judges held that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse; that it was a representation of the seller's opinion and judgment about the horse, for which he could not be made responsible, if he was honest when expressing it. See, further, as to innocent misrepresentation, *ante*, §§ 420–422.

§ 611. It also follows from what precedes, that a warranty given after a sale has been made is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty; and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given. (*c*) It further follows, and such is the general rule of law, that no warranty of the *quality* of a chattel is implied from the mere fact of sale. The rule in such cases is *caveat emptor*, (*c*[1]) by which is

Warranty after sale requires new consideration.

No warranty of quality implied by mere fact of sale.

(*c*) Roscorla *v.* Thomas, 3 Q. B. 234; [Tuttle *v.* Brown, 4 Gray, 457; Burdit *v.* Burdit, 2 A. K. Marsh. 143; Reed *v.* Wood, 9 Vt. 285; Bloss *v.* Kittredge, 5 Ib. 28; Towell *v.* Gatewood, 2 Scam. 24; Year Book, 5 Hen. 7, 7; Burton *v.* Young, 5 Harring. 233; Vincent *v.* Leland, 100 Mass. 432; Wilmot *v.* Hurd, 11 Wend. 584; Congar *v.* Chamberlain, 14 Wis. 258; Summers *v.* Vaughan, 35 Ind. 323. "The warranty must be upon the sale, and one of the terms of the contract of sale. Any subsequent or collateral contract of warranty must arise from an express promise or undertaking to warrant, and that upon a new consideration, distinct from that of the sale itself." Shaw C. J. in Hogins *v.* Plympton, 11 Pick. 97, 99, 100. But if, when parties first are in treaty respecting the sale, the owner offers to warrant the article sold, the warranty will be binding, although the sale does not take place till some days afterwards. Wilmot *v.* Hurd, 11 Wend. 584. But representations by the vendor in regard to the property sold, made a month before the sale was consummated, were held to be too remote to affect the sale, in Bryant *v.* Crosby, 40 Me. 9. Where a statement amounting to a warranty was made in the printed catalogue of an auction sale, but at the commencement of the sale the auctioneer announced that the seller warranted nothing, it was held that the purchaser must show that the warranty contained in the catalogue was imported into the sale. Craig *v.* Miller, 22 U. C. C. P. 348.]

Warranty must be upon sale; otherwise new consideration required.

Retraction at auction sale of warranty in printed catalogue.

(*c*[1]) [See article on *Caveat Emptor* in 1 U. C. Q. B. (O. S.) 193.]

meant that when the buyer has required no warranty, he takes the risk of quality upon himself, (*d*) and has no remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent. (*e*) To this rule there are many exceptions. (*f*)

Caveat emptor.

Many exceptions to this rule.

§ 612. In regard to warranty of *title*, inasmuch as it is an essential element of the contract of sale that there should be a transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the chattel the vendor undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell, and it is believed that such is the true rule of law, but the question is still open to doubt, as will presently be shown.

Warranty of title.

§ 613. No special form of words is necessary to create a warranty. (*f*[1]) It is nearly two hundred years since Lord Holt first settled the rule in Cross *v.* Gardner, (*g*) and

No special form of words

(*d*) Sprigwell *v.* Allen, Aleyn, 91, and 2 East, 448, note; Parkinson *v.* Lee, 2 East, 314; Williamson *v.* Allison, 2 East, 446; Earley *v.* Garrett, 9 B. & C. 928; Morley *v.* Attenborough, 3 Ex. 500; Ormrod *v.* Huth, 14 M. & W. 664; Hall *v.* Conder, 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J. C. P. 162; [Holden *v.* Dakin, 4 John. 421; Mixer *v.* Coburn, 11 Met. 559; Dean *v.* Mason, 4 Conn. 428; Frazier *v.* Harvey, 34 Ib. 469; Swett *v.* Colgate, 20 John. 196; Welsh *v.* Carter, 1 Wend. 185; Moses *v.* Mead, 1 Denio, 378; Kingsbury *v.* Taylor, 29 Me. 508; Otts *v.* Alderson, 10 Sm. & M. 476; West *v.* Cunningham, 9 Porter, 104; Beirne *v.* Dord, 2 Sandf. 89; Seixas *v.* Wood, 2 Caines, 48; Wright *v.* Hart, 18 Wend. 449; Johnston *v.* Cope, 3 H. & John. 89; Cozzins *v.* Whitaker, 3 Stew. & Port. 322; Taymon *v.* Mitchell, 1 Md. Ch. 496; Lord *v.* Grow, 39 Penn. St. 88; Hawkins *v.* Pemberton, 6 Robertson, 42; S. C. 51 N. Y. 198; Hadley *v.* Clinton &c. Co. 13 Ohio St. 502; Shaw C. J. in Winsor *v.* Lombard, 18 Pick. 59, 60; Whitaker *v.* Eastwick, 75 Penn. St. 229; Roberts *v.* Hughes, 81 Ill. 130; Hadley *v.* Prather, 64 Ind. 137.]

(*e*) [Warren *v.* Philadelphia Coal Co. 83 Penn St. 437; Jackson *v.* Wetherill, 7 Serg. & R. 480; Whitaker *v.* Eastwick, 75 Penn. St. 229. The rule of *caveat emptor* does not apply to cases of fraud. Irving *v.* Thomas, 18 Me. 418; Otts *v.* Alderson, 10 Sm. & M. 476.]

(*f*) *Post*, Warranty of Quality.

(*f*[1]) [Warren *v.* Philadelphia Coal Co. 83 Penn. St. 437; Ladomus *v.* Dash, 2 W. N. Cas. (Phil. 1875) 111; Polhemus *v.* Heiman, 45 Cal. 573; Murray *v.* Smith, 4 Daly (N. Y.), 277; Reed *v.* Hastings, 61 Ill. 266; Thorne *v.* McVeagh, 75 Ib. 81; Robinson *v.* Harvey, 82 Ib. 58; Lefroy B. in Sceales *v.* Scanlan, 6 Ir. L. R. 367, 371. If as regards the sale itself the statute of frauds is complied with, the warranty accompanying such sale need not be in writing. Northwood *v.* Rennie, 28 U. C. C. P. 202, affirmed in 3 Ont. App. 37.]

(*g*) Carthew, 90; 3 Mod. 261; 1 Show. 68.

needed to create warranty.

Medina *v.* Stoughton, (*h*) which Buller J. in 1789 laid down in the opinion given by him in the famous leading case of Pasley *v.* Freeman, (*i*) as follows: "It was rightly held by Holt C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended." (*k*) And in determining whether it was so intended, a decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to

Test for deciding whether representation amounts to warranty.

(*h*) 1 Lord Raymond, 593; Salk. 220.

(*i*) 3 T. R. 57; 2 Sm. L. C. 71.

(*k*) See, also, Power *v.* Barham, 4 Ad. & E. 473; Shepherd *v.* Kain, 5 B. & A. 240; Freeman *v.* Baker, 5 B. & Ad. 797; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J. C. P. 162; Taylor *v.* Bullen, 5 Ex. 779; Powell *v.* Horton, 2 Bing. N. C. 668; Allan *v.* Lake, 18 Q. B. 560; Simond *v.* Braddon, 2 C. B. N. S. 324; 26 L. J. C. P. 198; Hopkins *v.* Hitchcock, 14 C. B. N. S. 65; 32 L. J. C. P. 154. [It is equally well settled in the American cases that no particular form of words is necessary to constitute a warranty; but that if the vendor in a sale of chattels makes any assertion or affirmation, which is not a mere expression of judgment or opinion, respecting the kind, quality, or condition of the article sold, upon which he intends the purchaser shall rely as an inducement to the purchase, and upon which the purchaser does rely, that is an express warranty. Morrill *v.* Wallace, 9 N. H. 111; Henshaw *v.* Robbins, 9 Met. 83, 87, 88; Hillman *v.* Wilcox, 30 Maine, 170; Bryant *v.* Crosby, 40 Ib. 18; Osgood *v.* Lewis, 2 H. & Gill, 495; Chapman *v.* Murch, 19 John. 290; Roberts *v.* Morgan, 2 Cowen, 438; Whitney *v.* Sutton, 10 Wend. 412; Cook *v.* Moseley, 13 Ib. 277; Rogers *v.* Akerman, 22 Barb. 134; Hawkins *v.* Pemberton, 51 N. Y. 198; Polhemus *v.* Heiman, 45 Cal. 573; Murray *v.* Smith, 4 Daly (N. Y.), 277; Brown *v.* Tuttle, 66 Barb. 169; Beeman *v.* Buck, 3 Vt. 53; Hawkins *v.* Berry, 5 Gilman, 36; McGregor *v.* Penn, 9 Yerger, 74; Ricks *v.* Dillahunty, 8 Porter, 133; Towell *v.* Gatewood, 2 Scam. 24; Otts *v.* Alderson, 10 Sm. & M. 476; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; Anderson *v.* Burnett, 5 Ib. 165; Hanson *v.* King, 3 Jones (N. C.) Law, 419; McFarland *v.* Newman, 9 Watts, 56; Stone *v.* Denny, 4 Met. 151, 155; Ender *v.* Scott, 11 Ill. 35; Humphreys *v.* Comline, 8 Blackf. 516; Murphy *v.* Gay, 37 Mo. 535; Wilbur *v.* Cartwright, 44 Barb. 536; Bond *v.* Clark, 35 Vt. 577; O'Neal *v.* Bacon, 1 Houst. (Del.) 215; Beals *v.* Olmstead, 24 Vt. 114; Randall *v.* Thornton, 43 Maine, 226; Hahn *v.* Doolittle, 18 Wis. 197; Blythe *v.* Speake, 23 Texas, 430; Weimer *v.* Clement, 37 Penn. St. 147; Warren *v.* Philadelphia Coal Co. 83 Ib. 437; Crary *v.* Hoffman, 2 W. N. Cas. (Phil. 1875) 16; House *v.* Fort, 4 Blackf. 296; Carter *v.* Black, 46 Mo. 384; Lawton *v.* Keil, 61 Barb. 558; Wolcott *v.* Mount, 7 Vroom, 262; Byrne *v.* Jansen, 50 Cal. 624; Spading *v.* Marks, 86 Ill. 125; Kenner *v.* Harding, 85 Ib. 264; Clark *v.* Ralls, 50 Iowa, 275; Horn *v.* Buck, 48 Md. 358; Morgan *v.* Powers, 66 Barb. 35; Greenthal *v.* Schneider, 52 How. Pr. 133; Brown *v.* Tuttle, 66 Barb. 169; Chisholm *v.* Proudfoot, 15 U. C. Q. B. 203; Harrison *v.* Balfe, Bl., D. & O. (Ir.) 22; Bryce *v.* Parker, 11 So. Car. 337; Aubuchon *v.* Pohlman, 1 Mo. App. 298; Patrick *v.* Leach, 8 Neb. 530; Williams *v.*

No particular form of words necessary to constitute warranty.

Woodworth, Ib. 281.]

have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter not. (*l*) But in Chalmers *v.* Harding (17 L. T. N. S. 571), the exchequer of pleas held that a statement to a farmer by the vendor, who was the patentee's agent for sale of an agricultural machine, that it would "cut wheat, barley, oats, &c. efficiently," was not a warranty, but a mere representation of Wood's Patent Reapers generally. This intention is a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case, as will appear *passim* in the authorities to be reviewed. (*m*)

Chalmers *v.* Harding.

Whether warranty was intended, fact for the jury.

(*l*) Per Buller J. in Pasley *v.* Freeman, 3 T. R. 51; Powell *v.* Barham, 4 Ad. & E. 473; Jendwine *v.* Slade, 2 Esp. 572; and see per Bramwell B. in Stucley *v.* Baily, *infra;* Carter *v.* Crick, 4 H. & N. 412; 28 L. J. Ex. 238; Camac *v.* Warriner, 1 C. B. 356. [See American cases cited in note (*k*) above; Bishop *v.* Small, 63 Maine, 12, and cases cited; Wolcott *v.* Mount, 38 N. J. Law, 496, 499; Reed *v.* Hastings, 61 Ill. 266; Byrne *v.* Jansen, 50 Cal. 624. It was held in Fisher *v.* Budlong, 10 R. I. 525, that although a buyer is not liable in a suit for deceit, for misrepresenting a seller's chance of selling for a good price, when he is under no obligation to the seller for the accuracy of his statement, yet he will be liable if there is any peculiar relation between the parties implying or leading to confidence.]

(*m*) See, specially, Stucley *v.* Baily, 1 H. & C. 405; 31 L. J. Ex. 483; [Duffee *v.* Mason, 8 Cowen, 25; Whitney *v.* Sutton, 10 Wend. 411; Chapman *v.* Murch, 19 John. 290; Starnes *v.* Erwin, 10 Ired. 226; Foster *v.* Caldwell, 18 Vt. 176; Bradford *v.* Bush, 10 Ala. 386; Humphreys *v.* Comline, 8 Blackf. 516; House *v.* Fort, 4 Ib. 296; Fogart *v.* Blackweller, 4 Ired. 238; McFarland *v.* Newman, 9 Watts, 56; Wolcott *v.* Mount, 7 Vroom, 262. If there be any doubt upon the evidence whether the vendor intended to make an affirmation or to express an opinion or belief, the matter should be submitted to the jury. Morrill *v.* Wallace, 9 N. H. 111. See Stroud *v.* Pierce, 6 Allen, 413; Whitney *v.* Sutton, 10 Wend. 411; Foster *v.* Caldwell, 18 Vt. 176; Baum *v.* Stevens, 2 Ired. (N. Car.) Law, 411; House *v.* Fort, 4 Blackf. 293; Murray *v.* Smith, 4 Daly (N. Y.), 277; Tisdale *v.* Connell, 1 Kerr (N. B.), 401. Whether the statement, made by seller of a cow, that "she is all right," is a warranty of her soundness, was held to be a question for the jury, in Tuttle *v.* Brown, 4 Gray, 457. But in Brown *v.* Bigelow, 10 Allen, 242, 244, it was held that the construction of a written contract of warranty was exclusively for the court. See 1 Chitty Contr. (11th Eng. ed.) 103, and notes. In Stroud *v.* Pierce, 6 Allen, 413, 416, it appeared that the vendor of a piano-forte affirmed that it was well made and would stand up to concert pitch; and that this affirmation was untrue. The court ruled that this was a representation of fact, and being found to be false the purchaser was entitled to recover for a breach of it. The vendor claimed that it should be left to the jury to find whether the above language was intended to affirm the fact or express an opinion. Chapman J. said: "The intent of the party is immaterial. The legal proposition stated by the judge was correct." See Wason *v.* Rowe, 16 Vt. 525; Smith *v.* Justice, 13 Wis. 600; Baker *v.* Fawkes, 35 U. C. Q. B. 302.]

Who is to determine whether a warranty exists?

§ 614. In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect, and in some cases, even where the alleged warranty was expressed in writing, it has been left with the jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty or not, for *simplex commendatio non obligat.* (*n*) In Jendwine *v.* Slade (*o*) two pictures were sold at auction by a catalogue, in which one was said to be a sea-piece by Claude Lorraine, and the other a fair by Teniers. Lord Kenyon held this no warranty that the pictures were genuine works of these masters, but merely an expression of opinion by the vendor. But in Power *v.* Barham, (*p*) where the vendor sold by a bill of parcels, "four pictures, views in Venice, Canaletti," it was held proper that the jury should decide whether the defendant meant to warrant that the pictures were the genuine works of Canaletti. Lord Denman C. J. distinguished the case from Jendwine *v.* Slade, by the suggestion that Canaletti (*q*) was a comparatively modern painter, of whose works it would be possible to make proof as a matter of *fact;* but that in the case of very old painters the assertion was necessarily a matter of opinion.

Interpretation of express warranties.

Jendwine *v.* Slade.

Power *v.* Barham.

§ 615. In a sale of "a horse, five years old; has been constantly driven in the plough, warranted;" the warranty was held to refer to soundness only; (*r*) and where the sale was in these words: "Received 10*l.* for a gray four-year old colt, warranted sound in every respect," the warranty was also confined to soundness. (*s*) And in still another case, where the sale was thus worded: "Received 100*l.* for a bay gelding got by Cheshire Cheese, warranted sound," it was held that there was no warranty that the horse was of the breed

Examples of construction of written warranties.

(*n*) [See Morrill *v.* Wallace, 9 N. H. 111; Stroul *v.* Pierce, 6 Allen, 413, 416; Tewkesbury *v.* Bennett, 31 Iowa, 83; Horton *v.* Green, 66 N. C. 596. As to declarations by the vendor of the value of the article sold, see Ellis *v.* Andrews, 56 N. Y. 83; Bishop *v.* Small, 63 Maine, 12, and cases cited.]

(*o*) 2 Esp. 572.

(*p*) 4 Ad. & E. 473.

(*q*) Canaletti died in 1768; Claude Lorraine in 1682; Teniers the younger in 1694.

(*r*) Richardson *v.* Brown, 1 Bing. 344.

(*s*) Budd *v.* Fairmaner, 8 Bing. 48.

named. (*t*) In Lomi *v.* Tucker (*u*) the sale was of two pictures, said by the plaintiff to be "a couple of Poussins;" and it was left by Lord Tenterden to the jury to say whether the defendant bought the pictures, believing them, from the plaintiff's representation, to be genuine; for if so, he was not bound to take them unless genuine. In Wood *v.* Smith, (*x*) the action was *assumpsit*, and the proof was that the defendant, in reply to the plaintiff's question, had said that a mare sold was "sound to the best of his knowledge;" and on further question, had refused to warrant, saying, "I never warrant; I would not even warrant myself." The mare was unsound, and the defendant knew it. Gurney, for the defendant, insisted that the action should have been *tort*, for there was an express refusal to warrant. But Lord Tenterden at the trial, and the court in banco afterwards, held, that on these facts there was a *qualified warranty* that the mare was sound to the best of the defendant's knowledge, and that the action was therefore well brought in *assumpsit*. (*y*) In Powell *v.* Horton (*z*) the sale was "of mess pork, of Scott & Co.,"

Lomi *v.* Tucker.

Wood *v.* Smith.

Powell *v.* Horton.

(*t*) Dickinson *v.* Gupp, quoted at p. 50, in Budd *v.* Fairmaner, 8 Bing. 48. [See Mallan *v.* Radloff, 17 C. B. N. S. 588; Ketchum *v.* Wells, 19 Wis. 25. Where the contract of sale was, "Bought one red horse, six years old, for one hundred and twenty-five dollars, which I warrant sound and kind," the age was held to be a matter of description, and the warranty applicable only to the soundness and kindness. Willard *v.* Stevens, 24 N. H. 271. See Morrill *v.* Bemis, 37 Vt. 155. A bill of sale of a horse in which he is stated as "considered sound," does not import a warranty of soundness. Wason *v.* Rowe, 16 Vt. 525; Towell *v.* Gatewood, 2 Scam. 22; Baird *v.* Matthews, 6 Dana, 129; Burdit *v.* Burdit, 2 A. K. Marsh. 143.]

(*u*) 4 C. & P. 15. See, also, De Sewhanberg *v.* Buchanan, 5 C. & P. 343.

(*x*) 5 M. & R. 124.

(*y*) [An affirmation by the vendor that a horse was not lame, made at the time of sale, and that he would not be afraid to warrant that the horse was sound every way as far as he knew, was held to amount to a warranty. Cook *v.* Moseley, 13 Wend. 277. So where in an action for a breach of a warranty of a horse the proof was that the plaintiff said to the defendant that he would not exchange unless the defendant would warrant his horse to be sound, to which the defendant answered, "He is a sound horse except the bunch on his leg." The horse had the glanders. This was held to be a warranty and a breach of it. Roberts *v.* Morgan, 2 Cowen, 438; M'Guinness *v.* Hunter, 6 Ir. Jur. (O. S.) 103. A representation by a vendor upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the purchaser's agent that he may rely upon such representation, is a warranty of the quality of the flour, and the vendor is liable for any defect, whether he knew of it or not. Carley *v.* Wilkins, 6 Barb. 557. See Beeman *v.* Buck, 3 Vt. 53; Ricks *v.* Dillahunty, 8 Porter, 133.]

Examples of warranties.

(*z*) 2 Bing. N. C. 668.

and the defendant attempted to evade his responsibility by showing that the pork delivered by him was really mess pork, *consigned* to him by Scott & Co.; but proof was received to show that those words meant in the trade mess pork *manufactured* by Scott & Co., which was worth more in the market than the article delivered by the defendant, and the court held the defendant bound by a warranty that the pork was of that manufacture.

Yates v. Pym.

And in Yates *v.* Pym (*a*) the court refused to admit parol evidence of the usage of trade to qualify an express warranty. The sale was of "prime singed bacon;" and evidence was offered, that as bacon is an article necessarily deteriorating from its first manufacture, a usage of the trade was established, that a certain degree of deterioration, called average taint, was allowed, before the article ceases to become "prime bacon," but the evidence was held rightly rejected. (*b*) In Bywater *v.* Richardson (*c*) a notice that a warranty was to remain in force only till twelve o'clock next day, was construed to mean that the vendor was responsible only for such defects as might be pointed out before that hour; and in Chapman *v.* Gwyther (*d*) a sale of a horse, "warranted sound for one month," was also construed as a limitation of the vendor's responsibility to such faults as were pointed out within the month, so that he was held not liable for a defect which existed at the time of the sale, but was not discovered till more than a month had elapsed.

Bywater v. Richardson.

Chapman v. Gwyther.

§ 616. A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. (*e*)

General warranty does not

(*a*) 6 Taunt. 446.

(*b*) [See Winsor *v.* Lombard, 18 Pick. 57, cited and stated in note (*e*) below.]

(*c*) 1 Ad. & E. 508.

(*d*) L. R. 1 Q. B. 464; 35 L. J. Q. B. 142. See Mesnard *v.* Aldridge, 3 Esp. 271; Buchanan *v.* Parnshaw, 2 T. R. 745. [See § 599 *a*, *ante*.]

(*e*) [Vandewalker *v.* Osmer, 65 Barb. 556, 561. This rule does not apply where the vendor uses art to conceal and does conceal such defects. Chadsey *v.* Greene, 24 Conn. 562. See Richardson *v.* Johnson, 1 La. An. 389; Dillard *v.* Moore, 2 Eng. (Ark.) 166; Kenner *v.* Harding, Sup. Ct. Ill. Jan. T. 1877, 5 Cent. Law Journ. 116; S. C. 85 Ill. 264; Bennett *v.* Buchan, 76 N. Y. 386. In Brown *v.* Bigelow, 10 Allen, 242, it was held that a bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty. Bigelow C. J. said: "The doctrine that a warranty of

As to warranty covering obvious defects.

Brown v. Bigelow.

But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect. (*f*) In Liddard *v.* Kain (*g*) the sale was of horses known to the buyer to be affected, one with a

extend to defects apparent on simple inspection.

Liddard *v.* Kain.

soundness does not include or cover patent and obvious defects rests on the reasonable presumption that the parties could not have intended the warranty to apply to a defect rendering the horse unsound which was seen and known to both parties at the time of sale. But here the appearance of the horse did not disclose actual unsoundness. The unsoundness was not patent. Lameness may or may not make a horse unsound. If it was only accidental and temporary, it would not be a breach of warranty; but if it was chronic and permanent, arising from causes which were beyond the reach of immediate remedies, it would be clearly a case of unsoundness." See Birdseye *v.* Frost, 34 Barb. 367. In regard to the rule stated in the text, see Williams *v.* Ingram, 21 Texas, 300; Hill *v.* North, 34 Vt. 604; Dillard *v.* Moore, 2 Eng. (Ark.) 166; Fisher *v.* Pollard, 2 Head (Tenn.) 314; Mulvany *v.* Rosenberger, 18 Penn. St. 203; Schuyler *v.* Russ, 2 Caines, 202; Long *v* Hicks, 2 Humph. 305; Richardson *v.* Johoson, 1 La. An. 389; Dana *v.* Boyd, 2 J. J. Marsh. 587; Hudgins *v.* Perry, 7 Ired. 102; Vandewalker *v.* Osmer, 65 Barb. 556. Where a large number of barrels of mackerel, branded under the inspection laws as No. 1 and No. 2 mackerel, were sold under a warranty that they were of that grade or description, it was held that the vendors could not be understood to warrant the fish free from rust, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2, but only to warrant that they were inspected and branded as such. Winson *v.* Lombard, 18 Pick. 57. The sale of the mackerel in this case was made on the 22d May. Shaw C. J. said: "In the sale of mackerel, both parties must be presumed to be acquainted with the inspection laws, both must be understood to know the season of the year when this species of fish are caught, packed, and branded, and the species of damage or deterioration to which they are liable, and that if mackerel are sold in the spring, they cannot be of an inspection more recent than that of the preceding autumn. With these circumstances mutually understood we have no doubt that when these fish were sold as No. 1 and No. 2, the understanding of the parties was that they were fish packed, inspected, and branded as of those numbers respectively." "In this respect the parties referred to the brand, and to this extent they acted upon the faith of it. Then, as there was no express warranty of the actual condition of the fish, or of the manner in which they were kept and taken care of after the inspection, and from that time to the sale, and as there was no description embracing these particulars, it must be presumed that both parties relied upon the faith of the inspection and brand." Parol evidence is admissible to show that the vendor informed the purchaser, at the time of the sale, of the defect alleged. Schuyler *v.* Russ, 2 Caines, 202. In Pinney *v.* Andrus, 41 Vt. 631, Wilson J. said: "But it seems to be now well settled that the rule of law which exempts a vendor from liability upon a general warranty of soundness,

Winson *v.* Lombard.

(*f*) [A party may warrant against an obvious and patent defect as well as against any other. Pinney *v.* Andrus, 41 Vt. 631; Stucky *v.* Clyburn, Cheves, 186; Thompson *v.* Botts, 8 Mo. 710; Wilson *v.* Ferguson, Cheves, 190; Hambright *v.* Storer, 31 Ga. 300; Scarborough *v.* Reynolds, 13 Richardson, 98; House *v.* Fort, 4 Blackf. 293; Fisher *v.* Pollard, 2 Head (Tenn.), 314.]

(*g*) 2 Bing. 183.

cough, and the other with a swelled leg; but the vendor agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and this warranty was held to include the defects above mentioned, although known to the purchaser.

Margetson v. Wright.

§ 617. Margetson *v.* Wright, (*h*) which was twice tried, is instructive on this point. The sale was of a race-horse, which had broken down in training, was a crib-biter, and had a splint on the off fore-leg. The horse, sound in other respects, would have been worth 500*l.* if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for 90*l.* The defendant refused to give a warranty that the horse would stand training, and refused to sign a warranty that the horse was "sound, wind and limb," without adding the words, "at this time." Six months afterwards the horse broke down in training, and Park J. told the jury that the express warranty rendered the defendant responsible for the consequences of the splint, though it was known to the purchaser; but that the addition of the words, "at this time," was intended to exclude a warranty that the horse would stand training. On motion for new trial, the first branch of this ruling was held erroneous. Tindal C. J. saying: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a warranty was by an action of deceit grounded on a supposed fraud. (*i*) There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time; a party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not

where the defect is perfectly visible and obvious to the unaided senses, does not extend to an apparent defect, to understand the true nature and extent of which requires the aid of skill, experience, or judgment. Nor is the rule applicable to a case where the vendor has resorted to any acts or representations in respect to the property, intended or naturally calculated to throw the purchaser off his guard, and induce him to omit such thorough examination of the condition of the property as he might, and very likely would have made, if he had relied solely upon his own judgment in making the purchase. Nor has that rule any application to the case of a special warraaty against a specified defect."]

Language of Wilson J. as to defects covered by general warranty.

(*h*) 7 Bing. 603; 8 Bing. 454.

(*i*) [Huston *v.* Plato, 3 Col. 402; and see the remarks of Phelps J. in Vail *v.* Strong, 10 Vt. 457, to the effect that where an action is brought upon a warranty, and the *scienter* is averred, the plaintiff may recover either on the express contract or for the deceit. Larey *v.* Taliaferro, 57 Ga. 443. See § 904, note (*n*), *post*.]

Ground of recovery when a warranty is laid with *scienter*.

sue on a general warranty of soundness. In the present case, the splint was known to both parties, and the learned judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by the parties.*" On the new trial then ordered, the plaintiff proved, to the satisfaction of the jury, that there were two kinds of splints, some of which cause lameness, and others do not, and that the splint in question did cause a subsequent lameness, and they found that the horse at the time of the sale, "had upon him the seeds of unsoundness arising from the splint." Held, that this result not being apparent at the time, and the buyer not being able to tell whether the splint was one that would cause lameness, was protected by the warranty that the horse was then sound. (*i*[1])

§ 618. But in Tye *v.* Fynmore, (*k*) where the sale was of "fair merchantable sassafras wood," the purchaser refused to take the article, alleging that these words meant in the trade, the roots of the sassafras tree, but that the wood tendered by plaintiff was part of the timber of the tree, not worth more than one sixth as much as the roots. In answer to this it was shown that a specimen of the wood sold was exhibited to the buyer before the sale, and that the buyer was a druggist, well skilled in the article. Lord Ellenborough said: "It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity." (*l*)

Tye *v.* Fynmore.

(*i*[1]) See, also, Butterfield *v.* Burroughs, 1 Salk. 211; Southerne *v.* Howe, 2 Rolle, 5; 2 Bl. Com. 165, 166.

(*k*) 3 Camp. 462; [Henshaw *v.* Robins, 9 Met. 83.]

(*l*) [*Ante*, § 429, note (*b*); Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 233, note (2); First National Bank *v.* Grindstaff, 45 Ind. 158. In Henshaw *v.* Robins, 9 Met. 83, 89, which was an action for breach of warranty in a sale of indigo, Wilde J. said: "The plaintiff is, therefore, entitled to recover, unless, by the examination of the article purchased, he is to be considered as having waived his right to indemnity under the warranty. On this question the authorities are conflicting. But we are of opinion that the examination of the article by the plaintiff, at the time of the sale, is no evidence of his intention to waive any legal right. If the spurious nature of the article might have been detected on inspection, it might have been otherwise; but we must infer, from the instruction of the court, that the jury found that the article was so disguised that the deception could

Implication when the article is before the vendee.

Meaning of "soundness" in warranty of horses.

Kiddell *v.* Burnard.

§ 619. The meaning of the word "sound," when used in the sale of horses, has been the subject of several decisions, and it is settled that the interpretation of a warranty to that effect depends much on custom and usage, as well as upon the circumstances of the particular case. The rule was fully considered in Kiddell *v.* Burnard. (*m*) A verdict was given at nisi prius in favor of the plaintiff, who had purchased, with a warranty of soundness, some bullocks at a fair. The learned judge (Erskine J.) told the jury that the plaintiff was bound to show that at the time of the sale the beasts had some disease, or the seeds of some disease (*n*) in them, which would render them unfit, or in some degree less fit, for the ordinary use to which they would be applied. On the motion for new trial, Parke B. said: "The rule I laid down in Coates *v.* Stevens (*o*) is correctly reported, and I am there stated to have said: 'I have always considered that a man who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has either from disease or accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. (*p*) If the cough actually existed at the time of the sale

not have been detected by a skilful dealer in indigo, without resorting to an analytical experiment, so that no neglect can be imputed to the plaintiff in not making a careful experiment." But the law will not permit a purchaser, having the property before him, and defects in it plainly discoverable, to shut his eyes and ears, and omit to use his senses, and pretend that he relied on the representations made by the vendor, and was thereby misled. Vandewalker *v.* Osmer, 65 Barb. 556, 561.]

(*m*) 9 M. & W. 668; and see Holliday *v.* Morgan, 1 E. & E. 1; 28 L. J. Q. B. 9.

(*n*) [Woodbury *v.* Robbins, 10 Cush. 520; Stephens *v.* Chappell, 3 Strobh. 80.]

(*o*) 2 Moo. & Rob. 157.

(*p*) [Roberts *v.* Jenkins, 21 N. H. 116, 119, 120; Kornegay *v.* White, 10 Ala. 255; Burton *v.* Young, 5 Harr. 233; Brown *v.* Bigelow, 10 Allen, 244, 245; Hook *v.* Stovall, 21 Ga. 69; Crouch *v.* Culbreath, 11 Rich. 9; Woodbury *v.* Robbins, 10 Cush. 520; Foudren *v.* Durfee, 39 Miss. 324.]

as a disease, so as actually to diminish the natural usefulness of the horse at that time, and to make him less capable of immediate work, he was then unsound; (*q*) or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed at the moment on a new subject; it is the result of a full previous consideration.' That is the rule I have always adopted and acted on in cases of unsoundness, although in so doing I differ from the contrary doctrine laid down by my brother Coleridge in Bolden *v.* Brogden." (*r*) All the judges, Alderson, Gurney, and Rolfe BB., concurred in this exposition, the first named saying: "The doctrine laid down by my brother Parke to-day, and in the case of Coates *v.* Stevens, is not new law: it is to be found recognized by Lord Ellenborough (*s*) and other judges in a series of cases." In Bolden *v.* Brogden, (*r*) which it is submitted was overruled in Kiddell *v.* Burnard, Coleridge J. had told the jury that the question on such a warranty was whether the animal had upon him a disease calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness. (*t*)

Bolden *v.* Brogden overruled by Kiddell *v.* Burnard.

§ 620. It may be convenient to state some of the defects which have been held to constitute unsoundness. Any *organic* defect, such as that a horse had been *nerved;* (*u*) bone-spavin in the hock; (*x*) ossification of the cartilages; (*y*) the navicular disease (*z*) and thick wind (*a*) have been held to constitute unsoundness in horses, and goggles in sheep. (*b*) But roaring has been held not to be, (*c*) and in a later case to be, (*d*) unsoundness. Crib-biting (*e*) has been held to be not un-

Defects which have been held to constitute unsoundness.

(*q*) [See Roberts *v.* Jenkins, 21 N. H. 116; Kornegay *v.* White, 10 Ala. 255; Tatum *v.* Mohr, 21 Ark. 349; Thompson *v.* Bertrand, 23 Ib. 730; Merrick *v.* Bradley, 19 Md. 50.]

(*r*) 2 Moo. & Rob. 113.

(*s*) Elton *v.* Brogden, 4 Camp. 281; Elton *v.* Jordan, 1 Stark. 127.

(*t*) See, also, Onslow *v.* Eames, 2 Stark. 81; Garment *v.* Barrs, 2 Esp. 673, which seem also to be overruled by Kiddell *v.* Burnard.

(*u*) Best *v.* Osborne, Ry. & Moo. 290.

(*x*) Watson *v.* Denton, 7 C. & P. 85.

(*y*) Simpson *v.* Potts, Oliph. Law of Horses, 224.

(*z*) Matthews *v.* Parker, Oliph. Law of Horses, 228; and Bywater *v.* Richardson, 1 Ad. & E. 508.

(*a*) Atkinson *v.* Horridge, Oliph. Law of Horses, 229.

(*b*) Joliff *v.* Bendell, Ry. & Moo. 136.

(*c*) Bassett *v.* Collis, 2 Camp. 523.

(*d*) Onslow *v.* Eames, 2 Stark. 81.

(*e*) Brœnnenburgh *v.* Haycock, Holt N. P. 630.

soundness, but to be covered by a warranty against vices. (*f*) Mere badness of shape that is likely to produce unsoundness, and which really does produce unsoundness, is not a breach of warranty of soundness if the unsoundness does not exist at the time of the sale. As where a horse's leg was so ill-formed that he could not work for any length of time without cutting, so as to produce lameness; (*g*) or had curby hocks, that is, hocks so formed as to render him very liable to throw out a curb, and thus produce lameness; (*h*) or thin-soled feet, also likely to produce lameness. (*i*) But a horse may have a congenital defect, which, in itself, is unsoundness. In Holliday *v.* Morgan (*k*) a horse sold with a warranty of soundness had an unusual convexity in the cornea of the eye, which caused short-sightedness and a habit of shying. The direction to the jury was, that "if they thought the habit of shying arose from defectiveness of vision, caused by natural malformation of the eye, this was unsoundness. All the judges held this direction correct, and concurred in the doctrine of Kiddell *v.* Burnard, (*l*) that the true test of unsoundness is, as expressed by Hill J., "whether the defect complained of *renders the horse less than reasonably fit for present use.*" (*l*[1])

Holliday *v.* Morgan.

§ 621. Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter, by

Parol evidence inadmissible to prove

(*f*) Scholefield *v.* Robb, 2 Moo. & Rob. 210. [See Dean *v.* Morey, 33 Iowa, 120.]

(*g*) Dickinson *v.* Follett, 1 Moo. & Rob. 299.

(*h*) Brown *v.* Elkington, 8 M. & W. 132.

(*i*) Bailey *v.* Forrest, 2 C. & K. 131.

(*k*) 1 E. & E. 1; 28 L. J. Q. B. 9.

(*l*) 9 M. & W. 668.

(*l*[1]) [In Washburn *v.* Cuddihy, 8 Gray, 430, it was held that crib-biting, affecting the health and condition of the horse, so as to render him less able to perform service and of less value, is unsoundness. See Paul *v.* Hardwick, sittings at Westminster H. T. 1831, cited 1 Chitty Contr. (11th Am. ed.) 655, note (*r*). In Walker *v.* Halsington, 43 Vt. 608, a horse was warranted "sound and right," but he proved to be a "cribber." The court said: "Perhaps this horse was physically sound although he was what is called a cribber, and perhaps not; as to that we make no decision and express no opinion, but the warranty was as to more than soundness, it was that the horse was sound and right. A fair interpretation of this warranty would make it mean that the horse was right in conduct and behavior — as to all matters materially affecting its value, as well as in physical condition." Whether corns in a horse's feet constitute a breach of warranty of soundness is a question of fact for the jury. Alexander *v.* Dutton, 58 N. H. 282.]

Unsoundness in horses.

inference or implication. (*m*) In Kain *v.* Old, (*n*) the bill of sale in the usual form contained no warranty that the vessel sold was copper-fastened; there had been a previous written representation by the vendor that she was copper-fastened. Held that this prior representation formed no part of the contract, and was not a warranty. Abbott C. J. thus expounded the law: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always; because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writ-

warranty where the sale is written. Kain *v.* Old.

(*m*) [See Reed *v.* Wood, 9 Vt. 285; Salem Ind. Co. *v.* Adams, 23 Pick. 256; Lamb *v.* Crafts, 12 Met. 353; Batturs *v.* Sellers, 5 H. & John. 117; Dean *v.* Mason, 4 Conn. 432; Mumford *v.* McPherson, 1 John. 414; Wilson *v.* Marsh, Ib. 503; Van Ostrand *v.* Reed, 1 Wend. 424; Whitmore *v.* The South Boston Iron Co. 2 Allen, 58; Foster J. in Boardman *v.* Spooner, 13 Ib. 361, and cases cited; Rice *v.* Forsyth, 41 Md. 389; Fry *v.* The Richelieu Co. 9 Low. Can. 406; Morrow *v.* The Waterous Engine Co. 2 Pugsley & Burbridge (N. B.), 509; Mullain *v.* Thomas, 43 Conn. 252; Galpin *v.* Atwater, 29 Ib. 93; Shepherd *v.* Gilroy, 46 Iowa, 193. The writing is supposed to contain the whole contract between the parties. Randall *v.* Rhodes, 1 Curtis C. C. 90; Niles *v.* Culver, 8 Barb. 205; Sparks *v.* Messick, 65 N. C. 440. Where a bill of sale of a vessel was executed between the parties, containing a warranty of soundness, parol evidence was held inadmissible to prove an additional warranty of soundness. Pender *v.* Fobes, 1 Dev. & Bat. 250; Henderson *v.* Cotter, 15 U. C. Q. B. 345. See, also, Smith *v.* Williams, 1 Car. Law, 363; 1 Murph. 426; Peltier *v.* Collins, 3 Wend. 459; Wood *v.* Ashe, 1 Strobh. 407. In Lamb *v.* Crafts, 12 Met. 353, it appeared that C., whose business was that of collecting rough tallow and preparing it for market, made an oral agreement with L. to furnish him with a certain quantity of tallow, of *good quality and color*, at a certain price per pound, and to deliver it at a certain place, and afterwards furnished and delivered the specified quantity, and made and signed bills of parcels in which the article was denominated "tallow," without other description or designation; L. accepted the tallow, and paid the agreed price for it. Upon these facts, it was held that the agreement was within the statute of frauds, and that L. could not recover for a breach of warranty made by C. at the time of the agreement, that the tallow should be of good quality and color; and also, that if the delivery of the tallow by C., and the acceptance and payment by L. were to be regarded as constituting one entire contract of sale, yet there was no contract of warranty, because the bill of parcels, which was the only written memorandum signed by C., specified none, and contained no description or denomination from which a warranty could be inferred. Parol evidence of the warranty was excluded, in this case, because it formed a part of the original agreement, all of which was within the statute of frauds; and, not being in writing, none of it could be enforced, and no warranty accompanied the actual delivery of the tallow and the giving and acceptance of the bills of parcels.]

Contract in writing, parol evidence inadmissible to prove warranty.

Lamb *v.* Crafts.

(*n*) 2 B. & C. 627.

ing can be considered as a part of the contract. A matter antecedent to and dehors the writing may in some cases be received in evidence, as showing the inducement to the contract, such as a representation of some particular quality or incident to the thing sold; but the buyer is not at liberty to show such a representation, unless he can also show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist." (*o*)

§ 622. But where the written paper was in the nature of an informal receipt merely, held that parol evidence of a warranty was admissible. (*p*) In Dickson *v.* Zizinia (*q*)

Dickson *v.* Zizinia.

(*o*) See, also, Pickering *v.* Dowson, 4 Taunt. 779; Wright *v.* Crookes, 1 Scott N. R. 685.

(*p*) Allen *v.* Pink, 4 M. & W. 140; [Tisdale *v.* Connell, 1 Kerr (N. B.), 401; Bennett *v.* Tregent, 24 U. C. C. P. 565; Gordon *v.* Waterous, 36 U. C. Q. B. 321; Perrine *v.* Cooley, 10 Vroom, 449. In Bradford *v.* Manly, 13 Mass. 139, where a bill of parcels was given by the vendor to the purchaser, in which the article sold was described as a certain quantity of "cloves," the purchaser was allowed to prove by parol that the sale was by sample, and that the article delivered was inferior in quality to the sample. See Williams *v.* Spafford, 8 Pick. 250. In Hogins *v.* Plympton, 11 Pick. 97, there was a written agreement of the vendor, by which he undertook to ship to the purchaser, a certain quantity of "good fine wine," and acknowledged the receipt of payment, and in an action by the purchaser to recover of the vendor for delivering wine inferior to the description, parol evidence, offered by the vendor, was admitted to show the actual terms of the case, and that he shipped the wine selected by the purchaser. Bradford *v.* Manly, *supra*, was cited in this case, and considered in point. The case of Wallace *v.* Rogers, 2 N. H. 506, was decided on similar principles. Bills of parcels, it is said, introduce an exception to the general rule respecting the admissibility of parol evidence, being informal documents, intended only to specify prices, quantities, and a receipt of payment, and not being used or designed to embody or set out the terms and conditions of a contract of bargain and sale. Hazard *v.* Loring, 10 Cush. 267; Schenck *v.* Saunders, 13 Gray, 37, 41, 42; Fletcher *v.* Willard, 14 Pick. 464; Hildreth *v.* O'Brien, 10 Allen, 104; Stacy *v.* Kemp, 97 Mass. 168; Frost *v.* Blanchard, Ib. 155; Boardman *v.* Spooner, 13 Allen, 353; Atwater *v.* Clancy, 107 Mass. 369; Harris *v.* Johnston, 3 Cranch, 311; Wallace *v.* Rogers, 2 N. H. 506; Sutton *v.* Crosby, 54 Barb. 80; Foot *v.* Bentley, 44 N. Y. 166. The cases are numerous in which parol evidence has been held admissible to explain and qualify a warranty contained in a bill of parcels. See Atwater *v.* Clancy, Hazard *v.* Loring, Boardman *v.* Spooner, Frost *v.* Blanchard, and other cases above cited; Henshaw *v.* Robins, 9 Met. 83, 87; Pike *v.* Fay, 101 Mass. 136, 137; Harris *v.* Johnston, 3 Cranch, 311. A bill of sale of a horse, containing also a receipt for the payment of the price, does not exclude parol evidence that the vendor, at the time of the sale, warranted the horse sound. Hersom *v.* Henderson, 21 N. H. 224; Filkins *v.* Whyland, 24 Barb. 379. So a transfer of personal property may be shown by parol evidence to have been only a pledge, although accompanied by a bill of parcels in this

Parol evidence is admissible when writing is in nature of receipt; bill of parcels, &c.

(*q*) 10 C. B. 602; 20 L. J. C. P. 72.

there was an express warranty that a cargo of Indian corn, sold to the plaintiff, should be equal to the average of shipments of Salonica of that season, and should be shipped in good and merchantable condition, and the court refused to allow the warranty to be extended by evidence or implication, so as to render the defendant answerable that the corn should be in fit condition for a foreign voyage. But in Bigge *v.* Parkinson, (*r*) where the vendor gave a written guaranty that stores furnished for a troop-ship should pass survey by the East India Company's officers, this was held not to dispense the vendor from the warranty implied by law, (*s*) that the provisions should be reasonably fit for use for the intended purpose. In Bywater *v.* Richardson (*t*) there was a warranty of soundness, but the purchase was made at the repository, where there was a rule painted on a board fixed to the wall, that a warranty of soundness, when given there, was to remain in force only until twelve o'clock at noon on the next day after the sale; and the court held, on proof of the buyer's knowledge of the rules, that the warranty was limited, and it was the same as if the seller had told him that he would warrant the horse against such defects only as might be pointed out within twenty-four hours.

Bigge *v.* Parkinson.

Bywater *v.* Richardson.

§ 623. Blackstone says that "The warranty can only reach to things in being at the time of the warranty made, and not the things *in futuro:* as that a horse is sound at the buying of him, not that he will be sound two years hence." (*u*) But the law is now different, as is explained by Mr. Justice Coleridge in his notes on this passage. Lord Mansfield, also, in a

Warranty of future soundness.

form: "A. B. bought of C. D. [certain goods described]. Received payment, C. D." Hazard *v.* Loring, 10 Cush. 267; Whitaker *v.* Sumner, 20 Pick. 399. Parol evidence is admissible to show a usage of trade as to the mode of making sales, the written memorandum and the bought and sold note being silent upon the subject; Boorman *v.* Jenkins, 12 Wend. 567; and to prove that the vendor informed the purchaser, at the time of the sale, of the defect charged. Schuyler *v.* Russ, 2 Caines, 202. But a paper purporting to be a receipt, but containing in truth a complete contract between the parties to it, cannot be explained by parol, as can be more general receipts for property or money. Niles *v.* Culver, 8 Barb. 205; Goodyear *v.* Ogden, 4 Hill, 104; Stone *v.* Vance, 6 Ham. (Ohio) 247; Batturs *v.* Sellers, 5 H. & John. 117; S. C. 6 Ib. 249; Chapman *v.* Searle, 3 Pick. 38; Rice *v.* Forsyth, 41 Md. 389.]

(*r*) 7 H. & N. 955; 31 L. J. Ex. 301, in Cam. Scacc.

(*s*) *Post,* Implied Warranty of Quality.

(*t*) 1 Ad. & E. 508.

(*u*) 3 Bl. Com. 166.

case (*x*) where this passage was cited, said: "There is no doubt but you may warrant a future event." (*y*)

Warranties by agents. General rule.

§ 624. Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. (*z*) If in the sale of the goods confided to him it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale. (*a*) Thus, in Alexander *v.* Gibson, (*b*) a servant who was sent to sell a horse *at*

Alexander v. Gibson.

(*x*) Eden *v.* Parkinson, 2 Doug. 735.

(*y*) [See Upton *v.* Suffolk County Mills, 11 Cush. 586; Pike *v.* Fay, 101 Mass. 134; Swett *v.* Shumway, 102 Ib. 365, 368; Fatman *v.* Thompson, 2 Disney, 482; Stamm *v.* Kuhlman, 1 Mo. App. 296. But if the warranty cannot be performed within a year, it must be in writing. Nicholls *v.* Nordheimer, 22 U. C. C. P. 48. See Northwood *v.* Rennie, 28 Ib. 202.]

(*z*) Bayliffe *v.* Butterworth, 1 Ex. 425; Graves *v.* Legg, in Cam. Scacc. 2 H. & N. 210; 26 L. J. Ex. 316; Pickering *v.* Busk, 15 East, 38.

(*a*) [The American decisions are generally in harmony with the doctrine of the text. Skinner *v.* Gunn, 9 Porter, 305; Gaines *v.* McKinley, 1 Ala. (N. S.) 446; Bryant *v.* Moore, 26 Maine, 84, 87; Sandford *v.* Handy, 23 Wend. 260; Nelson *v.* Cowing, 6 Hill, 337; Hunter *v.* Jameson, 6 Ired. 252; Williamson *v.* Canaday, 3 Ib. 349; Woodford *v.* McClenahan, 4 Gilman, 85; Bradford *v.* Bush, 10 Ala. 386; Peters *v.* Farnsworth, 15 Vt. 155; Boothby *v.* Scales, 27 Wis. 626; Taggart *v.* Stanbery, 2 McLean, 543, 544; Lane *v.* Dudley, 2 Murph. 119; Ezell *v.* Franklin, 2 Sneed (Tenn.), 236; Croom *v.* Shaw, 1 Florida, 211; Upton *v.* Suffolk County Mills, 11 Cush. 586, 589; Morris *v.* Bowen, 52 N. H. 416, 421; Palmer *v.* Hatch, 46 Mo. 585; Randall *v.* Kehlor, 60 Maine, 37; Fay *v.* Richmond, 43 Vt. 25; Murray *v.* Brooks, 41 Iowa, 45; Applegate *v.* Moffitt, 60 Ind. 104. Where the customary mode of selling certain kinds of merchandise is by sample, if an agent is employed to make the sale, he may select the sample and bind his principal to the warranty resulting from a sale by sample. Andrews *v.* Kneeland, 6 Cowen, 354. An agent to sell would unquestionably, in all cases, be authorized to affect his principal with a warranty that the article sold would answer the description given of it in the power or direction under which the sale was made. See Upton *v.* Suffolk County Mills, 11 Cush. 586. But though the power to sell may authorize the agent to warrant the present condition or quality of the article sold, yet there is no implication from such power of an authority to warrant its future condition, *e. g.* that flour shall keep sweet on a voyage to California. Upton *v.* Suffolk County Mills, 11 Cush. 586. See Randall *v.* Kehlor, 60 Maine, 37, 47. In Blood *v.* French, 9 Gray, 197, 198, Bigelow J. said: "We doubt whether, in an ordinary sale of goods by auction, an auctioneer *virtute officii* has any right or authority to warrant goods sold by him in the absence of

American cases on power of agent to warrant.

(*b*) 2 Camp. 555. See, also, Helyear *v.* Hawke, 5 Esp. 72.

a fair, and receive the price, was held by Lord Ellenborough to be authorized to give a warranty of soundness, because "this is the common and usual manner in which the business is done." In Dingle *v.* Hare, (*c*) an agent selling guano was held authorized to warrant it to contain thirty per cent. of phosphate of best quality, the jury having found as a fact that ordinarily these manures were sold with such a warranty, all the judges agreeing, and Byles J. saying: "It is clear law, that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it was usual in the trade for the seller to warrant, Wilson (the agent) had authority to warrant." Dingle *v.* Hare.

§ 625. In Brady *v.* Todd, (*d*) the common pleas had before it the subject of warranty of a horse, by a servant authorized to sell, and Erle C. J. gave the unanimous decision of the judges after advisement. As this is the most authoritative exposition of the present state of the law on this point, full extracts are given. The facts were, that the plaintiff applied to the defendant, who was *not a dealer in horses*, but a tradesman in London, having also a farm in Essex, in order to buy the horse, and the defendant thereupon sent his farm-bailiff with the horse to the plaintiff, with authority to sell, but none to warrant. The bailiff warranted the horse to be sound and quiet in harness; and it was contended that "an authority to an agent to sell and deliver imports an authority to warrant," which the court held to be an undecided point. After referring to Helyear *v.* Hawke and Alexander *v.* Gibson, *supra*, and Fenn *v.* Harrison, (*e*) the learned chief justice said: "We understand those judges to refer to a *general* agent employed for his principal to carry on his business, Brady *v.* Todd.

any express authority from his principal to do so, and without proof of some known and established usage of trade, from which an authority can be implied." At all events, the court held in the case that an auctioneer has no authority to bind an administrator personally to a warranty of the condition of goods of the intestate. So it was held in Dodd *v.* Farlow, 11 Allen, 426, that a merchandise broker can have no implied authority, from the usage of trade, to warrant goods sold by him to be of merchantable quality. Where a party adopts a sale made by another, for him as his agent, he cannot repudiate a warranty made by the agent of the article sold, which was an essential part of the contract. Churchill *v.* Palmer, 115 Mass. 310; Eadie *v.* Ashbaugh, 44 Iowa, 519. See, as to warranty by deputy sheriff at sale of personal property, Mink *v.* Jarvis, 8 U. C. Q. B. 397; Mink *v.* Jarvis, 13 Ib. 84.]

(*c*) 7 C. B. N. S. 145; 29 L. J. C. P. 144.

(*d*) 9 C. B. N. S. 592; 30 L. J. C. P. 223; [Coaley *v.* Perrine, 12 Vroom, 322.]

(*e*) 3 T. R. 759.

that is, the business of horse-dealing, *in which case there would be by law the authority here contended for.* . . . . It is also contended that a *special* agent, without any express authority in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority as against the party who believed what was held out and acted on it (see Pickering *v.* Busk), (*f*) but the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that, in the usual course of selling, is required to complete a sale, and that the question of warranty is, in the usual course of a sale, required to be answered; and that, therefore, the defendant by implication gave to Greigg (the farm-bailiff) an authority to answer that question, and to bind him by his question. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point, also, the plaintiff has, in our judgment, failed. We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty, or even an inquiry about warranty. If we laid down for the first time that the *servant of a private owner*, intrusted to sell and deliver a horse on *one particular occasion*, is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence. For the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons inexperienced in law; and as everything said by the seller in bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold, that the buyer taking a warranty from such an agent as was employed in this case takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law does not, in our opinion, create it from the circumstances. . . . . It is unnecessary to add, that if the seller should repudiate the warranty made by his agent, it follows

(*f*) 15 East, 38.

that the sale would be void, there being no question raised upon this point."

§ 626. In Howard *v.* Sheward (*g*) the general rule, that the agent of a horse-dealer has an implied authority to warrant soundness when making sale of a horse, was recognized, and it was further held that a purchaser under such a warranty would be protected, even though the agent had been privately instructed not to warrant; and therefore that evidence was not admissible to show a custom of horse-dealers not to warrant in cases where a horse sold has been examined by a competent veterinary surgeon and pronounced sound. (*h*)

Howard *v.* Sheward.

SECTION II. — IMPLIED WARRANTY OF TITLE.

§ 627. The law in relation to the implied warranty of title in chattels sold was in an unsettled state until a recent decision in the common pleas, which has gone far toward establishing a satisfactory rule. In the examination of the subject, it will be found that on some points there is no conflict of opinion. First. It is well settled that in an executory agreement the vendor warrants, by implication, his title in the goods which he promises to sell. Plainly, nothing could be more untenable than the pretension that if A. promised to sell 100 quarters of wheat to B., the contract would be fulfilled by the transfer, not of the *property* in the wheat, but of the *possession* of another man's wheat. Secondly. It is also universally conceded, that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel *is his* is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale. But it has been said, thirdly, that in the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title and ability to sell, though all again admit, fourthly, that if in such case the vendor *knew* he had no title, and concealed that fact from the buyer, he would be liable on the ground of *fraud*. (*i*)

Implied warranty of title.

Warranty exists in executory agreement.

Affirmation by vendor, that the chattel is his is a warranty of title.

This affirmation may be implied from his conduct.

In absence of such affirmation, *quære?*

If vendor knows he has no title, and conceals the fact, it is fraud.

(*g*) L. R. 2 C. P. 148.

(*h*) [See Bryant *v.* Moore, 26 Me. 84, 87.]

(*i*) [Sweetman *v.* Prince, 62 Barb. 256; Payne *v.* Rodden, 4 Bibb, 304. In Sweetman *v.* Prince, 62 Barb. 256, 267, Mullin

§ 628. The one controverted question is thus narrowed to this point, whether in the sale of a chattel an innocent vendor by the mere act of sale asserts that he is owner, for if so, he warrants according to the second of the foregoing rules. The negative is stated to be the true rule of law on this point in recent text-books of deservedly high repute. (*k*) Undoubtedly, in some of the ancient

One question only that is controverted.

Discussion of the subject and review of the authorities.

J. said: "It is not necessary to cite authorities to show that a purchaser of personal property cannot defeat a recovery for the price, by showing that the property is owned by another, unless he has been ousted, or there has been a recovery by the true owner. But there is this important qualification of the rule — that if the seller has been guilty of fraud or deceit in the sale, proof of the fraud will defeat an action for the price, although there has been no ouster nor recovery had by the true owner. But it seems to me that where the vendor is not the owner of the property sold, he is not entitled to have it returned when he has been guilty of a fraudulent concealment or representation as to his title, as he would be if he were owner, and had been guilty of some other fraud in reference to the property; and one very conclusive reason is, that the purchaser is himself liable to the true owner for the value of the property, having had it in his possession and use." Chase *v.* Hall, 24 Wend. 102. In Pennsylvania, if the vendee would avail himself of a breach of warranty of title in an action for the price, he must show an eviction or an involuntary loss of possession. Krumbhaar *v.* Birch, 83 Penn. St. 426. In California the doctrine is that there is no breach of a warranty of title until the vendee's possession is disturbed by the true owner. Gross *v.* Kierski, 41 Cal. 111. In Illinois it has been held that on a suit upon a note given for personal property, it is no defence to set up a breach of an implied warranty of title so long as the vendee is in undisturbed possession of the chattel. Linton *v.* Porter, 31 Ill. 107. In Kentucky if there were an implied warranty of title the vendee may recover before eviction. It is sufficient to allege that the property belongs to another. Payne *v.* Rodden, 4 Bibb, 304; Chancellor *v.* Wiggins, 4 B. Monroe, 201. But if it is a breach of an express warranty of title the vendee must show an eviction. Tipton *v.* Triplett, 1 Metc. (Ky.) 570. In Massachusetts it has been decided that it is immaterial that the purchaser has not been deprived of the possession of the chattel. Grose *v.* Hennessey, 13 Allen, 389; Perkins *v.* Whelan, 116 Mass. 542. But if the third person who has the title to the goods is an assignee in bankruptcy, it seems that a different rule applies. Gay *v.* Kingsley, 11 Allen, 345; Fogg *v.* Willcutt, 1 Cush. 300; Hallett *v.* Fowler, 8 Allen, 93. In Tennessee it is held that there is a breach of the warranty of title the moment it is made, and upon eviction or a voluntary offer to return the property the vendee has a complete right of action. Word *v.* Cavin, 1 Head, 506. In Missouri it is held that a purchaser of personal property is not required to wait for an actual deprivation by the true owner. He may surrender the property voluntarily, but must then be able to show conclusively that

As to when vendee can show that vendor did not own the goods.

New York rule.

Pennsylvania rule.

California rule.

Illinois rule.

Kentucky: in case of implied warranty.

Kentucky: in case of an express warranty.

Massachusetts rule.

Tennessee rule.

Missouri rule.

(*k*) Chitty on Cont. 414 (9th ed.); Broom's Legal Max. 766 (4th ed.); Leake on Cont. 198; 2 Taylor on Ev. 997; Bullen & Leake, Prec. of Pl. 229, 230.

authorities on the common law, the rule is substantially so stated. In Noy's Maxims, c. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor:* (*k*[1]) and in Co. Lit. 102 a, Coke says: "Note, that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor.*" Blackstone, however, gives the contrary rule, (*l*) "if the vendor sells them as his own." But the authority mainly relied on by the learned authors mentioned in the note is the elaborate opinion given by Parke B. in the case of Morley *v.* Attenborough, (*m*) where the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case.

§ 629. It is, however, the fact that no direct decision has ever been given in England to the effect that where a man sells a chattel he does not thereby warrant the title. (*n*) It has been often said in cases that such was the rule of law, but no case has been decided directly to that effect. Since the decision in Morley *v.* Attenborough, there have been repeated references to the *dicta* contained in the opinion of Parke B. on this point, and dissatisfaction with them has been more than once suggested. It will be quite sufficient to confine the review of the decisions to Morley *v.* Attenborough and the subsequent cases, as they contain a full discussion of the whole subject, and reference to all the old authorities, except one to be specially noticed.

§ 630. Morley *v.* Attenborough (*o*) was the case of an auction sale, by order of a pawnbroker, of unredeemed pledged goods, *eo nomine*, and the court decided that, in the ab- Morley *v.* Attenborough.

his surrender was to the true owner. Dryden *v.* Kellogg, 2 Mo. App. 87. It has been held in Iowa, that where there is a sale of personal property with warranty of title, the vendee may remove an existing lien upon the property and deduct the amount thus paid from the sum which he owes on the purchase-money. Harper *v.* Dotson, 43 Iowa, 232.] Right of vendee to remove lien on goods.

(*k*[1]) [Thompson *v.* Nelles, 4 U. C. C. P. 399; Krumbhaar *v.* Birch, 83 Penn. St. 426. See § 640, *post.*]

(*l*) 2 Bl. Com. 451.

(*m*) 3 Ex. 500.

(*n*) Per Byles J. in Eichholz *v.* Banister, 17 C. B. N. S. 708; 34 L. J. C. P 105.

(*o*) 3 Ex. 500.

sence of an express warranty all that the pawnbroker asserted by his offer to sell was, that the thing had been pledged to him and was unredeemed, not that the pawnor had a good title; not professing to sell *as owner*, he did not warrant ownership. The following language contains the *dicta:* "The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law) undoubtedly transfers all the property the vendor has, where nothing further remains to be done, according to the intent of the parties to pass it. But it is made a question whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey. (o^1) With respect to *executory contracts* of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied under similar circumstances that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own and make full use of were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on *a consideration which had failed.* (p) But where there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title, or has it merely the effect of transferring such

(o^1) [Johnston *v.* Barker, 20 U. C. C. P. 228.]

(p) [The plaintiff agreed to sell to the defendant timber, which the plaintiff was to cut on a certain lot of crown land. He cut the timber and delivered it to the defendant. But the plaintiff not having obtained a patent before cutting the trees, the timber was subject to a government claim of $111. The court held that the case came within the principle laid down in that portion of Lord Wensleydale's opinion in Morley *v.* Attenborough, referred to *supra.* Harrison C. J. said: "The case comes fairly and fully under the operation of the exception (that is, of executory contract of sale). The conclusion at which we have arrived is one that honesty, justice, and equity all demand in the dealing between man and man, where one attempts to sell and another to buy *goods* and *chattels*, and not simply the *interest* which the seller may be *supposed* to have in them." Brown *v.* Cockburn, 37 U. C. Q. B. 532.]

Canadian decision on executory contract.

Brown *v.* Cockburn.

title as the vendor has? . . . . The result of the older authorities is, that there is by the law of England no *warranty of title in the actual contract of sale, any more than there is of quality.* The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. (p^1) This rule will be found in Co. Litt. 102 a; 3 Rep. 22 a; Noy Max. 42; Fitz. Nat. Brev. 94 c; in Springwell *v.* Allen, Aleyn, 91, cited by Littledale J. in Early *v.* Garrett, 9 B. & C. 932, and in Williamson *v.* Allison, 2 East, 449, referred to in the argument. . . . . It may be that, as in the earlier times, the chief transactions of purchase and sale were in markets and fairs, where the *bonâ fide* purchaser obtained a good title as against all except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. *In recent times a different notion appears to have been gaining ground* (see note of the learned editor to 3 Rep. 22 a); and Mr. Justice Blackstone says, 'In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants. At all times, however, the vendor was liable, if there was a warranty *in fact*, and at an early period the affirming those goods to be his own by a vendor in possession appears to have been deemed equivalent to a warranty. Lord Holt, in Medina *v.* Stoughton (1 Salk. 210; Ld. Raymond, 593), says that 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty.' And Mr. Justice Buller, in Pasley *v.* Freeman (3 T. R. 57), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. . . . . From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in Ormerod *v.* Huth (14 M. & W. 604), it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud a vendor is not liable for a bad title, unless there

(p^1) [Sweetman *v.* Prince, 62 Barb. 256.]

is an express warranty, or an equivalent to it, by *declarations or conduct; and the question in each case, where there is no warranty in express terms, will be whether there are such circumstances as will be equivalent to such a warranty.* Usage of trade, as a matter of fact, would of course be sufficient to raise an inference of such an engagement: and without proof of such usage the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. . . . . We do not suppose that there would be any doubt if the articles are bought in a shop professedly carried on for the sale of goods, that *the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased.* In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. But in the case now under consideration the defendant can be made responsible only *as on a sale of a forfeited pledge eo nomine,* . . . . and the question is, whether on such a sale, accompanied with possession, there is *any assertion of an absolute title to sell*, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." Held that the latter was the true meaning of the contract. The learned judge continued as follows: "It may be that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, *some circumstances must be shown* to enable the plaintiff to recover *for money had and received.* This case was not made at the trial, and the only question is, whether there was an implied warranty."

L'Apostre v. L'Plaistier.

§ 631. In the foregoing review of the older authorities by Parke B. the case of L'Apostre *v.* L'Plaistier escaped the research of his lordship. (*q*) . The case is mentioned

(*q*) It had likewise escaped the research of the author of this treatise when the first edition was published.

in 1 P. Williams, 318, as a decision by C. J. Holt on a different point. But when it was cited as an authority in Ryall *v.* Rowles (*r*) (1 Vesey, 348), Lee C. J., sitting in bankruptcy with Lord Chancellor Hardwicke, said: "*My* account of that case is different from that in Peere Williams. . . . . It was held by the court that *offering to sell generally was sufficient evidence of offering to sell as owner*, but no judgment was given, it being adjourned for further argument." (See the case of Ryall *v.* Rowles, as published in the 4th edition of Tudor's L. C. in Equity, at p. 738, for this report by the C. J. Lee of the decision in L'Apostre *v.* L'Plaistier.)

§ 632. Next came Hall *v.* Conder. (*s*) The written sale stated that the plaintiff had obtained a certain patent in this country, and had already sold "an interest of one half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby *declares that he has full right and title*," and he thereupon conveyed to the defendant "the above-mentioned one half of the English patent hereinbefore referred to." In an action for the price, the defendant pleaded, first, that the alleged invention was worthless, of no public utility, and not new in England; and secondly, that the plaintiff was not the true and first inventor thereof. The court held that there was no warranty that the patent right was a good right, saying: "Did the plaintiff *profess to sell*, and the defendants to buy, a good and indefeasible patent right? or was the contract merely to place the defendant in the same situation as the plaintiff was in, with reference to the alleged patent?" (*s*[1]) Held that the latter was the true nature of the contract. In this case, again, there is nothing to show that the sale of a chattel does not imply an affirmation of ownership, for there was an *express* warranty of ownership; but the subject-matter and true construction of the warranty were the points in question, and the warranty was held to mean that the patent, *such as it was*, belonged to the plaintiff, and to no one else, not that the patent was free from intrinsic defects that might make it voidable or defeasible. The *dicta*, however, was strongly in support of those in Morley *v.* Attenborough. So, in Smith *v.* Neale, (*t*) the same court, on facts almost iden-

Hall *v.* Conder.

Smith *v.* Neale.

(*r*) Also reported *sub nom.* Ryall *v.* Rolle, 1 Atk. 165.

(*s*) 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288.

(*s*[1]) [Harlow *v.* Putnam, 124 Mass. 556.]

(*t*) 2 C. B. N. S. 67; 26 L. J. C. P. 143.

tical with those of the preceding case, held, that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that her majesty had granted to the vendor the letters patent, which were the thing sold.

Chapman v. Speller.

§ 633. In Chapman *v.* Speller, (*u*) the plaintiff gave the defendant 5*l.* profit on a purchase made by the defendant at a sheriff's sale under a writ of *fi. fa.*, and the defendant handed to the plaintiff the receipt, which he had got from the auctioneer, in order to enable the plaintiff to claim the goods. The goods were afterwards taken under a superior title, and the plaintiff brought action, alleging a warranty of title by the defendant; but the court refused to consider the point of law, saying that the defendant had only sold "the right, whatever it was, that he had acquired by his purchase at the sheriff's sale." The court, however, added: "We wish to guard ourselves *against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel*, where the purchaser does not have that for which he paid."

Sims v. Marryat.

§ 634. In Sims *v.* Marryat (*x*) there were affirmations by the defendant, which were construed to amount to an express warranty, and the question now under consideration was not decided; but Lord Campbell said: "It does not seem necessary to inquire what is the general law as to implied warranty of title on sales of personal property *which is not quite satisfactorily settled.* According to Morley *v.* Attenborough, if a pawnbroker sells unredeemed pledges, he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawnor. Beyond that the decision does not go, but *a great many questions are suggested in the judgment which still remain open.*"

Somers v. O'Donohue.

§ 634 *a.* [In Somers *v.* O'Donohue (*x*[1]) there was a sale of a horse at auction, and evidence tending to show that the auctioneer said that he would stand between the purchaser and all claims; that no one need fear to buy; that he had come honestly by him. A verdict was taken for the plaintiff, the purchaser, in an action against the auctioneer, the declaration containing a special count and the common money counts. A rule

(*u*) 14 Q. B. 621; 19 L. J. Q. B. 241.
(*x*) 17 Q. B. 281; 20 L. J. Q. B. 454.
(*x*[1]) 9 U. C. C. P. 208.

nisi for a new trial was discharged, and Draper C. J., said: "Notwithstanding the case of Morley *v.* Attenborough, and particularly after the case of Sims *v.* Marryat, I should have great hesitation in holding, that where a man having a chattel in his possession sells and delivers it to another for value, there is not from the very nature of the transaction an implied undertaking that he has a right to sell. . . . . The strong inclination of my own opinion is to hold that where a man sells a chattel as his own, which is at the time of sale in his actual possession, and delivers it to the purchaser from whom it is taken by the right owner, the vendor is to be treated as impliedly warranting that he has a right to sell, and is therefore bound to compensate his vendee for the loss. In the present case it is not necessary to rest the decision on that ground, as there was some evidence to go to the jury of a warranty which was left to their consideration by the learned chief justice."]

§ 635. Then came Eichholz *v.* Banister, (*y*) in which one of the open questions at least was expressly decided by the common pleas in Michaelmas, 1864. The facts were very simple. The plaintiff went to the warehouse of the defendant, a "job-warehouseman," in Manchester, and bought certain goods, which the defendant said were "a job lot just received by him." The following was the invoice, which was in print, except the words in italics: Eichholz *v.* Banister.

20 Charlton Street, Portland Street,
Manchester, April 18, 1864.

Mr. *Eichholz*,

Bought of R. Banister, job-warehouseman.

Prints, gray fustians, &c. job and perfect yarns, in hanks, cops, and bundles.

17 *pieces of prints*, 52 *yards at* 5¼*d. per yard*	£19	6	0
1½ *per cent. for cash.*	0	6	0
	19	0	0

The price was paid and the goods delivered, but it turned out that they had been stolen, and the buyer was compelled to restore them to the true owner, and brought action on the *common money counts*, to which the defendant pleaded *never indebted*. Defendant

(*y*) 17 C. B. N. S. 708; 34 L. J. C. P. 105.

insisted at the trial that he had not warranted title, and the point was reserved. The judges gave separate opinions, all concurring in the existence of a warranty of title. Erle C. J. said that the rule was taken on a point of law that "a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. . . . . I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, *or by his conduct gives the purchaser to understand that he is such owner*, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." (y^1) After quoting a passage from the opinion in Morley *v.* Attenborough, his lordship continued: "I think where the sale is as it was in the present case, the shopkeeper does by his conduct affirm that he is the owner of the article sold, and he therefore contracts that he is such owner; and if he be not in fact the owner, the price paid for the purchase can be recovered back from him. So much for the present case." His lordship, then referring to the old authorities cited, said of the passage from Noy, quoted *ante*, § 528, that "at first sight this would shock the understanding of ordinary persons; but I take the meaning of the principle which it enunciates to be that where the transaction is of this nature, that I have the manual *possession* of a chattel, and without my affirming that I am the owner or not, you choose to buy it of me *as it is*, and give me the money for it, you the purchaser taking it on those terms cannot afterwards recover back what you have paid because it turns out that I was not the true owner." His lordship then pointed out that Morley *v.* Attenborough, Chapman *v.* Speller, and Hall *v.* Conder had all been decided on this principle; and that in "all these cases I think that the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had; but *in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would, therefore, as I think, commonly lead the purchaser to believe that he was the owner of the chattel.* In almost all ordinary transactions in modern times the vendor, in consideration of the purchaser paying the price, *is understood to affirm that he is the owner*

(y^1) Mercer *v.* Cosman, 2 Hannay (N. B.), 240.

of the article sold. . . . . The present case shows, I think, the wisdom of Lord Campbell's remark on the judgment of Parke B. in Morley *v.* Attenborough, when he said: (*z*) 'It may be that the learned baron is correct in saying, that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well-nigh eat up the rule.'" Byles J. concurred, and said: "It has been stated over and over again, that the mere sale of chattels does not involve a warranty of title, *but certainly such statement stands on barren ground and is not supported by one single decision;* and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title. Lord Campbell was right when he said that the exceptions to the application of *caveat emptor* had well-nigh eaten up the rule." Keating J. concurred.

§ 636. It is impossible to read the judgment of Erle C. J. in this case without yielding assent to the assertion that in modern times, in all ordinary sales, the vendor by exercising the highest act of dominion over the thing in offering it for sale, thereby leads the purchaser to believe that he is owner, and this *dictum* is fully supported by the report by Lee C. J. of the decision given in L'Apostre *v.* L'Plaistier, *ante*, § 631. This being equivalent to a warranty, the result would be, in modern times, that as a general rule the mere sale of a chattel implies a warranty of title, whereas the old rule is accounted for by Parke B. on the ground that in the olden days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market overt, where the title obtained by the buyer was good against everybody but the sovereign. It should also be remembered, when inferences are drawn from very ancient decisions, that there formerly existed statutory provisions which have long grown obsolete. The laws passed in the times of Ethelbert and Edgar specially prohibited the sale of anything above the value of 20*d.* unless in open market, and directed every bargain and sale to be made in the presence of credible witnesses. (*a*)

Remarks on this case.

§ 637. The question was alluded to by the lord chancellor (Chelmsford) in delivering the opinion of the court in Page *v.*

(*z*) In Sims *v.* Marryat, 17 Q. B. 281; 20 L. J. Q. B. 454.

(*a*) Wilkins's Leg. Anglo-Sax., LL. Ethel. 10, 12; Eadg. 80.

Cowasjee Eduljee, (*b*) where, in the case of a sale of a stranded vessel by the master, he said: "But supposing the plaintiff to have acted upon a mistaken view of the necessity of the case, the defendant could not insist upon there being any implied warranty of title. The plaintiff sold the vessel in the special character of master, *and not as owner*, and acted upon a *bonâ fide* belief of his authority to sell."

§ 638. The subject was again considered in the common pleas in Trinity Term, 1867, in Bagueley *v.* Hawley, (*c*) but with no satisfactory progress towards a final settlement of the point. The defendant bought a boiler, at auction, under distress for a poor-rate. The boiler was set in brick-work, and was too large to be taken away without taking down part of the outer wall of the boiler-house. The defendant agreed to sell it to the plaintiff at an advanced price as it stood. The plaintiff knew that the boiler had been bought at the auction by the defendant, and went with him to the auctioneer to obtain an extension of time for taking away the boiler; and this was conceded to him, but when he went to remove it, persons claiming to be mortgagees had it at work, and refused to allow its removal, stating that it had been illegally distrained. The plaintiff insisted that there was a warranty of title, and a warranty that he should be allowed to remove the boiler; the defendant contended that he merely sold such title as he had. Blackburn J. left it as a question of fact to the jury, who found that the sale was absolute and unconditional, and that there was an understanding that the plaintiff was to have effectual possession of the boiler, and they gave a verdict for the plaintiff. On leave reserved, a rule was made absolute for a nonsuit, by Bovill C. J. and M. Smith J.; *dissentiente* Willes J. Bovill C. J. put his opinion on the ground that by the general rule of law no warranty is implied in the sale of goods, but Smith J. on the principle of Chapman *v.* Speller; while Willes J. agreed with the jury and Blackburn J. that "the thing which the defendant sold was a boiler and not a lawsuit." The circumstances were so peculiar, and the opinions of the judges so little in accord, that the case has not much value as a precedent.

Bagueley *v.* Hawley.

§ 639. On the whole, it is submitted that, since the decision

(*b*) L. R. 1 P. C. App. 127-144; 3 Moore P. C. N. S. 499.

(*c*) L. R. 2 C. P. 625; 36 L. J. C. P. 328.

in Eichholz *v.* Banister, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, "of having been well-nigh eaten away." The rule at present would seem to be stated more in accord with the recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.* (c^1) Eichholz *v.* Banister was on the money counts, and therefore, strictly speaking, only decides that the price paid may be recovered back by the buyer on the failure of title in the thing sold; but as the *ratio decidendi* was that there was a warranty implied *as part of the contract*, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty.

Submitted that the general rule is now changed.

§ 640. Before leaving the subject, it should be noted that in Dickenson *v.* Naul (*d*) and in Allen *v.* Hopkins, (*e*) it was decided that where a party had bought and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first vendor for the price; these decisions being directly opposed to the maxim in Noy, quoted *ante*, § 628.

Dickenson *v.* Naul. Allen *v.* Hopkins.

§ 640 *a*. [A. agreed to sell certain land to B., and on the payment of a certain sum in instalments to execute a deed of the land to B. B. made default in the payments. After such default A. sold the land to C. and gave him a deed thereof. B. had previously gone into possession and was in possession when A. executed the deed to C. After the default of B. and after the conveyance to C., B. cut timber on the lot and sold the

McMahon *v.* Grover.

(c^1) [A. borrowed money of B., and in consideration thereof pledged to B. 180 cases of tobacco by a contract in writing, reciting that the tobacco was A.'s "own property and free from all incumbrance, and all of the crop of 1871." B. borrowed money of C., and in consideration of the loan, B. signed and delivered to C. the following assignment of the above-named contract: "For value received, we hereby assign and transfer to C. all our right, title, and interest in and under the contract, together with all the property mentioned therein." It was held that there was no implied warranty of title to the tobacco on the part of B. First Nat. Bank of Northampton *v.* Mass. Loan & Trust Co. 123 Mass. 330.]

First Nat. Bank *v.* Mass. Loan & Trust Co.

(d) 4 B. & A. D. 638.

(e) 13 M. & W. 94.

logs to D. who did not know of C.'s title. C. brought ejectment against B. and recovered. C. then gave notice to D. not to pay any more money to B. but to pay the remainder to him. It was held that B. could not recover in assumpsit from D. for the price of the logs. (e^1)]

Decisions in America.

§ 641. In America, the distinction between goods in possession of the vendor and those not in possession, so decisively repudiated by Buller J. in Paisley *v.* Freeman, (*f*) and by the judges in Eichholz *v.* Banister, (*g*) and in Morley *v.* Attenborough, (*h*) seems to be fully upheld; and the rule there is, that as to goods in possession of the vendor there is an implied warranty of title; (*i*) but where the goods sold are in possession of a

(e^1) [McMahon *v.* Grover, 3 U. C. C. P. 65; Marshall *v.* Beeber, 53 Ind. 83; Porter *v.* Bright, 82 Penn. St. 441.]

(*f*) 3 T. R. 58.

(*g*) 17 C. B. N. S. 708.

(*h*) 3 Ex. 500.

(*i*) Bennett *v.* Bartlett, 6 Cush. 225; Vibbard *v.* Johnson, 19 John. 78; Case *v.* Hall, 24 Wend. 102; Dorr *v.* Fisher, 1 Cush. 273; Burt *v.* Dewey, 40 N. Y. 483; [Gookin *v.* Graham, 5 Humph. 484; Scott *v.* Scott, 2 A. K. Marsh. 215; McCoy *v.* Artcher, 3 Barb. 323; Heermance *v.* Vernoy, 6 John. 5; Sweet *v.* Colgate, 20 Ib. 196; Rew *v.* Barber, 3 Cowen, 272; Vibbard *v.* Johnson, 19 John. 77; McKnight *v.* Devlin, 52 N. Y. 399, 401; Hoe *v.* Sanborn, 21 Ib. 552, 556; Thurston *v.* Spratt, 52 Maine, 202; Hale *v.* Smith, 6 Greenl. 420; Eldridge *v.* Wadleigh, 3 Fairfield, 372; Butler *v.* Tufts, 13 Maine, 302; Huntingdon *v.* Hall, 36 Ib. 501; McCabe *v.* Morehead, 1 Watts & S. 513; Chism *v.* Wood, Hardin, 531; Payne *v.* Rodden, 4 Bibb, 304; Cozzins *v.* Whitaker, 3 Stew. & Port. 322; Inge *v.* Bond, 3 Hawks, 101; Mockbee *v.* Gardner, 2 H. & Gill, 176; Coolidge *v.* Brigham, 1 Met. 551; per Shaw C. J. in Dorr *v.* Fisher, 1 Cush. 273; Emerson *v.* Brigham, 10 Mass. 202; Bucknam *v.* Goddard, 21 Pick. 71; Darst *v.* Brockway, 11 Ohio, 462; Lines *v.* Smith, 4 Florida, 47; Chancellor *v.* Wiggins, 4 B. Mon. 201; Colcock *v.* Goode, 3 McCord, 513; Ricks *v.* Dillahunty, 8 Porter, 134; Williamson *v.* Sammons, 34 Ala. 691; Whitney *v.* Heywood, 6 Cush. 82, 86; Sargent *v.* Currier, 49 N. H. 310; Storm *v.* Smith, 43 Miss. 497; Rice *v.* Forsyth, 41 Md. 389; Marshall *v.* Duke, 51 Ind. 62; Hackleman *v.* Harrison, 50 Ib. 156; Whitaker *v.* Eastwick, 75 Penn. St. 229; Gross *v.* Kierski, 41 Cal. 111; Morris *v.* Thompson, 85 Ill. 16. A warranty of title is to be implied, from the contract, as much in the case of an exchange of articles then in the possession of those making the trade, as upon a sale; and this implied warranty is as much a part of the contract as if it had been express. Hunt *v.* Sackett, 31 Mich. 18; Patee *v.* Pelton, 48 Vt. 182; Byrnside *v.* Burdett, 15 W. Va. 702. "Possession here," says Mr. Justice Dewey, in Whitney *v.* Heywood, 6 Cush. 82, "must be taken in its broadest sense, and as including possession by a bailee of the vendor. The excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive; and in such cases no warranty of title is implied. The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor, and if he sells goods thus held as his, a warranty of title is implied." Morton J.

Warranty of title implied in exchange same as sale.

"Possession," what it means.

third party at the time of the sale there is no such warranty, and the vendee buys at his peril. (*k*) And in the note of the learned editor of the last edition of Story on Sales (3d ed. p. 459), it is said that "this distinction has now become so deeply rooted in the decision of courts, in the *dicta* of judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated." And Kent sustains this view of the law of the United States. (*l*)

§ 642. By the civil law, the warranty against eviction exists in all cases. The law 3 ff. de act. empt. gives the maxim in the words of Pomponius as follows: "*Datio possessionis quæ a venditore fieri debet talis est ut si quis eam possessionem jure avocaverit, tradita possessio non intelligatur.*" Pothier gives the rule in these words: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale, to warrant and

Civil law.

Pothier.

in Shattuck *v.* Green, 104 Mass. 42, 45. The possession of the vendor is equivalent to an affirmation of title. McCoy *v.* Artcher, 3 Barb. 323. In cases where the implied warranty of title arises, it extends to a prior lien or incumbrance. Dresser *v.* Ainsworth, 9 Barb. 619; Sargent *v.* Currier, 49 N. H. 310, 311. As to the effect upon this implied warranty of an assignment and delivery, to the purchaser by the seller, of the bill of sale under which the latter acquired the property sold, see Shattuck *v.* Green, 104 Mass. 42. Long *v.* Anderson, 62 Ind. 537 is somewhat in conflict with Shattuck *v.* Green, *supra*. Whether under the implied warranty of title, if the vendor had no title at the time of sale, but acquired one afterwards, it would inure to the benefit of the purchaser, see Sherman *v.* Champlain Trans. Co. 31 Vt. 162.]

(*k*) Huntington *v.* Hall, 36 Me. 501; McCoy *v.* Artcher, 3 Barb. 323; Dresser *v.* Ainsworth, 9 Barb. 619; Edick *v.* Crim, 10 Barb. 445; Long *v.* Hickingbottom, 28 Miss. 772; [Andres *v.* Lee, 1 Dev. & Bat. Eq. 318; Sewall J. in Emerson *v.* Brigham, 10 Mass. 202; Pratt *v.* Philbrook, 32 Me. 23; Scranton *v.* Clark, 39 N. Y. 220; Fletcher *v.* Drath, 66 Mo. 126; Stephens *v.* Ells, 65 Ib. 456. In a sale by executors, administrators, and other trustees, there is no implied warranty of title. Mockbee *v.* Gardner, 2 H. & Gill, 176; Ricks *v.* Dilahunty, 8 Porter, 133; Forsythe *v.* Ellis, 4 J. J. Marsh. 298; Prescott *v.* Holmes, 7 Rich. Eq. 9; Brigham *v.* Maxcy, 15 Ill. 295; Blood *v.* French, 9 Gray, 197, cited *ante*, § 624, note (*a*). So in case of sales by officers of the law. Worthy *v.* Johnson, 8 Ga. 236; Hensley *v.* Baker, 10 Mo. 157; Davis *v.* Hunt, 2 Bailey, 412; Yates *v.* Bond, 2 McCord, 382; Morgan *v.* Fencher, 1 Blackf. 10; Rodgers *v.* Smith, 2 Cart. (Ind.) 526; Bostick *v.* Winton, 1 Sneed, 525; Bashore *v.* Whisler, 3 Watts, 490; Stone *v.* Pointer, 5 Munf. 287; Hicks *v.* Skinner, 71 N. C. 539; Fore *v.* McKenzie, 58 Ala. 115; Neal *v.* Gillaspy, 56 Ind. 451; Brunner *v.* Brennan, 49 Ib. 98; State *v.* Prime, 54 Ib. 450; Harrison *v.* Shanks, 13 Bush, 620; Sheppard *v.* Earles, 13 Hun, 651; Baker *v.* Arnot, 67 N. Y. 448; Mechanics' Sav. Ass. *v.* O'Conner, 29 Ohio St. 651.]

(*l*) Vol. 2, p. 478.

defend the buyer against eviction from that possession. This obligation is called warranty." (*m*)

French Code.

§ 643. In the French law, so deeply implanted is the obligation of warranty against eviction, that it exists so far as to compel return of the price, even though it has been expressly agreed that there shall be no warranty. The articles of the Civil Code are as follows: 1625. The warranty due by the vendor to the purchaser has two objects: first, the peaceful possession of the thing sold; secondly, the concealed defects or redhibitory vices of the thing. 1626. Although at the time of sale there may have been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (*charges prétendues sur cet objet*), and not mentioned at the time of the sale. 1627. The parties may, by special convention, add to this legal obligation, or diminish its effect, and may even stipulate that the vendor shall be liable to no warranty. 1628. Although it be stipulated that the vendor shall be liable to no warranty, he remains bound to a warranty against his own act: any contrary agreement is void. 1629. In the same case, of a stipulation of no warranty, the vendor remains bound to return the price to the purchaser in the event of eviction, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril. This subject, however, is more fully treated *ante*, book II. ch. vii. on the Nature and Effect of a Sale by the Civil Law.

SECTION III. — IMPLIED WARRANTY OF QUALITY.

Caveat emptor is the general rule.

§ 644. The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale. (*n*) A representation anterior to the

(*m*) Vente, 2 part, ch. 1, sec. 2, No. 82.

(*n*) [See French *v.* Vining, 102 Mass. 135; Bryant *v.* Pember, 45 Vt. 487; Bowman *v.* Clemmer, 50 Ind. 10. Although an ordinary contract for the sale of chattels carries with it no warranty of the quality of the articles sold, there is no principle of law which prevents a stipulation being made by the vendor as to the quality which will have the effect of a warranty. *E. g.*: C., having previously sold coal to W., offered him a lot at a certain

Stipulation as to quality may amount to warranty.

sale, and forming no part of the contract when made, is, as already shown (*ante*, §§ 610, 611), no warranty; but a representation, even though only an inducement to the contract, and forming no part of it, will, if false to the knowledge of the vendor, be a ground for rescinding the contract as having been effected through fraud. So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied* warranty of quality. (*o*)

No exception where an existing specific chattel inspected by buyer has been sold.

§ 645. But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given, as is shown by the authorities now to be reviewed. (*p*) If the specific existing chattel, however, is sold by description, and does not correspond with that description, the vendor fails to comply, not with a warranty or collateral agreement, but with a contract itself, by breach of a condition precedent, as explained *ante*, § 600. (*q*) This was strongly exemplified in Josling *v.* Kingsford, (*r*) where the vendor was held bound, as on a condition precedent, to deliver "oxalic acid," although he had exhibited the bulk of the article sold to the buyer, and written to him that he would not warrant its strength, in order to "avoid any unpleasant differences," and suggested to him to make a fresh examination if he thought proper.

Chattel to be made or supplied, implied warranty of quality.

Specific chattel sold by description.

§ 646. On the other hand, a severe application of the rule of

price, accompanying the offer with a statement that it was of the same quality as that which had been previously sold to him by the plaintiff. W. agreed to take it if it was good coal, but said if it was not he did not want it. The coal having been delivered, C. brought an action for the price; and it was held that evidence was admissible on behalf of the defendant to show that the coal furnished under this contract was not as good as that previously furnished. Warren *v.* Philadelphia Coal Co. 83 Penn. St. 437; Wilson *v.* Dunville, 4 L. R. Ir. 249.]

(*o*) Parkinson *v.* Lee, 2 East, 314; Chanter *v.* Hopkins, 4 M. & W. 64, and cases cited *ante*, § 611, note (*d*); [Deming *v.* Foster, 42 N. H. 165, 174; Byrne *v.* Jansen, 50 Cal. 624; Morris *v.* Thompson, 85 Ill. 16; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Dooley *v.* Gallagher, 3 Hughes (Circ. Ct.), 214; Swift *v.* Haliday, Arms., Mac. & Ogle (Ir.) 81. See Owens *v.* Dunbar, 12 Ir. L. R. 304.]

(*p*) [Rodgers *v.* Niles, 11 Ohio St. 48; Byers *v.* Chapin, 28 Ib. 300.]

(*q*) [*Ante*, § 600, note (*p*); Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515, 519.]

(*r*) 13 C. B. N. S. 447; 33 L. J. C. P. 94.

caveat emptor, where the thing sold answers the description, together with a lucid statement of the law, and the distinction between warranty of quality and description of the thing, may be found in the decision of the exchequer of pleas, delivered by Parke B. in Barr *v.* Gibson. (*s*) The defendant sold to the plaintiff, on the 21st October, 1836, "all that ship or vessel, called the *Sarah*, of Newcastle," &c. covenanting in the deed-poll by which the conveyance was made, that he "had good right, full power, and lawful authority" to sell. It turned out that the ship, which was on a distant voyage, had got ashore on the coast of Prince of Wales's Island on the 13th October, eight days *before* the sale; on a survey, on the 14th, it was recommended that she should be sold as she lay, because, under the circumstances of the winter coming on, and the want of facilities and assistance, the ship could not be got off so as to be repaired there: but if in England she might easily have been got off. At the sale, on the 24th of October, the hull produced only 10*l*. Patteson J. left it to the jury to say whether, at the time of the sale to the plaintiff, the vessel was or was not a *ship*, or a mere bundle of timber, and the jury found she was *not* a ship. On a rule to set aside the verdict, which was thereupon given for the plaintiff, Parke B. said: "The question is not what passed by the deed, but what is the meaning of the covenant contained in it."

Barr *v.* Gibson.

§ 647. "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud), imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship *does not imply a contract that it is then seaworthy, or in a serviceable condition;* and the express covenant that the defendant has full power to bargain and sell does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, *does imply a contract that the article sold is of that description;* (*t*) for which the cases of Bridge *v.* Wain (*u*) and Shepherd *v.* Kain, (*x*) and other cases, are authorities; and therefore the sale in this case of *a ship implies a contract* that the subject of the transfer did exist in the character of a ship, and the *express covenant* that the defendant had power

(*s*) 3 M. & W. 390.

(*t*) [See *ante*, § 600, note (*p*); Wolcott *v.* Mount, 7 Vroom, 262, 266.]

(*u*) 1 Stark. 504.

(*x*) 5 B. & A. 210.

to make the bargain and sale of the subject before mentioned must operate as an *express covenant to the same effect.* That covenant, therefore, was broken if the subject of the transfer had been at the time of the covenant physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, *although the ship was damaged, unseaworthy, or incapable of being beneficially employed.* The contract is for the sale of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so, it might happen that the same identical thing in the same state of structure might be a ship in one place and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect. . . . . We are of opinion, upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. . . . . Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still *a ship*, though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such." New trial ordered. (*y*)

§ 648. Of implied warranties in sales of chattels, there are several recognized by law. The first and most general is, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. The rule is so universally taken for granted that it is hardly necessary to give direct authority for it. The cases are very numerous in which it has been applied as a matter of course. (*z*) In

Implied warranties.

Sales by sample.

(*y*) See cases cited *ante*, § 600 *et seq.*

(*z*) [Bradford *v.* Manly, 13 Mass. 139; Henshaw *v.* Robins, 9 Met. 86, 87; Oneida Manuf. Co. *v.* Lawrence, 4 Cowen, 440; Andrews *v.* Kneeland, 6 Ib. 354; Gallagher *v.* Waring, 9 Wend. 20; Beebe *v.* Robert, 12 Wend. 412; Boorman *v.* Jenkins, Ib. 566; Sands *v.* Taylor, 5 John. 395; Woodworth J. in 20 John. 204; Moses *v.* Mead, 1 Denio, 378; Brower *v.* Lewis, 19 Barb. 574; Beirne *v.* Dord, 1 Selden, 95; S. C. 2 Sandf. (S. C.) 89; Hargous *v.* Stone, 1 Selden, 73; Williams *v.* Spafford, 8 Pick. 250; Hastings *v.* Lovering, 2 Ib. 219; Borrekins *v.* Bevan, 3 Rawle, 37; Rose *v.* Beatie, 2 Nott & McC. 538; Lothrop *v.* Otis, 7 Allen, 435; Messenger *v.* Pratt, 3 Lansing, 234; Leonard *v.* Fowler, 44 N. Y. 289; Boyd *v.* Wilson, 83 Penn. St. 319. An important case upon this subject is Beirne *v.* Dord,

Sale must be made solely upon the

Parker *v.* Palmer (*a*) Abbott C. J. stated it in this language: "The words, per sample, introduced into this contract, may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale." And in Parkinson *v.* Lee, (*b*) Lawrence J., in a sale of hops by sample, said that the contract was "No more than that the bulk should agree with the sample," and the latter is the phrase used by the judges, *passim*. In a sale of goods by sample, it is an implied condition, as shown *ante*, § 594, that the buyer shall have a fair opportunity of comparing the bulk with the sample; and an improper refusal by the vendor to allow this will justify the buyer in rejecting the contract. (*c*)

§ 649. It must not be assumed that in all cases where a sample is exhibited the sale is a sale "by sample." (*d*) The vendor

sample, to constitute sale by sample.

supra, in which it was held that, to constitute a sale by sample, the contract must be made solely with reference to the sample. See Bradford *v.* Manly, *supra*, per Parker C. J.; Cousinery *v.* Pearsall, 40 N. Y. Sup. C. 113; Day *v.* Raguet, 14 Minn. 273. Where the purchaser has an opportunity for personal examination, and is told by the seller to examine for himself, and does examine the article to be sold, being hemp in bales, by cutting open as many bales as he chooses; this is held not to be a sale by sample, and implies no warranty that the interior of the bales shall correspond to the exterior of them. Salisbury *v.* Stainer, 19 Wend. 159. But

Williams *v.* Spafford.

in Williams *v.* Spafford, 8 Pick. 250, the goods were purchased on an examination of specimens taken by the purchaser out of a small aperture in the case in which they were contained, and it was held to be a sale by sample. And in such case, where the article purchased was bought as a scroon of indigo, but the greater part of the contents of the scroon proved to be a different substance, and the remainder to be indigo of a quality inferior to the specimen, it was held that the seller was liable on the warranty, that the article sold was indigo of the same quality as the sample. In this case there was a bill of parcels describing the article as "one scroon of indigo." Without the sample, the purchaser might have held the seller on this description, so far as the article was a different substance.

Sale of manufactured goods by sample.

If manufactured goods are sold by sample, by a merchant who is not a manufacturer, and both the sample and the bulk of the goods contain a latent defect, there is no implied warranty against the defect. Dickinson *v.* Gay, 7 Allen, 29. As to the implication when the goods are sold by sample by the manufacturer, see § 651, at note (*o*), *post*. The law of Pennsylvania on this subject is peculiar. It was decided

Boyd *v.* Wilson. Pennsylvania case.

in Boyd *v.* Wilson, 83 Penn. St. 319, that in the absence of fraud or representation as to quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guaranty that the goods shall be similar in kind and be merchantable.]

(*a*) 4 B. & A. 387.

(*b*) 2 East, 314.

(*c*) Lorymer *v.* Smith, 1 B. & C. 1.

(*d*) [Beirne *v.* Dord, 1 Selden, 95; Hargous *v.* Stone, Ib. 73; Waring *v.* Mason, 18 Wend. 425; Kellogg *v.* Barnard, 6 Blatchf. 279; Hubbard *v.* George, 49 Ill. 275; Ames *v.* Jones, 19 Alb. L. J. 478; Cousinery *v.* Pearsall, 8 J. & Sp. 113; Atwater *v.* Clancy, 107 Mass. 369.]

may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk; (*e*) or the buyer may decline to trust to the sample and the implied warranty, and require an express warranty, in which case there is no implied warranty, *expressum facit cessare tacitum.* Thus, in Tye *v.* Fynmore, (*f*) where the vendor exhibited a sample of "sassafras wood," and the buyer inspected it, and had skill in the article, and the vendor then warranted the goods to be "fair merchantable sassafras wood," it was held not to be a sale by sample with implied warranty, but a sale with express warranty. So in Gardiner *v.* Gray (*g*) the sale was of waste silk, and a sample was shown, but Lord Ellenborough said it was not a sale "by sample." "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity." So in Powell *v.* Horton, (*h*) where a sample of the goods sold was exhibited, but the written contract was construed to contain a warranty that they should be "Scott & Co.'s mess pork," it was held not to be a sale "by sample," but a sale with express warranty. So also have we seen in the very stringent case of Josling *v.* Kingsford, (*i*) where the buyer not only inspected the samples, but the bulk; and the vendor said he would not warrant the strength of the "oxalic acid" sold; yet the purchaser was held not bound to accept the article, because by adulteration with sulphate of magnesia, a defect not visible to the naked eye, the article had lost the distinctive character required by the terms of the written contract, to wit, that of being "oxalic acid."

All sales where sample shown not necessarily sale "by sample."

Tye *v.* Fynmore.

Gardiner *v.* Gray.

Powell *v.* Horton.

Josling *v.* Kingsford.

§ 650. So, on the other hand, where the sold note in writing was silent as to quality, the buyer was not permitted by Lord Ellenborough (*k*) to show that a sample had been exhibited to him before he bought, because it was not a sale "by sample." In Carter *v.* Crick (*l*) the sale was by sample of an article which the vendor called seed barley,

Meyer *v.* Everth.

Carter *v.* Crick.

(*e*) [Kellogg *v.* Barnard, 6 Blatchf. 279; S. C. 10 Wallace, 383; Day *v.* Raguet, 14 Minn. 273; Jones *v.* Wasson, 3 Baxter (Tenn.), 211; Graff *v.* Foster, 67 Mo. 512.]

(*f*) 3 Camp. 462.

(*g*) 4 Camp. 144.

(*h*) 2 Bing. N. C. 668.

(*i*) 13 C. B. N. S. 447; 32 L. J. C. P. 94; and see Mody *v.* Gregson, *post*, § 667.

(*k*) Meyer *v.* Everth, 4 Camp. 22.

(*l*) 4 H. & N. 412; 28 L. J. Ex. 238.

but said he did not know what it really was, and the bulk corresponded with the sample. Held that the buyer took at his own risk whether it was seed barley or some other kind of barley, the vendor's warranty being confined to a correspondence between the bulk and the sample. In Russel *v.* Nicolopulo (*m*) there was a written sale in London of a cargo of wheat then lying in Queenstown, which closed with these words: "The above cargo is accepted on the report and samples of Messrs. Scott & Co. of Queenstown." Mellish, in arguing a demurrer to the declaration, insisted that this clause only warranted that the report of Scott & Co. was a genuine report, and the samples the genuine samples taken by them, but was not a warranty either that the statements in the report were true, or that the cargo was equal to the samples. But all the judges held that the true meaning of the clause was that the samples shown to the buyer were really samples drawn from the cargo, as represented in the report of Scott & Co., and that the bulk corresponded with the samples so drawn.

Russel *v.* Nicolopulo.

§ 651. A very full discussion of the law as to sales by sample is found in Heilbutt *v.* Hickson, (*n*) decided on 5th July, 1872; and a further authority on the subject is Couston *v.* Chapman, *infra*, decided in the House of Lords on the 19th of the same month. In Heilbutt *v.* Hickson, the plaintiffs, merchants in London, on the 30th December, 1870, contracted in behalf of correspondents at Lille in France, with the defendants, *manufacturers* of shoes, for the purchase of 30,000 pairs of black army shoes, *as per sample*, at four shillings and eight pence per pair, less $2\frac{1}{2}$ per cent. discount, to be delivered free at a wharf in weekly quantities; *to be inspected and quality approved before shipment;* payment in *cash on each delivery*. Both parties knew that the shoes were required for the French army for a winter campaign. A sample shoe was deposited. The plaintiffs appointed a skilled person to inspect the shoes on their behalf. A number were rejected, but a large number were inspected and approved. On the inspection, the soles were not opened, and it is not usual to open them; but without opening it could not be known of what substance the fillings of the soles had been made. Before the first delivery, it had been publicly reported that a contractor in France had been imprisoned for using paper as fillings

Heilbutt *v.* Hickson.

(*m*) 8 C. B. N. S. 362. (*n*) L. R. 7 C. P. 438.

for the soles, and the plaintiffs' agent at the wharf asked that a shoe might be cut open to see if there was any paper in the sole; the defendants' foreman assented, saying that the plaintiffs might cut open as many as they pleased, and would not find paper in any of them. One shoe was accordingly cut open, and no paper was found in it. The plaintiffs' evidence also went to show that many assurances had been given to them by the defendants that there was no paper in the soles of the shoes. The plaintiffs accordingly accepted and paid for 4,950 pairs, which were shipped to destination at Lille, where they arrived on the 10th February. In the mean time the plaintiffs had sent in advance, to Lille, one pair, which was there cut open and found to contain pieces of pasteboard as fillings of the soles. This was communicated to the defendants on the 9th February, when they asserted that it must be a mistake, and several more pairs were opened and found not to contain paper. The *sample shoe* was opened at the same time, *and it did contain paper in the sole.* Thereupon several of the cut pairs which did *not* contain paper fillings, and the sample shoe which did, were taken to Lille by the plaintiffs' agent (the plaintiffs having in the mean time declined to receive further deliveries), and after communication with the plaintiffs' correspondent at Lille, the agent, on the 10th February, telegraphed to the plaintiffs, "Pay for and ship all of Hickson's goods ready at wharf and warehouse." On receipt of this telegram the plaintiffs accepted and paid for a further quantity, which had been inspected, approved, and delivered at the wharf, but which they had previously declined to accept. The defendants knew that the shoes had to be passed by the French authorities, and that the sample shoe and the first pair sent to Lille had been found to contain paper; and after some discussion, they, on the 13th February, signed a letter, dated on the 11th February, addressed to the plaintiffs, agreeing to take back any shoes that might be rejected by the French authorities in consequence of containing paper, it being understood that they could not take back any large number if paper should be found in only a few pairs. Upon this letter being given to the plaintiffs, they accepted and paid for further deliveries, amounting to over 12,000 pairs. On the 26th February, information was received that some of the shoes had been found to contain paper; and on the 28th, when the entire quantity was tendered to the French authorities, some were opened

and found to contain paper, and the whole were rejected. They were sent to a public warehouse, where they remained deposited when the action was tried. From subsequent examination of a number of the shoes, it appeared that a large proportion — in one instance, seventeen out of eighteen pairs examined — and in another instance, more than half of over one hundred pairs taken from different cases — were found to contain paper, canvas shavings, or asphalte roofing-felt in the soles; and other similar examinations showed the same result. The jury found that the shoes delivered and those ready for delivery *were not equal to sample*, and that the defects *could not have been discovered by any inspection which ought reasonably to have been made*. The damages were assessed under the direction of Brett J., and were composed, 1st, of the *whole cost* of the shoes, with freight, charges, and insurance, till arrival at Lille; 2dly, of expenses for cartage and warehouse at Lille; 3dly, of loss of profit on the quantity delivered; and 4thly, of loss of profit on the quantity remaining to be delivered. And a verdict was entered for the whole, amounting to 4,214*l.* 5*s.*, leave being reserved to the defendants to move to reduce the damages by any sum that the court might think right. It will be seen by this statement that the principal questions involved turned upon the assessment of damages, and the case as to this point will be again referred to in the concluding chapter of this treatise; but it is convenient to state the facts here fully, in order to avoid repetition, and then to extract from the opinions of the judges the principles applicable to the subject now under consideration. Bovill C. J. delivered the judgment of the court, and upon the point in relation to the sample shoe, said: "It was contended for the defendants, that as the sample shoe contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect, the damages, and especially the loss of profits, did not result from the breach of warranty in the shoes not being equal to the sample. But the fact of the improper fillings in the sole of the sample shoe *was a hidden defect*, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes, and the letter of the 11th February was directed expressly to the point of paper being in the shoes, and in our opinion gave the right to reject the shoes on that ground, and entitles the plaintiffs to recover the loss of profit which

would have accrued if the shoes had been accepted by the French authorities." *Semble*, therefore, that if a *manufacturer* agrees to furnish goods according to sample, the sample is *to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties.* (*o*) The judgment of the court was put by the chief justice on the interpretation of the whole contract as originally made and as subsequently modified by the letter of the 11th February; but Brett J., while agreeing in the judgment, expressed a decided opinion that the rights of the plaintiffs would have been the same under the original bargain, independently of the letter, and he made the following important observations, which seem to be, in some points, justified by the decision of the House of Lords, in Couston *v.* Chapman, *infra*, and by Moody *v.* Gregson, *infra* (not cited in Heilbutt *v.* Hickson): "Besides the incidents attaching to a contract of sale by sample, which have been enumerated by my lord, I think there is also the following, that such contract *always contains an implied term that the goods may, under certain circumstances, be returned;* (*p*) that such term necessarily contains certain varying or alternative applications, and amongst them the following, — that *if the time of inspection, as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them* THEN AND THERE on the hands of the seller. . . . . The defect in the shoes was the consequence of acts of the defendants' servants, the defendants being the manufacturers of the goods, and the defect, though known to the defendants' servants, was a secret defect not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London — an inefficacy caused by this kind of fault, viz. a secret defect of manufacture which the defendants' servants committed — the apparent inspection in London could be of no more practical effect than no inspection at all. If it could be of no practical effect, there could not be any effective, and therefore any

Semble — Sample shown by manufacturer must be taken as free from secret defects.

Buyer's right of rejection after inspection.

(*o*) [See § 648, note (*z*), *ante.*]

(*p*) [Freeman *v.* Clute, 3 Barb. 424; Park *v.* Morris Axe Co. 4 Lansing, 103. Or sold by the purchaser, if the vendor will not accept a return. Messmore *v.* N. Y. Shot Co. 40 N. Y. 422.]

real practical inspection, until an inspection at Lille. . . . . The *apparent* inspection in London being then, *by the acts of the defendants' servants*, no inspection at all, and consequently a *real* inspection at Lille being, by the acts of the defendants' servants, the first possibly effective inspection, it seems to me that such inspection was, by the acts of persons for whose acts the defendants are responsible, substituted for the first inspection stipulated by the contract, and that the rights of the plaintiffs accrued upon that inspection as if it were the first, and therefore they were entitled to throw the shoes upon the hands of the defendants *at Lille*."

Inspection, if ineffective from vendor's default, is no inspection.

§ 652. In Couston *v.* Chapman, (*q*) the respondent Chapman, who was plaintiff in the court below, sold to Couston, at public auction, various lots of wine, *as per sample*, on the 19th March, 1870, and the delivery was completed on the 11th April. The purchasers had the wine examined, and, on the 31st May, wrote to say that they were "agreeable to pay for the rest of the goods," but objected to two lots, for which they would pay "when supplied according to the sample;" and they added that they "considered themselves entitled to the difference between the price of purchase and the price at which they could be bought in the market." The vendors rejected this proposal. Further discussion ensued, but nothing was done till the 13th June, when action was brought. The purchaser had kept all the lots of wine, and had paid for none of them when the action was brought. He was of course condemned to pay for the whole, and it was stated in the various opinions given, — 1st, that the sale of each lot was a separate contract; (*r*) 2d, that although it was clearly proved that the quality of the two lots objected to was inferior to sample, the purchaser was bound to a "timeous rejection and return of the goods if unwilling to keep them;" (*s*) 3d, that if the vendor will not acquiesce in the rejection, the purchaser ought to place the goods in neutral custody, giving notice to the vendor; (*t*) 4th, that the purchaser has no right to hold to the contract and ask for other goods than those which he rejects. Lord Chelmsford said: "Ref-

Couston *v.* Chapman.

Buyer's rights if goods not equal to sample.

(*q*) L. R. 2 Sc. App. 250.

(*r*) [See *ante*, §§ 134–137; Le Blanc J. in Rugg *v.* Minett, 11 East, 218.]

(*s*) [Freeman *v.* Clute, 3 Barb. 424; Park *v.* Morris Axe Co. 4 Lansing, 103.]

(*t*) [See Messmore *v.* N. Y. Shot Co. 40 N. Y. 422; Smith *v.* Love, 64 N. C. 439.]

erence has been made to the difference between the law of England and that of Scotland, as to the right of a purchaser to rescind a contract, and therefore I will say few words on that subject. In England, if goods are sold by sample, and they are delivered *and accepted* by the purchaser, he cannot return them, (*u*) but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he finds that they do not correspond with the sample, he has an absolute right to return them. . . . . With regard to the wine not corresponding with the sample, there can be no doubt whatever that large quantities of the wine in both lots was utterly bad, and could in no way whatever be said to conform to the sample; and, therefore, upon the discovery of that fact, the appellants had a clear right *not* (as appeared to be contended in the course of the argument) *to retain the good wine and return the bad, but to rescind the contract for those lots altogether.* The contracts being entire *for each lot*, the only way in which the appellants could discharge themselves from their obligation was by returning or offering to return the whole of [each of] the lots. His lordship then held that there had been improper delay, because the condition of the wine could have been discovered in the course of a week. And then went on to say: "Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is *his duty to make a distinct offer to return, or, in fact, to return the goods, by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that the purchaser rejects them, that he throws them back on the vendor's hands, and that the contract is rescinded.*" As to the effect of a sale by sample, in modifying the implied warranty that the goods are merchantable, the case of Moody *v.* Gregson, *infra*, § 667, may be consulted.

Buyer must accept all or none of an *entire* lot.

§ 652 *a*. [It has been decided that where goods are sold by sample, and the bulk is found by the purchaser on inspection after delivery not to be equal to sample, the purchaser may reject the

(*u*) [See Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515; McCormick *v.* Sarson, 45 Ib. 265.]

goods by giving notice to the vendor that he will not accept them, and that they are at the vendor's risk, and is not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody. Grimoldby *v.* Wells, L. R. 10 C. P. 391. Brett, J. said: "The purchaser has a right to inspect the goods, and it seems to me that where the sale is by sample, and inspection is to be at some place after delivery, the true proposition is, that if the purchaser on such inspection finds the goods are not equal to sample, or if they are, in fact, not equal to sample, he has a right to reject them then and there, and is not bound to do more than reject them. He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract and they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them." (*x*)]

Barnard *v.* Kellogg. American law.

§ 653. In the case of Barnard, appellant, *v.* Kellogg, respondent, (*y*) decided by the supreme court of the United States in December, 1870, the facts were these. The appellant, a commission merchant, residing in Boston, placed a lot of foreign wool received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of brokers for sale, *with instructions not to sell unless the purchaser came to Boston and examined the wool for himself.* The brokers sent to the respondents, who resided in Hartford, in the state of Connecticut, at their request, samples of the wool, and the latter offered to purchase it at fifty cents a pound, all round, *if equal to the samples furnished*, and this offer was accepted, *provided that the respondents examined the wool on the succeeding Monday, and reported on that day whether or not they would take it.* The respondents agreed to this, and went to Boston and examined four bales in the broker's office, as fully as they desired, and were offered an opportunity to examine all the bales and to have them opened for inspection. They declined to do this, and concluded the purchase. Some months afterwards, on opening the bales, it was found that some were falsely and deceitfully packed, by plac-

(*x*) [Lucy *v.* Mouflet, 5 H. & N. 233; Gill *v.* Kaufman, 16 Kansas, 571; Brown *v.* Corporation of the Town of Lindsay, 35 U. C. Q. B. 509. As to the effect of a sale by sample, in modifying the implied warranty that goods are merchantable, the case of Moody *v.* Gregson, *infra*, § 667, may be consulted.]

(*y*) 10 Wallace, 383.

ing in the interior rotten and damaged wool and tags, concealed by an outer covering of fleeces in good condition. The purchasers, therefore, demanded indemnity for the loss, and it was conceded that the vendor had acted in good faith and knew nothing of the false packing of the bales. On action brought by the respondents there were three counts: 1st, upon sale by sample; 2d, upon a promise, express or implied, that the bales should not be falsely packed; 3d, upon a promise, express or implied, that the inside of the bales should not differ from the samples by reason of false packing. It was held in the lower court that there was no express warranty that the bales not examined should correspond with those exhibited at the broker's office, and that the law, under the circumstances, would not imply a warranty; but that, as matter of fact, the examination of the interior of the bulk of bales of wool generally, put up like these, is not customary in the trade, and though possible would be very inconvenient, attended with great labor and delay, and for these reasons impracticable; that by the custom of merchants and dealers in foreign wools in Boston and New York, the principal markets of the country where such wool is sold, there is an implied warranty against false packing, and that, as matter of law, the custom was binding on the parties to this contract; and judgment was given for the purchaser. But the judgment was reversed on appeal, the supreme court holding, — 1st, that the sale was not by sample, as shown by the fact that the purchaser went to Boston to inspect the goods for himself, — which was unnecessary if the sale was by sample, — and had assented to the condition that the sale was only to take place after his own examination of the goods; 2d, that by the rule of the common law, where a purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and *is neither the manufacturer nor grower* of the goods sold, the maxim of *caveat emptor* applies; 3d, that inasmuch as the law in such a case implies no warranty of quality, evidence of custom that such warranty is implied is inadmissible, and the custom or usage is invalid and void, especially so in the case before the court, as the parties were shown to have had no knowledge of the custom and could not have dealt with reference to it.

§ 654. Where an average sample was taken of a large quantity of goods (beans) contained in a number of packages, by drawing samples from many of the packages and then mixing them together, it was held by the court of ap- Average sample. New York decision.

Leonard v. Fowler.

peals of the state of New York, in Leonard *v.* Fowler, (*z*) that the purchaser could not reject any of the packages on the ground that *they* were inferior to the average, nor recover for the difference in value on that ground; that the true test was whether, if the contents of all the packages were mixed together, the quality of the bulk so formed was equal to that of the average sample drawn. (*z*[1])

Warranty implied from usage.

§ 655. An implied warranty may result from the usage of a particular trade. (*a*) Thus, in Jones *v.* Bowden, (*b*) it was shown that in auction sales of certain drugs,

Jones v. Bowden.

as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. The court held, on this evidence, that freedom from sea-damage was an implied warranty in the sale.

Weall v. King.

And Heath J. in that case mentioned a nisi prius decision by himself, that where sheep were sold as stock, there was an implied warranty that they were sound, proof having been given that such was the custom of the trade; and said that this ruling was not questioned when the case was argued before the king's bench. The case referred to by the learned

(*z*) 44 N. Y. 289.

(*z*[1]) [And in Schnitzer *v.* Oriental Print Works, 114 Mass. 123, it was held that evidence is admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately.]

(*a*) [See Fatman *v.* Thompson, 2 Disney, 482. It is well settled that a usage repugnant to the terms of a contract is inadmissible to control it. Nor can a usage

Certain limitations upon usages.

of trade be maintained which engrafts on a contract of sale a stipulation or obligation different from or consistent with a rule of the common law on the subject. Foster J. in Boardman *v.* Spooner, 13 Allen, 353, 359. Thus, a usage that in sales by sample there is an implied warranty against latent defects existing in both the sample and the bulk is illegal. Dickinson *v.* Gay, 7 Allen, 34. So, likewise, is a usage that in sales of a particular kind of merchandise there is an implied warranty of its merchantable quality; and that a broker, without express authority, may insert such a stipulation in his memorandum of the bargain. Dodd *v.* Farlow, 11 Allen, 426; Boardman *v.* Spooner, 13 Ib. 353, 359, 360. On the other hand, a usage by which a manufacturer is held not to warrant against latent defects, when the law implied such a warranty, is held void. Whitmore *v.* South Boston Iron Co. 2 Allen, 52; Dickinson *v.* Gay, 7 Ib. 34; Snelling *v.* Hall, 107 Mass. 134, 139. As to usages, see § 215 note (*b*), *ante*. Where there is a usage that all sales are by sample, such usage may be shown, although it is not so expressed in the bought and sold notes. Syers *v.* Jonas, 2 Ex. 111; O'Neill *v.* Bell, Ir. R. 2 C. L. 68.]

(*b*) 4 Taunt. 847. [See Clark *v.* Baker, 11 Met. 186; Boorman *v.* Jenkins, 12 Wend. 567; Randall *v.* Kehlor, 60 Me. 37.]

judge was probably Weall *v.* King, (*c*) decided on a different point.

Sale of goods by description not inspected by buyer, implied warranty that they are salable.

Gardiner *v.* Gray.

§ 656. In a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the *condition precedent* that the goods shall answer the description, an *implied warranty* that they shall be salable or merchantable. (*d*) The rule was first clearly stated by Lord Ellenborough in Gardiner *v.* Gray, (*e*) where the defendant made a sale of twelve bags of "waste silk." The declaration contained a count alleging a sale by sample, but on this the proof failed. There were other counts, charging the promise to be that the silk should be of a good and merchantable quality. Lord Ellenborough said: "Under such circumstances the purchaser has a right to expect a *salable article*, answering the description in the contract. Without any particular warranty, this is an *implied term* in every such contract. *Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply.* (*f*) He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be *salable in the market* under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dung-hill." (*f*[1])

(*c*) 12 East, 452.

(*d*) [See Merriam *v.* Field, 24 Wis. 640; Hamilton *v.* Ganyard, 3 Keyes (N. Y.), 45; McClung *v.* Kelley, 21 Iowa, 508; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 518; Hyatt *v.* Boyle, 5 Gill & J. 110; Gallagher *v.* Waring, 9 Wend. 20; Hanks *v.* McKee, 2 Litt. 227; Magee *v.* Street, 1 Allen (N. B.), 242; Morehouse *v.* Comstock, 42 Wis. 626. Baker *v.* Frobisher, Quincy's Mass. Rep. 4, decided in 1762, was an action for selling the plaintiff unmerchantable soap. The justices were of opinion that every man is bound to see his goods are merchantable at the time of sale.]

(*e*) 4 Camp. 144.

(*f*) [As to sales of packed cotton, see Boorman *v.* Jenkins, 12 Wend. 566; Beebe *v.* Robert, Ib. 413; Oneida Manuf. Co. *v.* Lawrence, 4 Cowen, 444; Waring *v.* Mason, 18 Wend. 425; Salisbury *v.* Stainer, 19 Ib. 159. Of canned fruit or vegetables, Boyd *v.* Wilson, 83 Penn. St. 319. Of packed mackerel, Dodd *v.* Kirk, 2 W. N. Cas. (Phil. 1875) 260.]

(*f*[1]) [In Owens *v.* Dunbar, 12 Ir. L. R. 304, there was a contract in the following terms: "Sold this day through D. B. for account of Mr. Martin Owens . . . . a cargo of Indian corn, per the Ellen Jane, from Corunna, bill of lading dated Feb. 24th, 1847, at 71*s.* for 480 lbs. net, cash payment, to be as follows: £500 in cash to be paid on handing an order through the National Bank of Ireland, which order goes forward this day: remainder, less freight, to be paid on the arrival of the vessel at Galway. (Signed) Joseph Dunbar." Blackburne C. J. said: "This was an action of assumpsit for the non-delivery of a cargo of Indian corn. The declaration contained two special counts . . . . both (of which) proceed upon a contract to

§ 657. This rule has been followed in a long series of decisions, (*g*) and the law on the subject was reviewed, and the cases classified, in Jones *v.* Just, (*h*) decided in the queen's bench, in February, 1868. The plaintiffs in that case bought from the defendant certain "bales Manilla hemp," expected to arrive on ships named. The vessels arrived, and the hemp was delivered, damaged, so as to be unmerchantable, but being still properly described as Manilla hemp. Held that the vendors were liable, and that in such a sale the goods must not only answer the description, but must be salable or merchantable under that description. Mellor J. in delivering the judgment reviewed the whole of the decisions, giving this as the result: "The cases which bear on the subject do not appear to be in conflict when the circumstances of each are considered. They may, we think, be classified as follows: First. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though

Jones *v.* Just.

deliver a cargo warranted in the one count to be marketable, in the other, merchantable. The vessel was at sea when the contract was entered into. The bill of lading . . . shows that the thing purchased was a cargo of Indian corn, which in the course of transmission is extremely liable to injury. The defendant bought the cargo when it was at sea, without any warranty, and he sold it to the plaintiff on the very day he bought it. The question then is, did the defendant, on the document given in evidence, contract that the specific cargo would be of a marketable quality at the time of its arrival? . . This is a sale note of the particular cargo of a particular vessel — a specific thing of which the defendant knew at the time just as much as the plaintiff; both in fact were in actual ignorance of the state of the cargo; and we are now called upon to imply a condition or warranty by the defendant that this specific cargo would be, on its arrival at Galway, of merchantable or marketable quality. . . . . There was no warranty, but the cargo arriving in a bad condition, the plaintiff refuses to accept it, although that cargo was the very thing contracted for. . . . . How can the court say that the cargo was not the very thing contracted for? . . . . We would be doing the greatest injustice if . . . . we were to imply a warranty which the party never contemplated." In Rowe *v.* Faren, 8 Ir. C. L. R. 46, there was a contract by the defendant to sell to the plaintiff 200 bbls. of extra clean new Riga flaxseed, of the growth of 1856. The plaintiff declared that it was the duty of the defendant to deliver extra clean new Riga flax-seed of the growth of 1856, which should be good, sound and merchantable. But the court held otherwise, basing its decision largely on Owens *v.* Dunbar, *supra*. It was insisted that this was not like that case, since it was not a sale of a specific chattel. But the attempted distinction was not regarded as sound.]

(*g*) Jones *v.* Bright, 5 Bing. 533; Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108; Brown *v.* Edgington, 2 M. & G. 279; Shepherd *v.* Pybus, 3 Ib. 868; Camac *v.* Warriner, 1 C. B. 356; Stancliffe *v.* Clarke, 7 Ex. 439; Bigge *v.* Parkinson, 7 H. & N. 955; 31 L. J. Ex. 301, in Cam. Scacc.

(*h*) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89. [See Owens *v.* Dunbar, 12 Ir. L. R. 304.]

the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer. Parkinson *v.* Lee, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of a sale in the market of meat, which the buyer had inspected, but which was in fact diseased and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied. Emmerton *v.* Matthews, 7 H. & N. 586; 31 L. J. Ex. 139. (*i*) Secondly. Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. Barr *v.* Gibson, 3 M. & W. 390. Thirdly. Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288. (*k*) Fourthly. Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. Brown *v.* Edgington, 2 M. & G. 279; Jones *v.* Bright, 5 Bing. 533. (*k*[1]) In

(*i*) [*Post*, § 670, note (*r*); § 671, note (*u*).]

(*k*) [Wright *v.* Hart, 18 Wend. 449; Deming *v.* Foster, 42 N. H. 165; Pease *v.* Salim, 38 Vt. 432; Kreuger *v.* Blanck, L. R. 5 Ex. 179; Mason *v.* Chappell, 15 Grattan, 572; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Brown *v.* Murphee, 31 Miss. 91; Rodgers *v.* Niles, 11 Ohio St. 48; Hargous *v.* Stone, 5 N. Y. 73; Erle C. J. in Mallan *v.* Radloff, 17 C. B. N. S. 588, 600; Wolcott *v.* Mount, 7 Vroom, 262, 267; S. C. 9 Ib. 496; Port Carbon Iron Co. *v.* Groves, 68 Penn. St. 149; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83; Morrow *v.* Waterous Engine Co. 2 Pugsley & Burbridge (N. B.), 509; Ballou *v.* Parsons, 11 Hun, 602; Wilson *v.* Dunville, 4 L. R. Ir. 249; Gerst *v.* Jones, 32 Gratt. 518.]

(*k*[1]) [See Matthews *v.* Hartson, 3 Pittsb. (Pa.) 86; Grant *v.* Cadwell, 8 U. C. Q. B. 161; Colton *v.* Good, 11 Ib. 153; Chisholm *v.* Proudfoot, 15 Ib. 203; Bunnel *v.*

such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own. Fifthly. Where a

Whitlaw, 14 Ib. 241; Chicago Packing Co. *v.* Tilton, 87 Ill. 547; Robinson Machine Works *v.* Chandler, 56 Ind. 575; White *v.* Miller, 71 N. Y. 118. In Randall *v.* Newson, 2 Q. B. Div. 102, it was laid down as a general principle that, on the sale of an article for a specific purpose, there is a warranty by the seller that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects. In this case it appeared that the plaintiff ordered and purchased of the defendant, who was a coach-builder, a pole for the plaintiff's carriage. The pole broke while in use, and the horses became frightened and were injured. In an action brought to recover the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence; and it was held that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if it appeared that the injury to the horses was the natural consequence of the defect in the pole. Brett J. A., after a careful review of the cases bearing upon the point, said: "In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the *article offered* or *delivered shall answer the description of it contained in the contract.* That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase and sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is, that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale." The limitation above referred to is that which was applied to the contract of carriage in Readhead *v.* Midland Ry. Co. L. R. 4 Q. B. 379. The court, in Randall *v.* Newson, *supra*, rested their decision very much upon the opinion declared by Abbott C. J. in Gray *v.* Cox, 4 B. & C. 108, 115, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose;" and upon the case of Jones *v.* Bright, 5 Bing. 533, 540, in the decision of which the above ruling of Lord Tenterden was adopted. In Jones *v.* Bright the contract was for copper sheathing for a ship. The question proposed by Ludlow Serjt., in argument, was: "Whether the law will, according to the dictum of Lord Tenterden in Gray

Sale of article by manufacturer or dealer for specific purpose.

Randall *v.* Newson.

manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108. (*l*) And this doctrine has been held

v. Cox, 4 B. & C. at p. 115, lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him." Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration. The answer given by Best C. J. was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable, — that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. . . . . Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . . The law, then, resolves itself into this, — that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." "Nothing can be more clear," said Brett J. A., in Randall *v.* Newson, 2 Q. B. Div. 107, referring to the above language of Best C. J., "than that the rule is advisedly enunciated as a warranty, without limitation. Brown *v.* Edgington, 2 M. & G. 279, is to the same effect." In Bragg *v.* Morrill, 49 Vt. 45, Ross J. said: "We think the result of the cases on implied warranty is, that the vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced through the unskilfulness of some previous manufacturer or owner, without his knowledge or fault, except in those cases where the sale of the article by him is, in and of itself, legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects."]

Language of Best C. J.

(*l*) [Mann *v.* Everston, 32 Ind. 355. A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose. Allen J. in Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515, 518; Brown *v.* Sayles, 27 Vt. 227; Beals *v.* Olmstead, 24 Ib. 114; Walton *v.* Cody, 1 Wis. 420; Leopold *v.* Vankirk, 27 Ib. 152. See Brenton *v.* Davis, 8 Blackf. 317; Chambers *v.* Crawford, Addison, 150; Howard *v.* Hoey, 23 Wend. 350; Moses *v.* Mead, 1 Denio, 378; Leflore *v.* Justice, 1 Sm. & M. 381; Gallagher *v.* Waring, 9 Wend. 20; Misner *v.* Granger, 4 Gilman, 69; Whitmore *v.* South Boston Iron Co. 2 Allen, 58; Rodgers *v.* Niles, 11 Ohio St. 48; Bird *v.* Mayer, 8 Wis. 362; Fisk *v.* Tank, 12 Ib. 276; Hart *v.* Wright, 17 Wend. 267; Getty *v.* Roundtree, 2 Chand. 28; Dickson *v.* Jordan, 11 Ired. (Law) 166; Pease *v.* Sabin, 38 Vt. 432; Bartlett *v.* Hoppock, 34 N. Y. 118; Rice *v.* Forsyth, 41 Md. 389; Murray *v.* Smith, 4 Daly (N. Y.), 277; Sims *v.* Howell, 49 Ga. 620; Howie *v.* Rea, 70 N. Car. 559; Wilcox *v.* Hall, 53 Ga. 635; Spurr *v.* The Albert Mining Co. 2 Hannay (N. B.), 361; The Chicago Packing and Provision Co. *v.*

Implied warranty that goods are merchantable.

to apply to the sale by the builder of an existing barge, which was afloat, but not completely rigged and furnished: there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. Shepherd *v.* Pybus, 3 M. & G. 868."

Turner *v.* Mucklow.

§ 658. In the same case the learned judge explained the *ratio decidendi* of Turner *v.* Mucklow, (*m*) decided by himself at Liverpool, in 1862, and in which his ruling had been affirmed by the exchequer of pleas. That was a sale of a boat-load of "spent madder," being refuse of madder roots that the vendor had used in dying goods, and which lay in a heap in his yard, *open to vendee's inspection* if he chose to avail himself of it. On this ground, and because the vendor did not manufacture it for sale, it was held that there was no implied warranty of quality.

Bull *v.* Robison.

Warranty does not extend to necessary depreciation resulting from transit.

§ 659. But in Bull *v.* Robison (*n*) it was held that this warranty only extended to the condition of the goods when they leave the vendor's possession, and that, in the absence of express stipulation, he is not liable for any deterioration of quality rendering them unmerchantable at the place of delivery, if such deterioration result necessarily from the transit. The case was that of a sale of hoop iron, to be sent from Staffordshire, the place of making it, to Liverpool, where the buyer ordered it to be delivered in January and February. The iron was clean and bright when it left the vendor's premises to be forwarded by canal boats, vessels, and carts, and was rusted before it reached Liverpool, but not more so than was the necessary result of the transit. Held that the vendor was not responsible if it thereby became unmerchantable when received in Liverpool. (*o*)

Tilton, 87 Ill. 547; Weiger *v.* Gould, 86 Ib. 180; Harris *v.* Waite, 51 Vt. 480; Gerst *v.* Jones, 32 Gratt. 518; Robson *v.* Miller, 12 So. Car. 586. So it has been held that where lumber is sold without opportunity for examination by the purchaser, there is an implied warranty that it is merchantable. Merriam *v.* Field, 39 Wis. 578.]

(*m*) 8 Jurist N. S. 870; 6 L. T. N. S. 690.

(*n*) 10 Ex. 342; 24 L. J. Ex. 165.

(*o*) [But in Cushman *v.* Holyoke, 34 Maine, 289, where it appeared that the title to property sold had passed to the purchaser, but the property was to be taken to another place by the purchaser, and to be paid for according to its measurement at that place, and in its passage thither a depreciation and loss, commonly incident to such passage, occurred without any fault of the purchaser, he was held not to be chargeable with that loss.]

§ 660. In Gower *v.* Van Dedalzen (*p*) an attempt was made to extend this implied warranty to the packages or vessels in which the merchandise was contained. The dispute arose out of a sale of a cargo of oil, alleged in the declaration to be good merchantable Gallipoli oil, *the said cargo consisting of* 240 *casks*, and the defendant pleaded that the casks "were not well seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement." On special demurrer, held ill, Tindal C. J. saying, however, "I can conceive cases in which the state of the receptacle of the article sold might furnish a defence; as if it were a pipe of wine in bottles, with the cork of every bottle oozing: but in such case the plea would be that the wine was not in a merchantable state."

Gower *v.* Van Dedalzen.

Warranty does not extend to the packages.

§ 661. If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter*, if the buyer purchases on his own judgment. (*q*) This rule

Where article is bought for a particular purpose known to the seller, and buyer relies on

(*p*) 3 Bing. N. C. 717.

(*q*) [Randall *v.* Newson, 2 Q. B. Div. 102, cited and stated *ante*, § 657, note (*k*[1]); Cunningham *v.* Hall, 4 Allen, 273. In Beals *v.* Olmstead, 24 Vt. 114, it was said that if an article is bought for a particular purpose, and the vendor knew that the purchaser would not buy an inferior article, the sale of the article for the particular use ordinarily implies a warranty that it is fit for the use. Whitmore *v.* The South Boston Iron Co. 2 Allen, 58; Dutton *v.* Gerrish, 9 Cush. 89; Brown *v.* Sayles, 27 Vt. 227; Hoe *v.* Sanborn, 21 N. Y. 552; Rice *v.* Forsyth, 41 Md. 389; Gammell *v.* Gunby, 52 Ga. 504. But see Dickson *v.* Jordan, 7 Ired. 166; Stevens *v.* Smith, 21 Vt. 90; Van Wyck *v.* Allen, 69 N. Y. 61; Baker *v.* Lyman, 38 U. C. Q. B. 498. The plaintiffs were oil manufacturers at St. John, and in 1876 contracted with the defendants for the purchase of 2,000 tons of good, pure, clear coal, from the Albert mines. The coal delivered was mixed with shale and was unfit to manufacture into oil. It appeared that this mixture of shale could not be detected until the coal had been manufactured. It also appeared that the coal was "picked" at the mine to free it from shale, and that the shipping officer examined the coal and made allowance for any shale that might remain. The court held that there was an implied warranty that the coal should be reasonably fit for the purpose and that the defendants were liable, it having been found that the coal was not reasonably fit for the contemplated purpose. Spurr *v.* The Albert Mining Co. 2 Hannay (N. B.), 361. A. bought of B. certain soap-frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." A. had previously inspected the separate parts of the frames. Upon the trial

Goods bought for particular purpose: implied warranty.

Spurr *v.* Albert Mining Co.

Mallan *v.* Radloff.

the seller's skill.

Brown v. Edgington.

was stated by Tindal C. J. in Brown *v.* Edgington (*r*) to be the result of the authorities as they then stood. Jones *v.* Bright (*s*) had previously settled the rule that a

of an action for a breach of the above warranty, it was proved and found by the jury that, though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap, and it was held that this was sufficient to sustain a declaration that the defendant warranted the frames to be fit for the purpose of making soap. Mallan *v.* Radloff, 17 C. B. N. S. 588. See French *v.* Vining, 102 Mass. 135, 136; Gossler *v.* Eagle Sugar Refinery, 103 Ib. 331. In Dounce *v.* Dow, 64 N. Y. 411, it appeared that the defendant ordered of the plaintiff, a dealer in iron, but not a manufacturer of it, ten of "XX pipe iron," to be used in the manufacture of castings for farming implements, which required soft, tough iron. Plaintiff forwarded iron of the brand specified and billed it as such, which was accepted by defendant without testing, and a large portion of it had been used when it was discovered to be hard and brittle and unfit for the required purpose. In an action upon a note given for the purchase-money, wherein defendant set up as a counter-claim the damages sustained by the use of the iron, Church C. J. said: "The words 'pipe iron' referred to the furnace where manufactured, and 'XX' to the brand indicating the quality. The plaintiff was not a manufacturer, but a dealer in 'pig metals,' and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality. Hoe *v.* Sanborn, 21 N. Y. 552. There was no fraud. Both parties supposed, doubtless, that the iron was first quality for the purpose for which it was intended. But it is not enough that the plaintiff knew such purpose. Bartlett *v.* Hopkins, 34 N. Y. 118. The defendant should have exacted a specific warranty, and then both parties would have acted understandingly. If the defendant had ordered 'XX' pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiff had agreed to deliver iron of that quality, a warranty would have been established which, probably, within the case of Day *v.* Pool, 52 N. Y. 416, would have survived the acceptance of the article. Here both parties acted in good faith. The defendant ordered simply 'XX' pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is, which party is to bear the loss? The plaintiff, in the absence of fraud, was only bound by his contract, which was to deliver 'XX' pipe iron, and we are now assuming that such iron was delivered. If so, he was relieved from liability." Wilson *v.* Dunville, 4 L. R. Ir. 249, was an action for breach of an alleged warranty that certain grains sold by the defendant to the plaintiff were fit for cattle feeding. The defendant was an extensive distiller, and was in the habit of selling "distillery grains," which consist of what remains of the corn used in the manufacture of whiskey, after it has been subjected to the processes resorted to in the manufacture of that liquor. These sales were conducted under printed rules which classified the customers. The plaintiff was, and had been for several years, one of a lot known as "special customers," who guaranteed to take a certain quantity each week. For the season of 1877–78 the plaintiff was on the

Dounce v. Dow.

(*r*) 2 M. & G. 279; [Bigelow *v.* Boxall, 38 U. C. Q. B. 452; Morrow *v.* Waterous Engine Co. 2 Pugsley & Burbridge (N. B.), 509.]

(*s*) 5 Bing. 533; [*ante*, § 657, and notes.]

manufacturer impliedly warranted an article sold by him to be fit for the purpose stated by the buyer to be in- Jones v. Bright.

ten o'clock delivery list of each Friday for twenty bushels a week. On the 13th of March a fire occurred at the distillery, and on the Friday next after the fire the plaintiff did not send for grain, but did send on Friday the 22d. On that occasion the plaintiff's servant saw the bulk of grain lying in the distillery yard, which yard he was enabled to enter by reason of damage done by the fire. The grain delivered came from this bulk; usually the servant did not see the bulk, but received a quantity through a turnstile. It appeared that the plaintiff bought the grain for the purpose of feeding cattle, and there was evidence that the defendant knew of this purpose. It also appeared that the grain delivered on the 22d contained lead, which caused the death of several of the plaintiff's cattle. The defendant's counsel, at close of plaintiff's case, asked for a nonsuit, on what grounds does not appear. It was held that it should have been granted. Palles C. B. said: "This brings me to the second question: is the warranty relied on, viz. that the grains were fit for feeding cattle, implied in such a contract for sale as that upon which the former deliveries were made? It was a contract to supply a product which, although resulting from a manufacture carried on by the defendant for the purpose of producing another article, viz. whiskey, was an article in which the defendant dealt. It was an article of which, according to the usage, the purchaser had not an opportunity of inspection before delivery, and it was bought by the plaintiff, to the defendant's knowledge, for the purpose of feeding cattle. But on the other hand there does not, upon the evidence, appear to have been more than one description of grain produced in the manufacture. The entire (lot?) so produced was treated as one bulk, and each customer was supplied out of so much of the bulk as remained at the time appointed for his attendance. I think the liability of the defendant is as a dealer and not a manufacturer. In my opinion, the defendant is not a manufacturer of grains, in the sense in which that word is used in reference to implied warranties of fitness. No doubt he reduces corn into the condition of grains, but he does so solely in the course of the manufacture of another article — whiskey. His position as producer of these grains lacks the element upon which, in my mind, the liability of the manufacturer rests, viz. the power so to control the manufacturing process that a given result in the manufactured article can be arrived at. To attempt to alter or control the processes of the manufacture of whiskey, for the purpose of altering the character of the grain produced, would be inconsistent with the assumption which, on the evidence, I think I am bound to make, — that the sole object of the manufacture is to produce whiskey." This case was again before the court in 6 L. R. Ir. 210, in the form of an action for breach of warranty and fraudulent representations, as to the quality of the grain. It was admitted that there was no evidence of fraud, but under the ruling of the court, a verdict was had for the plaintiff, on the ground of a breach of warranty, with leave for the defendant to move to have the judgment entered for him if the judge should have directed a verdict in his favor. The motion was refused, and Palles C. B. said: "We held on a former argument that under the circumstances of the sale the contract implied was (not that the grains were fit for cattle feeding, but) that the thing sold reasonably answered the description of grains. The plaintiff bought the substance in question for the purpose, known to the defendant, of applying it to a use which was proved to be an ordinary (if it were not its *only* ordinary) use, cattle feeding. This substance — but not to the knowledge of the defendant — contained an admixture of fine particles of lead to such an extent that (according to the finding of the jury) it did not reasonably answer the description of grains."]

tended; and Chanter *v.* Hopkins (*t*) had settled that where the buyer had bought a specific article from the manufacturer on his own judgment, believing it would answer a particular purpose, he was bound to pay for it although disappointed in the intended use of it. (*u*) In Brown *v.* Edgington, (*x*) the judges all intimated that there was no difference in the case of a sale by a manufacturer or any other vendor in such cases, but the point was not necessary to the decision of the controversy then before the court, for the vendor had undertaken to have the goods manufactured for the purpose needed by the buyer. (*y*)

Chanter *v.* Hopkins.

§ 662. In Shepherd *v.* Pybus, (*z*) where the sale was of a barge by the *builder*, although the purchaser had inspected it after it was built, yet as he had had no opportunity of inspecting it during its progress, it was held that there was an implied warranty by the vendor, as the manufacturer, against such defects, not apparent by inspection, as rendered the barge unfit

Shepherd *v.* Pybus.

(*t*) 4 M. & W. 399; followed by the queen's bench in Ollivant *v.* Bayley, 5 Q. B. 288.

(*u*) [Upon the sale of a specific article then present and subject to examination, no warranty of its quality or fitness for a particular use will be implied, though the seller is aware that the article is purchased specially for such use. Deming *v.* Foster, 42 N. H. 165. In this case (p. 174) Bell C. J. said: "The negotiation was not for a yoke of oxen to do work upon a farm. The purchase was of the particular oxen here in question, then under the observation of the parties, and though both parties understood that they were purchased expressly to do the work upon a farm, yet, in such a case, the law implies no warranty as to their fitness for that use. The purchaser had opportunity to require an express warranty, if he thought proper." In County of Simcoe Ag. Soc. *v.* Wade, 12 U. C. Q. B. 614, an agricultural society sent a man to buy a bull for use in breeding, of which proposed use the vendor was aware. The vendor gave the agent the choice of two bulls. The agent selected one which proved to be useless for the purposes for which he was bought. It was held that there was no implied warranty on the vendor's part of fitness for the required purpose. Snelgrove *v.* Bruce, 16 U. C. C. P. 561, stated § 602, note (x^1), *ante*; Hight *v.* Bacon, 126 Mass. 10.]

Sale of specific article subject to examination; no warranty of fitness.

Co. of Simcoe Ag. Soc. *v.* Wade.

(*x*) See, also, Laing *v.* Fidgeon, 6 Taunt. 108; Gray *v.* Cox, 4 B. & C. 108; Okell *v.* Smith, 1 Stark. 107; Gardiner *v.* Gray, 4 Camp. 144; Bluett *v.* Osborne, 1 Stark. 384.

(*y*) See authorities in preceding note; [Misner *v.* Granger, 4 Gilman, 69; Leflore *v.* Justice, 1 Sm. & M. 381; Howard *v.* Hoey, 23 Wend. 351; Hart *v.* Wright, 17 Ib. 267.] See, also, the observations of the judges on this general principle, in Readhead *v.* Midland Railway Co. L. R. 2 Q. B. 412; and the cases *ante*, §§ 431, 432, as to the liability of the vendor, when manufacturer, to *third* persons for neglect and improper manufacture. [See the remarks of Brett J. A. upon Readhead *v.* Midland Ry. Co. in Randall *v.* Newson, 2 Q. B. Div. 102, 110, 111.]

(*z*) 3 M. & G. 868.

for use as an ordinary barge, (*a*) but that there was no implied warranty that the barge was fit for the precise use for which the buyer intended it, but which was not communicated by him to the vendor. In this case the reporter states that it was proved that the defendant *knew* the purpose for which the plaintiff wanted the barge (p. 871); but Tindal C. J. said in the judgment, that there was not "any evidence of distinct notice or of a declaration to the defendant, at the time the plaintiff inspected the barge or entered into the contract, of the precise service or use for which the barge was purchased by the plaintiff." Next came Burnby *v.* Bollett (*b*) in 1847. The defendant, a farmer, bought a pig exposed for sale by a butcher: the plaintiff, another farmer, went to the defendant and offered to purchase the pig which the latter had just bought, and the sale was made without any express warranty. The meat turned out to be diseased, and it was held that there was no implied warranty that it was fit for food (although the vendor must have known it was intended for that purpose), because the vendor was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent and who is bound to supply a good and merchantable article. Here, plainly, the purchaser bought on his own judgment.

Burnby *v.* Bollett.

§ 663. In 1862 Emmerton *v.* Matthews (*c*) was decided in the same court, where the vendor *was* a general dealer. The defendant was a salesman in Newgate Street, selling, on commission, meat consigned to him, and the plaintiff was a butcher or retailer of meat. The plaintiff bought a carcass from the defendant, which appeared to be good meat. The plaintiff saw it exposed for sale, bought it on his own inspection, and there was no warranty. The defect was such that it could not be detected till the meat was cooked, and then it proved to be unfit for human food. The court held that there was no implied warranty, the sale being of a specific article, the buyer having had an opportunity to examine and select it. Here, again, the purchaser bought the specific chattel on his own judgment.

Emmerton *v.* Matthews.

§ 664. In the same year the case of Bigge *v.* Parkinson (*d*) was

(*a*) See, also, Camac *v.* Warriner, 1 C. B. 356.

(*b*) 16 M. & W. 644.

(*c*) 7 H. & N. 586; 31 L. J. Ex. 139; [Ward *v.* Hobbs, 2 Q. B. Div. 331, and 3 Ib. 150; *post*, § 671, note (*u*).]

(*d*) 7 H. & N. 955; 31 L. J. Ex. 301, Cam. Scacc. [See Readhead *v.* Midland Ry. Co. L. R. 4 Q. B. 386.]

decided in the exchequer chamber, the court being composed of Cockburn C. J., and Wightman, Crompton, Byles, and Keating JJ. The defendant, a provision dealer, had made a written offer to the plaintiff in these words: "I hereby undertake to supply your ship, the *Queen Victoria*, to Bombay, with troop stores, viz. dietary, mess utensils, coals, &c. at 6*l.* 15*s.* 6*d.* per head, *guarantied to pass survey of the Honorable East India Company's officers, and also guaranty the qualities as per invoice.*" The plaintiff accepted this offer, which was made under an advertisement in which the plaintiff invited tenders for the supply of provisions and stores for troops which he had contracted with the East India Company to convey from London to Bombay. It was contended by the defendant, first, that the express warranty in the contract excluded any implied warranty; but this was overruled, the court holding it to be an express condition annexed to the ordinary implied warranty, for the benefit of the buyer, to guard himself against any rejection of the goods by the officers of the East India Company; secondly, that there was no warranty implied by law in such a sale; but the court held that the rule now under consideration (and which was quoted from Chitty on Contracts (*e*)) is the correct rule of law, and that "where a buyer buys a specific article, the rule *caveat emptor* applies, but where the buyer orders goods to be supplied and trusts to the judgment of the sellers to select the goods which shall be applicable to the purpose for which they are intended, which is known to both the parties, ... there is an implied warranty that they are fit for that purpose; and there is no reason why such a warranty should not be implied in the case of a sale of provisions."

Bigge *v.* Parkinson.

§ 665. In Macfarlane *v.* Taylor, (*f*) which was a Scotch appeal, the House of Lords decided, under the 5th section of the act 19 & 20 Vict. c. 60, which places the law of Scotland upon this subject on the same footing as our own, that a vendor was responsible in damages under the following facts: Taylor & Co. bought of Macfarlane & Co. distillers, of Glasgow, a quantity of spirits, intended by the purchasers to be used in barter with the natives on the coast of Africa, which purpose was communicated to the distillers, and they agreed to give to the spirits a specified shade of color, to make them resemble rum. In

Macfarlane *v.* Taylor.

(*e*) P. 420, 9th ed.

(*f*) L. R. 1 Scotch App. 245.

producing this color they made use of logwood, which, although not proved to cause any positive injury to health, dyed the secretions of those drinking it, so as to make them of the color of blood, and so to alarm the natives that the spirits were unsalable. Held that this was a breach of the implied warranty that the goods should be fit for the specified purpose.

§ 666. But to this general rule there is this exception, that no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound. (*g*) Thus, in the early leading case of Parkinson *v.* Lee, (*h*) where the goods were hops, sold by a fresh sample drawn from the bulk, it was held that the warranty resulting from the sale by sample, and which was satisfied when the bulk equalled the sample, could not be supplemented by a further implied warranty that the goods were merchantable. And in Dickson *v.* Zizinia, (*i*) where there was an express warranty that a cargo of Indian corn should be equal to the average of the shipments of Salonica of that season, and should be shipped in good and merchantable condition; it was held that this warranty could not be extended by implication so as to make the vendor answerable that the corn was in a good and merchantable condition *for a foreign voyage*, although the contract stated that the corn was bought for that purpose. *Expressum facit cessare tacitum.*

Implied, excluded where there is an express warranty.

Parkinson *v.* Lee.

Dickson *v.* Zizinia.

§ 667. But although goods sold by sample are not in general deemed to be sold with an implied warranty that they are merchantable, the facts and circumstances of the case may justify the inference that this implied warranty is superadded to the contract. In Mody *v.* Gregson (*k*) the defendant agreed to *manufacture* and supply 2,500 pieces of gray shirting according to sample, at 18*s.* 6*d.* per piece, each piece to weigh seven pounds. The goods were manufactured, delivered, and accepted by the plaintiff's agent as being according to sample, and they probably were so, although the fact did not very distinctly appear. But the goods contained a sub-

Mody *v.* Gregson.

Sale by sample; whether there is any im-

(*g*) [See Willard *v.* Stevens, 24 N. H. 271; Lanier *v.* Auld, 1 Murph. 138; Deming *v.* Foster, 42 N. H. 165; Gill *v.* Kaufman, 16 Kansas, 571. See McGraw *v.* Fletcher, 35 Mich. 104.]

(*h*) 2 East, 314.

(*i*) 10 C. B. 602; 20 L. J. C. P. 72.

(*k*) L. R. 4 Ex. 49.

plied warranty of merchantable character of goods.

stance called china clay to the extent of fifteen per cent. of their weight, introduced into their texture by the manufacturer for the *purpose only of making them weigh the contract weight of seven pounds*, and the goods, which otherwise would not have reached the required weight, were thus rendered unmerchantable. The defect was discovered on their arrival at Calcutta, but when the goods were accepted from the vendor in Manchester the purchaser could not tell, by examination or inspection, whether they, or the samples, contained any foreign ingredient introduced to increase their weight, or any other than the usual quantity of size employed in making such goods. Under these circumstances the vendor insisted, in defence, on the general proposition, that "upon a sale of goods by sample, no warranty that they were merchantable could be implied." The court held that neither inspection of bulk nor use of sample absolutely excluded an inquiry whether the thing supplied was otherwise in accordance with the contract: that if the sellers in this case had *expressly* agreed to deliver *merchantable* gray shirting according to sample, without disclosing that the goods were rendered unmerchantable by the mixture of the foreign ingredient, they would have been liable: and that the facts that the goods were not specific, ascertained, nor inspected, and that the sample did not disclose the defect, but, on the contrary, falsely represented on its face a merchantable article, taken in connection with the stipulation that the goods should be of a specified weight, which, if properly complied with, would have insured a merchantable article, amounted altogether to a contract *describing* the goods, and *asserting* their merchantable quality. The vendor was held bound, the opinion (by Willes J.) containing these further significant observations: "The contract, if truly fulfilled, would have given the buyer a merchantable article: and we need not consider whether the direction to the jury might not also be sustained upon the ground that the *seller himself made the sample, and must be taken to have warranted that it was one which so far as his, the seller's knowledge went, the buyer might safely act upon*." (*l*)

This warranty not implied in

§ 668. Before leaving this point the case of Longmeid *v.* Holliday (*m*) must be noticed. It was an attempt to make the vendor responsible to a *third person*, the wife of the

(*l*) Compare *dicta* of the judges in Heilbutt *v.* Hickson, *ante*, § 651.

(*m*) 6 Ex. 761.

purchaser, for injury resulting from the bursting of a lamp, alleged not to be fit for the purpose for which it was bought. The jury negatived fraud on the part of the vendor, or any knowledge that the lamp was unfit for use. The case was put on the ground of a breach of duty in the shop-keeper in selling a dangerous article, which was said to give a right of action in favor of any person injured by its use, though not a party to the contract. But the court held that the action was not maintainable, unless the facts showed such a fraudulent or deceitful representation as would bring it within the authority of Langridge *v.* Levy, (*n*) referred to *ante*, § 431, such action by third persons being an action of deceit, founded on tort, and not on contract.

favor of third persons.

Longmeid *v.* Holliday.

§ 669. It is said that there is an implied warranty that the subject-matter of the sale exists, and is capable of transfer to the purchaser; but this seems rather to come under the definition of a condition precedent than a warranty, for clearly it is not *collateral* to a contract of sale that there should be a subject-matter on which it can take effect. The cases have already been referred to *ante*, book I. part I. ch. iv. Of the Thing Sold.

Existence of thing sold not properly an implied warranty but a condition.

§ 670. Blackstone says, (*o*) in contracts for provisions it is always implied that they are wholesome, and that if they be not, an *action on the case for deceit* lies against the vendor. He gives no authority, and the proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, as settled in Pasley *v.* Freeman (*p*) and the cases there cited, and others which have since been determined on its authority. In Chitty on Contracts (*q*) the learned author says that "it appears that in contracts for the sale of *provisions*, by dealers and common traders in provisions, there is an implied warranty that they are wholesome." (*r*) The above quoted pas-

Is there an implied warranty, in sales of provisions, &c.?

(*n*) 2 M. & W. 519.

(*o*) Vol. 3, p. 166.

(*p*) 3 T. R. 51, and 2 Sm. L. C. 71.

(*q*) P. 420, 9th ed.

(*r*) [In Winsor *v.* Lombard, 18 Pick. 57, 62, Shaw C. J. said: "In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent represen-

Sale of provisions; what is the liability of vendor.

Shaw C. J.

sage from Blackstone is given as the authority for this statement, and in the note it is suggested that Emmerton *v.* Matthews, (*s*) so far as it contradicts this proposition, is not law.

§ 671. In Burnby *v.* Bollett, (*t*) however, all the old authorities are collected, and were cited in argument, and Rolfe B. said that the cases in the Year Books turned on the *scienter* of the seller, or on the peculiar duty of a taverner. In rendering judgment in that case, the point decided was, that the farmer who sold the pig was not liable on an implied warranty, because none of the authorities suggested the existence of such a warranty except in cases of "victuallers, butchers, and other common dealers in victuals;" (*u*) but Parke B. intimated quite

Burnby *v.* Bollett.

tation may readily be presumed. But these reasons do not apply to the case of provisions packed, inspected, and prepared for exportation in large quantities as merchandise." In French *v.* Vining, 102 Mass. 132, Ames J. said: "The relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail, may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys under such circumstances is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill and actual knowledge of the vendor." This matter is well explained by Sewall J. in Emerson *v.* Brigham, 10 Mass. 197.

Language of Ames J.

See Van Bracklin *v.* Fonda, 12 John. 468; Marshall *v.* Peck, 1 Dana, 612; Osgood *v.* Lewis, 2 H. & Gill, 495; Humphreys *v.* Comline, 8 Blatchf. 508; Moses *v.* Mead, 1 Denio, 378; Hoover *v.* Peters, 18 Mich. 51; Divine *v.* McCormick, 50 Barb. 116; Davis *v.* Murphy, 14 Ind. 158; McNaughton *v.* Joy, 1 W. N. Cas. (Phil. 1875) 470.]

(*s*) 7 H. & N. 586; 31 L. J. Ex. 139. [Emmerton *v.* Matthews is stated § 663, *ante*.]

(*t*) 16 M. & W. 644.

(*u*) [It has been held that there is a very plain distinction between selling provisions for "domestic use," and selling them as articles of merchandise, to one who does not intend them for immediate consumption, but to sell again; in the latter case there is no implied warranty. Winsor *v.* Lombard, 18 Pick. 57, 61, 62; Moses *v.* Mead, 1 Denio, 378; S. C. 5 Ib. 617; Hart *v.* Wright, 17 Wend. 267; Emerson *v.* Brigham, 10 Mass. 197; Hyland *v.* Sherman, 2 E. D. Smith, 234; Goldrich *v.* Ryan, 3 Ib. 324; Goad *v.* Johnson, 6 Heisk. (Tenn.) 340; Ryder *v.* Neitge, 21 Minn. 70. In Howard *v.* Emerson, 110 Mass. 321, Morton J. said: "The defendants contend that where articles of food are sold for immediate domestic use there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule. Van Bracklin *v.*

Alleged distinction between sale as merchandise and sale for domestic use.

plainly that in his opinion the general proposition was not maintainable. The notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which make the sale of unsound food punishable. The learned baron, after explaining this, said: "The statute 51 Henry 3, of the pillory and tumbril, and assize of bread and ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such as is not wholesome for man's body; and if any butcher sells contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, &c. Lord Coke goes on to say that Britton, who wrote after the statute 51 Henry 3, and following the same, saith: 'Puis soit inquise de ceux qneux achatent per un manner de measure et vendent per meinder measure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrives (macellarii, (*x*) butchers), et les gents que de usage vendent a tres-passants (pas-

Fonda, 12 John. 468. But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness." And so it was held in the above case, that where a farmer sells a live cow to retail butchers, he does not thereby impliedly warrant that she is fit for food, although the farmer knows that they buy her for the purpose of cutting up into beef for immediate domestic use. Where a person sends animals destined for human food to a public market for sale, it was once held, in Ward *v.* Hobbs, 2 Q. B. Div. 331, that he impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to animal life; and a condition of sale that they are to be "taken with all faults" does not negative or qualify this representation. But on appeal this decision was reversed. Ward *v.* Hobbs, 3 Q. B. D. 150. Bramwell L. J. said: ". . . Before a man can complain of a fraud he must show there is something done intentionally to deceive him as an individual, or as one of a class, or as one of the public; and it is not enough that he shows certain conduct not done with that view or intent, but which may have that consequence. Now, sending infected pigs to market is not a deceit on the public. The person sending them is committing a breach of the law, and is risking its consequences, but he is not making a representation of any sort or kind." Hill *v.* Balls, 2 H. & N. 302.] Ward *v.* Hobbs.

(*x*) Macellarii, rather, sellers of meat in shambles; but "macegriefs," by Termes de la Ley, means those who sell *wittingly* stolen meat.

sengers) mauvaise vians corrumpus et wacrus et nous autrement perillous a la saunty de home, encountre le forme de statutes.' This view of the case explains what is said in the Year Book, 9 Hen. 6, 53, that 'the warranty is not to the purpose, for it is *ordained* that none shall sell corrupt victuals;' and what is said by Tanfield C. B. and Altham B., Cro. Jac. 197, 'that if a man sell corrupt victuals without warranty, an action lies, because it is against *the commonwealth;*' and also explains the note of Lord Hale, in 1st Fitzherbert's Natura Brevium, 94, that there is a diversity between selling corrupt wines as *merchandise, for there an action on the case does not lie without warranty;* otherwise, if it be for a taverner or victualler, if *it prejudice any.*" (*y*)

§ 672. It is submitted that it results clearly from these authorities that the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, (*z*) that they shall make good any *damage caused* by their sale of unwholesome food. Emmerton *v.* Matthews, therefore, when applying the maxim of *caveat emptor* to the sale of an article of food, even when the vendor is a general dealer, if the buyer has bought on his own judgment, without express warranty, does not seem to be at all in contradiction with the earlier authorities, as explained in Burnby *v.* Bollett, by Parke B. (*z*[1])

§ 673. An implied warranty has been imposed on the vendor in certain sales by the "Merchandise Marks Acts, 1862" (25 & 26 Vict. c. 88), of which the 19th and 20th sections are in the following language: "In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell, or contract to sell (whether by writing or not), to any other person any chattel or article with any trade-mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrap-

Implied warranty from marks on packages.

25 & 26 Vict. c. 88. Sect. 19.

(*y*) See, also, remarks of Mellor J. on Emmerton *v.* Matthews, *ante*, § 657.

(*z*) All the old statutes referred to by Parke B., and many others of a similar kind, were swept away by the repealing act, 7 & 8 Vict. c. 24.

(*z*[1]) [See Ward *v.* Hobbs, L. R. 2 Q. B. D. 331, and 3 Ib. 150. In Burch *v.* Spencer, 15 Hun, 504, the court used language which seems to support the doctrine that there is a peculiar implied warranty of quality in the sale of provisions. But it is submitted that the case is simply the ordinary one of the vendee relying upon the judgment of the vendor, when there is no opportunity for the vendee to inspect the goods.]

Observations on a New York case.

per, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade-mark upon such chattel, or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee. In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee." Sect. 20.

CHAPTER II.

DELIVERY.

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§ 674. AFTER the contract of sale has been completed, the chief and immediate duty of the vendor, in the absence of contrary stipulations, is to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent, if any, incumbent on him. There is no branch of the law of sale more confusing to the student than that of delivery. This results from the fact that the word is unfortunately used in very different senses, and

Vendor's first duty is delivery.

Different senses in which the word "delivery" is used.

unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles.

§ 675. First. The word delivery is sometimes used with reference to the passing of *the property in* the chattel, (*a*) sometimes to the change of *the possession of* the chattel: in a word, it is used in turn to denote transfer of *title*, or transfer of *possession*. (*b*) Secondly. Even where "delivery" is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases; one having reference to the *formation* of the contract, the other to the *performance* of the contract. When questions arise as to the "actual receipt" which is necessary to give validity to a parol contract for the sale of chattels exceeding 10*l.* in value, the judges constantly use the word "delivery" as the correlative of that "actual receipt." (*c*) After the sale has been proven to *exist*, by delivery and actual receipt, there may arise a second and distinct controversy upon the point whether the vendor has *performed* his completed bargain by delivery of possession of the bulk to the purchaser. Thirdly. Even when the subject under consideration is the vendor's delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings attached to the word "possession." In general it would be perfectly proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the vendor. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them at his pleasure, and maintain trover for them. (*c*[1]) Yet, if he become insolvent, the vendor is said to have retained possession. (*d*) Again, if the vendor has delivered

(*a*) As, for instance, in the opinion of Park J. in Dixon *v.* Yates, 5 B. & Ad. 340.

(*b*) [Colt J. in Morse *v.* Sherman, 106 Mass. 433. "Delivery," as applied to a change of possession in pursuance of a sale, ordinarily includes both the act of the vendor in transferring the property and that of the vendee in receiving it. If unaccompanied by any word, or act, or circumstance to indicate that it is qualified or made subject to a condition, the vendee has a right to understand it to be absolute. Wells J. in Upton *v.* Sturbridge Cotton Mills, 111 Mass. 453.]

Delivery as applied to change of possession.

(*c*) [See the language of Bigelow J. in Marsh *v.* Hyde, 3 Gray, 331, 333, 334. In Boardman *v.* Spooner, 13 Allen, 357, Foster J. said: "The statute is silent as to the delivery of goods sold, which is the act of the seller. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer."]

(*c*[1]) [Newcomb *v.* Cabell, 10 Bush (Ky.), 460; Taylor *v.* Twenty-five Bales of Cotton, 26 La. An. 247.]

(*d*) [Although, as between vendor and

the goods to a carrier for conveyance to the purchaser, he is said to have lost his lien, because the goods are in the buyer's posses-

purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, the same rule does not operate against subsequent purchasers, attaching creditors, and others standing in like relation. To render a sale valid against these there must be a delivery, actual or constructive, of the property sold. Packard *v.* Wood, 4 Gray, 307; Vining *v.* Gilbreth, 39 Maine, 496; Ludwig *v.* Fuller, 17 Ib. 162; Shumway *v.* Rutter, 7 Pick. 56; Carter *v.* Willard, 19 Ib. 1; Parsons *v.* Dickinson, 11 Ib. 352; Green *v.* Rowland, 16 Gray, 58; Mt. Hope Iron Co. *v.* Buffington, 103 Mass. 62; Morgan *v.* Taylor, 32 Texas, 363; Conway *v.* Edwards, 6 Nev. 190; Haak *v.* Linderman, 64 Penn. St. 499; Thorndike *v.* Bath, 114 Mass. 116; Fairfield Bridge Co. *v.* Nye, 60 Maine, 372; Webster *v.* Granger, 78 Ill. 230; Williams *v.* M'Donald, 7 U. C. Q. B. 381; Allen *v.* Carr, 85 Ill. 388; Thornton *v.* Davenport, 1 Scam. (Ill.) 296; Thompson *v.* Yeck, 21 Ill. 73; Lefaver *v.* Mires, 81 Ib. 456; Sutton *v.* Ballou, 46 Iowa, 517; Crawford *v.* Forristall, 58 N. H. 114; and in connection with it, Crawford *v.* Forristall, 57 Ib. 102; Mosher *v.* Smith, 67 Me. 172; Burnham *v.* Waddell, 28 U. C. C. P. 263, affirmed in 3 Ont. App. 288; Seymour *v.* O'Keefe, 44 Conn. 128; Meade *v.* Smith, 16 Ib. 346; Wilson *v.* Paulsen, 57 Ga. 596; Richardson *v.* Rardin, 88 Ill. 124; Chase *v.* Snow, 48 Vt. 436; Pettengill *v.* Elkins, 50 Ib. 431; Uhl *v.* Robinson, 8 Neb. 272. In Nesbitt *v.* Bank of Montreal, 9 Low. Can. 193, the appellant had purchased certain articles from one Maguire, and had caused them to be weighed and measured, and had also paid for them. By a memorandum at the foot of a receipted bill it was agreed that the goods were to remain in vendor's store till the appellant should send a carter with an order for them. Maguire had caused the goods to be set apart in his cellar, and had given instructions to his clerk to deliver them to appellant whenever he should send for them. These goods were seized by creditors of Maguire, and it was held that there had not been sufficient delivery as against them, although the officer had been told before he seized the goods that they were the appellant's. In Doyle *v.* Lasher, 16 U. C. C. P. 263, A. bought a number of sheep from B., paying him a part of the purchase money then and the remainder a few days later. When the first payment was made, A. marked the sheep with red paint as his property, and they were then placed apart from the rest of B.'s sheep in a separate field on the latter's farm, where they were to remain until wanted by A. A. was a butcher, and it appeared to be the custom among butchers thus to leave stock purchased from farmers. Such had been the course of dealing between A. and B. The sheep remained on B.'s farm under the above circumstances until seized by the sheriff under an attachment against B. Held, that the above marking and setting apart did not constitute such a delivery or change of possession as is required by Con. St. U. C. ch. 45, § 4, which is as follows: " . . . Every sale of goods, not accompanied by an immediate delivery and followed by an actual and continued change of possession, &c. shall be in writing, &c. otherwise the sale shall be absolutely void as against the creditors of the bargainors and as against subsequent purchasers or mortgagees in good faith." Williams *v.* Rapelje, 8 U. C. C. P. 186. In Dempsey *v.* Gardner, 127 Mass. 381, tort was brought for the conversion of a horse. The defendant, a constable, justified under a writ against the mother of the plaintiff. It appeared that the plaintiff had from time to time advanced sums of money to his mother, equal to or greater than the value of the horse, and about three months prior to the attachment, in consideration of the payment of fifteen dollars additional, the mother executed a bill of sale

Delivery as to third persons.

When bill of sale alone is not good against third persons.

sion, the carrier being the agent of the buyer; but if the vendor claim to exercise the right of stoppage *in transitu*, while the car-

of the horse to the plaintiff. The horse was kept in the barn of the mother before and after the sale. She did not live with her son, but he frequently went to see her and often saw the horse. It was held that the title had not passed as against the creditor of the mother. Gray C. J. said: "But by the law as established in this commonwealth, it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No such delivery, actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him . . . . There was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough." In Solomons *v.* Chesley, 58 N. H. 238, trover was brought for certain chattels. It appeared that the defendant executed a bill of sale of the property to J. Y. & Co. as security for a debt due them for liquors illegally sold. Subsequently the plaintiffs, in good faith, in payment of a debt due them, took a bill of sale of the same property from J. Y. & Co. having no notice of any defect in the vendor's title. The vendees in both cases went through the form of taking possession, but the property always remained in the custody of the defendant. The jury found that the defendant was not estopped to claim the property by assenting to the sale to the plaintiffs. A verdict was entered for defendant. Foster J. said: "Where personal property is capable of convenient manual delivery upon sale, a mere bill of sale is not sufficient evidence of title to protect a purchaser, as against a vendor, who is not estopped to deny the validity of his sale." Where a sale has been perfected *bonâ fide*, if the parties wish to rescind the contract and revest the property in the vendor, the same formalities are necessary as in any sale. Quincy *v.* Tilton, 5 Greenl. 277; State *v.* Intoxicating Liquors, 61 Maine, 520; Kennedy *v.* Jones, 67 Ib. 538. In Quincy *v.* Tilton, *supra*, Mellen C. J. said: "When a sale or exchange of articles is legally rescinded on account of fraud in one of the parties, the whole thereby becomes nullified *ab initio;* and, of course, the property sold or exchanged is considered as having never been changed, in respect to the parties themselves or their creditors. This principle is not contested. On the contrary, where the sale or exchange is fairly and honestly made and perfected by delivery, the property is completely changed in the articles which are the subject of the sale or exchange; and if, after this, the parties agree to give up the bargain . . . . and place things as they stood before it was made, this object can only be effected by what, in legal contemplation, amounts to a resale or reëxchange; and whatever was necessary to constitute the original sale or exchange a legal transfer of the property from one of the parties to the other is equally necessary to constitute a legal resale or reëxchange." Beecher *v.* Myall, 16 Gray, 376; Gleason *v.* Drew, 9 Greenl. 79; Miller *v.* Smith, 1 Mason, 437; Spring *v.* Coffin, 10 Mass. 31; Warden *v.* Marshall, 99 Ib. 305; Tripp *v.* Tripp, Rice, 84; Hotchkiss *v.* Hunt, 49 Me. 213. In Boston Music Hall Ass. *v.* Cory, 129 Mass. 435, it was held that "it is not necessary that a transfer of stock should be made on the books of the corporation to be valid against an attaching creditor, when not required to be so made by positive provision of the statutes or of the charter." Colt J. said: "It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same, to a *bonâ fide* purchaser, is a sufficient delivery to transfer the title

Formalities upon rescission of *bonâ fide* sale.

Transfer of stock.

rier is conveying them, the goods are said to be only in the *constructive*, *not* in the *actual possession* of the buyer.

against a subsequent attaching creditor." Sargent *v.* Essex Mar. Railway Corp. 9 Pick. 201; Sargent *v.* Franklin Ins. Co. 8 Ib. 90; Fisher *v.* Essex Bank, 5 Gray, 373; Dickinson *v.* Central Bank, 129 Mass. 279. In Dempsey *v.* Gardiner, 127 Mass. 381, 383, Gray C. J. said: ". . . . Where property sold is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as against subsequent attaching creditors." And the cases seem to support the proposition. Russell *v.* O'Brien, 127 Mass. 349; Tuxworth *v.* Moore, 9 Pick. 347; Carter *v.* Willard, 19 Ib. 1; Appleton *v.* Bancroft, 10 Met. 231; Whipple *v.* Thayer, 16 Pick. 25; Bullard *v.* Wait, 16 Gray, 55; Hatch *v.* Lincoln, 12 Cush. 31; McCormick *v.* Hadden, 37 Ill. 370; Puckett *v.* Reed, 31 Ark. 131; Cofield *v.* Clark, 2 Col. 101; Crookshank *v.* White, 1 Kerr (N. B.), 367. As to what constitutes a sufficient delivery of growing crops as to third persons, there is some apparent conflict in the cases. In Thompson *v.* Wilhite, 81 Ill. 356, the property in question had been levied on by a creditor of the original owners. On the 26th of June, the property had been purchased from the debtor by the claimant, no judgment having then been rendered in favor of the creditor. The property consisted of growing wheat and corn. At the time of the levy, all the property was on a farm belonging to the wife of the execution debtor, and on this farm the wheat and corn had been grown. Scott C. J. said: "When he purchased, the claimant took all the possession of the wheat and corn that was possible for him to do. They were then growing in the field, and it was not practicable for him to remove them until the grain was ready to be harvested. Subsequently, and perhaps a day or two before the execution was levied, the wheat was cut down, but no sufficient time had then elapsed in which the claimant could have removed it. In regard to the wheat and corn, there having been a sufficient delivery to pass the title, the verdict was right." In Ticknor *v.* McClelland, 84 Ill. 471, Sheldon C. J. said: "In case of the sale of standing crops, the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them." Bull *v.* Griswold, 19 Ill. 631; Graff *v.* Fitch, 58 Ib. 373; Williamson *v.* Steele, 3 Lea (Tenn.), 527. In Brantom *v.* Griffits, 2 C. P. Div. 212, Cockburn C. J. said: "Now it is impossible that there can be present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser, and it is only when it reaches maturity that it can be removed, nor is it intended that it shall be removed till it is ripe. . . . In a popular and practical sense, growing crops are no more capable of removal than the land itself." In Noble *v.* Smith, 2 John. 52, 56, Kent C. J. said: "I do not know that corn, growing, is susceptible of delivery in any other way than by putting the donee into possession of the soil." Section 1923 of the Code of Iowa, provides that "no sale . . . . of personal property, where the vendor . . . . retains actual possession, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed . . . . and filed for record." In Smith *v.* Champney, 50 Iowa, 174, Adams J. said: "In our opinion, when a person sells a field of corn standing upon his farm, and the vendee does not commence to harvest it, nor otherwise visibly take charge of the corn or control of the field in which it stands, the actual possession is not changed within the meaning of the statute. The rules of construction require us to give force to the word *actual*. There is a clear implication that there might be a possession not actual, and that the transfer of such possession merely would be insufficient." Stone *v.* Peacock, 35 Me. 385.

Property in hands of bailee of vendor.

Delivery of growing crops.

§ 676. Delivery in the sense of a transfer of *title* has been considered *ante*, book II. Of the Effect of the Contract. Delivery of *possession*, as required under the statute of frauds, as the correlative of the buyer's "actual receipt" in order to prove the *formation* of the contract, has been considered in book I. part II. ch. iv. Of Acceptance and Actual Receipt. Delivery into the buyer's possession, sufficient to destroy the vendor's lien, or even his right of stoppage *in transitu*, will be discussed *post*, book V. This chapter is confined to a consideration of the vendor's duty of delivering the goods in *performance* of his contract, so as to enable him to defend an action by the buyer for non-delivery.

§ 677. Generally the purchaser in a bargain and sale of goods, where the property has passed, is entitled to take possession of them, and it is the vendor's duty to deliver this possession. But this right is only *primâ facie*, and it may well be bargained that the possession shall remain with the vendor until the fulfilment of certain conditions precedent by the purchaser. (*e*) Where nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the de-

Vendor's duty to deliver is only *primâ facie*, and may depend on conditions.

Delivery conditional on payment.

In Lamson *v.* Patch, 5 Allen, 586, there was a sale of growing grass, and the question was whether the vendee or a third party was entitled to the same. Hoar J. said: "The question upon which this case turns, therefore, is, whether plucking a handful of growing grass, and delivering it to a purchaser in the field, as in part execution of a contract of sale of the whole crop, is a good symbolical delivery of the whole? We are of the opinion that it is not. The time when this act was done was the first day of June. The grass was but six inches high; it was therefore not fit to cut, and but partially grown. It is said that the symbolical delivery was all which the nature of the case would admit; and several cases have been cited in argument, in which such a delivery has been held to be sufficient. But these are all cases .... where, by the intent and understanding of the parties, the delivery made was intended to transfer the immediate unqualified dominion of the property to the vendee. But in this case the grass was not fit to cut, and was not intended to be cut until it should have grown. .... As was said by Metcalf J. in Stearns *v.* Washburn, 7 Gray, 188, 'until severed, the grass was not personalty, not goods or chattels, but was part of the realty.'" When, therefore, the same chattels are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession will hold it against the other. Fletcher *v.* Howard, 2 Aiken, 115; Brown *v.* Pierce, 97 Mass. 46, 48; Dawes *v.* Cope, 4 Binney, 258; Lanfear *v.* Sumner, 17 Mass. 113; Babb *v.* Clemson, 10 Serg & R. 419; Hoofsmith *v.* Cope, 6 Whart. 53; 2 Kent, 522; Fairfield Bridge Co. *v.* Nye, 60 Maine, 372; Packard *v.* Wood, 4 Gray, 307; Veazie *v.* Somerby, 5 Allen, 280, 289.]

(*e*) [See Carter *v.* Kingman, 103 Mass. 517.]

livery of the possession concurrent conditions, (*f*) as is explained in book IV. part I. On Conditions. The vendor cannot insist on payment of the price without alleging that he is ready and willing

(*f*) [South Western Freight &c. Co. *v.* Plant, 45 Mo. 517; Scudder *v.* Bradbury, 106 Mass. 422, 427; Shaw C. J. in Knight *v.* The New England Worsted Co. 2 Cush. 271, 288; Barnes *v.* Bartlett, 15 Pick. 77, per Shaw C. J.; Michigan Central R. R. Co. *v.* Phillips, 60 Ill. 190; McCann *v.* Kirlin, 3 Allen (N. B.), 345; Butters *v.* Stanley, 21 U. C. C. P. 402; Phippen *v.* Hyland, 19 Ib. 416; Phelps *v.* Hubbard, 51 Vt. 489; Hancock *v.* Gibson, 3 U. C. Q. B. 41; Wright *v.* Weed, 6 Ib. 140; Heffernan *v.* Berry, 32 Ib. 518; Platt *v.* McFaul, 4 U. C. C. P. 293; Moore *v.* Logan, 5 Ib. 294. "The promise to deliver, involved in an agreement of sale, and the promise to pay the purchase-money, are mutually dependent. Neither party is bound to perform without contemporaneous performance by the other. Payment of the price is the condition upon which alone the purchaser can require the seller to complete the sale by delivery of the property. But it is so at the option of the seller. If he proceeds to deliver without insisting upon payment, and without qualifying the act in some way, the condition or mutual dependence is waived or severed. The contract is executed finally on his part, and he retains no lien upon the property. Delivery of possession, unqualified, is a release or waiver of his right, whether it be in the nature of a condition affecting the title or only a lien for the price." Wells J. in Haskins *v.* Warren, 115 Mass. 533; Upton *v.* Sturbridge Cotton Mills, 111 Ib. 446; Goodwin *v.* Boston & Lowell Railroad, Ib. 487; Freeman *v.* Nichols, 116 Ib. 309; Western Transportation Co. *v.* Marshall, 4 Abb. (N. Y.) App. Dec. 575; Mackaness *v.* Long, 85 Penn. St. 158. If, however, the delivery and payment are to be simultaneous, and the goods are delivered in the expectation that the price will be immediately paid, the refusal to make payment will be such a failure on the part of the purchaser to perform the contract as to entitle the vendor to put an end to it and reclaim the goods. Bellows C. J. in Paul *v.* Reed, 52 N. H. 136, 138; Leedom *v.* Phillips, 1 Yeates, 527; Harris *v.* Smith, 3 Serg. & R. 20; Palmer *v.* Hand, 13 John. 434; Marston *v.* Baldwin, 17 Mass. 606; Leven *v.* Smith, 1 Denio, 571; Conway *v.* Bush, 4 Barb. 564; Henderson *v.* Lauck, 21 Penn. St. 359; Deshon *v.* Bigelow, 8 Gray, 159; Ferguson *v.* Clifford, 37 N. H. 86, 103; Lacy *v.* Bundy, 9 Ib. 302; Gardner *v.* Clark, 21 N. Y. 399; Riley *v.* Wheeler, 42 Vt. 528; Hill *v.* McKenzie, 3 Thomp. & C. (N. Y.) 122; Miller *v.* Jones, 66 Barb. 148; Hodgson *v.* Barrett, 33 O. St. 63; Owens *v.* Weedman, 82 Ill. 409; Adair *v.* Malone, 1 Huds & Br. (Ir.) 19. In Henderson *v.* Lauck, 21 Penn. St. 359, there was a sale of corn, to be paid for on the delivery of the last load; and, as the loads were delivered, the corn was placed in a heap with other corn of the buyer, in the presence of both parties. On the delivery of the last lot the purchaser failed to pay, and the vendor gave notice that he claimed the corn, and brought replevin, which was held to lie, the court regarding the delivery as conditional, and the plaintiff in no fault for intermingling the corn. Paul *v.* Reed, 52 N. H. 136, was a similar case, in which the payment was arrested by a trustee process served upon the purchaser. Where the defendant agreed to sell and deliver to the plaintiff, within three months, 400,000 bricks, at $10.50 per thousand, it was held that the delivery of the entire quantity was a condition precedent to the right of the defendant to demand payment; and the fact that the plaintiff had not paid for what was in fact delivered did not excuse the defendant from delivering the residue. Mount *v.* Lyon, 49 N. Y. 552. See Talmadge *v.* White, 35 N. Y. Sup. Ct. 219; Russell *v.* O'Brien, 127 Mass. 349.]

Delivery of goods and payment therefor concurrent conditions.

Delivery in instalments: title.

to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price. (*g*) But it constantly happens that there is a stipulation to the contrary of this, and that the parties agree that the buyer is to take possession of the goods before paying for them, or, in the usual phrase, that the goods are sold on credit. The legal effect then is, that there has been an actual transfer of *title*, and an actual transfer of the *right of possession* by the bargain, so that in pleading, and for all purposes, save that of the vendor's lien for the price, the buyer is considered as being in possession, by virtue of the general rule of law that "the property of personal chattels draws to it the possession." (*h*) But although the buyer has thus acquired the *right of possession* not to be questioned for any legal purpose by any one save his vendor, the latter may refuse to part with the goods, and may exercise his lien as vendor to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession. (*i*)

Effect of sale on credit is to pass title and *right* of possession.

Vendor may refuse delivery, notwithstanding this right, on vendee's insolvency.

§ 678. The law on this whole subject was very perspicuously stated in the case of Bloxam *v.* Sanders, (*k*) which may be considered the leading case, always cited when these points are under discussion. The decision turned upon the following facts: One Saxby bought several parcels of hops of the defendants in August, 1823, the bought notes being as follows: "Mr. J. R. Saxby, of Sanders, eight pockets, at 155*s.* 8th August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights; and samples were given to Saxby, and invoices delivered, in which he was made debtor for six different parcels, amounting to 739*l.* The usual time of payment in the trade was the second Saturday subsequent to a purchase.

Bloxam *v.* Sanders.

(*g*) [Wells J. in Haskins *v.* Warren, 115 Mass. 533, cited in note (*f*), above; Chapin *v.* Potter, 1 Hilton (N. Y.), 366, 376; Pierson *v.* Hoag, 47 Barb. 244; Whitcomb *v.* Hungerford, 42 Ib. 177; Fleeman *v.* McKean, 25 Ib. 474; Conway *v.* Bush, 4 Ib. 564; McDonald *v.* Hewett, 15 John. 349; Hancock *v.* Gibson, 3 U. C. Q. B. 41; Toledo, Wabash & West. Ry. Co. *v.* Gilvin, 81 Ill. 511.]

(*h*) 2 Wms. Saunders, 47 *a*, note (1).

(*i*) [Where the vendor has agreed to receive the notes of a third party in payment for the goods sold, he is not bound to deliver the goods upon the tender of the notes of such third party, if he has become insolvent between the contract of sale and the period of delivery. Benedict *v.* Field, 16 N. Y. 595; Roget *v.* Merritt, 2 Caines, 117.]

(*k*) 4 B. & C. 941. See, further, as to effect of buyer's insolvency, *post*, book V. Part I. ch. i. Rights and Remedies of the Vendor.

Saxby did not pay for the hops, and on the 6th September the defendant wrote to him a notice that if he did not pay for them before the next Tuesday they would resell and hold him bound for any deficiency in price. They did accordingly resell some parcels with Saxby's express assent, and refused to deliver another parcel (that Saxby himself sold) without being paid. Saxby became bankrupt in November, and the defendants sold other hops afterwards on his account, and delivered account sales of them, charging him commissions, and *warehouse rent from the 30th August.* The plaintiffs were assignees of the bankrupt, and they demanded of the defendants the hops remaining in their hands, tendering at the same time the warehouse rent and charges; and the action was trover, not only for the hops remaining unsold, but for the proceeds of all those resold by the defendants after Saxby's failure to pay. Bayley J. delivered the judgment. He said: "Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price:* but the buyer has no right to have possession of the goods *till he pays the price.* The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a *condition precedent* on the buyer's part; and until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the *right of possession* and the *right of property* vests at once in him; but his *right of possession* is not absolute; it is liable to be defeated if he becomes insolvent before he *obtains* possession. Tooke *v.* Hollingworth, 5 T. R. 215. Whether default in payment when the credit expires will destroy his *right of possession*, if he has not before that time obtained *actual possession*, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. Hanson *v.* Meyer, 6 East, 614. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them

in transitu. (*l*) Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an *indefeasible right to the possession*, and his insolvency without payment of the price defeats that right. And if this be the case after he has dispatched the goods, and whilst they are *in transitu*, *a fortiori* is it where he has never parted with the goods, and where no transit has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or *they may still act upon their right of* PROPERTY *if anything unwarrantable is done to that right.* If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are *both* requisite, unless they have both those rights. Gordon *v.* Harper, 7 T. R. 9. Trover is an action of that description. It requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense; but that charge gave him no better right of possession than he would have had if that charge had not been made. . . . . Then, as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price." (*m*)

§ 679. Keeping in view this lucid exposition of the circumstances under which a vendor may decline delivery of possession, we will now inquire what he is bound to do where no legal ground exists for refusing to deliver. In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. (*m*[1]) He does all that he is bound to do by leaving or placing the goods

Vendor bound only to put goods at buyer's disposal, not to send them.

(*l*) Mason *v.* Lickbarrow, 1 H. Bl. 357; Ellis *v.* Hunt, 3 T. R. 464; Hodgson *v.* Loy, 7 T. R. 440; Inglis *v.* Usherwood, 1 East, 515; Bohtlingk *v.* Inglis, 3 East, 381.

(*m*) See, also, *per Cur.* in Spartali *v.* Benecke, 10 C. B. 212; 19 L. J. C. P. 293.

(*m*[1]) [If the vendee agrees to remove

at the buyer's disposal, so that the latter may remove them without lawful obstruction. (*n*) And if the delivery by the vendor is the goods within a given time this stipulation may become of the essence of the contract, and a failure to remove within that time may justify a repudiation of the contract on the part of the vendor. Higgins *v.* Del. &c. R. R. Co. 60 N. Y. 553; Boisaubin *v.* Reed, 2 Keyes, 323; Kellam *v.* McKinstry, 69 N. Y. 264; Bolton *v.* Riddle, 35 Mich. 13.]

Failure of vendee to remove goods

(*n*) [A sale is perfected by delivery when the property is so situated that the purchaser is entitled to, and can rightfully take, possession of it, at his pleasure. Means *v.* Williamson, 37 Me. 556; Heine *v.* Anderson, 2 Duer (N. Y.), 318; Houdlette *v.* Tallman, 14 Me. 400; Hotchkiss *v.* Hunt, 49 Ib. 213; Nichols *v.* Morse, 100 Mass. 523; Warden *v.* Marshall, 99 Ib. 306, 307; Hatch *v.* Bayley, 12 Cush. 27, 29; Stern *v.* Filene, 14 Allen, 9, 12; Turner *v.* Langdon, 112 Mass. 265; Marsh *v.* Rouse, 44 N. Y. 643; Bemis *v.* Morrill, 38 Vt. 153; Durbrow *v.* McDonald, 5 Bosw. (N. Y.) 130; Packard *v.* Dunsmore, 11 Cush. 282; Webber *v.* Minor, 6 Bush (Ky.), 463; Calkins *v.* Lockwood, 17 Conn. 154; Coe *v.* Bicknell, 44 Me. 163; Beller *v.* Block, 19 Ark. 566; Rattary *v.* Cook, 50 Ala. 352; Magee *v.* Billingsley, 3 Ib. 679; Rochelle *v.* Harrison, 8 Porter, 352; Sanborn *v.* Benedict, 78 Ill. 309; McMartin *v.* Moore, 27 U. C. C. P. 397; West *v.* Rutledge, 1 Pugsley & Burbridge (N. B.), 674; Partridge *v.* Wooding, 44 Conn. 277; Sibley *v.* Tie, 88 Ill. 287; Toledo, Wabash & West. Ry. Co. *v.* Gilvin, 81 Ib. 511; England *v.* Mortland, 3 Mo. App. 490. In Hutchins *v.* Gilchrist, 23 Vt. 88, which was a case of a sale of logs lying upon the land of a third person, the court said, that "it was not necessary to render a sale of logs, under such circumstances, valid, as against the creditors of the vendor, that there should be a change in their situation, and that there might be a change in the possession, while the *site* of the property remained the same." See Birge *v.* Edgerton, 28 Vt. 291; Sanborn *v.* Kittredge, 20 Ib. 639; Mills *v.* Camp, 14 Conn. 219; White *v.* Welsh, 2 Wright (Penn.), 396; Bradley *v.* Wheeler, 4 Rob. (N. Y.) 18; Jewett *v.* Warren, 12 Mass. 300; Carter *v.* Willard, 19 Pick. 1, 6; Montgomery *v.* Hunt, 5 Cal. 366; May *v.* Tallman, 20 Ill. 443; Cartwright *v.* Phœnix, 7 Cal. 281; Thompson *v.* Baltimore &c. R. R. 28 Md. 396; Leonard *v.* Davis, 1 Black (U. S.), 476; McNamara *v.* Edmister, 11 Hun, 597; Schoonmaker *v.* Vervalen, 9 Ib. 138; Hobbs *v.* Carr, 127 Mass. 532. "It is certain," said Colt J. in Ingalls *v.* Herrick, 108 Mass. 351, "that slight evidence of delivery is sufficient; and if the buyer, with the consent of the seller, obtains possession before any attachment or second sale, the transfer is complete without formal delivery. Shumway *v.* Rutter, 8 Pick. 443. In Hardy *v.* Potter, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet if prior to the attachment he had been to the place where the lumber was, and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it, good against a subsequent attachment. And this instruction was held not open to exception, although the evidence was that the purchaser had only been to the place where the lumber was and seen it. See, also, Phelps *v.* Cutler, 4 Gray, 137; Tuxworth *v.* Moore, 9 Pick. 347; Bullard *v.* Wait, 16 Gray, 55; Ropes *v.* Lane, 9 Allen, 502; S. C. 11 Ib. 591;" Thorndike *v.* Bath, 114 Mass. 118; Hayden *v.* Demets, 53 N. Y. 426. Where property at the time of the sale is in the possession and control of the purchaser, no formal act of delivery is necessary. Nichols *v.* Putten, 18 Me. 231; Martin *v.* Adams, 104 Mass. 262; Warden *v.* Marshall, 99 Ib. 305, 306. See Carrington *v.* Smith, 8 Pick. 419; Shurtleff *v.* Willard, 19 Ib. 209, 210; Macomber *v.* Parker, 13 Ib. 175; Markham *v.* Jaudon, 41 N. Y. 235, 242; Wells *v.* Miller, 37 Ill. 276; Lake *v.*

to take place upon the doing of certain acts by the purchaser, the vendor is not in default for non-delivery until notice from the purchaser of the performance of the acts on which the delivery is to take place. (n^1) Thus, if the vendor agrees to deliver on board of the purchaser's ship as soon as the latter is ready to receive the goods, the purchaser must name the ship and give notice of his readiness to receive the goods on board before he can complain of non-delivery. (o) In Salter *v.* Woollams, (p) the defendant, an auctioneer, sold a rick of hay, then on the premises of one Jackson, who had given a license to remove it. The license was read at the auction, and the auctioneer delivered to the buyer a note addressed to Jackson, requesting him to permit the buyer to remove the hay. Jackson refused, and the buyer brought action for non-delivery; but the court held that the delivery was complete, the auctioneer having made the only delivery the nature of the case permitted, and Tindal C. J. said he saw no reason why the buyer could not maintain trover against Jackson. Wood *v.* Manley (q) was another action growing out of the same sale, of a second rick of hay to another purchaser. The delivery was the same as in the previous case, and the buyer, on Jackson's refusal to let him take the hay, broke open the gate of Jackson's close, and entered and took the hay. Thereupon trespass was brought against the buyer, but the king's bench held that Jackson's license was irrevocable, (r) and that the delivery to the buyer by the auctioneer's order was a complete delivery, in performance of his contract. (s)

Delivery when conditional on notice from purchaser.

Salter *v.* Woollams.

Wood *v.* Manley.

Morris, 30 Conn. 201; Messer *v.* Woodman, 22 N. H. 172; Martin *v.* Adams, 104 Mass. 262. In a sale by one partner to his copartner, there must be a delivery; but such delivery consists rather in the surrender of the possession and control of the goods sold, than in the actual tradition of them from the vendor to the purchaser. Shurtleff *v.* Willard, 19 Pick. 202; Beaumont *v.* Crane, 14 Mass. 400; Turner *v.* Coolidge, 2 Met. 350; Cushing *v.* Breed, 14 Allen, 376.]

(n^1) [Leonard *v.* Wall, 5 U. C. C. P. 9; Vanbuskirk *v.* Green, 1 Hannay (N. B.), 25; Posey *v.* Scales, 55 Ind. 282.]

(o) Armitage *v.* Insole, 14 Q. B. 728; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Davies *v.* M'Lean, 21 W. R. 265; Stanton *v.* Austin, L. R. 7 C. P. 651; [Stinson *v.* Branigan, 10 U. C. Q. B. 210; Russell *v.* Rowe, 7 Ib. 484.]

(p) 2 M. & G. 650; and see Smith *v.* Chance, 2 B. & A. 753, for an *incomplete* delivery in a similar sale.

(q) 11 Ad. & E. 34.

(r) See Wood *v.* Leadbitter, 13 M. & W. 838; and Taplin *v.* Florence, 10 C. B. 744.

(s) [The remarks of Wells J. in McLeod *v.* Jones, 105 Mass. 403, 406, are instructive upon this point. "A sale of chattels," he says, "which are at the time upon the land of the

Sale of goods on vendor's land impliedly authorizes vendee to enter and take them.

§ 680. It might seem at first sight that the decision in Salter *v.* Woollams (*t*) is in conflict with the class of decisions exemplified in Bentall *v.* Burn, (*u*) and discussed *ante*, §§ 175 *et seq.*, in which the principle is established that there is no delivery where the goods are in possession of a third person, unless the third person assent to attorn to the buyer and become his bailee instead of that of the vendor. But a little reflection will show that there is really no such conflict; for, in Salter *v.* Woollams, the third person, although refusing to deliver to the buyer on the vendor's order *after* the sale, had assented *in advance* of the sale to become bailee for any person who might buy, and the court held this assent not to be revocable *after the sale*. The consequence then was, that the third person in possession became, by the completion of the sale, bailee for the buyer, and his refusal to deliver to the buyer was not a refusal to *become* bailee, but to do his duty as bailee, after assenting to assume that character.

Observations on these cases.

§ 681. In Wood *v.* Tassell (*x*) the plaintiff sued for non-delivery of certain hops sold to him by the defendant. The hops were parcel of a larger quantity lying at the warehouse of one Fridd, where they had been deposited by a

Wood *v.* Tassell.

seller, will authorize an entry upon the land to remove them, if by the express or implied terms of the sale that is the place where the purchaser is to take them. Wood *v.* Manley, 11 Ad. & E. 34; Nettleton *v.* Sikes, 8 Met. 34; Giles *v.* Simonds, 15 Gray, 441; Drake *v.* Wells, 11 Allen, 141; McNeal *v.* Emerson, 15 Gray, 384. A license is implied, because it is necessary in order to carry the sale into complete effect; and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, nor drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance. But there is no such inference to be drawn, when the property, at the time of the sale, is not upon the seller's premises; or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them affecting it except what results from the facts of ownership or legal title in one and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone." See 1 Sugden V. & P. (8th Am. ed.) 126, note (*n*) and cases cited. A sheriff having seized goods cannot sell them on defendant's premises without his permission, and any person going on the premises to purchase may be treated as a trespasser. McMaster *v.* McPherson, 6 U. C. Q. B. (O. S.) 16.]

Right of sheriff to sell on defendant's premises.

(*t*) 2 M. & G. 650.

(*u*) 3 B. & C. 423.

(*x*) 6 Q. B. 234.

former owner, who sold them to the defendant. After the sale to the plaintiff, he was informed that the hops were at Fridd's, and went there, had them weighed, and took away part. Some days after, when the plaintiff sent for the remainder, they were gone, having been claimed and taken away by a creditor of the defendant's vendor. Held that the defendant had done all that he was bound to do in making delivery, and was not responsible. In this case it is worth remarking that Lord Denman, in delivering the judgment, said: "I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought not to have given the plaintiff a delivery order, though not expressly required, in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that under the circumstances Fridd held the hops as agent for the plaintiff."

Place of delivery.

§ 682. As to the *place* where delivery is to be made, when nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal, at the place where they are when sold. No cases have been met with on this point. Lord Coke says: (*y*) "If the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty loads of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffor, but the obligor or feoffor before the day must go to the feoffee and know where he will appoint to receive it, and there it must be delivered." But this refers to estates held upon condition and to the duty of a *debtor*, and is not applicable to cases where the party bound to deliver, as a vendor, is only held to the obligation of keeping the thing at the disposal of the buyer, and is not bound to more than a *passive* readiness to allow the buyer to take the goods. Kent says: (*z*) "If no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place." (*a*) This appears to

(*y*) Co. Lit. 210 b.

(*z*) Vol. 2, p. 677 (11th ed.).

(*a*) [See 2 Kent, 505; 2 Chitty Contr. (11th Am. ed.) 1201 *et seq.* and notes;

be a very reasonable rule, and it would of course result as a consequence that the vendor would be responsible for removing the goods before delivery to a place where the buyer would be subjected to inconvenience or increased expense in taking possession of them.

Vendor's duty when he agrees to send goods.

Where time is not expressed in contract, reasonable time.

Ellis *v.* Thompson.

§ 683. If, however, the contract impose on the vendor the obligation of sending the goods, questions may arise as to the time and manner in which he is to fulfil this duty. (a^1) If nothing is said as to time, he must send within a *reasonable time*; (b) and when the sale is in writing, if nothing is said as to time, parol evidence is admissible of the facts and circumstances attending the sale in order to determine what is a reasonable time. (c) Thus, in Ellis *v.* Thompson, (d) where there was a sale of lead deliverable in London, parol evidence was admitted to

Miles *v.* Roberts, 34 N. H. 253, 254; Smith *v.* Gillett, 50 Ill. 290; Barr *v.* Myers, 3 Watts & S. 299; Middlesex Co. *v.* Osgood, 4 Gray, 447, 449; Lobdell *v.* Hopkins, 5 Cowen, 516; Goodwin *v.* Holbrook, 4 Wend. 380; Rice *v.* Churchill, 2 Denio, 145; Kraft *v.* Hurtz, 11 Mo. 109. But "where the vendee is, by the terms of the contract, to designate a place of delivery, the vendor is bound to be ready to make delivery at the place designated. If the vendee omits to designate the place, the vendor is guilty of no breach of contract, if the articles are ready for delivery at the time fixed by the contract." Bigelow J. in Lucas *v.* Nichols, 5 Gray, 309, 311; Smith *v.* Wheeler, 7 Oreg. 49; Bolton *v.* Riddle, 35 Mich. 13; Boyd *v.* Gunnison, 14 W. Va. 1; Brunskill *v.* Mair, 15 U. C. Q. B. 213.]

(a^1) [Brunskill *v.* Mair, 15 U. C. Q. B. 213; George *v.* Glass, 14 Ib. 514; Cox *v.* Jones, 24 Ib. 81; Twohy *v.* Armstrong, 15 U. C. C. P. 273; Wright *v.* Weed, 6 U. C. Q. B. 140; Molson *v.* Bradburn, 25 Ib. 457.]

(b) [See Adams *v.* Adams, 26 Ala. 272; Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530. The result of an

Omission to fix time for delivery.

omission to fix a time for delivery is, that the law treats the contract as if it had expressly stated that the goods sold or ordered were deliverable within a reasonable time. Story J. in Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530, 532. See Tufts *v.* McClure, 40 Iowa, 317; Rankin *v.* Goddard, 4 Allen (N. B.), 155; Kemple *v.* Darrow, 7 J. & Sp. 447; Bolton *v.* Riddle, 35 Mich. 13.]

(c) [The question of reasonable time is determined by a view of all the circumstances of the case; and parol evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what the parties thought was a reasonable time for performing it. Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530; Coates *v.* Sangston, 5 Md. 121. But no evidence will be admissible to prove a specific time for the delivery of the goods to be furnished when the contract is silent upon the point, because that would be to contradict and vary the legal interpretation of the instrument. Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530; Shaw C. J. in Atwood *v.* Cobb, 16 Pick. 227.]

How reasonable time is determined.

(d) 3 M. & W. 445; and see Jones *v.* Gibbon, 8 Ex. 920; Sansom *v.* Rhodes, 8 Scott, 544; [Cocker *v.* Franklin Hemp & Flax Manuf. Co. 3 Sumner, 530, 533.]

show that the defendant had asked the broker whether the lead was ready for shipment, and had been informed that it was, before the bought and sold notes were made out. And it was held that the defendant was relieved from the obligation of receiving delivery by reason of a long delay in getting the lead in barges from the mine down the Severn to Gloucester, from which port it was to be shipped to London.

§ 684. But where the contract expresses the time, the question is one of construction, and therefore one of law for the court, not of fact for the jury. (*e*) (See Conditions, *ante*, § 562.) The word "month," although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a *calendar* month. (*f*) And the court will look at the context in all cases, to see whether a calendar month was not intended, and if so will adopt that construction. (*g*) And now by statute 13 Vict. c. 21, s. 4, it is enacted, that "in all acts the word 'month' shall be taken to mean calendar months, unless words be added, showing lunar months to be intended." Where a certain number of "days" is to be allowed for the delivery, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed, (*h*) or an usage to that effect be shown. (*i*) And as to the odd day in leap year, see 40 Henry 3, at p. 4, vol. 1 of Statutes Revised. And the rule, though long in doubt, seems now to be settled by

Where the contract expresses the time.

"Month," its meaning.

Stat. 13 Vict. c. 21, s. 4.

"Days," how counted.

Leap year.

(*e*) [How far the question of reasonable time is for the court and how far for the jury, see Hill *v.* Hobart, 16 Me. 164; Attwood *v.* Clark, 2 Greenl. 249; Howe *v.* Huntington, 15 Me. 350; Kingsley *v.* Wallis, 14 Ib. 57; Murray *v.* Smith, 1 Hawks, 41; Greene *v.* Dingley, 24 Me. 131; Cameron *v.* Wells, 30 Vt. 633. A delivery and acceptance after the agreed time does not of itself enable the vendee to set up the non-delivery at the agreed time in reduction of the price. Moffat *v.* Lunt, 2 Pugsley & Burbridge (N. B.), 673; Wharton *v.* Mo. Car Foundry Co. 1 Mo. App. 577. But if a note is given in consideration of flour to be delivered on the day of the date of the note, a failure to deliver at that time will constitute a failure of consideration. Corwith *v.* Colter, 82 Ill. 585.]

Delivery after the agreed time; some of the effects of.

(*f*) Reg. *v.* Chawton, 1 Q. B. 247; Hart *v.* Middleton, 2 C. & K. 9; Webb *v.* Fairmaner, 3 M. & W. 473; [Thomas *v.* Shoemaker, 6 Watts & S. 179. In Churchill *v.* Merchants' Bank, 19 Pick. 532, 535, Dewey J. said: "As a legal phrase, a month in Massachusetts is considered as a calendar month. Such is the construction in mercantile contracts and in all legal proceedings."]

(*g*) Simpson *v.* Maritson, 11 Q. B. 23; Webb *v.* Fairmaner, 3 M. & W. 473.

(*h*) Brown *v.* Johnson, 10 M. & W. 331.

(*i*) Cochran *v.* Retberg, 3 Esp. 121.

the decision in Webb *v.* Fairmaner, (*k*) that if a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract. (*l*) A promise to deliver goods in two months from the 5th October is fulfilled by delivery at any time on the whole day of the 5th December, so that an action against the vendor would be premature if brought before the 6th. In Coddington *v.* Paleologo (*m*) the court of exchequer, on a contract for the delivery of goods, "delivering on April 17th, complete 8th May," was equally divided on the question whether the vendor was bound to commence delivery on the 17th April.

Webb *v.* Fairmaner.

Coddington *v.* Paleologo.

§ 685. In relation to the *hour* up to which a vendor can make a valid delivery, on the last day fixed by the contract, the whole subject is fully discussed, in the carefully considered case of Startup *v.* McDonald (*n*) in Cam. Scacc. In that case the plaintiff had sold to the defendant ten tons of linseed oil, "to be free delivered within the last fourteen days of March, and paid for at the expiration of that time, in cash." The defendant pleaded to an action for not receiving the oil that the tender was made on the last of the fourteen days, at nine o'clock at night, which was an unreasonable and improper time, &c. &c. The jury found as a special verdict, that the plaintiff made the tender at half-past eight o'clock at night of the 31st March, that day being *Saturday, that there was full time before twelve o'clock at night for the defendant to examine, and weigh, and receive the oil*, but that he objected on the ground that the tender was at an

"Hour."

Startup *v.* McDonald.

(*k*) 3 M. & W. 473; and see Lester *v.* Garland, 15 Vesey, 247; Pellow *v.* Wonford, 9 B. & C. 134; Young *v.* Higgon, 6 M. & W. 49; Blunt *v.* Heslop, 8 Ad. & E. 577; Isaacs *v.* Royal Insurance Co. L. R. 5 Ex. 296.

(*l*) [Farwell *v.* Rogers, 4 Cush. 460; Buttrick *v.* Holden, 8 Ib. 233; Oatman *v.* Walker, 33 Me. 71; Windsor *v.* China, 4 Greenl. 298; Homes *v.* Smith, 16 Me. 181; Ewing *v.* Bailey, 4 Scam. 420. So, the day of an act, from which a future time is to be ascertained, is to be excluded from the computation. Weeks *v.* Hull, 19 Conn. 376; Bigelow *v.* Wilson, 1 Pick. 485; Wiggin *v.* Peters, 1 Met. 127, 129; Henry *v.* Jones, 8 Mass. 453; Woodbridge *v.* Brigham, 12 Ib. 403; Blake *v.* Crowninshield, 9 N. H. 304; Avery *v.* Stewart, 2 Conn. 69; Aiken *v.* Appleby, 1 Morris, 8; Cornell *v.* Moulton, 3 Denio, 12. "Between two days," is exclusive of both. Atkins *v.* Boylston F. & M. Ins. Co. 5 Met. 440; Richardson *v.* Ford, 14 Ill. 332; Cook *v.* Gray, 6 Ind. 335; Cook *v.* Drais, 2 Cin. (Ohio) 340. See Cleveland *v.* Sterrett, 70 Penn. St. 204. From the 15th to the 28th of a month excludes both days. Newby *v.* Rogers, 40 Ind. 9. "Until" is exclusive. People *v.* Walker, 17 N. Y. 502.]

Computation of time.

(*m*) L. R. 2 Ex. 193.

(*n*) 6 M. & G. 593.

unreasonable hour ; that the plaintiff then kept the oil, and tendered it again on Monday morning, at seven o'clock; and that the hour of half-past eight on Saturday night *was an unreasonable and improper time of that day* for the tender and delivery of the oil. On these facts the court of common pleas had been unanimous in favor of the defendant, (*o*) but the judgment was reversed in Cam. Scacc. The judges, Denman C. J., Abinger C. B., Patteson and Williams JJ., and Parke, Gurney, Rolfe, and Alderson BB., were unanimous in opinion that the defendant was not bound to be present at the hour when the tender was made; but all were also of opinion (with the exception of Lord Denman, who dissented), that *being there*, he was bound by the tender ; and that the verdict of the jury, declaring that the tender was at an unreasonable and improper time, was an erroneous finding of the *law*, inconsistent with their finding of the *fact*, that the tender was made in full time for the defendant to examine, weigh, and receive the oil, before midnight. Parke B. gave an instructive statement of the whole law on the subject, in these words: " The question in this case is merely, what is the proper time of the day for a tender of goods, under a contract to sell and deliver to another within a certain number of days, the mode of tender being in other respects reasonable and proper (for it is found to be unreasonable only in respect of the *lateness*), the tender being made to the *vendee personally*, and there being no usage of trade as to the time for delivery, to qualify or explain the contract. . . . . Upon a reference to the authorities, and due consideration of them, it appears to me that there is no doubt upon this question. *It is not to be left to a jury* to be determined as a question of practical convenience or reasonableness in each case ; but the *law appeared to have fixed the rule*, and it is this, that a party who is by contract to pay money or to do a thing *transitory* to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days for the performance of his part of the contract; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other at his peril (Kidwelly *v.* Brand, Plowden, 71), and within the time limited if the other be within the four seas (Shepp. 136, ed. 1651), and he must do all that, without the concurrence of

(*o*) 2 M. & G. 395.

the other, he can do, to make the payment, or perform the act; and that at a convenient time *before midnight*, such time varying according to the quantum of the payment or the nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; (*p*) or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete.

§ 686. "But where the thing is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party *at that place;* and as the attendance of the other party is necessary at that place to complete the act, there the law, though it requires the other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; *and it is enough if he be at the place at such a convenient time before sunset on the last day, as that the act may be completed by daylight;* and if the party bound tender to the party there, if present, or if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made *to the other party, at the place at any time of the day*, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and *if it happen that both parties meet at the place at any other time of the last day*, or upon any other day within the time limited, and a tender is made, the tender is good. See Bacon's Abr. tit. Tender D. (a); Co. Lit. 202 a. This is the distinction which prevails in all the cases, — where a thing is to be done *anywhere*, a tender at a convenient time *before midnight* is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time *before sunset*. . . . . I therefore think that the tender was good in this case

(*p*) [See McClartey *v.* Gokey, 31 Iowa, 505.]

in point of time, and consequently that the plaintiff *having been able to meet with the defendant, and actually to tender* the oil to him a sufficient time before midnight to enable the defendant to receive, examine, and weigh the oil, performed so far as he could his part of the contract, and was entitled to recover for the breach of it by the defendant." (*p*[1])

§ 687. In Duncan *v.* Topham (*q*) the declaration alleged an order for goods to be delivered to the defendant within a *reasonable time*, but the proof showed a written order for "five tons, &c.: but it must be put on board *directly*," to which the plaintiff replied, "I shall ship you five tons, &c. *to-morrow*." Held that the proof did not support the declaration; and that a *reasonable time* was a more protracted delay than *directly*. In Attwood *v.* Emery (*r*) the agreement of the vendor, who was a *manufacturer*, to deliver goods "as soon as possible," was construed to mean "as soon as the *vendors* could," with reference to *their* ability to furnish the article ordered, consistently with the execution of prior orders in hand. A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th November, was held to be reasonably complied with by tender in the February following. For the meaning of the words *reasonable time*, see Brighty *v.* Norton (*s*) and Toms *v.* Wilson, (*t*) *post*, §§ 709, 710. Where the contract was to deliver goods "forthwith," the price being made payable within fourteen days from the making of the contract, it was held manifest that the goods were intended to be delivered within the fourteen days. (*u*)

Duncan *v.* Topham.

Delivery "directly."

Attwood *v.* Emery.

"As soon as possible."

"Reasonable time."

"Forthwith."

(*p*[1]) [Croninger *v.* Crocker, 62 N. Y. 151. Yazell contracted to furnish Kirkpatrick and Porter a certain number of hogs, the hogs to be delivered during "the first half of August, 1871; to be weighed at Mr. Gordon's scales near Burlington." It was held that the vendor was bound to deliver the hogs at the scales; that he had until noon of the 16th of the month to do it; and that he was bound to keep the hogs at the scales until noon of that day, and that the fact that the hogs were at the scales a part of the forenoon was not enough. Kirkpatrick *v.* Alexander, 60 Ind. 95; also 44 Ib. 595; Board of Ordnance *v.* Lewis, 7 Ir. Jur. O. S. 17 (Q. B.)]

Kirkpatrick *v.* Alexander.

(*q*) 8 C. B. 225.

(*r*) 1 C. B. N. S. 110; 26 L. J. C. P. 73. [Titcomb *v.* United States, 14 Ct. of Claims, 263. Attwood *v.* Emery, *supra*, was commented on in The Hydraulic Engineering Co. *v* McHaffie, L. R. 4 Q. B. D. 670; De Oleaga *v.* West Cumberland Iron Co. Ib. 472.]

(*s*) 3 B. & S. 305; 32 L. J. Q. B. 38.

(*t*) 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.

(*u*) Staunton *v.* Wood, 16 Q. B. 638.

§ 688. Where by the terms of a contract of sale the vendor was to deliver to the purchaser a bill of lading for the cargo which had been bought on the purchaser's orders, it was held that the delivery of the *bill of lading* within a reasonable time after its receipt, and without reference to the unloading of the *cargo*, was incumbent on the vendor, and that the buyer was justified in rejecting the purchase on the refusal to deliver the bill of lading. (*x*)

Vendor must deliver bill of lading when rightfully demanded, even before cargo lauded.

Barber *v.* Taylor.

§ 689. The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, (*y*) or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. In Dixon *v.* Fletcher (*z*) the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton, and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton, or "any part thereof." The court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of an averment that the plaintiffs were ready and willing to deliver the 200 bales only. So, in Hart *v.* Mills, (*a*) where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned. In Cunliffe *v.* Harrison (*b*) a purchase was made of ten hogsheads of claret, and the vendor sent fifteen. Held that the contract of the vendor was not performed, "for the per-

Delivery of more or of less than the contract requires not good.

Dixon *v.* Fletcher.

Hart *v.* Mills.

Cunliffe *v.* Harrison.

See, also, Roberts *v.* Brett, 11 H. L. Cas. 337, and 34 L. J. C. P. 241, as to interpretation of "forthwith." ["To ship and deliver as fast as vessels could be obtained" during the season. Isaacs *v.* N. Y. Plaster Works, 67 N. Y. 124.]

(*x*) Barber *v.* Taylor, 5 M. & W. 527.

(*y*) [Reuter *v.* Sala, 4 C. P. D. 239; Croninger *v.* Crocker, 62 N. Y. 151; Highland Chemical & Mining Co. *v.* Matthews, 76 Ib. 145. So, if he deliver the goods in an essentially altered condition. Reynolds *v.* Shuter, 3 U. C. Q. B. 377.] The rule is less rigid where goods are ordered from a correspondent who is an *agent* for buying them. See Ireland *v.* Livingston, L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; L. R. 5 Q. B. 516; 5 Eng. App. 395; *ante*, § 590; Johnston *v.* Kershaw, L. R. 2 Ex. 82; 36 L. J. Ex. 44.

(*z*) 3 M. & W. 146; [Rommel *v.* Wingate, 103 Mass. 327, cited and stated *ante*, § 376, note (*l*).]

(*a*) 15 M. & W. 85.

(*b*) 6 Ex. 903.

son to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." (*c*) In Nicholson *v.* Bradfield Union (*d*) the plaintiffs, under a contract for the sale of Ruabon coals, sent one lot of fifteen tons nine cwt. of real Ruabon coals on the 1st July, and another lot seven tons eight cwt. of coals, which were not Ruabon coals, on the 2d July, and the two parcels were shot into one heap, and it was held a bad delivery *for the whole*. In Levy *v.* Green (*e*) the goods ordered were sent, but they were packed in a crate with other goods not ordered, though perfectly distinguishable, the articles in excess being crockery ware of a different pattern. And Coleridge and Earle JJ. considered that the case was distinguishable on that ground from the cases already cited; but Campbell C. J. and Wightman J. thought it clear that the vendor had no right to impose on the purchaser the *onus* of unpacking the goods and separating those that he had bought from the others; and this latter view was held right by the unanimous decision of the exchequer chamber. (*e*[1])

Nicholson *v.* Bradfield Union.

Levy *v.* Green.

§ 690. If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the latter deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. (*f*) But the buyer is bound to pay for any part that he accepts; and after the time for deliv-

Where the delivery is less than required by the sale.

(*c*) Per Parke B.

(*d*) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.

(*e*) 8 E. & B. 575; 27 L. J. Q. B. 111; in Cam. Scacc. 28 L. J. Q. B. 319.

(*e*[1]) [Croninger *v.* Crocker, 62 N. Y. 151. See Southwell *v.* Breezley, 5 Oregon, 143. But where a purchaser received goods in excess of those ordered, and, on remitting the price for those ordered, wrote: "Balance of goods shipped me were not ordered. You will please have patience until they are sold; or they are subject to your order, if you prefer it," it was decided that neither this communication nor the retention of the "balance of goods" for several years, without proof that he sold them, constituted in law any promise to pay for them; his liability was a question for the jury. Goodwin *v.* Wells, 49 Ala. 309.]

Delivery of more goods than called for by contract.

(*f*) Per Park J. in Oxendale *v.* Wetherell, 9 B. & C. 386; [*ante*, § 47, note (*l*); Roberts *v.* Beatty, 2 Penn. 63; Wright *v.* Barnes, 14 Conn. 518; Dula *v.* Cowles, 2 Jones (N. C.) Law, 454; Marland *v.* Stanwood, 101 Mass. 470; Rockford, R. I. & St. L. R. R. Co. *v.* Lent, 63 Ill. 288; Smith *v.* Lewis, 40 Ind. 98.]

Buyer must pay for what he keeps.

ery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment until the vendor makes delivery of the rest. Thus,

Waddington v. Oliver.

in Waddington *v.* Oliver, (*g*) the plaintiff delivered on 12th December twelve bags of hops, in part performance of a contract to deliver 100 bags on or before the 1st January, and demanded immediate payment for them, and brought his action on the buyer's refusal. Held that no action could be maintained *prior* to the expiration of the time fixed for delivery of the remainder. But in Oxendale *v.* Wetherell (*h*) the plaintiff was held entitled to recover for 130 bushels of wheat delivered and kept by the buyer on a contract for the sale of 250 bushels, in an action brought *after* the expiration of the time fixed for the delivery of remainder. In Hoar *v.* Rennie, (*i*) where the contract was to deliver 667 tons of iron in four equal parts, in four successive months, the vendor having tendered delivery of only twenty-one tons in the first month, was held to have broken his contract so as to justify the purchaser's rejection of the whole bargain. But this case is strongly questioned. See *ante*, § 593. In Morgan *v.* Gath (*k*) the purchase was of 500 piculs of cotton, and only 420 were delivered. The jury having found on the facts that the buyer had consented to receive the 420 piculs, and had had them weighed, and accepted them, held that he could no longer object that the whole 500 piculs had not been delivered.

Oxendale v. Wetherell.

Hoar v. Rennie.

Morgan v. Gath.

§ 691. The quantity to be delivered is, however, sometimes stated in the contract with the addition of words such as "about," or "more or less," (*k*[1]) which shows that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance. In Cross *v.* Eglin (*l*) the purchase was of "about 300

Quantity stated "about" so much or "more or less."

Cross v. Eglin.

(*g*) 2 B. & P. N. R. 61.

(*h*) 9 B. & C. 386. See, also, Mavor *v.* Pyne, 3 Bing. 285; [*ante*, § 47, note (*l*); Shields *v.* Pettee, 2 Sandf. 262; Wright *v.* Barnes, 14 Conn. 518; McKnight *v.* Devlin, 52 N. Y. 399; Wilde J. in Snow *v.* Ware, 13 Met. 49; Bowker *v.* Hoyt, 18 Pick. 555; Roberts *v.* Beatty, 2 Penn. 62; Wilkins *v.* Stevens, 8 Vt. 214; Starr Glass Co. *v.* Morey, 108 Mass. 570, 574; Richards *v.* Shaw, 67 Ill. 222; Wilson *v.* Wagar, 26 Mich. 452.]

(*i*) 5 H. & N. 19; 29 L. J. Ex. 73.

(*k*) 3 H. & C. 748; 34 L. J. Ex. 165.

(*k*[1]) [Creighton *v.* Comstock, 27 O. St. 548; Brawley *v.* United States, 96 U. S. 168; Merriam *v.* United States, 14 Ct. of Claims, 289.]

(*l*) 2 B. & Ad. 106.

quarters (more or less) of foreign rye, ... shipped on board the *Queen Elizabeth*, &c.; also about fifty quarters of foreign red wheat, &c. &c." The vessel arrived, having on board 345 quarters of rye and ninety-one of wheat. The plaintiffs, the buyers, had paid by bill of exchange for fifty quarters of wheat and 300 quarters of rye; but the defendants, making no dispute about the wheat, insisted that the plaintiff should take the whole 345 quarters of rye, and refused to deliver any unless they would accept all. The plaintiffs thereupon, after making a formal demand of 300 quarters of rye and fifty of wheat, abandoned the contract, and sued for the amount of the bill of exchange which they had paid. Evidence was offered (and rejected) to show that it was contrary to the custom of merchants to require a buyer to receive so large an excess as was offered to the plaintiffs, under the expression "more or less." The plaintiffs had a verdict, and the court refused to disturb it, Lord Tenterden C. J. and Littledale J. both thinking that the excess was too great to be covered by the words "more or less;" Park and Patteson JJ. expressing a doubt on that point, but holding that, the expressions being obscure, the burden of proof lay on the vendors, who were seeking to enforce the contract, and that they had failed to show clearly what was the meaning of the parties. In Cockerell *v.* Aucompte (*m*) the court refused to give consideration to an objection against paying for 127 tons of coal, on a contract to deliver 100 tons "more or less;" but the coals had been supplied, and there was no offer to return them. Bourne *v.* Seymour (*n*) was a contract for the sale of "about" 500 tons of nitrate of soda, but the terms of the written contract made out by the brokers were so obscure that the case is of no value as a precedent. Creswell J. said that he did not think the parties understood the contract, "nor do I." (*o*) In Moore *v.* Campbell (*p*) the sale was of fifty tons of hemp, and the ven-

Cockerell *v.* Aucompte.

Bourne *v.* Seymour.

Moore *v.* Campbell.

(*m*) 2 C. B. N. S. 440; 26 L. J. C. P. 194.

(*n*) 16 C. B. 337; 24 L. J. C. P. 202.

(*o*) 24 L. J. C. P. 207. [In Pembroke Iron Co. *v.* Parsons, 5 Gray, 589, it was held that an agreement to sell "a cargo of old railroad iron, to be shipped per barque *Charles William*, at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the seas excepted — about 300 or 350 tons" — was complied with by a delivery at the port of discharge of as much as that vessel, being seaworthy and in good order, could carry, though only two hundred and twenty-seven tons. Bourne *v.* Seymour, cited in text, was distinguished. See Robinson *v.* Noble, 8 Peters, 181.]

(*p*) 10 Ex. 323; 23 L. J. Ex. 310.

dor offered the buyer two delivery orders from a warehouse for "about" thirty tons, and "about" twenty tons respectively, which the buyer declined, unless the vendor would guaranty that the whole quantity amounted to fifty tons. The vendor refused, and on the trial offered evidence that it was the usage of trade in Liverpool, where the contract was made, to insert the word "about" in delivery orders of goods warehoused. Held, that if this evidence had been offered in reference to the purchase of fifty tons of goods contracted to be sold and delivered simply, the evidence would be inadmissible; but if the contract be to sell and deliver *goods in a warehouse*, and there is a known usage of the place that warehousemen will not accept delivery orders in any other form, by reason of objecting to make themselves responsible for any particular quantity, the delivery warrants made in that form would, if tendered, be a sufficient compliance with the vendor's duty under the contract

McConnell *v.* Murphy. Meaning of "say about" so many.

§ 692. In McConnell *v.* Murphy, (*q*) decided in the privy council in April, 1873, where the sale was of "all of the spars manufactured by A., say about 600, averaging sixteen inches: the above spars will be out of the lot manufactured by J. B.," the court held that a tender of 496 spars, which were all of the specified lot that averaged sixteen inches, was a substantial performance of the contract by the vendor. These words "say about 600" were held to be words of expectation and estimate only, not amounting to an understanding that the quantity should be 600. The case of Gwillin *v.* Daniell (2 C., M. & R. 61; 5 Tyr. 644) was approved and followed; and the effect of the word "say," when prefixed to the word "about," was considered as emphatically marking the vendor's purpose to guard himself against being supposed to have made any absolute promise as to quantity. (*r*) Where delivery is to be made according to bills of lading, the authorities have already been reviewed, *ante*, § 591.

Where vendor is to send goods, delivery to

§ 693. Where the vendor is bound to send the goods to the purchaser, the rule is well established, as shown *ante*, § 181, that delivery to a common carrier, *a fortiori*, to one specially designated by the purchaser, is a delivery

(*q*) 21 W. R. 609; [Pembroke Iron Works *v.* Parsons, 5 Gray, 589; Robinson *v.* Noble, 8 Peters, 181.]

(*r*) See, further, Leeming *v.* Snaith, 16 Q. B. 275; Barker *v.* Windle, 6 E. & B. 675; Hayward *v.* Scougall, 2 Camp. 56.

to the purchaser himself; the carrier being, in contemplation of law in such cases, the bailee of the person *to* whom, not *by* whom, the goods are sent; the latter when employing the carrier being regarded as the agent of the former for that purpose. (*s*) If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent. (*t*) Where goods are ordered from a distant place, the vendor's duty to deliver them in merchantable condition is complied with if the goods are in proper condition when delivered *to the carrier*, provided the injury received during the transit does not exceed that which must necessarily result from the transit. Where hoop-iron was sold in Staffordshire, deliverable in Liverpool in the winter, the vendor was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, on proof that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire. (*u*)

common carrier suffices.

Vendor may contract to deliver at a distant place, and then carrier is *his* agent.

But he is not responsible for necessary deterioration occasioned by the transit.

§ 694. But the vendor is bound, when delivering to a carrier, to take the usual precautions for insuring the safe delivery to the buyer. (*u*[1]) In Clarke *v.* Hutchins (*x*) the vendor, in delivering goods to a trading vessel, neglected to

Vendor bound to take the usual precautions to

(*s*) Dawes *v.* Peck, 8 T. R. 330; Waite *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364, and 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E., B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 34 L. J. Q. B. 145; [Magruder *v.* Gage, 33 Md. 344; Hall *v.* Gaylor, 37 Conn. 550; Hunter *v.* Wright, 12 Allen, 548, 550; Putnam *v.* Tillotson, 13 Met. 517; Orcutt *v.* Nelson, 1 Gray, 536; Merchant *v.* Chapman, 4 Allen, 362; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Pacific Iron Works *v.* Long Isl. R. Co. 62 Ib. 272; Morey *v.* Medbury, 10 Hun, 540; Higgins *v.* Murray, 73 N. Y. 252. See Everett *v.* Parks, 62 Barb. 9, 15; Garretson *v.* Selby, 37 Iowa, 529; Strong *v.* Dodds, 47 Vt. 348.]

(*t*) Dunlop *v.* Lambert, 6 Cl. & F. 600; [Everett *v.* Parks, 5 Alb. L.J. 248.]

(*u*) Bull *v.* Robison, 10 Ex. 341; 24 L. J. Ex. 165. [See Cushman *v.* Holyoke, 34 Maine, 289.]

(*u*[1]) [If the manufacturer of a chattel, after it is made, agrees to deliver it at the usual place of business of the person for whom it was made, he is liable for any injury to it from carelessness in the transportation, although, at the time of the contract for making it, nothing was said about delivery, and there was no usage as to delivery. Taylor *v.* Cole, 111 Mass. 363; Hanauer *v.* Bartels, 2 Col. 514.]

(*x*) 14 East, 475. See, also, Buckman *v.* Levi, 3 Camp. 414; Cothay *v.* Tute, 3 Camp. 129.

insure safe delivery by carrier.

Clarke *v.* Hutchins.

apprise the carrier that the value of the goods exceeded 5*l.*, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and on the vendor's action for goods sold and delivered, it was held by the king's bench, Lord Ellenborough giving the decision, that the vendor had not made a delivery of the goods, not having "put them in such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers."

Vendor bound to give an opportunity to inspect the goods.

Isherwood *v.* Whitmore.

§ 695. In offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. (x^1) Thus, in Isherwood *v.* Whitmore, (y) the defendants, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods were shown two closed casks said to contain them. The persons in charge refused to allow the casks to be opened. Held that the plaintiff had not made a valid offer of delivery.

Symbolical delivery.

§ 696. There may be a symbolical delivery of goods, divesting the vendor's possession and lien. (z) Lord Ellenborough said, in Chaplin *v.* Rogers, (a) that "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property." And there was a like *dictum* by Lord Kenyon in Ellis *v.* Hunt. (b) On this principle the delivery of

(x^1) [See Croninger *v.* Crocker, 62 N. Y. 151.]

(y) 11 M. & W. 347; and per Parke B. in Startup *v.* McDonald, 6 M. & G. 593; [Boothby *v.* Scales, 27 Wis. 626.]

(z) [The symbol employed must have been delivered with the intention of transferring the title to the property sold. Clark *v.* Draper, 19 N. H. 419; Cartwright *v.* Phœnix, 7 Cal. 281. In the sale of oxen, a delivery of the brass knobs, which had been worn upon their horns, is not a symbolical delivery of the oxen, unless specially so agreed. Clark *v.* Draper, 19 N. H. 419.]

(a) 1 East, 192.

(b) 3 T. R. 464. [The formalities of a delivery necessary to protect a purchaser, in such cases, will adapt themselves in a measure to the nature and situation of the property sold. Thus, of ponderous articles a constructive delivery will be sufficient; Leisherness *v.* Berry, 38 Me. 83; Shurtleff *v.* Willard, 19 Pick. 210; Bethel

the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel. (*c*)

Steam Mill Co. *v.* Brown, 57 Me. 9; Boynton *v.* Veazie, 24 Ib. 286; Terry *v.* Wheeler, 25 N. Y. 520; Jewett *v.* Warren, 12 Mass. 300; Hayden *v.* Demets, 53 N. Y. 426; Taylor *v.* Richardson, 4 Houston (Del.), 300; Peoples' Bank *v.* Gridley, 91 Ill. 457; Audenried *v.* Randall, 3 Cliff. 99; Tucker *v.* Ross, 19 U. C. Q. B. 295; Newcomb *v.* Cabell, 10 Bush, 460; Adams *v.* Foley, 4 Clarke (Iowa), 52; Richardson *v.* Gray, 29 U. C. Q. B. 360; Puckett *v.* Reed, 31 Ark. 131; Calcutt *v.* Ruttan, 13 U. C. Q. B. 146; although it may leave the vendor in actual possession for certain purposes; such as transportation or delivery at another place. Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 18; Boynton *v.* Veazie, and Terry *v.* Wheeler, *ubi supra;* Montgomery *v.* Hunt, 5 Cal. 366. So, a delivery of the key of a shop or other storehouse, though at a place distant from it, if made with the intention to surrender the possession of the property stored therein to the purchaser, will render the sale of such property effectual against third persons. Vining *v.* Gilbreth, 39 Me. 496; Packard *v.* Dunsmore, 11 Cush. 282; 2 Kent, 499, 500; Wilkes *v.* Ferris, 5 John. 335; Chappel *v.* Marvin, 2 Aiken, 79; Ludwig *v.* Fuller, 17 Me. 166; Ricker *v.* Cross, 5 N. H. 571; Shindler *v.* Houston, 1 Denio, 48; S. C. 1 Comst. 261; Calkins *v.* Lockwood, 17 Conn. 164; Stinson *v.* Clark, 6 Allen, 340. So, where sheep were selected and marked and left in the possession of a third person, who was requested and who consented to hold them for the purchaser, this was held to be a sufficient delivery to complete the sale and pass the property as against the creditors of the vendor. Barney *v.* Brown, 2 Vt. 374. See Walden *v.* Murdock, 23 Cal. 540; Doyle *v.* Lasher, 16 U. C. C. P. 263; McMartin *v.* Moore, 27 Ib. 397. On the 30th April, 1868, the plaintiff by his agent made an oral contract with the defendant to sell him 170 barrels and six half barrels of mackerel at a specified price, and being all the mackerel stored in the agent's storehouse; the mackerel were to be delivered to the defendant as he wanted them. On May 1st, following, the defendant paid the plaintiff's agent $600, and received a written paper acknowledging the receipt of $600 "on account of mackerel in store No. 10, Long Wharf, at

(*c*) Atkinson *v.* Maling, 2 T. R. 462. [The delivery of a deed of transfer of a ship at sea passes the title to the purchaser, subject only to be defeated by his negligence in not taking possession of her within a reasonable time after her return to port. Brinley *v.* Spring, 7 Greenl. 241; Gardner *v.* Howland, 2 Pick. 602; Joy *v.* Sears, 9 Ib. 4; Tucker *v.* Buffington, 15 Mass. 477; Badlam *v.* Tucker, 1 Pick. 389; Turner *v.* Coolidge, 2 Met. 350. See Veazie *v.* Somerby, 5 Allen, 280; McLean *v.* Grant, 1 Kerr (N. B.), 50. The cargo of a ship at sea may be transferred by a delivery of the bill of lading, with an assignment indorsed on it. See § 813, note (c[1]), *post.* Peters *v.* Ballister, 3 Pick. 495; McKee *v.* Garcelon, 60 Me. 167; Pratt *v.* Parkman, 24 Pick. 42, 47; Gibson *v.* Stevens, 8 How. (U. S.) 399, 400. So by a delivery of the invoice with an assignment upon it there being no bill of lading in the possession of the vendor. Gardner *v.* Howland, 2 Pick. (2d ed.) 509, and notes. The same principles apply to the sale of all other chattels in the same or a similar situation. Pratt *v.* Parkman, 24 Pick. 46, 47; Gallop *v.* Newman, 7 Ib. 283; Gardner *v.* Howland, 2 Ib. 602; Gibson *v.* Stevens, 8 How. (U. S.) 384, 399, 400; McKee *v.* Garcelon, 60 Me. 167; Smith *v.* Davenport, 34 Ib. 520; Patrick *v.* Meserve, 18 N. H. 300; Dixon *v.* Buck, 42 Barb. 70; First Nat. Bank of Peoria *v.* No. Railroad, 58 N. H. 203.]

Sale of ship at sea.

Sale of cargo.

§ 697. So the indorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are

Indicia of property.

the purchaser's risk as regards fire." The next day the defendant caused each barrel to be examined by a cooper, who refilled with pickle such as needed it, and found two in which the fish had rusted, which were subsequently excepted and carried away by the plaintiff's agent. On or before May 9th, the defendant had paid $2,900 on account of the mackerel. During the night of May 9th fifty barrels were stolen. Subsequently the remaining barrels were taken away by the defendant. It was held that the sale was completed, and the loss fell on the purchaser. Chase *v.* Willard, 57 Me. 157; Hatch *v.* Lincoln, 12 Cush. 31. See Straus *v.* Minzesheimer, 78 Ill. 492. In Russell *v.* O'Brien, 127 Mass. 349, A. and B. entered into a contract for the sale and purchase of certain goods, to be shipped from a foreign port in twelve equal monthly shipments, and each shipment to be considered as a separate sale, the buyer to have the right to select the goods; sound packages to be accepted, and damaged packages, if any, to be rejected on the wharf. Eleven of the shipments were duly delivered and received. The goods composing the twelfth shipment were consigned to A. by the firm of which he had purchased them by one of a line of steamships, common carriers. The bill of lading, indorsed in blank, and the invoice, were received by A. by mail, and, upon the arrival of the steamship, were deposited by A. at the custom-house, and he received a permit stating that the duties on the goods had been paid, and giving permission to deliver them, and on payment of the freight received from the agent of the steamship line a certificate of such payment stating that the consignee was entitled to delivery. The permit and certificate, with a written order from A. addressed to the steamship, for the delivery of the goods to B., were delivered by A. to a teamster, who was employed by B., and had orders from B. to cart away from the wharves all his merchandise whenever it should arrive, and had so carted away the eleven previous shipments. The teamster presented these papers to the delivery clerk of the steamship line, who informed him that the goods in question had not come out, but would probably be out in a day or two. He had not seen the goods, but supposed they were there because they were on the bill of luding. On the next day, the goods, being still in the hold, were attached by an officer on a writ sued out by a creditor of A., and on the same day, B. paid A. for the goods. Had the goods been on the wharf, the teamster would have been allowed to remove them on giving up the papers. It was held that the jury were warranted in finding a symbolical delivery sufficient to perfect B.'s title as against the attaching creditor." Where there is a sale of property under attachment and in the hands of the officer, and the purchaser of it from the debtor cannot receive an actual possession, a *symbolical* delivery of it will be sufficient. *Ante*, § 7, and note. Klinck *v.* Kelly, 63 Barb. 622. "In such a case an actual change of the possession of the assigned property is not necessary. The deed transfers the title as between the parties to it, and the non-change of possession does not render the assignment void, as to the creditors of the assignor, for the reason that by the common law, and the statute in affirmance thereof, it is the retention of possession by the assignor, and not merely the non-delivery to the assignee, that is made the evidence of fraud in the transaction." Gilbert J. in Mumper *v.* Rushmore, 14 Hun, 591. Wheeler *v.* Nichols, 32 Me. 233; Mitchell *v.* Cunningham, 29 Ib. 376; Whipple *v.* Thayer, 16 Pick. 25; Fettyplace *v.* Dutch, 13 Ib. 388; Puckett *v.* Reed, 31 Ark. 131; Trieber *v.* Andrews, Ib. 163. So where the property is held in

Russell *v.* O'Brien.

known as representing the goods, would form a good delivery in *performance of the contract*, so as to defeat any action by the buyer against the vendor for non-delivery of the goods, according to the principles settled in Salter *v.* Woollams (*d*) and Wood *v.* Manley; (*e*) but the effect of transferring such documents of title upon

custody by a third party claiming it. First National Bank of Cairo *v.* Crocker, 111 Mass. 169, 170; *ante*, § 6, note (*a*); McKee *v.* Judd, 2 Kern. 622. A contract of sale including many different articles may be completed by a delivery of part in the name of the whole; and such delivery applies to all the goods embraced in the contract of sale, although they happen to be scattered in different places. Phelps *v.* Cutler, 4 Gray, 137; Boynton *v.* Veazie, 24 Me. 286; Chappel *v.* Marvin, 2 Aikens, 79; Shurtleff *v.* Willard, 19 Pick. 202; Legg *v.* Willard, 17 Ib. 140. Whether a delivery of part was for the whole is a fact to be determined by the jury. Pratt *v.* Chase, 40 Me. 269. It has been decided in Vermont, that there must be a substantial and visible change of possession, in order to perfect a sale of chattels as against the creditors of the vendor; Hutchins *v.* Marshall, 10 L. Rep. (N. S.) 55; and that notice to the creditors of a sale without such change of possession is of no avail, as it is but notice of an imperfect sale. Hutchins *v.* Marshall, *supra*. But see Ludwig *v.* Fuller, 17 Me. 162, in which it was held that if a party claiming title under the vendor of personal property, either as a subsequent purchaser or as attaching creditor, have notice of the prior sale before his rights accrued, he cannot allege any defects in the sale for want of a delivery. See Young *v.* Blaisdell, 60 Me. 272.]

(*d*) 2 M. & G. 650.

(*e*) 11 Ad. & E. 34. [See Van Blunt *v.* Pike, 4 Gill, 270; Adams *v.* Foley, 4 Iowa, 44; Tuxworth *v.* Moore, 9 Pick. 347, 349; Horr *v.* Barker, 8 Cal. 609; Pratt *v.* Parkman, 24 Pick. 46, 47; Hollingsworth *v.* Napier, 3 Caines, 182; Pleasants *v.* Pendleton, 6 Rand. 473; Glasgow *v.* Nicholson, 25 Mo. 29; Warren *v.* Milliken, 57 Me. 97; Cushing *v.* Breed, 14 Allen, 376; First National Bank of Cairo *v.* Crocker, 111 Mass. 163, 167; *post*, § 864, note (*l*). It was decided in First National Bank of Green Bay *v.* Dearborn, 115 Mass. 219, that the delivery, by an owner of goods, of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterwards attaches them upon a writ against the general owner. See National Bank of Cairo *v.* Crocker, 111 Mass. 163, and cases cited. So in Newcomb *v.* Boston & Lowell R. R. Corp. 115 Mass. 230, it appeared that B. sent goods by railroad from Detroit, Michigan, to Salem, Massachusetts, taking therefor a railroad receipt in which he was named as consignor and consignee; that B. indorsed on the receipt an order to deliver to C.; drew a draft on C. for the price; attached the draft to the receipt, and sent both to a bank in Massachusetts for collection; and forwarded an invoice of the goods to C., who went to the bank, accepted the draft, and afterwards sold the goods to D. A., at the request of C., and on an agreement with him that A. should sell the goods, and after deducting the draft and his commission, account to C. for the balance, paid and took up the draft with the receipt attached; and C. indorsed on the receipt an order to deliver the goods to A.; and it was thereupon held that A. had a special property in the goods; that C., until he paid the draft, had no title in the goods, and could pass none to D.; and that the carrier, on delivering them to D., was liable to an action by A. See Seymour *v.*

Effect of transfer of carrier's receipt.

Newcomb *v.* Boston & Lowell R. R.

the rights of the unpaid vendor is discussed hereafter in the chapters on Lien and Stoppage in Transitu, §§ 809 *et seq.* and §§ 862 *et seq.* The transfer of such documents would of course not be a sufficient delivery by the vendor, if the goods represented by the documents were subject to liens or charges in favor of the bailees.

Vendor not entitled to costs of labor in putting goods sold by weight and lying in bulk, into packages furnished by buyer.

Robinson *v.* The United States.

§ 698. In a case in the state of Vermont, (*f*) where wool lying in bulk on the vendor's premises was sold, payable on delivery by weight, the vendor was not allowed, in the absence of an express agreement, to recover the cost of labor, &c. in putting the wool into sacks furnished by the purchaser, the wool not having been weighed till after being put into the sacks. And in Robinson *v.* The United States (13 Wallace, 363), the supreme court of the United States held parol evidence admissible to prove, in a sale of 100,000 bushels of barley, a usage to deliver in *sacks*, not in *bulk*.

Newton, 105 Mass. 272; National Bank of Green Bay *v.* Dearborn, 115 Ib. 219; Stollenwerck *v.* Thacher, Ib. 224. See §§ 809 *et seq.* as to transfer of bills of lading and warehouse receipts.]

(*f*) Cole *v.* Kew, 20 Vt. 21.

PART III.

BUYER'S DUTIES.

CHAPTER I.

ACCEPTANCE.

	Section
Buyer must fetch goods bought	699
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But "not to measure," when bound by terms to pay before delivery	702
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Where goods do not agree with sample	705
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§ 699. THE vendor having done or tendered all that his contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he ACCEPTS, and PAYS the price. As to ACCEPTANCE, little need be said. When the vendor has tendered delivery, if there be no stipulated place, and no special agreement that the vendor is to send the goods, the buyer must fetch them; for it is settled law that the vendor need not aver nor prove in an action against the buyer anything more than his readiness and willingness to deliver on payment of the price. (*a*)

Buyer must fetch goods bought.

(*a*) Jackson *v.* Allaway, 6 M. & G. 942; Boyd *v.* Lett, 1 C. B. 222; Lawrence *v.* Knowles, 5 Bing. N. C. 399; De Medina *v.* Norman 9 M. & W. 820; Spotswood *v.* Barrow, 1 Ex. 804; Cort *v.* Ambergate Railway Company, 17 Q. B. 127; 20 L. J. Q. B. 460; Baker *v.* Firminger, 28 L. J. Ex. 130; Cutter *v.* Powell, 2 Sm. L. C. 1, and notes. [If in an action for goods sold and delivered, the plaintiff proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the defendant. Nichols *v.* Morse, 100 Mass. 523. See Pacific Iron Works *v.* Long Island R. R. Co. 62 N. Y. 272; Wright

§ 700. And if the vendee make default in fetching away goods within a *reasonable time* after the sale, upon request made by the vendor, the vendee will be liable for warehouse rent and other expenses growing out of the custody of the goods, or in an action for damages if the vendor be prejudiced by the delay. (*b*) The question of what is a reasonable time is one of fact for a jury under all the circumstances of the case. (*c*) In Jones *v.* Gibbons (*d*) it was held no defence to an action by the buyer for non-delivery "as required" that he had not requested delivery within a reasonable time. If the vendor wanted to get rid of his obligation because of unreasonable delay in taking the goods, or in requiring delivery, it was for him to offer delivery or to inquire of the buyer whether he would take the goods, and he had no right to treat the contract as rescinded by mere delay.

And is liable for default in fetching goods in reasonable time.

Reasonable time to be determined by jury.

Contract to deliver "as required."

Jones *v.* Gibbons.

§ 701. It has already been seen, in the chapter on Delivery, that the buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. (*d*[1]) He is not bound to accept goods in a closed cask which the vendor refuses to open; (*e*) nor to comply with the contract at all, but may rescind it, if the seller refuse to let him compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time; (*f*) nor to remain at his place of business after sunset on the day fixed for delivery, nor even if he happens to be there after sunset, to accept unless there be time before midnight for inspecting and receiving the goods; (*g*) nor to select the goods

Buyer has right to inspect before acceptance.

v. Weed, 6 U. C. Q. B. 140; Supple *v.* Gilmour, 5 U. C. C. P. 318.]

(*b*) Per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426; also per Bayley J. in Bloxam *v.* Sanders, *ante*, § 678; [Denman *v.* The Cherokee Iron Co. 56 Ga. 319.]

(*c*) Buddle *v.* Green, 3 H. & N. 906; 27 L. J. Ex. 33. [See Howe *v.* Huntington, 15 Me. 350; *ante*, § 684, note (*e*).]

(*d*) 8 Ex. 920.

(*d*[1]) [Pew *v.* Lawrence, 27 U. C. C. P. 402; Croninger *v.* Crocker, 62 N. Y. 151; Corrigan *v.* Sheffield, 10 Hun, 227. In Pease *v.* Copp, 67 Barb. 132, the court said that where merchandise is in its nature open to inspection it is the duty of the vendee to examine it at the time of sale, and if it is to be delivered by the vendor at a certain place it is the vendee's duty to have some person at the place of delivery to inspect it before it is transported to some other place.]

Duty of vendee to examine goods delivered.

(*e*) Isherwood *v.* Whitmore, 10 M. & W. 757; 11 M. & W. 347.

(*f*) Lorymer *v.* Smith, 1 B. & C. 1; Toulmin *v.* Headley, 2 C. & K. 157.

(*g*) Startup *v.* McDonald, 6 M. & G. 593.

bought out of a larger quantity, or a mixed lot that the vendor has sent him. (*h*) In a word, as delivery and acceptance are concurrent conditions, it is enough to say that the vendee's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor. Thus, in a sale of rice in "double bags," the purchaser was held not bound to accept the goods in single bags, in Makin *v.* London Rice Mills Co. (20 L. T. N. S. 705). In this case there was proof that this mode of packing rice made a difference in the sale.

Makin *v.* London Rice Mills Co.

§ 702. But in Pettitt *v.* Mitchell (*i*) it was held that the buyer had not the right to *measure* goods sold *by the yard* under the special circumstances of the case. The sale was at auction, and the conditions were that the purchasers were to pay an immediate deposit of 5*s.* in the pound in part payment; that the lots must be taken away, with all "faults, imperfections, or errors of description," by the following Saturday; that the remainder of the purchase-money was to be paid *before delivery:* and the catalogue also announced that "the stock comprised in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue." The goods remained open for public inspection two days *before* the sale. The defendant bought several lots, and went on the proper day to take the goods, but claimed a right to inspect and measure them *before paying*, which was refused. The action was for damages in special assumpsit, and the defendant pleaded a breach by plaintiff of conditions precedent, to wit, that the purchaser should be entitled "to *inspect and examine* the lot purchased by him, for the purpose of ascertaining whether the same was of the proper *quantity*, *quality*, *and description*," &c. &c.; and in another plea, breach of a condition that the purchaser "should be entitled to *measure* the lot." Held that the law did not imply the conditions stated in the pleas; and that under the contract as made the buyer was bound to pay before delivery, but that he had the right *after delivery*, and *before taking away the goods*, to measure them and claim an allowance for deficient measure, if any.

Right to measure goods sold by the yard. Pettitt *v.* Mitchell.

(*h*) Dixon *v.* Fletcher, 3 M. & W. 146; Hart *v.* Mills, 15 M. & W. 85; Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; Levy *v.* Green, 8 E. & B. 575; 1 E. & E. 969; 27 L. J. Q. B. 111; 28 L. J. Q. B. 319.

(*i*) 4 M. & G. 819; [Rimmer *v.* Ruston, 14 Low. Can. Jur. 325.]

§ 703. When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing and acceptance another. (*k*) But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, (*l*) or if any act be done by the buyer which he would have no right to do unless he were owner of the goods. (*m*) The following cases illustrate these rules, in addition to the authorities reviewed *ante*, §§ 141 *et seq.* In Parker *v.* Palmer (*n*) the purchaser, after seeing fresh samples drawn from the bulk of rice purchased by him, which were inferior in quality to the original sample by which he bought it, offered the rice for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but held, that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score. In Sanders *v.* Jameson (*o*) it was proven that by the custom of the Liverpool corn market the buyer was only allowed one day for objecting that corn sold was not equal to sample, after which delay the right of rejection was lost. Rolfe B. held that this was a reasonable usage, binding on the purchaser.

Mere receipt is not acceptance.

But becomes so by delay in rejecting, or by act of ownership.

Parker *v.* Palmer.

Sanders *v.* Jameson.

§ 704. In Chapman *v.* Morton (*p*) a cargo of oil-cake was shipped by the plaintiffs from Dieppe to the defendant, a mer-

(*k*) [See Fitzsimmons *v.* Woodruff, 1 N. Y. Sup. Ct. R. 3, 4; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Brown *v.* Corp. of Lindsay, 35 U. C. Q. B. 509. And a receipt and acceptance of part of the goods does not relieve the vendor from his duty to deliver the rest of the goods according to the contract quality. Kipp *v.* Meyer, 5 Hun. 111.]

(*l*) Bianchi *v.* Nash, 1 M. & W. 545; Beverley *v.* Lincoln Gas Light Company, 6 Ad. & E. 829; Conston *v.* Chapman, *ante*, § 652; L. R. 2 Sc. App. 250; [Treadwell *v.* Reynolds, 39 Conn. 31; 1 Chitty Contr. (11th Am. ed.) 651; Cox *v.* Jones, 24 U. C. Q. B. 81; Gordon *v.* Waterous, 36 Ib. 321; Pennell *v.* McAfferty, 84 Ill. 364; Doane *v.* Dunham, 79 Ib. 131; Hirshhorn *v.* Stewart, 49 Iowa, 418; Delamater *v.* Chappell, 48 Md. 244; Stafford *v.* Pooler, 67 Barb. 143: Greenthal *v.* Schneider, 52 How. Pr. 133; Coventry *v.* M'Eniry, 13 Ir. C. L. R. 160; Lewis *v.* Gibbons, Bl., D. & Osb. (Ir.) 62; Henkel *v.* Welsh, 41 Mich. 664; Shipman *v.* Graves, Ib. 675; Boughton *v.* Standish, 48 Vt. 594; Water's Heater Co. *v.* Mansfield, Ib. 378.]

(*m*) [See Bogue *v.* Newcomb, 1 N. Y. Sup. Ct. 251; Neaffie *v.* Hart, 4 Lansing, 4; Hamilton *v.* Myles, 24 U. C. C. P. 309; Watkins *v.* Paine, 57 Ga. 50; Wilds *v.* Smith, 2 Ont. App. 8.]

(*n*) 4 B. & A. 387.

(*o*) 2 C. & K. 557.

(*p*) 11 M. & W. 534; [Hayner *v.* Sherrer, 2 Bradwell (Ill.), 536.]

chant at Wisbech, in Cambridgeshire. On its arrival, in December, 1841, the defendant made complaint that it did not correspond with the sample. He, however, landed a part for the purpose of examination, and considering it not equal to sample, landed the whole, lodged it in the public granary, and on the 24th January, 1842, wrote to the plaintiffs that it lay there at their risk, and required them to take it back, which they refused to do. Some intervening negotiations took place without result, and in May, 1842, the defendant wrote to the plaintiffs that the oil-cake was lying in the granary at their disposal, and that if no directions were given by them, he would sell it for the best price he could get, and apply the proceeds in part satisfaction of his damage. The defendant had paid for the cargo by acceptances, before its arrival, and had taken up these acceptances, which were held by third parties. The plaintiffs replied that they considered the transaction closed. In July following, the defendant advertised the cargo for sale in *his own name*, and sold it in *his own name*, to a third person. On these facts it was held that the defendant had accepted the cargo. Lord Abinger said: "We must judge of men's intentions by their acts, and not by expressions in letters, which are contrary to their acts. If the defendant intended to repudiate the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called on the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs." Parke B. thought that there was no acceptance by the defendant down to the month of May, "but the subsequent circumstances of his offering to sell, and selling the cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him which may be considered as having been again offered to him by the plaintiffs' letter in the month of May." Anderson and Rolfe BB. concurred. (*q*)

Chapman v. Morton.

(*q*) [In an action to recover for goods alleged to have been sold by the plaintiff to the defendant, the evidence did not establish an assent by the defendant to the offer of the plaintiff, who sent the goods to the defendant's

Gowing v. Knowles.

Refusal to accept where goods do not agree with sample.

When acceptance based on deceptive sample may be retracted.

§ 705. The question whether, on the sale of specific goods, the purchaser may refuse acceptance because they do not correspond with sample, is discussed *post*, book V. part II. ch. i. The cases of Heilbutt *v.* Hickson, *ante*, § 651, and Mody *v.* Gregson, *ante*, § 667, are authorities to show under what circumstances an acceptance may be retracted, if the sample itself is deceptive.

warehouse, where they were receipted for by a boy in his employment and received by his servants without his knowledge. A bill upon the terms of the plaintiff's offer was sent with the goods, but there was no evidence that it was received by the defendant or his agents. A part of the goods were examined at the defendant's warehouse by his examiner. The defendant, who bought other similar goods of the plaintiff, went to the examiner's room almost daily to look at goods, and the goods were in the store where they might have been seen by the defendant. The defendant testified that he did not remember whether the goods in question were or were not included in the claim made by him upon an insurance company for loss on his store and its contents, which were destroyed by fire while the goods were remaining in the store; and it was held that the evidence did not establish such a subsequent acceptance of the goods by the defendant as to warrant the jury in finding a contract of sale. Gowing *v.* Knowles, 118 Mass. 232.]

CHAPTER II.

PAYMENT AND TENDER.

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Payment absolute or conditional.

§ 706. THE chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on. The terms of the sale may require, 1st, an *absolute* payment in cash, and this is always implied when nothing is said; or, 2dly, a *conditional* payment in promissory notes or acceptances; or 3dly, it may be agreed that credit is given for a stipulated time without payment, either absolute or conditional. In the first two cases, the buyer is bound to pay, if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last case he has a right to demand possession of the goods without payment.

At common law, a man bound

§ 707. The rule of the common law is that a man bound to pay has no right to delay till demand made, but must pay as soon as the money is due, under peril of being

sued: (*a*) and it has already been stated (*a*[1]) that the vendor, in the absence of a stipulation to the contrary, is not bound to send or carry the goods, nor to allege or prove in an action against the buyer anything more than a readiness and willingness to deliver. It therefore follows that as soon as a sale is completed by mutual assent, and no time given, the buyer ought at once to make payment, if the goods are ready for delivery, without waiting for a demand, and that an action is maintainable against him for the price if he fail to do so. (*b*)

to pay is not entitled to wait for demand.

§ 708. In cases where the property has passed, the buyer must pay the price according to the terms agreed on, even if the goods are destroyed in the vendor's possession, as has already been pointed out, *ante*, §§ 313 *et seq.* The goods are at the buyer's risk: they are *his* goods from the moment the property passes, and the price is due to the vendor, who simply holds the goods as bailee for the buyer in such a case. (*c*) And even where the property has not passed, and the price is to become payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery. (*d*) (*Ante*, § 328.) In Briggs *v.* Calverley (*e*) the vendor attempted to go one step farther, and to reject a tender of the price because not made till after he had instructed his attorney to sue out a *latitat* against the buyer, and after the attorney had applied for the writ, but before the writ was actually issued. Lord Kenyon C. J. said it was impossible to contend that the tender came too late, "having been made before the commencement of the suit." (*f*)

Buyer must pay even if goods destroyed before he gets delivery, where property has passed to him,

and, even where property has not passed, if he has assumed risk of delivery.

Tender valid before writ issued.

§ 709. But the contract sometimes provides that the payment is only to be made after demand or notice, and when this is the case, a reasonable time must be allowed for the

Where price is payable

(*a*) [Thomas *v.* Mallory, 6 U. C. Q. B. 521; Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa, 538; Wilcox *v.* Pillow, 28 U. C. C. P. 100.]

(*a*[1]) *Ante*, § 679.

(*b*) 1 Wms. Saunders, 33, note (2); [Maddock *v.* Stock, 4 U. C. Q. B. 118; Brandon Manuf. Co. *v.* Morse, 48 Vt. 322.]

(*c*) Rugg *v.* Minett, 11 East, 210; *ante*, § 322; [1 Chitty Contr. (11th Am. ed.) 518, and note (*k*), 519.]

(*d*) Castle *v.* Playford, L. R. 5 Ex. 165; 7 Ex. 98; Martineau *v.* Kitching, L. R. 7 Q. B. 436; *ante*, §§ 328, 329.

(*e*) 8 T. R. 629.

(*f*) [See 2 Chitty Contr. (11th Am. ed.) 1191, and note (*q*).]

only after demand, reasonable time allowed to fetch the money.

buyer to fetch the money. (f^1) In Brighty *v.* Norton, (g) where a bill of sale provided that payment should be made in ten years, or "at such earlier day or time as the defendant should appoint by notice in writing sent by post, or delivered to the plaintiff or left at his house or last place of abode," it was held that a notice served at noon to make payment in half an hour was not a reasonable notice, the judges concurring in this, though agreeing that it was difficult to say in general what would be a reasonable time. In Toms *v.* Wilson (h) it was held by the queen's bench, and in error by the exchequer chamber, that a promise to pay "immediately on demand" could not be construed so as to deprive the debtor of an opportunity to get the money which he may have in bank or near at hand; and Blackburn J. said that "if a condition is to be performed immediately, or on demand, that means that a reasonable time must be given, according to the nature of the thing to be done." (i) And in Massey *v.* Sladen, (k) where the promise was to pay "instantly on demand, and without delay on any pretence whatever," and demand might be made *by giving or leaving verbal or written notice for him at his place of business*, held that in the party's absence, reasonable time must be given for the notice left at his place of business to reach him.

Brighty *v.* Norton.

Toms *v.* Wilson.

Massey *v.* Sladen.

§ 710. As to the mode of payment, the buyer will be discharged if he make payment in accordance with the vendor's request, even if the money never reach the vendor's

Payment good if made in

(f^1) [The defendants sold to the plaintiffs a quantity of coal, the price being payable on receipt of the bill of lading. The bill of lading was presented at the plaintiffs' office in New York on Saturday, at five minutes before three P. M., and a check for the purchase-money was demanded. This was the first notice the plaintiffs had of the shipment of the coal. Some controversy ensued between the parties as to allowing a certain set-off claimed by the plaintiffs. The plaintiffs finally offered the defendants their check for the amount of the purchase-money, which the defendants refused to receive, saying that it was after three o'clock, at which time the banks closed. On Monday morning following the plaintiffs offered the defendants the money for the amount of the bill, which defendants declined to receive, and refused to deliver the coal. It was held that the plaintiffs were entitled to a reasonable time after the refusal to receive the check to procure the money, and that until morning of the next banking day was not unreasonable. Bass *v.* White, 65 N. Y. 565.]

Vendee allowed reasonable time to get money after demand.

Bass *v.* White.

(g) 3 B. & S. 305; 32 L. J. Q. B. 38.

(h) 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.

(i) Com. Dig. tit. Conditions, G. 5.

(k) L. R. 4 Ex. 13.

hands; as if it be transmitted by post in compliance with the vendor's directions and be lost or stolen. (*l*) But Lord Kenyon held that a direction to send by post was not complied with by the delivery of a letter, with the remittances inclosed, to the bellman or postman in the street, but should have been put into the general post-office or a receiving office authorized to receive letters with money. (*m*) In Caine *v.* Coulton (*n*) the plaintiff's attorney wrote to the defendant to *remit* the balance of the account due to the plaintiff, with 13*s.* 4*d.* costs. The defendant remitted by post a banker's bill payable at sight for the amount of the account without the costs. The next day the attorney wrote refusing to accept the bill unless the 13*s.* 4*d.* were also remitted. The defendant refused, and action was brought; but the attorney kept the banker's bill, although he did not cash it. The jury found that the attorney had waived any objection to the remittance not having been made in cash, and only objected because the costs were not paid. Held that the payment was good, on the ground that it was the attorney's duty to return the banker's bill if he did not choose to receive it in payment. Martin B. said of the attorney's conduct: "He says one thing, but he does another; he kept the banker's draft. It seems to me to be common sense to look at what is done, and not to what is said." This case was distinguished by Pollock C. B. in giving his decision, from Gordon *v.* Strange (*o*) and Hough *v.* May, (*p*) which will presently be noticed, on the ground that in this case the creditor ordered the money *remitted*, which the learned chief baron said was of the very essence of the question. In Eyles *v.* Ellis (*q*) both parties kept an account at the same banker's, and the plaintiff directed the amount to be paid there. The defendant ordered the banker

mode requested by vendor.

Money sent by post.

Caine *v.* Coulton.

Eyles *v.* Ellis.

(*l*) Warwick *v.* Noakes, Peake, 68, 98; [Wakefield *v.* Lithgow, 3 Mass. 249. But, on the other hand, in Crane *v.* Pratt, 12 Gray, 348, 349, Merrick. J. said: "It appears to be perfectly well settled that if money is transmitted in a letter through the post-office by a debtor to his creditor, without his previous direction or assent, either expressly given or to be implied from his conduct, the usual course of business, or particular facts and circumstances found, it remains, until it reaches its destination and is actually received, entirely at the risk of the owner." Gurney *v.* Howe, 9 Gray, 404, 408.]

Money sent by mail, at whose risk.

(*m*) Hawkins *v.* Rutt, Peake, 186, 248; [Williams *v.* Carpenter, 36 Ala. 9.]

(*n*) 1 H. & C. 764; 32 L. J. Ex. 97. And see Hardman *v.* Bellhouse, 9 M. & W. 596.

(*o*) 1 Ex. 477.

(*p*) 4 Ad. & E. 954.

(*q*) 4 Bing. 112.

to put the amount to the plaintiff's credit on Thursday, which was done, and the defendant so wrote to the plaintiff on Friday, but the plaintiff did not get the letter till Sunday. On Saturday the banker failed. Held a good payment, although the defendant, when the money was transferred on the banker's books, had already overdrawn his account. (q^1) In Gordon *v.* Strange (r) the defendant sent a post-office order in payment of a debt due the plaintiff, *without any direction* from the plaintiff. The order, by mistake, was made payable to Frederick Gordon instead of Francis Gordon. The plaintiff did not get it cashed, although he was told by the person who kept the post-office that the money would be paid to him if he would sign the name of the payee, as there was no one of the same name in the neighborhood. The plaintiff brought action, without returning the post-office order. The sheriff told the jury that the plaintiff having kept the order, with a knowledge that he might get the money for it at any time, was evidence of payment, although he was not bound, when he first received it, to put any name on it but his own. Held a wrong direction; "the defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him."

Gordon *v.* Strange.

§ 711. If the buyer has stated an account with the vendor, in which the vendor has, by mutual agreement, received credit for the amount of the goods sold, as a set-off against items admitted to be due by the vendor to the buyer, this is equivalent to an actual cash payment by the buyer of the price of the goods. The principle was thus explained by Lord Campbell, in a case which involved the necessity of a stamp to a written agreement, offered in proof of a plea of payment. (s) "The way in which an agreement, to set one debt against another of equal amount and discharge both, proves a plea of payment, is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the cross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect, because, in contemplation of law, a pecuniary transaction is supposed to have taken place by which each

Set-off in account stated, same as payment.

(q^1) [Platt *v.* McFaul, 4 U. C. C. P. 293.]

(r) 1 Ex. 477.

(s) Livingstone *v.* Whiting, 15 Q. B. 722; 19 L. J. Q. B. 528.

debt was then paid." A written memorandum of such a transaction was therefore held to be a receipt requiring a stamp. The cases establishing the above principles as to accounts stated are quite numerous; (*t*) but the rule is not applicable to ordinary accounts current, with no agreement to set off the items. (*u*)

Rule not applicable to ordinary accounts current.

§ 712. In the absence of any of these special modes of payment, it is the buyer's duty, under the contract, to make actual payment in cash, or a tender of payment, which is as much a performance and discharge of his duty as an actual payment.

Tender is equivalent to payment.

§ 713. A tender is only validly made when the buyer produces and offers to the vendor an amount of *money equal* to the price of the goods. (*x*) But the actual production of the money may be dispensed with by the vendor. (*y*) The courts, however, have been rigorous in requiring proof of a dispensation with the production of the money. (*z*) In Dickinson *v.* Shee (*a*) the debtor went to the attorney of the creditor, saying he was ready to pay the balance of the account, 5*l.* 5*s.*, and the attorney said he could not take that sum, the claim being above 8*l.* Held, not a good tender, because the money was not produced, and the defendant had not dispensed with the production; "if he saw it produced, he might be induced to accept of it." In Leatherdale *v.* Sweepstone (*b*) the defendant offered to pay the plaintiff, and put his hand into his pocket, but before the money could be produced the plaintiff left the room. Held, by

Requisites of valid tender.

Dickinson *v.* Shee.

Waiver of production of the money.

Leatherdale *v.* Sweepstone.

(*t*) Owens *v.* Denton, 1 Cr., M. & R. 711; Callendar *v.* Howard, 10 C. B. 290; Ashby *v.* James, 11 M. & W. 542; McKellar *v.* Wallace, 8 Moore P. C. 378; Smith *v.* Page, 15 M. & W. 683; Sutton *v.* Page, 3 C. B. 204; Clark *v.* Alexander, 8 Scott N. R. 147; Scholey *v.* Walton, 12 M. & W. 510; Worthington *v.* Grimsditch, 7 Q. B. 479; Sturdy *v.* Arnaud, 3 T. R. 599.

(*u*) Cottam *v.* Partridge, 4 M. & G. 271; and see *ante*, § 193.

(*x*) [See Sargent *v.* Graham, 5 N. H. 440; Matheson *v.* Kelly, 24 U. C. C. P. 598.]

(*y*) [See Sargent *v.* Graham, 5 N. H. 440, 441. But a mere offer to pay, it not appearing that the party had the money ready, does not amount to a tender. Fuller *v.* Little, 7 N. H. 535; Sargent *v.* Graham, 5 Ib. 440; Breed *v.* Hurd, 6 Pick. 356; Wheeler *v.* Knaggs, 8 Ohio, 169; Bakeman *v.* Pooler, 15 Wend. 637; Brown *v.* Gilmore, 8 Greenl. 107; Cashman *v.* Martin, 50 How. Pr. 337.]

(*z*) [See 2 Chitty Contr. (11th Am. ed.) 1191, and note (*x*).]

(*a*) 4 Esp. 67; [Knight *v.* Abbott, 30 Vt. 577.]

(*b*) 3 C. & P. 342.

Lord Tenterden, to be no tender. In Thomas *v.* Evans (*c*) the plaintiff called at his attorney's office to receive money, and was told by the clerk that he had 10*l.* for him, which had been left by the attorney to be paid to him. The plaintiff, who wrongly supposed that a larger sum had been collected for him, said he would not receive the 10*l.* The clerk did not produce the money. Held, no tender. In Finch *v.* Brook, (*d*) in the common pleas, in 1834, the defendant's attorney called on the plaintiff and said: "I have come to pay you 1*l.* 12*s.* 5*d.*, which the defendant owes you," and put his hand in his pocket; whereupon the plaintiff said: "I can't take it; the matter is now in the hands of my attorney." The money was not produced. Held, no tender. The facts were found on a special verdict, and the judges said that the jury, on the facts, would have been justified in finding a dispensation, and the court would not have interfered. (*e*) Vaughan J. said that Sir James Mansfield, who had held, in Lockyer *v.* Jones, (*f*) that the creditor could not object to the non-production of the money if at the time of the tender he had refused to receive it on the ground that he claimed a larger amount, (*g*) had in a subsequent case said, "that great importance was attached to the production of the money, as the sight of it might tempt the creditor to yield."

Thomas *v.* Evans.

Finch *v.* Brook.

Lockyer *v.* Jones.

§ 714. The following are cases in which the courts have held the acts or sayings of the creditor sufficient to dispense with the production of the money: Douglas *v.* Patrick, (*h*) where the debtor said he had eight guineas and a half in his pocket which he had brought for the purpose of satisfying the demand, and the creditor said "he need not give himself the trouble of offering it, for he would not take it, as the matter was in the hands of his attorney;" Read *v.* Goldring, (*i*) where the debtor pulled out his pocket-book and told the creditor, whom he met in the street, that if he would go into a neighboring public-house with him, he would pay him 4*l.* 10*s.*, and the creditor said "he would not take

Examples of sufficient waivers.

Douglas *v.* Patrick.

Read *v.* Goldring.

(*c*) 10 East, 101.

(*d*) 1 Bing. N. C. 253.

(*e*) [See Ashburn *v.* Poulter, 35 Conn. 553.]

(*f*) Peake, 239, note.

(*g*) [See Dunham *v.* Jackson, 6 Wend. 22.]

(*h*) 3 T. R. 683.

(*i*) 2 M. & S. 86.

it;" (*j*) Alexander *v.* Brown, (*k*) where the person who made a tender of 29*l.* 19*s.* 8*d.* had in his hand two bank-notes twisted up and inclosing four sovereigns and 19*s.* 8*d.* in change, making the precise sum, and told the plaintiff what it was, but did not open it before him, and it was objected that he ought to have *shown* him the money; Best C. J. saying in this last case, that if the debtor had not mentioned the amount to the creditor, the tender would not have been sufficient. In Harding *v.* Davies (*l*) the proof was that the defendant, at her own house, offered to pay the plaintiff 10*l.*, saying that she would go up-stairs and fetch it, and the plaintiff said "she need not trouble herself for he could not take it." Held by Best C. J. to be a good tender, (*m*) the learned chief justice adding, however, "I agree that it would not do if a man said, I have got the money, but must go a mile to fetch it."

Alexander *v.* Brown.

Harding *v.* Davies.

§ 715. The tender must of course be made in such a manner as will enable the creditor to examine and count the money, but it may be produced in a purse or bag ready to be counted by the creditor if he choose, provided the sum be the correct amount. (*n*) The tender must, at common law, be made in the current coin of the realm, (*o*) or foreign money legally made current by proclama-

Tender must be so made that creditor can examine and count the money.

(*j*) [In Hazard *v.* Loring, 10 Cush. 267, 269, Bigelow J. said: "The production of the money, and the actual offer of it to the creditor, is dispensed with, if the party is ready and willing to pay it, and is about to produce it, but is prevented from so doing by a declaration on the part of the creditor that he will not or cannot receive it. 2 Greenl. Ev. § 603; Barker *v.* Parkenhorn, 2 Wash. C. C. 142; Blight *v.* Asbley, Peters C. C. 15." Parker *v.* Perkins, 8 Cush. 318. So if a person is prevented from making a tender by any contrivance or evasion of the party to whom the money is to be paid, it will be equivalent to a tender, or a sufficient excuse for not making it. Southworth *v.* Smith, 7 Cush. 391, 393; Borden *v.* Borden, 5 Mass. 67, 74; Gilmore *v.* Holt, 4 Pick. 258, 264; Tasker *v.* Bartlett, 5 Cush. 359; Hazard *v.* Loring, 10 Ib. 267; Sands *v.* Lyon, 18 Vt. 18; Thorne *v.* Mosher, 5 C. E. Green, 257.]

When production of money dispensed with.

(*k*) 1 C. & P. 288.

(*l*) 2 C. & P. 77. And see Jones *v.* Cliff, 1 C. & M. 540; Ex parte Danks, 2 De G., M. & G. 936; 22 L. J. Bank. 73; Jackson *v.* Jacob, 3 Bing. N. C. 869.

(*m*) [See the remarks upon this case in Sargent *v.* Graham, 5 N. H. 440, 442, 443, and the reference to it in Breed *v.* Hurd, 6 Pick. 356.]

(*n*) Isherwood *v.* Whitmore, 11 M. & W. 347. [He who makes a tender is not bound to count out the money; it is enough if the money be there, and offered to the party; it is for the payee to tell the money. Wheeler *v.* Knaggs, 8 Ohio, 169; Behaly *v.* Hatch, Walker (Miss.), 369; Breed *v.* Hurd, 6 Pick. 356; Milburn *v.* Milburn, 4 U. C. Q. B. 179.]

(*o*) Wade's case, 5 Rep. 114 a.

tion. (*p*) And by "The Coinage Act, 1870," s. 4, a tender of payment in coin is declared to be legal: "In the case of gold coins for a payment of any amount; in the case of silver coins for a payment not exceeding forty shillings; in the case of bronze coins for a payment not exceeding one shilling." By the 7th section of the same act, all contracts, sales, payments, &c. "shall be made, executed, entered into, done, and had according to the coins which are current and legal tender pursuant to this act, and not otherwise, unless the same be made, executed, entered into, done, or had according to the currency of some British possession, or some foreign state." By the 3 & 4 W. 4, c. 98, s. 6, tenders are valid for all sums in excess of five pounds, if made in notes of the Bank of England, payable to bearer on demand, so long as the bank continues to pay on demand its notes in legal coin. (*q*)

In what coin tender must be made.

Bank of England notes.

§ 716. When the tender is made in a currency different from that required by the law, the courts are much less rigorous in inferring a dispensation than in cases where no money is produced. If the buyer should offer his vendor a country bank-note, or a check, or silver coin for a debt exceeding 40*s*., and the vendor shall refuse to receive payment, alleging any other reason than the *quality* of the tender; as if he should say that more was due him, and he would not accept the *amount* tendered, the inference would be readily admitted that he dispensed the buyer from offering the coin or Bank of England notes strictly requisite to make the tender valid. In Polglass *v.* Oliver (*r*) all the earlier cases were reviewed, and it was held that a tender in country bank-notes, where the plaintiff made no objection on that account, but said, "I will not take it; I claim for the last cargo of soap," was a

Waiver of objection to the kind of money offered easily inferred.

Polglass *v.* Oliver.

(*p*) Bac. Abr. Tender, B. 2; Wade's case, 5 Rep. 114; Cases of Mixed Moneys, Davys, 18.

(*q*) [As to the legal tender acts declaring certain United States notes a legal tender in payment of debts, see Bronson *v.* Rodes, 7 Wall. 229; Butler *v.* Horwitz, Ib. 258; Hepburn *v.* Griswold, 8 Ib. 603; Knox *v.* Lee, and Parker *v.* Davis, 12 Ib. 457; 4 Am. Law Rev. 586; Belloc *v.* Davis, 38 Cal. 242; Rankin *v.* Demott, 61 Penn. St. 263; O'Neil *v.* McKewn, 1 S. Car. 147; Breen *v.* Dewey, 16 Minn. 136; Barringer *v.* Fisher, 45 Miss. 200; Townsend *v.* Jennison, 44 Vt. 315; Kellogg *v.* Page, Ib. 356; Carter *v.* Cox, 44 Miss. 148; Crawford *v.* Beard, 13 U. C. C. P. 35, and 14 Ib. 87; Judson *v.* Griffin, 13 Ib. 350.]

(*r*) 2 Cr. & J. 15. See, also, Jones *v.* Arthur, 8 Dowl. P. C. 442; Caine *v.* Coulton, 1 H. & C. 764; 32 L. J. Ex. 97; *ante*, § 710.

valid tender. Bayley B. gave as a reason, that "if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money, and making a good and valid tender. But by not doing so, and claiming a larger sum, you delude him." (*s*)

§ 717. A tender of more than is due is a good tender, for *omne majus continet in se minus*, and the creditor ought to take out of the sum tendered him as much as is due to him. (*t*) A tender therefore, of 20*l.* 9*s.* 6*d.* in bank-notes and silver, proves a plea of tender of 20*l.* (*u*) So, where the debtor put down 150 sovereigns on the attorney's desk, and told him to take out of it what was due to him, held a good tender for 108*l.* (*x*)

Tender of more than is due.

§ 718. But a tender of a larger sum than is due, with a demand for change, is not a good tender, if the creditor objects to giving change. In Watkins *v.* Robb, (*y*) the proof in support of a plea of tender of 4*l.* 19*s.* 6*d.* was that the debtor tendered a five pound note, and demanded sixpence change, but Buller J. was of opinion that the creditor was not bound to give change, and held the tender bad. So a tender of a five pound note in payment of 3*l.* 10*s.*, with a demand for the change, was held no tender by Le Blanc J. in Betterbee *v.* Davis, (*z*) the learned judge saying, that if that was

Tender with demand for change.

Watkins *v.* Robb.

Betterbee *v.* Davis.

(*s*) [Bank bills cannot be tendered as cash; Coxe *v.* State Bank at Trenton, 3 Halst. 72; Moody *v.* Mahurin, 4 N. H. 296; Donaldson *v.* Benton, 4 Dev. & Bat. 435; even to the bank which issues them. Hallowell & Augusta Bank *v.* Howard, 13 Mass. 235; Coxe *v.* State Bank at Trenton, 3 Halst. 72. But they will considered a good tender unless objection is made to them on that account; Snow *v.* Perry, 9 Pick. 542; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333; Wheeler *v.* Knaggs, 8 Ohio, 169; Warren *v.* Mains, 7 John. 476; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Williams *v.* Rorer, 7 Ib. 556; Seawell *v.* Henry, 6 Ala. 226; Noe *v.* Hodges, 3 Humph. 162; Ball *v.* Stanley, 5 Yerger, 199; Brown *v.* Dysinger, 1 Rawle, 408; Towson *v.* Havre de Grace Bank, 6 Harr. & J. 53; Fosdick *v.* Van Husan, 21 Mich. 567; Harding *v.* Commercial Loan Co. 84 Ill. 251; even though the tender be made to a clerk or agent having authority to receive it. Hoyt *v.* Byrnes, 2 Fairf. 475. A waiver of a tender in coin may be made by an agreement to accept bank bills before day of payment. Warren *v.* Mains, 7 John. 476. A tender of a check is not good. Grussy *v.* Schneider, 50 How. Pr. 134.]

Tender of bank bill.

(*t*) 2 Wade's case, 3d resolution, 5 Rep. 115.

(*u*) Dean *v.* James, 4 B. & Ad. 546.

(*x*) Bevens *v.* Rees, 5 M. & W. 306; and see Douglas *v.* Patrick, 3 T. R. 683; Black *v.* Smith, Peake, 88, 121. [A valid tender may be made though it be of a gross amount on several demands, if enough be tendered to pay them all. Thetford *v.* Hubbard, 22 Vt. 440.]

(*y*) 2 Esp. 711.

(*z*) 3 Camp. 70. See Robinson *v.* Cook, 6 Taunt. 336.

good, a tender of a 50,000*l.* note, with demand for change, would be equally good. But in Tadman *v.* Lubbock, decided in M. Term, 1824 (and reported in the note to Blow *v.* Russell), (*a*) where a tender of 1*l.* 13*s.* was pleaded, the proof was that the party offered two sovereigns and asked for change, and that the other refused the tender, *on the ground* that more than 1*l.* 13*s.* was due. The court of king's bench held this a good tender.

Tadman *v.* Lubbock.

§ 719. It is now settled that there can be no valid tender of part of an *entire* debt, though a debtor may make a valid tender of one of several distinct debts if he specify the debt on account of which he makes the tender; and if he makes a tender without specifying which of several debts is the subject of the tender, and the amount tendered be insufficient to cover all, it will not be good for *any*. In Dixon *v.* Clarke (*b*) the authorities were all reviewed, and Wilde C. J. gave a very lucid exposition of the whole subject of tender, from which the following passages are extracted: "The argument further involved the general question, whether a tender of part of an entire debt is good. . . . . On consideration, we are of opinion, upon principle, that such a tender is bad. In actions of debt and assumpsit the principle of the plea of tender in our apprehension is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain his plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action in the sense that he will recover judgment for his cost of defence against the plaintiff, in which respect the plea of tender is essentially different from that of payment of money into court. And as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. With respect to the aver-

No valid tender of part of entire debt.

Dixon *v.* Clarke.

(*a*) 1 C. & P. 366. (*b*) 5 C. B. 365.

ment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an *entire* performance of the contract was demanded, and refused *at any time*, when by the terms of it he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made, and refused, a subsequent tender of part of it is bad, *notwithstanding that by part payment or other means the debt may have been reduced in the interim to the sum tendered.* And this is the principle of the decision in Cotton *v.* Godwin. (*c*) If, however, the demand was of a larger sum than that originally due under the contract, a refusal to pay it would *not* falsify the *toujours prist*, even though the amount demanded were made up of the sum due under the contract and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of Brandon *v.* Newington (*d*) and Hesketh *v.* Fawcett, (*e*) which appear to overrule Tyler *v.* Bland. (*f*) This principle, however, we think is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *toujours prist* as to *each.* But besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant so far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a *future day certain*, this branch of the plea can only be satisfied by *alleging a tender on the very day.* And this is the principle of the decisions of Hume *v.* Peploe (*g*) and Poole *v.* Tumbridge. (*h*) It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist.* Consequently, a plea by the acceptor of a bill or the maker of a note, of a performance *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay,

Cotton *v.* Godwin.

(*c*) 7 M. & W. 147. [See Thetford *v.* Hubbard, 22 Vt. 440.]
(*d*) 3 Q. B. 915.
(*e*) 11 M. & W. 356.
(*f*) 9 M. & W. 338.
(*g*) 8 East, 168.
(*h*) 2 M. & W. 223.

not only from the time of the tender (as the plea was in Hume *v.* Peploe), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by *alleging a tender of the whole sum* due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow."

§ 720. This thorough exposition of the subject was followed by the further decision in Hardingham *v.* Allen, (*i*) by the same court, in the same year, deciding that where a demand was made of 1*l.* 7*s.* for several matters, including 10*s.* for a particular contract, a tender of 19*s.* 6*d.*, without specifying the appropriation to be made of it, did not sustain a plea of tender of 10*s.* on the particular contract. In Searles *v.* Sadgrave (*k*) the defendant pleaded as to 55*l.* 6*s.*, parcel, &c. tender. Plaintiff replied that a larger sum was due at the time of the tender than the amount tendered, as *one entire sum* and on *one entire contract*, which larger sum the plaintiff demanded at the time of the tender, and the defendant refused. Rejoinder, that though a larger sum was due at the time of making the tender, yet before making the tender the plaintiff was indebted to the defendant in an amount equal to the whole of the larger sum, except the said sum of 55*l.* 6*s.*, parcel, &c. for money payable, &c. which amount, &c. the defendant was and still is *ready to set off*, &c. Demurrer and joinder. The demurrer was sustained, Lord Campbell saying that the statute 2 Geo. 2, c. 22, did not cover the case, and that the defendant was bound to plead his set-off, and pay the residue into court instead of tendering it. (*l*) The defendant was, therefore, allowed to amend on the usual terms.

Hardingham *v.* Allen.

Searles *v.* Sadgrave.

Tender of balance due, after set-off, not allowable.

§ 721. A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object. (*m*) Where there is no ambiguity in the language of the debtor, it is a question of law for the court

Tender must be unconditional.

(*i*) 5 C. B. 793.

(*k*) 5 E. & B. 639; 25 L. J. Q. B. 15. See, also, Robinson *v.* Ward, 8 Q. B. 920; Phillpotts *v.* Clifton, 10 W. R. Ex. 135.

(*l*) [A plea of tender is not supported by proving an offer of a promissory note due from the plaintiff to the defendant. Cary *v.* Bancroft, 14 Pick. 315; Bellows *v.* Smith, 9 N. H. 285.]

(*m*) [In Richardson *v.* Boston Chemical Laboratory, 9 Met. 42, 52, Dewey J. said the rule seemed to be established by numerous authorities in Massachusetts and elsewhere, that a tender must be an uncondi-

whether his tender was conditional or not, but if there be ambiguity, the question is properly left to the jury; as where a debtor said he had called to tender 8*l.* in *settlement* of an account, and Lord Denman C. J. left it to the jury whether that meant simply in *payment*, or involved a condition, and this was held right by the king's bench. (*n*)

§ 722. The condition which the debtor is the most apt to impose is one to which the law does not permit him to subject the creditor. The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no farther, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due. (*o*) In Sutton *v.* Hawkins (*p*) the money was tendered as "all that was due," and this was held bad. In the Marquis of Hastings *v.* Thorley (*q*) a tender of a sum "in payment of the half year's rent, due at Lady Day last," was held bad by Lord Abinger C. B., as putting on the creditor the condition of admitting that no more rent was due. The rent claimed by the plaintiff was 23*l.*, and the tender was of 21*l.* In Mitchell *v.* King (*r*) a tender by the debtor, who said, "I do not admit of its being taken in part, but as a settlement," was held no tender. (*s*) In Hough *v.* May (*t*) the tender was in a check, in these words:

Debtor has no right to demand admission that no more is due when making tender.

But may exclude any presumption against himself.

Sutton *v.* Hawkins.

Marquis of Hastings *v.* Thorley.

Mitchell *v.* King.

Hough *v.* May.

tional offer of the money; and if accompanied by any qualifying words, or with a demand of anything to be done by the party to whom the tender is made, beyond the mere receipt of the money tendered, it will avoid the tender. See Thayer *v.* Brackett, 12 Mass. 450; Loring *v.* Cooke, 3 Pick. 48; Robinson *v.* Batchelder, 4 N. H. 40; Buffum *v.* Buffum, 11 Ib. 451; Brown *v.* Gilmore, 8 Greenl. 110; Hepburn *v.* Auld, 1 Cranch, 321; Bacon *v.* Conn, 1 Sm. & M. Ch. 348; Eastland *v.* Longshorne, 1 Nott & McC. 194; Brooklyn Bank *v.* DeGrauw, 23 Wend. 342; Wood *v.* Hitchcock, 20 Ib. 47; Heelas *v.* Slevin, 53 How. Pr. 356.]

(*n*) Eckstein *v.* Reynolds, 7 Ad. & E. 80; Marsden *v.* Goode, 2 C. & K. 133.

(*o*) Bowen *v.* Owen, 11 Q. B. 131.

(*p*) 8 C. & P. 259.

(*q*) 8 C. & P. 573.

(*r*) 6 C. & P. 237.

(*s*) [But if a debtor tender to his creditor a sum of money in full for all legal claims which the creditor may have against him upon account, and the creditor receive the money protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit upon the account, and the debtor do not express any dissent to this course, the acceptance of the tender will be no bar to the creditor's right to recover such sum as may be found due to him, exceeding the amount of the tender. Gassett *v.* Andover, 21 Vt. 342. See Tyers *v.* United States, 5 Court of Claims, 509.]

(*t*) 4 Ad. & E. 954.

"Pay Messrs. Hough & Co. balance account railing, or bearer, 8*l.* 11*s.*" This was held no tender, because, as Coleridge J. put it, "Suppose this check had been presented, and it had been afterwards a question for a jury whether the plaintiff had been paid in full; they would see that before the action was brought the plaintiff had accepted and made use of a check professedly given for the then balance," and this condition vitiated the tender.

§ 723. But in Henwood *v.* Oliver, (*u*) where the defendant produced the money, saying: "I am come with the amount of your bill," and the plaintiff refused the money, saying: "I shall not take that. It is not my bill," the tender was held unconditional and good. Patteson J. said: "The defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect of it. How then would the plaintiff preclude himself from recovering more, by accepting an offer of part, accompanied by expressions that are *implied* in every tender. *Expressio eorum quæ tacite insunt nihil operatur.* If the defendant when he paid the money had called it *part* of the amount of the plaintiff's bill, he would thereby have admitted that more was due, and the effect of the tender would have been defeated." Henwood *v.* Oliver was followed by Wightman J. in Bull *v.* Parker, (*x*) in a case where the witness who proved the tender, said, "I offered him 4*l.*, and I said I went by the direction of Mr. C. Parker, to pay him 4*l.*, in full discharge of his account. I did not say I will pay the money, if you will accept it in full discharge." The learned judge held that there was no such condition annexed to the offer as amounted to saying, "Unless you accept this money in full discharge, I will not pay it at all."

Henwood *v.* Oliver.

Bull *v.* Parker.

§ 724. The latest case on this point is Bowen *v.* Owen, (*y*) where a tenant sent a person to his landlord with a letter, saying, "I have sent with the bearer, T. T., a sum of 26*l.* 5*s.* 7½*d.*, to settle one year's rent of *Nant-y-pair*." The messenger told the landlord that he had the money with him to

Bowen *v.* Owen.

(*u*) See, also, Evans *v.* Judkins, 4 Camp. 156; Strong *v.* Harvey, 3 Bing. 304; Ford *v.* Noll, 2 Dowl. N. S. 617; Bowen *v.* Owen, 11 Q. B. 131; Cheminant *v.* Thornton, 2 C. & P. 50; Griffith *v.* Hodges, 1 C. & P. 419; Huxham *v.* Smith, 2 Camp. 19; Read *v.* Goldring, 2 M. & S. 86.

(*x*) 12 L. J. Q. B. 93.

(*y*) 11 Q. B. 130.

pay, but the latter refused, saying more was due. The messenger went away, and returned, saying, he had a few pounds more in his pocket to pay, in addition to the 26*l.* 5*s.* 7½*d.*, certain arrears of duties, but the landlord again refused, saying, there was more due. It was objected that these offers, coupled with the plaintiff's letter, were no more than a conditional tender, and Rolfe B. so ruled; but the king's bench held that the letter did not contain a condition, Erle J. stating the general rule, as follows: "The person making a tender has a right to exclude presumptions against himself, by saying, 'I pay this as the whole that is due you;' but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender."

Tender with protest that the amount is not due.

§ 725. A tender accompanied by a protest that the amount is not due is a good tender. Lord Ellenborough was of a contrary opinion in Simmons *v.* Wilmot; (*z*) but this case must now be considered as overruled on this point by Scott *v.* Uxbridge Railway Company, (*a*) in which the court of common pleas adopted and followed the ruling of Pollock C. B. in Manning *v.* Lunn. (*b*) Nor is a tender vitiated because the debtor says he considers it all that is due. (*c*) A payment or tender, by one of several joint debtors or to one of several joint creditors, is valid. (*d*)

Whether at common law debtor was entitled to demand receipt?

Cole *v.* Blake.

§ 726. Whether or not the debtor was entitled at common law to demand a receipt for money tendered seems to be considered an open question. In Cole *v.* Blake (*e*) Lord Kenyon said that it had been determined that a party tendering money could not in general demand a receipt for the money, and quoted one case in which he said that it had been held that the king's receiver, as an exception to the general rule, was obliged to give a receipt. (*f*) And in Laing *v.* Meader, (*g*) where the defendant asked for a *stamped* receipt, Abbott C. J. said: "A party has no right to say,

(*z*) 3 Esp. 91.

(*a*) L. R. 1 C. P. 596; 35 L. J. C. P. 293.

(*b*) 2 C. & K. 13.

(*c*) Robinson *v.* Ferraday, 8 C. & P. 752.

(*d*) Douglas *v.* Patrick, 3 T. R. 683; Wallace *v.* Kelsall, 7 M. & W. 264; Jones *v.* Yates, 9 B. & C. 532; Gordon *v.* Ellis, 7 M. & G. 607; Cooper *v.* Law, 6 C. B. N. S. 502; 28 L. J. C. P. 282; Brandon *v.* Scott, 7 E. & B. 234; 26 L. J. Q. B. 163.

(*e*) Peake, 179, 238.

(*f*) Bunbury, 348.

(*g*) 1 C. & P. 257.

I will pay you the money if you will give me a stamped receipt, but he ought, according to the 43 Geo. 3, c. 126, to bring a receipt with him, and require the other party to sign it."

Richardson v. Jackson.

But in Richardson *v.* Jackson, (*h*) where the court held that the creditor could not object to the tender on the ground that a receipt was asked, because at the time of the offer he only refused it on the ground that a larger sum was due him, Alderson and Rolfe BB. were careful in guarding themselves against countenancing the rule that a man who pays money is not entitled to demand a receipt, Rolfe B. saying: "I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death the representatives may be deprived of all evidence of the payment." (*i*)

§ 727. But now, by statute, (*k*) a stamp of one penny is required on all receipts upon payment of money amounting to 2*l.*, and the debtor is empowered to tender a blank receipt with the proper stamp, at the time of payment, which the creditor is bound to fill up, and to pay the amount of the stamp, under the penalty of 10*l.* (*l*)

16 & 17 Vict. c. 59, ss. 3, 4.

Jones v. Arthur.

In Jones *v.* Arthur, (*m*) where the tender was made by a check in a letter which requested a receipt in return, this request was held not to invalidate the tender.

§ 728. It is now settled by the decision of the queen's bench in 1860, in James *v.* Vane, (*n*) overruling Cooch *v.* Maltby (*o*) and affirming the earlier case of Dixon *v.* Walker, (*p*) that a tender is a *bar to the action* quoad its amount, and not merely a bar to damages.

Tender is a bar to action, not merely to damages.

§ 729. The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the vendor's right to the price revived

Payment by bill or note.

Absolute or conditional.

Presumed conditional, unless con-

(*h*) 8 M. & W. 298.

(*i*) [See Thayer *v.* Brackett, 12 Mass. 450; Loring *v.* Cooke, 3 Pick. 48; Richardson *v.* Chemical Laboratory Co. 9 Met. 42, 52; Wood *v.* Hitchcock, 20 Wend. 47.]

(*k*) 16 & 17 Vict. c. 59, ss. 3, 4.

(*l*) 43 Geo. 3, c. 126, ss. 5, 6.

(*m*) 8 Dowl. 442.

(*n*) 2 E. & E. 883; 29 L. J. Q. B. 169.

(*o*) 23 L. J. Q. B. 305.

(*p*) 7 M. & W. 214.

ing on non-payment of the security. But if a dispute arise as to the intention of the parties, the question is one of fact for the jury. (*q*) The intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods, (*r*) or "in discharge" of the price. (*s*) Lord Kenyon said, in Stedman *v.* Gooch, (*r*) that "the law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable and default is made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses to accept it, in such a case he may consider it as waste paper, and resort to his original demand, and sue the debtor:" and this *dictum* was quoted by Tindal C. J. in Maillard *v.* the Duke of Argyle (*t*) to show that the word "payment" does not necessarily mean payment in satisfaction and discharge.

Contrary intention shown.

Payment does not necessarily mean satisfaction and discharge.

§ 730. The authorities in support of the rule that in the absence of stipulation to the contrary the negotiable security is only considered to be a conditional payment, defeasible on the dishonor of the security, need not be reviewed, as there is no conflict on the point. (*u*) The payment is absolute on the delivery of the bill, and takes effect from that date, but is defeated by the happening of the condition, *i. e.* non-payment at maturity. (*x*)

Is absolute when made, but defeasible.

(*q*) Goldshede *v.* Cottrell, 2 M. & W. 20.

(*r*) Stedman *v.* Gooch, 1 Esp. 5; Maillard *v.* Duke of Argyle, 6 M. & G. 40.

(*s*) Kemp *v.* Watt, 15 M. & W. 672.

(*t*) 6 M. & G. 40.

(*u*) Owenson *v.* Morse, 7 T. R. 64; Kearslake *v.* Morgan, 5 T. R. 513; Puckford *v.* Maxwell, 6 T. R. 52; Kendrick *v.* Lomax, 2 Cr. & J. 405; Griffiths *v.* Owen, 13 M. & W. 58; James *v.* Williams, Ib. 828; Crowe *v.* Clay, 9 Ex. 604; Belshaw *v.* Bush, 11 C. B. 191; Ford *v.* Beech, 11 Q. B. 873; Simon *v.* Lloyd, 2 C., M. & R. 187; Helps *v.* Winterbottom, 2 B. & Ad. 431; Plimley *v.* Westley, 2 Bing. N. C. 249; Valpy *v.* Oakley, 16 Q. B. 941; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204. [The rule stated in the text prevails in most of the American states. See 2 Chitty Contr. (11th Am. ed.) 1135, note (*x*) and cases cited; Middlesex *v.* Thomas, 5 C. E. Green, 39; Archibald *v.* Argall, 53 Ill. 307; Guion *v.* Doherty, 43 Miss. 538; Syracuse &c. R. R. Co. *v.* Collins, 3 Lansing (N. Y.), 29; Burkhalter *v.* Second Nat. Bank, 42 N. Y. 538; May *v.* Gamble, 14 Fla. 467.]

(*x*) Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24; Turney *v.* Dodwell, 3 E. & B. 136; 23 L. J. Q. B. 137. [In Chamberlin *v.* Perkins, 55 N. H. 237, it appeared

§ 731. But if the buyer offer to pay in cash, and the vendor takes a negotiable security in preference, the security is deemed to be taken as an absolute, not a conditional, payment. (*y*) And in Cowasjee *v.* Thompson, (*z*) where the vendor elected to take a bill at six months in preference to the cash, less discount, it was held in the privy council that this was a "payment in substance," making it the vendor's duty to give up the ship's receipt for the goods, and thus depriving him of the right of stoppage *in transitu*. But a man who prefers a check on a banker to payment in money is not considered as electing to take a security instead of cash, for a check is accepted as a particular form of *cash payment*, and if dishonored the vendor may resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken. (*a*) But if a check received in payment is not presented within reasonable time, and the drawer is injured by the delay, the check will operate as an *absolute* payment. (*b*)

Where vendor elects to take bill instead of cash, payment absolute.

Cowasjee *v.* Thompson.

Taking a check is not such an election.

When cbeck not presented in time.

§ 732. Whenever it can be shown to be the intention of the parties that a bill or note should operate as immediate payment, then the buyer will no longer be indebted for the *price of the goods*, although he may be responsible

When bill or note is taken in absolute payment,

that the owner of a lot of flour and grain sold and delivered it, and received the acceptances of the purchaser in full payment and discharge of the price therefor, which the purchaser afterwards refused to pay; and it was held that the seller, having been compelled to take up the acceptances, might elect to consider his agreement to receive the acceptances in payment of the original debt as rescinded, and might recover the price of the flour and grain in a suit therefor the acceptances being in court to be disposed of as the safety of the defendant might require.]

Payment by acceptance.

(*y*) Marsh *v.* Pedder, 4 Camp. 257; Strong *v.* Hart, 6 B. & C. 160; Smith *v.* Ferrand, 7 B. & C. 19; Robinson *v.* Read, 9 B. & C. 449; Anderson *v.* Hillies, 12 C. B. 499; 21 L. J. C. P. 150; Guardians of Lichfield *v.* Green, 1 H. & N. 884, and 26 L. J. Ex. 140.

(*z*) 5 Moore P. C. 165.

(*a*) Everett *v.* Collins, 2 Camp. 515; Smith *v.* Ferrand, 7 B. & C. 19; per Patteson J. in Pearce *v.* Davis, 1 M. & Rob. 365; Hough *v.* May, 4 Ad. & E. 954; Caine *v.* Coulton, 1 H. & C. 764; 32 L. J. Ex. 97; [Weddigen *v.* Boston Elastic Fabric Co. 100 Mass. 422; Small *v.* Franklin Mining Co. 99 Ib. 277; Phillips *v.* Bullard, 58 Ga. 256; Sweet *v.* Titus, 67 Barb. 327; Hodgson *v.* Barrett, 33 O. St. 63; Blair *v.* Wilson, 28 Gratt. 165. But if the check is that of a third person, the taking of it is presumed to be in payment. Redpath *v.* Kolfage, 16 U. C. Q. B. 433.]

(*b*) Hopkins *v.* Ware, L. R. 4 Ex. 268; Byles on Bills, p. 19 (9th ed.); [Smith *v.* Miller, 43 N. Y. 171.]

on the security: and the bill or note given in such case may be that of the buyer himself, (*c*) or that of a third person, on which the buyer has indorsed his name. (*d*)

buyer no longer owes the price of the goods.

§ 733. But although a bill or note be taken only as conditional payment, yet as it is *primâ facie* evidence of payment, the vendor who has received it must account for it before he can revert to the original contract and demand payment of the price. In Price *v.* Price (*e*) the defendant pleaded to an action of debt that he had given his promissory note at six months to the plaintiff, who took and received it "for and on account" of the debt. Replication, that the time had expired before the commencement of the action, &c. and that the defendant had not paid. Special demurrer, assigning for causes, that the replication did not show that the plaintiff held the note, and that it was consistent with the replication that the note might have been indorsed away, and payable to some other person. Joinder in demurrer. Held, after consideration, Parke B. giving the judgment of the court, that it lay on the defendant to make the first averment that the note had been indorsed away, it being *his own note*, which he was bound to pay, and not on the plaintiff to aver the negative in his replication; overruling Mercer *v.* Cheese; (*f*) but *secus*, if it had been the note of a third person.

Vendor must account for bill or note even when received only as conditional payment, before he can sue for the price.

Price *v.* Price.

Rule of pleading in such cases.

§ 734. It will be perceived that it was taken for granted in the above case that the vendor could not recover the price if he had parted with the negotiable security, and the reason is obvious, for the buyer would thus be compelled to pay twice, once to the vendor, and again to the holder of the bill; and the vendor would thus receive payment twice, once when he passed away the bill, and again when he obtained the price. And on this principle it was held, in Bunney *v.* Poyntz, (*g*) that the vendor who had negotiated the bill without making himself liable had converted the conditional into an absolute payment. The facts were that his

Reason why vendor must account for the security.

Bunney *v.* Poyntz.

(*c*) Sibree *v.* Tripp, 15 M. & W. 23; Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J. Ex. 140.

(*d*) Sard *v.* Rhodes, 1 M. & W. 153; Brown *v.* Kewley, 2 B. & P. 518; Camidge *v.* Allenby, 6 B. & C. 381; Lewis *v.* Lyster, 2 C., M. & R. 704.

(*e*) 16 M. & W. 232.

(*f*) 4 M. & G. 804.

(*g*) 4 B. & Ad. 568.

agent, who had received the buyer's notes in payment, discounted them with the agent's banker, giving his own indorsement. The vendor had not indorsed them. Held, that the vendor had received payment, and could not recover from the buyer, though the notes were not paid and the agent had become bankrupt. Plainly, if the vendor had been allowed to recover, the buyer would still have remained liable to pay a second time to the banker who held his notes. But where the vendor had indorsed the note received on paying it away, it was held, in Miles *v.* Gorton, (*h*) that on the bankruptcy of the buyer his lien of unpaid vendor revived. The learned author of Smith's Mercantile Law (*i*) observes of this case, with what seems great propriety, that although the vendor was responsible for the bill he had indorsed and passed away, yet till he had actually paid it he ought not to have been allowed to sue for the price of the goods sold, on the general principle that it is a good defence to an action for any debt that a negotiable bill given for it is outstanding in other hands. (*k*)

Vendor who has negotiated bill without indorsing it, converts conditional into absolute payment.

Miles *v.* Gorton.

Remarks on this case.

§ 735. If the bill or note given in payment by the buyer be not his own, but that of some third person, on which he has not put his name, and is therefore only secondarily liable, then it lies upon the vendor to allege and prove the dishonor of it in an action against the buyer for the price ; (*l*) and the vendor in such a case is bound to use due diligence in taking all the steps necessary to obtain payment of the security, and to preserve the rights of the buyer against all the parties to the instrument who were liable for its payment to the buyer when he passed it to the vendor; and in default of the performance of this duty, the buyer is discharged from the obligation of paying either the price of the goods or the bill or note given as conditional payment. (*m*) The leading case on this subject is Camidge *v.* Allenby. (*n*) The buyer gave the vendor, in payment for goods sold at York, on Saturday, the 10th December, country bank-notes of a bank at

Where bill or note given by buyer is not his own, and is not indorsed by him.

Vendor must show due diligence in collecting it.

Or buyer will he discharged from payment of price.

Camidge *v.* Allenby.

(*h*) 2 C. & M. 504.

(*i*) P. 539.

(*k*) Belsbaw *v.* Bush, 11 C. B. 191 ; 22 L. J. C. P. 24.

(*l*) Price *v.* Price, 16 M. & W. 232.

(*m*) [See Middlesex *v.* Thomas, 5 C. E. Green, 39; Mehlberg *v.* Tisher, 24 Wis. 607 ; Dunn *v.* The Fredericton Boom Co. 1 Pugsley & Burbridge (N. B.), 575.]

(*n*) 6 B. & C. 373.

Huddersfield. The notes were given at three o'clock in the afternoon, and the bank had stopped payment at eleven o'clock the same morning, neither party knowing the fact when the payment was made. The vendor did not circulate the notes, nor present them to the bankers for payment, and on the following Saturday, the 17th December, asked the vendee to pay him the amount of the notes, offering at the same time to return them. Held, that the notes were either taken as money, in which case the risk of everything but forgery was assumed by the party receiving them; (*o*) or that they were received as negotiable instruments, in which case the vendor had discharged the buyer by his laches. (*p*) In Smith *v.* Mercer (*q*) the buyer gave a bill drawn by Barned's Bank in Liverpool, on London, on the 20th February. The vendor put it in circulation, and the bill was not presented for acceptance in London till the 23d April, when it was dishonored, Barned's Bank having failed on the 19th April. *No notice of dishonor was given to the buyer*, and it was held that he was discharged; the court holding, as in Camidge *v.* Allenby, that the vendor either took the bill as cash, in which case there was no liability; or as a negotiable security, and then the buyer could not be in a worse position than if he had indorsed the bill, and was therefore entitled to notice as an indorser, in default whereof he was discharged.

Smith *v.* Mercer.

§ 736. But in this case of country bank-notes there would be no laches in the mere failure to present the notes for payment at the bankers' on finding that they had failed, if the notes were returned to the buyer within a reasonable time. (*r*) In Crowe *v.* Clay, (*s*) in exchequer chamber, it was held, reversing the judgment of the exchequer of pleas given, (*t*) that the vendor could not recover the price of the goods sold when he had lost the acceptance by the buyer, and could not return it. Of course, if the lost bill were afterwards found the right would revive. (*u*) In Al-

Country bank-notes.

Vendor cannot recover price if he has lost the bill given in conditional payment.

(*o*) See, on this point, Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J. Ex. 140.

(*p*) See, also, as to laches, Bishop *v.* Rowe, 3 M. & S. 362; Bridges *v.* Berry, 3 Taunt. 130; Soward *v.* Palmer, 8 Taunt. 277.

(*q*) L. R. 3 Ex. 51; 37 L. J. Ex. 24. But see Swinyard *v.* Bowes, 5 M. & S. 62; Van Wart *v.* Woolley, 3 B. & C. 439; Hitchcock *v.* Humfrey, 5 M. & G. 563.

(*r*) Robson *v.* Oliver, 10 Q. B. 104; Rogers *v.* Langford, 1 C. & M. 637.

(*s*) 9 Ex. 604.

(*t*) 8 Ex. 295.

(*u*) Dent *v.* Dunn, 3 Camp 296.

derson *v.* Langdale (*x*) the vendor was held to have lost his right to recover against the buyer by altering the bill given in payment so as to vitiate it, and thus destroying the buyer's recourse against antecedent parties, Lord Tenterden agreeing with the rest of the court that his ruling to the contrary, at nisi prius, was erroneous. But where the buyer is the party *primarily* liable, so that he is not injured by losing recourse on any antecedent parties in consequence of the alteration, the vendor may recover on the original contract after the term of credit has expired, (*y*) notwithstanding the alteration. It was held, in Rolt *v.* Watson, (*z*) that the vendor could recover on the original contract, even without producing a negotiable security given to him by the buyer in payment, on proof that the bill drawn to the vendor's order had been lost without indorsement by him, and could not therefore be negotiated. But this case was overruled in Romuz *v.* Crowe, (*a*) and the rule now is that if the instrument was negotiable in form, there can be no recovery on the original contract without producing it; otherwise if the bill or note was not negotiable in form. (*b*)

Or if he has altered the bill given to him.

But where buyer loses no recourse on antecedent parties by the alteration, vendor may recover price.

Rolt *v.* Watson.

Overruled in Romuz *v.* Crowe.

§ 737. If a bill or note be indorsed, and given by the buyer to the vendor merely as a collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment; and if he neglect to present, or to give notice of dishonor to the buyer, the buyer will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount. (*c*)

Where bill is given as collateral security, vendor's duty.

§ 738. In one case where goods were sold for cash, the buyer refused to pay cash, and gave the vendor his own dishonored acceptance, past due, and the payment was held good in the absence of fraud. But the decision pro-

Where buyer in sale for cash gave vendor his

(*x*) 3 B. & Ad. 661.

(*y*) Atkinson *v.* Handon, 2 Ad. & E. 628.

(*z*) 4 Bing. 273.

(*a*) 1 Ex. 167. And see Hansard *v.* Robinson, 7 B. & C. 90.

(*b*) Wain *v.* Bailey, 10 Ad. & E. 616; Ramuz *v.* Crowe, 1 Ex. 167; Price *v.* Price, 16 M. & W. 232-243; Hansard *v.* Robinson, 7 B. & C. 90. And see National Savings' Bank Association *v.* Tranah, L. R. 2 C. P. 556.

(*c*) Peacock *v.* Pursell, 14 C. B. N. S. 728; 32 L. J. C. P. 266; [Hazard *v.* Wells, 2 Abb. N. C. 444.]

ceeded on the ground of an implied assent to this mode of payment by the vendor, who had not returned his dishonored acceptance when sent to him in lieu of cash. (*d*)

own dishonored note.

§ 739. When the agreement is that the price of the goods sold shall be paid in a negotiable security, held by the buyer, to which he is no party, and for the payment of which he is not to be answerable, this may be considered as a species of barter, as was said by Lord Ellenborough in Read *v.* Hutchinson. (*e*) Or the bills given by the buyer may be deemed to have passed as cash, just as if they were Bank of England notes, as was said in Camidge *v.* Allenby, (*f*) and in Guardians of Lichfield *v.* Green. (*g*) If the securities thus passed, however, were forged or counterfeited; or if not what on their face they purport to be, as if they appeared to be foreign bills needing no stamp, but were really domestic bills, invalid for want of a stamp, the vendor would have the right to rescind the sale for failure of consideration, as explained in the chapter on that subject. (*h*) And if the securities, though genuine, were known to the buyer to be worthless when he passed them, his conduct would be deemed fraudulent, (*i*) and the vendor would be entitled to rescind the sale, and bring trover for the goods, as shown in the chapter on Fraudulent Sales. (*k*)

Where bills on which the buyer is not to be responsible are given for price.

Where forged securities are given in payment.

Securities known by the buyer to be worthless.

§ 740. In Hodgson *v.* Davies, (*l*) Lord Ellenborough held,

(*d*) Mayer *v.* Nyas, 1 Bing. 311. [A. bought goods of B. for a certain sum to be paid by giving up a promissory note of B., which he held, and paying in cash the balance of the contract price over the amount due on the note. It was held, that if A. did not give up the note, B. might recover from him the full contract price of the goods. Gray *v.* White, 108 Mass. 228.]

(*e*) 3 Camp. 352. [See Wise *v.* Chase, 44 N. Y. 337.]

(*f*) 6 B. & C. 373.

(*g*) 1 H. & N. 884; 29 L. J. Ex. 140. And see Fydell *v.* Clark, 1 Esp. 447.

(*h*) *Ante*, book III. ch. i. [See the points stated, and cases collected upon this subject, in 2 Chitty Contr. (11th Am. ed.) 1106, and note (z^1); Goodrich *v.* Tracey, 43 Vt. 314.]

(*i*) Read *v.* Hutchinson, 3 Camp. 352; Noble *v.* Adams, 7 Taunt. 59; Stedman *v.* Gooch, 1 Esp. 3; Hawse *v.* Crowe, R. & Mood. 414; per Bayley J. in Camidge *v.* Allenby, 6 B. & C. 373–382; [Loughnan *v.* Barry, Ir. R. 5 C. L. 538; S. C. 6 Ib. 457. Where a promissory note, the maker of which, unknown to both parties, was insolvent, had been taken in payment and discharge of a precedent debt, it was held to be a case of mutual mistake of fact, and that the party who so took it was entitled to recover of the party of whom he took it the amount of the original debt. Roberts *v.* Fisher, 43 N. Y. 159. See Wright *v.* Lawton, 37 Conn. 167.]

(*k*) *Ante*, §§ 433 *et seq.* [See Stewart *v.* Emerson, 52 N. H. 301.]

(*l*) 2 Camp. 530.

where a sale was made on credit for bills at two and four months: 1st. That the vendor must accept or reject the bills offered within a reasonable time, and five days were held too long a time to reserve the right of rejection. 2d. That a sale for bills does not mean *approved bills*, and parol evidence to that effect is not admissible when the written contract mentions "bills" only. 3d. That an *approved bill* means a bill to which no reasonable objection could be made, and which ought to be approved.

Sale for bills or for approved bills.

Hodgson v. Davies.

§ 741. Payment properly made to a duly authorized agent of the vendor is, of course, the same as if made to the vendor himself. Without entering into the general doctrines of the law of agency, it may be convenient to point out that in contracts of sale certain agents have been held entitled to receive payment from their known general authority. (l^1) Thus, a factor is an agent of a general character, entitled to receive payment and give discharge of the price; (m) but a broker is not, for he is not intrusted with the possession of the goods. (n) In Kaye *v.* Brett, (o) Parke B., delivering the judgment of the court, said: "If a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, the payment is not good. In Barrett *v.* Deere (p) Lord Tenterden held that payment to a person sitting in the counting-room, and appearing to be intrusted with the conduct of the business, is a good payment; and the same learned judge held a tender under similar circumstances to be valid. (q) An auctioneer employed to sell goods in his possesion for ready money has in general authority to receive payment for them, but the conditions of the sale may be such as show that the vendor intended payment to be made to himself, and in

Payment to agents.

Who are agents to receive price.

Factors are.

Brokers not.

Shopman.

Person with apparent authority.

Auctioneers

(l^1) [A wharfinger is not an agent of the forwarder, to whom the consignee is authorized to make payment, the goods having been delivered and an account having been stated between the consignee and forwarder. Torrance *v.* Hayes, 2 U. C. C. P. 338.]

Right of wharfinger to receive payment for forwarder.

(m) Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

(n) Baring *v.* Corrie, 2 B. & A. 137; Campbell *v.* Hassell, 1 Stark, 233; [Whiton *v.* Spring, 74 N. Y. 169; Irwine *v.* Watson, 5 Q. B. D. 102, 414.]

(o) 5 Ex. 269; Jackson *v.* Jacob, 5 Scott, 79; [Clark *v.* Smith, 88 Ill. 298.]

(p) M. & M. 200.

(q) Willmott *v.* Smith, M. & M. 238; [Harris *v.* Simmerman, 81 Ill. 413; Eclipse Windmill Co. *v.* Thorson, 46 Iowa, 181.]

such case a payment to the auctioneer would not bind the vendor; (*r*) and it is plain that if the auctioneer acts as a mere crier or broker for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price. A wife has no general authority to receive payment for a husband, and a payment to her of money even earned by herself will not bind the husband, without proof of authority express or implied. (*s*)

A wife.

§ 742. The general rule of law is, that an agent who makes a sale may maintain an action against the buyer in respect of his privity, and the principal may also maintain an action in respect of his interest; (*t*) but where the agent has himself an interest in the sale, as for example a factor or auctioneer, for his lien, a plea of payment to the principal is no defence to an action for the price by the agent, unless it show that the lien of the agent has been satisfied. (*u*)

Purchaser from agent cannot pay principal so as to defeat agent's lien.

In Catterall *v.* Hindle (*x*) a full exposition of the law as to the authority to receive payment conferred on agents to sell, was given in the decision pronounced by Keating J. It is not necessary to give the facts, somewhat complicated, to which the law was applied. The principles were thus stated: "That a broker or agent employed to sell has *primâ facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established; (*y*) and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent; (*y*[1]) see the judgment of Abbott C. J. in Russell *v.*

Payment to agent must be in money in usual course of business.

(*r*) Sykes *v.* Giles, 5 M. & W. 645. See Capel *v.* Thornton, 3 C. & P. 352; Williams *v.* Millington, 1 H. Bl. 81; Williams *v.* Evans, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; [Broughton *v.* Silloway, 114 Mass. 71; Taylor *v.* Wilson, 11 Met. 44.]

(*s*) Offley *v.* Clay, 2 M. & G. 172.

(*t*) Per Lord Abinger in Sykes *v.* Giles, 5 M. & W. 645.

(*u*) Williams *v.* Millington, 1 H. Bl. 81; Drinkwater *v.* Goodwin, Cowp. 251; Robinson *v.* Rutter, 4 E. & B. 954; 24 L. J. Q. B. 250, in which Coppin *v.* Walker, 7 Taunt. 237, and Coppin *v.* Craig, 7 Taunt. 243, are reviewed. See, also, Grice *v.* Kendrick, L. R. 5 Q. B. 340.

(*x*) L. R. 1 C. P. 186; 35 L. J. C. P. 161. The decision in this case was reversed on appeal, the exchequer chamber being of opinion that the case involved a question of fact which had not been submitted to the jury. L. R. 2 C. P. 368; [Noble *v.* Nugent, 89 Ill. 522; Home Macbine Co. *v.* Ballweg, Ib. 318.]

(*y*) [See Sangston *v.* Maitland, 11 Gill & J. 286.]

(*y*[1]) [Branskill *v.* Chumasero, 5 U. C. Q. B. 474; Bevis *v.* Heflin, 63 Ind. 129; Aultman *v.* Lee, 43 Iowa, 404.]

Bangley, 4 B. & A. 398; Todd *v.* Reid, 4 B. & A. 210; the authority of which, upon this point, is not affected by the correction as to a fact by Parke B. in Stewart *v.* Aberdein, 4 M. & W. 224. (*z*) It has also been held by this court, in the case of Underwood *v.* Nicholls, (*a*) that the return to the agent of his check, cashed for him by the debtor a few days before, was not part payment as against the principal. 'It amounts to no more,' said Jervis C. J., 'than the debtor seeking to discharge his debt to the principal, by writing off a debt due to him from the agent, which he has no right to do.' We think the present case the same in principle with Underwood *v.* Nicholls." . . . .

Del credere commission does not change agent's authority in this respect.

§ 743. "It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent selling upon a *del credere* commission (*b*) receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of any ordinary agent as to receiving payments on account of his principal." (*c*)

Williams *v.* Evans. Auctioneer has no authority to receive an acceptance as cash.

§ 744. In Williams *v.* Evans (*d*) the terms of an auction sale were that purchaser should pay down into the hands of the auctioneer a deposit of 5*s.* in the pound in part payment of each lot, remainder on or before the delivery of the goods. The sale was on 2d November, and the goods to be taken away by the evening of the 3d. A purchaser of some of the goods at first sale having failed to comply with the conditions, his lot was resold on the 4th on the same

(*z*) [1 Chitty Contr. (11th Am. ed.) 306, and note (*x*).]

(*a*) 17 C. B. 239; 25 L. J. C. P. 79.

(*b*) A *del credere* commission was defined by Lord Ellenborough in Morris *v.* Cleasby (4 M. & S. 566), as "the premium or price given by the principal to the factor for a guaranty." Disapproval was expressed by his lordship of the *dicta* in Grove *v.* Dubois, 1 T. R. 112, and in Houghton *v.* Matthews, 3 B. & P. 489. See, also, Story on Agency, § 33; Hornby *v.* Lacy, 6 M. & S. 166; Couturier *v.* Hastie, 8 Ex. 40; Ex parte White, in re Neville, L. R. 6 Ch. App. 397.

(*c*) See, also, Bartlett *v.* Pentland, 10 B. & C. 760; Underwood *v.* Nicholls, 17 C. B. 239; 25 L. J. C. P. 79; Favenc *v.* Bennett, 11 East, 36. [As to the authority of agents to sell on credit, Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 59, 60; 1 Chitty Contr. (11th Am. ed.) 295, and note (*y*); Riley *v.* Wheeler, 44 Vt. 189; Dresden School District No. 6 *v.* Ætna Ins. Co. 62 Maine, 330, and cases cited; Boorman *v.* Brown, 3 Q. B. 511; Parsons *v.* Martin, 11 Gray, 115.]

(*d*) L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

conditions, and bought by the defendant, and delivered to him on the 7th. On that day the plaintiff, doubting the auctioneer's solvency, told the defendant not to pay him any money. The defendant proved that he had paid the auctioneer on the 4th a part of the price in money, and had given him for the remainder a bill of exchange for 15*l.* 7*s.* on the 5th November, accepted by a third person, which was paid on the 9th, and that the auctioneer had agreed to take this bill as cash. The jury found the payment to be a good one. Held, not a good payment for the 15*l.* 7*s.*, the auctioneer having no authority to accept the bill as cash, but *semble*, it might have been a good payment if made by check, if the jury had found it to be so; in accordance with the *dictum* of Holt C. J. in Thorold *v.* Smith. (*e*)

Semble, secus, as to check.

§ 745. In Ramazotti *v.* Bowring (*f*) the facts were that the plaintiff, in an action of debt for wine and spirits supplied to the defendant, gave evidence that he was the owner of a business carried on under the name of "The Continental Wine Company," and that the goods had been delivered by that company to the defendant. It was proven, however, that one Nixon, the plaintiff's son-in-law, had been employed by him as clerk and manager in the business, and had told the defendant that the business was his own, and had agreed to furnish the goods to the defendant in part payment of a debt due by Nixon to the defendant. The goods were receipted for as follows: —

Agent in possession representing himself as owner.

Ramazotti *v.* Bowring.

18th October, 1858.

Mr. Bowring, — Please receive twelve bottles Martell's brandy.

R. A. ARUNDELL.

From the Continental Wine Company. G. RAMAZOTTI.

Arundell, who signed the receipt, was one of the defendants in the action. Invoices were sent for other goods, not containing the plaintiff's name, but headed "The Continental Wine Company," and in one, the words "J. Nixon, Manager," were written underneath. The learned common serjeant left to the jury the question whether Nixon or the plaintiff was the owner of the business,

(*e*) 11 Mod. 87. And see, on this point, Bridges *v.* Garrett, L. R. 4 C. P. 580; reversed in exchequer chamber, L. R. 5 C. P. 451.

(*f*) 7 C. B. N. S. 851; 29 L. J. C. P. 30; [1 Chitty Contr. (11th Am. ed.) 306, 307.]

telling them that if Nixon was the owner, the verdict should be for the defendants, but that if the plaintiff was the owner, he was entitled to recover. The court held this a misdirection, Erle C. J. saying: "The proper question to have asked the jury would have been, whether they were of opinion that the plaintiff had enabled Nixon to hold himself out as being the owner of these goods, and whether Nixon did in fact so hold himself out to the defendants as such owner. Then, if the jury should find that such was the case, I am of opinion that an undisclosed principal, adopting the contract which the agent has so made, must adopt it *in omnibus*, and take it, therefore, subject to any right of set-off which may exist." The learned judges all intimated, however, that there had been no contract of sale at all, that the goods had been misappropriated by the agent, and that the plaintiff might have recovered in trover for the tort, but that in an action on the contract he was bound to adopt the whole contract. (*g*)

Pratt *v.* Willey.

§ 745 *a*. In Pratt *v.* Willey (*h*) it appeared that the defendant, a tailor, made a bargain with one Surtees to furnish him clothes on credit, for which Surtees agreed to furnish the defendant on credit coals, which he represented as belonging to himself, and gave a card on which was written, "Surtees, coal merchant," &c. The coals really belonged to the plaintiff, who had employed Surtees as his agent to sell them, and when the coals were sent, *the name of the plaintiff was on the tickets as the seller*. On these facts, Best C. J. told the jury that the defendant ought to have made inquiries into the nature of the situation of Surtees, and should not have dealt with him as principal. The question was left to the jury, who found for the plaintiff.

Appropriation of payments.

Buyer has the right to make the appropriation.

§ 746. Where the purchaser owes more than one debt to the vendor, and makes a payment, it is his right to apply, or, in technical language, appropriate, the payment to whichever debt he pleases. (*i*) If the vendor is unwilling to apply it to the debt for which it is tendered, he must refuse it, and stand upon his rights, as given to him

(*g*) See, also, Semenza *v.* Brinsley, 34 L. J. C. P. 161; Drakeford *v.* Piercy, 7 B. & S. 515; [Bowmanville Machine Co. *v.* Dempster, 2 Can. Sup. Ct. 21.]

(*h*) 2 C. & P. 350.

(*i*) [See 2 Chitty Contr. (11th Am. ed.) 1110, and note (*n*[1]); King *v.* Andrews, 30 Ind. 429; Nutall *v.* Brannin, 5 Bush (Ky.), 11; McDaniel *v.* Barnes, Ib. 183; Champenoes *v.* Fort, 45 Wis. 355; Levystein *v.* Whitman, 59 Ala. 345; Lee *v.* Early, 44 Md. 80; Trullinger *v.* Kofoed, 7 Oreg. 228.]

by law, whatever they may be. And it makes no difference that the creditor may say he will not accept the payment as offered, if he actually receive it, for the law regards what he *does*, not what he *says*. (*k*) And if money be received by the creditor on account of the debtor, without the latter's knowledge, the right of the debtor to appropriate it cannot be affected by the creditor's attempt to apply it as he chooses before the debtor has an opportunity of exercising his election. (*l*)

Money received by creditor on account of debtor without debtor's knowledge.

§ 747. The debtor's election of the debt to which he applies a payment may be shown otherwise than by express words. (*l*[1]) A payment of the exact amount of one of several debts was said by Lord Ellenborough (*m*) to be "irrefragable evidence" to show that the payment was intended for that debt: (*n*) and in the same case, where the circumstances were that the debtor owed one debt past due, and another not yet due, but the latter was guarantied by a security given by his father-in-law, these facts, connected with proof of an allowance of discount by the creditor on a payment made, were held conclusive to show that the debtor intended to favor his surety and to appropriate the payment to the debt not yet due. (*n*[1]) So if a debtor owe a sum personally, and another as executor, and make a general payment, he will be presumed to have intended to pay his personal debt. (*o*)

Appropriation by debtor may be shown by implication from circumstances.

(*k*) Peters *v.* Anderson, 5 Taunt. 596; Simson *v.* Ingham, 2 B. & C. 65; Mills *v.* Fowkes, 5 Bing. N. C. 455; Croft *v.* Lumley, 5 E. & B. 648; 25 L. J. Q. B. 73; and in error, 27 L. J. Q. B. 321; 6 H. L. Cas. 672; Waller *v.* Lacy, 1 M. & G. 54; Jones *v.* Gretton, 8 Ex. 773; [2 Chitty Contr. (11th Am. ed.) 1110, and note (*n*[1]), 1111, and note (*o*); Reed *v.* Boardman, 20 Pick. 441.]

(*l*) Waller *v.* Lacy, 1 M. & G. 54.

(*l*[1]) [Pickett *v.* Merchants' Nat. Bank &c. of Memphis, 32 Ark. 346.]

(*m*) Marryatt *v.* White, 2 Stark. 101. See, also, Shaw *v.* Picton, 4 B. & C. 715; Newmarch *v.* Clay, 14 East, 239; Plomer *v.* Long, 1 Stark. 153; Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71.

(*n*) [2 Chitty Contr. (11th Am. ed.) 1111, note (*o*); Roberts *v.* Garnie, 3 Caines, 14.]

(*n*[1]) [So a payment may, by express agreement of parties, be appropriated to a debt not due. Shaw *v.* Pratt, 22 Pick. 305. But a general payment, without more, is to be appropriated to a debt due rather than to one not due. McDowell *v.* Blackstone Canal Co. 5 Mason, 11; Baker *v.* Stackpoole, 9 Cowen, 420; Stone *v.* Seymour, 15 Wend. 19, 24; Law *v.* Sutherland, 5 Grattan, 357; Hunter *v.* Osterhoudt, 11 Barb. 33; Caldwell *v.* Wentworth, 14 N. H. 431; Seymour *v.* Sexton, 10 Watts, 255; Bobe *v.* Stickney, 36 Ala. 482; Essan *v.* Dunn, 5 Allen (N. B.) 417.]

(*o*) Goddard *v.* Cox, 2 Str. 1194; [Sawyer *v.* Tappan, 14 N. H. 352; Fowke *v.* Bowie, 4 Harr. & J. 566. See Scott *v.*

§ 748. Where an account current is kept between parties, as a banking account, the leading case is Clayton's case, (*p*) in which Sir William Grant, the master of the rolls, said: "There is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out: it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." This case was followed and approved in Bodenham *v.* Purchas; (*q*) but although the rule was recognized as sound in Simson *v.* Ingham (*r*) and Henniker *v.* Wigg, (*s*) it was held that the circumstances of the case may afford grounds for inferring that the transactions of the parties were not intended to come under the general rule. In Field *v.* Carr (*t*) the court said that the rule had been adopted in all the courts of Westminster Hall. (*u*) The cases already cited on this point also establish the rule, that whenever a debtor makes a payment without appropriating it expressly or by implication, he thereby yields to his creditor the right of election in his turn. (*u*[1]) In the exercise of this right, the creditor may apply the payment to

Rule of appropriation where account current is kept between the parties.

If debtor does not appropriate creditor may.

Appropriation by creditor

Ray, 18 Pick. 361. Where funds arise from a security for a particular debt, they should be applied to the satisfaction of that debt. Sanders *v.* Knox, 57 Ala. 80.]

(*p*) 1 Merivale, 572, 608. See, also, Brown *v.* Adams, L. R. 4 Ch. App. 764; Thompson *v.* Hudson, L. R. 6 Ch. App. 320.

(*q*) 2 B. & A. 39.

(*r*) 2 B. & C. 65.

(*s*) 4 Q. B. 792. See, also, Stoveld *v.* Eade, 4 Bing. 154.

(*t*) 5 Bing. 13.

(*u*) [So in the American states. See 2 Chitty Contr. (11th Am. ed.) 1116, note (*o*), and cases cited; Sprague *v.* Hazenwinkle, 53 Ill. 419; Hill *v.* Robbins, 22 Mich. 475; Trs. of Germ. Luth. Church *v.* Heise, 44 Md. 454; Jackson *v.* Johnson, 74 N. Y. 607. And the presumption that payments made on an account current are to be applied in discharge of the earliest item in the account is not rebutted by the fact that those items are for goods sold on condition that they shall not become the property of the purchaser till paid for; although a memorandum of the condition is entered by the seller in his books containing the account. Crompton *v.* Pratt, 105 Mass. 255.]

(*u*[1]) [Hagerman *v.* Smith, Taylor (U. C.), 123; Caxwell *v.* De Vaughn, 55 Ga. 643; The Davis Sewing Machine Co. *v.* Buckles, 89 Ill. 237; Lewis *v.* Pease, 85 Ib. 31; Wilhelm *v.* Schmidt, 84 Ib. 183: Shipsey *v.* Bowery Bank, 59 N. Y. 485; Harding *v.* Tifft, 75 N. Y. 461; Nat. Bank of the Commonwealth *v.* Mechanics' Nat. Bank, 94 U. S. 437, 439.]

a debt which he could not recover by action against the defendant, as a debt barred by limitation, (*x*) and even a debt of which the consideration was illegal, (*x*) as a

lawful, even to a debt not recoverable by action.

(*x*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Ashby *v.* James, 11 M. & W. 542; [Carthcart *v.* Haggart, 37 U. C. Q. B. 47; Brown *v.* Burns, 67 Me. 535; Murphy *v.* Webber, 61 Ib. 478; Plummer *v.* Erskine, 58 Ib. 59. But if the contract was one which the law directly prohibited and not one which it simply declined to enforce, the creditor would not have a right to apply a payment to such a debt when other legal demands existed against the debtor. Phillips *v.* Moses, 65 Me. 70; Starkey *v.* Gabby, 1 Cr. & Dix, 248; Ramsay *v.* Warner, 97 Mass. 8. So the creditor may apply such payment to a debt on which the statute of frauds does not allow an action to be maintained. Haynes *v.* Nice, 100 Mass. 327. But although the creditor may appropriate the payment to a debt barred by the statute of limitations, such an appropriation will not have the effect to take the remainder of the debt, if there be any, out of the operation of the statute. Ramsay *v.* Warner, 97 Mass. 8, 13, 14. In this case Hoar J. said: "The rule as to the application of payments, where there are several debts, is this, that the debtor may, if he chooses, in the first instance, appropriate the payment; *solvitur in modum solventis;* if he omit to do so, the creditor may make the appropriation; *recipitur in modum recipientis;* if the creditor makes the appropriation, he may do it to a debt barred by the statute of limitations; but such an appropriation will not have the effect to take the debt out of the operation of the statute. It seems to be regarded as a mere permission of law to the creditor thus to apply it, and not an intentional payment on that account, which is necessary to involve the admission of the whole debt, and the implied renewal of the promse to pay it. The debtor is not presumed to have intended to renew a promise which is no longer legally binding upon him, although he has put it into his creditor's power to satisfy *pro tanto* a claim upon which he had lost his legal remedy. But where there are several ascertained and admitted debts, none of which are barred by the statute, and a payment is made without an application of it by the debtor, we think a different rule applies; and that the payment, when applied by the creditor, has all the effect upon the debt to which it is applied that it would have if it had been made by the debtor expressly on account of it. This distinction between debts barred by the statute at the time when the payment is made, and those not then barred, was expressly recognized in Pond *v.* Williams, 1 Gray, 630. See Nash *v.* Hodgson, 6 De G., M. & G. 474; Ayer *v.* Hawkins, 19 Vt. 26; Bancroft *v.* Dumas, 21 Ib. 456; Armistead *v.* Brooks, 18 Ark. 521; Burr *v.* Burr, 26 Penn. St. 284. The debtor must be held to intend the full effect of a payment upon whichever debt the creditor may elect to apply it. It was said by Erle and Crompton JJ. in Walker *v.* Butler, 6 E. & B. 506, that where there are two debts and a general payment, there is generally evidence for a jury of payment on account of both. The fact that the application does not appear to have been made until the suit was brought is not material. The creditor has a right to make it at any time. Mills *v.* Fowkes, 5 Bing. N. C. 455. And when it is made, it takes effect from the time of payment, and not from the date of the application. This would obviously be so in respect to the stopping of interest by reason of the payment, and we can see no reason why it should not relate back for all purposes." As to the time when the appropriation should be made by the creditor, see the cases cited to the point in 2 Chitty Contr. (11th Am. ed.) 1111, note (*o*).]

Creditor cannot appropriate to debt created by prohibited contract.

Appropriation by creditor, effect of.

debt contracted in violation of the tippling acts. (*y*) But if no appropriation be made by either party in a case where there are two debts, one legal and the other void for illegality, as where one debt was for goods sold, and the other for money lent on a usurious contract, the law will apply the payment to the legal contract. (*z*)

But there must be more than one existing debt to permit election.

§ 749. It has been held, however, that this doctrine will not apply in cases where there never was but *one* debt between the parties, as in the case of a building contract with a corporation not competent to contract save under seal, where it was held that the builder, who had supplied extra work on verbal orders, could not apply any of the general payments to the discharge of his claim for the extra work, that not being a debt at all against the corporation, either equitable or legal. (*a*) It was held by the king's bench, in Simson *v.* Ingham, (*b*) that creditors who had appropriated a payment by entries in account in their own books, they being the bankers of the debtor, were at liberty to change the appropriation within a reasonable time if they had not rendered accounts in the interval to the debtor, their right of election not being determined by such entry till communicated to the debtor.

Creditor's election not determined till communicated to debtor.

Simson *v.* Ingham.

Pro ratâ appropriation of payment.

§ 750. In a case where the buyer had bought from a broker two parcels of goods belonging to different principals, and had made a payment to the broker on account, larger than either debt, but not sufficient to pay both, without any specific appropriation, the king's bench held, that on the insolvency of the broker the loss must be borne proportionably by his two principals, and that the appropriation must be made by

(*y*) Dawson *v.* Remnant, 6 Esp. 24, approved in Laycock *v.* Pickles, 4 B. & S. 507; 33 L. J. Q. B. 43; Philpot *v.* Jones, 2 Ad. & E. 41; Crookshank *v.* Rose, 5 C. & P. 19; S. C. 1 Mood. & R. 100.

(*z*) Wright *v.* Laing, 3 B. & C. 165; [2 Chitty Contr. (11th Am. ed.) 1110, and note (n^1), 1111, and note (*o*), 1115; Caldwell *v.* Wentworth, 14 N. H. 431; Rohan *v.* Hanson, 11 Cush. 44; Bancroft *v.* Dumas, 21 Vt. 465; Kidder *v.* Norris, 18 N. H. 532; Wilhelm *v.* Schmidt, 84 Ill. 183; Albert *v.* Lindau, 46 Md. 334. See Foster *v.* McGraw, 64 Penn. St. 464; McKelvey *v.* Jarvis, 87 Ib. 414. In the absence of controlling evidence, if a man indebted to another makes a payment to him, it will be applied by law to the satisfaction of the debt. Fredericton Boom Co. *v.* McPherson, 2 Hannay (N. B.) 8.]

(*a*) Lamprell *v.* Billericay Union, 3 Ex. 283.

(*b*) 2 B. & C. 65; [Seymour *v.* Marvin, 11 Barb. 80; Dorsey *v.* Wayman, 6 Gill, 59.]

apportioning the payment *pro ratâ* between them according to the amount due them respectively, leaving to each a claim against the buyer for the unpaid balance of the price of his own goods. (*c*)

§ 752. In America, the common law rule is reversed in some of the states, and in Massachusetts, (*d*) Vermont, (*e*) Maine, (*f*) and Arkansas, (*g*) it is held that where a promissory note or bill of exchange is given for the price of goods, it is *primâ facie* an absolute payment, though the presumption may be rebutted. (*h*)

American law where bills or notes are given in payment.

(*c*) Favenc *v.* Bennett, 11 East, 36.

(*d*) [See Reed *v.* Upton, 10 Pick. 525; Watkins *v.* Hill, 8 Ib. 522; West Boylston Manuf. Co. *v.* Searle, 15 Ib. 230; Marston *v.* Boynton, 6 Met. 127; Maneely *v.* McGee, 6 Mass. 145; Wood *v.* Bodwell, 12 Pick. 268; Ilsley *v.* Jewett, 2 Met. 168; Butts *v.* Dean, Ib. 76; Melledge *v.* Boston Iron Co. 5 Cush. 158; Curtis *v.* Hubbard, 9 Met. 328; Thurston *v.* Blanchard, 22 Pick. 18; Kimball *v.* The Anna Kimball, 2 Clifford, 4; Hudson *v.* Bradley, Ib. 130; Wallace *v.* Agry, 4 Mason, 336, 342, 343; Re Clap, 2 Low. 226, 230. In the last cited case Lowell J. said: "The difference between the law of Massachusetts and that of England and most of the states of the Union, I understand to be merely this: That in the courts of this state a negotiable bill or note is taken to be a more beneficial security than a book account, or any debt of that kind; and though it does not operate as a merger in law, is presumed *primâ facie* to be taken as payment. But it is a mere question of fact, and any evidence which rebuts the presumption is competent, and it is easily overcome."]

(*e*) [See Hutchins *v.* Olcutt, 4 Vt. 549; Ferrey *v.* Baxter, 13 Ib. 452; Wait *v.* Brewster, 31 Ib. 516.]

(*f*) [Varner *v.* Nobleborough, 2 Greenl. 121; Descadillas *v.* Harris, 8 Ib. 298; Newall *v.* Hussey, 18 Maine, 249; Paine *v.* Dwinel, 53 Ib. 52; Ward *v.* Bourne, 56 Ib. 161.]

(*g*) [Camp *v.* Gullett, 2 Eng. 524; Costar *v.* Davies, 3 Ib. 213.]

(*h*) Story on Sales, § 219, where the cases are cited; [2 Chitty Contr. (11th Am. ed.) 1135, and note (*x*), where the cases are cited. In New York the taking of the negotiable note of the debtor does not extinguish the original demand. It operates to suspend the right of action until the maturity of the paper. Geller *v.* Seixas, 4 Abb. Pr. 103; Hughes *v.* Wheeler, 8 Cow. 77; Raymond *v.* Merchant, 3 Ib. 147; Cole *v.* Sackett, 1 Hill, 516; Hill *v.* Beebe, 13 N. Y. 556; Webster *v.* Bainbridge, 13 Hun, 180, Jagger Iron Co. *v.* Walker, 76 N. Y. 521. In Illinois the taking of negotiable paper is *primâ facie* a payment. Morrison *v.* Smith, 81 Ill. 221; Kappes *v.* White Hard Wood Lumber Co. 1 Bradwell (Ill.), 280; McConnell *v.* Stettinius, 2 Gilman 713. So in Indiana. Frazer *v.* Boss, 66 Ind. 1, p. 14. So in Wisconsin. Mehilberg *v.* Tisher, 24 Wis. 607. In California, in order that this result may follow, an express agreement must be shown. Griffith *v.* Grogan, 12 Cal. 321; Brewster *v.* Bours, 8 Ib. 506; Welch *v.* Allington, 23 Ib. 322; Brown *v.* Olmsted, 50 Ib. 162. In New Brunswick it is a question of fact as to intention. Dunn *v.* Fredericton Boom Co., 1 Pugsley & Burbridge (N. B.), 575. See Hunt *v.* Boyd, 2 La. 109. In Pennsylvania taking the draft of a third party for a preëxisting debt is presumed to be conditional payment. League

Force of taking negotiable paper for debt: New York.

Illinois.

Indiana.

Wisconsin.

California.

New Brunswick.

Pennsylvania.

§ 753. By the French Civil Code, art. 1271, it is declared that "novation" takes place "when a debtor contracts towards his creditor a new debt which is substituted for the old one that is extinguished." Novation is included in ch. v. as being one of the modes by which debts become extinct. Under this article, and the article 1273, which provides that "novation is not presumed, and the intention to novate must result clearly from the act," there has been quite a divergence of opinion among the commentators on the Code, and a conflict in the judicial decisions as to the effect of giving a negotiable instrument for the price of goods sold where the vendor has given an unqualified receipt for the price; but in the absence of an unreserved and unconditional receipt, all agree that the buyer's obligation to pay the price is not novated. (*i*) The French Code gives the debtor the right to "impute" a payment to the debt that he chooses, art. 1253; but he cannot apply money towards payment of the capital of a debt while arrearages of interest are due; and if a general payment is made on a debt bearing interest, the excess only, after satisfying interest already due, will be appropriated to payment of the capital. Art. 1254. And where no appropriation is made at the time of payment, the law applies the money to that debt, amongst such as are past due, which the debtor is most interested in discharging; but to a debt past due in preference to one not yet due, even if the debtor has a greater interest in discharging the latter than the former; if the debts are of the same nature, the appropriation is made to the oldest: if all are of the same nature and the same date, the appropriation is made proportionably. The creditor is never allowed to elect without the debtor's assent. Art. 1255.

French law.

Appropriation of payments.

§ 754. The law of tender is quite different on the Continent

v. Waring, 85 Penn. St. 244; McIntyre *v.* Kennedy, 5 Casey, 448. In Hays *v.* McClurg, 4 Watts, 452, Huston J. said: "In Pennsylvania the law seems to be settled, that the buyer's giving a promissory note for goods purchased at or before the date of the note is not an extinguishment of the original contract unless it has been agreed to be so." Weakly *v.* Bell, 9 Watts, 273. In West Virginia a note will not be regarded as absolute payment of precedent debt unless it be so expressly agreed. Poole *v* Rice, 9 W. Va. 73. In Oregon the taking of a promissory note is *primâ facie* evidence of payment. Matasce *v.* Hughes, 7 Oreg. 39.]

West Virginia.

Oregon.

(*i*) See the cases and authors cited and compared in Sirey, Code Civ. Annoté, art. 1271; [2 Chitty Contr. (11th Am. ed.) 1371 *et seq.*; Griswold *v.* Griswold, 7 Lansing, 72; Helms *v.* Kearns, 40 Ind. 124.]

from our law. There a debtor is allowed to make payment to his creditor by depositing the amount which he admits to be due in the public treasury, in a special department, termed Caisse des Consignations. This is as much an actual payment as if made to the creditor in person, and the money thus deposited bears interest at a rate fixed by the state. This deposit or "consignation" is made extra-judicially, but the debtor must cite his creditor to appear at the public treasury at a fixed time, and notify him of the amount he is about to deposit; and the public officer draws up a report or "process-verbal" of the deposit, and if the creditor is not present, sends him a notice to come and withdraw it. Code Civ. arts. 1257 *et seq.* This system is derived from the Roman law, in which the word "obsignatio" had the same meaning as the French "consignation."

Tender under the French law.

§ 755. The ancient civil law rules bore a strong resemblance to those of the common law, in regard to payment and tender. Whenever the sum due was fixed, and the date of the payment specified either by the law or by force of the contract, it was the debtor's duty to pay without demand, (*k*) according to the maxim that in such cases, *dies interpellat pro homine;* and the default of payment was said to arise *ex re.* (*l*) But in all other cases, a demand (*interpellatio*) by the creditor was necessary, which required to be at a suitable time and place, of which the judge (or prætor) was to decide in case of dispute, and the default in payment on such demand was said to arise *ex persona.* (*m*) On the refusal of the creditor to receive (*creditoris mora*), when the debtor made a tender (*oblatio*), the discharge of the debtor took place by his payment of the debt (*obsignatio*) into certain public offices or to certain ministers of public worship: "Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est," the obsignatio being made in *sacratissimas ædes*, or, if the debtor preferred, he might apply to the prætor to name the place of deposit. (*n*)

Roman law.

(*k*) Dig. 13. 3 de Condict. Trit. 4 Gaius: 19. 1 de Act. Emp. et Vend. 47, Paul: 45. 1 de Verb. obl. 114, Ulp.: Code. 4. 49. de Act. Empt. 12, Const. Justin.

(*l*) Dig. 40. 5. de Fidei-com. libert. 26, § 1, Ulp.: 22. 32. Marcian.

(*m*) Dig. *ubi supra.*

(*n*) Cod. 4. 32. de Usuris, 19, Const. Philipp.: 8. 43. de Solution. 9, Const. Diocl. et Max.

§ 756. And payment by *whomsoever made* liberated the debtor. "Nec tamen interest quis solvat utrum ipse qui debet, an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorante debitore vel invito solutio fiat." (*o*) On this point the law of England is not yet settled, as stated by Willes J. in Cook *v.* Lister, (*p*) and the rule would rather seem to be that payment by a third person, a stranger to the debtor, without his knowledge, would not discharge the debtor. (*q*) In the late case of Walter *v.* James, (*r*) Martin B. declared the true rule to be, that if a payment be made by a stranger, not as making a *gift* for the benefit of the debtor, but as an agent who intended to claim reimbursements, — though without authority from the debtor at the time of payment, — it is competent for the creditor and the agent to annul the payment at any time before ratification by the debtor, and thus to prevent his discharge.

By Roman law, payment could be made by any one in discharge of the debtor.

As to common law, *quere*.

Walter *v.* James.

§ 757. Mr. Smith, in his book on Mercantile Law, (*s*) also calls attention to the very singular sham or imaginary payment used in Rome — as a substitute for a common law release — known as *acceptilatio*. "Est acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titito debetur, si id velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere; *quod ego tibi promisi, habes ne acceptum?* et Titius respondeat, *habeo*. Quo genere ut diximus tantum exsolvuntur obligationes quæ ex verbis consistunt, non etiam cæteræ. Consentaneum enim visum est, verbis factum obligationem, aliis posse dissolvi." (*t*) The learned author adds, that though this sort of sham payment was applicable only to a debt due by express contract, "an acute person," called Gallus Aquilius, devised a means of converting all other contracts into express contracts to pay money, and then get rid of them by the *acceptilatio*, a device termed, in honor of its inventor, the *Aquiliana stipulatio*. This statement is quite accurate, the Aquilian stipulation being recognized in the Institutes of Justinian. (*u*) This "acute person" was a very eminent lawyer, the colleague in the prætorship, and

Acceptilatio, or fictitious payment and release.

(*o*) Inst. lib. 3, tit. 29, 1.

(*p*) 13 C. B. N. S. 543; 32 L. J. C. P. 121.

(*q*) See Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24; Simpson *v.* Eggington, 10 Ex. 845; 24 L. J. Ex. 312; Lucas *v.* Wilkinson, 1 H. & N. 420; 26 L. J. Ex. 13.

(*r*) L. R. 6 Ex. 124.

(*s*) Page 533, note.

(*t*) Inst. 3. 30. 1.

(*u*) Lib. 3. 29. 2.

friend of Cicero (*collega et familiaris meus*), (*x*) and of great authority among the jurisconsults of his day, "Ex quibus, Gallum maxime auctoritatis apud populum fuisse;" (*y*) especially for his ingenuity in devising means of evading the strict rigor of the Roman law, — which was quite as technical as the common law ever was, — and of tempering it with equitable principles and remedies. (*z*)

(*x*) De Officiis, lib. 3, § 14.

(*y*) Dig. 1. 2. de Orig. Jur. 2, § 42, Pomp.

(*z*) See, for another example, Dig. 28. 2. 29. pr. f. Scævola.

BOOK V.

BREACH OF THE CONTRACT

PART I.

RIGHTS AND REMEDIES OF THE VENDOR.

CHAPTER I.

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SECTION I. — WHERE THE PROPERTY HAS NOT PASSED.

Where the property has not passed, vendor's sole remedy is action for damages.

§ 758. WHEN the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as has been explained in book II.: as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery: the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods

are still his. He may resell or not at his pleasure. But his only action against the buyer is for damages for non-acceptance: he can in general only recover the damage that he has sustained: (*a*) not the full price of the goods. (*a*[1]) The law, with the reason for it, was thus stated by Tindal C. J. in delivering the opinion of the exchequer chamber in Barrow *v.* Arnaud: (*b*) "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. (*c*) So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." (*d*)

Reason of the law. Barrow *v.* Arnaud.

§ 759. The date at which the contract is considered to have

(*a*) Laird *v.* Pim, 7 M. & W. 478; [Rand *v.* White Mountains Railroad, 40 N. H. 79, 86; 1 Chitty Cont. (11th Am. ed.) 615, and cases in note (*p*).]

(*a*[1]) [But see Thorndike *v.* Locke, 98 Mass. 340; Pearson *v.* Mason, 120 Ib. 53, cited and stated *post*, § 763, in note (*s*).; Phillips *v.* Merritt, 2 U. C. C. P. 513; Moore *v.* Logan, 5 Ib. 294.]

(*b*) 8 Q. B. 604–609. See, also, Maclean *v.* Dunn, 4 Bing. 722; Busk *v.* Davis, 2 M. & S. 403; Phillpotts *v.* Evans, 5 M. & W. 475; Gainsford *v.* Carroll, 2 B. & C. 624; Boorman *v.* Nash, 9 B. & C. 145; Valpy *v.* Oakley, 16 Q. B. 941; 20 L. J. Q. B. 381; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Lamond *v.* Davall, 9 Q. B. 1030; Boswell *v.* Kilborn, 15 Moore P. C. C. 309.

(*c*) But this is not always the rule as to purchaser's damages. See *post*, part II. ch. i. §§ 869 *et seq.* [Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362; Deming *v.* Grand Trunk R. R. Co. 48 N. H. 455; Cutting *v.* Grand Trunk R. R. Co. 13 Allen, 381; Gordon *v.* Norris, 49 N. H. 376; 1 Chitty Contr. (11th Am. ed.) 621, and note (*e*) and cases cited; Aldis J. in Worthen *v.* Wilmot, 30 Vt. 555, 557; McNaught *v.* Dodson, 49 Ill. 446; Harralson *v.* Stein, 50 Ala. 347; Sanborn *v.* Benedict, 78 Ill. 309; Foos *v.* Sabin, 84 Ib. 564.]

(*d*) [See Thompson *v.* Alger, 12 Met. 428; Gordon *v.* Norris, 49 N. H. 376, 385; Rand *v.* White Mountains Railroad, 40 Ib. 79; Allen *v.* Jarvis, 20 Conn. 38; Girard *v.* Taggart, 5 Serg. & R. 19; Ballentine *v.* Robinson, 46 Penn. St. 177; Ganson *v.* Madigan, 13 Wis. 67; Dana *v.* Fiedler, 2 Kernan, 41; Orr *v.* Bigelow, 14 N. Y. 556; Dey *v.* Dox, 9 Wend. 129; Davis *v.* Shields, 24 Ib. 322; Stanton *v.* Small, 3 Sandf. 230; Mallory *v.* Lord, 29 Barb. 454, 465; Whittemore *v.* Coates, 14 Mo. 9; Williams *v.* Jones, 1 Bush (Ky.), 621, 627; Northup *v.* Cook, 39 Mo. 208; Haines *v.* Tucker, 50 N. H. 307; Griswold *v.* Sabin, 51 Ib. 167; Whelan *v.* Lynch, 65 Barb. 329; Hewitt *v.* Miller, 61 Ib. 571; Haskell *v.* Hunter, 23 Mich. 305; Chapman *v.* Ingram, 30 Wis. 290; Camp *v.* Hamlin, 55 Ga. 259; Pittsburgh, Cinn. & St. L. R. R. Co. *v.* Heck, 50 Ind. 303; Shawhan *v.* Van Nest, 15 Am. Law Reg. (N. S.) 153; Laubach *v.* Laubach, 73 Penn. St. 392; Brunskill *v.* Mair, 15 U. C. Q. B. 213; Harris Manuf'g Co. *v.* Marsh, 49 Iowa, 11.]

been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he *intends* to break the contract and to refuse accepting the goods. (*e*) And on this principle was decided the case of Boorman *v.* Nash, (*f*) in which the facts were that in November, 1825, the plaintiff sold goods to the defendant, deliverable in the months of February and March following. The defendant became bankrupt in January. The goods were tendered and not accepted at the dates fixed by the contract, and resold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, as soon as the buyer became bankrupt. Held that the contract was not rescinded by the bankruptcy; (*f*[1]) that the assignees had the right to adopt it; that the vendor was not bound to resell before the time for delivery; and that the true measure of damages was to be calculated according to the market price at the dates fixed by the contract for performing the bargain. And if goods are deliverable by successive instalments, the assignee of the bankrupt purchaser cannot adopt the contract and claim further deliveries under it, without paying the price of what was delivered prior to the bankruptcy. (*g*)

Date of the breach.

Boorman *v.* Nash.

Purchaser's bankruptcy before time fixed for delivery.

Or after partial delivery.

§ 759 *a*. In Morgan *v.* Bain, L. R. 10 C. P. 15, it appeared that the defendants had, on the 5th of February, sold to the plaintiffs 200 tons of iron, to be delivered twenty-five tons monthly at 5*l.* per ton, net cash, or by four months' bill with 2*s.* 6*d.* per ton added. By the usage of trade no delivery was due under this contract till the 1st of April. On the 12th of March the plaintiffs found themselves to be insolvent, and they gave notice of the fact to the defendants. On the 16th of March they filed a petition in the bankruptcy court for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for the defendants to deliver upon such contracts without further demand for delivery. No delivery, however, was made

Morgan *v.* Bain.

(*e*) Phillpotts *v.* Evans, 5 M. & W. 475; Leigh *v.* Paterson, 8 Taunt. 540; Ripley *v.* M'Clure, 4 Ex. 345; Boswell *v.* Kilborn, 15 Moore P. C. C. 309.

(*f*) 9 B. & C. 145.

(*f*[1]) [Brett J. in Morgan *v.* Bain, L. R. 10 C. P. 26; Follansbee *v.* Adams, 86 Ill. 13; Bingham *v.* Mulholland, 25 U. C. C. P. 210.]

(*g*) Ex parte Chalmers, in re Edwards, L. R. 8 Ch. App. 289; [Mears *v.* Waples, 3 Houst. (Del.) 581; Re Wheeler, 2 Low. 252. But see Kraft *v.* Dulles, 2 Cinn. (Ohio) 116.]

by the defendants or claimed by the plaintiffs in April. On the 5th of April, at the first meeting of the creditors, a resolution was passed to accept a composition of five shillings in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of the plaintiffs' affairs. No step was taken in relation to the contract by either party until the 13th of May, when the market for iron having risen, the plaintiffs claimed the delivery of iron in fulfilment of the contract, offering and being ready to pay cash for it. The defendants replied, stating that the plaintiffs having failed to perform their part of the contract there was an end of it. The plaintiffs thereupon brought an action against the defendants for non-delivery of the iron, in which judgment was ordered for the defendants. Lord Coleridge C. J. said: "We have in this case the fact of insolvency, coupled with the fact that upon such insolvency the insolvents take none of the steps essential to indicate that they meant to stand by the contract. That is evidence from which it may fairly be found that the other party to the contract had a right to conclude that the insolvents had abandoned it, and, if they did so conclude, to abandon it themselves, and there is also amply sufficient evidence that the vendors did so abandon it. In coming to the conclusion at which we have arrived, I think we are well within the authorities on this subject. These are all discussed in the cases of Freeth *v.* Burr, L. R. 9 C. P. 208; Bloomer *v.* Bernstein, L. R. 9 C. P. 588, the circumstances of which were analogous to those of the present case." Brett J. said: "After the making of the contract the plaintiffs were as a fact insolvent, and, moreover, they gave the defendants notice of the insolvency, which I take to be the governing fact in this case. . . . . When the fact of insolvency is communicated to the vendor, a duty arises on the part of the insolvent to negative the presumption, that the vendor would be otherwise entitled to draw, that the insolvent intends to abandon the contract. It is not, however, sufficient to put an end to the contract that the insolvent should intend to abandon it; the vendor must assent to its being put an end to. . . . . There must be some evidence of mutual rescission. . . . . I think the smallest evidence would be sufficient of the defendants having done so; and I think it is supplied by the fact that they did nothing to show that they wished to go on with the contract,

Vendee's insolvency, effect of.

and broke from what is stated to have been their ordinary course of trade, viz. by not delivering as usual without any demand for delivery." (g^1)

Cort v. Ambergate Railway Company.

Where purchaser gives notice to vendor that he will not receive goods ordered, vendor is not bound to go on making them.

§ 760. The rules of law on this subject were fully discussed in Cort *v.* Ambergate Railway Company, (h) in which the cases were reviewed, and the judgment of the queen's bench delivered by Lord Campbell C. J. The case was an action for damages by a manufacturer against a railway company for breach of a contract to accept and pay for certain railway chairs, part of which had been delivered when the plaintiff received orders from the defendant to make and send no more. The plaintiff thereupon discontinued making them, although he was in a position to continue the supply according to the contract. The manufacturer had made a sub-contract for a part of the goods which he had promised to supply to the defendants, and was compelled to pay 500*l.* to be released from this sub-contract; and had made contracts for supplies of the necessary iron, and had built a large foundry for the manufacture of the chairs. Two questions were presented: first, whether the plaintiff could recover without actually making and tendering the remainder of the goods, the declaration alleging that they were ready and willing to perform their contract until a refusal and wrongful discharge by the defendants, and that the defendants had wholly and wrongfully prevented and discharged the plaintiffs from supplying the said residue; secondly, what was the proper measure of damages. Lord Campbell said, in relation to Phillpotts *v.* Evans, (i) that it had been properly decided, but that the exchequer of pleas had not determined in that case that the vendor would not have the right of treating the bargain as broken, *if he chose to do so*, as soon as the buyer gave him notice that he would not accept the goods, without being compelled afterwards to make a tender of them: and that the true point, decided in Ripley *v.* McClure, (k) was that a refusal by the buyer to accept in advance of the arrival of the cargo he had agreed to purchase

Phillpotts v. Evans.

Ripley v. McClure.

(g^1) [Don *v.* Law, 12 U. C. C. P. 460; Bingham *v.* Mulholland, 25 Ib. 210.]

(h) 17 Q. B. 127; 20 L. J. Q. B. 460. And see Hochester *v.* De la Tour, 2 E. & B. 678; 22 L. J. Q. B. 455; *ante*, Conditions, §§ 566 *et seq.*; Frost *v.* Knight, L. R. 5 Ex. 322; 7 Ex. 111.

(i) 5 M. & W. 475.

(k) 4 Ex. 345. And see Avery *v.* Bowden, Reid *v.* Hoskins, 6 E. & B. 953, 961; 25 L. J. Q. B. 49, 55; 26 Ib. 3, 5.

was not necessarily a breach of contract, but that if unretracted down to the time when the delivery was to be made, it showed a *continuing refusal* dispensing the vendor from the necessity of making tender. His lordship then said that a like *continuing refusal*, unretracted, appeared in the facts of the case under consideration, and then laid down the following rule: "On the whole, we think we are justified on principle, and without trenching on any former decision, in holding that where there is an executory contract for the manufacturing and supply of goods from time to time to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." (*l*)

§ 761. On the question of damages, Coleridge J. had told the jury at nisi prius that the plaintiff ought to be put in the same position as if he had been permitted to complete the contract. This direction was approved, the learned chief justice saying that "the jury were justified in taking into their calculation all the chairs which remained to be delivered and which the defendants refused to accept." (*m*)

Measure of damages in such case.

§ 762. Although in general the vendor's recovery in damages is limited to the difference between the price fixed in the contract and the market value on the day appointed for

In certain special cases the

(*l*) [Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362; Haines *v.* Tucker, 50 N. H. 307; Smith *v.* Lewis, 24 Conn. 624; S. C. 26 Ib. 110; Hughes's Case, 4 Ct. of Cl. 64; Moore *v.* Logan, 5 U. C. C. P. 294.]

(*m*) [Where a party had contracted for a large quantity of a manufactured article but afterwards refused to take it, it was held that evidence was admissible to show that the contractor had on hand a large amount of raw material, partially prepared for the manufacturer of the article contracted for, and that its condition was such that it could not be sold again without a great sacrifice. Chicago *v.* Greer, 9 Wallace, 726; Polley *v.* Waterhouse, 3 Allen (N. B.) 291; Moore *v.* Logan, 5 U. C. C. P. 294.]

vendor may recover the whole price of goods, though the ownership remains vested in himself.

delivery, — according to the rule as stated by Parke B. in Laird *v.* Pim, (*n*) that "a party cannot recover the full value of a chattel, unless under circumstances which import that the *property has passed* to the defendant, as in the case of goods sold and delivered where they have been absolutely parted with and cannot be sold again," — there may be special terms agreed on, in conflict with this rule. (*n*[1]) A vendor may well say to a buyer, "I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods;" and if these terms be accepted, the vendor may recover the whole price of goods the property of which remains vested in himself. In such a case the buyer would be driven to his cross-action if the vendor, after receiving the price, should refuse delivery of the goods. (*o*)

In some cases vendor may consider contract rescinded when partially executed, and recover the value of the goods delivered. Bartholomew *v.* Markwick.

§ 763. The vendor may in some cases, under an executory contract partially performed, be entitled to consider the contract *as rescinded* and recover on a *quantum valebant* for the goods actually delivered. Thus, in Bartholomew *v.* Markwick, (*p*) the plaintiffs had contracted to supply the defendant with such furniture as he should require to the amount of 600*l.* or 700*l.*, payable half in cash, and half by bill at six months. After some of the goods had been delivered, the defendant became displeased, and wrote to the plaintiffs, — "I now close all further orders, and desire what I have not purchased be taken off my premises: I will not be responsible for them," &c. &c. The defendant kept goods of the value of 88*l.* 17*s.* 6*d.*, and on action brought for goods sold and delivered insisted that the plaintiffs ought to have declared specially, and could not recover on the common counts before the expiration of six months, for which a bill was to have been given; but held by the whole court, that the plaintiffs on receiving the defendant's letter had "a right to elect, if they would treat the contract as rescinded, and to sue for the value of the goods which had been delivered," (*q*) on the

(*n*) 7 M. & W. 478.

(*n*[1]) [See Thompson *v.* Alger, 12 Met. 428, cited and stated *post*, § 763, note (*s*).]

(*o*) Dunlop *v.* Grote, 2 C. & K. 153.

(*p*) 15 C. B. N. S. 711; 33 L. J. C. P. 145.

(*q*) [Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362; Haines *v.* Tucker, 50 N. H. 307; Smith *v.* Lewis, 24 Conn.

authority of Hochester *v.* De la Tour, (*r*) and cases of a like character, referred to *ante*, §§ 567 *et seq.*, in the chapter on Conditions. (*s*)

624; S. C. 26 Ib. 110; Thompson *v.* Smith, 21 U. C. C. P. 1.]

(*r*) 2 E. & B. 678; 22 L. J. Q. B. 455. And see Inchbald *v.* The Western Neilgherry Coffee Company, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(*s*) [There is said to be a distinction in reference to the rule of damages "between a contract to sell goods, then in existence, and an agreement to furnish materials and manufacture an article in a particular way, and according to order, which is not yet in existence. The latter is said not to be so much a contract for the sale and purchase of goods, as a contract for work and labor merely, and it is held that in that class of cases the statute of frauds does not apply when there is nothing paid and no actual delivery. In a large class of cases of that kind, where the plaintiff has made surgical instruments of a particular kind, and according to order, for the defendant, who had patented the same, and which would of course be worthless in the hands of the plaintiff; or where a tailor had made a suit of clothes to order, of a particular description and for a particular measure; or a shoemaker had made boots or shoes to order and of a particular size and pattern; or the carriage-maker had made a carriage in the same way, of a particular style and pattern; or the artist has painted a portrait of an individual to order; or an engineer has constructed an engine according to order for a particular use, &c. though the mechanic or artist may sell the goods, if he choose, and recover of the defendant the difference between the contract price and the price for which the article was sold, yet it is held that he may if he choose, when he has fully performed his part of the contract and tendered the article thus manufactured to the defendant, or offered it at the place appointed, recover the full value of the article and leave the defendant to sell or use or dispose of it at his pleasure, and for the reason, in addition to that already stated, that the article thus manufactured for a particular person, or according to a particular pattern, or for a particular use, may be of comparatively little value to anybody else, or for any other use or purpose; but cases of this class are recognized as exceptions to the general rule, which is to be applied in the sale of ordinary goods or merchandise which have a fixed market value." Sargent J. in Gordon *v.* Norris, 49 N. H. 383, 384; Allen *v.* Jarvis, 20 Conn. 38; Bement *v.* Smith, 15 Wend. 493, and cases; Ballantine *v.* Robinson, 46 Penn. St. 177; Rand *v.* White Mountains Railroad, 40 N. H. 85. Some of the authorities upon this point were reviewed in Shawhan *v.* Van Nest, 25 O. St. 490, and it was decided that, where the plaintiff, in pursuance of an agreement with the defendant, furnished the materials and constructed a carriage for the defendant, in accordance with his order and directions, for which a stipulated price was to be paid, and the defendant refused to receive and pay for it when completed and tendered, the measure of damages is the contract price and interest from the time the money should have been paid. Gilmore J. said: "When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he had agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he cannot be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as

SECTION II. — WHERE THE PROPERTY HAS PASSED.

None but personal action where goods are in actual possession of buyer.

§ 764. When by the contract of sale the property in the goods has passed to the buyer, the vendor may, under certain circumstances hereafter to be considered, exercise rights on the goods themselves, if the buyer make default in payment; but whenever the goods have reached the actual possession of the buyer, the vendor's *sole* remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favor *quâ* vendor are gone. By the law of England, differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved. The principle at common law is that the goods have become the property of the buyer, and that the vendor has agreed to take for them the buyer's *promise* to pay the price. If then the buyer fail to pay, the vendor's remedy is limited to an action for the breach of *that* promise, the damages for the breach being the amount of the price promised, to which may be added interest. The leading case on the subject is Martindale *v.* Smith, (*t*) in which Lord Denman C. J. delivered the opinion of the queen's bench after advisement. His lordship said: "Having taken time to consider our

Cannot rescind sale for default in payment of price.

Nature of his personal action.

Martindale *v.* Smith.

damages for the breach of contract by the defendant; or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between thecontract price and what it sold for." Thompson *v.* Alger, 12 Met. 428, was an action by the vendor against the purchaser for a breach of contract for the purchase and sale of railway shares. The purchaser had made a part payment for the shares, and while the contract was in force the plaintiff had actually transferred the stock, on the books of the company, to the purchaser, so that the plaintiff had actually lost his title to the shares, and upon this special ground the court held that the plaintiff was entitled to recover the full contract price. This rule was again and more broadly applied in Thorndike *v.* Locke, 98 Mass. 340; and again it was still further extended and applied in Pearson *v.* Mason, 120 Mass. 53, where, upon a contract by the defendant to purchase certain stock then owned by the plaintiff, at his request, for an agreed price, and a tender of the stock by the plaintiff before an action was brought, and a renewal of the tender at the trial, it was held that the plaintiff was entitled to recover as his damages the whole price that the defendant agreed to pay. See Shawhan *v.* Van Nest, *supra*, and note to it, 15 Am. Law Reg. (N. S.) 153, 160 *et seq.*]

(*t*) 1 Q. B. 395. See, also, Tarling *v.* Baxter, 6 B. & C. 360; Dixon *v.* Yates, 5 B. & Ad. 313.

judgment, owing to the doubts excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and reinvest the property in himself, by reason of the vendee's failure to pay the price at the appointed time, *we are clearly of opinion that he had no such right*, and that the action (trover) is well brought against him. For the sale of a specified chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the creditor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that *default of payment does not rescind the contract*." It has already been shown (*ante*, § 759) that the bankruptcy of the buyer gives to the vendor no right of rescission, because the assignee has by law the right either to disclaim or to adopt and carry out the contracts of the bankrupt. (*u*)

Cannot rescind because of buyer's bankruptcy.

§ 765. It is not proposed in this treatise to enter into any discussion of questions of procedure, but it may be stated generally that the vendor may recover the price of goods sold, where the property has passed to the buyer, on the common counts for goods *bargained and sold*, and goods *sold and delivered*, (*x*) but that where the property has not passed, the declaration must be special for not accepting. (*y*) The declaration must also be special where the payment is to be made by bill or note, or partly in cash and partly by bill, and the vendee refuses to give either, unless the vendor chooses to wait until the term of credit has expired, in which case he can recover

Different forms of declaration in personal action against buyer.

(*u*) Bankruptcy Act, 1869, sec. 23.

(*x*) [1 Chitty Contr. (11th Am. ed.) 614, and note (*n*); Nichols *v.* Morse, 100 Mass. 523; Morse *v.* Sherman, 106 Ib. 430; Gordon *v.* Norris, 49 N. H. 376. The rule of damages is the same under each of these counts, viz. the contract price. In either case it must be proved that the property passed to the purchaser. That being proved, the price, of course, belongs to the vendor, and he may recover it under either of these counts that may apply to the facts. Sargent J. in Gordon *v.* Norris, 49 N. H. 382; Bailey *v.* Smith, 43 Ib. 143, 144; Thompson *v.* Alger, 12 Met. 428, 443, 444; 2 Chitty Contr. (11th Am. ed.) 1330; Ganson *v.* Madigan, 13 Wis. 67; Sands *v.* Taylor, 5 John. 395, 411; Bement *v.* Smith, 15 Wend. 493–495, 497; Sedgwick Damages (5th ed.), 312–316; Mayne Damages (2d Eng. ed.), 116; Messer *v.* Woodman, 22 N. H. 172; Ockington *v.* Richey, 41 Ib. 279.]

(*y*) Chitty Contr. 407 (9th ed.); [1 Chitty Contr. (11th Am. ed.) 615, and cases in note (*p*); Atwood *v.* Lucas, 53 Maine, 508; Messer *v.* Woodman, 22 N. H. 172; Bailey *v.* Smith, 43 Ib. 141; Stearns *v.* Washburn, 7 Gray, 187; Gordon *v.* Norris, 49 N. H. 376; Newmarket Iron Foundry *v.* Harvey, 23 Ib 395.]

on the common counts. (*z*) But if the vendee gives notice on a partially executed contract for a sale on credit that he will not carry it out, and yet retain the goods already sent, the vendor, having the legal right to consider the contract as rescinded, may at once bring action on the new contract resulting from the buyer's conduct, and recover on the common counts the value of the goods delivered. (*a*) Where the buyer has given a bill in payment, the vendor must account for the bill if dishonored, and cannot recover the price if the bill be outstanding. (*b*)

(*z*) [1 Chitty Contr. (11th. Am. ed.) 615, and note (*r*) and cases; Bass *v.* White, 7 Lansing, 171. As to the damages in a special action for the security before the term of credit has expired, see Barron *v.* Mullin, 21 Minn. 374. The principle alluded to in the text, *supra*, applies where the vendee has obtained the goods by fraud on a term of credit. The vendor's remedy is on the express contract or in tort. Magrath *v.* Tinning, 6 U. C. Q. B. (O. S.) 484; Wakefield *v.* Gorrie, 5 U. C. Q. B. 159; Strutt *v.* Smith, 1 C., M. & R. 312; Dellone *v.* Hull, 47 Md. 112; Kellogg *v.* Turpie, 2 Bradwell (Ill.), 55; Sheriff *v.* McCoy, 27 U. C. Q. B. 597; Ferguson *v.* Carrington, 9 B. & C. 59; Bicknell *v.* Buck, 58 Ind. 354; Auger *v.* Thompson, 3 Ont. App. 19; Silliman *v.* McLean, 13 U. C. Q. B. 544. See § 433, *ante*.]

(*a*) Bartholomew *v.* Marwick, 15 C. B. N. S. 711; 33 L. J. C. P. 145.

(*b*) *Ante*, § 731; [Chamberlin *v.* Perkins, 55 N. H. 237, stated *ante*, § 730, note (*x*).]

CHAPTER II.

UNPAID VENDOR'S REMEDIES AGAINST THE GOODS. — GENERAL PRINCIPLES.

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§ 766. WHERE the property in goods has passed by a sale, the *right of possession* also passes, but is, as we have seen, defeasible on the insolvency of the buyer, or the non-performance of conditions precedent or concurrent imposed on him by the contract.

Goods may be either in possession of the buyer,

If the goods have been delivered into the actual *possession* of the buyer, all right on them is gone, (*a*) as has been stated in a preceding chapter; but if not so delivered, the goods may be placed in two different conditions of fact as regards their actual custody. They may be

or of the vendor;

still in the actual possession of the vendor (or of his agents or bailees, which amounts to the same thing), or they may have been put *in transit* for delivery to the buyer, and

or in transit for delivery to buyer.

thus in *actual possession* of neither party to the contract. When thus in transit, the law gives to the unpaid vendor the right of intercepting them if he can, and thereby of preventing them from reaching the actual possession of an *insolvent* buyer. This is the right well known in the law of sale as that of stoppage *in transitu*.

§ 767. When the goods have not yet left the actual possession

Vendor has at least a lien for unpaid price on goods while in his possession unless waived.

of the vendor, he has at common law *at least* a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive the money when he parts with his goods. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose that, after a bargain in which the lien has thus been unequivocally waived, the buyer for his convenience, or any other motive, has left the goods in the custody of the vendor until the credit has expired, and has then made default in payment, or has become insolvent *before* the credit has expired, what are the vendor's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive, on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*, — a right that might perhaps be termed a

(*a*) [Obermier *v.* Core, 25 Ark. 562; Gay *v.* Hardeman, 31 Texas, 245.]

stoppage *ante-transitum?* (*b*) The true nature and extent of the vendor's rights in this intermediate state of things have not yet perhaps been in all cases precisely defined; but they have been considered by the courts under such a variety of circumstances, that in practice there is now but little difficulty in advising on cases as they arise. (*c*)

§ 768. Before reviewing the authorities, attention must be recalled to the different meanings of the word "delivery," as pointed out in book IV. part II. ch. ii. For it will appear in the investigation of the present subject that the vendor is frequently considered by the courts as being in actual possession of the goods, when he has made so complete a delivery as to be able to maintain an action for goods sold and delivered. Thus, for instance, in the whole class of cases where the delivery has been effected by the consent of the vendor to assume the changed character of bailee for the buyer, it will be seen that the unpaid vendor is still deemed to be in the *actual possession* of the goods for the purpose of exercising his remedies on them, in order to obtain payment of the price: and this, even in a case where the vendor gave a written paper acknowledging that he held the goods for the buyer, and subject to the buyer's orders. (*d*)

Meaning of the word "delivery" in this connection.

§ 769. It will be convenient to review, in the first place, the cases which establish the existence of this peculiar right in the unpaid vendor who has waived his lien, and then to treat separately his remedies, 1st, of resale; 2dly, of lien; and 3dly, of stoppage *in transitu*. The leading cases of Bloxam *v.* Sanders (*e*) and Bloxam *v.* Morley (*f*) (which were said by Blackburn J. in 1866 (*g*) to be still correct expositions of the "peculiar law" as to unpaid vendors) were decided by the king's bench in 1825. Bayley J. stated the principles as follows: "The vendor's right in respect of his price is not a mere lien which he will

Division of the subject.

Bloxam *v.* Sanders.

Nature and extent of unpaid vendor's claim on the goods.

(*b*) This is termed the right of *retention* in the Scotch law. See *ante*, § 413.

(*c*) [See Parks *v.* Hall, 2 Pick. 206; Barrett *v.* Pritchard, 1b. 515; Haskell *v.* Rice, 11 Gray, 240; Riddle *v.* Varnum, 20 Pick. 280, 285; Milliken *v.* Warren, 57 Maine, 46; Young *v.* Austin, 6 Pick. 280; Newhall *v.* Vargas, 15 Maine, 314; Welsh *v.* Bell, 32 Penn. St. 12.]

(*d*) Townley *v.* Crump, 4 Ad. & E. 58, and other cases examined *post*.

(*e*) 4 B. & C. 941.

(*f*) 4 B. & C. 951.

(*g*) In Donald *v.* Suckling, L. R. 1 Q. B. 585; 35 L. J. Q. B. 237.

forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but *his right of possession is not absolute;* it is liable to be defeated if he become insolvent before he obtains possession. Tooke *v.* Hollingworth, 5 T. R. 215. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the *possession*, and his insolvency, without payment of the price, defeats that right. The buyer, or *those who stand in his place*, may still obtain the right of possession if they will pay or tender the price, or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights." The assignees of the insolvent buyer were therefore held not entitled to maintain trover against the unpaid vendor, who had sold the goods on credit, but who still held them in his own warehouse. In 1833, Miles *v.* Gorton (*h*) was decided in the exchequer. The vendor sold hops on credit, and kept them in his warehouse *on rent charged to the buyer*. The buyer dealt with the hops as his own, and sold part of them, which were delivered to the subvendee on the buyer's order. The buyer then became bankrupt, and his assignees brought trover for the remainder in the vendor's warehouse; but the court held that as against them the vendor had the right to retain possession till payment of the price.

Bankrupt's assignees cannot maintain trover against unpaid vendor in possession.

Miles *v.* Gorton.

§ 770. In Townley *v.* Crump, (*i*) decided in 1836, the defendants, wine merchants in Liverpool, sold to one Wright a parcel of wine held by them in their own bonded warehouse there, for an acceptance at three months, and gave him an invoice describing the wines by marks and numbers, and handed

Townley *v.* Crump.

(*h*) 2 C. & M. 504. (*i*) 4 Ad. & E. 58.

him the following delivery order: "Liverpool, 29th September, 1834. Mr. Benjamin Wright. *We hold to your order* 39 pipes and 1 hhd. red wine marked J C J M. No. 41 a 67 — 69 a 80 — pipes, No. 105 hhd., rent free to 29 November next. John Crump & Co." The bill accepted by Wright was dishonored; a fiat in bankruptcy issued against him on the 28th January, 1835, and his assignees brought trover against the vendor. It was admitted "that the invariable mode of delivering goods sold while in warehouses in Liverpool is by the vendors handing to the vendees delivery orders." Lord Abinger C. B., before whom the cause was tried at the Liverpool assizes, refused to receive evidence that the order in question was equivalent to an accepted delivery order, or that the witness (a broker and merchant holding bonded vaults in Liverpool) would consider the possession of such an order as possession of the property; but permitted him to say that, in his opinion, the possession of the order would obtain credit for the holder with a purchaser, and that, as a matter of custom, the goods specified in such an order would be considered the property of the person holding the order. His lordship directed a nonsuit, which the king's bench, in banc, refused to set aside, Lord Denman giving the opinion of the court, composed of himself and Patteson, Williams, and Coleridge JJ., in these words: "There was a total failure of proof that where a vendor, who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates by reason of this custom to prevent a lien from attaching, and I think it is not contended that there is any general usage which could divest the right in such a case, *upon the insolvency of the vendee.* Cases have been cited, but none where the question arose between the *original vendor and vendee.*" It is impossible to imagine a clearer case than this of the vendor's agreement to change the character of his possession into that of a bailee for the buyer; but this sort of delivery was not allowed so to operate as to force the vendor to give up the goods to the buyer's assignees in bankruptcy. (*k*) Yet it cannot be doubted that the vendor had done all that he was bound to do in performance of his con-

Unpaid vendor does not lose his rights on goods by agreeing to hold as bailee of the buyer.

(*k*) [See Rice *v.* Austin, 17 Mass. 204; Jewett *v.* Warren, 12 Ib. 300; Frazer *v.* Hilliard, 2 Strobh. 309; Gunn *v.* Bolckow, L. R. 10 Ch. App. 491; Farmeloe *v.* Bain, L. R. 1 C. P. D. 495.]

tract before the buyer's insolvency, and that he could have maintained an action for goods sold and delivered. (*l*)

Dodsley *v.* Varley.

§ 771. Next came, in 1840, the case of Dodsley *v.* Varley, (*m*) which arose under the statute of frauds, and the question was, whether the vendor had lost his lien, for if not, it was conceded that there was no actual receipt to take the case out of the statute. The facts were that a parcel of wool was bought by the defendant while it was in the plaintiff's possession: the price was agreed on, but the wool would have to be weighed: it was then *removed to the warehouse of a third person*, where the defendant collected wool purchased from various persons, and packed it in sheeting provided by himself. There it was weighed, together with other wools, and packed, but not paid for. It was the usual course for the wool to remain at this place till paid for. On these facts it was held that the wool in the warehouse was in the *defendant's* warehouse, "and that he was in *actual possession* of it there as soon as it was weighed and packed. . . . . Consistently with this, however, the plaintiff had, not what is commonly called a lien determinable on the loss of possession, but a *special interest*, sometimes, but improperly, called a lien, *growing out of his original ownership, independent of the actual possession*, and consistent with the *property* being in the defendant."

Unpaid vendor's right may exist by special contract after *actual* possession taken by buyer.

Valpy *v.* Oakeley.

§ 772. In 1851, Valpy *v.* Oakeley (*n*) was decided in the queen's bench. The defendant sold 500 tons of iron to one Boydell, to be delivered in three parcels of 100, 200, and 200 tons, and to be paid for by Boydell's acceptance of the vendor's bills drawn on him. Invoices of the iron *to be* delivered were sent to the buyer, with bills drawn on him for the price, which bills he accepted and returned to the vendor. The first bill was paid; the other two were not paid, and the buyer subsequently became bankrupt. These two bills were proven under the fiat, one by the vendor, and the other by a transferee of the vendor, but no dividend was received under either proof. There remained in the vendor's possession 185½ tons of the iron at the time of the bankruptcy of Boydell, and this action was brought by his assignees in assumpsit on the contract for the non-delivery of this portion. Held, that

Where bills given to vendor have been dishonored he may retain goods undelivered,

(*l*) [See Weld *v.* Came, 98 Mass. 152.]
(*m*) 12 Ad. & E. 632,
(*n*) 16 Q. B. 941; 20 L. J. Q. B. 380.

the plaintiffs could only recover such damages as the bankrupt might have recovered; and that he could only have recovered the difference between the contract price and the market price; and only nominal damages where no such difference is proven. The *ratio decidendi* in this case was distinctly, that on the dishonor of the bills given for the price, the parties were placed *in the same condition as if the bills had never been given, and the contract had been to pay in ready money.* All the judges treated the case as one of lien reviving on the non-payment of the bills. Wightman J. said: "I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running, they may be taken to have been *primâ facie* payment, but they were dishonored before the iron was delivered, and in that case I have no doubt *that the vendor's lien attaches*, and that he may retain his goods until he is paid." (*o*) The other judges took the same view of this point, though not expressed perhaps as distinctly as by Wightman J.

and will be responsible only for difference between the contract price and the market price.

§ 773. This point came again before the same court in Griffiths *v.* Perry (*p*) in 1859, the judges being Crompton and Hill, neither of whom was on the bench when Valpy *v.* Oakeley was decided. The circumstances were precisely the same as in the last named case. Crompton J. said: "I apprehend that where there is a sale of specific chattels, to begin with, and a bill is given, there is no lien, in the strict sense of the word; but if afterwards an insolvency happens, and the bill is dishonored, then the party has, in my opinion, a right *analogous to that which a vendor who exercises the right of stoppage in transitu has.* . . . . When goods are left in the hands of a vendor, it cannot properly be said to be a stoppage *in transitu*, for it is one of those cases in which the *transitus* has not commenced. . . . . It has always seemed to me, and I think it has been established in a great many cases, that there is a similar right where the *transitus* has not commenced; and although no right to a strict lien has ever existed, yet where goods remain in the party's hands and insolvency occurs, and the bill is dishonored, there a right analogous to that of stoppage *in transitu* arises, and there is a right to withhold delivery of the goods." It was accordingly held, 1st. That

Griffiths *v.* Perry.

Nominal damages given where no actual

(*o*) [Arnold *v.* Delano, 4 Cush. 33; Thurston *v.* Blanchard, 22 Pick. 18.]

(*p*) 1 E. & E. 680; 28 L. J. Q. B. 204.

damage proved.

Whether sale is of specific chattels or of goods to be supplied.

Indorsement of delivery order confers no greater title on sub-vendee than buyer had.

the plaintiff was only entitled to nominal damages, in accordance with the decision in Valpy *v.* Oakeley. 2dly. That it makes no difference in such cases whether the sale is of specific chattels, or an executory contract to supply goods. 3dly. That the indorsement to a third person of a delivery order for the goods given by the vendor to the buyer does not confer on such third person any greater rights than the buyer had. This last point had been previously settled by a direct decision of the House of Lords, (*q*) which was not cited in the case.

The unpaid vendor may estop himself as against sub-vendor.

§ 774. The rights of the unpaid vendor under the circumstances which we are now considering are not affected by a resale to a third person, unless the vendor has by his conduct *estopped* himself from asserting his own rights; and we must now turn to the class of cases where the conflict of pretensions on the goods not paid for arose between the original vendor and the sub-vendee. (*r*) Without referring specially to the early cases, (*s*) we may pass to the decision of the king's bench in Stoveld *v.* Hughes, (*t*) in 1811. There the defendants had sold timber lying at their wharf to one Dixon, and the timber was marked by mutual assent with the initials of the buyer; and the vendor promised to send it to Shoreham. The buyer gave acceptances at three months for the price. A small part was delivered, and the remainder, while still lying on the vendor's premises, was sold by Dixon to the plaintiffs, who paid the price. The plaintiffs informed the defendant of the sale by Dixon, to which the defendant answered "Very well;" and the plaintiff and the defendant then went together on the wharf of the defendant, and the plaintiff there marked the timber with his own initials, and told the defendant to send no more of the timber to Dixon, and the defendant made no objection. Dixon became insolvent, his bills were protested, and the defendant refused delivery. Lord Ellenborough said, on

Stoveld *v.* Hughes.

When vendor assented to resale, estopped to contest rights of sub-vendee.

(*q*) McEwan *v.* Smith, 2 H. L. Cas. 309; *post*, § 776; [Keeler *v.* Goodwin, 111 Mass. 490, 492, and cases cited.]

(*r*) [Chapman *v.* Shepard, 39 Conn. 413, 419; Haskell *v.* Rice, 11 Gray, 240; Parker *v.* Crittenden, 37 Conn. 148.]

(*s*) Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Hanson *v.* Meyer, 6 East, 626; Green *v.* Haythorne, 1 Stark. 447.

(*t*) 14 East, 308

these facts: "The defendants were the only persons who could contravene the sale and delivery to the plaintiff from the Dixons. And when that sale was made known to the defendant Hughes, he assented to it by saying 'Very well,' and to the marking of the timber by the plaintiff's agent, which took place at the same time. If that be not an executed delivery, I know not what is so." The other judges, Grose, Le Blanc, and Bayley, concurred. In Craven *v.* Ryder, (*u*) in 1816, the vendors undertook to deliver the goods free on board to the vendee. They delivered the goods on board, and took a receipt in their own name, thereby entitling themselves to demand the bill of lading. The purchaser resold and received payment, and became insolvent without paying the original vendor. The sub-vendee obtained a bill of lading, *without the assent* of the original vendor, and it was held that he had acquired no rights against the first vendor, who had never delivered the property out of his own control.

Craven *v.* Ryder.

But not bound without such assent.

§ 775. The next in date, and the leading case, is Dixon *v.* Yates, (*x*) in 1833. The plaintiff Dixon had bought a large number of puncheons of rum belonging to Yates, and lying in the latter's warehouse at Liverpool. He paid for them, thus becoming possessor as well as owner. He afterwards sold forty-six puncheons, parcel of his purchase, to one Collard, a clerk in Yates's service, and gave him an invoice specifying the number and marks of each puncheon, and took Collard's acceptances for the amount of the invoice. By invariable usage in Liverpool, the mode of delivering goods sold while in warehouse is that the vendor hands to the buyer a delivery order for the goods. On a former occasion, Collard had made in the same manner a similar purchase of another parcel of the rums, and Dixon gave him delivery orders for them; but when Collard applied for delivery orders for this second purchase, Dixon refused, but said if he wanted one or two puncheons he, Dixon, would let him have them. Collard then drew two orders on Dixon for one puncheon each, and the latter gave corresponding orders on Yates, and these two puncheons were delivered to a purchaser from Collard. One of Collard's bills became due on the 16th November, and was dishonored; and Dixon, on the 18th November, gave notice to Yates not to deliver the remaining forty-four puncheons to any one but

Dixon *v.* Yates.

(*u*) 6 Taunt. 433. (*x*) 5 B. & Ad. 313.

himself, and on the 19th made a verbal, and on the 21st a written, demand on Yates for the rum, but the latter refused to deliver it to Dixon. Collard had had the puncheons which he bought coopered at Yates's warehouse, and marked with the letter C. On the 28th October, before Collard's bill was due, he sold twenty-six puncheons of the rum bought from Dixon to one Kaye, receiving in payment Kaye's acceptances, which were duly honored. On the 31st October, Kaye's cooper went to Yates's premises and got Yate'ss warehouseman to go with him to the warehouse, and there marked the casks (which were described in Collard's invoice to Kaye by marks and numbers) with the letters J. A. K., and got the casks ready for Kaye's gauger, who gauged them, and the casks were then coopered by Kaye's cooper. When the gauger first came to Yates's office, a clerk of Yates repeatedly refused permission that he should gauge the casks for Kaye, but Collard came afterwards and had it done. Collard had taken samples of the rum when first landed on the quay, but not after it was in the warehouse. It was held by all the judges that the possession of the vendor Dixon had never been divested; *not* by Collard's *taking the samples*, for they were not taken as part of the bulk; *not* by his *taking possession of the two puncheons* which were actually delivered to him, because it is only when delivery of part is intended to operate as delivery of the whole that it can have that effect; *not* by the *marking*, for that is an equivocal act, and may be merely for the purpose of identifying the goods, besides which, usage required delivery orders, which had been expressly refused; *not* by the *coopering and gauging*, because that had been objected to by Yates's clerk, and was only accomplished through the unauthorized interference of Collard, availing himself of his position as clerk. Park J. in delivering his opinion, said: "There was no delivery to the sub-vendees, and the rule is clear *that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title defeasible on the non-payment of the price by the first vendee.* Craven *v.* Rider, 6 Taunton, 433." (*y*)

§ 776. McEwan *v.* Smith (*z*) was decided in the House of Lords in 1849. The facts were that certain sugars were imported by the respondents Smith, and warehoused for

McEwan *v.* Smith.

(*y*) See Griffiths *v.* Perry, *ante*, § 773. (*z*) 2 H. L. Cas. 309.

their account by their agent at Greenock, named James Alexander, in a bonded warehouse of Little & Co. The entry on the warehouse book was, "Received from James Alexander for J. & A. Smith." The respondents sold the sugar to Bowie & Co., and gave them an order dated 15th August, 1843, *on Alexander*, directing him to deliver to the purchasers "the under-noted 42 hhds. of sugar, ex *St. Mary*, from Jamaica, in bond." The sale was for a bill at four months. Bowie & Co. never claimed the delivery, and on the 26th September one of the vendors wrote to their agent Alexander, "I have just heard of Bowie & Co.'s failure. Take immediate steps to secure our 42 hhds. of sugar, ex *St. Mary*, lately sold them, if they are still in warehouse." In the mean time, however, the appellants McEwan had bought the sugar from Bowie & Co., and on the 25th September they sent to the office of Alexander and produced there the original delivery order of Smith & Co., which had been indorsed to them by Bowie & Co. Alexander's clerk, thereupon, gave them this note: "Delivered to the order of Messrs. McEwan & Sons, this date, forty-two hogsheads of sugar, ex *St. Mary*. James Alexander, per J. Adams." Alexander, when he received Smith's letter, removed the sugar to another warehouse, and wrote to them on the 27th September: "The order for these sugars was presented on the evening of the 25th inst. in the usual way; but the young man that came with it from the agents of Messrs. McEwan said that he wished them put in my books as delivered to these gentlemen; and from the order of delivery being transferred to them, my young man (for I was not within at the time) noted in the little book in which the weights are taken when weighing over, 'delivered to Messrs. McEwan per order of 25th Sept. 1843,' and at their request he gave them a slip of paper to this effect." On these facts Messrs. McEwan claimed that the goods had been delivered to them, and brought their action in Scotland for the goods. It seems manifest, on the face of the transaction, that Messrs. McEwan acted under the mistaken impression that Alexander held the goods as a warehouseman, for they only applied to have the entry of delivery *made on his books*, which they could not possibly have considered to be a delivery to them, if they had known that the sugar was in the warehouse of Little & Co. It was accordingly held by the House of Lords that nothing had been done to change the possession of the sugar up to the 26th September, when the

Effect of delivery order.

vendor exercised his lien. Several of the learned lords gave expositions of the nature and effect of delivery orders, and of dealings between vendors and sub-vendees, in constituting delivery of possession, and in vesting title in a sub-vendee as against the unpaid original vendor. The lord chancellor (Lord Cottenham) first said of the note given by Alexander's clerk, that it was "nonsense to say that by that memorandum the goods were delivered." His lordship then said: "First, it is said that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that . . . . merely puts the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effects of these two documents are quite different from each other, it seems to me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading. . . . . It was contended that, assuming the delivery note given to the first vendee to have no effect in changing the property, yet if the *second vendee* comes to the *original vendor* and obtains a new order, the vendor *cannot afterwards say* that he has not been paid by the first vendee, and so defeat the title of the second vendee, the sale to whom he had in fact sanctioned by making that second note, and dealing with him as a party entitled to the custody of the goods. But this argument is answered by the observation that Mr. Alexander is here assumed to have an authority which in fact he never possessed; for in truth he possessed no authority but that which the first delivery note given to Bowie & Co. had conferred upon him. . . . . Supposing the note of 25th Sept. to have been signed by Alexander himself, I am of opinion that it gave the second vendee no better title than the first delivery note gave to Bowie & Co. It is not possible to construe this note *as a dealing between the vendors and the second vendee*, when in fact there was no communication whatever between them." Lord Campbell said: "The single point in this case is, whether Smith & Co., the respondents, the original vendors of the goods, retained their lien upon them.

. . . . If a bill of lading is given, and that is indorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. . . . . It is said that the delivery order and the subsequent payment of the price by the second vendee take away the lien of the vendors. These acts do not seem to me to do so; for, first, this price was not paid to the original owners; and then to treat what passed between *other people as an estoppel to the original owners* is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to that point for which no authority in the usage of trade or in the law can be shown." (*a*) As to the true nature of the unpaid vendor's right on the goods in such circumstances, his lordship was very emphatic in repudiating any supposed analogy with stoppage *in transitu*. He said: "Several of the judges in the court below discuss at great length the question of stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case *than the doctrine of contingent remainders*." It was in his lordship's opinion clearly the revival of the lien, which entitles the vendor to exercise his right on goods sold originally with a waiver of lien, if the buyer becomes insolvent before the credit expires. (*b*)

§ 777. In Pearson *v.* Dawson (*c*) the facts were that the defendant sold sugar, held in his own bonded warehouse, to one Askew, and took an acceptance for the price. Askew resold twenty hogsheads of the sugar to the plaintiffs, and gave them a delivery order in the following words: "Mr. John Dawson: Please deliver to Messrs. Pearson & Hampton, or order, twenty hogsheads of sugar, ex *Orontes* [here were the specified marks, numbers, &c.]. James Askew." This order was handed by the plaintiffs to the defendant, who wrote in pencil on his "sugar book" the plaintiffs' name opposite the particular hogsheads resold. No one could take the hogsheads out of the warehouse without paying duty, and the plaintiffs having sold two of the hogsheads gave their own delivery order to the defendant for them, and the defendant gave the plaintiffs an order to his warehouseman to deliver them, and the plaintiffs paid the duty and

Pearson *v.* Dawson.

(*a*) See, also, Dixon *v.* Bovill, 3 McQueen H. L. Cas. 1.

(*b*) [See Arnold *v.* Delano, 4 Cush. 33, cited *ante*, § 767, note (*c*).]

(*c*) E., B. & E. 448; 27 L. J. Q. B. 248.

took them away. In the like manner other hogsheads, making altogether eight out of the twenty, had been taken from the warehouse by the plaintiffs when Askew become insolvent; his bills were dishonored, and the defendant then claimed his lien on the twelve remaining hogsheads. But the judges, Lord Campbell C. J. and Coleridge and Erle JJ., were unanimously of opinion that the original vendor was bound to state to the plaintiffs his objections, if he had any, to recognizing the delivery order given by Askew when made known to him, and that having by his conduct given an implied assent to the resale, he had lost possession and right of lien, and could not contest the title of the subvendee.

Vendor in such cases is estopped even from denying that the property had passed under his contract with first buyer.

Woodley *v.* Coventry.

§ 778. In Woodley *v.* Coventry (*d*) the defendants, corn factors, sold 350 barrels of flour, to be taken out of a larger quantity, to one Clarke, who had obtained advances from the plaintiff on the security of the flour, giving to the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse, and lodged it there, the granary clerk saying, "It is all right," and showing the plaintiff samples of the flour sold to Clarke. The plaintiff sold the flour to different persons, and the defendants delivered part of it, but Clarke having in the mean time absconded and become bankrupt, the defendants refused, as unpaid vendors, to part with any more of the flour. The plaintiff brought trover, and it was contended for the defendants that the estoppel set up against them by the plaintiff could not prevail against the rule that trover will not lie where the property is not vested; and that by the contract between the defendants and Clarke no property had passed, because the sale was not of any specific flour, but of flour to be supplied generally, in accordance with the samples. But the court held that the defendants were estopped also from denying that the property had passed, and refused to set aside the verdict given in plaintiff's favor. Under very similar circumstances, the queen's bench held, in Knights *v.* Wiffen, (*e*) that the estoppel took place even where the buyer had paid the price before presenting the delivery order, the court holding that the buyer's position was nevertheless altered through the defendant's conduct, because the buyer was thereby induced to rest satisfied that

Knights *v.* Wiffen.

(*d*) 2 H. & C. 164; 32 L. J. Ex. 185. (*e*) L. R. 5 Q. B. 660.

the property had passed, and to take no further steps for his own protection. (*e*[1])

§ 779. According to the foregoing authorities an unpaid vendor in actual possession of the goods sold, even where he has relinquished his lien by the terms of his contract, has the following rights, of which he is not deprived by assenting to hold the goods as bailee of the buyer: First, If the controversy be between the unpaid vendor and the insolvent buyer, or the assignees of the latter, the vendor may refuse to give up possession of the goods without payment of the price. (*f*) (And see *ante*, § 763, as to antecedent partial deliveries not paid for.) Secondly, The vendor's remedy will not be impaired by his giving a delivery order for the goods if countermanded before his bailee attorns to the buyer. (*g*) Thirdly, The rights of the unpaid vendor are the same against a sub-vendee as against the original buyer, (*h*) unless he be precluded by the estoppel resulting from his assent, express or implied, to the sub-sale when informed of it. (*i*) These rights taken in connection with the remedy by resale, and the vendor's lien, treated of in the two succeeding chapters, cover almost every conceivable controversy that can arise relative to the rights of an unpaid vendor before the buyer has obtained actual possession of the goods. (*i*[1])

Propositions deduced from the review of the authorities.

§ 780. It will be again necessary to refer more particularly (*post*, ch. iv. on Lien) to the effect of delivery orders, but before leaving the subject of estoppel, attention may properly be directed to the cases in which it has been applied to warehousemen and bailees, who may by their conduct make themselves responsible to sub-vendees without relieving themselves of liability towards the unpaid vendor. For the doctrine of estoppel in general, the reader is referred to

Warehousemen may make themselves liable as bailees to both parties.

(*e*[1]) [Voorhis *v.* Olmstead, 66 N. Y. 113. See Farmeloe *v.* Bain, L. R. 1 C. P. D. 445,]

(*f*) Tooke *v.* Hollingworth, 5 T. R. 215; Bloxam *v.* Sanders, 4 B. & C. 941; Miles *v.* Gorton, 2 Cr. & M. 504; Townley *v.* Crump, 4 Ad. & E. 58; Craven *v.* Ryder, 6 Taunt. 433; Dodsley *v.* Varley, 12 Ad. & E. 632; Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204.

(*g*) McEwan *v.* Smith, 2 H. L. Cas. 309; Griffiths *v.* Perry, 1 E. & E. 680; [Keeler *v.* Goodwin, 111 Mass. 490.]

(*h*) Craven *v.* Ryder, 6 Taunt. 433; per Parke B. in Dixon *v.* Yates, 5 B. & Ad. 313; McEwan *v.* Smith, 2 H. L. Cas. 309; Griffiths *v.* Perry, 1 E. & E. 680.

(*i*) Stoveld *v.* Hughes, 14 East, 308; Pearson *v.* Dawson, E., B. & E. 448; 27 L. J. Q. B. 248.

(*i*[1]) [See Farmeloe *v.* Bain, 1 C. P. Div. 445; Keeler *v.* Goodwin, 111 Mass. 490.]

the notes appended to the case of Doe *v.* Oliver, (*k*) in Mr. Smith's very valuable book. The principle was thus stated by Lord Denman in Pickard *v.* Sears: (*l*) "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But in Freeman *v.* Cooke (*m*) Parke B. said, — and this dictum was approved by Chelmsford L. C. in Clarke *v.* Hart (6 H. L. Cas. 633–656), — that "in most cases the doctrine in Pickard *v.* Sears is not to be applied unless the representation is such as to amount to the contract or license of the party making it." (*n*)

Principle on which estoppel rests.

§ 781. In Stonard *v.* Dunkin (*o*) the defendant, a warehouseman, gave a written acknowledgment that he held a parcel of malt for the plaintiff, who had advanced money on a pledge of it to one Knight. Knight became bankrupt, and the defendant attempted to show that the malt had not been measured, and that the property in it therefore passed to Knight's assignees; but Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff the malt is not yours, after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title." This case was followed by Hawes *v.* Watson (*p*) in the king's bench in 1824, and by Gosling *v.* Birnie (*q*)

Stonard *v.* Dunkin.

Warehousemen estopped from setting up the rights of unpaid vendor, after attorning to purchaser as sub-vendee.

Hawes *v.* Watson.

Gosling *v.* Birnie.

(*k*) 2 Smith's L. C. 768 *et seq.*

(*l*) 6 Ad. & E. 474.

(*m*) 2 Ex. 654.

(*n*) [Drew *v.* Kimball, 43 N. H. 282, in which the doctrine of estoppel is very fully treated and the cases reviewed; Fall River Nat. Bank *v.* Buffington, 97 Mass. 498, 500, 501; Andrews *v.* Lyons, 11 Allen, 349; Langdon *v.* Doud, 10 Ib. 437; Plumer *v.* Lord, 9 Ib. 455; Audendried *v.* Betteley, 5 Ib. 384; Erie County Savings Bank *v.* Roop, 48 N. Y. 292, 298; Montpelier & Wells River R. R. *v.* Langdon, 45 Vt. 137; 2 Sugden V. & P. (8th Am. ed.) 743, note (*u*) and numerous cases there cited; Copeland *v.* Copeland, 28 Me. 528; Wooley *v.* Chamberlain, 24 Vt. 270–276; Spiller *v.* Scribner, 36 Ib. 245; Halloran *v.* Whitcomb, 43 Ib. 306, 312; Kinney *v.* Farnsworth, 17 Conn. 355; Whitaker *v.* Williams, 20 Ib. 98; Maple *v.* Kussart, 53 Penn. St. 348; Brookman *v.* Metcalf, 4 Rob. (N. Y.) 568; Hicks *v.* Cram, 17 Vt. 448-455; Storrs *v.* Barker, 6 John. Ch. 166; Marshall *v.* Pierce, 12 N. H. 133; Roe *v.* Jerome, 18 Conn. 138; Noyes *v.* Ward, 19 Ib. 250.]

(*o*) 2 Camp. 344; [Chapman *v.* Searle, 3 Pick. 38.]

(*p*) 2 B. & C. 540.

(*q*) 7 Bing. 339.

in the common pleas in 1831, the assent of the wharfinger in the latter case being by parol. Tindal C. J. said: "The defendant is estopped by his own admissions, for unless they amount to an estoppel the word may as well be blotted from the law." (q^1) The rule has since been applied in very many cases, among which may be cited Gillett *v.* Hill, (r) Holl *v.* Griffin, (s) Lucas *v.* Dorrien, (t) and Woodley *v.* Coventry; (u) and it was recognized in Swanwick *v.* Sothern, (x) in the elaborate judgment delivered by Blackburn J. in the queen's bench, in Biddle *v.* Bond, (y) and in Knights *v.* Wiffen. (z)

(q^1) [It has been held in Nova Scotia, that where a warehouseman receives the delivery order of a vendor, and keeps it for over a month in his possession without notifying the vendee who sent the order to him that the property is not the property of the party by whom the order was made, he is liable to the vendee for the goods mentioned in such order. Twining *v.* Oxley, 2 Thompson, 18; Davis *v.* Browne, 9 U. C. Q. B. 193; Holton *v.* Sanson, 11 U. C. C. P. 606; Hegan *v.* The Fredericton Boom Co. 2 Pugsley & Burbridge (N. B.), 165.]

Liability of warehouseman to vendee.

(r) 2 C. & M. 536.

(s) 10 Bing. 246.

(t) 7 Taunt. 278.

(u) 2 H. & C. 164, and 32 L. J. Ex. 187.

(x) 9 Ad. & E. 895.

(y) 6 B. & S. 225, and 34 L. J. Q. B. 137. See the same principle applied in other cases: as in delivering certificates of shares, In re Bahia & San Francisco Ry. Co. L. R. 3 Q. B. 584; Hart *v.* Frontino Gold Mining Co. L. R. 5 Ex. 111; or in issue of debentures, Webb *v.* Herne Bay Commiss'rs, L. R. 5 Q. B. 642.

(z) L. R. 5 Q. B. 660; *ante*, § 778.

CHAPTER III.

REMEDIES AGAINST THE GOODS. — RESALE.

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§ 782. We have seen that the vendor has no right to rescind the sale when the buyer is in default for the payment of the price, (*a*) and this suggests at once other important questions. What is a vendor to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods are perishable, like a cargo of fruit; or expensive to keep, as cattle or horses? May the vendor resell? And if so, under what circumstances and with what legal effect? Before attempting to give an answer to these questions, let us see how the law stood when Blackburn on Sales was published, in 1845. The following is the statement of the learned author: "Assuming therefore what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attrib-

May vendor resell if buyer continues in default?

Law as stated in Blackburn on Sales.

(*a*) *Ante*, § 764.

uted to the assent of the purchaser under the contract of sale, the question arises, how much greater than a lien are they? and this is a question that in the present state of the law no one will venture to answer positively, but, as has already been said, the better opinion seems to be that *in no case do they amount to a complete resumption of the right of property*, or in other words, *to a right to rescind the contract of sale*, but perhaps come nearer to the rights of a *pawnee with a power of sale*, than to any other common law rights. At all events, it seems that a resale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover." (*b*)

§ 783. There has been a great deal of authority on the point since the publication of Blackburn on Sales, and it will be convenient first to refer succinctly to the decisions cited by that learned author. Martindale *v.* Smith (*c*) may be at once distinguished from all the other cases cited, by the circumstance that the resale in that case was made *after the buyer had tendered the price*, a proceeding to which no countenance has been given by any *dictum* or any decided case. To the latter case of Chinery *v.* Viall, (*d*) to be examined *post*, the same remark applies, the vendor having resold *before* the buyer was in default. In Langfort *v.* Tiler, (*e*) Holt C. J. ruled, in 1705, that "after earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him, and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." (*f*) We have already seen that by the law as now settled the agreement

Review of authorities. Right cannot exist after tender of price by buyer.

Nor before buyer's default.

Langfort *v.* Tiler.

(*b*) Blackburn on Sales, 325.

(*c*) 1 Q. B. 395.

(*d*) 5 H. & N. 288; 29 L. J. Ex. 180.

(*e*) 1 Salk. 113, cited by Lord Ellenborough in Hinde *v.* Whitehouse, 7 East, 571, and by Littledale J. in Bloxam *v.* Sanders, 4 B. & C. 945.

(*f*) [See Neil *v.* Cheves, 1 Bailey (S. C.), 537; 2 Kent, 495; Girard *v.* Taggart, 5 Serg. & R. 19; Dibble *v.* Corbett, 5 Bosw. (N. Y.) 202; Newhall *v.* Vargas, 15 Me. 314, 325, 326; Heffernan *v.* Berry, 32 U. C. Q. B. 518.]

is not dissolved according to the *dictum* in this old case. (*g*) In Hore *v.* Milner. Hore *v.* Milner, (*h*) at nisi prius in 1797, Lord Kenyon held that a vendor who had resold had estopped himself from alleging the contract to have been an executed bargain and sale, and could only recover on a count for damages, as on an executory agreement. In Mertens *v.* Adcock. Mertens *v.* Adcock, (*i*) in 1813, Lord Ellenborough held, in a case of goods sold at auction, with deposit of part of the price, and *express reservation* of power to resell, that the resale was not a rescission of the contract, and that the vendor might recover on a count for goods bargained and sold. This case has since been overruled. overruled. See Lamond *v.* Davall, § 786, *infra*. In Hagedorn *v.* Laing. Hagedorn *v.* Laing (*k*) the common pleas expressed a doubt of the correctness of Lord Ellenborough's ruling, in cases where there is an *express* reservation of the power to resell. In Greaves *v.* Ashlin. Greaves *v.* Ashlin, (*l*) in 1813, the facts were, that the defendant sold the plaintiff fifty quarters of oats at 45*s.* 6*d.*, and resold them on the buyer's default, at 51*s.* per quarter. Lord Ellenborough held the sale not to be rescinded by the resale, and the plaintiff recovered the profit on the resale.

§ 784. Next came Maclean *v.* Dunn, in 1828. The vendor in Maclean *v.* Dunn. that case resold the goods at a loss, after repeated requests that the buyer would take them. Best C. J. gave the decision of the court, that the original sale was not thereby rescinded, and that the buyer might be sued in assumpsit on the original contract; and the reasoning was as follows: "It is admitted that *perishable articles* may be resold. It is difficult to say what may be considered as perishable articles and what not; but if articles are not perishable, *price is*, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. Those which have been decided do not apply. . . . . *We are anxious to*

(*g*) [See Newhall *v.* Vargas, 15 Me. 314, 325.]

(*h*) 1 Peake, 42, note (58, note, in ed. 1820).

(*i*) 4 Esp. 251.

(*k*) 6 Taunt. 162.

(*l*) 3 Camp. 426.

confirm a rule consistent with convenience and law. It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower." (*m*) In Blackburn on Sales it is said of this case, that "the *dictum* of the court goes to the extent that the resale was perfectly legal and justifiable; *probably it may be so*, but there has never been a decision to that extent. (*n*)

§ 785. In Acebal *v.* Levy (*o*) the common pleas, in 1834, when Best C. J. had been succeeded by Tindal C. J., and when Vaughan, Bosanquet, and Alderson JJ. had become members of the court, subsequently to the decision in Maclean *v.* Dunn, said that it was unnecessary to decide "whether the plaintiff can or cannot maintain the count for goods bargained and sold, after he has resold the goods to a stranger, before the action brought, — a question which does not go to the merit, but is a question as to the pleading only, for *there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count framed upon the refusal to accept and pay for the goods bought.*" (*p*) In Milgate *v.* Kebble, (*q*) decided in the common pleas, in 1841, the plaintiff brought trover upon the following facts. The defendant sold to the plaintiff his crop of apples for 38*l.*, to be paid by instalments *before* the buyer took them away. The buyer paid 33*l.* on account, and gathered the apples on the 1st October, leaving them in the defendant's kiln. On the 27th December, the defendant wrote to the plaintiff a notice to pay for them and take them away, and this not being done, the defendant resold the apples for 6*l.* on the 22d January. The jury found that a reasonable time had *not* elapsed before the resale, and gave a verdict for 5*l.* damages to the plaintiff. On leave reserved, a motion for nonsuit was successful, on the ground that the vendor's right of *possession* was not lost, so as to enable the

Acebal *v.* Levy.

Milgate *v.* Kebble.

Vendee in default cannot maintain trover.

(*m*) 4 Bing. 722; [Newhall *v.* Vargas, 15 Me. 314.]

(*n*) Blackburn, p. 337.

(*o*) 10 Bing. 376.

(*p*) [See Newhall *v.* Vargas, 15 Me. 314.]

(*q*) 3 M. & G. 100. See, also, Bloxam *v.* Sanders, 4 B. & C. 948, and Felthouse *v.* Bindley, 11 C. B. N. S. 869; 31 L. J. C. P. 204; *ante*, § 40.

plaintiff to maintain *trover* against him. In this case, Tindal C. J. said the buyer was in the condition of a *pledger*, who cannot bring trover. In Fitt *v.* Cassanet (*r*) the subject again came before the same court, in 1842, but the facts did not require a direct decision on it, though the judges all assumed it to be settled law that a resale would be legal, after a refusal to accept on the part of the purchaser. Thus stood the authorities in 1845, and one of the points in dispute was settled very speedily afterwards.

Fitt *v.* Cassanet.

§ 786. In Lamond *v.* Davall, (*s*) decided in 1847, the vendor brought assumpsit for shares bargained and sold, and sold and delivered. At an auction sale the defendant had become the buyer, at 79*l.*, of certain shares, one of the conditions of the sale being that the goods might be resold unless the purchase-money was paid on the following day, the bidder so making default being answerable for the loss on the resale. The vendor resold for 63*l.* Erle J. nonsuited the plaintiff, on the ground that this reservation of the power of resale was in effect a condition for making void the sale on default of the buyer, and that the actual resale had rescinded the original contract, so that assumpsit could not be maintained on it. This nonsuit was upheld after advisement, the court overruling Mertens *v.* Adcock (*t*) and confirming the *dictum* of Gibbs C. J. in Hagedorn *v.* Laing. (*u*) Lord Denman C. J. said: "It appears to us that a power of resale implies a power of annulling the first sale, and that therefore the first sale is *on a condition, and not absolute*. There might be inconvenience to the vendor if the resale was held to be by him as *agent for the defaulter*, and there is injustice to the purchaser in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses. . . . . In Maclean *v.* Dunn (*x*) the action for damages for the loss on resale is spoken of as the proper course, where the power of resale is exercised

Lamond *v.* Davall.

A resale in accordance with a right expressly reserved rescinds the original sale.

(*r*) 4 M. & G. 898.
(*s*) 9 Q. B. 1030.
(*t*) 4 Esp. 251.
(*u*) 6 Taunt. 162.
(*x*) 4 Bing. 722.

without an express stipulation for it." The *point* here decided is, that where there is a resale on the buyer's default in accordance with an express reservation of that right in the original contract, the sale is rescinded. (*y*) The *dicta* are, that the vendor's remedy in case of resale at a loss is a special action for damages for the difference in price and the expenses, whether there has or has not been an express reservation of the right of resale.

§ 787. When the sale is thus conditional, the vendee's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is in *duriori casu*. He runs all the risk of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale. (*z*) But where such express reservation does not exist, the effect of a resale not being to rescind the sale, the goods are sold by the unpaid vendor, *quâ* pledgee, and as though the goods had been pawned to him: they are sold as being the property of the buyer, who is of course entitled to the excess if they sell for a higher price than he agreed to give. (*a*)

Vendee's rights on resale not the same when there has been an express reservation of the power of resale, as in the contrary case.

The cases of Valpy *v.* Oakeley (*b*) and Griffiths *v.* Perry, (*c*) cited in the preceding chapter, §§ 772, 773, decide that in an action by the buyer, *on the contract*, against the unpaid vendor for non-delivery, whether the sale was of specific goods or of goods to be supplied, the buyer can only recover the actual damages, that is the difference between the contract price and the market value; and to this extent the buyer's right is plain, because the effect of his default was not to rescind the contract, and he is entitled to any profit on the resale. But the cases go farther, and decide expressly that the vendor has no right to resell, for they determine that he is responsible for nominal damages where there is no difference in these values.

Modern cases decide that vendor has no right to resell on buyer's default.

And is always liable for nominal damages, even if no actual damage be proven.

§ 788. In the United States the law is somewhat different, and in Dustan *v.* McAndrew (*d*) was thus stated: "The vendor of personal property in a suit against the vendee

Law in America.

(*y*) [See Priest *v.* Wheeler, 101 Mass. 479; Warden *v.* Marshall, 99 Mass. 305.]

(*z*) Sugd. on Vendors, p. 39 (14th ed.).

(*a*) Greaves *v.* Ashlin, 3 Camp. 426; Valpy *v.* Oakeley, and Griffiths *v.* Perry, *ante*, §§ 772, 773.

(*b*) 16 Q. B. 941; 20 L. J. Q. B. 380.

(*c*) 1 E. & E. 680; 28 L. J. Q. B. 204.

(*d*) 44 N. Y. 72.

Dustan *v.* McAndrew.

for not taking and paying for the property has the choice ordinarily of one of three remedies: 1st, He may store or retain the property for the vendee and sue him for the entire price; 2d, He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; (*e*) or 3d, He may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price. (*e*[1])

Where vendor tortiously retakes goods after delivery — legal effect.

§ 789. Where an unpaid vendor, *after delivery* of the goods to the buyer, tortiously retakes and resells them, the law is equally well settled that the contract is not rescinded, and the vendor may still recover the price, while the buyer may maintain an action in trover for the conversion. In these cases neither party can set up his own right as a defence in an action by the other, but must

(*e*) [Sargent J. in Gordon *v.* Norris, 49 N. H. 383; Ladd J. in Haines *v.* Tucker, 50 Ib. 313; Whitney *v.* Boardman, 118 Mass. 242, 247; Hayden *v.* Demets, 53 N. Y. 426; Schultz *v.* Bradley, 4 Daly (N. Y.), 29; Camp *v.* Hamlin, 55 Ga. 259; Shawhan *v.* Van Nest, 25 Ohio St. 490; 15 Am. Law Reg. N. S. 153, 160, cited and stated *ante*, § 763 note (*s*). It is said by Chancellor Kent, that "the usage on the neglect or refusal of the buyer to come in a reasonable time after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales." 2 Kent, 504; Sands *v.* Taylor, 5 John. 395; Adams *v.* Mirick, cited in 5 Serg. & R. 32; Girard *v.* Taggart, Ib. 19; M'Combs *v.* M'Kennan, 2 Watts & S. 216; Eastman J. in Warren *v.* Buckminster, 24 N. H. 336, 344; Pollen *v.* Le Roy, 30 N. Y. 549; Granberry *v.* Frierson, 2 Baxter (Tenn.), 326; Cousinery *v.* Pearsall, 8 J. & Sp 113; Smith *v.* Pettee, 70 N. Y. 13; Tilt *v.* La Salle Silk Mfg. Co. 5 Daly, 19; McGibbon *v.* Schlessinger, 18 Hun, 225; Polley *v.* Waterhouse, 3 Allen (N. B.), 291; Kaufman *v.* Austin, 57 Ga. 87; Camp *v.* Hamlin, 55 Ib. 259; McLean *v.* Richardson, 127 Mass. 339. In Bagley *v.* Findlay, 82 Ill. 524, Dickey J. said: "In such case, the vendor takes the position of agent for the vendee, and is held to the same degree of care, judgment, and fidelity that is imposed by the law upon an agent put in the custody of such goods in such condition with instructions to sell them to the best advantage." The law, however, has established no particular mode of resale. The seller on the resale must dispose of the goods in good faith, in the mode best calculated to produce their valuc, whether it be at public auction, by a broker, or in any other mode that can and should be reasonably adopted. Crooks *v.* Moore, 1 Sandf. 297; Conway *v.* Bush, 4 Barb. 564; Pollen *v.* Le Roy, 30 N. Y. 549; Applegate *v.* Hogan, 9 B. Mon. 69; Haines *v.* Tucker, 50 N. H. 307, 313. As to the necessity for the vendor to give the purchaser notice of the purpose to resell, see Ladd J. in Haines *v.* Tucker, 50 N. H. 313; Redmond *v.* Smock, 28 Ind. 365; Saladin *v.* Mitchell, 45 Ill. 80; Rosenbaums *v.* Weeden, 18 Grattan, 785; Whitney *v.* Boardman, *supra;* Ullman *v.* Kent, 60 Ill. 271; George *v.* Glass, 14 U. C. Q. B. 514.]

Kent on right of resale.

Duty of vendor when he resells.

No particular mode of resale.

(*e*[1]) [Hayden *v.* Demets, 53 N. Y. 426.]

bring his cross-action. If, however, from the nature of the contract or the dealings between the parties, the vendor who has resold is in such a condition as to be unable to maintain a cross-action for the price, then the buyer's damages in trover will not be the whole value of the goods converted, but only the actual damages, namely, the value of the goods, after deducting the price due. The authorities in support of these conclusions are the following: —

§ 790. In Stephens *v.* Wilkinson, (*f*) to an action on a bill of exchange, the defence was that the bill was given for goods sold, which the plaintiff had tortiously retaken from the defendant two months after the delivery. This defence was held bad, because the tortious retaking did not authorize the buyer to consider the contract as rescinded; he must pay the price, and seek his remedy by action in trespass for the retaking of his goods, inasmuch as the consideration for the bill of exchange had not wholly failed, the buyer having enjoyed the consideration for some time after the sale. Lord Tenterden said: "The person who bought the goods paid part of the purchase-money, and gave this bill for the residue; had possession of the goods delivered to him; kept them for two months, and was then dispossessed by the vendor; and it is said that entitles the defendant to refuse to pay the bill. I am, however, inclined to think that in point of law that is not so, but that the vendee's remedy is by an action of trespass. In that action he will be entitled to recover a full compensation for the injury which he sustained by the wrongful seizure of the goods, and their value will be the measure of damages." Park J. also held that there was not a total failure of consideration, so that of course the defence was unavailing against a bill of exchange (because no partial failure of consideration, except for an ascertained liquidated sum, is a good defence in an action on a negotiable instrument); (*g*) but that great judge gave the following as the rule of law: "No case has been cited, and no *dictum* which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract. If the goods are delivered by the vendor, and taken possession of by the vendee, his title to them is complete; the consideration for the price is then perfect. If they are afterwards forcibly taken by the vendor, the vendee may maintain trespass,

Stephens *v.* Wilkinson.

(*f*) 2 B. & Ad. 320.

(*g*) Byles on Bills, 126 (9th ed.).

and the measure of the damages would be the value of the goods at the time of the retaking; whereas, if he may treat the retaking of the goods as a rescinding of the contract, it follows as a consequence that he would be entitled to recover the whole purchase-money, or the value of the goods as agreed upon at the time of the sale, notwithstanding he may have had the use of them in the interval between the sale and the retaking, and though they may be actually deteriorated in value, as they would be if they were of a perishable nature. *In point of law the situation is this: the vendee has had all he was entitled to by the contract of sale, and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken.*"

Gillard *v.* Brittan.

§ 791. The converse of this case came before the exchequer in 1841. In Gillard *v.* Brittan (*h*) the action was by the buyer for damages in trespass *de bonis asportatis*. The facts were that the defendant, to whom the plaintiff was indebted for goods sold, went in pursuit of the latter (who had sold off his furniture and left his home secretly), and having traced him to a distant place, went into the premises of the plaintiff's brother-in-law, accompanied by some police officers, and retook some of the goods sold, which he identified. The learned judge at nisi prius (Wightman J.) told the jury that in estimating the damages, they must take into consideration the plaintiff's debt to the defendant, which would be reduced *pro tanto* by the value of the goods retaken. The jury found a verdict for the defendant. This ruling was held wrong. Lord Abinger C. B. said: "It would lead to the consequence that a party may set off a debt due in one case against damages in another. *The verdict in this case does not at all affect the right of the defendant to recover the whole* 67*l. due to him from the plaintiff.* The learned judge was therefore clearly in error." Alderson B. said that the debt due by the plaintiff "ought to have been excluded altogether, otherwise it is equivalent to allowing a set-off in trespass."

Chinery *v.* Viall. Where vendor tortiously

§ 792. But in Chinery *v.* Viall, (*i*) in 1860, the exchequer of pleas held the contrary, on the following state of facts. The defendant had made a tortious resale of certain sheep sold by him to the plaintiff, and the buyer's dec-

(*h*) 8 M. & W. 576.

(*i*) 5 H. & N. 288; 29 L. J. Ex. 180

laration contained two counts, one on the contract, for non-delivery, and the other in trover. On the first count there was a verdict for 5*l.*, being the excess in the market value of the sheep over the price at which they had been bought. On the second count there was a formal verdict for 118*l.* 19*s.*, the whole value of the sheep, without deducting the unpaid price, with leave reserved to the defendant to move for a verdict in his favor on that count, or to reduce the damages. The court held the count in trover maintainable, in which opinion it was stated by Bramwell B. when delivering the judgment, that Blackburn J. concurred: and on the question of damages it was held that the plaintiff could only recover the actual loss sustained, not the whole value of the sheep for which he had not paid; and the damages were reduced to 5*l.* In this case, Gillard *v.* Brittan (*k*) was cited by counsel, and not overruled. The two cases, however, are quite distinguishable. In Gillard *v.* Brittan each party was entitled to his cross-action, the vendor for the price, the buyer for the goods, which had passed into his ownership and actual possession. But in Chinery *v.* Viall the *ratio decidendi* was that the vendor could not, by reason of his conversion *before* delivery, maintain a cross-action for the price, and therefore *ex necessitate* it must be allowed for in calculating the buyer's damages in his action, for otherwise the buyer would get the goods for nothing.

resells before delivery.

Observations on Gillard *v.* Brittan and Chinery *v.* Viall.

§ 793. On the point decided in Chinery *v.* Viall, namely, that in an action of trover the measure of damages is not always the full value of the goods, and that a party cannot recover more by suing on the tort than on the contract, but that the actual damage only ought to be given in either action, the case has met with full approval in subsequent decisions. It was followed by the common pleas (Williams J. *dis.*), in Johnson *v.* Stear, (*l*) which was an action in trover for a conversion of a pledge by the pawnee, the court holding that only nominal damages could be recovered, the pledge being insufficient to satisfy the debt: and Johnson *v.* Stear was followed in its turn by the queen's bench in Donald *v.* Suckling, (*m*) and by the exchequer chamber in Hal-

Damages in trover not always the full value of the goods converted.

Johnson *v.* Stear.

(*k*) 8 M. & W. 575.
(*l*) 15 C. B. N. S. 330; 33 L. J. C. P. 130.
(*m*) 7 B. & S. 783; 35 L. J. Q. B. 232.

Halliday v. Holgate.

liday *v.* Holgate, (*n*) with this modification, that not even nominal damages are recoverable in such an action, if the pledgee has not received full payment. In Page *v.* Cowasjee (*o*) the cases were all reviewed, and the court, after determining, as a matter of fact, that the buyer of a vessel was not in default under the circumstances as proven in the case, and that the vendor had acted tortiously in retaking the vessel out of the buyer's possession and reselling it, held the legal effect to be, that the contract was not rescinded, that the vendor could recover the price, and that the buyer *could not set up the resale in defence*, but must bring his cross-action for damages for the tortious retaking and resale, which damages would probably be measured by the price obtained at the resale.

Page v. Cowasjee.

Summary of the rules of law relative to resales by vendors.

§ 794. The following summary of the law is submitted as fairly resulting from the foregoing authorities: First. A resale by the vendor *on default* of the purchaser rescinds the original sale, when the right of resale was expressly reserved in the original sale; (*p*) but not in the absence of such express reservation. (*q*) Secondly. The vendor's remedy, after a resale under *an express reservation of that right* against a purchaser in default, is a special action for damages for the loss of price and expenses of the resale. (*r*) If the goods fetch a profit on the resale, the buyer derives no benefit from it, except as showing, by way of defence, that his default has caused no damage to the vendor. (*s*) Thirdly. The vendor's remedy, after a resale made in the absence of an express reservation of that right, is assumpsit on the original contract, which was not rescinded by the resale. And in this action he may either recover as damages the actual loss on the resale composed of the difference in price and expenses, (*t*) or he may refuse to give credit for the proceeds of the resale, and recover that whole price, leaving the buyer to a cross-action for damages for the resale. (*u*) And this rule prevails even in cases where the vendor has tor-

(*n*) L. R. 3 Ex. 299.

(*o*) L. R. 1 P. C. App. 127; 3 Moore P. C. N. S. 499.

(*p*) Lamond *v.* Davall, 9 Q. B. 1030.

(*q*) Maclean *v.* Dunn, 4 Bing. 722; Stephens *v.* Wilkinson, 2 B. & Ad. 320; Gillard *v.* Brittan, 8 M. & W. 575; Page *v.* Cowasjee, L. R. 1 P. C. App. 127; 3 Moore P. C. N. S. 499.

(*r*) Lamond *v.* Davall, 9 Q. B. 1030.

(*s*) Sugd. on Vendors, 39.

(*t*) Maclean *v.* Dunn, 4 Bing. 722; [Newhall *v.* Vargas, 15 Maine, 314.]

(*u*) Stephens *v.* Wilkinson, 2 B. & Ad. 320, and Page *v.* Cowasjee, L. R. 1 P. C. 127.

tiously retaken and resold the goods after their delivery to the purchaser. (*x*) Fourthly. In the case of resale, a buyer *in default* cannot maintain trover against the vendor, being deprived by his default of that right of *possession* without which trover will not lie. (*y*) Fifthly. A buyer, even if *not in default*, has no right to treat the sale as rescinded by reason of the vendor's tortious resale; and cannot get back any part of the price paid, nor refuse to pay the remainder when due. His only remedy is a cross action in damages. (*z*) Sixthly. A buyer *not in default* may maintain trover against a vendor who has tortiously resold, and the vendor cannot have the unpaid price deducted from the damages, but must bring his cross-action; (*a*) but if the vendor is unable to maintain a cross-action for the price, then the buyer's recovery in trover will be limited to the actual damage suffered, namely, the difference between the market value of his goods which have been resold and the unpaid price. (*b*) Seventhly. An unpaid vendor, with the goods in his possession, has more than a mere lien on them; he has a special property analogous to that of a pawnee. But it is a breach of his contract to resell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damage suffered, that is, the difference between the contract price and the market value on the resale; and if there be no proof of such difference, the recovery will be for nominal damages only. (*c*)

Title of second purchaser on resale.

§ 795. Where there has been a resale, the title of the second purchaser depends on the fact whether the first buyer was in default, for if not, we have seen that he may maintain trover. The subject was touched on in Gosling *v.* Birnie, (*d*) which went off on the point of estoppel, so that nothing was decided on it.

(*x*) Stephens *v.* Wilkinson, 2 B. & Ad. 320, and Page *v.* Cowasjee, L. R. 1 P. C. 127.

(*y*) Milgate *v.* Kebble, 3 M. & G. 100.

(*z*) Martindale *v.* Smith, 1 Q. B. 395; Stephens *v.* Wilkinson, 2 B. & Ad. 320; Page *v.* Cowasjee, L. R. 1 P. C. App. 127; 3 Moore P. C. N. S. 449.

(*a*) Gillard *v.* Brittan, 8 M. & W. 575.

(*b*) Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

(*c*) Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204. [See Ogg *v.* Shuter, 1 C. P. Div. 47, cited *ante*, § 399, note (*h*).]

(*d*) 7 Bing. 339.

CHAPTER IV.

REMEDIES AGAINST THE GOODS. — LIEN.

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§ 796. A LIEN in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied; (*a*) and as the rule of law is, that

Lien defined.

(*a*) Hammonds *v.* Barclay, 2 East, 235; [Shaw C. J. in Arnold *v.* Delano, 4 Cush. 38; Meany *v.* Head, 1 Mason, 319; Nevius *v.* Schofield, 2 Pugsley *v.* Burbridge (N. B.), 435. In Arnold *v.* Delano, 4 Cush. 33, Shaw C. J. said: "There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery, and to vest the property in the vendee, and that actual delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price. When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods without being paid for them. The term lien imports that by the contract of sale and a formal symbolical, or constructive delivery, the property has vested in the vendee, because no man can have a lien on his own goods. The very definition of lien is a right to hold goods, the property of another, in security for some debt, duty, or other obligation. If the holder is the owner, the right to retain is a right incident to the right of property; if he have had a lieo, it is merged in the general property. A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary, because a man is not required to part with his goods until he is paid for them. But *conventio legem vincet;* and when a credit is given by agreement, the vendee has a right to the custody and actual possession on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession. But the law in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession by a stoppage *in transitu*, then his lien is restored and he may hold the goods as security for the price." In Douglas *v.* Shumway, 13 Gray, 498, Bigelow J. said: "The evidence offered in support of the defendant's claim to a lien as vendor of the wood was rightly rejected. The contract of sale contemplated that the vendee should expend labor and money in felling the trees and preparing the wood for market, and the case finds that the wood had been cut

Lien, nature of.

Change of character of

in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right to retain the goods until payment of the price, (*b*) he has in all cases *at least* a lien, unless he has waived it. But this lien extends only to the price. If by reason of the vendee's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, *if any*, is personal against the buyer. In Somes *v.* The British Empire Shipping Company, (*c*) it was held, by the unanimous judgment of the queen's bench, the exchequer chamber, and the House of Lords, that a shipwright who kept a ship in his dock after repairing her, in order to preserve his lien, had *no claim at all* for dock charges against the owner of the ship for the time that elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default in payment. Cockburn C. J. in Cam. Scacc. (*d*) said: "It is not for us sitting here judicially to attach to the right of lien which a *vendor* or bailee has in certain cases a new right, which it is now sought to enforce for the first time." In the House of Lords, Lord Wensleydale said: "The first point is, whether if a person who has a lien on any chattel chooses to keep it for the purpose of enforcing his lien, he can make *any claim* against the proprietor of that chattel for so keeping it. . . . . I am clearly of opinion that no person has by law a right to add to his lien upon a chattel, a charge for keeping it till the debt is paid; that is in truth a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession." Lord Cranworth, who concurred, said, however, that he gave no

Extends only to price, not to charges, &c.

Somes *v.* The British Empire Shipping Company.

property by vendee, effects of.

by the vendee, and a portion thereof sold by him and hauled off the land. We think these facts are inconsistent with an existing right of lien in the vendor for the purchase-money. We know of no case where such a right has been recognized after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property."]

(*b*) Miles *v.* Gorton, 2 C. & M. 504; [Clark *v.* Draper, 19 N. H. 419, 421; Barr *v.* Logan, 5 Harring. 52; Wilde J. in Parks *v.* Hall, 2 Pick. 212; Barrett *v.* Pritchard, Ib. 515; Cornwall *v* Haight, 8 Barb. 328; Bowen *v.* Burk, 13 Penn. St. 146; Milliken *v.* Warren, 57 Maine, 46; Carlisle *v.* Kinney, 66 Barb. 363.]

(*c*) E., B. & E. 353; 27 L. J. Q. B. 397; in Cam. Scacc. E., B. & E. 367; 28 L. J. Q. B. 220; in Dom. Proc. 8 H. L. Cas. 338; 30 L. J. Q. B. 229.

(*d*) 28 L. J. Q. B. 221.

opinion "as to what would have been the right of Messrs. Somes, *if they had claimed no lien*, but had said to the owners of the ship, when the repairs were completed, 'Your ship is fit to be taken away; it encumbers our dock, and you must take it away immediately.' If after that the ship-owners had not taken it away but had left it an unreasonable time, namely, twenty-seven days, occupying the dock, neither the court of queen's bench, nor the court of exchequer chamber, has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock, for the time it was so improperly left there. (*e*) But the short question is only this, whether Messrs. Somes, retaining the ship, *not for the benefit of the owners* of the ship, *but for their own benefit*, in order the better to enforce the payment of their demand, could then say, 'We will add our demand for the use of the dock during that time to our lien for the repairs.' The two courts held, and I think correctly held, that they had no such right." In the case of Crommelin *v.* The New York & Harlem R. Co., (*f*) the court of appeals of New York held, in like manner, that a railway company had no lien for a claim in respect of the delay of a consignee in taking away goods, which therefore remained in their cars for a considerable time; that the lien was for freight only, and the claim for demurrage was only personal, and could not be enforced by a detention of the goods.

In America.

Crommelin *v.* The New York & Harlem R. Co.

§ 797. The vendor's lien may of course be waived expressly. It may also be waived by implication at the time of the *formation* of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the *performance* of the contract, by the vendor's actually parting with the goods before payment. (*f*[1]) The lien is waived by examination, when time is given for payment, and nothing is said as to delivery; in other words, when goods are sold on credit. (*g*) It is of course competent for the

Lien may be waived when contract is formed,

or abandoned afterwards.

Lien waived by sale on credit.

(*e*) See per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426.

(*f*) 4 Keyes, 90.

(*f*[1]) [Johnson *v.* Farnum, 56 Ga. 144.]

(*g*) [The right of lien is to be deemed to be waived when the party having the right enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may be fairly inferred. Sargent C. J. in Pickett *v.* Bullock, 52 N. H. 354; Dempsey *v.* Carson, 11 U. C. C. P. 462. By the law of Lower

parties to agree expressly that the goods, though sold on credit, are not to be delivered till paid for; (g^1) but unless this special agreement, or an established usage to the same effect in the particular trade of the parties, can be shown, selling goods on credit means *ex vi terminorum* that the buyer is to take them into his possession, and the vendor is to trust to the buyer's promise for the payment of the price at a future time. In Spartali *v.* Benecke (h) the sale was of thirty bales of wool, "to be paid for by cash in one month, less five per cent. discount." The vendors insisted that they were not bound to deliver the goods till payment, and tendered evidence of usage of the wool trade that under such a contract the vendors were not bound to deliver without payment. Both contentions were overruled by Talfourd J. at nisi prius, and it was held by the court in banc, first, that "it was clear law that where by the contract the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment;" (i) and, secondly, that parol evidence of usage was inadmissible to contradict the terms of the written contract, which implied, if indeed they did not express, that delivery was to be made before payment.

Spartali *v.* Benecke.

§ 798. But on this second point Spartali *v.* Benecke has been overruled by the exchequer chamber, in Field *v.* Lelean. (k) There the sale was by one broker in mining shares to another. The contract was: "Bought, Thomas Field, Esq., 250 shares, &c. at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment, half in two, half in four months." It was held by the court, unanimously, that parol evidence was admissible of a usage among dealers in such shares, that the delivery was to take place concurrently

Evidence of usage admissible to show that in a sale on credit delivery was not to be made till payment.

Field *v.* Lelean.

Canada when goods are sold on credit, the vendor may obtain possession of the goods again if the vendee becomes insolvent. Robertson *v.* Ferguson, 8 Low. Can. 239; Noad *v.* Lampson, 11 Ib. 29.]

(g^1) [Gregory *v.* Morris, 96 U. S. 619.]

(h) 10 C. B. 212; 19 L. J. C. P. 293. See, also, Ford *v.* Yates, 2 M. & G. 549; Lockett *v.* Nicklin, 2 Ex. 93; Greaves *v.* Ashlin, 3 Camp. 426, referred to *ante*, § 783.

(i) Chase *v.* Westmore, 5 M. & S. 180; Crawshay *v.* Homfray, 4 B. & A. 50; Cowell *v.* Simpson, 16 Vesey Jr. 275.

(k) 6 H. & N. 617; 30 L. J. Ex. 168. See, also, cases cited in notes to Wigglesworth *v.* Dallison, 1 Sm. L. C. 551.

with, and at the time agreed on for payment. Williams J. made some remarks with the view of suggesting a distinction between this case and Spartali *v.* Benecke, but added: "If Spartali *v.* Benecke cannot be distinguished in this way, I agree it ought to be overruled." Wightman J., however, delivered the judgment of the whole court, declining to make any distinction, so that upon *this point* Spartali *v.* Benecke must be treated as an overruled case. But its authority is unshaken in support of the principle, that a sale on credit, in the absence of a contrary stipulation express or implied from usage, is a waiver of the vendor's lien, and entitles the purchaser to delivery before payment. A vendor also waives his lien by taking from the buyer a bill of exchange or other security payable at a distant day; (*l*) and in Chambers *v.* Davidson, (*m*) Lord Westbury, in giving the decision of the privy council, said: "Lien is not the result of an express contract: it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.*"

Lien waived by taking bill of exchange or other security.

§ 799. The vendor's lien is abandoned when he makes delivery of the goods to the buyer. (*n*) At what precise state of the dealings between the parties the acts of the ven-

Lien abandoned by delivery of

(*l*) Hewison *v.* Guthrie, 2 Bing. N. C. 755; 3 Scott, 298; Horncastle *v.* Farran, 3 B. & A. 497. [But in Clark *v.* Draper, 19 N. H. 419, it was held that the giving of a promissory note, payable on demand, for the amount of the price, is not a payment so as to divest the lien. So it has been held where the note was payable on time, but still retained by the vendor. Milliken *v.* Warren, 57 Maine, 46; Arnold *v.* Delano, 4 Cush. 41; Thurston *v.* Blanchard, 22 Pick. 18; Re Batchelder, 2 Low. 245; Farmeloe *v.* Bain, L. R. 1 C. P. D. 445.]

(*m*) L. R. 1 P. C. App. 296; 4 Moore P. C. C. N. S. 158.

(*n*) ["The right of lien depends on the possession; and to maintain it a vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer, according to the terms of the contract, the lien is extinguished; and the goods cannot be reclaimed on the buyer's becoming insolvent. It has been doubted whether a *constructive* delivery is sufficient to take away the vendor's right of lien; and perhaps it would be going too far to say that in every possible case a constructive delivery would have this operation. But generally it is immaterial whether the delivery is actual or constructive. In many cases, wherein it has been held that the vendor's right of lien or of stopping *in transitu* had been defeated, the delivery was constructive only." Wilde J. in Parks *v.* Hall, 2 Pick. 206, 212, and cases cited. See Arnold *v.* Delano, 4 Cush. 38; Southwestern Freight Co. *v.* Stanard, 44 Mo. 71; Southwestern

Lien depends on possession.

the goods to the buyer.

dor, in performance of his contract, will amount to a delivery *sufficient to divest his lien*, is in some cases a matter very difficult to determine. As soon as a bargain and sale are completed, we have already seen that the buyer becomes at once vested with the ownership and the *right of possession*, but that *actual possession* does not pass by the mere contract. Something further is required, unless, indeed, the buyer had been previously in actual possession as bailee of the vendor, in which case, of course, the vendor's assent that the buyer shall thenceforth possess in his own right as proprietor of the thing would make a complete delivery for all purposes.

§ 800. The "actual receipt" required by the statute of frauds, being possible only when the vendor has made delivery, our present inquiry has been anticipated to some extent in book I. part II. ch. iv. But that inquiry had reference to the *formation* of the contract, and we must now seek for some guiding principles in the great mass of authorities for determining when the delivery by the vendor is so far advanced that he has lost his lien, and may maintain a count for goods sold and delivered.

Delivery to divest lien not the same as to satisfy 17th sect. of statute of frauds.

§ 801. As there must always be a delivery of possession of *part* of the goods at least to satisfy the clause of the statute of frauds which relates to "actual receipt," it would seem to be a natural inference that the same acts which have been held sufficient under that statute to constitute an actual receipt by the purchaser, would, if done in respect of the *whole* of the goods sold, have the like effect in determining the vendor's lien, and justifying an action for goods sold and delivered. This was the impression of the learned author of the Treatise on Mercantile Law, as shown in an elaborate note, in which the authorities are reviewed ; (*o*) and this view of the law is believed to be sound, so far as regards the ability of the vendor to maintain an action for goods sold and delivered. But we have seen in a preceding chapter (*p*) that in cases where the vendor retains possession of the chattel in the changed character of bailee for the buyer, there is a clear distinction between such a delivery as would suffice under the statute of frauds and a delivery sufficient to divest the vendor's lien.

Freight Co. *v.* Plant, 45 Ib. 517 ; Mason *v.* Hatton, 41 U. C. Q. B. 610.]

(*o*) Smith's Mer. Law, note (*m*), p. 495 (7th ed.).

(*p*) *Ante*, §§ 770, 771.

§ 802. Where the goods are at the time of the contract already in possession of the buyer, as agent of the vendor, the mere completion of the contract operates as a delivery of possession. There is nothing further that can be done to transfer the actual possession. (*q*) If the question were as to the *formation* of the contract under the statute of frauds, evidence would of course be required to show that the buyer's possession had become changed from that of bailee to that of purchaser. (*r*) But after a sale has been shown to exist, the goods being already in *actual* possession, and the effect of the contract being to transfer the *right of possession* as well as that of property, the delivery becomes complete of necessity, without further act on either side; though of course in this, as in all other cases, the parties may by agreement provide that this effect shall not take place. If A. has consigned to B. goods for sale, there is nothing in the law to prevent a contract between them by which A. sells the goods to B., coupled with a stipulation that B.'s possession shall continue to be that of a bailee for A., until the price is paid.

Where goods were already in possession of the buyer.

§ 803. When the goods are at the time of sale in possession of a third person, an actual delivery of possession takes place, and the vendor's lien is lost as soon as the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall become the agent of the buyer in retaining custody of them. (*s*) The cases have been reviewed *ante*, §§ 174 *et seq.*; §§ 776 *et seq.* The goods are generally in the vendor's possession at the time of sale, and the modes by which delivery can be effected are so various as fully to justify Chancellor Kent's remark, (*t*) that "it is difficult to select those

Where goods were in possession of bailee of the vendor.

Where goods are in possession of

(*q*) [See Warden *v.* Marshall, 99 Mass. 306, 307; Nichols *v.* Patten, 18 Maine, 231; Martin *v.* Adams, 104 Mass. 262; *ante*, § 679, note (*n*).]

(*r*) Eden *v.* Dudfield, 1 Q. B. 306; Lillywhite *v.* Devereux, 15 M. & W. 285; Taylor *v.* Wakefield, 6 E. & B. 765.

(*s*) Harman *v.* Anderson, 2 Camp. 244; Rentall *v.* Burn, 3 B. & C. 423; Lackington *v.* Atherton, 7 M. & G. 360; Farina *v.* Home, 16 M. & W. 119; Godts *v.* Rose, 17 C. B. 229; 25 L. J. C. P. 61; Bill *v.* Bament, 9 M. & W. 36; Lucas *v.* Dorrien, 7 Taunt. 278; Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. Ex. 185; [1 Chitty Contr. (11th Am. ed.), 555, and note (*y*); Chapman *v.* Searle, 3 Pick. 38; Plymouth Bank *v.* Bank of Norfolk, 10 Ib. 459; Tuxworth *v.* Moore, 9 Ib. 349; Bullard *v.* Wait, 16 Gray, 55; Linton *v.* Butz, 7 Barr, 89; Weld *v.* Came, 98 Mass. 152, 154; Re Batchelder, 2 Low. 245.]

(*t*) 2 Kent, 509.

vendor at time of sale.

leading principles which are sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law." Many points, however, are free from doubt.

Delivery to common carrier divests lien.

§ 804. A delivery of the goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien. (*u*)

Delivery of part when delivery of whole.

§ 805. Generally a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien. (*x*) He may, if he choose, give up part and retain the rest; and then his lien will remain on the part retained in his possession for the price of *the whole;* but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole, and puts an end to the vendor's possession, and consequently to his lien. The rule was stated conversely by Park J. in Dixon *v.* Yates, (*y*) where he said "that if part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole;" and by Taunton J. in Betts *v.* Gibbins, (*z*) where, in answer to counsel who maintained that a delivery of part amounts to a delivery of the whole only when circumstances show that it is meant as such, the learned judge said: "No; on the contrary, a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant;" but these *dicta* were strongly questioned by Pollock C. B. in Tanner *v.* Scovell, (*a*) and it is submitted that the cases support the principle above stated, in accordance with the opinion of Pollock C. B. The point is not, however, of much practical importance, as it always resolves itself into a question of intention to be determined

Always question of fact as to intention.

(*u*) Dawes *v.* Peck, 8 T. R. 330; Waite *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & F. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261; Hart *v.* Bush, E., B. & E. 494; 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145. But see Clarke *v.* Hutchins, 14 East, 475.

(*x*) [See Parks *v.* Hall, 2 Pick. 206, 212, 313, cited *ante*, § 799, note (*n*); Haskell *v.* Rice, 11 Gray, 240; Buckley *v.* Furniss, 17 Wend. 504.]

(*y*) 5 B. & Ad. 313–341.

(*z*) 2 Ad. & E. 73.

(*a*) 14 M. & W. 28.

by the jury according to all the facts and circumstances of the particular case. In Slubey *v.* Heyward, (*b*) the defendants, being in possession of bills of lading which had been indorsed to them as sub-vendees of a cargo of wheat, had ordered the vessel to Falmouth, with the consent of the vendor, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original vendor attempted to stop the further delivery because his buyer had become insolvent. Held, that "the *transitus* was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of, delivery to separate part of the cargo from the rest." Hammond *v.* Anderson (*c*) followed in the same court. It was the case of a delivery order for all the goods given to the purchaser, and possession taken by him of part at the wharfinger's premises, and a subsequent attempt by the vendor to stop delivery of the rest. It seems very plain that in these two cases there was a delivery of the whole, not because a part was carried away, but because the vendor's agent and bailee in each case had attorned to the buyer, and become the buyer's bailee. There was in the case of the bill of lading, and of the delivery order, an agreement between the vendor, the buyer, and the bailee, that the last named should thenceforth hold for account of the buyer.

Slubey *v.* Heyward.

Hammond *v.* Anderson.

§ 806. In Bunney *v.* Poyntz (*d*) the vendee of a parcel of hay asked the vendor's permission to take a part, and this was granted, and it was held not to be a delivery of the whole. So, in Dixon *v.* Yates, (*e*) the delivery by the vendor of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the vendor having refused a delivery order for the whole. In Simmons *v.* Swift (*f*) the delivery of part of a stack of bark was held not to be a delivery of the whole, but the decision was on the ground that the sale was by weight, and the part remaining had not been *weighed*. (*g*) In Miles *v.* Gorton (*h*) the vendor sold a parcel of hops consisting of two kinds, twelve pockets of one and ten pockets of the other. He rendered one invoice

Bunney *v.* Poyntz.

Dixon *v.* Yates.

Simmons *v.* Swift.

Miles *v.* Gorton.

(*b*) 2 H. Bl. 504. See criticism of Bramwell L. J. on this case, § 857, note (*e*), *post*.

(*c*) 1 B. & P. N. R. 69. See, also, Tansley *v.* Turner, 2 Bing. N. C. 151.

(*d*) 4 B. & Ad. 568.

(*e*) 5 B. & Ad. 313.

(*f*) 5 B. & C. 857.

(*g*) See Hanson *v.* Meyer, 6 East, 614.

(*h*) 2 C. & M. 504.

for the whole, which expressed that the goods remained at rent for account of the buyer. A bill of exchange was given in payment. The buyer sold the ten pockets of one kind, and they were delivered to his sub-vendee. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the vendor for the twelve pockets remaining on hand. Follett, for the plaintiffs, declined to contend that a vendor loses his lien by merely delivering part; and he admitted the rule to be that a part delivery only operates as a constructive delivery of the whole when so intended, but he insisted that the intention was to deliver the whole. It was held by all the judges that the delivery of part did not constitute delivery of the whole, and Harman *v.* Anderson was distinguished on the ground that the goods were in the possession of a *third person*, Bayley B. saying: "Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee as between him and the vendor. I do not think that the payment of warehouse rent to the vendor has the effect of a constructive delivery of the whole in a case where the goods remain in the possession of the vendor." (*i*) In Tanner *v.* Scovell (*k*) the facts were that one McLaughlin bought of Boutcher & Co. certain goods on board of a vessel lying at a wharf of defendants, and the vendors gave an order for the delivery to McLaughlin, addressed to the defendants in the following terms: "Please weigh and deliver to Mr. McLaughlin 48 bales glue pieces." The defendants, on receipt of the order, weighed and sent a return of the weight to Boutcher & Co., who thereupon made an invoice, which they sent to McLaughlin, showing the price to amount to 168*l.* 1*s.* 6*d.* About a month later, the defendant delivered five of

Tanner *v.* Scovell.

(*i*) [Goods were sold while lying in the vendor's warehouse, on a credit of six months, and a note was given for the price. The goods were sold by marks and numbers, and it was a part of the consideration of the purchase that they might continue to lie in the warehouse, rent free, at the option of the purchaser, and for his benefit, until the vendor should want the room; it was held that there was a complete delivery of the goods, so that, on the insolvency of the purchaser, they would not be stopped by the vendor. Barrett *v.* Goddard, 3 Mason, 107.]

(*k*) 14 M. & W. 28. See, also, Jones *v.* Jones, 8 M. & W. 431; Whitehead *v.* Anderson, 9 M. & W. 518; Wentworth *v.* Outhwaite, 10 M. & W. 436; Crawshay *v.* Eades, 1 B. & C. 181; Bolton *v.* Lancashire & York. Railway Company, L. R. 1 C. P. 431; 35 L. J. C. P. 137.

these bales to a sub-vendee of McLaughlin on the latter's order. Other vessels arrived with further goods, which were treated in the same way, by handing delivery orders to the buyer, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendant's books to McLaughlin, nor any rent charged to him. Another partial delivery was made to a sub-vendee of McLaughlin, and the vendors then notified the defendants to make no further deliveries, McLaughlin having failed to make them a payment according to promise, and being then in debt to them about 700*l*. McLaughlin afterwards became bankrupt, and his assignees brought this action in trover against the defendants. There was evidence at the trial in relation to some objection made by McLaughlin to the weights. Held, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and secondly, that the delivery of the part removed from the wharf was not intended to be, and did not operate as, a delivery of the whole, but was a separation for the purpose of that part only, leaving all the rest in *statu quo*. (*l*) No case has been met with where the delivery of part has been held to constitute a delivery of the remainder when kept in the *vendor's own custody*. (*m*)

No case where delivery of what remained in vendor's own custody is effected by previous delivery of part.

§ 807. A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name or setting them aside, (*n*) or boxing them up by the purchaser's orders, and putting his name on them, (*o*) so long as the vendor holds the goods, and has not agreed to give credit on them. On the same principle which permits the vendor to remain in custody of the goods in the changed character of bailee for the purchaser, it would seem that the buyer may be let into possession of the goods for a special purpose, or in a different character from that of buyer. Thus, A. might refuse to deliver a horse sold to B. *quâ* purchaser, but lend it to him for a day or a week: (*p*) might sell his horse

Effect of marking goods or putting them in packages.

Buyer may be let into possession as bailee of vendor.

(*l*) [See Arnold *v.* Delano, 4 Cush. 33; *ante*, § 696, note (*b*).]

(*m*) See Lord Ellenborough's remarks in Payne *v.* Shadbolt, 1 Camp. 427; [Wilde J. in Parks *v.* Hall, 2 Pick. 213;] and as to effect of partial delivery on the carrier's lien, see Moeller *v.* Young, 5 E. & B. 7; 24 L. J. Q. B. 217; 25 L. J. Q. B. 94.

(*n*) Goodall *v.* Skelton, 2 H. Bl. 316; Dixon *v.* Yates, 5 B. & Ad. 313; Simmons *v.* Swift, 5 B. & C. 857; Townley *v.* Crump, 4 Ad. & E. 58; Proctor *v.* Jones, 2 C. & P. 532.

(*o*) Boulter *v.* Arnott, 1 C. & M. 333.

(*p*) Tempest *v.* Fitzgerald, 3 B. & A. 680; Marvin *v.* Wallace, 6 E. & B. 726; 25 L. J. Q. B. 369.

to the stable-keeper, who already has the horse at livery, and stipulate that the buyer's possession should continue that of bailee until payment of the price. So in one case where a watch was transferred by the master of a vessel to the owners as pledgees, and they then lent the watch to the pawnor, it was held that the pawnor possessed as agent of the pawnees, and that they could recover the watch in trover against third persons, to whom the pawnor had pledged it a second time. (*q*)

Conditional delivery.

§ 808. If the vendor consent to give delivery to the buyer only on a condition, it is of course incumbent on the buyer to perform the condition before he can claim the possession. As where a vendor gave the buyer an order for goods lying in a bonded warehouse, with the understanding that the buyer was to pay the duties, it was held that on the buyer's insolvency his assignees could not take possession of the goods without refunding the duties which the vendor had advanced on default of the buyer. (*r*) So, also, if anything is to be done to the goods before delivery, as in Hanson *v.* Meyer (*s*) (where the goods were to be weighed), and the cases (*t*) decided on its authority.

Delivery by transfer of documents of title.

§ 809. It is now necessary to examine the question as to the effect on the vendor's lien of the transfer and indorsement to the buyer of the instruments known in commerce as documents of title. The statutory law will first be referred to, and it consists of the enactments known as the factors acts, the bills of lading act, the legal quays act for the port of London, and the sufferance wharves act, also for the port of London. The factors acts, namely, the 4 Geo. 4, c. 83, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, are intended to afford security to persons dealing with factors; and the last mentioned act provides substantially as follows: By the first section, that any agent intrusted with the possession of goods, *or of the documents of title to goods*, shall be *deemed and taken* to be *the owner of such goods and documents*, so far as to give valid-

Factors acts.
4 Geo. 4, c. 83.
6 Geo. 4, c. 94.
5 & 6 Vict. c. 39.

Agent intrusted with pos-

(*q*) Reeves *v.* Capper, 5 Bing. N. C. 136. [See Hall *v.* Jackson, 20 Pick. 198; Parks *v.* Hall, 2 Ib. 212.]

(*r*) Winks *v.* Hassall, 9 B. & C. 372.

(*s*) 6 East, 614.

(*t*) Wallace *v.* Breeds, 13 East, 522; Busk *v.* Davis, 2 M. & S. 397; Shepley *v.* Davis, 5 Taunt. 617; and see Swanwick *v.* Sothern, 9 Ad. & E. 895; [Parks *v.* Hall, 2 Pick. 213.]

ity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and that such contract or agreement shall be binding upon and good against the owner of such goods, and all persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent. By section 2 it is enacted that where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandise or document of title or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien, and security for, or in respect of, a previous advance by virtue of some contract or agreement made with such agent, such contract or agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance, within the true intent and meaning of this act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money, provided that the lien so acquired shall not exceed in amount the value of whatever may be delivered up or exchanged. By section 3 it is provided, "That this act, and every matter and thing therein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has no authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandise, and nothing herein shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid, in deviating from any express orders or authority received from the owner, but and for the purport and to the intent of protecting all such *bonâ fide*

session may pledge.

Both for original and continuing advance.

Notwithstanding notice of agency.

Transactions must be *bonâ fide*.

Antecedent debts.

loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods." By section 4, a "document of title" is stated to mean "*any bill of lading*, *India warrant*, *dock warrant*, *warehouse-keeper's certificate*, *warrant*, or *order for the delivery of goods*, or any other document used in the ordinary course of business as *proof of the possession* or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods *thereby represented*." (*u*) The same section defines an "agent" as "intrusted," whether he has the goods or documents in his actual custody, or they are held by any other person subject to his control or for him or on his behalf; and provides that, whether any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing, to consign, deposit, transfer, or deliver them, and they shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, though not actually received by the person making such loan or advance till the period subsequent thereto. The section further provides that any payment made, whether by money or bills of exchange, or other negotiable security, shall be an advance: and that the agent in possession of such goods *or documents* shall be taken to have been intrusted with them by the owner, *unless the contrary can be shown in evidence*. The antecedent act of 6 Geo. 4, c. 94, provided in the second section, that the possession of these documents of title should suffice "to give validity *to any sale or* disposition of the goods," by the factor, and the amending act during the reign of her majesty was intended to extend the powers of factors, to increase the security of those dealing with them, and to meet decisions in which, by the stringent construc-

(*u*) The stamp act, 1870 (ss. 87 to 92), requires delivery orders and warrants for goods to be stamped, and contains a definition of those instruments.

tion of the courts, (*x*) cases supposed to be within the former statutes had been excluded. These purposes are stated in the preamble.

§ 810. Under the factors acts it has been decided, 1st, That a factor may lawfully consign the goods consigned to him to another factor and obtain an advance on them; (*y*) and, 2dly, That the factor's authority is not exhausted by the first pledge made of the goods, but that he may lawfully obtain a second advance from a different person by a pledge of the surplus remaining after satisfying the holder of the first pledge. (*z*) The meaning of the words "any antecedent debt," used in the third section, has also been discussed in the cases noted below. (*a*)

Decisions under factors acts.

§ 811. By the 9 & 10 Vict. c. 399, entitled "An act for the regulation of the legal quays within the port of London," and the 11 & 12 Vict. c. 18, entitled "An act for the regulation of certain sufferance wharves in the port of London," (*b*) regulations are provided for the unloading of ships in the port of London, into warehouses, at the wharves, whenever the owner of the goods fails to make entry at the custom-house within forty-eight hours after due report, and for the preservation of the lien of the ship-owner for the freight, and the statutes also provide as follows: "And the said wharfinger, his servants and agents, are hereby required, upon due notice in writing in that behalf given by such master or owner, or other person aforesaid, to the said wharfinger, or left for him at his office or counting-house for the time being, to detain such goods in the warehouse of the said wharfinger until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage, rent, and other charges to which the same shall have become subject and liable." (Sec. 4.) "Provided always and be it enacted, that no such notice as hereinbefore mentioned to detain any goods for payment of freight shall be available unless the same be given or left as

9 & 10 Vict. c. 399. Legal quays in London. 11 & 12 Vict. c. 18. Sufferance wharves in London.

(*x*) The most important of these decisions were Evans *v.* Trueman, 1 Moo. & R. 10; Taylor *v.* Kymer, 3 B. & Ad. 320; Fletcher *v.* Heath, 7 B. & C. 517; Phillips *v.* Huth, 6 M. & W. 572; 9 M. & W. 647; Bonzi *v.* Stewart, 4 M. & G. 295.

(*y*) Navulshaw *v.* Brownrigg, 2 De G., M. & G. 441; 21 L. J. Ch. 57.

(*z*) Portalis *v.* Tetley, L. R. 5 Eq. 140.

(*a*) Jewan *v.* Whitworth, L. R. 2 Eq. 692; Macnee *v.* Gorst, L. R. 4 Eq. 315.

(*b*) These two acts, although published among the local acts, are declared by a clause annexed to each to be public acts, that are to be judicially noticed.

hereinbefore provided, *before the issue by the said wharfinger of the warrant for the delivery of the same goods, or an order given by the importer, proprietor, or consignee, or his agent, to and accepted by the wharfinger for the delivery of the same;* but nothing herein contained shall authorize any wharfinger to deliver or issue any warrant, or accept any order for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give, on payment or tender of the freight to which the goods shall be liable." (Sec. 5.) It will be remarked that in these acts the wharfinger's *warrant* for the delivery of the goods is treated as equivalent to an *accepted* delivery order.

§ 812. The next statute to be referred to in this connection is the bills of lading act, 18 & 19 Vict. c. 111, which, after reciting in the preamble, that "by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner," proceeds to enact by the first section, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." (*c*) The foregoing, together with such similar provisions as are found in the acts incorporating the several dock companies,

18 & 19 Vict. c. 111.

Bills of lading act.

(*c*) It was decided in the case of The Freedom (L. R. 3 P. C. C. 594), that under the above statute the transferee of a bill of lading might sue in his own name for damage to the goods under the 6th section of the admiralty act, 1861 (24 Vict. c. 10). [As to the effect of indorsements of bills of lading, &c. in Canada to banks, see Con. Sts. of Can. (1859) c. 54, §§ 8, 9; Goodenough *v.* The City Bank, 10 U. C. C. P. 51. As to negotiability in Louisiana, see Henry *v.* Philadelphia Warehouse Co. 81 Penn. St. 76, and cases cited. See § 864, *post.*]

being the only statutory law on the subject of delivery by *indicia* of title, these different commercial instruments will now be considered separately.

Bills of lading, their nature and effect.

§ 813. Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement (c^1) and delivery of a bill of lading transfers the property from the vendor to the vendee; (d) is a complete legal delivery of the goods; *divests the vendor's lien;* (e) and has now by the statute just quoted the further effect of vesting in the vendee all the vendor's rights of action against the ship, master, and owner. But though the vendor's lien is thus divested by reason of the complete delivery of the *indicia* of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu.* These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of Lickbarrow *v.* Mason, (f) on the authority of which very numerous decisions have since been made, and will be found collected in Smith's Leading Cases. (f) On this mode of delivery the law is free

(c^1) [So far as the transfer of title is concerned an indorsement is not essential. Merchants' Bank *v.* Union R. R. & Transportation Co. 69 N. Y. 373; City Bank *v.* Rome &c. R. R. Co. 44 Ib. 136; Holmes *v.* German Security Bank, 87 Penn. St. 525; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 366. The case of Stone *v.* Swift, 4 Pick. 389, sometimes cited *contra,* turned upon another consideration, viz. that the contract is not at common law transferred to the assignee. Moreover, the court did not allude to this subject at all.]

(d) [See Peters *v.* Ballistier, 3 Pick. 495; McKee *v.* Garcelon, 60 Maine, 167; Stone *v.* Swift, 4 Pick. 389; Davis *v.* Bradley, 28 Vt. 118; Tilden *v.* Minor, 45 Ib. 196; Davis *v.* Bradley, 24 Ib. 55; Joslyn *v.* Grand Trunk R. R. Co. 51 Ib. 92; Robinson *v.* Stuart, 68 Me. 61; Royal Can. Bank *v.* Grand Trunk Ry. Co. 23 U. C. C. P. 225; Glynn *v.* East India Dock Co. 5 Q. B. D. 129; 28 Weekly Rep. 444.]

(e) [*Post,* §§ 862, 863.]

(f) 2 T. R. 63; 1 H. Bl. 357; 6 East, 20; 1 Smith's L. C. 699. [A bill of lading, in the usual form, is both a receipt and a promise; and so far as it is a receipt, in a suit between the parties to it, being the shipper and the master who signed the bill for the delivery of the goods, it is competent for the master to show that the quantity of goods received was less than that acknowledged in the bill. O'Brien *v.* Gilchrist, 34 Maine, 554; Dickerson *v.* Seelye, 12 Barb. 102; Wayland *v.* Mosely, 5 Ala. 430; McTyer *v.* Steele, 26 Ib. 487; Bissel *v.* Price, 16 Ill. 408; Wolfe *v.* Myers, 3 Sandf. 7; Sutton *v.* Kettell, 1 Sprague, 309; Shepherd *v.* Naylor, 5 Gray, 591; Blanchet *v.* Powell's Llantivit Collieries Co. L. R. 9 Ex. 74; Relyea *v.* New Haven Rolling Mill Corp.

from doubt. The law in relation to bills of lading is more fully discussed *post*, on Stoppage in Transitu.

Delivery orders.

§ 814. In regard to delivery orders there is also little room for controversy, where by these words are meant orders given by the vendor on a bailee who holds possession as agent of the vendor. The decisions which settle that in such cases the delivery is not complete until the bailee attorns to the buyer, and thus becomes the latter's agent as custodian of the goods, have been reviewed. (*g*) It was also decided in McEwan *v.* Smith (*h*) and Griffiths *v.* Perry, (*i*) that such a delivery order differed in effect from a bill of lading; that the indorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor; and that his lien remained unaffected when neither the first buyer nor the sub-ven-

Their effect.

42 Conn. 579; Baltimore & Ohio R. R. Co. *v.* Wilkens, 44 Md. 11; Van Santen *v.* Standard Oil Co. 17 Hun, 140. See observations on Wertheimer *v.* Penn. R. R. Co. in Am. L. R. N. S. vol. 1, p. 431. So it may be shown by parol that the goods, though admitted in the bill of lading to have been "in good order," were not, in fact, in good order when received. Ellis *v.* Willard, 5 Selden, 529; Barrett *v.* Rogers, 7 Mass. 297; Clark *v.* Barnwell, 12 How. (U. S.) 272; Chapman *v.* Zealand, 24 U. C. C. P. 421; Mitchell *v.* The U. S. Express Co. 46 Iowa, 214; Choate *v.* Crowninshield, 3 Cliff. 184; Archer *v.* The Adriatic, 8 Reporter (Boston), 231. Where, however, a bill of lading imports that the goods are stowed under deck, and such is generally the import of a clean bill of lading, it cannot be varied by a contemporaneous parol contract by which it was agreed that they should be stowed on deck; nor can such a bill be contradicted as to the course designated in it which the vessel is to take. The Delaware, 14 Wallace, 579; Creery *v.* Holly, 14 Wend. 26; Ellis *v.* Willard, 5 Selden, 529, 531; Fitzhugh *v.* Wiman, Ib. 559; Barber *v.* Brace, 3 Conn. 9; May *v.* Babcock, 4 Ham. 334; Barrett *v.* Rogers, 7 Mass. 297; Sayward *v.* Stevens, 3 Gray, 97. "A bill of lading can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency." Paige J. in Bank of Rochester *v.* Jones, 4 N. Y. 497, p. 501; Hibbert *v.* Carter, 1 T. R. 745; Kyle *v.* Buffalo & Lake Huron Ry. Co. 16 U. C. C. P. 76. In Mitchell *v.* Ede, 11 Ad. & E. 888, Ld. Denman C. J. said: "We think, however, that this argument proceeds upon a misconstruction of the nature and operation of the bill of lading. As between the owner and shipper of the goods and the captain it fixes and determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or the bill of lading to the party named in it, and may order the delivery to be to some other person." Morton *v.* McLeod, 1 Russell & Chesley (N. S.), 71, p. 78; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360.]

(*g*) Book I. part II. ch. iv. On Actual Receipt; [Deady *v.* Goodenough, 5 U. C. C. P. 163.]

(*h*) 2 H. L. Cas. 309.

(*i*) 1 E. & E. 680; 28 L. J. Q. B. 208.

dee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded. (*k*)

§ 815. In treating of the effect of indorsing and delivering dock warrants, and warehouse warrants or certificates, Blackburn J. remarks, (*l*) that "these documents are generally written contracts by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his right; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is therefore a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore. Besides this substantial difference between them, there is the more technical one that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established." After reviewing the authorities then extant, the learned author concluded by saying: "It is therefore submitted, that the indorsement of a delivery order or dock warrant *has not* (independently of the factors acts) *any effect beyond that of a token of an authority to receive possession.* (*m*)

Dock warrants, and warehouse warrants or certificates.

Remarks in Blackburn on Sales.

(*k*) [See Mottram *v.* Heyer, 5 Denio, 630; Burton *v.* Curyea, 40 Ill. 320; Chicago Dock Co. *v.* Foster, 48 Ib. 507; Southwestern Freight Co. *v.* Stanard, 44 Mo. 71; Proudfoot *v.* Anderson, 7 U. C. Q. B. 573.]

(*l*) Blackburn on Sales, 297.

(*m*) [See Burton *v.* Curyea, 40 Ill. 320; Chicago Dock Co. *v.* Foster, 48 Ib. 507; Southwestern Freight Co. *v.* Stanard, 44 Mo. 71; Mottram *v.* Heyer, 5 Denio, 630. In Davis *v.* Russell, 52 Cal. 611, the supreme court of California said that the transfer of a warehouse receipt operated to pass the title to the transferee. The court said: ". . . . It was held in many cases in the English courts that an assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee. No substantial reason is offered for giving to the assignment of such an instrument an effect differing materially

His views confirmed by subsequent cases.

Farina *v.* Home.

§ 816. This view of the law was confirmed, immediately after the publication of the Treatise on Sales, by the exchequer of pleas, in Farina *v.* Home. (*n*) There the defendant had retained in his possession for many months a delivery warrant, signed by a wharfinger, whereby the goods were made deliverable to the plaintiff, *or his assignee by indorsement*, on payment of rent and charges from the 25th July; the document was dated on the 21st July, and forthwith indorsed to the defendant as vendee; but the latter refused to take the goods or return the warrant, saying, that he had sent it to his solicitor, and meant to defend the action, for he had never ordered the goods. Held, that there had been an acceptance, but no actual receipt of the goods; no delivery to the defendants. Parke B., in giving the judgment of the court, said: "This warrant is no more than an *engagement by the wharfinger* to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (*sic* consignee?), who is the vendor's agent, and his possession is that of the consignee, until an assignment has taken place, and the wharfinger *has attorned*, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and *then only is there a constructive delivery to him.* In the mean time, the warrant, and the indorsement of the warrant, is nothing more than *an offer* to hold the goods as the warehouseman of the assignee. The case is the same in principle as that of Bentall *v.* Burn, and others which are stated and well discussed

from that of an assignment of a bill of lading." See Horr *v.* Barker, 8 Cal. 613. The effect of an indorsement of such orders has been somewhat modified in Massachusetts by statute. St. 1878, c. 93, § 1, provides as follows: "The title to goods and chattels stored in a public warehouse shall pass to a purchaser or pledgee by the indorsement and delivery to such purchaser or pledgee of the warehouseman's receipt therefor, signed by the person to whom the receipt was originally given or by an indorsee of the receipt." In Illinois it is provided that "Warehouse receipts for property stored in any class of public warehouses . . . . shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another." R. S. Ill. (1880) c. 114, § 142. In Kentucky, warehouse receipts are made negotiable by statute, and under the statute, with certain conditions, the transfer of the receipt passes the property in the goods. See Cochran *v.* Ripy, 13 Bush, 495, p. 502. See Glass *v.* Whitney, 22 U. C. Q. B. 290; In re Coleman, 36 Ib. 559.]

(*n*) 16 M. & W. 119.

in a recent able work of Mr. Blackburn, On the Contract of Sale, pp. 27, 41, and 297, and in Mr. C. Addison's work, p. 70. We all therefore think, that though there was sufficient evidence of the acceptance, there is none of the *receipt*." (*o*) This decision has never been overruled, and before proceeding further, it is useful to remark how completely opposed to each other are the interpretations put on these documents by the courts and the law-givers. In the decided cases between vendor and vendee the judges construe these documents as mere "tokens of authority to receive possession;" as mere "offers" by the warehouseman to hold the goods for an indorsee of the warrant, inchoate and incomplete, till the vendee has obtained the warehouseman's assent to attorn to him.

Remarks on the opposite construction by courts and law-givers.

§ 817. The legislature, on the other hand, bases its enactments on the assumption that "dock warrants, warehouse keeper's certificates, warrants, or orders for the delivery of goods," are "*instruments used in the ordinary course of business as proof of the possession or control of goods*," and as "authorizing the *possessor* of such document to transfer *goods thereby represented*" (4th section of factors act); and on the further assumption that a wharfinger's *warrant* for the delivery of goods is equivalent in effect to an *accepted* delivery order. (Legal quays act, and sufferance wharves act.) In a word, the legislature deals with these documents, in the acts above referred to, as *symbols* of the goods. It is no matter for surprise, when the *ratio decidendi* of the courts on the one hand, and the *ratio legis ferendæ* of the legislature on the other, are so much at variance in regard to the *meaning* of these instruments, that the law should be in an anomalous and unsatisfactory state. It is perhaps to be regretted that the courts did not give to these papers originally the same meaning as the law-giver attached to them; a meaning which might have been given without doing violence to their language. No doubt a warehouseman or wharfinger in possession of goods is the bailee of the owner alone from whom he received them, and cannot be forced to become the bailee of any one else without his own consent. But what is there in the law to prevent this assent from being given *in advance?* (*p*) or to prohibit the bailee from giving *au-*

(*o*) [See 1 Chitty Contr. (11th Am. ed.) 555, and note (*y*) and cases cited.]

(*p*) See the cases of Salter *v.* Woollams and Wood *v.* Manley, cited *ante*, § 679, in the former of which cases Tindal C. J. said that Jackson had, in advance, "attorned to the sale."

thority to the owner of the goods to assent in the bailee's behalf to a change in the bailment? If a warehouseman give a written paper to the owner, saying, "I hold ten hogsheads of sugar belonging to you. I authorize you to assent in my behalf that I will be bailee of any one else to whom you may sell these goods, and your indorsement on this paper shall be accepted by me as full proof that you have given this assent for me, and shall be taken as my assent;" it is submitted that there is no principle of law which would prevent this paper from taking effect according to its import. But, in truth, special juries of London merchants have repeatedly volunteered statements that this is what they understand the paper to mean; that it is not a mere *offer* or *token of authority to receive possession*, but is meant by the parties to be an actual transfer of possession. In Lucas *v.* Dorrien (7 Taunt. 278), Dallas C. J. said, in relation to a West India Dock warrant, "I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by the indorsement of these instruments. All special juries cry out with one voice that the practice is that the produce lodged in the docks is transferred by indorsing over the certificates and dock warrants." And at nisi prius it was directly decided by Park J. in one case, (*q*) and by Dallas C. J. in another, (*r*) that such was the true construction of these mercantile "documents of title." But the law is now settled in opposition to this construction, for the cases above referred to and others were all before the court when Farina *v.* Home was decided, and were reviewed by the learned author of the Treatise on Sales, when he reached the conclusion above quoted. The reader's attention must therefore be directed to the subsequent decisions, and to the anomalous results that follow from them; results for which the judges, in the recent case of Fuentes *v.* Montis, (*s*) declared there was now no remedy save further legislation.

Vendee not included in the terms of the factors act.

§ 818. By the decision under the factors acts already referred to, (*t*) it is now settled that the words "an agent intrusted with goods or documents of title" do not include a vendee, because he holds in *his own right*, and not as agent. (*u*) The singular anomaly thus exists, that if a

(*q*) Zwinger *v.* Samuda, 7 Taunt. 265.
(*r*) Keyser *v.* Suze, Gow, 58.
(*s*) L. R. 3 C. P. 268.
(*t*) *Ante*, §§ 19, 20.
(*u*) Jenkyns *v.* Usborne, 7 M. & G. 678; Van Casteel *v.* Booker, 2 Ex. 691; Fuentes *v.* Montis, *supra*.

merchant, buying goods and paying the price, receives a transfer of the dock warrant, he will be safe if his vendor is *not owner*, but only agent of the assignor of the warrant, and will not be safe if the vendor *is owner*, because the price may remain unpaid to the assignor of the warrant; and this is the necessary result of the conflicting interpretations put on the dock warrant by the legislature and the courts. The original owner is held by the statute to have abandoned his *actual possession* by giving the document of title to his agent, although he retain *ownership and right of possession:* he is held by the courts to have retained his *actual possession* when he gives the document to a purchaser, although he has abandoned *both ownership and right of possession.*

§ 819. The safety of the man who buys goods from a *factor* is not affected by the fact that the document of title only came into the factor's hands in consequence of his false and fraudulent representations to the owner, if it appear that the owner really *intrusted* the factor or his agent with the document; (*x*) but if a person gets possession of a document of title by fraud, without having been *intrusted* with it *as agent of the owner*, or as vendee, he has no title at all, either as principal or agent, and can convey none to anybody else. (*y*) This was really the point decided by the exchequer chamber in Kingsford *v.* Merry, (*y*) a case which created some excitement among the city merchants, who did not at first understand its true import.

Factor's transfer of document of title valid in favor of *bonâ fide* purchaser, although obtained by fraud.

Kingsford *v.* Merry.

§ 820. In Baines *v.* Swainson (*z*) Blackburn J. first pointed attention to the clause at the end of the 4th section of the factors act, "unless the contrary can be shown in evidence," and attributed to it the effect of enabling the owner to set aside a sale, if he could succeed in disproving the ostensible intrusting. This view was deliberately adopted by Willes J. in delivering the opinion in Fuentes *v.* Montis, (*a*) which decides the very important point, that a secret revocation of the agent's power will defeat the rights of *bonâ fide* pledgees (and it would *seem* of purchasers), although the goods remained in the hands of the agent. The language of the learned judge is

Baines *v.* Swainson.

Fuentes *v.* Montis.

(*x*) Sheppard *v.* The Union Bank of London, 7 H. & N. 661; 31 L. J. Ex. 154; Baines *v.* Swainson, 4 B. & S. 270; 32 L. J. Q. B. 281.

(*y*) Kingsford *v.* Merry, 11 Ex. 577; 25 L. J. Ex. 166, and in Cam. Scacc. 1 H. & N. 503; 26 L. J. Ex. 83.

(*z*) 4 B. & S. 270; 32 L. J. Q. B. 281.

(*a*) L. R. 3 C. P. 268, and in error, L. R. 4 C. P. 93.

as follows: "In the case of an agent for sale, whose general business it is to sell, intrusted for a purpose other than sale, as, for instance, if he were intrusted upon an advance against the goods, but with directions not to sell, being a mere lender, and upon his pledge of them; or, if he happen to have a warehouse, though his general business was that of a factor, and not that of a warehouseman, and on the particular occasion the goods were put in his warehouse at a rent, in both cases he would be a person who, *primâ facie*, would be justified in dealing with goods under the factors act; and yet there is an express provision with respect to such a person — because one cannot doubt that the judges in the case of Baines *v.* Swainson were right in so expounding the section — there is an express provision, as it appeared to them, and as it appears to me, that with respect to such a person, he should only be *primâ facie* in the situation of being able to deal with the principal's goods more generally than the principal had authorized him; *that the principal, on proving the true nature of the transaction between them, should be able to rebut the presumption of his enlarged authority under the factors acts, and should be entitled to call for a better account from a third person dealing with his goods without his authority, than that they were obtained from an agent, and that the factors act applied.* That provision is the last in the 4th section of 5 & 6 Vict. c. 39: 'An agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' I believe that that provision in the 4th section has been applied to that extent in the judgment of my brother Blackburn in the case in 4 B. & S. 285, where he expressed an opinion that it was sufficient for the person making the advance upon the goods to show that the agent who was in apparent possession of them was an agent whose general business was one that would bring him within the operation of the factors act, and thereby to *throw upon the principal the burden of proving that, in the particular transaction, with respect to the goods in question, the agent was not such agent.* I should, therefore, but for that statement, have been rather disposed to read that last clause (the 4th section) as applicable to the cases expressly provided for in the previous act, and say that by this act a factor or agent is held to become intrusted with the possession of documents which he has been enabled to obtain by reason

of having been intrusted with the possession of other documents which led to the former being obtained, entirely, as it were, as a key to them. But I will not criticise the judgment of my brother Blackburn, and the other judges in that case, but adopt it for the purpose of the present. Here is a case in which an agent whose general business has been within the act, being in possession of goods, is supposed to have pledged them. What is the result? Is it that the person who dealt with such agent is by reason of his general employment, and by reason of his having been a *bonâ fide* agent, the principal being innocent of the transaction, to take advantage of the apparent ownership of the agent in a sale in market overt, or be entitled to take advantage of the sale, or is it open to after claim or proof, if the principal can make out that there was no real intrusting within the meaning of the act? Let the act speak for itself. 'An agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' The inevitable conclusion is, that if the contrary be shown in evidence, 'an agent in possession as aforesaid of such goods or documents' is not to be taken to have been 'intrusted therewith by the owner thereof.' I draw my conclusions from that state of the law of which I have endeavored to give a summary, not dwelling upon the precise language of the act for the present, but dwelling upon the construction which has been put upon the acts with a view to see whether that construction comes, in reality, to a decision of this case. The conclusion to which the course of decisions compels me to arrive is that expressed by Blackburn J. in the case in 4 B. & S., namely, *that the authority given by the factors acts, quoad third persons, is an authority superadded and accessary to the ordinary authority given by a principal to his factor;* or to such authority given by the principal to his agent as would fall within the provisions of the factors acts. It is not intended by these acts of parliament to provide a remedy for those hardships which have accrued to innocent persons by dealing with people in the apparent ownership of goods as if they were the real owners; but the intention of the legislature was only to deal with cases in which *innocent persons had been taken in in such dealings by the agents of the owners of the goods — the agents 'intrusted and in possession.'* Much argument was bestowed, and properly, upon those words,

'intrusted and in possession;' but it appears to me that before you can deal with either the state of being 'intrusted,' or the state of being 'in possession,' you must first get hold of your substantive, namely, 'agent'; the person who is to give the title as against the principal must be an agent, and if he is not an agent he is not a person to whom the provisions of the acts apply." But this decision seems not to have met the approval of Lord Westbury, whose remarks on it in Vickers *v.* Hertz (*b*) have been referred to *ante*, § 20.

Warehouseman may demand surrender of his warrant promising to deliver goods "on presentation" *before* giving the goods.

§ 821. The recent cases in which this question has been referred to, independently of the factors acts, will now be presented. It was held, in Bartlett *v.* Holmes, (*c*) that a delivery order by which a warehouseman acknowledged to hold goods deliverable to A., "on the *presentation* of this document duly indorsed by you," did not authorize the indorsee to claim the goods by merely *showing* the order, but that he must deliver it up to the warehouseman *before* the latter could be required to part with the goods. The reasoning of the court in this case would seem to cover all "documents of title." The grounds given by Jervis C. J., and concurred in by Williams and Cresswell JJ., were two: 1st. That confidence must be placed by one of the parties in the other, where the article is bulky, and the exchange of the goods for the document cannot possibly be simultaneous. 2dly. That if the party having the goods were to make the delivery before receiving the document, he would *expose himself to the risk of the document's being transferred to third persons by a second sale.* In Johnson *v.* Stear (*d*) the action was trover by the assignee of one Cumming, who had pledged goods to defendant by delivering him the dock warrant, with authority to sell the goods, if the loan for which they were pledged was not repaid on the 29th January. In the middle of January, Cumming became bankrupt, and the defendant, Stear, sold the goods on the *28th*, and handed over the dock warrant to the vendee on the *29th*, and the latter took the goods on the *30th*. The court held this a conversion by Stear, the defendant; Erle C. J. saying, that "by delivering over the dock warrant to the vendee . . . . he interfered with the right which Cumming had, of tak-

Bartlett *v.* Holmes.

Johnson *v.* Stear.

(*b*) L. R. 2 Sc. App. 113.
(*c*) 13 C. B. 630; 22 L. J. C. P. 182.
(*d*) 15 C. B. N. S. 330; 33 L. J. C. P. 130.

ing possession on the 29th if he repaid the loan, for which purpose the dock warrant would have been an important instrument." Williams J. said: "The handing over of the dock warrant to the vendee, before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was *tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol*, but because, according to the doctrines applied in donations *mortis causa*, it is the *means* of coming into possession of a thing, which will not admit of corporal delivery."

§ 822. In 1870 the case of Meyerstein *v.* Barber (*e*) was decided by the House of Lords, and the point determined excited great interest in the city. The consignee of certain cotton, which arrived on the 31st January, 1865, entered it at the custom-house, to be landed at a sufferance wharf, with a stop for freight, under the sufferance wharves act; (*f*) and the cotton was so landed. On the 4th March, the consignee obtained an advance from the plaintiff on the pledge of the bills of lading, but gave up only two of the bills; the plaintiff, who did not know that the vessel had arrived, believing that the third was in the captain's hands. The consignee fraudulently pledged the third bill on the 6th March to the defendant for advances, and on that day the stop for freight was removed; and the defendant obtained the wharfinger's warrant, and sold the cotton and received the proceeds. The action was for money had and received, and in trover. It was contended on behalf of the defendant, that goods are not represented by bills of lading after they have been landed, and the master has performed his contract; that the bill of lading ceases to be negotiable after this is done: and upon this contention the case turned. The judges in the lower courts had however held unanimously that the *bills of lading continued to represent the goods at the sufferance wharf, until replaced by the wharfinger's warrant;* and that the plaintiff was therefore entitled to maintain his verdict. Martin B., in delivering the judgment of the exchequer chamber, said: "For many years past there have been *two symbols of property* in goods imported: the one the bill

Bill of lading represents goods *after* being landed at London wharves until replaced by wharfinger's warrant.

Meyerstein *v.* Barber.

(*e*) L. R. 4 Eng. & Ir. App. 317; L. R. 2 C. P. 38, 361; [Blanchard *v.* Page, 8 Gray, 281, 298.]

(*f*) *Ante*, § 811.

of lading; *the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger*, the former remains the *only symbol* of property in the goods." These *dicta*, however, which would seem, at least so far as the London quays and sufferance wharves are concerned, to be in opposition to the ruling in Farina *v.* Home, in relation to the effect of documents of title, must be taken in connection with the fact that Blackburn J., who was a member of the court, is reported to have said, when the passage from the Treatise on Sales, (*g*) above quoted (§ 815), was cited in argument: "That was published twenty-two years ago, and I have not changed my opinion." In the House of Lords the judgment was also unanimous in affirmance of that given in the exchequer chamber, and it was pointed out that, 1st. The person who first gets *one* bill of lading out of the set of *three* (the usual number) gets the property which it represents, and needs do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate; (*g*[1]) and 2d. That though the ship-owner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivery, so the holder of another bill of the set acquired subsequently, that fact will not affect the legal ownership of the goods as between the holders of the two bills of lading.

Effect of transferring parts of one set of bills of lading to different persons.

§ 823. It is to be inferred from the foregoing authorities that by the law as now settled the indorsement and transfer of a dock warrant, warehouse certificate, or other like document of title, by a vendor to a vendee, *is not such a delivery of possession as divests the vendor's lien.* (*h*) Whether this result would be affected by proof of *usage in the particular trade*, that the delivery

Indorsement and delivery of dock warrants and other like documents of title by vendor to vendee does not divest lien.

(*g*) Blackburn on Sales, pp. 297, 298.

(*g*[1]) [In Skillings *v.* Bollman, 6 Mo. App. 76, Bakewell J. said: "The person who first gets one bill of lading out of a set of three gets the property it represents, and need do nothing more to secure his title. It is a symbolical delivery, and has the effect of an actual delivery of the property, neither less nor more. Unless where the bill of lading is made negotiable by statute, the indorsement and transfer can convey to the indorsee or assignee no greater rights than those of the indorser or assignor; but such rights as the indorser has in the goods pass with the bill of lading, and nothing further need be done to insure the title of the assignee, which is then complete, and to which any subsequent dealing with the other bills of the set is subordinate." Glyn *v.* East & West India Dock Co. 5 Q. B. Div. 129.]

(*h*) [See per Shaw C. J. in Arnold *v.* Delano, 4 Cush. 38, 40.]

of such documents is intended by both parties to constitute a delivery of *actual possession*, is a point that does not seem to have arisen since the decision in Farina *v.* Home, and may perhaps be deemed still an open question.

Quære, whether proof of usage to the contrary would avail.

§ 823 *a.* [In Gunn *v.* Bolckow, L. R. 10 Ch. App. 491, the Aberdare Iron Company entered into a contract with Bolckow for the manufacture of 2,000 tons of rails. The contract contained the following stipulation: "Payment to be made by buyer's acceptance of seller's draft at six months' date against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." Under this contract Bolckow commenced to manufacture iron rails, which when made were approved and stacked at the works of Bolckow, and the wharfinger's certificates, with the certificates of the inspector attached, of each 500 tons ready for shipment, were given at different dates in November and January. The wharfinger's certificate was as follows: "I hereby certify that there are lying at the works of Messrs. Bolckow 500 tons of iron rails which are ready for shipment, and which have been rolled under contract dated November 20, 1874. . . . . W. Roe, wharfinger." These certificates, with the inspector's certificate attached, were, as they were signed, delivered to the Aberdare Co. in exchange for acceptances by the company of drafts by Bolckow at six months, date. In February, 1875, the Aberdare Company entered into an agreement with one Jones that he should advance them 21,000*l.*, and signed a memorandum as follows: "It having been arranged to-day that you advance us 21,000*l.* against warrants of about 3,000 tons of Russian rails, ... by your accepting our drafts with about four months to run, we herewith inclose warrants dated 28th Dec., 4th and 26th Jany., with inspector's certificate attached, and our drafts as follows," &c. With this memorandum the Aberdare Company handed to Jones three of the wharfinger's certificates of the rails which were referred to as warrants, and Jones accepted the drafts. Jones died on the 15th of March, 1875, and the plaintiff in the suit was his administrator. On the 22d of May the plaintiff notified Bolckow that he claimed a lien on the iron rails for which he held warrants issued by him. Bolckow replied that he had issued no warrants and he should not recognize the plaintiff's claim. On the fifth of June, the Aberdare Com-

Gunn *v.* Bolckow.

pany filed a liquidation petition. Two of the bills accepted by them had become due and had been dishonored. The plaintiff in his bill claimed a lien on the rails mentioned in the certificates, and prayed an injunction to restrain Bolckow from parting with the rails without first satisfying his lien. Sir G. Mellish L. J. said: "The next point is as to the wharfinger's certificate. It is perfectly plain upon the contract, and on reading the certificate, what the certificate is. . . . . It professes simply to be what it is, a certificate that those tons are ready for shipment. It is merely a security to the buyer that such things are actually there. . . . . The wharfinger certifies that those rails have been actually brought down, and are actually ready for shipment. It is utterly impossible, in my opinion, to make that out to be a document of title. A document of title is something which represents the goods, and from which either immediately or at some future time the possession of the goods may be obtained. . . . . It is perfectly plain that the certificate was never intended to represent the goods, and the goods could never have been obtained by it, because by the contract and by the certificate itself the goods were to be shipped for Cronstadt and were to be delivered at Cronstadt. . . . . Then it is said there is a custom of trade to treat these certificates as warrants. That these certificates are often pledged, and that as between the party who pledges them and the party who advances money they would be evidence of an equitable charge, is, I think, very probable. The iron trade we know is a very speculative trade. I dare say those who are engaged in it raise money in that way. If the custom were proved, I cannot understand how any practice of raising money in that way can affect the vendor's right. The vendor having agreed by his contract that he would give the wharfinger's certificate in order that the purchaser may have evidence that the goods have been actually made, and now are actually ready to be shipped, cannot help giving the certificate, and how the fact of his giving that certificate, which does not profess to be negotiable, and does not profess to require the delivery of the goods to order or to bearer, can affect his lien as vendor, merely because the purchaser chooses to borrow money on the faith of it, I am at a loss to conceive."]

Vendor's lien not lost by delivering goods f. o.

§ 824. The vendor's lien is not lost by sending goods on board of a vessel in accordance with the buyer's instructions, even though by the contract the goods are

to be delivered free on board to the buyer, if the vendor on delivering the goods takes (*i*) or demands (*k*) a receipt for them in his own name, for this is evidence that he has not yet parted with his control; the possession of the receipt entitles him to the bill of lading; and the goods, represented by their symbol the bill of lading, are still in his possession, which can only be divested by his parting with the bill of lading. But if the vessel belonged to the purchaser, the delivery would be complete under such circumstances, and the lien lost. (*l*)

b. on a vessel if he take receipt in his own name;

unless the vessel belonged to the purchaser.

§ 825. When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. The point was directly decided at nisi prius by Bayley J. in New *v.* Swain, (*m*) and by Littledale J. in Bunney *v.* Poyntz, (*n*) and has ever since been treated as settled law, though there has been no case decided in banc. Among the numerous *dicta* where the law is assumed to be undoubted on this point are those of Lord Campbell, *ante*, § 776; of Parke B. in Dixon *v.* Yates (*o*) of the court, in Martindale *v.* Smith, (*p*) of the barons of the exchequer, in Castle *v.* Sworder, (*q*) and in Miles *v.* Gorton; (*r*) and of the judges of the queen's bench, in Valpy *v.* Oakeley. (*s*)

Lien revives in case of goods sold on credit, if possession remains in vendor at expiration of credit.

§ 826. As the vendor's lien is a right granted to him by law solely for the purpose of enabling him to obtain payment of the price, it follows that a tender of the price puts an end to the lien, even if the vendor decline to receive the money; and this was the decision in Martindale *v.* Smith. (*t*)

Tender of price divests a lien.

§ 827. Where the vendor allows the purchaser to mark, or spend money upon the goods sold, which are lying at a public wharf, or on the premises of a third person, *not the bailee of the vendor*, and to take away part of the

Loss of lien where goods are lying on premises of

(*i*) Craven *v.* Ryder, 6 Taunt. 433.
(*k*) Ruck *v.* Hatfield, 5 B. & Ald. 632.
(*l*) Cowasjee *v.* Thompson, 5 Moore P. C. C. 165.
(*m*) Danson & L. 193.
(*n*) 4 B. & Ad. 568.
(*o*) 5 B. & Ad. 341.
(*p*) 1 Q. B. 395.
(*q*) 5 H. & N. 281; 29 L. J. Ex. 235
(*r*) 2 C. & M. 510.
(*s*) 16 Q. B. 941; 20 L. J. Q. B. 380.
(*t*) 1 Q. B. 389.

a third person not bailee of vendor.

goods, this is so complete a delivery of possession as to divest the lien, although the vendor might, under the same circumstances, have had the right to retain the goods, if they had been on his own premises. (*u*)

(*u*) Tansley *v.* Turner, 2 Bing. N. C. 151; Cooper *v.* Bill, 3 H. & C. 722; 34 L. J. Ex. 161; [See French *v.* Freeman, 43 Vt. 93, 97.]

CHAPTER V.

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§ 828. THE last remedy which an unpaid vendor has against the goods is stoppage *in transitu*. This is a right which arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts. (*a*) If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (*b*) (which, as we have seen in the preceding chapter, is such a constructive delivery as divests the vendor's lien) — he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. (*b*[1])

This right exists only when buyer is insolvent.

§ 829. The history of the law of stoppage *in transitu* is given

(*a*) Per Lord Northington C. in D'Aquila *v.* Lambert, 2 Eden, 77. [The right of the vendor to stop *in transitu* is, in its nature, adverse to the purchaser. Abbott Ship. (6th Am. ed.) 514; Naylor *v.* Dennie, 8 Pick. 198. And the doctrine on that subject does not apply to a case where the vendor and purchaser are agreed that the property shall be reclaimed; for it is then a question of rescission or reconveyance. Ash *v.* Putnam, 1 Hill (N. Y.), 302. See *post*, § 858, note.]

(*b*) ["Stoppage *in transitu* can only take place where there is a vendor, vendee, and a middleman, such as a carrier. If the goods come into the actual or constructive possession of the vendee, the vendor's right over them is gone." Cooper *v.* Bill, 3 H. & C. 722, 727.]

(*b*[1]) [See Keeler *v.* Goodwin, 111 Mass. 490, 492.]

very fully by Lord Abinger, in Gibson *v.* Carruthers, (*c*) to which the reader is referred. It now prevails almost universally among commercial nations, and may best be considered by dividing the inquiry into the following sections: 1. Who may exercise the right? 2. Against whom may it be exercised? 3. When does the transit begin? When does it end? 4. How is the vendor to exercise the right? 5. How may the right be defeated when the goods are represented by a bill of lading? 6. What is the legal effect of the exercise of the right?

History given by Lord Abinger.

SECTION I. — WHO MAY EXERCISE THE RIGHT?

§ 830. Stoppage *in transitu* is so highly favored, on account of its intrinsic justice, that it has been extended by the courts to quasi-vendors: to persons in a position similar to that of vendors. In Feise *v.* Wray (*d*) Lord Ellenborough and the other judges of the king's bench held the right to exist in favor of a consignor who had bought goods, on account and by order of his principal, on the factor's own credit, in a foreign port, and had shipped the goods to London, drawing bills on the merchant here, who had ordered the goods and become bankrupt during the transit. The bankrupt's assignee contended that the factor was but an *agent* with a lien; but the court held that he might be considered as a vendor who had first bought the goods, and then sold them to his correspondent at cost, plus his commission. The principle of this case has been recognized in numerous subsequent decisions. (*e*) The transfer of the bill of lading by the vendor to his agent vests a sufficient special property in the latter to entitle him to stop *in transitu* in his own name. This was held to be the law, even before the bills of lading act. (*f*)

Persons in position similar to vendors, as consignors, &c. may stop.

Consignor who has bought with his own money or credit.

Agent of vendor to whom the latter has indorsed the bill of lading may stop in his own name.

(*c*) 8 M. & W. 337.

(*d*) 3 East, 93.

(*e*) The Tigress, 32 L. J. Adm. 97; Patten *v.* Thompson, 5 M. & S. 350; Ogle *v.* Atkinson, 5 Taunt. 759; Oakford *v.* Drake, 2 F. & F. 493; Tucker *v.* Humphrey, 4 Bing. 516; Turner *v.* Trustees Liverpool Dock Company, 6 Ex. 543; 20 L. J. Ex. 393; Ellershaw *v.* Magniac, 6 Ex. 570; [Newhall *v.* Vargas, 13 Maine, 93, 103; Seymour *v.* Newton, 105 Mass. 272, 275.]

(*f*) Morison *v.* Gray, 2 Bing. 260; [Sword *v.* Carruthers, 7 U. C. Q. B. 313. See Seymour *v.* Newton, 105 Mass. 272; Newhall *v.* Vargas, 13 Maine, 93, 103. The right of stoppage may be exercised by a person who pays the price of the goods for the purchaser and takes from him an assignment of the bill of lading as security for such advances. Gossler *v.* Schepeler, 5 Daly (N. Y.), 476.]

§ 831. The vendor of an interest in an executory agreement may also stop the goods, as if he were owner of them. In Jenkyns *v.* Usborne (*g*) the plaintiff was agent of a foreign house, which had shipped a cargo of beans to London; a portion of the cargo had been ordered by Hunter & Co. of London, but only one bill of lading had been taken for the whole cargo, and this was given to Hunter & Co., they giving to the plaintiff a letter, acknowledging that 1,442 sacks of the beans were his property, together with a delivery order, addressed to the master of the vessel, requesting him to deliver to bearer 1,442 sacks out of the cargo on board. Before the arrival of the vessel, plaintiff sold these 1,442 sacks, on credit, to one Thomas, giving him the letter and delivery order of Hunter & Co. Thomas obtained an advance from the defendant on this delivery order and letter, together with other securities. Thomas stopped payment before the arrival of the vessel, and before paying for the goods, and the plaintiff gave notice to the master, on the arrival of the goods, not to deliver them. Held, that although at the time of the stoppage the property in the 1,442 sacks had not vested in the plaintiff, but only the right to take them after being separated from the portion of the cargo belonging to Hunter & Co., yet the interest of the plaintiff in the goods was sufficient to entitle him to exercise the vendor's rights of stoppage. It was said by Lord Ellenborough, in Siffken *v.* Wray, (*h*) that a mere surety for the buyer had no right to stop *in transitu:* bnt if a surety for an insolvent buyer should pay the vendor, it would seem that he would now have the right of stoppage *in transitu*, if not in his own name, at all events in the name of the vendor, by virtue of the provisions of the 5th section of the mercantile law amendment act (19 & 20 Vict. c. 97), which provides that "every person, who being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and *such person shall be*

Vendor of an interest in an executory contract may stop the goods.

Jenkyns *v.* Usborne.

May surety exercise the right?

(*g*) 7 M. & G. 678; 8 Scott N. R. 505. (*h*) 6 East, 371.

entitled to stand in the place of the creditor, and *to use all the remedies*, and if need be, and upon a proper indemnity, to *use the name* of the creditor in any action *or other proceeding at law or in equity*, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty," &c.: but no case has yet been presented for decision on this point. (*i*)

Parties having other liens than that of vendor cannot stop.

§ 832. The right of stoppage *in transitu* does not depend on the fact that the vendor, having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods, *quâ* vendor, which is greater than a lien. Other persons, therefore, entitled to liens, as factors, (*k*) fullers (*l*) who have fulled cloths, have no right to stop *in transitu* before obtaining or after having lost possession.

Consignor may stop even if his factor have made advances or have a joint interest in the goods.

Agent of vendor.

§ 833. A principal consigning goods to a factor has the right of stoppage *in transitu*, on the latter becoming insolvent, even if the factor have made advances on the faith of the consignment, (*m*) or have a joint interest with the consignor. (*n*) An agent of the vendor may make a stoppage in behalf of his principal, (*o*) but attempts have been made occasionally by persons who have no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions.

Ratification after stoppage where party has never had any agency for vendor.

Bird *v.* Brown.

§ 834. Where the stoppage *in transitu* is effected in behalf of the vendor by one who has at no time had any authority to act for him, a subsequent ratification of the vendor will be too late if made after the transit is ended. In Bird *v.* Brown (*p*) the holder of some bills of exchange drawn by the vendor on the purchaser, for the price of the goods, assumed to act in behalf of the vendor in stopping the goods *in transitu*, and the assignees of the

(*i*) The only decisions met with as to the construction of this section are Lockhart *v.* Reilly, 1 De G. & J. 464; 27 L. J. Ch. 54; Batchelor *v.* Lawrence, 9 C. B. N. S. 543; 30 L. J. C. P. 39; De Wolf *v.* Lindsell, L. R. 5 Eq. 209; Phillips *v.* Dickson, 8 C. B. N. S. 391; 29 L. J. C. P. 223.

(*k*) Kinloch *v.* Craig, 3 T. R. 119; and in Dom. Proc. Ib. 786; 4 Brown's P. C. 47.

(*l*) Sweet *v.* Pym, 1 East, 4.

(*m*) Kinloch *v.* Craig, 3 T. R. 119.

(*n*) Newsom *v.* Thornton, 6 East, 17.

(*o*) Whitehead *v.* Anderson, 9 M. & W. 518.

(*p*) 4 Ex. 786.

bankrupt buyer also demanded the goods. After this demand by the assignee, the vendor adopted and ratified the stoppage made in his behalf by the holder of the bills of exchange, but the court held that the property in the goods had vested in the assignees, by their demand of delivery, and this ownership could not be altered retrospectively by the vendor's subsequent ratification. (p^1) But in Hutchings *v.* Nunes (q) the stoppage was made by the defendant, who had previously done business for the vendor as his agent. The defendant had written to the vendor, informing him of the insolvency of the buyer, on the 26th March, and the vendor, on the 16th April, inclosed to the defendant a power of attorney to act for him. The defendant, before receiving this power, to wit, on the 21st April, assumed to act for the vendor, and effected the stoppage. Held, by the privy council, distinguishing this case from Bird *v.* Brown, that the power actually dispatched on the 16th April was a sufficient ratification of the agent's act done on the 21st, although the agent was not then aware of the existence of the authority. (r)

Ratification where a letter giving authority had not reached agent when he assumed to act.

Hutchings *v.* Nunes.

§ 835. The vendor's right exists, notwithstanding partial payment of the price; (s) and it is not lost by his having received conditional payment by bills of exchange or other securities, (t) even though he may have negotiated the bills so that they are outstanding in third hands, unmatured. (u) It has already been shown, however, (x) that a vendor is not unpaid, if he have taken bills or se-

Vendor's right not affected by partial payment.

Nor by conditional payment.

(p^1) [Davis *v.* McWhirter, 40 U. C. Q. B. 598.]

(q) 1 Moore P. C. N. S. 243; [Durgy Cement and Umber Company *v.* O'Brien, 123 Mass. 12.]

(r) [In Reynolds *v.* Boston & Maine Railroad, 43 N. H. 589, Bell C. J. having noticed without disapproval the case of Bird *v.* Brown, added: "Yet we regard it as settled that any agent who has power to act for the consignor, either generally or for the purposes of the consignment in question, may stop goods *in transitu* without any authority specially directed to that end, or empowering him to adopt that particular measure." Bell *v.* Moss, 5 Whart. 189; Newhall *v.* Vargas, 13 Maine, 93.]

Stoppage by agent.

(s) Hodgson *v.* Loy, 7 T. R. 440; Feise *v.* Wray, 3 East, 93; Edwards *v.* Brewer, 2 M. & W. 375; Van Casteel *v.* Booker, 2 Ex. 702; [Newhall *v.* Vargas, 13 Maine, 93.]

(t) Dixon *v.* Yates, 5 B. & Ad. 345; Feise *v.* Wray, *supra;* Edwards *v.* Brewer, *supra.*

(u) Feise *v.* Wray, *supra;* Patten *v.* Thompson, 5 M. & S. 350; Edwards *v.* Brewer, 2 M. & W. 375; Miles *v.* Gorton, 2 C. & M. 504; [Newhall *v.* Vargas, 13 Maine, 93; Bell *v.* Moss, 5 Whart. 189; Donath *v.* Broomhead, 7 Penn. St. 301; Hays *v.* Mouille, 14 Ib. 48; Stubbs *v.* Lund, 7 Mass. 453; Arnold *v.* Delano, 4 Cush. 33; Lewis *v.* Mason, 36 U. C. Q. B. 590.]

(x) *Ante,* § 732.

But vendor who has received securities in absolute payment cannot stop.

curities in *absolute* payment. He must, in such cases, seek his remedy on the securities, having no further right on the goods. (*y*) In Wood *v.* Jones (*z*) it was held that the consignor, whose bill drawn against a cargo had been dishonored by an insolvent consignee, was not deprived of the right of stoppage because he had in his own hands goods belonging to his consignee unaccounted for, and the account current between them had not been adjusted, and the balance was uncertain. But in Vertue *v.* Jewell (*a*) it was held by Lord Ellenborough, and confirmed by the court in banc, that a consignor who was indebted to the consignee on a balance of accounts, in which were included acceptances of the consignee outstanding and unmatured, and who, under these circumstances, shipped a parcel of barley on account of that balance, had no right of stoppage on the insolvency of the consignee, although the acceptances were afterwards dishonored. Lord Ellenborough said that "the circumstance of Bloom (the consignor) being indebted to them on the balance of accounts divested him of all control over the barley from the moment of the shipment. The non-payment of the bills of exchange cannot be taken into consideration." The court held, in banc, that under these circumstances the consignees were to be considered as purchasers for a valuable consideration. The case has never been overruled, but if correctly reported is very questionable law. Blackburn J. in his Treatise on Sales (p. 220), suggests an explanation, that the position of the consignor was not such as to allow him to be considered as a vendor, and that the case would therefore be an authority for the proposition that the right of stoppage is peculiar to a vendor. But it happens, unfortunately for this explanation, that the report states in express terms that the ground of the decision in banc was, that the consignees "were to be considered the purchasers of the goods for a valuable consideration;" a ground which would prove the right of stoppage to *exist;* for it had already been held by the same court, in Feise *v.* Wray, (*b*) that a vendor's right of stoppage was not taken away by the fact that he had received acceptances for the price of

Consignor may stop although the account current with consignee is unadjusted and balance uncertain.

Wood *v.* Jones.

A consignor who ships goods in payment of unmatured acceptances cannot stop *in transitu* on learning the insolvency of the acceptor — *quære?*

Vertue *v.* Jewell.

Vertue *v.* Jewell questioned.

(*y*) [Eaton *v.* Cook, 32 Vt. 58.]
(*z*) 7 D. & R. 126.
(*a*) 4 Camp. 31.
(*b*) 3 East, 93.

the goods, which were outstanding and unmatured at the time of the stoppage. When this case was pressed on the court by the counsel in Patten *v.* Thompson, (*c*) Lord Ellenborough did not suggest that it was good law *as reported*, but said: "*I have looked also into that case* of Vertue *v.* Jewell, and find that there the bill of lading was indorsed and sent by the consignor on account of a balance due from him, including several acceptances then running; *so that it was the case of a pledge to cover these acceptances.*" There was an interval of only two years between the cases, and this explanation scarcely renders Vertue *v.* Jewell more intelligible; for it was recognized as settled law in Patten *v.* Thompson that a consignor may stop the *specific* goods on which his consignee has made advances, on learning the consignee's insolvency; (*d*) and it is very hard to understand how a consignor's right of stoppage can be greater against the very goods on the faith of which an advance has been made to him, than against goods on which the consignee has made no special advance, but which are sent to him to meet unmatured acceptances given in general account; or why the latter is a pledge, and not the former. (*e*)

Patten *v.* Thompson.

§ 836. The unpaid vendor's right of stoppage is higher in its nature than a carrier's lien for a *general balance*, (*f*) though not for the special charges on the goods sold: and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods while in transit, by process out of the mayor's court of the City of London. (*g*) In the case of The Mercantile and Exchange Bank *v.* Gladstone (*h*) it was held that the consignor's right of stoppage was paramount to a demand for freight under the following circumstances. The goods were ordered by Fernie & Co. of Liverpool from the defendant's house in Calcutta, and were shipped on board of Fernie & Co's own vessel, the master signing bills of lading "freight for the said goods free on

Vendor's right of stoppage paramount to general lien of carrier, and to attaching creditor's.

And in certain cases to demand for freight.

Mercantile and Exchange Bank *v.* Gladstone.

(*c*) 5 M. & S. 350.

(*d*) This had been settled in Kinloch *v.* Craig, in Dom. Proc. (*ante*, § 832) 3 T. R. 786.

(*e*) [See Wood *v.* Roach, 1 Yeates, 177; 2 Dall. 180; Clark *v.* Mauran, 3 Paige, 373.]

(*f*) Oppenheim *v.* Russell, 3 B. & P. 42.

(*g*) Smith *v.* Goss, 1 Camp. 282; [Clark *v.* Lynch, 4 Daly (N. Y.), 83.]

(*h*) L. R. 3 Ex. 233.

owner's account." This bill of lading was such as the master had authority from the owners to sign, but *before* it was signed in Calcutta the owners in Liverpool had transferred the vessel with "all the profits and all the losses, as the case might be," though this transfer was unknown to the consignors or to the captain when the bills of lading were signed. It was held, under these circumstances, that the consignor's right of stopping the goods "free of freight" could not be affected by the sale in England, which was unknown to him. Kelly C. B. expressed the opinion also, that the master of a vessel in distant seas retains all the authority given to him by the owner who appointed him, notwithstanding an intervening transfer, until such transfer is made known to him; and on that ground also held that the transferee of the ship was bound by the terms of the bill of lading.

SECTION II. — AGAINST WHOM MAY IT BE EXERCISED?

§ 837. The vendor can only exercise this right against an *insolvent* or *bankrupt* buyer. By the word "insolvency" is meant a general inability to pay one's debts; (*i*) and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence. (*k*) And in a number of the cases, the fact that the buyer or consignee had "stopped payment" has been considered, as

Only against bankrupt or insolvent vendee.

What is insolvency.

(*i*) Parker *v.* Gossage, 2 C., M. & R. 617; Biddlecombe *v.* Bond, 4 Ad. & E. 332; [Durgy Cement Co. *v.* O'Brien, 123 Mass. 12.]

(*k*) Smith's Merc. Law, note, p. 549; [Thompson *v.* Thompson, 4 Cush. 127, 134; Lee *v.* Kilburn, 3 Gray, 594, 600; Herrick *v.* Borst, 4 Hill, 650; Chandler *v.* Fulton, 10 Texas, 2; Benedict *v.* Schaettle, 12 Ohio St. 515; Blum *v.* Marks, 21 La. An. 268. The mere issuing of an attachment against the vendee is not evidence of insolvency. Gustine *v.* Phillips, 38 Mich. 674. *Insolvency* includes not only taking the benefit of an insolvent law, but also a stoppage of payment, and a failure in one's circumstances, as evidenced by some overt act. Rogers *v.* Thomas, 20 Conn. 54. In this last cited case it was held that the requisite insolvency must occur between the time of the sale and the exercise of the right; that if the insolvency exists at the time of the sale the vendor cannot stop the goods on that ground, although he was ignorant of the fact of insolvency. But this decision is at variance with Benedict *v.* Schaettle, 12 Ohio St. 515, in which it was held that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency, although he could not if he knew it when he sold. It was disapproved of in Reynolds *v.* Boston & Maine Railroad, 43 N. H. 589. See, also, Naylor *v.* Dennie, 8 Pick. 198, 205; Conyers *v.* Ennis, 2 Mason, 236; Buckley *v.* Furniss, 15 Wend. 137; S. C. 17 Wend. 504; Biggs *v.* Barry, 2 Curtis, 259; Stevens *v.* Wheeler, 27 Barb. 663. In the above case of Benedict *v.* Schaettle, 12 Ohio St. 515, 521, Gholson J. said: "If the true principle of the right of

Insolvency, meaning of.

When insolvency must occur.

a matter of course, to be such an insolvency as justified stoppage *in transitu*. (*l*)

Vendor stops at his peril in advance of buyer's insolvency.

§ 838. If the vendor stop *in transitu* where the vendee has not yet become insolvent, he does so at his peril. If on the arrival of the goods at destination the vendee is then insolvent, the premature stoppage will avail for the protection of the vendor; but if the vendee remain solvent, the vendor would be bound to deliver the goods, with an indemnification for expenses incurred. (*m*) In The Tigress, (*n*) Dr. Lushington, in delivering judgment, said: "Whether the vendee is insolvent may not transpire till afterwards (*i. e.* after the stoppage), when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent." But this was a case between the vendor and the owners of the vessel, not between vendor and vendee, and will be more fully referred to *post*.

SECTION III. — WHEN DOES THE TRANSIT BEGIN: AND END?

How long the transit continues.

§ 839. The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it; that is to say, from the time when the vendor has so far made delivery that his right of retaining the goods and his right of lien, as described in the antecedent chapters, are gone, to the time when the goods have reached the *actual* possession of the buyer.

§ 840. And here the reader must be reminded that the vendor's

stoppage *in transitu* be found in that certainly just rule of mutual contract, by which either party may withhold performance on the other becoming unable to perform on his part, if the foundation of the rule be a just lien on the goods for the price, until delivered, an equitable lien adopted for the purposes of substantial justice, then it is the ability to perform the contract — to pay the price — which is the material consideration. If there be a want of ability, it can make no difference in justice or good sense whether it was produced by causes, or shown by acts, at a period before or after the contract of sale. Substantially, to the vendor who is about to complete delivery and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part; has he from insolvency become unable to pay the price?"]

(*l*) Vertue *v.* Jewell, 4 Camp. 31; Newsom *v.* Thornton, 6 East, 17; Dixon *v.* Yates, 5 B. & Ad. 313; Bird *v.* Brown, 4 Ex. 786. And see a discussion by Willes J. as to meaning of "insolvency" in The Queen *v.* The Saddlers' Co. 10 H. L. Cas. 404, 425.

(*m*) Per Lord Stowell, in The Constantia, 6 Rob. Ad. R. 321.

(*n*) 32 L. J. Adm. 97

right in the goods is very frequently not ended on their arrival at their ultimate destination, because of his having retained *the property* in them. The mode by which the vendor may guard himself against the buyer's insolvency through the reservation of the *jus disponendi* of the *title* to the goods has been treated *ante*, book II. ch. vi. The stoppage *in transitu* is called into existence for the vendor's benefit after the buyer has acquired *title*, and *right of possession*, and *even constructive possession*, but not yet *actual possession*. (*n*[1]) In James *v.* Griffin, (*p*) which was twice before the exchequer of pleas, Parke B., in giving his opinion on the second occasion, thus stated the general principles: "Of the law on this subject to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods, — before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, — and thereby to *replace the vendor* in the same situation as if he had not parted with the actual possession. . . . . The actual delivery to the vendee or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; Scott *v.* Pettit (3 B. & B. 469); Rowe *v.* Pickford (8 Taunt. 83); or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself; Dixon *v.* Baldwin (5 East, 175); (*q*) or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination." (*r*) It is obvious from this clear statement of the law that each case must be determined according to its own

The right comes into existence after vendor has parted with title and right of possession and actual possession.

General principles as stated by Parke B.

James *v.* Griffin.

(*n*[1]) [Keeler *v.* Goodwin, 111 Mass. 490, 492; Treadwell *v.* Aydlett, 9 Heiskell (Tenn.), 388.]

(*p*) 1 M. & W. 20; 2 M. & W. 633.

(*q*) [See Sawyer *v.* Joslin, 20 Vt. 172; Hays *v.* Mouille, 14 Penn. St. 48; Biggs *v.* Barry, 2 Curtis, 259; Cabeen *v.* Campbell, 30 Penn. St. 254; Harris *v.* Pratt, 17 N. Y. 249; Pottinger *v.* Hecksher, 2 Grant, 309; Rowley *v.* Bigelow, 12 Pick. 307; Guilford *v.* Smith, 30 Vt. 49.]

(*r*) [See per Morton J. in Mohr *v.* Boston & Albany Railroad Co. 106 Mass. 67, 72; cited *post*, § 854, note (*s*).]

circumstances, the inquiry being whether at the time of the stoppage the transit of the goods had or had not determined. An attempt will be made to classify the cases, so as to afford examples of the controversies most frequently arising in the business of merchants.

§ 841. Goods are liable to stoppage as long as they remain in possession of the carrier, *quâ carrier* (*s*) (a qualification to be kept in view, for, as we shall presently see, he may become bailee for the buyer as warehouseman or wharfinger, after his duties as carrier have been discharged), and it makes no difference that the carrier has been named or appointed by the vendee. (*t*) But when the owner sends his own servant for the goods, the delivery to the servant is a delivery into the actual possession of the master. If, therefore, the buyer send his own cart or his own vessel for the goods, they have reached the buyer's *actual possession* as soon as the vendor has delivered them into the cart or vessel. (*u*)

Goods may be stopped in hands of carrier, even though named by purchaser.

Goods in passage on the buyer's own cart or vessel are not *in transitu.*

§ 842. But if the vendor desire to restrain the effect of a delivery of goods on board the vendee's own vessel, he may do so, by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not *an agent to receive possession for the purchaser.* This point was decided in Turner *v.* Liverpool Docks Trustees, (*x*) the facts of which are fully reported *ante*, § 392, and that case was recognized as settled law in Schotsman *v.* Lancashire & Yorkshire Railway Company, (*y*) decided by the full court of chancery appeals. Lord Cairns, then lord justice, said: "The *London* was the ship of Cunliffe, and indicated as such for

Vendor may restrain the effect of delivery on the buyer's vessel by the bill of lading.

Schotsman *v.* Lancashire & Yorkshire Railway Company.

(*s*) Mills *v.* Ball, 2 B. & P. 457; James *v.* Griffin, 2 M. & W. 633; Lickbarrow *v.* Mason, 1 Sm. L. C. 699, and notes, and the cases on Stoppage, *passim;* [Bell C. J. in Reynolds *v.* Boston & Maine Railroad, 43 N. H. 591; Atkins *v.* Colby, 20 Ib. 154; White *v.* Mitchell, 38 Mich. 390.]

(*t*) Holst *v.* Pownall, 1 Esp. 240; Northey *v.* Field, 2 Esp. 613; Hodgson *v.* Loy, 7 T. R. 440; Jackson *v.* Nicholl, 5 Bing. N. C. 508; per Buller J. in Ellis *v.* Hunt, 3 T. R. 466; Stokes *v.* La Riviere, reported by Lawrence J. in giving the judgment of the court in Bohtlingk *v.* Inglis, 3 East, 397; Berndtson *v.* Strang, L. R. 4 Eq. 481; 36 L. J. Ch. 879.

(*u*) Blackburn on Sales, 242; Ogle *v.* Atkinson, 5 Taunt. 759; *per Cur.* in Turner *v.* Liverpool Docks Company, 6 Ex. 543; 20 L. J. Ex. 394; Van Casteel *v.* Booker, 2 Ex. 691; [Carrick *v.* Atkinson, 5 Allen (N. B.), 515.]

(*x*) See preceding note.

(*y*) L. R. 2 Ch. App. 332; 36 L. J. Ch. 361.

the delivery of the goods. The master was his servant. *No special contract* was entered into by the master to *carry the goods for or to deliver them to any person other than Cunliffe, the purchaser.* In point of fact no contract of affreightment was entered into, for the person to sue on such a contract would be Cunliffe, in whom was vested the property in the goods, and the person to be sued would be the same Cunliffe as owner of the *Londos.* The *essential feature* of a stoppage *in transitu*, as has been remarked in many of the cases, is that *the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them.* It was suggested here that the master of the ship was a person filling this character, but the master of the ship is the servant of the owner: and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal." Lord Chelmsford C. gave an opinion to the same effect, and pointed out that if the vendor had desired to restrain the effect of the delivery, he should have taken a bill of lading with the proper indorsement, as was established in Turner *v.* Liverpool Docks Trustees. In the foregoing case it was further held by both the learned lords, reversing Lord Romilly's judgment at the rolls, (*z*) that there was no difference in the effect of the delivery, whether the buyer's ship was expressly sent for the goods, or whether it was a general ship belonging to the buyer, and the goods were put on board without any previous special arrangement.

No distinction in the effect of delivery on buyer's ship sent expressly for the goods, or on his general ship without previous arrangement.

§ 843. Whether a vessel chartered by the buyer is to be considered his own ship depends on the nature of the charter-party. If the charterer is, in the language of the law-merchant, owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then a delivery on board of such a chartered ship would be a delivery to the buyer; but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the

Where the delivery is on board a vessel chartered by the buyer.

(*z*) L. R. 1 Eq. 349.

vendor of goods on board is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be determined by the terms of the charter-party. (*a*)

§ 844. In Berndtson *v.* Strang (*b*) the subject was elaborately discussed, and all the cases reviewed by Lord Hatherley (then vice chancellor). The buyer had sent a vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f. o. b.), and the vendor took a bill of lading, deliverable to "order or assigns," and indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held that the effect of taking the bill of lading in that form, from the master of the chartered ship, was to interpose him, as a carrier, between the vendor and the vendee, and to preserve the right of stoppage to the former. The following instructive passages are extracted from the opinion of the learned lord: "Now there are two criteria, as it appears to me, with respect to the stoppage *in transitu*, viz. whether there is a *transitus* at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board of his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery, and the *transitus* is at an end just as much (as was said in Van Casteel *v.* Booker, 2 Ex. 691) as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. There they are at home in the hands of the purchaser, and the whole delivery is at an end. The next thing to be looked to is, *whether there is any intermediate person interposed between the vendor and the purchaser.* Cases may no doubt arise where the *transitus* may be at an end, although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them.

Berndtson *v.* Strang.

(*a*) Blackburn on Sales, 242; Fowler *v.* McTaggart, cited 7 T. R. 442, and 10 East, 522; Inglis *v.* Usherwood, 1 East, 515; Bohtlingk *v.* Inglis, 3 East, 381. See the cases collected in Maude & Poll. on Shipping, 296–298, 2d ed.; and a further discussion of the subject in the case of Sandeman *v.* Scurr, L. R. 2 Q. B. 86; 36 L. J. Q. B. 58; [Stubbs *v.* Lund, 7 Mass. 453; Newhall *v.* Vargas, 13 Me. 105–108; Ilsley *v.* Stubbs, 9 Mass. 72, 73; Aguirre *v.* Parmelee, 22 Conn. 473. Where the purchaser is owner or charterer of the ship, he is entitled to receive payment of the freight and charges on the goods reclaimed, and has a lien on them therefor. Newhall *v.* Vargas, 15 Me. 314.]

(*b*) L. R. 4 Eq. 481; 36 L. J. Ch. 879.

The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself, and about to sail on a roving voyage. In that case, when the goods are on board the ship, everything is done, for the goods have been put in the place indicated by the purchaser, and there *is* an end of the *transitus*. (*c*) But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name, and being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the *master is a person interposed between vendor and purchaser*, in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession until the voyage is terminated and the freight paid, according to the arrangement in the charter-party. . . . . The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else, *quâ carrier*, to deliver the goods, so that according to the ordinary rule as laid down in Bohtlingk *v.* Inglis, 3 East, 381, and continually referred to as settled law upon the subject, the *transitus* is only at an end when the carrier has arrived at the place of destination and has delivered the goods." (*d*) On the appeal in this case (*e*) it was affirmed on the point argued before the lower court, but the decree was varied on a new point which had passed *sub silentio* in that court. The goods were injured in transit, and were also made to contribute to a general average, and for these two claims the purchaser was entitled to indemnity from underwriters under policies effected by him. The vendor claimed a right of stoppage as to the insurance money thus accruing to the purchaser, which had been brought into court, but Lord Cairns C. held the pretension to be utterly untenable.

Right of stoppage does not extend to insurance money due to purchaser for damage to the goods.

(*c*) ["Where goods are shipped on board a vessel, appointed by the vendee, to be transported, not to his residence or to be received by him, but to other markets, there is a termination of the transit, and the right of stoppage by the vendor ceases." Weston C. J. in Newhall *v.* Vargas, 13 Me. 105; Noble *v.* Adams, 7 Taunt. 59; Stubbs *v.* Lund, 7 Mass. 453; Rowley *v.* Bigelow, 12 Pick. 307.]

(*d*) [See Stubbs *v.* Lund, 7 Mass. 453.]

(*e*) L. R. 3 Ch. Ap. 639. See, also, Fraser *v.* Witt, L. R. 7 Eq. 64.

§ 845. Before a bill of lading is taken the vendor preserves his lien, and is not driven to the exercise of his right of stoppage if he has taken or demanded the receipts for the goods in his own name: though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage. (*f*) If, however, the vessel were the purchaser's own vessel, and the receipts contained nothing to show that a bill of lading was to be delivered by which the vendor's control over the goods was to be retained, the principle in Schotsman *v.* Lancashire & Yorkshire Railway Company (*g*) would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage. (*h*)

Where vendor takes a receipt for goods in his own name lien not lost, unless the vessel belonged to purchaser.

§ 846. Goods may be still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's orders. Goods sold in Manchester to a merchant in New York may be still in transit while lying in a warehouse in Liverpool. The question, and the sole question, for determining whether the *transitus* is ended, is, In what capacity the goods are held by him who has the custody? Is he the buyer's agent to *keep* the goods, or the buyer's agent to *forward* them to the destination intended at the time the goods were put in transit? If, in the case supposed, the goods in the Liverpool warehouse are there awaiting shipment to New York, in pursuance of the purchaser's original order to send him the goods to New York, they are still in transit, even though the parties in possession in Liverpool may be the general agents of the New York merchant for selling as well as forwarding goods. But if the buyer ordered his goods to Liverpool only, and they are kept there awaiting his further instructions, they are no longer in transit. They are in his own possession, being in possession of his agent, and may be sold in Liverpool or shipped to the East or disposed of at the will and pleasure of the buyer. And it is well observed in the Treatise on Sales, (*i*) that "it then becomes a question depending upon what was done, and what was the intention with which it was

Transitus not ended till goods reach their ultimate destination.

Test question for determining whether transit is ended.

(*f*) Craven *v.* Ryder, 6 Taunt. 433; Ruck *v.* Hatfield, 5 B. & A. 632.

(*g*) L. R. 2 Ch. App. 332; 26 L. J. Ch. 361.

(*h*) Cowasjee *v.* Thompson, 5 Moore P. C. C. 165.

(*i*) Blackburn on Sales, 224.

done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point;" and "that the acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same, Has the person who has the custody of the goods got possession as an agent to *forward* from the vendor to the buyer, or as an agent to hold for the buyer?" (*k*)

§ 847. A few of the cases offering the most striking illustrations of the distinction will now be presented. In Leeds *v.* Wright (*l*) the London agent of a Paris firm had in the packer's hands in London goods sent there by the vendor from Manchester, under the agent's orders; but it appeared that the goods were, at the agent's discretion, to be sent where he pleased, and not for forwarding to Paris; and it was held that the *transitus* was ended. In Scott *v.* Pettit (*m*) the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own; and there was no *ulterior* destination. Held, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders. In Dixon *v.* Baldwin (*n*) the facts were, that Battier & Son of London ordered goods of the defendant at Manchester, to be forwarded "to Metcalfe & Co. at Hull, to be shipped for Hamburg as usual;" the course of dealing of the Battiers being to ship such goods to Hamburg. Part of the goods were ordered in March and part in May, and were sent to Hull as directed. The Battiers became bankrupt in July, and the vendors stopped the goods at Hull, including four bales actually shipped for Hamburg, which were relanded on the vendor's application, they giving an indemnity to Metcalfe. The latter, as witness, said "that at the time of the stoppage he held the goods for the Battiers, *and at their disposal;* that he accounted with the Battiers for the charges. The witness described his business to be merely an *expeditor* agreeable to the directions of the Battiers, — a *stage* and *mere instrument* between buyer and seller;

Cases selected as examples.

Leeds *v.* Wright.

Scott *v.* Pettit.

Dixon *v.* Baldwin.

(*k*) Blackburn on Sales, 244.
(*l*) 3 B. & P. 320.
(*m*) 3 B. & P. 469.
(*n*) 5 East, 175.

that he had no authority to sell the goods, and frequently shipped them without seeing them; that the bales in question were to remain at his warehouse for the orders of Battier & Son, and he had no other authority than to forward them; that at the time the goods were stopped, he was waiting for the orders of the Battiers; that he had shipped the four bales, expecting to receive such orders, and relanded them because none had arrived." Lord Ellenborough held, on these facts, "that the goods had so far gotten to the end of their journey, *that they waited for new orders from the purchaser to put them again in motion*, to communicate to them *another* substantive destination; and that *without such orders they would continue stationary.* Lawrence and Le Blanc JJ. concurred, but Grose J. dissented on this point. In Valpy *v.* Gibson, (*o*) which was a case very similar to the foregoing, the goods were ordered of the Manchester vendor, and sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward till receiving orders from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the vendor, with orders to repack them into eight packages instead of four; and the vendors accepted the instructions, writing, "We are now repacking them in conformity with your wishes." Held, that the right of stoppage was lost; that the *transitus* was at an end; and that the redelivery to the vendor for a new purpose could give him no lien. See, also, Wentworth *v.* Outhwaite, (*p*) Dodson *v.* Wentworth, (*q*) Cooper *v.* Bill, (*r*) Smith *v.* Hudson, (*s*) and Rowe *v.* Pickford. (*t*)

Valpy *v.* Gibson.

(*o*) 4 C. B. 837; [Biggs *v.* Barry, 2 Curtis, 259, 262; Covell *v.* Hitchcock, 23 Wend. 611.]

(*p*) 10 M. & W. 436.

(*q*) 4 M. & G. 1080.

(*r*) 3 H. & C. 722; 34 L. J. Ex. 151.

(*s*) 6 B. & S. 431; 34 L. J. Q. B. 145.

(*t*) 8 Taunt. 83. [In Sawyer *v.* Joslin, 20 Vt. 172, 179, Hall J. said: "The question in this case is whether the landing of the goods upon the wharf is to be considered as an actual or constructive delivery of them to Preston (the purchaser), within the doctrine of the adjudged cases on this subject. I am unable to come to any other conclusion than that it was such a delivery. Under the charge of the court the jury must have found that all the duties and responsibilities of the transportation line, in regard to the goods, had ceased; that no duty or responsibility was cast upon Chapman, the wharfinger, by the landing of the goods on his wharf; that the goods lay on the wharf, subject to the control and direction of no other person than Preston; and that they would remain there in that precise position until Preston saw fit to remove them. It is difficult to conceive of a more effectual delivery of the goods than this, short of their coming to the corporal

Landing goods at usual wharf, no duty being cast on wharfinger.

§ 848. Reference will now be made to some of the cases in which the *transitus* was considered *not* at an end, where the goods had reached the custody of the buyer's agent, the agent's duty being merely to forward them. In Smith *v.* Goss (*u*) the buyer at Newcastle wrote to the vendor at Birmingham to send him the goods by way of London or Gainsborough; "if they are sent to London, address them to the care of J. W. Goss, with directions to send them by the first vessel for Newcastle." Lord Ellenborough said that "the goods were merely at a stage upon their transit;" and the vendor's right of stoppage remained. (*x*) In Coates *v.* Railton (*y*) it appeared that the course of business was that Railton at Manchester should purchase goods on account of Butler of London, and forward them to a branch of Butler's house in Lisbon, by whom the goods were ordered through the London house; neither of the Butler firms had any warehouse at Manchester; and the vendor was told that the goods were to be sent to Lisbon as on former occasions. The goods were delivered at the warehouse of Railton, who had them calendered and made up, and was then to forward them to Liverpool for shipment to Lisbon. Held, that the *transitus* was not ended by the delivery to Railton. Bayley J. said: "It is a general rule that where goods are sold to be sent to a particular *destination named by the vendee*, the right of the vendor to stop them continues until they arrive at that place of destination." After reviewing all the previous cases, the learned judge said: "The principle deduced from these cases is, that the *transitus is not at an end until the goods have reached the place named by the buyer to the seller as the place of destina-*

Cases where *transitus* was held not ended.

Smith *v.* Goss.

Coates *v.* Railton.

touch of the vendee. The special property of the carriers had ceased, the wharfinger had nothing to do with the goods, and unless they are to be considered as having been in the possession of the vendee, no person whatever had any possession of them — they were absolutely abandoned by all persons. It will not be pretended they had assumed the character of lost goods. They must therefore have come to the possession of Preston. It being the custom of Preston to receive goods thus consigned to him on the wharf of Chapman, that must be considered as the place to which they were directed by the vendor."]

(*u*) 1 Camp. 282.

(*x*) [See Smith Merc. Law (Am. ed. 1874), 552, 553; Walworth Ch. in Covell *v.* Hitchcock, 23 Wend. 613; Bronson J. in Mottram *v.* Heyer, 1 Denio, 487; Hays *v.* Mouille, 14 Penn. St. 48; Harris *v.* Pratt, 17 N. Y. 249 (a case in which this point is much discussed); Cabeen *v.* Campbell, 30 Penn St. 254; Guilford *v.* Smith, 30 Vt. 49.]

(*y*) 6 B. & C. 422.

tion." (*z*) In this case it will be remarked that Railton's agency from the beginning was to buy *and forward to Lisbon to the*

(*z*) [See Ex parte Golding Davis & Co. 13 Ch. Div. 628, stated § 848 *a*, *post*. See Stoppage in Transitu, 69 Law Times (May 8, 1880), p. 21; Treadwell *v.* Aydlett, 9 Heiskell (Tenn.), 388. See Cabeen *v.* Campbell, 30 Penn. St. 254; Covell *v.* Hitchcock, 23 Wend. 611. Mohr *v.* Boston & Albany Railroad Co. 106 Mass. 67, was an action of replevin of fifty barrels of whiskey. It appeared that the plaintiffs sold to one Dewey in Boston two hundred and fifty barrels of whiskey, then in a government bonded warehouse in Indiana, and Dewey gave his acceptances for the price. The government storekeeper gave his certificate for the whiskey, as the property of Dewey; and this certificate was sent by the plaintiffs to Dewey. It was part of the terms of sale that the plaintiffs should from time to time, as Dewey should request, ship the whiskey to Boston, and pay the storehouse charges, taxes, and insurance, drawing on Dewey for the amounts. The plaintiffs having shipped most of the whiskey to Dewey in this manner, and having received an order to ship the remaining barrels, being those in controversy, the warehouseman, by the plaintiffs' direction, as had been the practice with the previous shipments, caused the whiskey to be regauged in order to ascertain the taxes due, paid the taxes, and drew on the plaintiffs for the amount so paid and the warehouse charges. The whiskey could not be taken out of the warehouse until it was thus regauged and the taxes paid. The plaintiffs sent the bill of lading, and also the bill of the warehouseman to Dewey, and drew on him for the amount thereof. The barrels were delivered to a railroad company for transportation to Dewey at Boston. While they were in the hands of the company and on their passage Dewey became insolvent. On the same day the goods arrived at the depot in Boston; and while still at the depot were taken on this process. It was held that the plaintiffs' right of stoppage *in transitu* was not lost. Morton J. said: "The principle is, that the *transitus* is not at an end until the goods have reached the place contemplated by the contract between the buyer and the seller as the place of their destination. In the case at bar something remained to be done by the vendors, under the contract of sale, before the goods would come into the possession of the vendee at the place of destination. The contract contemplated that they were to forward them to Boston. If the goods had been and remained in their actual possession, as vendors, until they forwarded them on the order of Dewey, their right of stoppage *in transitu* would have been unquestionable. Arnold *v.* Delano, 4 Cush. 33. The result is the same though they remained stored in a government warehouse, unless the transfer to Dewey upon the records at the warehouse is to be treated as the termination of the transit. But, as we have seen, the terms of the sale provided that the plaintiffs should forward the goods to Boston as their place of destination, and the storage in the warehouse was preliminary to their transit, and not the termination of it. It is no answer to this view to say that there was a constructive delivery of the whiskey to Dewey which vested the property in him, and that he had the right to take possession of it and withdraw it from the warehouse. In all cases of delivery of goods to a common carrier for the purpose of transit, the vendee, acting in good faith, has the right to intercept the goods before they reach their destination, and by taking actual possession of them, to defeat the vendor's lien. But unless he does so, the lien continues till they reach the end of the transit. Dewey did not take possession of these goods at the warehouse, but left them to be forwarded by the plaintiffs under the contract. We are of opinion, upon the facts of this case, that when the plaintiffs obtained possession of the whis-

Mohr *v.* Boston & Albany R. R. Co.

Sale of goods in government warehouse; certificate of storekeeper being given for goods as property of vendee; vendor to forward to another place.

vendee; and the goods were not to be held by him to await orders, or any other disposal of them. So, in Jackson *v.* Nichol, (*a*) where the goods were placed by the vendors, at Newcastle, at the disposal of Crawhall, an agent of the buyers, by a delivery order. Crawhall was a general agent of the buyers, who had been in the habit of receiving goods for them, and awaiting their orders, but in this particular instance had received instructions to forward the goods to the buyers in London *before the goods left the vendor's possession;* and on receiving the delivery order he at once indorsed it to a wharfinger, "to go on board the *Esk*," and the wharfinger gave the order to a keelman, who went for the goods and put them on board the *Esk*. The *Esk* arrived in the port of London with the goods, and while moored in the Thames, the goods were put on board a lighter sent for them by the defendants, who were the wharfingers of the *Esk*, and the stoppage was made while the goods were on the lighter. The court held that "the lead never came into the actual possession of Crawhall, the agent," that the series of acts done at Newcastle were but "links in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyers' in London." Tindal C. J. said also: "If the goods had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, *such possession would have been the constructive possession* of the buyers themselves, and the right to stop *in transitu* at an end."

Jackson *v.* Nichol.

§ 848 *a.* [In November, 1877, Knight & Son, of London, contracted to purchase from Golding Davis & Co. 1,200 drums of caustic soda, to be delivered at the rate of 100 drums per month, during the year 1878, to be shipped free on board at Liverpool, and paid for fourteen days after each delivery. On the same day Knight & Son made a similar contract, but at a higher price, to supply Taylor & Sons with 1,200 drums of caustic soda, of Golding & Co.'s make. In October, 1878, Knight & Son, in pursuance of instructions from Taylor & Sons, directed Golding Davis & Co. to ship the goods for New York on board

Mere fact that purchaser has resold goods, and that bill of lading has been made out in name of sub-purchaser, does not destroy right of stoppage.

key in question by their writ of replevin it was *in transitu,* and they had a right to stop it for the purpose of enforcing their equitable lien for the price."]

(*a*) 5 Bing. N. C. 508.

The Larnaca, a general ship lying at Liverpool. Golding Davis & Co. duly shipped the goods, and the bill of lading signed by the master stated that the goods were shipped by Taylor & Sons, to be delivered at New York to order or assigns on payment of freight. On the 7th of November, Golding Davis & Co. sent the bill of lading to Knight & Son in London. But on the morning of the 8th, hearing that Knight & Son had stopped payment on the 7th, Golding Davis & Co. telegraphed to Knight & Son not to part with the bill of lading, and gave notice of stoppage to the master of *The Larnaca*, which was still in dock. Knight & Son had not paid Golding Davis & Co., nor had Taylor & Sons paid Knight & Son. Knight & Son went into liquidation, and under arrangement their contract with Taylor & Sons was completed, and Taylor & Sons paid the contract price into a bank to await the decision of the court. Cotton L. J. said: "Now, of course, it is undoubted that the transit or journey might be put an end to by the purchaser having the right to the property, and the right to claim possession of the goods. But in the present case the goods were in the ship, where the ship-owner and captain were acting, subject to what I shall presently consider as carriers for the purpose of completing the journey which was indicated as between the vendors and purchasers. But it is said . . . . that the transit between the vendors and purchasers was ended. Now, really, that must mean either that there had been a taking possession by the purchasers, or the sending of the goods on a new and different voyage, if it is to have any effect; because if it only means that when the goods arrived at their destination they would, under the circumstances existing at the time when the right is attempted to be exercised, go not to the original purchaser but to somebody else; that is the case whenever goods are dealt with by the original purchaser having handed over the rights to receive the goods at the end of the voyage to somebody else. It must exist in every case of a transfer of a bill of lading; and the transfer of a bill of lading, except for value, will never defeat the right of stoppage *in transitu*, and never put an end to the transit by making the journey not the journey as between vendor and the original purchaser, but as between the vendor and somebody else. The real fact here was this: that the original purchasers, Knight & Son, had entered into another contract not to sell these particular goods, but another

Ex parte Golding Davis & Co.

contract which they had intended to supplement and make good by means of the goods which they acquired under this contract. But New York did not on that account cease to be, and was not a bit the less, the end of the journey contemplated as between Golding Davis & Co. and Knight & Son. . . . . The journey indicated by and under the contract as between vendor and purchaser was still continuing; there had been no new or different journey indicated. . . . . Where, on the original purchase, one journey and one transit only has been contemplated, but in consequence of a contract with a sub-purchaser the original purchaser directs that the goods should go to a different place or to a different terminus, then, of course, the right of stoppage *in transitu* is ended, because it would be equivalent to the original purchaser taking possession and dealing with the goods by means of that possession." (a^1)]

Where goods have reached destination but are still in carrier's possession.

§ 849. Next come the cases where the goods have reached their ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *quâ carrier*, or, if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive them and hold them for the buyer's account. (b) Blackburn on Sales has this passage: (c) "In none of these cases, it may be observed, was there any doubt as to the law: the question was one of fact, viz. in what capacity did the different agents hold possession? This question becomes still more difficult to answer when the party holding the goods acts in two capacities; as, for instance, a

(a^1) [Ex parte Golding Davis & Co; In re Knight, 13 Ch. Div. 628. See Ex parte Falk, 14 Ch. Div. 446. See § 867 *a*, *post*.]

(b) ["The cases in general," says Chancellor Kent, "upon the subject of constructive delivery may be reconciled by the distinction, that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for *safe custody, or for disposal on the part of the vendee*, and the middleman is by the agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage." 2 Kent, 545; Ilsley *v.* Stubbs, 9 Mass. 73; Bradford *v.* Marbury, 12 Ala. 520; Bell C. J. in Reynolds *v.* Boston & Maine Railroad, 43 N. H. 591; Atkins *v.* Colby, 20 Ib. 154; Stubbs *v.* Lund, 7 Mass. 457; Cabeen *v.* Campbell, 30 Penn. St. 254; Buckley *v.* Furniss, 15 Wend. 137; S. C. 17 Ib. 504; Hoover *v.* Tibbetts, 13 Wis. 79; Aguirre *v.* Parmelee, 22 Conn. 473; Harris *v.* Pratt, 17 N. Y. 249; Sturtevant *v.* Orser, 24 Ib. 538; Markwald *v.* Creditors, 7 Cal. 213; Pottinger *v.* Heckscher, 2 Grant, 309; Harris *v.* Hart, 6 Duer, 606.]

Goods in hands of carrier; when right of stoppage lost.

(c) P. 248.

carrier who also acts as a warehouseman, and who may therefore have goods in his warehouse, either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer: or a wharfinger who sometimes receives goods as agent of the ship-owner, and sometimes as agent of the consignee. In all such cases, as the leading fact, viz. the possession of the goods, is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts. If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at an end: but I apprehend that both these intents must concur, and that neither can the carrier, of his own will, convert himself into a warehouseman, so as to terminate the *transitus*, without the agreeing mind of the buyer (James *v.* Griffin, 2 M. & W. 623), nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer. (Jackson *v.* Nichol, 5 Bing. N. C. 508.)" ([c1])

Both buyer and carrier must agree before the carrier can be converted into bailee to keep the goods for the buyer.

§ 850. This view of the law has received full confirmation in subsequent cases. In James *v.* Griffin, above quoted, and decided in 1837, the buyer, knowing himself to be insolvent, determined that he would not receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead: and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, Bolland, and Alderson BB. held the *transitus* not ended, and that the buyer's intention not to receive being proven, the wharfingers could not receive as his agents without his assent. Abinger C. B. dissented on the ground that the intention of the buyer not having been communicated to the wharfingers, the agency of the latter could not be affected by it, and that the *transitus* was therefore ended. But all agreed that the sole question was whether the wharfingers were in possession *qua agents of the buyer*. And in Jackson *v.* Nichol (*d*) repeated demands

James *v.* Griffin.

Jackson *v.* Nichol.

([c1]) [Inslee *v.* Lane, 57 N. H. 454.]

(*d*) 5 Bing. N. C. 508.

were made by the buyers for the goods after the arrival of the *Esk* in the Thames (*e*) before there was a stoppage, but the master of the vessel refused delivery, and the court of common pleas held that the goods had not come into possession of the buyer. Nothing was here wanting to possession but the carrier's assent to put an end to the *transitus*, (*f*) and the principle seems to be exactly that of Bentall *v.* Burn, and the class of cases like it, reviewed *ante*, §§ 175, 177.

Bolton *v.* Lancashire & Yorkshire Railway Company.

§ 851. In a recent and quite singular case, this question was considered by the common pleas. In Bolton *v.* The Lancashire and Yorkshire Railway Company (*g*) the facts stated in the special case were that Wolstencroft, of Manchester, sold to Parsons, of Brierfield, certain goods lying at the defendant's station at Salford, and sent the buyer an invoice, and delivered part of them. Parsons then wrote, refusing to take any more on account of the alleged bad quality. Wolstencroft had, on the same day, ordered the defendants to deliver another portion of the goods to Parsons, and wrote to the latter that he had done so, "according to your wish; the other four lying at Salford awaiting your instructions." Parsons wrote back returning the invoice, and refusing the goods, saying: "We shall not have any more of it." Wolstencroft then sent a letter through his solicitor demanding payment of all the goods undelivered, and sent an order to the railway company, the defendants, to deliver the rest of the goods to Parsons. Some of the goods were taken by the carter of Parsons from the station at Brierfield without the knowledge of Parsons, and he at once returned them, and ordered all the goods to be sent back to Wolstencroft. The latter refused to receive them, and ordered them back to Parsons. The defendants then wrote to Parsons asking what they were to do with the goods, and Parsons replied: "We shall have nothing to do with them; they belong to Wolstencroft." Parsons afterwards became bankrupt, and the vendor sent a stoppage order to the defendants, in whose hands the goods still remained, and the goods were delivered to the vendor. The action was brought against the carriers by the assignees of the buyer. Held, that the *transitus* was not at an end. Erle J. said: "I am of opinion that

(*e*) *Ante*, § 848.

(*f*) See Forster *v.* Frampton, 6 B. & C. 107, where the assent of both parties was given.

(*g*) L. R. 1 C. P. 431; 35 L. J. C. P. 137

these goods did not cease to be *in transitu* by being at the Brierfield station. Before they arrived there, notice had been given by Parsons to the vendor that he declined to receive them: and after their arrival Parsons gave the defendants orders to take them back again. The vendor at first refused to have anything to do with them; and thus the goods, *being rejected by both the vendor and by Parsons*, remained in the hands of the defendants. Under these circumstances, it seems to me the goods never ceased to be *in transitu*. It is clear, from the case of James *v.* Griffin (2 M. & W. 623), that the intention of the vendee to take possession is a material fact. So, in Whitehead *v.* Anderson (9 M. & W. 529), Parke B. says, 'the question is *quo animo* the act is done. My notion has always been whether the consignee has taken possession, not whether the captain has intended to deliver it.' . . . . It was urged by Mr. Holker that, being repudiated by both parties to the contract, the goods remained in the hands of the railway company as warehousemen for *the real owner*, that is for Parsons. There is no doubt but that the carrier may, and often does, become a warehouseman for the consignee; but that must be *by virtue of some contract or course of dealing between them*, that when arrived at their destination the character of carrier shall cease, and that of warehouseman supervene." Willes J. laid stress on the circumstance that the goods were, at the time of the sale, in possession of the railway company as warehousemen and bailees of the vendor, and thought that this agency had never ended, because the order for delivery to the buyer must be considered as subject to the condition "if he will receive them," but not to an absolute abandonment, or authority to throw them away, if the buyer would not have them. And on the main question the learned judge said: "Mr. Holker is undoubtedly right when he says that the property in these goods passed to the vendee. Unless the property passed, there would be no need of the right of stoppage *in transitu*. The only effect of the property passing is that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession, unless he is prepared to pay for the goods. . . . . The right to stop *in transitu* upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new des-

tination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu*. It must be observed that there is, besides the propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz. that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such that the buyer has *taken actual or constructive possession of the goods, and that cannot be as long as he repudiates them.*" (*h*) This case is a complete confirmation of the principle that the carrier cannot change his character so as to become the buyer's agent to keep the goods for him without the latter's assent; and the case of Whitehead *v.* Anderson, (*i*) a leading case on this subject, is as direct an authority for the converse principle that the buyer cannot force the carrier to become his bailee to keep the goods without the latter's assent. In that case, the buyer having become bankrupt, his assignee on the arrival of the vessel with a cargo of timber went on board, and told the captain that he had come to take possession of the cargo, and went into the cabin, into which the ends of the timber projected, and saw and touched the timber. The captain made no answer at first to the assignee's statement that he came to take possession, but afterwards told him at the same interview that he would deliver him the cargo when he was satisfied about his freight. They then went ashore together. The vendor then went on board and gave notice of stoppage to the mate who had charge of the vessel and cargo. Held, that no actual possession had been taken by the assignee, and that, as the *captain had not contracted to hold as his agent*, the *transitus* was not at an end, and the stoppage was good.

Whitehead *v.* Anderson.

§ 852. In Coventry *v.* Gladstone (*k*) the consignee on the arrival of the vessel sent a barge for the goods, and the lighterman was told that the goods could not be got at, but that they would be delivered to him when they could be got at, and Lord Hatherley (then vice chancellor) held that this was not an attornment by the carrier to the consignee, that the character of the former as carrier was not changed into that of agent of the consignee, and that the goods were still liable to stoppage *in transitu*.

Coventry *v.* Gladstone.

(*h*) [See Grout *v.* Hill, 4 Gray, 361; Naylor *v.* Dennie, 8 Pick. 198; Allen *v.* Mercier, 1 Ash. 103; Stubbs *v.* Lund, 7 Mass. 453.]

(*i*) 9 M. & W. 518; Tudor's L. C. on Mer. Law, 632.

(*k*) L. R. 6 Eq. 44.

§ 853. The carrier's change of character into that of agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied. (*l*) Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods after arrival at destination as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid." The question is one of intention; and in Whitehead *v.* Anderson (*m*) the captain was held not to have intended such an agreement by telling the assignee that he *would* deliver him the cargo when he was satisfied about the freight; Parke B. saying, "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise without a new consideration to *fulfil the original contract*, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. *After* the agreement he *remained* a mere agent for expediting the cargo to its original destination." (*n*)

Carrier may become agent to keep goods for buyer while retaining his own lien.

§ 854. The question whether the vendee may anticipate the end of the *transitus*, and thus put an end to the vendor's right of stoppage *in transitu*, was treated by most of the books (*o*) as settled in the affirmative, on the authority of the cases in the note, (*p*) and in opposition to the ruling of Lord Kenyon and the king's bench in Holst *v.* Pownall. (*p*[1]) And in Whitehead *v.* Anderson, (*q*) in which the judgment was prepared after advisement, Parke B. expressed no doubt upon the subject. He said: "The law is clearly settled that the unpaid vendor has a right to retake the goods *before* they have arrived at the destination originally con-

Buyer may anticipate the end of the *transitus*, and thus put an end to the right of stoppage.

(*l*) Allan *v.* Gripper, 2 Cr. & J. 218; but see Crawshay *v.* Eades, 1 B. & C. 181; *post*, § 856.

(*m*) 9 M. & W. 518.

(*n*) [See Calahan *v.* Babcock, 21 Ohio St. 281; Guilford *v.* Smith, 30 Vt. 49, 71, 72; Sawyer *v.* Joslin, 20 Ib. 192; Buckey *v.* Furniss, 15 Wend. 137.]

(*o*) 1 Smith's L. C. 755; Tudor's L. C. Mer Law. 664, 665; Houston on Stop. in Tran. 130 *et seq.*; 1 Grif. & Holmes on Bank. 353; [2 Kent, 547; Jordan *v.* James, 5 Ham. (Ohio) 89; Wood *v.* Yeatman, 15 B. Mon. 270.]

(*p*) Mills *v.* Ball, 2 Bos. & P. 457; Wright *v.* Lawes, 4 Esp. 82; Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 5 Bing. N. C. 508; Whitehead *v.* Anderson, 9 M. & W. 518; Foster *v.* Frampton, 6 B. & C. 107; James *v.* Griffin, 2 M. & W. 633. [See Secomb *v.* Nutt, 14 B. Mon. 324, 327.]

(*p*[1]) 1 Esp. 240.

(*q*) See *ante*, § 851.

templated by the purchaser, (*r*) *unless in the mean time* they came to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though in the case of the absence of the carrier's consent it may be a wrong to him, for which he would have a right of action." (*s*) There was, however, no direct decision on the point, and it rested on *dicta* till the recent case of

London & North Western Railway Company *v.* Bartlett.

The London and North Western Railway Company *v.* Bartlett, (*t*) in which the exchequer of pleas held that the carrier and consignee might agree together for the delivery of goods at any place they pleased, and Bramwell B. said it would "probably create a laugh anywhere except in a court of law, if it was said a carrier could not deliver to the consignee short of the particular place specified by the consignor."

§ 855. In Blackburn on Sales (*u*) the learned author does not yield assent to that passage in the opinion of Parke B. above quoted, in which it is intimated that "the vendee can improve his position by a tortious taking of actual possession against the will of the carrier," in cases where the carrier has a right to refuse to allow the vendee to take possession. (*x*) The doubt thus suggested seems to be justified by the decision in Bird *v.* Brown, (*y*) which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case the carrier tortiously refused possession to the purchaser when the goods had arrived at destination; and the exchequer court held, after advisement and in very decided language, that the purchaser's rights could not be impaired by the carrier's wrongful refusal

Buyer's rights of possession not affected by carrier's *tortious* refusal to deliver, and the right of stoppage is at an end.

(*r*) [See Mohr *v.* Boston & Albany Railroad Co. 106 Mass. 67; Atkins *v.* Colby, 20 N. H. 154, 156; Biggs *v.* Barry, 2 Curtis, 259; Cabeen *v.* Campbell, 30 Penn. St. 254; Covell *v.* Hitchcock, 23 Wend. 611; Aguirre *v.* Parmelee, 22 Conn. 473.]

(*s*) [In Mohr *v.* Boston & Albany Railroad Co. 106 Mass. 67, 72, Morton J. said: "In all cases of delivery of goods to a common carrier for the purpose of transit, the vendee, acting in good faith, has the right to intercept the goods before they reach their destination, and, by taking actual possession of them, to defeat the vendor's lien." See 2 Kent, 547; Jordan *v.* James, 5 Ohio, 89; Wood *v.* Yeatman, 15 B. Mon. 270; Dungy Cement Co. *v.* O'Brien, 123 Mass. 12.]

(*t*) 7 H. & N. 400; 31 L. J. Ex. 92.

(*u*) P. 259.

(*x*) See the civil law texts: Dig. Ulpian, l. 134, § 1, Æ. Edict. lib. xxi.; Broom's Legal Maxims, 275; Phill. on Jurisp. 224.

(*y*) 4 Ex. 786.

to deliver; that the *transitus* was at an end; and the right of stoppage gone.

§ 856. Of course the mere arrival of the goods at destination will not suffice to defeat the vendor's rights. The vendee must take actual, if he has not obtained constructive, possession. (*z*) What will amount to taking actual possession is a question in relation to which much of the law already referred to, in connection with actual receipt, under the statute of frauds, (*a*) and delivery sufficient to divest lien, (*b*) will be found applicable. In Whitehead *v.* Anderson (*c*) it was held, as we have seen, that going on board the vessel and touching the timber was not taking it into possession; and *per Cur.*: "It appears to us very doubtful whether an act of marking, or taking samples, or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession, unless accompanied by such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the nature of an agent for custody." In Crawshay *v.* Eades (*d*) the carrier having reached the consignee's premises began unloading, and put a part of the goods on his wharf, but hearing that the consignee had absconded and was bankrupt, took them back again on board the barge; and it was held that the right of stoppage remained, and that there had been no delivery of any part of the goods.

Right of stoppage continues after arrival at destination until vendee takes possession.

What is such possession.

Crawshay *v.* Eades.

§ 857. Whether delivery of part, when not retracted under the peculiar circumstances shown in Crawshay *v.* Eades, amounts to delivery of the whole, is always a question of intention, as shown *ante*, §§ 805 *et seq.*, where the cases mentioned in the note (*e*) have been reviewed; and the general rule was there deduced, that a delivery

Delivery of part is not delivery of the whole unless it be shown that it was so intended.

(*z*) [See Buckley *v.* Furniss, 15 Wend. 137; Sawyer *v.* Joslin, 20 Vt. 172; Hays *v.* Mouille, 14 Penn. St. 48; Naylor *v.* Dennie, 8 Pick. 198; Allen *v.* Mercier, 1 Ash. 103; Aguirre *v.* Parmelee, 22 Conn. 473; Levy *v.* Turnbull, 1 Low. Can. 21. The fact that the goods have arrived at the place of destination, where the purchaser has been in the habit of receiving merchandise sent to him, does not constitute delivery to him in any particular case. Seymour *v.* Newton, 105 Mass. 275.]

(*a*) *Ante*, §§ 172 *et seq.*

(*b*) *Ante*, §§ 799 *et seq.*

(*c*) 9 M. & W. 518.

(*d*) 1 B. & C. 181.

(*e*) Dixon *v.* Yates, 5 B. & A. 313; Betts *v.* Gibbins, 2 Ad. & E. 73; Tanner *v.* Scovell, 14 M. & W. 28; Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.*

of part is not a delivery of the whole, unless the circumstances show that it was intended so to operate.

Delivery into the possession of a buyer, even after his bankruptcy, or into that of his assignees, ends the *transitus*.

Buyer on becoming insolvent may rescind the contract, or refuse to receive possession, and vendor's right of stoppage will remain unimpaired.

§ 858. The bankruptcy of the buyer not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the buyer's warehouse after his bankruptcy, or an actual possession of them taken by his assignees, will suffice to put an end to the *transitus*, and to determine the right of stoppage. (*g*) Where the buyer has become insolvent after his purchase, he has a right to rescind the contract, with the assent of his vendor, while the goods are still liable to stoppage; and then the subsequent delivery of the goods into the buyer's possession cannot affect the vendor's rights, because the *property* in the goods will not be in the buyer: or he may refuse to take *possession* and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the assignees of the buyer. (*h*) The subject has been considered *ante*, §§ 498–501, where the cases are referred to.

Anderson, 1 B. & P. N. R. 69; Bunney *v.* Poyntz, 4 B. & Ad. 568; Simmous *v.* Swift, 5 B. & C. 857; Miles *v.* Gorton, 2 C. & M. 504; Jones *v.* Jones, 8 M. & W. 431; Wentworth *v.* Outhwaite, 10 M. & W. 436; [Buckley *v.* Furniss, 17 Wend. 504; Burr *v.* Wilson, 13 U. C. Q. B. 478. In Ex parte Falk, 28 Weekly Rep. 785, Bramwell L. J. said: "I cannot understand the case of Slubey *v.* Heyward, because it appears that there the sub purchaser had paid for the goods, and on what ground there could be a stoppage *in transitu* as against him I am at a loss to see. The note of the case is a very loose one. The court seems to have held that which, with great submission, appears to me a very doubtful proposition — that the carrier's duty had come to an end. As to Hammond *v.* Anderson, there is not a word in the judgments to show that the delivery of part of the cargo is a constructive delivery of the whole. What the court said was this: 'On a former occasion the court decided that when a part of the goods sold by an entire contract was taken possession of, the vendee has taken possession of the whole.'"]

(*g*) Ellis *v.* Hunt, 3 T. R. 467; Tooke *v.* Hollingworth, 5 T. R. 215; Scott *v.* Pettit, 3 B. & P. 469; Inglis *v.* Usherwood, 1 East, 515. [So if the purchaser dies before the goods arrive, and afterwards they arrive, and are taken possession of by his administrator, the estate being insolvent, the transit is determined, and no right of stoppage exists. Conyers *v.* Ennis, 2 Mason, 236.]

(*h*) [Don *v.* Law, 12 U. C. C. P. 460. So, where the consignee or purchaser has the right to reject the goods forwarded, should they on arrival and examination prove unsatisfactory, and a bill of sale thereof is sent by mail and received by him, but before he knows of their arrival, or pays the price or the freight thereon, ascertaining that he is insolvent, he executes a bill of sale thereof to the vendor and delivers it to a third person

Right of insolvent vendee to reject the goods.

SECTION IV. — HOW IS THE RIGHT EXERCISED?

§ 859. No particular form or mode of stoppage has been held necessary in any case; and Lord Hardwicke once said that the vendor was so much favored in exercising it as to be justifiable in getting his goods back by any means not criminal, before they reached the possession of an insolvent vendee. (*i*) All that is required is some act or declaration of the vendor countermanding delivery. (*i*[1]) The usual mode is a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders. (*k*) In Litt *v.* Cowley, (*l*) where notice had been given to the carrier not to deliver the goods to the vendee, the carrier's clerk made a mistake, and delivered the package to the buyer, who opened it and sold part of the contents; and then became bankrupt. The assignees claimed to hold the goods, but were unsuccessful. Gibbs C. J. in delivering judgment said: "It was formerly held that unless the vendor recovered back actual possession of the goods by a corporeal seizure of them, he could not exercise his right of stoppage *in*

No particular mode of stoppage required.

The usual mode is a simple notice to carrier forbidding delivery to vendee.

Litt *v.* Cowley.

for him; this operates as a stoppage *in transitu*, or a refusal to complete the contract of sale. In Grout *v.* Hill, 4 Gray, 361, Shaw C. J. said: "It was very early held, that where the consignee, being a purchaser of goods on credit, finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a good stoppage *in transitu*, although the bankruptcy of the consignee intervene; and the goods revest in the consignor. Atkin *v.* Barwick, 1 Stra. 165. This was approved and confirmed in the case of Salte *v.* Field, 5 T. R. 211. The same principle was adopted in this commonwealth, though the facts led to a different result in Lane *v.* Jackson, 5 Mass. 157." See *ante*, § 500, and cases in note (*e*). The assent of the vendor to the rescission of the contract is sufficient, in such case, though it is not received until after the goods have been attached by the creditors of the purchaser. Sturtevant *v.* Orser, 24 N. Y. 538, a case in which the authorities are carefully examined by Smith J. See *ante*, § 828, note (*a*); Greaner *v.* Mullen, 15 Penn. St. 200.]

(*i*) Snee *v.* Prescot, 1 Atk. 250.

(*i*[1]) [The notice must specify the goods with such certainty that the carrier may be enabled to identify them. Clementson *v.* The Grand Trunk Ry. Co. 42 U. C. Q. B. 263.]

Nature of notice necessary to carrier.

(*k*) [See Reynolds *v.* Boston & Maine Railroad, 43 N. H. 591; Bell *v.* Moss, 5 Whart. 189; Newhall *v.* Vargas, 13 Me. 93, 109; Mottram *v.* Heyer, 5 Denio, 629; Seymour *v.* Newton, 105 Mass. 272, 275; Rucker *v.* Donovan, 13 Kan. 251; Ascher *v.* Grand Trunk Ry. Co. 36 U. C. Q. B. 609.]

(*l*) 7 Taunt. 169; 2 Marsh. 457.

transitu. Latterly it has been held that notice to the carrier is sufficient; and that if he deliver the goods after such notice, he is liable. That doctrine cannot be controverted, and is supported by all the modern decisions. In the present case, the plaintiff gave notice to the carriers at the place whence the boat sailed, and it would be monstrous to say that after such notice a transfer made by their mistake should be such as to bind the plaintiffs, and to vest a complete title in the bankrupts and their representatives. . . . . As soon as the notice was given, *the property returned to the plaintiffs*, and they were entitled to maintain trover, not only against the carriers, but against the assignees of the bankrupts, or any other person." So far as the *dictum* is concerned, that the effect of the stoppage was to revest the *property*, the law is now otherwise; (*m*) but that it revests the *possession*, so as to restore to the vendor his lien, is undoubted. In Bohtlingk *v.* Inglis (*n*) a demand for the goods made by the vendor's agent on the master of the ship was held a sufficient stoppage: and in Ex parte Walker & Woodbridge (*o*) it was decided that an entry of the goods at the custom house by the vendor, on the arrival of the vessel, in order to pay the duties, was a valid stoppage, as against the assignees of the bankrupt purchaser, who afterwards got forcible possession of the goods when landed. In Northey *v.* Field, (*p*) wine bought by the bankrupt was landed from the vessel and put in the king's cellars, according to the excise law, where it was to remain until the owner paid duty and charges; but if not paid within three months, then to be sold, and the excess of the proceeds, after payment of duty and charges, to be paid to the owner. The assignees petitioned to have the wine, and it was also claimed by the vendor's agent while in the king's cellar, but it was sold at the end of the three months under the law. Lord Kenyon held that the claim made by the vendor was a good stoppage *in transitu*, the wine being *quasi in custodiâ legis*. (*q*)

Bohtlingk *v.* Inglis.

Ex parte Walker & Woodbridge.

Northey *v.* Field.

(*m*) *Post*, sec. V.

(*n*) 3 East, 397.

(*o*) Cited in Cooke's Bankrupt Law 402.

(*p*) 2 Esp. 613; [Burr *v.* Wilson, 13 U. C. Q. B. 478; Howell *v.* Alport, 12 U. C. C. P. 375.]

(*q*) See Nix *v.* Olive, Abbott on Ship. 439; [Mottram *v.* Heyer, 5 Denio, 629; *ante*, § 848, cases in note; Donath *v.* Broomhead, 7 Penn. St. 301, 304. So, where goods are still in the custom house, the right to stop them is not defeated, although the vendee has paid the freight, the goods not having been entered by reason

Goods still in custom house.

§ 859 *a*. [In Howell *v.* Alport (q^1) Alport bought goods consisting of teas and tobacco of Howell and Company of New York. The goods were shipped to Belleville and landed on the 21st of November at a wharf, where one Martin, acting as wharfinger, had charge of them; he paid the freight, which Alport repaid him. The goods being subject to duties were carried by defendant's team to the bonded warehouse and were bonded by the defendant. The warehouse was a part of the defendant's premises. It was a room the entrance to which was by a door opening from a room in which the defendant carried on his own business. On this door there were two locks, the key to one being kept by the defendant, the key to the other by the customs officer. Both keys were necessary to open the door. While the goods were in this warehouse the defendant sold part of them, and by permission of the messenger of customs, who unlocked the customs lock, he marked the goods thus sold. But the duty was not paid on any of the goods. On the 22d day of December the defendant became insolvent, and on the following day the plaintiffs notified the customs officer that they claimed the goods. On an interpleader, it was held that the plaintiffs had not lost the right to stop the goods. In Wiley *v.* Smith (q^2) the facts were as follows: The defendant was the assignee of the estate of E. Bendelari & Co. The plaintiff, of New York, sold to Bendelari & Co. 250 barrels of currants on time. The currants were sent from New York by rail on the 7th of January, 1876, at the risk of Bendelari & Co. A bill of lading was duly received by Bendelari & Co., the goods arrived on the 12th of January, and the freight was paid by Bendelari & Co., who also gave acceptances to the plaintiff for the price, which were payable thirty days from the date thereof. When the goods arrived at Toronto, the place of business of Bendelari & Co., they bonded the same.

Canadian cases as to effect of entry of goods in custom house on stoppage *in transitu*. Howell *v.* Alport.

Wiley *v.* Smith.

of the loss of the invoice. Donath *v.* Broomhead, 7 Penn. St. 301. The mere entry of goods without payment of duties is not a termination of the transit. Mottram *v.* Heyer, 5 Denio, 629; S. C. 1 Ib. 483. In re Bearns, 18 Bank. Reg. 500; Burnham *v.* Winsor, 5 Law Rep. 507; Northey *v.* Field, 2 Esp. 613. But where the vendor had goods on board ship which he sold on four months' credit, and took notes for the price, and handed all the shipping papers to the purchaser, who entered the goods and warehoused them in his own name, the vendor had thereafter no right of stoppage nor a lien. Parker *v.* Byrnes, 1 Lowell, 539.]

(q^1 [12 U. C. C. P. 375.]

(q^2) [1 Ont. App. 179.]

Subsequently Bendelari & Co. sold a portion of the currants, and the remainder, consisting of one hundred barrels, was bonded in a portion of the warehouse of Bendelari & Co., partitioned off and used by the customs authorities as a bonded warehouse, and for which they paid rent. On the 7th of February the defendant was chosen and appointed the assignee of Bendelari & Co. On the 8th of March the plaintiff demanded the goods from the collector, and on the 9th of March the defendant demanded them. The court held that the plaintiff's right of stoppage was lost. Burton J. A. said: "It appears to me that the question, in determining whether the *transitus* is ended, is to ascertain in what capacity the goods are held by the person who has the custody. Is he the vendee's agent to keep the goods, or does he hold them as the agent of the carrier, or as a mere bailee or middleman not exclusively the agent of the vendor or vendee? The delivery into a warehouse, though belonging to the insolvent but used also as a bonded warehouse, would not in itself be a delivery to him; but whenever the collector of customs recognized his title and took from him a bond for the payment of the duties at a future day, it appears to me out of the question to contend that the customs officer was a middleman, and that notice to him would operate as a stoppage in *transitu*. There was nothing remaining to be done on the part of the vendee as between him and the vendor. All that remained to be done was between the vendee and the crown; and if the officer representing the crown in the exercise of his lawful authority chooses to accept the bond of the vendee in place of the duties, it scarcely lies in the mouth of the vendors to say that the delivery is not complete. From the moment the collector of customs received the bond of the vendee, there was as complete a delivery as if the goods had been delivered into his own hands. Howell *v.* Alport *supra*, was said not to be good law. (q^3) In Irish cases. Haig *v.* Wallace (q^4) the vendor and plaintiff, a distiller, had, under 4 Geo. IV. c. 94, deposited spirits in the king's warehouse, subject to the king's duty. A sale was made of these goods subject to the duty, and a delivery order given to the customs warehouseman to deliver the puncheons sold to the ven-

(q^3) [Graham *v.* Smith, 27 U. C. C. P. 1; Burr *v.* Wilson, 13 U. C. Q. B. 478. See Lewis *v.* Mason, 36 U. C. Q. B. 590; Wilds *v.* Smith, 2 Ont. App. 8, modifying and reversing the same case in 41 U. C. Q. B. 136.]

(q^4) [2 Huds. & Br. 671.]

dee, "he paying duty and storage." The vendee gave in payment a three months' bill. The vendee lodged the delivery order with the warehouseman, who indorsed thereon "transfer received," and the transfer was entered in the keeper's books. While the puncheons were still in the warehouse the vendee became insolvent, but it was held that the vendor's right of stoppage was gone. And in Orr *v.* Murdock, 2 Ir. C. L. R. 9, Haig *v.* Wallace was affirmed, and it was held that the transfer of the order on the warehouseman's books was not essential. (q^5)]

§ 860. The notice of the stoppage must be given to the person in possession of the goods, or if to his employer, then under such circumstances and at such time as to give the employer opportunity, by using reasonable diligence, to send the necessary orders to his servant. (q^6) In Whitehead *v.* Anderson (r) the vendor attempted to effect a stoppage of a cargo of timber while on its voyage from Quebec to Port Fleetwood in Lancashire, by giving notice to the ship-owner in Montrose, who thereupon sent a letter to await his captain's arrival at Fleetwood. Parke B., delivering the judgment, said: "The next question is whether the notice to the ship-owner, living at Montrose, is such a [valid] stoppage of the cargo, then being on the high seas, on its passage to Fletwood. We think it was not: for to make a notice effective as a stoppage *in transitu* it must be given to the person who has *the immediate custody* of the goods; (s) or if given to the principal, whose servant has the custody, it must be given as it was in the case of Litt *v.* Cowley, at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible from the distance and want of means of communication to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use

The notice of stoppage must be given to the person in possession;

or if to the employer, in time to enable him to send notice to his servant not to deliver.

(q^5) [Croker *v.* Lawder, 9 Ir. L. R. 21.]

(q^6) [Ex parte Falk, 14 Ch. Div. 446; Ascher *v.* The Grand Trunk Ry. 36 U. C. Q. B. 609.]

(r) 9 M. & W. 518.

(s) [Mottram *v.* Heyer, 5 Denio, 629.]

reasonable diligence to prevent the delivery, and in the present case such diligence was used." (*t*)

§ 861. The mode of exercising the right of stoppage underwent careful investigation in the admiralty court in the case of The Tigress. (*u*) It was there determined by Dr. Lushington: First. That a vendor's notice to stop made it the duty of the master of the vessel to refuse delivery to the vendee to whom a bill of lading had been indorsed, and was sufficient without any representation that the bill of lading had not been transferred by the vendee. Secondly. That the master's refusal to acquiesce in the vendor's claim of stoppage was a *breach of duty*, giving jurisdiction to the admiralty court. Thirdly. That the vendor's right included the right of demanding *delivery to himself*, and that the carrier has no right to say that he will retain the goods for delivery to the true owner after the conflicting claims have been settled. Fourthly. That the stoppage is at the vendor's peril, and it is incumbent on the master to give effect to a claim as soon as he is satisfied that it is made by the vendor, unless *he is aware of a legal defeasance* of the vendor's claim; but it is not a matter ordinarily within his cognizance, whether or not the buyer has indorsed over a bill of lading to a third person. Fifthly. That if bills of lading are presented to the master by two different holders "he is not concerned to examine the best right in the different bills; all he has to do is to deliver upon one of the bills." (*x*) This last proposition was said by the learned judge to be unnecessary to the decision. It was stated on the authority of Fearon *v.* Bowers, reported in the notes to Lickbarrow *v.* Mason, (*y*) but is very doubtful law; for it is well settled that a bailee delivers at his peril, that he is bound to decide between conflicting claimants to goods in his possession, that he is liable in trover if he delivers to the wrong person, (*y*[1]) and that his only mode of protecting him-

Vendor need not inform the master of vessel that the bill of lading is still in possession of buyer.

Master's duty is to deliver goods to vendor, not simply to retain them till claims have been settled.

Master as bailee delivers at his peril, and if indemnity is refused may file a bill of interpleader in chancery.

(*t*) [Mottram *v.* Heyer, 5 Denio, 629.]

(*u*) 32 L. J. Adm. 97.

(*x*) See *ante*, § 822, as to effect of transferring parts of one set of bills of lading to different holders.

(*y*) 1 H. Bl. 364; 1 Sm. L. C. 723 (6th ed.).

(*y*[1]) [It has been held in Canada that the vendor cannot maintain trover against the carrier who wrongfully delivers the goods to the vendee after notice from the vendor to hold the goods. The plaintiffs sold goods to Henderson, living at Meaford, and shipped them by the Grand Trunk Railway to Toronto, and

In Canada vendor cannot maintain trover against carrier after notice of stoppage.

self is to take an indemnity, and if that be refused, to file a bill of interpleader in chancery. (*z*) This is clearly the opinion of Blackburn J., for in the Treatise on Sales he adverts to it as unquestionable law, in these words: "As the carrier obeys the stoppage *in transitu at his peril*, if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act." (*a*) In the opinion delivered in The Tigress this suggestion is rejected, the judge saying distinctly, that the proof of the conditions on which the vendor's rights depend would always be difficult, often impossible at the time of their exercise; "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange given for the goods becomes due; for it is as I conceive clear law, that the right to stop does not require the vendee to have been found insolvent." And see the decision of the House of Lords in Meyerstein *v.* Barber, as stated *ante*, § 822. The stoppage to be effectual must be on behalf of the vendor, in the assertion of his rights as paramount to the rights of the buyer." (*b*)

Stoppage must be on behalf of vendor, in assertion of his paramount right to the goods.

SECTION V. — HOW MAY IT BE DEFEATED?

§ 862. The vendor's right of stoppage *in transitu* is defeasible in one way only, (*c*) and that is when the

Vendor's right defeasible

thence by defendants' railway to Collingwood. While the goods were at the latter place the defendants received notice from the plaintiffs to stop the goods, but the defendants disregarded the notice and delivered the goods to Henderson, who was found by the jury to have been insolvent at the time the notice was given. The plaintiffs sued the company in trover. Draper C. J. said: "But this right of the vendor to withhold the goods from his vendee, who by payment would have an immediate right to the possession as being already the owner by sale and delivery to the carrier, is a very different thing from the right of property and of possession which is asserted in the action of trover, which in my humble judgment will not lie upon the facts in evidence. We must not be understood as giving any support to the notion that the defendants were right in delivering these goods to Henderson. If he, tendering the freight, had demanded the goods, threatening a suit, we have no doubt the defendants might have got an interpleader issue." Childs *v.* The Northern Railway of Canada, 25 U. C. Q. B. 165.]

(*z*) Wilson *v.* Anderton, 1 B. & Ad. 450; Batut *v.* Hartley, L. R. 7 Q. B. 594; [Campbell *v.* Jones, 9 Low. Can. 10.]

(*a*) P. 266.

(*b*) Ib; Skiffken *v.* Wray, 6 East, 371; Mills *v.* Ball, 2 B. & P. 457.

(*c*) [An attachment of the goods on their passage to the consignee, as the property of the consignee, does not defeat the right of the consignor to stop them *in transitu;* Naylor *v.* Dennie, 8 Pick. 198;

Attachment of goods does not defeat vendor's right.

only by transfer of bill of lading to a *bonâ fide* indorsee for value.

goods are represented by a bill of lading, which is a symbol of property, and when the vendee, being in possession of the bill of lading with the vendor's assent, transfers it to a third person, who *bonâ fide* gives value for it. (*d*)

§ 863. The bills of lading act, 18 & 19 Vict. c. 111 (referred to *ante*, § 812), and the factors act (*ante*, §§ 809 *et seq.*), have largely extended the effects of these mercantile instruments, and

By common law consignee could only defeat vendor's rights by resale, but now, by the factors act, by pledge also.

the rights of the holders of them. By the common law, as established in Lickbarrow *v.* Mason, (*e*) and the numberless cases since decided on the authority of that celebrated case, the right to stop *in transitu* was defeasible by the transfer of the bill of lading to a *bonâ fide* indorsee; but if the indorsement was by a factor or consignee, it was only valid in case of sale, not of pledge: and even when by the vendor himself, the transfer operated as a conveyance of the property in the goods, (*f*) but not as an *assign-*

Buckley *v.* Furniss, 15 Wend. 137; Durgy Cement Co. *v.* O'Brien, 123 Mass. 12; Clark *v.* Lynch, 4 Daly (N. Y.), 83; Dickman *v.* Williams, 50 Miss. 500; Morris *v.* Shryock, Ib. 590; Hause *v.* Judson, 4 Dana, 13; Wood *v.* Yeatman, 15 B. Mon. 270; Newhall *v.* Vargas, 15 Maine, 314; Seymour *v.* Newton, 105 Mass. 272; Hays *v.* Mouille, 14 Penn. St. 48; O'Brien *v.* Norris, 16 Md. 122; Calahan *v.* Babcock, 21 Ohio St. 281; nor will a sale of the goods by the purchaser before the termination of the transit, if such sale is not made by a *bonâ fide* transfer of the bill of lading. See Ilsley *v.* Stubbs, 9 Mass. 65; Stanton *v.* Eager, 16 Pick. 473; Gardner *v.* Howland, 2 Ib. 599; Miles *v.* Gorton, 2 C. & M. 504; Dixon *v.* Yates, 5 B. & Ad. 339; Chapman C. J. in Seymour *v.* Newton, 105 Mass. 275; Secomb *v.* Nutt, 14 B. Mon. 324; Atkins *v.* Colby, 20 N. H. 154; Sawyer *v.* Joslin, 20 Vt. 172; Covell *v.* Hitchcock, 23 Wend. 611; Harris *v.* Hart, 6 Duer, 606; Kitchen *v.* Spear, 30 Vt. 545; O'Brien *v.* Norris, 16 Md. 122; Hays *v.* Mouille, 14 Penn. St. 48; Rosenthal *v.* Dessau, 11 Hun, 49.]

When sale will defeat it.

(*d*) [Rawls *v.* Deshler, 4 Abb. (N. Y.) App. Dec. 12; Stanton *v.* Eager, 16 Pick. 476; *ante*, § 813; Lee *v.* Kimball, 45 Maine, 172; Dows *v.* Greene, 24 N. Y. 638; Blanchard *v.* Page, 8 Gray, 281, 298; Walter *v.* Ross, 2 Wash. C. C. 283; 2 Kent, 549; 1 Chitty Contr. (11th Am. ed.) 608, and note (*i*), and cases cited; Conard *v.* Atlantic Ins. Co. 1 Peters, 445; Winslow *v.* Norton, 29 Maine, 421; Dows *v.* Perrin, 16 N. Y. 325; Pratt *v.* Parkman, 24 Pick. 42; Clark *v.* Chipman, 2 Eng. 197; Gardner *v.* Howland, 2 Pick. 599; Lackington *v.* Atherton, 1 U. C. Q. B. (O. S.) 87; S. C. 7 M. & G. 360; Clementson *v.* The Grand Trunk Ry. Co. 42 U. C. Q. B. 263; Andenreid *v.* Randall, 3 Cliff. 99; Kemp *v.* Canavan, 15 Ir. C. L. R. 216. As between the original parties to a bill of lading, the receipt of it by the purchaser or consignee merely establishes the vesting of the property in him. Of course it does not defeat the right of stoppage *in transitu*, but rather gives occasion for its exercise. Stanton *v.* Eager, 16 Pick. 474; Addison Contr. (Am. ed. 1857) 261, 262.]

Effect of receipt of bill of lading by vendee.

(*e*) 1 Smith's L. C. 199 (6th ed.); [Bramwell L. J. 2 Q. B. Div. 381, 382.]

(*f*) [See Barber *v.* Meyerstein, L. R. 4

ment of the contract so that the indorsee was not empowered to bring suit on the bill of lading. (*g*) But now, by the effect of the factors acts, the indorsement of a bill of lading by factors or consignees, intrusted with it as agents of the owners, is as effective as that of the vendor would be in giving validity to "any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents [including bills of lading], as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and *good against the owner of such goods*, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." So that, as regards the effect of the transfer of the bill of lading, it now makes no difference whether the consignor was vendor or merely consigning goods for sale, his rights of stoppage will be defeated by the assignment of the bill of lading, even to a person not a vendee, but from whom money has been borrowed on the faith of it. And by the bills of lading act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or *indorsee, to whom the property in the goods shall pass.* For decisions upon the legal effect of the words just quoted in italics, reference may be made to the cases quoted in the note. (*h*)

Transfer of bill of lading is now an assignment of the contract.

§ 864. It is not within the province of this treatise to examine the general law in relation to bills of lading, for which the authorities are collected in the notes to Lickbarrow *v.* Mason, (*i*) but only the effect of transferring these documents in defeating the right of stoppage. The first point to be noticed is, that a bill of lading is not negotiable in the same sense

Bill of lading not negotiable

H. L. 317; L. R. 2 C. P. 38, 661; Blanchard *v.* Page, 8 Gray, 281, 298; Winslow *v.* Norton, 29 Maine, 421; Tilden *v.* Minor, 45 Vt. 196; Davis *v.* Bradley, 28 Ib. 118; Davis *v.* Bradley, 24 Ib. 55.]

(*g*) Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 296; [per Shaw C. J. in Blanchard *v.* Page, 8 Gray, 297, 298.]

(*h*) Fox *v.* Nott, 6 H. & N. 630; The Figlia Maggiore, L. R. 2 Adm. 106; The Nepoter, L. R. 2 Adm. 375; The Freedom, L. R. 3 P. C. C. 594; Dracachi *v.* The Anglo-Egyptian Navigation Co. L. R. 3 C. P. 190; Short *v.* Simpson, L. R. 1 C. P. 248, 252.

(*i*) 1 Sm. L. C. 699 (5th ed.).

like a bill of exchange.

as a bill of exchange, (*k*) and that therefore the mere honest *possession* of a bill of lading indorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The *indorsement of a bill of lading gives no better right to the goods than the indorser himself had* (except in cases where an agent *intrusted with it* may transfer it to a *bonâ fide* holder under the factors act), so that if the owner should lose or have stolen from him a bill of lading indorsed in blank, the finder or the thief could confer no title upon an innocent third person. (*l*) But the title of *bonâ fide* third persons will prevail against the vendor who has *actually*

Transferee has no better title than indorser.

But *bonâ fide* indorsee will

(*k*) [Rowley *v.* Bigelow, 12 Pick. 307, 314; Marine Bank of Buffalo *v.* Fiske, 71 N. Y. 353; Stanton *v.* Eager, 16 Pick. 467, 474; Saltus *v.* Everett, 20 Wend. 268. See per Morton J. in Pratt *v.* Parkman, 24 Pick. 42, 48; Winslow *v.* Norton, 29 Maine, 414, 421; Gray C. J. in Stollenwerck *v.* Thaeher, 115 Mass. 226, 227.]

(*l*) Gurney *v.* Behrend, 3 E. & B. 622; 23 L. J. Q. B. 265; and see Coventry *v.* Gladstone, L. R. 6 Eq. 44; Blackburn on Sales, p. 279, and cases there cited. [Tison *v.* Howard, 57 Ga. 410; Mechanics' & Traders' Bank *v.* Farmers' & Mechanics' Bank, 60 N. Y. 40; Farmers' & Mechanics' Bank *v.* Erie Ry. Co. 72 Ib. 188; Bank *v.* Shaw, 1 L. & Eq. Reporter (Boston), 591. "A bill of lading, even when in terms running to order or assigns, is not negotiable like a bill of exchange, but is a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of the delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a *bonâ fide* purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal." Gray C. J. in Stollenwerck *v.* Thacher, 115 Mass. 224, 227, and cases cited; National Bank of Green Bay *v.* Dearborn, Ib. 219. When a bill of lading is negotiated, its negotiation is regulated by the law of the state in which it is negotiated, not by the law of the state in which it is made. Bank *v.* Shaw, 1 L. & Eq. Reporter (Boston), 591. When a draft is drawn by the shipper of goods on the consignee, and a bill of lading by which the goods are deliverable to the order of the shipper, and which is indorsed to the consignee, is attached to the draft and delivered to the bank discounting the draft, as collateral security for the money advanced, such delivery transfers a special property in the goods to the bank, and gives it a right of immediate possession sufficient to enable it to maintain replevin against the shipper and any one attaching the goods as his property. Fifth National Bank in Chicago *v.* Bayley, 115 Mass. 228; Hathaway *v.* Haynes, 124 Ib. 311; Libby *v.* Ingalls, Ib. 503; The Royal

As to negotiable nature of bills of lading.

transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so, (*m*) because, as we have seen, (*n*) a transfer obtained by fraud is only voidable, not void. In Dracachi *v.* The Anglo-Egyptian Navigation Company (*o*) the plaintiff proved that the consignor had indorsed the bill of lading to A., and that A. had indorsed it to the plaintiff for value so as to pass the property; and it was objected by defendant that there was no proof that the first indorsement was for value *so as to pass the property* under the 1st section of the bills of lading act; but the court held that the transfer by the consignor was strong *primâ facie* evidence that the property had passed, sufficient to justify the jury in finding that the property in the goods was in the plaintiff.

hold goods against vendor who has been defrauded.

Where bill of lading is shown to have been indorsed to holder for value, this is *primâ facie* evidence of ownership, without proving that previous indorsement was for value.

§ 865. If the consignor or vendor transfers the bill of lading as security for advances, and the bill of lading is then transferred back on the repayment of the advances, the rights of the original consignor or vendor return to him, and he is remitted to all his remedies under the original contract. (*p*) But the vendor's rights of stoppage *in transitu* may be defeated in part only, for the bill of lading may be transferred as a pledge or security for the debt, and then in general the *property* in the goods remains in the vendee; but even if by agreement the *property* in the goods has been assigned as well as the *possession*, it is only a *special* property that is thus transferred, and the *general* property remains in the vendee. On these grounds, therefore, the vendor's right of stoppage will remain so far as to entitle him to any surplus proceeds after satisfying the creditor to whom the bill of lading was transferred as security; and the vendor will have the further equitable right of insisting on *marshalling the assets;* that is to say, of forcing the creditor to exhaust any other securities held by him towards satis-

Where consignor or vendor gets back bill of lading after transfer, his original rights revive.

Where bill of lading has been indorsed as a pledge, vendor's right of stoppage remains for surplus after pledgee is satisfied;

and vendor may force pledgee to marshal the assets.

Canadian Bank *v.* Carruthers, 29 U. C. Q. B. 283. See, as to the duty of a bank to whom a bill of exchange is sent for collection together with the bill of lading of certain goods, The Wis. Mar. & Fire Ins. Co. Bank *v.* The Bank of British N. Am. 21 U. C. Q. B. 284.]

(*m*) Pease *v.* Gloahec, L. R. 1 P. C. App. 219.

(*n*) *Ante*, §§ 433 *et seq.*

(*o*) L. R. 3 C. P. 190; 37 L. J. C. P. 71.

(*p*) Short *v.* Simpson, L. R. 1 C. P. 248; 35 L. J. C. P. 147.

fying his claim before proceeding on the goods of the unpaid vendor. (*q*)

Transfer of bill of lading will defeat vendor's rights, even when indorsee knows that goods have not been paid for, if the transaction is honest.

§ 866. The transfer of the bill of lading, in order to affect the vendor's right of stoppage *in transitu*, must be, both by the statute and the common law, to a *bonâ fide* third person. This means, not without notice that the goods have not been paid for, because a man may be perfectly honest in dealing for goods that he knows not to have been paid for, (*r*) but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable*. (*s*) Thus, in Vertue *v.* Jewell, (*t*) where Lord Ellenborough held that the vendor had no right of stoppage, he said expressly that if such a right had existed against the consignee, he would have enforced it against Ayres, the indorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee. (*u*) On this principle it was decided by the judicial committee of the privy council, (*x*) that the forbearance or release of an antecedent claim is not a good consideration for the transfer of a bill of lading so as to defeat the right of stoppage *in transitu*.

Transfer for antecedent debt will not defeat the right.

Remarks of Cotton L. J. on rights of vendor against third persons.

§ 866 *a*. [In Ex parte Golding Davis & Co. 13 Ch. Div. 628, Cotton L. J. said: "Now, I take it, the principle is this, that the vendor cannot exercise his right to stop during the transit, if the interests or rights of any other persons, which they have acquired for value, will be defeated by his so doing. Except so far as it is necessary to give

(*q*) In re Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; S. C. on App. 15 L. J. Ch. 374, and in the note to Berndtson *v.* Strang, L. R. 4 Eq. 486. See, as to marshalling assets in equity, Aldrich *v.* Cooper, and notes, 2 Tudor's L. C. in Eq. 80 *et seq.*

(*r*) Cuming *v.* Brown, 9 East, 506; [Stanton *v.* Eager, 16 Pick. 467, 476; Chandler *v.* Fulton, 10 Texas, 2; Dows *v.* Perrin, 16 N. Y. 325.]

(*s*) Ib.; Salomons *v.* Nissen, 2 T. R. 681.

(*t*) 4 Camp. 31. See, also, Wright *v.* Campbell, 4 Burr. 2046. [And see the remarks of Bramwell L. J. upon Vertue *v.* Jewell, in Leask *v.* Scott, 2 Q. B. Div. 380, 381.]

(*u*) [See Stanton *v.* Eager, 16 Pick. 476, 477.]

(*x*) Rodger *v.* The Comptoir d'Escompte, L. R. 2 P. C. C. 393. [This case was dissented from, in Leask *v.* Scott, 2 Q. B. Div. 376, where it was held that the transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder.]

effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can. He can say, I claim a right to retain my vendor's lien. I will not defeat the right of the sub-purchaser; but what I claim is to defeat the right of the purchaser from me, that is, to intercept the purchase-money which he will get, so far as it is necessary to pay me. That, in my opinion, he is entitled to do, not in any way thereby interfering with the rights of the sub-purchaser, but only, as against his own vendee, asserting his right to resume his vendor's lien and to obtain payment by an exercise of that right." (x^1)]

SECTION VI. — WHAT IS THE EFFECT OF A STOPPAGE IN TRANSITU.

§ 867. There can no longer be a reasonable doubt that the true nature and effect of this remedy of the vendor is simply to restore the goods to his *possession*, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale. The point has never been directly decided, because the circumstances are rarely such as to raise the question; but if there should be a considerable advance in the price of the goods sold, it is obvious that the subject would acquire a practical importance. The series of cases in which the question has been examined may be found cited in 1 Smith's Leading Cases, 748; and in Wentworth *v.* Outhwaite, (y) where the point was raised and elaborately argued. Parke B. gave the judgment, in 1842, in which he declared that in his own opinion and that of his brethren, with the exception of Lord Abinger, who dissented, the effect of the stoppage was "to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods till the price

Effect is to restore the goods to vendor's possession, not to rescind the sale.

Wentworth *v.* Outhwaite.

(x^1) [See the statement of this case *ante*, § 848 *a*. See, also, Ex parte Falk, 14 Ch. Div. 446.]

(y) 10 M. & W. 436.

is paid down." In Martindale *v.* Smith, (*z*) however, as we have seen, where the point was raised and determined after consideration by the queen's bench, whether the vendor had a right to reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, the court conclude the expression of a very decided opinion in the negative by the statement, "The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain." (*z*[1])

Martindale *v.* Smith.

In Valpy *v.* Oakeley, (*a*) where the assignees of the bankrupt sued the defendant in assumpsit for non-delivery of goods brought by the bankrupt, of which the defendants stopped delivery after the bankrupt had become insolvent, although they had received from him acceptances for the price, the court held that when the bills were dishonored, the parties were in the same position as if bills had never been given at all. It did not hold the contract rescinded, but decided that the assignees were entitled to recover the value of the goods less the unpaid price, that is, merely nominal damages unless the market has risen. And this case was followed by the same court in Griffiths *v.* Perry, (*b*) in which, under similar circumstances, it was held that the vendor's right was a right similar to that of stoppage *in transitu* (that is to say, that the vendor need not go through the idle form of putting the goods into a cart and then taking them out, but had the right to retain them by a *quasi* stoppage *in transitu*), and the court gave to the assignees of the bankrupt nominal damages for the vendor's stoppage of the delivery; a judgment only possible on the theory that the contract had not been rescinded.

Valpy *v.* Oakeley.

Griffiths *v.* Perry.

§ 868. But the strongest ground for holding the question to be now at rest is, that courts of equity have assumed regular jurisdiction of bills filed by vendors to assert their right of stoppage *in transitu*, — a jurisdiction totally incompatible with the theory of a rescission of the contract; for if the contract was rescinded, there would be no privity in a court of equity between the parties. This was pointed out by Lord Cairns, in Schotsman *v.* The Lancashire & Yorkshire Railway Com-

This is settled in the equity decisions.

(*z*) 1 Q. B. 389.

(*z*[1]) [Rucker *v.* Donovan, 13 Kansas, 251.]

(*a*) 16 Q. B. 941; 20 L. J. Q. B. 380.

(*b*) 1 E. & E. 680; 28 L. J. Q. B. 204.

pany; (*c*) and in that case both his lordship and Lord Chelmsford declared that they entertained no doubt of the jurisdiction of a court of equity, in the case of a bill filed, to enforce the vendor's right of stoppage. In the United States it has also been decided that the legal effect of the stoppage *in transitu* is to entitle the vendor to enforce his right to be paid the price, not to give him the power to rescind the sale. (*d*)

La in America.

(*c*) L. R. 2 Ch. App. 332.

(*d*) Cross *v.* O'Donnell, 44 N. Y. 661.

Stoppage is lien extended.

[The right of stoppage *in transitu* is nothing more than the extension of the right of lien which by the common law the vendor has upon goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. Shaw C. J. in Rowley *v.* Bigelow, 12 Pick. 313, and in Groat *v.* Hill, 4 Gray, 361, 366; Jordan *v.* James, 5 Ham. 98; 2 Kent, 541; Rogers *v.* Thomas, 20 Conn. 53; Chandler *v.* Fulton, 10 Texas, 2; Newhall *v.* Vargas, 13 Maine, 93, 104; S. C. 15 Ih. 315; Hann *v.* Bowne, 2 Caines, 38, 42; Atkins *v.* Colby, 20 N. H. 154, 155. It has been decided in several cases in the American states, that the stoppage *in transitu* does not of itself rescind the contract of sale, but only places the parties in the same situation, as nearly as may be, in which they would have been if the vendor had not parted with the possession. Newhall *v.* Vargas, and other cases above cited; Stanton *v.* Eager, 16 Pick. 475. The vendor, in exercising this right of stoppage, does not take possession of the goods as his own, but as the goods of the purchaser, on which the vendor has a lien for his unpaid purchase-money. If the purchaser has paid part of the price he cannot recover it back while the vendor, having regained the possession, is still willing to deliver the goods on payment of the balance. If the purchaser refuses to pay the balance, the vendor may, after notice and a reasonable time allowed to pay for and take the goods, resell them, and apply the proceeds to the payment of the price; and should a balance remain unpaid the vendor may recover it of the purchaser. Newhall *v.* Vargas, *supra;* Abbott Ship. (6th Am. ed.) 516.]

Effect of stoppage upon the contract.

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

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§ 869. THE breach of contract of which the buyer complains may arise from the vendor's default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or the collateral contract of warranty either of quality or title. The buyer's right to *avoid* the contract for mistake, failure of consideration, fraud, or illegality, has been discussed in book III. of this treatise. There remain therefore for consideration, 1st. The remedies of the buyer before obtaining possession of the goods sold; which must be subdivided into cases where the contract is executory only, and cases where the property has passed. 2dly. The remedies of the buyer after having taken actual possession of the goods.

Right to avoid the contract for mistake, failure of consideration, fraud, or illegality.

SECTION I. — WHERE THE CONTRACT IS EXECUTORY.

§ 870. Where by the terms of the contract the property has not passed to the buyer in the thing which the vendor has agreed to sell, it is obvious that the buyer's remedy for the breach of the vendor's promise is the same as that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relations of vendor and vendee. The damages which the buyer may recover in such an action are in general the difference between the contract price and the market value of the goods at the time when the contract is broken, (*a*) as explained by Tindal C. J. in the

Only remedy is action for the breach of contract.

What damages buyer may recover.

(*a*) [See Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362; Cutting *v.* Grand Trunk Railway Co. 13 Allen, 381; Deming *v.* Grand Trunk Railway Co. 48 N. H. 455; Gordon *v.* Norris, 49 Ib. 376; Furlong *v.* Polleys, 30 Me. 493; Kountz *v.* Kirkpatrick, 72 Penn. St. 376; Chadwick *v.* Butler, 28 Mich. 349; McKercher *v.* Curtis, 35 Ib. 478; M'Dermid *v.* Redpath, 39 Ib. 372; Colton *v.* Good, 11 U. C.

opinion delivered in Barrow *v.* Arnaud, cited *ante*, § 758; and numerous instances of the application of this rule are to be found in the reported cases. (*b*) But the law distinguishes the damages which may be claimed on a breach of contract,

Damages general or special.

Q. B. 153; Smith *v.* Mayer, 3 Col. 207; Miles *v.* Miller, 12 Bush, 134; Koch *v.* Godshaw, Ib. 318; Knibs *v.* Jones, 44 Md. 396; Kemple *v.* Darrow, 7 J. & Sp. 447; Parsons *v.* Sutton, 66 N. Y. 92; Cahen *v.* Platt, 69 Ib. 348; O'Neill *v.* Rush, 12 Ir. L. R. 34; Watrous *v.* Bates, 5 U. C. C. P. 367. "The rule of damages in respect to the non-delivery of merchandise is the difference between the agreed price and that at which the merchandise could be sold, when the action is against the vendee for not accepting; and when against the vendor for not delivering, the value of the article on the day when it should have been delivered. The value of the article on the day of delivery forms the most direct method of ascertaining the measure of indemnity." Ingraham J. in Whelan *v.* Lynch, 65 Barb. 329; Dana *v.* Fiedler, 12 N. Y. 40. But when the market price of an article is unnaturally inflated by unlawful means, it is not the true criterion of the value of that article, and does not furnish the means of ascertaining the measure of damages for non-delivery of it. This point is very ably discussed, and the cases cited, by Agnew J., in Kountz *v.* Kirkpatrick, 72 Penn. St. 376, who concluded his examination of the cases by saying: "I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of the actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated." See the remarks of Nelson C. J. in Smith *v.* Griffith, 3 Hill, 337, 338; Wilson *v.* Davis, 5 Watts & S. 523; Hopkinson J. in Blydenburg *v.* Welsh, Baldw. Rep. 331; Andrews *v.* Hoover, 8 Watts, 239; Strong J. in Trout *v.* Kennedy, 47 Penn. St. 393; Cole *v.* Cheovenda, 4 Col. 17; Stark *v.* Alford, 49 Tex. 260.]

Rule of damages for not delivering and not accepting.

Market price not always true value.

(*b*) Boorman *v.* Nash, 9 B. & C. 145; Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 381; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Peterson *v.* Eyre, 13 C. B. 353; Josling *v.* Irvine, 6 H. & N. 512; 30 L. J. Ex. 78; Boswell *v.* Kilborn, 15 Moore P. C. C. 309; Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180; Wilson *v.* Lancashire & Yorkshire Railway Company, 9 C. B. N. S. 632; 30 L. J. C. P. 232; [Clarke *v.* Dales, 20 Barb. 42; Dana *v.* Fiedler, 12 N. Y. 40; Orr *v.* Bigelow, 14 Ib. 556; Dey *v.* Dox, 9 Wend. 129; Davis *v.* Shields, 24 Ib. 322; Stanton *v.* Small, 3 Sandf. 230; Beals *v.* Terry, 2 Ib. 127; Mallory *v.* Lord, 29 Barb. 454, 465; Lattin *v.* Davis, Hill & Denio, 9, 12; Pitcher *v.* Livingston, 4 John. 15; Clark *v.* Pinney, 7 Cowen, 687; Brackett *v.* M'Nair, 14 John. 170; Gordon *v.* Norris, 49 N. H. 376, 385; Stevens *v.* Lyford, 7 Ib. 360; Shaw *v.* Nudd, 8 Pick. 9; Dewey J. in Thompson *v.* Alger, 12 Met. 428, 443; Quarles *v.* George, 23 Pick. 400; Swift *v.* Barnes, 16 Ib. 194; Worthen *v.* Wilmot, 30 Vt. 555; Shepherd *v.* Hampton, 3 Wheat. 200, 204; Douglass *v.* M'Allister, 3 Cranch, 298; Davis *v.* Richardson, 1 Bay, 106; Whitmore *v.* Coates, 14 Mo. 9; Wells *v.* Abernethy, 5 Conn. 222; West *v.* Pritchard, 19 Ib. 212; Cannell *v.* M'Clean, 6 Harr. & J. 297; Gilpins *v.* Consequa, Peters C. C. 85, 94; Willings *v.* Consequa, Ib. 172, 176; Smith *v.* Berry, 18 Me. 122; Donald *v.* Hodge, 5 Hayw. 85; Bailey *v.* Clay, 4 Rand. 346; Marchesseau *v.* Chaffee, 4 La. An. 24; Atkins *v.* Cobb, 56 Ga. 86; Gregory *v.* McDowell, 8 Wend. 435. "Should it appear that goods of a kind like those sold could not be obtained at the time and place of delivery, and that no

Result when there is no market price at place of delivery.

and allows not only *general* damages, that is, such as are the necessary and immediate result of the breach, (*c*) but *special* damages, which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effect. (*d*) It is by reason of this distinction that damages of the latter class are not recoverable, unless stated in the declaration with sufficient particularity to enable the defendant to prepare himself with evidence to meet the demand at the trial, while those of the former case are sufficiently particularized by the very statement of the breach. (*e*)

Special damages must be stated in declaration.

§ 871. The rule on the subject of the measure of damages on breach of contract was thus laid down in Hadley *v.* Baxendale: (*f*) "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of con-

Rule in Hadley *v.* Baxendale.

market price there existed, the party entitled to damages must, upon principle, be allowed to ascertain the market price at the nearest and most suitable place where the goods could have been purchased, and the difference between the market value there at the time, and the price paid, adding the necessary cost of their transportation to the place of delivery, would be the measure of damages." Sternfels *v.* Clark, 4 N. Y. Sup. Ct. 397; Griffin *v.* Colver, 16 N. Y. 489; per Shepley C. J. in Furlong *v.* Polleys, 30 Me. 493, 494; McHose *v.* Fulmer, 73 Penn. St. 365. The question of market value is one peculiarly for the consideration of the jury. See Younger *v.* Givens, 6 Dana, 1; Smith *v.* Griffith, 3 Hill, 333; Gregory *v.* McDowell, 8 Wend. 435; Blydenburg *v.* Welsh, Baldw. 331, 340; Joy *v.* Hopkins, 5 Denio, 84; Furlong *v.* Polleys, 30 Me. 493; Hanna *v.* Harter, 2 Pike, 397. The rule of damages is the same, whether the action is brought for non-delivery or for the delivery of an article of a different quality from that contracted for. Williamson *v.* Dillon, 1 H. & Gill, 444. Where the vendee has paid the purchase-money, the measure of damages for non-delivery is the value of the goods at the time at which they were to have been delivered, and not the contract price. Cofield *v.* Clark, 2 Col. 101. Sedgwick on Damages (5th ed.), p. 291. Where A. contracts to sell to B. certain letters patent for an alleged invention for making fruit cans, or in case of default on his part to redeliver to B. certain notes given in payment for the assignment, if he makes default in procuring the letters the measure of B's damage is the amount which he was compelled to pay to parties to take up his notes and not the value of the letters patent. Serviss *v.* Stockatill, 30 Oh. St. 418.]

Measure where vendee has paid the purchase-money.

Failure to deliver where vendee's note for price has passed into third party's hands.

(*c*) Boorman *v.* Nash, 9 B. & C. 145.

(*d*) Crouch *v.* Great Northern Railway Company, 11 Ex. 742; 25 L. J. Ex. 137; Hoey *v.* Felton, 11 C. B. N. S. 143; 31 L. J. C. P. 105.

(*e*) Smith *v.* Thomas, 2 Bing. N. C. 372; 1 Wms. Saunders, 243 d, note (5); [M'Daniel *v.* Terrell, 1 Nott & McC. 343; Brown *v.* Gibson, Ib. 326; Stevens *v.* Lyford, 7 N. H. 360; Williamson *v.* Dillon, 1 H. & Gill, 444; Furlong *v.* Polleys, 30 Maine, 493; Dickinson *v.* Boyle, 17 Pick. 78; Palmer *v.* York Bank, 18 Maine, 166.]

(*f*) 9 Ex. 341–354; 23 L. J. Ex. 179.

tract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. (*g*)

(*g*) [Wolcott *v.* Mount, 38 N. J. (Law) 496; Pa. R. R. Co. *v.* Titusville &c. Co. 71 Penn. St. 350; Feehan *v.* Hallinan, 13 U. C. Q. B. 440; Watrous *v.* Bates, 5 U. C. C. P. 366; The Mihills Manuf. Co. *v.* Day, 50 Iowa, 250; McCormick *v.* Vanatta, 43 Ib. 389; Booth *v.* Spuyten Duyvil Rolling Co. 60 N. Y. 487; White *v.* Miller, 71 Ib. 118; Clark *v.* Troper, 2 Alb. L. J. 393; Reily *v.* Howard, 6 Ib. 307; Laird *v.* Townsend, 5 Hun, 107; Schutt *v.* Baker, 9 Ib. 556; Hydraulic Engineering Co. *v.* McHaffie, L. R. 4 Q. B. D. 670; Scott *v.* Kittanning Coal Co. 19 Am. L. Reg. N. S. 410; Hopkins *v.* Sanford, 41 Mich. 243; Lalor *v.* Burrows, 18 U. C. C. P. 321. The rule laid down in Hadley *v.* Baxendale has been applied in analogous cases. In actions against carriers for the non-delivery of goods, it may be assumed, in general, to be within their contemplation that goods sent may be intended for sale, and accordingly they are held responsible for the market value of the goods at the time and place at which they ought to have been delivered; so that in case of delay the loss sustained by a fall in the market is recoverable as damages, without any special notice to the carrier that the goods were intended for sale. Collard *v.* South Eastern Railway Co. 7 H. & N. 79; Wilson *v.* Lancashire & Yorkshire Railway Co. 9 C. B. N. S. 632; Rice *v.* Baxendale, 7 H. &. N. 96; O'Hanlan *v.* Great Western Railway Co. 6 B. & S. 484; Deming *v.* Grand Trunk Railroad Co. 48 N. H. 455; Cutting *v.* Grand Trunk Railroad Co. 13 Allen, 381; Sisson *v.* Cleveland & Toledo Railroad, 14 Mich. 489; Scoville *v.* Griffith, 2 Kernan, 509, 358; Yorke *v.* Ver Plank, 65 Barb. 316; Farwell *v.* Davis, 66 Ib. 73; The Compta, 5 Sawyer (Circ. Ct.), 137. But the carrier is not, in general, responsible for the failure of any particular purpose for which the goods are intended, of which he has no notice. Wilson *v.* Lancashire & Yorkshire Railway Co. *supra;* Great Western Railway Co. *v.* Redmayne, L. R. 1 C. P. 329. Thus, in an action against a carrier for delay in delivering bales of cotton sent by him, it was held that the plaintiff was not entitled to recover, as the natural consequence of such delay, the loss arising from the stoppage of his mill

Actions against carriers; failure to deliver.

§ 872. Although this rule has generally been accepted as sound, it is not universally true that the *mere* communication of the special circumstances of the case made by one party to the other would impose on the latter an obligation to indemnify the former for all the damages that would ordinarily follow from the breach: and to produce such a result, it would require proof of an assent by the latter to assume such a responsibility, in many cases which might be suggested, in which the application of the rule now criticised would otherwise be productive of startling injustice. (*h*) The courts have accordingly departed from this rule in many instances where the special circumstances required its modification in order to do justice between the parties. Some of the cases affording illustrations of the mode in which the courts deal with this difficult question will be given; but for a full discussion of the principles on which damages are measured, the reader must be referred to Mr. Lumly Smith's second edition of Mayne on Damages for the law of England, and to the treatise of Mr. Sedgwick on the same subject for the law prevalent in the United States. In Loder *v.* Kekulé (*i*) the buyer had paid in advance for the goods to be supplied, and they were found on delivery to be of inferior quality, and were rejected, so that the amount of the damages ought to have been fixed with reference to the market price on that day; and the buyer did not resell the goods till some time afterwards, when the market price had fallen; but the court being of opinion that it was the vendor who by his conduct had delayed the sale, and the jury having found that the resale was within a reasonable time, the buyer recovered as damages the full difference between the market value at the date of the breach and the price subsequently obtained on the resale. So, in Ogle *v.* Earl Vane, (*k*) decided in Hilary Term, 1868, where the defendant failed to make deliv-

This rule not universally true.

Where vendor by his own conduct enhances the damage.

Loder *v.* Kekulé.

Where the repurchase was delayed at

for want of cotton to work. Gee *v.* Lancashire & Yorkshire Railway Co. 6 H. & N. 211. See Copper Company *v.* Copper Mining Company, 33 Vt. 92.]

(*h*) See the observations of Willes J. on this point in the British Columbia Sawmill Co. *v.* Nettleship, L. R. 3 C. P. 499; *post*, § 874, and the cases collected in the 2d ed. of Mayne on Damages, 10-20. See, also, Vicars *v.* Willcocks, and the notes to that case, 2 Sm. Lead. C. 487; and the important case of Horne *v.* Midland Railway Co. in the exchequer chamber, L. R. 8 C. P. 131; *post*, § 875.

(*i*) 3 C. B. N. S. 128; 27 L. J. C. P. 27.

(*k*) L. R. 3 Q. B. 272; 37 L. J. Q. B. in Cam. Scacc.; S. C. L. R. 2 Q. B. 275.

vendor's request, and for his benefit. Ogle *v.* Earl Vane.

ery of 500 tons of iron according to contract, owing to an accident to his furnaces, the general rule was not applied, because the court and jury were of opinion that the plaintiff's delay in buying other iron, to replace that not delivered, had taken place at the defendant's request and for his benefit. (*k*[1]) The plaintiff was therefore entitled to claim the largely increased damages caused by a rise in price in the market during the delay. (*k*[2]) It was further held that the buyer's consent to wait at the vendor's request was no new contract which required to be proved under the statute of frauds, because the buyer retained the power of suing at any moment he pleased for breach of the original contract, but was an independent fact bearing only on the question of damages, and justifying an exception from the general rule. In Fletcher *v.* Tayleur (*l*) the plaintiff claimed special damages for the non-delivery of a ship which the defendant had agreed to construct for him, and it was proved that the ship was intended for a passenger-ship to Australia; that the defendant knew this; that if the ship had been delivered according to contract the plaintiffs would have made a profit of 7,000*l.* on the voyage, but that, in consequence of the fall in freight, they made only 4,280*l.* on the voyage when the vessel was delivered. The jury gave the plaintiff 2,750*l.* damages. Crowder J. read to the jury as the rule the passage above quoted (p. 728) from the opinion in Hadley *v.* Baxendale. (*m*) On motion for new trial, Hugh Hill insisted that the probable profits of a voyage were too vague a criterion by which to measure damages; but the court refused to interfere on the ground that both parties had agreed that the question for the jury was, What was the loss sustained by the non-delivery of the ship at the time stipulated for by the contract? and that the question was properly left to them by Crowder J. In the course of the trial, Jervis C. J. suggested that "it would be convenient if some general rule were established as to the measure of damages in all cases of breach of contract.

Probable profits of a voyage, as damages for delay in delivering a ship. Fletcher *v.* Tayleur.

(*k*[1]) [In Tyers *v.* Rosedale & Ferryhill Iron Co. L. R. 8 Ex. 318, Martin B., in his dissenting opinion, said: "It is impossible to distingnisb the case of the application for postponement coming from the vendors, and one coming from the vendee." S. C. in exchequer chamber, L. R. 10 Ex. 195.]

(*k*[2]) [See Tyers *v.* Rosedale and Ferryhill Iron Co. L. R. 8 Ex. 305; reversed in the exchequer chamber, L. R. 10 Ex. 195.]

(*l*) 17 C. B. 21; 25 L. J. C. P. 65.

(*m*) 9 Ex. 341; 23 L. J. Ex. 179.

Would not an average percentage of mercantile profits be the fair measure of damages for a breach of mercantile contract? That is very much the result of the decision in Hadley *v.* Baxendale." This suggestion met the concurrence of Willes J., but no further notice was taken of it, on the ground that the question had not been raised at the trial.

§ 873. In the case of The Columbus (*n*) will be found a discussion by Dr. Lushington of the admiralty rules which govern the allowance of freight as damages in cases of collision. Cory *v.* Thames Iron Works Company, (*o*) decided by the queen's bench in Hilary Term, 1868, was very similar in its features with Fletcher *v.* Tayleur, but the decision was different, because the defendants were not made aware of the special purpose which the buyer had in view. The plaintiff claimed damages for the non-delivery, at the specified time, of the hull of a floating boom derrick, which they intended to use for working machinery in the discharge of coals; but the defendants were not aware of this, and believed that the hull was wanted for the storage of coals. It was contended for the defendant that no damages were due, because the two parties had not in contemplation the same results from the breach, but the court held this an inadmissible construction of the rule in Hadley *v.* Baxendale; (*p*) that the true rule is, that the vendor is always bound for such damages as result from the buyer's being deprived of the ordinary use of the chattel; but is not bound for the further special damage that the buyer may suffer by being debarred from using it for some special and unusual purpose, not made known to the vendor, when he contracted for the delivery. In the case of In re The Trent & Humber Company, (*q*) where damages were claimed for the breach of a contract to repair a ship within an agreed period, Cairns L. C. held the measure of damages to be *primâ facie* the sum which would have been earned in the ordinary course of employment of the ship during the delay.

The Columbus.

Cory *v.* Thames Iron Works Company.

Vendor always bound for such damages as result from buyer's being deprived of the ordinary use of the chattel.

In re The Trent & Humber Co.

§ 874. In Brady *v.* Oastler (*r*) the barons of the exchequer decided (Martin B. *diss.*), that in an action for damages for non-delivery of goods at a specified time, under a

Parol evidence not allowed,

(*n*) 3 Wm. Robinson, 158.

(*o*) L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.

(*p*) 9 Ex. 341; 23 L. J. Ex. 179.

(*q*) L. R. 6 Eq. 396; 4 Ch. App. 112.

(*r*) 3 H. & C. 112; 33 L. J. Ex. 300.

where contract was in writing, to show special circumstances in order to enhance damages.

Brady *v.* Oastler.

Damage to crops by delay in delivering threshing engine.

Smeed *v.* Foord.

written contract, parol evidence was inadmissible to show, with a view to estimate the damages, that the price fixed in the contract had been enhanced above the market value, in consideration of the vendor's being allowed an unusually short time for the manufacture and delivery of the articles. In Smeed *v.* Foord (*s*) the defendant had contracted to furnish a steam threshing engine on a day fixed, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the engine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by the weather, and it was necessary to kiln-dry a part of it, and its market value was deteriorated. Held, that the defendant was responsible for these damages. (*t*) In the case of the British Columbia Saw Mill Company *v.* Nettleship, (*u*) the plaintiff sued for damages for breach of contract for the carriage to Vancouver's Island of several cases of machinery intended for the erection of a saw-mill; one of the cases which contained parts of the machinery, without which the mill could not be erected, was missing when the vessel arrived at destination. The defendant knew that the cases contained machinery. The plaintiff was obliged to send to England to replace the missing parts, and was delayed twelve months in the erection of his mill. Held, that the measure of damages was the cost of the missing parts, including freight and interest for the twelve months, but that the plaintiff could not recover anything for the loss of the use of the saw-mill for twelve months, as the defendant had not been apprised that the cases contained such machinery as could not be replaced at Vancouver's Island, nor that all the cases actually delivered would be useless unless the missing part could be supplied. And, *semble*, that even with knowledge of these facts, the defendant would not

British Columbia Saw Mill Co. *v.* Nettleship.

(*s*) 1 E. & E. 602; 28 L. J. Q. B. 178.

(*t*) [In Griffin *v.* Colver, 16 N. Y. 489, it was held that, upon the breach of a contract to deliver at a certain day a steam-engine, built and purchased for the purpose of driving a planing-mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine may be recovered as damages. See, also, Freeman *v.* Clute, 3 Barb. 424; Blanchard *v.* Ely, 21 Wend. 342.]

(*u*) L. R. 3 C. P. 499; 37 L. J. C. P. 235.

have been liable without some proof that he assented to become responsible for these consequences, when he contracted to carry the goods.

Horne *v.* Midland Railway Company.

§ 875. In the case of Horne *v.* Midland Railway Company (*x*) this question of the measure of damages for a breach of a carrier's duty to deliver in time (and in most but not all cases the vendor's breach of duty to deliver would be governed by the same rules) was fully discussed under the following circumstances: The plaintiffs were under contract for the delivery of a quantity of shoes at an unusually high price, to be delivered in London by the 3d February, 1871, and the goods were delivered to the defendants for carriage in time for reaching London in the usual course on the afternoon of the 3d, and *the company had notice of the contract of the plaintiffs*, and *that the goods would be rejected and thrown on their hands* if not delivered on the day fixed, but the defendants were not informed that the goods had been sold at an *exceptionally high price and not at the market rate.* The goods were not tendered for delivery till the 4th, and were rejected on that ground; and the question was, whether the damages payable by the defendants were to be measured with reference to the price at which the plaintiffs would have been paid for them if delivered in time, or to the market price. It was held in the common pleas by Willes and Keating JJ. that the latter was the true measure of damages, the defendants not having been notified of the exceptional price contracted for; and Willes J. repeated his opinion previously expressed in British Columbia Saw Mill Company *v.* Nettleship, *ante*, § 874, by which the rule in Hadley *v.* Baxendale was to be taken with this qualification, that "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." (*y*) The judgment was affirmed in the exchequer chamber by Kelly C. B., Blackburn and Mellor JJ., and Martin and Cleasby BB. (*diss.* Lush J. and Pigott B.); and Martin and Cleasby BB. and Blackburn and Lush JJ. intimated in pretty distinct language their concurrence with Willes J. in the *dictum* above quoted, while none of the judges expressed dissent. In

(*x*) L. R. 7 C. P. 583; 8 C. P. 131.

(*y*) [See cases *ante*, § 729, note (*a*); Wolcott *v.* Mount, 7 Vroom, 262.]

this case reference will be found to all the antecedent authorities upon the subject under discussion.

France v. Gaudet.

§ 876. France *v.* Gaudet (*z*) was an action for conversion, but the considered opinion of the court, delivered by Mellor J., contains *dicta* having an important bearing on the rules governing the measure of damages. In that case the plaintiff had sold cases of champagne at a profit of 10*s.* per case, and was prevented by the defendant from making delivery, and no similar goods were procurable in the market, so that he lost the benefit of the resale. The question was, whether the damages were to be measured by reference to a fair usual market profit of 4*s.* per case, or to the exceptional profit of 10*s.* Held, that the true rule is to ascertain in *cases of tort* the actual value of the goods at the time of conversion, and that the plaintiff having made an actual sale at the profit of 10*s.*, the goods had acquired that special value under the circumstances, and he was entitled to recover on that basis; but the learned judge pointed out that there was no analogy between the case and that of a contract between two parties for the sale and delivery of a chattel, "where the vendee gives notice to the vendor of the precise object of the purchase." In Borries *v.* Hutchinson (*a*) the plaintiff had bought from defendant seventy-five tons of caustic soda, deliverable in three equal parts, in June, July, and August. The vendor knew that the soda was bought for sale on the Continent, and was to be shipped from Hull, and also knew before the end of August that it was to be shipped to Russia; but there was no evidence that the vendor knew this last fact at the time of making the contract. The buyer, at the time when he contracted for the purchase, made a like contract for resale, at a profit, to a St. Petersburg merchant. The latter, in his turn, made a sub-sale, at a profit, in St. Petersburg. None of the soda was delivered till between the 16th September and 26th October, when a portion of it was received by the plaintiff in Hull, and shipped to St. Petersburg, at which season the rates of freight and insurance are always raised, so that plaintiff was put to increased cost in making delivery. The soda was an article manufactured by the vendor, and there was no

Rule of damages not applicable whe e there is no market for the goods.

Borries *v.* Hutchinson.

(*z*) L. R. 6 Q. B. 199.

(*a*) 18 C. B. N. S. 445; 34 L. J. C. P. 169. See, also, Wilson *v.* Lancashire & Yorkshire Railway Company, 9 C. B. N. S. 632; 30 L. J. C. P. 232.

market in which the buyer could have supplied himself at the date of the breach, so as to be able to perform his contract of resale. The plaintiff had paid 159*l.* to his vendee in St. Petersburg as damages for non-delivery to him, and for his loss of profit on his sub-sale. Held, that the buyer was entitled to recover as damages his lost profits on the resale, and all his additional expenses for freight and insurance, but not the damages paid to his vendee for the latter's loss on the sub-sale, those being too remote. (*b*) The ground on which the measure of damages in this case was held to form an exception to the general rule was, that there was no market in which the buyer could have replaced the soda at the time fixed for the delivery, so as to bring it within the principle on which the rule is based, namely, that the disappointed buyer can go into the market with the money which he had prepared for paying the first vendor, and replace the goods, subject only to damages arising out of the difference in price. (*c*)

§ 876 *a*. [In Hinde *v.* Liddell, L. R. 10 Q. B. 265, it appeared that the defendant contracted to supply to the plaintiff 2,000 pieces of gray shirtings, to be delivered on the 20th of October, certain, at so much per piece. The defendant was informed that the goods were for shipment. Shortly before the 20th of October, the defendant informed the plaintiff that he would be unable to complete his contract by the time specified, on which the plaintiff endeavored to obtain the shirtings elsewhere; but, there being no market in England for them, that kind of shirtings could only be procured by a previous order to manufacture them. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to the plaintiff. The plaintiff sought to recover against the defendant for the breach of the contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. It was admitted, at the trial, that the shirtings which plaintiff bought were the nearest in price and quality that

Hinde *v.* Liddell.

(*b*) [See Wolcott *v.* Mount, 7 Vroom, 262, 270, 271; S. C. 9 Ib. 496.]

(*c*) See, on this point, O'Hanlan *v.* Great Western Railway Company, 6 B. & S. 484; 34 L. J. Q. B. 154; Rice *v.* Baxendale, 7 H. & N. 96; 30 L. J. Ex. 371; [Furlong *v.* Polleys, 30 Maine, 493, 494, cited *ante*, § 870, note (*b*); McHose *v.* Fulmer, 73 Penn. St. 365; Hopkinson J. in Blydenburg *v.* Welsh, Bald. Rep. 331; Kountz *v.* Kirkpatrick, 72 Penn. St. 376.]

could be got by the 20th of October, and the jury rendered a verdict for the amount claimed; and upon this it was held, that, there being no market for the article contracted for, the measure of damages was the value of it at the time of the breach, and that the plaintiff, having done the best he could, was entitled to recover the difference in the price. Cockburn C. J. said: "The question is whether, when one person orders and another undertakes to supply goods which are not to be had ready made in the market, but have to be first manufactured, the latter may break his contract at the risk of having to pay nominal damages only, or whether he must pay such damages as usually arise in mercantile transactions of the kind, where he neglects to fulfil his contract on the given day. Here the defendants inform the plaintiff that they will be unable to supply and deliver the shirtings; the plaintiff immediately goes over Manchester and tries, but cannot get shirtings like those he ordered, but he gets the nearest to them that he can, and so avoids what would otherwise have been the consequence of his not fulfilling his contract of shipment. In so doing he incurs a loss by having to pay a larger price with no advance from his vendee. The course the plaintiff pursued was right and reasonable; he would have had to pay larger damages had he not fulfilled his contract, and so by giving this advance of price he did what was best for all parties. He is, therefore, entitled to the damages he claimed." Blackburn J. said: "Borries *v.* Hutchinson, 18 C. B. N. S. 445, 465, is directly in point. How does this differ from the case of a carrier who fails to carry a passenger to a given place, in which case the passenger has been held over and over again to be entitled to take the best substitute in the shape of a conveyance he can get, no matter that it costs much more than the fare? The carrier contracts to supply the conveyance, and fails by not carrying his passenger." (c^1)]

Loss of profits on sub-sale.

Williams *v.* Reynolds.

§ 877. But in Williams *v.* Reynolds (d) it was held that the buyer could not recover as damages the profit that he would have gained by delivering the goods under a resale made by him before the time appointed for the performance of his vendor's contract; and that the dam-

(c^1) [See Bridge *v.* Wain, 1 Stark. 504.]

(d) 6 B. & S. 495; 34 L. J. Q. B. 221; and see Gee *v.* Lancashire & Yorkshire Railway Company, 6 H. & N. 211; 30 L. J. Ex. 11; Great Western Railway Company *v.* Redmayne, L. R. 1 C. P. 329; Portman *v.* Middleton, 4 C. B. N. S. 322; 27 L. J. C. P. 231; Mayne on Damages, 31, 32 (2d ed.).

ages must be assessed according to the market value at the date of the breach; and Crompton J. said that the common pleas, in deciding Borries *v.* Hutchinson, must be taken to have considered the sub-contract as contemporaneous, and known to the defendant at the time of his making his contract. In Randall *v.* Raper, (*e*) however, which was for damages for breach of warranty, and will therefore be considered in the next chapter, liability of the buyer for damages to sub-vendees was taken into consideration in estimating his damages against the first vendor. It may be useful to the reader, before leaving this branch of the subject, to point out that, in the case of Dunlop *v.* Higgins, (*f*) where it was decided that the purchaser might recover as damages any profit that he would have made on a resale, without reference to the market value at the time of the breach, the decision went exclusively on the Scotch authorities as showing what was the law of Scotland, where the contract was made, and the case is not an authority on the English law, although the rule of the English courts was mentioned with severe disapproval by Lord Cottenham. (*g*) In Mossmere *v.* The New York Shot & Lead Co. (*h*) it was decided that if the vendor know the purchase is made in order to enable the buyer to fulfil an existing contract for resale at a profit, the latter may recover as damages this profit, if lost by the vendor's default. (*i*)

Randall *v.* Raper.

Dunlop *v.* Higgins.

Law in America.

§ 878. If the contract which has been broken provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should make this request either personally or by letter, unless there has been a waiver of compliance with this condition, resulting from the vendor's having incapacitated himself from complying with the request by consuming, or reselling, or otherwise so disposing of the goods as to render a request

Where goods are deliverable to buyer "on request."

(*e*) E., B. & E. 84; 27 L. J. Q. B. 266.

(*f*) 1 H. L. Cas. 381.

(*g*) See the remarks on this case in Mayne on Damages, 31, 32, quoted and approved by the judges in Williams *v.* Reynolds, *supra*.

(*h*) 40 N. Y. 422.

(*i*) [See Bridges *v.* Stickney, 38 Maine, 361; Fox *v.* Harding, 7 Cush. 516; Masterton *v.* Mayor of Brooklyn, 7 Hill, 61; Philadelphia &c. Railroad Co. *v.* Howard, 13 How. (U. S.) 307; Western Gravel Road Co. *v.* Cox, 39 Ind. 260; 2 Chitty Contr. (11th Am. ed.) 1325, note (*h*); Wolcott *v.* Mount, 7 Vroom, 262; S. C. 9 Ib. 496. Upon a breach of contract for the delivery of merchandise, the plaintiff cannot recover damages for his trouble and expenses in procuring the contract to be made. Stevens *v.* Lyford, 7 N. H. 360.]

idle and useless,(*k*) as heretofore explained in the chapter on Conditions. (*l*)

Where no damages proved nominal damages recoverable.

§ 879. If the buyer is unable to prove the existence of any actual damage resulting from the non-delivery, he will nevertheless be entitled to recover nominal damages, (*m*) on the general principle that every breach of contract imports some damage in law. It must not be forgotten that even after the goods have been sent to the buyer, in the performance of an executory contract, his right of rejecting them is unaffected by the actual delivery to him, until he has had a reasonable opportunity of inspection and examination, as shown *ante*, § 701, in the chapter on Acceptance.

Measure of damages in contracts for future deliveries in instalments.

§ 880. Several cases have been recently decided as to the effect of a breach of contract of sale where the goods are to be delivered *in futuro* by instalments. It has already been shown, *ante*, § 593, that a partial breach of the contract, by a refusal to accept or to deliver any particular parcel of the goods, was decided by the queen's bench, in Simpson *v.* Crippin, (*n*) not to give to the aggrieved party the right to rescind the whole contract, but only to a compensation in damages for the partial breach; and this decision was treated as settling the law on this point in Roper *v.* Johnson, *infra*.

§ 881. The measure of damages to which the buyer is entitled on the breach of such a contract has been determined in two cases, — one in which the action was brought after the time fixed for the final delivery, and the other where the action was brought after partial breach but *before* the time fixed for the last delivery. In

Brown *v.* Muller.

Brown *v.* Muller (*o*) the contract was for the delivery of 500 tons of iron in about equal proportions in September, October, and November, 1871, and action was brought in December by the buyer. The defendant had given notice soon after the contract that he "considered the matter off," and that he regarded the contract as cancelled, and had expunged the order

(*k*) Bach *v.* Owen, 5 T. R. 409; Radford *v.* Smith, 3 M. & W. 254; Bowdell *v.* Parsons, 10 East, 359; Amory *v.* Brodrick, 5 B. & A. 712.

(*l*) *Ante*, § 567.

(*m*) Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; [Putt *v.* Duncan, 2 Bradwell (Ill.), 461; Cockcroft *v.* N. Y. & Harlem R. R. Co. 69 N. Y. 201.]

(*n*) L. R. 8 Q. B. 14. [See Brandt *v.* Lawrence, 1 Q. B. Div. 344.]

(*o*) L. R. 7 Ex. 319.

from his books. It was held that the proper measure of damages was the sum of the difference between the contract and the market prices of one third of 500 tons on the 30th of September, the 31st October, and the 30th November respectively. In this case the plaintiff had not elected to consider the defendant's repudiation of the contract as a breach, which he was at liberty to do under the decisions in Hochester *v.* De la Tour (*p*) and Frost *v.* Knight (*q*) (*ante*, § 569), but had insisted on the execution of the contract after that repudiation.

§ 882. In Roper *v.* Johnson (*r*) the defendants had contracted to sell to the plaintiffs 300 tons of coal, "to be taken during the months of May, June, July, and August;" and the plaintiffs having taken no coals in May, the defendants on the 31st of that month wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th June, when the defendants positively refused delivery, and the action was commenced on the 3d July. It was held, 1st, that on the authority of Simpson *v.* Crippin, *supra*, the defendants had no right to rescind the contract by reason of the plaintiff's default in not sending to take the May delivery; and, 2dly, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th June as a breach of the contract *on that day*, under the doctrine of the cases of Hochester *v.* De la Tour and Frost *v.* Knight; but although that was the date of the breach, it was also held, 3dly, that *in the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss*, the measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought, or the cause tried. The jury were to estimate, as best they could, the probable difference in respect of the future deliveries. (*s*)

Roper *v.* Johnson.

(*p*) 2 E. & B. 678; 22 L. J. Q. B. 455.

(*q*) L. R. 7 Ex. 111.

(*r*) L. R. 8 C. P. 167. [See Bergheim *v.* Blaenavon Iron Co. L. R. 10 Q. B. 319.]

(*s*) [In Merrimack Manuf. Co. *v.* Quintard, 107 Mass. 127, it appeared that the defendant contracted to sell and deliver a large quantity of coal to the plaintiffs at a fixed price, in equal monthly portions, during a certain time, to be transported by ship and rail to the plaintiffs' factory at their expense; and the plaintiffs agreed to receive the coal if the first cargo should prove satisfactory. The action was brought to recover for a breach of the contract in

Merrimack Manuf. Co. *v.* Quintard.

SECTION II. — WHERE THE PROPERTY HAS PASSED.

§ 883. Where the contract which has been broken by the vendor is one in which the property has passed to the buyer, there arise in favor of the latter the rights of an owner; of one who has not only the property in the goods, but the *right of possession*, defeasible only on his own default in complying with his duty of accepting and paying for them. A buyer in this condition has of course the right of action for damages for breach of the contract, discussed in the preceding section; for that is a right common to all parties to contracts of every kind, and was formerly the *only* remedy at common law for such breach.

Buyer had no other remedy at common law but action for damages.

§ 884. In equity, however, the courts would in certain cases compel the vendor to deliver the specific chattel sold, and the cases on the subject are collected in the first volume of White and Tudor's Leading Cases in Equity, (*t*) where the rule as deduced from the authorities is stated in these words: "The question in all cases is this, Will damages at law afford an adequate compensation for breach of the agreement? If they will, there is no occasion for the interference of equity; the remedy at law

But equity would sometimes enforce specific performance.

Rule in equity.

delivering coal of an inferior quality, and in failing to deliver it until after the contract time, and it was held that the measure of damages for delivering coal of an inferior quality was the difference between the value at the factory of the coal called for by the contract and that of the coal delivered, and the measure of damages for the failure to deliver in time was not the difference in the market value, but the difference between the actual charge for freight and insurance and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period. Colt J. said: "As to the rule of damages, the plaintiffs are entitled to recover for such losses as were the direct and natural consequence of the defendants' failure to perform, and also for such as were foreseen, or may reasonably be supposed to have been foreseen, at the time of making the contract. To ascertain what these were, resort must be had to the terms of the contract for its meaning, as applied to the subject-matter, and as interpreted by the general and known usages of the business to which it refers. . . . The difference in market value of the coal between the time of actual delivery and the time it should have been delivered, as a rule of damages, is not applicable. The plaintiffs received all the coal called for by the contract, at the contract price, and do not claim damages for any deficiency in quantity. They are entitled to the benefit of their contract, although the market value had increased by the delay." Tyers *v.* Rosedale & Ferryhill Iron Co. L. R. 10 Ex. 195, 198, 199.]

(*t*) In notes to Cuddee *v.* Rutter, 715, 3d ed.

is complete: if they will not, specific performance of the agreement will be enforced." (*u*)

§ 885. But now, by the mercantile law amendment act, 1856 (19 & 20 Vict. c. 97, s. 2), it is provided, that "in all actions for breach of contract to deliver specific goods for a price in money, on application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what, if any, is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages, if any, the plaintiff would have sustained if the goods should be delivered under execution as thereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery — on payment of such sum, if any, as shall have been found to be payable by the plaintiff as aforesaid — of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed."

Specific performance now allowed at law by mercantile law amendment act.

§ 886. The buyer to whom the property has passed may, if not in default, maintain an action in trover for damages for the conversion, on the vendor's refusal to deliver, as well as an action on the contract; but he cannot recover greater damages by thus suing in tort than by suing on the contract. If, therefore, the vendor's conversion was before delivery, so that he cannot maintain an action for the price, as if he has resold the goods to a third person, the damages recoverable would be only the difference between the contract price and the market value. (*x*) But if the vendor's right of action for the recovery of the price were not thus lost, as if he had delivered the goods and afterwards tortiously re-

Buyer may also maintain trover.

Rule of damages for conversion by vendor before delivery.

(*u*) See, also, opinion of Kindersley V. C. in Falcke *v.* Gray, 4 Drew. 658; 29 L. J. Ch. 28, in which he held that a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of virtu, will be specifically enforced. [This subject is considered in 2 Chitty Contr. (11th Am. ed.) 1425–1427, and the American cases are cited in the notes; and in 2 Kent, 487, note (*d*).]

(*x*) Cbinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

taken and converted them, the buyer's right of recovery in trover would be for the whole value, and the vendor would be driven to his cross action for the price. (*y*) The subject has already been discussed, in the examination of the vendor's right of resale, in part I. ch. iii. book V.

After delivery.

§ 887. After the property in the specific chattel has passed to the buyer, it may happen that he discovers the goods bought to be different in kind or quality from that which he had a right to expect according to the agreement. In such case it is necessary to distinguish whether the defect be one in the performance of a condition or of a warranty. In the former case he may refuse to accept the goods and reject the contract, but not in the latter. (*z*) The reason for this difference is, that in the one case the contract itself depends on the performance of the condition precedent incumbent on the vendor, while in the other the principal contract has been performed, and the breach is only of the collateral undertaking of warranty.

Buyer's right to refuse the goods offered.

§ 888. If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as explained *ante*, §§ 600 *et seq.*, in the chapter on Conditions, where the cases are cited and reviewed. But where the property in the goods has passed to the buyer *unconditionally*, the law gives him no right to rescind the contract in the absence of an express stipulation to that effect, and the property therefore remaining in him, he is bound to pay the price even if he rejects the goods, which still remain his. (*a*) His proper remedy, therefore, is to

He may refuse the goods if not of the description agreed on.

He cannot reject them for breach of warranty of quality.

(*y*) Gillard *v.* Brittan, 8 M. & W. 575.

(*z*) [In Massachusetts and some other states the purchaser may reject or return the goods in either of these cases. See note (*a*) below.]

(*a*) Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 C. & M. 205; Poulton *v.* Lattimore, 9 B. & C. 259; Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 530; Cutter *v.* Powell, in notes, 2 Sm. L. C. 26; [Hinchcliffe *v.* Barwick, 5 Ex. Div. 177.] Lord Eldon's decision to the contrary, in Curtis *v.* Hannay, 3 Esp. 83, is overruled by the later cases. [In Mansfield *v.* Trigg, 113 Mass. 354, Wells J. said: "In strictness, both warranty and rescission import that the subject is within the contract, and passed to the purchaser by its operation. The rejection and return of articles of a different kind or description, not answering to the terms of the contract, does not stand upon the ground of rescission; nor does the right to return them depend upon the existence of a warranty." See Osborn *v.* Gantz, 60 N. Y. 540. In some of the American courts the right to return the goods for a breach of warranty is limited to cases of fraud, or of express

Right to return goods for breach of warranty: in America.

receive the goods, and to exercise the rights explained in the next chapter.

agreement to that effect between the parties. See Thornton *v.* Wynn, 12 Wheat. 183; Withers *v.* Greene, 9 How. (U. S.) 213; Lyon *v.* Bertram, 20 Ib. 149; Voorhees *v.* Earl, 2 Hill, 288; Cary *v.* Gruman, 4 Ib. 626; Comstock J. in Muller *v.* Eno, 14 N. Y. 601; Lattin *v.* Davis, Hill & Denio, 9, 16; Kase *v.* John, 10 Watts, 109; Freyman *v.* Knecht, 78 Penn. St. 141; Lightburn *v.* Cooper, 1 Dana, 273; Allen *v.* Anderson, 3 Humph. 581; Williams *v.* Hurt, 2 Ib. 68; West *v.* Cutting, 19 Vt. 536; Mayer *v.* Dwinell, 29 Ib. 298; Day *v.* Pool, 52 N. Y. 416, 419; Fuentes *v.* Caballero, 1 La. An. 27; Rust *v.* Eckler, 41 N. Y. 488; Matteson *v.* Holt, 45 Vt. 336; Hoadley *v.* House, 32 Ib. 180; Milton *v.* Rowland, 11 Ala. 732; Bunce *v.* Beck, 43 Mo. 279; Cable *v.* Ellis, 86 Ill. 525; Marsh *v.* Low, 55 Ind. 271; Walls *v.* Gates, 6 Mo. App 242; Kimball Manfg. Co. *v.* Vroman, 35 Mich. 310. But in Massachusetts and some other states the purchaser has a right to rescind the contract and return the goods in all cases of a breach of warranty express or implied. The same rule has been adopted in Iowa. Rogers *v.* Hanson, 35 Iowa, 283. See Aultman *v.* Theirer, 34 Ib. 272. In Illinois. Sparling *v.* Marks, 86 Ill. 125. In Perley *v.* Balch, 23 Pick. 283, which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, *or an express warranty and a breach of it,* the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defence to the action. See Conner *v.* Henderson, 15 Mass. 319; Kimball *v.* Cunningham, 4 Ib. 502; Carter *v.* Walker, 2 Rich. 40. Shaw C. J. in Dorr *v.* Fisher, 1 Cush. 271, 274, said: "A warranty is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods and have a remedy for his damages by action. But to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase-money, as in case of fraud." Foster J. in Morse *v.* Brackett, 98 Mass. 209; and in Boardman *v.* Spooner, 13 Allen, 361. But if the purchaser does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor, and without this he cannot recover. Shaw C. J. in Dorr *v.* Fisher, 1 Cush. 274; Conner *v.* Henderson, 15 Mass. 319; Kimball *v.* Cunningham, 4 Ib. 502; Perley *v.* Balch, 23 Pick. 283. He must rescind the entire contract and restore the whole of the property sold. Bigelow C. J. in Morse *v.* Brackett, 98 Mass. 207. Such a restoration of the goods, and of all other benefits derived from the sale, is a direct condition, without a compliance with which the vendee cannot rescind the contract and recover back the money or other property paid or delivered on the contract. Shaw C. J. in Dorr *v.* Fisher, 1 Cush. 274; Bartlett *v.* Drake, 100 Mass. 176; Hunt *v.* Sackett, 31 Mich. 18. In Bryant *v.* Isburgh, 13 Gray, 607, it was decided that a breach of an express warranty of soundness upon the sale of a horse authorizes the purchaser to rescind the contract and return the horse, although there was no express agreement to that effect, and no fraud. Mr. Justice Metcalf, giving the opinion of the court in this case, stated that the principle of this decision had been understood and practised upon as the law of Massachusetts for more than forty years; and that until 1831, when a

Massachusetts.

Iowa.

Illinois.

Massachusetts decisions.

§ 889. In the recent case of Heyworth *v.* Hutchinson (*b*) the buyer was held bound to accept the goods, *although the property had not passed to him, although he had not had an opportunity of inspection before purchase, and although the goods were much inferior in quality to the warranty in the written contract.* The case turned on the meaning of the written contract; but the *dicta* of the judges would *seem* to imply that the same decision would be given in the case of any contract for the sale of specific goods. The defendant bought a quantity of wool, "413 bales greasy Entre Rios, at 10¼*d.* per pound, to arrive ex *Stige*, or any vessel they may be transshipped in, and subject to the wool not being sold in New York, before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkin's and Robinson's possession, *and if any dispute arises it shall be decided by the selling* brokers, whose decision shall be final," &c. On arrival it was found by the brokers that 180 bales were not as good as the orig-

Heyworth *v.* Hutchinson.

Buyer held bound to accept goods even in an executory contract, although not equal to warranty.

contrary opinion was expressed by the court of king's bench, in Street *v.* Blay, 8 B. & Ad. 461, the law of England upon the point had been supposed to be the same. In Maryland, the purchaser may either sue for a breach of warranty, without returning the goods, or he may rescind the contract by returning or offering to return them within a reasonable time, and sue for and recover back the purchase-money. This reasonable time for rescinding the sale by returning or offering to return the goods is to be computed from the time the unsoundness is discovered, and not from the date of the contract. Taymon *v.* Mitchell, 1 Md. Ch. 496; Hyatt *v.* Boyle, 5 Gill & J. 110; Franklin *v.* Long, 7 Ib. 407, 419; Rutter *v.* Blake, 2 Harr. & J. 353; Horn *v.* Buck, 48 Md. 358. See Matteson *v.* Holt, 45 Vt. 341; Gates *v.* Bliss, 43 Ib. 299. The rule in Maine is similar. Marston *v.* Knight, 29 Maine, 341. The purchaser must use proper diligence in rescinding the sale. Cutler *v.* Gilbreth, 53 Maine, 176. If upon a sale with a warranty, or if by the special terms of the contract, the purchaser is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the purchaser to maintain an action for money had and received, in case the purchase-money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property, because in both the contract is rescinded by the agreement of the parties, and the purchaser is well entitled to retain the purchase-money in the one case, or to recover it back in the other. Washington J. in Thornton *v.* Wynn, 12 Wheat. 183, 193. If the goods have been returned, after payment of the price, the purchaser will be entitled to recover back the whole price paid. See Conner *v.* Henderson, 15 Mass. 319; Kimball *v.* Cunningham, 4 Ib. 502; Perley *v.* Balch, 23 Pick. 283; Taymon *v.* Mitchell, 1 Md. Ch. 496.]

Maryland rule.

Maine.

(*b*) L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

inal samples by 2*d.* a pound; 201 bales not as good by 1¼*d.* a pound; and thirty-two bales not as good by ½*d.* per pound. The buyer on inspecting the wool refused to take it, and after due notice to, and under protest from him, the brokers awarded that he should take it at the above allowances. The second count of the declaration alleged this decision of the brokers as an *award after due arbitration.* One of the brokers deposed at the trial that the wool was not "about similar to samples," and that was the reason for making the allowances. The defendant was held bound to accept under the award. Among the *dicta*, however, were the following, some of which, if taken literally, go farther, it is submitted, than has yet been determined by any direct authority. Cockburn C. J. said: "This contract is for the sale of specific wools to arrive by a particular ship; they are ear-marked so as to prevent the contract applying to any other wools; and they are guarantied as about similar to samples. If the matter stood there, this *being a sale of specific goods, though with a warranty, there would not be any right or power on the part of the buyer to reject the goods on the ground of their not being conformable to the samples;* but the buyer's remedy would be either by a cross action on the warranty, or by giving the inferiority in evidence in reduction of damages." Blackburn J. put his judgment on the ground of the written contract, and said as to the clause of warranty: "Now such a clause may be a simple guaranty or warranty, or it may be a condition. Generally speaking, when *the contract is as to any goods*, such a clause is a *condition* going to the essence of the contract; but when the contract is as *to specific goods*, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages." Lush J. said: "This was not a contract to supply *any* goods answering the description, but a contract to *sell specific goods*, with a warranty of their being about similar to sample; and *clearly by the general law there was no power in the buyer to reject them*, because they did not answer the description." When Heyworth *v.* Hutchinson was cited in Azémar *v.* Casella, (*c*) Blackburn J. said that the decision was quite consistent with the judgment in the latter case, because "the wool which arrived was of the same kind or character as that contracted for, but inferior only in quality."

§ 890. It is very difficult to understand the reason for the dis-

(*c*) L. R. 2 C. P. 677, in Cam. Scacc.; 36 L. J. C. P. 263.

tinction suggested in the above *dicta* of the eminent judges of the queen's bench if intended to apply to cases where the specific chattels have never been in a condition to be inspected by the buyer, and where *the property has not passed to him*. The cases in which it has been held that on the sale of a specific chattel the buyer's remedy is confined to a cross action or to a defence by way of reduction of the price, are all cases of the *bargain and sale* of a special chattel *unconditionally*, where, consequently, the property had become vested in the buyer; but no similar case of an *executory contract* has been found; no case in which the buyer has been held bound to accept goods which required to be weighed before delivery, and in which, therefore, the property remained in the vendor, if they were not equal in quality to the sample by which they were bought. In justice and principle there seems to be no difference between a vendor's saying, "I will sell you 100 bales of wool at 10*d*. a pound warranted equal to this sample," and his saying, "I will sell you 100 bales of wool marked with my name, which I have on board the ship *Stiye*, now at sea, at 10*d*. a pound, warranted equal to this sample." Why should the vendor have the right to reject the goods, if inferior in quality to the sample, in the former case, and not in the latter? In neither instance has he an opportunity to inspect, and in neither does the reason exist on which the opinion rested in Street *v.* Blay, (*d*) where the court specially put the doctrine on the ground that the property had passed. The language is as follows: "Where the property in the specific chattel has passed to vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and *revest the property in the vendor*, ... but must sue upon the warranty unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract. . . . . It is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, *revest the property in the seller* and recover the price, when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot by the same means protect himself from the payment of the price on the same ground. . . . . It is to be observed that although the vendee of a

Remarks on the *dicta* in this case.

(*d*) 2 B. & Ad. 456. See, also, Heilbutt *v.* Hickson, L. R. 7 C. P. 438; *ante*, § 651.

specific chattel *delivered with a warranty* may not have a right to return it, the *same reason does not apply to the case of executory contracts*, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. . . . . *Nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk which may not agree with it.*"

§ 891. In every one of the cases cited in the books as authority for the proposition that the buyer cannot refuse acceptance of a specific chattel sold, on the ground of breach of warranty of quality, the contract was a *bargain and sale*, and the property in the specific chattel had passed. (*e*) In Toulmin *v.* Hedley (*f*) it was held by Cresswell J. that the purchaser of a *specific cargo* of guano had a right to inspect it on arrival and reject it, if not equal in quality to "average imports in Ichaboe" as warranted; and in Mondel *v.* Steel (*g*) the well-considered opinion of the court, as delivered by Parke B. (*post*, § 898), gives as the reason why a purchaser is driven to a cross action on a warranty, "that the property has vested in him indefeasibly." Toulmin *v.* Hedley.

§ 892. It is submitted, therefore, that the *dicta* of the learned judges in Heyworth *v.* Hutchinson must be taken as referring to cases of *bargain and sale*, not to *executory contracts*, (*h*) unless there be something in the terms of the agreement to show that the buyer had consented to take the goods at a reduced price, if they turned out to be inferior to the quality warranted.

(*e*) Weston *v.* Downes, Doug. 23; Gompertz *v.* Denton, 1 C. & M. 207; Murray *v.* Mann, 2 Ex. 538; Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 523; 20 L. J. C. P. 116; Payne *v.* Whale, 7 East, 274; Cutter *v.* Powell, 2 Sm. L. C. 26, and notes; [Cripps *v.* Smith, 3 L. R. Ir. 277.]

(*f*) 2 C. & K. 157.

(*g*) 8 M. & W. 858.

(*h*) The learned editor of the last edition of Chitty on Contracts seems to take a different view, p. 427.

CHAPTER II.

AFTER RECEIVING POSSESSION OF THE GOODS.

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§ 893. AFTER the goods have been delivered into the actual possession of the buyer, the performance of the vendor's duties may still be incomplete by reason of the breach of some of the warranties, express or implied, whether of title or quality, to which he has bound himself by the contract. If the breach be of the warranty of title, the buyer may either bring his action for the return of the price on the ground of failure of the

Breach of warranty of title.

consideration for which the price was paid, as in Eichholz *v.* Banister, *ante*, § 635, or he may sue in damages for breach of the vendor's promise as in all other cases of breach of contract.

Breach of warranty of quality. Three remedies:

§ 894. Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer has the choice of three remedies: First. He may refuse to accept the goods and return them, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter. Secondly. He may accept the goods and bring a cross action for the breach of the warranty. Thirdly. If he has not paid the price, he may plead the breach of warranty in reduction of the damages in the action brought by the vendor for the price. (*a*)

1st. Right to reject the goods.

§ 895. That the buyer, *where the property has not passed to him*, may reject the goods if they do not correspond in quality with the warranty, seems to be the necessary result of the principles established heretofore in the chapters on Delivery and Acceptance. The buyer's obligation to accept depends on the compliance by the vendor with his obligation to deliver. In an executory agreement for sale with a warranty of quality, as, for example, in a sale by sample, it is part of the vendor's promise to furnish a bulk equal in quality to the sample; and in general this must operate as a condition precedent. If the buyer has inspected goods and agreed to buy them, it may, perhaps, be inferred that a warranty of quality is an independent contract, collateral to the principal bargain, and only giving rise to a cross action for the breach. *Ante* §§ 561 *et seq.* But where the buyer has agreed to buy goods that he has never seen, nor had an opportunity of inspecting, on the vendor's warranting that they are

(*a*) [Morrill *v.* Nightingale, 39 Wis. 247; Smith *v.* Dunham, 2 Kerr (N. B.), 630; Coventry *v.* M'Eniry, 13 Ir. C. L. R. 160. The case of Carey *v.* Guillow, 105 Mass. 18, goes still farther, and holds that in an action of tort, for false and fraudulent representations of the defendant in exchanging horses with the plaintiff, concerning the horse which he delivered to the plaintiff in the exchange, the defendant may recoup damages for like representations made to him in the transaction, by the plaintiff, concerning the other horse. In allowing this defence to be made in such a case, the court rely very much upon the "tendency of modern judicial decisions to avoid circuity and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence, by way of defence, instead of requiring a cross action, when it can be done without a violation of principle or great inconvenience in practice." But see Odom *v.* Harrison, 1 Jones (N. Car.), 402, which seems *contra*.]

Recoupment.

of a specified quality, nothing seems clearer than that this warranty is not an independent contract, but is a part of the original contract, operating as a condition, and that what the buyer intends, when accepting the offer, is, "I agree to buy IF the goods are equal to the quality you warrant." (*b*) Accordingly the learned author of the Leading Cases thus expresses the rules deduced from the authorities: (*c*) "A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, *so as to be capable of being inspected at the time of the contract*, and is a collateral engagement that the specific thing so sold possesses certain qualities; but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. . . . . But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because *the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted." The same reasoning which applies to a thing not yet existing, or not yet ascertained, would seem equally applicable to goods in a distant country, or on the high seas, beyond the possible reach of the buyer's inspection.

§ 896. In the absence of some such express stipulation as was contained in Heyworth *v.* Hutchinson, *ante*, § 889, it is therefore a complete defence for the buyer to show that in such a sale the delivery offered was not in accordance with the promise. (*d*) And the buyer may even reject the goods, if the vendor refuses him an opportunity for inspection when demanded at a reasonable time, although the vendor, a few days afterwards, offers them for inspection; as was decided in Lorymer *v.* Smith, *ante*, § 594.

(*b*) [As to the remedy of the purchaser, when goods ordered have been sent to him, but not according to order, and he has been put to expense in regard to them, see Barrett *v.* Terry, 42 Geo. 283; Leitner *v.* Goodwin, 60 Ga. 148.]

(*c*) Vol. 2, p. 27.

(*d*) Street *v.* Blay, 2 B. & Ad. 456; Sanders *v.* Jameson, 2 C. & K. 557; Cooke *v.* Riddelien, 1 C. & K. 561; Heilbutt *v.* Hickson, L. R. 7 C. P. 438; [Comstock J. in Muller *v.* Eno, 14 N. Y. 601, 602; Butler *v.* Northumberland, 50 N. H. 33.]

In actual practice, the only difficulty which arises in these cases grows out of controversies whether the buyer has actually accepted the goods and thus become owner. On this point the cases show that acceptance does not take place by mere retention of the goods for the time necessary to examine or test them, nor by the consumption of so much as is necessary for such examination and testing; and it is always a question of fact for the jury, whether the goods were kept longer, or whether a larger quantity was consumed, than was requisite to enable the buyer to decide whether he would accept or reject. (*e*)

The buyer's action for damages after goods have been accepted.

§ 897. The second proposition, that the buyer may, after receiving and accepting the goods, bring his action for damages in case the quality is inferior to that warranted by the vendor, needs no authority. It is taken for granted in all the cases, there being nothing to create an exception from the general rule, that an action for damages lies in every case of a breach of promise made by one man to another, for a good and valuable consideration. (*f*)

The buyer's right to plead breach of warranty in diminution of price.

Mondel *v.* Steel.

§ 898. The third remedy of the buyer, with an exposition of the whole law on the subject, cannot be better presented than by extracts from the lucid decision given, in behalf of the exchequer of pleas, by Parke B. in Mondel *v.* Steel. (*g*) In that case the action was by the buyer for damages for breach of an express warranty in the quality of a ship built under written contract. The defendant pleaded in effect, that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. The damages claimed in the declaration were special, and were alleged to result from defects in the fastenings, whereby the vessel was so much strained as to require refastening and repair, so that the plaintiff was deprived of the use of the vessel while undergoing repairs. A general de-

(*e*) See the cases reviewed *ante*, §§ 595, 596. [When goods of a specific kind are ordered, and those received do not answer the description, the party giving the order may reject and return the goods; but if he would avail himself of this right he must do it promptly, as soon as he has time and opportunity to ascertain the fact. Boughton *v.* Standish, 48 Vt. 594.]

(*f*) See the opinions of the judges in Poulton *v.* Lattimore, 9 B. & C. 259; [Gilson *v.* Bingham, 43 Vt. 410; Horn *v.* Buck, 48 Md. 358; Hall *v.* Belknap, 37 Mich. 179.]

(*g*) 8 M. & W. 858; and see Rigge *v.* Burbidge, 15 M. & W. 598.

murrer to the plea was sustained, and *per Cur.* : "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty ; in which action, as well the difference between the price contracted for, and the real value of the articles or of the work done as any consequential damage, might have been recovered ; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby *the property vested in him indefeasibly, and is incapable of returning it back ;* he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. (*h*) In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price ; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of Basten *v.* Butter (*i*) a different practice began to prevail, and being attended with much practical convenience has been since generally followed ; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. . . . . The rule is, that it is competent for the defendant *not to set off by a procedure in the nature of a cross action* the amount of damages which he has sustained by breach of the contract, but simply *to defend himself by showing how much less the subject-matter of the action was worth* by reason of the breach of contract, (*k*) and to the extent that he obtains, or is capable of ob-

(*h*) [*Ante*, § 888, note (*a*).]

(*i*) 7 East, 479.

(*k*) [Walker *v.* Hoisington, 43 Vt. 608 ; Muller *v.* Eno, 14 N. Y. 597 ; Harrington *v.* Stratton, 22 Pick. 510 ; Dorr *v.* Fisher, 1 Cush. 275 ; Mixer *v.* Coburn, 11 Met. 561 ; Wentworth *v.* Dows, 117 Mass. 14, 15 ; Hodgkins *v.* Moulton, 100 Ib. 309 ; Howie *v.* Rea, 70 N. Car. 559 ; Church *v.* Abell, 1 Can. Sup. Ct. 442 ; Parker *v.* Pringle, 2 Strobh. 242 ; Butler *v.* Northumberland, 50 N. H. 33 ; Goodwin *v.* Morse, 9 Met. 278 ; Reab *v.* McAllister, 8 Wend. 109 ; Still *v.* Hall, 20 Ib. 51 ; Batter-

taining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action *to that extent but no more*." (*l*) This case is the leading case now always cited for establishing, first, that the buyer may set up the defective quality of the warranted article in diminution of the price; and, secondly, that he must bring a cross action, if he desires to claim special or consequential damages, which action is not barred by reason of his having obtained a diminution of price in a previous action brought by his vendor. (*m*)

But must bring cross action for special damages.

man *v.* Pierce, 3 Hill, 171; Gordon *v.* Waterous, 36 U. C. Q. B. 321.]

(*l*) [In Cook *v.* Castner, 9 Cush. 266, it was held that where two cross actions are tried together, one for the price of property sold, and the other for fraud in the vendor, the jury, if they find the fraud, and that the damages equalled or exceeded the purchase-money, may render a verdict for the defendant in the first action, and for the plaintiff in the second action, for the excess of such damages, if any, over the purchase-money. If the damage is less than the price sued for, it should go in reduction of the price in the first action, and the verdict should be for the defendant in the second action. But the defendant in the action for the goods sold and delivered, being the plaintiff in the cross action, is not entitled to have damages assessed in both actions for the same breach of contract; nor to divide his claims for damage as he may see fit between the two. Both actions being tried together, his entire damages for breaches of the contract must be assessed and applied first to cancel, in whole or in part, the sum due upon the contract for the goods delivered. If it exceeded that balance, the excess would be returned in a verdict for the plaintiff in the cross action. If not, then the verdict in the cross action must be for the defendant. Wells J. in Starr Glass Co. *v.* Morey, 108 Mass. 573.]

Cross actions; one for goods, other for fraud in sale: effect of such trial in Massachusetts.

(*m*) See, also, Rigge *v.* Burbidge, 15 M. & W. 598; Cutter *v.* Powell, 2 Sm. L. C. notes, p. 26; [Cook *v.* Castner, 9 Cush. 266; Starr Glass Co. *v.* Morey, 108 Mass. 570, 573; McKnight *v.* Devlin, 52 N. Y. 402; Beall *v.* Brown, 12 Md. 550; Barker *v.* Cleveland, 19 Mich. 230. But in Burnett *v.* Smith, 4 Gray, 50, it was held that if in an action against the purchaser, on a promissory note given in payment for goods, he has pleaded want of consideration, by reason of false representations of the vendor concerning the value of the goods, and the vendor, being plaintiff, has recovered judgment for a part only of the note, the purchaser is barred of his action for the false representations. See O'Conner *v.* Varney, 10 Gray, 231; Fabbrizcotti *v.* Lannitz, 3 Sandf. 743. In O'Conner *v.* Varney, 10 Gray, 231, Shaw C. J. said: "A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defence. But if he intends to claim, by way of damages for non-performance of the contract, more than the amount for which he is sued, he must not rely on the contract in defence, but must bring a cross action, and apply to the court to have the cases continued, so that the executions may be set off. He cannot use the same defence, first as a shield and then as a sword." The correctness of the decision in Burnett *v.* Smith, *supra*, was recognized in Bodurtha *v.* Phelon, 13 Gray, 413. But this last case was an ac-

Pleading fraud in suit on promissory note: effect of.

Vendee claiming damages in excess of plaintiff's claim, what he must do.

§ 898 *a*. [In Abell *v.* Church, (m^1) there had been a sale of a water wheel, which the vendor warranted should answer a certain purpose. The wheel did not answer the purpose, and the vendee brought an action for breach of warranty, and recovered damages. The vendee's declaration contained three counts, all of them charging a warranty in different terms, and alleging as ground of damages for the breach that the plaintiff thereby incurred expense in removing the wheel, in repairing it and putting in another wheel, and suffered damages from the stopping of his mill. There was also a money count. There was a general verdict for the plaintiff, and he had judgment and satisfaction. From the postea it appeared that the vendee recovered damages for the breach of the warranty of fitness. The vendor subsequently brought suit for the price of the wheel, and it was held that the vendee could not introduce evidence tending to show that the wheel was worthless. Patterson J. said: . . . . " The precise point of law here raised has not been directly decided by any case in England or here, although I think there is no difficulty in applying to it the principles settled by the cases to which I have referred [having referred to Mondel *v.* Steel among others]. . . . . I rest my decision on two grounds: First, that the defendant has in fact received satisfaction for all the damages to which the breach of warranty entitled him, which I take to be the conclusive effect of the judgment recovered and satisfied; and, secondly, that the right of action on the warranty being gone, there is no inde-

Abell *v.* Church.

What is rule where vendee sues for breach of warranty before vendor sues for price?

tion brought before a justice of the peace, on a note given for the price of a horse, in which the defendant relied on a breach of warranty, and judgment was given for a portion of the note, from which the plaintiff appealed to the court of common pleas, and the defendant was there defaulted. It was held that the former judgment was no bar to an action on the warranty. A similar case was Bascom *v.* Manning, 52 N. H. 132, in which the plaintiff brought an action to recover damages for a breach of warranty in the sale of a lot of cotton, and it appeared that the plaintiff had pleaded the facts upon which his right of action depended in defence, *pro tanto*, of a suit brought against him for the price of the cotton, by the present defendant, in another state, and then he afterwards suffered judgment to go against him by default in that suit, offering no evidence in support of his plea, it was held that he was not estopped by the record and proceedings in the other state from maintaining the present action. In an action for the price of property sold where the defendant set up a breach of warranty in defence and succeeded, it was held in Virginia that he could not afterwards sue for other damages and expenses incurred by him on account of the breach of warranty. Huff *v.* Broyles, 26 Grattan, 283.]

(m^1) [26 U. C. C. P. 338.]

pendent right to recover damages by way of deduction from the price." But on appeal this decision was reversed. In Church *v.* Abell, 1 Can. Supr. Ct. 442, Richards C. J. said: "The fitting deduction from the language used and principles laid down in the cases of Mondel *v.* Steel and Davis *v.* Hedges . . . . is to hold that when the purchaser brings his action upon the warranty before making payment, and I should add to this when the payment is due, he shall be restricted to the recovery of any special damages he has sustained, and shall not be permitted to recover for inferiority of value; for the simple reason, that if he is afterwards sued for the price, the law affords him full protection by enabling him to assert the inferiority as a ground of defence."]

§ 899. In Davis *v* Hedges (*n*) the queen's bench followed Mondel *v.* Steel, and further held that the buyer has the *option* of setting up the defective quality as a defence, or of maintaining a separate action. In Poulton *v.* Lattimore (*o*) the buyer's defence in an action for the price was successful for the *whole amount of the price.* The vendor sued to recover the price of seed, warranted to be good new growing seed, part of which the buyer had sowed himself, and the remainder was sold to two other persons, who proved that the seed was worthless; that it had turned out to be wholly unproductive; and that they had neither paid, nor would pay for it. (*p*) It was further held in this case that the buyer might insist on his defence without returning, or offering to return, the seed. (*q*) And

Davis *v.* Hedges.

Poulton *v.* Lattimore.

Buyer relieved from paying any part of the price.

Buyer may defend or bring action for breach of warranty

(*n*) L. R. 6 Q. B. 687.

(*o*) 9 B. & C. 259.

(*p*) [It is not a defence to a note given for the price of an article that it turns out to be of no value, in a case where there is no warranty and no fraud in the sale. Bryant *v.* Pember, 45 Vt. 487; Boit *v.* Maybin, 52 Ala. 252; Preston *v.* Dunham, Ib. 217. See Ricks *v.* Dillahunty, 8 Porter, 133; Johnson *v.* Titus, 2 Hill (N. Y.), 606; Conner *v.* Henderson, 15 Mass. 319; Perley *v.* Balch, 23 Pick. 283, 286; Wright *v.* Hart, 18 Wend. 454; Mooklar *v.* Lewis, 40 Ind. 1; McKnight *v.* Devlin, 52 N. Y. 399, 402; Sapona Iron Co. *v.* Holt, 64 N. C. 335; Myers *v.* Conway, 62 Ind. 474; Vincent *v.* Berry, 46 Iowa, 571; Earl *v.* Peck, 64 N. Y. 596.]

Where note has been given, what cannot be pleaded in defence.

(*q*) [Shepherd *v.* Temple, 3 N. H. 455; Bliss *v.* Negus, 8 Mass. 46; Perley *v.* Balch, 23 Pick. 283; Stone *v.* Frost, 6 Lansing, 440. See Evans *v.* Gale, 21 N. H. 245; Mooklar *v.* Lewis, 40 Ind. 1; Day *v.* Pool, 52 N. Y. 420; Dounce *v.* Dow, 57 Ib. 16, 22; Dill *v.* O'Ferrell, 45 Ind. 268. But if the goods are of any value, such defence cannot be made without a return. Perley *v.* Balch, 23 Pick. 283. See Kinney *v.* Kiernan, 49 N. Y. 164. In Cook *v.* Gilman, 34 N. H. 556, it was held that a party wishing to rescind a contract on the ground of fraud

Rescission.

without returning the goods, or giving notice to vendor.

the cases cited in the note are authorities to the effect, that not only may the breach of warranty be so used in defence, but that a direct action by the buyer may be maintained for damages for the breach, without notice to the vendor. (*r*)

But his failure to do so raises a presumption against him.

§ 900. It has been said, however, by eminent judges, and the jury at the trial would no doubt be told, that the failure either to return the goods, or to notify the vendor of the defect in quality, raises a strong presumption that the complaint of defective quality is not well founded. (*s*) In Adam *v.* Richards (*t*) the common pleas held that where a horse had been sold with express warranty and an agreement to take him back if found faulty, it was incumbent on the purchaser to return the horse *as soon as the faults were discovered*, unless the seller by subsequent misrepresentation induced the purchaser to prolong the trial. (*u*) But the right to return a horse for breach of warranty was held by the

Adam *v.* Richards.

Where vendor has agreed to take back the chattel if found faulty, it must be returned as soon as defect is found.

must restore what he has received. If the subject-matter received is the note of the third person, and it is not returned, it will not be admissible to show that the maker was insolvent and the note worthless, as a ground of rescinding the contract. Dixon *v.* Paul. 4 U. C. Q. B. (O. S.) 327; Hall *v.* Coleman, 3 Ib. 39; McCollum *v.* Church, Ib. 356; Gittings *v.* Carter, 49 Iowa, 338; Hess *v.* Young, 59 Ind. 379. See Brewster *v.* Burnett, 125 Mass. 68.]

(*r*) Fielder *v.* Starkin, 1 H. Bl. 17; Pateshall *v.* Tranter, 3 Ad. & E. 103; Buchanan *v.* Parnshaw, 2 T. R. 745; [Vincent *v.* Leland, 100 Mass. 432; Kellogg *v.* Denslow, 14 Conn. 411; Osborne *v.* Tuller, Ib. 529; Douglass Axe Manuf. Co. *v.* Gardner, 10 Cush. 88; Beebe *v.* Robert, 12 Wend. 413; Waring *v.* Mason, 18 Ib. 425; Comstock J. in Muller *v.* Eno, 14 N. Y. 602; Thompson *v.* Botts, 8 Mo. 710; Milton *v.* Bowland, 11 Ala. 732; Taymon *v.* Mitchell, 1 Md. Ch. 496; Carter *v.* Stennet, 10 B. Mon. 250; Parker *v.* Pringle, 2 Strobh. 242; Kornegay *v.* White, 10 Ala. 255; Borrekins *v.* Bevan, 3 Rawle, 23; Cozzins *v.* Whitaker, 3 Stew. & Port. 822; Rutter *v.* Blake, 2 Harr. & J. 350; Cottle *v.* Wilson, 1 La. An. 4; Hills *v.* Bannister, 8 Cowen, 31; Day *v.* Pool, 52 N. Y. 416; Parks *v.* Morris Axe & Tool Co. 54 Ib. 586.]

(*s*) Per Lord Ellenborough in Fisher *v.* Samuda, 1 Camp. 190; per Lord Loughborough, in Fielder *v.* Starkin, 1 H. Bl. 17; Poulton *v.* Lattimore, 9 B. & C. 259; Prosser *v.* Hooper, 1 Moore, 106; [Boorman *v.* Jenkins, 12 Wend. 566; Thornton *v.* Wynn, 12 Wheat. 183; Sands *v.* Taylor, 5 John. 396; 2 Kent, 480; Kellogg *v.* Denslow, 14 Conn. 411. But to have this effect the delay must take place after the discovery of the deficiency in the goods. Clements *v.* Smith, 9 Gill, 156.]

(*t*) 2 H. Bl. 573.

(*u*) [The authority of Adam *v.* Richards, cited in the text, has been denied, and the doctrine of it rejected, in a late case in Massachusetts, where it was held that a purchaser may sustain an action upon the warranty, without a return of the property sold, although by the contract of sale the vendor engaged that the article might be returned if it did not

exchequer not to be affected by an accident to the horse after the sale without any default in the buyer. (*x*)

Where defect occurs after sale.

§ 901. The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them, (*x*[1]) all of which acts show an agreement to accept the goods, (*y*) but do not constitute an abandonment of his remedy by cross action, or his right to insist in defence upon a reduction of price. (*z*)

Buyer loses his right of returning goods by any act equivalent to acceptance, but not his other remedies.

§ 902. The buyer's right to insist on a reduction of price on the ground of breach of warranty cannot be made available if he has given a negotiable security for the price, and the action is brought on the security. He is driven in such a case to a cross action as his only remedy. The reason is that the law does not permit an unliquidated and uncertain claim to be set up in defence against the liquidated demand represented by a bill or note. (*a*)

Buyer cannot set up breach of warranty in defence to a negotiable security given for the price.

fulfil the contract. Douglass Axe Manuf. Co. *v.* Gardner, 10 Cush. 88; McCormick *v.* Duaville, 36 Iowa, 645; Seigworth *v.* Leffel, 76 Penn. St. 476; Aultman *v.* Thierer, 34 Iowa, 272. In Marshall *v.* Perry, 67 Me. 78, the plaintiff claimed that there was a usage in Portland, where the sale was made, by which, if there was a warranty and a breach of it, the defendant was bound to return the goods within a reasonable time after receiving them, or give notice of the breach, or he would be precluded from claiming any reduction in the price on account of the breach. It was held that if there was an express warranty of quality, such an alleged usage could not be admitted to control it. See § 599 *a*, *ante*.]

(*x*) Head *v.* Tattersall, L. R. 7 Ex. 7.

(*x*[1]) [Dounce *v.* Dow, 64 N. Y. 411.]

(*y*) *Ante*, §§ 703 *et seq.*; [Wilds *v.* Smith, 2 Ont. App. 8, reversing Wilds *v.* Smith, 41 U. C. Q. B. 136.]

(*z*) Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Allen *v.* Cameron, 1 C. & M. 832; [Smith *v.* Mayer, 3 Col. 207; Atkins *v.* Cobb, 56 Ga. 86; Ferguson *v.* Hosier, 58 Ind. 438; Defenbaugh *v.* Weaver, 87 Ill. 132; Dounce *v.* Dow, 57 N. Y. 16; Parks *v.* Morris Ax Co. 54 Ib. 586; Day *v.* Pool, 52 Ib. 416; Zuller *v.* Rogers, 7 Hun, 540; Nichols *v.* Townsend, Ib. 375; Gurney *v.* Atlantic Ry. Co. 58 N. Y. 358; Muller *v.* Eno, 14 Ib. 597. There are New York decisions which, as to defects apparent upon inspection, are inconsistent with the rule stated in the text. Dounce *v.* Dow, 64 N. Y. 411; Draper *v.* Sweet, 66 Barb. 145; Gautier *v.* Douglass M'n'f'g Co. 13 Hun, 514, pp. 524, 525. See McI'arlin *v.* Boynton, 71 N. Y. 604.]

(*a*) See the exposition of the law, and citation of authorities, in Byles on Bills, 126, 9th ed.; Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56; 36 L. J. Ex. 33; [Cripps *v.* Smith, 3 L. R. Ir. 277. Such is the Canadian rule. Kellogg *v.* Hyatt, 1 U. C. Q. B. 445; Georgian Bay Lumber Co. *v.* Thompson, 35 Ib. 64. But

§ 903. In relation to the measure of damages which the buyer is entitled to recover for breach of warranty, the rules are substantially the same as those which govern in the

Measure of damages

it has been held in many cases in the United States, that where the goods sold appear to be of some value, and are retained by the purchaser, he may still avail himself of a fraud in the sale or a breach of warranty, by way of partial defence and to reduce the damages, in an action by the payee on a bill or note given for the price. Harrington *v.* Stratton, 22 Pick. 510; Perley *v.* Balch, 23 Ib. 283; Mixer *v.* Coburn, 11 Met. 561; Westcott *v.* Nims, 4 Cush. 215; Cook *v.* Castner, 9 Ib. 266; Burnett *v.* Smith, 4 Gray, 50; Stacy *v.* Kemp, 97 Mass. 166, 168; Rasberry *v.* Moye, 23 Miss. 320; Burton *v.* Stewart, 3 Wend. 236; Spalding *v.* Vandercook, 2 Ib. 431; Coburn *v.* Ware, 30 Maine, 202; Shepley J. in Hammatt *v.* Emerson, 27 Ib. 323, 324; Hitchcock *v.* Hunt, 28 Conn. 343; Albertson *v.* Halloway, 16 Ga. 377; Love *v.* Oldham, 22 Ind. 51; McKnight *v.* Devlin, 52 N. Y. 399, 402, and cases cited; Hill *v.* Southwick, 9 R. I. 299; Wilson *v.* King, 83 Ill. 232; Home Machine Co. *v.* Reber, 66 Ind. 498; Ingram *v.* Jordan, 55 Ga. 356; Shook *v.* Singer M'n'f'g. Co. 61 Ind. 520; Bryant *v.* Sears, 49 Iowa, 373; Fisher *v.* Sharpe, 5 Daly, 214. And the same defence is open to the purchaser in such case against an indorsee of the note, if it was negotiated when it was overdue and dishonored. Goodwin *v.* Morse, 9 Met. 278; Hammatt *v.* Emerson, 27 Maine, 308; McKnight *v.* Devlin, 52 N. Y. 399, 401. See Aldrich *v.* Stockwell, 9 Allen, 45. The purchaser, under these circumstances, is entitled to have so much deducted from the amount of the note as the goods, by reason of the defects in them, are worth less than they would have been if the defects had not existed; but he is not entitled, as a general rule, to a deduction of the difference between the amount of the note and the sum which the jury might deem the true value of the goods. Goodwin *v.* Morse, 9 Met. 278; Stiles *v.* White, 11 Ib. 356; Tuttle *v.* Brown, 4 Gray, 457; Cothers *v.* Keever, 4 Barr, 168; Shaw C. J. in Reggio *v.* Braggiotti, 7 Cush. 166, 169; Gray J. in Morse *v.* Hutchins, 102 Mass. 440; Wright *v.* Roach, 57 Maine, 600; *post*, § 903, note (*d*). In New Hampshire it was held, in Drew *v.* Towle, 27 N. H. 412, that a partial failure of consideration may be shown in defence to an action on a promissory note, as between the original parties to it, where the amount to be deducted on that account can be ascertained by mere computation, but it is otherwise where such amount depends upon the ascertainment of unliquidated damages. In Riddle *v.* Gage, 37 N. H. 519, which was an action upon a note for a certain sum, given for the price of several different articles of machinery, it appeared that the title of the vendor to a part of the articles failed, so that they were taken from the purchaser, and it was held, that as there was no specific price fixed upon the different articles at the time of the purchase, but the value of those as to which the title failed was unliquidated, this partial failure of consideration could not be made available for the reduction of the amount to be recovered on the note. After the above decisions, the law of New Hampshire was changed by statute of 1861, and in Butler *v.* Northumberland, 50 N. H. 33, it was held that the purchaser of goods by sample, which, on delivery, are found to be of inferior quality to those bargained for, may keep the goods, and, in an action for the price, may show such inferiority in reduction of damages. See Burton *v.* Schermerhorn, 21 Vt. 289; Pulsifer *v.* Hotchkiss, 12 Conn. 234; Andrews *v.* Wheaton, 23 Ib. 112; Pierce *v.* Cameron, 7 Rich. 114; Hodgskins *v.* Moulton, 100 Mass. 310, 311. In Cantrall *v.* Fawcett, 2 Bradwell (Ill.) 569, it was held that even where a

Defence of partial failure of consideration to note given for goods.

New Hampshire cases.

case of the vendor's breach of his obligation to deliver. *Ante*, § 871. In Dingle *v.* Hare, (*b*) cited *ante*, § 624, it was held that the jury had properly allowed the purchaser the difference of value between the article delivered and the article as warranted. And in Jones *v.* Just, (*c*) cited *ante*, § 657, the same rule was applied, and the plaintiff recovered as damages 756*l.*, although by reason of a rise in the market the inferior article sold for nearly as much as the price given in the original sale. (*d*) In Lewis *v.* Peake (*e*) the buyer of a horse, relying on a warranty, resold

on breach of warranty.

Dingle *v.* Hare.

Jones *v.* Just.

Lewis *v.* Peake.

second note had been given, the first having been surrendered, and there was a warranty at time of sale, it was for the jury to say whether the contract of warranty still remained or was adjusted when the second note was given. Aultman *v.* Wheeler, 49 Iowa, 647. If the note has passed into the hands of an innocent holder for value before maturity, the payment of the note to such holder does not bar the vendee's claim for damages against the vendor. Creighton *v.* Comstock, 27 O. St. 548.]

(*b*) 7 C. B. N. S. 145; 29 L. J. C. P. 144.

(*c*) L. R. 3 Q. B. 197; 37 L. J. Q. B.

(*d*) [A warranty binds the party entering into it, upon breach thereof, to repay the difference between the actual value of the article sold and that of an article such as the article sold was represented to be at the time and place of delivery. Morse *v.* Hutchins, 102 Mass. 439, 440; Stiles *v.* White, 11 Met. 356; Tuttle *v.* Brown, 4 Gray, 457; Reggio *v.* Braggiotti, 7 Cush. 166; Goodwin *v.* Morse, 9 Met. 278; Whitmore *v.* South Boston Iron Co. 2 Allen, 52; Cothers *v.* Keever, 4 Barr, 168; Page *v.* Parker, 40 N. H. 47; Fisk *v.* Hicks, 31 Ib. 535; Edwards *v.* Collson, 5 Lansing, 324; Woodward *v.* Thacher, 21 Vt. 580; Houghton *v.* Carpenter, 40 Ib. 588; Overbay *v.* Lighty, 27 Ind. 27; Street *v.* Chapman, 29 Ib. 142; Booher *v.* Goldsborough, 44 Ib. 490; McClure *v.* Williams, 65 Ill. 390; Muller *v.* Eno, 4 Kernan, 597; Sherwood *v.* Sutton, 5 Mason, 1; Wells *v.* Selwood, 61 Barb. 238; Sharon *v.* Mosher, 17 Ib. 518; Thornton *v.* Thompson, 4 Grattan, 120; Moulton *v.* Scruton, 39 Maine, 287; Wright *v.* Roach, 57 Ib. 600; Bartlett *v.* Blanchard, 13 Gray, 429; Grose *v.* Hennessey, 13 Allen, 389; Brown *v.* Bigelow, 10 Ib. 242; Worthy *v.* Patterson, 20 Ala. 172; Wolcott *v.* Mount, 7 Vroom, 262; S. C. 9 Ib. 496; Cline *v.* Myers, 64 Ind. 304; Ferguson *v.* Hosier, 58 Ib. 438; Horn *v.* Buck, 48 Md. 358; Zuller *v.* Rogers, 7 Hun, 540; Van Wyck *v.* Allen, 69 N. Y. 61; Wyeth *v.* Morris, 13 Hun, 338; White *v.* Brockway, 40 Mich. 209; Wing *v.* Chapman, 49 Vt. 33; The Aultman Co. *v.* Hetherington, 42 Wis. 622; Drake *v.* Sears, 8 Oreg. 209; Smith *v.* Green, 1 C. P. Div. 92. The rule of damages is the same in an action for deceit in the sale. Stiles *v.* White, 11 Met. 356; Morse *v.* Hutchins, 102 Mass. 439, 440. Strictly within the rule, and a strong illustration and application of it, was the case of Murray *v.* Jennings, 42 Conn. 9, in which it appeared that the plaintiff exchanged with the defendant a yoke of oxen for a horse. The defendant fraudulently represented the horse as sound when it was not so. The plaintiff was guilty of no fraud, and would not have made the exchange but for the defendant's representation. The action was brought for the deceit in the

What vendor must pay for breach of warranty.

Murray *v.* Jennings.

(e) 7 Taunt. 153.

the animal with warranty, and being sued by his vendee, informed his vendor of the action, and offered him the option of defending it, to which offer he received no answer, and thereupon defended it himself, and failed. The common pleas held that the costs so incurred were recover-

Buyer may recover the costs of defence against his sub-vendee in certain cases.

sale. The evidence showed that the oxen were worth a hundred dollars; and that the horse was worth a hundred and twenty-five dollars, unsound as he was; but that, if sound, he would have been worth two hundred and twenty-five dollars. The court ruled that the plaintiff was entitled to recover the difference between the actual value of the horse and its value if sound; and that the question was not affected by the fact that its value as unsound was greater than that of the oxen. Phelps J. said: "In one sense the plaintiff would seem to have suffered no damage, but the law gives her the benefit of the contract, and places her, with respect to it and to all her rights under it, in the same position as if no fraud had been practised upon her, and as if the horse was as sound and valuable as she had a right, from the defendant's representations to her, to believe it was." The purchaser is not entitled to recover anything on the ground of the loss of profits on the warranted article. Lattin *v.* Davis, Hill & Denio, 9; Blanchard *v.* Ely, 21 Wend. 342; Gifford *v.* Betts, 64 N. C. 62. If the article sold proves to be wholly worthless, then the purchaser shall recover what would have been its value at the time of the warranty, had it been, in fact, what it was warranted to be. "*Primâ facie*, the price first paid for the article is good evidence of its value in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country, the established rule in relation to damages in such actions is, that the plaintiff may recover what he can show that he has actually lost. A subsequent sale by the vendee of the article warranted is evidence of its value to him." Shaw C. J. in Reggio *v.* Braggiotti, 7 Cush. 166, 169. "To allow to the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrong-doer, and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract." Gray J. in Morse *v.* Hutchins, 102 Mass. 440; Tuttle *v.* Brown, 4 Gray, 457. See Thornton *v.* Thompson, 4 Grattan, 121; Cary *v.* Gruman, 4 Hill, 625; Comstock *v.* Hutchinson, 10 Barb. 211; Glover *v.* Hutson, 2 McMullan, 109; Seibles *v.* Blackwell, 1 Ib. 56; Texada *v.* Camp, Walker, 150; Wright *v.* Roach, 57 Maine, 600; Booher *v.* Goldsborough, 44 Ind. 490; Thorne *v.* McVeagh, 75 Ill. 81. Interest is not to be added to the amount of that difference. Moulton *v.* Scruton, 39 Maine, 287. Where there has been a breach of warranty, nominal damages are recoverable in an action thereon, although the plaintiff, the purchaser, acquired a profit on the resale of the goods. Per Parke J. in Street *v.* Blay, 2 B. & Ad. 456, 458; Brown *v.* Bigelow, 10 Allen, 242; Medbury *v.* Watson, 6 Met. 246; Milton *v.* Rowland, 11 Ala. 732. The purchaser may recover for a breach of warranty, although he has resold the goods, and no claim has been made on him, and he is liable to none on account of the alleged defect; and in such an action he is not required to prove the price at which he resold the goods to entitle him to recover. Muller *v.* Eno, 4 Kernan, 597. See Burt *v.* Dewey, 40 N. Y. 283.]

Nominal damages where no real injury.

able as special damages against the first vendor. (*f*) In Randall *v.* Raper (*g*) the plaintiffs had bought barley from the defendant as Chevalier seed barley, and in their trade as corn factors resold it with a warranty that it was such seed barley. The sub-vendees sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy, but no particular sum was fixed, and nothing had yet been paid by the plaintiffs. The difference in the value of the barley sold by the defendant, and the barley as described, was 15*l.*, but the plaintiffs recovered 261*l.* 7*s.* 6*d.*, the excess being for such damages as the plaintiffs were deemed by the jury liable to pay to their sub-vendees. All the judges of the queen's bench held the damages to the sub-vendees to be the necessary and immediate consequence of the defendant's breach of contract, and properly recoverable. (*g*[1]) Wightman J., however, expressed a doubt whether these damages were recoverable before the plaintiffs had actually paid the claims of their sub-vendees, but declined to dissent from his brethren on the point. (*h*)

Randall *v.* Raper.

Buyer may recover damages which he is liable to pay to sub-vendees.

§ 904. The damages recoverable by the buyer for a breach of warranty may be greatly augmented when they are the consequence of a fraudulent misrepresentation by the vendor. Thus, in Mullett *v.* Mason, (*i*) the plaintiff, having placed with other cattle a cow bought from the defendant, which was fraudulently warranted to be sound, although known by the vendor to be affected with an infectious disease, was held entitled to recover as damages the

Damages aggravated by fraudulent misrepresentation by vendor.

Mullett *v.* Mason.

(*f*) [That is, the taxable costs. Reggio *v.* Braggiotti, 7 Cush. 166; Coolidge *v.* Brigham, 5 Met. 68. But the plaintiff, in such case, cannot recover counsel fees paid for his defence. Reggio *v.* Braggiotti, 7 Cush. 166; Leffingwell *v.* Elliott, 10 Pick. 204. But see Swett *v.* Patrick, 3 Fairf. 9; and see, also, Fuentis *v.* Caballero, 1 La. An. 27. In general, a vendor, on an implied warranty of title, would not be liable to the purchaser on failure of title, for costs of a previous defence, unless the defence was made for his benefit and at his expense. Shaw C. J. in Bucknam *v.* Goddard, 21 Pick. 70, 71. See Eldridge *v.* Wadleigh, 3 Fairf. 372, 373; Cockerell *v.* Smith, 1 La. An. 1. As to the expenses incurred in consequence of the unsoundness, as of an animal, see Murray *v.* Meredith, 25 Ark. 164.]

(*g*) E., B. & E. 84; 27 L. J. Q. B. 266.

(*g*[1]) [Wolcott *v.* Mount, 38 N. J. Law (9 Vroom), 496.]

(*h*) [Burt *v.* Dewey, 40 N. Y. 283; Wolcott *v.* Mount, 7 Vroom, 262, 272, 273.]

(*i*) L. R. 1 C. P. 559; [Packard *v.* Slack, 32 Vt. 9; Cate *v.* Cate, 50 N. H. 146; Fultz *v.* Wycoff, 25 Ind. 321; Jeffrey *v.* Bigelow, 13 Wend. 518.]

value of such of his own cattle as had died from the disease communicated to them by the infected animal, (*k*) the court distinguishing the case from Hill *v.* Balls (*l*) on the ground that in this latter case there had been no misrepresentation to induce the buyer to put a glandered horse in the same stable with others. In George *v.* Skivington (*m*) it was held that the buyer might recover damages for personal injury resulting to him from the use of a deleterious compound furnished by a chemist and unfit for the purpose for which he professed to sell it. (*n*)

Hill *v.* Balls.

Damages for personal injury from quality of the thing sold.

(*k*) [Marsh *v.* Webber, 16 Minn. 418. And so in a similar case it was decided that if certain animals in a drove are sold, under a warranty that all the animals in the drove are free from contagious or infectious diseases, the purchaser may recoup in damages, in an action for the price, the whole loss occasioned to him by the existence of such a disease in the drove at that time, although some of the animals purchased by him did not take the disease until afterwards. Bradley *v.* Rea, 14 Allen, 20. See Ward *v.* Hobbs, 2 Q. B. Div. 331; 3 Ib. 150.]

(*l*) 2 H. & N. 299; 27 L. J. Ex. 45.

(*m*) L. R. 5 Ex. 1; 29 L. J. Ex. 8. [See Randall *v.* Newson, 2 Q. B. Div. 102, cited and stated *ante*, § 657 note (*k*[1]).]

(*n*) [See Wellington *v.* Downer Kerosene Oil Co. 104 Mass. 64, 68. In an action on a warranty, it is necessary for the plaintiff to prove clearly the breach thereof. But the defendant's knowledge of the defect or bad quality of the goods need not be proved. Williamson *v.* Allison, 2 East, 446; Carley *v.* Wilkins, 6 Barb. 557; Bartholomew *v.* Bushnell, 20 Conn. 271; Tyre *v.* Causey, 4 Harring. 425. Even if the knowledge be charged in the declaration. House *v.* Fort, 4 Blackf. 293; Massie *v.* Crawford, 3 Monroe, 218. See Ross *v.* Mather, 51 N. Y. 108. But if an action be brought for fraud in the sale by representations which the vendor knew to be false, the knowledge of the defect or bad quality of the goods must be brought home to the vendor. Bartholomew *v.* Bushnell, 20 Conn. 271; Vail *v.* Strong, 10 Vt. 457; Kingsbury *v.* Taylor, 29 Maine, 508. Where the representations of the vendor amount to a warranty of the goods sold, and he knew the representations to be untrue, the purchaser may sue him either in an action of tort or in contract on the warranty. See Hillman *v.* Wilcox, 30 Maine, 170; Kingsbury *v.* Taylor, 29 Ib. 508; Salem India Rubber Co. *v.* Adams, 23 Pick. 256; Lassiter *v.* Ward, 11 Ired. 443; Maburin *v.* Harding, 28 N. H. 128; Pierce *v.* Carey, 37 Wis. 232. In Kingsbury *v.* Taylor, 29 Me. 508, it was held, that where *winter* rye was sold for seed *spring* rye, and the purchaser thereby lost his crop, an action of deceit would not lie, unless the vendor knew it to be *winter* rye. See Salem India Rubber Co. *v.* Adams, 23 Pick. 256; Stone *v.* Denny, 4 Met. 151; Emerson *v.* Brigham, 10 Mass. 197; Randall *v.* Newson, 2 Q. B. Div. 102, cited and stated *ante*, § 657, in note (*k*[1]).]

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