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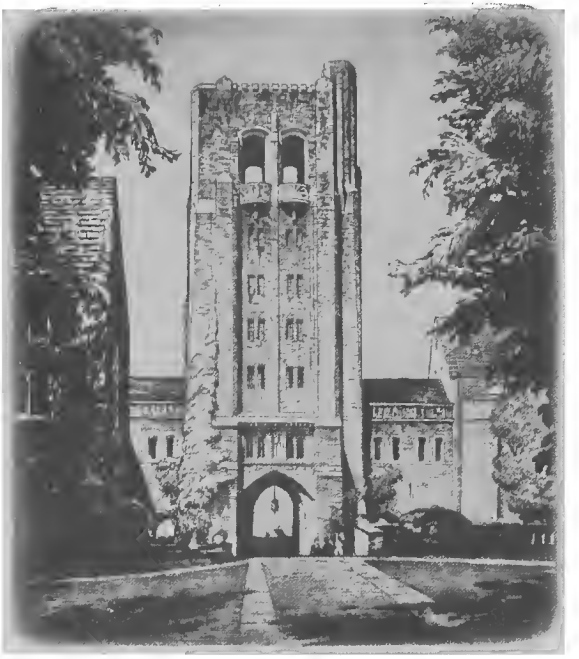

BENJAMIN'S

Treatise on the Law

OF

SALE OF PERSONAL PROPERTY

WITH REFERENCES TO THE

AMERICAN DECISIONS.

THIRD ENGLISH EDITION.

WITH THE AUTHOR'S SANCTION AND REVISION.

BY

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SECTION I.—AT COMMON LAW.

Sale void when entered into for illegal purpose.

§ 786. 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 know-

ingly 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.

Where the unlawful agreement is executory only, money or goods reclaimable.

§ 787. [It is important, however, to observe that although the courts will not entertain an action either to enforce an unlawful agreement or to have an unlawful agreement set aside after it has been *executed*, yet if money has been paid, or goods have been delivered under an unlawful agreement, which remains in other respects *executory*, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods. The action is then founded, not upon the unlawful agreement, but upon its disaffirmance.

Taylor *v.* Bowers.

Thus, in Taylor *v.* Bowers, (*a*) the plaintiff had assigned and delivered goods to one Alcock for the purpose of defrauding his (the plaintiff's) creditors. Alcock, without the plaintiff's assent, executed a bill of sale of the goods to the defendant, who was aware of the illegal transaction. It was held that the plaintiff was entitled to repudiate the transaction, and recover his goods from the defendant. Mellish, L. J., said, "If money is paid, or goods delivered, for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."

Law same in America.

The law has very recently been laid down to the same effect by the Supreme Court of the United States. (*b*) [1]

(*a*) 1 Q. B. D. 291, C. A., and see Symons *v.* Hughes, 2 Eq. 475, 479.

(*b*) Spring Co. *v.* Knowlton, 13 Otto 49.

1. **An Unlawful Agreement may be Disaffirmed Before Execution.**—Knowlton *v.* Congress and Empire Spring Co., 57 N. Y. 518. See dissenting opinion (p. 540) of Dwight, Comm'r, which was followed by United States Supreme Court in same case, 103 U. S. 49. Merritt *v.* Millard, 4 Keyes 208; White *v.* Franklin Bank, 22 Pick. 181; Lowell *v.* Boston, &c., R. R., 23 Pick. 24. So, also, the buyer may avoid the sale and recover back the price on discovery of facts showing that the sale was illegal. Burkholder *v.* Beetem, 65 Penna. 496; Stanley *v.* Chamberlin, 39 N. J. L. 565.

The Law Aids Neither Party to an Illegal Contract.—After the contract has been executed, a party who knew of the illegality cannot be aided in disaffirming it. Thus in Myers *v.* Meinrath, 101 Mass. 366, a coat was exchanged for jewelry. The jewelry was returned and suit was brought for the price of the coat, but failed because of the illegality of the contract, which was made on Sunday. Thereupon the coat was demanded and trover brought. But Wells, J., said:

§ 788. The subject will be considered in two parts: 1st, with reference to the common law; 2nd, the acts of parliament.

At common law the rule is invariable: *Ex turpi causa non oritur actio.* And this rule is as applicable to a statement of defence as to a statement of claim; for, as was said by Lord Mansfield in Montefiori *v.* Montefiori, (*c*) "no man shall set up his own iniquity as a defence any more than as a cause of action." (*d*) [2] Sales are therefore void, and neither party can maintain

Illegal act unavailable for defence as well as for action.

"The illegality is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. The ends of justice are found to be best secured by permitting it to be thus administered upon one of two offending parties at the instigation of the other." (But Sunday contracts in some states are an exception to this rule. See *post* notes 34 and 35.) See Horton *v.* Buffinton, 105 Mass. 399; McWilliams *v.* Phillips, 51 Miss. 196; Ratcliffe *v.* Smith, 13 Bush 172; Penn *v.* Bornmann, 102 Ill. 523; Banking Co. *v.* Kantenberg, 103 Ill. 460. No action can be brought for fraud in an illegal contract. See *post* note 36. Smith *v.* Bean, 15 N. H. 577; Gunderson *v.* Richardson, 56 Iowa 56; Robeson *v.* French, 12 Metc. 24; Way *v.* Foster, 1 Allen 408; Gregg *v.* Wyman, 4 Cush. 322. Otherwise if the unlawful contract is not essential to the case of plaintiff. Welch *v.* Wesson, 6 Gray 505. In Block *v.* McMurry, 56 Miss. 217, it was held that if a man induced to make a contract on Sunday was intoxicated to a degree that he was not competent to make a contract, he might avoid it. And so where cattle were obtained on Sunday through previous fraudulent representations, and a subsequent promise to pay was made, a suit was sustained. Winchell *v.* Carey, 115 Mass.560. As to ratification of Sunday contracts, see *post* note 39.

(*c*) 1 Wm. Bl. 363; and see, also, Doe d. Roberts *v.* Roberts, 2 B. & Ald. 367.

(*d*) See the authorities collected in the notes to the leading case of Collins *v.* Blantern, in 1 Sm. L. C. (8th ed.) 387.

2. The Test is Whether the Case or Defence is Made out Through the Aid of the Illegal Contract.—If so it must fail. Taylor *v.* Chester, L. R., 4 Q. B. 309, 314; Swan *v.* Scott, 11 S. & R. 155; Hipple *v.* Rice, 28 Penna. 406; Fowler *v.* Scully, 72 Penna. 456, 468; Gilliam *v.* Brown, 43 Miss. 641, 660; Roby *v.* West, 4 N. H. 290; Welch *v.* Wesson, 6 Gray 505; Phalen *v.* Clark, 19 Conn. 421. But this is said to be too narrow in Hanauer *v.* Woodruff, 15 Wall. 439, 443, as not including the case of goods sold with knowledge of intent to use them to further crime. It is immaterial whether plaintiff or defendant first urges the illegality. When disclosed, the party relying on it for relief will fail. Sampson *v.* Shaw, 101 Mass. 145, 151; Myers *v.* Meinrath, 101 Mass. 366; Hanauer *v.* Woodruff, 15 Wall. 439, 443; Laing *v.* McCall, 50 Vt. 657.

Dealings With Property Illegally Acquired.—Although the illegal contract is void, yet, after it has been executed, legal contracts with respect to the subject matter will be sustained. In Lestapies *v.* Ingraham, 5 Penna. 81, Gibson, C. J., said: "True it is that an illegal contract will not be executed, but where it has been executed by the parties the money or thing which was the product of it may be a legal consideration among themselves for a promise either express or implied, and the court will not unravel the transaction to discover its origin." Fox *v.* Cash, 11 Penna. 207. In Randon *v.* Toby, 11 How. 493, 520, the suit was on a note given for the price of slaves. It

an action on them, if the thing sold be contrary to good morals or public decency. Sales of an obscene book, (*e*) and of indecent prints or pictures, (*f*) have been held illegal and void at common law. (*g*)

Consideration illegal in part.

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, (*h*) on the authority of Featherston *v.* Hutchinson, (*i*) and was affirmed by all the judges who delivered opinions in the Exchequer Chamber in Jones *v.* Waite. (*j*)[3]

Jones v. Waite.

Separable contract.

§ 789. [But it is necessary to distinguish the case where part of the consideration for a contract is illegal, and the contract is rendered void in its entirety, from one where the contract is in its nature separable into distinct parts, and the consideration for one part is illegal. In the latter case, if it is clear on the face of the agreement that the parties intended it to be carried into effect piece-

was held no defence that the slaves had been unlawfully brought into the state. See Gisaf *v.* Neval, 81 Penna. 354, where it was held that creditors of the grantor could not take property which he had conveyed to his mistress. An agent cannot retain from his principal the fruits of an unlawful traffic. Gilliam *v.* Brown, 43 Miss. 641, 660; Planters' Bank *v.* Union Bank, 16 Wall. 483; Brooks *v.* Martin, 2 Wall. 79; McBlair *v.* Gibbes, 17 How. 232. But these decisions are questioned in New Jersey, and it was held that where the traffic is a crime, such as the sale of lottery tickets, the courts will not interfere between partners. Watson *v.* Murray, 23 N. J. Eq. 257; Todd *v.* Rafferty, 30 N. J. Eq. 254; Gregory *v.* Wilson, 36 N. J. L. 320.

(*e*) Popplett *v.* Stockdale, Ry. & Moo. 337.

(*f*) Fores *v.* Johns, 4 Esp. 97.

(*g*) As to immoral considerations, see per Lord Selborne in Ayerst *v.* Jenkins, 16 Eq., at p. 282.

(*h*) 1 Bing. N. C. 656.

(*i*) Cro. Eliz. 199.

(*j*) 5 Bing. N. C. 341. See, also, Shackell *v.* Rozier, 2 Bing. N. C. 634; Hopkins *v.* Prescott, 4 C. B. 578; and Harrington *v.* The Victoria Graving Dock Co., 3 Q. B. D. 549.

3. **An Entire Contract, Illegal in Part, is Void.**—Trist *v.* Child, 21 Wall. 441; Meguire *v.* Corwine, 101 U. S. 108 Filson *v.* Himes, 5 Penna. 452, 456 Saratoga Bank *v.* King, 44 N. Y. 87, 91; Woodruff *v.* Hinman, 11 Vt. 592; Snyder *v.* Willey, 33 Mich. 483, 495; Appeal of Bredin, 92 Penna. 241, 247; Carleton *v.* Whitcher, 5 N. H. 196; Kimbrough *v.* Lane, 11 Bush 556; Lindsay *v.* Smith, 78 N. C. 328; Laing *v.* McCall, 50 Vt. 657. Where a note is given for the price of goods sold in part legally and in part illegally, no recovery can be had on the note. Widoe *v.* Webb, 20 Ohio St. 431; Deering *v.* Chapman, 22 Me. 488. But no doubt a recovery might be sustained on the legal sales if separable from the illegal. See next note. Some cases sustain a recovery to the extent of the price of the lawful sales represented by the note. Hynds *v.* Hays, 25 Ind. 31; Warren *v.* Chapman, 105 Mass. 87.

meal, the illegality of the consideration for one part will not prevent the other legal part of the contract from being enforced. (*k*)][4]

In Scott *v.* Gillmore, (*l*) 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, (*m*) where the action was brought on a promissory 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.

Scott *v.* Gillmore.

Crookshank *v.* Rose.

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 covenants so far as reasonable, and reject only the excess. (*n*) [5]

§ 790. The sale of a thing in itself an innocent and proper article 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. [6]

Sale of thing innocent in itself, when vendor knows it is intended for illegal purpose.

(*k*) Odessa Tramways Co. *v.* Mendel, 8 Ch. D. 235, C. A.

4. **A Severable Contract May be Illegal in Part and Valid in Part.**—Walker *v.* Lowell, 28 N. H. 138, 146; Carleton *v.* Woods, 28 N. H. 291; Drew *v.* Blake, 38 Me. 528; Boyd *v.* Eaton, 44 Me. 51; Frazies *v.* Thompson, 2 Watts & S. 235; Duckman *v.* Hagerty, 6 Watts 65; Yundt *v.* Roberts, 5 S. & R. 139; Erie Railway *v.* Union Locomotive Co., 35 N. J. L. 240; Ohio, ex rel. Laskey, *v.* Board of Education, 35 Ohio St. 519, 527.

(*l*) 3 Taunt. 226.

(*m*) 5 C. & P. 19.

(*n*) See the cases of Mallan *v.* May, Green *v.* Price, and others cited *post*, "Restraint of Trade," § 814.

5. But see Saratoga Co. Bank *v.* King, 44 N. Y. 87, where the cases cited in note (*n*) were not followed, though cited by counsel. See *post* note 22.

6. **Sale for an Unlawful Use.**—The modern English doctrine, as stated in the text, has been adopted by some of the American courts; and where the unlawful use intended amounts to a felony, by all. Hooker *v.* De Palos, 28 Ohio St. 251; Suit *v.* Woodhall, 113 Mass. 391; Riley *v.* Jordan, 122 Mass. 231; Wilson *v.* Stratton, 47 Me. 120, 126; Tolman *v.* Johnson, 43 Iowa 127; Hanauer *v.* Doane,

Faikney v. Reynous.

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.

12 Wall. 342. But the following is the doctrine generally received.

Mere Knowledge of the Seller that the Buyer Intends an Unlawful Use of the Goods will not Avoid the Contract.—This is the American doctrine sustained by the clear weight of authority, and is founded on the decision of Hodgson *v.* Temple, stated *post* § 791. Armstrong *v.* Toler, 11 Wheat. 258; Wallace *v.* Lark, 12 S. C. 576; Hill *v.* Spear, 50 N. H. 253; Tracy *v.* Talmage, 14 N. Y. 162; Webber *v.* Donnelly, 33 Mich. 469, 472; Bickel *v.* Sheets, 24 Ind. 1; Steele *v.* Curle, 4 Dana 381; Cheney *v.* Duke, 10 Gill & J. 11; Harris *v.* Runnels, 12 How. 79; Michael *v.* Bacon, 49 Mo. 474; Gaylord *v.* Soragen, 32 Vt. 110; Armfield *v.* Tate, 7 Ired. L. 258; Hedges *v.* Wallace, 2 Bush 442; Bishop *v.* Honey, 34 Tex. 245; McKinney *v.* Andrews, 41 Tex. 363. But a purchase made with intent to use the property to commit a felony or a crime involving great moral turpitude, if known to the seller, will prevent a recovery of the price. Brickell *v.* Sheets, 24 Ind. 1, 6; Steele *v.* Curle, 4 Dana 381.

Sales in Aid of Treason.—Such sales cannot be enforced. So where an agent of the confederate government gave notes for supplies, the seller, knowing for what purpose the supplies were to be used, it was held that the seller could not recover. The ground upon which the judgment was placed was that the sale was in aid of treason. Hanauer *v.* Doane, 12 Wall. 342; Texas *v.* White, 7 Wall. 700; Thomas *v.* City of Richmond, 12 Wall. 349; Hanauer *v.* Woodruff, 15 Wall. 439; Carlisle *v.* United States, 16 Wall. 147, 150; Sprott *v.* United States, 20 Wall. 459, 463; Whitfield *v.* United States 92 U. S. 165, 170; Dewing *v.* Perdicaries, 96 U. S. 193, 195; Tatum *v.* Kelly, 25 Ark. 209; Milner *v.* Patton, 49 Ala. 423, 426; Roquemore *v.* Alloway, 33 Tex. 461; Lewis *v.* Latham, 74 N. C. 283.

Sales for an Unlawful Use in Another State.—A sale made and completed in one state and valid there, will sustain a recovery in another state where such sale is invalid, though the seller knew that the buyer intended to violate the laws of the latter state. This question has often arisen where liquor has been sold to be sent into a state having a prohibitory liquor statute, and the law was held, as above stated, in Green *v.* Collins, 3 Cliff. 494, 500, after a thorough review of the authorities. To the same effect see Hill *v.* Spear, 50 N. H. 253; Sortwell *v.* Hughes, 1 Curt. 244; Orcutt *v.* Nelson, 1 Gray 536; Lindsey *v.* Stone, 123 Mass. 332; Jameson *v.* Gregory, 4 Metc. (Ky.) 363. (This is a lottery case. See, on the other hand, Watson *v.* Murray, 23 N. J. Eq. 257.) See, *contra*, Wilson *v.* Stratton, 47 Me. 120, 126. In Maine, by special statute, no recovery can be had for liquor sold in any state, though the seller did not know it was to be used in Maine. Mersevey *v.* Gray, 55 Me. 540. And a sale against good morals or public policy will not be enforced, though valid where made. Watson *v.* Murray, 23 N. J. Eq. 257; Frazier *v.* Fredericks, 24 N. J. L. 162.

A Seller who Assists in the Violation of Law cannot Recover.—Where the seller goes beyond the act of selling and assists the buyer in his design to violate the law, the contract will be void. Foster *v.* Thurston, 11 Cush. 322; Aiken *v.* Blaisdell, 41 Vt. 655, 668; Gaylord *v.* Soragen, 32 Vt. 110; Banchor *v.* Mansel, 47 Me. 58; Skiff *v.* Johnson, 57 N. H. 475; Arnot *v.* Pittston, &c., Coal Co., 68 N. Y. 558.

(*o*) 4 Burr. 2070.

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.*"

This case was followed, in 1789, by the judges in Petrie *v.* Hannay, (*p*) 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*. Petrie *v.* Hannay.

These two cases were repeatedly questioned and disapproved, as will be seen by reference to Booth *v.* Hodgson, (*p*) Aubert *v.* Maze, (*q*) Mitchell *v.* Cockburn, (*r*) Webb *v.* Brooke, (*s*) and Langton *v.* Hughes; (*t*) and in these, as well as in many subsequent cases, the distinction drawn between a thing *malum in se* and *malum prohibitum* was overruled. *Malum in se* *Malum prohibitum.*

§ 791. In 1803, the case of Bowry *v.* Bennet (*u*) was tried before Lord Ellenborough. A prostitute was sued for the value of 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.*" Bowry *v.* Bennet.

In 1813, Hodgson *v.* Temple (*x*) 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 further 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* Hodgson *v.* Temple.

(*p*) 3 T. R. 418.
(*p*) 6 T. R. 405.
(*q*) 2 Bos. & P. 371.
(*r*) 2 H. Bl. 379.
(*s*) 3 Taunt. 6.
(*t*) 1 M. & S. 594.
(*u*) 1 Camp. 348. See, also, Lloyd *v.* Johnson, 1 B. & P. 340; and Crisp *v.* Churchill, there cited in argument; Girardy *v.* Richardson, 1 Esp. 13; Jennings *v.* Throgmorton, Ry. & Moo. 251; Appleton *v.* Campbell, 2 C. & P. 347; and Smith *v.* White, 1 Eq. 626; 35 L. J., Ch. 454.
(*x*) 5 Taunt. 181.

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.*" 7

Langton *v.* Hughes.

§ 792. This decision was given in November, 1813, and is the more remarkable because the case of Langton *v.* Hughes (*y*) 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." (*z*)

Cannan *v.* Bryce.

§ 793. The leading case of Cannan *v.* Bryce (*a*) 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*

7. This has been widely followed in America, and is a correct statement of the law as held in most of the states, with this modification, that the unlawful use be not a felony or crime involving great moral turpitude. See *ante* note 6.

(*y*) 1 M. & S. 593.

(*z*) Per Le Blanc, J., and see the strong observations of Eyre, C. J., in Lightfoot *v.* Tennant, 1 B. & P. 551.

(*a*) 3 B. & Ald. 179.

object to which they were to be applied, and *for the express purpose of accomplishing that object.* 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. [8]

In McKinnell *v.* Robinson, (*b*) in the Exchequer, in 1838, it was held, that 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. McKinnell *v.* Robinson.

§ 794. The latest case, that of Pearce *v.* Brooks, (*c*) 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. Pearce *v.* Brooks.

§ 795. [In a recent case the Supreme Court of the United States held, that a purchaser of cotton from the government of the Confederate States, who knew that the purchase money went to sustain the rebellion, was not entitled to the proceeds of the cotton which had been captured and sold by the government of the United States under the captured and abandoned property act, 1863. The question involved, however, seems rather to be one of ownership than of contract. See the dissenting judgment of Field, J. (*d*)] [9] Case in America.

8. See *ante* note 6.

(*b*) 3 M. & W. 435.

(*c*) L. R., 1 Ex. 212. See, also, Taylor *v.* Chester, L. R., 4 Q. B. 309, and Bagott *v.* Arnott, Ir. R., 2 C. L. 1.

(*d*) Sprott *v.* United States, 20 Wall. 459. See, also, Hanauer *v.* Doane, 12 Wall. 342; Hanauer *v.* Woodruff, 15 Wall. 439.

9. See *ante* note 6.

Sale to an alien enemy.

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. (*e*) [10]

Smuggling contracts.

Biggs *v.* Lawrence.

Sale completed abroad.

Holman *v.* Johnson.

§ 796. 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. (*f*) This case was followed in Clugas *v.* Penaluna. (*g*) 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; was not immoral nor 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. (*h*)

Waymell *v.* Reed.

Sale abroad where vendor assists the smuggler.

In Waymell *v.* Reed, (*i*) 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.

Pellecat *v.* Angell.

Distinction in sales made in foreign countries, when vendor does or does not aid the smuggler.

In Pellecat *v.* Angell, (*k*) 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. (*l*) [11]

(*e*) Brandon *v.* Nesbitt, 6 T. R. 23.

10. **Dealings with the Public Enemy.**—Such dealings are void. Clements *v.* Yturria, 14 Hun 151; Bank of New Orleans *v.* Matthews, 49 N. Y. 12; United States *v.* Lapene, 17 Wall. 601; Whitfield *v.* United States, 92 U. S. 165; Railey *v.* Gay, 20 La. Ann. 158.

(*f*) Biggs *v.* Lawrence, 3 T. R. 454.

(*g*) 4 T. R. 466.

(*h*) Holman *v.* Johnson, 1 Cowp. 341.

(*i*) T. R. 599.

(*k*) 2 C., M. & R. 311.

(*l*) See Westlake Private International Law (1880), § 203.

11. **Violation of Revenue Laws.**—Where an alien and a native citizen engaged in frauds on the revenue, held that

§ 797. At common law, also, certain contracts are prohibited as being against public policy. Most of these are not properly within the scope of this treatise, such as contracts in restraint of marriage; marriage brokage contracts; contracts compounding felonies, &c. Confining our attention to sales illegal at common law, because contravening or 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, (*m*) and by Lord Campbell in Hilton *v.* Eckersley, (*n*) 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 further 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, 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."

Contracts against public policy.

§ 798. In Hilton *v.* Eckersley, (*o*) 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

the alien could not call the native to account for the profits. Cambioso *v.* Moffitt, 2 Wash. C. C. 98. See New Brunswick Oil Works Co. *v.* Parsons, 20 U. C. Q. B. 531, 535. No action will lie for the price of smuggled goods. Condon *v.* Walker 1 Yeates 483.

(*m*) 2 Bing. 342.

(*n*) 24 L. J., Q. B. 353; 6 E. & B. 47.

(*o*) 24 L. J., Q. B. 353; 6 E. & B. 47.

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."

[There is now a strong tendency towards controlling the exercise of judicial discretion in laying down fresh principles of public policy, and towards limiting the application of the doctrine to certain well-known classes of contracts, and to such contracts as may from time to time be held by analogy to fall within those classes. In a recent case Jessel, M. R., said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." (*p*)] [12]

Forestalling, regrating and engrossing.

§ 799. An illustration of the justice of these remarks is to be 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. (*p*) In The King *v.* Waddington, (*q*) the defendant was sentenced to a fine of £500 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 mar-

(*p*) The Printing and Numerical Co. *v.* Sampson, 19 Eq., at p. 465, adopted by Ery, J., in Rousillon *v.* Rousillon, 14 Ch. D., at p. 365.

12. See Hill *v.* Spear, 50 N. H. 253.

(*p*) 4 Black. Com. 158; and Mr. Chitty's note, (ed. 1844.)

(*q*) 1 East 143.

ket 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 could 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."

§ 800. The common law rules on the subject of these offences were abolished by the statute 7 and 8 Vict., c. 24, and although no legislation on the subject has taken place in America, Mr. Story says: (*r*) "These three prohibited acts are not only practiced 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."

Common law rules abolished, 7 and 8 Vict., c. 24.

Law in America.

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 law-suits, or interests in litigation.

§ 801. 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

Contracts for sale of offices.

(*r*) Story on Sales, § 490.

sales were held to be subversive of public policy, as opposed to the interests of the people and to the proper administration of government.[13] *Nulla alia re magis Romana respublica interiit, quam quod magistratus 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, (*s*) 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 revenue, may sit in parliament,

Garforth *v.* Fearon.

13. **Sales of Offices or Official Influence.**—This subject is fully discussed in the United States Supreme Court in the late case of Oscanyan *v.* Arms Co., 103 U. S. 261, 273. The plaintiff was consul-general for Turkey at the New York port. His government sent an officer to New York to examine and buy arms. Oscanyan agreed with the defendants to recommend their rifles, and defendants agreed to pay him a commission on all sales made through his influence. Such sales having been made, he sued the arms company for his commission. Field, J., said: "Independently of the official relation of plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government was not the subject of bargain and sale. Personal influence over an officer of government in the procurement of contracts is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. This is true where the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring where he is also its officer." Cites Tool Co. *v.* Norris, 2 Wall. 45; Coppell *v.* Hall, 7 Wall. 542; Marshall *v.* Balt. & O. R. R. Co., 16 How. 314; Trist *v.* Child, 21 Wall. 441; Meguire *v.* Corwine, 101 U. S. 108. As to the suggestion that the contract was known to the Turkish government, the court said: "Contracts are not enforceable in our courts if they contravene our laws, our morality, our polity. Had the contract been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement." See further as to sales of offices or influence, Filson *v.* Himes, 5 Penna. 452; Ferris *v.* Adams, 23 Vt. 136; Bowers *v.* Bowers, 26 Penna. 74; Hunter *v.* Nolf, 71 Penna. 282; Ashburner *v.* Parrish, 81 Penna. 52; Everhart *v.* Searle, 71 Penna. 256; Hatzfield *v.* Gulden, 7 Watts 152; Eddy *v.* Capron, 4 R. I. 394; Martin *v.* Wade, 37 Cal. 168; Gray *v.* Hook, 4 N. Y. 449; Carlton *v.* Witcher, 5 N. H. 196; Meredith *v.* Ladd, 2 N. H. 517; Guernsey *v.* Cook, 120 Mass. 501.

(*s*) 1 Hy. Bl. 237.

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 the 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?"

§ 802. In Parsons *v.* Thompson, (*t*) 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.

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. (*u*) And in Law *v.* Law, (*x*) a bond was held illegal by which a party covenanted to pay £10 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.

§ 803. In Blachford *v.* Preston, (*y*) 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." Blachford *v.* Preston.

In Card *v.* Hope, (*z*) the court went further, and not only affirmed the doctrine of Blachford *v.* Preston, but expressed a strong opinion that the majority of the owners of any Card *v.* Hope

(*t*) 1 Hy. Bl. 322. See, also, Waldo *v.* Martin, 4 B. & C. 319, case of a contract relative to an appointment in the Petty Bag Office.

(*u*) Harrington *v.* Du Chastel, 1 Bro. C. C. 124; Methwold *v.* Walbank, 2 Ves., Sr., 238.

(*x*) 3 P. Wms. 391.

(*y*) 8 T. R. 89.

(*z*) 2 B. & C. 661.

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 detur digniori.*

Harrington v. Du Chastel.

In Harrington *v.* Du Chastel, (*a*) Lord Thurlow held illegal a bargain by which an officer in the King's household recommended a person to another office in the household in consideration of an annuity to be paid to a third person.

Corporation of Liverpool v. Wright.

§ 804. In The Corporation of Liverpool *v.* Wright, (*b*) 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 appointor or to anybody else.

Mayor of Dublin v. Hayes.

[In The Mayor of Dublin *v.* Hayes, (*c*) the Court of Common Pleas in Ireland, following the decision in The Corporation of Liverpool *v.* Wright, has lately held an agreement to be illegal where the defendant, upon his appointment to an office in the gift of the corporation, agreed to accept a fixed salary, the amount of which was very much below the value of the fees attached to the office, and to account for and pay over all the fees to the city treasurer.]

Palmer v. Bate.

In Palmer *v.* Bate, (*d*) 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

(*a*) 1 Bro. C. C. 124.
(*b*) 28 L. J., Ch. 868; S. C., Johnson 359.
(*c*) 10 Ir. R. C. L. 226.
(*d*) 2 Br. & B. 670.

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.

§ 805. The pay or half-pay of a military officer is not a legal subject of sale. (*e*) Nor a pension or annuity to a civil officer, unless exclusively for past services, as was held in Wells *v.* Foster, (*f*) 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."

Sale of pension illegal, unless exclusively for past services.

Wells *v.* Foster.

§ 806. 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. 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. [14]

Restraint of trade.

When vendor is restrained *generally*, sale is void.

(*e*) Flarty *v.* Odlum, 3 T. R. 681; Lidderdale *v.* Montrose, 4 T. R. 248; Barwick *v.* Reade, 1 Hy. Bl. 627.

(*f*) 8 M. & W. 149.

14. **Sales in General Restraint of the Exercise of a Trade by the Seller, not Void.**—Saratoga Bank *v.* King, 44 N. Y. 87; Alger *v.* Thacher, 19 Pick. 51; Lange *v.* Werk, 2 Ohio St. 519; Callahan *v.* Donnelly, 45 Cal. 152; Keeler *v.* Taylor, 53 Penna. 467; Gillis *v.* Hall, 7 Phil. 422, 424; Long *v.* Towl, 42 Mo. 545, 549. Where the exercise of the trade is restrained over a limited territory only, the agreement is valid if the restraint is reasonable in purpose and extent. See note 15, *post*. But in Taylor *v.* Blanchard, 13 Allen 370, a restraint upon the seller of a stock and business forbidding the exercise of the trade in the state, was held too extensive because calculated to drive skilled laborers out of the state. Restrictions in restraint of trade at any point in the state were held void also, in Wright *v.* Ryder, 36 Cal. 342, 359, and in More *v.* Bonnett, 40 Cal. 251. See, also, Lawrence *v.* Kidder, 10 Barb. 641. But see Oregon, &c, Co. *v.* Winsor, 20 Wall. 64, stated *post* note 15.

A Secret Combination to Stifle Competition is Illegal.—Thus in Central Ohio Salt Co. *v.* Gathier, 35 Ohio St. 666, an agreement that all salt manufactured by members of an association, should

Mitchel v. Reynolds.

The leading case on this subject is Mitchel *v.* Reynolds, (*g*) in the Queen's Bench, 1711, and republished in Smith's Leading Cases. (*h*) The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messuage and bake-house 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. The defendant pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus*, the said bond was 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 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 (*i*) 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. (*k*)

Homer v. Ashford.

Restraint as to particular place.

§ 807. In Homer *v.* Ashford, (*l*) 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." 15

as soon as manufactured become the property of the association, which should regulate prices, was held void and in restraint of trade, and an action by the company to obtain possession of salt under the agreement, failed. A like result was reached as to a coal combination in Morris Run Coal Co. *v.* Barclay Coal Co., 68 Penna. 173, and in Arnot *v.* Pittston, &c., Coal Co., 68 N. Y. 558, and as to a grain combination by buyers to keep down prices, in Craft *v.* McConoughy, 79 Ill. 346.

(*g*) 1 P. Wms. 181.

(*h*) Vol. I., (8th ed.,) p. 417.

(*i*) Overruled as to adequacy of consideration, *post* § 811.

(*k*) Master of Gunmakers *v.* Fell, Willes 388; 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.

(*l*) 3 Bing. 328.

15. **Restraint as to Particular Place.** —Such restraint, if for good reason and

within a reasonable extent of territory, is valid. The question is discussed in Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64. Bradley, J., said: "It is a well-settled rule that an agreement in general restraint of trade is void, but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. * * * It is often difficult to decide whether a contract not to exercise a trade in a particular state is, or is not, within the rule. It has generally been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state to pursue his avocation. But this mode of applying the rule must be received with caution. This country is substantially one country, especially in all matters of trade and business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state." In the case before the court an agreement on sale of a steamer that it should not be used in California waters was held valid. In Grassell *v.* Lowden, 11 Ohio St. 349, suit was brought against the proprietor of a laboratory for a nuisance. In settlement thereof he agreed to discontinue operations within five years, or pay $3000 damages. This agreement was held valid, and a judgment for the sum specified was sustained. The most common illustrations of this principle arise on sale of a business, where the seller agrees not to compete within certain limits. Such conditions are sustained if reasonable in extent. Gompers *v.* Rochester, 56 Penna. 194; McClurg's Appeal, 58 Penna. 51; Harkinson's Appeal, 78 Penna. 196; Palmer *v.* Graham, 1 Pars. 476; Dunlop *v.* Gregory, 10 N. Y. 241; Curtis *v.* Gokey, 68 N. Y. 300; Gilman *v.* Dwight, 13 Gray 356; Boutelle *v.* Smith, 116 Mass. 111; Ropes *v.* Upton, 125 Mass. 258; Hoyt *v.* Holly, 39 Conn. 326; Cook *v.* Johnson, 47 Conn. 175; Whitney *v.* Slayton, 40 Me. 224; Palmer *v.* Jones, 56 Ga. 504; California Nav. Co. *v.* Wright, 6 Cal. 258; S. C., 8 Cal. 585; Hedge *v.* Lowe, 47 Iowa 137, 140; Smalley *v.* Greene, 52 Iowa 241; Gueraud *v.* Dandelet, 32 Md. 561, 569; Warfield *v.* Booth, 33 Md. 63, 70; Self *v.* Cordell, 45 Mo. 345; Perkins *v.* Clay, 54 N. H. 518; Linn *v.* Sigsbee, 67 Ill. 75, 80; Hoagland *v.* Segur, 38 N. J. L. 230; Richardson *v.* Peacock, 33 N. J. Eq. 597. See, also, Mitchel *v.* Reynolds, 1 Smith's Leading Cases 724, [524], where the older cases will be found collected. In Hubbard *v.* Miller, 27 Mich. 15, 21, the contract on sale of the business of sinking drive-wells and selling materials therefor at Grand Haven, contained a provision that the sellers would not "keep well-drivers' tools or engage in the business of well-driving." Although silent as to the limits of the restriction, the court construed it to apply only to Grand Haven and enforced it by injunction. In Lange *v.* Werk, 2 Ohio St. 520, a contract not to manufacture stearine in Hamilton county, Ohio, or anywhere else in the United States, was held good, and was enforced as to Hamilton county, but was of course held bad as to the rest of the United States.

Sale of Good Will.—In Morgan *v.* Perhamus, 36 Ohio St. 517, a milliner sold her stock and good will in the town of F., and agreed not to carry on the trade at any time in the future in the same town or within such distance from it as would interfere with the buyer's business. A violation of this agreement was enjoined. In Dethlefs *v.* Tamsen, 7 Daly 354, the seller of a store and good will of the business carried on there, agreed to do nothing to "injure the sale." This was held to forbid him from setting up a rival establishment close by.

Does Mere Sale of Good Will Restrain Trade.—Whether on a sale of the

Examples.

In accordance with these principles, covenants have been held legal not to carry on business as a surgeon for fourteen years within ten miles of a particular place; (*m*) not to practice as attorney within London and 150 miles from thence; (*n*) not to practice as attorneys or solicitors *in Great Britain* for twenty years, without the consent of the vendee to whom the business was sold; (*o*) not to carry on trade as a horsehair manufacturer within 200 miles of Birmingham; (*p*) not to carry on trade as a milk-man for twenty-four months within five miles from Northampton Square; (*q*) not to supply bread to the customers of a baker's shop, of which the lease and good-will were sold; (*r*) not to travel for any other commercial firm than that of the employers, within the district for which the traveler was employed; (*s*) not to run a coach within certain specified hours upon a particular road. (*t*)

[The cases in which the restriction has been held reasonable and unreasonable respectively will be found chronologically arranged.

1. Down to 1854, in a tabular statement annexed to the report of Avery *v.* Langford, Kay 667, 668.
2. From 1854 up to date, in Pollock on Contracts (3d ed.,) page 333.]

good will of a business, there is any implied covenant that the seller shall not compete with the buyer, depends on the nature of the business. If a store is sold with the good will of the business carried on there, this does not restrain the seller from opening another store in the same town to carry on the same trade, the good will sold being of the *store* and not of the whole town. Hall's Appeal, 60 Penna. 458, (sale of an undertaker's establishment); Rupp *v.* Over, 3 Brewst. 133, (sale of a newspaper and good will); White *v.* Jones, 1 Abb. (N. Y.) Prac. (N. S.) 328; Bassett *v.* Percival, 5 Allen 345, (sale of a grocery store); Porter *v.* Gorman, 65 Ga. 11, (good will of a newspaper); Grimm *v.* Warner, 45 Iowa 106. But a sale by a physician of his practice and good will implies that the vendor will not do anything to disturb or injure the buyer in the enjoyment of what he has purchased, and therefore he will be restrained from starting a rival practice. Dwight *v.* Hamilton, 113 Mass. 175. See, also, Angier *v.* Webber, 14 Allen 211. And in Hall's Appeal, 60 Penna. 458, although it was held that a sale of his business and good will by an undertaker did not prevent him from starting a rival business, yet he was enjoined from holding himself out as continuing his former business. In Warren *v.* Jones, 51 Me. 146, it was held that a sale by a soap-maker of his stock and business, and "also all his trade and customers," implied a covenant not to compete with the buyer, for the breach of which damages were held recoverable.

(*m*) Davis *v.* Mason, 5 T. R. 118.

(*n*) Bunn *v.* Guy, 4 East 190.

(*o*) Whittaker *v.* Howe, 3 Beav. 383; this was on the ground of limitation of time (*sed quære?*), *post* § 810.

(*p*) Harms *v.* Parsons, 32 L. J., Ch. 247.

(*q*) Procter *v.* Sargent, 2 M. & G. 20.

(*r*) Rannie *v.* Irvine, 7 M. & G. 969.

(*s*) Mumford *v.* Gething, 7 C. B. (N. S.) 305, and 29 L. J., C. P. 105.

(*t*) Leighton *v.* Wales, 3 M. & W. 545.

§ 808. 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, (*u*) in the absence of any expressions indicating the intention of the parties to adopt a different mode of measurement. (*v*) [16]

Mode of measuring the space

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. (*x*) 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, (*y*) 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 possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void." [17]

Where restraint general as to *place*, sale void.

Examples.

Hitchcock *v.* Coker.

In Hinde *v.* Gray, (*z*) 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 latter 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.

§ 809. [In The Leather Cloth Company *v.* Lorsont, (*a*) decided in 1869, James, L. J. (then V. C.), came to the conclusion that there was no rule laid down by the authorities as to the invalidity of a restraint which is unlimited in point of space, and expressed the opinion that the sole test in all cases was the reasonableness of the restraint, having regard to the subject matter of the contract; the criterion of reasonableness being that amount of restraint which is necessary for the due protection of the covenantee. The case, it is to be observed, related to the disclosure or

Existence of any rule now doubtful.

Leather Cloth Co. *v.* Lorsont.

(*u*) Mouflet *v.* Cole, L. R., 7 Ex. 70; 8 Ex. 32, in Ex. Ch.

(*v*) Atkyns *v.* Kinnier, 4 Ex. 776; Leigh *v.* Hind, 9 B. & C. 774.

16. See Cook *v.* Johnson, 47 Conn. 175, where it was held that an agreement by a dentist not to practice within ten miles from a village, means ten miles from the centre of it.

(*x*) Ward *v.* Byrne, 5 M. & W. 548.

(*y*) 6 Ad. & E. 456.

17. See *ante* note 14.

(*z*) 1 M. & G. 195.

(*a*) 9 Eq. 345.

non-disclosure of a trade secret, as to which it is well settled that a restraint, though general as to space, may be enforced. (*b*) Accordingly, in Allsopp *v.* Wheatcroft, (*c*) decided in 1872, Wickens, V. C., held that The Leather Cloth Company *v.* Lorsont was no authority for departing "from the recognized rules as to the limitations of space." But in the last case on this subject, Rousillon *v.* Rousillon, (*d*) decided in 1880, Fry, J., upon a review of the authorities, adopted the opinion of James, L. J., in preference to the decision of Wickens, V. C., and held that the alleged rule had no existence. The learned judge explained the decisions in Ward *v.* Byrne and Hinde *v.* Gray, referred to in the text, where a general restraint had been spoken of as void, and relating only to cases where, from the circumstances and subject matter of the contract, the restraint was in fact unreasonable. In this state of the authorities, and pending a decision of an appellate court, it would perhaps, be as yet premature to affirm that the rule, assuming it to have once existed, is now abrogated.] [18]

Allsopp *v.* Wheatcroft.

Rousillon *v.* Rousillon.

§ 810. The restraint may be general or limited as to *time*, as well as *space*. In Ward *v.* Byrne, (*e*) 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.

Restraint as to time.

Ward *v.* Byrne.

In Hitchcock *v.* Coker, (*f*) 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

Hitchcock *v.* Coker.

(*b*) Bryson *v.* Whitehead, 1 Sim. & St. 74.
(*c*) 15 Eq. 59.
(*d*) 14 Ch. D. 351.
18. See Morse Twist Drill Co. *v.* Morse, 103 Mass. 73.
(*e*) 5 M. & W. 548.
(*f*) 6 Ad. & E. 438. See, also, Pemberton *v.* Vaughn, 10 Q. B. 87.

otherwise reasonable—and the judges considered this point as settled law, in Mumford *v.* Gething, (*g*) 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." Mumford *v.* Gething.

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. The decision of Lord Langdale, M. R., therefore, in Whittaker *v.* Howe (*h*) (*ante* § 807,) has been practically overruled in the later cases. (*i*) [19] Restraint as to time unimportant.

§ 811. It has already been seen that in the leading case of Mitchel *v.* Reynolds, (*k*) 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." Courts will not inquire into *adequacy* of consideration. Mitchel *v.* Reynolds overruled on this point.

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, (*l*) 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. Young *v.* Timmins.

In Wallis *v.* Day, (*m*) a contract was held valid as being for 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. Wallis *v.* Day.

(*g*) 29 L. J., C. P. 104, and 7 C. B. (N. S.) 305. See Jones *v.* Lees, 26 L. J., Ex. 9; Catt *v.* Tourle, 4 Ch. 654, per Selwyn, L. J., at p. 659.

(*h*) 3 Beav. 383.

(*i*) See remarks of Patteson, J., in Nicholls *v.* Shelton, 10 Q. B., at p. 353.

19. Cook *v.* Johnson, 47 Conn. 175; Goodman *v.* Henderson, 58 Ga. 567; Guerand *v.* Dandelet, 32 Md. 561; Bowser *v.* Bliss, 7 Blackf. 344.

(*k*) 1 P. Wms. 181.

(*l*) 1 Cr. & J. 331. "If Young *v.* Timmins turned on the question of consideration, it must be treated as overruled by Hitchcock *v.* Coker," per Jessel, M. R., in Gravely *v.* Barnard, 18 Eq., at p. 521.

(*m*) 2 M. & W. 273.

§ 812. But in Pilkington *v.* Scott, (*n*) 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, *and the adequacy of the 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, (*o*) 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."

Pilkington *v.* Scott.

§ 813. 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."

Hitchcock *v.* Coker.

(*n*) 15 M. & W. 657. (*o*) 6 Ad. & E. 438

This decision was held in Archer *v.* Marsh, (*q*) to have settled the law on the principle that the parties must act on their own views as to the adequacy of the compensation.

Archer *v.* Marsh.

[It is therefore sufficient for the plaintiff to show that he gave any consideration, however small, and in the case of a bond, the consideration, if not actually expressed, may be inferred from the terms of the instrument.] (*r*) [20]

§ 814. 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. [21]

Even if restraint be partial and for good consideration, sale not valid if contract is unreasonable.

The whole doctrine on the subject, and the authorities, were reviewed in Mallan *v.* May, (*s*) 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 practicing, &c., &c.

Mallan *v.* May.

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 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,

(*q*) 6 Ad. & E. 966. See, also, Sainter *v.* Ferguson, 7 C. B. 716, and Hartly *v.* Cummings, 5 C. B. 247.

(*r*) Gravely *v.* Barnard, 18 Eq. 518; Middleton *v.* Brown, 47 L. J., Ch. 411, C. A.; 38 L. T. (N. S.) 334.

20. Duffy *v.* Shokey, 11 Ind. 70; Linn *v.* Sigsbee, 67 Ill. 75, 80; McClurg's Appeal, 58 Penna. 51.

21. Ross *v.* Sadgbeer, 21 Wend. 166; Chappell *v.* Brockway, 21 Wend. 157; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133; Oregon, &c., Co. *v.* Winsor, 20 Wall. 64.

(*s*) 13 M. & W. 511, and 11 M. & W. 653.

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."

§ 815. 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, (*t*) that "*whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void.*" 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: 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 practicing in London (*u*) was *valid, and was not affected by the illegality of the other part.* (*u*) 22

Restraint larger than necessary for protection of vendee renders contract void as to excess.

This decision was followed in Green *v.* Price, (*x*) where an agreement not to carry on business 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 the Exchequer Chamber. (*y*)

Green *v.* Price.

(*t*) 7 Bing. 743.

(*u*) The court held that "London" meant the city of London, and did not include Great Russell street, Middlesex: 13 M. & W. 517.

22. **Restraint May be Illegal in Part and Valid in Part.**—The cases of Mallan *v.* May and Green *v.* Price, stated in the text, were approved and followed in Oregon Steam Navigation Co. *v.* Winsor, 20 Wall. 64, 71. In that case a restraint of competition for ten years was held unreasonable under the peculiar circumstances of the case, but the court declared it good for seven years and enforced it by injunction. See, also, Hubbard *v.* Miller, 27 Mich. 15; Dean *v.* Emerson, 102 Mass. 480, 485; Erie Railway Co. *v.* Union, &c., Co., 35 N. J. L. 240; Peltz *v.* Eichele, 62 Mo. 171; Lange *v.* Work, 2 Ohio St. 520. But see More *v.* Bonnett, 40 Cal. 251, where the restraint was upon the exercise of a trade in San Francisco or in California. This was held void because excessive, and not valid as to San Francisco, because not severable. See, to like effect, Saratoga Bank *v.* King, 44 N. Y. 87, where the court would not follow Mallan *v.* May and Green *v.* Price, though cited by counsel.

(*x*) 13 M. & W. 699.

(*y*) 16 M. & W. 346. See, also,

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. (*z*)

Contract valid if good when made.

[Where the subject matter of the contract is *a trade secret*, a restraint unlimited in regard to space is not unreasonable. (*a*)] [23]

Trade secret.

§ 816. Contracts for the sale of lawsuits or interests in litigation are, in certain cases, also void at common law, as being against public policy. [24]

Sales of lawsuits.

Champerty (*campi partitio*) 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 recov-

Champerty and maintenance.

Nicholls *v.* Stretton, 10 Q. B. 346, and Tallis *v.* Tallis, 1 E. & B. 391; 22 L. J., Q. B. 185. But see Allsopp *v.* Wheatcroft, 15 Eq. 59, disapproved by Fry, J., in Rousillon *v.* Rousillon, 14 Ch. D. 351. The two cases appear to be in direct conflict: see, also, Collins *v.* Locke, 4 App. Cas. 674, 686.

(*z*) Elves *v.* Crofts, 10 C. B. 241; Jones *v.* Lees, 1 H. & N. 189.

(*a*) Leather Cloth Co. *v.* Lorsont, 9 Eq. 345; Hagg *v.* Darley, 47 L. J., Ch. 567.

23. Peabody *v.* Norfolk, 98 Mass. 252; Jarvis *v.* Peek, 10 Paige 118.

24. **Champerty and Maintenance.**— In Schomp *v.* Schenck, 40 N. J. L. 195, 202, an attorney contracted to contest a will on terms that he should receive five per cent. of the estate if successful. The suit succeeding, an action for the five per cent. was sustained, the court holding that the statutes as to champerty and maintenance were framed when the influence of rank and power was felt in the courts of justice and were intended to protect the weak; and that those statutes did not apply to the polity of New Jersey. To the same effect see Lytle *v.* The State, 17 Ark. 608, 620; Richardson *v.* Rowland, 40 Conn. 565; Mathewson *v.* Fitch, 22 Cal. 86; Peck *v.* Briggs, 3 Denio 107; Sedgwick *v.* Stanton, 14 N. Y. 289, 295; Schaferman *v.* O'Brien, 28 Md. 565. In many of the states, however, champerty is recognized as an offence against the law, and therefore avoids any contract. Martin *v.* Clark, 8 R. I. 402. In Thompson *v.* Reynolds, 73 Ill. 11, it was agreed that an attorney should prosecute a suit, pay all necessary expenses, and receive half of what he should realize. This was held to be champertous and void, in Illinois, and the same result was reached in Massachusetts in the recent case of Ackert *v.* Barker, 131 Mass. 436. So, also, in Missouri in Duke *v.* Harper, 66 Mo. 51, after a full discussion of the authorities. Henry, J., said: "The race of intermeddlers and busybodies is not extinct. It was never confined to Great Britain. A law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary even in Missouri." In that case, however, the contract was held not champertous, "because while the attorneys agreed to receive a compensation for their services, as such, a portion of the property in controversy, they did not bind themselves to pay any portion of the expenses of litigation." See Coughlin *v.* N. Y. Central and Hudson River R. R. Co., 71 N. Y. 443; Scobey *v.* Cass,

ery 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, (*b*) "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."

Stanley v. Jones.

In Stanley *v.* Jones, (*c*) 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 formerly. (*d*)

Hutley v. Hutley.

In Hutley *v.* Hutley, (*e*) 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 an interest.

§ 817. Taking a transfer of an interest in litigation as a security is not champertous, and is a valid contract; (*f*) [and a fair

13 Ind. 117; Greenman *v.* Cohee, 61 Ind. 201; Key *v.* Vattier, 1 Ohio 132; Davis *v.* Sharron, 15 B. Mon. 64.

(*b*) Co. Lit. 368 b; 4 Black. Com. 135; Elliott *v.* Richardson, L. R., 5 C. P. 744.

(*c*) 7 Bing. 369; and see Syrpe *v.* Porter, 7 E. & B. 58; 26 L. J., Q. B. 64.

(*d*) See further as to maintenance and champerty, Re Masters, 4 Dow 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 Ex. Ch.; 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; In re Attorneys' and Solicitors' Act, 1 Ch. D. 573; In re The Paris Skating Rink Co., 5 Ch. D. 959, C. A.; Seear *v.* Lawson, 15 Ch. D. 426, C. A., where a sale by a trustee in bankruptcy of the debtor's right of action was upheld. Ball *v.* Warwick, 50 L. J., Q. B. 382; 29 W. R. 468; Planting Co. *v.* Farquharson, 17 Ch. D. 49, C. A.

(*e*) L. R., 8 Q. B. 112.

(*f*) Anderson *v.* Radcliffe, E., B. & E. 806–819; 28 L. J., Q. B. 32; in error, 29 L. J., Q. B. 128.

agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, will not be regarded as being, *per se*, opposed to public policy. "Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property and no means except the property itself, should be assisted in this manner." (*g*)] [25]

Interest in litigation as a security not champertous.

SECTION II.—CONTRACTS ILLEGAL BY STATUTE.

§ 818. 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. (*h*) [26]

Prohibition express or implied.

Implied whenever penalty is imposed.

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

Distinction between statutes passed for revenue purposes and others.

(*g*) Per Committee of Privy Council in Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, 2 App. Cas. 186, 210.

25. McPherson *v.* Cox, 96 U. S. 404, 416; Duke *v.* Harper, 66 Mo. 51.

(*h*) Bensley *v.* Bignold, 5 B. & Ald. 335; Forster *v.* Taylor, 5 B. & Ad. 887; Cope *v.* Rowlands, 2 M. & W. 149; Chambers *v.* Manchester and Milford Railway Co., 5 B. & S. 588; 32 L. J., Q. B. 268; In re Cork and Youghall Railway Co., 4 Ch. 748.

26. **The Imposition of a Penalty is in General Equivalent o a Prohibition.**—Bank of United States *v.* Owens, 2 Pet. 538; Columbia, &c., Co. *v.* Halderman, 7 W. & S. 233; Seidenbender *v.* Charles, 4 S. & R. 159; Holt *v.* Green, 73 Penna. 198; Mitchell *v.* Smith, 1 Binn. 110; Berkholder *v.* Bertem, 65 Penna. 496, 505; Gregory *v.* Wilson, 36 N. J. L. 315, 316; Dillon *v.* Allen, 46 Iowa 299; Caldwell *v.* Bridal, 48 Iowa 15; Durgin *v.* Dyer, 68 Me. 143; Prescott *v.* Battersby, 119 Mass. 285; Sawyer *v.* Smith, 109 Mass. 220; Smith *v.* Arnold, 106 Mass. 269; Libby *v.* Downy, 5 Allen 299; Miller *v.* Post, 1 Allen 434; Woods *v.* Armstrong, 54 Ala. 150.

A Forbidden Contract cannot be Enforced.—"The law will not lend its support to a claim founded on its own violation." Coppell *v.* Hall, 7 Wall. 542, 559; Auding *v.* Levy, 57 Miss. 51; Decell *v.* Lewenthal, 57 Miss. 331; Colten *v.* McKenzie, 57 Miss. 418; James *v.* Josselyn, 65 Me. 138; Block *v.* McMurry, 56 Miss. 217. The parties are left in the position in which they have placed themselves. Gunderson *v.* Richardson, 56 Iowa 56, 58. See *ante* note 1.

revenue purposes, and those which have in contemplation, wholly or in part, the protection of the public, or the promotion of some object of public policy. It is necessary to review the cases, as the principles established by them seem to be imperfectly stated in some of the text-books.

Johnson v. Hudson.

§ 819. The leading case on this point is Johnson *v.* Hudson, (*i*) 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: and 2ndly, 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 segars, *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."

Brown v. Duncan.

§ 820. Next, in 1829, Brown *v.* Duncan (*j*) 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 guaranteed the 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

(*i*) 11 East 180.

(*j*) 10 B. & C. 93. See, also, Wetherell *v.* Jones, 3 B. & Ad. 221.

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 the particular dimensions. Here the clauses of the act of parliament had *not for their object to protect the public, but the revenue only.*" (*k*)

§ 821. In 1836, Cope *v.* Rowlands (*l*) 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, § 4, which provides that if any person should act as a broker in making sales, &c., without such license, he shall forfeit £25 "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 statute 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*

Cope *v* Rowlands.

(*k*) The law relating to the manufacture and sale of spirits is consolidated and amended by 43 and 44 Vict., c. 24, (The Spirits Act, 1880.) As regards the subject of this treatise see especially §§ 100–102; and 126–130 (as to the sale of methylated spirits.)

(*l*) 2 M. & W. 149; and see Fergusson *v.* Norman, 5 Bing. N. C. 76, approving Cope *v.* Rowlands and Barton *v.* Piggott, L. R., 10 Q. B. 86.

it is." The court then decided that the benefit and security of the public formed *one* object of the statute, and that the plaintiff was not entitled to recover.

Smith v. Mawhood.

§ 822. Again, in 1845, the same point was discussed in the same court, in Smith *v.* Mawhood, (*m*) 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. Held, that 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."

This distinction seems to be as sound as it is acute. In Cope *v.* Rowlands, 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.

Cundell v. Dawson.

§ 823. In the Court of Common Pleas, in 1847, all the foregoing cases were cited and considered in Cundell *v.* Dawson. (*n*) At the close of the argument, Wilde, C. J., 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 of April to the 8th of May, when the Chief Justice delivered the opinion of the court. The action was for the price

(*m*) 14 M. & W. 463.

(*n*) 4 Com. B. 37

of coals, and the defence was that the plaintiff had violated the statute 1 and 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 "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, (*o*) that the coal acts (*p*) were intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

§ 824. In 1848, the same court adverted to the same distinction in Ritchie *v.* Smith. (*q*) 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. IV., c. 61, (*r*) inflicted a penalty, when liquor was sold to be drunk on the premises, without such license, of not more than £20 nor less than £5, "for every such offence." Wilde, C. J., said that "it is impossible to look at this agreement without seeing that the parties 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,

Ritchie *v.* Smith.

(*o*) 9 B. & C. 192.

(*p*) The coal act, 1 and 2 Vict., c. 101, does not apply where coals are unloaded directly from the vessel in which they were shipped onto the wharf of the purchaser. Blandford *v.* Morrison, 15 Q. B. 724, and 19 L. J., Q. B. 533.

(*q*) 6 C. B. 462.

(*r*) The penalties now in force for the sale of intoxicating liquors without license are those imposed by 35 and 36 Vict., c. 84, § 3, (Licensing Act, 1872.)

that the law was made *not merely for revenue purposes*, but for the protection of the public morals. (*s*)

§ 825. The propositions that seem fairly deducible from the foregoing authorities are the following—

General rules on the distinction between the two classes of statutes.

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.

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 requirements 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. 27

See, also, §§ 4–8 of the same act and § 9 of 37 and 38 Vict., c. 49, (Licensing Act, 1874.)

(*s*) 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.

27. **Where the Law Declares the Consequences of its Violation the Contract will not be Avoided Unless so Declared.**—This is a natural rule of interpretation to discover the intent of the law-maker. Rossman *v.* McFarland, 9 Ohio St. 369; Vining *v.* Bricker, 14 Ohio St. 331. In this case there was a penalty for selling diseased sheep, but the act provided that the person injured might also sue for damages or defend a suit brought on the contract of sale, and this was held to show that the contract was valid. See, also, Todd *v.* Wick, 36 Ohio St. 370, 388.

If the Purpose of the Statute is Promoted Without Avoiding the Contract it will be Sustained, notwithstanding the Penalty.—This of course does not apply where the statute expressly delares the contract void. In such case the grounds of the prohibition are immaterial. Rossman *v.* McFarland, 9 Ohio St. 369, 379. But where a penalty is imposed for making a contract, the question whether the contract is made void is one of intent, to be determined from the language and purpose of the law. The leading case is Harris *v.* Runnels, 12 How. 79. A statute in Mississippi forbade the bringing of convict slaves into that state, and required that

§ 826. It is quite in accordance with these principles that in Bensley *v.* Bignold, (*t*) it was held by the Common Pleas that a printer who had omitted to affix his name to a book, in

Acts relative to printers.

certain certificates of the character of any slaves brought in should be filed under penalty of $100, upon seller or buyer. On a suit for the price of slaves brought into Mississippi, a violation of this act was pleaded. Wayne, J., referred to the English decisions, "that the non-observance of excise regulations will not avoid a contract in respect of their subject matter, although a penalty attaches," and called attention to the contrary *dictum* of Parke, B., in Cope *v.* Rowland, *ante* § 821. "We have concluded before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. It is true that a statute containing a prohibition and a penalty makes the act which it pnnishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. * * * It is a rule, if effects and consequences shall result from an interpretation of a statute contrary to the policy which it discloses, or avoiding the infliction of a penalty upon the transgressor, that such an interpretation must be rejected. In this case the interpretation contended for by the defendant would lead to the infliction of a severer penalty for buying slaves who are not convicts than the statute imposes upon those who shall bring convict slaves into the state." That is, the value of a slave is more than the penalty. See Scotten *v.* The State, 51 Ind. 52; Burkholder *v.* Beetem, 65 Penna. 496; In re Pitcock, 2 Sawyer 416, 421; Dowell *v.* Applegate, 7 Fed. Rep. 881; Strong *v.* Darling, 9 Ohio 201. In this case the seller of town plots was required under penalty of $50 fine to record a plot thereof. Sales in violation of this act were held valid. On a like act this decision was followed in Bemis *v.* Becker, 1 Kan. 226; Mason *v.* Pitt, 21 Mo. 391, and in Pangborn *v.* Westlake, 36 Iowa 547; Platt *v.* Short, 79 N. Y. 437; Bibb *v.* Miller, 11 Bush 306.

Penalties Imposed for Collection of Revenue.—In Ruckman *v.* Bergholz, 37 N. J. L. 437, 440, an agent sued for commissions on a sale of land. It appeared that he had taken out no license under the United States revenue law, and was therefore liable to a fine. But the New Jersey Court of Errors and Appeals overruled the objection on the authority of the English decisions stated in the text. Runyon, C., said: "The question in such case is, whether the legislature intended to prohibit the act unless done by a qualified person, or merely that every person who did it should pay a license fee. If the latter, the act is not illegal." And the sole object of the act being to raise revenue, the contract was held valid. To the same effect, see Corning *v.* Abbott, 54 N. H. 469, 471; Aiken *v.* Blaisdell, 41 Vt. 655, 666; Larned *v.* Andrews, 106 Mass. 435; Lindsey *v.* Rutherford, 17 B. Mon. 245. In Holt *v.* Green, 73 Penna. 198, a contract made with a broker without a license for commissions was held void under an act expressly forbidding any person from acting as broker without a license, the court refusing to follow the English revenue decisions. But in Rahter *v.* Bank of Lancaster, 92 Penna. 393, a sale of whiskey by one who made himself liable to a penalty for the sale, was held valid.

(*t*) 5 B. & Ald. 335.

Bensley *v.* Bignold.

violation of 39 Geo. III., c. 79, § 27, (*u*) which punishes such omission by a penalty of £20 *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, (*v*) 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. III., c. 88; and in Law *v.* Hodson, (*w*) a vendor failed in his action because his bricks had been sold of smaller dimensions than permitted by the statute 17 Geo. III., c. 42. In both these statutes a penalty was imposed *for every offence*.

Acts relative to sales of butter.

Forster *v.* Taylor.

Act relative to the sale of bricks.

Law *v.* Hodson.

In Lightfoot *v.* Tenant, (*x*) 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. I., c. 21, § 2, all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

East India trade acts.

Lightfoot *v.* Tenant.

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. (*y*) [28]

Weights and measures acts.

[The law on this subject is now consolidated by the 41 and 42 Vict., c. 49, the weights and measures act, 1878.]

§ 827. The statute 1 and 2 Will. IV., 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. (*z*) The 17th section authorizes every person who shall have

Game laws.

(*u*) This section is now repealed by the 32 and 33 Vict., c. 24.

(*v*) 5 B. & Ad. 887.

(*w*) 11 East 300; and see a case on the game laws, Helps *v.* Glenister, 8 B. & C. 553.

(*x*) 1 B. & P. 551.

(*y*) 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, 23 L. J., Q. B. 356, and 3 E. & B. 954; Jones *v.* Giles, 23 L. J., Ex. 292, and 10 Ex. 119; and in Ex. Ch., 24 L. J., Ex. 259, and 11 Ex. 303; Watts *v.* Friend, 10 B. & C. 446.

28. See Durgin *v.* Dyer, 68 Me. 143, and cases cited; Woods *v.* Armstrong, 54 Ala. 150; Ritchie *v.* Boynton, 114 Mass. 431; Eaton *v.* Keegan, 114 Mass. 433.

(*z*) Loome *v.* Bayly, 30 L. J., M. C. 31; but see, also, Porritt *v.* Baker, 10 Ex. 759.

obtained a game certificate, to sell game to a licensed dealer, with a proviso that no game-keeper shall sell any game, except for account and on the written authority of his master, whenever his game certificate has cost less than £3 13*s.* 6*d.*

The 25th section prohibits, under penalty of not more than £2 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 inn-keeper 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 *bona 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.

[The 4th section of the 43 and 44 Vict., c. 47 (Ground Game Act, 1880,) confers upon the occupier of land the same power to *sell ground game* killed by him, or by persons authorized by him, as if he had a license to kill game.]

§ 825. The statute 8 and 9 Vict., c. 109, § 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."

Gaming, by means of time bargains for sale of goods.

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. (*a*) [29] Since the passing of the above statute,

(*a*) Sherbon *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.

29. In some states wager contracts have been held void on grounds of public policy, irrespective of statutes. Perkins *v.* Eaton, 3 N. H. 152; Winchester *v.* Nutter, 52 N. H. 507; Edgell *v.* McLaughlin, 6 Whart. 176; Rice *v.* Gist, 1 Strobh. L. 82; Collamer *v.* Day, 2 Vt. 144. In Ball *v.* Gilbert, 12 Metc. 397, 399, Shaw, C. J., said: "In Massachusetts it is believed no action has been sustained on a wager, probably because none has been brought. As far as judicial opinions have been indirectly expressed, they have been adverse to such an action. Amory *v.* Gilman, 2 Mass. 1; Babcock *v.* Thompson, 3 Pick. 446." At all events,

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) 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.[30] In Grizewood *v.* Blane, (*b*) where the contract was for the future delivery

Grizewood *v.* Blane

the court held a wager on a public election void, whether other wagers were or not.

30. **Gambling Contracts. Optional Contracts.**—A contract to pay an amount equal to any rise in the market price of grain, stock, or other article of commerce at a certain future time, in consideration that the other party will pay the amount equal to any fall, is void at common law as gambling. The difficulty is to determine whether the intent of the parties is to make a delivery of the property contracted for, or merely to pay the difference in price. In Brua's Appeal, 55 Penna. 294, 298, a claim was made on notes which were given for the loss on a "short" sale of Harlem stock. It was found that the actual transfer of stock had not been contemplated by the parties, and the notes were held void. In Fareira *v.* Gabell, 89 Penna. 89, a broker engaged in buying and selling stock, advanced money to pay the losses of his principal, and brought suit for the money thus advanced. The jury were charged that if they should believe that the transactions were carried on without the means or intent to receive or deliver stock, and this was known to the broker, he could not recover commissions, or money advanced to pay losses, and this was held correct. See Gheen *v.* Johnson, 90 Penna. 38, 44; Kirkpatrick *v.* Bonsall, 72 Penna. 155, 158; Swartz's Appeal, 3 Brewst. 131. In Illinois the cases are numerous and the law is the same. In Pickering *v.* Chase, 79 Ill. 328. Scott, C. J., said, speaking of sales where no design to deliver existed: "Such contracts are void at common law as being inhibited by a sound public morality." In Lyon *v.* Culbertson, 83 Ill. 33, the contract was for future sale of wheat, the performance of which was secured by a deposit for security or margin. It was agreed that if the margin should by rise or fall in price become insufficient, on default to put up further margin on notice,

(*b*) 11 C. B. 526. The decision was (apparently) disapproved by Bramwell, B., in Marten *v.* Gibbon, 33 L. T. (N. S.) at p. 563. See the same case as to the pleadings in 21 L. J., C. P. 46; see, also, Knight *v.* Combers, and Knight *v.* Fitch, 15 C. B. 562, 566; Jessopp *v.* Lutwyche, 11 Ex. 614.

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 contract, 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. (*c*)

§ 829. [But the statute affects only the contract which actually makes the bet or wager. It does not apply to a contract which is a gambling transaction in the sense only that its object is to enable one of the contracting parties to gamble. Thus, in Thacker v. Hardy, (*d*) the defendant had employed the plaintiff, a broker, to speculate for him on the stock exchange. It was never intended between the parties that the defendant should take up the contracts into which the plaintiff entered on his behalf, but the plaintiff was to arrange matters so that nothing but "differences" should be

Thacker v. Hardy.

the party prejudiced might treat the contract as filled immediately and recover the difference in price. This was held to characterize the contract as a gambling transaction. (Dickey, J., dissenting.) See, further, Beveridge *v.* Hewitt, 8 Ill. App. 467; Melchert *v.* American Union Co., 11 Fed. Rep. 193, and Wharton's note; Rudolf *v.* Winters, 7 Neb. 125; Sampson *v.* Shaw, 101 Mass. 145; Gregory *v.* Wendell, 39 Mich. 337, 344; Barnard *v.* Backhaus, 52 Wis. 593, 597. In this last case, unlike the New York cases cited in this note *infra*, it is held that a contract for future delivery is to be regarded as a gambling contract in the absence of proof establishing it as legitimate. This is followed in Everingham *v.* Meighan, Wis. Sup. Ct., Sept., 1882, 14 Reporter 799. But the mere fact that the seller has not under his control the stock or property which he contracts to deliver in the future, will not be conclusive. The court will inquire into the circumstances (it is usually a question for the jury), and sustain the contract if there appears to have been an intention to fulfill, and not merely to make a settlement of differences. "In the one case the transaction is within the scope of business everywhere recognized as legitimate; in the other it is a gambling transaction." Thompson, C. J., in Smith *v.* Bouvier, 70 Penna. 325, 332; Maxton *v.* Gheen, 75 Penna. 166; Pixley *v.* Boynton, 79 Ill. 351; Cole *v.* Milmine, 88 Ill. 349; Hatch *v.* Douglass, 48 Conn. 116, 127; Brown *v.* Speyers, 20 Gratt. 296; Sawyer *v.* Taggart, 14 Bush 727. The transaction will be presumed legitimate unless there is proof that it is a gambling transaction. Morris *v.* Tumbridge, 83 N. Y. 92; Bigelow *v.* Benedict, 70 N. Y. 202; Story *v.* Salomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 77 N. Y. 612. See, *contra*, the Wisconsin cases in this note, *supra*. The intent must be common to both buyer and seller. Rumsey *v.* Berry, 65 Me. 570; Williams *v.* Carr, 80 N. C. 294, 298; Gregory *v.* Wendell, 39 Mich. 337, 344; Murray *v.* Ocheltree, Iowa Sup. Ct., Oct., 1882, 15 Reporter 48.

(*c*) And see Higginson *v.* Simpson, 2 C. P. D. 76, and cases there cited.

(*d*) 4 Q. B. D. 685, C. A.; where the findings of the jury in Grizewood *v.* Blane are criticized by Brett, L. J., at p. 695, and by Cotton, L. J., at p. 696; see, also, Cooper *v.* Neill, 27 W. R. 159; W. N., 1878, p. 128.

actually payable to or by the defendant. The plaintiff knew that unless such an arrangement was effected, the defendant would not be in a position to take up the contracts. The plaintiff accordingly entered into contracts on the defendant's behalf in respect of which he became by the rules of the stock exchange personally liable, and he then sued the defendant for commission and for indemnity against the liability he had incurred. Held, by Lindley, J., and afterwards by the Court of Appeal, distinguishing Grizewood *v.* Blane, that the agreement between the plaintiff and defendant was not a contract by way of gaming or wagering within the meaning of 8 and 9 Vict., c. 109, § 18, and that the plaintiff was entitled to recover.[31] In the judgment of Lindley, J., the nature of the transactions on the stock exchange, and in particular that of the so-called "time-bargains," is fully considered.

'Time-bargains.'

It may be remarked that there are transactions, in which the parties may gain or lose, according to the happening of some future event which are not within the provisions of 8 and 9 Vict., c. 109; for instance, the sale of the next year's crop of a specified orchard. (*d*)]

§ 830. In the case of Rourke *v.* Short, (*e*) 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 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. (*f*)

Rourke *v.* Short.

§ 831. By the statute 24 Geo. II., c. 40, § 12, (usually termed the Tippling Act), as amended by the 25 and 26 Vict., c. 38, no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bona fide*, to the amount of 20*s.* or upwards, except in cases when sold to be consumed elsewhere than

Tippling acts.

31. Williams *v.* Carr, 80 N. C. 294; Warren *v.* Hewitt, 45 Ga. 501. But see Fareira *v.* Gabell, 89 Penna. 89, stated *ante* note 30.

(*d*) See per Bramwell, L. J., 4 Q. B. D., at p. 692, and per Cotton, L. J., at p. 696.

(*e*) 5 E. & B. 904; 25 L. J., Q. B. 196.

(*f*) *Quære*—unenforceable. The stat-

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 and 31 Vict, c. 142, § 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 respect of any money or goods lent or supplied, or of any security given" for obtaining said articles.

Act 30 and 31 Vict., c. 142, § 4.

§ 832. 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; (*g*) but in Spencer *v.* Smith, (*h*) Lord Ellenborough would not allow this defence to prevail, where a bill of exchange for £6 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, (*i*) 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, (*j*) 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.* Dove. (*k*)

Decisions under tippling acts.

Spencer *v.* Smith.

Burnyeat *v.* Hutchinson.

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. (*l*)

Some cases (*m*) in which the price of spirits sold in contravention of

ute makes gaming contracts null and void, but not illegal. See Fitch *v.* Jones, 5 E. & B. 238.

(*g*) Hughes *v.* Dove, 1 Q. B. 294, overruling Jackson *v.* Attrill, Peake 181.

(*h*) 3 Camp. 9.

(*i*) 5 B. & Ald. 241.

(*j*) 7 Car. & P. 67.

(*k*) 1 Q. B. 294.

(*l*) Owens *v.* Porter, 4 C. & P. 367.

(*m*) Scott *v.* Gillmore, 3 Taunt. 226; Crookshank *v.* Rose, 5 Car. & P. 19; Philpott *v.* Jones, 2 Ad. & E. 41; Gaitskill *v.* Greathead, 1 Dow. & Ry. 359; Dawson *v.* Remnant, 6 Esp. 24.

the tippling acts formed only part of the consideration of the contract sued on, are cited in the note. See, also, *ante* §§ 788, 789, as to consideration partly illegal. 32

Cattle salesmen in London.

§ 833. By the 31 Geo. II., c. 40, § 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.

Sales of office.

Acts 5 and 6 Edw. VI., c. 16; 49 Geo. III., c. 126.

§ 834. The statutes passed in relation to the sale of offices are the 5 and 6 Edw. VI., c. 16, and the 49 Geo. III., 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,* (*n*) 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 and 6 Edw. VI., c. 16, § 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

32. The following cases relate to the validity of liquor sales: State *v.* Greenleaf, 31 Me. 517; Wilson *v.* Stratton, 47 Me. 120; Webster *v.* Sanborn, 47 Me. 471; State *v.* Delano, 54 Me. 501; Holt *v.* O'Brien 15 Gray 311; Doolittle *v.* Lyman, 44 N. H. 608; Aiken *v.* Blaisdell, 41 Vt. 655.

(*n*) The clause in italics seems to be repealed by the 6 Geo. IV., c. 104. See "The Statutes Revised," vol. I., p. 559.

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 at 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 Victualing, 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 all offices, commissions, places, and employments belonging to or under the appointment or control of the United Company of Merchants of England trading to the East Indies." (49 Geo. III., c. 126, § 1.)

§ 835. 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: nor to any office of parkership or the keeping of any park, house, manor, garden, chase, or forest, or to any of them." (*o*) 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." (*p*)

Exceptions to the prohibition.

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 baud 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

Further exceptions.

(*o*) Stat. 5 and 6 Edw. VI., c. 16, § 4.

(*p*) Id., § 7, repealed by the statute law revision act, 1863; and see 6 Geo. IV., cc. 83, 84.

Repealed in 1872.

by his Majesty in that behalf," (*q*) but this section is repealed by the statute law revision act, 1872 (No. 2.)

Another section (*r*) excludes from the operation of the act of 49 Geo. III. "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."

§ 836. 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. III., c. 126, § 10); nor "to any annual reservation, charge or payment made or required to 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." (Id., § 11.)

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.

Contract that A shall resign with intent that B shall get the office void.

Sir Arthur Ingram's case.

§ 837. In Sir Arthur Ingram's case, (*s*) the report in Coke is as follows: "Sir Robert Vernon, Knight, being coferer (*t*) of the king's house of the king's gift, and having the receit of a great summe of money yearely 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 surrendred it accordingly: and thereupon sir A was, by the king's appointment, admitted and sworne coferer. And it was resolved by sir Thomas

(*q*) 49 Geo. III., c. 126, § 7.

(*r*) Id., § 9.

(*s*) Co. Lit. 234 a. See, also, Huggins *v.* Bainbridge, Willes 241.

(*t*) Coferer, or treasurer, from "coffer."

Egerton, lord chancellor, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute (5 and 6 Edw. VI., c. 16,) and that sir A was disabled to have or to take the said office."

§ 838. It was also held, in the case of Godolphin *v.* Tudor, (*u*) in the Queen's Bench and affirmed in the House of Lords, (*x*) that where the salary of an office within the statute 5 and 6 Edw. VI. 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 the 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. (*y*) And the case was not affected by the fact that it appeared on the record that the payment was to be £200 a year, and that the profits of the office had amounted to £329 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.

Godolphin *v.* Tudor.

Deputation of an office for price "out of the profits."

The principles established in these decisions under the 5 and 6 Edw. VI. were held by the Queen's Bench, in Greville *v.* Atkins, (*z*) to be applicable also to the enactments in 49 Geo. III., c. 126.

Decisions applicable to the later statute.

§ 839. In the case of Aston *v.* Gwinnell, (*a*) in the Exchequer Chamber 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." (*b*

Aston *v.* Gwinnell.

(*u*) 2 Salk. 467, and 6 Mod. 234; also Willes, p. 575, *n.*

(*x*) 1 Bro. P. C. 135.

(*y*) See, also, Culliford *v.* De Cardenell, 2 Salk. 466.

(*z*) 9 B. & C. 462.

(*a*) 3 Y. & J. 136.

(*b*) But see Palmer *v.* Bate, 2 Br. & B. 673, *ante* § 804.

Hopkins v. Prescott.

In Hopkins *v.* Prescott, (*c*) an agreement for the sale of a law-stationer's business, he being also *subdistributor 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.

What offices are within the statute.

§ 840. In Harrison *v.* Kloprogge, (*d*) it was held, that the office of private secretary was not within the statutes. The following officers have been held to come within their provisions: officers of spiritual courts, as chancellor, registrar, and commissary, (*e*) clerk of the fines to a justice in Wales, (*f*) surrogate, (*g*) gaolers, (*h*) undersheriffs, (*i*) stewards of court-leets, (*k*) but not the bailiff of a hundred, (*l*) or the undermarshal of the city of London. (*m*)

Cadetships in East India service.

In a case under the 49 Geo. III., 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. (*n*)

Paying money to the officer of a regiment to induce his retirement.

In Graeme *v.* Wroughton, (*o*) 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. 33

Goods delivered without permit.

§ 841. By the 2 Will. IV., c. 16, § 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. (*p*)

(*c*) 4 C. B. 578.

(*d*) 2 Bro. & B. 678.

(*e*) Dr. Tudor's case, Cro. Jac. 269; Robotham *v.* Tudor, 2 Brownl. 11.

(*f*) Walter *v.* Walter, Golds. 180.

(*g*) 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.

(*h*) Stockwith *v.* North, Moore 781; Huggins *v.* Bainbridge, Willes 241.

(*i*) Browning *v.* Halford, Free. 19; and see stat. 3 Geo. I., c. 15.

(*k*) Williamson *v.* Barnsley, 1 Brownl. 70.

(*l*) Godbold's case, 4 Leon. 33.

(*m*) Ex parte Butler, 1 Atk. 210.

(*n*) Rex *v.* Charretier, 13 Q. B. 447, and 18 L. J., M. C. 100.

(*o*) 11 Ex. 146, and 24 L. J., Ex. 265.

33. As to sale of offices and official influence, see *ante* note 13.

(*p*) See a decision on the construction of this statute, Nicholson *v.* Hood, 9 M. & W. 365.

§ 842. At common law, a sale made on Sunday was not void. In Drury *v.* Defontaine, (*q*) Sir James Mansfield delivered the judgment of the Common Pleas, that such a sale was not illegal, until made so by statute. [34]

Sales on Sunday not void at common law.

(*q*) 1 Taunt. 131.

34. **A Sale on Sunday is Valid at Common Law.**—Richardson *v.* Goddard, 23 How. 28, 42. This subject received thorough consideration in Bloom *v.* Richards, 2 Ohio St. 387, where a bill was filed for the specific performance of a contract made on Sunday for the sale of lands. The Ohio statute simply forbade common labor and the sale of liquor on Sunday, (not "business"), and the court held that this did not render illegal the making of a sale, and therefore the contract was held valid. This act was copied in Nebraska, and the same interpretation was given it in Horacek *v.* Keebler, 5 Neb. 355, 358, where a contract on Sunday for the sale of calves was held valid. In Kansas, also, the prohibition extends to labor only, and not to all business, and contracts of sale are held valid. Johnson *v.* Brown, 13 Kan. 529; Merritt *v.* Earle, 29 N. Y. 120; Kaufman *v.* Haven, 30 Mo. 387. In Adams *v.* Gay, 19 Vt. 358, horses were exchanged on Sunday in New Hampshire, and one party being defrauded claimed to rescind and brought trover in Vermont. Defendant neglected to prove the New Hampshire Sunday statute, and the court therefore determined the case on common law principles, and held that the sale was legal, and therefore the suit could be sustained. On a similar state of facts the same result was reached in O'Rourke *v.* O'Rourke, 43 Mich. 58. See Davis *v.* Barger, 57 Ind. 54; Kepner *v.* Keefer, 6 Watts 231; Fox *v.* Mensch, 3 W. & S. 444. In Eberle *v.* Mehrbach, 55 N. Y. 682, a horse was sold on Sunday and the buyer brought suit for breach of warranty. This was sustained under a statute forbidding the exposing of wares for sale. It was held that a private sale, though by a dealer, was no breach of the statute. In California the act forbids not sales but keeping open a place of business on Sunday, and sales are valid. Moore *v.* Murdock, 26 Cal. 514, 526.

Executed Contracts.—In Pennsylvania, though the statute punishes Sunday contracts, yet the courts hold that the statute does not avoid an executed contract consummated on Sunday in violation of the law, but refuse to enforce an executory contract. If the contract is executed, it will pass good title. And so the title acquired under a deed made on Sunday was held good, in Shuman *v.* Shuman, 27 Penna. 90. In Foreman *v.* Ahl, 55 Penna. 325, fifteen mules were sold, and thirteen of them were delivered on Sunday. It was held that there could be no recovery for the price of those sold and delivered on that day, though title had passed. In Chestnut *v.* Harbaugh, 78 Penna. 473, the property was sold and delivered on Sunday, and was afterwards seized by creditors of the seller, alleging that the sale was illegal and void. But the court held that having been executed it was valid. See Baker *v.* Lukens, 35 Penna. 146. In Massachusetts the same result is reached on different grounds. In Pennsylvania it is said that the statute does not apply to executed sales. But in Massachusetts, it is said: "The transaction takes effect from the disability of the parties to assert any right to the contrary. The court does not give it effect, but simply refuses its aid to undo what the parties have already done." Wells, J., in Myers *v.* Meinrath, 101 Mass. 366. In Horton *v.* Buffinton, 105 Mass. 399, a creditor of the seller at a Sunday sale seized a wagon sold, alleging such sale to be void, but it was held valid, follow-

29 Car. II., c. 7.

By the 29 Charles II., 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 person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale. (*r*) [35]

ing the case last cited. To the same effect, see Greene *v.* Godfrey, 44 Me. 25; Moore *v.* Kendall, 1 Chand. (Wis.) 33; Ellis *v.* Hammond, 57 Ga. 179; Moore *v.* Murdoch, 26 Cal. 514; Kinney *v.* McDermot, 55 Iowa 674.

(*r*) As to the mode of instituting proceedings under this act, see 34 and 35 Vict., c. 87. This last act is continued by the expiring laws continuance act, 1881.

35. **Sunday Sales Void for Illegality, by Statute.**—As will be seen from the last note the common law is in many states unchanged as to the validity of sales, though in nearly all servile labor is forbidden, and in most the keeping open of a place of business. A full review of the statutes and decisions of most of the states will be found in Tucker *v.* West, 29 Ark. 386. See, also, a series of articles in the American Law Register, vol. XIX., pages 137, 209, 273. In the New England states, and in most others, all worldly business is forbidden as in the English statute, and some of the states prohibit unnecessary travel. Where business is prohibited, all contracts (except of necessity and charity,) are held illegal. Some recent cases may be stated in illustration. In Mace *v.* Putnam, 71 Me. 238, a creditor wishing to leave the state at once, drew an order on his debtor for the amount due, which the debtor accepted on Sunday. On the same day the creditor transferred the order with the debtor's assent to M., from whom he received the amount of it. It was held that M. could not recover the debt, because his claim was founded on a Sunday transaction. Money borrowed on Sunday cannot be recovered back. In deciding such a case Appleton, C. J., said: "The contract was illegal because made on a day when the making of contracts is forbidden, and plaintiff cannot claim through an act prohibited by the statute. It is an unfortunate condition of the law when the violator of its commands is rewarded by it for such violation," and he quotes Juvenal—

"*Multi,*
Committunt eadem, diverso crimina fato,
Ille crucem pretium sceleris tulit, hic diadema,"

and comments: "So, now, of two criminals guilty of the same offence, one is punished and the other rewarded by the law which creates the offence." Meader *v.* White, 66 Me. 90. That a loan made on Sunday is presumptively worldly business, and unless shown to be a work of necessity or charity, cannot be recovered, was held in the well-considered case of Troewert *v.* Decker, 51 Wis. 46, and in Finn *v.* Donahue, 35 Conn. 216. That a note given on Sunday is void has been held in many cases. See Tucker *v.* West,

§ 843. The first reported case under this statute seems to have been Drury *v.* Defontaine, (*q*) 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.

Decisions under this statute.

Drury *v.* Defontaine.

Next, in 1824, in Bloxsome *v.* Williams, (*t*) 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, 2ndly, that it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own 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.

Bloxsome *v.* Williams.

§ 844. In 1826, Fennell *v.* Ridler, (*u*) 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 construc-

Fennell *v.* Ridler.

29 Ark. 386, where the decisions are collected. But if the note is given on Sunday for a consideration received on a week-day, although the note will be void, an action can be maintained on the original consideration. An offer to rescind on Sunday is of no avail. Merritt *v.* Robinson, 35 Ark. 483, 491. Other cases illustrating the Sunday laws are the following: Powhatan Steamboat Co. *v.* Appomattox R. R., 24 How. 247; Phila., &c., R. R., 23 How. 209, 217; Holcomb *v.* Danby, 51 Vt. 334; Davis *v.* Somerville, 128 Mass. 594; White *v.* Lang, 128 Mass. 598; Davidson *v.* Portland, 69 Me. 116; Platz *v.* Cohoes, 24 Hun 101; Gilbert *v.* Vachon, 69 Ind. 372; Parker *v.* Pitts, 73 Ind. 597; Ball *v.* Powers, 62 Ga. 757; Carroll *v.* Staten Island R. R., 58 N. Y. 126.

Contracts of Charity and Necessity. —A contract made by the overseers of a town for the relief of a sick pauper was held valid in Aldrich *v.* Blackstone, 128 Mass. 148. Sales of food on Sunday for immediate consumption, made by proprietors of hotels and eating-houses are lawful. State *v.* Gregory, 47 Conn. 276. Probably like sales by any person would be sustained. In Carver *v.* State, 69 Ind. 61, the sale of cigars from a cigar stand in a hotel on Sunday, in the same manner as on week-days, was held lawful. But this seems doubtful. Subscriptions to pay off a church debt, or to purchase a church building, are valid, though made on Sunday. Allen *v.* Duffie, 43 Mich. 1; Dale *v.* Knapp, Sup. Ct. Penna., 12 Law Reporter 665. And see Doyle *v.* Lynn, &c., R. R, 118 Mass. 195.

(*q*) 1 Taunt. 131.

(*t*) 3 B. & Cr. 232.

(*u*) 5 B. & Cr. 406.

tion to the act in the previous case, and that it was intended to regulate private conduct as well as to promote public decency. [36]

Smith v. Sparrow.

Next, in 1827, came Smith *v.* Sparrow, (*v*) 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."

Williams v. Paul.

§ 845. In Williams *v.* Paul, (*x*) 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. [37]

Simpson v. Nicholls.

But in Simpson *v.* Nicholls, (*y*) Parke, B., expressed the opinion that the decision in Williams *v.* Paul could not be supported in law. (*z*) 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*

36. **No Action will lie for Fraud or Warranty in an Illegal Sale.**—Although the sale may be executed, and therefore binding, yet the collateral contract of warranty being executory, will be void. Howard *v.* Harris, 8 Allen 297; Smith *v.* Bean, 15 N. H. 577; Gunderson *v.* Richardson, 56 Iowa 56; Plaisted *v.* Palmer, 63 Me. 576; Murphy *v.* Simpson, 14 B. Mon. 337. But see Winchell *v.* Carey, 115 Mass. 560. See *ante* note 1.

(*v*) 4 Bing. 84.

(*x*) 6 Bing. 653.

37. See *post* note 39, as to ratification of Sunday sales. Williams *v.* Paul has given rise to much controversy in the United States, but has been generally preferred to the later English cases.

(*y*) 3 M. & W. 244, and S. C., corrected report in 5 M. & W. 702.

(*z*) See the American cases referred to, *post* §§ 848–850.

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.

In Scarfe *v.* Morgan, (*a*) 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. Scarfe *v.* Morgan.

§ 846. [The statute 37 and 38 Vict., c. 49, § 9, (Licensing Act, 1874,) renders penal the sale of intoxicating liquors on Sunday within the hours prohibited by the 3d section of the act. Licensing act, 1874

The statute 30 and 31 Vict., c. 29, § 1, renders void any contract for the sale of shares in a joint stock banking company unless the contract sets forth in writing the numbers of the shares on the register of the company, or where the shares are not distinguished by numbers, the names of the registered proprietors of the shares in the books of the company. (*b*) Leeman's act.

The statute 37 and 38 Vict., c. 51, § 3, enacts, that no maker of or dealer in anchors and chain cables shall sell, or contract to sell, and no person shall purchase, or contract to purchase, for the use of any British ship, any chain cable or any anchor exceeding in weight 168 lbs. which has not been previously tested and stamped in accordance with "The Chain Cables and Anchors' Acts, 1864 to 1874." (*c*) Sale of chain cables and anchors.

§ 847. The statute 38 and 39 Vict., c. 63, § 6, (*d*) enacts that "no person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance and quality of the article demanded by such Sale of food and drugs act, 1875.

(*a*) 4 M. & W. 270.

(*b*) See Nelson Mitchell *v.* City of Glasgow Bank, 4 App. Cas. 624; Neilson *v.* James, 9 Q. B. D. 546, C. A.

(*c*) 27 and 28 Vict., c. 27, § 11; 34 and 35 Vict., c. 101, §§ 7, 9; 35 and 36 Vict., c. 30.

(*d*) Sale of food and drugs act, 1875 amended by the 42 and 43 Vict., c. 30 The decisions under the act are given *post,* chapter on Warranty.

purchaser" under the penalty therein mentioned; a proviso follows having reference to certain cases in which an offence is not to be deemed to be committed under the section. By the 8th section the seller may protect himself by giving notice to the purchaser. (*e*)

Other statutes relating to sales.

Several important statutes have recently been passed regulating the sales of intoxicating liquors, (*f*) of spirits, (*g*) of explosives, (*h*) and of poisons. (*i*)]

Cases in America.

§ 848. 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.

Secondly.—A collateral contract made in aid of one tainted by illegality cannot be enforced.

Thirdly.—A collateral contract, disconnected from the illegal transaction which was the basis of the first contract, is not illegal, and may be enforced.

§ 849. In relation to sales made on Sunday, nearly, if not all the states have passed laws substantially in accordance with the 29 Charles II., c. 7, and there is very great diversity of opinion on the questions which have arisen under these statutes. [38] In many of the states the law makes no distinction between sales made by a party in his ordinary

(*e*) See Sandys *v.* Small, 3 Q. B. D. 449.

(*f*) The licensing acts, 1872, 1874, (35 and 36 Vict, c. 94, and 37 and 38 Vict., c. 49.)

(*g*) The spirits act, 1880, (43 and 44 Vict., c. 24.)

(*h*) The explosives act, 1875, (38 Vict., c. 17.)

(*i*) The pharmacy act, 1868, (31 and 32 Vict., c. 121, § 17, amended by 32 and 33 Vict., c. 117, § 3.)

38. The New England and many Southern states have followed the English act, and have forbidden labor and business. Some have even forbidden unnecessary travel. But New York, Ohio, California and most Western states have forbidden labor, but not business, so that a sale on

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 of the payee; but it is not settled whether such a note is void in the hands of an innocent endorsee. (*k*)

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. (*l*) And a note, though signed on Sunday, may be enforced, if delivered on some other day; (*m*) 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. (*n*)

§ 850. There is a 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 possession of the thing sold on some other day, after making a purchase of it on Sunday. The case of Williams *v.* Paul, (*o*) and the observations of Parke, B., seriously questioning its authority, (*p*) have been much discussed in the American courts. In the case of Adams *v.* Gay, (*q*) 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 (*r*) 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, (*s*) where a vote was given on Sunday for the price of a horse sold that day, and the buyer afterwards made payments on account of

Sunday is not necessarily illegal in those states. See note 39, *post*.

(*k*) Allen *v.* Deming, 14 N. H. 113; Saltmarsh *v.* Tuthill, 13 Ala. 390. It has been decided in Massachusetts that an endorsee of a promissory note received for a good consideration and without notice of any illegality attaching to it, can maintain an action on the note against the maker, although the note was made and delivered to the payee on a Sunday. Cranson *v.* Goss, 107 Mass. 439.

(*l*) Stackpole *v.* Symonds, 23 N. H. 229; Smith *v.* Bean, 15 N. H. 577; Sumner *v.* Jones, 24 Vt. 317; Goss *v.* Whitney, 24 Vt. 187; Butler *v.* Lee, 11 Ala. 885.

(*m*) Hilton *v.* Houghton, 35 Me. 143; Lovejoy *v.* Whipple, 18 Vt. 379; Clough *v.* Davis, 9 N. H. 500; Hill *v.* Dunham, 73 Mass. 543.

(*n*) Smith *v.* Bean, 15 N. H. 577; Allen *v.* Deming, 14 N. H. 133; Horton *v.* Buffinton, 105 Mass. 399.

(*o*) 6 Bing. 653.

(*p*) *Ante* § 845.

(*q*) 19 Vt. 358.

(*r*) 21 Vt. 99.

(*s*) 24 Vt. 317

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, (*t*) however, New Hampshire, (*u*) [and Massachusetts, (*x*)] 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, (*u*) the New Hampshire court expressly held that an illegal contract is incapable of ratification or of forming a good consideration for a subsequent promise. [39]

(*t*) Butler *v.* Lee, 11 Ala. 885.

(*u*) Allen *v.* Deming, 14 N. H. 133, and Boutelle *v.* Melendy, 19 N. H. 196.

(*x*) Day *v.* McAllister, 81 Mass. 433; Tuckerman *v.* Hinkley, 91 Mass. 452, at p. 454.

39. **Ratification of a Sunday Contract.**—The case of Williams *v.* Paul has been much discussed in the American courts. In Vermont, Williams *v.* Paul was approved by Redfield, C. J., in an able opinion in the often-cited case of Adams *v.* Gay, 19 Vt. 360, and that case has been repeatedly recognized in that state. The law was stated in Flinn *v.* St. John, 51 Vt. 334, 345, by Ross, J., (1879), as follows: "It is well settled in this state that the illegality which attaches to a contract executed on Sunday is not an illegality which enters into the subject matter or essence of the contract, and for that reason renders it void; that such contracts being illegal on account, only, of the day on which they are made, are capable of ratification by any act which fairly recognizes them as existing contracts, on a subsequent week-day, like a promise to perform or pay the amount stipulated therein, or a part payment of the same, or a refusal to return property fraudulently obtained by such contract, or an offer to rescind by the other party and a demand for the return of the property. Lovejoy *v.* Whipple, 18 Vt. 379; Sargeant *v.* Butts, 21 Vt. 99; Sumner *v.* Jones, 24 Vt. 317. These cases go the full length of holding that any act done by the parties on a week-day, which recognizes it as a contract existing between them, is a ratification." "Contracts executed on Sunday are not declared illegal. It is only the making of them at that particular time that is illegal." These principles have been recognized in several other states to this extent, that while the mere retention of goods bought on Sunday will not raise an implied promise to pay for them, yet an express promise will be valid. Such is the ruling of Williams *v.* Paul, *ante* § 845; Smith *v.* Case, 2 Oreg. 190; Perkins *v.* Jones, 26 Ind. 449. In Reeves *v.* Butcher, 31 N. J. L. 224, Williams *v.* Paul is doubted, and it is held that payment of interest on a note given on Sunday for a loan of money, will not ratify the note or loan. In Ryno *v.* Darby, 20 N. J. Eq. 231, the Chancellor said that when a contract was made on Sunday no subsequent recognition of it short of a new contract could give it validity. In Tucker *v.* West, 29 Ark. 386, 406, English, C. J., referring to a note given on Sunday for property conveyed on that day, said: "We think the better rule is that he [the debtor] could ratify the note by an express promise made on a week-day to pay it," and he cites Williams *v.* Paul and the Vermont case of Adams *v.* Gay. In Winchell *v.* Carey, 115 Mass. 560, a suit was sustained upon a promise to pay for cattle previously sold on Sunday, but the ground of the decision was that the Sunday sale was void for fraudulent repre

sentations made on Saturday, and that the case was one of wrongful taking. See Stebbins *v.* Peck, 8 Gray 553. In Melchoir *v.* McCarty, 31 Wis. 252, 256, Lyon, J., said that while it was a general rule that a promise to pay for a past consideration for which there has never been a legal liability is void, yet Sunday sales are an exception, and one who has bought property on credit on Sunday can be held on a subsequent promise to pay for it. In the late case of Troewert *v.* Decker, 51 Wis. 46, a suit was brought to recover money loaned on Sunday, and it was urged that the retention of the money, and the conversion of it by the borrower to his own use, would raise an implied promise to pay it. But the court preferred the Massachusetts, Maine and Pennsylvania decisions to those of Vermont and other states, following Williams *v.* Paul, though, as the question of an express ratification was not before the court, it was not adjudged. A subsequent partial payment for goods sold and delivered on Sunday was held a ratification in Banks *v.* Werts, 13 Ind. 203, following the Vermont decisions above stated. If the Sunday contract is merely executory, no ratification not amounting to a new contract can be binding. And so where a promise to pay a voluntary subscription was void because made on Sunday, it was held that a subsequent promise to execute it was void for want of consideration. Catlett *v.* Trustees, &c., 62 Ind. 365. In that case Biddle, J., said: "Keeping the property, and making the promise, constitute the new contract, or ratification. But when nothing has passed, a mere promise will have no validity." See Heller *v.* Crawford, 37 Ind. 279; Harrison *v.* Colton, 31 Iowa 16. In Campbell *v.* Young, 9 Bush 240, money was loaned and a note given for it on Sunday. Part of the loan was paid by the lender in cash, and part by check. The collection of the check on Monday was held to ratify the contract. In Sayles *v.* Wellman, 10 R. I. 465, horses were sold and delivered on Sunday, but a note for the price was given on Tuesday. An action on this note was sustained. Adams *v.* Gay and Williams *v.* Paul were approved. The distinction between contracts which may be and those which will not be ratified by subsequent promise is stated in Gray *v.* Hook, 4 N. Y. 449, by Mullett, J., who said: "It depends on the fact whether the new contract seeks to carry out or enforce any of the provisions of the former illegal contract, or whether it is based upon a moral obligation, growing out of the execution of an agreement which could not be enforced by law. In the first class of cases, no change in the form of the contract will avoid the illegality of the first consideration, while expressed promises, based upon the last class of considerations may be sustained." This was approved in Woodworth *v.* Bennett, 43 N. Y. 273, and in Gwinn *v.* Simes, 61 Mo. 335, 338, and in the latter case a mortgage made on a week-day to secure payment of money loaned on Sunday was held valid. A written contract dated on Sunday will be valid if delivered on a week-day. Lamore *v.* Frisbie, 42 Mich. 186. The cases of Tucker *v.* Mowrey, 12 Mich. 378, and Dodson *v.* Harris, 10 Ala. 560, hold that Sunday sales are void, and therefore the seller may tender back the price and recover the property; but these are unsustained.

Cases Holding that Sunday Contracts cannot be Ratified.—In Pope *v.* Leim, 50 Me. 83, a note was given on Sunday. *Held*, that a subsequent promise to pay it would not make it actionable, because the plaintiff could not make his case without proving his illegal act. A strong case is that of Tillock *v.* Webb, 56 Me. 100. There a man hired a horse and wagon to take a young lady home from "meeting," on Sunday. He damaged the

French code.

§ 851. The French Civil Code, art. 1133, provides that "the 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, (*y*) 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. (*z*)

horse and wagon by careless driving, and gave his note for the damages. In a suit on the note, he set up that there was no valid consideration, the driving being not for any purpose of charity or necessity; and the defence was sustained, the court holding that as the contract for hiring was an illegal bailment, no damages could arise from an improper use of the thing bailed and it was incapable of ratification. See Day *v.* McAlister, 15 Gray 433. In Plaisted *v.* Palmer, 63 Me. 576, a horse was sold on Sunday, but the bill of sale was retained by a third person until a check for the price should be paid, and was delivered on a week-day. It was held that no action for deceit in the sale would lie. The case was distinguished from Bradley *v.* Rea, 14 Allen 20; S. C., 103 Mass. 188, where the property, though bargained for on Sunday, was delivered on Monday, and a recovery was had on a *quantum meruit* for goods sold and delivered. The court in the Maine case said that if the horse had not been paid for when delivered on Monday an action for his value could be sustained, but not an action on the contract made on Sunday, either for the price or for false representations. In Kountz *v.* Price, 40 Miss. 341, salt was delivered on Sunday under an agreement made that day to exchange it for cotton. A few days later the debtor gave a writing as follows: "Due J. K. 9 bales of cotton, C. D." Suit was brought on this, but the court held it void, as a continuation of the illegal contract. See Morgan *v.* Bailey, 59 Ga. 683; Cranson *v.* Goss, 107 Mass. 441; Smith *v.* Foster, 41 N. H. 215.

(*y*) Pp. 280–282, (ed. 1859.)

(*z*) Sirey, V. 41, 1, 623; D. P. 41, 1, 228.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS.

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§ 852. 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 [or counter-claim], 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.

§ 853. The subjects of representation, warranty, conditions, and fraud, run so closely together, and are so frequently intertwined, 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.* Hence it follows, that even 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. 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

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. Saund. 352; Cutter *v.* Powell, 2 Sm. L. C. 1, and the numerous authorities in the notes; Leake Dig. of the Law of Contract, p. 649.

false; (*b*) or when it differs from the truth so grossly and unreasonably as to evince a dishonest purpose. (*c*) 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.

§ 854. 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 counter-claim 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, (*d*) but a stipulation that she shall sail with all convenient speed, or within a reasonable time, is held to be an independent agreement. (*e*) In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield, in Jones *v.* Barkley, (*f*) 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." [1]

(*b*) Elliott *v.* Von Glehn, 13 Q. B. 632; 18 L. J., Q. B. 221; Wheelton *v.* Hardesty, 8 E. & B. 232; 27 L. J., Q. B. 241; Reese River Mining Co. *v.* Smith, L. R., 4 H. L. 64; Weir *v.* Bell, 3 Ex. D. 238, C. A.

(*c*) Barker *v.* Windle, 6 E. & B. 675; S. C., 25 L. J., Q. B. 349.

(*d*) 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.

(*e*) Tarrabochia *v.* Hickie, 1 H. & N. 183; 26 L. J., Ex. 26; Dimech *v.* Corlett, 12 Moo. P. C. C. 199; Clipsham *v.* Vertue, 5 Q. B. 265; M'Andrew *v.* Chapple, 35 L. J., C. P. 281; L. R., 1 C. P. 643. But the delay must not be such as to frustrate the object of the voyage. Jackson *v.* Union Marine Insurance Co., L. R., 8 C. P. 572; in Ex. Ch., L. R., 10 C. P. 125; and see the observations of some of the judges in Rankin *v.* Potter, L. R., 6 H. L. 83; and for the same doctrine considered in the case of a contract of sale, see King *v.* Parker, 34 L. T. (N. S.) 887.

(*f*) 2 Doug. 684–691; and see per Blackburn, J., in Bettini *v.* Gye, 1 Q. B. D., at p. 187.

1. Tifton *v.* Feltner, 20 N. Y. 425, 431; Caldwell *v.* Blake, 6 Gray 407.

§ 855. And the rules for discovering the intention are mainly these:—

Rules of construction for discovering intention.

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 to be a condition precedent.

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. (*g*)

3. Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent: formerly called dependent conditions. (*h*)

4. Where each party is to do an act at the same 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. (*i*)

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. (*k*) 2

(*g*) Per Parke, B., in Graves *v.* Legg, 9 Ex. 709, 716; Bettini *v.* Gye, 1 Q. B. D. 183.

(*h*) See Glazebrook *v.* Woodrow, 8 T. R. 366; Jackson *v.* Union Insurance Co., L. R, 10 C. P., at p. 141; Poussard *v.* Spiers, 1 Q. B. D. 410.

(*i*) These rules are (in substance) given in 1 Wms. Saund. 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 Ex. Ch. in Behn *v.* Burness, 3 B. & S. 751; 32 L. J., Q. B. 204.

(*k*) 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. C. 337.

2. Rules for the Interpretation of Conditions.—The first four rules are in substance the same as the five rules given by Serg. Williams in 1 Saund. 320 b, and quoted in Cutter *v.* Powell, 2 Sm. L. Cas. 1. These rules are so general, vague and difficult of application that they are of little practical use. Like most arbitrary rules, on a question of interpretation, they often lead away from the intent of the parties, instead of aiding to discover it. In Watchman *v.* Crook, 5

Gill & J. 239, 254, the court said: "The strong leaning of the courts in modern times has been to disencumber themselves from the fetters of technical rules, and to give such rational interpretation to the contract as will carry the intention of the parties into full and complete operation." This was approved in Md. Fertilizing Co. *v.* Lorentz, 44 Md. 218, 231. But as these rules have been often recognized, some American decisions illustrating them may be given, though the courts reciting them usually proceed to inquire into the intent from a consideration of the whole contract and the surrounding circumstances, without much regard to the terms of the rules. They are rarely mentioned in recent American cases. The fifth rule stated by our author, which is an amplified statement of the rule that *the intent controls*, is invaluable, and applies to every case.

The First Rule.—In Goldsborough *v.* Orr, 8 Wheat. 217, 225, the facts were these: Orr agreed to buy lumber from Goldsborough, one-half in 1818, and one-half in 1819, to the amount of $10,000, in lots as Orr might call for it, and Orr paid the price in advance, $6400, by conveyance of land and $3600, by his note, payable February 15th, 1819. The note was not paid when it came due, and thereupon Goldsborough refused to deliver more lumber. There was still due a balance of $3000, payable in lumber, for the price of the lands. For this balance Orr sued, and his suit was sustained. Under the contract he could lawfully call for all the lumber before the time when the note came due, therefore payment of the note was not a condition precedent to his right to receive the lumber. In Edgar *v.* Boies, 11 S. & R. 445, 450, Edgar agreed to pay $200, and deliver 500 gallons of whiskey May 1st, in each of the years 1813, 1814, 1815 and 1816, to Boies, and Boies agreed to convey a tract of land therefor to Edgar, May 1st, 1815. In a suit brought in 1819, by Boies for breach of this agreement, it was held unnecessary for him to show any tender of a deed by him May 1st, 1815, or at any other time, because *part* of the acts were to be performed by Edgar before the date fixed for delivery of the deed, and therefore the conditions were clearly independent. Later decisions, however, would hold the covenant to deliver May 1st, 1813–1814, independent, and the later deliveries dependent on delivery of the deed. See Kane *v.* Hood, 13 Pick. 281, stated *infra*. In Tipton *v.* Feltner, 20 N. Y. 423, the plaintiff agreed to deliver to defendant eighty-eight dressed hogs at seven cents per pound, and certain live hogs then on the way from Ohio, at five cents per pound. The dressed hogs were delivered at once, but not paid for. The live hogs arrived five days later, but the seller refused to deliver them and sued for the price of the dressed hogs. The defence was that a delivery of the live hogs was a condition precedent to any action on the contract, but the court sustained a recovery. Selden, J., said that in the absence of any provision giving credit, the price of the dressed hogs was due upon delivery, and therefore was to precede delivery of the live hogs. "When, by the terms of a contract, a payment by one party is to precede some act to be done by the other, then the performance of the act cannot be treated as a condition of the payment." In Isaacs *v.* New York Plaster Works, 67 N. Y. 124, the seller agreed in July to ship before January 3000 tons of Nova Scotia plaster, *as fast as ships could be obtained* at Nova Scotia. Part was delivered and paid for. Two cargoes arrived in December for the seller, and the buyers demanded them under their contract, which had not been satisfied in full, offered the contract price for the cargoes, and on refusal to deliver brought suit for damages. The buyers did not prove demand or offer to pay for the balance of the 3000 tons, or that they were at the end of the season ready and willing to pay, and

the defence was based on these grounds. But the court held that the contract was severable as to each cargo, and an action might be sustained for breach of the agreement to deliver as fast as vessels could be procured. If any breach by the buyer had been committed that would be the subject of an independent suit or counter-claim. In Kane *v.* Hood, 13 Pick. 281, land was sold to be paid for in three installments, deed to be given when the last installment was paid. It was held that the agreement to pay the first two installments was independent; but the agreements to pay the last, and to deliver the deed were mutually dependent. See White *v.* Atkins, 8 Pick. 367; Sheeren *v.* Moses, 84 Ill. 448; Adrian *v.* Lane, 13 S. C. 183; Front Street, &c., R. R. *v.* Butler, 50 Cal. 574; State *v.* Winona, &c., R. R., 21 Minn. 472; Shaffer *v.* McKanna, 24 Kan. 22; Stokes *v.* Recknagel, 38 N. Y. Super. Ct. 368, 385; Stevenson *v.* Kleppinger, 5 Watts 420; Lowry *v.* Mehaffy, 10 Watts 387. The following cases illustrate dependent conditions: In Gill *v.* Weller, 52 Md. 8, one who had contracted to buy 40,000 paving blocks, accepted an order for the price, payable September 10th, as follows: "Accepted when the blocks are delivered." Before September 10th, only 38,300 blocks had been delivered, and the buyer refused to receive the other 1700 after the 10th, and it was held that he was not liable on the order. In James *v.* Adams, 16 W. Va. 245, the contract was that the owner of a stock of goods should sell off as many as he could before a certain day, when the buyer should take and pay for what remained. It was held that the seller, on a suit by him for breach of contract, must allege and prove that he had complied on his part, and must also show notice to or knowledge of the buyer that he had done so, because whether he had done so or not was peculiarly within his own knowledge. In Boyd *v.* Fletcher, 12 Heisk. 649, the seller of horses agreed not to expect payment "if the Confederacy fails," and it was held that he could not recover. Goodwin *v.* Lynn, 4 Wash. C. C. 714; Moore *v.* Waldo, 69 Mo. 277; Drake *v.* Hill, 53 Iowa 37; Cooper *v.* McKee, 53 Iowa 239; Toombs *v.* Consolidated Poe Mining Co., 15 Nev. 444.

The Second Rule.—See Obermyer *v.* Nichols, 6 Binn. 159, 164; Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218; Auchterlonie *v.* Arms, 25 U. C. C. P. 403. This rule was declared unsound in Grant *v.* Johnson, 5 N. Y. 247, quoted in this note *infra*. See Champlin *v.* Rowley, 18 Wend. 194; Murphy *v.* St. Louis, 8 Mo. App. 483, stated *post* § 1032, note 18.

Third Rule.—Dakin *v.* Williams, 11 Wend. 67; Dermott *v.* Jones, 2 Wall. 1. In the famous case of Britton *v.* Turner, 6 N. H. 481, 493, a laborer employed for a fixed price for one year, left after 9½ months' labor and sued for the value of his services. This suit was sustained. Parker, J., said: "Where a beneficial service has been performed and received, under contracts of this kind, the mutual agreement cannot be considered as giving to the whole of the consideration so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect." See note 3, *post*.

Fourth Rule—Concurrent Conditions.—In Robison *v.* Tyson, 46 Penna. 286, 293, an agreement was made to deliver oil within a reasonable time on board the cars at a certain station. The buyer sued for breach, but failed in his action for lack of proof that he was ready to receive the oil. See Council Bluffs Iron Co. *v.* Cuppey, 41 Iowa 104; Smith *v.* Wheeler, 7 Oreg. 49, stated *post* note 6, and see *post* note 23.

The Fifth Rule—The Intent Controls.—This rule is worth more than all the others together, as the cases stated in the following notes will abundantly establish. In Grant *v.* Johnson, 5 N. Y. 247, the second rule above stated, (being Serg Williams' third rule), was disputed by the court. Foot, J., said: "One rule is uni-

§ 856. 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. (*l*)

Condition precedent may be changed into warranty by acceptance of partial performance.

§ 857. 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 counter-claim for damages. (*m*) 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 or counter-claim for 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. (*n*) [3]

versal, and that is, that the intent of the parties is to control." Knight *v.* New England Worsted Co., 2 Cush. 287; Livingston *v.* Strong, 90 Ill. 556; Blackman *v.* Dowling, 63 Ala. 304.

(*l*) Behn *v.* Burness, 3 B. & S. 751, per Williams, J.; see, also, Oppenheim *v.* Fraser, 34 L. T. (N. S.) 524.

(*m*) Ellen *v.* Topp, 6 Ex. 424; Behn *v.* Burness, 3 B. & S. 751; 32 L. J., Q. B. 204; Jud. Act, 1875, Ord. XIX., r. 3.

(*n*) 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.* Beaton, 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 Moo. 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.; Carter *v.* Scargill, L. R., 10 Q. B. 564; 1 Wms. Saund. (ed. 1871), p. 554, notes to Pordage *v.* Cole.

3. **Acceptance of Part Performance.**

§ 858. Apart from this modification of the principle, in cases where one of the parties has 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 fulfillment is incumbent can call on the other to comply with his promise. [4]

Condition precedent must be strictly performed before the party bound to fulfill it can demand compliance from the other.

But the necessity for performing the condition 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. 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, or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfill the condition. [5]

Performance may be waived.

No authority is needed, of course, for the proposition that the party in whose favor the condition has been imposed may expressly waive it.

—Where the contract is severable, performance of one of the severable portions will entitle the party so performing to corresponding performance by the other. See *post* § 1032, note 19. Highlands Chemical Co. *v.* Matthews, 76 N. Y. 145; Per Lee *v.* Beebe, 13 Hun 89; Scott *v* Kittanning Coal Co., 89 Penna. 231; Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218; Tenny *v.* Mulvaney, 8 Oreg. 129. But as to the effect of acceptance of part performance of an entire contract, the American cases are very conflicting. See *post* § 1032, note 19, where many cases are collected. Champlin *v.* Rowley, 18 Wend. 194, note.

4. **Conditions Precedent Must be Strictly Performed.**—"It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him." Swayne, J., in Dermott *v.* Jones, 2 Wall. 1, 7; School Trustees *v.* Bennett, 27 N. J. L. 513; Adams *v.* Nichols, 19 Pick. 275; Crane *v.* Indiana, &c., Railway Co., 59 Ind. 165; Collins *v.* Delaporte, 115 Mass. 159; Willard *v.* Morse, 32 Penna. 506; Missouri, &c., R. R. *v.* Fort Scott, 15 Kan. 435; Durland *v.* Pitcairn, 51 Ind. 426; Husted *v.* Craig, 36 N. Y. 221; Fredenburg *v.* Turner, 37 Mich. 402; Kirkpatrick *v.* Alexander, 60 Ind. 95, stated *post* § 1023, note 11. "When the law creates a duty, and the party is disabled from performing it, without any default of his own, the law will excuse him. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Shaw, C. J., in Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 441.

5. The condition of payment on delivery implied in every sale not on credit, is waived by delivering goods without requiring payment. See *ante* § 351. Objection for reasons not well founded to the

The cases, however, are numerous to establish the propositions above stated, in relation to the *implied* waiver.

Waiver implied in certain cases.

Performance obstructed.

§ 859. 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, (*o*) 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." (*p*) [6] 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

Positive refusal by the other party to fulfill contract.

performance tendered by the other party, may operate as a waiver of well-founded objections as to which the objecter is silent. This is especially true where the objection relates to a matter which could readily be remedied. See *ante* §§ 533–535, and Smith *v.* Pettee, *post* § 1030, note 17.

(*o*) 1 T. R. 645.

(*p*) 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 Co., 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; Mackay *v.* Dick, 6 App. Cas. 251.

6. **Is Prevention of Performance by one Party Equivalent to Performance by the other Party to a Contract.**—The statement of Ashhurst, J., quoted in the text, is likely to mislead. The prevention by one party to a contract of the performance of a condition by the other party, is "equal to performance," for the purpose of relieving the obstructed party from the consequences of breach of the condition. But it is *not* necessarily nor usually equal to performance, for the purpose of giving him the same remedies upon the contract which he would have for performance, though such a result may follow in some cases. In Wolf *v.* Marsh, 54 Cal. 228, prevention was equivalent to performance. In that case the owner of a lease of a coal mine for seven years gave a note, with a condition that it was not to be paid if the coal mines yielded no profits to the maker of the note. After five years without profits, he sold his interest in the mine, and it was held that as he had put it out of his power ever to realize profit from the mine the note came due immediately. So, too, in Bolton *v.* Riddle, 35 Mich. 13, where the contract was to cut cedar posts and deliver them at the rail of vessels in the season of 1872, the sellers delivered the posts on the beach, vessels not being furnished. It was held that no deduction from the price could be made for the expense of taking the posts from the beach and placing them on the rail of the vessels. See Town of Mt. Vernon *v.* Patten, 94 Ill. 65; Wheatley *v.* City of Covington, 11 Bush 18. On the other hand in Smoot *v.* United States, 15 Wall. 36, 46, Miller, J., said: "While an impossibility

his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent: as if A engage 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

[to perform] may release the party from liability to suit for non-performance, it does not stand for performance so as to enable the party to sue for and recover as if he had performed." In Butler *v.* Butler, 77 N. Y. 472, the contract was to furnish materials and set up a gas machine in the buyer's hotel, for $1500, to be paid when the works "are on that ground." The materials were sent to the premises and received, but the owner of the hotel refused to permit the machine to be set up. The seller claimed to recover the price, and obtained judgment for the amount less $100, the cost of putting up the machine. This was affirmed by the Supreme Court, but reversed in the Court of Appeals. The court held that the property in the materials remained in the seller, and his remedy was for damages only. Danforth, J., said: "The cause of action was treated by the court below as one where property bargained for had been delivered and title vested in the purchaser, and for which, therefore, the plaintiff might recover the price. There is nothing in the evidence to warrant that view of the case." To the same effect see the similar case of Hosmer *v.* Wilson, 7 Mich. 294, 303, and see Atkinson *v.* Bell, 8 B. & C. 277; Allen *v.* Jarvis, 20 Conn. 38; Moody *v.* Brown, 34 Me. 107; Ganson *v.* Madigan, 13 Wis. 67; S. C., 15 Wis. 144, 150; Collins *v.* Delaporte, 115 Mass. 159, 162; Rawson *v.* Clark, 70 Ill. 656; Cox *v.* McLaughlin, 52 Cal. 590.

Prevention by one Party Excuses Non-Performance by the Other.—"He who prevents a thing being done, shall not avail himself of the non-performance he has occasioned." Fleming *v.* Gilbert, 3 Johns. 528. In United States *v.* Peck, 102 U. S. 64, Peck agreed to supply hay at a military station, to be cut, as contemplated by both parties, at Big Meadows. The officers fearing that Peck would not procure the hay in time, sent other persons, who cut it and delivered it. The court held that Peck was excused from performance, having been prevented by the act of the agents of the government. But where a contractor agreed to deliver mules in Washington, and while on his way for that purpose was turned back by military officers because that city was in danger of capture, and thereby the mules fell into the hands of the enemy, it was held that the United States was not liable, because the act of the officers providing for public defence was not on the same footing with the act of contracting agents within the scope of their authority. Wilson *v.* United States, 11 Ct. of Cl. 513. In the case of Ketchum *v.* Zeilsdorff, 26 Wis. 514, the buyer aided to prevent delivery of the goods sold by becoming surety on the bond of an adverse claimant, who took the goods by replevin. It was held that the buyer had thereby waived delivery until the determination of the suit in replevin. See, also, Sullings *v.* Goodyear Dental Co., 36 Mich. 313, where a contract to permit one to use a patent was held to be broken by procuring an injunction to prevent such use. In Allen *v.* Pennell, 51 Iowa 537, sheep were contracted for, to be paid for by the pound. The buyer sued for breach of this contract, and it was held that he could recover without proving tender of the price, because it was impossible to ascertain the price until after the sheep were tendered

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.* (*q*) [7]

by the seller and weighed. See Escott *v.* White, 10 Bush 169; Gallagher *v.* Nichols, 60 N. Y. 438, 448; Kingsley *v.* Brooklyn, 78 N. Y. 200, 212; Wheatley *v.* Covington, 11 Bush 18; McCormick *v.* Hamilton, 23 Gratt. 561, 572; Taylor *v.* Renn, 79 Ill. 181; Williams *v.* United States, 15 Ct. of Cl. 461; Clearwater *v.* Meredith, 1 Wall. 25, 39; Bright *v.* Taylor, 4 Sneed 159; Seipel *v.* International Life Ins. Co., 84 Penna. 47; Camp *v.* Barker, 21 Vt. 469; Stewart *v.* Keteltas, 36 N. Y. 388; Gallagher *v.* Nichols, 60 N. Y. 438, 448; Hawley *v.* Smith, 45 Ind. 183, 202; Atwood's Adm'r *v.* Turner, 37 Mich. 402; Smith *v.* Boston, &c., R. R., 36 N. H. 458, 494; Jones *v.* Walker, 13 B. Mon. 163; Connelly *v.* Devoe, 37 Conn. 570; Belden *v.* Woodmansee, 81 Ill. 25; Smyth *v.* Craig, 3 W. & S. 14, stated *ante* § 87, note 3; Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104; Smith *v.* Wheeler, 7 Oreg. 49.

(*q*) Cort *v.* The Ambergate Railroad Co., 17 Q. B. 127; 20 L. J., Q. B. 460; Bowdell *v.* Parsons, 10 East 59; Amory *v.* Brodrick, 5 B. & Ald. 712; Short *v.* Stone, 8 Q. B. 358; Caines *v.* Smith, 15 M. & W. 189; Reid *v.* Hoskins, 4 E. & B. 979; 5 E. & B. 729; 25 L. J., Q. B. 55, and 26 L. J., Q. B. 5; Avery *v.* Bowden, 5 E. & B. 714; 6 E. & B. 953; 25 L. J., Q. B. 49, and 26 L. J., Q. B. 3; Bartholomew *v.* Markwick, 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 Co., 17 C. B. (N. S.) 733; 34 L. J., C. P. 15.

7. **Refusal by one Party before the Time of Performance, Warrants Rescission by the Other.**—Such refusal, unless withdrawn, constitutes a sufficient excuse for default of the other party, who may treat the contract as at an end. Crist *v.* Armour, 34 Barb. 378; McPherson *v.* Walker, 40 Ill. 371; Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Wight *v.* Gardner, 66 Ill. 94; Saylor *v.* United States, 14 Ct. of Cl. 453; Williams *v.* United States, 16 Ct. of Cl. 461; Haines *v.* Tucker, 50 N. H. 307, 312; Smith *v.* Lewis, 26 Conn. 110; Sullings *v.* Goodyear Dental Co, 36 Mich. 313; Buffkin *v.* Baird, 73 N. C. 283. In Burge *v.* Koop, 48 N. Y. 225, the time for delivery of property sold expired July 31st. On a suit by the buyer for breach, Earl, Comm'r, said: "On the 28th of July the defendants informed the plaintiffs that they could not perform, and this dispensed with any offer of performance by the plaintiff on the 31st or any other day." In Greene *v.* Haley, 5 R. I. 260, the owner of a lot of land contracted to furnish timber to a builder who agreed to construct a house on the lot. The owner delivered the timber on the lot, and refused to deliver it at the shop of the builder, or to permit the builder to take it there. It was held that as this refusal was in violation of the contract fairly interpreted, and prevented the builder from doing his work to the best advantage, it justified the builder in rescinding the contract, and he could recover for that part of the work which he had performed. That was a case where the work was upon the materials and property of the owner, who thereby obtained the benefit of it. Where the builder works on his own materials,

Mere assertion that a party will be unable or unwilling to comply, no waiver.

§ 860. 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 compliance with the contract, it is plain that he does not understand it to be at an end. (*r*) [8] The authorities will be found collected and considered in the notes to Cutter *v.* Powell, 2 Smith's Leading Cases 1

which remain his when the owner terminates the contract, the remedy is for damages for breach of the contract, and not for the value of labor and materials. Curtis *v.* Smith, 48 Vt. 116; Allen *v.* Thrall, 36 Vt. 711; Black *v.* Woodrow, 39 Md. 194, 217; Shulte *v.* Hennessy, 40 Iowa 352. But see, *contra*, Prawson *v.* Clark, 70 Ill. 656.

Lex Neuminem ad Vana sen Inutilia Cogit.—In Hawley *v.* Keeler, 62 Barb. 231, affirmed, 53 N. Y. 114, the owners of property, having contracted to sell it to one, sold it to another. The last sale was held to render it unnecessary for the first buyer to tender the price before bringing suit for damages. On a similar state of facts, in Parker *v.* Pettitt, 43 N. J. L. 512, 517, Depue, J., said: "Where the vendor, before the time for performance of his contract, has disabled himself from performing, neither a demand of performance, nor a tender of the consideration, nor an averment of plaintiff's readiness to accept the goods and pay for them, is necessary." Grove *v.* Donaldson, 15 Penna. 128.

(*r*) Barrick *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.* Bowden, 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; Leeson *v.* The North British Oil Co., 8 Ir. R. C. L. 309.

8. **An Assertion by one that he will not Perform will not Excuse the other if withdrawn before Acted upon.**—In Westlake *v.* Bostwick, 35 N. Y. Super Ct. 256, the contract was to deliver oil August 27th. The buyer wrote August 22d to the sellers that unless they sent word at once that the oil would be delivered, the buyer would buy the oil elsewhere and hold the sellers liable. August 23d, the buyer wrote that he had purchased oil elsewhere. August 27th he demanded delivery, according to contract, and being refused, brought suit for damages. It was held that he could recover, no evidence appearing to show that the sellers had acted on or been misled by the letters of August 22d and 23d. Had the sellers acted on the faith of the letters, the result would have been otherwise, but as they, in fact, had the oil, and refused to deliver it for reasons distinct from any waiver, they were held liable. Smoot *v.* United States, 15 Wall. 36, cited by our author, was a case where the government had contracted for cavalry horses to be inspected. After the making of the contract, a regulation was adopted requiring horses rejected to be branded "R," if fraudulently presented. The contractor refused to deliver horses under these terms, because his own purchases were made subject to this inspection, and the farmers from whom he bought would not take the risk of such branding. The contractor

The Supreme Court of the United States has cited the foregoing passage with approval as a correct statement of the law. (*s*)

The whole law on this subject has been re-examined 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. Frost *v.* Knight.

In New York, also, 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 fulfill 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. [9] Case in New York.

brought suit against the government for damages. But the court held that he was bound to tender the horses, and if then the examining officers insisted on illegal conditions, that would be the proper time to refuse to perform under such conditions. In Brooklyn Life Ins. Co. *v.* Bledsoe, 52 Ala. 538, it was held that the act relied upon as prevention or waiver of performance must be the proximate, and not the remote cause of the failure to perform. In Coffin *v.* Reynolds, 21 Minn. 456, strict performance of the seller's agreement to deliver was held excused by the fact that the buyer notified the seller (under a mistake) that he had delivered enough. But the obligation to deliver the balance revived on discovery of the mistake. A denial of the contract after the time for performance will not avail the other party in a suit for damages for non-performance, if he did not tender performance on his part. In Simmons *v.* Green, 35 Ohio St. 104, where the suit was by the buyer for non-delivery, it was held that he must prove readiness to receive and pay for the goods, and that he was not relieved by the fact that the other party denied the contract in his pleadings and evidence. To the same effect, see Mowry *v.* Kirk, 19 Ohio St 383; Zuck *v.* McClure, 98 Penna. 541, 545.

(*s*) Smoot *v.* The United States, 15 Wall. 36, at p. 48.

9. **On Refusal to Fulfill can the Other Party Sue at Once Without Awaiting till the Time for Performance Expires?**—On this question there is some difference of opinion. As to breaches of promise of marriage the right to sue at once is sustained. As to contracts of sale, it was said in Freer *v.* Denton, 61 N. Y. 492, 496, that the right to sue at once on notice by the other party that he will not perform is not settled In Platt *v.* Woodruff, 61 N. Y. 374, Dwight, Comm'r, approved Frost *v.* Knight, and Hochster *v.* De la Tour, but the other judges reserved their opinions, concurring on other grounds in the judgment. In Shaw *v.* Republic Life Ins. Co., 69 N. Y. 286, 293, Folger, J., said that a refusal by one party to perform, waived tender of performance by the other. Whether such refusal was an immediate breach for which an action would lie as maintained in England, he said was not needful to determine in that case. This seems to be the latest declaration on the subject in that court. See Gray *v.* Green, 9 Hun 334. In Illinois

§ 861. It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfill it, if the performance be in its nature possible.[10] But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God, (*u*) 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 an end. (*x*)

Impossibility as an excuse.

In Taylor *v.* Caldwell, (*y*) 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

Taylor *v.* Caldwell.

Hochster *v.* De la Tour, was followed in Fox *v.* Kitton, 19 Ill. 519, 534, and that case is cited with approval in Follansbee *v.* Adams, 86 Ill. 13, where it is held that on notice that default will be made in delivery of grain, the buyer may at once provide himself with grain elsewhere, and may at the time fixed for delivery refuse to accept grain if tendered. See Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Lee *v.* Pennington, 7 Brad. 247, 251. In James *v.* Adams, 16 W. Va. 245, 266, a stock of goods was to be delivered on a certain day, part of the price to be paid on that day in cash, and the residue in six and twelve months. On suit against the buyer for non-acceptance, the court held (p. 266) that "as the contract is an entire thing, the refusal of defendant to take the goods or make the cash payment was a repudiation and breach of the entire contract, and plaintiff had at once a cause of action for such breach without waiting till the deferred payments would have become due under the contract and without proving any formal tender, for such refusal was a waiver by defendant of such tender." In Dingley *v.* Oler, 11 Fed. Rep. 373, Lowell, J., said: "In contracts for deliveries of merchandise, if the buyer, before the time of performance arrives, renounces the contract, an immediate action will lie." See Stage Co. *v.* Peck, 17 Kan. 271; Holloway *v.* Griffith, 32 Iowa 409; Davis Sewing Machine Co *v.* McGinnis, 45 Iowa 538; McCormick *v.* Basal, 46 Iowa 235. In Daniels *v.* Newton, 114 Mass. 530, 535, 539, the court criticised Frost *v.* Knight and Hochster *v.* De la Tour, cited in the text, and concluded that the principles there stated were not to be generally applied. Wells, J., said: "The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering on or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed," and it was held that no action would lie on a contract to buy land before the time for performance, though the buyer had refused ever to fulfill.

10. See *post* note ¼.

(*u*) The meaning and extent of the term "act of God" are considered by Cockburn, C. J., in his judgment in Nugent *v.* Smith, 1 C. P. D. 423, where the corresponding expressions in the civil law are explained.

(*x*) Shep. Touch. 173, 382; Co. Lit. 206 a; Faulkner *v.* Lowe, 2 Ex. 595; Williams *v.* Hill, Palm. 548; Laughter's case, 5 Rep. 21 b; Hall *v.* Wright, 1 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.

(*y*) 3 B. & S. 826; 32 L. J., Q. B. 164.

specified days, and the defence was that the hall had been burnt down before the appointed days, so that it was impossible to fulfill the condition. This excuse was held valid. The learned 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."

Vendor excused from delivery if goods perish without his fault.

§ 862. That this is the rule of English law, is established by the case of Rugg *v.* Minett. (*z*) 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.* [11] This case was followed in Appleby *v.* Meyers, in the Exchequer Chamber. (*a*) And in Robinson *v.* Davison, (*a*) 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. [12]

Robinson *v.* Davison.

(*z*) 11 East 210.

11. **Impossibility Arising from Destruction of Thing Essential to Performance.**—In Dexter *v.* Norton, 47 N. Y. 62, the contract was for the sale of certain specific bales of cotton. Before delivery, and while they were still the property of the seller, they were destroyed by fire. The buyer sued for damages for non-fulfillment of the contract, but the court held that the law implied that the delivery was conditional on the continued existence of the thing sold. See Booth *v.* Spuyten Duyvil, &c., Co., 60 N. Y. 487, 491; Whitaker *v.* Hawley, 25 Kan. 674, 686; Price *v.* Pepper, 13 Bush 42; Walker *v.* Tucker, 70 Ill. 527, 543; Leopold *v.* Salkey, 89 Ill. 412, 419; Wells *v.* Calnan, 107 Mass. 514. Steele *v.* Buck, 61 Ill. 343, stated *post* note 14, is perhaps an authority to the contrary. Cook *v.* McCabe, 53 Wis. 250.

(*a*) Appleby *v.* Meyers, L. R., 1 C. P. 615; 35 L. J., C. P. 295, reversed in Ex. Ch., 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; Anglo-Egyptian Navigation Co. *v.* Rennie, L. R., 10 C. P. 271; Howell *v.* Coupland, L. R., 9 Q. B. 462, on App, 1 Q. B. D. 258; Poussard *v.* Spiers, 1 Q. B. D. 410, 414; Simeon *v.* Watson, 46 L. J., C. P. 679.

12. To the same effect see Spalding *v.* Rosa, 71 N. Y. 40. See, also, Stewart *v.* Loring, 5 Allen 306, where a promise to pay for tuition was held not actionable, because the pupil was sick and unable to receive the tuition.

In Dexter *v.* Norton, (*b*) 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.

Dexter v. Norton.

American law.

§ 863. [The principle of Taylor *v.* Caldwell was applied to a case where the contract was to sell "200 tons of potatoes grown *on land belonging to the defendant in Whaplode.*" The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only able to deliver 80 tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance, on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused, if, before breach, performance became impossible from the perishing, without default on his part, of the subject matter of the contract. (*c*)]

Howell *v.* Coupland.

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 the obligor no longer bound. (*d*) [13]

Legal impossibility.

§ 864. 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 fulfill a promise, when he might have guarded himself by the terms of his contract. (*e*) [14]

Thing possible in itself.

(*b*) 47 N. Y. 62.

(*c*) Howell *v.* Coupland, L. R., 9 Q. B. 462; S. C. affirmed, 1 Q. B. D. 258, C. A.

(*d*) Brewster *v.* Kitchell, 1 Salk. 198; Davis *v.* Cary, 15 Q. B. 418; Doe *v.* Rugely, 6 Q. B. 107; Wynn *v.* Shropshire Union Railway Co., 5 Ex. 420; Brown *v.* Mayor of London, 9 C. B. (N. S.) 726, and 31 L. J., C. P. 280; Bailey *v.* De Crespigny, L. R., 4 Q. B. 180, where the whole subject is elaboratety discussed in the decision of the Q. B. delivered by Hannen, J.; Newby *v.* Sharpe, 8 Ch. D. 39; Newington Local Board *v.* Cottingham Local Board, 12 Ch. D. 725.

13. Shellington *v.* Howland, 53 N. Y. 371, 375; Hanger *v.* Abbott, 6 Wall. 532; Semmes *v.* Hartford Ins. Co., 13 Wall. 158.

(*e*) See per Mellish, J., in River Wear Commissioners *v.* Adamson, 1 Q. B. D., at p. 548, and *per eundem* in Nichols *v.* Marsland, 2 Ex. D., at p. 4. See, also, Arthur *v.* Wynne, 14 Ch. D. 603.

14. **A Breach of an Agreement not Impossible in its Nature, though Im-**

Thus in Kearon *v.* Pearson, (*f*) the defendant undertook to deliver a cargo of coals on board of a vessel with the usual despatch. 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. Kearon *v.* Pearson.

§ 865. So in Barker *v.* Hodgson, (*g*) the defendant attempted to ex-

possible under the Circumstances, is Actionable.—This is the general rule the exceptions to which have been above stated. Thus, in Harmony *v.* Bingham, 12 N. Y. 99, 115, a carrier agreed to transport goods to a certain point within twenty-six days. He failed because of a freshet obstructing navigation, but was held liable. Ruggles, J., said: "In the instance of an absolute contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by, or within the control of the party. "Still less is a party excused from performance, because it is difficult. Oakley *v.* Morton, 11 N. Y. 25, 31." The impossibility which releases a man from the obligation to perform his contract, must be a real impossibility, and not a mere inconvenience." Smoot *v.* United States, 15 Wall. 36. See Booth *v.* Spuyten Duyvel Rolling Mill, 60 N. Y. 487. In Jones *v.* United States, 96 U. S. 24, a manufacturer agreed to manufacture and deliver a certain quantity of army clothing within a certain time. This became impossible by reason of the loss of the mill of the manufacturer by fire, but he was held not to be released from liability for breach. Clifford, J., said: "When the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency." And in Eddy *v.* Clement, 38 Vt. 486, one who agreed to furnish lumber as fast as wanted for certain buildings was held liable for breach, though prevented by a drouth which stopped all the saw-mills accessible. In Bacon *v.* Cobb, 45 Ill. 47, a party was held liable for not delivering corn in time, and the fact that he was hindered because the government seized the railroad to transport army supplies, was not allowed to relieve him. In Steele *v.* Buck, 61 Ill. 343, parties who chartered a vessel and agreed to restore her at the end of a certain period, were held liable for not restoring her, though she was lost in a storm, without fault of the charterers. (Sheldon, J., dissented, because performance was rendered impossible by act of God, and destruction of the subject matter of the contract. See notes 11, 15.) See Wareham Bank *v.* Burt, 5 Allen 113; Hand *v.* Baynes, 4 Whart. 204, 214; Dewey *v.* Alpena School District, 43 Mich. 480; Kribs *v.* Jones, 44 Md. 396, 406; Kitzinger *v.* Sanborn, 70 Ill. 146; Hodgdon *v.* New Haven, &c., R. R., 46 Conn. 376; Aylevard *v.* Smith, 2 Low. Dec. 192. The case of Lovering *v.* Buck Mountain Coal Co., 54 Penna. 291, seems to be at variance with those above stated. The coal company in that case agreed to deliver 1000 tons of coal per month. Having failed during one month to deliver, they were held excused by act of God, because navigation was interrupted on their line of transport by a freshet.

(*f*) 7 H. & N. 386; 31 L. J., Ex. 1.

(*g*) 3 M. & S. 267; but see Ford *v.* Cotesworth, L. R, 4 Q. B. 127; 5 Q. B. 544, in error; and Cunningham *v.* Dunn, 3 C. P. D. 443, C. A.

Barker v. Hodgson.

cuse himself for not furnishing a cargo in a foreign 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."

§ 866. So in Kirk *v.* Gibbs, (*h*) 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.

§ 867. 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, (*i*) the declaration was in case, and

(*h*) 1 H. & N. 810; 26 L. J., Ex. 209. (*i*) 2 Lord Raym. 1164.

alleged that the defendant, in consideration of 2*s.* 6*d.* paid, and of £4 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 infra 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. Thornborow *v.* Whitacre.

The reporter says that in arguing this case, the old case of James *v.* Morgan (*k*) 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 500 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, being £8; and so they did, and it was afterwards moved in arrest of judgment, (*l*) 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.) James *v.* Morgan.

(*k*) 1 Levinz 111. (*l*) 1 Keble 569.

The 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. (*m*)

§ 868. 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, (*n*) 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.

[The rule is well illustrated by a decision in the State of Connecticut, School District *v.* Dauchy. (*o*) The defendant had agreed to complete the building of a school-house by a certain time, and before its expiration the building, when nearly completed, was destroyed by lightning, whereby alone the defendant was prevented from performing his contract, which was absolute in its terms. It was held that the destruction of the building was no excuse for the non-performance of the contract. The judgment of Ellsworth, J., who delivered the opinion of the court, is well worth consideration.] [15]

Case in America.

(*m*) Reid *v.* Hoskins, 6 E. & B. 953; 26 L. J., Q. B. 5; Esposito *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. C. 856; Atkinson *v.* Ritchie, 10 East 530; Adams *v.* Royal Mail Co., 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 (see remarks of Lord Blackburn on this case in River Wear Commissioners *v.* Adamson, 2 App. Cas., at p. 770); Chitty on Cont. (ed. 1881), p. 667; Leake Dig. of the Law of Contract, p. 681, *et seq.*; Broom's Leg. Max. 245.

(*n*) L. R., 6 Q. B. 115.

(*o*) 25 Conn. 530. See, also, Harmony *v.* Bingham, 2 Kernan 106, and Booth *v.* Spuyten Duyvil Mills Co., 60 N. Y. 487, at pp. 490, 491, where Dexter *v.* Norton (*ante*, § 862) was distinguished, and the limits of the rule are laid down by Church, C. J., in delivering the opinion of the court.

15. To the same effect see Dermott *v.*

§ 869. The conditions most frequently occurring in contracts of sale will now be considered.

Sale dependent on an act to be done by third person.

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, and if the third party refuse, even unreasonably, to perform the act, this will not dispense with such compliance. Thus in Brogden *v.* Marriott, (*p*) the vendor sold a horse for one shilling cash, and a further payment of £200 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 defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party."

Brogden *v.* Marriott.

Thurnell *v.* Balbirnie.

So in Thurnell *v.* Balbirnie, (*q*) 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.

Jones, 2 Wall. 1; School Trustees *v.* Bennet, 27 N. J. L. 513; Tompkins *v.* Dudley, 25 N. Y. 272; Stees *v.* Leonard, 20 Minn. 494. But where the building had been erected and the contract was to put in it steam works for heating, and after the work was nine-tenths finished, the building was burned, it was held that the plumber could recover, for the owner by his contract was bound to provide the building. Niblo *v.* Binsee, 1 Keyes 476. See Schwartz *v.* Saunders, 46 Ill. 18. So, too, where a contractor agreed to put up certain iron work, to be manufactured in a building, and the building was destroyed, it was held that the contractor could recover the price, though the contract required the certificate of the architect, the case contemplated for such certificate not having arisen. Rawson *v.* Clark, 70 Ill. 656.

(*p*) 2 Bing. N. C. 473.

(*q*) 2 M. & W. 786.

The party who claims must show performance of condition.

§ 870. 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; (*q*) 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 *bona fide*, it was held, that the insured could not recover without the certificate, even though the minister unreasonably refused to give it; (*r*) 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. (*s*) [16]

(*q*) Mills *v.* Bayley, 2 H. & C. 36; 32 L. J., Ex. 179.

(*r*) Worsley *v.* Wood, 6 T. R. 720.

(*s*) 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; Richardson *v.* Mahon, 4 L. R., Ir. 486.

16. **Condition that some Act shall be done by a Third Person.**—See *ante* § 87, note 3; Boardman *v.* Spooner, 13 Allen 353, 361. In United States *v.* Robeson, 9 Pet. 319, 327, a ship-owner chartered his vessel to the government, and it was agreed that freight should be paid on the amount of stores carried, on production of a certificate from the commanding officer. The question was whether the owner could recover more than was included in such certificate. McLean, J., said: "Where the parties fix on a mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. Had it been proved that application had been made to the officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." A provision that disputes shall be settled by arbitration, will not take away the jurisdiction of the courts. Gray *v.* Wilson, 4 Watts 39. The distinction between the class of cases where a provision for arbitration by a third person is essential to establish a right under a contract, and that class where the law will arbitrate notwithstanding such provision, is stated in Del. and Hud. Canal Co. *v.* Penna. Coal Co., 50 N. Y. 250, 266. Allen, J., said: "In one class the parties undertake by an independent agreement to provide for as settlement of all disputes by arbitration, to the exclusion of the courts; in the other they merely, by the same agreement that creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue, certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent, either in terms or by necessary implication." See Herrick *v.* Estate of Belknap, 27 Vt. 673; Mark *v.* Ins. Co., 24 Hun 565; Gibbs *v.* Ins. Co., 13 Hun 611; Elliott *v.* Hewitt, 11 U. C. Q. B.

871. 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, (*t*) where the outgoing tenant sold the straw on a farm to the incomer at a valuation to be made by two indifferent persons, but pending the valuation the buyer consumed the straw.[17] 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. (*u*)

If condition rendered impossible by vendee, vendor may recover *quantum valebat*.

Clarke *v.* Westrope.

§ 872. 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 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. (*x*) 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, (*y*) 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.

292; Aitcheson *v.* Cook, 37 U. C. Q. B. 490; Drake *v.* Hill, 53 Iowa 37, 39. In Sullivan *v.* Byrne, 10 S. C. 122, a building contract provided that payments should be made only on the architect's certificate, but it was held that if he improperly withheld his certificate, a recovery could be had without it.

(*t*) 18 C. B. 765; 25 L. J., C. P. 287.

17. This language of the text is quoted and approved in Humaston *v.* Telegraph Co., 20 Wall. 20, 28. See, also, United States *v.* Wilkins, 6 Wheat. 135, 143.

(*u*) Batterbury *v.* Vyse, 2 H. & C. 42; 32 L. J., Ex. 177.

(*x*) 2 Wms. Saund. 62 a, n. 4.

(*y*) Cited in 6 M. & W., at p. 454, in the opinion delivered by Parke, B., in Vyse *v.* Wakefield, from which the doctrine in the text is chiefly extracted.

vendor should get for the barley from J. S., (*z*) for the party bound in this event is sufficiently notified by the terms of his contract, that a sale is or will be made to 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.[18] Therefore, in Vyse *v.* Wakefield, (*a*) 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

True test of the necessity of notice.

Vyse *v.* Wakefield.

(*z*) Viner's Ab. Condition (A. d.), pl. 15.

18. **Duty to Give Notice of Event.**—Where the contract expressly requires notice given, such notice may be a condition precedent. In Nichols *v.* Hall, 4 Neb. 210, 214, the buyer defended a suit for the price of a machine on the ground of breach of warranty. But the agreement containing the warranty provided that if the machine failed to operate well, the seller should receive written notice and have a reasonable time to remedy the defect. No such notice having been given, it was held that the buyer had failed to comply with the condition on which the warranty depended, and therefore could not avail himself of it. In Williams *v.* United States, 15 Ct. of Cl. 461, the contract was to deliver 7000 cords or less, as might be required, at a certain military post. The proper officer notified the contractor to deliver the whole. Subsequently the officers of the post refused to accept the whole. It was held that the government was liable for damages, though the contractor abandoned the contract. Kirkpatrick *v.* Alexander, 44 Ind. 595, 597; S. C., 60 Ind. 95, stated *post* § 1023, note 11; Home Life Ins. Co. *v.* Pierce, 75 Ill. 426, 432; Sanborn *v.* Benedict, 78 Ill. 309; Posey *v.* Scales, 55 Ind. 282, stated *post* § 1018, note 7; Hammond *v.* Gilmore, 14 Conn. 479, 486; Watson *v.* Walker, 23 N. H. 471; Quarles *v.* George, 23 Pick. 400; James *v.* Adams, 16 W. Va. 245, 258, stated *ante* note 2.

(*a*) 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.*

contained the proviso alleged in the declaration. Held, that the declaration was bad.

§ 873. A very frequent contract among merchants is a sale of goods "to arrive." (*b*) 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. [19]

Sale of goods "to arrive."

In Boyd *v.* Siffkin, (*c*) the sale was of "32 tons, more or less, of Riga Rhine hemp *on arrival per Fanny and Almira, &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, (*d*) where the sale was thus expressed: "I have this day sold for and by your order *on arrival* 100 tons, &c."

Boyd *v.* Siffkin.

Hawes *v.* Humble.

In Idle *v.* Thornton, (*e*) 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 of 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 of 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.

Idle *v.* Thornton.

§ 874. In Lovatt *v.* Hamilton, (*f*) the contract was, "We have sold you 50 tons of palm oil, *to arrive* per Mansfield, &c. In case of non-arrival, 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 trans-shipped, 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.

Lovatt *v.* Hamilton.

Insole, 14 Q. B. 728; 19 L. J., Q. B. 202.

(*b*) As to the meaning of the word "arrive" in a contract, see Montgomery *v.* Middleton, 13 Ir. C. L. R. 173.

19. See *post* note 20.

(*c*) 2 Camp. 326.

(*d*) 2 Camp. 327, n.

(*e*) 3 Camp. 274.

(*f*) 5 M. & W. 639.

The Mansfield also arrived safely. The question was whether the arrival of the oil *in the Mansfield* was a condition precedent to the buyer's right to claim the delivery, and the court, without hearing the vendor's counsel, held the affirmative to be quite clear.

Alewyn v. Pryor.

In Alewyn *v.* Pryor, (*g*) 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 30th day of June next*, &c." The vessel did not arrive till the 4th of July, and the purchaser refused to take the oil. Held, that the arrival *by the 30th of June* was a condition precedent, and not a warranty by the seller.

Johnson v. Macdonald.

In Johnson *v.* Macdonald, (*h*) 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.

Gorrissen v. Perrin.

§ 875. In Gorrissen *v.* Perrin, (*i*) the sale was of "1170 bales of gambier, *now on passage from Singapore*, and *expected to arrive* in London, viz., per Ravenscraig 805 bales, per Lady Agnes Duff 365 bales." Both vessels arrived with the specified 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 hundredweight. 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 1170 *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

(*g*) Ry. & M. 406.
(*h*) 9 M. & W. 600.
(*i*) 27 L. J., C. P. 29; 2 C. B. (N. S.) 681.

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, (*k*) 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. (*l*)

Fischel *v.* Scott.

§ 876. In Vernede *v.* Weber, (*m*) the contract was for the 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 quality not to exceed 50 tons, or else at the option of buyers to reject any excess, &c." 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, (*n*) that the buyer had no right to the *Larong* rice, because the contract was entire: it contemplated the sale of a

Vernede *v.* Weber.

(*k*) 15 C. B. 69.

(*l*) See, on this point, Lord Ellenborough's remarks in Hayward *v.* Scougall, 2 Camp. 56.

(*m*) 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.

(*n*) 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.

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.

§ 877. In Simond *v.* Braddon, (*o*) the sale was "of the following cargo of Aracan rice, per Severn, Captain Bryan, now on her way to Akyab (where the cargo was to be taken on board), *via* Australia. The cargo to consist of fair average Necrensie 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 Necrensie rice, and he was held liable for a breach of it, the cargo proving to be Necrensie rice of inferior quality.

Simond *v.* Braddon.

In Hale *v.* Rawson, (*p*) the declaration alleged an agreement by the defendant to sell to the plaintiff 50 cases of East India tallow, "to be paid for *in fourteen days after the landing thereof*, to be delivered by the defendant to the plaintiff, *or 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 or warranty that the tallow was on board the ship.

Hale *v.* Rawson.

§ 878. In Smith *v.* Myers, (*q*) 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 *Pre-*

Smith *v.* Myers.

(*o*) 2 C. B. (N. S.) 324; 26 L. J., C. P. 198.

(*p*) 4 C. B. (N. S.) 85; 27 L. J., C. P. 189.

(*q*) L. R., 5 Q. B. 429; 7 Q. B. 139, in Ex. Ch.

cursor, 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 of 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 of August, an earthquake had destroyed the greater part of the nitrate while lying at the port of lading, and on the 2d of 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 canceled by the Valparaiso house; the vendors in England being ignorant of these facts when they made the contract with the plaintiff on the 8th of 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 of 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 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 plaintiffs' demand, if it had come on a vessel of a different name.

Covas *v.* Bingham.

Sale of cargo to arrive "as it stands."

§ 879. In Covas *v.* Bingham, (*r*) 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 1300 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

(*r*) 2 E. & B. 836; 23 L. J., Q. B. 26.

100 kilos—payment cash *on handing shipping documents and policy of insurance.*" The contract was made on the 16th of 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 of 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 $1667\frac{3}{5}$ 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 $1614\frac{1}{2}$ 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 lading, with all the chances of excess or deficiency in the quantity that might be on board.

§ 880. It appears from this review of the decisions that contracts of this character may be classified as follows:

Result of the decisions in sales "to arrive."

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,) (*s*) 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 "1170 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

(*s*) Per Parke, B., in Johnson *v.* McDonald, 9 M. & W. 600-604.

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, (*t*) the condition precedent is not fulfilled, and neither party is bound by the bargain. [20]

§ 881. In Neill *v.* Whitworth, (*u*) an attempt was made to convert

(*t*) See *post*, Part II., Ch. 1, Warranty, for the effect of a *description* of the thing sold.

20. **Sales to Arrive.**—In Shields *v.* Pettee, 4 N. Y. 122, the contract was for the sale of 150 tons No. 1 pig iron, "on board Siddons," a vessel at sea. She arrived with the quantity, on board, but not of the quality bargained for. The buyers took 60 tons and used a portion, when they discovered that it was not of the required quality, and refused to complete the sale. They were sued for the value of the iron received by them, and were held liable for it on an implied contract at its market value, which by a rise was above the contract price for better iron. Hurlbut, J., said: "One hundred and fifty tons of pig iron of quality No. 1 was expected to arrive by the Siddons, and the contract was to the effect, that if that quantity and quality of iron did so arrive, one party should sell and the other should receive it, at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end." The liability for iron taken was therefore solely on an implied contract. A like construction was put upon the contract in the case of Neldon *v.* Smith, 36 N. J. L. 148, 154. In that case Smith agreed to deliver three boat-loads of coal to Neldon at a certain price, provided he should procure it from the Del., Lack. & W. Co. before September 1st. A strike lasting till after September 1st prevented the shipment of any coal. It was held that Neldon could not after that date call for the delivery of any coal, although the company settled with Smith and delivered him the coal he had ordered in July. In Rogers *v.* Woodruff, 23 Ohio St. 632, the sale was of salt "to arrive by the 15th November," and damages were claimed by the buyer, because of the non-delivery of the salt so bargained for. Stone, J., said: "Whether it would arrive or not depended upon contingencies not within the control of either party. * *

* It has uniformly been held that contracts of this description are conditional, the words 'to arrive' not importing a warranty that the goods will arrive, and the obligation to perform the contract being contingent upon its arrival." See Russell *v.* Nicoll, 3 Wend. 112; Benedict *v.* Field, 16 N. Y. 595, 597; Smith *v.* Pettee, 70 N. Y. 13. In Dike *v.* Reitlinger, 23 Hun 241, the suit was by the buyer for breach of contract to deliver a quantity of hair "to arrive" equal to sample. The hair did arrive, but was refused, because not equal to sample. The action was sustained. Shields *v.* Pettee was distinguished, because in that case there was no warranty.

(*u*) 18 C. B. (N. S.) 435; 34 L. J., C. P. 155.

Neill *v.* Whitworth.

a stipulation introduced in the vendor's favor into a condition precedent which he was bound to fulfill. 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 from the quay within twenty-four hours, in default whereof they are removed and warehoused by the dock authorities.

§ 882. 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.

Vendor to give notice in sales "to arrive."

In Buck *v.* Spence, (*x*) 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 of 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.

Buck *v.* Spence.

§ 883. This point seems not to have occurred again until 1854, when it was carefully considered as a new question, and determined in the same way, in the Exchequer, in Graves *v.* Legg, (*y*) the decision of Gibbs, C. J., in Buck *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

Graves *v.* Legg.

(*x*) 4 Camp. 329.

(*y*) 9 Ex. 709; 23 L. J., Ex. 228.

Court of Exchequer, as well as the Exchequer Chamber, held that this was a compliance with the condition. (*z*)

§ 884. [Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract. It is then a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expressions "to be shipped" or "shipment" within a certain time. They may be construed to mean either that the goods shall be placed on board ship during the time specified, or that the shipment shall be completed before that time expires. The former has now been decided by the highest authority to be the natural meaning of the words, and one which the courts for the future will place upon them, in the absence of any trade usage to alter that meaning. The point in question was fully considered in the two cases of Alexander *v.* Vanderzee (*a*) and Shand *v.* Bowes. (*b*)

Sale of goods "to be shipped" within a certain time.

§ 885. In Alexander *v.* Vanderzee, (*a*) the defendant had contracted for the purchase of 10,000 quarters of Danubian maize, *for shipment in June and* [*or*] *July*, 1869 (old style), seller's option. In fulfillment of the seller's contract two cargoes of maize were tendered to the defendant, the bills of lading for which were dated respectively the 4th and the 6th of June, 1869. The loading of the two cargoes was commenced on the 12th and 16th of May, and completed on the 4th and 6th of June, rather more than half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June, but it does not appear that any evidence of usage to affect the ordinary meaning of the words was tendered. (c) At the trial it was left to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term, and they found that they were, and the majority of the Court of Exchequer Chamber held, affirming the decision of the Court of Common Pleas, that the question was rightly left to the jury, and that their verdict,

Alexander *v.* Vanderzee.

(*z*) 11 Ex. 642; 26 L. J., Ex. 316. See, also, Gilkes *v.* Leonino, 4 C. B. (N. S.) 485.

(*a*) L. R., 7 C. P. 530.

(*b*) 2 App. Cas. 455, *sub nom.* Bowes *v.* Shand, affirming the decision of the Div. Court, 1 Q. B. D. 470, and reversing that of the Court of Appeal, 2 Q. B D. 112.

(*c*) See, however, the argument of counsel in Bowes *v.* Shand, 2 App. Cas., at the foot of p. 460.

therefore, disposed of the case. In the Exchequer Chamber, Martin, B., Blackburn, Mellor, and Lush, JJ., were of opinion that the words "June and [or] July shipment" were ambiguous, and might mean either that the shipment was to be completed in one of those months, or that the whole quantity of grain was to be put on board within those months, and that it was properly left to the jury to decide. Kelly, C B., on the other hand, was of opinion that, in the absence of any suggestion that the words bore a technical meaning, the construction of them was for the judge, and that their natural meaning was that the cargoes should be put on board in June or July, not partly in May, particularly upon the evidence that a May shipment was more likely to heat than a June shipment, but he declined to differ from the rest of the court.

Shand v. Bowes.

§ 886. But the authority of this case is shaken by the later decision of the House of Lords in Shand *v.* Bowes. (*e*) The contract was for the sale of 600 tons of "Madras rice *to be shipped* at Madras or coast *during the months of March and* [*or*] *April*, 1874, per Rajah of Cochin."

The Rajah of Cochin arrived at Madras in February, and by far the larger portion of the rice was put on board in that month, and bills of lading for various portions were given upon the 23d, 24th, and 28th of February. The last bill of lading was given upon the 4th of March, but all except a very small portion of the parcel shipped under this bill of lading also had been put on board in February. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March and [or] April. There was no evidence tendered on behalf of the plaintiffs to show that the words "to be shipped during the months of March and [or] April" had in the trade any other than their natural and ordinary meaning. On the other hand, the defendants called evidence to prove affirmatively that the words were understood in the trade in their ordinary meaning, and they obtained an admission to the same effect from one of the plaintiffs in cross-examination. It was held that the natural meaning of the stipulation as to shipment contained in the contract was that the whole of the rice should be put on board during the months mentioned: and that, in the absence of any trade usage to affect the meaning of the words, it was for the court to construe the contract.

(*e*) 2 App. Cas. 455, *sub nom.* Bowes *v.* Shand, affirming the decision of the Div. Court, 1 Q. B. D. 470, and reversing that of the Court of Appeal, 2 Q. B. D. 112.

Lord Blackburn, who as Mr. Justice Blackburn had been a party to the decision in Alexander *v.* Vanderzee, and also to that of the Divisional Court in Bowes *v.* Shand, distinguished the former case on the ground that there the shipment of the parcel of goods in question had been indeed begun before the end of the month of May, and had been proceeded with *continuously* with reasonable dispatch and in the ordinary way as a matter of fair dealing, but the completion of the shipment had been in June, although the commencement was in May, and it might therefore well be a question for the jury whether it was a May or June shipment, whereas, in the case then under consideration, nearly nine-tenths of the goods had been put on board during February, the shipment of that portion had been completed and bills of lading taken during that month, that therefore as to the great bulk of the goods it was a February and not a March shipment.

§ 887. It is submitted, however, that Alexander *v.* Vanderzee, although not expressly overruled by Bowes *v.* Shand, cannot, after that decision, possess any authority. It would seem that in Alexander *v.* Vanderzee no evidence of trade usage was given, and Bowes *v.* Shand decides that, in the absence of such usage, it is for the court to construe the words, while at the same time it settles what the true construction of them is.

In treating of the fulfillment of the description given by the contract as a condition precedent, Lord Blackburn makes some valuable observations. He says, at p. 480, "It was argued, or tried to be argued, on one point that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject matter of the contract went, its being shipped at another and a different time being, (it was said,) only a breach of a stipulation, which could be compensated for in damages. But I think that that is quite untenable. I think—to adopt an illustration which was used a long time ago by Lord Abinger, (*f*) and which always struck me as being a right one—that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. And he said, if you contract to sell peas, you cannot oblige the party to take beans; if the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained

(*f*) In Chanter *v.* Hopkins, 4 M. & W. 399, *post.*

for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras—I do not quite know what the boundary is—and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare-say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."]

§ 888. There is not an entire concordance in the authorities as to the true construction of a contract for the sale of "a cargo."[21] In Kreuger *v.* Blauck, (*g*) the defendant in Liverpool sent an order to the plaintiffs, at Mauritius, on the 25th of July, for "a small cargo (of lathwood) of about the following lengths, &c., &c., in all about 60 cubic fathoms, which you will please to effect on opportunity for my account, at £6 15*s.* c. f. and i. (*h*) 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

What is meant by "a cargo."

Kreuger *v.* Blanck.

21. **Sale of a Cargo.**—In Flanagan *v.* Demarest, 3 Robt. 173, 182, the sale was of a "cargo of barley containing about 9000 bushels." When the cargo arrived it was found to contain only 5070 bushels. It was held that the buyer might have rejected this because not answering the description, but having accepted it, he could not demand the residue of the 9000 bushels. Monell, J., said: "A cargo is the lading of a ship or other vessel, the bulk of which is to be ascertained from the capacity of the vessel. And where the name of the vessel is in the contract, her capacity or the bulk of her cargo need not be stated, for the word 'cargo' embraces all that the vessel is capable of carrying. The contract before us was an entire contract; neither less nor more than a 'cargo of barley' could be tendered as performance." In Clark *v.* Baker, 5 Metc. 452, 460, the sale was of a cargo of corn warranted to be of a certain quality, at a fixed price per bushel. The buyer paid $1200 in advance. He accepted part of the corn, amounting to $1067, but declined to accept the residue because not answering the warranty, and sued to recover his over-payment. But it was held that the contract was for the entire cargo, and the buyer was bound to reject the whole, or else accept the whole and seek redress on his warranty. See Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Seamens *v.* Loring, 1 Mason 127, 142; Pembroke Iron Co. *v.* Parsons, 5 Gray 589.

(*g*) L. R., 5 Ex. 179.

(*h*) The initials mean, "cost, freight, and insurance."

a ship and loaded her with 83 fathoms, and on the arrival of the vessel the plaintiffs' 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.

§ 889. But this case was referred to with marked doubt, by Blackburn, J., in the opinion given by him in Ireland *v.* Livingston, (*i*) 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—50 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." Ireland *v.* Livingston.

The plaintiffs answered on the 6th of September: "We are in receipt of your esteemed favor of the 25th of 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 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 15*s.* to £3 per ton.

In the course of September the plaintiffs received an offer from a partly loaded vessel, to take 7000 or 8000 bags of sugar at a freight

(*i*) L. R., 2 Q. B. 99; 5 Q. B. 516; L. R., 5 H. L. 395-410.

of £2 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 5778 bags, weighing about 392 tons, within the limits, and reduced their own commissions by a sum of £163 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 defendants' account, they shipped on their own account about 150 tons of inferior quality, and the ship sailed on the 29th of 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 of 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.

§ 890. 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 Channell, 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 fulfillment 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.,) were 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.

Order for goods at price to cover cost, freight, and insurance.

§ 891. "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. (*k*) 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.

Vendor's obligations on such order.

§ 892. "If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is

(*k*) And it is not sufficient to tender the bill of lading without the policy of insurance, nor (*semble*) to hand a policy of insurance upon a larger parcel of goods, if the policy is "warranted free from particular average." Hickox *v.* Adams, 34 L. T. (N. S.) 404.

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.

§ 893. "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 fulfill 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 therefrom 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 super added 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." (*l*)

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.

(*l*) See *ante* § 237, and Cassaboglou *v.* Gibbs, 9 Q. B. D. 220, where it was held, that, upon breach of a contract by a commission merchant to supply his correspondent with goods of a specific description, the damages are to be assessed on the footing of principal and agent, and not of vendor and vendee.

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, (*m*) was that the contract was one of agency, as explained by Blackburn, J.

If order capable of two constructions, principal bound by either if adopted *bona fide* by agent.

§ 894. 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 bona 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.*"

Borrowman *v.* Drayton.

[In Borrowman *v.* Drayton, (*n*) the Court of Appeal defined "cargo" to be the entire quantity of goods loaded on board a vessel on freight for a particular voyage, and held, therefore, that a purchaser of a cargo was not bound to accept a part only of the entire load of the ship, thus practically affirming Kreuger *v.* Blanck. The opinion of Blackburn, J., in Ireland *v.* Livingston, was referred to in argument, but not noticed in the judgment, which was delivered by Mellish, L. J., who suggested reasons why a purchaser might prefer to have the entire quantity of goods loaded on the vessel. (*o*)] [22]

Sale of cargo by bill of lading.

§ 895. 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.

Tamvaco *v.* Lucas.

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 condi-

(*m*) The Lords present were Chelmsford, Westbury and Colonsay.

(*n*) 2 Ex. D. 15, C. A.

(*o*) See, also, Anderson *v.* Morice, L. R., 10 C. P. 58, at p. 71, considered *ante* § 376.

22. See *ante* note 21. As to liability of a principal to his agent for part performance of an entire order, see Marland *v* Stanwood, 101 Mass. 470, where a broker, ordered to buy 150 bales of cotton at a certain price, procured only 78 bales, and it was held that the broker could hold the principal for the price advanced by the broker and his loss on resale.

tions of the contract. In the first case, (*p*) the sale was of a cargo of wheat "of about 2000 quarters, say from 1800 to 2200 quarters, * * * to be shipped between the 1st of September and the 12th of October: * * * sellers guarantee 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 72 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 2215 quarters, and that the plaintiffs had wrongly stated in the invoice that the cargo was only 2200 quarters: that when the bill of lading was tendered 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 1800 and less than 2000 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.

§ 896. The second case, (*q*) 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

(*p*) 1 E. & E. 581; 28 L. J., Q. B. 150.

(*q*) Tamvaco *v.* Lucas, 1 E. & E. 592; 28 L. J., Q. B. 301.

1800 quarters, and this plea was held good on demurrer. The contracts in the two cases were held to mean substantially that the vendor was to supply in each case a cargo of "about 2000 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 agreements, conditions concurrent.

§ 897. 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, (*r*) or offer to perform, or averring readiness and willingness to perform his own promise. (*s*) 23

(*r*) Morton *v.* Lamb, 7 T. R. 125; Waterhouse *v.* Skinner, 2 B. & P. 447; Rawson *v.* Johnson, 1 East 203; Withers *v.* Reynolds, 2 B. & Ad. 882; Jackson *v.* Allaway, 6 M. & G. 942.

(*s*) Rawson *v.* Johnson, *supra;* Jackson *v.* Allaway, *supra;* Boyd *v.* Lett, 1 C. B. 222.

23. **In Executory Contracts, Payment and Delivery are Mutual and Concurrent Conditions Precedent.**— Therefore, before either party can call upon the other to perform, he must tender performance on his part. This principle is undisputed, but in what manner this performance is to be tendered is not always clear. On an agreement by a company to sell some of its stock to a subscriber, the company must tender its stock before it can sue for the subscription, or on a note given for it. Summers *v.* Sleeth, 45 Ind. 598. In such case the company must prepare the certificates before the thing sold has any tangible existence. In Simmons *v.* Green, 35 Ohio St. 104, it was held that a buyer suing for damages, for non-delivery of the goods sold, must prove that he was ready and willing to receive and pay for them, notwithstanding the making of the contract was denied by the seller. But where an existing chattel is contracted for, in the absence of provision for delivery elsewhere, the buyer should come to receive it at the place where the goods are when purchased, and it is sufficient for the seller to be ready to deliver it there. See *post* § 1022, note 10. At variance with this, however, is the case of Hapgood *v.* Shaw, 105 Mass. 276. The facts were these: Hapgood contracted to buy certain guns from Shaw, who agreed to deliver them June 1st, or sooner if ordered, on payment of the price, a part of which, $100, was paid. The guns were in a bonded warehouse, and no place of delivery was fixed. Neither party took any action until June 6th, when Shaw offered to deliver and Hapgood refused to accept the guns. Shaw sued for damages for not accepting, and Hapgood sued to recover back his payment of

In Atkinson *v.* Smith, (*t*) there was a *mutual* agreement for cross sale, as follows: "Bought of A & Co., about thirty packs of Cheviot fleeces, and agreed to take the under-mentioned noils (coarse woollen cloths, so called); also agreed to draw for £250, on account, at three months. Sixteen packs No. 5 noils, at 10¾*d.*; eight 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.

Atkinson *v.* Smith.

Mutual agreement for cross sale.

$100; and both cases were tried together. Wells, J., said: "Neither party is in default; neither can hold the other for breach of the agreement. Upon such an agreement, if both parties remain inactive there is no breach by either. If either would charge the other upon it, he must put him in default. He must show a refusal by the other to perform, or some act or neglect on his part equivalent to a refusal. Unless excused by some conduct equivalent to a refusal, he must show that he has offered to perform his part of the agreements, or at least that he gave notice of his readiness to perform, or being thus ready, requested performance by the other party. Failing to do that, he cannot charge the mere neglect of the other party to take any action, as a refusal to perform, or as a breach of the agreement." And it was held that it was not material whether the guns were to be delivered by warehouse receipt or by corporal delivery. To the like effect see Barr *v.* Myers, 3 W. & S. 298; Allen *v.* Woods, 24 Penna. 76, stated *post* § 1018, note 8.

Hapgood v. Shaw Criticised.—Hapgood *v.* Shaw and similar cases seem to require more than is reasonable to be done by the seller. The true rule is that laid down in Phelps *v.* Hubbard, 51 Vt. 489, 493. In that case tobacco was ordered and packed for delivery, and the buyer not calling for it, was sued for the price. Dunton, J., said: "All that is required of a vendor in a case like the one at bar, is to be present with the property at the time and place agreed upon, ready to deliver the same to the vendee upon the payment by him of the agreed price." To the same effect see Posey *v.* Scales, 55 Ind. 282; Jones *v.* Marsh, 22 Vt. 144; Cleveland *v.* Sterrett, 70 Penna. 204; Sousely *v.* Burns, 10 Bush 87; Rowland *v.* Lehigh Coal Co., 28 Penna. 215. In Stoolfire *v.* Royse, 71 Ill. 223, the contract was for the sale of cattle to be paid for by assignment of a mortgage. It was held that delivery of the cattle and of the mortgage were mutually dependent acts. The buyer, who held the mortgage, having neglected to record his mortgage until after part of the mortgaged premises had been conveyed to a *bona fide* purchaser, it was held that the buyer was disabled from performing, and as he could not tender proper performance, he could not recover any damages from the seller of the cattle for non-performance. Payment and delivery as conditions precedent to the passing of property are discussed *ante* § 325, *et seq.*, and § 334, *et seq.*

(*t*) 14 M. & W. 695.

§ 898. In Withers *v.* Reynolds, (*u*) the defendant agreed to furnish plaintiff with wheat straw, sufficient for his use as stable-keeper, from the 20th of October, 1829, till the 24th of 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 of 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.

Withers *v.* Reynolds

In Bankart *v.* Bowers, (*x*) there was a 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 concurrent stipulations, and there was judgment for the defendant on the demurrer.

Bankart *v.* Bowers.

§ 899. [But it is to be borne in mind that, to entitle the seller to rescind the contract, the acts and conduct of the buyer must either amount to an *express refusal* or manifest a complete inability to perform his part of the contract.[24] Thus in Corcoran *v.* Prosser, (*y*) the contract was for the sale of 2000 quarters of barley at the price of 17*s.* c. f. and i., "to be paid for in net cash in exchange for bills of lading, as soon as the vessel or vessels which had the barley on board arrived in Dublin." Four deliveries were made and paid for by the plaintiff, some of them being short in weight. On discovering the deficiency, the plaintiff wrote claiming an allowance for short weight

To entitle seller to rescind, buyer must expressly refuse or be completely unable to perform.

Corcoran *v.* Prosser.

(*u*) 2 B. & Ad. 882. See the interlocutory observations of Jessel, M. R., and Bowen, L. J., on this case in The Mersey Steel Co. *v.* Naylor, 51 L. J., Q. B., at p. 581.

(*x*) L. R., 1 C. P. 484.

24. See *ante* note 8, and *post* note 26.

(*y*) 22 W. R. 222 (Ir. Ex. Ch.)

and for cost of re-weighing, and upon the next delivery *refused to accept the defendant's cash order without the deduction.* The defendant thereupon treated the contract as rescinded. In an action by the plaintiff for the non-delivery of the residue of the barley according to the contract, it was held by the majority of the Court of Exchequer Chamber in Ireland that the conduct of the plaintiff did not amount to a positive refusal to pay, but was only a collateral claim to a deduction off the price, which did not justify the defendant in rescinding the contract.

§ 900. In Bloomer *v.* Bernstein, (*z*) the defendants, who were merchants at Antwerp, contracted to sell to the plaintiff "from 3650 to 5110 tons of old iron rails, delivery to take place during 1872, and to be completed in December of that year, payment net cash, in London, against bill of lading and sworn weigher's certificate." It was proved that under such a contract the practice was to deliver monthly. The plaintiff duly paid for the first parcel on presentment of the bill of lading on the 27th of January, 1872, but did not take up the bill of lading for the second parcel, presented on the 31st, and after further negotiations during which the second parcel was sold, the defendant's agent wrote on the 14th of February that he considered the contract canceled. Upon the 22d of February the plaintiff went into liquidation. After agreeing to pay a composition of 2*s.* 6*d.* in the £, his estate was re-assigned to him, and he then brought this action for non-delivery of the iron. At the trial, Brett, J., ruled that, if before the alleged breach the buyer was insolvent and neglected to pay the amount due on presentment of the bill of lading, he could not afterwards insist upon any delivery, at all events without tendering the price or giving the sellers reasonable evidence that he would be able and willing to pay the price; and he then asked the jury, among other questions, to say whether the defendants, by reason of the plaintiff's conduct, had reasonable ground for believing, and did they believe, that plaintiff would be unable to pay for the future bills of lading to be presented under the contract. The jury answered in the affirmative, and upon motion in the Court of Common Pleas, the court held that the findings of the jury concluded the matter in favor of the defendants, and brought the case directly within the authority of Withers *v.* Reynolds. (*a*)

Bloomer *v.* Bernstein.

The effect of the purchaser's bankruptcy as an act entitling the

(*z*) L. R., 9 C. P. 588.

(*a*) 2 B. & Ad. 882, *ante* § 898.

seller to treat the contract as abandoned is considered *post*, Book V., Part I., Ch. 1, § 1.]

Stipulations as to *time*.

§ 901. 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. (*b*) [25]

Deliveries by installments.

Hoare *v.* Rennie.

In Hoare *v.* Rennie, (*c*) 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

(*b*) This statement of the law was cited with approval by Folger, J., in delivering the opinion of the Court of Appeals of New York in Higgins *v.* The Delaware Railroad Co., 60 N. Y., at p. 557. The judicature acts provide that stipulations in contracts as to time or otherwise, which would not before the commencement of the act of 1873 have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they formerly would have received in equity. Jud. Act, 1873, § 25, subs. 7; Jud. Act, 1875, § 10. At common law, even before the acts, on a sale of chattels time was not of the essence of the contract, in the absence of express agreement to that effect. See per Lord Denman in Martindale *v.* Smith, 1 Q. B., at p. 395. See, also, Wolfe *v.* Horne, 2 Q. B. D. 355.

25. **Stipulations as to Time.**—See *ante* § 855, note 2, and *post* note 26. In Rouse *v.* Lewis, 4 Abh. App. Dec. 121, Rouse ordered two machines to be manufactured for him, and paid for them in advance. They were not finished at the time stipulated; and he refused to take them, though they were finished a week later; and he sued to recover back the price. A recovery was sustained, and it was held that a buyer having paid for chattels to be delivered at a future day is not bound to receive them after that day, unless the delay was caused by his acts before that day, or unless he has waived punctual performance. If he has prevented or waived punctual performance, he cannot complain, and notice before time of performance that he intends not to perform, is a waiver. Young *v.* Hunter, 6 N. Y. 203; Holmes *v.* Holmes, 9 N. Y. 525; Bunge *v.* Koop, 48 N. Y. 225. And see *ante* notes 6, 7, 8. In Woodward *v.* City of Boston, 115 Mass. 81, a building was sold and paid for, to be removed within five days. Not being removed the owner resold it. On a suit by the first buyer for the value of the building it was held that the sale was upon condition of removal within five days, and the condition being broken the buyer could not maintain trover. But in Davis *v.* Emery, 61 Me. 140, under like circumstances, it was held that the buyer did not forfeit the property, but was merely liable for damages. Three out of the seven judges dissented, holding that the sale was conditional, and the building remained the property of the seller when the license to remove it expired. See Judevine *v.* Goodrick, 35 Vt. 21.

(*c*) 5 H. & N. 19; 29 L. J., Ex. 73.

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. But this case has been much questioned, particularly in Simpson *v.* Crippin, *infra.*

§ 902. In Jonassohn *v.* Young, (*d*) 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, 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. Jonassohn *v.* Young

§ 903. In Simpson *v.* Crippin, (*e*) the defendants had agreed to supply the plaintiff with 6000 to 8000 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 1st of July next." During the first month, July, the plaintiff sent wagons for 158 tons only, and on the 1st of August, the defendants wrote that the contract was canceled 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 canceled, 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 defendants in rescinding the contract, under the rule established by Pordage *v.* Cole. (*f*) Two of the judges (Blackburn and Lush, JJ.,) declared that they could not understand Hoare *v.* Rennie, and declined to follow it. Simpson *v.* Crippin.

(*d*) 4 B. & S. 296; 32 L. J., Q. B. 385. See, also, Bradford *v.* Williams, L. R., 7 Ex. 259, a case intermediate to Jonassohn *v.* Young, and Simpson *v.* Crippin, and referred to by Baggallay, L. J., in Honck *v.* Müller, 7 Q. B. D., at p. 102, as one in which the principle of Hoare *v.* Rennie was adopted.

(*e*) L. R., 8 Q. B. 14.

(*f*) 1 Wms. Saund. 319 l.

§ 904. [In Freeth *v.* Burr, (*g*) the defendant contracted to sell to the plaintiffs 250 tons of pig iron, half to be delivered in two, remainder in four weeks, payment net cash fourteen days after delivery of each parcel. The delivery of the first parcel of 125 tons was not completed for nearly six months, in spite of repeated demands by plaintiffs. The plaintiffs thereupon refused to pay for the parcel, claiming an allowance, but they still urged delivery of the second parcel. The defendant treated the refusal to pay as an abandonment of the contract and declined to deliver any more. The price of the first parcel was ultimately paid, and it was not suggested that plaintiffs were unable to pay. On these facts the Court of Common Pleas held that the refusal to pay was not, under the circumstances, sufficient to warrant the defendant in treating the contract as abandoned by the plaintiffs. Coleridge, C. J., in delivering judgment, says (at p. 213): "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is, *whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract.* I say this in order to explain the ground on which I think the decisions in those cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., *that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.* Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be *evidence for a jury* of an intention wholly to abandon the contract and set the other party free. This is the true principle on which Hoare *v.* Rennie was decided, whether rightly or not upon the facts, I will not presume to say." (*h*)

Freeth *v.* Burr.

Test proposed by Coleridge, C. J.

§ 905. In Brandt *v.* Lawrence (*i*) there were two contracts, each for

(*g*) L. R., 9 C. P. 208.

(*h*) Another explanation of the decision in Hoare *v.* Rennie was offered by Bowen, L. J., in the very recent case of The Mersey Steel Co. *v.* Naylor, 51 L. J., Q. B., at p. 591. He there says: "I think that the true explanation of that case is that the plea was not, so to speak, a formal plea; it was a special plea which set out various points from which I confess two different inferences may quite well be drawn; and as you draw one or the other, I think the decision in Hoare *v.* Rennie (which was given upon a demurrer to the plea) would be supported or not; and the court in the decision upon the special plea in Hoare *v.* Rennie, seems to have drawn the sort of inference from the special plea which one would expect the court to draw from the statement of a special case."

(*i*) 1 Q. B. D. 344, C. A.

the sale by plaintiff to defendant of 4500 quarters of Russian oats, more or less, *shipment by steamer or steamers* during February. The plaintiff shipped on board one steamer 4511 quarters to answer the first contract, and 1139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time, that on the second too late. Held, that the defendant was bound to accept the 1139 quarters in part fulfillment of the second contract, notwithstanding that the remaining shipment in respect of that was made too late; the court holding that the words "by steamer or steamers" showed an intention that the shipment should be made in different parcels and not in two specific lots, so that the case was brought within the principle of Simpson *v.* Crippin. Brandt *v.* Lawrence.

§ 906. In Reuter *v.* Sala, (*k*) the contract was for the sale, by plaintiffs to defendants, of twenty-five tons Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, *name of vessel or vessels to be declared.* The plaintiffs declared twenty-five tons by a particular vessel, only twenty tons of which complied with the terms of the contract as to shipment, and it was held by the majority of the Court of Appeal, Cotton and Thesiger, L. JJ., (Brett, L. J., dissenting,) that the defendants were not bound to accept less than twenty-five tons. Brandt *v.* Lawrence was distinguished, on the ground that in the case under consideration the plaintiffs had only named one ship, and made one indivisible shipment. Lord Justice Brett, however, delivered a dissentient judgment, laying down that "the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfill his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfill his undertaking to accept or deliver the whole of the specified quantity. *The reasons given are, that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach* Reuter *v.* Sala.

(*k*) 4 C. P. D. 239, C. A.

can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part and that the other party should have been, or should be, always ready and willing and able to accept or tender the whole." The Lord Justice then proceeds to consider the mercantile consequences of otherwise construing such contracts, showing that the rule of construction adopted in Simpson *v.* Crippin is as sound on mercantile as on legal considerations.

Honck *v.* Muller.

§ 907. In Honck *v.* Müller, (*l*) the plaintiff had bought from the defendant 2000 tons of iron to be delivered "in November or equally over November, December and January" at an increased price. The plaintiff failed to take delivery of any of the iron in November, and the defendant thereupon canceled the contract. In an action by the plaintiff for damages on account of the defendant's refusal to deliver in December and January, it was held by the majority of the court, that the plaintiff's refusal to accept in November justified the defendant in refusing to continue to carry out the contract. On the one hand, Bramwell and Baggallay, L. JJ., distinctly approved and followed Hoare *v.* Reunie; the former learned judge distinguishing Simpson *v.* Crippin upon the ground of part performance, the latter finding it impossible to reconcile Simpson *v.* Crippin with Hoare *v.* Rennie, and preferring to adopt the principles enunciated in the latter case; Brett, L. J., on the other hand dissented, and preferred to adopt the doctrine laid down in Simpson *v.* Crippin, and contained in the notes to Pordage *v.* Cole, (*m*) resting his judgment mainly upon the view taken by merchants of the class of contracts in question. (*n*)

Mersey Steel and Iron Co. *v.* Naylor.

§ 908. In a still more recent decision, The Mersey Steel and Iron Company *v.* Naylor, (*o*) the Court of Appeal, *differently constituted*, and consisting of Jessel, M. R., and Lindley and Bowen, L. JJ., has affirmed that there is no absolute rule in these cases, and unanimously stated the true test to be that suggested by Lord Coleridge in Freeth *v.* Burr, viz., *whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract, and that this is a*

No absolute rule.

(*l*) 7 Q. B. D. 92, C. A.

(*m*) 1 Wms. Saund. 319 l.

(*n*) In this case an appeal to the House of Lords was lodged, but afterwards abandoned.

(*o*) 51 L. J., Q. B. 576, only reported while the sheets of this edition were passing through the press.

question of evidence. The court indirectly affirms the authority of Simpson *v.* Crippin, by laying down that non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not *per se* necessarily evidence of any such intention. Test proposed by Coleridge, C. J., the true one.

Jessel, M. R., (at p. 582,) and Bowen, L. J., (at p. 590,) take occasion to criticise the distinction drawn by Bramwell, L. J., in Honck *v.* Müller, between the case of a contract partly performed and one not performed at all, showing from decided cases that this distinction is not well founded. It is submitted that this decision must be taken to settle the law upon this subject.

§ 909. In America the law appears to be fairly settled in accordance with the decision in Simpson *v.* Crippin, viz., that in the absence of any expressed intention of the parties, (*p*) a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one installment does not entitle the other party to refuse delivery or acceptance of the installments that remain. (*q*) Law in America.

Only one case, King Philip Mills *v.* Slater, (*r*) a decision of the State of Rhode Island, has been found, in which the rule laid down in Simpson *v.* Crippin is directly attacked.][26]

(*p*) Higgins *v.* Delaware Railroad Co., 60 N. Y. 553.

(*q*) Scott *v.* Kittanning Coal Co., 89 Penna. 231, (decided in 1879,) where it is treated as settled law in that state by Trunkey, J., at p. 237; Haines *v.* Tucker, 50 N. H. 307.

(*r*) 34 Am. Rep. 603; S. C., 12 R. I. 82.

26. **Delivery by Installments.**—The case of Simpson *v.* Crippin has been much discussed in America as well as in England. The weight of American authority seems to be against it. Under the second rule, stated, *ante* § 855, each delivery under a contract for delivery by installments would be regarded as independent of the others, and default of the buyer in making payment for the first delivery, would not excuse the seller from continuing to make further deliveries. But to compel a seller to continue delivering to one who owes for previous deliveries, or to compel a buyer to continue paying to one who has previously defaulted in delivering goods paid for in advance, is manifestly unreasonable and a violation of the intent. In order to avoid the injustice of enforcing such contracts the English courts resort to the theory of an abandonment of the contract by the defaulting party, and suppose that the default of a party in making one payment or delivery may "evince an intention to abandon and be no longer bound by the contract, and that this is a question of evidence." *Ante* § 908. In the American cases the rule is to look to the intent and where it cannot be supposed to have been the intent of the parties in making the contract that one must continue performing while the other is in default, the contract may be abandoned by the aggrieved party. In King Philip Mills *v.* Slater, 12 R. I. 82

the contract was made January 28th, to supply goods (jaconets) to the extent of the entire product of 400 looms until July 1st, of certain quality, to be delivered in lots of 1000 pieces. The goods of the first two lots were deficient in width and weight and were rejected. The manufacturer offered to alter his looms so as to make suitable goods, but the buyer answered that he required an immediate supply, and terminated the contract. The manufacturer sued for breach. Potter, J., said: "The plaintiffs having failed in the first deliveries, the defendants were not bound to take the goods offered during the latter part of the period. * * Each case must depend on its own circumstances. To hold that the purchaser must receive such lots as are of the right quality, and that when they are not so he must supply himself elsewhere, and sue for damages, or claim to deduct them, would introduce confusion into business. It would in most cases entirely frustrate the object of the contract." The rules distinguishing independent from dependent conditions are discussed and criticised. Simpson *v.* Crippin doubted, and other English cases reviewed. In Stewart *v.* Many, 7 Ill. App. 508, the agreement sued upon was that defendant should ship to plaintiff 100 machines per week at a fixed price, and that plaintiff should sell them for cash and make prompt remittance of the price out of the proceeds. The buyer neglected to remit promptly, and the seller stopped delivering machines. On a suit for damages for the breach the buyer recovered a verdict, but it was set aside in the appellate court. Bailey, J., said that the buyer was a man without responsibility. "The defendant's only safety was in insisting upon cash sales and prompt remittances. The plaintiff's agreement in that behalf was of the very essence of the contract. It would be singularly inequitable, under these circumstances, to hold defendant bound to continue the consignment of machines to plaintiff, to the full extent of the contract, while the plaintiff was refusing or neglecting to account for and turn over the proceeds of his sales as provided by the same contract." See, however, Hime *v.* Klasey, 9 Brad. 166, S. C. 190. See, also, Auchterlonie *v.* Arms, 25 U. C. C. P. 403, 412, where a pleading setting out in defence to a suit for damages by the buyer, that the seller had stopped monthly shipments because the buyer did not remit as agreed, was held bad for want of an allegation that the remittance of payment was a precedent condition to continuance of monthly shipments. In Reybold *v.* Voorhees, 30 Penna. 116, 120, a farmer agreed to sell his peach crop, and received $500 as security for performance by the buyer. Deliveries were to be made from day to day, and paid for at the end of each week. No payment was made at the end of the first week. The seller delivered on Monday, when the amount due him was $539. He then discontinued further deliveries. Two days later the buyer paid $39, and offered to pay the whole $539, and permit $500 to remain as security, if the seller would perform the contract. The seller refused, and the buyer sued for damages. A judgment in his favor was reversed on appeal. Lowrie, C. J., said: "The plaintiffs broke their contract by not paying on Saturday, and defendant had a right then to rescind it, and seek another market. He continued another day to execute it on his side, and again the plaintiffs failed. Then he rescinded, and a day or two afterwards the plaintiffs came and were willing to pay. We think they were too late. To relieve them would be to change their contract without cause." Our author cites as supporting Simpson *v.* Crippin, the case of Scott *v.* Kittanning Coal Co., 89 Penna. 231, 237. In that case the contract was for delivery of 50,000 tons of coal, 6000 tons monthly, at the buyer's option, the buyer to give notice on the 25th of each month how much he would require next month. No notice

was ever given. During seven months only 18,000 tons were delivered, when the buyer refused to receive more and was sued for the breach. The defence was that the coal furnished was not of the contract quality. But Trunkey, J., said that the buyer might have refused inferior coal, and having accepted it, he could not refuse to receive further deliveries of such coal as the contract required. "This contract was severable, and the coal delivered was paid for and used by defendants. They can restore nothing. They never notified plaintiffs that they would receive no more coal for their default in performance." It will be observed that this was a case where the buyer, by acceptance, had waived his right to set up a breach from defect of quantity or quality in the first deliveries. To the same effect, see Cahen *v.* Platt, 69 N. Y. 348; Maryland, &c., Co. *v.* Lorentz, 44 Md. 218, 233, following Carter *v.* Cargill, 10 Q. B., L. R. 564. In Haines *v.* Tucker, 50 N. H. 307, the contract was to deliver 5000 bushels within five months, at the rate of 1000 bushels per month, as the buyer should call for it. The buyer called for less than 1000 bushels in all, for four months, and the seller then demanded that he should receive at the rate of 1000 bushels per month. This the buyer refused, and after the five months expired, the seller sued for damages for non-acceptance. It was held that both assented to the earlier deliveries, but that the refusal of the buyer to go on at all with the contract excused the seller from offering to perform, and from even keeping himself in readiness to perform. In Stephenson *v.* Cady, 117 Mass. 6, a manufacturer of yarn made two contracts for yarn to be delivered as manufactured, the deliveries of the lot sold under the second contract to commence when those under the first contract were complete, and to be completed January 1st, payments cash on delivery. Before the deliveries under the first contract were complete the buyer refused to pay for the last lot received by him, unless security should be given him for the performance of the second contract, his apprehensions having been aroused by the burning of the seller's mills. The seller refused to give security or to continue deliveries, and sued for and recovered the balance due. After January 1st the buyer demanded the performance of the second contract, and sued for damages. The court held that the buyer's refusal to pay, without security for the entire fulfillment of the contracts, was "sufficient to warrant a jury in finding the defendant justified in treating the contract as abandoned by the plaintiff, and as ended in its unfulfilled obligations upon him. It was something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments." Withers *v.* Reynolds (*ante* § 898) and Bloomer *v.* Bernstein (*ante* § 900) are quoted and relied on. This decision, it will be seen, like the English cases, is founded on the theory of an abandonment by consent of the party first in default. In Norrington *v.* Wright, a case in the United States Circuit Court, (E. D. Penna. 1881,) 11 Law Reporter 287, the contract was to ship 5000 tons of old iron rails to London, at the rate of about 1000 tons per month, commencing with February. Only 395 tons were shipped in February, on ascertaining which fact the buyer rescinded and refused to accept the shipments as they were tendered. The seller sued for damages, but was nonsuited. A motion to set aside the judgment of non-suit was denied. Butler, J., said: "The doctrine of severableness (if I may coin a word) is an invention of the courts to enable one who has partly performed to sustain an action. But this equitable doctrine should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind; as against such a party, the contract should be treated and enforced as

§ 910. 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, (*s*) the purchaser asked to look at the bulk of 1400 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.

Sale by sample is conditional that buyer shall have a fair opportunity to compare the bulk.

Lorymer *v.* Smith.

entire. To render the plaintiff's position logical it is necessary to take a step forward, and hold that such a transaction constitutes several and independent contracts. Then of course, it follows that a failure as respects one of several successive deliveries, affords no right to rescind in regard to those yet to be made. And this step, after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in Simpson *v.* Crippin, which overruled Hoare *v.* Rennie. In our own country the cases are inharmonious and the question unsettled. I shall not be surprised if the courts here finally adopt the English rule. I say this not because I think it wise to adopt that rule." McKennan, J., said: "I concur even more decidedly. I am not satisfied that the weight of the opinions even in England, is with these decisions. So far as this country is concerned it cannot be said there is any such rule." In Cox *v.* McLaughlin, 52 Cal. 590, 597, a contractor stopped work on his contract because of non-payment of an installment due, and brought suit *on the contract* for the price. But the court said that he had not been prevented from performing and therefore could not sue on the contract without performing. But it was suggested to the plaintiff that he should amend and prove the actual value of his labor up to the time of the failure to pay, and the court cite Canal Co. *v.* Gordon, 6 Wall. 561, as deciding that "where a contract is to complete a structure, with agreement for installment payments, a failure to make a payment at the time specified justifies an abandonment of the work, and entitles the contractor to receive a reasonable compensation for the work actually done."

In Bradley *v.* King, 44 Ill. 339, 341, the contract was to deliver lumber in installments, payable on delivery of each lot. Laurence, J., said: "The obligation was payment on delivery. If the purchasers refused to perform this obligation on their part, the vendors were excused from further delivery. The payment for the lumber at the time of its receipt was a condition precedent, *so far as concerned the right of the plaintiffs to demand a further delivery.*" See Elting Woolen Co. *v.* Martin, 5 Daly 417. Morgan *v.* McKee, 77 Penna. 228; Webb *v.* Stone, 24 N. H. 282; Sumner *v.* Parker, 36 N. H. 449, 454. Since writing the foregoing note, the attention of the editor has been called to a note by Mr. Lucius S. Landreth to the case of Norrington *v.* Wright, in the American Law Register, vol. 21, (N. S.) 398, in which Mr. Landreth comes to the conclusion with Mr. Benjamin that the weight of American authority supports the English rule. It illustrates the complexity of the subject to say that the editor of this work, like McKennan, J., in Norrington *v.* Wright, has reached the opposite conclusion. Many of the decisions cited by Mr. Landreth are old. Many of the late decisions relied on by him can be explained on other grounds.

(*s*) 1 B. & C. 1.

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 the 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. 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. 1, § 3, Implied Warranty of Quality.

§ 911. 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. (*t*) 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.

Sales "on trial," "on approval," "sale or return."

In sales "on trial," the mere failure to return the goods within the time specified for trial, makes the sale absolute, (*u*) 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. (*x*) [27]

Failure to return goods in reasonable time makes "sale on trial" absolute.

(*t*) Cited, with approval, as a correct statement of the law by Denman, J., in Elphick *v.* Barnes, 5 C. P. D., at p. 326.

(*u*) Humphries *v.* Carvalho, 16 East 45.

(*x*) Ellis *v.* Mortimer, 1 B. & P. N. R. 257. See, also, Elpbick *v.* Barnes, *ut supra.*

27. **Sales on Trial are on Condition of Approval by the Buyer.**—This would be the condition implied from the mere fact of sale on trial. But the condition might be on trial to see whether the thing sold answered certain representations, in which case the buyer would be bound to accept it if it did answer them, whether he was satisfied in other respects or not. Clark *v.* Rice, 46 Mich. 308. Hunt *v.* Wyman, 100 Mass. 198, illustrates this class of sales. The suit was for the price of a horse which defendant took on trial, agreeing "if he did not like it he could return it in as good condition as he got it." The horse ran away before trial and was injured so badly that it could not be removed from defendant's stable. Three weeks after, plaintiff sued for the price. Wells, J., said: "The sale would not take effect until 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 upon which plaintiff is entitled to a remedy, but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination by the defendant of his option to purchase—but it would be only evidence. In this case the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence. The action, being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported." See Mowbray *v.* Cady, 40 Iowa 604; McCormick *v.* Basal, 50 Iowa 523; Manny *v.* Glendinning, 15 Wis. 50; Pitt's Sons' Co. *v.* Poor, 7 Brad. 24; Southern *v.* Cunningham, 11 Rich. 533; Aiken *v.* Hyde, 99 Mass. 183. In Hartford Sorghum Co. *v.* Brush, 43 Vt. 528, a sugar evaporator was taken on trial, to be paid for if the buyer liked it. The buyer used it the whole season, but did not give it a proper trial and refused to take it. He was sued for the price. Wheeler, J., said: "The trial was to ascertain whether defendant liked it, and not to ascertain whether it was equal to the recommendations. To this trial defendant was bound to bring honesty of purpose—anything short would not determine his wishes fairly, but only his caprice or dishonorable design. To it he was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circumstances." To the same effect see McCarren *v.* McNulty, 7 Gray 139; Brown *v.* Foster, 113 Mass. 136; Zaleski *v.* Clark, 44 Conn. 218. But see Daggett *v.* Johnson, 49 Vt. 345, and dissenting opinion of Judge Brady in Gray *v.* N. J. Central R. R., 11 Hun 70, that the dissatisfaction must be actual, not pretended. Several of these cases are stated and others are cited *ante* § 51, note 17, "Illusory Sales."

Sales on Trial Coupled with a Warranty.—A sale of a machine, if it is "satisfactory or does what is claimed for it," is obligatory on the buyer, if the machine answers the warranty, whether the buyer is satisfied or not. Clark *v.* Rice, 46 Mich. 308. A machine sold on trial may be sold with a warranty, and in such case, though the machine be returned, an action will still lie on the independent contract of warranty. Thus, in Northwood *v.* Rennie, 3 Ont. App. 37, affirming S. C., 28 U. C. C. P. 202, a hay press was warranted capable of pressing ten tons of hay per day, and was returned after trial: a verdict for heavy damages was given and was sustained for the buyer's losses from the failure of the machine to perform as represented. And in Aultman *v.* Theirer, 34 Iowa 272, where a machine was taken with privilege of limited trial and was warranted, the buyer was held bound to take the machine because he exceeded the limit, but was allowed to recoup damages for breach of warranty.

Approval may be Implied from Failure to Return or to Give Notice of Disapproval.—Such failure is evidence for the jury. Hunt *v.* Wyman, 100 Mass. 198, stated in this note *ante*. In Waters Heater Co. *v.* Mansfield, 48 Vt. 378, a water heater was delivered to be used thirty days, to be paid for if satisfactory, otherwise to be returned. The buyer neither tested it nor returned it, nor did he give notice of rejection within the time limited, and he was held liable for the contract price; and it was held incompetent to show that the buyer had discovered after the time for trial expired, that such a heater had been rejected by another person who had tested it. See Delamater *v.* Chappell, 48 Md. 244, 253; Jackson *v.* McLane, 7 Blackf. 50; Fairfield *v.* Madison Manuf'g Co., 38 Wis.

346; Bayliss *v.* Hennessey, 54 Iowa 11; Moore *v.* Piercy, 1 Jones 131. In a suit by the same company, Waters Patent Heater Co. *v.* Smith, 120 Mass. 444, on a like sale, the buyer, who had neglected to make trial, was permitted to show from the results of trials by others, that the heater was defective in certain essential particulars, and must fail as "the inevitable result of the construction of the mechanism." The implication of acceptance once being raised the property is in the buyer, though the seller may wish to reclaim it. Thus, in Witherby *v.* Sleeper, 101 Mass. 138, a machine was sold on trial, and the buyer used it, neither accepting nor rejecting it. The seller replevied it because of non-payment, but it was held that the title was in the assignee of the buyer, who had become insolvent. In Kahn *v.* Klabunde, 50 Wis. 235, a mare was delivered on trial "until Tuesday night;" if the buyer was not suited, he should either then return the mare, or let her stand idle until called for by the seller. The buyer worked the mare until Friday, when the seller called, and the buyer offered to return her. The seller refused to receive her, and sued for the price. Taylor, J., said: "We do not think the use of the mare after Tuesday was conclusive evidence against defendant, but we think such use was a fact which should have been submitted to the jury, as evidence tending to show that he had determined to keep her as his under the proposed contract of sale. The case differs essentially from Fairfield *v.* Madison Manuf'g Co., 38 Wis. 346. In that case it was expressly agreed by Fairfield 'that if the machine failed to work he should lay it aside, and that if he used it more than two days, he would consider the warranty fulfilled.' And this court held that under that agreement the title did not pass until Fairfield had tried the machine for the two days; but if he used it more he would be deemed to have accepted the machine, and would not be heard thereafter to allege that it did not work well."

Notice of Disapproval or Rejection.—In Dewey *v.* Erie Borough, 14 Penna. 211, a note was given for the price of a town clock, payable in one year, "conditioned that the said clock performs to the satisfaction of the town council." In a suit on the note it was proven that the clock was not satisfactory, but the suit was sustained because the council did not offer to return it, or give notice of dissatisfaction or make any effort to give notice. This case was approved and followed in Spickler *v.* Marsh, 36 Md. 222. As to what is reasonable notice, see Hall *v.* Meriwether, 19 Tex. 224. In The Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, the suit was for a press delivered under an agreement that the buyer should have thirty days "to determine whether to keep the press or not." Scott, J., said: "On failure of appellant within thirty days to elect whether it would keep the press or not, the right vested at once to recover the contract price." A covenant, by the seller, "to keep the press in order permanently," was held clearly independent. See Lewis *v.* Hubbard, 1 Lea 436. In Gibson *v.* Vail, 53 Vt. 476, the sale was of milk pans, on trial for thirty days. The result of the trial was a "disastrous failure." Taft, J., said, in a suit for the price: "The duty was then cast upon the defendant of notifying the plaintiff, within a reasonable time, of the failure of the trial, that he might retake his property, unless the facts excused her from that obligation. The referee finds that when the plaintiff was applied to by the defendant as to how the defendant should notify her of the result, she replied that she would come and see for herself. She failed to do so, and notice was not given until two months afterward. We think the defendant was under no obligation to give notice of the result to the plaintiff,

When trial involves consumption of what is tried.

§ 912. 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. This was ruled by Parke, B., in Elliott *v.* Thomas, (*y*) and approved by the court in banc, in that case, as well as by Martin and Bramwell, BB., in Lucy *v.* Mouflet. (*z*)

Question for jury, if goods used more than is necessary for trial.

Okell *v.* Smith.

In Okell *v.* Smith, (*a*) 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 the defendant had used them more than was necessary for a fair trial. [28]

"Sale or return."

Moss *v.* Sweet.

§ 913. The bargain called "sale or return" was explained by the Queen's Bench, in Moss *v.* Sweet, (*b*) 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. In this case, Iley *v.* Frankenstein (*c*) was overruled, and Lyons *v.* Barnes (*d*) was said by Patteson, J., not to be "very good law," as had been previously intimated by Lord Abinger, C. B., in Bianchi *v.* Nash. (*e*) [29]

Iley *v.* Frankenstein overruled

Lyons *v.* Barnes disapproved.

Ex parte White.

§ 914. In a case before the Lords Justices, Ex parte White, (*f*) the facts were that Alfred Nevill was a partner in a firm of Nevill & Co. He also did business *on his individual ac-*

unless applied to for that purpose." To the same effect, see the similar case of Smalley *v.* Hendrickson, 29 N. J. L. 371.

(*y*) 3 M. & W. 170.

(*z*) 5 H. & N. 229; 29 L. J., Ex. 110.

(*a*) 1 Starkie 107; and see Street *v.* Blay, 2 B. & Ad. 456.

28. See Aultman *v.* Theirer, 34 Iowa 272; Kahn *v.* Klabunde, 50 Wis. 235; Ray *v.* Thompson, 12 Cush. 281; Smith *v.* Love, 64 N. C. 439.

(*b*) 16 Q. B. 493; 20 L. J., Q. B. 167. See Swain *v.* Shepherd, 1 M. & Rob. 223; Ex parte Wingfield, 10 Ch. D. 591, C. A., at p. 593. See, also, remarks on the case of Moss *v.* Sweet, in Ray *v.* Barker, 4 Ex. D. 279, C. A.

(*c*) 8 Scott N. R. 839.

(*d*) 2 Starkie, 39.

(*e*) 1 M. & W. 546; and see Bailey *v.* Goldsmith, Peake 56, 78; Beverley *v.* Lincoln Gaslight Co., 6 Ad. & E. 829.

29. See *post* note 30.

(*f*) 6 Ch. 397, affirmed by House of Lords, *sub. nom.* Towle *v.* White, 21 W. R. 465.

count 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 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 him in their books, or cheques, or both; and when cheques were sent they were always drawn by 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.

Sale or return of goods consigned, *del credere* agency.

§ 915. 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.

James, L. J., 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 of 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 stating 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 guarantees that those persons to whom he sells shall perform the contracts 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.*" 30

30. **Sale or Return.**—In these cases the title passes, the buyer reserving a right to return, which is in effect a right to resell to his vendor. Until the option to return is exercised, title remains in the buyer. Thus, in Stevens *v.* Cunningham, 3 Allen 491, the seller, under an agreement for sale or return, refused to take back an engine sold, but agreed to take it to his shop, and pay for the use of it. He took it back under this arrangement and mortgaged it, and it was held that the mortgagee obtained no lien, the buyer having acquired the title and never having parted with it. Bolles *v.* Stearns, 11 Cush. 320; Martin *v.* Adams, 104 Mass. 262; McKinney *v.* Bradlee, 117 Mass. 321; Mofflyn *v.* Hathaway, 106 Mass. 414; Schlessinger *v.* Stratton, 9 R. I. 578, 581; Dearborn *v.* Turner, 16 Me. 17; Crocker *v.* Gullifer, 44 Me. 491, Boswell *v.* Bicknall, 17 Me. 344; Perkins *v.* Doug-

§ 916. In Head *v.* Tattersall, (*g*) the plaintiff on Monday, the 13th of March, bought at the defendant's auction a horse described in the catalogue as "having hunted with the Bicester and Duke of Grafton's hounds," and learned after the sale that this was not true. A condition of the sale

"Sale or return of a horse" injured or dying while in possession of the buyer.

lass, 20 Me. 317; Southwick *v.* Smith, 29 Me. 228. The case of Ex parte White, stated in the text, was followed in the very similar case of Nutter *v.* Wheeler, 2 Low. Dec. 346. In that case the manufacturer of goods kept a quantity stored in the shop of one Gear for which he paid, or which were charged to him, at a fixed tariff whenever he made a sale, the profit belonging to him. Lowell, J., said: "As to the goods which had been consigned to Gear, he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them, nor liable to pay for them, until he had succeeded in finding a purchaser, but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals." See In re Linforth, 4 Sawy. 370; Merrill *v.* Rinker, Bald. 528. The only American cases which this editor has noticed in conflict with the principles above stated in the text and in this note, are two Massachusetts cases. One is Schenck *v.* Saunders, 13 Gray 37, already stated and criticised, *ante* § 2, note 6, "Sale or Hiring of Services upon Chattels." The other is Eldridge *v.* Benson, 7 Cush. 483. In that case the contract was made by a book publisher with one Benson to deliver to agents, chosen by Benson, copies of a certain literary work to be sold by such agents, who should remit proceeds of sale to the publisher. The books, when delivered by the publisher, were to be charged to Benson at $13.50 per copy, and all remittances from agents were to be credited to him. Any unsold books might be returned, and should be credited at $13.50 per copy, to Benson. Under this contract it was held that the property in the books in the hands of Benson's agents remained in the publisher, and that therefore the books were not liable to the debts of Benson. Bigelow, J., said: "By construing this contract as a contract of sale, by which the property became vested in Benson, we should be led to the absurd conclusion that a vendee, to whom the absolute right of property had passed, could still retain the right of returning it to his vendor." The case was clearly one of sale or return. There is no absurdity in selling property and agreeing to buy it back. The risk of the property was thrown upon Benson, and the chances of profit were his. He was not a mere selling agent, for the entire proceeds of his sales came to him, being paid to the publisher as a pledge to secure Benson's debt. See Powder Co. *v.* Burkhardt, 97 U. S. 110; Dittmar *v.* Norman, 118 Mass. 319, stated *ante* § 2, note 6, and see under said note "Sale or Consignment to Sell" and "Sale or Hiring of Services upon Chattels." If, however, the delivery is under an express bailment, with leave to the bailee to purchase, no title passes until the option to purchase is exercised. See *ante* § 2, note 6. Chamberlain *v.* Smith, 44 Penna. 431. On a contract for sale or return, no definite time being limited, if on demand the buyer refuses to pay for or return the goods, the seller may treat the sale as absolute and recover the price. Jones *v.* Wright, 71 Ill. 61.

(*g*) L. R., 7 Ex. 7.

Head v. Tattersall.

was "horses not answering the description must be returned before 5 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 5 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 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. [31]

§ 917. [And applying the same principle, that the sale is only complete when the time limited for the return has expired, it was held in Elphick *v.* Barnes, (*h*) where the buyer had eight days to return a horse, and the horse died in his possession before the end of that time, but without any fault of his, that the seller could not recover the price in an action for goods sold and delivered.

Elphick v. Barnes.

In Hinchcliffe *v.* Barwick, (*i*) the plaintiff bought a horse which was warranted a good worker. The form of condition was, that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty, must be returned before 5 o'clock of the day after the sale; shall be then tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The purchaser did not return the horse within the time specified, but brought an action on the breach of warranty. Held, on demurrer, that the purchaser's only remedy was to return the horse within the time limited by the condition. The court laid stress upon the fact, that the object of the condition was to provide an immediate and final settlement of all disputes that might arise upon the warranty.]

Hinchcliffe v. Barwick.

Sale by description involves condition precedent.

§ 918. 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 de-

31. See Hunt *v.* Wyman, 100 Mass. 198, quoted *ante* note 27.

(*h*) 5 C. P. D. 321.

(*i*) 5 Ex. D. 177, C. A.

livered, 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 something 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; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill: as if 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 is no *warranty* that he should sell him peas, the *contract* is to sell peas, and if he sell him anything else in their stead, it is a non-performance of it." (*j*) 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, or if he has paid for it, to recover the price as money had and received for his use; whereas, in case of warranty, the rules are very different, as will appear *post* (Book V., Part II., Ch. 2.) 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. [32]

Description is not *warranty*, but *condition*.

(*j*) In Chanter *v.* Hopkins, 4 M. & W. 399; see, also, per Lord Blackburn, in Shand *v.* Bowes, 2 App. Cas., at p. 480, *ante* § 887.

32. **A Sale by Description is upon Condition that the Thing Sold Answers the Description.**—Hedstrom *v.* Toronto Car Wheel Co., 31 U. C. C. P. 475. The importance of distinguishing between a breach of condition in the quality of the thing sold, and a breach of warranty, consists in the remedy as explained in the text. In those states, therefore, where an avoidance is permitted for breach of warranty, the distinction loses its importance. See *ante* §§ 623 *et seq.* The American cases almost unanimously treat conditions of this class as warranties. The distinction is often very narrow. For instance, our author classes an agreement that the article sold shall correspond to a sample shown, as a warranty, and yet it is not easy to see wherein, for the purpose of this classification, a sale by sample differs from a sale by description. In fact a sale by sample is a sale by description. The article sold is in effect described as corresponding in

§ 919. In Nichol *v.* Godts, (*k*) the sale was of "foreign refined rape oil, warranted only equal to samples." *The oil tendered corresponded with sample*, but the jury found that 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 if a man contracts to buy a thing, he ought not to have something else delivered to him."

Nichol *v.* Godts.

In Shepherd *v.* Kaine, (*l*) 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.[33] But in the very similar case of Taylor *v.* Bullen, (*m*) where the vessel was described as "teak-built," and the terms were "with all faults, * * * and without any allowance for any defect or *error* whatever," it was held that the addition of the word "error" distinguished the case from Shepherd *v.* Kaine, 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.

Shepherd *v.* Kaine.

Taylor *v.* Bullen.

kind and quality to the sample, while in sales by description the kind and quality are named. In Wolcott *v.* Mount, 36 N. J. L. 262, 266, Depue, J., said: "The right to repudiate the purchase for nonconformity of the article delivered to the description under which it was sold, is universally conceded. That right is founded upon the engagement of the vendor by such description, that the article delivered shall correspond with the description. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by principle can be advanced, why he should not have upon his contract such redress as is practicable. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial." See American decisions on this subject, stated *post* § 966, note 24.

(*k*) 10 Ex. 191; 23 L. J., Ex. 314.

(*l*) 5 B. & Ald. 240; and see Kain *v.* Old, 2 B. & C. 627.

33. Followed in Henshaw *v.* Robins, 9 Metc. 83, 90; Winsor *v.* Lombard, 18 Pick. 57, 60; Whitney *v.* Boardman, 118 Mass. 242, 247.

(*m*) 5 Ex. 779.

§ 920. In Allan *v.* Lake, (*n*) 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." 34 Allan v. Lake.

In Wieler *v.* Schilizzi, (*o*) the sale was of "Calcutta linseed, *tale quale*," and the article delivered contained an admixture of 15 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. The jury so found, and the purchaser succeeded in 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*. Wieler v. Schilizzi.

In Hopkins *v.* Hitchcock, (*p*) the plaintiffs, Hopkins & Co., had succeeded to the firm of Snowden & Hopkins, 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 67 tons of the iron, and the broker made the bought note for "67 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. Hopkins v. Hitchcock.

§ 921. In Bannerman *v.* White, (*q*) 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 Bannerman v. White.

(*n*) 18 Q. B. 560.

34. See *post* § 966, note 24, where several cases of sales of seeds by a misdescription are stated.

(*o*) 17 C. B. 619; 25 L. J., C. P. 89; and see Kirkpatrick *v.* Gowan, 9 Ir. R. C. L. 521.

(*p*) 14 C. B. (N. S.) 65; 32 L. J., C. P. 154.

(*q*) 10 C. B. (N. S.) 844; 31 L. J., C. P. 28.

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 willful, 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 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.

§ 922. In Josling *v.* Kingsford, (*r*) 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.

§ 923. In Azémar *v.* Casella, (*s*) the plaintiff sold cotton to the defendants 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.

Azemar *v.* Casella.

(*r*) 13 C. B. (N. S.) 447; 32 L. J., C. P. 94.

(*s*) L. R., 2 C. P. 431–677 in error; 36 L. J., C. P. 124.

A. Casella & Co., the following cotton, viz., D° 128 bales at 25*d.* per pound, expected to arrive in London per Cheviot, from Madras. The cotton *guaranteed 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 guarantee, 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 *quality*, but difference of *kind;* that there was a condition precedent, and not simply a warranty, and that the defendants were not bound to accept.

On error, to the Exchequer Chamber, the judgment of the court below was unanimously confirmed, without hearing the defendants' counsel. 35

§ 924. Lord Tenterden held in two cases (*t*) 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.

Books and maps sold according to 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 is describing it. 36

Sale of securities, implied condition that they are genuine.

35. See Lyon *v.* Bertram, 20 How. 150.

(*t*) Paton *v.* Duncan, 3 C. & P. 336, and Teesdale *v.* Anderson, 4 C. & P. 198.

36. **Sale of Securities. Implied Condition of Genuineness.**—Where securities sold as genuine prove worthless the sale may be avoided. See *ante* § 619, note 10. The American cases hold that there is an implied warranty that securities sold are genuine and not forgeries. In Swanzey *v.* Parker, 50 Penna. 441, 450, Strong, J., said: "A transferrer even by delivery of a note or bill of exchange, though he does not generally warrant the solvency of the maker, does warrant that the bill or note is not forged or fictitious, that it is what it appears to be." So where bonds were issued by town officers without authority, one who buys such bonds from the holder as genuine can recover back the price if they prove void. See Cabot Bank *v.* Morton, 4 Gray 156; Wood *v.* Sheldon, 42 N. J. L. 421; Thrall *v.* Newell, 19 Vt. 208; Smith *v.* McNair, 19 Kan. 330. See Stoolfire *v.* Royse, 71 Ill. 223, stated *ante* § 897, note 23. But see Lettauer *v.* Goldman 72 N. Y. 506, questioned in Wood *v.* Sheldon, *supra.*

Jones v. Ryde.

Thus, in Jones *v.* Ryde, (*u*) it was held that the vendor of a forged navy bill was bound to return the money received for it.

Young v. Cole.

§ 925. In Young *v.* Cole, (*x*) the plaintiff, a stock broker, was employed by the defendant to sell for him four Gautemala bonds, in April, *1836*, and it was shown that in *1829*, unstamped Gautemala 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 Gautemala 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 has not delivered something which, though resembling the article contracted to be sold, is of no value."

Westropp v. Solomon.

In Westropp *v.* Solomon, (*y*) 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.

Gompertz v. Bartlett.

§ 926. In Gompertz *v.* Bartlett, (*z*) 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.

Pooley *v.* Brown, (*a*) where the plaintiff bought foreign bills from the defendant, and by the stamp act, 1854, (*b*) 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

(*u*) 5 Taunt. 488.

(*x*) 3 Bing. N. C. 724.

(*y*) 8 C. B. 345.

(*z*) 2 E. & B. 849; 23 L. J., Q. B. 65. The 33 and 34 Vict., c. 97, § 52, (the Stamp Act, 1870,) provides that every bill of exchange, *purporting* to be drawn or made at any place out of the United Kingdom, shall for the purposes of the act be deemed a foreign bill.

(*a*) 11 C. B. (N. S.) 566; 31 L. J., C. P. 134.

(*b*) 17 and 18 Vict., c. 83, § 5. See, now, 33 and 34 Vict., c. 97, § 24.

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 had by his own laches and delay lost all right to complain, under the special circumstances.

Gurney *v.* Womersley.

In Gurney *v.* Womersley, (c) a bill of exchange was sold to the plaintiffs, on which all the signatures were forged except that of the last endorser, 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 endorser'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 endorsed according to its purport.

Question of fact whether thing delivered is really what was intended by both parties.

§ 927. 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. 37

Mitchell *v.* Newhall.

Thus, in Mitchell *v.* Newhall, (*d*) 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

(*c*) 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 Mail Co., L. R., 2 Q. B., at p. 587.

37. In Edwards *v.* Marcy, 2 Allen 486, the purchaser of a bond of a railroad company sued to recover back the price, on the ground that the bond stated on its face that it was a first mortgage bond, whereas it was not so in fact. It was left to the jury to determine whether in making the purchase the buyer relied on this statement. In Charnley *v.* Dulles, 8 W. & S. 353, a certificate of deposit was transferred without recourse by a second endorser. The first endorsement proved to be a forgery, and suit was brought against the second endorser. The court said it was for the jury to say whether the plaintiff took the certificate subject to every risk of genuineness as well as solvency. The words "without recourse" alone would not exempt the defendant. This was followed in Porter *v.* Bright, 82 Penna. 441, where it was held that if the jury believed that the seller of counterfeit bonds told the buyer that he would guarantee against nothing except their being stolen, it would warrant a finding that the buyer took the risk of their genuineness.

(*d*) 15 M. & W. 308.

commonly bought and sold as shares in this company on the stock exchange. And in Lamert *v.* Heath, (*e*) 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 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."

Lamert *v.* Heath.

In Lamond *v.* Duvall, (*f*) 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.

§ 928. [A reference should be made here to the important decision in Johnson *v.* Raylton, (*g*) where the majority of the Court of Appeal held, in opposition to two decisions of the Court of Session in Scotland, (*h*) that on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is (in the absence of any usage in the particular trade, or as regards the particular goods, to supply goods of other makers), an implied condition that the goods shall be those of the manufacturer's own make, and the purchaser is entitled to reject others, although they are of the quality contracted for. (*i*)]

Implied condition on sale of goods by a manufacturer that goods are of manufacturer's own make.

(*e*) 15 M. & W. 487.

(*f*) 9 Q. B. 1030.

(*g*) 7 Q. B. D. 438, C. A.

(*h*) West Stockton Iron Co. *v.* Nielson, 17 Sc. L. R. 719; 7 Court Sess. Cas. (4th ser.) 1055; Johnson *v.* Nicoll, 18 Sc. L. R. 268; 8 Court Sess. Cas. (4th ser.) 437.

(*i*) In this case an appeal to the House of Lords was lodged but afterwards abandoned.

PART II.

VENDOR'S DUTIES.

CHAPTER I.

WARRANTY.

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SECTION I.—EXPRESS WARRANTY.

What is a warranty.

§ 929. 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*)

Antecedent representations.

It follows, therefore, that antecedent representations 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. [1]

(*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.

1. **A Warranty must form Part of the Contract of Sale.**—In Zimmerman *v.* Morrow, 28 Minn. 367, the suit was upon an alleged warranty in the sale of a horse, and the complaint set up that before plaintiff bought, the defendant told him that nothing ailed the horse but a cold. In fact, the horse had the glanders, of which he died. The complaint was held insufficient. Gilfillan, C. J., said: "It does not appear under what circumstances, nor, except that it was before the sale, at what time, defendant told plaintiff what is stated in the complaint. It is not stated that it was during the negotiations for the sale or in any way connected with them, or with a view to the sale, or to induce the plaintiff to buy." "The fact alleged that plaintiff was led to purchase by the representation does not alter the case, for there being no fraud, he had no right to rely on it, unless it was made in such a manner, and under such circumstances, as gave him a right to under-

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 the 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 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.[2] See further as to innocent misrepresentation, *ante* §§ 614–616.

Hopkins *v.* Tanqueray.

§ 930. 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

Warranty after sale requires new consideration.

stand that defendant intended to be bound by it as part of the contract of sale." See Torkelson *v.* Jorgenson, 28 Minn. 383. Representations in an advertisement do not constitute a warranty where the buyer inspects the goods. Calhoun *v.* Vecchio, 3 Wash. C. C. 165; McVeigh *v.* Messersmith, 5 Cranch C. C. 816. In Osborn *v.* Gantz, 60 N. Y. 540, Allen, J., said: "A warranty is an incident only of consummated or completed sales, and has no place as a contract, having present vitality and force in an executory agreement of sale." Damages may be recovered for breach of warranty, notwithstanding the contract permits a return of the property, and it has been returned. See Dike *v.* Reitlinger, 23 Hun 241; Northwood *v.* Tennie, 3 Ont. App. 37, stated *ante* § 911, note 27. And where there was a warranty and an agreement for return of a horse, it was held that a recovery could be had on the warranty though the horse died, and so could not be returned. Perrine *v.* Serrell, 30 N. J. L. 454. That a warranty, when given, is an essential part of the contract of sale, and must appea in a memorandum to satisfy the statute of frauds, see Peltier *v.* Collins, 3 Wend. 459; Boardman *v.* Spooner, 13 Allen 353, 361, and see *ante* § 209, note 6, and *post* § 942.

(*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.

2. See Craig *v.* Miller, 22 U. C. C. P. 348.

in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given. (*c*) [3]

No warranty of quality implied by mere fact of sale.

Caveat emptor.

Many exceptions to this rule.

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*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself, (*d*) [4] 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. To this rule there are many exceptions. (*e*)

Warranty of title.

§ 931. 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

(*c*) Roscorla *v.* Thomas, 3 Q. B. 234.

3. **A Warranty Given After the Sale is Void Unless for a New Consideration.**—In Congar *v.* Chamberlain, 14 Wis. 258, 264, trees were ordered, but delivered so late that the buyer refused to receive them, whereupon the seller agreed that if the buyer would accept them, he would warrant them against injury from freezing. This was held a new and valid consideration. In Vincent *v.* Leland, 100 Mass. 432, cider was ordered and delivered. The price was fixed afterwards and at the same time a warranty was given. This was held part of the contract of sale, and therefore valid. But when the warranty is after the sale and without new consideration, it is void. Hogins *v.* Plympton, 11 Pick. 97; Wilmot *v.* Hurd, 11 Wend. 584; Summers *v.* Vaughan, 35 Ind. 323; Morehouse *v.* Comstock, 42 Wis. 626; Porter *v.* Pool, 62 Ga. 238; Grant *v.* Cadwell, 8 U. C. Q. B. 161.

(*d*) Springwell *v.* Allen, Aleyn 91, and 2 East 448 n.; Parkinson *v.* Lee, 2 East 314; Williamson *v.* Allison, 2 East 446; Earley *v.* Garrett, 9 B. & C. 902; 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 and 288; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J., C. P. 162.

4. **Caveat Emptor.**—See *ante* § 641, note 8, and see *post* note 23. Barnard *v.* Kellogg, 10 Wall. 383, 388. "With regard to the goodness of wares purchased, the vendor is not bound to answer unless he expressly warrant them to be sound and good, or there has been a fraudulent representation—an affirmation of the quality known to the vendor to be false." Duncan, J., in Jackson *v.* Wetherill, 7 S. & R. 480, quoted in Warren *v.* Phila. Coal Co., 83 Penna. 437; Eagan *v.* Call, 34 Penna. 236; Whitaker *v.* Eastwick, 75 Penna. 229; Heilbrunner *v.* Wayte, 51 Penna. 259; Mason *v.* Chappell, 15 Gratt. 572, 582; Rice *v.* Forsyth, 41 Md. 389, 405; Salisbury *v.* Stainer, 19 Wend. 158; Mixer *v.* Coburn, 11 Metc. 559; Winsor *v.* Lombard, 18 Pick. 57; Wentworth *v.* Dows, 117 Mass. 14, 16; Roberts *v.* Hughes, 81 Ill. 130; Del., Lack. & W. R. R. *v.* Blair, 28 N. J. L. 139; Richardson *v.* Bouck, 42 Iowa 185. But in South Carolina the rule is said to be *caveat venditor*. Barnard *v.* Yates, 1 Nott & M. 142. See *post* note 32.

(*e*) *Post*, warranty of quality.

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.

No special form of words needed to create warranty.

§ 932. No special form of words is necessary to create a warranty. It is nearly two hundred years since Lord Holt first settled the rule, in Cross *v.* Gardner, (*f*) and Medina *v.* Stoughton, (*g*) which Buller, J., in 1789, laid down in the opinion given by him in the famous leading case of Pasley *v.* Freeman, (*h*) 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." (*i*) [5]

And in determining whether it was so intended, a decisive test is

(*f*) Carthew 90; 3 Mod. 261; 1 Show. 68.

(*g*) 1 Lord Raym. 593; Salk. 220.

(*h*) 3 T. R., at p. 57; 2 Sm. L. C., p. 66 (ed. 1879.)

(*i*) See, also, Power *v.* Barham, 4 Ad. & E. 743; Shepherd *v.* Kain, 5 B. & Ald. 240; Freeman *v.* Baker, 5 B. & Ad. 797; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J., C. P. 162; Taylor *v.* Bullen, 6 Ex. 779; Powell *v.* Horton, 2 Bing. N. C. 668; Allen *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; Cowdy *v.* Thomas, 36 L. T. (N. S.) 22.

5. **Whether the Words Used Constitute a Warranty is a Question of Intent.**—Mason *v.* Chappell, 15 Gratt. 572, 583; Warren *v.* Phila. Coal Co., 83 Penna. 437, 440. In this case Woodward, J., said: "No special form of words is necessary. The word 'warrant,' though it is the one generally used, is not so technical that it may not be supplied by others." Leggatt *v.* Sands Ale Brewing Co., 60 Ill. 158, 160; Thorne *v.* McVeagh, 75 Ill. 81; Wheeler *v.* Reed, 36 Ill. 81; Reed *v.* Hastings, 61 Ill. 266; Tyre *v.* Causey, 4 Harring. 425; Patrick *v.* Leach, 8 Neh. 530. If a party makes representations which amount to a warranty, he cannot avoid their effect by showing that he did not intend to warrant. Smith *v.* Justice, 13 Wis. 600. Some of the older Pennsylvania cases are very strict in their requirements as to the language that will constitute a warranty. In Wetherill *v.* Neilson, 20 Penna. 448, soda-ash was sold, the seller's agent representing it as he was authorized to do, to contain "48 per cent. English test." The court refused to admit testimony to show that the ash was far below 48 per cent. English test, and this was sustained on writ of error on the ground that there was nothing in the representations of the agent or in the authority given him to justify a finding of warranty; and Lowrie, J., said: "As to the offer to prove a special custom in Philadelphia as to the special article of soda, if it means anything at all, it means that when people in Philadelphia are selling soda, common English words of representation become words of warranty." And see Weimer *v.* Clement, 37 Penna. 147. But the law now is as stated in the text. Warren *v.* Phila. Coal Co., *supra*.

Test for deciding whether representation amounts to warranty.

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 have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter, not. (*j*) [6]

But in Chalmers *v.* Harding, (*k*) the Exchequer of Pleas, held, that

(*j*) 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.* Bailey, 1 H. & C. 405; 31 L. J., Ex. 483; Carter *v.* Crick, 4 H. & N. 412; 28 L. J., Ex. 238; Camac *v.* Warriner, 1 C. B. 356.

6. **An Affirmation of Quality by the Seller at the Time of Sale Intended as an Assurance of Fact and Relied on by the Buyer, Constitutes a Warranty.**—Osgood *v.* Lewis, 2 Harr. & G. 495; Crenshaw *v.* Slye, 52 Md. 140, 146; Mason *v.* Chappell, 15 Gratt. 572, 583; Randall *v.* Thornton, 43 Me. 226; Stroud *v.* Pierce, 6 Allen 413, 416; Smith *v.* Justice, 13 Wis. 600; Hahn *v.* Doolittle, 18 Wis. 196; Austin *v.* Nickerson, 21 Wis. 542; Tewkesbury *v.* Bennett, 31 Iowa 83; Reid *v.* Hastings, 61 Ill. 266; Marsh *v.* Webber, 13 Minn. 109; Polhemus *v.* Heiman, 45 Cal. 573, 578; Henshaw *v.* Robins, 9 Metc. 83; Robinson *v.* Harvey, 82 Ill. 58; Waterbury *v.* Russell, 8 Baxt. 159. In Warren *v.* Phila. Coal Co., 83 Penna. 437, 440, Woodward, J., said: "It is enough if the words used are not equivocal, and if it appears from the whole evidence that the affirmant intended to warrant, and did not express a mere matter of judgment or opinion." In Smith *v.* Richards, 13 Pet. 26, 42, Barbour, J., delivering the opinion of the United States Supreme Court, said: "We think we may safely lay down this principle, that wherever a sale is made of property not present but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least the seller is bound to make good the representation." See McFerran *v.* Taylor, 3 Cranch 281.

An Affirmation of Fitness for a Certain Purpose May be a Warranty.—In Richardson *v.* Grandy, 49 Vt. 22, 25, the suit was for damages for breach of warranty on a sale of a second-hand machine, which the seller promised to have repaired and "made as good as new of the kind." Royce, J., said: "Where representations are made by the vendor of the quality of the thing sold, or its fitness for a particular purpose, if intended as a part of the contract of sale, and the vendee makes the purchase relying upon such representations, they will in law constitute a contract of warranty." Murray *v.* Smith, 4 Daly 277; Robson *v.* Miller, 12 S. C. 586; Lamme *v.* Gregg, 1 Metc. (Ky.) 444; Smith *v.* Justice, 13 Wis. 600; Jack *v.* Des Moines, &c., Co., 53 Iowa 399; Northwood *v.* Rennie, 3 Ont. App. 37; Beals *v.* Olmstead, 24 Vt. 114. A representation that a machine or implement will "do good work" has been held a warranty. Elkins *v.* Kenyon, 34 Wis. 93; Osborn *v.* Ramson, 48 Mich. 206; Roe *v.* Bacheldor, 41 Wis. 360. But in Worth *v.* McConnell, 42 Mich. 473, such language was said to fall far short of amounting to a warranty. And see Hunter *v.* McLaughlin, 43 Ind. 38, 48.

(*k*) 17 L. T. (N. S.) 571.

Chalmers *v.* Harding

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.

Whether warranty was intended, fact for the jury.

This 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. (*l*) [7]

Interpretation of express warranties.

§ 933. 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 to 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.* [8]

(*l*) See, specially, Stucley *v.* Bailey, 1 H. & C. 405; 31 L. J., Ex. 483.

7. **Where the Language is Equivocal the Intention to Warrant is a Question of Fact for the Jury.**—Where the language is unmistakable the court may find either that there is or is not a warranty. In Daniels *v.* Aldrich, 42 Mich. 58, the evidence was that the seller of a horse declared that he was a good work horse, true and kind. He was proved to have been balky. The judge refused to leave it to the jury to find whether the seller warranted the horse, and charged that the words, if believed, were a warranty, and this was held correct. But where the language used is ambiguous, then the question is for the jury. Thus, in Crenshaw *v.* Slye, 52 Md. 140, 146, the alleged warranty was that the article sold was "a valuable fertilizer." It was held that it was properly left to the jury to determine whether the property was bought upon this representation, and that if so, and it was valueless, there was a breach. Horn *v.* Buck, 48 Md. 358, 370; Tuttle *v.* Brown, 4 Gray 457; Edwards *v.* Marcy, 2 Allen 486, 490; Wolcott *v.* Mount, 36 N. J. L. 262, 268; Thorne *v.* McVeagh, 75 Ill. 81; Tewkesbury *v.* Bennett, 31 Iowa 83; McDonald Manuf'g Co. *v.* Thomas, 53 Iowa 558; Murray *v.* Smith, 4 Daly 277, 282; Claghorn *v.* Lingo, 62 Ala. 230; Driesbach *v.* Lewisburg Bridge Co., 81 Penna. 177; Baker *v.* Fawkes, 35 U. C. Q. B. 302; Bennett *v.* Tregent, 24 U. C. C. P. 565. Where the seller said that the horse sold was not lame, and that he would not be afraid to warrant him, a finding by the jury that this was a warranty was sustained. Cook *v.* Moseley, 13 Wend. 277.

A Written Warranty Usually Raises a Question of Law for the Court.—"Of written contracts the courts are the expositors." Osgood *v.* Lewis, 2 Harr. & G. 518; approved, Horn *v.* Buck, 48 Md. 358, 370; Edwards *v.* Marcy, 2 Allen 486, 489; Whitney *v.* Thacher, 117 Mass. 523, 526; Brown *v.* Bigelow, 10 Allen 242, 244. See, however, § 933.

8. **Interpretation of Express Warranties.**—An agreement to warrant is interpreted like other agreements, from an examination of the words used. Where these leave the intent at all doubtful, the

surrounding circumstances may be proved to assist the court or jury to determine whether a warranty was in fact given, and, if given, its extent. In Dounce *v.* Dow, 64 N. Y. 411, a manufacturer requiring soft, tough iron, ordered "X X pipe iron," and after using a part found that it was hard and brittle. It appeared that iron of that description might be either soft or hard. The court held that there was a warranty that the iron was as described, but not that it was suitable to the use of the buyer. A warranty of a patent diamond drill that it was "to be complete in everything for working," was held to mean that the machine should be delivered fully equipped to do what in principle it was capable of doing, not that it would do the work for which it was purchased. McGraw *v.* Fletcher, 35 Mich. 104. See Parks *v.* Morris Ax and Tool Co., 54 N. Y. 586; Kimball, &c., Co. *v.* Vroman, 35 Mich. 310. A representation that goods are "perfect" means that they are fit for the purpose for which the buyer designs them, if that purpose is known to the seller. Roe *v.* Bacheldor, 41 Wis. 360. A warranty that goods will pass inspection, is equivalent to a warranty of soundness. Gibson *v.* Stevens, 8 How. 384, 401.

Simplex Commendatio non Obligat.—Representations that constitute a warranty are quite similar to those which, if false, constitute such fraud as will avoid a contract. See *ante* §§ 637, 639, and notes. Therefore opinions or statements not relied on do not make a warranty. "Remarks which may be construed as simple praise or commendation, imply no warranty." Tewkesbury *v.* Bennett, 31 Iowa 83; Miller *v.* Craig, 36 Ill. 109. "The statement that a machine is a good machine, or will do good work, does not necessarily constitute a warranty. It is a question for the jury under proper instructions." Adams, C. J., in McDonald Manuf'g Co. *v.* Thomas, 53 Iowa 558, 561; Wheeler *v.* Reed, 36 Ill. 81. That wine sold is "good, fine wine" was held no warranty that the wine was of any particular description or quality. Hogins *v.* Plympton, 11 Pick. 97. And in Jackson *v.* Wetherill, 7 S. & R. 480, it was held no warranty to say that a mare was safe and gentle in harness. But these cases are now doubtful, and would probably be left to the jury. Thus, it was left to the jury to determine whether coal represented to be "of good quality" was warranted. Pearson *v.* Martin, 38 Wis. 265, 269. See, also, *ante* note 5. That a horse was "all right" was held to be a warranty of soundness, and that he was fit for the buyer's use. Smith *v.* Justice, 13 Wis. 600; and see Little *v.* Woodworth, 8 Neb. 281. That a horse is sound to the best of the seller's knowledge, is a representation and not a warranty. Myers *v.* Conway, 62 Ind. 474, 479. But it seems that if the seller knew that the horse was unsound, he would not only be liable for fraud, but in *assumpsit* for breach of warranty. See *post* § 936.

Expression of Opinion no Warranty.—The expression of an opinion by the seller that logs sold will yield a certain amount of merchantable lumber, is not a warranty, where the buyer examines for himself. Fauntleroy *v.* Wilcox, 80 Ill. 477; Byrne *v.* Jansen, 50 Cal. 624. A representation involving a question of law is necessarily an opinion. Duffany *v.* Ferguson, 66 N. Y. 482. In Baker *v.* Henderson, 24 Wis. 509, the purchaser of trees saw them taken from the ground, and packed after long exposure. The seller assured him that they would not suffer from long exposure to the air before they were packed. Upon these facts it was held that there was no warranty. Dixon, C. J., said: "It is obvious that they were but mere expressions of opinion, not intended as a warranty, nor so understood." So in Carondelet Iron Works *v.* Moore, 78 Ill. 65, 71, the description of iron sold as mill-iron, was held no warranty that it was such, but a mere opinion, because the buyer

§ 934. In Jendwine *v.* Slade, (*m*) 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, (*n*) 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 (*o*) 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.

Jendwine *v.* Slade.

Power *v.* Barham.

§ 935. 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, (*p*) and where the sale was in these words: "Received £10 for a grey four-year-old colt, warranted sound in every respect," the warranty was also confined to soundness. (*q*) And where the sale was thus worded, "Received £100 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 named. (*r*) [And again, in another case where the warranty was contained in the following receipt, "Received from C. Anthony, Esq., £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," it was held that there was no warranty that the horse was quiet to ride and drive. (*s*)]

Examples of construction of written warranties.

In Lomi *v.* Tucker, (*t*) 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

Lomi *v.* Tucker.

had examined it before contracting. See Falkner *v.* Lane, 58 Ga. 116; Robinson *v.* Harvey, 82 Ill. 58; Bryant *v.* Crosby, 40 Me. 9; Lindsay *v.* Davis, 30 Me. 406; Bond *v.* Clark, 35 Vt. 577.

(*m*) 2 Esp. 572.

(*n*) 4 Ad. & E. 473.

(*o*) Canaletti died in 1768; Claude Lorraine in 1682; Teniers the younger in 1694.

(*p*) Richardson *v.* Brown, 1 Bing. 344.

(*q*) Budd *v.* Fairmaner, 8 Bing. 48.

(*r*) Dickenson *v.* Gupp, quoted at p. 50 in Budd *v.* Fairmaner, 8 Bing. 48.

(*s*) Anthony *v.* Halsted, 37 L. T. (N. S.) 433.

(*t*) 4 Car. & P. 15. See, also, De Sewhanberg *v.* Buchanan, 5 Car. & P. 343.

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.

Wood v. Smith.

§ 936. In Wood *v.* Smith, (*u*) 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 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*.

Powell v. Horton.

In Powell *v.* Horton, (*v*) the sale was "of mess pork, of Scott & Co.," 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.

§ 937. And in Yates *v.* Pym, (*x*) 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.

Bywater v. Richardson.

In Bywater *v.* Richardson, (*y*) 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, (*z*) 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

Chapman v. Gwyther.

(*u*) 5 M. & R. 124.
(*v*) 2 Bing. N. C. 668.
(*x*) 6 Taunt. 446.
(*y*) 1 Ad. & E. 508.
(*z*) 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.

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.

§ 938. 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. [9] But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect. [10]

General warranty does not extend to defects apparent on simple inspection.

In Liddard *v.* Kain, (*a*) the sale was of horses, known to the buyer to be affected, one with a 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.

Liddard *v.* Kain.

Margetson *v.* Wright, (*b*) 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

Margetson *v.* Wright.

9. **A General Warranty Does not Apply to Apparent Defects.**—"A warranty must be a representation of something as a fact, upon which the purchaser relies. In the nature of things one cannot rely upon the truth of that which he knows to be untrue." Dickinson, J., in McCormick *v.* Kelly, 28 Minn. 135, 138; Marshall *v.* Drawhorn, 27 Ga. 275; Schuyler *v.* Russ, 2 Caines 202; Van Schoick *v.* Niagara, &c., Co., 68 N. Y. 434; Bennett *v.* Buchan, 76 N. Y. 386, 391; Williams *v.* Ingram, 21 Tex. 300; Van Allen *v.* Allen, 1 Hilt. 524; Fisher *v.* Pollard, 2 Head 314; Hill *v.* North, 34 Vt. 604. But where the vendor uses artifice and thereby conceals defects, the warranty will apply. So where a mule was shown in a dark stall, and the buyer overlooked the fact that it had crooked pastern joints, it was held that a warranty of soundness applied. Kenner *v.* Harding, 85 Ill. 264, 268; Chadsey *v.* Greene, 24 Conn. 562, 573; Kohl *v.* Lindley, 39 Ill. 195, 202; Robertson *v.* Clarkson, 9 B. Mon. 506; Gant *v.* Shelton, 3 B. Mon. 420.

10. **A Warranty May Protect Against the Consequences of Patent Defects.**—In Marshall *v.* Drawhorn, 27 Ga. 275, 279, Lumpkin, J., said: "This court held in Calloway *v.* Jones, 19 Ga. 277, that a general warranty of soundness *might* cover patent defects. But it is confined to those cases of doubt and difficulty where the purchaser relies on his warranty, and not on his own judgment." This language was approved in McCormick *v.* Kelly, 28 Minn. 135, 138, by Dickinson, J., who added: "It has no application to the case of a purchaser who knows the defects in the property, and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects." Shewalter *v.* Ford, 34 Miss. 417, 422; Bank of Kansas City *v.* Grindstaff, 45 Ind. 158; Brown *v.* Bigelow, 10 Allen 242, 244; Hill *v.* North, 34 Vt. 604.

(*a*) 2 Bing. 183.

(*b*) 7 Bing. 603; 8 Bing. 454.

have been worth £500 if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for £90. 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 Parke, 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. 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 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. (*c*)

§ 939. But in Tye *v.* Fynmore, (*d*) where the sale was of "fair merchantable sassafras wood," the purchaser refused to take the article, alleging that these words meant in the trade,

Tye *v.* Fynmore.

(*c*) See, also, Butterfield *v.* Burroughs, 5; 2 Bl. Com. 165–6. 1 Salk. 211; Southern *v.* Howe, 2 Rolle

(*d*) 3 Camp. 462.

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."

§ 940. 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. (*e*) 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 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 (*f*) 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. If the cough actually existed at the time of the sale 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

Meaning of "soundness" in warranty of horses.

Kiddell *v.* Burnard.

(*e*) 9 M. & W. 668; and see Holliday *v.* Morgan, 1 E. & E. 1; 28 L. J., Q. B. 9.

(*f*) 2 Moo. & Rob. 157.

then unsound; 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 that 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." (*g*) 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 (*h*) and other judges in a series of cases."

Bolden *v.* Brogden overruled by Kiddell *v.* Burnard.

In Bolden *v.* Brogden, (*g*) 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. (*i*)

Defects which have been held to constitute unsoundness.

§ 941. 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;* (*k*) bone-spavin in the hock; (*l*) ossification of the cartilages; (*m*) the navicular disease (*n*) and thick wind (*o*) have been held to constitute unsoundness in horses, and goggles in sheep. (*p*) But roaring has been held not to be, (*q*) and in a later case to be, (*r*) unsoundness. Crib-biting (*s*) has been held to be not unsoundness, but to be covered by a warranty against vices. (*t*) [11]

Mere badness of shape that is likely to produce unsoundness, and

(*g*) 2 Moo. & Rob. 113.

(*h*) Elton *v.* Brogden, 4 Camp. 281; Elton *v.* Jordan, 1 Stark. 127.

(*i*) See, also, Onslow *v.* Eames, 2 Stark. 81; Garment *v.* Barrs, 2 Esp. 673, which seem also to be overruled by Kiddell *v.* Burnard.

(*k*) Best *v.* Osborne, Ry. & Moo. 290.

(*l*) Watson *v.* Denton, 7 Car. & P. 85.

(*m*) Simpson *v.* Potts, Oliphant Law of Horses, (ed. 1882) (by C. E. Lloyd), 467, Appendix.

(*n*) Matthews *v.* Parker, Oliphant Law of Horses, 471, Appendix; and Bywater *v.* Richardson, 1 Ad. & E. 598.

(*o*) Atkinson *v.* Horridge, Oliphant Law of Horses, 472, Appendix.

(*p*) Joliff *v.* Bendell, Ry. & Moo. 136.

(*q*) Bassett *v.* Collis, 2 Camp. 523.

(*r*) Onslow *v.* Eames, 2 Stark. 81.

(*s*) Brœnnenburgh *v.* Haycock, Holt N. P. 630.

(*t*) Scholefield *v.* Robb, 2 Mood. & Rob. 210.

11. Whether "cribbing" is unsoundness was said to be doubtful in Hunt *v.* Gray, 35 N. J. L. 227, 234. It was held unsoundness in Washburn *v.* Cuddihy, 8 Gray 430. And in Walker *v.* Haloington, 43 Vt. 608, it was held a breach of a war-

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; (*u*) o had curby hocks, that is, hocks so formed as to render him very liable to throw out a curb, and thus produce lameness; (*v*) or thin-soled feet, also likely to produce lameness. (*x*)

But a horse may have a congenital defect, which, in itself, is unsoundness. In Holliday *v.* Morgan, (*y*) a horse sold with a warranty of soundness had an unusual convexity in the corner 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, (*z*) 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.*" (*a*) [12]

Holliday *v.* Morgan.

§ 942. 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 inference or implication. [13]

Parol evidence inadmissible to prove warranty where the sale is written.

ranty that the horse was "sound and right." See Dean *v.* Morey, 33 Iowa 120.

(*u*) Dickinson *v.* Follett, 1 Mood. & Rob. 299.

(*v*) Brown *v.* Elkington, 8 M. & W. 132.

(*x*) Bailey *v.* Forrest, 2 Car. & K. 131.

(*y*) 1 E. & E. 1; 28 L. J., Q. B. 9.

(*z*) 9 M. & W. 668.

(*a*) On this subject the reader is referred to the 4th chapter of Oliphant's Law of Horses, (ed. 1882), p. 70, *et seq.*

12. **What Constitutes Breach of Warranty of Soundness of a Horse.**—In Brown *v.* Bigelow, 10 Allen 242, the court said: "Lameness may or may not make a horse unsound. If it was only accidental and temporary it would not be a breach of warranty; if permanent it would be clearly a case of unsoundness." A cold, controllable by ordinary remedies, is not unsoundness. Springstead *v.* Lawson, 23 How. Pr. 302. Whether a particular defect is unsoundness will often be a question for the jury. Alexander *v.* Dutton, 58 N. H. 282. In Whitney *v.* Taylor, 54 Barb. 536, a mare was sold and warranted "all right every way for livery purposes." This was held no more than equivalent to a warranty of soundness, and the mare proving to be with foal, this was held no breach. The unsoundness must have existed at the time of the sale, to constitute a breach. Miller *v.* McDonald, 13 Wis. 673; Bowman *v.* Clemmer, 50 Ind. 10.

13. **Where the Contract is in Writing a Parol Warranty cannot be Proved.**—This results from the general rule of evidence that no new terms can

Kain v. Old.

In Kain *v.* Old, (*b*) 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 writing 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." (*c*)

§ 943. But where the written paper was in the nature of an informal receipt merely, held, that parol evidence of a warranty was admissible. (*d*) [14]

be added by parol to vary a contract which the parties have reduced to writing. See *ante* § 209, note 6. Randall *v.* Rhodes, 1 Curt. C. C. 90; Frost *v.* Blanchard, 97 Mass. 155; Whitmore *v.* South Boston Iron Co., 2 Allen 52, 58; Cunningham *v.* Hall, 4 Allen 268, 272; Wiener *v.* Whipple, 53 Wis. 298, 304; Shepherd *v.* Gilroy, 46 Iowa 193. In Merriam *v.* Field, 24 Wis. 640, 642, the written contract contained certain express warranties. Parol evidence was offered to establish other warranties, but the court rejected it, saying that the writing was presumed to express the whole contract as to warranties, and could not be varied or added to by parol. See Mullain *v.* Thomas, 43 Conn. 252.

Parol Evidence is Admissible to Explain a Written Warranty.—Where the sale was by sample, parol evidence was admitted to determine whether the article tendered was equal to the sample, (Hogins *v.* Plympton, 11 Pick. 97); and where the sale was by description, evidence was admitted to determine whether the article delivered answered to the description. Stoop *v.* Smith, 100 Mass. 63. And where white willow cuttings were sold, parol testimony was admitted to show what was meant by white willow cuttings, and to prove that the sale was by sample. Pike *v.* Fay, 101 Mass. 134. Where the goods were warranted in writing to be "perfect," this was held to mean that they were perfect for the use intended by the buyer, and parol evidence was admitted to show that such intended use was made known to the seller. Roe *v.* Bacheldor, 41 Wis. 360.

(*b*) 2 B. & C. 627.

(*c*) See, also, Pickering *v.* Dowson, 4 Taunt. 779; Wright *v.* Crookes, 1 Scott N. R. 685.

(*d*) Allen *v.* Pink, 4 M. & W. 140.

14. Receipted Bill of Parcels.—A

In Dickson *v.* Zizania, (*e*) 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. Dickson *v.* Zizania.

But in Bigge *v.* Parkinson, (*f*) 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, (*g*) that the provisions should be reasonably fit for use for the intended purpose. Bigge *v.* Parkinson.

In Bywater *v.* Richardson, (*h*) there was a warranty of soundness, but the purchase was made at a 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 day next 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. Bywater *v.* Richardson.

§ 944. Blackstone says: that "The warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as that a horse is sound at the buying of him, not that he will be sound two years hence. (*i*) But the law is now different, as is explained by Mr. Justice Coleridge in his notes on this passage. Lord Mansfield, also, in a case (*k*) where this Warranty of future soundness.

receipted bill of parcels sold will not shut out parol evidence of a warranty not mentioned therein. Atwater *v.* Clancy, 107 Mass. 369, 375; Hazard *v.* Loring, 10 Cush. 267; Sutton *v.* Crosby, 54 Barb. 80; Koop *v.* Handy, 41 Barb. 454; Filkins *v.* Whyland, 24 N. Y. 338; Cassidy *v.* Begoden, 38 N. Y. Super. Ct. 180; Perrine *v.* Cooley, 39 N. J. L. 449; Harris *v.* Johnston, 3 Cranch 311; Irwin *v.* Thompson, 27 Kan. 643. In Bennett *v.* Tregent, 24 U. C. C. P. 565, where a bill of sale of a steam vessel was given containing a warranty of title, it was left to the jury to determine whether there was an oral contract containing a warranty of the power and capability of the vessel, of which contract the giving of the bill of sale was a partial execution.

(*e*) 10 C. B. 602; 20 L. J., C. P. 72.

(*f*) 7 H. & N. 955; 31 L. J., Ex. 301, in Ex. Ch.

(*g*) *Post*, Implied Warranty of Quality.

(*h*) 1 Ad. & E. 508.

(*i*) 3 Bl. Com. 166.

(*k*) Eden *v.* Parkinson, 2 Doug. 735.

passage was cited, said: "There is no doubt but you may warrant a future event." [15]

Warranties by agents.

General rule.

§ 945. 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. (*l*) 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. [16]

15. **Warranty of a Future Event.**— A warranty ordinarily applies only to defects existing at the time of sale. It is, however, competent for the seller to warrant or insure against future accidents. The intention to constitute such a warranty must be plain. In Leggatt *v.* Sands' Ale Brewing Co., 60 Ill. 150, ale was ordered to be sent from Chicago to Montana. The seller recommended its quality, but it was sour when it reached its destination. It was held that the warranty applied to its condition only at the time of shipment at Chicago. But where the intent is clear the future warranty is sustained. In Osborn *v.* Nicholson, 13 Wall. 654, a negro was sold in 1861 and warranted to be a slave for life. He was liberated in 1863. An action on the warranty was sustained. See Richardson *v.* Mason, 53 Barb. 601.

(*l*) Bayliffe *v.* Butterworth, 1 Ex. 425; Graves *v.* Legg, in Ex. Ch., 2 H. & N. 210; 26 L. J., Ex. 316; Pickering *v.* Busk, 15 East 38.

16. **Warranties by Agents.**— In Schuchardt *v.* Allens, 1 Wall. 359, 369, where the sale was made by a broker, by sample, the court said: "Authority, without restriction, to an agent to sell, carries with it authority to warrant." This seems to be an extension of the agent's authority somewhat beyond the statement of the text, though the point decided is not inconsistent with our author's statement of the law. In that case the authority to sell by sample, and therefore to warrant the property equal to the sample, was fairly to be inferred from the fact that the seller sent the sample to the broker to sell by. The cases cited are The Monte Allegre, 9 Wheat. 616, 644, and Andrews *v.* Kneeland, 6 Cowen 354. In the latter case a broker was employed to sell cotton. Savage, C. J., said: "He had authority to sell, as cotton was sold in the due course of business. It appears that the most usual sales of cotton were by inspecting the bulk; but that it was unusual to sell by sample. The broker, no doubt, however, had authority to sell by sample if he thought proper, and to bind his principal by such sale." In Nelson *v.* Cowing, 6 Hill 336, Bronson, J., said that an agent to sell has power to warrant unless the contrary appears, and many cases sustain this proposition. The foregoing are cases of sales by sample, and are explained on that ground in Cooley *v.* Perrine, stated *infra*. But other cases are not consistent with the doctrine of the text. Thus, in Murray *v.* Brooks, 41 Iowa 45, a warranty, by a general agent to sell reapers, was held binding on the principal, who was not permitted to show that his agent had no authority to give a warranty, except in writing, or that it was not the custom of the seller to

give warranties, such custom not having been made known to the buyer. In Boothby *v.* Scales, 27 Wis. 626, 635, it was held that an agent, authorized generally to sell machines, had power to sell with warranty, unless the buyer knew that the agent's powers were restricted. In Deming *v.* Chase, 48 Vt. 382, a horse was sold by a special agent to sell, having no express authority to warrant. Royce, J., discussed the question whether there was any difference between a special and general agent, and after a review of nearly all the cases cited by our author on this subject, concluded that where it is stated that a special agent to sell cannot bind his employer by a warranty in the sale of a horse, it is with the qualification that the agent is expressly directed not to warrant, and therefore, in the case before the court, the warranty was held binding, in the absence of proof of restriction of authority. See Skinner *v.* Green, 9 Porter 305; Gaines *v.* McKinley, 1 Ala. 446; Bradford *v.* Bush, 10 Ala. 386; Cocke *v.* Campbell, 13 Ala. 286. These Alabama cases are criticised in Herring *v.* Skaggs, 62 Ala. 180, *infra*. See, also, Ezell *v.* Franklin, 2 Sneed 236; Randall *v.* Kehlor, 60 Me. 37, 47. But several recent cases of authority indicate that the law as stated by our author will be generally accepted as correct in America. In Smith *v.* Tracy, 36 N. Y. 79, 82, the New York Court of Appeals approved the following rule stated in Parsons on Contracts: "An agent employed to sell, without express authority to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty." Therefore, in that case, where the sale was of bank stocks, the agent had no power to warrant, because no custom existed to warrant such sales. In Ahern *v.* Goodspeed, 72 N. Y. 108, 114, an agent employed to sell a note represented that it was business paper. His principal was held bound by this representation, because such was the usual representation on a sale of a note, and the agent to sell was authorized to make any declaration usually incident to such sales. In Palmer *v.* Hatch, 46 Mo. 585, an agent to sell whiskey was held to have no authority to warrant against a seizure for prior violation of the revenue laws. But this is a doubtful case. See McKnight *v.* Devlin, 52 N. Y. 399. In Alabama the language of our author in the text was recently quoted in Herring *v.* Skaggs, 62 Ala. 180, 185, and Stone, J., said: "We fully approve and adopt this language of this very accurate writer." In that case the agent who sold a safe warranted that it could not be opened by burglars in twelve hours. The buyer having been robbed by burglars sued the principal on the warranty. It was held to be a question for the jury, in the absence of express authority, whether a custom existed to give such warranty on sales of safes. The subject received thorough consideration in Cooley *v.* Perrine, 41 N. J. L. 322. In that case the sale was of a horse. The principal was not a horse dealer, and the agent was a man in his employ. The authority was simply to sell the horse for $150. The agent said that the horse was "all right." Dixon, J., said: "A sale of a chattel is a transfer of its title for a price. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to these component particulars. Under certain circumstances a sale legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged." And this was illustrated by the cases above stated of sales authorized to be by sample, and hence raising an implied warranty that the thing sold equaled the sample. "But in a sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a clear

Thus, in Alexander *v.* Gibson, (*m*) a servant who was sent to sell a horse *at 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."

Alexander *v.* Gibson.

In Dingle *v.* Hare, (*n*) an agent selling guano, was held authorized to warrant it to contain 30 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.

§ 946. In Brady *v.* Todd, (*o*) [17] 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

Brady *v.* Todd.

deduction that in an authority to make such a sale no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell." Brady *v.* Todd, 9 C. B. (N. S.) 592, is approved, and the warranty was held void. On writ of error the opinion of the court below was commended. Perrine *v.* Cooley, 42 N. J. L. 623. In Dodd *v.* Farlow, 11 Allen 426, it is held that a broker to sell merchandise cannot warrant without authority, and that a general custom of brokers to warrant all their sales is bad, because it makes no distinction between the different classes of property, or varying circumstances. See Graul *v.* Strutzel, 53 Iowa 712; Croom *v.* Shaw, 1 Fla. 211. Auctioneers cannot warrant without special authority. So, in The Monte Allegre, 9 Wheat. 616, 647, where, on an auction sale of tobacco, several bales of the lot sold were opened for inspection, and it was claimed that the sale was by sample, Thompson, J., said: "Sales at auction, in the usual mode, are never understood to be accompanied by a warranty. Auctioneers are special agents and have only authority to sell, and not to warrant unless specially instructed so to do." Where the principal adopts a sale made by his agent he must adopt also the warranty, if any given by his agent. This was held in Eadie *v.* Ashbough, 44 Iowa 519, though the principal did not know of the warranty. Two of the justices dissented. The same conclusion was reached in Victor, &c., Co. *v.* Rheinschild, 25 Kan. 534. But these decisions are doubtful. It is a settled principle that the principal is not bound by ratification of a bargain to terms of which he has no knowledge. Croom *v.* Shaw, 1 Fla. 211; Combs *v.* Scott, 12 Allen 493; Smith *v.* Tracy, 36 N. Y. 79; Gulick *v.* Grover, 33 N. J. L. 463; Cooley *v.* Perrine, 41 N. J. L. 322, 331.

(*m*) 2 Camp. 555. See, also, Helyear *v.* Hawke, 5 Esp. 72.

(*n*) 7 C. B. (N. S.) 145; 29 L. J., C. P. 144.

(*o*) 9 C. B. (N. S.) 592; 30 L. J., C. P. 223.

17. Brady *v.* Todd was approved and followed in Perrine *v.* Cooley, 42 N. J. L. 623; S. C., 41 N. J. L. 322, stated in last note.

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 gent 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, (*p*) the learned Chief Justice said: "We understand those judges to refer to a *general* agent employed for his principal to carry on his business, that is, the business of horse dealing, *in which 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,) (*q*) 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 Greig (the farm bailiff) an authority to answer that question, and to bind him by his answer. 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

(*p*) 3 T. R. 759. (*q*) 15 East 38.

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 that the sale would be void, there being no question raised upon this point."

Howard *v.* Sheward.

§ 947. In Howard *v.* Sheward, (*r*) 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.

SECTION II.—IMPLIED WARRANTY OF TITLE.

Implied warranty of title.

§ 948. 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 towards establishing a satisfactory rule.

In the examination of the subject, it will be found that on some points there is no conflict of opinion.

Warranty exists in executory agreement.

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.

(*r*) L. R., 2 C. P. 148.

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.

Affirmation by vendor that the chattel is his is a warranty of title.

This affirmation may be implied from his conduct.

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,

In absence of such affirmation, *quære?*

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*.[18]

If vendor knows he has no title, and conceals the fact, it is fraud.

-8. **A Sale of Property in the Buyer's Possession Implies a Warranty of Title.**—Boyd *v.* Bopst, 2 Dall. 91; McCabe *v.* Morehead, 1 W. & S. 513; Marshall *v.* Duke, 51 Ind. 62; Morris *v.* Thompson, 85 Ill. 16; Uttley *v.* Donaldson, 94 U. S. 29, 45; Costigan *v.* Hawkins, 22 Wis. 74; Whitney *v.* Heywood, 6 Cush. 82; Shattuck *v.* Green, 104 Mass. 42; Brown *v.* Pierce, 97 Mass. 46; Miller *v.* Van Tassel, 24 Cal. 458; Gross *v.* Kierski, 41 Cal. 14; Thurston *v.* Spratt, 52 Me. 202; Matheny *v.* Mason, 73 Mo. 677, 682; Byrnside *v.* Burdett, 15 W. Va. 718; Chancellor *v.* Wiggins, 4 B. Mon. 201; Richardson *v.* Tipton, 2 Bush 202; Patee *v.* Pelton, 48 Vt. 182; Williamson *v.* Sammons, 34 Ala. 691; Lines *v.* Smith, 4 Fla. 47; Hunt *v.* Sackett, 31 Mich. 18; Davis *v.* Nye, 7 Minn. 414, 418; Dryden *v.* Kellogg, 2 Mo. App. 87; Long *v.* Hickingbottom, 28 Miss. 772. These cases rest on the theory that possession of the vendor is equivalent to an affirmation of title. McCoy *v.* Archer, 3 Barb. 323. If the seller acquires title after the sale, it enures to the benefit of the buyer, the seller being estopped by his warranty from disputing the title of his vendee. Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

What Constitutes a Breach of the Implied Warranty of Title.—In general, the implied warranty of title to personalty is construed like the covenant of warranty of lands, and therefore no right of action arises until the buyer is evicted or disturbed in his possession. Thus, in Randon *v.* Toby, 11 How. 493, it was held that one sued for the price of slaves could not set up in defence that they had been unlawfully brought into the state, and that therefore the title was bad, so long as he was in undisturbed possession. To the same effect see Krumbharr *v.* Birch, 83 Penna. 426. In that case the buyer undertook to show in defence to a suit for property sold, that he had since bought the title of a third person. But the court said that to sustain the defence of breach of warranty there must be proof of eviction. In Burt *v.* Dewey, 40 N. Y. 283, the sale was of a stolen horse, and judgment was recovered against the purchaser in trover by the owner. Thereupon the purchaser sued his vendor on an implied warranty of title, but the court held that there was no breach, because he had not paid the judgment. See Wansler *v.* Messler, 29 N. J. L. 256. In Gross *v.* Kierski, 41 Cal. 111, it was held that there was an implied warranty of title, and that the statute of limitations did not begin to run against the buyer's remedy thereon until disturbance of possession, for

One question only that is controverted.

§ 949. 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.

Discussion of the subject and review of the authorities.

The negative is stated to be the true rule of law on this point in recent text-books of deservedly high repute. (*s*) Undoubtedly, in some of the ancient authorities on the common law, the rule is substantially so stated. In Noy's Max-

there was no right to sue till such disturbance. Wallace, J., referred to Tipton *v.* Triplett, 1 Metc. (Ky.) 570, and other Kentucky cases, where it is held that on an *express* warranty of title, there is no right of action till disturbance, but on an implied warranty an action arises at once upon the sale, and he pronounced the distinction to be without good reason and unsupported. See Word *v.* Cavin, 1 Head 507; Linton *v.* Porter, 31 Ill. 107; Case *v.* Hall, 24 Wend. 102; Bordwell *v.* Collie, 45 N. Y. 494; McGiffin *v.* Baird, 62 N. Y. 329; Jennings *v.* Sheldon, 44 Mich. 92. The buyer may pay off encumbrances on property sold him, and bring suit for breach, or set up the amount paid in reduction on suit for the price. Sargent *v.* Currier, 49 N. H. 310; Harper *v.* Dotson, 43 Iowa 232; Lane *v.* Romer, 2 Chand. 61. The right of action will not accrue until the money is paid. Burt *v.* Dewey, *supra;* Sargent *v.* Currier, *supra.* And one whose title is threatened may give up possession peaceably, and can then recover against his vendor on proof that the claim to which he surrendered was valid. McGiffen *v.* Baird, 62 N. Y. 329; Matheny *v.* Mason, 73 Mo. 677, 683, and cases there cited. But in Grose *v.* Hennessey, 13 Allen 389, the sale was of a building, and at the same time the seller assigned to the buyer a lease of the lot on which the building stood. The buyer brought suit for breach of warranty of title to the building, though his possession was undisturbed, and the suit was sustained. Hoar, J., said that the rules as to covenants of warranty of real estate had no application. This was followed in Perkins *v.* Whelan, 116 Mass. 542, where on sale of a horse it was held that the right of action for breach of implied warranty of title accrued immediately on the sale, and therefore the statute of limitations began to run at that time. These cases do not seem to be in harmony with those above stated, or with Bennett *v.* Bartlett, 6 Cush. 225, where a claim for breach of implied warranty of title was held not provable, before disturbance of possession, against a bankrupt, and therefore not barred by his discharge. The case of Estelle *v.* Peacock, 48 Mich. 469, is peculiar. The defence to a suit for the price was breach of warranty of title. The court said that, in general, such defence could be set up only after disturbance of possession, or after settling with the real owner. But in the case before the court the claimant adverse to the seller's title had come forward and assumed the defence, and would be bound by the result. Therefore, the court sustained the defence. In McKnight *v.* Devlin, 52 N. Y. 399, it was held that there was a breach of warranty of title in a sale of liquor, which before sale had been forfeited by the seller's violation of the revenue law, and which after sale was condemned and seized. See, *contra,* Palmer *v.* Hatch, 46 Mo. 585.

(*s*) Chitty on Cont. 413 (11th ed.); Broom's Legal Max. 799–801 (5th ed.); Leake, Dig. of Law of Cont. 402; 2 Taylor on Ev. 984; Bullen & Leake Prec. of Pl. 342 (ed. 1882.)

ims, 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:*" 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, (*t*) "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, (*u*) where the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case.

§ 950. 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. (*x*) 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.

§ 951. Morley *v.* Attenborough (*y*) 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 absence 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:*— Morley *v.* Attenborough.

"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,

(*t*) 2 Bl. Com. 451.
(*u*) 3 Ex. 500.
(*x*) Per Byles, J., in Eichholz *v.* Bannister, 17 C. B. (N. S.) 708; 34 L. J., C. P. 105.
(*y*) 3 Ex. 500.

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. 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.* 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 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. 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 *bona fide* purchaser without notice obtained a good title as against all except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. VIII., 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 under-

takes 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.

§ 952. "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. 664, 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 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, if proved 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.

§ 953. "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'Plaistrier.

§ 954. In the foregoing review of the older authorities by Parke, B., the case of L'Apostre *v.* L'Plaistrier escaped the research of his Lordship. (*z*) The case is mentioned in 1 Peere Williams 317, as a decision by Holt, C. J., on a different point. But when it was cited as an authority in Ryall *v.* Rowles, (*a*) 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." (*b*)

Hall v. Conder.

§ 955. Next came Hall *v.* Conder. (*c*) 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 defendant to buy, a good and indefeasible patent right? or was the contract merely to

(*z*) It had likewise escaped the research of the author of this treatise when the first edition was published.

(*a*) 1 Ves., Sr., at p. 351. Also reported *sub nom.* Ryall *v.* Rolle, 1 Atk. 165.

(*b*) See the case of Ryall *v.* Rowles, 2 W. & Tud. L. C. in Eq. (5th ed.), at p. 733, for this report by Lee, C. J., of the decision in L'Apostre *v.* L'Plaistrier.

(*c*) 2 C. B. (N. S.) 22; 26 L. J., C. P. 138, 288.

place the defendant in the same situation as the plaintiff was in, with reference to the alleged patent?" Held, that the latter was the true nature of the contract. In this case, again, there is nothing to show that a 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, were strongly in support of those in Morley *v.* Attenborough.

So, in Smith *v.* Neale, (*d*) the same court, on facts almost identical 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. [19] Smith *v.* Neale.

§ 956. In Chapman *v.* Speller, (*e*) the plaintiff gave the defendant £5 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." Chapman *v.* Speller.

§ 957. In Sims *v.* Marryat, (*e*) there were affirmations by the de-

(*d*) 2 C. B. (N. S.) 67; 26 L. J., C. P. 143.

19. **Sales of Choses in Action and Patents.**—The implied warranty of title is not limited to chattels, but applies to securities or other intangible property. Baker *v.* Arnot, 67 N. Y. 448; Gilchrist *v.* Hilliard, 53 Vt. 592, 596; Wood *v.* Sheldon, 42 N. J. L. 421; Donaldson *v.* Newman, 9 Mo. App. 235; Flynn *v.* Allen, 57 Penna. 482; Swazey *v.* Parker, 50 Penna. 441; Chambers *v.* Union Bank, 78 Penna. 205. See *ante* § 924. On sale of a patent there is an implied warranty of title and validity. Darst *v.* Brockway, 11 Ohio 462, 471; Croninger *v.* Paige, 48 Wis. 229.

(*e*) 14 Q. B. 621; 19 L. J., Q. B. 241.

(*e*) 17 Q. B. 281; 20 L. J., Q. B. 454.

Sims *v.* Marryat.

fendant, 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.*"

Eichholz *v.* Banister.

§ 958. Then came Eichholz *v.* Banister, (*f*) 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:

20, Charlton street, Portland street,
Manchester, April 18, 1864.

Mr. *Eichholz,*

Bought of R. Banister, job-warehouseman.

Prints, grey fustians, &c., job and perfect yarns, in hanks, cops, and buudles.

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 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

(*f*) 17 C. B. (N. S.) 708; 34 L. J., C. P. 105.

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." 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* § 649, 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.* Condor, 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 of the article sold.* * * * The present case shows, I think, the wisdom of Lord Campbell's remark on the judgment of Parke, B., in Morely *v.* Attenborough, when he said: (*g*) 'It may be that the learned Baron is correct in saying, that on a sale of personal property the maxim of *caveat emptor*

(*g*) In Sims *v.* Marryat, 17 Q. B. 281; 20 L. J., Q. B. 454.

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.

Remarks on this case.

§ 959. 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 a 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'Plaistrier, *ante* § 954. 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. (*h*)

The question was alluded to by the Lord Chancellor (Chelmsford) in delivering the opinion of the court in Page *v.* Cowasjee Eduljee, (*i*) where, in the case of the 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

(*h*) Wilkins' Leg. Anglo-Sax. Ll. Ethel. 10, 12; Eadg. 80.

(*i*) L. R., 1 P. C. 127–144; Moo. P. C. (N. S.) 499.

the special character of master *and not as owner*, and acted upon a *bona fide* belief of his authority to sell."

§ 960. The subject was again considered in the Common Pleas in Trinity Term, 1867, in Bagueley *v.* Hawley, (*k*) 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 brickwork, 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 law-suit." 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.

§ 961. On the whole, it is submitted that, since the decision 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 war-*

Submitted that the general rule is now changed.

(*k*) L. R., 2 C. P. 625; 36 L. J., C. P. 328.

rants 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. 20

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.

Before leaving this subject, it should be noted that in Dickenson *v.* Naul, (*l*) and in Allen *v.* Hopkins, (*m*) 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* § 949.

Diokenson *v.* Naul.

Allen *v.* Hopkins.

§ 962. In America, the distinction between goods in possession of the vendor and those not in possession, so decisively repudiated by Buller, J., in Pasley *v.* Freeman, (*n*) and by the judges in Eichholz *v.* Banister, (*o*) and in Morley *v.* Attenborough, (*p*) 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; (*q*) but where the goods sold are in possession of a third party at the time of the sale, there is no such warranty, and the vendee buys at

Decisions in America.

20. **It may be Shown that the Buyer Took the Risk of the Title.**—The sale may be expressly subject to an adverse claim, in which case, of course, no warranty can be implied Bogert *v.* Christie, 24 N. J. L. 57. And on a sale of all the seller's right or interest in property, no warranty of title can be implied. Bank of Northampton *v.* Mass. Loan, &c., Co., 123 Mass. 330; Krumbharr *v.* Birch, 83 Penna. 426; Jones *v.* Huggeford, 3 Metc. 515, 519.

No Warranty of Title is Implied in Official Sales.—This rule applies to sales by sheriffs, constables and other officers executing judicial orders, and to sales by executors or administrators. Mockbee *v.* Gardner, 2 Harr. & G. 176; Storm *v.* Smith, 43 Miss. 497; Harrison *v.* Shanks, 13 Bush 620; Hicks *v.* Skinner, 71 N. C. 539; Brunner *v.* Brennan, 49 Ind. 98; Neal *v.* Gillaspy, 56 Ind. 451; The Monte Allegre, 9 Wheat. 616; Corwin *v.* Benham, 2 Ohio St. 36.

(*l*) 4 B. & Ad. 638.

(*m*) 13 M. & W. 94.

(*n*) 3 T. R. 58.

(*o*) 17 C. B. (N. S.) 708.

(*p*) 3 Ex. 500.

(*q*) Bennett *v.* Bartlett, 6 Cush. 225; Vibbard *v.* Johnson, 19 Johns. 78; Case *v.* Hall, 24 Wend. 102; Dorr *v.* Fisher, 1 Cush. 273; Burt *v.* Dewey, 40 N. Y. 483.

his peril. (*r*) And in the note of the learned editor, of the last edition of Story on Sales, (*s*) it is said that "this distinction has now become so deeply rooted in the decisions 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. (*t*) [21]

§ 963. 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.*" Civil law.

Pothier gives the rule in these words: "The vendor's obligation is not at an end when he has deliverd the thing sold. He remains responsible after the sale, to warrant and defend the buyer against eviction from that possession. This obligation is called warranty." (*u*) Pothier.

§ 964. 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 French code.

(*r*) Huntingdon *v.* Hall, 36 Me. 501; McCoy *v.* Archer, 3 Barb. 323; Dresser *v.* Ainsworth, 9 Barb. 619; Edick *v.* Crim, 10 Barb. 445; Long *v.* Hickingbottom, 28 Miss. 772.

(*s*) § 377, p. 436, (4th ed.)

(*t*) Vol. 2, p. 478, (12th ed.)

21. **In America there is no Implied Warranty of Title to Property not in the Seller's Possession.**—McCoy *v.* Artcher, 3 Barb. 323; Edick *v.* Crim, 10 Barb. 445; Hopkins *v.* Grinnell, 28 Barb. 533; Scranton *v.* Clark, 39 N. Y. 220, 224; Sheppard *v.* Earles, 13 Hun 651; Huntingdon *v.* Hall, 36 Me. 501; Storm *v.* Smith, 43 Miss. 497; Byrnside *v.* Burdett, 15 W. Va. 702, 717; Scott *v.* Hix, 2 Sneed 192. In Shattuck *v.* Green, 104 Mass. 42, 45, Morton, J., says: "If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title, and a warranty is implied." And he approves the language of Dewey, J., in Whitney *v.* Heywood, 6 Cush. 82, 86, that "Possession here must be taken in its broadest sense, and 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." If this definition should be closely followed the American law would differ little from that established in England in Eicholz *v.* Banister. In fact though the law in America as stated in the text has been approved in many *dicta* on the authority of Kent and Story, very few recent cases will be found where it has been applied, and in many cases where it might have been applied, the courts have granted relief to the buyer on the theory of fraud or failure of consideration. See Matheny *v.* Mason, 73 Mo. 677.

(*u*) Vente, 2 Part, Ch. 1, § 2, No. 82.

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. 7, on the nature and effect of a sale by the civil law.

SECTION III.—IMPLIED WARRANTY OF QUALITY.

Caveat emptor is the general rule.

§ 965. 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.[22]

A representation anterior to the sale, and forming no part of the contract when made, is, as already shown (*ante* § 929), 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.

No exception where an existing specific

§ 966. So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned,

22. Hargous *v.* Stone, 5 N. Y. 73, 81, 89; Miller *v.* Tiffany, 1 Wall. 298, 309; Barnard *v.* Kellogg, 10 Wall. 383, 388; Richardson *v.* Bouck, 42 Iowa 185; Morris *v.* Thompson, 85 Ill. 16; Bryant *v.* Pember, 45 Vt. 487.

the rule of *caveat emptor* admits of no exception by *implied* warranty of quality. (*v*) [23]

chattel inspected by buyer has been sold.

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. If

Chattel to be made or supplied, implied warranty of quality.

(*v*) Parkinson *v.* Lee, 2 East 314; Chanter *v.* Hopkins, 4 M. & W. 64, and cases cited *ante* § 930.

23. **No Warranty of Quality on a Present Sale is Implied where the Buyer Inspects the Goods.**—See *ante* note 4. Barnard *v.* Kellogg, 10 Wall. 383, 388; Weimer *v.* Clement, 37 Penna. 147; Eagen *v.* Call, 34 Penna. 236; Jennings *v.* Gratz, 3 Rawle 168; Fitch *v.* Archibald, 29 N. J. L. 160; Getty *v.* Rountree, 2 Chand. 28; Hunter *v.* McLaughlin, 43 Ind. 38, 48; Bowman *v.* Clemmer, 50 Ind. 10, 12; Hadley *v.* Prather, 64 Ind. 137; Ryder *v.* Neitge, 21 Minn. 70; Ranges *v.* Hearne, 37 Tex. 30; Hight *v.* Bacon, 126 Mass. 10; Rice *v.* Forsyth, 41 Md. 389, 406; Barnett *v.* Stanton, 2 Ala. 195; Wilson *v.* Shackleford, 4 Randolph 5; Moses *v.* Mead, 1 Den. 378; S. C., 5 Den. 617; Salisbury *v.* Stainer, 19 Wend. 159; Hotchkiss *v.* Gage, 26 Barb. 141; Lukens *v.* Freiund, 27 Kan. 664; Kohl *v.* Lindley, 39 Ill. 195; County of Simcoe Soc. *v.* Wade, 12 U. C. Q. B. 614. As to cases where the defect is not discoverable by inspection, see *post* note 32. If the buyer makes a careless inspection, or neglects to inspect at all, his position will be the same as if he had fully inspected, in the absence of fraud. In Carson *v.* Baillie, 19 Penna. 375, 380, the sale was of lard grease. The buyer inspected several of the packages, declined to inspect further, and bought the lot. He sued for breach of warranty, alleging that a part of the grease was inferior and adulterated. It was held that there was no warranty. Lowrie, J., said: "Where goods are sold on inspection there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered." This was followed in Lord *v.* Grow, 39 Penna. 88, where the sale was by a grain dealer of spring wheat for seed. It proved to be winter wheat and the crop was lost, but it was held that there was no warranty, the buyer having inspected, notwithstanding the fact that the difference could not be determined by inspection. This is a doubtful case. See Wolcott *v.* Mount, 38 N. J. L. 496, and see *post* note 24. Where the buyer declines to inspect from want of judgment and expressly trusts the seller, the latter is bound only to exercise good faith. Hanger *v.* Evins, 38 Ark. —. In Byrne *v.* Jansen, 50 Cal. 624, the sale was of wool, bargained for before it was sheared. The buyer was asked by the seller to look at the sheep, but neglected to do so, nor did he examine the wool when delivered at his store. A year later the wool was examined and found very poor, and the seller was sued for breach of warranty. The court said: "Under such circumstances, no artifice having been used to prevent the examination, the maxim *caveat emptor* applies." See Chicago, &c., Co. *v.* Tilton, 87 Ill. 547; Hyatt *v.* Boyle, 5 Gill & J. 110.

Specific chattel sold by description.

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 the contract itself, by breach of a condition precedent, as explained *ante* § 918.[24] This was strongly exemplified in

24. **Sales by Description.** — The American decisions treat a sale by description as analogous to a sale by sample, and hold that words of description imply a warranty that the property shall answer the description. The effect is to extend to breaches of condition of this class the remedies available in cases of breach of warranty, while at the same time the English remedy of rejection of the property is not denied. See the language of Justice Depue on this subject in Wolcott *v.* Mount, 36 N. J. L. 262, 265, quoted *ante* § 918, note 32. As American lawyers will naturally seek for the law on this subject, under the head of "warranty," our citations are collected here, referring the reader, however, to our author's discussion of the subject in the Chapter on Conditions, *ante* §§ 918–923. The American cases sustain the following proposition.

A Sale by Description Imports a Warranty that the Property Sold is of that Description. — In Borrekins *v.* Bevan, 3 Rawle 23, 43, Rogers, J., said: "In all sales there is an implied warranty that the article corresponds in specie with the commodity sold." "It may be safely ruled that a sample or description in a sale-note, advertisement, bill of parcels or invoice, is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor." In Hogins *v.* Plympton, 11 Pick. 97, 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." To the same effect, see Winsor *v.* Lombard, 18 Pick. 57. In Hawkins *v.* Pemberton, 51 N. Y. 198, the contract was made at auction for the sale of blue vitriol. The article on closer examination than was practicable at the sale proved to be green vitriol, an inferior article, and the buyer refused to accept it. On a suit for damages the plaintiff had judgment on the authority of Chandelor *v.* Lopus, Cro. Jac. 4, Seixas *v.* Woods, 2 Caines 48, and Swett *v.* Colgate, 20 Johns. 196. But this was reversed, the cases cited being overruled, and it was held that the facts established a breach of warranty, or at least that question must be left to the jury. In White *v.* Miller, 71 N. Y. 118, 129, the buyer, a market gardener, ordered from a seed-grower six pounds of "Bristol cabbage seed," and the grower delivered a package thus described. The seed was impure because grown too near other varieties of cabbage, and therefore did not produce Bristol cabbages, but inferior cabbages fit only for cattle. The description of the seed was held to be a warranty that it was as described. The same judgment was reached by the New Jersey Court of Errors and Appeals, in Wolcott *v.* Mount, 38 N. J. L. 496, affirming S. C., 36 N. J. L. 262. To the same effect, see Passinger *v.* Thorburn, 34 N. Y. 634; Fleck *v.* Weatherton, 20 Wis. 392; Van Wyck *v.* Allen, 69 N. Y. 61. See, also, Whitaker *v.* McCormick, 6 Mo. App. 114; Lewis *v.* Rountree, 78 N. C. 323; Dailey *v.* Green, 15 Penna. 118; Brantley *v.* Thomas, 22 Tex. 270; Henshaw *v.* Robins, 9 Metc. 83; Mixer *v.* Coburn, 11 Metc. 559; Flint *v.* Lyon, 4 Cal. 17; Webber *v.* Davis, 44 Me. 147; Osgood *v.* Lewis, 2 Harr. & G. 495; Edgar *v.* Canadian Oil Co., 23 U. C. Q. B. 333.

Right of Inspection.—As an inspection of the goods is necessary to enable

Josling *v.* Kingsford, (*x*) 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. 25

§ 967. On the other hand, a severe application of the rule of *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. (*y*) The defendant sold to the plaintiff, on the 21st of October, 1836, "all that ship or vessel, called the Sarah, of Newcastle, &c.," covenanting in the deed-poll by which the conveyonce 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' Island on the 13th of 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. 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, (at p. 399): "The question is not what passed by the deed, but what is the meaning of the covenant contained in it." Barr v. Gibson.

§ 968. "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply

the buyer to ascertain whether they answer the description by which they were sold, it follows that the seller is bound to give the buyer an opportunity to make such inspection, and an acceptance for that purpose will not be a waiver of the right to reject. See *post* chapters on "Delivery" and "Acceptance." Doane *v.* Dunham, 79 Ill. 131; S. C., 65 Ill. 512.

(*x*) 13 C. B. (N. S.) 447; 32 L. J., C. P. 94.

25. A "sale with all faults" will not be satisfied by delivery of a thing different from that bargained for. It means all faults consistent with the identity of the thing described. Whitney *v.* Boardman, 118 Mass. 242.

(*y*) 3 M. & W. 390.

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;* for which the cases of Bridge *v.* Wain, (*z*) and Shepherd *v.* Kain, (*a*) 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 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. (*b*)

§ 969. Of implied warranties in sales of chattels, there are several recognized by law.

Implied warranties.

The first and most general is, that in a sale of goods by

(*z*) 1 Stark. 504.
(*a*) 5 B. & Ald. 240.
(*b*) See cases cited *ante* § 918, *et seq.*

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. In Parker *v.* Palmer, (*c*) 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, (*d*) 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.* 26

Sales by sample.

(*c*) 4 B. & Ald. 387.

(*d*) 2 East 314. See per Montague Smith, J., in Azémar *v.* Casella, L. R., 2 C. P. 446; and per Fitzgerald, J., in McMullen *v.* Helberg, 4 L. R., Ir. 94, at p. 100.

26. **In a Sale by Sample the Seller Warrants the Quality Equal to Sample.**—This is generally held, and yet, as will be seen, not without dissent. That a sale by sample implies a warranty that the bulk is equal to the sample was held in the United States Supreme Court in Schuchardt *v.* Allens, 1 Wall. 359, 370, and was decided or taken for granted in the following cases: Barnard *v.* Kellogg, 10 Wall. 383; Hubbard *v.* George, 49 Ill. 275; Webster *v.* Granger, 78 Ill. 230; Gill *v.* Kaufman, 16 Kan. 571; Gunther *v.* Atwell, 19 Md. 157; Boothby *v.* Plaisted, 51 N. H. 436; Brantley *v.* Thomas, 22 Tex. 270; Whitaker *v.* Hueske, 29 Tex. 355; Bradford *v.* Manly, 13 Mass. 139; Williams *v.* Spofford, 8 Pick. 250; Whitmore *v.* South Boston Iron Co., 2 Allen 52, 58; Waring *v.* Mason, 18 Wend. 425; Moses *v.* Mead, 1 Denio 378, 386; Beirne *v.* Dord, 5 N. Y. 95, 99; Leonard *v.* Fowler, 44 N. Y. 289; Hughes *v.* Bray, Cal. Sup. Ct., 1882, 13 Reporter 623; Graff *v.* Foster, 67 Mo. 512, 521. If the buyer refuses to accept goods sold by sample, the seller, in a suit for the price, must prove that the goods tendered were equal to the sample. Merriman *v.* Chapman, 32 Conn. 146.

In Pennsylvania there is no Implied Warrant that Goods Sold by Sample are Equal to the Sample in Quality.—In Pennsylvania the maxim *caveat emptor* has always been very rigidly applied, and the law as established by a series of decisions was stated in the case of Boyd *v.* Wilson, 83 Penna. 319, 324, as follows: "If we trace the law of this state through the following cases we shall find that a sale of chattels by the production of a sample, but without fraud or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality. The sample, under such circumstances, pure and simple, becomes a guaranty only that the article to be delivered shall follow its kind and be simply merchantable. These are the cases referred to: Borrekins *v.* Bevan, 3 Rawle 23; Jennings *v.* Gratz, Id. 169; Kirk *v.* Nice, 2 Watts 367; McFarland *v.* Newman, 9 Id. 56; Fraley *v.* Bispham, 10 Penna. 320; Carson *v.* Bailey, 19 Penna. 378; Wetherill *v.* Neilson, 20 Penna. 448; Eagan *v.* Call, 34 Penna. 236; Weimer *v.* Clement, 37 Penna. 147; Whitaker *v.* Eastwick, 75 Penna. 229. Such precisely was the state of this case. The broker produced a can

In a sale of goods by sample, it is an implied condition, as shown *ante* § 910, 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. (*e*)

All sales where sample shown not necessarily sales "by sample."

§ 970. It must not be assumed that in all cases where a sample is exhibited, the sale is a sale "by sample."[27] The vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk; 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, for "*expressum facit cessare tacitum.*" (*f*)

of the corn and exhibited it to defendants, and they asked to see others, which they opened and examined and proved." "The court saw no evidence in the case of either fraud or warranty, and under these circumstances charged that a sale by sample was not in itself a warranty of the quality of the corn. This language is too broad for all cases, but, under these facts, it seems to us there was no error in the instruction. It was said of a general sale without circumstances. The seller did not agree or say that the remainder should be of the same quality as the sample, and the purchaser did not order the corn delivered to be of the same quality as the sample. Nothing was said or done on either side to give character to the sample cans as a standard of quality. This being the nature of the sale the sample became a standard only of the kind, and that the goods were simply merchantable. So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty." It seems to be a fair inference from this case and the earlier cases cited, that in Pennsylvania there is no *implied* warranty that goods sold by sample are equal in quality to the sample, and that such warranty must be *express*.

(*e*) Lorymer *v.* Smith, 1 B. & C. 1.

27. **Showing a Sample Does not Necessarily make the Transaction a Sale by Sample** —In Hargous *v.* Stone, 5 N. Y. 73, 85, Paige, J., said: "The mere exhibition of a sample at the sale amounts only to a representation that the sample exhibited has been taken from the bulk of the commodity offered for sale in the usual way." "Every exhibition of a sample to the purchaser at the time of the sale does not *per se* make a sale by sample. There must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be by sample." See Gunther *v.* Atwell, 19 Md. 157; Waring *v.* Mason, 18 Wend. 425, 434; Beirne *v.* Dord, 5 N. Y. 95, 99, 104; Jones *v.* Wasson, 3 Baxt. 211; Day *v.* Ragnet, 14 Minn. 273, 282; The Monte Allegre, 9 Wheat. 616, 647; Barnard *v.* Kellogg, 10 Wall. 383, stated in the text, *post* § 979. In Ames *v.* Jones, 77 N. Y. 614, a sample of grain was shown, and after examining it the buyer ordered the lot. It was held that this was not sufficient evidence of a sale by sample. In Atwater *v.* Clancy, 107 Mass. 369, where a sample was shown, it was left to the jury to determine whether the sale was meant to be by sample, and evidence was held admissible to show a usage that goods of that class were sold by sample.

(*f*) And see per May, C. J., in McMullen *v.* Helberg, 4 L. R., Ir., at p. 121.

Thus, in Tye *v.* Fynmore, (*g*) 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. Tye *v.* Fynmore.

§ 971. So in Gardiner *v.* Gray, (*h*) 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." Gardiner *v.* Gray.

So in Powell *v.* Horton, (*i*) 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. Powell *v.* Horton.

So also have we seen in the very stringent case of Josling *v.* Kingsford, (*j*) 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." Josling *v.* Kingsford.

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." Meyer *v.* Everth.

§ 972. In Carter *v.* Crick, (*l*) the sale was by sample of an article which the vendor called seed barley, 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. Carter *v.* Crick.

In Russell *v.* Nicolopulo, (*m*) there was a written sale in London of

(*g*) 3 Camp. 462.
(*h*) 4 Camp. 144.
(*i*) 2 Bing. N. C. 668.
(*j*) 13 C. B. (N. S.) 447; 32 L. J., C. P. 94; and see Mody *v.* Gregson, *post* § 1003.
(*k*) Meyer *v.* Everth, 4 Camp. 22.
(*l*) 4 H. & N. 412; 28 L. J., Ex. 238.
(*m*) 8 C. B. (N. S.) 362.

Russell *v.* Nicolopulo.

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.

[And in a sale of guano, where the buyer had asked for a "guaranteed analysis" to accompany the sample, and a printed analysis signed by the vendor had been sent with the sample, the vendor was held to have warranted not only that the bulk was equal to sample, but that the analysis, at the time it was made, was a fair analysis of the bulk out of which the guano was supplied. (*n*)

Towerson *v.* Aspatria Society.

§ 973. A curious mistake in a sale by sample occurred in the case of Megaw *v.* Molloy, (*o*) decided by the Court of Appeal in Ireland in 1878. A corn broker, by the plaintiff's instructions, put up a quantity of maize for sale by auction. Under the conditions of sale, the maize was to be "sold as it now lies in store (sellers being irresponsible.") The advertisement of the sale also announced that purchasers were required to examine bulk for themselves, as sellers would accept no responsibility. In the auction room samples of the maize to be sold were handed about in bags labeled "Ex Emma Peasant," the name of the ship whose cargo the plaintiff had directed to be sold. The defendant, who had not inspected the bulk, became the purchaser, but afterwards refused to accept delivery of the cargo on account of its inferior quality. It was proved that the sample shown at the sale had been taken by mistake, not from the cargo of the "Emma Peasant," but from that of the "Jessie Parker," which was of superior quality. The plain-

Mistake in sale by sample.

Megaw *v.* Molloy.

(*n*) Towerson *v.* Aspatria Agricultural Society, 27 L. T. (N. S.) 276, Ir. Ex. Ch. reversing Court of Exchequer on the question whether there was any warranty of the bulk being equal to the analysis.

(*o*) 2 L. R., Ir. 530, C. A.; and see *ante* § 50, on mutual mistake as to the subject matter of the contract.

tiff resold the maize, "Ex Emma Peasant," and sued the defendant for the loss on the resale. Held, that as the plaintiff intended to sell one bulk, and the defendant to buy another, there was no contract between them; and by Christian, L. J., that assuming a contract to have existed, it must be a contract for the purchase of that cargo of which a sample had been shown at the sale.]

§ 974. A very full discussion of the law as to sales by samples is found in Heilbutt *v.* Hickson, (*p*) decided on the 5th of 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. Heilbutt *v.* Hickson.

In Heilbutt *v.* Hickson, the plaintiffs, merchants in London, on the 30th of 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 back army shoes, *as per sample*, at four shillings and eight pence per pair, less 2½ 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 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 plaintiff's 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 4950 pairs, which were shipped to destination at Lille, where they arrived on the 10th of February.

In the meantime the plaintiffs had sent in advance, to Lille, one

(*p*) L. R., 7 C. P. 438.

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 of 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 meantime declined to receive further deliveries), and after communication with the plaintiffs' correspondent at Lille, the agent, on the 10th of 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 of February, signed a letter, dated on the 11th of 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 of 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 100 pairs taken from different cases—were found to contain paper, canvas shavings, or asphalt 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 costs* of the shoes, with freight, charges, and insurance, till arrival at Lille; 2ndly, 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 £4214 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.

§ 975. 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 of 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.* [28]

Semble— Sample shown by manufacturer must be taken as free from secret defects.

§ 976. The judgment of the court was put by the Chief Justice on the interpretation of the whole contract

28. See *post* note 33. Where goods are sold by sample by one who is not the manufacturer, no implied warranty arises against latent defects in both bulk and sample. Bradford *v.* Manly, 13 Mass. 139; Dickinson *v.* Gay, 7 Allen 29; Sand *v.* Taylor, 5 Johns. 395, 404.

as originally made and as subsequently modified by the letter of the 11th of 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 Mody *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;*

Buyer's right of rejection after inspection.

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. (*q*) * * * 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 real practical inspection until an inspection at Lille. * * *

Inspection, if ineffective from vendor's default, is no inspection.

The *apparent* inspection in London being then, *by the act of the defendants' servants*, no inspection at all, and consequently a *real* inspection at Lille being, by the act 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

(*q*) Affirmed and restated by Brett, J., L. R., 10 C. P., at p. 396, *vide post* § in his judgment in Grimoldby *v.* Wells, 978.

they were entitled to throw the shoes upon the hands of the defendants *at Lille.*"

§ 977. In Couston *v.* Chapman, (*r*) 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 of March, 1870, and the delivery was completed on the 11th of April. The purchasers had the wine examined, and on the 31st of 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 of 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—

Couston *v.* Chapman.

Buyer's rights if goods not equal to sample.

1st. That the sale of each lot was a separate contract.

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."

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.

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, "Reference 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 a 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; 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.

(*r*) L. R., 2 Sc. App. 250.

"As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find 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."

Buyer must accept all or none of an *entire* lot.

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.*" [29]

Buyer's duty when goods not equal to sample.

Dictum of Lord Chelmsford.

29. **Goods not Equal to Sample or Description, may be Rejected by the Buyer, but if he Accepts them he may Recover on his Warranty.**—The subject of avoidance for breach of warranty has been discussed *ante* §§ 623–635. Here we consider the right of rejection before title passes. The subject is also considered under the head of "Remedies of the Buyer," in Book V., *post.* In Doane *v.* Dunham, 65 Ill. 512, 516; S. C., 79 Ill. 131, this subject is discussed. The property was sold by an executory contract, and defendant set up against a suit for the price that it was unmerchantable. It was held that the law gave the buyer a reasonable time to examine and reject the property. "If defendants failed to make the examination within a reasonable time, they will be precluded from the right to offer it back, rescind the contract, and avoid payment on that ground; but would still have the right to rely upon the warranty implied by law in mitigation of damages under the general issue, or, in other words, will be liable upon a *quantum meruit* for the goods." In Daily *v.* Green, 15 Penna. 118, 126, lumber was delivered which did not answer the description by which it was sold. The buyer discovered the defects but did not notify the seller of his rejection promptly, and the lumber being swept off he was held liable to pay for it. He was however allowed to deduct damages for breach of warranty. See Cox *v.* Long, 69 N. C. 7, followed in Lewis *v.* Rountree, 78 N. C. 323; Rodgers *v.* Niles, 11 Ohio St. 48; Byers *v.* Chapin, 28 Ohio St. 300; Boothby *v.* Plaisted, 51 N. H. 436; Field *v.* Kinnear, 4

Kan. 476; McCarty *v.* Gorden, 14 Kan. 35; Gill *v.* Kaufman, 14 Kan. 571; Bigger *v.* Bovard, 20 Kan. 204, 207; Nye *v.* Iowa City Alcohol Works, 51 Iowa 129; Morehouse *v.* Comstock, 42 Wis. 626; Owens *v.* Stevens, 67 Ill. 366; Taylor *v.* Cole, 111 Mass. 363; Youghiogeny Iron and Coal Co. *v.* Smith, 66 Penna. 340; Brantley *v.* Thomas, 22 Tex. 270; Polhemus *v.* Heiman, 45 Cal. 573, 579. In this case Belcher, J., said: "There may be an express or implied warranty when the contract is executory as well as when it is executed." "Having a warranty the defendants were not required to return or offer to return the wool. If it was not what it was warranted to be, they might have done so, and thus have rescinded the contract, but they were at liberty to retain it and bring an action on the breach of warranty or plead the breach in reduction of the price." In New York the law was stated as follows by Paige, J., in Hargous *v.* Stone, 5 N. Y. 73, 86: "Where the sale is executory, if the goods purchased are found on examination to be unsound, or not to answer the order given for them, the purchaser must immediately return them to the vendor or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods." This has been followed in New York in the following cases: McCormick *v.* Sarson, 45 N. Y. 265; Gaylord Manufacturing Co. *v.* Allen, 53 N. Y. 515, 519. These two cases relate to sales that may be considered to have been by description, which under our author's classification would imply not a warranty, but a condition that the thing supplied should answer the description. A similar case following those last cited is Locke *v.* Williamson, 40 Wis. 377, 381. But in Reed *v.* Randall, 29 N. Y. 358, 362, the action was for damages for breach of the implied warranty that tobacco sold should be merchantable. It appeared at the trial that plaintiff received the tobacco under an executory contract, and gave no notice that it was not merchantable, whereupon a non-suit was granted. This was sustained on appeal. In Sprague *v.* Blake, 20 Wend. 61, also, the acceptance of unmerchantable wheat was held to bar suit on a warranty, though it had been expressly agreed that the wheat should be merchantable. And in Dutchess Company *v.* Harding, 49 N. Y. 321, the contract was for the sale of sumac, "quality to be like sample in every respect." The buyer inspected part of the lot tendered and accepted the whole, but afterwards sued for damages for breach of warranty. Church, C. J., said: "In such a case the vendee must immediately rescind the contract and return or offer to return the goods, or he will be foreclosed from all claim. He cannot retain the property, and afterwards sue for damages on account of the inferior quality." The plaintiff, however, recovered because of a fraudulent device of the seller which prevented complete inspection. But later New York cases have modified the former rule to this extent, at least, that an action or defence may be sustained on the warranty implied in a sale by sample, or on an express warranty in an executory contract of sale, though the buyer accepts and does not offer to return the goods. Whether any remedy would be held to survive the acceptance of goods sold by description, or of goods not merchantable, seems to be an open question in New York. In Day *v.* Pool, 52 N. Y. 416, Peckham, J., said: "The agreement to warrant, in an executory contract of sale, is just as obligatory as a warranty on a present sale and delivery of goods. Is there any reason why the vendee, in such executory contract of sale, may not rely upon that warranty to the same extent as upon a warranty in a present sale and delivery of property." Upon a warranty on a present sale the buyers might use the subject of the sale without returning it, though defective, and rely on their

§ 978. [In Grimoldby *v.* Wells, (*s*) the Court of Common Pleas, laid down the rule that the buyer is under no obligation either to return or to offer to return goods to the seller, or to place them in neutral custody when, upon inspection, the bulk proves to be inferior to sample; it is sufficient for him to give clear notice to the seller that he rejects the goods, and that they are at the seller's risk, and it then rests with the seller to remove them. The court explained Lord Chelmsford's meaning in the above-cited passage from his judgment in Couston *v.* Chapman, to be, not that the buyer was bound to return or to offer to return the goods, but that he might have effectually declared his intention of rejecting them in either of those ways.

Explained in Grimoldby *v.* Wells.

Buyer not bound to return goods.

Brett, J., adhered to the opinion which he had before expressed in Heilbutt *v.* Hickson (*ante* § 976.) "The defendant 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, 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. There are several modes in which he may 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 ven-

warranty. "I confess myself unable to see any controlling reason for a legal difference." This was a case of an express warranty. In the case of Gurney *v.* Atlantic, &c., R'y Co., 58 N. Y. 358, the contract was to manufacture and deliver iron "frogs" corresponding in all respects with a sample furnished. This was held to imply a warranty of quality. The frogs proved defective and brittle in use. After a discussion of all the New York cases above cited in this note, Day *v.* Pool was followed. Church, C. J., said: "The principle enunciated applied to the facts of this case must, I think, determine this question in favor of the right of the vendee to retain the property and recoup the damages." Gurney *v.* Atlantic, &c., R'y Co., was followed in Gautier *v.* Douglass, &c., Co., 13 Hun 514. In Marshuetz *v.* McGreevy, 23 Hun 408, the sale was of a cask of gin represented to be of good quality, and a sample was shown. The court held that the buyer could rely on his warranty, and need not test the gin at the time of delivery. "When he did examine the gin and found it defective, he was not bound to return or offer to return it. And his remedy upon the warranty was not lost by his retaining the gin and using it." Day *v.* Pool was cited and followed. See Muller *v.* Eno, 14 N. Y. 602; Boorman *v.* Jenkins, 12 Wend. 677; Morehouse *v.* Comstock, 42 Wis. 626; Shields *v.* Reibe, 9 Brad. 598.

(*s*) L. R., 10 C. P. 391, and see the *dicta* of Martin and Bramwell, BB., in Lucy *v.* Monflet, 5 H. & N. 223, at p. 233.

dor's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them."] [30]

As to the effect of a sale, per sample, in modifying the implied warranty that goods are merchantable, the case of Mody *v.* Gregson, *infra*, § 1003, may be consulted.

§ 979. In the case of Barnard, appellant, *v.* Kellogg, respondent, (*t*) 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 50 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 brokers' 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 placing 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.

Barnard *v.* Kellogg.

American law

§ 980. On action brought by the respondents there were three counts: 1, upon sale by sample; 2, upon a promise, express or implied, that the bales should not be falsely packed; 3, 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 brokers' 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

30. Starr *v.* Torrey, 22 N. J. L. 190. (*t*) 10 Wall. 383.

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.

§ 981. 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 Appeals of the State of New York, in Leonard *v.* Fowler, (*u*) 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.

Average sample.

New York decision.

Leonard *v.* Fowler.

[And, in Massachusetts, evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represented the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately. (*x*)]

Massachusetts decision.

Schnitzer *v.* Oriental Print Works.

(*u*) 44 N. Y. 289.

(*x*) Schnitzer *v.* Oriental Print Works, 114 Mass. 123.

§ 982. An implied warranty may result from the usage of a particular trade.[31] Thus, in Jones *v.* Bowden, (*y*) it was shown that in auction sales of certain drugs, 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. 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 judge was probably Weall *v.* King, (*z*) decided on a different point.

Warranty implied from usage.

Jones *v.* Bowden.

Weall *v.* King.

§ 983. 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.[32] The rule was first clearly stated by Lord Ellen-

Sale of goods by description not inspected by buyer, implied warranty that they are salable.

31. In Atwater *v.* Clancy, 107 Mass. 369, evidence was admitted of a usage to sell goods of a certain class by sample, and it was left to the jury whether the sale in question was by sample. But no usage can be shown in contravention of law, as for instance, to give a limited or extended meaning to the warranty implied on a sale by sample. Dickinson *v.* Gay, 7 Allen 29; Whitmore *v.* South Boston Iron Co., 2 Allen 52; Snelling *v.* Hall, 107 Mass. 134. In Wetherill *v.* Neilson, 20 Penna. 448, 453, it was held that no usage could be allowed to change words of representation into a warranty. See this case stated *ante* note 5.

(*y*) 4 Taunt. 847.

(*z*) 12 East 452.

32. **There is an Implied Warranty that Goods Sold by Description shall be Merchantable.**—Howard *v.* Hoey, 23 Wend. 350; Merriam *v.* Field, 24 Wis. 640; S. C., 29 Wis. 592; S. C., 39 Wis. 578; Morehouse *v.* Comstock, 42 Wis. 626; Brantley *v.* Thomas, 22 Tex. 270; Gammell *v.* Gunby, 52 Ga. 504; Wilcox *v.* Hall, 53 Ga. 635; McClurg *v.* Kelley, 21 Iowa 508; Hamilton *v.* Ganyard, 34 Barb. 204; Clen *v.* McPherson, 1 Bosw. 480; Newberry *v.* Wall, 35 N. Y. Super. Ct. 106; Fitch *v.* Archibald, 29 N. J. L. 160; French *v.* Vining, 102 Mass. 132; Baker *v.* Frobisher, Quincy (Mass.) 4; Swett *v.* Shumway, 102 Mass. 365, 369; Whitmore *v.* South Boston Iron Co., 2 Allen 52, 58; Kohl *v.* Lindley, 39 Ill. 195; Weiger *v.* Gould, 87 Ill. 180; Edwards *v.* Hathaway, 1 Phil. 547. An exception to this rule was held to exist in Chicago, &c., Co. *v.* Tilton, 87 Ill. 547, 553, where both parties were dealers in a board of trade under rules providing that one who took property without inspection, took it at his own risk.

Gardiner v. Gray.

borough, in Gardiner *v.* Gray, (*a*) where the defendant made a sale of twelve bags of "waste silk." The delaration 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.* 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 dunghill."

§ 984. This rule has been followed in a long series of decisions, (*b*) and the law on the subject was reviewed, and the cases classified, in Jones *v.* Just, (*c*) 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 vendor was 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:

Jones v. Just.

§ 985. *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 the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.

General principles.

(*a*) 4 Camp. 144.

(*b*) 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 M. & G. 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 Ex. Ch.

(*c*) L. R., 3 Q. B. 197; 37 L. J., Q. B. 89.

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 a 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.

§ 986. "*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 pary, there is no implied warranty. Bar *v.* Gibson, 3 M. & W. 390.[33]

33. **Defects not Discoverable by Inspection.**—That there is no implied warranty of quality where the buyer inspects or may inspect the goods, see *ante* § 966, note 23. Where the defect is one not discoverable by inspection, the same rule applies, subject to the exceptions named in the text, as to cases of fraud, or where the seller is the manufacturer or grower, and therefore his supposed care and skill constitute a part of what is contracted for. In Cogel *v.* Kinseley, 89 Ill. 598, an engine was sold as second-hand, and was bought after examination by the buyer and by an engineer employed by him. It was held that there was no warranty, and no fraud, though the seller did not point out cracks in the bed which might have been seen on careful inspection, or disclose that it had been in a building destroyed by fire. In Bragg *v.* Morrill, 49 Vt. 45, a machinist sold and prepared for use, by turning, a piece of iron shafting not forged by him, which broke by reason of a hidden flaw in the manufacture. It was held that there was no implied warranty of soundness. In Hoe *v.* Sanborn, 21 N. Y. 552, 566, where the sale was of saws found to be unfit for use by reason of soft temper Selden, J., said: "The rule I hold to be this: the vendor is liable in such cases for any latent defect not disclosed to the purchaser arising from the manner in which the article was manufactured; and if he knowingly uses improper materials he is liable for that also, but not for any latent defect in the material which he is not shown and cannot be be presumed to have known." But see Rodgers *v.* Niles, 11 Ohio St. 48, where the majority of the court would not follow Hoe *v.* Sanborn, but held the seller, under similar circumstances, liable on an implied warranty. This seems to accord with the law in England. See *post* § 994. That the rule, *caveat emptor* applies to purchases from one not the maker or grower, where the buyer inspects the goods, notwithstanding there are defects not discoverable by inspection, see the following cases: Deming *v.* Foster, 42 N. H. 165; Kohl *v.* Lindley, 39 Ill. 195; Moses *v.* Mead, 1 Denio 378; Scott *v.* Renick, 1 B. Mon. 63; Bartlett *v.* Hoppock, 34 N. Y. 118; Goldrich *v.* Ryan, 3 E. D. Smith (N. Y.) 324; Lindsay *v.* Davis, 30 Mo.

§ 987. "*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.[34]

406; Snelgrove *v.* Bruce, 16 U. C. C. P. 561; Coate *v.* Terry, 26 U. C. C. P. 35. The seller must not cheat the buyer, but may let him cheat himself. Armstrong *v.* Bufford, 51 Ala. 410; Biggs *v.* Perkins, 75 N. C. 397. But though the general rule is that there is no warranty against secret defects, yet the concealment of such defects by the seller will sometimes afford the buyer a remedy in an action founded on fraud. Hadley *v.* Clinton Co., 13 Ohio 502; Maynard *v.* Maynard, 49 Vt. 297. See *ante* § 732, note 51.

Caveat Venditor the Rule in South Carolina.—In South Carolina it was held in Barnard *v.* Yates, 1 Nott & M. 142, that the rule in that state was rather *caveat venditor* than *caveat emptor*. The rule is that a sound price implies, as against secret defects, a warranty of soundness of the property. Whitefield *v.* McLeod, 2 Bay 380; State *v.* Gaillard, 2 Bay 19; Timrod *v.* Schoolbred, 2 Bay 324; Eastland *v.* Longshorn, 1 Nott & M. 194; Missroon *v.* Waldo, 2 Nott & M. 76; Rose *v.* Beatie, 2 Nott & M. 538; Calcock *v.* Reid, 3 McCord 513; Watson *v.* Boatwright, 1 Rich. L. 402. The civil law as held in Louisiana imposes on the seller the obligation of warranting the thing sold against hidden defects. Bulkley *v.* Honold, 19 How. 390. (Mr. Benjamin of counsel.)

34. **There is no Implied Warranty where the Buyer Gets what he Bargained for, though it is Worthless, or does not Answer his Purpose.**—See *ante* § 620, note 11. Whitmore *v.* South Boston Iron Co., 2 Allen 52, 58; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83, 88; Miller *v.* Ferguson, 37 Ga. 558; Percival *v.* Harger, 40 Iowa 286. In Davis *v.* Murphy, 14 Ind. 158, the contract was for the purchase of all the wheat to be raised on a certain farm. This was interpreted to raise no warranty of quality. In Port Carbon Iron Co. *v.* Groves, 68 Penna. 149, Read, J., approved the following statement of the law in Parsons on Contracts: "If a thing be ordered of a manufacturer for a special purpose and be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle must be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, though this be intended for a special purpose." In McGraw *v.* Fletcher, 35 Mich. 104, a patent diamond drill was sold to one who designed to use it for prospecting, a work for which it was not primarily intended. Graves, J., said that whether there was an implied warranty that it would be useful in such special service, depended on the particular facts, and "they ought to be very strong to warrant the inference of an agreement by the seller that a machine contrived for work of a given kind, and within a given range, will operate well in practice in work of a different character." And it was held that there was no implied warranty. See Palmer's Appeal, 96 Penna. 106. In Mason *v.* Chappell, 15 Gratt. 572, and in Walker *v.* Pue, 57 Md. 155, 167, a certain fertilizer was sold, and it was held that a particular article having been called for and furnished, the seller was not answerable for results, though it proved useless. But in Georgia it is held that on a sale of a fertilizer

§ 988. "*Fourthly.*—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which h deals, to be applied to a particular purpose, so that the buyer neces sarily trusts to the judgment or skill of the manufacturer or deale: 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. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own. (*d*) [35]

§ 989. "*Fifthly.*—Where a 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. [36] Laing *v.*

there is an implied warranty that it is fit for the purpose for which sold. See Georgia cases cited in note 38, *post.*

(*d*) See Randall *v.* Newson, 2 Q. B. D. 102, C. A., *post* § 994. See, also, Johnson *v.* Raylton, 7 Q. B. D. 438, C. A., *ante* §§ 59, 928, as to an implied warranty by a manufacturer that the goods are *his own make.*

35. **Goods Manufactured or Produced for a Particular Purpose.**—Where an article is bargained for to be manufactured for a particular purpose, there is an implied warranty that it will reasonably answer the purpose in the same manner as other articles of the same class. Port Carbon Iron Co. *v.* Groves, 68 Penna. 149, quoted in last note; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Hylton *v.* Symes, 7 Phil. 96; Robson *v.* Miller, 12 S. C. 586; Taylor *v.* Cole, 111 Mass. 363; Gautier *v.* Douglass, &c., Co., 13 Hun 514; Howard *v.* Hoey, 23 Wend. 350; Van Wyck *v.* Allen, 69 N. Y. 61; Hoe *v.* Sanborn, 21 N. Y. 552, stated *ante* note 33; Harris *v.* Waite, 51 Vt. 480; Byers *v.* Chapin, 28 Ohio St. 300, 306; Rodgers *v.* Niles, 11 Ohio St. 48, 54; Street *v.* Chapman, 29 Ind. 142; Brenton *v.* Davis, 8 Blackf. 317; Field *v.* Kinnear, 4 Kan. 476; Craver *v.* Hornburg, 26 Kan. 94; Lukens *v.* Freiund, 27 Kan. 664; Walton *v.* Cody, 1 Wis. 420; Fisk *v.* Tank, 12 Wis. 276; Ketchum *v.* Wells, 19 Wis. 26, [34]; Merrill *v.* Nightingale, 39 Wis. 247, 251; Brown *v.* Murphee, 31 Miss. 91; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Cunningham *v.* Hall, 1 Sprague 404; Beers *v.* Williams, 16 Ill. 69; Bigelow *v.* Boxall, 38 U. C. Q. B. 452; Overton *v.* Phelan, 2 Head 445; Brown *v.* Sayles, 27 Vt. 226; Pease *v.* Sabin, 38 Vt. 432; Dawes *v.* Peebles, 6 Fed. Reporter 856; Thomas *v.* Simpson, 80 N. C. 4; Gerst *v.* Jones, 32 Gratt. 518, 523, where Jones *v.* Just and Benjamin on Sales are approved and followed. On this principle it was held in White *v.* Miller, 71 N. Y. 118, 131, that on a sale of seed there is an implied warranty that "the seeds sold were free from any latent defect arising from the mode of cultivation;" and this was applied to a case where cabbage seed was raised on Bristol cabbage stocks but became impure because planted near stocks of other varieties, and fertilized by the pollen therefrom, thus producing a mongrel variety. See for other cases of seed sales, *ante* note 24.

36. **Implied Warranty that Goods to be Supplied by the Manufacturer shall be Merchantable.**—Hoe *v.* Sanborn, 21 N. Y. 552, 562; Ketchum *v.*

Fidgeon, 4 Camp. 169; 6 Taunt. 108. And this doctrine has been held 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.

§ 990. In the same case the learned judge explained the *ratio decidendi* of Turner *v.* Mucklow, (*e*) 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 vendors had used in dyeing goods, and which lay in a heap in their yard, *open to vendee's inspection* if he chose to avail himself of it. On this ground, and because the vendors did not manufacture it for sale, it was held that there was no implied warranty of quality.

Bull *v.* Robinson.

Warranty does not extend to necessary depreciation resulting from transit.

§ 991. But in Bull *v.* Robinson, (*f*) 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. 37

§ 992. In Gower *v.* Van Dedalzeu, (*g*) an attempt was made to ex-

Wells, 19 Wis. 25; Pease *v.* Sabin, 38 Vt. 432; Wilcox *v.* Hall, 53 Ga. 635; Gammell *v.* Gunny, 52 Ga. 504. See *ante* § 983, note 32.

(*e*) 8 Jur. (N. S.) 870; 6 L. T. (N. S.) 690.

(*f*) 10 Ex. 342; 24 L. J., Ex. 165.

37. See Leggett *v.* Sands Ale Co., 60 Ill. 158, stated *ante* § 944, note 15. Cushman *v.* Holyoke, 34 Me. 289. In Bigger *v.* Bovard, 20 Kan. 204, where the buyer rejected and returned meat because unmerchantable, it was held that he was not liable for depreciation while in his possession or on its way back, if he used due care.

(*g*) 3 Bing. N. C. 717.

tend 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.

§ 993. 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.[38]

Where article is bought for a particular purpose known to the seller, and buyer relies on the seller's skill.

38. **Sale for a Particular Purpose where the Buyer Relies on the Seller's Skill.**—Of this class are contracts by a manufacturer to make a machine or goods for a particular use, as already considered *ante* § 988, note 35. In Georgia and South Carolina it is held that one who sells a fertilizer warrants it fit for the purpose for which sold. Robson *v.* Miller, 12 S. C. 586; Wilcox *v.* Hall, 53 Ga. 635; Gammell *v.* Gunby, 52 Ga. 504; Wilcox *v.* Owens, 64 Ga. 601. But it has been held otherwise in Virginia and Maryland, as to fertilizers. If the seller does not misrepresent the results of analysis of the fertilizer, he is in no manner responsible for its fitness for use. Rosin *v.* Conley, 58 Md. —; Mason *v.* Chappel, 15 Gratt. 572; and Walker *v.* Pue, 57 Md. 155, stated *ante* note 34. In Hanger *v.* Evins, 38 Ark. —, it is said that where the buyer declines to inspect for want of judgment, and expressly declares his reliance on the judgment of the seller, this imposes on the seller, if he accepts the trust, the duty of fair representations, though even then he is only bound for a fair exercise of his judgment, and is not liable for an honest mistake. That garden seeds are warranted true to their kind, as represented, see *ante* note 24. But in Snelgrove *v.* Bruce, 16 U. C. C. P. 561, it was held that there was no implied warranty on sale of garden seeds that they were fresh or would grow. In Bigelow *v.* Boxall, 38 U. C. Q. B. 452, the contract was to supply a furnace to heat certain offices. This was held to imply a warranty that it would answer. In Boothby *v.* Scales, 27 Wis. 626, it was held that where one bought a fanning-mill for a fair price, there was an implied warranty that it was fit for use, though the buyer might have inspected it. See Leopold *v.* Van Kirk, 24 Wis. 152; Beals *v.* Olmsted, 24 Vt. 114.

This rule was stated by Tindal, C. J., in Brown *v.* Edgington, (*h*) to be the result of the authorities as they then stood. Jones *v.* Bright (*i*) had previously settled the rule that a manufacturer impliedly warranted an article sold by him to be fit for the purpose stated by the buyer to be intended; and Chanter *v.* Hopkins (*k*) 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. In Brown *v.* Edgington, (*l*) 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. (*m*)

Brown *v.* Edgington.

Jones *v.* Bright.

Chanter *v.* Hopkins.

§ 994. [The warranty extends to latent defects unknown to and even undiscoverable by the vendor which render the article sold unfit for the purpose intended. Thus, in Randall *v.* Newson, (*n*) the defendant, a carriage-builder, supplied a pole for the plaintiff's carriage, which broke when the plaintiff was driving, in consequence of which his horses were injured. The jury found that the pole was not reasonably fit and proper for the carriage, at the same time absolving the defendant from any negligence, but, acting under a misapprehension, they assessed the damages at the value of the pole only. *Held*, by the Court of Appeal, that the defendant must be taken to have warranted the pole to be reasonably fit for the particular purpose, and that it was immaterial that the fracture was caused by a latent defect in the wood which he could not by the exercise of any reasonable care or skill have discovered. The case was therefore sent to be retried, in order that a jury might determine whether the damage caused to the horses was the natural consequence

Warranty extends to latent defects.

Randall *v.* Newson.

(*h*) 2 M. & G. 279.

(*i*) 5 Bing. 533.

(*k*) 4 M. & W. 399; followed by the Q. B. in Ollivant *v.* Bayley, 5 Q. B. 288.

(*l*) 2 M. & G. 279. 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.

(*m*) See authorities in preceding note. 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 remarks of Brett, J. A., thereon in Randall *v.* Newson, 2 Q. B. D., at pp. 110, 111; and the cases *ante* §§ 643–645, as to the liability of the vendor, when manufacturer, to *third* persons for negligent and improper manufacture.

(*n*) 2 Q. B. D. 102, C. A.

of the fracture, in which event the defendant would be liable for such damage. All the cases are collected and discussed in the judgment of Brett, L. J., who delivered the opinion of the court, and the limitation as to latent defects which was introduced by the decision in Readhead *v.* The Midland Railway Company, (*n*) is confined to contracts of carriage. The Lord Justice says (at page 109), "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." (*o*)] [39]

Shepherd *v.* Pybus.

§ 995. In Shepherd *v.* Pybus, (*p*) 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 for use as an ordinary barge, (*q*) 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."

Cases of sales of provisions.

Burnby *v.* Bollett.

§ 996. Next came Burnby *v.* Bollett (*r*) 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 im-

(*n*) L. R., 2 Q. B. 412; in error, L. R., 4 Q. B. 379.

(*o*) See the observation of Kelly, C. B., at p. 111 of the report, on the language reported to have been used by him in Francis *v.* Cockerell, L. R., 5 Q. B., at p. 503.

39. Rodgers *v.* Niles, 11 Ohio St. 48, accords with Randall *v.* Newson. But see, *contra*, Bragg *v.* Morrill, 49 Vt. 45, and Hoe *v.* Sanborn, 21 N. Y. 552, 556. These cases are all stated *ante* note 33.

(*p*) 3 M. & G. 868.

(*q*) See, also, Camac *v.* Warriner, 1 C. B. 356.

(*r*) 16 M. & W. 644.

plied 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.

Emmerton v. Matthews.

§ 997. In 1862, Emmerton *v.* Matthews, (*s*) 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.

Bigge *v* Parkinson.

§ 998. In the same year the case of Bigge *v.* Parkinson, (*t*) was 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 15*s.* 6*d.* per head, *guarantied to pass survey of the Honorable East India Company's officers, and also guarantee 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 im-

(*s*) 7 H. & N. 586; 31 L. J., Ex. 139, approved and followed by the Common Pleas Division in Smith *v.* Baker, 40 L. T. (N. S.) 261.

(*t*) 7 H. & N. 955; 31 L. J., Ex. 301 Ex. Ch.

plied by law in such a sale; but the court held that the rule now under consideration (and which was quoted from Chitty on Contracts (*u*)) 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."

§ 999. [In Beer *v.* Walker, (*x*) there was a contract by the plaintiff, a wholesale provision dealer, to send rabbits weekly by rail from London to Brighton to the defendant who was a retail dealer there. The rabbits were sound when delivered to the railway company in London, but unfit for human food when they reached the defendant. It was held, on the authority of Bigge *v.* Parkinson, that there was an implied warranty that the rabbits should be fit for human food, and further, that this warranty extended until in the ordinary course of transit they should reach the defendant at Brighton, and he should have had a reasonable opportunity of dealing with them in the usual way of business.

Beer *v.* Walker.

Warranty extends until goods reach purchaser.

§ 1000. It may be useful to refer here to the case of a sale of animals suffering from disease. It has been decided by the highest authority that a person who sends animals to a public market for sale does not impliedly represent that they are free from contagious disease dangerous to animal life; and will not, when they are sold "with all faults," be liable in an action either for breach of warranty or for false representation. The mere act of sending the infected animals to the market, although a statutory offence under the contagious diseases (animals) act, does not amount to a representation by conduct on the vendor's part that the animals are in fact free from disease. (*y*)]

Sale of animals infected with disease.

§ 1001. In Macfarlane *v.* Taylor, (*a*) which was a Scotch appeal, the House of Lords decided, under the 5th section of the act 19 and 20 Vict., c. 60, which places the law of Scot-

Macfarlane *v.* Taylor.

(*u*) Page 417, ed. 1881.
(*x*) 46 L. J., C. P. 677; 25 W. R. 880.
(*y*) Ward *v.* Hobbs, 4 App. Cas. 13; and 3 Q. B. D. 150, C. A., overruling S. C., 2 Q. B. D. 331.
(*a*) L. R., 1 Sc. App. 245.

land 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 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.

§ 1002. 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.[40] Thus, in the early leading case of Parkinson *v.*

Implied warranty excluded where there is an express warranty.

40. **An Express Warranty Excludes an Implied Warranty.**—This is the rule where the express and implied warranty relate to the same subject. Deming *v.* Foster, 42 N. H. 165; McGraw *v.* Fletcher, 35 Mich. 104; Walton *v.* Cody, 1 Wis. 420. In Mullain *v.* Thomas, 43 Conn. 252, the warranty was in writing as to the age and soundness of a horse. This was held to exclude any evidence of statements as to his docility. In Jackson *v.* Langston, 61 Ga. 392, a fertilizer was sold "guaranteed as to its effects on crops *only* as to the analysis of the state inspector." This was held to exclude the implied warranty of fitness for use. An express warranty of quality will, of course, not exclude the implied warranty of title. Conversely, an express warranty of title does not exclude any implied warranty of quality. Wells *v.* Spears, 1 McCord 421; Wood *v.* Ashe, 3 Strob. 64; Trimmier *v.* Thomson, 10 S. C. 164, 186. In Wood *v.* Ashe, *supra*, Frost, J., said: "The implied warranty subsists along with the written contract. The one is the act of the parties, the other is created by law. If the parties make a special contract of warrant, that, the law executes. If they stipulate against any warranty, the law does not impose an implied contract against their consent." In Jackson *v.* Langston, 61 Ga. 392, *supra*, Bleckley, J., said: "Nothing we have said is to be understood as intimating that an express warranty confined to quality would supersede the implied warranty in respect to title. We have no such thought." And goods furnished by a manufacturer for a certain purpose must be merchantable and fit for use, notwithstanding an express warranty of certain other qualities. In Wilcox *v.* Owens, 64 Ga. 601, guano was sold with a warranty of the correctness of a chemical analysis. Jackson, J., said: "It is not pretended that the warranty of the title is excluded by the guaranty. Is the other implied warranty excluded? There are no words that expressly except this warranty which the law also puts in it, and the nature of the transaction does not except it because the thing sold was known by both parties to be for fertilizing the soil; that was the use intended. The guaranty that the article comes up to analysis does not ex-

Lee, (*b*) 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 equaled the sample, could not be supplemented by a further implied warranty that the goods were merchantable. And in Dickson *v.* Zizania, (*c*) 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.*"

Parkinson *v.* Lee.

Dickson *v.* Zizania.

§ 1003. 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, (*d*) the defendants agreed to *manufacture* and supply 2500 pieces of grey shirting according to sample, at 18*s.* 6*d.* per piece, each piece to weigh 7 lbs. The goods were manufactured, delivered and accepted by the plaintiffs' agent as being according to sample, and they probably were so, although the fact did not very distinctly appear. But the goods contained a substance 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* 7 *lbs.*, 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,

Mody *v.* Gregson.

pressly exclude the warranty that it is merchantable and reasonably suited to the use intended. Both might well consist. The one the law gave the purchaser, the other the express contract gave him." These Georgia decisions are under the code, which, however, seems to be only declaratory of the common law on this subject. In Merriam *v.* Field, 24 Wis. 640, lumber was sold warranted in writing free from adverse claims. It was held that this did not exclude an implied warranty that it was merchantable. See Boothby *v.* Scales, 27 Wis. 626, 633. In Thorne *v.* McVeigh, 75 Ill. 81, the declaration contained counts on both an express and implied warranty and the case was left to the jury on both.

(*b*) 2 East 314. See, however, Randall *v.* Newson, 2 Q. B. D. 102, C. A., where Brett, J. A., says, at p. 106, "It is sufficient to say of Parkinson *v.* Lee that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled."

(*c*) 10 C. B. 602; 20 L. J., C. P. 72.

(*d*) L. R., 4 Ex. 49.

but when the goods were accepted from the vendors in Manchester the purchasers 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 vendors 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 excludes 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* grey 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, (*e*) taken in connection with the stipulation that the goods should be of a specified weight, which, if properly complied with, would have ensured a merchantable article, amounted altogether to a contract *describing* the goods, and *asserting* their merchantable quality. The vendors were 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.*" (*f*)

This warranty not implied in favor of third persons.

Longmeid *v.* Holliday.

§ 1004. Before leaving this point the case of Longmeid *v.* Holliday (*g*) must be noticed. It was an attempt to make a vendor responsible to a *third person*, the wife of the 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 sell-

(*e*) See, however, the remarks of Grove, J., on the state of the sample, in Smith *v.* Baker, 40 L. T. (N. S.) 262.

(*f*) At page 57 of the report. Compare *dicta* of the judges in Heilbutt *v.* Hickson, *ante* §§ 975, 976.

(*g*) 6 Ex. 761.

ing 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, (*h*) referred to *ante* § 644, such action by third persons being an action of *deceit*, founded on *tort*, and not on *contract*.[41]

Existence of thing sold not properly an implied warranty but a condition.

§ 1005. 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. 4, Of the Thing Sold.[42]

Is there an implied warranty in sales of provisions, &c. ?

§ 1006. Blackstone says, (*i*) in contracts for provision 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, (*j*) and the cases there cited, and others which have since been determined on its authority. In Chitty on Contracts, (*k*) 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." The above-quoted passage, from Blackstone, is given as the authority for this statement, and in the note it is suggested that Emmerton *v.* Matthews, (*l*) so far as it contradicts this proposition, is not law.[43]

Burnby *v.* Bollett.

§ 1007. In Burnby *v.* Bollett, (*m*) 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

(*h*) 2 M. & W. 519.

41. The vendor's warranty does not inure to the benefit of a purchaser from the vendee. Moser *v.* Hock, 3 Penna. 230.

42. See *ante* § 76.

(*i*) Vol. 3, p. 166.

(*j*) 3 T. R. 51, and 2 Sm. L. C. 66, (ed. 1879.)

(*k*) Page 419, (ed. 1881.)

(*l*) 7 H. & N. 586; 31 L. J., Ex. 139.

43. See *post* note 44.

(*m*) 16 M. & W. 644.

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 "victualers, butchers, and other common dealers in victuals;" but Parke, B., intimated quite 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 III., 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 III., and following the same, saith: '*Puis soit inquise de ceux queux 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 macegrieves* (*macellarii*, (*n*) butchers), *et les gents que de usage vendent a tres-passants* (passengers) *mauvaise vians corrumpus et wacrus et autrement perrillous a la saunty de home, encountre le forme de nous statutes.*'

"This view of the case explains what is said in the Year Book, 9 Hen. VI. 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 victualer, *if it prejudice any.*" (*o*)

§ 1008. It is submitted that it results clearly from these authorities that the responsibility of a victualer, vintner, brewer, butcher, or cook, for selling unwholesome food does not arise out of any contract

(*n*) *Macellarii*, rather, sellers of meat in shambles; but "*macegriefs*," by *Termes de la Ley*, means those who sell *wittingly* stolen meat.

(*o*) See, also, remarks of Mellor, J., on Emmerton *v.* Matthews, *ante* § 984.

or implied warranty, but is a responsibility imposed by statute, (*p*) 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. [And the correctness of the decision has been since confirmed by the Common Pleas Division. (*q*)

§ 1009. An instance of such a statutory responsibility is that imposed upon sellers of food by the 38 and 39 Vict., c. 63 (sale of food and drugs act, 1875), which, by the 6th section, inflicts a penalty upon any person who sells, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance or quality of the article demanded by such purchaser; and, by the 27th section, makes it a misdemeanor to give false warranties in writing or to supply false labels on the sale of food or drugs. (*r*)]

Sale of food and drugs act, 1875.

§ 1010. An implied warranty has been imposed on the vendor in certain sales by the "Merchandise Marks Act, 1862" (25 and 26 Vict., c. 88,) of which the 19th and 20th sections are in the following language:—

Implied warranty from marks on packages.

25 and 26 Vict., c. 88.

"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, wrapper, 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

Sec. 19.

(*p*) All the old statutes referred to by Parke, B., and many others of a similar kind, were swept away by the repealing act, 7 and 8 Vict., c. 24.

(*q*) See Smith *v.* Baker, 40 L. T. (N. S.) 261.

(*r*) The statute is amended by the 42 and 43 Vict., c. 30. The following are some of the decisions under the principal act: Barnes *v.* Chipp, 3 Ex. D. 176; Rook *v.* Hopley, Id. 209; Francis *v.* Maas, 3 Q. B. D. 341; Sandys *v.* Small, Id. 449; Hoyle *v.* Hitchman, 4 Q. B. D. 233; Webb *v.* Knight, 26 W. R. 14; Horder *v.* Scott, 42 L. T. (N. S.) 660; Rough *v.* Hall, 6 Q. B. D. 17.

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.

Sect. 20.

§ 1011. "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."

Law in America.

§ 1012. [In America, upon the question of implied warranty on the sale of provisions, it has been laid down, in the State of New York, that to render a vendor liable they must be sold *for domestic use or immediate consumption.* The ground given for this implied warranty is, that it is a "principle not only salutary but necessary to the preservation of health and life." The warranty will only be implied where the vendor is a dealer or trader in provisions who sells *directly* to the consumer for domestic use. (*s*) [44]

(*s*) Van Bracklin *v.* Fonda, 12 Johns. 468; Divine *v.* McCormick, 50 Barb. 116. See, however, the limits of the implication laid down by Bronson, C. J., in Moses *v.* Mead, 1 Den., at p 387; by Shaw, C. J., in a case in the Supreme Court of Massachusetts, Winsor *v.* Lombard, 35 Mass., at p. 61; and by Morton, J., in Howard *v.* Emerson, 110 Mass. 321.

44. **On a Sale of Provisions to the Consumer, there is an Implied Warranty that they are Wholesome.**—In Van Bracklin *v.* Fonda, 12 Johns. 468, the court said on the authority of Blackstone: "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril." This was recognized in Moses *v.* Mead, 1 Den. 386, and followed in Divine *v.* McCormick, 50 Barb. 116. In Burch *v.* Spencer, 15 Hun 504, the court extended the principle to a case where the sale was to a dealer, but it was not needed for the decision, there having been deceit in the

In other respects the law as to implied warranty of quality seems to be the same in America as in England. (*t*)]

case. In Hoover *v.* Peters, 18 Mich. 51, 55, the court held that the warranty was implied though the seller was a wholesale dealer. "The doctrine seems to be that any purchase for domestic consumption is protected." Per Campbell, J. See McNaughton *v.* Joy, 1 Weekly Notes of Cases (Phila.) 470. Whether this implied warranty applies to food for animals is doubtful. In French *v.* Vining, 102 Mass. 132, white lead was spilled on a quantity of hay. The owner removed it as well as he could and sold the hay. It poisoned a cow of the buyer, and the seller was held liable on the theory of a warranty of wholesomeness, and also on the theory that concealment under such circumstances was equivalent to deceit. But in Lukens *v.* Freiund, 27 Kan. 664, bran was bought from a mill for food for cows. By accident two copper clasps used about the mill fell into the bran. These were swallowed by one of the buyer's cows and caused her death. It was held that there was no warranty on which the miller was liable. The presence of the clasps in the bran was not known to him.

There is no Implied Warranty of the Soundness of Provisions Sold Unless Bought for Domestic Use.—This was held after a full discussion of the subject in Moses *v.* Mead, 1 Denio 378. Bronson, J., said: "When provisions are not sold for immediate consumption there is no more reason for implying a warranty of soundness than there is in relation to sales of other articles of merchandise." This was affirmed by an equally divided court. 5 Denio 617. See Miller *v.* Scherder, 2 N. Y. 262, 267. Moses *v.* Mead was followed in Ryder *v.* Neitge, 21 Minn. 70, 75. 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 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. But these reasons do not apply to the case of provisions packed, inspected, and prepared for exportation in large quantities as merchandise." See Emerson *v.* Brigham, 10 Mass. 197; Mattoon *v.* Rice, 102 Mass. 236; Howard *v.* Emerson, 110 Mass. 320.

(*t*) Story on Sales, § 366, *et seq.*

CHAPTER II.

DELIVERY.

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Vendor's first duty is delivery.

§ 1013. 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.

Different senses in which the word "delivery" is used.

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 unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles.

§ 1014. *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*.

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 in value, the judges constantly use the word "delivery" as the correlative of that "actual receipt." 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. Yet, if he become insolvent, the vendor is said to have retained possession. Again, if the vendor has delivered 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 possession, the carrier being the agent of the buyer; but if the vendor claim to exercise the right of stoppage *in transitu*, while the carrier is conveying them, the goods are said to be only in the *constructive, not* in the *actual possession* of the buyer.[1]

§ 1015. 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

(*a*) As for instance, in the opinion of Parke, J., in Dixon *v.* Yeats, 5 B. & Ad., at p. 340.

1. The effect upon the passing of property, of the seller's agreement to deliver, was considered *ante* § 325, *et seq.* In some states a sale is held fraudulent and void as against a subsequent vendee, or attaching creditor of the seller until delivery. See *ante* § 740, note 60.

formation of the contract, has been considered in Book I., Part 2, Ch. 4, 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.

§ 1016. 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 *prima facie*, and it may well be bargained that the possession shall remain with the vendor until the fulfillment of certain conditions precedent by the purchaser. Where nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions, as is explained in Book IV., Part 1, On Conditions.[2] The vendor cannot insist on payment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price.[3] 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."(*b*) 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

Vendor's duty to deliver is only *prima facie*, and may depend on conditions.

Delivery conditional on payment.

Effect of sale on credit is to pass title and *right* of possession.

Vendor may refuse delivery, notwithstanding.

2. See *ante* § 897, note 23. Leonard *v.* Davis, 1 Black 476; Tipton *v.* Feltner, 20 N. Y. 423.

3. As to the remedy where the seller delivers in expectation of immediate payment, which is not made, see *ante* § 335, *et seq.* Hodgson *v.* Barrett, 33 Ohio St. 63.

(*b*) 2 Wms. Saund. 47, n. 1.

goods, and may exercise his lien as vendor to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession. [4]

ing this right, on vendee's insolvency.

§ 1017. The law on this whole subject was very perspicuously stated in the case of Bloxam *v.* Sanders, (*c*) 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 of 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. The usual time of payment in the trade was the second Saturday subsequent to a purchase. Saxby did not pay for the hops, and on the 6th of September the defendants 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 of 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 prop-

Bloxam *v.* Sanders.

4. The American decisions give the seller the choice of three remedies on default of payment while the seller retains possession. He may rescind, and keep the goods as his own, (see *ante* § 334, *et seq.*,) or he may treat the goods as the property of the buyer, and either store them for him and sue him for the price, or resell them as his agent, and sue for the loss on such resale. See *post* Book V., Ch. III., "Resale."

(*c*) 4 B. & C. 941. See, further, as to effect of the buyer's insolvency, Ex parte Chalmers, 8 Ch. 289, per Mellish, L. J., at p. 291; Bloomer *v.* Bernstein, L. R., 9 C. P. 588; Morgan *v.* Bain, L. R., 10 C. P. 15; Ex parte Stapleton, 10 Ch. D. 586, C. A.; *post* Book V., Part I., Ch. I.

erty 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* vest 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.[5] 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 despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu.* (*d*) 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 despatched the goods, and whilst they are *in transitu a fortiori* is it, where he has never parted with the goods, and where no *transitus* 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

5. See *ante* § 334, *et seq.*, and see *post* Book V., Ch. II.

(*d*) 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.

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. (*e*)

[And, in accordance with this view, it was held in Lord *v.* Price (*f*) that the purchaser of goods which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase money, cannot maintain an action of trover against one who has wrongfully removed them.] Lord *v.* Price.

§ 1018. 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. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction.[6] Vendor bound only to put goods at buyer's disposal, not to send them.

(*e*) See, also, *per cur.* in Spartali *v.* Benecke, 10 C. B. 212; 19 L. J., C. P. 293.

(*f*) L. R., 9 Ex. 54.

6. **The Seller, Unless he Agrees to Deliver, is not required to Carry the Goods to the Buyer, but must place them at his Disposal.**—See *ante* § 897, note 23, and *post* § 1022, note 10. Where goods have been made to order it has been held that when completed and the buyer notified, the seller's duty was fully discharged and that the property was thenceforth at the buyer's risk. Goddard *v.* Binney, 115 Mass. 450, 456; Bement *v.* Smith, 15 Wend. 493; Stern *v.* Filene, 14 Allen 9; Sanborn *v.* Benedict, 78 Ill. 309; Phelps *v.* Hubbard, 51 Vt. 489; Middlesex Co. *v.* Osgood, 4 Gray 447. But the decisions are not harmonious on this subject. See *ante* §§ 536–540. In Wheelock *v.* Tanner, 39 N. Y. 481, 488, the contract was that wagons might be made and delivered in payment of a mortgage. A part were made and shown to the creditor, who requested the debtor to store them. Subsequently and in due time the others were made. It was held that the debt was paid from the time the wagons were finished. Where time and place are fixed, a delivery accordingly has been held to entitle the seller to recover the price, though the buyer be not at hand to

Delivery when conditional on notice from purchaser;

And if the delivery by the vendor is 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.

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. (*g*) [7]

receive and accept, and this seems to be the law in America. Barton *v.* McKelway, 22 N. J. L. 165; Nichols *v.* Morse, 100 Mass. 523. See *post* Book V., Ch. 1, Section II.

(*g*) Armitage *v.* Insole, 14 Q. B. 728; Sutherland *v.* Allhusen, 14 L. T. (N. S.) 666; Davies *v.* M'Lean, 21 W. R. 264; 28 L. T. (N. S.) 113; Stanton *v.* Austin, L. R., 7 C. P. 651.

7. **Notice to Deliver.**—See *ante* § 872, note 18. Edwards *v.* Hartt, 66 Ill. 71; Lockhart *v.* Bonsall, 77 Penna. 53, 59. In Hunter *v.* Wetsell, 84 N. Y. 549, 554, the contract was for the sale of a quantity of hops examined by the buyer, to be delivered at a place to be designated by the buyer. The buyer did not call for the hops or designate a place and was sued for the price. It was objected to a recovery that there had been no tender of the hops. Finch, J., said: "The place of delivery was to be named by the purchaser. He was informed, after the hops were weighed and baled, that they were ready for delivery. The vendor stood in the attitude of readiness to perform. He had done all that he could do until the vendee named the place of delivery. We think there was a sufficient offer of performance to enable the vendor to maintain his action for the price." To the same effect see Weld *v.* Came, 98 Mass. 152. In Muckey *v.* Howenstine, 3 N. Y. Sup. Ct. (T. & C.) 28, barrels were ordered to be manufactured, and the buyer was to call for them. He was notified when they were finished, but failed to call and take them. He was held liable in a suit for the price. In Kunkle *v.* Mitchell, 56 Penna. 100, the contract was to deliver lumber on the cars at a certain station before a certain time. Only part was delivered and the buyer sued for damages, but failed because he did not prove any demand for the lumber, or that he had provided or offered to provide cars. In Bolton *v.* Riddle, 35 Mich. 13, the seller was to deliver posts on board of certain vessels, but the buyer not providing the vessels at the proper time, a delivery on the beach was held a good delivery, and the buyer was not allowed to deduct from the price the cost of loading the posts on the vessel. In Posey *v.* Scales, 55 Ind. 282, the contract was to deliver chattels within a certain period on a day to be fixed by the purchaser. The purchaser neglected to give notice to deliver on any day, whereupon the seller, who had held himself in readiness to perform, sold to another and recovered his loss on the sale by a suit for damages. In Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104, the contract was to deliver 1105 railroad ties in December and 1105 ties on or before January 12th on board cars to be furnished at Avoca station. The seller prepared the ties at his mill, a mile and a half from the station, but did not haul them there, no cars being furnished. He claimed that the providing of cars was a condition precedent to delivery by him. But the court held that he was bound to haul them to Avoca, and pile them near

[And, conversely, the same principle applies where the acts are to be performed by the *vendor*. Thus, in a contract for the sale of goods "*Ex quay* or warehouse," there is an implied condition that the vendor shall give notice to the purchaser of the place of storage, and until such notice has been given, the purchaser is not in default for non-acceptance. (*h*)] [8]

Or on notice from seller.

§ 1019. In Salter *v.* Woollams, (*i*) 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

Salter *v.* Woollams.

the railroad track if no cars were there to receive them, and set them apart for the buyer. As he had not done this he was liable to pay in cash the debt which had been made payable in the ties. On the other hand, in Smith *v.* Wheeler, 7 Oreg. 49, Smith contracted to manufacture heavy machinery and deliver it on board of cars to be furnished at a certain depot by Wheeler. The machinery was made but the cars were not furnished at the time specified. It was held not necessary for Smith to haul the machinery to the depot and tender it there, and a suit by him for damages was sustained. See cases stated *ante* § 859, note 6.

(*h*) Davies *v.* M'Lean, *ubi supra*.

8. **Notice to Accept.**—Where the seller is to manufacture or prepare goods for the buyer, who is then to come and take them, it is incumbent on the seller to give notice when they are ready. Having completed the goods and given notice in due time, his obligations are discharged. Hunter *v.* Wetsell, 84 N. Y. 549; Muckey *v.* Howenstine, 3 N. Y. Sup. Ct. (T. & C.) 28; Higgins *v.* Murray, 73 N. Y. 252. In Ruffee *v.* United States, 15 Ct. of Cl. 291, the contract was for wood to be used at a military post, to be delivered on the ground where corded. The contractor gave notice that the wood was ready for inspection. This was held a sufficient delivery on his part, and inspection and measurement by the proper officers was held a sufficient acceptance by the government. Where goods on shipboard are sold to arrive, and the seller agrees to give notice of arrival, he is held to strict compliance. See *ante* § 882. In Barr *v.* Myers, 3 W. & S. 293, it was held that where the contract does not fix the place for delivery, the seller need not carry the property sold to the buyer but must seek him a reasonable time before the day of delivery, to ask him to appoint a place of delivery. This was approved in Allen *v.* Woods, 24 Penna. 76. See, also, Morey *v.* Enke, 5 Minn. 392, 396. These cases impose on the seller the burden of seeking the buyer. The weight of authority is in favor of the proposition that the seller is only required to have the goods ready at the proper time and place. See *ante* note 6 and *post* note 10. Where the contract was to deliver corn on ten days' notice by the buyer, after a reasonable time, if the buyer neglects to give notice, the seller may offer to deliver and demand the price, and on refusal may recover damages. Sanborn *v.* Benedict, 78 Ill. 309.

(*i*) 2 M. & G. 650; and see Smith *v.* Chance, 2 B. & Ald. 753, for an *incomplete* delivery in a similar sale.

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.

Wood *v.* Manley (*k*) 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, (*l*) and that the delivery to the buyer by the auctioneer's order was a complete delivery, in performance of his contract.

Observations on these cases.

§ 1020. It might seem at first sight that the decision in Salter *v.* Woollams, (*m*) is in conflict with the class of decisions exemplified in Bentall *v.* Burn, (*n*) 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 that 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. [9]

(*k*) 11 Ad. & E. 34.

(*l*) See Wood *v.* Leadbitter, 13 M. & W. 838, and Taplin *v.* Florence, 10 C. B. 765.

(*m*) 2 M. & G. 650.

(*n*) 3 B. & C. 423.

9. **A Sale of Property on the Seller's Land or on Land of one who Consents to the Sale, is an Irrevocable License to the Buyer to Enter and Take the Property.**—Nettleton *v.* Sikes, 8 Metc. 34; Folsom *v.* Moore, 19 Me. 252; White *v.* Elwell, 48 Me. 360; Heath *v.* Randall, 4 Cush. 195; Walsh *v.* Taylor, 41 Md. 592. Wood *v.* Manley was followed in Long *v.* Buchanan, 27 Md. 502, 515. In that case the plaintiff agreed to sell defendant her crop of corn; which he was to take from the crib, to be paid for by credit on a mortgage held by defendant upon land of plaintiff. Subsequently, she notified him that the corn was ready, but afterwards changed her mind and forbade him to take it. He

§ 1021. In Wood *v.* Tassell, (*o*) 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 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. Wood *v.* Tassell.

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."

§ 1022. 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: (*p*) "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 feoffee, 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 Place of delivery.

entered her land, notwithstanding, broke open the crib and took the corn. She sued him for trespass, but it was held that no action would lie. Weisel, J., said: "This state of facts would constitute a license coupled with an interest which rendered it irrevocable." But in Churchill *v.* Hulbert, 110 Mass. 42, it was held that though such irrevocable license existed, it would not justify a breach of the peace. If resisted, the buyer should resort to his legal remedies. Drury *v.* Hewey, 126 Mass. 519. See *ante* § 428.

(*o*) 6 Q. B. 234.

(*p*) Co. Lit. 210 b.

buyer, and is not bound to more than a *passive* readiness to allow the buyer to take the goods. Kent says: (*q*) "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." [10] This appears to 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.

(*q*) Vol. 2, p. 505 (12th ed.)

10. **The Place of Delivery is that Place Where the Goods are at the Time of Sale.**—This is the rule in the absence of express or implied provision to the contrary. Smith *v.* Gillett, 50 Ill. 290; Middlesex Co. *v.* Osgood, 4 Gray 447; Goddard *v.* Binney, 115 Mass. 450, 456; Hamilton *v.* Calhoun, 2 Watts 139; Allen *v.* Hartfield, 76 Ill. 358; Rice *v.* Churchill, 2 Denio 145; Lobdell *v.* Hopkins, 5 Cowen 516; Counsel *v.* Vultura Mining Co., 5 Daly 74, 76; Phelps *v.* Hubbard, 51 Vt. 489, stated *ante* § 897, note 23. In Sousely *v.* Burns, 10 Bush 87, the seller alleged a contract to deliver 100 hogs, and that he had that number at a convenient place ready at the proper time for delivery. The buyer refused to receive them, and the seller sued for damages. The court held that no cause of action was shown because the seller did not aver a readiness and willingness to deliver the hogs at his residence, and that the buyer failed to attend to receive them. Peters, J., said: "No place was fixed by the terms of the contract at which the hogs were to be delivered, and in the absence of an agreement by the parties on the place of delivery, it is well settled that where the articles sold are cumbersome the law fixes the residence of the vendor as the place of performance. A different rule could not be adopted without giving to one of the parties the power to appoint the place of performance, which would place it at his option at all times to comply or not." Cites Wilmouth *v.* Patton 2 Bibb 280; Chandler *v.* Robertson, 9 Dana 291. In Barr *v.* Myers, 3 W. & S 298, and in Allen *v.* Woods, 24 Penna. 76, stated *ante* note 8, and in Hapgood *v* Shaw, 105 Mass. 276, it was held that where no place of delivery was fixed it was not only necessary for the seller to keep himself in readiness to fulfill, but that he must also seek the buyer and call upon him to perform, or at least give notice of his own readiness, in order to put the buyer in default. But this does not accord with the weight of authority. See *ante* § 897, note 23, where Hapgood *v.* Shaw, is discussed and other cases cited. The conduct of the parties, the nature of the contract, or the custom of trade, may be such that it will be presumed that the parties intended that the seller should carry the property sold to the buyer. Thus in Field *v.* Runk, 22 N. J. L. 525, corn was sold to a miller and part of it delivered at his mill. It was held that the mill was contemplated as the place of delivery, and the residue not being delivered there, the buyer might sue for

§ 1023. 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 fulfill this duty. If nothing is said as to time, he must send within a *reasonable time;* 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. [11]

Vendor's duty when he agrees to send goods.

Where time is not expressed in contract, reasonable time.

breach without proving demand. See Greene *v.* Haley, 5 R. I. 260, stated *ante* § 859, note 7.

11. **If the Contract Fixes no Time, a Reasonable Time is Allowed for Delivery, Depending on the Circumstances of the Case.**—Blydenburgh *v.* Welsh, Bald. 331, 338; Boyd *v.* Gunnison, 14 W. Va. 1; Tufts *v.* McClure, 40 Iowa 317; Mowry *v.* Kirk, 19 Ohio St. 375, 382; Howe *v.* Huntington, 15 Me. 350; Grant *v.* Merchants' Bank, 35 Mich. 515, 528; Nunan *v.* Bourquin, 7 Phil. 239; Cameron *v.* Wells, 30 Vt. 633. In this case two hundred bushels of corn were to be delivered on demand. Part was delivered. Five years later the rest was demanded. The court said that "reasonable time" did not begin to run until some one interested calls for something to be done about it. But the contract was held to have been mutually abandoned. On a sale of stocks they should be tendered at once. Demarest *v.* McKee, 2 Grant (Pa.) 248; Sadler *v.* Gould, 6 Phil. 529. When the facts are not disputed, what is a reasonable time is a question for the court. Greene *v.* Dingley, 24 Me. 131; Echols *v.* New Orleans, &c., R. R. Co., 52 Miss. 610. In the last-cited case the contract was to furnish wood to a railroad company at a fixed price per cord, "as long as satisfaction be given by the contractors," the company reserving twenty-five cents per cord till a year's supply was furnished. It was held that it was reasonable to terminate this at the end of one year. In Cumberland Bone Co. *v.* Atwood Lead Co., 63 Me. 167, a contract to furnish sulphuric acid was held terminable at any time by either party, no term of continuance being fixed. What is reasonable time to perform a written contract, not fixing the time, is determined by proof of circumstances, but not by proof of an oral agreement fixing the time. Stange *v.* Wilson, 17 Mich. 342, 348; Coon *v.* Spaulding, 47 Mich. 162.

Where the Place is Fixed, but not the Time, the Seller should Give Notice of the Time when he will Offer Delivery.—This is the rule where payment is to be made on delivery, so that the buyer may have an opportunity to prepare for payment. Thus, in Cullum *v.* Wagstaff, 48 Penna. 300, barrels were to be paid for as soon as delivered on board of a boat. Suit was brought for non-delivery of the barrels, and the defence was that the buyer had not tendered payment. Agnew, J., said: "Until plaintiff had notice of defendant's readiness to load the barrels on board, or until they were actually on board, he could not know when to be ready to tender the draft. The time of his performance had not arrived, nor could it arrive until defendant moved in the matter by loading the barrels. If defendant was ready to load them, at least he should have informed the plaintiff of the fact." See Bass *v.* White, 65 N. Y. 565; Myers *v.* De Mier, 52 N. Y. 647; Sweet *v.* Harding, 19 Vt. 587; Sanborn *v.* Benedict, 78 Ill. 309. In Kirkpatrick *v.* Alexander, 60 Ind. 95, a lot of hogs were contracted for to be delivered during "the first half of August." Neither

Ellis v. Thompson.

Thus in Ellis *v.* Thompson, (*s*) where there was a sale of lead, deliverable in London, parol evidence was admitted to 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.

Where the contract expresses the time.

§ 1024. 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. (See Conditions, *ante* § 855.) [12]

"Month," its meaning.

The word "month," although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a calendar month. (*t*) [13] And the court will look at the

party gave any notice to the other, but in the forenoon of August 16th the hogs were delivered at the place agreed on and weighed. The buyer not being at hand to receive them, and the weather being warm, they were taken back to their pen, where there was water, at about eleven o'clock. On suit for damages for non-acceptance, Biddle, C. J., said that the buyer had till the last moment before noon to decide whether he would receive the hogs or not, as there was no notice of delivery at any other time; and that delivery at the scales was essential, and the failure of the buyer to be present at the scales to receive the hogs would not excuse the seller from performing his part of the agreement if he desired to resort to his legal remedy. This is a doubtful case, and may be questioned under the maxim *Lex neminem ad vana cogit.* See *ante.* § 859. But the seller might have protected himself by notice stating the hour when he would tender delivery.

(*s*) 3 M. & W. 445; and see Jones *v.* Gibbons, 8 Ex. 920; Sansom *v.* Rhodes, 8 Scott 544.

12. See *ante* § 855, note 2, and § 901, note 25.

On Sales of Chattels the Time of Delivery is of the Essence both in Law and Equity.—In Clark *v.* Wright, 5 Phil. 439, Hare, J., said that the buyer was not responsible unless tender was made at the time and place specified. "No case can, I believe, be found where an executory contract for the sale of chattels has been taken out of the strict rule of the common law by equity, or an equitable principle. The lapse of twenty-four hours may bring about a change of circumstances or price, rendering a chattel of no real value to a purchaser who may yet be unable to substantiate the alteration with the accuracy of legal proof. This is peculiarly true of men engaged in trade, who buy to sell again, watch the turn of the market, and often find a bargain that would have been profitable yesterday worthless to-day. See Jones *v.* United States, 96 U. S. 24.

(*t*) Reg. *v.* Chawton, 1 Q. B. 247; Hart *v.* Middleton, 2 C. & K. 9; Webb *v.* Fairmaner, 3 M. & W. 473.

13. Shapley *v.* Garey, 6 S. & R. 539; Churchill *v.* Merchants' Bank, 19 Pick. 532; Rives *v.* Guthrie, 1 Jones L. 87; Thomas *v.* Shoemaker, 6 W. & S. 179.

context in all cases, to see whether a calendar month was not intended, and if so, will adopt that construction. (*u*)

And now by statute 13 and 14 Vict., c. 21, § 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." Stat. 13 and 14 Vict., c. 21, § 4.

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, (*x*) or an usage to that effect be shown. (*y*) [14] And as to the odd day in leap year, see 40 Henry III., at p. 4, Vol. 1, of Statutes Revised, [which enacted that the extra day in leap year and the preceding day shall be reckoned as one day, but this statute has been repealed by the 42 and 43 Vict., c. 59, and the effect is that the extra day will in future count by itself.] "Days," how counted. Leap year.

And the rule, though long in doubt, seems now to be settled by the decision in Webb *v.* Fairmaner, (*z*) that if a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract. A promise to deliver goods in two months from the 5th of October, is fulfilled by delivery at any time on the whole day of the 5th of December, so that an action against the vendor would be premature, if brought before the 6th. [15] Webb *v.* Fairmaner.

(*u*) Simpson *v.* Margitson, 11 Q. B. 23; Webb *v.* Fairmaner, 3 M. & W. 473.

(*x*) Brown *v.* Johnson, 19 M. & W. 331.

(*y*) Cochran *v.* Retberg, 3 Esp. 121.

14. But Sunday is not a day for the purpose of performance, and so if the last day to tender delivery or payment falls on Sunday it is to be regarded as stricken from the calendar, though intervening Sundays are to be counted. Sands *v.* Lyon, 18 Conn. 18, 31; Barrett *v.* Allen, 10 Ohio 426; Salter *v.* Burt, 20 Wend. 205; Stebbins *v.* Leowolf, 3 Cush. 137; Harker *v.* Addis, 4 Penna. 515; Marks *v.* Russell, 40 Penna. 372; Croninger *v.* Crocker, 62 N. Y. 151.

(*z*) 3 M. & W. 473; and see Lester *v.* Garland, 15 Ves. 247; Pellew *v.* Wonford, 9 B. & C. 134; Young *v.* Higgin, 6 M. & W. 49; Blunt *v.* Heslop, 8 Ad. & E. 577; Isaacs *v.* Royal Insurance Co., L. R., 5 Ex. 296.

15. Interpretation of Provisions as to Time of Performance.—Where a certain number of days are allowed, they should be reckoned by excluding the day of contract. Weeks *v.* Hull, 19 Conn. 376; Sands *v.* Lyon, 18 Conn. 28; Buttrick *v.* Holden, 8 Cush. 233. In Cleveland *v.* Sterrett, 70 Penna. 204, the contract was to deliver oil at any time "between July 1st and December 1st," the buyer giving ten days' notice of his option. The buyer giving no notice, it was held that by the failure of the buyer to give notice, December 1st was fixed as the last day to deliver, and the sellers were bound to be ready on that day. Their failure to be ready warranted the buyer to rescind and recover back his payment on his con-

Coddington v. Paleologo.

In Coddington *v.* Paleologo, (*a*) the Court of Exchequer on a contract for the delivery of goods, "delivering on April 17th, complete 8th of May," was equally divided on the question whether the vendor was bound to commence delivery on the 17th of April.

"Hour."

Startup v. McDonald.

§ 1025. 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, (*b*) in the Exchequer Chamber.

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 of March, that day being *Saturday, that there was full time before twelve o'clock at night for the defendants to examine, and weigh, and receive the oil,* but that he objected on the

tract. This decision was approved in Conawingo Petroleum, &c., Co. *v.* Cunningham, 75 Penna. 138. There the contract was to deliver oil "at any time from this date to December 31st, 1870." This was held to give the seller the right to deliver on December 31st, "the word 'to' having no precise and definite signification to require exclusion of the last day." A contract to give one "until" a certain day to accept an offer, was held to include that day in Houghwort *v.* Boisaubin, 18 N. J. Eq. 315. But "until January 1st" in a certain year was held to exclude that day. "All our habits and usages point to that as the natural meaning in such a connection." This was a case of a charter which was presumed to expire with the year. Johnson, C. J., in People *v.* Walker, 17 N. Y. 502. A contract to deliver "from the 15th to the 28th" of a certain month, was held to exclude both of the days mentioned, and a tender on the 28th was held too late in Newby *v.* Rogers, 40 Ind. 9, 15. Both days named were also held to be excluded by a contract to deliver "between the 10th and 20th of November." Cook *v.* Gray, 6 Ind. 335. To the same effect, see Atkins *v.* Boylston, &c., Co., 5 Metc. 439. To be shipped "by freight as soon as possible" was considered to give a reasonable time to deliver, in Tufts *v.* McClure, 40 Iowa 317. An agreement to deliver 3000 tons of plaster "as fast as ships could be obtained" was held to entitle the buyer to claim damages if the first cargoes shipped were not delivered to him. Isaacs *v.* New York Plaster Works, 67 N. Y. 124, stated *ante* § 855, note 2.

(*a*) L. R., 2 Ex. 193. In Bergheim *v.* Blaenavon Iron Co., L. R., 10 Q. B. 319, the judges of the Q. B. showed the same difference of opinion as to the time when delivery ought to take place.

(*b*) 6 M. & G. 593.

ground that the tender was at an *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, (*c*) but the judgment was reversed in Cam. Scac. The judges, Denman, C. J., Abinger, C. B., Patteson, and Williams, JJ., and Parke, Gurney, Rolfe, and Alderson, BB., were unanimously of 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 appears 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 a 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 the other, he can do, to make the payment, or perform the act; and that at a convenient time *before midnight*, such time vary-

(*c*) 2 M. & G. 395.

ing according to the *quantum* of the payment or 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; 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.

§ 1026. "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 that 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 the tender was good in this case 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." [16]

§ 1027. In Duncan *v.* Topham, (*d*) 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*.

Duncan *v.* Topham.

Delivery "directly."

In Attwood *v.* Emery, (*e*) 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.

"As soon as possible."

Attwood *v.* Emery.

16. **The Tender Must be at a Reasonable Hour.**—In Croninger *v.* Crocker, 62 N. Y. 151, 158, the contract was for the sale of a large lot of wool, which was not tendered until ten o'clock, P. M. of the last day for delivery. Allen, J., said: "Whether the tender should be made before sunset may depend upon circumstances, and does not appear to have been decided by the courts of this state. But when daylight is required for the proper examination and assortment of the goods tendered, there can be but little doubt that time should be given for such examination before sunset and by daylight. The evidence is that wool can only be examined and its quality ascertained by daylight, and that the inspection of the quantity contemplated by this contract would require more than one day." Therefore the tender was held bad. See Kirkpatrick *v.* Alexander, 60 Ind. 95, stated *ante* § 858, note 4; Bass *v.* White, 65 N. Y. 565. A tender at the agreed time and place, properly made, will be sufficient, though the buyer be not there to receive it. Case *v.* Green, 5 Watts 262. The case of Startup *v.* McDonald, stated in the text, was cited and followed in Berry *v.* Nall, 54 Ala. 446, 454. In that case the contract was made October 13th to deliver 27 bales of cotton "to be paid for as soon as ready for market." The seller gave notice October 18th that the cotton would be ready on the 20th. The buyer came to the premises of the seller half an hour after sunset of the 20th and tendered payment, but the seller said that "it was no time to weigh and deliver cotton," and that the time was out. Suit was brought by the buyer for damages. The court sustained a verdict for plaintiff, and referred to Startup *v.* McDonald as holding "that if the party to whom the offer is made be found after evening has set in, but in time for performance of what is needed to be done to complete the transaction before midnight, the offer to deliver would then be good." This case is readily reconciled with Croninger *v.* Crocker, above stated. In that case the buyer refused to fulfill for want of proper opportunity to examine the wool sold. In Berry *v.* Nall the buyer was willing to examine the cotton sold after dark, and the seller having given very short notice, was bound to be liberal in interpreting its requirements. The seller could count the money after dark as well as before.

(*d*) 8 C. B. 225.

(*e*) 1 C. B. (N. S.) 110; 26 L. J., C. P. 73.

A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th of November, was held to be reasonably complied with by tender in the February following.

§ 1028. [But in the later case of the Hydraulic Engineering Company *v.* McHaffie (*f*) this construction of the words "as soon as possible" was not adopted, and they were interpreted to mean within a reasonable time, with an undertaking to do it in the shortest practicable time. "By the words 'as soon as possible,'" said Cotton, L. J., "the defendants must be taken to have meant that they would make the gun as quickly as it could be made in the largest establishment with the best appliances." The delay arose solely from the seller's want of a competent workman, and he was held liable for a breach of contract; Attwood *v.* Emery being distinguished upon the ground that the possibility of a delay caused by the seller's execution of prior orders was one which the purchaser might reasonably be presumed to have taken into account.]

Hydraulic Engineering Co. *v* McHaffie.

§ 1029. For the meaning of the words *reasonable time*, see Brighty *v.* Norton, (*g*) and Toms *v.* Wilson, (*h*) *post* §§ 1057, 1058

"Reasonable time."

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. (*i*)

"Forthwith."

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. (*k*)

Vendor must deliver bill of lading when rightfully demanded, even before cargo landed.

Barber *v.* Taylor.

§ 1030. The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, (*l*) 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

Delivery of more or of less than the contract requires not good.

(*f*) 4 Q. B. D. 670, C. A.

(*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*) Stainton *v.* Wood, 16 Q. B. 638

See, also, Roberts *v.* Brett, 11 H. L. C. 337, and 34 L. J., C. P. 241, as to interpretation of "forthwith."

(*k*) Barber *v.* Taylor, 5 M. & W. 527.

(*l*) The rule is less rigid where goods

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. (*m*) [17]

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 H. L. 395, *ante* § 889; Johnston *v.* Kershaw, L. R, 2 Ex. 82; 36 L. J., Ex. 44; Jefferson *v.* Querner, 30 L. T. (N. S.) 867.

(*m*) Reuter *v.* Sala, 4 C. P. D. 239, C. A.

17. **Delivery of More than the Contract Requires.**—The American decisions make a distinction between those cases where the act of separation is burdensome and expensive, or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. See *ante* § 531, *et seq.* In Croninger *v.* Crocker, 62 N. Y. 151, 157, the tender was of wool, part washed and part unwashed, which required assortment. The contract called for washed wool. Allen, J., said that the seller should assort the wool and tender only such as the buyer must accept. "A tender of a larger bulk from which plaintiffs might with great labor have selected the quantity, and of the quality they had purchased, was an insufficient tender, and a refusal to perform the contract, except by a delivery of wool in bulk, the good and bad mingled together, requiring labor to separate them, was a breach of the agreement." In Stevenson *v.* Burgin, 49 Penna. 36, 44, the contract was to deliver 100 tons of oil-cake on board of a vessel. The seller placed 107 tons on the vessel and tendered a bill of lading, and claimed payment for that amount. The buyer was held not liable for damages for refusal to accept this delivery. See Clark *v.* Baker, 11 Metc. 186; Marland *v.* Stanwood, 101 Mass. 470; Brewer *v.* Housatonic R. R., 104 Mass. 593; Rodman *v.* Guilford, 112 Mass. 405. See, also, cases stated and cited *ante* § 537, *et seq.* On the other hand, in Lockhart *v.* Bonsell, 77 Penna. 53, 60, the contract was for 5000 barrels of oil to be delivered at a station. The seller delivered 5981 barrels there, all of the same quality, and offered 5000 of the lot. The buyer refused to accept any of it. The court held the offer good. Williams, J., said that the seller did not offer a larger quantity and insist that the buyer should accept and pay for the whole. Had he done so the case would have come within the ruling of the case of Stevenson *v.* Burgin, *supra.* The buyer was to pump the oil into the cars, and if the seller furnished a sufficient quantity, he was not bound to set apart the precise quantity. So, in Iron Cliffs Co. *v.* Buhl, 42 Mich 86, it was held a sufficient delivery of ore to pile it at a convenient place for removal, although ore of the same quality was placed in the same pile for other buyers. See Damon *v.* Osborn, 1 Pick. 476; Southwell *v.* Beezley, 5 Oreg. 143; Page *v.* Carpenter, 10 N. H. 77; Ganson *v.* Madigan, 9 Wis. 146; S. C., 13 Wis. 67; Larkin *v.* Mitchell, 42 Mich. 296. See *ante* § 477, *et seq.* A refusal to receive, on other grounds than that of excessive quantity, may be a waiver of objection on that ground. Thus, in Smith *v.* Pettee, 70 N. Y. 13, the contract was for 100 tons of scrap iron to arrive by ship Christopher. The ship St. Christopher brought 103 tons. The buyer refused to accept solely because, as he said, this was not the ship the contract named. It was held that he could not set up as a defence to a suit for breach, that the amount tendered him was too great. Barton *v.* Kane, 18 Wis. 262, stated *ante* § 533; Downer *v.* Thompson, 6 Hill 208, stated *ante* § 534.

Where the delivery is more than required by the sale.

Dixon v. Fletcher.

In Dixon *v.* Fletcher, (*n*) 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.

Hart v. Mills.

So in Hart *v.* Mills, (*o*) where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned.

Cunliffe v. Harrison.

§ 1031. In Cunliffe *v.* Harrison, (*p*) 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 person 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." (*q*)

Nicholson v. Bradfield Union.

In Nicholson *v.* Bradfield Union, (*r*) the plaintiffs, under a contract for the sale of Ruabon coals, sent one lot of 15 tons 9 cwt. of real Ruabon coals on the 1st of July, and another lot of 7 tons 8 cwt. of coals, which were not Ruabon coals, on the 2d of July, and the two parcels were shot into one heap, and it was held a bad delivery *for the whole.*

Levy v. Green

In Levy *v.* Green, (*s*) 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 Erle, 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.

(*n*) 3 M. & W. 146.
(*o*) 15 M. & W. 85.
(*p*) 6 Ex. 903.
(*q*) Per Parke, B.
(*r*) L. R., 1 Q. B. 620; 35 L. J., Q. B. 176.
(*s*) 8 E. & B. 575; 27 L. J., Q. B. 111; in Ex. Ch., 28 L. J., Q. B. 319. See, also, Tarling *v.* O'Riordan, 2 Ir. L. R. 82, C. A.

§ 1032. 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 later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. (*t*)[18] But the buyer is bound to pay for any part that he accepts; and after the time for delivery 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.[19]

Where the delivery is less than required by the sale.

Buyer must pay for what he keeps.

(*t*) Per Parke, J., in Oxendale *v.* Wetherall, 9 B. & C. 386; Brandt *v.* Lawrence, 1 Q. B. D. 344, C. A.; Bowes *v.* Shand, 2 App. Cas. 455; Reuter *v.* Sala, 4 C. P. D. 239, 244, C. A., considered *ante* § 1030.

18. **The Buyer may Refuse a Delivery of Less than the Contract Requires.**—See *ante* § 535. Smith *v.* Lewis, 40 Ind. 98; Hausman *v.* Nye, 62 Ind. 485; Roberts *v.* Beatty, 2 Penna. 63, 69; Bear *v.* Harnish, 3 Brewst. 113; Rockford, &c., R. R. Co. *v.* Lent, 63 Ill. 288; Polhemus *v.* Heiman, 45 Cal. 573, 577. In Murphy *v.* St. Louis, 8 Mo. App. 483, the owner of a pond contracted to sell to Murphy all the ice on the pond at a certain price per ton, but permitted a third person to take a part. The court held that the buyer might refuse to take any of the remaining ice, and might recover for damages the difference between the contract price, and the value of all the ice on the pond.

19. **Acceptance of Part Delivery under a Severable Contract.**—Where the contract is severable the cases are harmonious that performance of one of the separate parts will entitle the party so performing to call on the other party for corresponding performance. Thus, in Highlands Chemical Co. *v.* Matthews, 76 N. Y. 145, the contract was to deliver 10,000 carboys of acid in lots as called for, payable on delivery of each lot. Only 7300 carboys were delivered, but a recovery was sustained, for the price less damages for the non-delivery of the residue. And in Per Lee *v.* Beebe, 13 Hun 89, the contract was to deliver at a certain price per ton all the coal the buyer might order during a limited period. Before the end of that period the seller refused to deliver more, and sued for the price of the amount already delivered. The court held that in the absence of any provision to the contrary the price was payable on delivery of each lot called for, and therefore could be recovered, the buyer being left to his suit for damages for breach. See Scott *v.* Kittanning Coal Co., 89 Penna. 236; Maryland Fertilizing Co. *v.* Lorentz, 44 Md. 218; Tenny *v.* Mulvaney, 8 Oreg. 129; Young, &c., Co. *v.* Wakefield, 121 Mass. 91. But, as to the effect of acceptance of a delivery of a part of the goods contracted for under an entire contract, the American cases are very conflicting.

Acceptance of Delivery of Part under an Entire Contract.—See *ante* § 48, note 12, and § 857. In New York the rule formerly was that nothing could be recovered for part performance of an entire contract, unless delivery of the residue was waived, and this has been followed in other states. And this seems to be still the law of New York, though somewhat softened by the recent case of Avery *v.*

Wilson, stated *infra*. In Champlin *v.* Rowley, 18 Wend. 194, by the contract, 100 tons of hay were to be delivered at Rhinebeck, between September 12th and the close of navigation on the Hudson river, in parcels, and paid for when the whole should be delivered. Only 52 tons were delivered, for which the seller brought suit. The judge at Circuit sustained the suit, because of the receipt and acceptance of a substantial part of that which was to be done in his favor, and judgment was given for the price of the part received. But this was reversed in the Supreme Court, (13 Wend. 258), and the Court of Errors and Appeals agreed with the Supreme Court. Walworth, C., said that there could be no action founded on the buyer's neglect to return the hay received, for it was to be delivered in lots, and might be consumed before it was to be paid for. And it was held that the seller could not recover anything for the hay sold by him, because he had not complied with the condition precedent to deliver 100 tons before the close of navigation. In Timmons *v.* Nelson, 66 Barb. 594, the contract was to sell all the manure that should be made during the ensuing year on a certain farm for $30. After the buyer had taken seven loads the seller refused to permit him to take more, unless he should first pay for the seven loads. It was held that the seller could not recover for any part of the manure. In Paige *v.* Ott, 5 Denio 406, the contract was to deliver a quantity of oak timber. A part was delivered, which the buyer used, and a further agreement was made extending the time to deliver a certain substituted quantity. This quantity was delivered, but part was elm instead of oak, and the buyer rejected the elm, but took the oak. Held, that there was no recovery for the oak. But this case is in effect overruled by Avery *v.* Wilson, *infra*. In Catlin *v.* Tobias, 26 N. Y. 217, and in Smith *v.* Brady, 17 N. Y. 173, Champlin *v.* Rowley was followed. See, also, Kein *v.* Tupper, 55 N. Y. 550, stated *ante* § 48, note 12. The subject was considered in the recent case of Avery *v.* Wilson, 81 N. Y. 341. In that case the contract was to deliver 699 boxes of glass, together, at one time. The seller delivered, and the buyer accepted a portion, making no conditions as to the delivery of the residue. Suit was brought for the price of the portion delivered, and was sustained. Miller, J., said that in the cases above cited no waiver of the condition that the whole must be delivered before payment could be inferred from delivery of part, because the contracts called for deliveries in installments. But in the case before the court, "while defendants were not bound to accept a delivery of a portion of the glass, and had a right to reject or retain the same as they saw fit, yet if they elected to receive the part delivered, appropriated the same to their own use, and by their acts evinced that they waived this condition, they became liable to pay for what was actually delivered." In Haslack *v.* Mayers, 26 N. J. L. 284, an agreement was made March 5th to purchase a lot of groceries, and to pay therefor March 12th by delivery of certain shares of stock, conveyance of certain lands and by giving certain notes. The buyer assigned and delivered the shares March 5th, and assisted the seller of the groceries to make an immediate sale of part of the shares. On the 12th of March the buyer of the groceries neglected to make conveyance of the land or to give the notes, and brought suit to recover the value of the shares. The court held that part performance, where there was no intention to sever the contract, furnished no ground for a recovery *pro tanto*, and Champlin *v.* Rowley and other New York cases are followed. In Witherow *v.* Witherow, 16 Ohio 238, also, Champlin *v.* Rowley is followed. In that case suit was brought for the price of corn delivered, but the suit failed because the seller had bargained to deliver 500

bushels, and had delivered only 216, for which he sued. As the contract was entire, he could recover nothing. Another hard case, under the rule of the New York cases, is that of Jennings *v.* Lyons, 39 Wis. 553, where a husband and wife were employed for a year. After four months' service the wife left because of imminent confinement, whereupon both were discharged, and it was held that they could recover nothing, because though sickness in general will excuse, this sickness ought to have been foreseen and provided against in the contract. See Clark *v.* Baker, 5 Metc. 452; Larkin *v.* Buck, 11 Ohio St. 561; Allen *v.* Curtis, 6 Ohio St. 505; Crane *v.* Knubel, 61 N. Y. 645; Holden Steam Mill Co. *v.* Westervelt, 67 Me. 446, 449.

Modern American Rule.—But a new and just rule was laid down, applicable to all these cases of part performance, in the famous case of Britton *v.* Turner, 6 N. H. 481. In that case a laborer agreed to work one year for $120, but left the service of his employer after nine and a half months, and sued for the value of his services. A verdict for $95 was sustained. In an opinion of great ability, Parker, J., said: "If a party to a contract actually receives labor, or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess." This case, though disapproved in many decisions, including Champlin *v.* Rowley, Haslack *v.* Mayers, and other cases above cited, has been steadily gaining ground. In McClay *v.* Hedge, 18 Iowa 66, Dillon, J., said of Britton *v.* Turner, "That celebrated case has been criticised, doubted and denied to be sound. Yet its principles have been gradually winning their way into professional and judicial favor. It is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases." See, also, Pixler *v.* Nichols, 8 Iowa 106; Byerlee *v.* Mendel, 39 Iowa 382; Wolf *v.* Gerr, 43 Iowa 339. In the last case Day, J., said: "It is now the settled doctrine in this state that a party, who has failed to perform in full his contract, may recover compensation for the part performed, less the damages occasioned by his failure." The same principle has been adopted in Michigan, Illinois, Kansas, Texas, Nebraska and other states. Duncan *v.* Baker, 21 Kan. 99; Hollis *v.* Chapman, 36 Tex. 1; Carroll *v.* Welch, 26 Tex. 149; Parcell *v.* McComber, 11 Neb. 209; Bush *v.* Jones, 2 Tenn. Ch. 190; Horn *v.* Batchelder, 41 N. H. 86; Ryan *v.* Dayton, 25 Conn. 188; Fenton *v.* Clark, 11 Vt. 560; Blood *v.* Enos, 12 Vt. 625; Lee *v.* Ashbrook, 14 Mo. 378; Lamb *v.* Brolaski, 38 Mo. 51; Nicklaus *v.* Roach, 3 Ind. 78; Bast *v.* Byrne, 51 Wis. 531, 537; Clark *v.* Moore, 3 Mich. 55, 58; Allen *v.* McKibbin, 5 Mich. 449; Wildey *v.* Fractional School Dist., 25 Mich. 419; Wilson *v.* Wagar, 26 Mich. 452; Dermott *v.* Jones, 2 Wall. 1; Phillips, &c., Co. *v.* Seymour, 91 U. S. 646, 649; Leonard *v.* Dyer, 26 Conn 172; Bowker *v.* Hoyt, 18 Pick. 555; Roberts *v.* Beatty, 2 Penna. (P. & W.) 63, 69; Polhemus *v.* Heiman, 45 Cal. 573. In striking contrast with the Ohio case of Witherow *v.* Witherow above stated is Richards *v.* Shaw, 67 Ill. 222. In that case the contract was to deliver 500 bushels of corn at a specific price per bushel, and the seller delivered only 391 bushels, for which he brought suit. Sheldon, J., said that if the vendee received part of the goods sold under an entire contract and retained that part after breach, this was a severance, and a suit would lie for the price, but the buyer might deduct damages for failure to fulfill the residue of the contract.

Waddington v. Oliver.

Thus, in Waddington *v.* Oliver, (*u*) the plaintiff delivered on the 12th of December twelve bags of hops in part performance of a contract to deliver 100 bags on or before the 1st of January, and demanded immediate payment for them, and brought his action on the buyer's refusal. Held, that no such action could be maintained *prior* to the expiration of the time fixed for delivery of the remainder.

Oxendale v. Wetherell.

§ 1033. But in Oxendale *v.* Wetherell, (*x*) 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.

Hoare v. Rennie.

In Hoare *v.* Rennie, (*x*) 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 21 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* § 901.

Morgan v. Gath.

In Morgan *v.* Gath, (*y*) 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.

Law in New York.

[In the State of New York the qualification, that a recovery may be had for the portion delivered, if retained by the vendee until after the time for the full performance of the contract, has been expressly repudiated.] (*z*) [20]

Quantity stated "about" so much, or "more or less."

§ 1034. The quantity to be delivered is, however, sometimes stated in the contract with the addition of words, such as "about," or "more or less," which show that the quantity is not restricted to the exact number or amount specified, but

(*u*) 2 B. & P. N. R. 61. See, also, a decision of Lord Hale's at the Norfolk Assizes, 1662, reported 1 Comyn Dig., Action, F 2.

(*x*) 9 B. & C. 386. See, also, Mayor *v.* Pyne, 3 Bing. 285.

(*x*) 5 H. & N. 19; 29 L. J., Ex. 73.

(*y*) 3 H. & C. 748; 34 L. J., Ex. 165.

(*z*) Per Spencer, J., in M'Millan *v.* Venderlip, 12 Johnson, at p. 167; per Nelson, J., in Champlin *v.* Rowley, 13 Wendell, at p. 260; per Bronson, J., in Mead *v.* Degolyer, 16 Wendell, at p. 636; per Church, C. J., in Kein *v.* Tupper, 52 N. Y., at p. 555.

20. See *ante* note 19, and see Avery *v.* Wilson, 81 N. Y. 341.

that the vendor is to be allowed a certain moderate and reasonable latitude in the performance. [21]

In Cross *v.* Eglin, (*a*) the purchase was of "about 300 quarters (more or less) of foreign rye, * * * shipped on board the Queen Elizabeth, &c., also about 50 quarters of foreign red wheat, &c., &c. The vessel arrived, having on board 345 quarters of rye and 91 of wheat. The plaintiffs, the buyers, had paid by bill of exchange for 50 quarters of wheat and 300 quarters of rye; but the defendants, making no dispute about the wheat, insisted that the plaintiffs 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 50 of wheat, abandoned the contract, and sued for the amount of the bill of exchange which they had paid. Evidence was offered [and admitted, subject to objection] 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 question of admissibility was not decided, though there were doubts expressed whether it was admissible, and the case was decided without reference to this evidence.] 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;" Parke and Patteson, JJ., expressing a doubt on that point, but holding, that the expressions being obscure, the burthen 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.

Cross *v.* Eglin.

§ 1035. In Cockerell *v.* Aucompte, (*b*) 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.

Cockerell *v.* Aucompte.

Bourne *v.* Seymour (c) 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. Cresswell, J., said that he did not think the parties understood the contract, "nor do I." (*d*)

Bourne *v.* Seymour.

21. See *post* § 1039, and note 22.

(*a*) 2 B. & Ad. 106.

(*b*) 2 C. B. (N. S.) 440; 26 L. J., C. P. 194.

(*c*) 16 C. B. 337; 24 L. J., C. P. 202.

(*d*) 24 L. J., C. P. 207.

Moore v. Campbell.

In Moore *v.* Campbell, (*e*) the sale was of 50 tons of hemp, and the vendor offered the buyer two delivery orders from a warehouse for "about" 30 tons, and "about" 20 tons respectively, which the buyer declined, unless the vendor would guarantee that the whole quantity amounted to 50 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.

§ 1036. In McConnell *v.* Murphy, (*f*) where the sale was of "all of the spars manufactured by A, say about 600, averaging 16 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 16 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 Gwillim *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. (*g*)

Morris v. Levison.

Full and complete cargo, say about 1100 tons.

§ 1037. [In Morris *v.* Levison, (*h*) a charter-party provided that the ship should load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons. It was held that the words "say about 1100 tons" were words of contract, and must have been intended as a guide to the charterer with regard to the amount of cargo which he would have to

(*e*) 10 Ex. 323; 23 L. J., Ex. 310.

(*f*) L. R., 5 P. C. C. 203.

(*g*) See, further, Leeming *v.* Snaith, 16 Q. B. 275; Barker *v.* Windle, 6 E. & B. 675; Hayward *v.* Scougall, 2 Camp. 56.

(*h*) 1 C. P. D. 155.

provide, that he was not therefore bound to load a full and complete cargo of 1210 tons, but was bound to provide a reasonable margin over 1100 tons; and that 3 per cent. being such a reasonable margin he ought to have loaded 1133 tons.

McLay v. Perry.

§ 1038. In McLay *v.* Perry (*i*) the plaintiff's agent, seeing in the defendants' yard a heap of scrap iron said "You seem to have about 150 tons there," to which one of the defendants replied, "Yes, or more." The plaintiffs were informed by their agent that the defendants had about 150 tons of old iron for sale, and thereupon wrote to them—"We are buyers of good wrought scrap iron, free of light and burnt iron, for our American house, and understand from Mr. Scott that you have for sale about 150 tons. We can offer you 80*s.* per ton." Some correspondence ensued relating to the place of delivery and the expense of cartage, and eventually the defendants wrote, "We accept your offer for old iron, viz. 80*s.* per ton, we delivering alongside vessel in one of the London docks. Please let me know when you can send a man here to see it weighed and also inform us where to send it." The defendants only delivered 44 tons, which was the weight of the heap in their yard. They were not dealers in iron. Held, in an action for damages for short delivery, that the words "about 150 tons" were words of estimate only, that the defendants had not warranted the quantity, and that the subject matter of the contract was not 150 tons of iron, but the iron which the plaintiffs' agent had seen in the defendants' yard.

Law in America.

Brawley v. The United States.

§ 1039. In America, this question has been very recently discussed in a case before the Supreme Court of the United States, (*k*) and three rules were laid down for the guidance of the courts in the construction of similar contracts. Firstly, where the goods are identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

(*i*) 44 L. T. (N. S.) 152.

(*k*) Brawley *v.* The United States, 6 Otto 168; per Bradley, J., at p. 171, in delivering the opinion of the court.

Secondly.—Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

Thirdly.—In the last case, however, if the qualifying words "about," "more or less," and the like are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions.] [22]

Where delivery is to be made according to bills of lading, the authorities have already been reviewed *ante* § 895.

Where vendor is to send goods, delivery to common carrier suffices.

§ 1040. 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 to the purchaser himself; the carrier being, in contemplation of

22. **Meaning of Terms "About," "More or Less."**—In Brawley *v.* United States, 96 U. S. 168, the contract was to deliver at a fort 880 cords of wood, more or less, as should be determined to be necessary by the commander, for the regular supply for one year. The commander, as soon as he learned of the contract, but after the contractor had cut the entire quantity, notified the contractor that only 40 cords would be required, which proved to be the fact. It was held that the substance of the contract was to furnish simply what was needed at the post, as determined in good faith by the commander. In Creighton *v.* Comstock, 27 Ohio St. 548, the contract was to deliver 23,000 feet, more or less, of lumber, for $5000. The amount delivered was only 16,000 feet. It was held that the words "more or less" would not cover so wide a variance, and the buyer could recover back the difference in value. See Melick *v.* Dayton, 34 N. J. Eq. 245. In Holland *v.* Rea, 48 Mich. 218, the contract was to deliver 500,000 feet of lumber, "more or less," and 473,000 were tendered, of which 173,000 were refused. Graves, C. J., said that this agreement was not void for indefiniteness, and that the buyers, having taken 300,000 feet out of a lot of 473,000 tendered them, and having raised no objection on the ground of the quantity tendered, as less than required, had given the contract a practical construction, and would be bound by the delivery. Whether a contract to supply "about 100 castings" was substantially complied with, by delivery of 331 castings, was left to the jury in Clapp *v.* Thayer, 112 Mass. 296. See Merriam *v.* United States, 14 Ct. of Cl. 289; Robinson *v.* Noble, 8 Pet. 181; Flanagan *v.* Demarest, 3 Robt. 173, stated *ante* § 888, note 21; Harrington *v.* Mayor, &c., 10 Hun 248, affirmed 70 N. Y. 604; Callmeyer *v.* Mayor, &c., 83 N. Y. 116; Stickle *v.* Conteau, 10 Mo. App. 241; Patterson *v.* Judd, 27 Mo. 563.

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. (*l*)

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. (*m*) 23 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.

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.

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. (*n*)

(*l*) 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, 4 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.

(*m*) Dunlop *v.* Lambert, 6 Cl. & F. 600.

23. **Delivery to a Carrier.**—In general, delivery to a carrier to be transported to the buyer is a delivery to the buyer. Presumptively, the consignee is the owner of the goods, and the one to whom the carrier is responsible. See *ante* § 490, § 517, *et seq.*, and § 573. The Sally Magee, 3 Wall. 451; Penna. Coal Co. *v.* Holderman, 69 Ind. 18; Moral School Township *v.* Harrison, 74 Ind. 93; Stafford *v.* Walter, 67 Ill. 83; Hall *v.* Gaylor, 37 Conn. 550; Wilcox, &c., Co. *v.* Green, 72 N. Y. 17; Strong *v.* Dodds, 47 Vt. 348. But if the place of delivery is agreed upon, the property will be at the seller's risk in transit to that place. See *ante* § 574, *et seq.*, and see Devine *v.* Edwards, 101 Ill. 138, stated *ante* § 328. Thompson *v.* Cinn. R. R., 1 Bond 152; Hooper *v.* Railway Co., 27 Wis. 81; Higgins *v.* Murray, 73 N. Y. 252; See *v.* Bernheimer, 38 N. Y. Super. Ct. 40. But in Pacific Iron Works *v.* L. I. R. R., 62 N. Y. 272, where the seller agreed to furnish goods by a steamer named and pay charges, and performed his agreement fully, it was held that the goods were at the buyer's risk on the arrival of the vessel, and the seller could sue for the price, though the buyer failed to receive the goods. If the buyer has agreed "to advance the freight," the seller may, on refusal to pay to him the freight before shipment, treat the contract as at an end. Hartje *v.* Collins, 46 Penna. 268.

(*n*) Bull *v.* Robison, 10 Ex. 342; 24 L. J., Ex. 165.

§ 1041. But the vendor is bound, when delivering to a carrier, to take the usual precautions for ensuring the safe delivery to the buyer. In Clarke *v.* Hutchins, (*o*) the vendor, in delivering goods to a trading vessel, neglected to apprise the carrier that the value of the goods exceeded £5, 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." [24]

Vendor bound to take the usual precautions to ensure safe delivery by carrier.

Clarke *v.* Hutchins.

§ 1042. 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. [25] Thus in Isherwood *v.* Whitmore, (*p*) the

Vendor bound to give an opportunity to inspect the goods.

(*o*) 14 East 475. See, also, Buckman *v.* Levi, 3 Camp. 414; Cothay *v.* Tute, 3 Camp. 129.

24. **The Vendor is Bound to Take Reasonable Precautions for Safe Delivery.**—See *ante* § 528. Ward *v.* Taylor, 56 Ill. 494; Stafford *v.* Skelton, 67 Ill. 83; Taylor *v.* Cole, 111 Mass. 363; Higgins *v.* Murray, 73 N. Y. 252; Purcell *v.* Jacox, 59 N. Y. 288; Leggatt *v.* Sands Ale Brewing Co., 60 Ill. 158, stated *ante* § 944, note 15. Insurance of the goods in transit may by the custom of trade be the duty of the vendor shipping goods. Ranney *v.* Higby, 4 Wis. 174, [154,] 179. A delivery to a carrier with a misdirection by the seller, which prevents the receipt of the property by the buyer, is an insufficient delivery. Finn *v.* Clark, 10 Allen 479; S. C., 12 Allen 522; Woodruff *v.* Noyes, 15 Conn. 334; Garretson *v.* Selby, 37 Iowa 529. Failure to give notice of a shipment, whereby the buyer lost the goods because not at hand to accept them from the carrier, it would seem, might be a breach of the shipper's duty. But see *ante* § 528. If the buyer rejects and returns the goods, he is not liable for depreciation resulting from delay, if he used due care. Bigger *v.* Bovard, 20 Kan. 204, and see *ante* § 991.

25. **Reasonable Opportunity for Inspection.**—See *ante* §§ 910, 976, 966, note 23. Croninger *v.* Crocker, 62 N. Y. 151, 158, stated *ante* note 16. Boothby *v.* Scales, 27 Wis. 626, 636. In general, the buyer must inspect at the place of delivery, and cannot reject after an unreasonable delay to inspect. Bromler *v.* Bolton, 44 Mich. 218 What is a reasonable time for inspection is a question for the jury; and where there is a usage not to examine goods sold at wholesale until opened to sell to customers, such an examination will be in reasonable time if the goods are offered for sale in due course of trade. Doane *v.* Dunham, 79 Ill. 131. See Paige *v.* McMillan, 41

(*p*) 11 M. & W. 347; and per Parke, B., in Startup *v.* McDonald, 6 M. & G. 593.

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. Isherwood *v* Whitmore.

§ 1043. There may be a symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in Chaplin *v.* Rogers, (*q*) 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. (*r*) On this principle the delivery of the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel. (*s*) Symbolical delivery.

§ 1044. So the endorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are 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 (*t*) and Wood *v.* Manley; (*u*) [26] but the effect of transferring such documents of title upon the rights *Indicia* of property.

Wis. 337; Carondelet Iron Works *v.* Moore, 78 Ill. 65; Knoblauch *v.* Kronschnabel, 18 Minn. 300, 305. In this last-named case the sale was of flour. The price was paid, and the flour examined and rejected immediately after. It was held that the price might be recovered back.

(*q*) 1 East 192.

(*r*) 3 T. R. 464.

(*s*) Atkinson *v.* Maling, 2 T. R. 462.

(*t*) 2 M. & G. 650.

(*u*) 11 Ad. & E. 34.

26. **Symbolical or Constructive Delivery**—Constructive acceptance, to satisfy the statute of frauds, has been discussed. *ante* § 144–147. Transfers of a ship at sea by bill of sale, and of a cargo or of goods in transit, or in a warehouse, by delivery of the bill of lading, are familiar instances of symbolic delivery. See Conrad *v.* Atlantic Ins. Co., 1 Pet. 445; Gibson *v.* Stevens, 8 How. 384, 399; Prickett *v.* Read, 31 Ark. 131; King *v.* Jarman, 35 Ark. 190, 196; Davis *v.* Russell, 52 Cal. 611; Russell *v.* O'Brien, 127 Mass. 349. A symbolic delivery operating by force of the making of a present contract without any further formality, is held sufficient to pass possession as well as property in the case of the sale of logs floating in the water, or other cumbrous property. Leonard *v.* Davis, 1 Black 476, 482; Hayden *v.* Demets, 53 N. Y. 426; Toquini *v.* Kyle, Sup. Ct. Nevada Oct., 1882, 15 Law Reporter 20, and

of the unpaid vendor is discussed hereafter in the chapters on Lien and Stoppage *in Transitu*. 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's right to tender a second delivery within the time limited by the contract.

§ 1045. [In Borrowman *v.* Free, (*x*) it has been decided that the seller has a right, within the time limited by the contract, to tender a second delivery, although the first tender has been properly rejected by the buyer as being not in accordance with the contract.

Borrowman *v.* Free.

Cargo sold "from the deck."

In Playford *v.* Mercer, (*y*) where a cargo was sold "from the deck," it was held to mean that the seller should pay all that was necessary in order to enable the buyer to remove the cargo from the deck.]

Playford *v.* Mercer.

Law in America.

§ 1046. In a case in the State of Vermont, (*z*) 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.

Vendor not entitled to cost of labor in putting goods sold by weight and lying in bulk, into packages furnished by buyer.

In Robinson *v.* The United States, (*a*) 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*.

Robinson *v.* The United States.

[In the State of New York evidence was held inadmissible to prove a usage for the vendor of sheep to shear them and appropriate the wool before delivery.] (*b*)

Groat *v.* Gile.

cases cited; Ruffer *v.* United States, 15 Ct. of Cl. 291. A delivery may take place by mere arrangement that the seller or a third person having the possession shall hold as bailee for the buyer. See *ante* §§ 174, 182. Carpenter *v.* Grabam, 42 Mich. 191; Webster *v.* Anderson, 42 Mich. 554; Chapman *v.* Searle, 3 Pick. 38. A purchase of grain in the Chicago wholesale market is satisfied by delivery of warehouse receipts for grain of the quality sold, such being the course of trade in that market. Bailey *v.* Bensley, 87 Ill. 556; McPherson *v.* Gale, 40 Ill. 368.

(*x*) 4 Q. B. D. 500, C. A.

(*y*) 22 L. T. (N. S.) 41.

(*z*) Cole *v.* Kew, 20 Vt. 21.

(*a*) 13 Wallace 363.

(*b*) Groat *v.* Gile, 51 N. Y. 431.

PART III.

BUYER'S DUTIES.

CHAPTER I.

ACCEPTANCE.

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§ 1047. 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*) [1]

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 Co., 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.

1. The buyer must fetch the goods in the absence of an agreement for delivery. See *ante* § 1018, note 6; § 1022, note 10; § 897, note 23.

§ 1048. And if the vendee make default in fetching away the 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*)

And is liable for default in fetching goods in reasonable time.

The question of what is a reasonable time is one of fact for a jury under all the circumstances of the case. (*c*) 2

Reasonable time to be determined by jury.

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. 3

Contract to deliver "as required."

Jones *v.* Gibbons.

§ 1049. 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. He it 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 bought out of a larger quantity, or a mixed

Buyer has right to inspect before acceptance.

(*b*) Per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426; also per Bayley, J., in Bloxam *v.* Sanders, *ante* § 1017.

(*c*) Buddle *v.* Green, 3 H. & N. 996; 27 L. J., Ex. 33.

2. Reasonable Time.—Bass *v.* White, 65 N. Y. 565; Pinney *v.* St. Paul R. R., 19 Minn. 251; Stange *v.* Wilson, 17 Mich. 342, 348. In Coon *v.* Spaulding, 47 Mich. 162, the buyer of a lot of hay was to press it, after which it was to be delivered by the seller and paid for. A delay of forty-five days to press the hay was held so unreasonable as to warrant the seller to refuse delivery.

(*d*) 8 Ex. 920.

3. Notice to Accept.—See *ante* § 1018, note 8, and § 1023, note 11. Cameron *v.* Wells, 30 Vt. 633; Edwards *v.* Hartt, 66 Ill. 71.

(*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.

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. [4]

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.* The London Rice Mills Company. (*i*) In this case there was proof that this mode of packing rice made a difference in the sale.

Makin *v.* London Rice Mills Co.

§ 1050. But in Pettitt *v.* Mitchell, (*j*) 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."

Right to measure goods sold by the yard.

Pettitt *v.* Mitchell.

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*

(*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; Tarling *v.* O'Riorden, 2 Ir. L. R. 82.

4. The buyer is entitled to a fair opportunity to inspect the goods before acceptance. See *ante* § 1042, note 25. Shields *v.* Reibe, 9 Brad. 598.

(*i*) 20 L. T. (N. S.) 705.

(*j*) 4 M. & G. 819.

away the goods, to measure them and claim an allowance for deficient measure, if any.

Mere receipt is not acceptance.

But becomes so by delay in rejecting, or by act of ownership.

§ 1051. 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 But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, (*k*) or if any act be done by the buyer which he would have no right to do unless he were owner of the goods. The following cases illustrate these rules, in addition to the authorities reviewed *ante* §§ 139, *et seq.* [5]

(*k*) Bianchi *v.* Nash, 1 M. & W. 545; Beverly *v.* Lincoln Gas Light Co., 6 Ad. & E. 829; Couston *v.* Chapman, L. R., 2 Sc. App. 250, *ante* § 977.

5. **Receipt is not Acceptance.**—The buyer may reject the goods as soon as he has time and opportunity to examine them, if they do not answer the description. Boughton *v.* Standish, 48 Vt. 594; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Simpson *v.* Krumdick, 28 Minn. 352; Doane *v.* Dunham, 79 Ill. 131. As to what is a reasonable time within which to examine and reject, see *ante* § 1042, note 25. To recover for goods sold and delivered, no acceptance need be shown. Nichols *v.* Morse, 100 Mass. 523; Barton *v.* McKelway, 22 N. J. L. 165. After inspection and acceptance, the buyer cannot, in general, change his mind and reject. Carondelet Iron Works *v.* Moore, 78 Ill. 65, 69. See *ante* § 966, note 23; § 977, note 29.

Receipt may become Acceptance by Waiver of Objections.—Such waiver may be inferred from delay to object. Gaylord Manufacturing Co. *v.* Allen, 53 N. Y. 515; Reed *v.* Randall, 29 N. Y. 358; Paige *v.* McMillan, 41 Wis. 337; Barton *v.* Kane, 17 Wis. 37; S. C., 18 Wis. 262; Kahn *v.* Klabunde, 50 Wis. 235; Hadley *v.* Prather, 64 Ind. 137; Watkins *v.* Paine, 57 Ga. 50; Gaff *v.* Homeyer, 59 Mo. 345; Owens *v.* Sturges, 67 Ill. 366. Although acceptance, without objection after inspection, will preclude the buyer from rejecting the goods or avoiding the contract, yet acceptance of an installment of inferior goods will not warrant the seller to continue to deliver inferior goods. Cahen *v.* Platt, 69 N. Y. 348; Kipp *v.* Meyer, 5 Hun 111. If the buyer improperly refuses to accept a delivery of part, the seller is excused from tendering the whole. Hughes *v.* United States, 4 Ct. of Cl. 64. Receipt after the time limited is a waiver of objections and damages, because of the delay to deliver. Baker *v.* Henderson, 24 Wis. 509; Bock *v.* Healey, 8 Daly 156. See Adams *v.* Helen, 50 Mo. 468. Delivery after the time is a waiver of damages for refusal to receive within the time limited. Gibbons *v.* United States, 2 Ct. of Cl. 421. In Ruffee *v.* United States, 15 Ct. of Cl. 291, the contract was for from 500 to 800 cords of wood for a military post, to be delivered on the ground where cut and corded. The contractor tendered the wood, and the officers measured and inspected it. Before it was removed or paid for, part of it was stolen. It was held that the delivery had been completed, and the loss must fall on the government. A sale of part of the property by the buyer is an acceptance. Hill *v.* McDonald, 17 Wis. 97. In Brownlee *v.* Bolton, 44 Mich. 218, the contract was for cedar posts, to be delivered on board of vessels to be provided by the buyer. It was held that the posts must

In Parker *v.* Palmer, (*l*) 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. Parker *v.* Palmer.

In Sanders *v.* Jameson, (*m*) 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. Sanders *v.* Jameson.

§ 1052. In Chapman *v.* Morton, (*n*) a cargo of oil-cake was shipped by the plaintiffs, from Dieppe to the defendant, a merchant, at Wisbeach, 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 of 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 Chapman *v.* Morton.

be accepted or rejected at the place of shipment, and the buyer could not inspect and reject at the end of the voyage.

(*l*) 4 B. & Ald. 387.
(*m*) 2 C. & K. 557.
(*n*) 11 M. & W. 534.

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.[6] 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." Alderson and Rolfe, BB., concurred.

Refusal to accept where goods do not agree with sample.

§ 1053. 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.

When acceptance based on deceptive sample may be retracted.

The cases of Heilbutt *v.* Hickson, *ante* § 974, and Mody *v.* Gregson, *ante* § 1003, are authorities to show under what circumstances an acceptance may be retracted if the sample itself is deceptive.

6. **Notice of Rejection.**—When the purchaser refuses to accept goods because not equal to sample, in general, notice of non-acceptance is requisite, but such notice may be waived by agreement of the parties as expressed, or as implied from circumstances. Wartman *v.* Breed, 117 Mass. 18; Suit *v.* Bonnell, 33 Wis. 180.

CHAPTER II.

PAYMENT AND TENDER.

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§ 1054. 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, secondly, 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. [1]

Payment absolute or conditional.

[Frequently, also, the terms of payment are "cash less discount at a fixed date, with option of bill," or *vice versa*, "bill, with option of cash less discount." In the former case, the seller can sue for the price of goods sold and delivered immediately on the buyer's refusal to accept at

"Cash, with option of bill."

"Bill, with option of cash."

1. The effect of payment on passing of property in the goods has been considered *ante* § 334, *et seq.*, § 425, *et seq.* Payment as a condition precedent or concurrent has been discussed *ante* § 897, note 23; § 1016. See Robison *v.* Tyson, 46 Penna. 287, 273; Kunkle *v.* Mitchell, 56 Penna. 100. Acceptance of payment without objecting that it is not made seasonably will be a waiver of that objection. Adams *v.* Helm, 55 Mo. 468. Where credit is given, the buyer is entitled to immediate possession. Leonard *v.* Davis, 1 Black 476, 483.

the date fixed. In the latter, the seller cannot sue for the price of goods sold and delivered, until the due date of the bill drawn by him, even although the buyer has refused to accept it, but he may bring a special action against the buyer for non-acceptance of the bill.] (*a*)

§ 1055. 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: and it has already been stated (*b*) 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 fails to do so. (*c*) 2

At common law, a man bound to pay is not entitled to wait for demand.

§ 1056. 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. (*d*) 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 (*e*) (*ante* §§ 373–375.)

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.

In Briggs *v.* Calverley, (*f*) the vendor attempted to go one step

(*a*) This was, in effect, the ruling of Cockburn, C. J., at Nisi Prius, in Anderson *v.* The Carlisle Horse Clothing Co., 21 L. T. (N. S.) 760, where he explains the two earlier decisions of Mussen *v.* Price, 4 East 147, and Rugg *v.* Weir, 16 C. B. (N. S.) 471.

(*b*) *Ante* § 1018.

(*c*) 1 Wms. Saund. 33 b, n. 2.

2. See *ante* § 1018, note 6; § 1022, note 10. Sanders *v.* Norton, 4 T. B. Mon. 464; Davis, &c., Co. *v.* McGinnis, 45 Iowa 538; Bishop *v.* Woodruff, 3 N. J. L. 111, [519]; King *v.* Finch, 60 Ind. 420; Smith *v.* Foster, 5 Oreg. 44.

(*d*) Rugg *v.* Minett, 11 East 210; *ante* § 368.

(*e*) Castle *v.* Playford, L. R., 5 Ex. 165; 7 Ex. 98; Martineau *v.* Kitching, L. R., 7 Q. B. 436.

(*f*) 8 T. R. 629.

Tender valid before writ issued.

further, 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."[3]

Where price is payable only after demand, reasonable time allowed to fetch the money.

§ 1057. 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 buyer to fetch the money. 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.[4]

Brighty *v.* Norton.

Toms *v.* Wilson.

§ 1058. 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 "in-

3. **Tender After Suit Commenced Must Include Costs.**—Eaton *v.* Wells, 22 Hun 123. Where tender is made after suit brought, if the debtor does not know of the suit, and the creditor does not apprise him of it, the tender will be valid though the costs are not included. Haskell *v.* Brewer, 11 Me. 258. But in Wright *v.* Behrens, 39 N. J. L. 413, the only action taken by plaintiff's attorney had been to draw a summons which was lying on his table and had not been delivered to the sheriff. Yet it was held that the tender was not sufficient, because it did not include seventy cents costs of a suit of which the debtor had no knowledge.

(*g*) 32 L. J., Q. B. 38; 3 B. & S. 305.

4. Bass *v.* White, 65 N. Y. 565. In this case delivery was tendered at a late hour on Saturday, and no time for delivery having been previously fixed, it was held that the buyer was entitled to pay on Monday.

(*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.

stantly 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. Massey v. Sladen.

§ 1059. 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 hands; as if it be transmitted by post in compliance with the vendor's directions and be lost or stolen. (*l*) 5 But Lord Kenyon held that a direction to send by post was not complied with by the delivery of a letter, with the remittances enclosed, 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*) Payment good if made in mode requested by vendor. Money sent by post.

§ 1060. In Caine *v.* Coulson, (*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, Caine v. Coulson.

(*l*) Warwick *v.* Noakes, Peake 68, 98.

5. **Payment Transmitted in the Manner Directed by the Creditor is at His Risk.**—Wakefield *v.* Lithgow, 3 Mass. 249; Morgan *v.* Richardson, 13 Allen 410; Gurney *v.* Howe, 9 Gray 404. But if sent by mail without the creditor's order, it is at the risk of the debtor. Gurney *v.* Howe, 12 Gray 348; First National Bank of Bellefonte *v.* McManigle, 69 Penna. 156. Where a debtor in payment of his debt sent money, by permission of the creditor, to a third person, it was held that he was bound to notify the creditor. And a letter sent, which did not reach the creditor, stating that the money would be sent, but not stating how soon, was held no notice. Holland *v.* Tyns, 56 Ga. 56.

Special Mode of Payment.—Contracts providing for payment in some other manner than by cash are not unusual. Where the buyer has an option to pay before a certain day, in goods or other property, his option, like any other agreement to deliver, will be at an end, unless performed before the expiration of the time limited. After the date the creditor can exact cash. Church *v.* Feterow, 2 Penna. (P. & W.) 301; Roberts *v.* Beatty, 2 Penna. (P. & W.) 63; Fleming *v.* Potter, 7 Watts 380; Grieve *v.* Annin, 6 N. J. L. 463; Lent *v.* Paddelford, 10 Mass. 230, 239; Stone *v.* Nichols, 43 Mich. 16; Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa 538, 540.

(*m*) Hawkins *v.* Rutt, Peake 186, 248.

(*n*) 1 H. & C. 764; 32 L. J., Ex. 97. And see Hardman *v.* Bellhouse, 9 M. & W. 596.

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.

Eyles *v.* Ellis.

§ 1061. In Eyles *v.* Ellis, (*q*) both parties kept an account at the same bankers, and the plaintiff directed the amount to be paid there. The defendant ordered the banker 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.

Gordon *v.* Strange.

In Gordon *v.* Strange, (*r*) the defendant sent a post-office order in payment of a debt due to 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."

(*o*) 1 Ex. 477.
(*p*) 4 Ad. & E. 994.
(*q*) 4 Bing. 112.
(*r*) 1 Ex. 477.

§ 1062. 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 debt was then paid." [6] A written memorandum of such a transaction was therefore held to be a receipt requiring a stamp. The cases establishing the above principle 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*)

Set-off in account stated, same as payment.

Rule not applicable to ordinary accounts current.

§ 1063. 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. [7]

Tender is equivalent to payment.

(*s*) Livingstone *v.* Whiting, 15 Q. B. 722; 19 L. J., Q. B. 528.

6. **Payment by Agreement to Set Off Mutual Claims.**—In Strong *v.* Kennedy, 40 Mich. 327, the debtor gave his creditor a horse to sell, and apply the proceeds to the debt. The creditor, instead of selling, exchanged the horse. It was held that the transaction constituted a payment on the debt to the extent of the value of the property, and was not the basis of a set-off.

(*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 Moo. 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*) Cottom *v.* Partridge, 4 M. & G. 271; and see *ante* §§ 192–194.

7. **A Sale Implies Payment in Money.**—In Wabash Elevator Co. *v.* Bank of Toledo, 23 Ohio St. 311, 319, where a creditor bargained for the purchase of his debtor's grain, and having obtained possession refused to pay except by credit on the debt, it was held that the buyer had obtained possession with the

Requisites of valid tender.

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. But the actual production of the money may be dispensed with by the vendor. The courts, however, have been rigorous in requiring proof of a dispensation with the production of the money. [8]

Waiver of production of the money.

Dickinson *v.* Shee.

§ 1064. In Dickinson *v.* Shee, (*x*) the debtor went to the attorney of the creditor, saying he was ready to pay the balance of the account, £5 5*s.*, and the attorney said he could not take that sum, the claim being above £8. 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."

Leatherdale *v.* Sweepstone.

In Leatherdale *v.* Sweepstone, (*y*) 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 Lord Tenterden, to be no tender.

Thomas *v.* Evans.

In Thomas *v.* Evans, (*z*) the plaintiff called at his attorney's office to receive money, and was told by the clerk that he had £10 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. The clerk did not produce the money. Held, no tender.

Finch *v.* Brook.

In Finch *v.* Brook, (*a*) in the Common Pleas, in 1834, the defendant's attorney called on the plaintiff and said: "I have come to pay you £1 12*s.* 5*d.*, which the defendant owes you," and put his hand in his pocket; whereupon the plaintiff said:

fraudulent intent of not paying for the property, and the seller could reclaim it. Day, J., said that even if there had been no fraud, "if the sellers understood it to be a sale for cash, and the buyers understood it to be in payment of a debt, the minds of the parties did not meet, and there was no agreement or contract of sale." See Allen *v.* Hartfield, 76 Ill. 358, stated *ante* § 348, and see *post* § 1092, note.

8. **Actual Production of the Money is Essential to a Tender, Unless Waived.**—A mere offer to pay is not a tender. Harmon *v.* Magee, 57 Miss. 410, 417; Sheredine *v.* Gaul, 2 Dall. 190; Potts *v.* Plaisted, 30 Mich. 149.

The Debtor need not go out of the State where the Debt was Incurred to make Tender.—Allshouse *v.* Ramsay, 6 Whart. 331; Smith *v.* Smith, 25 Wend. 405; S. C., 2 Hill 351; Tasker *v.* Bartlett, 5 Cush. 359; Gill *v.* Bradley, 21 Minn. 15, 20.

(*x*) 4 Esp. 68.

(*y*) 3 C. & P. 342.

(*z*) 10 East 101.

(*a*) 1 Bing. N. C. 253. See, however, Maber *v.* Maber, L. R., 2 Ex. 153.

"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. Vaughan, J., said that Sir James Mansfield, who had held, in Lockyer *v.* Jones, (*b*) 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, 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." Lockyer *v.* Jones.

§ 1065. 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, (*c*) 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, (*d*) 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 10*s.*, and the creditor said "he would not take it;" Alexander *v.* Brown, (*e*) where the person who made a tender of £29 19*s.* 8*d.* had in his hand two bank-notes twisted up and enclosing 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. Examples of sufficient waivers. Douglas *v.* Patrick. Read *v.* Goldring. Alexander *v.* Brown.

In Harding *v.* Davis, (*f*) the proof was that the defendant, at her own house, offered to pay the plaintiff £10, saying that she would go upstairs 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, the learned Chief Justice adding, Harding *v.* Davis.

(*b*) Peake 239, n.
(*c*) 3 T. R. 683.
(*d*) 2 M. & S. 86.
(*e*) 1 C. & P. 288.
(*f*) 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.

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.'" [9]

Tender must be so made that creditor can examine and count the money.

§ 1066. 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. (*g*) [10]

9. **Waiver of Production of the Money.**—"If the creditor dispenses with the production of the money, or do anything which is equivalent thereto, and the debtor have the money at the time, or is ready to produce it, there is no necessity for producing the money." Maxwell, C. J., in Guthman *v.* Kearn, 8 Neb. 502, 507. In Berry *v.* Nall, 54 Ala. 446, 451, the buyer, who had agreed to pay the price of cotton in greenbacks, appeared ready to make tender, part in greenbacks, and part in gold, which was at a premium. The seller refused to weigh the cotton or to deliver it. It was held that this refusal dispensed with the production of the money, and that a tender in gold, dollar for dollar, would have been sufficient, the provision permitting payment in greenbacks being in the buyer's favor. "The creditor may not only waive the actual production of the money, but the actual possession of it in hand by the debtor." Wagner, J., in Berthold *v.* Reyburn, 61 Mo. 586, 595. In Breed *v.* Hurd, 6 Pick. 356, the buyer's agent offered to pay a bill for hay delivered if the seller would deduct $1 per ton, at the same time making a motion with his hand towards the desk where he kept money, but the seller said he would deduct nothing. On suit for the debt the agent swore that he believed that he had in the desk money enough, but if not he could have obtained it in five minutes. The court said: "To our surprise there are cases very nearly like this where the offer was held to be a valid tender, as in Harding *v.* Davis [see text], where a woman stated that she had the money upstairs. Here the witness said he could get the money in five minutes. We all think this was not a tender. The party must have the money about him, though it is not necessary to count it. We think there was not a tender here, even on the broad cases in England." In Hazard *v.* Loring, 10 Cush. 267, 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 can not receive it." See Blight *v.* Ashley, Peters' C. C. 15. Parker *v.* Pettit, 43 N. J. L. 512, 516, quoted *ante* § 859, note 7; Stokes *v.* Recknagel, 38 N. Y. Super. Ct. 368; Pinney *v.* Jorgenson, 27 Minn. 26. Where tender is a condition precedent, any words or acts by the party entitled to receive payment, showing that it would not be received, such as refusing to fulfill the contract or denying it, will operate as a waiver not only of production of the money, but of any tender at all. See *ante* § 859, notes 6 and 7; Marie *v.* Garrison, 45 N. Y. Super. Ct. 157.

(*g*) Isherwood *v.* Whitmore, 11 M. & W. 347.

10. **The Tender Must be Reasonable.**—Where a tender was made on the street of the amount of over-due mortgages to the holder, who was known to be sick and nearly blind, and who declined to transact the business until the next morning, it was held that the tender was not good. Waldron *v.* Murphy, 40 Mich. 668.

The tender must, at common law, be made in the current coin of the realm, (*h*) or foreign money legally made current by proclamation. (*i*) [11] In what coin tender must be made.

And by "The Coinage Act, 1870," § 4, a tender of payment in coin is declared to be legal :— Coinage Act, 1870. 33 Vict., c. 10.

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 and 4 Will. IV., c. 98, § 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. Bank of England notes.

§ 1067. 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 a silver coin for a debt exceeding 40*s*., and the vendor should refuse to receive payment, alleging any other reason than the *quality* of the tender; as if he should say that more was due to 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. [12] Waiver of objection to the kind of money offered easily inferred.

(*h*) Wade's case, 5 Rep. 114 a.

(*i*) Bac. Abr., Tender, B 2; Wade's case, 5 Rep. 114; Case of Mixed Moneys, Davys, 18.

11. **What Money is a Legal Tender.**—Under the constitution of the United States prohibiting the issuing of bills of credit by a state and intrusting coinage to the general government, the only money available for legal tender is the federal specie currency, or federal paper currency made legal tender by express terms by act of congress. Legal Tender Cases, 12 Wall. 457, overruling Hepburn *v.* Griswold, 8 Wall. 457; Dooley *v.* Smith, 13 Wall. 604; Longworth *v.* Mitchell, 26 Ohio St. 334; Maryland *v.* R. R. Co., 22 Wall. 105; Lovejoy *v.* Stewart, 23 Minn. 94.

12. **Waiver of Objection to the Kind of Money.**—Where the money tendered is in bank-bills generally cur-

Polyglass v. Oliver.

In Polyglass *v.* Oliver, (*k*) 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 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."

Tender of more than is due.

§ 1068. 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. (*l*) A tender, therefore, of £20 9*s.* 6*d.* in bank-notes and silver, proves a plea of tender of £20. (*m*) 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. (*n*)

Tender with demand for change.

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.

Watkins v. Robb.

In Watkins *v.* Robb, (*o*) the proof in support of a plea of tender of £4 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.

Betterbee v. Davis.

So, a tender of a five-pound note in payment of £3 10*s.* with a demand for the change, was held no tender by Le Blanc, J., in Betterbee *v.* Davis, (*p*) the learned judge saying that if

rent and accepted at par in business transactions at the place where offered, the tender will be good unless objection is made at the time to the kind of money. Ward *v.* Smith, 7 Wall. 447, 451; Brown *v.* Dysinger, 1 Rawle 408, 415; Wheeler *v.* Knaggs, 8 Ohio 169, 172. But where the creditor rejects the tender, not knowing that the money offered is not legal tender, he cannot be considered to have waived that objection. Waldron *v.* Murphy, 40 Mich. 668. See Decamp *v.* Feay, 5 S. & R. 523; Cornell *v.* Green, 10 S. & R. 14.

(*k*) 2 Cr. & J. 65. See, also, Jones *v.* Arthur, 8 Dowl. P. C. 442; Caine *v.* Coulson, 1 H. & C. 764; 32 L. J., Ex. 97, *ante* 700.

(*l*) 2 Wade's case (3d resolution), 5 Rep. 115.

(*m*) Dean *v.* James, 4 B. & Ad. 546.

(*n*) Bevans *v.* Rees, 5 M. & W. 306; and see Douglas *v.* Patrick, 3 T. R. 683; Black *v.* Smith, Peake 88.

(*o*) 2 Esp. 711.

(*p*) 3 Camp. 70. See Robinson *v.* Cook, 6 Taunt. 336.

that was good, a tender of a £50,000 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), (*q*) where a tender of £1 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 13*s.* was due. The Court of King's Bench held this a good tender. Tadman *v.* Lubbock.

§ 1069. 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*.[13] No valid tender of part of entire debt.

In Dixon *v.* Clarke, (*r*) 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: Dixon *v.* Clarke.

"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

(*q*) 1 C. & P. 366.

13. **Tender of Part of an Entire Debt.**—Such tender is not available for any purpose if refused. Wright *v.* Behrens, 39 N. J. L. 413. But where the tender was not sufficient in amount, because the buyer did not know the amount paid for freight which he was to refund to the seller, and the seller would not communicate it, such tender was held sufficient. Nelson *v.* Robson, 17 Minn. 284.

(*r*) 5 C. B. 365.

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.

§ 1070. "With respect to the averment 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.*

Cotton *v.* Godwin.

And this is the principle of the decision in Cotton *v.* Godwin. (*s*) 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 (*t*) and Hesketh *v.* Fawcett, (*u*) which appear to overrule Tyler *v.* Bland. (*x*)

"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*.

§ 1071. "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 (*y*) and Poole *v.* Tunbridge. (*z*) 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*,

(*s*) 7 M. & W. 147.
(*t*) 3 Q. B. 915.
(*u*) 11 M. & W. 356.
(*x*) 9 M. & W. 338
(*y*) 8 East 168.
(*z*) 2 M. & W. 223.

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, 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."

This thorough exposition of the subject was followed by the further decision in Hardingham *v.* Allen, (*a*) by the same court, in the same year, deciding that where a demand was made of £1 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.

Hardingham *v.* Allen.

§ 1072. In Searles *v.* Sudgrove, (*b*) the defendant pleaded as to £55 6*s.*, parcel, &c., tender. Plaintiff replied that a larger sum was due at the time of the tender than the account 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 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. II., 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. The defendant was, therefore, allowed to amend on the usual terms.

Searles *v.* Sudgrove.

Tender of balance due, after set-off not allowable.

§ 1073. A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object. Where there is no ambiguity in the language of the debtor, it is a question of law for the court whether his tender was

Tender must be unconditional.

(*a*) 5 C. B. 793.

(*b*) 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.

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 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. (*c*) [14]

Debtor has no right to demand admission that no more is due when making tender.

But may exclude any presumption against himself.

§ 1074. 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 further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due. (*d*) [15]

Sutton *v.* Hawkins.

In Sutton *v.* Hawkins, (*e*) the money was tendered as "all that was due," and this was held bad.

Marquis of Hastings *v.* Thorley.

In the Marquis of Hastings *v.* Thorley, (*f*) 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

(*c*) Eckstein *v.* Reynolds, 7 Ad. & E. 80; Marsden *v.* Goode, 2 C. & K. 133.

14. **A Tender Must be Unconditional.**—Rose *v.* Duncan, 49 Ind. 269; Flake *v.* Nuse, 51 Tex. 98. Where the debtor proved an offer as follows, "I showed him $500 and told him he could have it for his claim," it was held that such an offer was conditional and unavailing as a tender. Tompkins *v.* Batie, 11 Neb. 147. But this seems questionable. It is legitimate for the debtor to state that he regards his tender as the whole amount due, and it is essential that he should state the purpose of offering money. See § 1077. A tender of the amount due upon a note at a bank on condition of surrender of the note is a good tender. Storey *v.* Krewson, 55 Ind. 397. If the money is tendered conditionally the creditor should not accept it unless he assents to the conditions, for if he receives it and is silent he may be presumed to have acquiesced in the conditions. Hall *v.* Holden, 116 Mass. 172, 176; Adams *v.* Helm, 55 Mo. 468, 471. But if the creditor receives the money, protesting that it is not sufficient, and that he will credit it on account, and the debtor does not refuse to deliver it, neither party will be concluded as to the true amount due. Gassett *v.* Andover, 21 Vt. 342, 351.

(*d*) Bowen *v.* Owen, 11 Q. B. 131.

15. **The Debtor Cannot Demand a Release.**—A tender accompanied by a demand for a release is bad unless justified by the express stipulation of the parties. Hepburn *v.* Auld, 1 Cranch 321. But where by statute it is the duty of the creditor to give a release, a demand of such release will not vitiate the tender. Baline *v.* Wamhaugh, 16 Minn. 116.

(*e*) 8 C. & P. 259.

(*f*) Id. 573.

due. The rent claimed by the plaintiff was £23, and the tender was of £21.

In Mitchell *v.* King, (*g*) 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. Mitchell *v.* King.

In Hough *v.* May, (*h*) the tender was in a cheque, in these words: "Pay Messrs. Hough and Co., balance account railing, or bearer, £8 11*s*." This was held no tender, because, as Coleridge, J., put it, "Suppose this cheque 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 cheque professedly given for the then balance," and this condition vitiated the tender. Hough *v.* May.

§ 1075. But in Henwood *v.* Oliver, (*i*) 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.

Henwood *v.* Oliver was followed by Wightman, J., in Bull *v.* Parker, (*k*) in a case where the witness who proved the tender, said: "I offered him £4, and I said I went by the direction of Mr. C. Parker, to pay him £4, 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 Bull *v.* Parker.

(*g*) 6 C. & P. 237.

(*h*) 4 Ad. & E. 954.

(*i*) 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.

(*k*) 1 Q. B. 409.

condition annexed to the offer, as amounted to saying, "unless you accept this money in full discharge, I will not pay it at all."

Bowen v. Owen.

§ 1076. In Bowen *v.* Owen, (*l*) a tenant sent a person to his landlord with a letter, saying, "I have sent with the bearer, T. T., a sum of £26 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 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 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."

[The latest case on this point is Jones *v.* Bridgman, (*m*) where a tender of rent with the words, "Here is your quarter's rent," was held to be good as not imposing any condition on the receipt; and the decision in the Marquis of Hastings *v.* Thorley, *ante* § 1074, was stated to be inconsistent with Bowen *v.* Owen, which was followed.]

Jones v. Bridgman.

Tender with protest that the amount is not due.

§ 1077. 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; (*n*) but this case must now be considered as overruled on this point by Scott *v.* Uxbridge Railway Company; (*o*) in which the Court of Common Pleas adopted and followed the ruling of Pollock, C. B., in Manning *v.* Lunn. (*p*)

Nor is a tender vitiated because the debtor says he considers it all that is due. (*r*)

(*l*) 11 Q. B. 130.
(*m*) 39 L. T. (N. S.) 500.
(*n*) 3 Esp. 91.
(*o*) L. R., 1 C. P. 596; 35 L. J., C. P. 293.
(*p*) 2 C. & K. 13.
(*r*) Robinson *v.* Ferraday, 8 C. & P. 752.

A payment or tender by one of several joint debtors, or to one of several joint creditors, is valid. (*s*)

Whether at common law debtor was entitled to demand receipt.

§ 1078. Whether or not the debtor was entitled at common law to demand a receipt for money tendered seems to be considered an open question.

Cole *v.* Blake.

In Cole *v.* Blake, (*t*) 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. (*u*) And in Laing *v.* Mender, (*v*) where the defendant asked for a *stamped* receipt, Abbott, C. J., said: "A party has no right to say I will pay you the money if you will give me a stamped receipt, but he ought, according to the 43 Geo. III., c. 126, to bring a receipt with him, and require the other party to sign it."

Richardson *v.* Jackson.

§ 1079. But in Richardson *v.* Jackson, (*x*) 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 to 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."

16 and 17 Vict., c. 59, §§ 3, 4.

But now, by statute, (*y*) a stamp of one penny is required on all receipts upon payment of money amounting to £2, 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. (*z*)

§ 1080. [The statutes 16 and 17 Vict., c. 59, §§ 3 and 4, and 43

(*s*) 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.

(*t*) Peake 179.

(*u*) Bunbury 348.

(*v*) 1 C. & P. 257.

(*x*) 8 M. & W. 298.

(*y*) 16 and 17 Vict., c. 59, §§ 3, 4.

(*z*) 43 Geo. III., c. 126, §§ 5, 6.

Stamp Act, 1870.

Geo. III., c. 126, are repealed by the Inland Revenue Repeal Act, 1870 (33 and 34 Vict., c. 99,) and receipt stamps are now regulated by the Stamp Act, 1870 (33 and 34 Vict., c. 97,) §§ 120–123. It is left open whether the person giving or the person taking a receipt is to pay the amount of the stamp, but any person giving any receipt liable to duty, and not duly stamped, is liable to a penalty. This, in practice, throws the obligation upon the creditor.

Receipt by a third party.

As to how far a receipt by a third party is admissible to prove payment, when the liability of the defendant depends upon the plaintiff having paid money to such third party, see The Carmarthen and Cardigan Railway Company *v.* The Manchester and Milford Railway Company. (*a*)]

Jones *v.* Arthur.

In Jones *v.* Arthur, (*b*) 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.

Tender is a bar to action, not merely to damages.

It is now settled by the decision of the Queen's Bench in 1860, in James *v.* Vane, (*c*) overruling Cooch *v.* Maltby, (*d*) and affirming the earlier case of Dixon *v.* Watkin, (*e*) that a tender is a *bar to the action quoad* its amount, and not merely a bar to damages. [16]

Payment by bill or note.

§ 1081. 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

(*a*) L. R., 8 C. P. 685.

(*b*) 8 Dowl. 442.

(*c*) 2 E. & E. 883; 29 L. J., Q. B. 169.

(*d*) 23 L. J., Q. B. 305.

(*e*) 7 M. & W. 214.

16. **Effect of Tender.** — In Gracy *v.* Potts, 4 Bax. 395, the effect of tender was held to be merely to relieve the debtor of subsequent interest and costs. To the same effect see Cornell *v.* Green. 10 S. & R. 14. But the true practice seems to be, where the tender is found sufficient and the money has been paid into court, to give judgment for defendant. The plaintiff can take the money out of court at any time after it is paid in, without prejudice. Pennypacker *v.* Umberger, 22 Penna. 492; Wheeler *v.* Woodward, 66 Penna. 158.

The Tender Must be Kept Good and Followed by Payment into Court on Suit.—Where, after refusal of tender, the creditor changes his mind and requests payment of the amount, it must be paid, or the tender will not avail. Carr *v.* Miner, 92 Ill. 604, 608; Parke *v.* Alten 42 Mich. 482; Dodge *v.* Fearly, 19 Hun 277; Gray *v.* Angier, 62 Ga. 596; Crain *v.* McGoon, 86 Ill. 431; Thayer *v.* Meeker, 86 Ill. 470. The tender, if relied on as a defence, must be specially pleaded and the amount tendered paid into court. Gilkeson *v.* Smith, 15 W. Va. 44; Hegler *v.* Eddy, 53 Cal. 597; Hamlett *v.* Tallman, 30 Ark. 505; Becker *v.* Boon, 61 N. Y. 317.

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 reviving 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. (*f*) [17] The intention to take a bill in absolute payment for

Absolute or conditional.

Presumed conditional, unless contrary intention shown.

(*f*) Goldshede *v.* Cottrell, 2 M. & W. 20.

17. **Payment by Note or Bill.**—The American decisions differ as to the effect of payment by note or bill of exchange. In most of the states and in the federal courts the law is established as in England. In Massachusetts, Maine, Vermont and Indiana such payment is presumptively absolute. See *post* § 1110, note 37. It is universally held that these presumptions arise only in the absence of other evidence as to the intent of the parties. If it appears from circumstances or the terms of the contract that the creditor accepted the bill or note only conditionally, or as security for the debt, the courts will carry out the intent; and if intended as absolute payment, the courts will so treat it. Sheehy *v.* Mandeville, 6 Cranch 253, 264, quoted *infra;* Lightbody *v.* Ontario Bank, 11 Wend. 915; Mooring *v.* Marine Dock, &c., Co., 27 Ala. 254.

Debtor's Own Note for Contemporaneous Debt.—A distinction is recognized between those cases where a note is given for an antecedent debt, and those where a note is given for a contemporaneous debt. Story considers all payments by note as presumptively conditional. Story on Notes, § 104. Parsons says that a note given on a contemporaneous sale is substantially a barter of the note for the goods, that the remedy on the note is more convenient to the creditor, and that there is no sufficient reason for allowing a resort to the original liability. 2 Parsons on Notes and Bills 157. Daniel considers the weight of authority to favor Story, though inclined on principle to the views of Parsons. Daniel on Negotiable Instruments, § 1261.

Payment by Note of a Third Person. Contemporaneous Debt.—Where goods are sold and by the agreement the note of a third person is accepted on delivery of the goods, the fair inference is that the note is taken in absolute payment, the transaction being a barter of the goods for the note. If the seller desires to hold the buyer, the appropriate method is by requiring his endorsement. If the seller accepts a note without endorsement, this fact indicates an intent to take the note in exchange for the goods, and not to hold the buyer. 2 Daniel on Negotiable Instruments, § 1264. In Noel *v.* Murray, 13 N. Y. 167, a note of a third person was given for the price of goods, but not being paid, suit was brought against the buyer for the price. The jury found that the note was taken in payment, the court refusing to charge that the presumption was otherwise. The judgment was sustained. Marvin, J., following Whitbeck *v.* Van Ness, 11 Johns. 409, said that there was no precedent debt. "Where at the time of the sale and delivery of goods, the vendor receives from the vendee the note of a third person for the price, the presumption is that he takes it in payment." This was recognized in Youngs *v.* Stahelin, 34 N. Y. 258, 265, the court, however, in that case holding that the circumstances showed an intent that the debt should not be regarded as paid. In Bayard *v.* Shunk, 1 W. & S. 95, Gibson, C. J., said that if notes "are transferred for a debt contracted at the time, the presumption is they are received in satisfaction of it, but if for a precedent debt, it is that they are received as collateral secur-

ity for it, and in either case it may be rebutted." This was approved in McIntyre *v.* Kennedy, 29 Penna. 448. See Bicknell *v.* Warterman, 5 R. I. 43; Porter *v.* Bedford, 51 Miss. 84; Ford *v.* Mitchell, 15 Wis. 304, 308; Devlin *v.* Chamberlin, 6 Minn. 468; Gibson *v.* Tobey, 53 Barb. 191, 195; Shriver *v.* Keller, 25 Penna. 61; Long *v.* Spruill, 7 Jones 96. In Scruggs *v.* Gass, 8 Yerg. 175, payment in the bills of a bank which had suspended without the knowledge of either party, was held absolute. But see, *contra*, Union Bank *v.* Smiser, 1 Sneed 501, and Weddigen *v.* Boston, &c., Co., 100 Mass. 422, 424, where Foster, J., said: "Even in the case of payment by bank-bills, if the bank had failed before the bills were taken it is not a valid payment." If it appears that the note of a third person is given as a conditional payment and that the buyer is still answerable for the price, this intent will control. Thus, where the buyer who gave notes of a third person in payment, said that if the notes were not paid he would pay them, this was considered to make the payment conditional. The promise, though in form to pay the debt of another, was in fact to pay the buyer's own debt. Allen *v.* Bantel, 2 N. Y. Sup. Ct. (T. & C.) 342. Where the creditor takes the note of an agent for the debt of the principal, knowing of the liability of the principal, he discharges the principal. Perkins *v.* Cady, 111 Mass. 318; Ames, &c., Co. *v.* Tucker, 8 Mo. App. 95. But where the creditor takes the agent's note, not knowing of the agency, he may resort for payment to the principal when disclosed. Lovell *v.* Williams, 125 Mass. 439.

Indorsement by the Debtor.—Where the debtor endorses the note of a third party to his creditor, this is held to show that he gives the note as conditional payment. 2 Daniel on Negotiable Instruments, § 1265; Shriver *v.* Keller, 27 Penna. 61; Monroe *v.* Huff, 5 Den. 369: Butler *v.* Haight, 8 Wend. 535. But see 2 Am. L. Cas. 302, (5th ed.)

Payment of a Precedent Debt by Note or Bill.—The general rule is that a precedent debt is not paid absolutely, either by the debtor's own note or by that of a stranger. 2 Daniel on Negotiable Instruments, § 1260, note. For decisions in support of the contrary doctrine, see *post* § 1110, note 37.

Federal Courts.—In the case of "The Kimball," 3 Wall. 37, 45, Field, J., said: "A promissory note does not discharge the debt for which it is given, unless such be the express agreement of the parties. It only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt." See Peters *v.* Beverly, 10 Pet. 532, 568, approving James *v.* Hackly, 16 Johns. 277. In Sheehy *v.* Mandeville, 6 Cranch 253, the suit was against two partners for goods sold and delivered. One of them pleaded that the other had given his individual note, which was received *in discharge* of the debt. Plaintiff demurred to the plea. Marshall, C. J., said, (p. 264): "That a note without a special contract would not of itself discharge the original cause of action, is not denied." "But the note of one of the parties or of a third person may, by agreement, be received in payment." The plea was therefore sustained.

New Hampshire.—Jaffrey *v.* Cornish, 10 N. H. 505; Foster *v.* Hill, 36 N. H. 526; Johnson *v.* Cleaves, 15 N. H. 332.

Connecticut. — Clark *v.* Savage, 20 Conn. 258; Bill *v.* Porter, 9 Conn. 33; Dougal *v.* Cowles, 5 Day 511.

Rhode Island.—Wilbur *v.* Jernegan, 11 R. I. 113; Nightingale *v.* Chafee, 11 R. I. 609, 617. In the last case, Durfee, C. J., said: "It is settled in this state, by repeated decisions, that giving a note for an antecedent debt does not absolutely pay the debt unless it is given and re-

ceived as payment, and that the burden is upon the debtor to show that it is so given and received." Cites Sweet *v.* James, 2 R. I. 270–293; Wheeler *v.* Schroeder, 4 R. I. 383, 389.

New York.—"It is a well-settled general rule that a promissory note given for an existing indebtedness is evidence merely of that debt, and is not the debt itself; and it is extremely well settled in this state that the taking of a debtor's note does not merge or extinguish the demand for which it is taken." "The operation of such a note is to extend the time of payment until the note becomes due, and if it be not then paid, the creditor may sue upon the original demand, though he must be able to produce at the trial the note for cancellation, or show its loss or destruction. The giving of a receipt in full on taking the note is no discharge, unless the note be paid." Davis, P. J., in Parrott *v.* Colby, 6 Hun 55, 58; affirmed, 71 N. Y. 597. As to the note of a third party, Bronson, C. J., in Vail *v.* Foster, 4 N. Y. 312, said: "Taking the note of a third person for an existing debt is not payment, unless the creditor agrees to receive it in payment." The New York decisions supporting these principles are very numerous. Gregory *v.* Thomas, 20 Wend. 17; Waydell *v.* Luer, 5 Hill 448; Cole *v.* Sackett, 1 Hill 516; Schermerhorn *v.* Lonies, 7 Johns. 313; Tobey *v.* Barber, 5 Johns. 68; S. C., 2 Am. L. Cas. 225; Smith *v.* Ryan, 66 N. Y. 352, 354; Turner *v.* Bank of Fox Lake, 4 Abb. App. Dec. 434; Feldman *v.* Beier, 78 N. Y. 293, 298; Fleischman *v.* Stern, 24 Hun 265, 269. The rule is not changed by renewals of the note. "The giving up of one promise to pay, on taking another from the same party, is but a continuation of the promise, and the giving of further time to perform it. As the first did not pay the debt, the other does not redeem the promise of the first, nor itself pay the debt." Folger, J., in Jagger Iron Co. *v.* Walker, 76 N. Y. 521, 525; National Bank of Newburgh *v.* Bigler, 83 N. Y. 51, 59.

New Jersey—Ayres *v.* Van Liew, 5 N. J. L. 765, 770; Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. 39, 41.

Pennsylvania.—In Hunter *v.* Moul, 98 Penna. 13, 15, where the debt was on book account for goods sold, Mercur, J., said: "The mere acceptance from a debtor, of his own note or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred." See Weakley *v.* Bell, 9 Watts 273; McIntyre *v.* Kennedy, 29 Penna. 448; Brown *v.* Scott, 51 Penna. 357, 363. The same rule applies to the draft of a third party. League *v.* Waring, 85 Penna. 244. See Brown *v.* Olmsted, 50 Cal. 162.

Maryland.—Haines *v.* Pearce, 41 Md. 221, 231; Morrison *v.* Welty, 18 Md. 169, 175; Glenn *v.* Smith, 2 Gill & J. 493, 508; Berry *v.* Griffin, 10 Md. 27, 31.

Virginia.—Lewis *v.* Davisson, 29 Gratt. 216, 226; McCluny *v.* Jackson, 6 Gratt. 96, 106.

West Virginia.—Poole *v.* Rice, 9 W. Va. 73, 76; Feamster *v.* Withrow, 12 W. Va. 611, 644; Dunlap *v.* Shanklin, 10 W. Va. 662.

North Carolina.—Spear *v.* Atkinson, 1 Ired. L. 262; Gordon *v.* Price, 10 Ired. L. 385.

South Carolina.—Watson *v.* Owens, 1 Rich. L. 111; Kelsey *v.* Rosborough, 2 Rich. L. 241, 244; Mars *v.* Conner, 9 S. C. 70; Bank *v.* Bobo, 9 Rich. L. 31.

Florida.—May *v.* Gamble, 14 Fla. 467, 471, following Sheehy *v.* Mandeville, 6 Cranch 253.

Alabama.—Myatts *v.* Bell, 41 Ala. 222, 232; McNeil *v.* Marshall, 42 Ala. 149.

Mississippi.—Guion *v.* Doherty, 43

goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods, (*g*) or "in discharge" of the price. (*h*) Lord Kenyon said, in Stedman *v.* Gooch, (*g*) 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,

Miss. 538; Lear *v.* Friedlander, 45 Miss. 559; Parton *v.* Bedford, 51 Miss. 84; Wadlington *v.* Covert, 51 Miss. 631.

Texas.—McNeil *v.* McCamley, 6 Tex. 163.

Arkansas.—Brugman *v.* McGuire, 32 Ark. 733, 740; Costar *v.* Davies, 8 Ark. 213. A *dictum* to the contrary will be found in Carlton *v.* Buckner, 28 Ark. 66, 68.

Missouri.—McMurray *v.* Taylor, 30 Mo. 263, 267; Howard *v.* Jones, 33 Mo. 583; Appleton *v.* Kennon, 19 Mo. 637, 640; Hughes *v.* Israel, 73 Mo. 538, 548; Leabo *v.* Goode, 67 Mo. 126.

Ohio.—Merrick *v.* Bowry, 4 Ohio St. 60; Sutliff *v.* Atwood, 15 Ohio St. 186, 198; Emerine *v.* O'Brien, 36 Ohio St. 491.

Illinois.—In Archibald *v.* Argall, 53 Ill. 307, goods were sold on credit to a firm which soon after dissolved, a new member taking the place of one partner. The new firm continuing the business, gave their note for the price. The creditor sued the former partners, and the suit was sustained. Walker, J., said: "It is the established doctrine of this court that the mere giving of a note does not, of itself, extinguish a precedent debt, whether it be an account or other demand." And instructions to the jury "that the taking of the notes did not satisfy the account of the old firm, unless it was so agreed by the parties," were held correct. In Walsh *v.* Lennon, 98 Ill. 27, 31, Dickey, C. J., said: "The giving of a note for a debt, whether sealed or unsealed, does not pay or discharge the debt, unless it be agreed that it shall be accepted as payment and satisfaction, and *assumpsit* may be maintained for the debt, if the note be produced on the trial to be canceled." Wilhelm *v.* Schmidt, 84 Ill. 183, 187. Our author supposes that by the law of Illinois payment by note is presumptively settlement, and he cites Morrison *v.* Smith, 81 Ill. 221, where there is a *dictum* to that effect. See *post* § 1110. The cases above cited show that the law in Illinois agrees with that of England.

Michigan.—Case *v.* Sears, 44 Mich. 195; Breitung *v.* Lindauer, 37 Mich. 217; Brown *v.* Dunckel, 46 Mich. 29.

Wisconsin.—Matteson *v.* Ellsworth, 33 Wis. 488; Mehlberg *v.* Tisher, 24 Wis. 607; Paine *v.* Voorhees, 26 Wis. 526; Ford *v.* Mitchell, 15 Wis. 308; Eastman *v.* Porter, 14 Wis. 39, 45; Lindsey *v.* McClelland, 18 Wis. 481, 485.

Iowa—Farwell *v.* Grier, 38 Iowa 83; McLaren *v.* Hall, 26 Iowa 297; Logan *v.* Attix, 7 Iowa 77; Edwards *v.* Trulock, 37 Iowa 244.

Nebraska.—Young *v.* Hibbs, 5 Neb. 433, 437.

California.—In this state the settled rule is that a bill of exchange or note of either the debtor or a third person is presumptively a conditional payment. Brown *v.* Olmsted, 50 Cal. 162; Welch *v.* Allington, 23 Cal. 322; Smith *v.* Owens, 21 Cal. 11.

(*g*) Stedman *v.* Gooch, 1 Esp. 5; Maillard *v.* Duke of Argyle, 6 M. & G. 40.

(*h*) Kemp *v.* Watt, 15 M. & W. 672.

drawn on a person who has no effect of the drawer's in his hands, and who therefore refuses to accept it, in such 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, (*i*) to show that the word "payment" does not necessarily mean payment in satisfaction and discharge. [18]

Payment does not necessarily mean satisfaction and discharge.

§ 1082. 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. (*j*)

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.*, nonpayment at maturity. (*k*)

Is absolute when made but defeasible.

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. (*l*) And in Cowasjee *v.* Thompson, (*m*) where the vendor elected

Where vendor elects to take bill instead of cash, payment absolute.

(*i*) 6 M. & G. 40.

18. **A Receipt may be Explained and Contradicted.**—It is well settled that a receipt, may be explained or even disputed. So where "full satisfaction" or "full payment" is acknowledged, this may be shown to have been by note or other security. Glenn *v.* Smith, 2 G. & J. 493; Hurley *v.* Hollyday, 35 Md. 469, 473; Re Hurst, 1 Flip. C. Ct. 462; Walters *v.* Odorn, 53 Ga. 286; Winans *v.* Hassey, 48 Cal. 634; Smith *v.* Schulenberg, 34 Wis. 41; Brice *v.* Hamilton, 12 S. C. 32; Feldman *v.* Beier, 78 N. Y. 293, 298; Grinnell *v.* Spink, 128 Mass. 25. The receipt may be explained though it is embodied in a written contract. Smith *v.* Holland, 61 N. Y. 635; Texas Mut. Life Ins. Co. *v.* Davidge, 51 Tex. 244.

(*j*) 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. & Jervis 405; Griffiths *v.* Owen, 13 M. & W. 58; James *v.* Williams, 13 M. & W. 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; Gunn *v.* Bolckow, Vaughan & Co., 10 Ch. 491, per Mellish, L. J., at p. 501; Currie Misa, L. R., 10 Ex. 153; *per cur.* at p. 163; Cohen *v.* Hale, 3 Q. B. D. 371, as to payment by a check; Ex parte Willoughby, 16 Ch. D. 604.

(*k*) 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.

(*l*) 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.

(*m*) 5 Moo. P. C. 165.

Cowasjee *v.* Thompson.

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*.

Taking a check is not such an election.

§ 1083. 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. (*n*)

When check not presented in time.

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. (*o*) [19]

(*n*) 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.* Coulson, 1 H. & C. 764; 32 L. J., Ex. 97; and see Cohen *v.* Hale, 3 Q. B. D. 371.

(*o*) Hopkins *v.* Ware, L. R., 4 Ex. 268; Byles on Bills, p. 20, (ed. 1879.)

19. **Payment by Check or Draft.**—Such payment is presumptively conditional upon the honoring of the check, whether the drawer is the debtor or a third person. If the check is good, it is a payment from the time it was given. If dishonored it is no payment. Hunter *v.* Wetsell, 84 N. Y. 549; stated *ante* § 192, note 2, p. 209; Bliss *v.* Shwarts, 65 N. Y. 444, 450; Sweet *v.* Titus, 67 Barb. 327; Thompson *v.* Bank, 82 N. Y. 1; Hall *v.* Barber, 13 N. Y. 566; Bradford *v.* Fox, 38 N. Y. 289; Syracuse, &c., R. R. *v.* Collins, 1 Abb. N. Cas. 47, 49; Turner *v.* Bank of Fox Lake, 4 Abb. App. Dec. 434; McIntyre *v.* Kennedy, 29 Penna, 448, 455. Warriner *v.* People, 74 Ill. 346; Heartt *v.* Rhodes, 66 Ill. 351; Kermeyer *v.* Newby, 14 Kans. 164; Mordis *v.* Kennedy, 23 Kans. 408; Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. 39; Kuhl *v.* Jersey City, 23 N. J. Eq. 84; De Yampert *v.* Brown, 28 Ark. 166; Phillips *v.* Bullard, 58 Ga. 256. By agreement a check may be taken as an absolute payment. Blair *v.* Wilson, 28 Gratt. 165.

Delay to Present a Check.—The effect of payment by check was considered in Hodgson *v.* Barrett, 33 Ohio St. 63, 68, where the above language of our author was quoted and approved. In that case the drawer of the check had not funds to meet it, and it was held that he was not prejudiced by the delay to present it. See Small *v.* Franklin, &c., Co., 99 Mass. 277, 280; Weddigen *v.* Boston, &c., Co., 100 Mass. 422; Syracuse, &c., R. R. *v.* Collins, 1 Abb. N. Cas. 47; Stevens *v.* Park, 73 Ill. 387. In Smith *v.* Miller, 43 N. Y. 171, the creditor received the check of a third party in payment for goods. It would have been paid if presented on the day of its receipt, but the drawer became insolvent the next day, whereupon the check was dishonored. It was held that though the payment was originally conditional, the delay of one day made it absolute. If the delay has not prejudiced the debtor he cannot claim that the conditional payment has become absolute. Jones *v.* Heiliger, 36 Wis. 149.

[The presentment of checks is dealt with by sec. 74 of the new statute 45 and 46 Vict., c. 61 (Bills of Exchange Act, 1882.) Under this section the holder of a check, which is not duly presented, is entitled to stand in the drawer's place as a creditor of the bank, and if the bank fail, to prove against the estate for the amount of the check. What amounts to due presentment of a foreign check was discussed in Heywood *v.* Pickering. (*p*)]

45 and 46 Vict., c. 61, § 74.

Presentment of foreign check.

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 on the security: and the bill or note given in such case may be that of the buyer himself, (*q*) or that of a third person, on which the buyer has endorsed his name. (*r*)

When bill or note is taken in absolute payment, buyer no longer owes the price of the goods.

§ 1084. But although a bill or note be taken only as conditional payment, yet as it is *prima 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.[20] In Price *v.* Price, (*s*) 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 endorsed 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 endorsed away,

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.

(*p*) L. R., 9 Q. B. 428.

(*q*) Sibree *v.* Tripp, 15 M. & W. 23; Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J., Ex. 140.

(*r*) Sard *v.* Rhodes, 1 M. & W. 153; Brown *v.* Kewley, 2 B. & B. 518; Camidge *v.* Allenby, 6 B. & C. 381; Lewis *v.* Lyster, 2 C. M. & R. 704.

20. **The Vendor must Account for the Check or Note Received before he can Recover the Price.**—Unless the note be accounted for it will be regarded as payment. Morrison *v.* Smith, 81 Ill. 221; Walsh *v.* Lennon, 98 Ill. 27, 31; McMurray *v.* Taylor, 30 Mo. 263; Parrott *v.* Colby, 6 Hun 55, affirmed 71 N. Y. 597; stated *ante* § 1081, note 17. This principle will be found recognized in nearly all the cases cited *ante* note 17.

(*s*) 16 M. & W. 232.

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; (*t*) but *secus*, if it had been the note of a third person.

§ 1085. 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, (*u*) 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 agent, who had received the buyer's notes in payment, discounted them with the agent's banker, giving his own endorsement. The vendor had not endorsed 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.

Reason why vendor must account for the security.

Bunney *v.* Poyntz.

Vendor who has negotiated bill without endorsing it converts conditional into absolute payment.

§ 1086. But where the vendor had endorsed the note received on paying it away, it was held, in Miles *v.* Gorton, (*x*) that on the bankruptcy of the buyer, his lien of unpaid vendor revived. The learned author of Smith's Mercantile Law (*y*) observes of this case, with what seems great propriety, that although the vendor was responsible for the bill he had endorsed 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. (*z*)

Miles *v.* Gorton.

Remarks on this case.

§ 1087. 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

Where bill or note given by buyer is not his own, and is not endorsed by him.

(*t*) 4 M. & G. 804.
(*u*) 4 B. & Ad. 568.
(*x*) 2 C. & M. 504.
(*y*) Page 541, (ed. 1877.)
(*z*) Belshaw *v.* Bush, 11 C. B. 191; 22 L. J., C. P. 24.

the dishonor of it in an action against the buyer for the price; (*a*) 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.

Vendor must show due diligence in collecting it;

Or buyer will be discharged from payment of price.

§ 1088. The leading case on this subject is Camidge *v.* Allenby. (*b*) The buyer gave the vendor in payment for goods sold, at York, on Saturday, the 10th of December, country bank-notes of a bank at 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 of 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, (*c*) or that they were received as negotiable instruments, in which case the vendor had discharged the buyer by his laches. (*d*)

Camidge *v.* Allenby.

§ 1089. In Smith *v.* Mercer, (*e*) the buyer gave a bill drawn by Barned's Bank in Liverpool, on London, on the 20th of February. The vendor put it in circulation, and the bill was not presented for acceptance in London till the 23d of April, when it was dishonored, Barned's Bank having failed on the 19th of 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 endorsed the bill, and was there-

Smith *v.* Mercer.

(*a*) Price *v.* Price, 16 M. & W. 232.

(*b*) 6 B. & C. 373.

(*c*) See, on this point, Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J., Ex. 140.

(*d*) See, also, as to laches, Bishop *v.* Rowe, 3 M. & S. 362; Bridges *v.* Berry, 3 Taunt. 130; Soward *v.* Palmer, 8 Taunt. 277.

(*e*) 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; and Hitchcock *v.* Humfrey, 5 M. & G. 563.

fore entitled to notice as an endorser, in default whereof, he was discharged. [21]

Country bank-notes.

But in the 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. (*f*)

Vendor cannot recover price if he has lost the bill given in conditional payment;

§ 1090. In Crowe *v.* Clay, (*g*) in the Exchequer Chamber, it was held, reversing the judgment of the Exchequer of Pleas, (*h*) that the vendor could not recover the price of the goods sold when he had lost the acceptance given by the buyer, and could not return it. Of course if the lost bill were afterwards found, the right would revive. (*i*)

Or if he has altered the bill given to him.

In Alderson *v.* Langdale, (*k*) 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, (*l*) notwithstanding the alteration. [22]

But where buyer loses no recourse on antecedent parties by the alteration, vendor may recover price.

21. **One who takes the Note of a Stranger for a Debt must use Diligence to Collect it.**—Whether notice to the debtor of dishonor is necessary where the note of a third person, not endorsed by the debtor, is given by him to the creditor, was considered in Hunter *v.* Moul, 98 Penna. 13, where Mercur, J., said: "The law is clearly stated in 2 Parsons on Bills 184, where it is said that if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper, it is not even necessary to give him notice thereof as an endorser, but the debtor may show in defence any injury he has sustained by the actual laches of the creditor." In Mehlberg *v.* Tisher, 24 Wis. 607, Dixon, C. J., said that taking a bill of exchange for a debt "is absolute payment, if the holder, through negligence, fails to take proper steps to obtain payment, or if not paid, to charge the drawer with liability." See Allan *v.* Eldred, 50 Wis. 132, 135.

(*f*) Robson *v.* Oliver, 10 Q. B. 104; Rogers *v.* Langford, 1 C. & M. 637.

(*g*) 9 Ex. 604.

(*h*) 8 Ex. 295.

(*i*) Dent *v.* Dunn, 3 Camp. 296.

(*k*) 3 B. & Ad. 661.

(*l*) Atkinson *v.* Handon, 2 Ad. & E. 628.

22. **Is Alteration of a Note by the Creditor an Acceptance of it as Payment?**—Alderson *v.* Langdale was

§ 1091. It was held, in Rolt *v.* Watson, (*m*) 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 endorsement by him, and could not therefore be negotiated. But this case was overruled in Ramuz *v.* Crowe, (*n*) 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. (*o*) [But although the seller cannot recover on the original contract, when he has lost the buyer's bill of exchange for the price, he may bring an action upon the lost bill and recover from the buyer the amount for which it was

Rolt *v.* Watson.

Overruled in Ramuz *v.* Crowe.

Vendor may bring an action on the lost bill.

cited and followed in Sykes *v.* Gerber, 98 Penna. 179, 183. In that case the note of the debtor was given for a debt, but a suit upon the note failed because of an alteration by the creditor. Thereupon a second suit was brought upon the original debt. Trunkey, J., said: "By vitiating the note given for his labor claim, the plaintiff caused it to operate as a satisfaction of the debt, and he cannot recover in a second action against the defendant." As the note was that of the debtor, and he lost no remedy over by reason of the alteration, this decision appears to rest on no sound foundation. It would seem that the attention of the court was not called to the case of Atkinson *v.* Handon, cited by our author, which case, and not Alderson *v.* Langdale, was the true precedent. But Sykes *v.* Gerber was decided mainly on the ground that the debt might have been proved under the pleadings in the first suit, and that therefore the matter was *res judicata*. In Merrick *v.* Boury, 4 Ohio St. 60, the note of the buyer was given for a bill of goods. The seller wrote acknowledging receipt of the note and adding: "As you are aware that our custom is to make all notes due us payable with difference of exchange on Baltimore, we have taken the liberty to add this small item to said note, not doubting it will fully meet your approval." In a suit on the original debt, it was set up that the alteration of the note not only destroyed it, but also the original cause of action. Thurman, C. J., reviewed the cases, distinguished Alderson *v.* Langsdale, because there antecedent parties were released, approved and followed Atkinson *v.* Handon, cited by our author *supra*, and Clute *v.* Small, 17 Wend. 238, saying: "It is difficult to perceive how the destruction without fraud of a mere security given by the debtor himself, and the destruction of what can in no event prejudice him, can operate to discharge the precedent debt." See, also, to the same effect, Matteson *v.* Ellsworth, 33 Wis. 488, 501; *contra*, Martendale *v.* Follett, 1 N. H. 95; Smith *v.* Mace, 44 N. H. 553.

(*m*) 4 Bing. 273.

(*n*) 1 Ex 167; and see Hansard *v.* Robinson, 7 B. & C. 90.

(*o*) 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.

Bills of Exchange Act, 1882, §§ 69, 70.

drawn, on providing an indemnity against any claims that may be made in respect of the bill. And now, when the seller has lost a bill of exchange before it is overdue, he will be entitled, on giving security against any claims in respect of the lost bill, to insist upon the drawer's giving him a duplicate bill. (*p*)]

§ 1092. If a bill or note be endorsed, 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. (*q*)

Where bill is given as collateral security, vendor's duty.

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 proceeded 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. (*r*) [23]

Where buyer in a sale for cash gave vendor his own dishonored note.

§ 1093. 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. (*s*) 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, (*t*) and in guardians of Lich-

Where bills on which the buyer is not to be responsible are given for the price.

Where forged

(*p*) 45 and 46 Vict., c. 61, §§ 69, 70, (Bills of Exchange Act, 1882.)

(*q*) Peacock *v.* Pursell, 14 C. B. (N. S.) 728; 32 L. J., C. P. 266.

(*r*) Mayer *v.* Nyas, 1 Bing. 311.

23. **Tender of the Seller's Dishonored Paper in Payment of Price.** —An agreement to sell implies in the absence of any provision to the contrary, that the price will be payable in *money*. See *ante* § 2. Therefore a tender of the seller's own over-due notes is not the payment which the law requires. If the seller sues for the price the buyer may avail himself of the notes by way of set-off. But if the sale is for cash on delivery, the seller may refuse the notes and may rescind the sale, if the cash is not tendered. See Allen *v.* Hartfield, 76 Ill. 358, stated *ante* § 348. Wilmarth *v.* Mountford, 4 Wash. C. C. 79; Barker *v.* Walbridge, 14 Minn. 469. See *ante* § 1063, note 7.

(*s*) 3 Camp. 352.

(*t*) 6 B. & C. 373.

field *v.* Green. (*u*) 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 seller would have the right to rescind the sale for failure of consideration, as explained in the chapter on that subject. (*v*) [24] And if the securities, though genuine, were known to the buyer to be worthless when he passed them, his conduct

securities are given in payment.

Securities known by the buyer to be worthless.

(*u*) 1 H. & N. 884; 29 L. J., Ex. 140. And see Fydell *v.* Clark, 1 Esp. 447.

(*v*) *Ante* Book III., Ch. 1.

24. **Payment in Forged or Counterfeit Paper.**—In Emerine *v.* O'Brien, 36 Ohio St. 491, 496, Boynton, C. J., said: "No principle is better settled or rests upon more solid reason than that a forged note delivered in payment does not operate as a satisfaction or extinguishment of an antecedent debt or demand." Goodrick *v.* Tracy, 43 Vt. 314; Ritter *v.* Singmaster, 73 Penna. 400; Eagle Bank *v.* Smith, 5 Conn. 71.

Forged Paper must be Promptly Returned.—But in Atwood *v.* Cornwall, 28 Mich. 336, 342, it was held after full discussion that one who received a counterfeit bill must be diligent to ascertain whether it is valid. In that case, the creditor receiving the bill carried it for five months before learning that it was counterfeit, and the delay was held too great to permit him then to return it. Campbell, C. J., said: "There is much force in the doctrine which requires a party to be vigilant before taking bad money. That is the only rule likely to prevent its circulation. A person who takes it without dispute and examines it afterwards, if he is able to remember from whom he took it, and is allowed to recover back the amount, may save himself, but will usually subject an equally innocent party to loss. And it is also manifest that if he is ready to testify positively from whom he received it, his adversary cannot generally be as certain whether or no he paid it out, and cannot, by his own oath alone, even if he is certain, convict a false witness of perjury. It will never do, in laying down rules, to overlook the consequences." Atwood *v.* Cornwall was approved and followed in Wingate *v.* Neidlinger, 50 Ind. 520, 526, where the counterfeit bill was kept six months before its character was ascertained; in Samuels *v.* King, 50 Ind. 527, where the delay was forty-five days, and in Bank *v.* Stevenson, 51 Ind. 594, where the bill was offered back, but the evidence did not show when.

Payment in Genuine but Worthless Paper.—In general, such payment releases no previous liability. There is a failure of consideration which warrants the avoidance of the transaction. See *ante* § 619. This rule is subject to an exception already noted where the person receiving such paper gets what he bargained for, though it proves worthless. See *ante* § 620. Bicknall *v.* Waterman, *infra*. Where notes tendered in payment are those of one who became insolvent after the contract to take them for the price was made but before delivery of the goods, in such case there is a failure of consideration; and the seller may refuse such notes. Benedict *v.* Field, 16 N. Y. 595; Roget *v.* Merritt, 2 Caines 117. But see, *contra*, Bicknall *v.* Waterman, 5 R. I. 43, 49, where a distinction is made between the case where the note to be given is that of the buyer and the case where the note is an existing note of a third person. It was held that the insolvency

would be deemed fraudulent, (*x*) and the seller would be entitled to rescind the sale, and bring trover for the goods, as shown in the chapter on Fraudulent Sales. (*y*)

Sale for bills or for approved bills.

Hodgson *v.* Davies.

§ 1094. In Hodgson *v.* Davies, (*z*) Lord Ellenborough held, 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.

2nd. 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.

3rd. That an *approved bill* means a bill to which no reasonable objection could be made, and which ought to be approved.

Payment to agents.

Who are agents to receive prices.

Factors are.

Brokers, not.

§ 1095. 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. Thus, a factor is an agent of a general character, entitled to receive payment and give discharge of the price; (*a*) but a broker is not, for he is not intrusted with the possession

of such third person after the contract and before delivery of the goods would not warrant a rescission by the seller. This case goes on the theory that the note given for a contemporaneous debt was to be regarded as absolute payment, and that the risk of insolvency of the maker of the note was taken by the seller of the goods when he agreed to take the note. Taking the note of a married woman for her husband's debt is not payment in Indiana, such note being void. Little *v.* American, &c., Co., 67 Ind. 67. A check or draft on a bank where the drawer has no funds is fraudulent, and no payment. Thayer *v.* Peck, 93 Ill. 357; Warriner *v.* People, 74 Ill. 346. See *ante* § 1083, note 19 Payment in a note void for usury does not destroy the antecedent right of action. Cook *v.* Barnes, 36 N. Y. 520; Gerwig *v.* Sitterly, 56 N. Y. 214. In Tennessee, however, it is held that one who takes genuine current bank-notes which both parties believe to be good, but which are in fact worthless because of the failure of the bank, must bear the loss. Ware *v.* Street, 2 Head 609; Scruggs *v.* Gass, 8 Yerg. 175. Payments accepted in confederate notes are good, and the money cannot be collected over again. Piegzar *v.* Twohig, 37 Tex. 225; Douglass *v.* Neil, 7 Heisk. 437, 443.

(*x*) 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.

(*y*) *Ante* § 648, *et seq.*

(*z*) 2 Camp. 530.

(*a*) Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

of the goods. (*b*) [25] In Kaye *v.* Brett, (*c*) 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." Shopman.

(*b*) Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassel, 1 Stark. 233.

25. **What Agents are authorized to receive Payment. Agents intrusted with the Goods.**—Where an agent is authorized to sell and is intrusted with the goods, he has an implied authority to receive payment. See *ante* § 241, note 39. Butler *v.* Dorman, 68 Mo. 298; Sumner *v.* Sands, 51 Mo. 89; Rice *v.* Groffman, 56 Mo. 434; Seiple *v.* Irwin, 30 Penna. 513; Law *v.* Stokes, 32 N. J. L. 249; Higgins *v.* Moore, 34 N. Y. 418. In Whirton *v.* Spring, 74 N. Y. 169, 173, where a ship was the subject of sale, Earl, J., said: "An agent authorized to sell personal property, which he has in his possession and can deliver, must, in the absence of any known limitation upon his authority, be authorized to receive the price." But it was held that no authority was implied to receive payment before it was due.

Agents not Intrusted with the Goods.—Agents who are merely employed to sell, and who are not entrusted with the custody of the goods, have no implied authority to receive payment. Such agents are canvassers, or others employed to solicit orders, agents authorized to sell by sample, and brokers. Abrahams *v.* Weiller, 87 Ill. 179; Clark *v.* Smith, 88 Ill. 298; Cupples *v.* Whelan, 61 Mo. 583; Butler *v.* Dorman, 68 Mo. 298; Seiple *v.* Irwin, 30 Penna. 513; Law *v.* Stokes, 32 N. J. L. 249; Higgins *v.* Moore, 34 N. Y. 417; Harrison *v.* Ross 44 Super. Ct. 230, 236. But see Putnam *v.* French, 53 Vt. 402. This case, where payment to a traveling salesman not entrusted with goods was held good, can, perhaps, be reconciled with those above cited, on the ground that the custom of trade was to pay such salesmen, and that the seller did not disaffirm the whole contract when they learned that the agreement was to pay to the agent. Mere agency to sell was held to imply agency to receive payment in Hoskins *v.* Johnson, 5 Sneed 469, and Collins *v.* Newton, 7 Bax. 269. Authority to an agent to receive payment may be implied from other circumstances than mere agency to sell. Thus, where the principal sent to his selling agent a bill to be presented to the buyer, this was held to warrant the buyer to pay to the agent. Adams *v.* Humphreys, 54 Ga. 496. Where an agent to sell safes took an old one in part payment, and the principal accepted the safe, it was held that the debtor was warranted in paying the residue of the price to the agent in the absence of notice to the contrary. Harris *v.* Simmerman, 81 Ill. 413. Other acts holding out an agent as having authority to receive payment are illustrated in the following cases: Howe Machine Co. *v.* Ballweg, 89 Ill. 318; Uelrich *v.* McCormick, 66 Ind. 243; Packer *v.* Locomotive Works, 122 Mass. 484. An agent to sell may give credit unless the custom of the trade is to sell for cash. White *v.* Fuller, 67 Barb. 267. If payment is made to one without authority to receive it for the creditor, the receiver becomes the agent of the debtor to make the payment to the creditor. O'Conner *v.* Arnold, 53 Ind. 203; King *v.* Paterson, &c., R. R., 29 N. J. L. 504. The right to money paid to such unauthorized agent does not vest in the creditor until he has ratified the act of the agent. Strayhorn *v.* Webb, 2 Jones L. 199.

(*c*) 5 Ex. 269; Jackson *v.* Jacob, 5 Scott 79.

Person with apparent authority.

Barrett *v.* Deere.

In Barrett *v.* Deere, (*d*) Lord Tenterden held, that payment to a person sitting in a counting-room, and appearing to be entrusted with the conduct of the business, is a good payment; and the same learned judge held a tender under similar circumstances to be valid. (*e*)

[In Finch *v.* Boning (*f*) a tender to a clerk in a solicitor's office of a debt due to the solicitor was held to be a good tender, and by Lord Coleridge, C. J., that the clerk's refusal to receive the money, on the ground that he had "no instructions" in the matter, did not amount to a disclaimer of his authority to receive it.]

Finch *v.* Boning

§ 1096. An auctioneer employed to sell goods in his possession 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 such case a payment to the auctioneer would not bind the vendor; (*g*) 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.

Auctioneers.

§ 1097. 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. (*h*) [But the plea of payment to the wife, which was held to be bad in Offley *v.* Clay, would, since the Married Women's Property Acts, be a good defence in an action by the husband. Under the provisions of those statutes the earnings of a married woman are made her separate property, and her receipt alone is a good discharge for the same. (*i*)]

A wife.

§ 1098. 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; (*j*) but where the agent has himself an interest in the sale, as for example, a factor or

Purchaser from agent cannot pay principal so as to defeat agent's lien.

(*d*) M. & M. 200.

(*e*) Willmott *v.* Smith, M. & M. 238.

(*f*) 4 C. P. D. 143; and see Bingham *v.* Allport, 1 Nev. & M. 398.

(*g*) 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.

(*h*) Offley *v.* Clay, 2 M. & G. 172.

(*i*) 33 and 34 Vict., c. 93, § 1, (Married Women's Property Act, 1870,) and 45 and 46 Vict., c. 75, § 2, (Married Women's Property Act, 1882.)

(*j*) Per Lord Abinger, in Sykes *v.* Giles, 5 M. & W. 645.

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. (*k*)

§ 1099. In Catterall *v.* Hindle, (*l*) 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 *prima facie* no authority to receive payment, otherwise than in money, according to the usual course of business, has been well established; 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: see the judgment of Abbott, C. J., Russell *v.* Bangley, 4 B. & Ad. 398; Todd *v.* Reid, 4 B. & Ad. 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. It has also been held by this court, in the case of Underwood *v.* Nicholls, (*m*) 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." * * * 26

Payment to agent must be in money in usual course of business.

(*k*) 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, Id. 243, are reviewed. See, also, Grice *v.* Kendrick, L. R., 5 Q. B. 340.

(*l*) 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.

(*m*) 17 C. B. 239; 25 L. J., C. P. 79.

26. **Payment to an Agent must be in Money.**—This is the general principle in the absence of express authority to the agent to receive payment in something else than money. See *ante* § 1063, note 7, and § 1092, note 23; Reynolds *v.* Ferree, 86 Ill. 570; Trudo *v.* Anderson, 10 Mich. 357, 367; Burger *v.* Limback, 42 Mich. 162; Wheeler, &c., Co. *v.* Givan, 65 Mo. 89; Mudgett *v.* Day, 12 Cal. 139; Scoby *v.* Woods, 3 Bax. 66; McCulloch *v.* McKee, 16 Penna. 289, 294; Drain *v.* Doggett, 41 Iowa 682; Aultman *v.* Lee, 43 Iowa 404; Kendall *v.* Wade, 5 La. Ann. 157. The agent, in the absence of special restriction, will be authorized to receive any money generally current. Rodgers

v. Bass, 46 Tex. 505. A general agent to collect and settle debts may receive property in settlement. McLaughlin *v.* Blount, 61 Ga. 168. But such agent cannot buy property of the debtor and thereby create a debt against his principal. Pollock *v.* Cohen, 32 Ohio St. 514. Power to receive payment of the whole of a debt includes power to receive part payment. Whelan *v.* Reilley, 61 Mo. 565.

Payment by Discharging Agent's Private Debt does not Bind the Principal.—Such payment is on its face an appropriation by the agent to his private use of the property of his principal, and the creditor of the agent will not be allowed to collect his debt in such manner without the clearest evidence of the principal's authority. McCormick *v.* Keith, 8 Neb. 142; Merchants' Mut. Ins. Co. *v.* Excelsior Ins. Co., 4 Mo. App. 578; Stewart *v.* Woodward, 50 Vt. 78; Neuendorff *v.* World Ins. Co., 69 N. Y. 389; Wheeler, &c., Co. *v.* Givan, 65 Mo. 89; Benney *v.* Rhodes, 18 Mo. 147; Aultman *v.* Lee, 43 Iowa 404; Holton *v.* Smith, 7 N. H. 446. Under this head may be classed the case of Whiton *v.* Spring, 74 N. Y. 169, 173, where payment was made to an agent to sell a ship by one intending to buy it, in anticipation of the purchase which was afterwards effected. The court held that the agency implied from possession of the ship with power to sell, was to receive payment upon the sale, that the money advanced to him before sale was in effect a loan to him, and could not be deducted from the price which became due under the contract of sale afterwards made. As to the power of a factor who has made advances upon goods to pledge or sell them for his own debt, see *ante* § 19, *et seq.* Blair *v.* Childs, 10 Heisk. 199; Merchants' Bank *v.* Trenholm, 12 Heisk. 520; Cotton *v.* Hiller, 52 Miss. 7; Brown *v.* Combs, 63 N. Y. 598.

Authority to Receive Payment Does not Import Power to Release or Exchange any Security for the Debt on Part Payment.—McHany *v.* Schenck, 88 Ill. 357; Herring *v.* Farrell, 74 N. C. 588. Nor to extend the time for payment. Gerrish *v.* Maher, 70 Ill. 470; Ritch *v.* Smith, 82 N. Y. 627. Nor to assign the debt or any security for the debt paid, nor to make a valid agreement for such assignment. Stonington, &c., Bank *v.* Davis, 14 N. J. Eq. 286.

Payment by an Agent.—An agent authorized to buy and sell timber, transact business and employ men, has power to pay men employed by him, in lumber. Taylor *v.* Labeaume, 14 Mo. 572; 17 Mo. 338. See Tappan *v.* Bailey, 4 Metc. 529. But an agent to buy is not authorized to pay in advance of delivery. Godman *v.* Meixsel, 53 Ind. 11. A clerk in a retail store has no power to deliver goods in payment of a debt of his employer. Nash *v.* Drew, 5 Cush. 422; Lee *v.* Tingee, 7 Md. 215; Hampton *v.* Matthews, 14 Penna. 105.

Ratification.—If the seller ratifies the act of an unauthorized agent in making sale, he will also ratify his act in receiving payment. He cannot avail himself of part of the unauthorized act and repudiate the rest. Dalton *v.* Hamilton, 1 Hannay (N. B.) 422; stated *ante* § 660, note 19. See Carson *v.* Cummings, 69 Mo. 325; Waterson *v.* Rogers, 21 Kan. 529; Pollock *v.* Cohen, 32 Ohio St. 514; Ogden *v.* Marchand, 29 La. Ann. 61. Ratification to bind the principal, must be with knowledge of all material facts. Bannon *v.* Warfield, 42 Md. 22; Ritch *v.* Smith, 82 N. Y. 627. Where an agent makes a contract partly within his authority and partly in excess of it, it would seem that the principal may reject the unauthorized part and adopt the rest if severable. So where a clerk in a store sold goods, and agreed at the same time to take back damaged goods previously sold, it was held that a suit for the price by the principal did not ratify the agreement to take back the damaged goods. Carew *v.* Lillienthall, 50 Ala. 44.

"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, (*n*) receives an additional consideration for extra risk incurred, but it is not thereby relieved from any of the obligations of an ordinary agent as to receiving payments on account of his principal." (*o*)

Del credere commission does not change agent's authority in this respect.

§ 1100. In Williams *v.* Evans, (*p*) 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 the 2d of 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 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 7*s.* on the 5th of 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 7*s.*, the auctioneeer 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

Williams *v.* Evans.

Auctioneer has no authority to receive an acceptance as cash.

Semble, secus as to check.

Death of the Principal Revokes an Agency to Receive Payment.—This is the rule except where the agency is coupled with an interest. See *ante* § 305, note 21. Clayton *v.* Merritt, 52 Miss. 353.

(*n*) 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 guarantee." Disapproval was expressed by his Lordship of the *dicta* in Grove *v.* Dubois, 1 T. R. 112, and in Houghton *v.* Matthews, 3 Bos. & P. 489. See, also, Story on Agency, § 33, p. 36, (ed. 1882); Hornby *v.* Lucy, 6 M. & S. 166; Couturier *v.* Hastie, 8 Ex. 40; Ex parte White, 6 Ch. 397; S. C., in H. of L., 21 W. R. 465.

(*o*) 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; Pierson *v.* Scott, 47 L. J., Ch. 705; 26 W. R. 796; Story on Agency, § 98. As to the evidence required of an agent's authority to take a bill in payment, see Hogarth *v.* Wherley, L. R., 10 C. P. 630.

(*p*) L. R., 1 Q. B. 352; 35 L. J., Q. B. 111.

to be so: in accordance with the *dictum* of Holt, C. J., in Thorold *v.* Smith. (*q*)

Agent in possession representing himself as owner.

Ramazotti *v.* Bowring.

§ 1101. In Ramazotti *v.* Bowring, (*r*) the facts were that the plaintiff in an action of debt for wine and spirits supplied to the defendants, 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 defendants. 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 defendants that the business was his own, and had agreed to furnish the goods to the defendants in part payment of a debt due by Nixon to the defendants. The goods were receipted for as follows:—

18th October, 1858.

Mr. Bowring:—Please receive twelve bottles Martell's brandy.

R. A. ARUNDELL.

From the Continental Wine Company. J. 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 Sergeant left to the jury the question whether Nixon or the plaintiff was the owner of the business, telling them that if Nixonwas 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

(*q*) 11 Mod. 87. And see, on this point, Bridges *v.* Garrett, L. R., 4 C. P. 451.

(*r*) 7 C. B. (N. S.) 851; 29 L. J., C. P. 580; reversed in Ex. Ch., L. R., 5 C. P. 30.

in trover for the tort, but that in an action on the contract, he was bound to adopt the whole contract. (*s*) [27]

§ 1102. In Pratt *v.* Willey, (*t*) 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 ticket 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.

Pratt *v.* Willey.

§ 1103. 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. [28] 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 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

Appropriation of payments.

Buyer has the right to make the appropriation.

(*s*) See, also, Semenza *v.* Brinsley, 18 C. B. (N. S.) 467; 34 L. J., C. P. 161; Drakeford *v.* Piercy, 7 B. & S. 515; Ex parte Dixon, 4 Ch. D. 133, C. A.

27. **Payment to an Agent Representing Himself as Owner.**—Where the principal permits his agent to hold himself out as owner, or ratifies a contract in which the agent has so represented himself, the principal takes only his agent's rights and remedies, and the other party may set off against the principal any claims he may have against the agent. Frame *v.* William Penn Coal Co., 97 Penna. 309, 312; Eclipse Windmill Co. *v.* Thorson, 46 Iowa 181; Peel *v.* Shepherd, 58 Ga. 365; Taintor *v.* Prendergast, 6 Hill 72, quoted *ante* § 237, note 37; Pratt *v.* Collins, 20 Hun 126; Putnam *v.* French, 53 Vt. 402.

(*t*) 2 C. & P. 350.

28. **The Debtor's Appropriation of a Payment Controls.**—In Jones *v.* United States, 7 How. 681, 688, Daniel, J., said: "In the general proposition upon this subject, all courts agree. It is this, that the party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent, the law must decide." United States *v.* January, 7 Cranch 572, 574; Mayor of Alexandria *v.* Patten, 4 Cranch 317; Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226, 234; Lee *v.* Early, 44 Md. 80, 93; Hansen *v.* Rounsavell, 74 Ill. 238; Stewart *v.* Hopkins, 30 Ohio St. 502, 540; Gaston *v.* Barney, 11 Ohio St. 506; Pennypacker *v.* Umberger, 22 Penna. 492; Jamison *v.* Collins, 83 Penna. 359; Whitaker *v.* Groover, 54 Ga. 174; Jones *v.* Williams, 39 Wis. 300.

actually receive it, for the law regards what he *does*, not what he *says*. (*u*) [29] 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. (*x*) [30]

Money received by creditor on account of debtor without debtor's knowledge.

§ 1104. The debtor's election of the debt to which he applies a payment may be shown otherwise than by express words. [31] A payment of the exact amount of one of several

Appropriation by debtor may be shown

(*u*) 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; and 6 H. L. C. 672; Waller *v.* Lacy, 1 M. & G. 54; Jones *v.* Gretton, 8 Ex. 773.

29. Stewart *v.* Hopkins, 30 Ohio St. 502, 540; Pennypacker *v.* Umberger, 22 Penna. 492.

(*x*) Waller *v.* Lacy, 1 M. & G. 54.

30. The creditor can appropriate only where the debtor has had an opportunity to do so and has neglected to avail himself of it. Jones *v.* Williams, 39 Wis. 300, 307; Jones *v.* Benedict, 83 N. Y. 79, 86.

31. **The Debtor's Appropriation of a Payment May be Implied From Circumstances.**—In Taylor *v.* Sandiford, 7 Wheat. 13, 20, Marshall, C. J., said: "A person owing money under distinct contracts has undoubtedly a right to apply his payments to whichever debt he may choose; and although prudence might suggest an express direction of the application of his payments at the time of their being made, yet there may be cases in which this power would be completely exercised without any express direction given at the time. A direction may be evidenced by circumstances as well as by words. A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would, we think, be such a circumstance." In Adams Express Co. *v.* Black, 62 Ind. 128, 135, an agent of the company incurred two debts, one of which the company admitted as their own, the other of which they repudiated as the private debt of their agent. They sent a sum of money exactly equal to the debt admitted by them and in excess of the other debt. The creditor undertook to apply it in payment of the disputed debt, and sued the company for the balance of the debt admitted by them. The judge charged the jury that in the absence of *express* application by the debtor, the creditor might make the application, but this was held error on appeal, and Hawk, J., said that the circumstances might well be considered by the jury to show an intent by the debtor to apply the payment on the debt which it would exactly pay, and if such intent did appear, the creditor would be bound by it. Where a creditor holds security for one of several debts, he must apply the proceeds to that debt for which the security was given. Avera *v.* McNeill, 77 N. C. 50; Suter *v.* Ives, 47 Md. 520; Levystein *v.* Whitman, 59 Ala. 345, 346; Bennett *v.* Austin, 81 N. Y. 308, 332. The debtor loses the right to make the application if he does not exercise it at the time of payment. Bell *v.* Radcliff, 32 Ark. 645, 665; Primrose *v.* Anderson, 24 Penna. 215; Bank of Newburgh *v.* Bigler, 83 N. Y. 51, 63, 64.

debts was said by Lord Ellenborough (*y*) to be "irrefragable evidence" to show that the payment was intended for that debt: 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 guaranteed 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.

by implication from circumstances.

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. (*z*)

§ 1105. Where an account current is kept between parties, as a banking account, the leading case is Clayton's case, (*a*) 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." [32] This case was followed and approved in Bodenham *v.* Purchas; (*b*) but although the rule was recognized as sound in Simson *v.* Ingham, (*c*) and Henniker *v.* Wigg, (*d*) 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. [As an instance of which, it has been decided that when a trustee pays into his private account at a bank money which is partly his own and partly trust money, it is to be inferred that he intends to draw

Rule of appropriation where account current is kept between the parties.

Rule in Clayton's case.

Trustee's banking account.

In re Hallett's Estate.

(*y*) Marryatt *v.* White, 2 Starkie 101. See, also, Shaw *v.* Picton, 4 B. & C. 715; Newmarch *v.* Clay, 14 East 239; Plumer *v.* Long, 1 Stark. 153; Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71.

(*z*) Goddard *v.* Cox, 2 Str. 1194.

(*a*) 1 Meraivale 572, 608. See, also, Brown *v.* Adams, 4 Ch. 764; Thompson *v.* Hudson, 6 Ch. 320.

32. See *post* note 36.

(*b*) 2 B. & A. 39. See, also, Hooper *v.* Keay, 1 Q. B. D. 178.

(*c*) 2 B. & C. 65.

(*d*) 4 Q. B. 792. See, also, Stoveld *v.* Eade, 4 Bing. 154; City Discount Co. *v.* McLean, L. R., 9 C. P. 692, Ex. Ch.

against his own fund, and not against the trust fund, and this inference is sufficient to exclude the application of the rule. (*d*)]

In Field *v.* Carr, (*e*) the court said that the rule had been adopted in all the courts of Westminster Hall.

If debtor does not appropriate creditor may.

Appropriation by creditor lawful, even to a debt not recoverable by action.

§ 1106. 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.[33] In the exercise of this right, the creditor may apply the payment to a debt which he could not recover by action against the defendant, as a debt barred by limitation, (*f*) and even a debt of which the consideration was illegal, (*f*) as a debt contracted in violation of the Tippling Acts. (*g*) 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. (*h*)[34]

(*d*) In re Hallett's Estate, 13 Ch. D. 696, C. A.

(*e*) 5 Bing. 13.

33. **The Creditor May Appropriate the Payment if the Debtor Does Not.**—In Mayor of Alexandria *v.* Patten, 4 Cranch 317, Marshall, C. J., said that the debtor may apply his payments. "If he fails to make the application the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it, but until he makes it he is free to credit either the bond or simple contract" Pennsylvania Coal Co. *v* Blake, 85 N. Y. 226, 233; Harding *v.* Tifft, 75 N. Y. 461; Wittowski *v.* Reid, 84 N. C. 21; Levystein *v.* Whitman, 59 Ala. 345; Bean *v.* Brown, 54 N. H. 395; Hansen *v.* Rounsavell, 74 Ill. 238; Lewis *v.* Pease, 85 Ill. 31; Davis Sewing Machine Co. *v.* Buckles, 89 Ill. 237.

(*f*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Ashby *v.* James, 11 M. & W. 542.

(*g*) 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.

(*h*) Wright *v.* Laing, 3 B. & C. 165.

34. **Application to a Debt Due on an Illegal Contract.**—In Emmons *v.* Hayward, 11 Cush. 44, the debtor agreed to pay $24 per month as interest on a note for $200. He paid $216, which the creditor applied as interest. The suit was for the entire principal. Dewey, J., said: "The right of election by the creditor should not embrace contracts prohibited by law under heavy forfeitures, and payments which may be recovered back because illegal. * * * The right of a creditor to apply a payment made generally, to such demand as he elects, extends only to lawful demands." Phillips *v.* Moses, 65 Me. 70, 73; McCausland *v.* Ralston, 12 Nev. 195. That a creditor cannot apply a payment to usurious interest, see, also, Pickett *v.* Merchants' Bank, 32 Ark. 346; Greene *v.* Tyler, 39 Penna. 361. But if a debtor makes an application of a payment to an illegal debt

§ 1107. 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. (*i*)

But there must be more than one existing debt to permit election.

§ 1108. It was held by the King's Bench, in Simson *v.* Ingham, (*k*) 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.

[It follows, that if the creditor has appropriated payments by entries in account, and has furnished the debtor with a copy of the account, his right of election is gone. (*l*)] [35]

Aliter if communicated.

or consents to it, he is bound by it. Emmons *v.* Hayward, 11 Cush. 44; Cobb *v.* Morgan, 83 N. C. 211; Brown *v.* Burns, 67 Me. 535; Feldman *v.* Gamble, 26 N. J. Eq. 494; Phillips *v.* Moses, 65 Me. 70. The creditor may apply the payment to any valid debt though the debtor disputes it, unless the debtor disputed it at the time of the payment. McLendar *v.* Frost, 57 Ga 448; Lee *v.* Early, 44 Md. 80.

Debt Barred by Limitation.—The application, by the creditor, of a payment to a debt barred by the statute of limitations will not have the effect to revive the right of action as to the unpaid residue, unless the debtor makes the application. Ramsay *v.* Warner, 97 Mass. 8, 13; Kaufman *v.* Broughton, 31 Ohio St. 424; McMullen *v.* Rafferty, 24 Hun 363; Harper *v.* Fairley, 53 N. Y. 442; Sitterly *v.* Gregg, 22 Hun 258; Krone *v.* Krone, 38 Mich. 661; Carroll *v.* Forsyth, 69 Ill. 127. But where the payment is made to a creditor holding several debts, none of which are barred, at the time of payment, he may make an application after one of them is barred, and it will take effect from the time of payment and not from the date of application. Ramsay *v.* Warner, 97 Mass. 8, 14; Pond *v.* Williams, 1 Gray 630; Moore *v.* Kieff, 78 Penna. 96. An application to a debt from which the debtor had been discharged in bankruptcy was sustained in Hill *v.* Robbins, 22 Mich. 475, under peculiar circumstances.

(*i*) Lamprell *v.* Billericay Union, 3 Ex. 283.

(*k*) 2 B. & C. 65.

(*l*) Hooper *v.* Keay, 1 Q. B. D. 178.

35. **How Long Does Creditor's Right to Apply Continue?**—"It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and *a fortiori* at the time of the trial." Story, J., in United States *v.* Kirkpatrick, 9 Wheat. 720, 737. Followed, Applegate *v.* Koons, 74 Ind. 247; Milliken *v.* Tufts, 31 Me. 497; Moss *v.* Adams, 4 Ired. Eq. 42, 52. But this view of the law has been questioned,

Pro rata appropriation of payment.

§ 1109. 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 apportioning the payment *pro rata* between them according to the amount due to them respectively, leaving to each a claim against the buyer for the unpaid balance of the price of his own goods. (*m*) [36]

and on the authority of English decisions it is said that in the absence of circumstances making it reasonable that the creditor should be put to an earlier election, an application by him at any time before the case came under the consideration of a jury, would control. Gaston *v.* Barney, 12 Ohio St. 506, 512; Brice *v.* Hamilton, 12 S. C. 32, 37. The creditor having once applied the payment cannot change it. Mayor of Alexandria *v.* Patten, 4 Cranch 317; Wright *v.* Wright, 72 N. Y. 149, 153; McMaster *v.* Merrick, 41 Mich. 505, 512.

(*m*) Favenc *v.* Bennett, 11 East 36.

36. **Where Neither Party Appropriates the Payment, the Law Applies It.**—This is the general rule long established. It is in these cases where neither party has made an application that the chief difficulty arises. The principles upon which the appropriation by the law will be made are discussed in the American Leading Cases, vol. I., p. 347, [283.] Here only a general statement will be given. Where neither party has made an application, in the absence of conflict in the evidence, the court should direct the application. In case of such conflict, the question may be one for the jury under proper instructions. It is error to charge the jury to appropriate a payment as they please. Nutall *v.* Brannin, 5 Bush 11, 19.

Account Current.—In United States *v.* Kirkpatrick, 9 Wheat. 720, 737, Story, J., said: "In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts according to the priority of time, so that the credits are to be deemed payments *pro tanto* of the debts antecedently due." See Pierce *v.* Sweet, 35 Penna. 151, 157; Hollister *v.* Davis, 54 Penna. 508, 510; Souder *v.* Schechterly, 91 Penna. 83; Pickering *v.* Day, 2 Del. Ch. 333; Allen *v.* Brown, 39 Iowa 330; St. Albans *v.* Failey, 46 Vt. 448; Langdon *v.* Bowen, 46 Vt. 512; Neidig *v.* Whiteford, 29 Md. 178, 185; Crompton *v.* Pratt, 105 Mass. 255; Sprague *v.* Hazenwrinkle, 53 Ill. 419; Worthley *v.* Emerson, 116 Mass. 374.

Payments are to be Applied to the Debt least Secured.—Where the creditor has security for one debt and none for the other, the court will, if the parties have made no appropriation, apply the payment to the unsecured debt. In Field *v.* Holland, 6 Cranch 8, 28, Marshall, C. J., said: "If neither party avails himself of his power, in which case it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts

§ 1110. In America, the common law rule is reversed in some of the states, and in Massachusetts, Vermont, Maine, Ar- American law

for which the security is most precarious." Although the case of Field *v.* Holland was disputed in Pattison *v.* Hull, 9 Cowen 771, it is now generally adopted. See 1 Am. Lead. Cas. (5th ed.) 352, [286] In McCauley *v.* Holtz, 62 Ind. 205, a payment was made on account of the price of land and chattels sold together. Suit was brought for the residue of the price, and a vendor's lien was claimed for it on the land. The lien was sustained, the court applying the payment to the chattels, so as to preserve the lien. To the same effect see Hare *v.* Stegall, 60 Ill. 380; Bowen *v.* Fridley, 8 Brad. 595, 599; Wilhelm *v.* Schmidt, 84 Ill. 183, 188; Moss *v.* Adams, 4 Ired. Eq. 42, 53; Chester *v.* Wheelwright, 15 Conn. 562; Trullinger *v.* Kofoed, 7 Oreg. 228; Pierce *v.* Sweet, 33 Penna. 151; Ege *v.* Watts, 55 Penna. 321; Foster *v.* McGraw, 64 Penna. 464; McKelvey *v.* Jarvis, 87 Penna. 414, 418; Woods *v.* Sherman, 71 Penna. 100; Langdon *v.* Bowen, 46 Vt. 512; McDaniel *v.* Barnes, 5 Bush 183, 186; Jones *v.* Benedict, 83 N. Y. 79, 86. But see, *contra*, Windsor *v.* Kennedy, 52 Miss. 164; Neal *v.* Allison, 50 Miss. 175, where it is held that the payment should be applied for the debtor's advantage, and therefore upon a mortgage debt in preference to a contract debt. Why it should be considered for the debtor's advantage is not apparent, unless it is supposed that the debtor desires to repudiate, and is inconvenienced by the mortgage. The law in Louisiana appears to be the same as in Mississippi in this respect. N. O. Ins. Co. *v.* Tio, 15 La. Ann. 174; Spiller *v.* Creditors, 16 La. Ann. 292; Miller *v.* Steamer Trabue, 16 La. Ann. 375. The equities of the particular case will always be considered by the court. So in Dungan *v.* Dollman, 64 Ind. 327, where a mechanics' lien was claimed on several houses, the court so applied the owner's payments as to relieve a house sold to a *bona fide* purchaser whom the owner was bound to protect from the lien. Youmans *v.* Heartt, 34 Mich. 397, 401. The creditor's application, however, is not affected by equities of which he has no notice between his debtor and a third person. And so where a surety on one note gave the debtor money to pay it, and the creditor, receiving it without notice of its origin and without application by the debtor, applied it to the unsecured note, it was held that this appropriation bound all parties, and the surety was held liable on the note secured by him. Harding *v.* Tifft, 75 N. Y. 461.

The application will be made to a sum due in preference to one not due. Although, of course, if both debtor and creditor assent, a payment may be credited on an obligation not yet due, yet in the absence of the debtor's assent, neither the creditor nor the court can make such application. To do so would be to compel the debtor to pay a debt not yet due. Brown *v.* Shirk, 75 Ind. 266, 271; Seymour *v.* Sexton, 10 Watts 255.

A payment will be applied to an absolute debt of the payer in preference to a contingent liability. Snyder *v.* Robinson, 35 Ind. 311. The application will be to the several debt of the payor in preference to a debt which he owes jointly with another. Hunt *v.* Brewer, 68 Me. 262.

The law will apply a payment to a legal and not an illegal debt. Stover *v.* Haskell, 50 Vt. 341. The application will be first to the interest in arrear and afterwards to the principal. Moore *v.* Kiff, 78 Penna. 96; Merchants' Bank *v.* Freeman, 15 Hun 359; Mills *v.* Saunders, 4 Neb. 190; Johnson *v.* Robbins, 20 La. Ann. 569.

where bills or notes are given in payment.

kansas, [Louisiana, Illinois, Indiana, Wisconsin and Oregon, (*n*)] it is held that where a promissory note or bill of exchange is given for the price of goods, it is *prime facia* an absolute payment, though the presumption may be rebutted. (*o*) 37

(*n*) Re Clap, 2 Low., at p. 230; Hutchins *v.* Olcutt, 4 Vt. 549; Ward *v.* Bourne, 56 Maine 161; Hunt *v.* Boyd, 2 Miller 109; Camp *v.* Gullett, 2 English 514; Morrison *v.* Smith, 81 Ill. 221; Mehlberg *v.* Tucker, 24 Wis. 607; Matasee *v.* Hughes, 7 Oreg. 39.

(*o*) Story on Sales, § 219, (ed. 1871,) where the cases are cited.

37. **Decision that Payment by Note or Bill is Presumptively Absolute.**—Our author is misled as to the law in some of the states above named by him. As we have seen, *ante* note 17, a payment by note is held *prima facie* conditional in Illinois, Wisconsin and Arkansas. The Illinois case cited by our author is discussed *ante* note 17. The Wisconsin case of Mehlberg *v.* Tucker is authority for the proposition that payment by a note is conditional (not absolute) payment, and there is no state where this principle is more firmly established, as will appear fron the cases cited in note 17. A late case in Arkansas, Brugman *v.* McGuire, 32 Ark. 733, 740, overrules Camp *v.* Gullett, cited by our author in note (*n*.) There are four states which can be confidently said to hold what is called the Massachusetts rule, that payment by note is *prima facie* absolute, and those are Maine, Vermont, Massachusetts and Indiana. The following decisions illustrate the law in those states:

Maine.—In this state, where the creditor takes a note for his debt, the debt is extinguished, unless it appears that the parties do not so intend. Where the creditor has better security for the original debt than the note, it is presumed that he does not intend to abandon such security, and therefore that the payment by the note is only conditional. Mehan *v.* Thompson, 71 Me. 492; Fowler *v.* Ludwig, 34 Me. 455; Kidder *v.* Knox, 48 Me. 551; Paine *v.* Dwinell, 53 Me. 52; Ward *v.* Bourne, 56 Me. 161.

Vermont.—Hutchins *v.* Olcutt, 4 Vt. 549, 555; Dickinson *v.* King, 28 Vt. 378; Wait *v.* Brewster, 31 Vt. 516; Robinson *v.* Hurlburt, 34 Vt. 115; Wemet *v.* Mississquoi Lime Co., 46 Vt. 458.

Massachusetts.—That a note taken for the price is *prima facie* absolute payment has been often held in this state. Parham Sewing Machine Co. *v.* Brock, 113 Mass. 194; Connecticut Trust Co. *v.* Melendy, 119 Mass. 449; Ely *v.* James, 123 Mass. 36; Dodge *v.* Emerson, 131 Mass. 467; Reed *v.* Upton, 10 Pick. 525; House *v.* Alexander, 2 Metc. 157. But the presumption may be readily rebutted, and is sometimes rebutted by the mere fact that the creditor has a better remedy, which he would lose if the note were regarded as payment. Thus, where goods were sold to one who was agent for an undisclosed principal, it was held that the agent's note was not an absolute payment, but the creditor on discovery of the principal might resort to him for payment. Lovell *v.* Williams, 125 Mass. 439; Re Clap, 2 Low. Dec. 226, 230.

Indiana.—The law of this state will be found set forth with fulness in Smith *v.* Bettger, 68 Ind. 254. It is there held that a note governed by the law-merchant is to be regarded as an absolute payment. Otherwise as to payment by notes not governed by the law-merchant, which are considered conditional. Jewett *v.* Pleak, 43 Ind. 368; Maxwell *v.* Day, 45 Ind. 509, 514; Alford *v.* Baker, 53 Ind. 279; Grant *v.* Monticello, 71 Ind. 58; Teal *v.* Spangler, 72 Ind. 380, 384. See, also, Matasee *v.* Hughes, 7 Oreg. 39.

[On the other hand, in New York the rule seems to be the same as in England, and the taking of the debtor's promissory note or bill of exchange operates only to suspend the right of action until the maturity of the instrument, and successive renewal notes are held to be simply extensions from date to date of the time of payment. (*p*) In California, Pennsylvania and West Virginia, a promissory note or bill of exchange will not be regarded as absolute payment unless it be so expressly agreed. (*q*) In New York and these states, as in England, the creditor cannot recover on the original debt without giving up the negotiable security or proving satisfactorily that it has been lost or destroyed.] (*r*) [38]

Rule in New York.

§ 1111. 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. (*s*)

French law.

§ 1112. 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

Appropriation of payments.

(*p*) Jagger Iron Co. *v.* Walker, 76 N. Y. 521, where an earlier decision of the Supreme Court of New York, Fisher *v.* Marvin, 47 Barbour 159, is expressly overruled by the Court of Appeals.

(*q*) Brown *v.* Olmsted, 50 Cal. 162; Hays *v.* McClurg, 4 Watts (Penna.) 452; Poole *v.* Rice, 9 W. Va. 73.

(*r*) Jagger Iron Co. *v.* Walker, *ubi supra*; Hays *v.* McClurg, *ubi supra*. The judgment of Huston, J., in this latter case, is well worth perusal.

38. See *ante* note 20.

(*s*) See the cases and authors cited and compared in Sirey, Code Civ. Annote, art. 1271.

such as are past due, which the debtor is not 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. [39]

Tender under the French law.

§ 1113. The law of tender is quite different on the continent 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 "*procès-verbal*" of the deposite, and if the creditor is not present, sends him a notice to come and withdraw it. Cod. 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.*"

Roman law.

§ 1114. 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, (*t*) according to the maxim that in such cases, *dies interpellat pro homine;* and the default of payment was said to arise *ex re.* (*u*) But in all other cases, a demand (*interpellatio*) by the creditor was necessary, which was required to be at a suitable time and place, of which the judge (or *prætor*) was

39. This is substantially the same as the law in Louisiana. Byrne *v.* Grayson, 15 La. Ann. 457; Slaughter *v.* Milling, 15 La. Ann. 526; Robson *v.* McKoin, 18 La. Ann. 544.

(*t*) 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.

(*u*) Dig. 40. 5. de Fidei-com. libert. 26, § 1, Ulp.: 22. 32. Marcian.

to decide in case of dispute, and the default in payment on such demand was said to arise *ex persona.* (*v*)

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 deposite. (*x*)

§ 1115. 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.*" (*y*) On this point the law of England is not yet settled, as stated by Willes, J., in Cook *v.* Lister, (*z*) 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. (*a*) [40]

By Roman law, payment could be made by any one in discharge of the debtor.

As to common law, *quære.*

In Walter *v.* James, (*b*) 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 reimbursement,—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.

Walter *v.* James.

§ 1116. Mr. Smith, in his book on Mercantile Law, (*c*) also calls

(*v*) Dig. 40. 5. de Fidei-com. libert. 26, § 1 Ulp.: 22. 32. Marcian.

(*x*) Cod. 4. 32. de Usuris 19, Const. Philipp.: 8. 43. de Solution. 9 Const. Diocl. et Max.

(*y*) Inst. lib. 3, tit. 29, 1.

(*z*) 13 C. B. (N. S.) 543; 32 L. J., C. P. 121.

(*a*) 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, 26 L. J., Ex. 13; 1 H. & N. 420.

40. **Payment by a Stranger.**—In Louisiana any third person who demands no subrogation may tender to a creditor the debt due, and compel the creditor to accept payment. State *v.* Pilsbury, 29 La. Ann. 787. But the common law rule is different. A stranger who has paid the debt of another cannot recover for money paid, unless the debtor ratifies the payment. This the debtor may do at any time, though after suit brought by the original creditor; and if the debtor avails himself of the stranger's payment and sets it up in defence to a suit on the original debt, that will be a ratification. A very full discussion of the effect of payment by a stranger will be found in Neely *v.* Jones, 16 W. Va. 625.

(*b*) L. R., 6 Ex. 124, at p. 128.

(*c*) Page 535, note (*e*), (ed. 1877.)

Acceptilatio, or fictitious payment and release.

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 Titio 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.*" (*d*) 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. (*e*) This "acute person" was a very eminent lawyer, the colleague in the prætorship, and friend of Cicero (*collega et familiaris meus*), (*f*) and of great authority among the jurisconsults of his day, "*Ex quibus, Gallum maxime auctoritatis apud populum fuisse;*" (*g*) 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. (*h*)

(*d*) Inst. 3, 30, 1.
(*e*) Lib. 3. 29. 2.
(*f*) De Officiis, lib. 3, § 14.
(*g*) Dig. 1, 2. de Orig. Jur. 2, § 42, Pomp.
(*h*) 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.

PERSONAL ACTIONS AGAINST THE BUYER.

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SEC.

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SECTION I.—WHERE THE PROPERTY HAS NOT PASSED.

§ 1117. 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

Where the property has not passed vendor's sole remedy is action for damages.

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.[1] The law, with the reason for it, was thus stated by Tindal, C. J.,

Reason of the law.

(*a*) Laird *v.* Pim, 7 M. & W. 478.

1. **Seller's Remedy where the Property has not Passed.**—The American courts are more liberal in their extension of remedies than the English. Where the property has not passed, the only remedy of the seller is an action for non-acceptance, but in many American cases the seller, being ready to deliver the property sold, is held to have an election of three remedies—1st. To treat the property as his own, and sue for damages. 2d. As the property of the buyer, and sue for the price. 3d. As the property of the buyer, and to resell it for him, and sue for the difference between the contract price and that obtained on resale. See *post* § 1164. Aside from this right to elect, it is necessary, in order to decide whether the suit should be for non-acceptance or for the price, first to determine whether the property has passed, and this, as we have seen, is often a question of difficulty. *Ante* Book II., §§ 308–604.

Seller's Action for Damages for Non-Acceptance.—This is the only remedy where the seller is prevented from performing an executory contract. In Hosmer *v.* Wilson, 7 Mich. 294, an engine was ordered to be manufactured, "price to be $230, and to be paid when taken out of the shop." After the manufacturer had expended $108 for labor and materials, the order was countermanded. Without completing the machine the manufacturer brought suit on the common counts for his labor and materials. Christiancy, J., said (p. 303): "The only contract upon which plaintiff can rely to pay him for the labor, is the special contract. No duty is imposed upon defendants otherwise than by this. This contract, therefore, must form the basis of plaintiff's action. He must declare upon it, and claim his damages for the breach of it, or for being wrongfully prevented from performing it. His damages will then be the actual damages which he has suffered from the refusal of the defendants to accept the articles, or in consequence of being prevented from its performance, and these damages may be more or less than the value of the labor." Allen *v.* Jarvis, 20 Conn. 38, is cited as "a well-reasoned case, which we entirely approve." In both these cases Atkinson *v.* Bell, 8 B. & C. 277, is followed. Moody *v.* Brown, 34 Me. 107, is also cited. This case follows the English rule, holding that there can be no recovery for the price of an article made to order, unless it is accepted. See *ante* § 539. The case of Hosmer *v.* Wilson, 7 Mich. 294, was cited with approval in Butler *v.* Butler, 77 N. Y. 472, stated *ante* § 859, note 6. In Pittsburg, &c., R. R. *v.* Heck, 50 Ind. 303, the contract was to cut wood and pile it along the line of a railroad, and the buyer agreed to measure, receive and pay for it at a fixed price per cord. A quantity of wood was thus piled, but before it was measured or received it was destroyed by fire. *The seller had insured it as his own.* Suit was brought for the price, but it was held that it would not lie, the fact of the insuring showing that the seller had title, and that action should have been for damages for non-acceptance, which damages would be the difference between the contract price and the market price, at the time and place of delivery. It is to be observed that in this case the seller insured the

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." Barrow *v.* Arnaud.

§ 1118. The date at which the contract is considered to have 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. (*d*) [2] Date of the breach.

wood as his own after it should have been received. In Collins *v.* Delaporte, 115 Mass. 159, 162, Colt, J., said: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits." See Ind., &c., R. R. *v.* Maguire, 62 Ind. 140; Fell *v.* Muller, 78 Ind. 507, 512; Girard *v.* Taggart, 5 S. & R. 19, 34; McNaughter *v.* Cassally, 4 McL. 530; McConihe *v.* New York & E. R. R., 20 N. Y. 495; Williams *v.* Jones, 1 Bush 621; Haskell *v.* McHenry, 4 Cal. 411; Northrup *v.* Cook, 39 Mo. 208; Ganson *v.* Madigan, 13 Wis. 67, 75; Gordon *v.* Norris, 49 N. H. 376; Camp *v.* Hamlin, 55 Ga. 259; Perdicaris *v.* Trenton, &c., Co., 29 N. J. L. 367, 370; Thompson *v.* Alger, 12 Metc. 428; Sanborn *v.* Benedict, 78 Ill. 309; Hellman *v.* Kent, 60 Ill. 271; Danforth *v.* Walker, 37 Vt. 239; McCormick *v.* Hamilton, 23 Gratt. 561, 577; James *v.* Adams, 16 W. Va. 245, 267; Auger *v.* Thompson, 3 Ont. App. 19.

(*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.* Duvall, 9 Q. B. 1030; Boswell *v.* Kilborn, 15 Moo. P. C. C. 309; Silkstone and Dodsworth Coal and Iron Co. *v.* Joint Stock Coal Co., 35 L. T. (N. S.) 668.

(*c*) But this is not always the rule as to purchaser's damages. See *post* Part II., Ch. I.

(*d*) Phillpotts *v.* Evans, 5 M. & W. 475; Leigh *v.* Patterson, 8 Taunt. 540; Ripley *v.* McClure, 4 Ex. 345; Boswell *v.* Kilborn, *ubi supra*.

2. **When Does the Cause of Action Arise?**—In general the cause of action arises upon breach of the contract, by refusal to accept. Prevention by the buyer of performance by the seller may give the seller an immediate right of action. See *ante* § 859, note 6. Where the sale is on credit and acceptance of the goods is refused, the seller need not wait till the end of the term of credit. He may sue for damages for breach of the agreement to accept at once upon the breach, but not for the price. Hosmer *v.* Wilson, 7 Mich. 294, quoted next note; James *v.* Adams, 16 W. Va., 245, 267; McCormick *v.* Basal, 46 Iowa 235.

And on this principle was decided the case of Boorman *v.* Nash, (*e*) 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; 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.

Boorman *v.* Nash.

Purchaser's bankruptcy before time fixed for delivery.

§ 1119. [But although the buyer's insolvency does not *per se* put an end to the contract, yet if the buyer has given notice to the seller of his insolvency, (*f*) the latter is justified in treating the notice as a declaration of intention to repudiate the contract, and, after the lapse of a reasonable time to allow the buyer's trustee to elect to complete the contract by paying the price *in cash*, the seller may, without tendering the goods to the trustee, consider the contract as broken, and prove against the insolvent's estate for the damages arising from the breach. (*g*)

Seller's right to treat a notice of the buyer's insolvency as a repudiation of the contract.

It would seem that a subpurchaser from the insolvent buyer would also be entitled to complete the contract by paying the price in cash within a reasonable time. (*h*)

When the trustee omits to disclaim the debtor's contract under the 23d section of the Bankruptcy Act, 1869, and, after carrying it on for a time, then gives notice that he intends to abandon it, the seller cannot recover the amount of the damages resulting from the breach against the trustee either personally or as representing the insolvent's estate: his only remedy is to prove against the estate under the 31st section of the act. (*i*)

Disclaimer of contract by trustee after part performance.

(*e*) 9 B. & C. 145.

(*f*) There must be notice of "an inability to pay avowed either in act or word," see In re Phœnix Bessemer Steel Co., 4 Ch. D. 108, C. A.

(*g*) In Ex parte Chalmers, 8 Ch. 289, per Mellish, L. J.; Ex parte Stapleton, 10 Ch. D. 586, C. A.; per Brett, J., in Morgan *v.* Bain, L. R., 10 C. P. 15, at pp. 25, 26.

(*h*) *Per cur.* in Ex parte Stapleton, *ubi supra*, at p. 590.

(*i*) Ex parte Davis, 3 Ch. D. 463, C. A.

§ 1120. If goods are deliverable by successive installments, the trustee of the bankrupt purchaser cannot adopt the contract and claim further deliveries under it, without paying the price of the goods delivered prior to the bankruptcy. (*k*)

Purchaser's bankruptcy after partial delivery.

In Morgan *v.* Bain (*l*) the plaintiffs sought to recover damages for the defendant's breach of contract to deliver 200 tons of pig iron. The contract was made on the 5th of February, 1872, and provided that the iron should be delivered in monthly installments of 25 tons at a time. It was admitted that by the usage of the iron trade the first installment would not have become due until the 1st of April. The plaintiffs were insolvent at the date of the contract, but it was not until the 14th of March that they gave the defendants notice of their intention to suspend payment. On the 16th of March they filed a liquidation petition. At the first meeting of the creditors, on the 5th of April, a composition was accepted. The contract with the defendants was then referred to, and it was known to the creditors present, but it was not included in the plaintiff's statement of affairs nor was any claim made in respect of it. On the 13th of May the plaintiffs wrote to the defendants claiming delivery of the iron, when the defendants at once repudiated all liability under the contract. Before that date the plaintiffs had never demanded delivery and no delivery had been made. Held, that the contract had been rescinded before the 13th of May; that the fact that the plaintiffs were insolvent, and had given notice of their insolvency to the defendants, justified the latter, in the absence of any steps on the plaintiff's part to enforce the contract, in concluding that they had abandoned the contract upon their insolvency; and that the consent of the defendants to the abandonment was established by their having made no deliveries of iron in April and May, and having at once repudiated their liability when called upon to deliver.]

Morgan *v.* Bain.

§ 1121. The rules of law on this subject were fully discussed in Cort *v.* Ambergate Railway Company, (*m*) 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

Cort *v.* Ambergate Railway Co.

Where purchaser gives notice to vendor that he will not re-

(*k*) Ex parte Chalmers, *ubi supra*.

(*l*) L. R., 10 C. P. 15. See, also, Bloomer *v.* Bernstein, L. R., 9 C. P. 588.

(*m*) 17 Q. B. 127; 20 L. J., Q. B. 460; and see Hochster *v.* De la Tour, 2 E. & B. 678; 22 L. J., Q. B. 455; *ante*, Conditions, § 859, *et seq.*; Frost *v.* Knight, L. R., 5 Ex. 322; 7 Ex. 111.

ceive goods ordered, vendor is not bound to go on making them.

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 subcontract for a part of the goods which he had promised to supply to the defendants, and was compelled to pay £500 to be released from this subcontract; 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 plaintiff from supplying the said residue; *secondly*, what was the proper measure of damages. Lord Campbell said, in

Phillpotts v. Evans.

relation to Phillpotts *v.* Evans, (*n*) 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

Ripley v McClure.

point, decided in Ripley *v.* McClure, (*o*) was that a refusal by the buyer to accept in advance of the arrival of the cargo he had agreed to purchase 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 (at p. 148):—

"Upon 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

(*n*) 5 M. & W. 475.

(*o*) 4 Ex. 345; and see Avery *v.* Bowden, and Reid *v.* Hoskins, 6 E. & B. 953, 961; 25 L. J., Q. B. 49, 55; 26 Id. 3, 5.

desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, (*p*) maintain an action against the purchaser for breach of 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." [3]

Measure of damages in such case.

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." [4]

(*p*) See, also, on this point, Silkstone Coal Co. *v.* Joint Stock Coal Co., 35 L. T. (N. S.) 668.

3. **The Seller need not Tender Performance Before Bringing Suit, When the Buyer Refuses to Accept.**—See *ante* § 860, note 9, where this subject has been discussed. In Hosmer *v.* Wilson, 7 Mich. 294, 304, stated *ante* note 1, Christiancy, J., said: "It was claimed that no action could be maintained on the special contract until fully performed, and the engine delivered or tendered; that the unqualified refusal to take the engine when it should be completed was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light, as respects the plaintiff's remedy, as an absolute, physical prevention by the defendants." Cites Cort *v.* Ambergate Ry. Co., stated in the text, and Derby *v.* Johnson, 21 Vt. 21; Clark *v.* Marsiglia, 1 Denio 317; and Hochster *v.* De la Tour, cited in the text, *post* § 1123. Cort *v.* Ambergate Railway Co., was followed in Haines *v.* Tucker, 50 N. H. 307, 311. See, also, Smith *v.* Lewis, 24 Conn. 624; S. C., 26 Conn. 110; Platt *v.* Brand, 26 Mich. 173; Begoli *v.* McKenzie, 26 Mich. 470; Clement, &c., Co. *v.* Messerole, 107 Mass. 362; Collins *v.* Delaporte, 115 Mass. 159, 162; Stephenson *v.* Cody, 117 Mass. 6; Chamber of Commerce *v.* Sollitt, 43 Ill. 519, 523; McPherson *v.* Walker, 40 Ill. 371, 373. That a suit for damages can be sustained upon a mere refusal to perform without waiting for the expiration of the time for performance was denied in Daniels *v.* Newton, 114 Mass. 539, where the court criticise Frost *v.* Knight, L. R., 7 Ex. 111, and Hochster *v.* De la Tour, 2 E. & B. 678. But Hochster *v.* De la Tour was approved in Fox *v.* Kitton, 19 Ill. 519, 534. See dissenting opinion of Dickey, J., in Lyon *v.* Culbertson, 83 Ill. 33, 49.

4. **The Measure of Damages for a Failure to Receive Personal Property is the Difference Between the Contract Price and the Fixed Market Value of the Property at the Time and Place of Delivery.**—McNaughter *v.* Cassally, 4 McL. 530; Thurman *v.* Wilson, 7 Brad. 312, 314; Phelps *v.* McGee, 18 Ill. 158; Sanborn *v.* Benedict, 78 Ill. 309; Bagley *v.* Findlay, 82 Ill. 524; Foos *v.* Sabin, 84 Ill. 565; James *v.* Adams, 16 W. Va. 245, 267; Camp *v.* Hamlin, 55 Ga. 259; Williams *v.* Jones, 1 Bush 621; Gordon *v.* Norris, 49 N. H.

In certain special cases the seller may recover the whole price of goods though the ownership remains vested in himself.

§ 1122. 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 delivery,—according to the rule as stated by Parke, B., in Laird *v.* Pim, (*q*) 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. 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

376, 385; Haines *v.* Tucker, 50 N. H. 307; Pittsburg, &c., R. R. *v.* Heck, 50 Ind. 303; Brownlee *v.* Bolton, 44 Mich. 218; Harris Manufacturing Co. *v.* Marsh, 49 Iowa 11. In Bridgford *v.* Crocker, 60 N. Y. 627, the seller having tendered cattle sold, sued for damages for non-acceptance. It appeared that he had kept them some months and sold them for an enhanced price. The court said that this fact could not be considered in fixing damages. After the failure of the buyer to perform, the seller and not the buyer was entitled to the rise in market price. In Chicago *v.* Greer, 9 Wall. 726, the contract was to furnish 13,000 feet of fire-hose. The city received 2150 feet, and after trial, rejected it and refused to receive more. The manufacturer sued for damages and was allowed to prove that he had prepared leather for the hose, that there was no market for such hose and he had been compelled to manufacture it into smaller hose, involving loss of leather. This evidence was held properly received, because "the loss resulting from the waste of leather and of labor was an immediate and necessary consequence of the refusal of the city to comply with its contract."

Market Price or Value.—See *ante* § 86, note 2. In McCormick *v.* Hamilton, 23 Gratt. 561, 577, the suit was for damages for non-acceptance of hogs, to be delivered at a certain station. The court said: "There being no market for hogs on the day and at the place of delivery, it was competent to show their actual value at that time and place, which is the true point of inquiry, by comparison of such prices and sales in the vicinity at or about that time as can be shown, and by reference to the reasonable probabilities of the case; in such case, recourse may be had to the sales which were made nearest in time and in the nearest market. But this is a means merely of ascertaining the value at the time and place of delivery when there is no market value there, or but an uncertain one, but not the only means." Cites Sedgwick on Damages, (4th ed.), pp. 294, 316, note 1. Kountz *v.* Kirkpatrick, 72 Penna. 376, 384, is a case where the question as to what constitutes market value was discussed with great fulness. See, also, Durst *v.* Burton, 47 N. Y. 167, 175; Thurman *v.* Wilson, 7 Brad. 312; Paxton *v.* Meyer, 58 Miss. 445, 454.

(*q*) 7 M. & W. 478.

to his cross-action if the vendor, after receiving the price should refuse delivery of the goods. (*r*)

§ 1123. The seller 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, (*s*) the plaintiffs had contracted to supply the defendant with such furniture as he should require to the amount of £600 or £700, 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 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 the 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," on the authority of Hochster *v.* De la Tour, (*t*) and cases of a like character, referred to *ante* § 859, *et seq.*, in the chapter on Conditions. [5]

In some cases seller may consider contract rescinded when partially executed, and recover the value of the goods delivered.

Bartholomew *v.* Markwick.

§ 1124. [In Wayne's Merthyr Steam Company *v.* Morewood & Company (*u*) the plaintiffs had contracted to supply the defendants with coke bars of a particular quality by successive deliveries, payment to be made in cash for discount within a month, or by bills at four months, at the defendants' option. The plaintiffs delivered coke bars which were inferior to sample; but it was only after the defendants had worked all the

Wayne's Merthyr Steam Co. *v.* Morewood & Co.

(*r*) Dunlop *v.* Grote, 2 Car. & K. 153.

(*s*) 15 C. B. (N. S.) 710; 33 L. J., C. P. 145.

(*t*) 2 E. & B. 678; 22 L. J., Q. B. 455; and see Inchbald *v.* The Western Neilgherry Coffee Co., 17 C. B. (N. S.) 733; 34 L. J., C. P. 15.

5. Partial Deliveries.—The right to recover for part delivery where the buyer retains possession of the portion delivered, is discussed, *ante* § 1032, note 19. The price recoverable for such partial deliveries, accepted by the buyer was said in Shields *v.* Pettee, 4 N. Y. 122, to be the market price, though in excess of the contract price. But other cases cited in note 19, § 1032, hold that in no case can the seller in default recover more than the contract price for the portion delivered by him, and this would seem equitable.

(*u*) 46 L. J., Q. B. 746.

bars up into plates that they discovered their inferior quality, and they then refused to accept the residue. Before the discovery the defendants had been ready to pay for the bars by bill. The plaintiffs thereupon, and *before the expiration of the period of credit*, brought an action for the price of goods sold and delivered. It was contended, on the authority of Bartholomew *v.* Markwick, that they were entitled to treat the original contract as rescinded, but it was held that as *the goods had been delivered and accepted under the original contract*, and it was owing solely to the plaintiffs' breach of contract in delivering inferior goods that the defendants had withheld the bill for the price, the plaintiffs were not entitled before the expiration of the time of credit to sue on a *quantum valebant* for the value of the goods delivered.]

SECTION II.—WHERE THE PROPERTY HAS PASSED.

None but personal action where goods are in actual possession of buyer.

§ 1125. 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 *qua* vendor are gone. [6]

6. **Is Acceptance Essential to a Suit for the Price.**—Acceptance is essential to a suit for the price, where it is essential to the passing of property in the goods. Where the property in the goods passes without acceptance, a suit for the price can be sustained. Therefore, in general, on a sale of an existing chattel examined by the purchaser, a right to sue for the price arises at once, though the actual possession may not be changed. Wade *v.* Moffett, 21 Ill. 110. See *ante* § 313, *et seq.*

Executory Contracts. — The cases presenting difficulty are those where a chattel is to be manufactured or supplied under an executory contract of sale. Here the English rule is that though the chattel be procured or completed and tendered according to contract, yet it remains the property of the seller until accepted, and therefore no suit for the price will lie until acceptance. And some American decisions follow this rule. See *ante* §§ 1018, note 6, and §§ 536–540. But the recent American doctrine, sustained by the weight of authority, gives the seller who has completed a chattel made to order, or who holds ready for delivery goods contracted for under an executory contract of sale, a choice of remedies. The New York decisions on this subject are numerous. The leading case is Bement *v.* Smith, 15 Wend. 493, where a wagon was made to order, and a recovery of the price was sustained on refusal of the buyer to accept. Pollen *v.* Le Roy, 30 N. Y. 549, 556, was a case where a quantity of lead on shipboard was sold to arrive, and the purchaser after examination refused to accept it. The seller resold

By the law of England, differing in this respect from the civil law, the buyer's default in paying the price will

Cannot rescind sale for default in

it and sued for the difference in price, and his suit was sustained. Emott, J., said: "A vendor in such case may, if he choose, abandon the property, treat it as the vendee's and sue the latter for the price. But it can hardly be for the interest of the latter that he should do so, and especially not in the case of perishable property, when the result might be a total loss to the vendee. He may, therefore, sell the property as speedily as possible, and recover the deficiency, together with his expenses as damages." In Dustan *v.* McAndrew, 44 N. Y. 72, 78, the seller in a suit for not taking property was said to have three remedies—to keep the property for the buyer and sue for the price, to resell and sue for the difference, to keep the property as his own, and sue for loss. See *post* § 1164, where this case is stated by our author. This was followed in Hayden *v.* Demets, 53 N. Y. 426, where the property tendered was held to have passed to the buyer, though he refused it, and a suit for the contract price was sustained. See, to the same effect, Mason *v.* Decker, 72 N. Y. 595, 599; Bridgford *v.* Crocker, 60 N. Y. 627; Pacific Iron Works *v.* Long Island R. R. 62 N. Y. 272; Quick *v.* Wheeler, 78 N. Y. 300; Higgins *v.* Murray. 73 N. Y. 252. Hunter *v.* Wetsell, 84 N. Y. 549, 555, is a recent case, where the contract was to bale and deliver hops at a place to be fixed by the buyer at a certain price per pound. The seller offered to deliver, but the buyer did not designate a place for delivery. The suit was for the price. Finch, J., said: "The vendor stood in the position of such complete performance as entitled him to recover the contract price as his measure of damages. That the property was perishable does not alter the situation. He was not bound to sell the hops at auction after due notice and on account of the vendee. He might have done so, but was at liberty to abandon the property, treat it as the vendee's, and sue the latter for the price." In Bagley *v.* Findlay, 82 Ill. 524, Dickey, J., said: "When a vendee of goods sold at a specific price refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice and recover the full contract price, or he may keep the goods and recover the excess of the contract price above the market price." In Kentucky the law is the same as in New York. In Bell *v.* Offutt, 10 Bush 632, 639, Cofer, J., said that the buyer refusing to accept, the seller being ready to deliver had three courses open. *First*, he might consider the property as his own and sue for the difference between the contract and the market price. *Second*, he might consider the property to be the buyer's and sell it to satisfy his lien for the price; or *third*, he might consider the property as the buyer's and hold it subject to his order, and sue for the whole price. See Cook *v.* Brandeis, 3 Metc. (Ky.) 557. In Pennsylvania the New York case of Bement *v.* Smith, 15 Wend. 493, was followed in Ballentine *v.* Robinson, 46 Penna. 177. In that case the contract was to build and deliver a boiler and engine. The buyer refused to accept and pay, and it was held that the seller could recover the price. See Gordon *v.* Norris, 49 N. H. 376, 383; Rand *v.* White Mts. R. R., 40 N. H. 79, 85; Shawhan *v.* Van Nest, 25 Ohio St. 490; Nichols *v.* Morse, 100 Mass. 523; McLean *v.* Richardson, 127 Mass. 339, 345; Pearson *v.* Mason, 120 Mass. 53; Thorndike *v.* Locke, 98 Mass. 340; Thompson *v.* Alger, 12 Metc. 428; Armstrong *v.* Turner, 49 Md. 589, 599; Barton *v.* McKelway, 22 N. J. L. 165; Hughes *v.* United States, 4 Ct. of Cl. 64, 74.

payment of price.

not justify an action for the rescission of the contract, unless that right be expressly reserved. 7

Nature of his personal action.

§ 1126. 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.

Martindale v. Smith.

The leading case on the subject is Martindale *v.* Smith, (*u*) 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 judgment, owing to the doubt excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and re-invest 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.*"

Cannot rescind because of buyer's bankruptcy.

It has already been shown (*ante* § 1118) 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. (*x*)

7. **Can the Seller Rescind for Default of Payment?**—We have already seen that the right of the seller to rescind for default of payment is recognized in the American decisions, where the property sold is still in the possession of the seller, or where it is delivered in expectation of immediate payment which is not made. See *ante* § 335, *et seq.* Solomon *v.* Hathaway, 126 Mass. 482; Hickock *v.* Hoyt, 33 Conn. 553. Where property is sold on credit, which is given because of fraudulent representations of the buyer, it is held in New York (contrary to the doctrine elsewhere) that the credit may be rescinded and suit brought at once for the price. But in the absence of fraud, the seller cannot rescind the credit and sue for the price because of insolvency. Keller *v.* Strasburger, 23 Hun 625. A recovery of judgment for the price will not prevent an avoidance of the contract for fraud discovered after judgment. See Kraus *v.* Thompson, Sup. Ct. Minn., Dec., 1882, 15 Law Reporter 180.

(*u*) 1 Q. B. 365. See, also, Tarling *v.* Baxter, 6 B. & C. 360; Dixon *v.* Yates, 5 B. & Ad. 313.

(*x*) Bankruptcy Act, 1869, § 23.

§ 1127. 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, either where the goods have been *sold and delivered* to the buyer, or where they have been only *bargained and sold* to him;[8] but that where the property has not passed, the vendor's claim must be special for damages for non-acceptance. (*y*)

Different forms of claim in personal action against buyer.

The claim 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 time of credit has expired, in which case he can then recover the full price of the goods, or the sum which was to be paid in cash. (*z*)[9]

§ 1128. But if the vendee give 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

8. **Action for the Price.**—This may be upon the common counts for goods bargained and sold, or for goods sold and delivered. The seller who has proved a sale need not show an acceptance. This was applied to a case where hay was ordered and delivered, to be of a certain quality. Nichols *v.* Morse, 100 Mass. 523; Rodman *v.* Guilford, 112 Mass. 405. But if the property delivered is not shown to be of the quality agreed, then the seller cannot recover unless he proves acceptance. Brewer *v.* Housatonic Ry. Co., 104 Mass. 593; S. C., 107 Mass, 277. On a count for goods bargained and sold, it is not necessary to a recovery of the price to prove delivery. Doremus *v.* Howard, 23 N. J. L. 390, 392.

(*y*) Chitty on Contracts, p. 408, (ed. 1881.)

(*z*) Id., p. 409.

9. **Action for Damages. When does the cause of Action Arise.**—Where a note or other security is to be given for the price, and is refused, the seller need not wait until the end of the term of credit. If he would sue for the price, he must wait till it is due, but he may sue for damages for breach of the agreement to give security, at once upon the breach, and recover the whole damages equal to the value of the security had it been given, *prima facie* the amount of the sum to be secured. Barrow *v.* Mullin, 21 Minn. 374; Rinehart *v.* Olwine, 5 W. & S. 157, 162; Hanna *v.* Mills, 21 Wend. 90; Manton *v.* Gammon, 7 Brad. 201, 208; Girard *v.* Taggart, 5 S. & R. 19; Davis, &c., Co. *v.* McGinnis, 45 Iowa 538. Where the buyer has an option to pay in cash or in some other manner, if he neglects to pay in the special mode at the proper time he may be sued on the common counts for the price. Stone *v.* Nichols, 43 Mich. 16; Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa 538; Childs *v.* Fisher, 52 Ill. 205; County of Jackson *v.* Hall, 53 Ill. 440; Bicknell *v.* Buck, 58 Ind. 354; Moore *v.* Kiff, 78 Penna. 96, 100. As we have seen, a suit for the price affirms the contract. If, therefore, the vendor would avail himself of the buyer's fraud he should either bring a special action for damages for the fraud, or trover or replevin for the goods. See *ante* § 660, note 19; Auger *v.* Thompson, 3 Ont. App. 19; Dellone *v.* Hull, 47 Md. 112.

resulting from the buyer's conduct, and recover 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*) [10]

(*a*) Bartholomew *v.* Markwick, 15 C. B. (N. S.) 711; 33 L. J., C. P. 145; but see Wayne's Merthyr Steam Co. *v.* Morewood & Co., 46 L. J., Q. B. 746.

(*b*) *Ante* § 1084.

10. See *ante* §§ 1084–1089, and notes.

CHAPTER II.

UNPAID VENDOR'S REMEDIES AGAINST THE GOODS—GENERAL PRINCIPLES.

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§ 1129. 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.

If the goods have been delivered into the *actual possession* of the buyer, all right on them is gone, as has been stated in a preceding chapter;[1] but if not so delivered, the goods may be placed in two different conditions of fact as regards their actual custody. They may be 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 thus in the *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*.[2]

Goods may be either in possession of the buyer;

or of the vendor;

or in transit for delivery to buyer.

§ 1130. When the goods have not yet left the actual possession 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 his 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

Vendor has at least a lien for unpaid price on goods while in his possession unless waived.

Sale on credit.

1. An exception to the general statement that all right to the goods is gone when they are delivered into the possession of the buyer exists, as we have seen, in certain cases. Among these are cases where the property is delivered in expectation of immediate payment which is not made, (see *ante* § 335, *et seq.*,) where title or a right to retake the goods in case of non-payment is expressly reserved, (see *ante* §§ 366 425, *et seq.*,) and where, by mistake or fraud of the buyer, the seller has the right to avoid the contract, (see *ante* § 605, *et seq.*, and § 648, *et seq.*) Williamson *v.* New Jersey Southern R. R., 29 N. J. Eq. 311, 319; Donaldson *v.* Utley, 93 U. S. 631. The rule of the text is applicable where both property and possession have passed and there is no fraud or mistake.

2. See *post* Chap. V., "Stoppage *in Transitu*."

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 stoppage *ante-transitum*? (*a*) 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.

§ 1131. 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. 2. 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. (*b*)

Meaning of the word "delivery" in this connection.

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*.

Division of the subject.

§ 1132. The leading cases of Bloxam *v.* Sanders, (*c*) and Bloxam *v.* Morley, (*d*) (which were said by Blackburn, J., in 1866, (*e*) 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 forfeit if he parts with the possession, but grows out of

Bloxam *v.* Sanders.

Nature and extent of unpaid vendor's claim on the goods.

(*a*) This is termed the right of *retention* in the Scotch law. See *ante* § 604.

(*b*) Townley *v.* Crump, 4 Ad. & E. 58, and other cases examined *post* §§ 1133, 1134.

(*c*) 4 B. & C. 941, *ante* § 1017.

(*d*) 4 B. & C. 951.

(*e*) In Donald *v.* Suckling, 35 L. J., Q. B., at p. 237.

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 despatched 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."

Bankrupt's trustee cannot maintain trover against unpaid vendor in possession.

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.

§ 1133. In 1833, Miles *v.* Gorton (*f*) 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.

Miles *v.* Gorton.

§ 1134. In Townley *v.* Crump, (*g*) 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 him the

Townley *v.* Crump.

(*f*) 2 C. & M. 504. See, also, Grice *v.* Richardson, 3 App. Cas. 319, (Privy Council.)

(*g*) 4 Ad. & E. 58.

following delivery order:—"Liverpool, 29th of 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 of 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 devest 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.*"

Unpaid vendor does not lose his rights on goods by agreeing to hold as bailee of the buyer.

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 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. Yet it cannot be doubted that the vendor had done all that he was bound to do in performance of his contract before the buyer's insolvency, and that he could have maintained an action for goods sold and delivered.

§ 1135. Next came, in 1840, the case of Dodsley *v.* Varley, (*h*)

(*h*) 12 Ad. & E. 632.

Dodsley *v.* Varley.

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." [3]

Unpaid vendor's right may exist by special contract after *actual* possession taken by buyer.

§ 1136. In 1851, Valpy *v.* Oakeley (*i*) 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 the plaintiffs could only recover such damages as the bankrupt might have recovered; and that he could only have recovered the difference between the

Valpy *v.* Oakeley.

Where bills given to vendor have been dishonored he may retain goods undelivered.

And will be responsible only for difference between the

3. See Safford *v.* McDonough, 120 Mass. 290, distinguishing Dodsley *v.* Varley.

(*i*) 16 Q. B. 941; 20 L. J., Q. B. 380.

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 *prima 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." The other judges took the same view of this point, though not expressed perhaps as distinctly as by Wightman, J.

contract price and the market price.

§ 1137. This point came again before the same court in Griffiths *v* Perry, (*k*) in 1859, the judges being Crompton and Hill, neither of whom was on the bench when Valpey *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 withold delivery of the goods." It was accordingly held, 1st. That the plaintiff was only entitled to nominal damages, in accordance with the decision in Valpy *v.* Oakeley. 2ndly. That it makes no difference in such cases whether the sale is of specific chattels, or an executory contract to supply goods. (*l*)

Griffiths *v.* Perry.

Nominal damages given where no actual damage proved.

Whether sale is of specific chattels or of goods to be supplied.

(*k*) 1 E. & E. 680; 28 L. J., Q. B. 204. (*l*) It was also held that the endorse

§ 1138. [The subject was again considered in Ex parte Chalmers (*m*) in 1873 before the Court of Appeal in Chancery. Hall & Co. had contracted to sell goods to Edwards by monthly installments, payment to be by cash in fourteen days from the date of each delivery. Deliveries were made and duly paid for under the contract. Edwards became insolvent, and there was then one installment of goods already delivered which was unpaid for, and a final installment remaining to be delivered. Hall & Co., upon notice of the insolvency, refused to deliver the remaining installment, whereupon Edwards' trustees in bankruptcy sued them for damages for breach of contract. *Held*, that Hall & Co. had a right to refuse delivery of the goods until the price of both installments had been paid. In delivering the opinion of the court (composed of Lord Selborne, C., James, L. J., and himself), Mellish, L. J., said, "The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract of sale has been completely performed? I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that if a debt is due to him for goods already delivered he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered as well as the price of those still to be delivered." His Lordship then reviews the authorities, and decides in accordance with the view of Crompton, J., in Griffiths *v.* Perry, that the seller's right exists as well on a contract to sell goods to be delivered by installments as on a sale of specific goods.

Ex parte Chalmers.

§ 1139. Grice *v.* Richardson (*n*) was decided in the Privy Council in 1877. The facts were precisely similar to those presented in Miles *v.* Gorton, *ante* § 1133. The sellers were warehousemen, as well as importers, of tea. They gave to the buyers delivery orders for the tea, which provided that the buyers should pay warehouse rent, and they made a transfer entry of the tea

Grice *v.* Richardson.

Vendor's lien exists although he is warehouseman for the purchaser.

ment to a third person of a delivery order for the goods given by the vendor to the buyer, did 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, in M'Ewan *v.* Smith, 2 H. L. C. 309, *post* 1143, which was not cited in the case. See now, however, Factors' Act, 1877, § 5, *post* § 1152.

(*m*) 8 Ch. 289.

(*n*) 3 App. Cas. 319.

into the buyers' names in their warehouse books. The price was to be paid by the buyers' notes or acceptances. The buyers became insolvent during the period of credit, and their trustee brought an action of trover for the parcels of tea remaining in the warehouse; but it was held, upon the authority of Miles *v.* Gorton, that as the goods remained in the possession of the sellers, and no actual delivery had been made to the buyers, the sellers' lien revived upon the buyers' insolvency.] [4]

4. Rights of Unpaid Seller in Possession where Buyer becomes Insolvent.—In some decisions, an assignee in bankruptcy has been regarded as succeeding to all the rights which the bankrupt would have had if solvent. Thus, in Gates *v.* Winooski Lumber Co., 18 Nat. Bank. R. 31, in the United States Circuit Court for Vermont, the contract was to provide lumber for building a dam. The seller placed the lumber on his own premises, from which the bankrupt took a portion from time to time, until his failure, when the seller disposed of the residue and was sued by the assignee of the bankrupt for the proceeds. It was held that the question was whether the property had passed, and if so, the proceeds were considered to belong to the assignee. But here the question of the rights of the vendor arising from his possession and the buyer's insolvency seems not to have been considered. The law is set forth in White *v.* Welsh, 38 Penna. 396, 420. In that case a quantity of sugar was sold and remained in the warehouse of the seller, who delivered therefrom several retail lots, as requested by the buyer. Notes were given for the price, part of which were paid. Before the residue were due the buyer failed and made an assignment; the assignee brought trover against the seller for the sugar, which the seller had retained under his lien, for the price. Lowrie, C. J., said: "Judges do not ordinarily distinguish between the retainer of goods by a vendor, and their stoppage *in transitu* on account of the insolvency of the vendee, because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If the vendor has a right to stop *in transitu*, *a fortiori* he has a right of retainer before any transit has commenced. * * * The goods over which the right of retention was asserted, had not been removed after the sale, but still continued, until the plaintiff's insolvency, in the stores and custody of defendant. This fact itself preserves to the defendants their lien and right of retention for unpaid purchase money. On the failure of the plaintiffs, where no right of third persons has intervened, as there has not here, there is nothing like an estoppel of their right of retention." The court criticised Barrett *v.* Goddard, 3 Mason 107, which was also questioned in Parker *v.* Byrnes, 1 Low. Dec. 539. White *v.* Welsh was approved and followed in Wanamaker *v.* Yerkes, 70 Penna. 443, where goods were sold on the credit of an order of a third person, to be shipped to the buyer. Before they were removed from the store the seller learned of the insolvency of the person who drew the order, and thereupon refused to deliver the goods. It was held that he might properly retain them. In Arnold *v.* Delano, 4 Cush. 33, 41, the sale was of wood on the seller's land, for the price of which the buyer gave his note payable in six months, within which period he became insolvent. His assignee brought trover against the seller for the wood. The suit failed. Shaw, C. J., said: "Such

§ 1140. The rights of the unpaid vendor, under the circumstances which we are now considering, are not affected by a resale to a third person, (*o*) 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 subvendee.

The unpaid vendor may estop himself as against subvendee.

Without referring especially to the early cases, (*p*) we may pass to the decision of the King's Bench in Stoveld *v.* Hughes, (*p*) 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 vendors 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 plaintiff, who paid the price. The plaintiff's agent informed one of the defendants 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 defendants, and the plaintiff's agent there marked the timber with the plaintiff's own initials and told the defendants to send no more of the timber to Dixon, and the defendants made no objection. Dixon became insolvent, his bills were protested, and the defendants refused delivery. Lord Ellenborough said, on 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

Stoveld *v.* Hughes.

Where vendor assented to resale, estopped from contesting rights of subvendee.

a vendor in possession is regarded as having a higher equity to retain for the price, than the assignee of a debtor who has not paid for the property, has to claim it for the general creditors. If it might be supposed that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is, that a promissory note, even if in form negotiable, while it remains in the hands of the vendor and not negotiated, but ready to be delivered up on discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties." This was approved in Parker *v.* Byrnes, 1 Low. Dec. 539. See D'Wolf *v.* Babbett, 4 Mason 289, 295; Toledo, &c., R. R. *v.* Gilvin, 81 Ill. 511, 520; Hodgson *v.* Barrett, 33 Ohio St. 63.

(*o*) But see, now, 40 and 41 Vict., c. 39, § 5, Factors' Act, 1877, *post* § 1152.

(*p*) 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.

(*p*) 14 East 308.

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.

§ 1141. In Craven *v.* Ryder, (*q*) 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 vendors. The subvendee obtained a bill of lading, *without the assent* of the original vendors, and it was held that he had acquired no rights against the first vendors who had never delivered the property out of their own control.

Craven *v.* Ryder.

But not bound without such assent.

§ 1142. The next in date, and the leading case, is Dixon *v.* Yates, (*r*) 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' 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 of November, and was dishonored; and Dixon, on the 18th of November, gave notice to Yates not to deliver the remaining forty-four puncheons to any one but 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' warehouse, and marked with the letter C. On the 28th of October, before

Dixon *v.* Yates.

(*q*) 6 Taunt. 433.

(*r*) 5 B. & Ad. 313.

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 of October, Kaye's cooper went to Yates' premises, and got Yates' 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 Kay's cooper. When the gauger first came to Yates' 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' clerk, and was only accomplished through the unauthorized interference of Collard, availing himself of his position as clerk. Parke, J., in delivering his opinion, said: "There was no delivery to the subvendees, 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.* Ryder, 6 Taunton, 433" (*s*)[5]

(*s*) See Griffiths *v.* Perry, *ante* § 1137.

5. Right of Unpaid Seller in Possession against Subvendee.—In Haskell *v.* Rice, 11 Gray 240, timber was sold and in part removed from the seller's premises. The buyer resold it, and soon after became insolvent. Thereupon the seller forbade the subvendee to remove it, and upon removal by him, brought suit. A recovery was sustained. In Milliken *v.* Warren, 57 Me. 46, the sale was of a half interest in a lot of corn for which the buyer gave his notes, leaving the corn in the hands of the seller. The buyer resold the corn and became insolvent before the notes became due. The first seller refused to deliver it to the second buyer because of non-payment of the price. Dickerson, J., said: "A vendor of goods has a lien upon them at common law so long as they remain in his possession, and the vendee neglects to pay the price according

§ 1143. McEwan *v.* Smith (*t*) was decided in the House of Lords in 1849. The facts were that certain sugars were imported by the respondents Smith, and warehoused for 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. and A. Smith." The respondents sold the sugar to Bowie & Co., and gave them an order dated 15th of 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 of 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 meantime, however, the appellants McEwan had bought the sugar from Bowie & Co., and on the 25th of September they sent to the office of Alexander and produced there the original delivery order of Smith & Co., which had been endorsed 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 of 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 *v.* Smith.

Effect of delivery order.

to the conditions of sale; and if the vendee becomes insolvent, while the goods are yet in the hands of the vendor, the latter may retain them until the price is paid. This rule of law is applicable, though a negotiable note has been given for the purchase money, if it remains in the hands of the vendor and has not been negotiated, so that it may be delivered up on discharge of the lien." But in Hunn *v.* Bowne, 2 Caines 38, goods were sold and left with the seller, a note being given for the price. The buyer offered the goods for sale, and the seller showed them as the property of the buyer to one proposing to buy, and who afterwards did buy. No notice of the second sale was given to the original seller until after the bankruptcy of the first buyer, leaving unpaid his note given for the price. The original seller claimed to hold the goods against the subvendee, but was held estopped. Kent, J., dissented.

(*t*) 2 H. L. C. 309.

McEwan per order of 25th of September, 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.

§ 1144. 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 of September, when the 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 subvendees, in constituting delivery of possession, and in vesting title in a subvendee as against the unpaid original vendor.

§ 1145. 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 endorsed 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 effects 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 the 25th of September 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.

§ 1146. 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 endorsed 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." (*u*) [6]

As to the true nature of the unpaid vendor's right on the goods in

(*u*) See, also, Dixon *v.* Bovill, 3 McQueen H. L. C. 1; Imperial Bank *v.* London and St. Katharine Docks Co., 5 Ch. D. 195; Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., Id. 205; Farmeloe *v.* Bain, 1 C. P. D. 445. [Now, however, by the Factors' Act, 1877, (40 and 41 Vict., c. 39,) § 5, the transfer of a delivery order by a vendee to a *bona fide* holder for value has the same effect for defeating the vendor's lien as the transfer of a bill of lading. See *post* § 1152.]

6. The case of McEwan *v.* Smith was followed in Keeler *v.* Goodwin, 111 Mass. 490. In that case, the seller gave the buyer an order for 1000 bushels of corn in a warehouse, to be paid in cash in ten days. The buyer endorsed and delivered the order as security for a lien. The buyer became insolvent within the ten days, and for that reason the seller countermanded the order before it reached the warehouseman. The holder of the order brought trover against the seller. It was held that the suit would not lie. Wells, J., said: "Until the delivery is actual and absolute, the seller may suspend it, and revoke the authority of any intermediary to perfect it. The insolvency of the purchaser was a sufficient justification for so doing, even if the sale was an unconditional one upon a credit of ten days. In Mohr *v.* Boston, &c., R. R., 106 Mass. 67, the seller stored whiskey in the name of the buyer, receiving his acceptances for the price. By agreement, the seller paid the tax and warehouse charges on a portion of the whiskey, and forwarded it to

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.

Pearson v. Dawson.

§ 1147. In Pearson *v.* Dawson, (*x*) 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 20 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 specified the 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 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 became 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 denying that the property had passed

§ 1148. In Woodley *v.* Coventry, (*y*) the defendants, corn-factors, sold 350 barrels of flour, to be taken out of a larger quantity, to one Clarke, who obtained advances from the plaintiff on the security of the flour, giving to the plain-

the buyer, but learning of his insolvency, took it from the carrier by replevin. The replevin was sustained.

(*x*) E., B. & E. 448; 27 L. J., Q. B. 248.

(*y*) 2 H. & C. 164; 32 L. J., Ex. 185.

tiff 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 meantime 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 his contract with first buyer.

Woodley *v.* Coventry.

Under very similar circumstances, the Queen's Bench held in Knights *v.* Wiffen, (*z*) 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 the property had passed, and to take no further steps for his own protection. [7]

Knights *v.* Wiffen.

§ 1149. [In Gunn *v.* Bolckow, Vaughan & Company, (*a*) the defendants had contracted to make and sell to the Aberdare Iron Company, for shipment to Russia, a large quantity of iron rails, and in pursuance of the contract delivered to the Aberdare Company in exchange for their acceptances, certain wharfinger's certificates in the following form :—

Gunn *v.* Bolckow, Vaughan & Co.

Wharfinger's certificates not equivalent to warrants and not negotiable.

"I hereby certify that there are lying at the works of Messrs.

(*z*) L. R., 5 Q. B. 660.

7. Knights *v.* Wiffen was followed in Voorhis *v.* Olmstead, 66 N. Y. 113, 117. In that case, the unpaid seller permitted a warehouse receipt for the goods to be given to a security company, which had advanced money to the buyer in anticipation of obtaining the receipt. It was held that as the lender had reposed on the possession of the receipt, and forborne the measures to protect itself, which would naturally have been taken had the receipt been refused by the seller, its position was altered and the seller was estopped from holding the goods for the payment of the price. Knights *v.* Wiffen is also cited and is distinguisbed in Barnard *v.* Campbell, 55 N. Y. 456.

(*a*) 10 Ch. 491.

Bolckow, Vaughan & Co., Limited, of Middlesborough * * * tons of iron rails which are ready for shipment, and which have been rolled under contract dated * * * * between the said company and the Aberdare Iron Company.

W. ROE, *Wharfinger.*

The Aberdare Company obtained advances from the plaintiff on the security of these certificates, which they called warrants. Subsequently the Aberdare Company filed a liquidation petition, and their acceptances were dishonored. The plaintiff claimed a lien on the rails mentioned in the certificates, upon the ground that they were equivalent to warrants or documents of title, and were negotiable according to the custom of the iron trade. But this contention was repudiated by the Court of Appeal in Chancery. "To say that," says James, L. J., (at p. 499), "is in truth to say a thing which cannot be. No custom of the trade can make a certificate a bill of exchange or a warrant. What is evidently meant by that allegation, giving the most liberal interpretation to it in favor of the pleader, is that people deposit the certificates as if they were warrants." And Mellish, L. J., says (at p. 502), "It is utterly impossible, in my opinion, to make this 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." He then proceeds to point out the distinction between such a document and a bill of lading, or a delivery order. The case was, therefore, brought within the general principle, and the sellers' lien revived upon the buyer's insolvency.

Farmeloe *v.* Bain.

Nor "undertakings" of a form not known to merchants.

§ 1150. In Farmeloe *v.* Bain, (*b*) the defendants under a contract for the sale of 100 tons of zinc, gave to the buyers, Messrs. Burrs & Co., four undertakings in the following form :—

"We hereby undertake to deliver *to your order indorsed hereon* twenty-five tons merchantable sheet zinc off your contract of this date."

The contract was not for the sale of any specific zinc, but of 100 tons to be taken from a quantity which the defendants had on their wharf

(*b*) 1 C. P. D. 445.

at the time. The plaintiffs bought from Burrs & Co. on the faith of these documents; but it was admitted that the documents were not known documents amongst merchants. Burrs & Co. failed without paying the contract price. Held, in trover, that these "undertakings" must be construed as any other written instruments, and did not contain any representation that the goods were the goods of Burrs & Co. free from lien; that the defendants, therefore, were not estopped from setting up their right as unpaid vendors to withhold delivery.

§ 1151. In the Merchant Banking Company of London *v.* Phœnix Bessemer Steel Company, (*c*) the defendants, under a contract of sale to Messrs. Gilead Smith & Co. for steel rails to be delivered in monthly quantities, invoiced the rails to Messrs. Smith & Co., and at their request sent in addition warrants for the monthly quantities in the following form, *mutatis mutandis*:—

Merchant Banking Co. *v.* Phœnix Bessemer Co.

Vendor estopped from setting up lien when he has issued documents which are, by the custom of the trade, negotiable.

"*The undermentioned iron will not be delivered to any party but the holder of this warrant.*

"PHŒNIX BESSEMER STEEL COMPANY, LIMITED.

"No. 88. *Dec.* 19, 1874.

"Stacked at the works of the Phœnix Bessemer Steel Company, The Ickles, Sheffield.

"Warrant for 403 tons, 2 qrs. 9 lbs. steel rails. Iron deliverable (f. o. b.) to Messrs. Gilead A. Smith & Co., of London, *or to their assigns by endorsement hereon.*"

Smith & Co. endorsed the warrants to the plaintiffs for value, and on the failure of Smith & Co. and the defendants, the plaintiffs claimed a first charge upon the iron mentioned in the warrants.

It was proved that, by the usage of the iron trade, warrants in the above form passed from hand to hand without any notice being given to the person issuing the warrant, and were taken to give to the holders for value a title free from any vendor's lien; (*d*) and in the case before him, Jessel, M. R., drew the inference that the sellers must have in-

(*c*) 5 Ch. D. 205.

(*d*) The form of these warrants had been settled in 1866 by counsel, Mr. (afterwards Chief Justice) Bovill and Mr. Lloyd. Jessel, M. R., suggested that it would have been better to have stated on the face of the warrant that it was free from any vendor's lien, and he advised the insertion of words to that effect for the future.

tended these warrants to be used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued the warrants in addition to the ordinary invoices of the goods. He held, therefore, that they were estopped from afterwards setting up their claim as unpaid vendors.

This decision shows clearly the distinction between warrants which are documents of title transferable by endorsement, and which represent, and are intended to represent, the goods, and wharfingers' certificates which, as in Gunn *v.* Bolckow, Vaughan & Co., are not documents of title at all, and are not intended to represent the goods.

§ 1152. The law as laid down by the foregoing decisions, so far as relates to the effect of the transfer of delivery orders or dock warrants, has been altered by the last Factors' Act (40 and 41 Vict., c. 39.) The 5th section provides, that "where any document of title to goods has been lawfully endorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by endorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* and for valuable consideration, the last-mentioned transfer shall have the same effect *for defeating any vendor's lien* or right of stoppage *in transitu, as the transfer of a bill of lading has for defeating the right of stoppage in transitu.*"

Factors' Act, 1877.

Sect. 5.

The expression "documents of title" is, it is submitted, to be interpreted by the definition given of such documents in the earlier Factors' Act (5 and 6 Vict., c. 39, § 4); see *post* § 1202. If this view be correct, the decision in The Merchant Banking Company *v.* Phœnix Bessemer Steel Company is covered by this section, the iron-warrants in that case being clearly documents of title within the definition of the Factors' Act, 1842; on the other hand, the section does not enlarge the effect of a transfer of documents such as the wharfinger's certificates in Gunn *v.* Bolckow, Vaughan & Company, or the "undertakings" in Farmeloe *v.* Bain.]

§ 1153. Having regard to the foregoing authorities [and the 5th section of the Factors' Act, 1877] 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:

Propositions deduced from the review of the authorities.

First.—If the controversy be between the unpaid vendor and the insolvent buyer, or the latter's trustee, the vendor may refuse to give up possession of the goods without payment of the price. (*g*) [8] (And see *ante* § 1120 as to antecedent partial deliveries not paid for.)

Secondly.—The vendor's remedy will not be impaired by his giving a delivery order [or other document of title] for the goods if countermanded before his bailee attorns to the buyer. (*h*) [9]

[*Thirdly.*—As against a subvendee or pledgee the right of the unpaid vendor to retain possession of the goods depends upon whether he has or has not transferred to the buyer, and the latter transferred to the subvendee or pledgee a document of title to the goods. If a document of title has been so transferred, the effect of the 5th section of the Factors' Act, 1877, is to destroy the vendor's lien. But if a document of title has not been so transferred, or if the document issued to the buyer is not a document of title, then the rights of the unpaid vendor are the same against a subvendee or pledgee as against the original buyer, (*i*) unless he be precluded by the estoppel resulting from his assent, express or implied, to the subsale or pledge when informed of it. (*k*) [10]

Fourthly.—The assent may be impliedly given by the conduct of the seller before the subsale or pledge has taken place; (*l*) but will not be implied from the mere fact that the seller has issued to the buyer documents other than documents of title which the buyer has dealt with by way of sale or pledge, unless such documents contain some representation of fact creating an estoppel. (*m*)]

(*g*) 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; Ex parte Chalmers, 8 Ch. 289; Grice *v.* Richardson, 3 App. Cas. 319.

8. Arnold *v.* Delano, 4 Cush. 33; Parker *v.* Byrnes, 1 Low. Dec. 539.

(*h*) McEwan *v.* Smith, 2 H. L. C. 309; Griffiths *v.* Perry, *ubi supra.* See, also, Pooley *v.* Great Eastern Railway Co., 34 L. T. (N. S.) 537, where it was argued that the attornment was on the facts conditional, but the court held otherwise.

9. Keeler *v.* Goodwin, 111 Mass. 490, 492.

(*i*) Craven *v.* Ryder, 6 Taunt. 433; per Parke, B., in Dixon *v.* Yates, 5 B. & Ad. 313; McEwan *v.* Smith, and Griffiths *v.* Perry, *ubi supra.*

(*k*) Stoveld *v.* Hughes, 14 East 308; Pearson *v.* Dawson, E., B. & E. 448; 27 L. J., Q. B. 248; Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

10. Voorhis *v.* Olmstead, 66 N. Y. 113; Hazard *v.* Fiske, 83 N. Y. 287.

(*l*) Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., *ubi supra.*

(*m*) Gunn *v.* Bolckow, Vaughan & Co.,

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.

§ 1154. 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 subvendees without relieving themselves of liability towards the unpaid vendor. For the doctrine of estoppel in general, the reader is referred to the notes appended to the case of Doe *v.* Oliver, (*n*) in Mr. Smith's very valuable book. The principle was thus stated by Lord Denman in Pickard *v.* Sears: (*o*) "Where one by his words or conduct willfully 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, (*p*) Parke, Baron, said,—and this dictum was approved by Chelmsford, L. C., in Clarke *v.* Hart, (*q*)—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." [11]

Warehousemen may make themselves liable as bailees to both parties.

Principle on which estoppel rests.

§ 1155. In Stonard *v.* Dunkin, (*r*) 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

Stonard v. Dunkin.

Warehousemen estoped from setting up the rights of unpaid vendor, after

10 Ch. 491; Farmeloe *v.* Bain, 1 C. P. D. 445.

(*n*) 2 Sm. L. C., p. 775, *et seq.*, (ed. 1879.)

(*o*) 6 Ad. & E. 475. See the remarks of Lord Blackburn on the doctrine of estoppel *in pais* in Burkinshaw *v.* Nicholls, 3 App. Cas., at p. 1026, and the definition of estoppel offered by Bramwell, L. J., in Simm *v.* Anglo-American Telegraph Co., 5 Q. B. D. 188, C. A., at p. 202, and the observations of Brett, L. J., at p. 206.

(*p*) 2 Ex. 654.

(*q*) 6 H. L. C., at p. 656. See per Lord Cranworth, L. C., in Jorden *v.* Money, 5 H. L. C., at pp. 213, 214.

11. Ex parte Rockford, &c., Co., 1 Low. Dec. 345; Drew *v.* Kimball, 43 N. H. 282.

(*r*) 4 Camp. 344.

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." attorning to purchaser as subvendee.

This case was followed by Hawes *v.* Watson, (*s*) in the King's Bench in 1824, and by Gosling *v.* Birnie, (*t*) 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." Hawes *v.* Watson. Gosling *v.* Birnie.

The rule has since been applied in very many cases, among which may be cited, Gillett *v.* Hill, (*u*) Holt *v.* Griffin, (*v*) Lucas *v.* Dorrien, (*x*) and Woodley *v.* Coventry; (*y*) and it was recognized in Swanwick *v.* Sothern, (*z*) in the elaborate judgment delivered by Blackburn, J., in the Queen's Bench, in Biddle *v.* Bond, (*a*) and in Knights *v.* Wiffen. (*b*)

[The rules as to estoppels *in pais* were very fully and carefully laid down by Brett, J., in delivering the judgment of the Court of Common Pleas in Carr *v.* The London and North Western Railway Company. (*c*)] [12] Carr *v.* London and North Western Railway Co.

(*s*) 2 B. & C. 540.

(*t*) 7 Bing. 339.

(*u*) 2 C. & M. 536.

(*v*) 10 Bing. 246.

(*x*) 7 Taunt. 278.

(*y*) 2 H. & C. 164, and 32 L. J., Ex. 187.

(*z*) 9 Ad. & E. 895.

(*a*) 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 and San Francisco Railway 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 Commissioners, L. R., 5 Q. B. 642. See, however, the limits of the principle in such cases laid down by the Court of Appeal in Simm *v.* Anglo-American Telegraph Co., 5 Q. B. D. 188, where some criticisms are passed upon Hart *v.* Frontino Gold Mining Co., by Bramwell, L. J., at p. 204, and upon Knights *v.* Wiffen, by Brett, L. J., at p. 212; and see Waterhouse *v.* London and South Western Railway Co., 41 L. T. (N. S.) 553.

(*b*) L. R., 5 Q. B. 660, *ante* § 1148. See, also, Farmeloe *v.* Bain, 1 C. P. D. 445, *ante* § 1150.

(*c*) L. R., 10 C. P. 307, at pp. 316–318.

12. **A Warehouseman is Estopped from Denying the title of the one to whom he gives his Receipt.**—Hurff *v.* Hires, 40 N. J. L. 581, 591; Chapman *v.* Searle, 3 Pick. 38, 43; Adams *v.* Gorham, 6 Cal. 68; Goodwin *v.* Scarwell, 6 Cal. 541.

CHAPTER III.

REMEDIES AGAINST THE GOODS—RESALE.

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§ 1156. 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? 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:—

May vendor resell if buyer continues in default?

"Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed to the assent of the purchaser, under the contract of sale, the question arises, how much greater than

Law as stated in Blackburn on Sales.

(*a*) *Ante* § 1125.

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*)[1]

§ 1157. 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 later case of Chinery *v.* Viall, (*d*) to be examined *post*, the same remark applies; the vendor having resold, *before* the buyer was in default.

Review of authorities.

Right cannot exist after tender of price by buyer.

Nor before buyer's default.

In Langfoot *v.* Tyler, (*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." We have already seen that by the law as now settled, the agreement is not dissolved, according to the *dictum* in this old case.

Langfoot *v.* Tyler.

§ 1158. In Hore *v.* Milner, (*f*) 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 bar-

Hore *v.* Milner

(*b*) Blackburn on Sales, p. 325.

1. See *post* § 1165, and note thereto, and § 1180, note 5.

(*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*) 1 Peake 42, n. (58, n. in ed. 1820.)

gain and sale, and could only recover on a count for damages, as on an executory agreement.

Mertens v. Adcock.

In Mertens *v.* Adcock, (*g*) 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. See Lamond *v.* Duvall, § 1162, *infra*.

Overruled.

Hagedorn v. Laing.

In Hagedorn *v.* Laing, (*h*) 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.

Greaves v. Ashlin.

In Greaves *v.* Ashlin, (*i*) 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.

Maclean v. Dunn.

§ 1159. Next came Maclean *v.* Dunn, in 1828. The vendor in 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 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

(*g*) 4 Esp. 251.
(*h*) 6 Taunt. 162.
(*i*) 3 Camp. 426.

worse the longer they are kept, and at all events there is the risk of the price becoming lower." (*k*)

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." (*l*)

§ 1160. In Acebal *v.* Levy, (*m*) 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.*" Acebal *v.* Levy.

§ 1161. In Milgate *v.* Kebble, (*n*) 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, to be paid by installments *before* the buyer took them away. The buyer paid £33 on account, and gathered the apples on the 1st of October, leaving them in the defendant's kiln. On the 27th of 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, on the 22nd of January. The jury found that a reasonable time had *not* elapsed before the resale, and gave a verdict for £5 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 plaintiff to maintain *trover* against him. In this case, Tindal, C. J., said the buyer was in the condition of a *pledgor*, who cannot bring trover. Milgate *v.* Kebble. Vendee in default cannot maintain trover.

In Fitt *v.* Cassanet, (*o*) the subject again came before the same court,

(*k*) 4 Bing. 722.
(*l*) Blackburn, p. 337.
(*m*) 10 Bing. 376.
(*n*) 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* § 39; Lord *v.* Price, L. R., 9 Ex. 54.
(*o*) 4 M. & G. 898.

Fitt *v.* Cassanet.

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.

§ 1162. Thus stood the authorities in 1845, and one of the points in dispute was settled very speedily afterwards.

Lamond *v.* Duvall.

A resale in accordance with a right expressly reserved rescinds the original sale.

In Lamond *v.* Duvall, (*p*) 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, 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. 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, (*q*) and confirming the *dictum* of Gibbs, C. J., in Hagedorn *v.* Laing. (*r*) 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, (*s*) the action for damages for the loss on resale is spoken of as the proper course, where the power of resale is exercised without an express stipulation for it."

The *point* here decided is, that where there is a resale on the buyer's defalt, in accordance with an express reservation of that right in the original contract, the sale is rescinded.

The *dicta* are, that the vendor's remedy in case of resale at a loss is

(*p*) 9 Q. B. 1030.
(*q*) 4 Esp. 251.
(*r*) 6 Taunt. 162.
(*s*) 4 Bing. 722.

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.

§ 1163. 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. (*t*) 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, *qua* 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. (*u*)

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.

§ 1164. The cases of Valpy *v.* Oakeley, (*x*) and Griffiths *v.* Perry, (*y*) cited in the preceding chapter, §§ 1136, 1137, 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 further, 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. 2

Modern cases decide that vendor has no right to resell on buyer's default.

And is always liable for nomina damages, even if no actual damage be proven.

§ 1165. In the United States the law is somewhat different, and in Dustan *v.* McAndrew, (*z*) was thus stated: "The vendor of personal property in a suit against the vendee for not

Law in America.

(*t*) Sugd. on Vendors, p. 39, (ed. 1862.)

(*u*) Ashlin *v.* Greaves, 3 Camp. 426; Valpy *v.* Oakeley, and Griffiths *v.* Perry, *ante* §§ 1136, 1137.

(*x*) 16 Q. B. 941; 20 L. J., Q. B. 380.

(*y*) 1 E. & E. 680; 28 L. J., Q. B. 204.

2. See *post* note 5. The rule in the United States is that if the vendor on the buyer's default resells without notice to the buyer, he rescinds the sale. But he may elect to resell as agent for the buyer, in which case he must give the buyer notice of his election so to do. Fancher *v.* Goodman, 29 Barb. 315. See Sloane *v.* Van Wyck, 4 Abb. App. Dec. 250.

(*z*) 44 N. Y. 72; Hayden *v.* Demetz, 53 N. Y. 426, per Church, C. J., at p. 431; 2 Kent 504, (ed. 1873.)

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; or, 3rd, 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." 3

Dustan v. McAndrew.

§ 1166. 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 could, previous to the Judicature Acts, set up his own right as defence in an action by the other, but was obliged to bring his cross-action, but now either party can obtain relief by counter-claim. 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 an action or set up a counter-claim 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:—

Where vendor tortiously retakes goods after delivery —legal effect.

§ 1167. In Stephens *v.* Wilkinson, (*b*) 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

Stephens v. Wilkinson.

3. **Seller's Choice of Remedies.**—The principles stated in Dustan *v.* McAndrew, and quoted in the text, have been frequently recognized in the United States before as well as since the decision of that case. Shawhan *v.* Van Nest, 25 Ohio St. 490; Holland *v.* Rea, 48 Mich. 218; Cook *v.* Brandeis, 3 Metc. (Ky.) 557; Bell *v.* Offutt, 10 Bush 632; Mason *v.* Decker, 72 N. Y. 595, 599; Bagley *v.* Findlay, 82 Ill. 524; Barr *v.* Logan, 5 Harring. 52; Young *v.* Mertens, 27 Md. 114, 126. See *post* note 5.

(*b*) 2 B. & Ad. 320.

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 refused 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." Parke, 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, (c) 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, 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.*"

§ 1168. The converse of this case came before the Exchequer in 1841. In Gillard *v.* Brittan, (*d*) 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

Gillard *v.* Brittan.

(*c*) Byles on Bills 132, (ed. 1879); but now unliquidated damages may be set up in a counter-claim. Ord. XIX., r. 3; Ord. XXII., r. 10.

(*d*) 8 M. & W. 575.

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 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 equivaleut to allowing a set-off in trespass."

Chinery *v.* Viall.

Where vendor tortiously resells before delivery.

§ 1169. But in Chinery *v.* Viall, (*e*) 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 declaration 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, 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 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.

Observations on Gillard *v.* Brittan, and Chinery *v.* Viall.

In this case, Gillard *v.* Brittan (*f*) 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

(*e*) 5 H. & N. 288; 29 L. J., Ex. 180. (*f*) 8 M. & W. 575.

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. (*g*)

§ 1170. 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. 4 It was followed by the Common Pleas (*dissentiente* Williams, J.), in Johnson *v.* Stear, (*h*) which was an action in trover for a conversion of the 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, (*i*) and by the Exchequer Chamber in Halliday *v.* Holgate, (*j*) with this modification, that not even nominal damages are recoverable in such an action, if the pledgee has not received full payment.

Damages in trover not always the full value of the goods converted.

Cases of pledge.

Johnson *v.* Stear.

Donald *v.* Suckling.

Halliday *v.* Holgate.

§ 1171. [But the case of a *pledge* giving a right of property in the goods must be distinguished from that of a *lien* giving a mere right of detainer. Where a third person has only a lien over the goods, and has then tortiously sold them so that his lien is destroyed, he is liable in an action for conversion by the unpaid vendor for the full value of the goods, and is

Lien to be distinguished from pledge.

Mulliner *v.* Florence.

(*g*) See per Denman, J., in Johnson *v.* Lancashire and Yorkshire Railway Co., 3 C. P. D., at p. 507.

4. In Bowser *v.* Birdsell, Mich. Sup. Ct., June, 1882, 14 Law Reporter 435, there was a present sale of a hog for $8.75, of which $5 was paid. The buyer delayed to call for the hog until a few days after the time fixed, and the seller resold after waiting only one day. It was held that the buyer could recover in trover but that the recovery could be for only $5. See Hefferman *v.* Berry, 32 U. C. Q. B. 518.

(*h*) 15 C. B. (N. S.) 330; 33 L. J., C P. 130. Reflected upon in Mulliner *v.* Florence, 3 Q. B. D. 484, C. A., per Bramwell, L. J., at p. 490, and Brett, L. J., at p. 493:—"Johnson *v.* Stear would require great consideration before it was acted upon."

(*i*) 7 B. & S. 783; L. R., 1 Q. B. 585. Blackburn, J. (at p. 618), seems to doubt the correctness of the decision in Johnson *v.* Stear.

(*j*) L. R., 3 Ex. 299.

not entitled to deduct the amount which was due to him in respect of his lien. (*k*)

The qualification of the *prima facie* rule as to the measure of damages in an action of trover is confined to cases where the relationship of seller and buyer exists between the plaintiff and defendant, and does not apply to a case where the defendant is a mere stranger to the plaintiff. Thus, where there had been an arrangement that the seller should receive payment direct from a third person to whom the buyer was under contract to deliver the goods, and the seller converted the goods, it was held, in an action for conversion brought by the third person against the seller, that the latter was liable for the full value of the goods, and was not entitled to deduct the contract price. (*l*)

Full value of goods recoverable against a mere stranger.

Johnson *v.* Lancashire and Yorkshire Rail. Co.

If, after the conversion, a return, or the equivalent of a return, of the goods has been made to the plaintiff, he can only recover the damages sustained by the wrongful act, and not the full value of the goods. (*m*)

Measure of damages where the goods are returned.

It is to be observed that the Judicature Acts have not altered the law as to what constitutes a conversion, although they have substituted a new form of action in place of the old count in trover and conversion. (*n*)]

Effect of Judicature Acts.

§ 1172. 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.

(*k*) Mulliner *v.* Florence, 3 Q. B. D. 484, C. A., where Johnson *v.* Stear, Donald *v.* Suckling, and Halliday *v.* Holgate, *ubi supra*, are distinguished on this ground.

(*l*) Johnson *v.* Lancashire and Yorkshire Railway Co., 3 C. P. D. 499, where the cases are reviewed by Denman, J.

(*m*) Hiort *v.* London and North Western Railway Co., 4 Ex. D. 188, C. A.

(*n*) See Appendix A to the act of 1875, Part II., § 4, and per Bramwell, L. J., in Hiort *v.* London and North Western Railway Co., *supra*, at p. 194.

(*o*) L. R., 1 P. C. 127; 3 Moo. P. C. C. (N. S.) 499.

§ 1173. [The above-cited decisions are of little importance since the Judicature Acts. The forms of action are no longer material, and by Ord. XIX., r. 3, of the act of 1875, it is provided, that "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim." In cases like Stephens *v.* Wilkinson, *ante* § 1167, Gillard *v.* Brittan, *ante* § 1168, and Page *v.* Cowasjee, *ante* § 1172, the defendant might now obtain relief by way of counter-claim.]

Effect of Judicature Acts.

§ 1174. The following summary of the law is submitted as fairly resulting from the foregoing authorities, [having regard to the effect of the Judicature Acts]:—

Summary of the rules of law relative to resales by vendors.

First. A resale by the vendor *on default* of the purchaser rescinds the original sale, when the right of sale was expressly reserved in the original sale; (*p*) but not in the absence of such express reservation. (*q*)

§ 1175. *Secondly.* The vendor's remedy, after a resale under *an express reservation of that right,* against a purchaser in default, is an 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*)

§ 1176. *Thirdly.* The vendor's remedy, after a resale made in the absence of an express reservation of that right, is an action 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 claim the whole price, (*u*) leaving the buyer to his counter-claim for damages for the resale.

And this rule prevails even in cases where the vendor has tortiously retaken and resold the goods after their delivery to the purchaser. (*u*)

(*p*) Lamond *v.* Duvall, 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. 127; 3 Moo. P. C. (N. S.) 499.

(*r*) Lamond *v.* Duvall, *ubi supra.*

(*s*) Sugd. on Vendors, p. 39.

(*t*) Maclean *v.* Dunn, *ubi supra.*

(*u*) Stephens *v.* Wilkinson, and Page *v.* Cowasjee, *ubi supra.*

§ 1177. *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. (*x*)

§ 1178. *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 remedy is an action for damages, (*y*) or a counter-claim in the vendor's action for the price.

§ 1179. *Sixthly.* A buyer, *not in default*, may maintain trover against a vendor who has tortiously resold, but the vendor may set up a counter-claim for the amount of the unpaid price; but if the vendor, by reason of his conversion before delivery, is unable to maintain an action, or set up a counter-claim, 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. (*z*)

§ 1180. *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. (*a*) [5]

(*x*) Milgate *v.* Kebble, 3 M. & G. 100; Lord *v.* Price, L. R., 9 Ex. 54.

(*y*) Martindale *v.* Smith, 1 Q. B. 395; Stephens *v.* Wilkinson, 2 B. & Ad. 320; Page *v.* Cowasjee, L. R., 1 P. C. 127; 3 Moo. P. C. (N. S.) 499.

(*z*) Chinery *v.* Viall, 5 H. & N. 288; 29 L. J., Ex. 180.

(*a*) 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.

5. **Resale on Default of the Buyer to Accept the Goods.**—The remedy of a resale by the seller on the buyer's failure to accept the goods contracted for, which seems from our author's review not even yet very clearly defined in England, is settled in many of the states, as stated in the case of Dustan *v.* McAndrew, cited in the text, § 1165. Several Pennsylvania cases hold that a resale merely affords evidence of the market price, and that other evidence of the price may be offered no matter how fair the sale may have been. These cases have occasionally been followed in other states. In Girard *v.* Taggart, 5 S. & R. 19, (1818,) the sale was at auction, and the buyer refused to take the goods. He was sued after resale for damages. Tilghman, C. J., said: "Without a resale it would have been difficult to ascertain the amount of damage. For this purpose, a resale has been the usual practice." This was approved in Andrews *v.* Hoover, 8 Watts 239, (1839,) and in McCombs *v.* McKen-

nan, 2 W. & S. 216, 219, (1841), the court saying that a resale was the usual mode to ascertain damages. "But it is not the only mode, nor even when it takes place, is it decisive." To the same effect, see Coffman *v.* Hampton, 2 W. & S. 377, 390. A similar principle seems to be recognized in the cases of Chapman *v.* Ingram, 30 Wis. 290, 295; Rickey *v.* Tenbroeck, 63 Mo. 563, 567, and Haskell *v.* McHenry, 4 Cal. 411. See Stevenson *v.* Burgin, 49 Penna. 36. But the principle in the recent decisions is, that if the vendor notifies the buyer on his default that the goods will be resold, the seller is the agent of the buyer in making such resale.

The Vendor may Resell as Agent for the Buyer in Default.—In Ganson *v.* Madigan, 13 Wis. 67; S. C., 15 Wis. 144, 151, the suit was for the price of a reaping machine. The buyer was shown the separate pieces of a large number of machines, and the seller offered to set up one, but the buyer refused to accept any. The court said that the seller had his choice of three remedies, (stated *ante* § 1165), and that by not setting apart any machine as the property of the buyer he had waived the right to recover the price and the right to resell, (both of which remedies proceed upon the theory that the property had passed), and had retained only the right to sue for damages for non-acceptance. In Smith *v.* Pettee, 70 N. Y. 13, 18, a cargo of iron was sold to arrive, and arrived and was rejected in June. The sellers gave notice to the buyer that they would resell on his account, and after some unsuccessful efforts to resell, effected a resale in November and sued for the difference in price. Rapallo, J., said: "The plaintiffs promptly took their position, and became agents of the defendants for the sale of the iron, and bound to the exercise of good faith and reasonable diligence to effect the sale at the best price. They would, doubtless, have been bound to obey any instructions which the defendants might have given them as to the time and manner of sale, and which they could follow without sacrificing the lien they had on the iron for the contract price. In the absence of any such instructions, they had the right to exercise their discretion within reasonable bounds. The exception to the refusal of the referee to decide that the rule of damage was the difference between the contract price and what the iron could be sold for within the shortest reasonable time after the breach of the contract, cannot be sustained. If made within a reasonable time, that is all that can be required, and the sale cannot be invalidated by showing that it might have been made sooner than it was." In Bell *v.* Offutt, 10 Bush 632, the sale was of 1000 hogs, which being tendered and refused, were immediately resold. A recovery of the difference in price was sustained, the court citing and following the case of Cook *v.* Brandeis, 3 Metc. (Ky.) 557. See Sands *v.* Taylor, 5 Johns. 395, (the leading case); Lewis *v.* Greider, 51 N. Y. 231, 236, stated *infra;* Schultz *v.* Bradley, 4 Daly 29, 32, (reversed, but on other grounds); McGibbon *v.* Schlessinger, 18 Hun 225; Hunter *v.* Wetsell, 84 N. Y. 549, 555; Phelps *v.* Hubbard, 51 Vt. 489; Jones *v.* Marsh, 22 Vt. 144; Rosenbaum *v.* Weeden, 18 Gratt. 785, 792; McLean *v.* Richardson, 127 Mass. 339, 345; Whitney *v.* Boardman, 118 Mass. 242, 248; Bartley *v.* New Orleans, 30 La. Ann., Part I., 264; Williams *v.* Godwin, 4 Sneed 557; Van Horn *v.* Rucker, 33 Mo. 391; Barr *v.* Logan, 5 Harring. 52; Young *v.* Mertens, 27 Md. 114, 126; Lamkin *v.* Crawford, 8 Ala. 153.

The Resale must be within a Reasonable Time and must be Shown to have been Fair.—In Pickering *v.* Bardwell, 21 Wis. 562, the seller of wheat, after fifteen months' delay, resold and sued for the difference between the price obtained and the contract price. But the court held that the delay was too great, and the true measure of damages must be tested

by what might have been obtained had the sale been made within a reasonable time. In Brownlee *v.* Bolton, 44 Mich. 218, the contract was for the sale of cedar posts, which were not accepted, and which were resold after they had been piled ready for delivery for more than two years. A suit was brought by the seller for the difference between the contract price and the price obtained on resale, and the court charged the jury that such difference was the measure of damages, and judgment was given for that amount. But a new trial was ordered by the Supreme Court. Graves, J., said that there was no proof to show the condition of the property after two years' delay, or that the sale was fair. The court could not determine from the proof whether the resale was such that, in justice, the price obtained should bind the defendant. "It is now sufficient to say generally that the vendor's right of resale must be exercised in good faith and in such time and in such manner and under such circumstances and by such methods as will be best calculated to produce the fair value of the property, and that in case he seeks to avail himself of it before a jury, it is incumbent on him to adduce the necessary facts to show that, in exercising the right, this manner was observed." In Camp *v.* Hamlin, 55 Ga. 259, the recovery was for the difference between the contract price of fruit trees and that obtained on a resale, but it was set aside, the court saying: "The mere fact is stated in the evidence that they were sold at auction, and brought so much. The plaintiff should enter into a more full and minute accounting as to the auction, in order to use it as a final test of value. He ought to show when and where the auction took place, what notice of it was given, how the sale was conducted, who were the purchasers of the various lots, and at what prices, or if any of these particulars are omitted in his showing, he ought to explain why the omission cannot be supplied. In respect to the conduct and proceeds of the auction, he is in the position of a party accounting, and ought to account fully, and with reasonable particularity, by the production of satisfactory evidence at the trial." See Smith *v.* Pettee, 70 N. Y. 13, 18, quoted *supra*. In Rosenbaum *v.* Weeden, 18 Gratt. 785, 797, there was a delay of two months before resale. The court refused to charge that if the plaintiffs delayed the resale unreasonably on a falling market and then sold, they could not recover, and this was sustained on appeal. Moncure, Pres., said that the sellers made efforts to persuade the defendants to accept and hold the goods for two months, subject to their order. The defendants still refusing, the plaintiffs then gave notice that they would resell, and sold without delay at auction, and of this course the buyer could not complain. In Saladin *v.* Mitchell, 45 Ill. 79, 85, grain was sold, but the buyer neglecting for five months to take it from storage, a sale was made, and it was held that this bound the buyer. See Tilt *v.* La Salle Silk Co., 5 Daly 19. But where the seller of a lot of hogs, on the buyer's default, kept them, in order to profit by a rise in the market, it was held that he could not charge the expense of keeping to the buyer. Thurman *v.* Wilson, 7 Ill. App. 312.

Is Notice to the Buyer of Time and Place of Resale Necessary.—Notice to the buyer in default that the goods will be resold, and of the time and place of such resale, should be given, where practicable, because it strengthens the proof that the sale was fair. But it often happens that the goods can be best sold at private sale, in which case it is not practicable or necessary to give notice of time or place. In Ullmann *v.* Kent, 60 Ill. 271, the contract was for the sale of the hair and bristles of all the hogs the seller might kill during the season. On default of the buyer the seller resold without notice, but obtained the highest market price, and it

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, (*b*) which went off on the point of estoppel, so that nothing was decided on it.

Title of second purchaser on resale.

was held that notice was unnecessary. In Pollen *v.* Le Roy, 30 N. Y. 549, 556, Emott, J., said that the law regards the seller as the agent of the buyer in making a resale. "But it is no part of such agency or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold. In a majority of cases such notice would be entirely impracticable, as it would have been in this. Unless the sale is to be public and at auction no notice of the time and place can be given. But in very many cases sales by auction are not the usual, nor are they a favorable mode of disposing of merchandise. * * The only requisite to such a sale as a measure of the rights and the injury of the party is good faith, including the proper observance of the usages of the particular trade." In Lewis *v.* Greider, 51 N. Y. 231, 236, Pollen *v.* Leroy was followed, and the court said that the vendor was the agent of the vendee to sell the property fairly, that notice of the time and place was unnecessary, and that the sale need not be at the place of delivery if a better market could be found. McGibbon *v.* Schlessinger, 18 Hun 225. But in Chapman *v.* Ingram, 30 Wis. 290, 295, the sale was held unfair because after default the seller transferred the property to a distant market instead of selling at the place of delivery. This was followed in Rickey *v.* Tenbroeck, 63 Mo. 563, 567. In these cases it was probably not made to appear that a better market had been found by the removal of the goods.

Notice to the Buyer that the Vendor will Resell.—"It is now generally assumed that where the agreement is silent in regard to it, and no special incidents appear to contend for it, and where the extent of the vendee's liability is not to be materially decided by the price obtained, no notice of the resale itself is necessary. On the other hand, it is held by high authority that to entitle the vendor to proceed by resale instead of by rescission, or by action for the whole price, he must manifest his election by preliminary notice that he intends to sell and hold the vendee for the loss, or notice to that effect. This notice, it will be observed, is not a notice of resale, but a notice that the vendor will assert the right of resale, and bind the vendee by the price obtained." Graves, C. J., in Holland *v.* Rea, 48 Mich. 218, 224. Redmond *v.* Smock, 28 Ind. 365, 370; Gashell *v.* Morris, 7 W. & S. 22; Rosenbaum *v.* Weeden, 18 Gratt. 785, 793; Saladin *v.* Mitchell, 45 Ill. 76, 85; Bagley *v.* Findlay, 82 Ill. 524; McClure *v.* Williams, 5 Sneed 718; Hughes *v.* United States, 4 Ct. of Cl. 64, 74.

(*b*) 7 Bing. 339.

CHAPTER IV.

REMEDIES AGAINST THE GOODS—LIEN.

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§ 1181. 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 in 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. [1]

Lien defined.

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 the Exchequer Chamber, (*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

Extends only to price, not to charges, &c.

Somes *v.* The British Empire Shipping Co.

(*a*) Hammonds *v.* Barclay, 2 East 235.

(*b*) Miles *v.* Gorton, 2 C. & M. 504.

1. Parks *v.* Hall, 2 Pick. 206, 212; Ware River R. R. *v.* Vibbard, 114 Mass. 447, 454; Southwestern Freight, &c., Co. *v.* Stanard, 44 Mo. 71, 84; Southwestern Freight, &c., Co. *v.* Plant, 45 Mo. 517; Bradley *v.* Michael, 1 Ind. 551; Owens *v.* Weedman, 82 Ill. 409, 419; Thompson *v.* Gray, 1 Wheat. 75; United States *v.* Lutz, 2 Blatch. 383; Osborne *v.* Gantz, 38 N. Y. Super. Ct. 148, affirmed, 60 N. Y. 540. In Douglass *v.* Shumway, 13 Gray 498, the owner of land sold standing timber. After it was cut and before it was removed the vendor claimed a lien for the price, but the court denied it, Bigelow, J., saying: "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."

(*c*) 1 E., B. & E. 353; 27 L. J., Q. B. 397; in Ex. Ch., E., B. & E. 367; 28 L. J., Q. B. 220; in the House of Lords, 8 H. L. C. 338; 30 L. J., Q. B. 221.

(*d*) 28 L. J., Q. B. 221.

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 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 shipowners 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 America.

In the case of Crommelin *v.* The New York and 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.[2]

Crommelin *v.* The New York and Harlem R. Co.

§ 1182. 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;[3] and it may be abandoned during the *performance* of the contract, by the vendor's actually parting with the goods before payment.

Lien may be waived when contract is formed.

Or abandoned afterwards.

(*e*) See per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426.

(*f*) 4 Keyes 90.

2. Hazeltine *v.* Weld, 73 N. Y. 156; Lee *v.* Gould, 47 Penna. 398, 402.

3. Douglass *v.* Shumway, 13 Gray 498; Pickett *v.* Bullock, 52 N. Y. 354.

The lien is waived by implication, when time is given for payment, and nothing is said as to delivery; in other words, when goods are sold on credit. It is of course competent for the parties to agree expressly that the goods, though sold on credit, are not to be delivered till paid for; 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.

Lien waived by sale on credit.

§ 1183. In Spartali *v.* Benecke (*g*) 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;" (*h*) 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.

§ 1184. But on this second point, Spartali *v.* Benecke has been overruled by the Exchequer Chamber, in Field *v.* Lelean. (*i*) There the sale was by one broker in mining-shares to another. The contract was, "Bought, Thomas Field, Esq., 250 shares, &c., at £2 5*s.* per share, £562 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

Evidence of usage admissible to show that in a sale on credit delivery was not to be made till payment.

(*g*) 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* § 1158.

(*h*) Chase *v.* Westmore, 5 M. & S. 180; Crawshay *v.* Homfray, 4 B. & Ald. 50; Cowell *v.* Simpson, 16 Ves., Jr., 275.

(*i*) 6 H. & N. 617; 30 L. J., Ex. 168 See, also, cases cited in notes to Wiggles worth *v.* Dallison, 1 Sm. L. C. 594, (ed 1879.)

Field v. Lelean.

among dealers in such shares, that the delivery was to take place concurrently 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.

Lien waived by taking bill of exchange or other security.

§ 1185. A vendor also waives his lien by taking from the buyer a bill of exchange or other security payable at a distant day; (*k*) and in Chambers *v.* Davidson, (*l*) 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.*" [4]

(*k*) Hewison *v.* Guthrie, 2 Bing. N. C. 755; 3 Scott 298; Horncastle *v.* Farran, 3 B. & Ald. 497; Pooley *v.* Great Eastern Railway Co., 34 L. T. (N. S.) 537.

(*l*) L. R., 1 P. C. 296; 4 Moo. P. C. C. (N. S.) 158.

4. **Sale on Credit, or where Bill of Exchange is taken for the Price.**—When credit is given the lien is waived and the seller is entitled to immediate possession. Leonard *v.* Davis, 1 Black 476, 483; McNail *v.* Ziegler, 68 Ill. 224; Thompson *v.* Wedge, 50 Wis. 642; McCraw *v.* Gilmer, 83 N. C. 162; Johnson *v.* Farnum, 56 Ga. 144; Dempsey *v.* Carson, 11 U. C. C. P. 462.

Insolvency of the Buyer Revives the Lien.—American decisions generally hold that if the buyer becomes insolvent before the seller has parted with possession of the goods, the seller has a lien even though the sale may have been on credit or a note may have been given for the price, and the term of credit has not expired. In Arnold *v.* Delano, 4 Cush. 33, wood was sold, piled on land of the seller, and the purchaser gave his note payable in six months for the price. The purchaser became insolvent and made an assignment, and his assignee claimed the wood, still being on the seller's land, within six months. It was held that the vendor might retain the wood provided he surrendered the note. Shaw, C. J., said: "The law, in holding that a vendor who has given credit for goods waives his lien for the price, does so on one implied condition, that the vendee shall keep his credit good. If, therefore, before payment the vendee becomes insol-

§ 1186. The vendor's lien is abandoned when he makes delivery of the goods to the buyer.[5] At what precise state of the dealings between the parties, the acts of the vendor 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.

Lien abandoned by delivery of the goods to the buyer.

§ 1187. 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. 4. 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.

vent 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 on their way to the vendee, and the vendor 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." White *v.* Welsh, 38 Penna. 396, 420; Parks *v.* Hall, 2 Pick. 206, 211; Parker *v.* Byrnes, 1 Low. Dec. 539, 540; Re Batchelder, 2 Low. Dec. 245, 248; Benedict *v.* Field, 16 N. Y. 595; Milliken *v.* Warren, 57 Me. 46, 50; Clark *v.* Draper, 19 N. H. 419; Southwestern Freight, &c., Co. *v.* Stanard, 44 Mo. 71, 84; Hunter *v.* Talbot, 11 Miss. 754. Where goods are thus detained under a lien, it seems that the vendor must hold them until the expiration of the credit. If not then paid, he may resell on notice to the buyer. Babcock *v.* Bonnell, 80 N. Y. 244.

5. **Delivery to the Buyer is a Waiver of the Lien.**—See *ante* §§ 351–355. Welsh *v.* Bell, 32 Penna. 12, 17; Bowen *v.* Burk, 13 Penna. 146; Muskegon Booming Co. *v.* Underhill, 43 Mich. 629; Haskins *v.* Warren, 115 Mass. 514; Freeman *v.* Nichols, 116 Mass. 309; Scudder *v.* Bradbury, 106 Mass. 422; Farlow *v.* Ellis, 15 Gray 229; Johnson *v.* Farnum, 56 Ga. 144; Barnett *v.* Mason, 7 Ark. 253; Lupin *v.* Narie, 6 Wend. 77; Boyd *v.* Mosely, 2 Swan 661; Flint *v.* Rawlings, 20 La. Ann. 557; Musson *v.* Elliott, 30 La. Ann., Part I., 147. But although the vendor's common law lien is lost by delivery to the buyer, this will not prevent the parties from agreeing that a lien shall exist after delivery. Such agreement will be valid as between the parties. Gregory *v.* Morris, 96 U. S. 619, 623; Husted *v.* Ingraham, 75 N. Y. 251, 257; Sawyer *v.* Fisher, 32 Me. 28; Bunn *v.* Valley Lumber Co., 51 Wis. 376, 380.

Delivery to divest lien not the same as to satisfy 17th section of Statute of Frauds.

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: (*m*) 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 (*n*) 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.

Where goods were already in possession of the buyer.

§ 1188. 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. [6] 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. (*o*) 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.

§ 1189. When the goods are at the time of sale in possession of a

(*m*) Sm. Mer. Law, note (*s*), p. 497, (ed. 1877.)

(*n*) *Ante* § 1134.

6. Warden *v.* Marshall, 99 Mass. 305; Martyn *v.* Adams, 104 Mass. 262; Re Batchelder, 2 Low. Dec. 245, 249.

(*o*) Eden *v.* Dudfield, 1 Q. B. 306; Lillywhite *v.* Devereux, 15 M. & W. 285; Taylor *v.* Wakefield, 6 E. & B. 765.

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. (*p*) The cases have been reviewed *ante* §§ 174, *et seq.*; 1143, *et seq.* 7

Where goods were in possession of bailee of the vendor.

§ 1190. 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, (*q*) that "it is difficult to select those 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.

Where goods are in possession of vendor at time of sale.

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. (*r*) 8

Delivery to common carrier divests lien.

§ 1191. 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. 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

Delivery of part when delivery of whole.

(*p*) Harman *v.* Anderson, 2 Camp. 244; Bentall *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.

7. Bullard *v.* Wait, 16 Gray 55; Linton *v.* Butz, 7 Penna. 89. Where no notice was given of the sale to the warehouseman, the seller was held to have retained his lien in the case of In re Batchelder, 2 Low. Dec. 245, 247.

(*q*) 2 Kent 510, (ed. 1873.)

(*r*) 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.

8. **Delivery to a Carrier Divests the Vendor's Lien.**—See *ante* §§ 517–523. Mason *v.* Hatton, 41 U. C. Q. B. 610, 615. But the seller may preserve his lien by consigning to himself or to his agent. See "Reservation of the *Jus Disponendi*," *ante* § 541, *et seq.*; *post* § 1226. Seymour *v.* Newton, 105 Mass. 272.

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 Parke, J., in Dixon *v.* Yates, (*s*) 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.* Gibbons, (*t*) 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, (*u*) 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 by the jury according to all the facts and circumstances of the particular case.

Always question of fact as to intention.

§ 1192. In Slubey *v.* Heyward, (*x*) the defendants being in possession of bills of lading which had been endorsed to them as subvendees 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."

Slubey *v.* Heyward.

Hammond *v.* Anderson (*y*) 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.

Hammond *v.* Anderson.

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,

(*s*) 5 B. & Ad. 313–341.
(*t*) 2 Ad. & E. 73.
(*u*) 14 M. & W. 28.
(*x*) 2 H. Bl. 504.
(*y*) 1 B. & P. N. R. 69. See, also, Tansley *v.* Turner, 2 Bing. N. C. 151.

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.

§ 1193. [Slubey *v.* Heyward and Hammond *v.* Anderson were explained in this way by Brett, L. J., in Ex parte Cooper, (*z*) and do not, therefore, form exceptions to the general rule, that *in the absence of evidence to the contrary* it is to be assumed that the delivery of a part of the goods is intended to operate only as a delivery of that part and not of the whole.] [9]

In the absence of evidence to the contrary, delivery of part operates only as delivery of that part.

In Bunney *v.* Poyntz, (*a*) 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.

Bunney *v.* Poyntz.

So in Dixon *v.* Yates, (*b*) 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.

Dixon *v.* Yates.

In Simmons *v.* Swift, (*c*) 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.* (*d*)

Simmons *v.* Swift.

§ 1194. In Miles *v.* Gorton, (*e*) the vendors sold a parcel of hops consisting of two kinds, twelve pockets of one, and ten pockets of the other. They rendered one invoice 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 subvendee. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the vendors 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

Miles *v.* Gorton.

(*z*) 11 Ch. D. 68, C. A., at p. 74. See, also, the observations on these cases by Bramwell, L. J, in Ex parte Falk, 14 Ch. D. 446, C. A., at p. 455. Ex parte Cooper and Ex parte Falk are noticed *post*, chapter on Stoppage *in Transitu*.

9. Haskell *v.* Rice, 11 Gray 240; Buckley *v.* Furniss, 17 Wend. 504. A carrier may deliver part of a lot of goods and yet retain his lien for the whole of his freight and charges on the residue. Potts *v.* N. Y. & N. E. R. R., 131 Mass. 455.

(*a*) 4 B. & Ad. 568.

(*b*) 5 B. & Ad. 313.

(*c*) 5 B. & C. 857.

(*d*) See Hanson *v.* Meyer, 6 East 614.

(*e*) 2 Cr. & M. 504; and see Grice *v.* Richardson, 3 App. Cas. 319.

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."

Tanner *v.* Scovill.

§ 1195. In Tanner *v.* Scovill, (*f*) 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 1*s.* 6*d.* About a month later, the defendants delivered five of these bales to a subvendee 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 subvendee 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. 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

(*f*) 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.* Ede, 1 B. & C. 181; Bolton *v.* Lancashire and Yorkshire Railway Co., L. R., 1 C. P. 431; 35 L. J., C. P. 137.

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*.

No case where delivery of what remained in vendor's own custody is effected by previous delivery of part.

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*. (*g*)

Effect of marking goods or putting them in packages.

§ 1196. 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, (*h*) or boxing them up by the purchaser's orders, and putting his name on them, (*i*) so long as the vendor holds the goods, and has not agreed to give credit on them.

Buyer may be let into possession as bailee of vendor.

§ 1197. 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, *qua* purchaser, but lend it to him for a day or a week: (*k*) might sell his horse 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. (*l*)

Conditional delivery.

§ 1198. 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

(*g*) See Lord Ellenborough's remarks in Payne *v.* Shadbolt, 1 Camp. 427; 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.

(*h*) 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.

(*i*) Boulter *v.* Arnott, 1 C. & M. 333.

(*k*) Tempest *v.* Fitzgerald, 3 B. & Ad. 680; Marvin *v.* Wallace, 6 E. & B. 726; 25 L. J., Q. B. 369.

(*l*) Reeves *v.* Capper, 5 Bing. N. C. 136.

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. (*m*) So, also, if anything is to be done to the goods before delivery, as in Hanson *v.* Meyer (*n*) (where the goods were to be weighed), and the cases (*o*) decided on its authority.

§ 1199. It is now necessary to examine the question as to the effect on the vendor's lien, of the transfer and endorsement 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.

Delivery by transfer of documents of title.

The Factors' Acts, 1823 to 1877, namely, the 4 Geo. IV., c. 83, 6 Geo. IV., c. 94, 5 and 6 Vict., c. 39, and 40 and 41 Vict., c. 39, are intended to afford security to persons dealing with factors. The act 5 and 6 Vict., c. 39, provides substantially as follows:

Factors' Acts. 4 Geo. IV., c. 83 (1823.) 6 Geo. IV., c. 94 (1825.) 5 and 6 Vict., c. 39 (1842.) 40 and 41 Vict., c. 39 (1877.)

By the 1st section, that any agent entrusted 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 validity to any contract or agreement by way of pledge, lien or security, *bona fide* made by any person with such agent so entrusted 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.

Agent entrusted with possession may pledge.

Both for original and continuing advance.

Notwithstanding notice of agency.

§ 1200. By the 2d section 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 ne-

Bona fide exchange of securities.

(*m*) Winks *v.* Hassall, 9 B. & C. 372.
(*n*) 6 East 614.
(*o*) Wallace *v.* Breeds, 13 East 522; Busk *v.* Davis, 2 M. & S. 396; Shepley *v.* Davis, 5 Taunt. 617; and see Swanwick *v.* Sothern, 9 Ad. & E. 895.

gotiable 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 *bona 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 *bona 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.

§ 1201. By the 3d section it is provided, "That this act, and every matter and thing herein 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 *bona fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *mala 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 (*o*) owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent entrusted as aforesaid, in deviating from any express orders or authority received from the owner, but that for the purpose and to the intent of protecting all such *bona fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's 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."

Transactions must be *bona fide*.

Antecedent debts.

§ 1202. By the 4th section, 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

Definition of "document of title."

(*o*) This must be taken subject to 6 Geo. 4, c. 94, § 3, by which a pledge by a factor for an antecedent debt stands good to the amount of the factor's interest in the goods; and see Jewan *v.* Whitworth 2 Eq. 692; and Macnee *v.* Gorst, 4 Eq 315.

authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods *thereby represented.*" (*p*)

Definition of entrustment.

§ 1203. The same section defines an "agent" as "entrusted," 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, where any loan or advance shall be *bona fide* made to any agent entrusted 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. (*q*)

Advance made prior to transfer of goods or document of title, but on faith of agreement in writing to transfer.

Definition of advance.

Agent in possession to be deemed to have been entrusted.

unless contrary be

§ 1204. The 4th 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 entrusted with them by the owner, *unless the contrary can be shown in evidence.* (*r*)

(*p*) The Stamp Act, 1870, (§§ 87–92,) requires delivery orders and warrants for goods to be stamped, and contains a definition of those instruments.

(*q*) As to these last words there is a *dictum* of Lord Hatherley (then Wood, V. C.,) in Portalis *v.* Tetley, L. R., 5 Eq., at p. 148, that they were meant to apply to "the case where the factor being advised that goods are coming forward to him, agrees that as soon as he gets them, and as soon as the bills of lading come to hand, he will pledge them." The point was again raised but not decided in Cole *v.* The North Western Bank, L. R., 9 C. P. 470. See per Coleridge, C. J., at pp. 486, 487. The editors submit, although with diffidence, that these words were meant to apply to such a state of facts as arose in Bonzi *v.* Stewart, 4 M. & G. 295, where a factor obtained an advance on a *Saturday*, upon promising to deposit dock warrants to cover the advance. The dock warrants were not then in existence, but were afterwards made out and deposited on the *Monday*. The goods represented by the dock warrants were in dock on the *Saturday*, consigned to the factor who held bills of lading for them. The question was not properly raised on the pleadings, but the court intimated their opinion that this was the real question between the parties, and that such a transaction was not protected by the then Factors' Act, 6 Geo. IV., c. 94, § 2, because the factor was not *entrusted with and in possession of the warrants* at the time of the advance, and leave was given to amend the pleadings.

(*r*) Baines *v.* Swainson, *post* § 1220.

shown in evidence.

The antecedent act of 6 Geo. IV., c. 94, provided in the 2d 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 construction of the courts, (*s*) cases supposed to be within the former statutes had been excluded. These purposes are stated in the preamble.

Factors' Act, 1877.

§ 1205. [By the Factors' Act, 1877 (40 and 41 Vict., c. 39,) it is provided substantially as follows:—

By the 2d section, that where any agent has been entrusted with and continues in the possession of any goods or documents of title to goods within the meaning of the previous acts, as amended by that act, any revocation of his entrustment or agency shall not affect the rights of any other person who, *without notice of such revocation*, purchases such goods or makes advances upon the faith or security of such goods or documents.

Secret revocation of entrustment.

This alters the law as laid down in Fuentes *v.* Montis, (*t*) *post* § 1220.

By the 3d section, that where any goods have been sold, and *the vendor or any person on his behalf continues or is in possession of the documents of title thereto*, any sale, pledge, or other disposition of the goods or documents, made by such vendor, or any person or agent entrusted by the vendor with the goods or documents, shall be as effectual as if such vendor or person were *an agent entrusted by the vendee* with the goods or documents within the meaning of the previous acts, as amended by that act, provided that the person to whom the sale or pledge is made has not notice that the goods have been previously sold.

Vendor continuing in possession to be deemed a person entrusted.

This alters the law as laid down in the cases of Johnson *v.* The Credit Lyonnais Company and Johnson *v.* Blumenthal, (*u*) which came before the courts immediately before the passing of the act.

(*s*) 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.

(*t*) L. R., 3 C. P, 268; aff. in Ex. Ch., 4 C. P. 93.

(*u*) 2 C. P. D. 224; aff. on appeal, 3 C. P. D. 32. Cockburn, C. J., at p. 36, in delivering his judgment in the Court of Appeal, refers to this section of the act which had received the royal assent pending the appeal. The act is not retrospective in its operation (§ 6.)

§ 1206. By the 4th section, that where any goods have been sold or contracted to be sold, and *the vendee or any person on his behalf obtains the possession of the documents of title thereto from the vendor or his agents*, any sale or pledge of such goods, or documents by such vendee so in possession, or by any other person or agent entrusted by the vendee with the documents within the meaning of the acts, shall be as effectual as if such vendee or other person were an *agent entrusted by the vendor* with the documents within the meaning of the previous acts, as amended by that act, provided the person to whom the sale or pledge is made has not notice of any lien or other right of the vendor in respect of the goods.

And so also vendee obtaining possession.

This alters the law as laid down in the cases of Jenkyns *v.* Usborne, (*x*) and Van Casteel *v.* Booker. (*y*)

§ 1207. By the 5th section, that where any document of title to goods has been *lawfully* endorsed or otherwise transferred to any person *as a vendee or owner of the goods*, and such person transfers such document by endorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* and for valuable consideration, *the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu, as the transfer of a bill of lading has for defeating the right of stoppage in transitu.*

Effect of transfer of document of title by vendee.

The effect of this section is to assimilate all documents of title when in the hands of a *bona fide* transferee for value from the original purchaser, that is to say, documents of title as defined by the previous act (5 and 6 Vict., c. 39, § 4,) (*a*) to bills of lading for the purposes mentioned in the section, viz., of defeating the vendor's lien or his right of stoppage *in transitu*. It thus, to some extent, gives effect to the remarks of Mr. Benjamin in the earlier editions of this work, and is in accordance with the understanding of London merchants with regard to these documents, see *post* §§ 1215–1217. (*a*)]

§ 1208. 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, (*b*) and,

Decisions under Factors' Acts.

(*x*) 7 M. & G. 678, 699; S. C., 8 Scott N. R. 505.

(*y*) 2 Ex. 691; S. C., 18 L. J., Ex. 9.

(*a*) *Ante* § 1202.

(*b*) Navulshaw *v.* Brownrigg, 21 L. J., Ch. 57; S. C., 1 Sim. (N. S.) 573; 2 De G., M. & G. 441, where an elaborate judgment of Lord St. Leonards upon the

2ndly, 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. (*c*)

§ 1209. By the 9 and 10 Vict., c. 399, entitled "An Act for the Regulation of the Legal Quays within the Port of London," and the 11 and 12 Vict., c. 18, entitled "An Act for the Regulation of certain Sufferance Wharves in the Port of London," (*d*) 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 shipowner 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." (Sect. 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 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

9 and 10 Vict., c. 399.

Legal Quays in London.

11 and 12 Vict., c. 18.

Sufferance Wharves in London.

wording and effect of the earlier statutes will be found.

(*c*) Portalis *v.* Tetley, 5 Eq. 140.

(*d*) 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.

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." (Sect. 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.

18 and 19 Vict., c. 111.

§ 1210. The next statute to be referred to in this connection is the Bills of Lading Act, 18 and 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 endorsement, the property in the goods may thereby pass to the endorsee, 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 1st section, that "every consignee (*e*) of goods named in a bill of lading, and every endorsee of a bill of lading to whom the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, 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." (*f*)

Bills of Lading Act.

The foregoing, together with such similar provisions as are found in the acts incorporating the several dock companies, 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.

§ 1211. Bills of lading by the law-merchant are representatives of the property for which they have been given, and the endorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; *divests the vendor's lien;* 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,

(*e*) A consignee who retains the bill of lading for goods, but has parted with the beneficial interest in them, is still a "consignee" within the meaning of the act. Fowler *v.* Knoop, 4 Q. B. D. 299, C. A.

(*f*) It was decided in the case of "The Freedom," L. R., 3 P. 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

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.* Maso, (*g*) on the authority of which very numerous decisions have since been made, and will be found collected in Smith's Leading Cases. (*g*) On this made of delivery the law is free from doubt. [10]

The law in relation to bills of lading is more fully discussed *post*, in the chapter on Stoppage *in transitu*.

§ 1212. 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. (*h*) It was also decided in M'Ewan *v.* Smith, (*i*) and Griffiths *v.* Perry, (*k*) that such a delivery order differed in effect from a bill of lading: that the endorsement of it by a vendee to a subvendee was unavailing to oust the possession of the original vendor, and that his lien remained unaffected when neither the first buyer nor the subvendee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded [but, as we have already seen, the law on this point is now altered by the 5th section of the Factors' Act, 1877.]

Delivery orders.

Their effect.

(*g*) 2 T. R. 63; 1 H. Bl. 357; 6 East 20; 1 Sm. L. C. 753, (ed. 1879.)

(*g*) See note (*g*), *ante* § 1211.

10. **Bills of Lading.**—That the endorsement and delivery of a bill of lading by the seller to the purchaser passes the property as fully as the delivery of the goods themselves (subject only to the right of stoppage *in transitu*) has been adjudged in many cases. See Conrad *v.* Atlantic Insurance Co., 1 Pet. 386, 446; The Thames, 14 Wall. 98, 106; Emery *v.* Irving Bank, 25 Ohio St. 360, 366; Robinson *v.* Stuart, 68 Me. 61. An endorsement of the bill of lading is not necessary to a complete transfer of the property. A delivery without endorsement of the bill of lading, if intended to pass the property, will have that effect, but the fact of delivery with that intent must be shown by one who claims under such delivery. Merchants' Bank *v.* Union R. R., 69 N. Y. 373, 379; Emery *v.* Irving Bank, 25 Ohio St. 360, 368; Holmes *v.* German Security Bank, 87 Penna. 525, 528; Holmes *v.* Bailey, 92 Penna. 57, 61. The consignor who retains the bill of lading, may, before delivery of the property to the consignee, change his purpose and order delivery to some person other than the consignee. Halsey *v.* Warden, 25 Kan. 128, 136.

(*h*) Book I., Part II., Ch. 4, *ante* § 174, "On Actual Receipt."

(*i*) 2 H. L. C. 309.

(*k*) 1 E. & E. 680; 28 L. J., Q. B. 208

§ 1213. In treating of the effect of endorsing 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 endorsed 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 rights; 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 thould 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.

Dock warrants and warehouse warrants or certificates.

Remarks in Blackburn on Sales.

"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 endorsement of a delivery order or dock warrant *has not* (independently of the Factors' Acts) *any effect beyond that of a token of authority to receive possession.*" 11

(*l*) Blackburn on Sales, p. 297.

11. **Warehouse Receipt.**—In Davis *v.* Russell, 52 Cal. 611, a warehouseman gave a depositor a receipt for wheat. The depositor endorsed the receipt to an agent to sell the wheat, but the agent transferred it for his own debt, and the receiver transferred it again to a *bona fide* purchaser, to whom the warehouseman delivered the wheat, but not until after he had been warned by the depositor not to surrender it. The depositor sued the warehouseman. The court cited the above section from Benjamin on Sales, but dissents from it. "No substantial reason is offered for giving to the assignment of such an instrument an effect different from that of an assignment of a bill of lading." Cites Horr *v.* Baker, 8 Cal. 613. The court also held that a precedent debt was a good consideration under the Factors' Act. (Cal. Civil Code, § 2991.) Warehouse receipts are made by statute negotiable by endorsement in New York, unless marked non-negotiable, and like acts have been passed in Massachusetts, Illinois, Kentucky and other states. See Whitlock *v.* Hay, 58 N. Y. 484; Cochran

§ 1214. 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. (*m*) 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 endorsement*, on payment of rent and charges from the 25th of July; the document was dated on the 21st of July, and forthwith endorsed 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 meantime the warrant, and the endorsement 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 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.*"

His views confirmed by subsequent cases.

Farina *v.* Home.

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 endorsee

Remarks on the opposite construction by courts and law-givers.

v. Ripy, 13 Bush 495. See In re Coleman, 36 U. C. Q. B. 559.

(*m*) 16 M. & W. 119.

of the warrant, inchoate and incomplete, till the vendee has obtained the warehouseman's assent to attorn to him.

§ 1215. 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 not 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.

§ 1216. 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?* (*o*) or to prohibit the bailee from giving *authority* 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 the bailee of any one else to whom you may sell these goods, and your endorsement 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

(*o*) See the cases of Salter *v.* Woollams and Wood *v.* Manley, cited *ante* § 1019, in the former of which cases Tindal, C. J., said that Jackson had, in advance "attorned to the sale."

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 the 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 endorsement 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 endorsing over the certificates and dock warrants." And at Nisi Prius, it was directly decided by Parke, J., in one case, (*p*) and by Dallas, C. J., in another, (*q*) that such was the true construction of these mercantile "documents of title."

§ 1217. But the law was 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 followed from them; results from which the judges in Fuentes *v.* Montis, (*r*) declared there was then no remedy, save further legislation.

[And now by the Factors' Act, 1879, these mercantile documents of title are, when in the possession of a *bona fide* transferee for value from the buyer, placed on the same footing with bills of lading.] Factors' Act, 1877.

§ 1218. But the decisions under the earlier Factors' Acts already referred to, (*s*) it was settled that the words "an agent entrusted with goods or documents of title" did not include a vendee, because he held in *his own right*, and not as agent. (*t*) The singular anomaly thus existed, that if a merchant, buying goods and paying the price, received a transfer of the dock warrant, he would be safe if his vendor was *not owner*, but only agent of the assignor of the warrant, and would not be safe if the vendor *was owner*, because the price might remain unpaid to the assignor of the warrant; and this was the necessary result of the con- Vendee not included in the terms of the earlier Factors' Acts.

(*p*) Zwinger *v.* Samuda, 7 Taunt. 265.
(*q*) Keyser *v.* Suze, Gow 58.
(*r*) L. R., 3 C. P. 268; 37 L. J., C. P. 137.
(*s*) *Ante* §§ 19–23.
(*t*) Jenkyns *v.* Usborne, 7 M. & G. 678; Van Casteel *v.* Booker, 2 Ex. 691; Fuentes *v.* Montis, *supra*.

flicting interpretations put on the dock warrant by the legislature and the courts. The original owner was held by the statute to have abandoned his *actual possession* by giving the document of title to his agent, although he retained *ownership and right of possession:* he was held by the courts to have retained his *actual possession* when he gave the document to a purchaser, although he had abandoned *both ownership and right of possession.*

[But, as we have already seen, *ante* § 1206, this anomaly is now removed by the 4th section of the Factors' Act, 1877.]

Factors' Act, 1877, § 4.

Factors' transfer of document of title valid in favor of *bona fide* purchaser, although obtained by fraud.

§ 1219. 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 *entrusted* the factor or his agent with the document: (*u*) but if a person gets possession of a document of title by fraud, without having been *entrusted* 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. (*x*) This was really the point decided by the Exchequer Chamber in Kingsford *v.* Merry, (*x*) a case which created some excitement among the city merchants, who did not at first understand its true import.

Kingsford *v.* Merry.

§ 1220. In Baines *v.* Swainson, (*y*) Blackburn, J., first pointed attention to the clause at the end of the 4th section of the Factors' Act, 1842, "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 entrusting.

Baines *v.* Swainson.

This view was deliberately adopted by Willes, J., in delivering the opinion in Fuentes *v.* Montis, (*z*) decided in 1868, which settled the very important point, that a secret revocation of the agent's power would defeat the rights of *bona 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 as follows:—

Fuentes *v.* Montis.

Effect of secret revocation of authority previous to Factors' Act, 1877.

(*u*) 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.

(*x*) Kingsford *v.* Merry, 11 Ex. 577; 25 L. J., Ex. 166; and in Ex. Ch., 1 H. & N. 503; 26 L. J., Ex. 83; Hollins *v.* Fowler, L. R., 7 H. L. 757, per Blackburn, J., at p. 763.

(*y*) 4 B. & S. 270; 32 L. J., Q. B. 281.

(*z*) L. R., 3 C. P. 268; 37 L. J., C. P. 137; and in error, L. R., 4 C. P. 93.

"In the case of an agent for sale, whose general business it is to sell, entrusted for a purpose other than sale, as, for instance, if he were entrusted 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, *prima 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 *prima 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 and 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 entrusted 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 burthen 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 entrusted with the possession of documents which he has been enabled to obtain by reason of having been entrusted with the possession of other documents which led to the former being obtained, en-

tirely, 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 *bona 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 entrusting 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 'entrusted 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 accessory 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 'entrusted and in possession.'* Much argument was bestowed, and properly, upon those words, 'entrusted and in possession;' but it appears to me that before you can deal with either the state of being 'entrusted,' 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 prin-

cipal must be an agent, and if he is not an agent he is not a person to whom the provisions of the act apply."

But this decision seems not to have met the approval of Lord Westbury, whose remarks on it in Vickers *v.* Hertz (*a*) have been re-referred to *ante*, § 23; [and the law is now expressly altered by the 2d section of the Factors' Act, 1877, *ante*, § 1205.]

Law altered by Factors Act, 1877, § 2.

§ 1221. 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, (*b*) that a delivery order by which a warehouseman acknowledged to hold goods deliverable to A, "on the *presentation* of this document duly endorsed by you," did not authorize the endorsee 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 Creswell, 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.*

Warehouseman may demand surrender of his warrant, promising to deliver goods "on presentation" *before* giving the goods.

Bartlett *v.* Holmes.

§ 1222. In Johnson *v.* Stear, (*c*) the action was trover by the assignee of one Cumming, who had pledged goods to the 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 of 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 taking possession on the 29th if he repaid

Johnson *v.* Stear.

(*a*) L. R., 2 Sc. App. 113. See, however, note (*e*), *ante* § 23.

(*b*) 13 C. B. 630; 22 L. J., C. P. 182.

(*c*) 15 C. B. (N. S.) 330; 33 L. J., C. P. 130.

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 *tantamoun 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."

Bill of lading represents goods *after* being landed at London wharves until replaced by wharfinger's warrant.

Meyerstein *v.* Barber.

§ 1223. In 1870, the case of Meyerstein *v.* Barber (*d*) 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 of 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; (*e*) and the cotton was so landed. On the 4th of 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 of 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 defendants, that goods are not represented by bills of lading after they have been landed, and the master had 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 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

(*d*) L. R., 4 H. L. 317; 2 C. P. 38 and 661.

(*e*) *Ante* § 1209.

goods." These *dicta*, however, which would seem, at least so far as the London quays and sufference 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, (*f*) above quoted (§ 1213), was cited in argument: "That was published twenty-two years ago, and I have not changed my opinion."

§ 1224. 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,

Effect of transferring parts of one set of bills of lading to different person.

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; and

2nd. That though the shipowner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivery to 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.

[Upon this last point, which, it is to be observed, did not arise in Meyerstein *v.* Barber, and which is only referred to by Lord Westbury in his opinion in that case in order to show that it was still *res non judicata*, the reader is referred to the important case of Glyn *v.* The East and West India Dock Company, (*i*) which is noticed *post*, in the chapter on Stoppage *in Transitu*.][12]

Glyn *v.* East and West India Dock Co.

§ 1225. It is to be inferred from the foregoing authorities that by the law as now settled, the endorsement 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*; [nor prior to the Factors' Act, 1877, did the transfer of such documents by the vendee to a *bona fide* holder for value en-

Endorsement and delivery of dock warrants and other like documents of title by vendor to vendee does not divest lien.

But transfer by vendee to *bona*

(*f*) Blackburn on Sales, pp. 297, 298.

(*i*) 7 App. Cas. 591; S. C., 6 Q. B. D. 475, C. A.; 5 Q. B. D. 129.

12. Where the bill of lading delivered to the consignor differs from that kept by the master of the vessel, the former controls. Ontario Bank *v.* Hanlon, 23 Hun 283; The Thames, 14 Wall. 98, 105.

fide holder for value does divest lien.

large their effect, except on satisfactory proof that, by the usage of the trade and the intention of the parties, the documents in question were meant to be negotiable; (*j*) but by the 5th section of that statute, the transfer by endorsement or delivery of such documents by a vendee to a *bona fide* holder for value divests the vendor's lien.]

Quære, whether as between vendor and vendee proof of usage would avail.

Whether, *as between the vendor and vendee*, this result would be affected by proof of *usage in the particular trade*, that the delivery 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.

Vendor's lien not lost by delivering goods f. o. b. on a vessel if he take receipt in his own name.

§ 1226. 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 (*k*) or demands (*l*) 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. (*m*) [13]

Unless the vessel belonged to the purchaser.

Lien revives in case of goods sold on credit, if possession remains in vendor at expiration of credit.

§ 1227. 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, (*n*) and by Littledale, J., in Bunney *v.* Poyntz, (*o*) 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

(*j*) See Merchants' Banking Company of London *v.* Phœnix Bessemer Company, 5 Ch. D. 205. As to the materiality of such proof when the documents are not documents of title, see Gunn *v.* Bolckow, Vaughan & Co., L. R. 10 Ch. 491.

(*k*) Craven *v.* Ryder, 6 Taunt. 433.

(*l*) Ruck *v.* Hatfield, 5 B. & Ald. 632.

(*m*) Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

13. Seymour *v.* Newton, 105 Mass. 272.

(*n*) 1 Dans. & L. 123.

(*o*) 4 B. & Ad. 568.

assumed to be undoubted on this point, are those of Lord Campbell, *ante* § 1146; of Parke, B., in Dixon *v.* Yates; (*p*) of the court, in Martindale *v.* Smith; (*q*) of the Barons of the Exchequer, in Castle *v.* Sworder, (*r*) and in Miles *v.* Gorton, (*s*) and of the Judges of the Queen's Bench, in Valpy *v.* Oakeley. (*t*) [14]

Tender of price divests lien.

§ 1228. 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. (*u*)

Loss of lien where goods are lying on premises of a third person not bailee of vendor.

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 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. (*x*)

(*p*) 5 B. & Ad., at p. 341.
(*q*) 1 Q. B., at p. 395.
(*r*) 5 H. & N. 281; 29 L. J., Ex. 235.
(*s*) 2 C. & M., at p. 510.
(*t*) 16 Q. B. 941; 20 L. J., Q. B. 380.
14. See Arnold *v.* Delano, 4 Cush. 33, and other cases cited *ante* § 1185, note 4.
(*u*) 1 Q. B. 389.
(*x*) Tansley *v.* Turner, 2 Bing. N. C. 151; Cooper *v.* Bill, 3 H. & C. 722; 34 L. J., Ex. 171; *ante* § 178.

CHAPTER V.

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§ 1229. 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 be not 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—(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. [1]

This right exists only when buyer is insolvent.

(*a*) Per Lord Northington (then Lord Henley), L. C., in D'Aquila *v.* Lambert, 2 Eden, at p. 77; S. C., Amb. 399.

1. The Nature of the Right—The right of stoppage *in transitu* is but an equitable extension or enlargement of the vendor's common law lien for the price, and not an independent and distinct right. Shaw, C. J., in Rowley *v.* Bigelow, 12 Pick. 313; Benedict *v.* Schaettle, 12 Ohio St. 515; Loeb *v.* Peters, 63 Ala. 249; Grout *v.* Hill, 4 Gray 361; Babcock *v.* Bonnell, 80 N. Y. 244, 251; White *v* Welsh, 38 Penna. St. 420. In the case last cited, Lowrie, C. J., said: "Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage *in transitu* on account of the insolvency of the vendee, because these terms refer to the *same right* only at different stages of perfection and execution of the contract of sale. * * * The rule is that so long as the vendor has the actual possession of the goods, or as they are in the custody of his agents, *and*

§ 1230. The history of the law of stoppage *in transitu* is given very fully by Lord Abinger, in Gibson *v.* Carruthers, (*b*) 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:

History given by Lord Abinger.

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 [or other document of title?]
6. What is the legal effect of the exercise of the right?

SECTION I.—WHO MAY EXERCISE THE RIGHT?

§ 1231. 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. [2]

Persons in positions similar to vendors, as consignors, &c., may stop.

while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery if the vendee be in failing circumstances." The right of stoppage *in transitu* exists in the single case of insolvency, and presupposes, not only that the property has passed to the consignee, but that the possession is in a third person in transit to the consignee. Story, J., in The St. Joze Indiano, 1 Wheat. 208.

(*b*) 8 M. & W. 337. The earliest reported case in which the right is recognized is Wiseman *v.* Vandeputt, 2 Vern. 202, in Chancery, temp. 1690. It became settled as an equitable doctrine by the subsequent cases of Snee *v.* Prescott, 1 Atk. 245, and D'Aquila *v.* Lambert, *ubi supra*, and was introduced as such into the Courts of Common Law by Lord Mansfield. Assignees of Burghall *v.* Howard, 1 Hy. Bl. 366, n. (*a.*)

2. **Who may Exercise the Right?**—Any person standing substantially in the position of a vendor has the benefit of the right of stoppage *in transitu*. Newhall *v.* Vargas, 13 Me. 93; Gossler *v.* Schepeler, 5 Daly (N. Y.) 476. In Muller *v.* Pondir, 55 N. Y. 325, the plaintiff in Havana bought bills of exchange on New York at the request of S. & Co., and sent them in a package by steamer to S. & Co., notifying them by telegraph of the shipment. S. & Co. obtained a loan from defendant on a promise to transfer the bills, but before they arrived, S. & Co. became insolvent, and plaintiff claimed the package of bills of exchange. The court sustained the claim as an exercise of the right of stoppage *in transitu*. Allen, J., approved Wiseman *v.* Vandeputt, 2 Vern. 203, and said: "The fact that the credit and the danger of loss arose from a sale of merchandise, *rather than in any other commercial dealings*, had no peculiar force, and added no charm to the equity. All that is necessary to bring a case within the precise principle, and the reasons assigned in that case, and which have never been repudiated, but have

Consignor who has bought with his own money or credit.

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*)

come to be favored both at law and in equity, is, that faith and credit shall have been given to the solvency of another who has failed, while yet the fruits of that credit are in the actual or constructive possession or within the reach of the party giving the credit, and who will be the loser, unless he can retain or reclaim such fruits; and the particular relation of the parties to each other, or the nature of the transaction in which credit is given is not material, neither is the right confined to goods or personal chattels, or to a sale of goods on credit. There is no distinction between personal chattels *in transitu*, or merchandise or money, or negotiable bills, which affects the rights of parties." But where goods are shipped to the consignee on the credit of a third person, there is no right of stoppage *in transitu*. In Eaton *v.* Cook, 32 Vt. 58, goods were bought by defendant on the credit of an order of a third person, one Barnes, who agreed to pay for them. While the goods were in transit to the defendant, Barnes became insolvent, and the seller attempted to exercise the right of stoppage. But the court held that no such right existed. Redfield, C. J., said that if the tranaction was to be regarded as a sale to defendant, then he had paid for the goods with the order of Barnes. If it was to be regarded as a sale to Barnes, then the goods had, with the seller's assent been resold and put on their transit to the second purchaser, and the right of stoppage did not exist. And the right does not exist where the seller ships at the buyer's request to a third person, in the name of the buyer as consignor. Rowley *v.* Bigelow, 12 Pick. 307, 314; Treadwell *v.* Aydlett, 9 Heisk. 388. In Gwin *v.* Richmond and Danville R. R., 85 N. C. 429, cotton was in the hands of an agent who had a lien on it for advances to the owner. The owner sold the cotton and requested the agent to send it by rail to the buyer. The agent did so, but not being paid his debt by the seller, stopped the goods in transit. But the court held that the lien of the agent had been lost by delivery to the carrier, and that there was no right of stoppage for such a claim.

(*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.* Homphrey, 4 Bing. 516; Turner *v.* Trustees of Liverpool Dock Co., 6 Ex. 543; 20 L. J., Ex. 393; Ellershaw *v.* Magniac, 6 Ex. 570; Ireland *v.* Livingstone, L. R., 5 H. L. 395, per Blackburn, J at p. 408; Ex parte Banner, 2 Ch. D. 278, C. A. As to how far the commission agent is vendor, and how far agent, see Cassaboglou *v.* Gibbs, 9 Q. B. D. 220.

§ 1232. 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*)

Agent of vendor to whom the latter has endorsed the bill of lading may stop in his own name.

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 beansto 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, aud this was given to Hunter & Co., they giving to the plaintiff a letter, acknowledging that 1442 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 1442 sacks, out of the cargo on board. Before the arrival of the vessel, plaintiff sold these 1442 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 1442 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.

Vendor of an interest in an executory contract may stop the goods.

Jenkyns *v.* Usborne.

§ 1233. It was said by Lord Ellenborough, in Siffkin *v.* Wray, (*h*) that a mere surety for the buyer had no right to stop *in transitu:* but 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 and 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

May surety exercise the right?

(*f*) Morrison *v.* Gray, 2 Bing. 260.
(*g*) 7 M. & G. 678; 8 Scott N. R. 505.
(*h*) 6 East 371.

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, specially 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 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." (*l*)

Imperial Bank of London *v.* London and St. Katharine Dock Co.

§ 1234. [The opinion submitted in the text is confirmed by the decision of Jessel, M. R., in the case of The Imperial Bank *v.* The London and St. Katharine Dock Company. (*m*) Goods had been purchased by a broker without disclosing the name of his principals. By the custom of the market, the broker on the buyer's default became personally liable to the seller for the price. The buyers stopped payment, and the broker thereupon paid the vendors the price, and obtained from them a delivery order for the goods. Held, that, by reason of the custom of the trade, the broker stood in the position of surety for the buyers, and that "having regard to the terms of the Mercantile Law Amendment Act, and to the justice of the case," the lien of the unpaid vendors was a security which subsisted for the benefit of the surety, so as to entitle him to stop the goods in the vendor's name.]

Parties having other liens than that of vendor cannot stop.

§ 1235. 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 *qua* vendor, which is greater than a lien. Other persons, there-

(*l*) The only decisions met with as to the construction of this section are Lockhart *v.* Reilly, 1 De G. & J. 464; 25 L. J., Ch. 54; Batchelor *v.* Lawrence, 9 C. B. (N. S.) 543; 30 L. J., C. P. 39; Brandon *v.* Brandon, 28 L. J., Ch. 150; De Wolf *v.* Lindsell, 5 Eq. 209; and Phillips *v.* Dickson, 8 C. B. (N. S.) 391; and 29 L. J., C. P. 223.

(*m*) 5 Ch. D. 195. In an earlier case of Hathesing *v.* Laing, 17 Eq. 92, 101, Bacon, V. C., intimated an opinion that a broker who, on behalf of his principal, purchases and pays for goods, which he ships in his principal's name, is not entitled to stop them *in transitu*. The case, however, was decided on other grounds, and the *dictum* of the learned judge seems to be irreconcilable with the authorities above referred to.

fore, entitled to liens, as factor's, (*n*) fullers (*o*) who have fulled cloths, have no right to stop *in transitu*, before obtaining or after having lost possession. [3]

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, (*p*) or have a joint interest with the consignor. (*q*)

Consignor may stop even if his factor have made advances or have a joint interest in the goods.

§ 1236. An agent of the vendor may make a stoppage in behalf of his principal, (*r*) but attempts have been made occasionally by persons who had no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions. [4]

Agent of vendor.

(*n*) Kinloch *v.* Craig, 3 T. R. 119; and in the House of Lords, Id. 786, and 4 Bro. P. C. 47.

(*o*) Sweet *v.* Pym, 1 East 4.

3. The Right as Affected by Subsequent Agreement of the Parties.—If the vendor chooses to exercise the right of stoppage *in transitu, he must act upon that theory*, and not base his claim upon a subsequent agreement between him and the insolvent vendee; for in the latter case he may stand only on a level with other creditors. At least, the doctrine of stoppage *in transitu, as such*, will have no application. Lane *v.* Jackson, 5 Mass. 162; Ash *v.* Putnam, 1 Hill 302; Sturtevant *v.* Orser, 24 N. Y. 538. In Grant *v.* Hill, 4 Gray, 361, the vendee after having obtained possession of the goods, ascertained that he was insolvent, whereupon he deposited them in a warehouse, subject to the order of the vendor, and notified the vendor thereof by letter; but before the vendor had signified his assent, the goods were attached by another creditor. It was held that the law of stoppage *in transitu* had no application, but that the vendor's title should prevail upon the ground of a rescission of the contract by the mutual consent of the seller and purchaser. Still, the right of stoppage will not be defeated because the consignor obtained from the consignee, a writing by which the latter revoked the order for the goods and requested them to be delivered to the seller. Naylor *v.* Dennie, 8 Pick. 198; Scholfield *v.* Bell, 14 Mass. 40. Parker, C. J., in Naylor *v.* Dennie, *supra*, says: "But we understand this doctrine to mean no more than that the right of stopping *in transitu* cannot be exercised under a title derived from the consignee, not that it shall be exercised *in hostility* to him."

(*p*) Kinloch *v.* Craig, 3 T. R. 119.

(*q*) Newsom *v.* Thornton, 6 East 17.

(*r*) Whitehead *v.* Anderson, 9 M. & W. 518.

4. Stoppage by an Agent.—In Reynolds *v.* R. R., 43 N. H. 580, 589, Bell, C. J., after stating and approving Bird *v.* Brown, stated in the text, *supra*, said: "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." See Bell *v.* Moss, 5 Whart. 189, 206; Chandler *v.* Fulton, 10 Tex. 2; Durgy Cement Co. *v.* O'Brien, 123 Mass. 12. In this last case, a question was raised under Bird *v.* Brown of the agent's authority, but the court sustained the authority because it was ratified before

Ratification after stoppage where party has never had any agency for vendor.

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, (*s*) 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 bankrupt buyer also demanded the goods. After this demand by the assignees, 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.

Bird *v.* Brown.

Ratification where a letter giving authority had not reached agent when he assumed to act.

§ 1237. But in Hutchings *v.* Nunes, (*t*) 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 of March, and the vendor on the 16th of April enclosed to the defendant a power of attorney to act for him. The defendant, before receiving this power, to wit, on the 21st of 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 despatched on the 16th of 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.

Hutchings *v.* Nunes.

Vendor's right not affected by partial payment,

but only exercisable over goods remaining unpaid for;

§ 1238. The vendor's right exists, notwithstanding partial payment of the price; (*u*) [but when the contract is apportionable, and payment has been made in respect of a part of the goods, the vendor can only exercise his right of stoppage over the goods which remain unpaid for; (*v*)] neither is the vendor's right lost by his having received conditional payment by bills of exchange or other securities, (*x*) even

the buyer or his assignee obtained possession of the goods.

(*s*) 4 Ex. 786.

(*t*) 1 Moo. P. C. (N. S.) 243.

(*u*) 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.

(*v*) Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

(*x*) Dixon *v.* Yates, 5 B. & Ad. 345; Feise *v.* Wray, *ubi supra;* Edwards *v.*

though he may have negotiated the bills so that they are outstanding in third hands, unmatured. (*y*) [5]

nor by conditional payment.

It has already been shown, however, (*z*) that a vendor is not unpaid, if he have taken bills or securities in *absolute* payment. He must in such cases seek his remedy on the securities, having no further right on the goods.

But vendor who has received securities in absolute payment cannot stop.

§ 1239. In Wood *v.* Jones, (*a*) 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.

Consignor may stop although the account current with consignee is unadjusted and balance uncertain.

Wood *v.* Jones.

But in Vertue *v.* Jewell (*b*) 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 nonpayment 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.

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.

§ 1240. This case has never been overruled, but, if correctly reported, is very questionable law. Lord Blackburn, in the Treatise on Sales (p. 220), suggests as 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

Vertue *v.* Jewell questioned.

Brewer, *ubi supra.*

(*y*) Feise *v.* Wray, *ubi supra;* Patten *v.* Thompson, 5 M. & S. 350; Edwards *v.* Brewer, *ubi supra;* Miles *v.* Gorton, 2 Cr. & M. 504.

5. Stubbs *v.* Lund, 7 Mass. 453, 456; Arnold *v.* Delano, 4 Cush. 33; Hays *v.* Mouille, 4 Clark 413; affirmed, 14 Penna. 48; Lewis *v.* Mason, 36 U. C. Q. B. 590, 607.

(*z*) *Ante* §§ 1082, 1083

(*a*) 7 D. & R. 126.

(*b*) 4 Camp. 31.

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, (*c*) that a vendor's right of stoppage was not taken away by the fact that he had received acceptances for the price of the goods, which were outstanding and unmatured at the time of the stoppage.

Patten *v.* Thompson.

§ 1241. When this case was pressed on the court by the counsel in Patten *v.* Thompson, (*d*) 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 endorsed 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; (*e*) 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.[6]

Vendor's right of stoppage

§ 1242. 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:[7]

(*c*) 3 East 93.

(*d*) 5 M. & S. 350.

(*e*) This had been settled in Kinloch *v.* Craig, in the House of Lords, 3 T. R. 786.

6. That the right of stoppage *in transitu* does not exist where goods are shipped in payment of a precedent debt, was held in Wood *v.* Roach, 1 Yeates 177; Burritt *v.* Rench, 4 McLean 325.

(*f*) Oppenheim *v.* Russell, 3 B. & P. 42.

7. **The Vendor's Right is Subject to the Carrier's Lien.**—The carrier's freight charges are a lien paramount to the vendor's right on a stoppage *in transitu.* "This right is indeed paramount to any lien created by usage or by agreement between the carrier and the consignee for a general balance of account. But the common law lien of a carrier upon a particular consignment of goods arises from the act of the consignor him-

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*) [8]

paramount to general lien of carrier, and to attaching creditor's.

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 defendants' 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 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

And in certain cases to demand for freight.

Mercantile and Exchange Bank *v.* Gladstone.

self in delivering the goods to be carried, and no authority has been cited to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee." Gray, C. J., in Potts *v.* N. Y. & N. E. R. R., 131 Mass. 455. In the same case it was held that this lien of the carrier included freight paid by him to a previous carrier forwarding the goods under the same shipment, and that the delivery of part of the goods did not reduce the amount which could be claimed as a lien on the residue. In Rucker *v.* Donovan, 13 Kan. 251, 256, an attaching creditor of the buyer paid the carrier's freight charges and was held to be entitled to hold the goods as security for the payment against the seller exercising the right of stoppage. See Newhall *v.* Vargas, 15 Me. 314.

(*g*) Smith *v.* Goss, 1 Camp. 282.

8. **The Vendor's Right is Paramount to that of a Creditor of the Buyer Attaching in Transit.**—Durgy Cement, &c., Co. *v.* O'Brien, 123 Mass. 12, 14; Seymour *v.* Newton, 105 Mass. 272, 275; Allen *v.* Mercier, 1 Ash. 103; Hays *v.* Monille, 14 Penna. 48; Pottinger *v.* Hecksher, 2 Grant 309; Wood *v.* Yeatman, 15 B. Mon. 270, 273; Hause *v.* Judson, 4 Dana 13; Morris *v.* Shryock, 50 Miss. 590, 600; O'Brien *v.* Norris, 16 Md. 122, 129; White *v.* Mitchell, 38 Mich. 390, 392; Calahan *v.* Babcock, 21 Ohio St. 281; Naylor *v.* Dennie, 8 Pick. 198; Clark *v.* Lynch, 4 Daly 83; Buckley *v.* Furness, 15 Wend. 137; Blackman *v.* Pierce, 23 Cal. 509; O'Neill *v.* Garrett, 6 Iowa 480, 486. In Mississippi Mills *v.* Union Bank, 21 Am. L. Reg. (N. S.) 534, (Sup. Ct. Tenn., 1882,) the goods were attached at the railroad station after they had reached their destination, for the buyer's debts, but it was held that this did not impair the seller's right of stoppage. An assignment for the benefit of creditors will not defeat the right; but possession obtained by the assignee will have the same effect as if obtained by the buyer. Stanton *v.* Eager, 16 Pick. 476; Arnold *v.* Delano, 4 Cush. 33; Harris *v.* Hurd, 6 Duer 606.

(*h*) L. R., 3 Ex. 233

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?

§ 1243. 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*) [9] And in a number of the cases, the fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage *in transitu*. (*l*) [10]

Only against bankrupt or insolvent vendee.

What is insolvency?

(*i*) Parker *v.* Gossage, 2 C., M. & R. 617; Biddlecombe *v.* Bond, 4 Ad. & E. 322, 696; and see Billson *v.* Crofts, 15 Eq. 314.

(*k*) Sm. Merc. Law, note, p. 550, (ed. 1877.)

9. **Insolvency in General.**—This word, as used in various connections, is interpreted in Thompson *v.* Thompson, 4 Cush. 127; Lee *v.* Kilburn, 3 Gray 594; Ferry *v.* The Bank of Central New York, 15 How. Pr. (N. Y.) 445, and cases there cited; Mitchell *v.* Gazzam, 12 Ohio 335; Douglass *v.* Reynolds, 12 Pet. 491.

(*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. 736. And see a discussion by Willes, J., as to meaning of "insolvency" in The Queen *v.* The Saddlers' Co., 10 H. L. C. 404, 425.

10. **What is Sufficient Insolvency of the Buyer to Warrant a Stoppage in Transitu**—It is well settled that the buyer need not have taken advantage of the insolvent or bankrupt acts, in order to allow the vendor to stop the goods *in transitu*. Any circumstances showing the vendee's general inability to settle his affairs in the usual course of business are sufficient. See the recent case of Loeb *v.* Peters, 63 Ala. 243, where evidence of the confession of judgments by the vendees and immediate levy of executions thereon, before the receipt of the goods, was allowed to prove insolvency. And in Reynolds *v.* Boston and Maine Railroads, 43 N. H. 580, Bell, C. J., said, (page 592): "The proof that they [the vendees] did not pay the bill, that they got possession of the goods without payment, and that no such parties could be found afterwards, was competent evidence, from which the jury might find their insolvency, as well as their entire failure to perform the conditions of the sale." See also Benedict *v.* Schaettle, 12 Ohio St. 515; Hays *v.* Monille, 14 Penna. St. 48; Secomb *v.* Nutt, 14 B. Mon. 324; Naylor *v.* Dennie, 8 Pick. 198; O'Brien *v.* Norris, 16 Md. 122; More *v.* Lott, 13 Neb. 376; Durgy Cement and Umber Co. *v.* O'Brien, 123 Mass. 12. "By the term 'insolvency' of the buyer," said Morton, J., in the case last cited, "is meant his inability to pay

§ 1244. 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*) [11]

Vendor stops at his peril in advance of buyer's insolvency.

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?

§ 1245. 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

Duration of transit.

his debts in the usual course of business. It is not necessary that he should have been adjudicated a bankrupt or insolvent debtor." In Hays *v.* Monille, *supra*, Hepburn, J., in instructing the jury, (and his charge was approved by the appellate court,) said: "The insolvency of the vendor, Rhodes, is the groundwork of the plaintiff's claim, and this is a fact for your decision, Was Rhodes insolvent when these goods were replevied by the plaintiffs? It is not necessary to prove insolvency, that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more." Rogers *v.* Thomas, 20 Conn. 54, which required the insolvency of the vendee to be evidenced *by some overt act* on his part, must be considered as overruled by the later cases cited above.

(*m*) Per Lord Stowell, in The Constantia, 6 Rob. Adm. R. 321.

11. **When Insolvency must Exist.**—The case of Rogers *v.* Thomas, 20 Conn. 54, holding that if the insolvency of the vendee exists at the time of the sale, the vendor, though he be ignorant of that fact, will have no right of stoppage, stands alone in that ruling, which has generally been repudiated outside of the state in which it was decided. With this exception, the American cases unite in declaring that it is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at that time. Loeb *v.* Peters, 63 Ala. 243; Reynolds *v.* Boston and Me. R. R., 43 N. H. 580; Benedict *v.* Schaettle, 12 Ohio St. 515; Buckley *v.* Furniss, 15 Wend. 137; Naylor *v.* Dennie, 8 Pick. 205; White *v.* Mitchell, 38 Mich. 390; Blum *v.* Marks, 21 La. Ann. 268; O'Brien *v.* Norris, 16 Md. 122.

(*n*) 32 L. J., Adm. 97.

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.[12]

The right comes into existence after vendor has parted with title and right of possession and actual possession.

And here the reader must be reminded that the vendor's 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. 6. 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*.

General principles as stated by Parke, B.

§ 1246. In James *v.* Griffin, (*o*) which was twice before the Exchequer of Pleas, Parke, B., 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.* Petit 3 B. & B. 469, Rowe *v.* Pickford, 8 Taunt. 83; or at a place

James *v.* Griffin.

12. **When Does the Transit End?**—The general principle is well settled throughout the United States that, in order to terminate the right of stoppage *in transitu* the vendee must have acquired *possession* of the goods, in which event the transit is at an end and this favored right of the vendor has ceased. Harris *v.* Pratt, 17 N. Y. 249; Hays *v.* Monille, 14 Penna. St. 48; Donath *v.* Broomhead, 7 Penna. St. 301; Cabeen *v.* Campbell, 30 Penna. St. 254; Covell *v.* Hitchcock, 23 Wend. 611; Hoover *v.* Tibbits, 13 Wis. 89; Blackman *v.* Pierce, 23 Cal. 509; Keeler *v.* Goodwin, 111 Mass. 490; Aguirre *v.* Parmelee, 22 Conn. 493; More *v.* Lott, 13 Neb. 376; McFetridge *v.* Piper, 40 Iowa 627; Greve *v.* Dunham, Sup. Ct. of Iowa, Dec., 1882. In re Foot, 11 Blatch. 530.

(*o*) 1 M. & W. 20; 2 M. & W. 633.

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; 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."

It is obvious from this clear statement of the law, that each case must be determined according to its own 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.

§ 1247. Goods are liable to stoppage as long as they remain in possession of the carrier, *qua carrier* (*p*) (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. (*q*)

Goods may be stopped in hands of carrier.

Even though named by purchaser.

§ 1248. 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. (*r*) [13]

Goods in passage on the buyer's own cart or vessel are not *in transitu*.

[So in a case where the goods were loaded in trucks sent by the agents of the purchaser, it was held that, *under the circumstances*, the transit ceased upon the loading. (*s*) But

But, *semble*, a question of intention.

(*p*) Mills *v.* Ball, 2 B. & P. 457; James *v.* Griffin, 2 M. & W. 633; Lickbarrow *v.* Mason, 1 Sm. L. C. 753, (ed. 1879,) and notes, and the cases on stoppage, *passim*.

(*q*) 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, 4 Eq. 481; 36 L. J., Ch. 879; S. C., 3 Ch. 588; Ex parte Rosevear China Clay Co., 11 Ch. D. 560, C. A.

(*r*) Blackburn on Sales 242; Ogle *v.* Atkinson, 5 Taunt. 759; *per cur.* in Turner *v.* Trustees of Liverpool Docks, 6 Ex. 543; 20 L. J., Ex. 394; Van Casteel *v.* Booker, 2 Ex. 691.

13. Receipt of the Goods by the Seller's Agent.—In general, such receipt would be a receipt by the principal, but to have that effect the agent must receive in that capacity. The seller may also reserve his control over the goods by the course of dealing. Inslee *v.* Lane, 57 N. H. 454; Callahan *v.* Babcock, 21 Ohio St. 281. *Ante* §§ 569, 581, 582.

(*s*) Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

Jessel, M. R., expressed the opinion (at p. 219) that the determination of the transit does not follow as a proposition of law, from the fact of the purchaser having sent his own cart for the goods, and received them in the cart, but is a question of inference from known facts as to what the real intention of the parties was, and, therefore, when the trial is by a judge and jury, a question for the jury.][14]

Vendor may restrain the effect of delivery on the buyer's vessel by the bill of lading.

§ 1249. 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.* Trustees of the Liverpool Docks, (*t*) the facts of which are fully reported, *ante* § 552 and that case was recognized as settled law in Schotsman *v.* Lancashire and Yorkshire Railway Company, (*u*) decided by the full court of Chancery Appeals. Lord Cairns, then Lord Justice, said: "The Londos was the ship of Cunliffe, and indicated as such for 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 endorsement, as was established in Turner *v.* Trustees of Liverpool Docks.

Schotsman *v.* Lancashire and Yorkshire Railway Co.

14. See *ante* §§ 568, 569, and 579–582.

(*t*) 6 Ex. 543; 20 L. J., Ex. 394.

(*u*) 2 Ch. 332; 36 L. J., Ch. 361.

In the foregoing case it was further held by both the learned lords, reversing Lord Romilly's judgment at the Rolls, (*x*) 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.

§ 1250. 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 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. (*y*)

Where the delivery is on board a vessel chartered by the buyer.

§ 1251. In Berndtson *v.* Strang, (*z*) the subject was elaborately discussed, and all the cases reviewed by Lord Hatherley (then V. C.) 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 endorsed 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 ex-

Berndtson *v.* Strang.

(*x*) 1 Eq. 349.

(*y*) 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 & Pollock on Shipping (ed. 1881, by Pollock & Bruce,) vol. I., p. 418; and a further discussion of the subject in Sandeman *v.* Scurr, L. R., 2 Q. B. 86; 36 L. J., Q. B. 58, and the Omoa Coal and Iron Co. *v.* Huntley, 2 C. P. D. 464. As to what amounts to a demise of a ship, see Meiklereid *v.* West, 1 Q. B. D. 428.

(*z*) 4 Eq. 481; 3 Ch. 588; and see Ex parte Rosevear China Clay Co., 11 Ch D. 560, C. A., *post* § 1263.

tracted 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 carts of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. (*a*) 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. 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*. 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, *qua 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

(*a*) But see per Jessel, M. R., in Mer- Bessemer Steel Co., 5 Ch. D., at p. 219.
chant Banking Co. of London *v.* Phœnix

end when the carrier has arrived at the place of destination and has delivered the goods."

§ 1252. On the appeal in this case, (*a*) 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. (*b*)

Right of stoppage does not extend to insurance money due to purchaser for damage to the goods.

§ 1253. 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. (*c*) 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 and Yorkshire Railway Company, (*d*) would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage. (*e*) [15]

Where vendor takes a receipt for goods in his own name lien not lost,

unless the vessel belonged to purchaser.

(*a*) 3 Ch. 588. See, also, Fraser *v.* Witt, 7 Eq. 64.

(*b*) This distinction between the right to goods, and to the proceeds of a policy of insurance effected upon them, was recognized in Latham *v.* The Chartered Bank of India, 17 Eq. 205, 216. And for the distinction between the right to goods and to the proceeds arising from their subsale, see Kemp *v.* Falk, 7 App. Cas. 573, *post* § 1291.

(*c*) Craven *v.* Ryder, 6 Taunt. 433; Ruck *v.* Hatfield, 5 B. & Ald. 632.

(*d*) 2 Ch. 332; 26 L. J., Ch. 361.

(*e*) Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

15. **How to Prevent the Transfer of the Bills by the Purchaser.**—The vendor of goods, or a lender of money on the faith of the goods as collateral security, may take the bill of lading in his own name or in that of his agent, and thereby render the vendee or borrower unable to transfer the goods until he has fulfilled his contract. First Nat. Bank of Toledo *v.* Shaw, 61 N. Y. 283; Farmers' *v.* Mechanics' Nat. Bank *v.* Logan, 74 N. Y. 568, and cases cited. Ogg *v.* Shuter, 1 L. R., C. P. Div. 47; Fifth Nat. Bank of Chicago *v.* Bayley, 115 Mass. 228; Dows *v.* National Exchange Bank of Milwaukee, 91 U. S. 618.

Where the Goods are Received on the Consignee's Own Vessel.—See *ante* §§ 567–569, 578–582. Bolin *v.* Huffnagle, 1 Rawle 9, is a leading case. The plaintiffs shipped at Malaga, in Spain, pursuant to an order from the

vendees certain Malaga wines and raisins, consigned to the latter at Philadelphia. The goods were transported on a brig belonging to the vendees, commanded by the master acting in their employment. The bill of lading stated and the plaintiffs (consignors) knew, that the vessel was owned by the consignees. Before the goods arrived at Philadelphia the consignees became insolvent and made a general assignment. The goods having been replevied by plaintiffs and afterwards, by consent of parties, sold, the question was submitted to the court to decide to whom the proceeds should belong. It was held (two of the five judges dissenting) after much discussion, that the delivery of the goods upon the vessel of the consignees, under the charge of their servant, the master, terminated the right of stoppage *in transitu*, and no weight was given to the clause in the bill of lading which stated the goods were "to be delivered at the port of Philadelphia" unto the consignees, which, as the court say, was "a mere form of expression, and was not intended to vary the ordinary mode of delivery to a known agent, nor was it meant as a special reservation of a right of stoppage *in transitu*, until, in the language of Lord Mansfield, they shall come to the corporal touch of the vendees." This case was approved and followed in Thompson *v.* Stewart, decided in the District Court of Philadelphia, 7 Phil. 187. Still these decisions are clearly at variance with the case of Stubbs *v.* Lund, 7 Mass. 453, where C. J. Parsons said: "The other objection is, that the consignees being either the owners or the hirers of the ship *Henry*, as soon as the goods were received on board that ship, and bills of lading signed by the master, there was no further transit, the goods being in the possession and custody of the consignees, and to support this objection it was urged by the defendants' counsel that the right to stop *in transitu* extends only to goods shipped on board a general ship. We think this objection cannot prevail. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them *bona fide*, and endorsed over the bills of lading to the purchaser, and in our opinion the true distinction is, whether any actual possession of the consignee or his assigns, after the determination of the voyage, be or be not provided for in the bills of lading. When such actual possession after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment." See, also, Ilsley *v.* Stubbs, 9 Mass. 65. The court in the well-known case of Newhall *v.* Vargas, 13 Me. 93, extensively discussed this same question, and after reviewing the above cases from Pennsylvania and Massachusetts decidedly disapproved of the former and followed the ruling in the latter cases. Both of the above cases in Massachusetts are cited with apparent approval in Cross *v.* O'Donnell, 44 N. Y. 666. But see *dictum* of Smith, J., in Sturtevant *v.* Orser, 24 N. Y. 539. If the doctrine laid down in Bolin *v.* Huffnagle, *supra* be sound (of which there must be grave doubts,) it should probably be accompanied with the qualification that the vendor or shipper knows the vessel to be that of the vendee at the time of shipment. Gossler *v.* Schepeler, 5 Daly 476. If, however, according to the Massachusetts view, the goods are to be delivered by the purchaser's vessel to some other person than the buyer, or are shipped in the buyer's name to a third person, the right of stoppage is lost after delivery to the buyer's vessel. Rowley *v.* Bigelow, 12 Pick. 307.

§ 1254. 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, (*f*) that "it then becomes a question depending upon what was done, and what was the intention with which it was 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?" (*g*) [16]

Transitus not ended till goods reach their ultimate destination.

Test question for determining whether transit is ended.

(*f*) Blackburn on Sales 224.

(*g*) Id., p. 244.

16. **Delivery to a Warehouseman or Middle-man.**—Here the question is whether the warehouseman received the goods to be forwarded in accordance with the previous understanding of the parties, or whether they are to await the fresh and independent direction of the vendee. In the former case, the transit, while the goods are in the possession of the warehouseman or middleman, even though he be the vendee's agent, still continues; in the latter, in their receipt by him, the transit ceases and the right of stoppage is gone. Guilford *v.* Smith, 30 Vt. 49; Blackman *v.* Pierce, 23 Cal. 509; Cabeen *v.* Campbell, 30 Penna. 254; Hoover *v.* Tibbits, 13 Wis. 89; Covell *v.* Hitchcock, 23 Wend. 611; White *v.* Mitchell, 38

Mich. 390; Rowley *v* Bigelow, 12 Pick. 307; Danforth, J., in Becker *v.* Hallgarten, 86 N. Y. 173; Barrett *v.* Goddard, 3 Mason 107; Aguirre *v.* Parmelee, 22 Conn. 473; Harris *v.* Pratt, 17 N. Y. 249, where this subject was exhaustively discussed. Holbrook *v.* Vase, 6 Bosw. (N. Y.) 76; Biggs *v.* Barry, 2 Curtis C. C. 259; Pottinger *v.* Hecksher, 2 Grant Cas. 309; Chandler *v.* Fulton, 10 Tex. 2; O'Neill *v.* Garrett, 6 Iowa 480. In Cabeen *v.* Campbell, 30 Penna. (at page 259,) Judge Strong concisely states the rule as follows: "If, in the hands of the middleman, they require new orders to put them again in motion, and give them another substantive destination, if without such new orders they must continue stationary, then the delivery is complete, and the lien of the vendor has expired. This is the doctrine of Dixon *v.* Baldwin, 5 East 175, which is a leading case, and such is the recognized law of this state." This point was ably discussed and the distinction clearly taken in the well-considered Vermont case of Guilford *v.* Smith, cited above. Parties at Burlington, Vermont, purchased flour on credit of a firm in Canada and ordered it shipped to their agents at Ogdensburg, N. Y., whose habit had been to hold flour thus shipped and to forward the same wherever and as directed by their principals in Burlington. The bill of lading described the agents as consignees, but stated the flour was to be forwarded to Burlington, *though this statement was not authorized by the order for the flour.* The flour having arrived by steamer at Ogdensburg, but neither the freight nor the government duties having been paid, was placed, subject to the provisions of the United States warehousing system, in a warehouse under the charge of the owners of the steamer from which it could not be moved until the freight was paid, and the duties either paid or secured according to the United States laws. The purchasers became insolvent, and their agents, in accordance with directions, notified the warehouseman to retain the flour until further orders. On this state of facts, the court held the right of stoppage *in transitu* had ceased, and laid down the rule as follows: "The rule is explicit, and the difficulties arise in its application in determining the capacity in which a third person holds the goods before they have come to the actual possession of the vendee. If he holds them for the mere purpose of transport in the course of their transit to the vendee, or to their ultimate place of destination, the goods in such third person's hands are still *in transitu* and may be stopped, not because the delivery to such third person was not a constructive delivery to the vendee, but because it was a delivery *to transport*, as a connected link in the transmission of the property to the vendee. As a general rule, a constructive possession in the vendee is as available to put an end to the transit as an actual one can be, and it is only when the constructive possession is for the purpose of transport, that an exception to the general rule is found. A middleman simply to *forward* is no more the agent of the vendor than the vendee. * * * The rule is well settled by authority, that when the goods are delivered at a place where they will remain until a fresh impulse is communicated to them by the vendee, the *transitus* is at an end." But in Donath *v.* Broomhead, 7 Penna. 301, it was held that the right of stoppage was not lost where the customs officers had stored the goods which they held for duties, though the buyer had paid the freight. In Treadwell *v.* Aydlett, 9 Heisk. 388, the purchaser directed the vendor to ship the goods to a third party in his (the purchaser's) name as consignor, which the vendor did. The purchaser became insolvent and the vendor replevied the goods from the carrier, on their way to the consignee. It was held that in taking the bill of lading in the name of the vendee as consignor

§ 1255. A few of the cases offering the most striking illustrations of the distinction will now be presented. Cases selected as examples.

In Leeds *v.* Wright, (*h*) 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. Leeds *v.* Wright.

In Scott *v.* Pettit, (*i*) 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. Scott *v.* Pettit.

§ 1256. In Dixon *v.* Baldwin, (*k*) the facts were, that Battier & Son, of London, ordered goods of the defendants 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 giv- Dixon *v.* Baldwin.

the vendor thereby recognized his right to control the goods as owner, and the vendor's right of stoppage was lost. Where the buyer, having the shipping papers in his possession, enters and warehouses the goods in his own name, the seller's right of stoppage has ceased. Parker *v.* Byrnes, 1 Low. 539. In Wiley *v.* Smith, 1 Ont. App. 179, merchants in New York sold and consigned 250 barrels of currants to merchants in Toronto. The goods were placed in a bonded warehouse and were held there for the payment of duties, for which the buyers gave a bond. The buyers sold and delivered 150 barrels on which the customs were paid. Afterwards they became insolvent, and the sellers claimed the remaining 100 barrels as still in transit. But their claim was disallowed, the court after a full review of English, Canadian and American decisions overruling the cases of Howell *v.* Alport, 12 U. C. C. P. 375, and Graham *v.* Smith, 27 U. C. C. P. 1. Donath *v.* Broomhead, 7 Penna. 301, was distinguished because there the custom-house officers had never recognized the buyer's title. Motham *v.* Heyer, 1 Denio 483; affirmed, 5 Denio 629, was approved. Wiley *v.* Smith, does not overrule, but distinguishes and confirms Lewis *v.* Mason, 36 U. C. Q. B. 590, 600, where Motham *v.* Heyer, 5 Denio 629, was followed, and it was held that delivery to the officers of the customs would not terminate the transit until after a perfect entry made.

(*h*) 3 B. & P. 320.

(*i*) Id. 469.

(*k*) 5 East 17.

ing 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; 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. [17]

§ 1257. In Valpy *v.* Gibson, (*l*) 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.

Valpy *v.* Gibson.

§ 1258. [In Ex parte Gibbes, (*m*) the vendors were cotton merchants at Charleston, in America, and the purchasers cotton-spinners at Luddenden Foot, in Yorkshire. Their mode of transacting business was as follows:—the vendors consigned the cotton to their agents at Liverpool, at the same time transmitting to them the shipping documents, with bills of exchange drawn upon the purchasers for the price. The agents sent the bills to the purchasers for

Ex parte Gibbes.

17. Dixon *v.* Baldwin was approved in Cabeen *v.* Campbell, 30 Penna. 259, quoted *ante* note 16.

(*l*) 4 C. B. 837.

(*m*) 1 Ch. D. 101.

acceptance, and, upon their returning them accepted, sent them the shipping documents. The purchasers endorsed the bills of lading, and sent them to the manager of the railway company at Liverpool, who, after paying any sea-charges, took possession of the cotton and forwarded it by the company's line of rail to Luddenden Foot station. The invoice of the cotton described it as shipped by the vendors by steamer to Liverpool consigned to order, for account and risk of the purchasers, Luddenden Foot; and the bill of lading, provided for the shipment of the cotton to Liverpool, "there to be delivered unto order or assigns, he or they paying freight immediately on landing the goods." Upon these facts, Bacon, C. J., held that the transit was at an end when the goods reached Liverpool. The manager of the railway company then took possession of the cotton as agent to hold it for the purchasers, it was there and then at the purchasers' order and disposition, and the subsequent transit from Liverpool to Luddenden Foot was one prescribed by them. The company, no doubt, were forwarding agents and would, in the ordinary course, forward the goods to the purchasers at Luddenden Foot; but it was at the purchasers' option to countermand that destination and substitute another, or to direct that the goods should remain in the company's possession to await further instructions.]

See, also, Wentworth *v.* Outhwaite, (*n*) Dodson *v.* Wentworth, (*o*) Cooper *v.* Bill, (*p*) Smith *v.* Hudson, (*q*) and Rowe *v.* Pickford. (*r*)

§ 1259. 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.

Cases where *transitus* was held not ended.

In Smith *v.* Goss, (*s*) 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.

Smith *v.* Goss.

(*n*) 10 M. & W. 436.
(*o*) 4 M. & G. 1080.
(*p*) 3 H. & C. 722; 31 L. J., Ex. 151.
(*q*) 4 B. & S. 431; 34 L. J., Q. B. 145.
(*r*) 8 Taunt. 83.
(*s*) 1 Camp. 282.

§ 1260. In Coates *v.* Railton, (*t*) 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 destination.*" In this case it will be remarked, that Railton's agency from the beginning was to buy *and forward to Lisbon to the vendee;* and the goods were not to be held by him to await orders, or any other disposal of them.

Coates *v.* Railton.

§ 1261. So in Jackson *v.* Nichol, (*u*) 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 endorsed 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

Jackson *v.* Nichol.

(*t*) 6 B. & C. 422.

(*u*) 5 Bing. N. C. 508.

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."

§ 1262. [In Ex parte Watson, (*v*) an agreement had been entered into between one Love, a China merchant in London, and Watson, a Yorkshire manufacturer, that Watson should supply Love with goods, Watson drawing upon Love and Love accepting bills of exchange for the invoice price. *By the terms of the agreement Love was to ship the goods to his correspondents, Rothwell, Love & Co., in Shanghai,* and on receipt of the bills of lading was to send them to Rothwell, Love & Co., to whose order they were to be made out. Watson was to have a lien upon the bills of lading and each shipment of goods in transit outwards, which lien was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. Love had undertaken to give notice to Rothwell, Love & Co. of this agreement and its terms, but he never in fact gave such notice. In pursuance of the agreement Love ordered a parcel of goods from Watson. The goods were packed by Watson's packer, who forwarded them by rail to London in bales marked "*Shanghai*," and addressed to a ship called the *Gordon Castle* designated by Love, which was loading in the West India Docks for Shanghai. The carriage to London was paid by Watson. The packer, in advising Love of the dispatch of the goods, stated that they were "at his disposal." Love accepted a six months' bill of exchange drawn upon him by Watson for the invoice price. The railway company, on the arrival of the goods at their Poplar Dock Station, sent an advice-note to Love, informing him that the goods remained at his order and were held by the company as warehousemen at his risk, adding, however, "will be sent to the *Gordon Castle*." The goods were afterwards shipped on board that vessel. The bills of lading were, by Love's directions, made out to the order of himself or assigns, but were retained by the shipowners, as the freight was not paid by Love. The ship sailed for Shanghai with the goods on board. Love became bankrupt while the goods were at sea, and Watson telegraphed to Rothwell, Love & Co., at Shanghai, requesting them to deliver the goods

Ex parte Watson.

Transit contemplated by the terms of agreement.

(*v*) 5 Ch. D. 35, C. A.

to his agents there; he also demanded the bills of lading from the shipowners in London. It was held by the Court of Appeal on this state of facts—*first*, that the agreement did not destroy or diminish the vendor's right of stoppage *in transitu*; *secondly*, that the transit continued, and was intended to continue, from the railway station in Yorkshire up to Shanghai, inasmuch as Watson could have obtained an injunction to restrain Love from sending the goods to any other destination; and *thirdly*, that the demand by Watson of the bills of lading from the shipowners was an effectual exercise of the right of stoppage.

Ex parte Rosevear China Clay Co.

§ 1263. In Ex parte Rosevear China Clay Company, (*x*) the vendors had contracted to deliver a cargo of china clay f. o. b. a vessel in the harbor of Fowey. The destination of the cargo was not disclosed at the date of the contract. The cargo was delivered by the vendors at Fowey, on board a vessel chartered by the purchaser for the purpose of being carried to Glasgow. Before the vessel left the harbor, the vendors gave the ship's master notice to stop the cargo. Held, by the Court of Appeal, reversing the decision of Bacon, C. J., that the *transitus* was not at an end. The court adopted the rule, as stated by Lord Cairns in Berndtson *v.* Strang *ante* § 1251. "The authorities show," says James, L. J., "that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary." It was contended in the course of the argument, that as the vessel itself was the only destination for the cargo which had been communicated to the vendors, the transit ceased upon shipment. The court, however, refused to draw this distinction, holding that the mere circumstance of the port of destination not having been disclosed at the date of the execution of the contract did not affect the vendor's right to stop the goods.]

Immaterial that the destination of the goods is not disclosed at time of contract.

§ 1264. Next come the cases where the goods have reached their

(*x*) 11 Ch. D. 560, C. A.; and see Kendall *v.* Marshall, 46 L. T. (N. S.) 693. Kendall *v.* Marshall was reversed on appeal. See "The Times," February 28th, 1883.

ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *qua 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. Blackburn on Sales has this passage: (*y*) "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 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 shipowner, 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.)"

Where goods have reached destination, but are still in carrier's possession.

Both buyer and carrier must agree before the carrier can be converted into bailee to keep the goods for the buyer.

This view of the law has received full confirmation in subsequent cases.

§ 1265. 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.

James *v.* Griffin.

(*y*) Page 248.

Parke, Bolland, and Anderson, 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, (*z*) repeated demands were made by the buyers for the goods after the arrival of the Esk in the Thames (*a*) 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*, (*b*) and the principle seems to be exactly that of Bentall *v.* Burn, and the class of cases like it, reviewed *ante* §§ 175–177.

Jackson *v.* Nichol.

§ 1266. This question was considered by the Common Pleas in the singular case of Bolton *v.* The Lancashire and Yorkshire Railway Company. (*c*) 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 are 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

Bolton *v.* Lancashire and Yorkshire Railway Co.

(*z*) 5 Bing. N. C. 508.

(*a*) *Ante* § 1261.

(*b*) See Foster *v.* Frampton, 6 B. & C. 107, where the assent of both parties was given.

(*c*) L. R., 1 C. P. 431; 35 L. J., C. P. 137.

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 vendee. 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 opinion that 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 the 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. at p. 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 pre-

pared 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 destination. 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.*"

§ 1267. 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.

[This is again illustrated by the case of Ex parte Barrow. (*e*) Goods were shipped in London to be delivered to the purchaser at Falmouth. Upon the arrival of the ship at Falmouth, the goods were transferred to and warehoused by the agents of the shipping company. It was their custom to notify to the consiguee that the goods had arrived, and that they held them at the consignee's risk, and to forward them according to instructions on payment of the sea-charges. The arrival of the goods in question was never notified to the purchaser, as he had already absconded. The vendor stopped the goods. Held, by Bacon, C. J., that the transit was not at an end. The only question to determine was, whether the shipping agents had divested themselves of their character of carriers, and were in possession of the goods as agents of the buyer; and this was concluded by the fact that, from the circumstances of the case, the buyer could never have given his assent to such an arrangement.]

Ex parte Barrow.

§ 1268. The case of Whitehead *v.* Anderson, (*f*) a leading one 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

Whitehead *v.* Anderson.

(*e*) 6 Ch. D. 783. See p. 789 of the report, where the statement of the law given in the text is referred to with approval.

(*f*) 9 M. & W. 518. Tud. L. C. on Mer. Law 632, (ed. 1868.)

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.

§ 1269. In Coventry *v.* Gladstone, (*g*) 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 V. C.) 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.

[The same principle was recently expressed by the Court of Appeal in the following terms:—"Where goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or wharfinger."] (*h*) [18] Ex parte Cooper.

§ 1270. The carrier's change of character into that of agent to keep the goods for the buyer, is not at all inconsistent with his

(*g*) 6 Eq. 44.

(*h*) Ex parte Cooper, 11 Ch. D. 68, C. A. This case also decides that the right to stop *in transitu* is not affected by the circumstance that the purchaser is a member of the vendor's firm. For cases where the *transitus* was held to have ceased upon notice of the arrival of the goods being given by the carrier to the purchaser, see Ex parte Catlin, Re Chadwick, 29 L. T. (N. S.) 431, and Ex parte Gouda, Re Millo, 20 W. R. 981. In both these cases there was evidence that the purchaser assented to the carrier no longer holding as carrier, but as warehouseman for him. In Chadwick's case it was expressly so stated in Chadwick's affidavit, and in Millo's case, on the advice note of the arrival of the goods being handed to the bankrupts, they signed for the goods, and afterwards paid the carrier's charges.

18. Alsberg *v.* Latta, 30 Iowa 442, 447; McFetridge *v.* Piper, 40 Iowa 627.

Carrier *may* become agent to keep goods for buyer while retaining his own lien.

right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied. (*i*) 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, (*k*) 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 *fulfill 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."

But the retention of the lien is strong evidence that the carrier has not changed his character.

[But the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and, in order to rebut this presumption, there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him. (*l*)]

Buyer may anticipate the end of the *transitus*, and thus put an end to the right of stoppage.

§ 1271. 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 (*m*) as settled in the affirmative on the authority of the cases in the note, (*n*) and in opposition to the ruling of Lord Kenyon, and the King's Bench in Holst *v.* Pownall. (*o*) And in Whitehead *v.* Anderson, (*p*) in which the judgment was pre-

(*i*) Allan *v.* Gripper, 2 Cr. & J. 218; but see Crawshay *v.* Edes, 1 B. & C. 181; *post* § 1273.

(*k*) 9 M. & W. 518.

(*l*) Ex parte Barrow, 6 Ch. D. 783; Ex parte Cooper, 11 Ch. D. 68, C. A.; Ex parte Falk, 14 Ch. D. 446, C. A. And see per Lord Blackburn in S. C. in the House of Lords, reported *sub nom.* Kemp *v.* Falk, 7 App. Cas., at p. 584.

(*m*) 1 Sm. L. C., p. 821, (ed. 1879.) Tudor's L. C. Mer. Law 664, 665; Houston on Stoppage *in Transitu*. 130, *et seq.*; 1 Griffith & Holmes on Bankruptcy 352.

(*n*) 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.

(*o*) 1 Esp. 240.

(*p*) 9 M. & W. 518

pared 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 contemplated by the purchaser, *unless in the meantime* 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 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." There was, however, no direct decision on the point, and it rested on *dicta* till the case of The London and North Western Railway Company *v.* Bartlett, (*q*) 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." [19]

London and North Western Railway Co. *v.* Bartlett.

§ 1272. In Blackburn on Sales, (*r*) 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. (*s*) The doubt thus suggested seems to be justified by the decision in Bird *v.* Brown, (*u*) 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 owner when the goods had arrived at destination, and the Exchequer Court held,

Buyer's right of possession not affected by carrier's *tortious* refusal to deliver, and the right of stoppage is at an end.

(*q*) 7 H. & N. 400; 31 L. J., Ex. 92.

19. **Interception of the Goods in Transit by the Buyer.**—In Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658, this question arose and it was decided that where goods consigned to the vendees at Brooklyn were, in pursuance of an order from the vendee on the carrier, delivered into the hands of a sub-purchaser in New York, the right of stoppage was ended. See, also, Morton, J., in Mohr *v.* Boston and Albany R. R. Co., 106 Mass. 72; Chandler *v.* Fulton, 10 Tex. 2; Secomb *v.* Nutt, 14 B. Mon. 327; Wood *v.* Yeatman, 15 B. Mon. 270, 280; The Muskegon Booming Co. *v.* Underhill, 43 Mich. 629, where the subsequent course of the parties to the contract, involving a peculiar state of facts, amounted to a delivery, and cut off the right of stoppage *in transitu*.

(*r*) Page 259.

(*s*) See the civil law texts; Dig. Ulpian, l. 134, § 1, Æ Edict. Lib. XXI.; Broom's Legal Maxims 279; Phillimore on Jurisprudence 224.

(*u*) 4 Ex. 786.

after advisement and in very decided language, that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver; that the *transitus* was at an end; and the right of stoppage gone.

Right of stoppage continues after arrival at destination until vendee takes possession.

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. 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, (*x*) and delivery sufficient to divest lien, (*y*) will be found applicable.

What is such possession?

§ 1273. In Whitehead *v.* Anderson, (*z*) 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 asseuted to keep the goods in the nature of an agent for custody."

Crawshay *v.* Edes.

In Crawshay *v.* Edes, (*a*) 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.

Delivery of part is not delivery of the whole unless it be shown that it was so intended.

Whether delivery of part, when not retracted under the peculiar circumstances shown in Crawshay *v.* Edes, amounts to delivery of the whole, is always a question of intention, as shown *ante* § 1191 *et seq.*, where the cases mentioned in the note (*b*) have been reviewed; and the general rule was there deduced, that a delivery of part is not a delivery of

(*x*) *Ante* § 173, *et seq.*

(*y*) *Ante* § 1186, *et seq.*

(*z*) 9 M. & W. 518.

(*a*) 1 B. & C. 181.

(*b*) Dixon *v.* Yates, 5 B. & Ad. 313, per Parke, J., at p. 341; Betts *v.* Gibbins, 2 Ad. & E. 73; Tanner *v.* Scovell, 14 M. & W. 28; Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Bunney *v.* Poyntz, 4 B. & Ad. 568; Simmons *v.* Swift, 5 B. & C. 857; Miles *v.* Gorton, 2 Cr. & M. 504; Jones *v.* Jones, 8 M. & W. 431; Wentworth *v.* Outhwaite, 10 M. & W. 436; Ex parte Gibbes, 1 Ch. D. 101; and observations upon Slubey *v.* Heyward, Hammond *v.* Anderson, and Jones *v.* Jones, *supra*, per Brett and Cotton, L. JJ., in Ex parte Cooper, 11 Ch.

the whole, unless the circumstances show that it was intended so to operate.

§ 1274. [The rule to be gathered from recent decisions may be expressed as follows:—A delivery of part of the goods does not operate as a constructive delivery of the whole, unless the parties intended it so to operate, and it rests with the party who relies on the part delivery as a constructive delivery of the whole, to prove such intention. This proof may be established (1) from the circumstances under which the delivery took place, *e. g.*, the purchaser may at the time express his intention to take the whole of the goods, although he actually takes only a part; or (2) possibly in some cases from the intrinsic nature of the goods delivered, as *e. g.*, where the cargo consists of an entire machine, and an essential portion of it is delivered to the purchaser. [20]

Rule stated.

Further, where the shipowner or carrier has not been paid in full his freight or charges, there is a strong presumption that he intends to retain his lien, and part delivery will not operate as a constructive delivery of the whole, unless it can be shown that the shipowner or carrier assented to the buyer's taking possession of the goods without payment of freight or charges.] [21]

§ 1275. 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 trustee, will suffice to put an end to the *transitus*, and to determine the right of stoppage. (c) [22]

Delivery into the possession of a buyer, even after his bankruptcy or into that of his trustee, ends the *transitus*.

D. 68, C. A., at pp. 74 and 77, and per Bramwell, L. J., in Ex parte Falk, 14 Ch. D., C. A., at p. 455. See, also, per Lord Blackburn in S. C., in the House of Lords, reported *sub nom.* Kemp *v.* Falk, 7 App. Cas., at p. 586.

20. **Effect of a Part Delivery.**—The mere fact that a portion of a quantity of goods purchased at one time and constituting but one parcel has actually come to the vendee's possession does not necessarily defeat the right of stoppage as to a residue which was separated and left behind on the transit, and which has not reached its ultimate destination. Buckley *v.* Furness, 17 Wend. 504. Bronson, J., who distinguished the case before him from Slubey *v.* Heyward, 2 H. Bl. 504, and Hammond *v.* Anderson, 4 Bos. & P. 69, by the fact that in the latter cases *the whole* of the property was already at its ultimate destination, and he cites for authority Hanson *v.* Meyer, 6 East 614.

21. See *ante* § 1193, note 9.

(*c*) Ellis *v.* Hunt, 3 T. R. 467; Tooke *v.* Hollingworth, 5 T. R. 226; Scott *v.* Pettit, 3 B. & P. 469; Inglis *v.* Usherwood, 1 East 515.

22. If the purchaser dies during the transit, the administrator may receive the

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 buyer's trustee. The subject has been considered, *ante* §§ 782–785, where the cases are referred to. [23]

Buyer on becoming insolvent may rescind the contract,

or refuse to receive possession, and vendor's right of stoppage will remain unimpaired.

SECTION IV.—HOW IS THE RIGHT EXERCISED?

§ 1276. 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. (*d*) All that is required is some act or declaration of the vendor countermanding delivery. 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. [24]

No particular mode of stoppage required.

The usual mode is a simple notice to carrier forbidding delivery to vendee.

§ 1277. In Litt *v.* Cowley, (*e*) 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 unsuc-

Litt *v.* Cowley.

goods and thereby put an end to the transit, even though the purchaser died insolvent. Conyers *v.* Ennis, 2 Mason 236.

23. See *ante* § 785, note 65; Cox *v.* Burns, 1 Iowa 64; Morris *v.* Shryock, 50 Miss. 590, 599; Grout *v.* Hill, 4 Gray 361.

(*d*) 1 Atk. 250.

24. The vendor need not demand a redelivery of the goods to him. If the party in possession is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient. Jones *v.* Earl, 37 Cal. 630; Rucker *v.* Donovan, 13 Kan. 251; Reynolds *v.* Boston and Maine Railroad, 43 N. H. 591; Newhall *v.* Vargas, 13 Me. 109; Bell *v.* Moss, 5 Whart. 189. In Clementson *v.* Grand Trunk Railway Co., 42 U. C. Q. B., a notice to the carrier was held insufficient because it did not clearly identify the goods.

(*e*) 7 Taunt. 168; 2 Marsh. 457.

cessful. 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 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; (*f*) but that it revests the *possession*, so as to restore to the vendor his lien, is undoubted.

§ 1278. In Bohtlingk *v.* Inglis, (*g*) 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 and Woodbridge, (*h*) 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.

Bohtlingk *v.* Inglis.

Ex parte Walker and Woodbridge.

In Northey *v.* Field, (*i*) 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 custodia legis*. (*j*)

Northey *v.* Field.

(*f*) *Post* Section V.

(*g*) 3 East 397.

(*h*) Cited in Cooke's Bankrupt Law 402.

(*i*) 2 Esp. 613.

(*j*) See Nix *v.* Olive, Abbott on Ship. (12th ed.) 424.

§ 1279. 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.[25] In Whitehead *v.* Anderson, (*k*) 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 shipowner 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 shipowner, living at Montrose, is such a [valid] stoppage of the cargo, then being on the high seas, on its passage to Fleetwood. 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: 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 reasonable diligence to prevent the delivery, and in the present case such diligence was used."

The notice of stoppage must be given to the person in possession.

Or to the employer, in time to enable him to send notice to his servant not to deliver.

§ 1280. [In his judgment in Ex parte Falk (*l*) Bramwell, L. J., expressed doubt as to whether it is the shipowner's duty ot communicate to the master of the ship the vendor's notice to stop goods *in transitu*. And James, L. J., referring to Whitehead *v.* Anderson, said, in the course of the argument: "That is not a judicial decision that any such duty is imposed on the shipowner, it is only a decision that, at the most, he could be under no further obligation."

Whether the shipowner is under any obligation to communicate notice.

Lord Blackburn, however, in his opinion in the same case in the

25. Mottram *v.* Heyer, 5 Denio 629; Rucker *v.* Donovan, 13 Kan. 251.

(*k*) 9 M. & W. 518.

(*l*) 14 Ch. D. 446, C. A., at p. 455.

House of Lords, (*m*) dissents from this view, and states his own view to be that the shipowner, who receives a notice to stop goods, is under an obligation to forward it, if he can, with reasonable diligence, to the ship's master; but that, provided he use remarkable diligence, he will be excused in the event of the master having delivered the goods before the arrival of the notice.

Opinion of Lord Blackburn.

It has been held that the unpaid vendor may effectually exercise his right of stoppage by demanding the bills of lading from the shipowner when the latter has retained them in his possession as security for the unpaid freight. (*n*)]

The notice of stoppage may be given to the shipowner when he has retained the bills of lading for unpaid freight.

§ 1281. The mode of exercising the right of stoppage underwent careful investigation in the Admiralty Court in the case of The Tigress. (*o*) 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 endorsed, and was sufficient without any representation that the bill of lading had not been transferred by the vendee.

Vendor need not inform the master of vessel that the bill of lading is still in possession of buyer.

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.

Master's duty is to deliver goods to vendor, not simply to retain them till 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 endorsed over a bill of lading to a third person.

Fifthly. That if bills of lading are presented to the master by two

(*m*) 7 App. Cas., at p. 585. Reported C. A. *sub nom.* Kemp *v.* Falk.

(*n*) Ex parte Watson, 5 Ch. D. 35,

(*o*) 32 L. J., Adm. 97.

Master's duty as between conflicting claims.

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."

Master as bailee delivers at his peril, and if indemnity is refused may bring an action of interpleader.

§ 1282. The 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, (*p*) 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, and that his only mode of protecting himself is to take an indemnity, and if that be refused, to bring an action of interpleader. (*q*) This was clearly the opinion of Lord Blackburn, 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." (*r*) 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* § 1223.

Glyn *v.* East and West India Dock Co.

§ 1283. [The proposition was very fully discussed in the important case of Glyn *v.* The East and West India Dock Company. (*s*) The action was for conversion of a cargo of sugar. The goods in question had been consigned to Cottam & Co. The shipmaster signed a set of three bills of lading, marked

(*p*) 1 H. Bl. 364; 1 Sm. Lead. Cas., at p. 782, (ed. 1879.)

(*q*) Wilson *v.* Anderton, 1 B. & Ad. 450; Batut *v.* Hartley, L. R., 7 Q. B. 594. Under the Judicature Acts any person may, it would seem, after notice of conflicting claims, bring an action of interpleader in any division of the High Court, without waiting for legal proceedings to be taken against him. Wilson's Jud. Acts, Ord. I. r. 2, notes p. 181, (ed. 1882.)

(*r*) P. 266. See, also, Abbott on Shipping, Part 3, Chap. 9, § 25, (ed. 1827.)

(*s*) 7 App. Cas. 591, affirming S. C., 6 Q. B. D. 475, C. A.; reversing S. C., 5 Q. B. D. 129.

"first," "second" and "third" respectively, by which the goods were deliverable "to Cottam & Co., or their assigns, freight payable in London, one of the bills being accomplished, the others to stand void." During the voyage Cottam & Co. endorsed the bill of lading marked "first" to the plaintiffs, who were a firm of bankers, as security for an advance. The plaintiffs had not inquired for, nor obtained the other two copies of the set. Upon the arrival of the ship in London, the goods were landed and placed in the custody of the defendants, a dock company, the master lodging with them a notice, under the provisions of the 68th section of the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. Cottam & Co. then produced to the defendants the bill of lading marked "second," unendorsed, and the defendants entered Cottam & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the defendants *bona fide*, and without notice or knowledge of the plaintiffs' claim, delivered the goods to other persons upon delivery orders signed by Cottam & Co. Upon these facts, Field, J., sitting without a jury, held the defendants liable. He refrained from deciding whether the master could have been exonerated by a delivery of the goods to the person who first presented a bill of lading; but he held that the defendants were not by receiving the goods, subject to the stop for freight, placed in the same position as the master, and entitled to his rights, and that, by delivering the goods on the order of Cottam & Co., they had acted in a character beyond that of mere warehousemen, and were guilty of a conversion. The majority of the Court of Appeal reversed this decision, upon the ground that the defendants had disposed of the goods according to the terms on which they had received them, having no notice of any claim, title or right, other than that of the person from whom they received them, and could not, therefore, be held guilty of a conversion.

Bramwell, L. J.'s, view was in favor of the non-liability of the master, on the authority of Fearon *v.* Bowers, and on the ground that it was the undoubted practice to deliver without inquiry to one who produces a bill of lading (p. 492.)

Baggallay, L. J., hesitated to apply the rule laid down in Fearon *v.* Bowers to its full extent, and preferred to adopt the more guarded suggestion of Lord Westbury in Meyerstein *v.* Barber, (*t*) that the shipowner, *who is in ignorance of any previous dealing with the bill of*

(*t*) L. R., 4 H. L., at p. 336, *ante* § 1223.

lading, may be justified in delivering the goods to the party presenting one part of the set (p. 504.)

Brett, L. J., in a dissentient opinion, maintained the view that the master delivers at his peril. He differed from the *dicta* of Dr. Lushington in "The Tigress," and of Lord Loughborough in Lickbarrow *v.* Mason, and declined to follow the decision in Fearon *v.* Bowers, even with the limitation suggested by Lord Westbury in Meyerstein *v.* Barber.

§ 1284. The case was taken on appeal to the House of Lords, who affirmed the decision of the Court of Appeal. (*u*) The *ratio decidendi* of their judgment, as expressed in the opinion of Lord Blackburn, to which all the other Lords expressed their adhesion, is, that the master is excused for delivering goods according to his contract to the person appearing to be the assign of the bill of lading which is first produced to him, no matter which part it is, *so long as he has no notice or knowledge of any dealing with either of the other two parts;* and that the defendants were for this purpose in the same position as the master. In the case under consideration, the master had received no notice, and it was therefore unnecessary to decide what his duty would be in such an event; but Lord Blackburn, in the course of his opiuion, takes occasion to say, "Where the master has notice, or probably even knowledge of the other endorsement, I think he must deliver at his peril to the rightful owner, or interplead." Their Lordships, therefore, adopted the view taken by Baggallay, L. J., in the Court of Appeal, and by Lord Westbury in Meyerstein *v.* Barber and affirmed the authority of Fearon *v.* Bowers only to that extent.]

The case in the House of Lords.

Where master has no notice or knowledge of prior dealing he may deliver to holder of bill of lading first presented.

Stoppage must be on behalf of vendor in assertion of his paramount right to the goods.

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. (*x*)

SECTION V.—HOW MAY IT BE DEFEATED?

Vendor's right defeasible only by trans-

§ 1285. The vendor's right of stoppage *in transitu* is defeasible in one way only, and that is when the goods are represented by a bill of lading [or other document of title, (*y*)] and

(*u*) 7 App. Cas. 591, only reported while the sheets of this edition were passing through the press.

(*x*) Siffkin *v.* Wray, 6 East 371; Mills *v.* Ball, 2 B. & P. 457.

(*y*) See the 5th section of the Factors Act, 1877, *ante* § 1207.

when the vendee, being in possession of such document of title with the vendor's assent, transfers it to a third person, who *bona fide* gives value for it. (*z*) 26

Transfer of document of title to a *bona fide* endorsee for value.

The Bills of Lading Act, 18 and 19 Vict., c. 111 (referred to *ante* § 1210,) and the Factors' Acts (*ante* § 1199, *et seq.*,) have largely extended the effects of these mercantile instruments, and the rights of the holders of them. By the common law, as established in Lickbarrow *v.* Mason, (*a*) 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 *bona fide* endorsee; but if the endorsement 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, but not as an *assignment of the contract* so that the endorsee was not empowered to bring suit on the bill of lading. (*b*) But now by the effect of the Factors' Acts, the endorsement of a bill of lading by factors or consignees, entrusted 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 *bona fide* made by any person with such agent so entrusted 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

By common law consignee could only defeat vendor's rights by resale, but now by the Factors' Acts, by pledge also.

Transfer of bill of lading is now an assignment of the contract.

(*z*) It would seem that the mere endorsement, unaccompanied by a transfer of the bill of lading, has no effect on the vendor's right of stoppage. Ex parte Golding Davis & Co., 13 Ch. D. 628, C. A., *post* § 1289.

26. **The Transfer by the Buyer of the Bill of Lading to a Bona Fide Purchaser Defeats the Right of Stoppage.** —Becker *v.* Hallgarten, 86 N. Y. 167; Andenreid *v.* Randall, 3 Cliff. 99; Chandler *v.* Fulton, 10 Tex. 2; First National Bank of Memphis *v.* Pettit, 9 Heisk. 447; Halliday *v.* Hamilton, 11 Wall. 560; Conard *v.* The Atlantic Insurance Co., 1 Pet. 386. These are all cases where the transfer took place before notice of stoppage. As to transfer after notice, see *post* note 28.

(*a*) 1 Sm. Lead. Cas. 753, (ed. 1879.)

(*b*) Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 296.

consignor was vendor, or merely consigning goods for sale, his right 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 *endorsee, 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. (*c*)

[And by the recent act to amend the Factors' Acts (40 and 41 Vict., c. 39, § 5, *ante* § 1205,) the doctrine has been extended so as to include not only bills of lading, but all documents of title, that is, it is submitted, documents of title as defined by the previous Factors' Act (5 and 6 Vict., c. 39, § 4.)] (*d*)

Factors' Act, 1877.

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, (*e*) but only the effect of transferring these documents in defeating the right of stoppage.

§ 1286. The first point to be noticed is, that a bill of lading is not negotiable in the same sense as a bill of exchange, and that therefore the mere honest *possession* of a bill of lading endorsed 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 *endorsement of a bill of lading gives no better right to the goods than the endorser himself had* (except in cases where an agent *entrusted with it* may transfer it to a *bona fide* holder under the Factors' Acts), so that if the owner should lose or have stolen from him a bill of lading en-

Bill of lading not negotiable like a bill of exchange.

Transferee has no better title than endorser.

(*c*) Fox *v.* Nott, 6 H. & N. 630; The Figlia Maggiore, L. R., 2 Ad. & E. 106; The Nepoter, L. R., 2 Ad. & E. 375; The Freedom, L. R., 3 P. C. 594; Dracachi *v.* The Anglo-Egyptian Navigation Co., L. R., 3 C. P. 690; Short *v.* Simpson, L. R., 1 C. P. 248, 252.

(*d*) In the very recent case of Kemp *v.* Falk, 7 App. Cas. 573, *post* p. 861, it was argued that cash receipts given by vendees to their subpurchasers, upon the presentation of which the latter received the goods from the master of the ship in which the goods lay, were documents of title, as equivalent to delivery orders; but the suggestion was repudiated by Lord Blackburn, (at p. 584 of the report.) This, so far as the editors are aware, is the only reported decision in which the 5th section of the Factors Act, 1877, has been noticed.

(*e*) 1 Sm. Lead. Cas. 753, (ed. 1879.)

dorsed in blank, the finder or the thief could confer no title upon an innocent third person. (*f*) [27]

(*f*) Gurney *v.* Behrend, 3 E. & B. 622; 23 L. J., Q. B. 265; and see Coventry *v.* Gladstone, 6 Eq. 44; Blackburn on Sale, p. 279, and cases there cited.

27. **The Holder of a Bill of Lading can Transfer no Better Title than He has.**—In Maryland and in Louisiana, and perhaps in some other states, bills of lading are made by statute negotiable in the same sense as bills of exchange and promissory notes. See Tiedman *v.* Knox, 53 Md. 612, and Henry *v.* Philadelphia Warehouse Co., 81 Penna. 76, 79, interpreting Louisiana law. In the absence of such statutes, bills of lading are not negotiable in the same sense as bills and notes. The purchaser takes no better title that he would acquire if the endorser delivered to him the goods themselves which the bill represents, and that could be no better title than he had. Baltimore and Ohio R. R., 44 Md. 11, 27; Tiedman *v.* Knox, 53 Md. 612, 615; Stollenwerck *v.* Thacher, 115 Mass. 224, 227. In Dows *v.* Perrin, 16 N. Y. 325, Denio, C. J., said: "The right of stoppage *in transitu* is cut off by the transfer of the bill of lading to a *bona fide* purchaser, but it by no means follows that the holder of such a bill, void on account of fraud, can confer a better title than he had himself, and I am of opinion that he cannot do so." And the bill must have come to the possession of the consignee before he can transfer it. Pattison *v.* Culton, 33 Ind. 240; Stanton *v.* Eager, 16 Pick. 476; Muller *v.* Pondir, 55 N. Y. 325; Walter *v.* Ross, 2 Wash. C. C. 283. In Pattison *v.* Culton, *supra*, it appeared that the sellers shipped at Chicago a quantity of wheat, consigned, according to the bill of lading, to the buyers at Indianapolis, *on account of the sellers*, but the title to the wheat was not to pass until paid for. While the wheat was yet in transit the plaintiff purchased the same from the buyers (consignees) and paid for it, and on the false supposition that the goods had then arrived, a new bill of lading was issued to the consignees on account of the plaintiff and duly endorsed to him. But the consignees had not yet received the original bill of lading, though the shipping list had arrived. The consignees being insolvent the carrier was notified to hold the wheat for the consignors. Held, that the plaintiff had no right to the wheat. The court say: "A bill of lading is a muniment of title, and *quasi* negotiable. But Comstock & Co. (the original purchasers) did not possess this evidence of title, and of course did not endorse it to Pattison (the plaintiff); and herein is found an important difference between this case and Coxe *v.* Harden, 4 East 211; Dows *v.* Greene, 32 Barb. 490; Lee *v.* Kimball, 45 Me. 172, cited by the appellant." In Becker *v.* Hallgarten, 86 N. Y. 167, it was held unnecessary that the bill of lading should be *endorsed* over to the purchaser, provided (as in that case), the bill itself ran in the name of his agents as consignees; and it was further held that the fact that the delivery of the bill to the party making a loan on the faith of the goods, took place *after* the money was in fact advanced, did not impair the rights of the lender.

The Carrier May be Estopped by the Bill of Lading.—The carrier who gives a bill of lading is estopped from disputing the receipt of the goods therein named, as against one who has made a *bona fide* advance or purchase on the faith of the bill of lading. Thus, in Van Santen *v.* Standard Oil Co., 17 Hun 140, affirmed, 81 N. Y. 171, the consignor represented to the master of a vessel that there had been placed in the vessel 110 barrels of oil more than the quantity in fact put in, and the master gave a bill of lading for the excessive amount. The bill of lading having been transferred to purchasers for

[As to what constitutes "an agent entrusted with and in possession of a bill of lading or other document of title" within the meaning of the Factors' Acts, see *ante* § 19 *et seq.* It had been held, previous to the act of 1877, that a vendor left by his vendee in possession of the documents of title was not "an agent entrusted" within the meaning of the earlier acts.] (*g*)

Agent entrusted.

§ 1287. But the title of *bona fide* third persons will prevail against the vendor who has *actually* transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so, (*h*) because, as we have seen, (*i*) a transfer obtained by fraud is only voidable not void. [28]

But *bona fide* endorsee will hold goods against vendor who has been defrauded.

value, it was held that the master was liable to them for the value of the 110 barrels. See Sears *v.* Wingate, 3 Allen 103; Relyea *v.* New Haven Rolling Mill Co., 42 Conn. 579; Miller *v.* Hannibal and St. Joe R. R., 24 Hun 607. But the agent of a shipowner or other carrier who fraudulently gives a bill of lading for goods never received by him, cannot thereby estop his principal, although the bill may have been transferred to a purchaser for value, without notice of the fraud. See Schooner Freeman *v.* Buckingham, 18 How. 182; Sears *v.* Wingate, 3 Allen 103; Baltimore and Ohio R. R. *v.* Wilkens, 44 Md. 11, 24. As between the consignor and carrier, the bill of lading is not conclusive as to the condition of the goods. Mitchell *v.* United States Express Co., 46 Iowa 214.

(*g*) Johnson *v.* Credit Lyonnais Co., and Johnson *v.* Blumenthal, 3 C. P. D. 32, C. A.

(*h*) Pease *v.* Gloahec, L. R., 1 P. C. 219.

(*i*) *Ante* §§ 649 *et seq.*

28. **Effect of Transfer by the Buyer After Notice of Stoppage to the Carrier.**—The only direct decision on this point seems to be Newhall *v.* Central Pacific R. R. Co., 51 Cal. 345. In that case the goods were consigned and the bill of lading sent to the buyer, and he endorsed the bill of lading to one who made advances upon the credit of it in good faith. But before the advances and endorsement took place, the seller had given to the carrier a notice of stoppage, on account of the buyer's insolvency. The title of the endorsee was sustained against the seller. Crockett, J., said: "The question involved being one of great practical importance, it has been discussed by counsel, both orally and in printed arguments, with learning and ability. But after the most careful research, they have failed to call to our attention a single adjudicated case in which the precise question under review has been decided or discussed. There are numerous decisions both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods *in transitu* will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is Lickbarrow *v.* Mason, 2 Term R. 63, the authority of which has been almost universally acquiesced in by the courts and text-writers in this country and in England. * * * The first, and, as I think, the controlling point determined in these cases, is that by the bill of lading the legal title to the goods passes to the vendee, subject only to the *lien* of the vendor for the unpaid price; which lien

continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit. On the failure of each of these conditions the right of stoppage is gone, and the lien ceases, even as against the vendee. But it is further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a *bona fide* purchaser for a valuable consideration *before* the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a *bona fide* holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded,) the rule applies that where the equities are equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods, and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, without notice of such circumstances as render the bill of lading not fairly and honestly assignable, has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee. Brewster *v.* Sims, 42 Cal. 139. These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made *before* the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made *after* the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person who, in the language of Mr. Benjamin, in his work on Sales, takes an assignment of a bill of lading 'without notice of such circumstances as render the bill of lading not fairly and honestly assignable.' The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and carrier; and in dealing with the vendee whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier—it may be on some remote portion of the route—that the goods are stopped *in transitu*. If a person taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated." If this case correctly expresses the law, it would seem incumbent on one who would exercise the right of stoppage to take the goods into his possession, though even then he would not be protected if the reasoning of the court is carried to its logical conclusion. The case seems doubtful except in those states where a bill of lading has been made negotiable in the same sense as a promissory note. Upon the exercise of the right of stoppage by notice to the carrier, the buyer loses the right to take possession of the goods under the bill of lading. If, as we have seen in the last note, (27), the endorser of a bill of lading can give no better title than he has himself, how can he confer a right to the possession of the goods after he has himself lost that right? Like the assignee of a chose in action, the assignee of a bill

In Dracachi *v.* The Anglo-Egyptian Navigation Company, (*k*) the plaintiff proved that the consignor had endorsed the bill of lading to A, and that A had endorsed 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 endorsement 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 *prima facie* evidence that the property had passed, sufficient to justify the jury in finding that the property in the goods was in the plaintiff.

Where bill of lading is shown to have been endorsed to holder for value, this is *prima facie* evidence of ownership, without proving that previous endorsement was for value.

§ 1288. 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. (*l*)

Where consignor or vendor gets back bill of lading after transfer, his original rights revive.

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 *marshaling the assets;* that is to say, of forcing the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding on the goods of the unpaid vendor. (*m*)

Where bill of lading has been endorsed as a pledge, vendor's right of stoppage remains for surplus after pledgee is satisfied.

And vendor may force pledgee to marshal the assets.

of lading takes subject to all equities existing against his assignor.

(*k*) L. R., 3 C. P. 190; 37 L. J., C. P. 71.

(*l*) Short *v.* Simpson, L. R., 1 C. P. 248; 35 L. J., C. P. 147.

(*m*) 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 Berndson *v.* Strang, 4 Eq. 486, and Kemp *v.* Falk, 7 App. Cas. 573, where the principle established by In re Westzinthus and Spalding *v.* Ruding, is approved and adopted. See, as to marshaling assets in equity, Aldrich *v.* Cooper, and notes, 2 Tud. L. C. in Eq. 80, 93 (ed., 1877.)

§ 1289. [In Ex parte Golding Davis & Company, (*n*) the principle that, where there has been a pledge of the goods by the purchaser, the vendor may still render his right of stoppage effectual, so far as he does not thereby interfere with the special property of the pledgee in them, was applied to the case of a subsale of the goods by the original purchasers during the continuance of the transit. The purchasers had entered into a contract to resell the goods, and the bill of lading had been made out in the name of, *but not transferred to*, the subpurchasers. The transit indicated by the contract between the original vendors and their vendees had not ceased at the time when the vendors gave notice of stoppage. It was held, that the vendors were equitably entitled to intercept, to the extent of their own unpaid purchase money, the purchase money which was due from the subpurchasers to the original vendees. Cotton, L. J., after laying down as the guiding principle that the vendor can exercise his right of stoppage *in transitu*, so far as he does not thereby defeat or interfere with the rights or interests of purchasers for value, continues, "except so far as it is necessary to give 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 any way the interest of the in subpurchaser? In my opinion he can."

Subsale of goods during the transit.

Ex parte Golding Davis & Co.

Judgment of Cotton, L. J.

§ 1290. In Ex parte Falk, (*o*) the facts, so far as material to the point under consideration, were as follows: The buyer of goods, which had been shipped by the seller, consigned them abroad, and endorsed the bill of lading to a bank by way of security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to subpurchasers who paid their purchase money, but only took, as it afterwards appeared, (*o*) *cash receipts* in exchange. The buyer became bankrupt, and the un-

Ex parte Falk.

(*n*) 13 Ch. D. 628, C. A.

(*o*) 14 Ch. D. 446, C. A. The facts are taken from the agreed statement before the Court of Appeal, as modified by the supplementary statement laid before the House of Lords, 7 App. Cas., at p. 574. The statement of facts before the Court of Appeal was inaccurate as to the form of the documents given by the consignees to the subpurchasers.

paid seller thereupon gave the ship's master notice to stop the goods *in transitu*. The notice was effected after the date of the subsales, but before the goods had been delivered to the subpurchasers.

It was held by the Court of Appeal, that, although the seller through the resale (accompanied as they understood it to be by the transfer to the subpurchasers of *delivery orders*), had lost the right to stop the actual goods, yet that he was entitled to intercept, to the extent of his own unpaid purchase money, so much of the subpurchasers' purchase money as had not reached the vendee's hands when the notice to stop was given. James and Baggallay, L. JJ., rested their judgments upon the authority of Ex parte Golding Davis & Co., but Bramwell, L. J., (at page 457 of the report) says: "I am not going to shelter myself under the authority of that case. In my opinion it was rightly decided. What difference is there in principle between the case of a man selling goods on credit for £500, and their being resold for £600, and the case of the purchaser pledging the goods for £600, with a right of sale by the pledgee? * * * The decisions in In re Westzinthus, and Spalding *v.* Ruding, seem to me to be applicable both to Ex parte Golding Davis & Co., and to the present case."

Judgment of Bramwell, L. J.

§ 1291. Leave was given to appeal to the House of Lords, (*p*) who affirmed the decision of the Court of Appeal, but upon a different ground. Their Lordships pointed out that as the true effect of the subsales was not to displace the right of stoppage, that right being defeated only by the absolute transfer of the bill of lading (or other document of title) for valuable consideration, the fact that subsales had taken place was an immaterial one; and they held, therefore, that the right remained, subject only to the satisfaction of the bank's claim, according to the principle established by In re Westzinthus, and Spalding *v.* Ruding.

The case in the House of Lords.

Right of stoppage defeated only when subsale accompanied by transfer of bill of lading, or other document of title.

In this view it was unnecessary for their Lordships to express any opinion as to the correctness of the decision in Ex parte Golding Davis & Co. Lords Blackburn and Watson (at pp. 581, 588) distinctly refrain from offering any opinion upon it, whilst Lord Selborne (at p. 577,) without expressly mentioning the case, states his opinion to be, that there can be no right of

Opinion of Lord Selborne.

(*p*) Only reported while these sheets were passing through the press, *sub nom.* Kemp *v.* Falk, 7 App. Cas. 573.

stoppage *in transitu* as against the purchase money payable by subpurchasers to their vendor. He there says: "I assent entirely to the proposition that where the subpurchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu* as against the purchase money payable by them to the vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*. But when the right exists as against the goods which are *in transitu*, it is manifest that all other persons who have, subject to that right, any equitable interest in those goods by way of contract with the original purchaser, or otherwise, may come in, and if they satisfy the claim of the seller who has stopped the goods *in transitu*, they can of course have effect given to their rights: and I apprehend that a court of justice, in administering the rights which arise in actions of this description, would very often find that the rights of all parties were properly given effect to, if so much of the purchase money payable by the subpurchasers were paid to the original vendor as might be sufficient to discharge his claim; and, subject of course to that, the other contracts would take effect in their order, and in their priorities."

And as to the effect of a subsale, Lord Blackburn, at p. 582, expresses the same view:—"*No sale, even if the sale had been actually made with payment, would put an end to the right of stoppage in transitu, unless there were an endorsement of the bill of lading.* (*p*) Why any agreement, unless it was made in such a way as to pass the property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu*, I cannot understand. I am quite clear that it does not."

§ 1292. The view taken by Lord Selborne, in the passage above cited, is in strong contrast with that expressed by Cotton, L. J., in Ex parte Golding Davis & Co., *ante* § 1289 Lord Selborne's view is, that where there has been a resale of goods during the transit, *unaccompanied by a transfer of the bill of lading*, the rights of the subpurchaser can only take effect after those of the unpaid vendor; that of Cotton, L. J., on the other hand, being that the unpaid vendor can

(*p*) Lord Fitzgerald (at p. 590) reserves his opinion on this point. In point of fact, it appears that the subsales were for cash, although the purchase money had not reached the vendee's hands when the notice to stop was given.

only exercise his rights, subject to the rights of the subpurchaser, and that it would seem whether the subsale has or has not been accompanied by the transfer of the bill of lading. It is submitted, that while the *decision* in Ex parte Golding Davis & Co. may be supported on the ground that, upon the subsale, there was a mere *endorsement* but no *transfer* of the bill of lading, the *dicta* of Cotton, L. J., in that case, and of Bramwell, L. J., in Ex parte Falk, to the effect that, on an absolute subsale of the goods, with transfer of the bill of lading, there may be a right of stoppage as against the purchase money due to the vendee, are irreconcilable with the general principles of stoppage *in transitu*. The alleged right is stated to be only an extension of the principle of In re Westzinthus and Spalding *v.* Ruding, but the principle of those decisions, it is submitted, is entirely different, and is, that where the vendee has transferred only a *special property* in the goods, *e. g.* by pledging the bill of lading, it is possible to give effect to the right of stoppage *in transitu*, as against the *general property* in the goods, which remains in the vendee. But when the vendee has resold the goods, and transferred the bill of lading, or other document of title, to the subpurchaser, *ex hypothesi* all the property in the goods has passed out of the vendee, and nothing remains to which the right of stoppage can attach.]

Remarks upon Ex parte Golding Davis & Co.

§ 1293. 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 *bona 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, (*q*) but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable*. (*r*) Thus in Vertue *v.* Jewell, (*s*) 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 endorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee. 29

Transfer of bill of lading will defeat vendor's rights, even when endorsee knows that goods have not been paid for, if the transaction is honest.

(*q*) Cuming *v.* Brown, 9 East 506.

(*r*) Ib.; Salomons *v.* Nissen, 2 T. R. 681.

(*s*) 4 Camp. 31. See, also, Wright *v.* Campbell, 4 Burr. 2046.

29. The Transfer Must be Bona

§ 1294. On this principle it was decided, by the Judicial Committee of the Privy Council in Rodger *v.* The Comptoir d'Escompte, (*t*) 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.

Rodger's case.

[But in Leask *v.* Scott, (*u*) the Court of Appeal dissented from this decision of the Judicial Committee. The facts were, that the defendants had sold a cargo of nuts to Geen & Co., who were largely indebted to the plaintiff for past advances. Geen & Co. applied to the plaintiff for a further advance, which the plaintiff consented to make upon their promise to cover their account (*i. e.*, to deposit securities.) On Geen & Co.'s undertaking to do so, the plaintiff made the advance. *Some days after* Geen & Co., in fulfillment of their promise, deposited (among other securities) with the plaintiff the bill of lading for the cargo of nuts purchased from the defendants. Geen & Co. stopped payment, and the defendants claimed the right to stop the nuts *in transitu.* The jury found at the trial that the plaintiff received the bill of lading fairly and honestly. It was contended on behalf of the defendants, on the authority of Rodger *v.* The Comptoir d'Escompte, that the equitable right of stoppage must prevail against a legal title acquired by receiving the bill of lading for a consideration, no part of which was given *on the faith of* the bill of lading. The court admitted that the *ratio decidendi* of Rodger *v.* The Comptoir d'Escompte justified this contention, but declined to adopt it, stating that there was "not a trace of such distinction between cases of past

Leask *v.* Scott.

Fide.—The transfer must be in good faith and not for the purpose of defeating the right. Rosenthan *v.* Dessan, 11 Hun 49. Evidence that the endorsee knew at the time of transfer that the consignee was insolvent is relevant and proper to show, in connection with other testimony, that the transfer was not *bona fide.* Loeb *v.* Peters, 63 Ala. 243; Stanton *v.* Eager, 16 Pick. 476. See, also, Ilsley *v.* Stubbs, 9 Mass. 65; Gardner *v.* Howland, 2 Pick. 399; Seymour *v.* Newton, 105 Mass. 275; Atkins *v.* Colby, 20 N. H. 154; Sawyer *v.* Joslin, 20 Vt. 172; Kitchen *v.* Spear, 30 Vt. 545; Covell *v.* Hitchcock, 23 Wend. 611.

What is Sufficient Consideration ?—The following are cases bearing upon the subject: Loeb *v.* Peters, 63 Ala. 243, Leask *v.* Scott, 2 Q. B. Div. 376; Becker *v.* Hallgarten, 86 N. Y. 167; Rawls *v.* Deshler, 3 Keyes 572; S. C., 4 Abb. (N. Y.) App. Dec. 12; Lesaissier *v.* Southwestern, 2 Woods C. C. 35; Lee *v.* Kimball, 45 Me. 172; Dows *v.* Greene, 24 N. Y. 638; Dows *v.* Perrin, 16 N. Y. 325; Winslow *v.* Norton, 29 Me. 421; Pratt *v.* Parkman, 24 Pick. 42; Blanchard *v.* Page, 8 Gray 281.

(*t*) L. R., 2 P. C. 393; and see The Chartered Bank of India *v.* Henderson, L. R., 5 P. C. 501.

(*u*) 2 Q. B. D. 376, C. A.

and present consideration to be found in the books." They held, therefore, that the defendants' right of stoppage was defeated by the transfer of the bill of lading to the plaintiff, who had received it *bona fide* and for valuable consideration. The court expressed a further opinion, that, from the nature of the case, the consideration, although past in time, had practically a present operation in "staying the hand of the creditor," *i. e.*, in inducing the plaintiff to forbear to enforce his debt.][30]

SECTION VI.—WHAT IS THE EFFECT OF A STOPPAGE IN TRANSITU.

§ 1295. 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.

Effect is to restore the goods to vendor's possession, 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 811, 813; (*v*) and in Wentworth *v.* Outhwaite, (*x*) 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

Wentworth *v.* Outhwaite.

30. **Is an Antecedent Debt a Sufficient Consideration?**—It seems to be unsettled whether the consideration must be advanced by the transferee at the time of transfer, on the faith of the goods, or whether a past consideration is sufficient. The question arose in Loeb *v.* Peters, 63 Ala. 243, recently, in which the bill of lading was transferred as security for a pre-existing debt due from the consignee to the endorsee, and it was held (though, perhaps, the case really turned on another point) that the consideration for the transfer was insufficient to defeat the right of stoppage. See, also, Lesaissier *v.* Southwestern, 2 Woods C. C. 35; Naylor *v.* Dennie, 8 Pick. 199; Lee *v.* Kimball, 54 Me. 172; Holbrook *v.* Vase, 6 Bosw. 76, 107. However, it was held that in case the transfer is made in *payment* of the precedent debt, which is thereby actually discharged, the right of stoppage will be cut off. Lee *v.* Kimball, 45 Me. 172; and see Sm. Lead. Cas., vol. 1., pp. 1190, 1191. In Clementson *v.* Grand Trunk Railway Co., 42 U. C. Q. B. 263, 273, the court was inclined to follow Leask *v.* Scott, though the question was not decided.

(*v*) Ed. 1879.

(*x*) 10 M. & W. 436.

as if he had not parted with the possession, and entitle him to hold the goods till the price is paid down."

§ 1296. In Martindale *v.* Smith, (*y*) 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 revest the property in himself by reason of the vendee's failure to pay the price at the appointed time, the court concluded 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." Martindale *v.* Smith.

§ 1297. In Valpy *v.* Oakeley, (*z*) where the assignees of bankrupts sued the defendant in *assumpsit* for non-delivery of goods bought by the bankrupts, of which the defendant stopped delivery after the bankrupts had become insolvent, although he had received from them 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, (*a*) 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.

§ 1298. 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 rights of stoppage *in transitu;* a jurisdiction totally incompatible with the theory of a rescission of the contract; for if the contract was rescinded, This is settled by the decisions in equity.

(*y*) 1 Q. B. 389.

(*z*) 16 Q. B. 941; 20 L. J., Q. B. 380.

(*a*) 1 E. & E. 680; 28 L. J., Q. B. 204. See, also, per Lord Blackburn in Kemp *v.* Falk, 7 App. Cas., at p. 581. "It is pretty well settled now that a stoppage *in transitu* would not have rescinded the contract."

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 and Yorkshire Railway Company; (*b*) 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.

§ 1299. [The doctrine of stoppage *in transitu*, as established in the United States since their independence, accords in general with the principles of the law of England on the subject. "The English law," says Chancellor Kent, (*c*) "on the subject of this right, and the class of cases by which it is asserted and established, have been very generally recognized and adopted in our American courts." A few of the leading American decisions, in which the English cases are referred to by way of illustration and authority, are collected in the note. (*d*)]

Law in America.

In the United States it has 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. (*e*) [31]

(*b*) 2 Ch. 332.

(*c*) 2 Kent 543, (ed. 1873.)

(*d*) Ludlow *v.* Bowne, 1 Johnson, at p. 15; The St. Jose Indiano, 1 Wheaton, at p. 210; Stubbs *v.* Lund, 7 Mass. 453; Rowley *v.* Bigelow, 29 Mass. 306; Newhall *v.* Vargas, 13 Me. 93; S. C., 15 Me. 314; Bell *v.* Moss, 5 Whart. (Penna.) 189; Grout *v.* Hill, 70 Mass. 361; Reynolds *v.* Boston and Maine Railway, 43 N. H. 580; Seymour *v.* Newton, 105 Mass. 272; Mohr *v.* Boston and Albany Railroad Co., 106 Mass. 67.

(*e*) Cross *v.* O'Donnell, 44 N. Y. 661; Newhall *v.* Vargas, *ubi supra*.

31. **What is the Effect of Stoppage in Transitu?**—It must be considered at this time to be perfectly well settled in the American states that the exercise of the right of stoppage *in transitu* does not rescind the sale, but is only an assertion of a lien on the goods. Babcock *v.* Bonnell, 80 N. Y. 244, in which this doctrine was lately conceded to be the generally accepted rule, though its propriety was questioned when compared with the theory of a rescission. Benedict *v.* Schættle, 12 Ohio St. 515; Newhall *v.* Vargas, 15 Me. 314; Rowley *v.* Bigelow, 12 Pick. 307; Cross *v.* O'Donnell, 44 N. Y. 665; Rucker *v.* Donovan, 13 Kan. 251; Rogers *v.* Thomas, 20 Conn. 53; Chandler *v.* Fulton, 10 Tex. 2; Patten's Appeal, 45 Penna. 151.

The Rights of the Parties After Stoppage.—The situation of the parties with reference to their respective rights and duties after the property is stopped *in transitu* is well stated in Babcock *v.* Bonnell, 80 N. Y. 244, by Church, C. J. He says, (at page 249): "Upon the theory that this right is to enforce a lien, as claimed by the defendant, he (the vendor) must hold the property until the expiration of the credit, and be able to deliver it upon payment of the price, and the vendee has the right to pay the price and take the property. According to that theory, the credit is not abrogated, nor the sale, but the vendor is permitted to retake the possession of the property and hold it as security until the price is paid

§ 1300. [A long time elapsed before the doctrine of stoppage *in transitu* was embodied in the legal systems of those countries whose jurisprudence is based upon the civil law. It was a well known rule of the civil law that on a sale of goods for ready money the property in them did not pass to the buyer, even after delivery, until he had paid or given security for the price. (*f*) The unpaid and unsecured vendor might pursue and retake the goods as his own property out of the possession of the buyer or even of third persons who had *bona fide* given value for them. And even where the sale was on credit (and credit was never presumed,) although the property in the goods passed to the buyer from the time of delivery, the seller might still by the aid of a prætorian action establish a preferable claim over them so long as they remained in the buyer's possession, although having once lost his real right he had no remedy against third persons who had, in the meantime, *bona fide* given value for them. Civil law.

§ 1301. These rules became established in France, Spain, Italy, Germany, Holland, and in fact in nearly all the states of the Continent. With the growth of commerce, however, and of credit it was found necessary, first to modify and then to change the established law on this subject. Merchants were liable to be deprived of goods for which they had paid, by some original vendor who remained unpaid, and were exposed to ruin by giving credit on the faith of a large stock-in-trade, which was possibly subject to the latent but preferable claim of those from whom it had been bought. Hence it was, that towards the end of the last, and early in the present century, the right of stoppage *in transitu* was for reasons of mercantile convenience incorporated in the municipal codes of commercial states, and thenceforward formed a part of the mercantile law of Europe.

If not paid at the time stipulated, the vendor, in analogy to other cases of lien, may sell the property upon giving notice. The general rule upon the theory of a lien must be that the vendor, having exercised the right of stoppage *in transitu*, is restored to his position before he parted with the possession of the property." See, also, Stanton *v.* Eager, 16 Pick. 475; 1 Sm. Lead. Cas. 1226; Newhall *v.* Vargas, 15 Me. 314. Under this theory, in case of a deficit arising from a resale of the goods by the vendor to satisfy his lien, he may share *pro rata* with the other creditors of the vendee. Patten's Appeal, 45 Penna. 151.

(*f*) The rule was as old as the Twelve Tables, "*Venditæ vero res et traditæ non aliter emptori adquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem et lege XII. Tabularum, tamen recte dicitur et jure gentium, id est jure naturali, id effici.*" Inst. ii. § 41.

§ 1302. In France, for example, the Code de Commerce (*g*) in 1807 rejected the old law of *revendication*, whereby the unpaid vendor was enabled to reclaim goods from the possession of the buyer if they were capable of identification, and adopted instead the principle of the law of stoppage *in transitu*. The right may be exercised :—

France.

1stly. Where the goods have been sold, so long as they are still in transit, and have not been delivered into the bankrupt purchaser's warehouse, or into the warehouse of his commission agent. They cannot, however, be stopped, if, before the end of the transit, they have been *bona fide* sold upon the faith of the invoices, bills of lading, or way-bills (*sur factures, et connaissemens ou lettres de voiture*), signed by the consignor of the goods. The vendor, if he exercises the right, must repay to the estate of the bankrupt any sums he may have received on account of the price, as well as all advances actually made by the bankrupt on account of the freight, carriage, commission, insurance, or other expenses, and must indemnify the estate against any sums that may be due for the above objects. (*h*) The committee of the bankrupt's creditors (*les syndics*) have the right to demand delivery of the goods on payment of the price.

2ndly. Where the goods have been consigned to the bankrupt as bailee (*à titre de depôt*) or for sale on commission, they may be reclaimed so long as they exist in specie (*en nature*), wholly or in part. In this last case, if the goods have been sold by the bankrupt, the consignor may intercept so much of the price due from the purchaser to the bankrupt as remains unpaid or unaccounted for.

§ 1303. The right of stoppage *in transitu* was introduced into the law of Scotland just a century after its recognition by the English courts. Down to the year 1790 the doctrine of presumptive fraud, which empowered the unpaid vendor to retake possession of the goods, if the buyer became bankrupt within a period of three days (*intra triduum*) after their delivery, seems to have prevailed. This right was based on the assumption that the buyer must

Scotland.

(*g*) Code de Commerce, Nos. 574–579. See, also, The Code Napoléon, arts. 1583, 1606, 1612–13, 1654–57. The doctrine would be introduced into Holland with the Code Napoléon in 1811; Vanderlinden's Institutes of Law of Holland (translated by Henry), Introd. p. xiii. It was adopted in Russia by Imperial Ukase in 1781, quoted and relied on in Inglis *v.* Usherwood, 1 East 515, and Bothlingk *v.* Inglis, 3 East 381. See, also, the Code Civil D'Italie (*traduit par Gandolfi*) tit 6, cap. 5, art. 1513.

(*h*) This seems to assume that the effect of the exercise of the right is to rescind the sale.

have secretly known of his impending bankruptcy and fraudulently concealed it from the vendor. In the year 1790 the House of Lords, in deciding an appeal from the Court of Session in Scotland, (*i*) overthrew the doctrine of presumptive fraud, and asserted that the right of stoppage *in transitu* was conformable to the law of Scotland. Since then the doctrine has been established in Scotland, and the English decisions on the subject have been recognized as directly authoritative, except in cases where they are traceable to principles peculiar to the law of England and inconsistent with those of the law of Scotland.] (*k*)

(*i*) The noted case of Jaffrey (Stein's Creditors) *v.* Allan, Stewart & Co., 3 Paton 191. The judgment of the House was based on the opinion of Lord Thurlow.

(*k*) See Bell's Comm., vol. I., p. 226, (ed. 1870,) and Brown on the Law of Sale in Scotland, p. 434.

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

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§ 1304. 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 of the collateral contract of warranty either of quality or title.

Right to avoid the contract for mistake, failure of consideration, fraud, or illegality.

The buyer's right to *avoid* the contract for mistake, failure of consideration, fraud, or illegality, has been discussed in the Third Book 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. 2ndly. The remedies of the buyer after having taken actual possession of the goods.

SECTION I.—WHERE THE CONTRACT IS EXECUTORY.

Only remedy is action for the breach of contract.

§ 1305. 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.[1]

1. **The Buyer Must Offer Payment Before he can Sue for Non-Delivery, Unless Credit was Given or Payment Waived.**—See *ante* § 897, note 23. Parker *v.* Pettit, 43 N. J. L. 512, 516; Leonard *v.* Davis, 1 Black 476, 483; Keeler *v.* Schmertz, 46 Penna. 135, 139; Pinkus *v.* Hamaker, 11 S. & R. 200; Simmons *v.* Green, 35 Ohio St. 104; Mowry *v.* Kirk, 19 Ohio St. 375, 383. A formal tender of payment is not a condition precedent, but the buyer must be ready and willing to pay. West *v.* Platt, 127 Mass. 367, 370; Bear *v.* Harnish, 3 Brewst. 113; Robison *v.* Tyson, 46 Penna. 286, 292. And if goods are to be delivered to the buyer on request, such request is a condition precedent to his right of action. See *post* § 1329.

Buyer's Suit to Recover Back the

What damages buyer may recover.

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, as explained by Tindal, C. J., in the opinion delivered in Barrow *v.* Arnaud, cited *ante* § 1117; and numerous instances of the application of this rule are to be found in the reported cases. (*a*) [2]

Price.—In Nash *v.* Towne, 5 Wall. 689, 701, the suit was on the common counts to recover for breach of contract to deliver flour, the price of which had been paid. Clifford, J., said: "Where the seller of goods received the purchase money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted them to his own use, it was held at a very early period that an action for money had and received would lie, to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness." Cleveland *v.* Sterrett, 70 Penna. 204, 209. The buyer who has paid the price may, instead of suing for the price, sue for the value of the goods at the time and place of delivery, and if he has sustained special damages, may plead and recover them. See *post* notes 2, 4. The buyer cannot bring replevin for the goods sold under an agreement to sell, where the property has not passed to him, even though he may have made payment in whole or part. Boutell *v.* Warne, 62 Mo. 350, 353.

(*a*) 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 Moo. P. C. C. 309; Chinery *v.* Viall, 5 H. & N. 288; 29 L. J., Ex. 180; Wilson *v.* Lancashire and Yorkshire Railway Co., 9 C. B. (N S.) 632; 30 L. J., C. P. 232; per Blackburn, J., in Elbinger Co. *v.* Armstrong, L. R., 9 Q. B., at p. 476; Silkstone Co. *v.* Joint Stock Coal Co., 35 L. T. (N. S.) 668.

2. Measure of Damages for Breach of Contract to Deliver.—The measure of damages for breach of contract to deliver is, in general, the difference between the contract price and the market value at the time and place of the delivery. Thompson *v.* Cincinnati, &c., R. R. Co., 1 Bond 152; White *v.* Arleth, 1 Bond 319, 327; Halsey *v.* Hurd, 6 McL. 102, 106; Barnard *v.* Conger, 6 McL. 497; Blydenburgh *v.* Welsh, Bald. 331; Fessler *v.* Love, 48 Penna. 407, 410; Missouri Furnace Co. *v.* Cochran, U. S. C. C., 12 Law Reporter 520; Parsons *v.* Sutton, 66 N. Y. 92, 96; Dana *v.* Fiedler, 12 N. Y. 40; Cohen *v.* Platt, 69 N. Y. 348, 351; McKercher *v.* Curtis, 35 Mich. 478; Miles *v.* Miller, 12 Bush 134, 138; Koch *v.* Godshaw, 12 Bush 318; Kribs *v.* Jones, 44 Md. 396. There are cases holding that where the buyer pays the price in advance, he may recover for breach the highest market price between the time of delivery and the commencement of the suit. But these cases are not recent, and the exception is not generally recognized. See Field on Damages, § 246.

Market Price at the Time of Delivery.—In Shepherd *v.* Hampton, 3 Wheat. 200, the contract was to deliver 100,000 pounds of cotton on or before February 15th, at ten cents per pound. The seller delivered half but refused to deliver the residue, and the buyer sued for damages. The market price on the 15th of February was twelve cents per pound, but it rose gradually to thirty cents, when the suit was commenced for damages. Mar-

§ 1306. But the law distinguishes the damages which may be claimed on a breach of contract, and allows not only *general* damages, that is, such as are the necessary and immediate result of the breach, (*b*) but *special* damages, which are such as are a natural and proximate consequence of the breach,

Damages general or special.

shall, C. J., said: "The only question is, whether the price at the time of the breach of the contract, or at any subsequent time before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article at the time it was to be delivered is the measure of damages." Douglass *v.* McAllister, 3 Cranch 298; Bear *v.* Harnish, 3 Brewst. 113. Evidence of price for a brief period before and after the day of performance may be given to show the price on that day. Cahen *v.* Platt, 69 N. Y. 348, 352.

Market Price at the Place of Delivery.—In Grand Tower Co. *v.* Phillips, 23 Wall. 471, 479, a coal company agreed to deliver coal at Grand Tower, a point on the Mississippi, north of Cairo, and was sued for breach. Bradley, J., said: "The rule of law regards the price at the place of delivery as the normal standard by which to estimate the damage for non-delivery. It is alleged by the plaintiffs that this rule would have been a futile one in their case, because no market for the purchase of coal existed at Grand Tower, except that of defendant itself, which, by the very hypothesis of the action, refused to deliver coal to plaintiffs, and which had the whole subject in its own control. This is certainly a very forcible answer to the proposition to make the price of coal at Grand Tower the only criterion. It is apparent that the plaintiffs would be obliged to resort to some other source of supply, in order to obtain the coal which the defendant ought to have furnished them. And it would not be fair, under the circumstances of the case, to confine them to the prices at which the defendant chose to sell the coal to other persons. The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling, would be the true measure of damages. To this is properly to be added the claim (if any) for keeping boats and barges ready at Grand Tower for the receipt of coal. But the prices of coal at New Orleans, at Natchez and other places of distribution and sale, although they might afford a basis for estimating the profits which the plaintiffs might have made had the coal stipulated for been delivered to them, cannot be adopted as a guide to the actual damage sustained so long as any more direct method is within reach." In Cahen *v.* Platt, 69 N. Y. 348, 352, Earl, J., said: "It may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets, may be given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery." See cases cited. See, further, as to "Market Price" and "Market Value," and mode of proving, Harrison *v.* Glover, 72 N. Y. 451; Douglass *v.* Merseles, 25 N. J. Eq. 144; Kountz *v.* Kirkpatrick, 72 Penna. 376, *ante* § 86, note 2, Follansbee *v.* Adams, 86 Ill. 13.

(*b*) Boorman *v.* Nash, 9 B. & C. 145.

although not in general following as its immediate effect. (c) It is by reason of this distinction, that damages of the latter class are not recoverable, unless alleged in the statement of claim with sufficient particularity to enable the defendant to prepare himself with evidence to meet the demand at the trial, while those of the former class are sufficiently particularized by the very statement of the breach. (d) [3]

Special damages must be alleged in statement of claim.

§ 1307. The rule on the subject of the measure of damages on breach of contract was thus laid down in Hadley *v.* Baxendale; (e) "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 contract, 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." [4]

Rule in Hadley *v.* Baxendale.

(c) Crouch *v.* Great Northern Railway Co., 25 L. J., Ex. 137; 11 Ex. 742; Hoey *v.* Felton, 11 C. B. (N. S.) 143; 31 L. J., C. P. 105.

(d) Smith *v.* Thomas, 2 Bing. N. C. 372; 1 Wms. Saund. 243 d, n. 5.

3. Special damages must be pleaded by the buyer. Parsons *v.* Sutton, 66 N. Y. 92, 96; Miles *v.* Miller, 12 Bush 134, 138; Furlong *v.* Polleys, 30 Me. 491, 493; Lalor *v.* Burrows, 18 U. C. C. P. 321, 329.

(e) 9 Ex. 341–354; 23 L. J., Ex. 179. See, also, Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A., *post* § 1326, and Sawdon *v.* Andrew, 30 L. T. (N. S.) 23.

4. **Special Damages.**—See American cases stated by our author, *post* §§ 1337, 1338. 1 Sedgwick Dam. (7th ed.) 218. In Fessler *v.* Love, 48 Penna. 407, 410, the suit was for damages for non-delivery of white pine logs, and the buyer claimed damages as a manufacturer, and because his mill stood idle for want of logs. Thompson, J., said that the damages were wanting in directness, and quoted the opinion of the court in Adams Express

Co. *v.* Egbert, 36 Penna. 360, as follows: "There is no measure for those losses which have no direct and necessary connection with the stipulations of the contract, or which are dependent upon contingencies other than the performance of the contract, and which are therefore incapable of being estimated. With no certainty can it be said that such losses are attributable to the wrongful act or omission of him who has violated the engagement. But, on the other hand, the loss of profits or advantages which must have resulted from a fulfillment of the contract may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made." Thompson, J., in Fessler *v.* Love, approved the foregoing, and referring to the case before him, said: "The plaintiffs could not know whether the logs were intended for manufacture or not, in the absence of anything being said on the point. Nor could they know anything about whether there would be profits made in that way or not. If they were to take the risk of that, it should be shown. Without this, the rule is not applicable." In the case of The Consolidated Oil Co. *v.* Schleus, Md. Ct. of App., 1882, 14 Law Reporter 309, oil was delivered at the ship's side in Baltimore for export to Bremerhaven. It was found when it was examined at Bremerhaven to be inferior to the quality contracted for, and the buyer sued for damages. The court quoted Hadley *v.* Baxendale, and said: "The inferior oil having no market price at Bremerhaven when it arrived, and being then unsalable, the plaintiffs were entitled to dispose of the same, with reasonable diligence, for the best price they could obtain, and the difference between the price thus realized and the market price of the oil contracted for would be the measure of their damages, and they were also entitled to the necessary and proper expenses incurred by them in so dealing with the oil." Cites Abbott *v.* Gatch, 13 Md. 333. In Hammer *v.* Schoenfelder, 47 Wis 455, the contract was to supply a butcher for a stipulated price for the season of 1878 with what ice he might require for his ice-box in which he kept fresh meat. About the last of July the ice-man stopped supplying ice, and the butcher lost some fresh meat, which spoiled for want of ice. The butcher sued for damages. He had paid nothing on the contract. Cole, J., approves Hadley *v.* Baxendale, and says: "As the defendant knew for what purpose the ice agreed to be furnished by him was to be used, he should fully indemnify the plaintiff for the loss he sustained by non-delivery of the ice, and he was therefore justly chargeable in damages for the meat spoiled in consequence of the inability of plaintiff to procure ice elsewhere. It is a consequence which 'may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract, as the probable result of the breach of it.'" It was held, however, that the contract price of the ice should be deducted from the damages. White *v.* Miller, 71 N. Y, 118, 132; Passinger *v.* Thorburn, 34 N. Y. 634; Drysdall *v.* Smith, 44 Mich. 119; Hopkins *v.* Sanford, 41 Mich. 243, 248; Shepard *v.* Milwaukie Gas Light Co., 15 Wis. 318; Richardson *v.* Chynoweth, 26 Wis. 656; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 626; Brooks *v.* McDaniell, 41 Wis. 139; Frohreich *v.* Gammon, 28 Minn. 476, 481; Paine *v.* Sherwood, 21 Minn 225, 232; S. C., 19 Minn. 315; Mihills Manufacturing Co. *v.* Day, 50 Iowa 250; Goodkind *v.* Rogan, 8 Brad. 413, 418; Pennsylvania R. R. Co. *v.* Titusville, &c., Co., 71 Penna. 350; Billmeyer *v.* Wagner, 91 Penna. 92; Jones *v.* Gilmore, 91 Penna. 310; Lalor *v.* Burrows, 18 U. C. C. P. 321; Crater *v.* Binninger, 33 N. J. L. 513, 517; Schutt *v.* Baker, 9 Hun 556; Peshine *v.* Shipperson, 17 Gratt. 472, 485; Gerst *v.* Jones, 32 Gratt. 518, 527.

§ 1308. 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. (*f*) 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 the third edition of Mayne on Damages (by the author and Mr. Lumley Smith, 1877) for the law of England: to the Treatise of Mr. Sedgwick on the same subject for the law prevalent in the United States, where an interesting and valuable note upon the rule in Hadley *v.* Baxendale will be found, vol. 1, p. 218, ed. 1880; and to Mr. H. D. Sedgwick's Leading Cases on the Measure of Damages (New York, 1878.)

This rule not universally true.

§ 1309. In Loder *v.* Kekulé, (*g*) 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

Where vendor by his own conduct enhances the damage.

Loder *v.* Kekule.

(*f*) See the observations of Willes, J., on this point in the British Columbia Sawmill Co. *v.* Nettleship, L. R., 3 C. P. 499, *post* § 1319, and the cases collected in Mayne on Damages, (ed. 1877,) pp. 9–33. See, also, Vicars *v.* Wilcocks, and the notes to that case in 2 Sm. Lead. Cas. 552; the important case of Horne *v.* Midland Railway Co., in the Ex. Ch., L. R., 8 C. P. 131, *post* § 1320; the remarks of Blackburn, J., in Elbinger Co. *v.* Armstrong, L. R., 9 Q. B., at p. 478; and Simpson *v.* London and North-Western Railway Co., 1 Q. B. D. 274.

(*g*) 3 C. B. (N. S.) 128; 27 L. J., C. P. 27.

market value at the date of the breach and the price subsequently obtained on the resale.

§ 1310. So in Ogle *v.* Earl Vane, (*h*) decided in Hilary Term, 1868, where the defendant failed to make delivery 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. The plaintiff was therefore entitled to claim the largely increased damages caused by a rise in price in the market during the delay. 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. (*i*)

Where the repurchase was delayed at vendor's request, and for his benefit.

Ogle *v.* Earl Vane.

§ 1311. [The two cases of Tyers *v.* The Rosedale Iron Company, (*j*) and Hickman *v.* Haynes, (*k*) already considered *ante* § 216, afford illustrations of the same principle. In Tyers *v.* The Rosedale Iron Company, the defendants, under contract to deliver monthly quantities of iron over 1871, withheld delivery of various monthly quantities at the request of the plaintiffs. In December, 1871, the last month of the contract time, the plaintiffs demanded delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver more than the monthly quantity for December. Martin, B., whose dissentient opinion upon the main question, viz., that the defendants were not justified in refusing absolutely to deliver the residue of the iron, was adopted by the Exchequer Chamber, held, citing Ogle *v.* Earl Vane as an authority, that the damages should be the difference between the contract price and the market price at the date of the refusal to deliver, viz., December, and not, as was contended by the defendants' counsel, upon the principle of Brown *v.* Muller (*post* § 1332), the sum of the differences between the contract price and the market price on the last day of each month during 1871.

Tyers *v.* The Rosedale Iron Co.

(*h*) L. R., 3 Q. B. 272; 37 L. J., Q. B. in Ex. Ch.; S. C., L. R., 2 Q. B. 275, *ante* § 215.

(*i*) On this latter point, see *ante* § 215.

(*j*) L. R., 8 Ex. 305; S. C. in Ex. Ch., L. R., 10 Ex. 195.

(*k*) L. R., 10 C. P. 598.

§ 1312. In the Exchequer Chamber, this latter point was not taken by the defendants' counsel, and it seems to have been assumed that if the damages were not to be assessed at the market price in December, then they were to be assessed at the market price at later dates, because the defendants would remain liable to deliver at reasonable dates after December, 1871. As, however, the plaintiffs had assessed their damages at the market price in December, *and the market was a rising one*, the defendants agreed to pay the damages so assessed in the event of the plaintiffs succeeding upon the main question.

The case in the Exchequer Chamber.

The judgment of Martin, B., also decides, going upon this point a good deal further than Ogle *v.* Earl Vane, that it is immaterial that the postponement of deliveries has taken place at the request of *the plaintiff*, and for his benefit.

Immaterial that postponement has taken place at plaintiff's request.

A consideration of this case shows how advisable it is that any agreement for the postponement of deliveries should specify the date to which postponement is made, and whether the installments are to accumulate and be all delivered at that date, or the deliveries are to continue beyond that date, at the intervals fixed by the original contract.

§ 1313. In Hickman *v.* Haynes, (*k*) where the plaintiff, under contract to deliver 100 tons of iron by monthly deliveries of 25 tons, in March, April, May, and June, 1873, postponed delivery from time to time at the request of the defendant, of the last 25 tons, the damages were assessed upon the difference between the contract price and the market value *at the end of a reasonable time from the last request of the defendant for postponement of delivery;* Lindley, J., who delivered the judgment of the Court of Common Pleas, referring with approval to the rule laid down in Ogle *v.* Earl Vane.

Hickman *v.* Haynes.

§ 1314. These three cases appear to determine:

1. That where delivery has been postponed to a *specified* date by agreement between the parties, or by forbearance of the one party at the request of the other, damages must be assessed according to the market price at the postponed date. [5]

Measure of damages where there has been postponement of delivery.

2. Where the postponement is *indefinite*, the damages must be assessed:—

(*k*) L. R., 10 C. P. 598.

5. McDermid *v.* Redpath, 39 Mich. 372.

(a.) Either according to the market price at the date when the plaintiff calls upon the defendant to accept or give delivery;

(b.) Or according to the market price at a reasonable time after the last request for postponement made by the defendant.

Ogle *v.* Earl Vane was again referred to with approval by Bacon, C. J., in Ex parte Llansamlet Tin Plate Co., (*l*) where the contract was for the delivery of iron by monthly instalments, but was distinguished, there being no evidence that the forbearance to deliver had taken place at the sellers' request, and it being proved, on the other hand, that the purchasers had in some cases bought iron in the market to supply the monthly deficiencies. The damages were therefore assessed on the principle laid down in the cases of Brown *v.* Muller, and Roper *v.* Johnson, *post* §§ 1332, 1333.]

Ex parte Llansamlet Tin Plate Co.

§ 1315. In Fletcher *v.* Tayleur, (*m*) the plaintiffs claimed special damages for the non-delivery of a ship which the defendant had agreed to construct for them, 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 £7000 on the voyage, but that in consequence of the fall in freight, they made only £4280 on the voyage when the vessel was delivered. The jury gave the plaintiff £2750 damages. Crowder, J., read to the jury as the rule the passage above quoted (§ 1307) from the opinion in Hadley *v.* Baxendale. (*n*) 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 this 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. Would not an average percentage of mercantile profits be the fair measure of damages for a breach of a mercantile contract? That is very much the result of the decision in Hadley *v.* Baxendale." This suggestion met the concur-

Probable profits of a voyage, as damages for delay in delivering a ship.

Fletcher *v.* Tayleur.

(*l*) 16 Eq. 155.

(*m*) 17 C. B. 21; 25 L. J., C. P. 65.

(*n*) 9 Ex. 341; 23 L. J., Ex. 179.

rence of Willes, J., but no further notice was taken of it, on the ground that the question had not been raised at the trial.

The Columbus.

In the case of The Columbus, (*o*) 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 Co.

§ 1316. Cory *v.* Thames Iron Works Company, (*p*) 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 plaintiffs 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 defendants 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; (*q*) 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 it 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.

Vendor always bound for such damages as result from buyer's being deprived of the ordinary use of the chattel.

In re The Trent and Humber Co.

In the case of In re The Trent and Humber Company, (*r*) 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 *prima facie* the sum which would have been earned in the ordinary course of employment of the ship during the delay.

Parol evidence not allowed where contract was in writing, to show special circumstances in order to

§ 1317. In Brady *v.* Oastler, (*s*) the Barons of the Exchequer decided (*dissentiente* Martin, B.,) that in an action for damages for non-delivery of goods at a specified time, under a 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

(*o*) 3 Wm. Robinson 158.
(*p*) L. R., 3 Q. B. 181; 37 L. J., Q. B. 68.
(*q*) 9 Ex. 341; 23 L. J., Ex. 179.
(*r*) 6 Eq. 396; 4 Ch. 112.
(*s*) 3 H. & C. 112; 33 L. J., Ex. 300.

in consideration of the vendor's being allowed an unusually short time for the manufacture and delivery of the articles.

enhance damages.

Brady *v.* Oastler.

§ 1318. In Smeed *v.* Foord, (*t*) 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.

Damage to crops by delay in delivering threshing engine.

Smeed *v.* Foord.

§ 1319. 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 her 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 have been liable without some proof that he assented to become responsible for these consequences, when he contracted to carry the goods.

British Columbia Saw Mill Co. *v.* Nettleship.

§ 1320. In the case of Horne *v.* Midland Railway Company, (*x*)

(*t*) 1 E. & E. 602; 28 L. J., Q. B. 178. See, also, The Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A., *post* § 1326; and Wilson *v.* The General Screw Collier Co., 47 L. J., Q. B. 239.

(*u*) L. R., 3 C. P. 499; 37 L. J., C. P. 235.

(*x*) L. R., 7 C. P. 583; 8 C. P. 131. In actions against carriers for non-delivery of goods, it has been assumed in some instances to be within the contemplation of both parties, that the goods sent must have been intended for immediate sale, and damages for *loss of market* have been given. Collard *v.* South-Eastern Railway, 7 H. & N. 79. But this case has not been

Horne v. Midland Railway Co.

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 of 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* § 1319, 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. (*dissentientibus* 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 this case reference will be found to all the antecedent authorities upon the subject under discussion.

altogether approved. See The Parana, 2 P. D. 118, C. A., reversing S. C., 1 P. D. 452, where an attempt to extend the doctrine to carriers by sea failed, and the distinction between the carriage of goods by railway, and by sea, was pointed out at pp. 122–3.

(*y*) L. R., 7 C. P., at p. 591.

§ 1321. 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."

France *v.* Gaudet.

§ 1322. In Borries *v.* Hutchinson, (*z*) the plaintiff had bought from defendant 75 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 subsale, at a profit, in St. Petersburg. None of the soda was delivered till between the 16th of September and the 26th of 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 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

Rule of damages not applicable where there is no market for the goods.

Borries *v.* Hutchinson.

(*z*) L. R., 6 Q. B. 199.

(*z*) 18 C. B. (N. S.) 445; 34 L. J., C. P. 169. See, also, Wilson *v.* Lancashire and Yorkshire Railway Co., 9 C. B. (N. S.) 632; 30 L. J., C. P. 232; and Elbinger Co. *v.* Armstrong, L. R., 9 Q. B. 473, at p. 476.

resale. The plaintiff had paid £159 to his vendee in St. Petersburg as damages for non-delivery to him, and for his loss of profit on his subsale. 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 subsale, those being too remote.

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. (*a*) [6]

Loss of profits on subsale.

Williams *v.* Reynolds.

§ 1323. But in Williams *v.* Reynolds (*b*) 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 subsequently to the date of the original contract; and that the damages 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

(*a*) See, on this point, O'Hanlan *v.* Great Western Railway Co., 6 B. & S. 484; 34 L. J., Q. B. 154; Rice *v.* Baxendale, 7 H. & N. 96; 30 L. J., Ex. 371.

6. **Where there is no Market in which Buyer can Repurchase.**—Bank of Montgomery *v.* Reese, 26 Penna. 143; McHose *v.* Fulmer, 73 Penna. 365, stated in the text, *post* § 1338. Richardson *v.* Chynoweth, 26 Wis. 656, 660; Shepard *v.* Milwaukie Gas Light Co., 15 Wis. 318; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 623. In Parsons *v.* Sutton, 66 N. Y. 92, 99, the contract was to deliver certain paper June 2d for the frontispiece of a periodical. June 7th, the paper not having been delivered, the buyers gave notice that they would not receive it. June 8th, it was tendered and refused, and the buyers claimed special damage because, not being able to procure proper paper, they had issued the periodical without the frontispiece. It did not appear that the paper tendered June 8th might not have been used. Earl, J., said: "Under such circumstances they could not refuse to take the paper offered, and throw upon the sellers all the remote subsequent damage which they claimed to have sustained. They had the right to refuse to take this paper after the 2d day of June. But they could not refuse to take it and then claim special damages because they could not get it."

(*b*) 6 B. & S. 495; 34 L. J., Q. B. 221; and see Gee *v.* Lancashire and Yorkshire Railway Co., 6 H. & N. 211; 30 L. J., Ex. 11; Great Western Railway Co. *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, pp. 43, *et seq.*, (ed. 1877.)

to have considered the subcontract as contemporaneous, and known to the defendant at the time of his making his contract.

In Randall *v.* Roper, (c) however, which was for damages for breach of warranty, and will therefore be considered in the next chapter, the liability of the buyer for damages to sub-vendees was taken into consideration in estimating his damages against the first vendor. Randall *v.* Roper.

§ 1324. [In the Elbinger Co. *v.* Armstrong, (*d*) the defendant had agreed to supply the plaintiffs with certain sets of wheels and axles during the months of February, March, and April, 1872. This contract was subsidiary to one which the plaintiffs had made to supply a Russian railway company with wagons by two deliveries in May of the same year, under penalties for delay. The defendant had notice of this subcontract, but not of the date of delivery, or of the amount of the penalties. By reason of the defendant's delay in delivering the wheels and axles, which, being made according to tracings, were not obtainable in the market, the plaintiffs had to pay £100 to the Russian company by way of penalties under their subcontract. Held, that the plaintiffs were not entitled, as a matter of law, to damages to the amount of the penalties paid to the Russian company, but that the jury might reasonably assess the damages at that amount, the proper direction for the jury being, "that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary." Elbinger Co. *v.* Armstrong.

§ 1325. In Hinde *v.* Liddell, (*e*) the defendants had contracted to supply the plaintiff with gray shirtings by the 20th of October. They were informed generally, that the shirtings were intended for shipment, but had no notice of the particular subcontract which the plaintiff had made. Shortly before the time Hinde *v.* Liddell.

(*c*) E., B. & E. 84; 27 L. J., Q. B. 266.

(*d*) L. R., 9 Q. B. 473. See remarks of Cotton, L. J., on this case in Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D., at p. 677.

(*e*) L. R., 10 Q. B. 265. See, also, an earlier case at Nisi Prius (Bridge *v.* Wain, 1 Starkie 504,) where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings. Lord Ellenborough held that the plaintiffs were entitled to the value of scarlet cuttings in China.

for delivery, the defendants notified to the plaintiff that they would be unable to complete their contract. There being no market for the kind of shirting contracted for, the plaintiff procured shirtings of a better quality at a higher price, in order to fulfill his subcontract, but he received no advance in price from his subvendee. It was admitted at the trial, that the shirtings which the plaintiff had bought were the nearest in quality and price that could be obtained in the market for delivery by the 20th of October. Held, that the plaintiff was entitled to recover the difference between the price paid for the substituted shirtings, and the defendants' contract price. Blackburn, J., said, during the argument, "There was no market for this particular description of shirtings, and therefore no market price; in such a case, the measure of damages is the value of the thing at the time of the breach of contract, and that must be *the price of the best substitute procurable.* Borries *v.* Hutchinson 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."

When there is no market for the goods buyer may procure substitute.

In The Dunkirk Colliery Co. *v.* Lever, (*f*) which was the converse case, where the buyer had refused to accept goods, and there was no market for their resale, it was held that the proper measure of damages was *the actual loss which the sellers, acting as reasonable men in the ordinary course of their business, had in fact sustained by the buyer's default.*

Dunkirk Colliery Co. *v.* Lever.

§ 1326. In The Hydraulic Engineering Co. *v.* McHaffie, (*g*) the plaintiffs, being under a contract with Justice for the supply of a peculiar machine by the end of August, 1878, contracted with the defendants to make a part of the machine as soon as possible. The defendants were aware of the plaintiffs' contract with Justice and knew that the machine was wanted by Justice at the end of August, but did not complete their part of it until the end of September. Justice then refused to accept the machine. Under these circumstances the plaintiffs were held entitled to recover damages for (1) loss of profit on their contract with Justice;

Hydraulic Engineering Co. *v.* McHaffie.

(*f*) 9 Ch. D. 20; see, per James, L. J., at p. 25; 41 L. T. (N. S.) 633, C. A.; 43 L. T. (N. S.) 706, in the House of Lords.

(*g*) 4 Q. B. D. 670, C. A. See, also, Wilson *v.* The General Screw Collier Co., 47 L. J., Q. B. 239.

(2) expenditure uselessly incurred in making other parts of the machine; and (3) cost of preserving and warehousing it.

In Thol *v.* Henderson, (*h*) the latest case on this subject, Grove, J., held, distinguishing Borries *v.* Hutchinson, that when the buyer at the time of the sale has neither made known to the seller the subcontract of sale, nor the specific purpose for which the goods are bought, but has merely informed him that the goods are purchased for the purpose of being resold, he cannot, on the seller's default, recover damages for the loss of profits on the subsale. Thol *v.* Henderson.

§ 1327. It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them:—

I. If at the time of the sale the existence of a subcontract is made known to the seller, (*i*) the buyer, on the seller's default in delivering the goods, has two courses open to him:— Rules where goods are bought for resale and there is no market for their purchase.

(1) He may elect to fulfill his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted. (*k*)

(2) He may elect to abandon his subcontract, and in that case he may recover as damages against the seller (a) his loss of profits on the subsale, and (b) any penalties he may be liable to pay for breach of his subcontract; (*l*) but if the *amount* of the penalties has not been made known to the seller, the buyer is not entitled to recover their amount as a matter of right, but the jury may, if the penalties are reasonable, assess the damages at that amount. (*m*) It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to the seller at the time when the contract was made, under circumstances implying

(*h*) 8 Q. B. D. 457.

(*i*) In Thol *v.* Henderson, *supra*, Grove, J., expresses the opinion that it would be sufficient if the seller, without knowing of the existence of any particular subcontract, knew that the goods were being bought for a specific purpose.

(*k*) Hinde *v.* Liddell, L. R., 10 Q. B. 265.

(*l*) Borries *v.* Hutchinson, 18 C. B. (N. S.) 445; Elbinger Co. *v.* Armstrong, L. R., 9 Q. B. 473; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A.

(*m*) Elbinger Co. *v.* Armstrong, L. R., 9 Q. B. 473.

that he accepted the contract with the special condition attached to it. (*n*)

II. If at the time of the sale the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with the general intention to resell, or notice of the subcontract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract; the buyer may either procure the best substitute for the goods as before, and fulfill his subcontract, charging the seller with the difference in price, or abandon the subcontract and bring his action for damages, when the ordinary rule, it would seem, will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price in the sense that there is no place where the buyer can readily procure the goods contracted for. (*o*)

III. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss.] (*p*) [7]

(*n*) See *ante* § 1320; opinion of Willes, J., in British Columbia Saw Mill Co. *v.* Nettleship, and in Horne *v.* Midland Railway Co.; and see, also, Sedgwick on Damages, vol. 1, p. 233, (ed. 1880,) and the case of Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487, in the Court of Appeals of the State of New York, noticed *post* § 1337.

(*o*) Williams *v.* Reynolds, 6 B. & S. 495; Thol *v.* Henderson, 8 Q. B. D. 457.

(*p*) Dunkirk Colliery Co. *v.* Lever, 9 Ch. D. 20; 41 L. T. (N. S.) 633, C. A.; 43 L. T. (N. S.) 706, in the House of Lords; Hinde *v.* Liddell, L. R., 10 Q. B. 265.

7. **The Buyer cannot Recover Damages Willfully or Needlessly Incurred by Him.**—In Hamilton *v.* McPherson, 28 N. Y. 72, 76, the suit was for damages for breach of contract to transport oats on a certain day. The carrier delayed until after that day, and the oats heated, for want of proper storage, in the warm weather that came on during the delay. Selden, J., said: "The law for wise reasons imposes upon a party subjected to injury from a breach of contract, the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality unite with the law in demanding this, and if the injured party, through negligence or willfulness, allows the damages to be enhanced, the increased loss justly falls upon him." In Hammer *v.* Schoenfelder, stated *supra*, note 4, the charge to the jury, which was considered unexceptionable, was "that it was necessary for plaintiff to use reasonable care and make reasonable exertions to obtain a sufficient quantity of ice, if it could be procured, in order to prevent his meat from spoiling, but that he was not obliged to use extraordinary diligence to purchase ice, to entitle him to damages on that ground." In Beymer *v.* McBride, 37 Iowa 114, the sale was of the stock and business of an agricultural warehouse, and the seller agreed to turn over a number of machines which he had for sale on commission, including several orders already taken. The agent of the owner

§ 1328. 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, (*q*) 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. (*r*)

Dunlop *v.* Higgins.

§ 1329. 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 dis-

Where goods are deliverable to buyer "on request."

of the machines took them into his possession, and kept them at a place about 100 yards from the warehouse, and refused to permit the buyer of the warehouse to keep possession of them, but did offer to permit him to sell them and receive the commission, in the same manner as if he had retained the possession which his vendor previously had. He refused to avail himself of the privilege and sued the seller for damages. On the trial the defendant offered to prove the permission given the plaintiff to sell, but the court ruled out the evidence. For this cause the judgment was reversed. Day, J., said: "It is a general principle of law in case of a breach of a specific contract, that if the injured party can protect himself from damage he is bound to do so, if practicable, at a moderate expense, or by ordinary efforts, and he can charge the delinquent party for such expense and efforts, and for such damages only as could not be prevented by the exercise of such diligence. 2 Greenl. Ev., § 261, and cases cited. Mather *v.* Butler County, 28 Iowa 253. If the facts offered to be proved existed, the plaintiff could, without *any* expense on his part, by simply accepting the offer made, have secured the commissions upon all the orders already taken for the sale of threshers and reapers, and also upon all the sales which he might make, and thus he would have sustained no damage upon this ground." See Loker *v.* Damon, 17 Pick. 284, 288; Miller *v.* Mariners' Church, 7 Me. 51, 55; State, ex rel. Rice, *v.* Powell, 44 Mo. 436, 440; French *v.* Vining, 102 Mass. 132; Shannon *v.* Comstock, 21 Wend. 437, 461; Hecksher *v.* McCrea, 24 Wend. 304, 309; Parsons *v.* Sutton, 66 N. Y. 92, 98. On notice of rescission by one party, the other is entitled to damages up to that time, but cannot go on making damages. Clark *v.* Marsiglia, 1 Denio 317; Dillon *v.* Anderson, 43 N. Y. 231, 239.

(*q*) 1 H. L. C. 381.

(*r*) See the remarks on this case in Mayne on Damages, p. 48, (ed. 1877,) quoted and approved by the judges in Williams *v.* Reynolds, 6 B. & S. 495, per Crompton, J., at p. 501, and per Blackburn, J., at p. 506.

posing of the goods as to render a request idle and useless, (*s*) as heretofore explained in the chapter on Conditions. (*t*) [8]

Where no damages proved nominal damages recoverable.

§ 1330. 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, (*u*) on the general principle that every breach of contract imports some damage in law. [9]

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* § 1049, in the chapter on Acceptance.

Measure of damages in contracts for future deliveries in instalments.

§ 1331. Several cases have been decided as to the effect of a breach of contract of sale where the goods are to be delivered *in futuro* by installments. It has already been shown, *ante* § 903, 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, (*v*) 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*. [10]

The measure of damages to which the buyer is entitled on the breach

(*s*) 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. & Ald. 712.

(*t*) *Ante* § 858, *et seq.*

8. See *ante* § 860, notes 7, 8, and 9; Chadwick *v.* Butler, 28 Mich. 349.

(*u*) 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.

9. **Nominal Damages.**—In Wilson *v.* Whitaker, 49 Penna. 114, the contract was to sell stock which the agent of the seller had, without the seller's knowledge, sold already. The buyer sued for breach and claimed the benefit of a subsequent rise in the market price of the stock. But the court held that it was a case for nominal damages only. In Moses *v.* Rasin, 14 Federal Reporter 772, tried by the court without a jury, the court not finding the evidence of any rise in market price sufficient, gave judgment for nominal damages. But see Barnard *v.* Conger, 6 McL. 497, where the price at the time of delivery was lower than the contract price, and the court held on a suit by the buyer for non-delivery that as no damages had been sustained, none could be recovered, and the verdict was for defendant. But the question of the right to nominal damages seems not to have been considered.

(*v*) L. R., 8 Q. B. 14; and see the cases reviewed *ante* §§ 903–909.

10. Simpson *v.* Crippin has not been generally followed in the United States. See *ante* § 909, note 26.

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.

§ 1332. In Brown *v.* Muller, (*x*) 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 canceled, and had expunged the order 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 of October, and the 30th of 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 Hochster *v.* De la Tour, (*y*) and Frost *v.* Knight, (*z*) but had insisted on the execution of the contract after that repudiation. Brown *v.* Muller.

§ 1333. In Roper *v.* Johnson, (*a*) 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 canceled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendants positively refused delivery and the action was commenced on the 3d of July. Roper *v.* Johnson.

It was held, first, that on the authority of Simpson *v.* Crippin, the defendants had no right to rescind the contract by reason of the plaintiffs' default in not sending to take the May delivery; and, 2ndly, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th of June as a breach of the contract *on that day*, under the doctrine of the cases of Hochster *v.* De la Tour and Frost *v.* Knight; but although that was the date of the breach, it was also held,

(*x*) L. R., 7 Ex. 319. See, also, Ex parte Llansamlet Co., 16 Eq. 155, and Barmingham *v.* Smith, 31 L. T. (N. S.) 540, where the damages were assessed upon the same principle.

(*y*) 2 E. & B. 678; 22 L. J., Q. B. 455

(*z*) L. R., 7 Ex. 111.

(*a*) L. R., 8 C. P. 167.

3rdly, 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. 11

Where the amount of installments not mentioned in contract.

§ 1334. [It may be observed that where, as in Roper *v.* Johnson, the amount of the installments is not specified in the contract, the *prima facie* rule would seem to be that the deliveries should be ratably distributed over the contract period, but if it can be gathered from the terms of the contract or the circumstances of the contracting parties, that ratable deliveries were not intended, it then becomes a question for the jury, whether the tender of, or demand for, delivery is a reasonable one. (*b*)

Bergheim *v.* Blaenavon Iron Co.

Bergheim *v.* The Blaenavon Iron Company (*c*) was a somewhat different case. The defendants had entered into a contract for the sale of iron rails to the plaintiff, delivery to commence by the 15th of January, 1873, and to be completed by the 15th of May. *In the event of the defendants exceeding the time of delivery*, they were to pay, by way of fine, 7*s.* 6*d.* per ton per week. The defendants failed to deliver the iron within the time limited. In an action to recover damages for delay in delivery, it was held, that the fine ought to be calculated from the date at which the contract was to be completed, and not, as was contended by the plaintiffs, upon the strength of Roper *v.* Johnson, and Brown *v.* Muller, from the different dates at which the delivery of a parcel might reasonably have been expected. Of the judges of the Queen's Bench, Blackburn, J., declined to express any opinion upon the construction of the delivery clause, while between Field and Mellor, JJ., there was the same divergence of opinion which was shown by the judges of the Court of Exchequer who decided Coddington *v.* Paleologo (*ante* § 1024), where the language of the contract was somewhat similar; but, upon the construction of the penalty clause, they were unanimous in deciding that

11. Shreve *v.* Brereton, 51 Penna. 175, 185, Hubbert *v.* Borden, 6 Whart. 79, 97; Grand Tower Co. *v.* Phillips, 23 Wall. 471.

(*b*) See Calaminus *v.* Dowlais Iron Co., 47 L. J., Q. B. 575.

(*c*) L. R., 10 Q. B. 319.

the parties intended the 15th of May to be the date from which the penalty for non-delivery was to be assessed.

Law in America.

§ 1335. The rules in America for the assessment of damages do not materially differ from those adopted in England.

The general rule is well established, that on the seller's failure to deliver the goods according to the contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when, and at the place where, they should have been delivered; and where there is no market at the place of delivery, then at the nearest available market, with the addition of the increased expense of transportation and hauling. (*e*) [12]

Special damages. Griffin *v.* Colver.

§ 1336. With regard to special damages, it has been laid down in the leading case of Griffin *v.* Colver, (*f*) that "the broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained;" and this rule is subject to but two conditions.

1. *The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and*

2. *They must be certain, both in their nature and in respect to the cause from which they proceed.*

"The familiar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be, not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

The rules laid down in this case have been always referred to with approval, and have been recently re-affirmed by the same court. (*g*)

§ 1337. In America, therefore, the second branch of the rule laid

(*e*) Dana *v.* Fielder, 12 N. Y. 40; Grand Tower Co. *v.* Phillips, 23 Wallace 471, per Bradley, J., at pp. 479, 480.

12. See *ante* § 1305, note 2.

(*f*) 16 N. Y. 489 (decided in 1858), per Selden, J., in delivering the opinion of the Court of Appeals, at p. 494.

(*g*) Messmore *v.* The New York Shot and Lead Co., 40 N. Y. 422, 427; Cassidy *v.* Le Fevre, 45 N. Y. 562, 567; Booth *v.* The Spuyten Duyvil Mill Co., 60 N. Y. 487, at p. 492; Devlin *v.* The Mayor and Aldermen of New York, 63 N. Y. 8, at p. 25.

Second branch of the rule in Hadley *v.* Baxendale adopted in America.

down in Hadley *v.* Baxendale, viz., that the damages must be "such as may fairly be supposed to have been in the contemplation of the parties at the time when they made the contract," has been generally accepted and adopted as a charge to juries. And the first branch of the rule, viz., "that the damages must be such as flow directly and naturally, *i. e.*, in the ordinary course of things, from the breach of the contract," has been treated as only another way of expressing the same rule. (*h*) [13]

Enlargement of liability by communication of special consequences that will result from breach.

Upon the question referred to *ante* § 1323, *et seq.*, it was held in Messmore *v.* The New York Shot and Lead Company, (*i*) that if the vendor know that the purchase is made in order to enable the buyer to fulfill an existing contract for resale at a profit, the latter may claim as damages this profit if lost by the vendor's default.

Messmore *v.* New York Shot and Lead Co.

Booth *v.* Spuyten Duyvil Mill Co.

And in Booth *v.* Spuyten Duyvil Mill Company, (*k*) this rule was accepted, subject to the limitation that to charge a party to a contract with responsibility for special consequences which may result from breaking it, notice of such consequences must have been given *under circumstances implying that it formed the basis of the agreement.*

Church, C. J., in delivering the opinion of the court at p. 494, says, after referring to Hadley *v.* Baxendale: "This case has been frequently referred to, and the rule, as laid down, somewhat criticised; but the criticism is confined to the *character* of the notice or communication of the special circumstances. Some of the judges, in commenting upon it, have held that a bare notice of special consequences which might result from a breach of the contract, *unless under such circumstances as to imply that it formed the base of the agreement,*

(*h*) Per Selden, J., in Griffin *v.* Colver, 16 N. Y. 489, at p. 494. Mr. Sedgwick (Sedgwick on Damages, vol. I., p. 233, ed. 1880,) declares his preference for the first branch of the rule, upon the ground that it is possible to say with some definiteness, what would follow in the usual course of things; but what the intention of the parties *probably* was, is a very difficult matter to arrive at, and that parties usually contemplate the performance, and not the breach, of contracts.

13. See *ante* § 1307, note 4.

(*i*) 40 N. Y. 422.

(*k*) 60 N. Y. 487. It should be noted, that in this case there was no notice to the vendor of the price provided for in the subcontract, and it was insisted, therefore, that the contract was not made with reference to such price, and that, as there was no market for the goods in question, the defendant was liable only to nominal damages. But this contention was rejected by the court. At p. 493.

would not be sufficient. I concur with the views expressed in these cases; and I do not think the court in Hadley *v.* Baxendale intended to lay down any different doctrine."

§ 1338. The Supreme Court of Pennsylvania has gone somewhat further than any reported case in the State of New York, and in McHose *v.* Fulmer (*l*) decided that where the goods cannot be obtained in the market, the measure of damages is *the actual loss the buyer sustains.* The plaintiff, a manufacturer, contracted for iron from the defendant, who failed to deliver, and the plaintiff was unable to supply himself in the market. It was held that the measure of damages was the actual loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price on contracts he had entered into, relying on his contract with Fulmer.]

McHose *v.* Fulmer.

In Pennsylvania the damages where there is no market for the article contracted for are the actual loss sustained.

SECTION II.—WHERE THE PROPERTY HAS PASSED.

§ 1339. Where the contract 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.

§ 1340. 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 White & Tudor's Leading Cases in Equity, (*m*) 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

But equity would sometimes enforce specific performance.

Rule in equity.

(*l*) 73 Penna. 365. See, also, Bank of Montgomery *v.* Reese, 26 Penna. 143.

(*m*) Vol. I., p. 848, (ed. 1877,) notes to Cuddee *v.* Rutter.

law is complete: if they will not, specific performance of the agreement will be enforced." (*n*) [14]

Specific performance now allowed at law by Mercantile Law Amendment Act.

But now, by the Mercantile Law Amendment Act, 1856 (19 and 20 Vict., c. 97, § 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."

Buyer may also maintain trover.

§ 13[illegible]. 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. (*o*) 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 retaken and converted

Rule of damages for conversion by vendor before delivery.

(*n*) 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 vertu, will be specifically enforced.

14. 1 White & Tudor Leading Cases in Equity, (Am. ed. 1876,) p. 1096.

(*o*) Chinery *v.* Viall, 5 H. & N. 288; 29 L. J., Ex. 180.

After delivery.

them, the buyer s right of recovery in trover was, prior to the Judicature Acts, for the whole value, and the vendor was driven to his cross-action, (*p*) but he may now set up a counter-claim for the price. [15] The subject has already been discussed, in the examination of the Vendor's Right of Resale, in Part I., Chap. 3, Book V.

Buyer's right to refuse the goods offered.

§ 1342. 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.

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.

He may refuse the goods if not of the description agreed on.

§ 1343. If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as explained *ante* § 918, *et seq.*, in the chapter on Conditions, where the cases are cited and reviewed. [16]

He cannot reject them for breach of warranty of quality.

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 reject the goods, which still remain his. (*q*) His proper remedy, therefore, is to receive the goods, and to exercise the rights explained in the next chapter. [17]

(*p*) Gillard *v.* Brittan, 8 M. & W. 575.

15. Johnson *v.* Dickinson, 78 N. Y. 42.

16. **Buyer's Remedy Where the Goods do not Answer the Description.**—That the buyer may reject the property sold by description, if on examination it is found not to answer the description, is well settled in America. See *ante* § 918, note 32; Avery *v.* Miller, 118 Mass. 500. But most American decisions, for the sake of extending the remedy, permit the buyer to treat words of description in a sale as a warranty; and, therefore, he can, if he chooses, in such case accept the property and hold the seller for damages. See *ante* § 918, note 32, and § 966, note 24.

(*q*) Street *v.* Blay, 2 B. & Ad. 456;

17. **Buyer's Remedies for Breach of Warranty.**—In many states it is held that the buyer may avoid the sale for breach of warranty, and defend a suit for

§ 1344. In Heyworth *v.* Hutchinson, (*r*) 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 that may be transhipped 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."

Heyworth *v.* Hutchinson.

Buyer held bound to accept goods even in an executory contract, although not equal to warranty.

On arrival it was found by the brokers that 180 bales were not as good as the original samples by 2*d.* a pound; 201 bales not as good by 1¼*d.* a pound; and 32 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

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. 30, (ed. 1879.) Lord Eldon's decision to the contrary, in Curtis *v.* Hannay, 3 Esp. 83, is overruled by the later cases.

(*r*) L. R., 2 Q. B. 447; 36 L. J., Q. B. 270.

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the price, or recover it back if he has paid it. This subject is treated at length and the American cases stated *ante* § 623, *et seq.* Wright *v.* Davenport, 44 Tex. 164; Churchill *v.* Price, 44 Wis. 540, 544; Jack *v.* D. M., &c., R. R., 53 Iowa 399, 402. But the sale cannot be avoided for breach of warranty if the buyer has received and used part of the goods. Lyon *v.* Bertram, 20 How. 149, 154; *ante* § 606, note 2.

Remedy on the Warranty After Return of the Goods.—Whether the buyer avoids the sale for breach of warranty or not, he retains his remedy on the warranty. He may return the goods, if he has that right either by law or by express agreement, and may still recover any damages he may have sustained by breach of the warranty. Kimball, &c., Co. *v.* Vroman, 35 Mich. 310, 326; Mandel *v.* Buttles, 21 Minn. 391, 397; Dike *v.* Reitlinger, 23 Hun 241, 243; Clarke *v.* McGatchie, 49 Iowa 437; Northwood *v.* Rennie, 28 U. C. C. P. 202, 209, affirmed on appeal, 3 Ont. App. 37.

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 car-marked so as to prevent the contract applying to any other wools; and they are guaranteed 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, (*s*) 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."

§ 1345. It is very difficult to understand the reason for the distinction 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

Remarks on the *dicta* in this case.

(*s*) L. R., 2 C. P. 677, in Ex. Ch.; 36 L. J., C. P. 263.

reduction of the price, are all cases of the *bargain and sale* of a special chattel *unconditionally*, where, consequently, the property has 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 Stige, 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, (*t*) 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 the 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 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.*"

(*t*) 2 B. & Ad. 456. See, also, Heilbutt *v.* Hickson, L. R., 7 C. P. 438, *ante* § 974

§ 1346. 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. (*u*)

In Toulmin *v.* Hedley, (*x*) 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 from Ichaboe" as warranted; and in Mondel *v.* Steel, (*y*) the well-considered opinion of the court as delivered by Parke, B. (*post* § 1352,) 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.

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*, (*z*) 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.

(*u*) 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., at p. 30, (ed. 1879.)

(*x*) 2 C. & K. 157.

(*y*) 8 M. & W. 858.

(*z*) The learned editor of the last edition of Chitty on Contracts seems to take a different view, p. 425, (ed. 1881.)

CHAPTER II.

AFTER RECEIVING POSSESSION OF THE GOODS.

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§ 1347. 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.

Breach of warranty of title.

If the breach be of warranty of title, the buyer may either bring his action for the return of the price on the ground of failure of the consideration for which the price was paid, as in Eichholz *v.* Banister, *ante* § 958, or he may sue in

damages for breach of the vendor's promise as in all other cases of breach of contract. [1]

Breach of warranty of quality.

§ 1348. 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 :—

Three remedies.

First. He may, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter, refuse to accept the goods, and return them, [or it is sufficient for him, without returning the goods, to give notice to the seller that he rejects them, and that they remain at the seller's risk. (*a*)]

Secondly. He may accept the goods and bring an action for the breach of the warranty.

Thirdly. If he has not paid the price, he may now set off or set up by way of counter-claim, damages for breach of warranty in the vendor's action for the price. (*b*)

1. **Breach of Warranty of Title.**— In Massachusetts, it has been held that where title fails, the buyer may bring an action to recover back the price, even though he has not been deprived of possession. See *ante* § 948, note 18; Grose *v.* Hennessey, 13 Allen 389; Perkins *v.* Whelan, 116 Mass. 542. As usually stated, the doctrine is that the cause of action does not arise until the buyer is compelled to give, or voluntarily gives possession, or pays damages to the person having title. See *ante* § 948, note 18; Randan *v.* Toby, 11 How. 493; Sweetman *v.* Prince, 26 N. Y. 224, 233; Matheny *v.* Mason, 73 Mo. 677, 682; Byrnside *v.* Burdett, 15 W. Va. 702; Burt *v.* Dewey, 40 N. Y. 283, 286. See Wood *v.* Sheldon, 42 N. J. L. 421. Where both buyer and seller of a horse knew that it was stolen, it was held that neither could have any remedy on the transaction, the court applying the maxim "*in pari delictu potior est conditio possidentis.*" Bixler *v.* Saylor, 68 Penna. 146. In Arthur *v.* Moss, 1 Oreg. 193, the measure of damages for failure of title was held to be the price paid, though the property had increased in value at the time of the eviction. The buyer, on failure of title to personal property, can only resort to his immediate vendor. Bordwell *v.* Collie, 45 N. Y. 494, 498; Moser *v.* Hock, 3 Penna. St. 230. As to choses in action and the like, the law is illustrated by the cases of Wood *v.* Sheldon, 42 N. J. L. 421, and Otis *v.* Cullum, 92 U. S. 447. In the former case, a company issued a scrip dividend, which the court afterwards annulled. A purchaser from a stockholder brought suit against him and recovered on the ground of an implied warranty. But in Otis *v.* Cullum, the sale was of city bonds, which were issued under an act afterwards adjudged unconstitutional and void. One who had bought bonds from a bank, which in turn had bought from a former holder, sued the bank for failure of consideration. But the court held that the bank was not liable unless on an express warranty. See *ante* § 924, note 36; § 987, note 34; § 620, note 11.

(*a*) Grimoldby *v.* Wells, L. R., 10 C. P. 391.

(*b*) By the rules of the Supreme Court, Ords. XIX., r. 3, and XXII., r. 10, a defendant may recover his whole damages by way of counter-claim, and obtain judgment for the balance should it prove to be in his favor. Prior to the Judicature

§ 1349. 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 an action for the breach, *ante* § 853, *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 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 quantity you warrant." 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

1st. Right to reject the goods.

Acts the buyer could only plead the breach of warranty in diminution of the price.

See *post* § 1352.

(c) Vol. II., p. 30, (ed. 1879.)]

applicable to goods in a distant country, or on the high seas, beyond the possible reach of the buyer's inspection. [2]

§ 1350. In the absence of some such express stipulation as was contained in Heyworth *v.* Hutchinson, *ante* § 1344, 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* § 910.

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.

§ 1351. 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. (*d*) [3]

Or counter-claim in the vendor's action for the price.

§ 1352. The *third* remedy of the buyer is by a counter-claim for damages for breach of warranty in the vendor's action for the price. Before the Judicature Acts his only remedy was to plead the breach of warranty in diminution of the

2. See *ante* § 1343, notes 15, 16, and *ante* §§ 623–635.

(*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.

(*e*) See the cases reviewed, *ante* §§ 911, 912.

(*d*) See the opinions of the judges in Poulton *v.* Lattimore, 9 B. & C. 259. The same view has been taken by the American courts. Day *v.* Pool, 52 N. Y. 416.

3. Douglass Axe Manufacturing Co. *v.* Gardner, 10 Cush. 88; Freyman *v.* Knecht, 78 Penna. 141, 144; Youghiogeny Iron Co. *v.* Smith, 66 Penna. 340, 344; Whelock *v.* Pacific, &c., Co., 51 Cal. 223; Hughes *v.* Bray, Cal. Sup. Ct., 1882; Frohreich *v.* Gammon, 28 Minn. 476, 480.

Mondel v. Steel.

price. The 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. (*e*) 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 fastening and repair, so that the plaintiff was deprived of the use of the vessel while undergoing the repairs. A general demurrer 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. 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, (*f*) a different practice began to prevail, and being attended with much practical convenience, has been since

(*e*) 8 M. & W. 858; but the decision is now of little practical importance, *post* § 1353. Parke, B.'s, exposition of the law in Mondel *v.* Steel, was approved and acted upon in Towerson *v.* Aspatria Society, 27 L. T. (N. S) 276, where see the observations of Willes, J., on the report of Parke, B.'s, judgment in Meeson & Welsby. See, also, Rigg *v.* Banbridge, 15 M. & W. 598.

(*f*) 7 East 479.

generally followed; and the defendant is now permitted to show that the chattels, 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; and to the extent that he obtains, or is capable of obtaining, 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.*"

§ 1353. This case was, before the Judicature Acts, the leading one always cited for establishing—

First. That the buyer might 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 desired to claim special or consequential damages, which action was not barred by reason of his having obtained a diminution of price in a previous action brought by his vendor. (*g*)

But was obliged to bring cross action for special damages.

[But this restriction has been removed by the provisions of the new procedure. Under Order XIX., r. 3, a defendant may set up by way of set-off or counter-claim any claim, *whether sounding in damages or not*, which he has against the claim of the plaintiff; and under Order XXII., r. 10, the defendant is enabled to recover consequential damages which may far exceed the amount of the price sued for by the plaintiff.]

Effect of Judicature Acts.

In Davis *v.* Hedges, (*h*) the Queen's Bench followed Mondel *v.* Steel, and further held that the buyer had the *option* of setting up the defective quality as a defence, or of maintaining a separate action. [4]

Davis *v.* Hedges

(*g*) See, also, Rigge *v.* Burbidge, 15 M. & W. 598; Cutter *v.* Powell, 2 Sm. Lead. Cas., (ed. 1879,) notes, pp. 29, 30.

(*h*) L. R., 6 Q. B. 687.

4. Breach of Warranty as a Defence.—Marsh *v.* McPherson, 105 U. S. 709, 717; Trimmier *v.* Thomson, 10 S. C. 164, 187; Stevens *v.* Johnson, 28 Minn. 172; Bouker *v.* Randles, 31 N. J. L. 335 A judgment against the buyer for the price is no bar to a subsequent suit for breach of warranty, unless the buyer set up the breach in defence to the suit for the price. Barker *v.* Cleveland, 19 Mich. 230, 237; Bodutha *v.* Philon, 13 Gray 413; Perrine *v.* Serrell, 30 N. J. L. 458.

§ 1354. In Poulton *v.* Lattimore, (*i*) 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. [5]

Poulton *v.* Lattimore.

Buyer relieved from paying any part of the price.

It was further held in this case, that the buyer might insist on his defence without returning, or offering to return, the seed. And 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. (*k*) [6]

Buyer may defend or bring action for breach of warranty without returning the goods, or giving notice to vendor.

It has been said, however, by eminent judges, and the jury at the

This seems to be the common law rule. In some states it may be modified by statutes requiring the buyer to recoup damages if he claims any. The right to set up breach of warranty in defence to a suit for the price is personal to the buyer. Therefore, one who is surety for the price cannot set it up in defence to an action by the seller. Henry *v.* Doley, 17 Hun 210. See Comstock *v.* Ames, 3 Keyes 357; Marsh *v.* Low, 55 Ind. 271.

Recoupment or Counter-claim.—In most of the states, the buyer sued for the price may set up a counter-claim for damages for breach of warranty. Withers *v.* Green, 9 How. 213, 227; Croninger *v.* Paige, 48 Wis. 229; Warder *v.* Fisher, 48 Wis. 338, 342; Gautier *v.* Douglass Axe Co., 13 Hun 514; Smith *v.* Mayer, 3 Col. 207, 210; Lilley *v.* Randall, 3 Col. 298, 302; Steigleman *v.* Jeffries, 1 S. & R. 477; Huff *v.* Broyles, 26 Gratt. 283; Carey *v.* Guillow, 105 Mass. 18; Wentworth *v.* Dows, 117 Mass. 14; Bradley *v.* Rea, 14 Allen 20. In Aultman *v.* Jett, 42 Wis. 488, and Aultman *v.* Hetherington, 42 Wis. 622, the court refused to permit the buyer, under a recoupment, to recover against the seller while notes for the price were outstanding.

(*i*) 9 B. & C. 259.

5. Crenshaw *v.* Slye, 52 Md. 140, 146.

(*k*) Fielder *v.* Starkin, 1 H. Bl. 17; Pateshall *v.* Tranter, 3 Ad. & E. 103; Buchanan *v.* Parnshaw, 2 T. R. 745.

6. An Action or Defence on the Warranty may be Sustained Without Notice or Offer to Return the Goods. —See *ante* § 977, note 29; Vincent *v.* Leland, 100 Mass. 432; Fisk *v.* Tank, 12 Wis. 276, 302; Warder *v.* Fisher, 48 Wis. 334, 342; Seigworth *v.* Leffel, 76 Penna. 476, 480; Cox *v.* Long, 69 N. C. 7; Lewis *v.* Rountree, 78 N. C. 323, 327; Richardson *v* Grandy, 49 Vt. 22, 26; Morehouse *v.* Comstock, 42 Wis. 626, 630; Day *v.* Pool, 52 N. Y. 46; Gurney *v.* Atlantic, &c., R. R., 58 N. Y. 358, 365; Marshuetz *v.* McGreevy, 23 Hun 408; Polhemus *v.* Heiman, 45 Cal. 573, 579; Camors *v.* Gomila, 9 Mo. App. 205; Ferguson *v.* Hosier, 58 Ind. 438. But see Locke *v.* Williamson, 40 Wis. 377, stated *post* note 11.

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. (*l*) [7]

But his failure to do so raises a presumption against him.

§ 1355. In Adams *v.* Richards, (*m*) 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. [8]

Adams *v.* Richards.

Where vendor has agreed to take back the chattel if found faulty, it must be returned as soon as defect is found.

[In Hinchcliffe *v.* Barwick, (*n*) the plaintiff had purchased a horse warranted to be a good worker. It was one of the conditions of sale that if the horse did not answer to the warranty, the purchaser should return him within a given time. The plaintiff did not return the horse within the time, but sued on the warranty. Held, that the action was not maintainable, the plaintiff's only remedy being the return of the horse.]

Hinchcliffe *v.* Barwick

But the right to return a horse for breach of warranty was held by the Exchequer not to be affected by an accident to the horse after the sale without any default in the buyer; (*n*) [and, on the same principle, it was held that when a horse

Sale does not become absolute by accident or

(*l*) Per Lord Ellenborough, in Fisher *v.* Samuda, 1 Camp. 190; per Lord Loughborough, in Fielder *v.* Starkin, *supra;* Poulton *v.* Lattimore, 9 B. & C. 259; Prosser *v.* Hooper, 1 Moo. 106.

7. Richardson *v.* Grandy, 49 Vt. 22, 26; Morehouse *v.* Comstock, 42 Wis. 626, 630.

(*m*) 2 H. Bl. 573.

8. **Effect of Privilege to Return Coupled with Warranty.**—In Douglass Axe, &c., Co. *v.* Gardner, 10 Cush. 88, the court refused to follow Adam *v.* Richards. Metcalf, J., said: "When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded promise rescinds and vacates the contract of warranty. We are of opinion that, in such case, the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of warranty." To the same effect, see McCormick *v.* Dunville, 36 Iowa 645, 650; Aultman *v.* Theirer, 34 Iowa 272, 275; Seigworth *v.* Leffel, 76 Penna. 476, 430; Perrine *v.* Serrell, 30 N. J. L. 454. But if there is an express agreement that the thing sold shall be returned if it does not answer the warranty, or that if kept for a certain time or used to a certain extent it shall be accepted, in such cases the buyer cannot keep the property and recover on the warranty. Bomberger *v.* Griener, 18 Iowa 477; Bayliss *v.* Hennessey, 54 Iowa 11.

(*n*) 5 Ex. D. 177, C. A.

(*n*) Head *v.* Tattersall, L. R., 7 Ex. 7.

death during time limited for return.

died during the time limited for its return, the seller must bear the loss, and could not maintain an action for goods sold and delivered.] (*o*) [9]

§ 1356. 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; all of which acts show an agreement to accept the goods, (*p*) [10] but do not constitute an abandonment of his remedy by cross-action, (*q*) or now by a counter-claim in the vendor's action for the price. [11]

Buyer loses his right of returning goods by any act equivalent to acceptance.

But not his other remedies.

(*o*) Elphick *v.* Barnes, 5 C. P. D. 321.

9. Perrine *v.* Serrell, 30 N. J. L. 454.

(*p*) *Ante* § 1051, *et seq.*

10. See *ante* § 1051, note 5; § 622. Morgan *v.* Thetford, 3 Brad. 323; Wilds *v.* Smith, 2 Ont. App. 8, 13; Lyon *v.* Bertram, 20 How. 149, 154; Warder *v.* Fisher, 48 Wis. 338, 342.

(*q*) Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Allen *v.* Cameron, 1 C. & M. 832.

11. **Action for Breach of Warranty After Acceptance of the Goods.**—That delay or acts of acceptance destroy the buyer's right to reject goods not equal to the warranty, see *ante* § 1051, note 5. Some of the earlier New York decisions held that the acceptance of goods delivered under an executory contract was a waiver of the right to sue for breach of warranty. But the rule of law was established in that state in the case of Day *v.* Pool, 52 N. Y. 416, that the remedy on the warranty is not lost by acceptance, and this rule has been confirmed by late decisions. See *ante* § 977, note 29; Parks *v.* Morris Axe and Tool Co., 54 N. Y. 586, 590; Gurney *v.* Atlantic & G. W. R. R., 58 N. Y. 358, 365. In Walling *v.* Schwartzkopf, 44 N. Y. Super. Ct. 576, it is held that the estoppel of the buyer from recovering damages for defects where he has accepted the goods applies only where there is no warranty, and that a warranty survives acceptance. See Marcus *v.* Thornton, 44 N. Y. Super. Ct. 411, 415; Morgan *v.* Thetford, 3 Brad. 323. In Locke *v.* Williamson, 40 Wis. 377, the contract was to deliver wood at a certain dock. The buyer accepted the wood and carried it away, protesting at the time that it was inferior to the quality required by the contract. Afterwards, the buyer set up the inferior quality of the wood in defence to a suit for the price. Cole, J., said: "We have concluded to hold this rule in respect to an executory contract, that when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination and knows of such defects, he must, either when he receives the goods or within a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty, otherwise the defects will be deemed waived." The cases cited as supporting this rule are Reed *v.* Randall 29 N. Y. 358; McCormick *v.* Sarson, 45 N. Y. 265, and Gaylord Manufacturing Co. *v.* Allen, 53 N. Y. 515. But these cases were practically overruled by Day *v.* Pool, Parks *v.* Morris, &c., Co., and Gurney *v.* Atlantic, &c., Co. above cited.

§ 1357. The buyer's right to insist on a reduction of price on the ground of breach of warranty could not, previous to the Judicature Acts, be made available if he had given a negotiable security for the price, and the action was brought on the security. He was driven in such a case to a cross-action as his only remedy. The reason was that the law did not permit an unliquidated and uncertain claim to be set up in defence against the liquidated demand represented by a bill or note, (*r*) but now the buyer may set up unliquidated damages by counter-claim. (*s*) [12]

Buyer could not, before Judicature Acts, set up breach of warranty in defence to a negotiable security given for the price.

§ 1358. 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 case of the vendor's breach of his obligation to deliver. [13]

Measure of damages on breach of warranty.

See, however, Dounce *v.* Dow, 64 N. Y. 411, and McParlin *v.* Boynton, 8 Hun 449, affirmed, 71 N. Y. 604, by a majority of one. The New York decisions are not easily reconciled on this subject with each other. Nye *v.* Iowa City Alcohol Works, 51 Iowa 129, stated *post* § 1358, note 13. An action for damages for breach of warranty can be sustained, though notes for the price are still outstanding. Frohreich *v.* Gammon, 28 Minn. 476, 483; Thoreson *v.* Minnesota Harvester Works, The Law Reporter, vol. 14, p. 753, (Minn. Sup. Ct. 1882); Aultman *v.* Wheeler, 49 Iowa 647.

(*r*) See the exposition of the law and citation of authorities in Byles on Bills, p. 132, (ed. 1879); Agra & Masterman's Bank *v.* Leighton, L. R., 2 Ex. 56; 36 L. J., Ex. 33.

(*s*) Ords. XIX., r. 3; XXII., r. 10.

12. **Can a Breach of Warranty be set up as a Defence to a suit on a Note Given For the Price.**—On this question, American authorities differ. The weight of recent authority probably favors the affirmative. Withers *v.* Greene 9 How. 213, 224; Wright *v.* Davenport, 44 Tex. 164; Wyckoff *v.* Runyon, 33 N. J. L. 107; Shackelton *v.* Lawrence, 65 Ill. 175; Reed *v.* Hastings, 61 Ill. 266; McClure *v.* Williams, 65 Ill. 390; Mann *v.* Smyser, 76 Ill. 365; Ruff *v.* Jarrett, 94 Ill. 475; Wentworth *v.* Dows, 117 Mass. 14.

13. **Measure of Damages on Breach of Warranty.**—These damages are settled on the principles laid down in Hadley *v.* Baxendale, quoted *ante* § 1307. See 1 Sedgwick on Damages, (ed. 1880,) pp. 234, 606. The subject is discussed in Frohreich *v.* Gammon, 28 Minn. 476, where the suit was for breach of warranty of a reaping machine. The plaintiff alleged that he had been delayed about his work by the defects of the machine, and that he had lost much grain by the delay, for which he claimed compensation. Berry, J., said: "The measure of damages is the difference between the value of the thing warranted as it in fact was and its value as it would have been if it had been as warranted. When the warranty is fraudulent, as in Marsh *v.* Webber, 16 Minn. 418, the damages may exceed this measure, and so there may be special circumstances which make a different measure proper. * * * When one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such use, a certain loss to the buyer will be the probable re-

In Dingle *v.* Hare, (*t*) cited *ante* § 945, 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, (*u*) cited *ante* § 984, the

Dingle *v.* Hare.

Jones *v.* Just.

sult if the warranty is untrue, in such circumstances, the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in the contemplation of the parties when making the contract." Referring to the case before the court, Berry, J., continued: "We do not conceive of any case in which the vendor could be charged for the loss of the buyer's crop, unless, of course, the vendor made an express warranty against such loss." In Wolcott *v.* Mount, 38 N. J. L. 496, 501, affirming 36 N. J. L. 262, the sale was of turnip seed, which proved to be of a variety different from that represented. The buyer sued for damages and recovered the value of the crop that would have been raised by the seed ordered, less the value of the crop which was in fact produced. The case was treated as one of breach of warranty, but the measure of damages in such cases is the same as for non-delivery as stated *post* § 1358. The Court of Errors and Appeals affirmed the judgment. Beasley, C. J., said: "The defendant, at the time of the sale, was possessed of all the facts. He knew the business of the plaintiff and the use to be made of the thing sold. He was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff if the warranty should be broken. Nor are the gains which have been lost subject to any uncertainty. The seed sold was planted and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury, there is nothing speculative or contingent. There are a number of authorities which sanction the recovery of profits of a much more uncertain character than these." Cites Davis *v.* Talcott, 14 Barb. 611; Griffin *v.* Colver, 16 N. Y. 489, stated by our author *post* § 1336; Messmore *v.* New York Shot and Lead Co., 40 N. Y. 422, stated *post* § 1337. See Cassidy *v.* Lefevre, 45 N. Y. 562; Van Wyck *v.* Allen, 69 N. Y. 61; Parks *v.* Morris Axe, &c., Co., 54 N. Y. 586; Rice *v.* Manley, 66 N. Y. 82; Hexter *v.* Knox, 63 N. Y. 561; Van Arsdale *v.* Rundle, 82 Ill. 63; Thomas *v.* McVeagh, 75 Ill. 81; Thomas *v.* Dingley, 70 Me. 100; Porter *v.* Pool, 62 Ga. 238; Herring *v.* Skaggs, 62 Ala. 180, 191; Rutan *v.* Ludlam, 29 N. J. L. 398; White *v.* Miller, 71 N. Y. 118; S. C., 78 N. Y. 393; Birdsall *v.* Carter, 11 Neb. 143; Merrill *v.* Nightingale, 39 Wis. 247; Brooks *v.* McDonnell, 41 Wis. 139; Aultman *v.* Hetherington, 42 Wis. 622; Schutt *v.* Baker, 9 Hun 556; Murray *v.* Jennings, 42 Conn. 9; Freyman *v.* Knecht, 78 Penna. 141; Ferguson *v.* Hosier, 58 Ind. 438; McCormick *v.* Vanatta, 43 Iowa 389. The buyer cannot needlessly incur damages and hold the seller for them. See *ante* § 1327, note 7. In Nye *v.* Iowa City Alcohol Works, 51 Iowa 129, the buyers of a steam pump for immediate use to keep water out of a well they were digging, found, on receipt of the pump, that it was cracked. Nevertheless, they used it, and then sued the seller for the additional cost of digging the well caused by the defect of the pump. But the court held that they might have refused to receive the pump and thus have prevented any damages from its use, and therefore they could not recover. See Hitchcock *v.* Hunt, 28 Conn. 343.

(*t*) 7 C. B. (N. S.) 145; 29 L. J., C. P. 144.

(*u*) L. R., 3 Q. B. 197; 37 L. J., Q. B. 89.

same rule was applied, and the plaintiff recovered as damages £756, 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.

Lewis v. Peake.

Buyer may recover the costs of defence against his sub-vendee in certain cases.

In Lewis *v.* Peake, (*x*) the buyer of a horse, relying on a warranty, resold 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 recoverable as special damages against the first vendor. [14]

Randall v. Raper.

Buyer may recover damages which he is liable to pay to sub-vendees.

§ 1359. In Randall *v.* Raper, (*y*) the plaintiffs had bought barley from the defendant as Chevalier seed barley, and in their trade as corn-factors resold with a warranty that it was such seed barley. The subvendees 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, but the plaintiffs recovered £261 7*s.* 6*d.*, the excess being for such damages as the plaintiffs were deemed by the jury liable to pay to their subvendees. All the judges of the Queen's Bench held the damages to the subvendees to be the necessary and immediate consequence of the defendant's breach of contract, and properly recoverable. Wightman, J., however, expressed a doubt whether these damages were recoverable before the plaintiffs had actually paid the claims of their subvendees, but declined to dissent from his brethren on the point.

Sale of Food and Drugs Act, 1875.

Buyer may recover the amount of penalty and costs paid

§ 1360. [The Sale of Food and Drugs Act, 1875 (38 and 39 Vict., c. 63, § 28,) provides that in any action brought by any person for a breach of contract on the sale of any article of food, or of any drug, such person may recover alone, or in addition to any other damages recoverable by him, *the amount of any penalty* in which he may have been convicted under this act, *together with the costs* paid by him upon such conviction, and those incurred by him in and about

(*x*) 7 Taunt. 153.

14. 1 Sedgwick on Damages, (ed. 1880,) p. 617; Marlatt *v.* Clary, 20 Ark. 251; Reggio *v.* Braggiotti, 7 Cush. 166; Jeter *v.* Glenn, 9 Rich. L. 374.

(*y*) E., B. & E. 84; 27 L. J., Q. B. 266.

on conviction under the act.

his defence thereto, if he prove that the article or drug, the subject of such conviction, was sold to him as and for an article or drug of the same nature, substance and quality as that which was demanded of him, and that he purchased it not knowing it to be otherwise, and afterwards sold it in the same state in which he purchased it; the defendant in such action being nevertheless at liberty to prove that the conviction was wrongful, or that the amount of costs awarded or claimed was unreasonable.

Wilson v. Dunville.

§ 1361. In Wilson *v.* Dunville, (*z*) before the Exchequer Division in Ireland, the plaintiff had bought from the defendants, who were a firm of distillers, a quantity of grains, which the defendants warranted to be "distillers' grains," and which were ordinarily used for feeding cattle. The grains contained an admixture of lead, and several of the plaintiff's cattle, which were fed upon them, were poisoned and died. The warranty was not fraudulent. Upon the finding of the jury that the substance did not reasonably answer the description of "distillers' grains," the court held the defendants to be liable in damages for the value of the cattle which had died, on the ground that their death was the natural consequence of the defendants' breach of warranty.]

Damages aggravated by fraudulent misrepresentation by vendor.

§ 1362. 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. [15] Thus in Mullett *v.* Mason, (*a*) 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 value of such of his own cattle as had died from the disease communicated to them by the infected animal, the court distinguishing the case from Hill *v.* Balls, (*b*) 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.

Mullett v. Mason.

Hill v. Balls.

Smith v. Green.

[And even when the warranty was not proved to be fraudulent, the buyer was held equally entitled to recover when the seller knew him to be a farmer, who would, in the ordinary

(*z*) 6 L. R., Ir. 210; S. C., 4 L. R., Ir. 249.

15. Herring *v.* Skaggs, 62 Ala. 180; Ruff *v.* Jarrett, 94 Ill. 475.

(*a*) L. R., 1 C. P. 559.

(*b*) 2 H. & N. 299; 27 L. J., Ex. 45.

course of his business, place the infected animal with others. (*c*) The case then came within the rule laid down in Hadley *v.* Baxendale, and the only question for the jury to determine was, whether the infection of the herd followed as a natural consequence from the seller's breach of warranty. (*d*)] [16]

In George *v.* Skivington, (*e*) 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; [but this case has been since disapproved, and is very questionable law. (*f*)]

Damages for personal injury from quality of the thing sold.

(*c*) Smith *v.* Green, 1 C. P. D. 92.

(*d*) Smith *v.* Green, *supra;* Randall *v.* Newson, 2 Q. B. D. 102, C. A.

16. In Marsh *v.* Webber, 16 Minn. 418, 421, the seller falsely represented as sound, sheep having a contagious disease. The buyer recovered damages occasioned by the presence of the disease in the flock bought, and also damages to his own flock from contagion. Bradley *v.* Rea, 14 Allen 20; Jeffrey *v.* Bigelow, 13 Wend. 518, 523; Wintz *v.* Morrison, 17 Tex. 372.

(*e*) L. R., 5 Ex. 1; 39 L. J., Ex. 8.

(*f*) Heaven *v.* Pender, 9 Q. B. D. 102, (under appeal.)

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