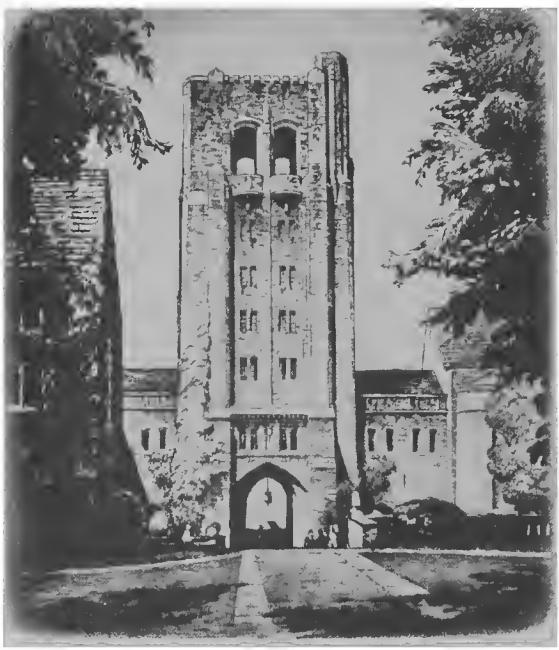

BENJAMIN'S TREATISE

ON THE LAW OF

SALE OF PERSONAL PROPERTY;

WITH REFERENCES TO THE

AMERICAN DECISIONS

AND TO THE

FRENCH CODE AND CIVIL LAW.

Seventh American Edition,

FROM THE LATEST ENGLISH EDITION.

WITH AMERICAN NOTES

BY

THE LATE EDMUND H. BENNETT, LL. D.
FORMERLY DEAN OF THE BOSTON UNIVERSITY LAW SCHOOL,

AND

SAMUEL C. BENNETT,
DEAN OF THE SAME SCHOOL.

INDIANAPOLIS AND KANSAS CITY:
THE BOWEN-MERRILL COMPANY.
1899.

PREFACE TO THE FIRST EDITION.

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

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

Temple, *August*, 1868.

PREFACE TO THIS EDITION.

THIS edition is reprinted from the latest English edition prepared by Messrs. Arthur Beilby Pearson-Gee and Hugh Fenwick Boyd, of the Inner Temple. Their additions to the text, made since Mr. Benjamin's death, were inclosed in brackets, thus [ ], which are here retained. The American editors have also inserted a few still later decisions, which are distinguished in the same manner.

The American law is presented, as in the previous edition, in a continuous note at the end of each chapter; a method which, notwithstanding some inconveniences, seems to have been generally approved. These notes usually treat the subject in the same order and upon the same lines adopted by Mr. Benjamin in the text itself.

In the preparation of this edition, the editors have followed the lines of the edition of 1892. The effort has been made to examine every decision of the American courts reported since that date, and of the English and Canadian courts as well, and to insert in this edition all the cases of value. In the edition of 1892 it was said: —

"The editors have not thought it necessary to cite every reported case upon familiar and well-settled propositions, but upon points unusually delicate, or not yet universally assented to, they have endeavored to present a full review of the American decisions. This has been sometimes done in chronological order, and sometimes by reference to the States in alphabetical order, as in the note on Conditional Sales, p. 293; on Sales of Chattels not Specific, p. 317; and some others. Special attention has also been given to the notes on Parties, p. 38; Mutual Assent, p. 76; Statute of Frauds, p. 110; Fraudulent Sales, p. 469; Illegality, p. 535; Conditions, p. 594; Warranty, p. 662; Delivery, p. 718; and Stoppage in Transitu, p. 907.

"The fulness with which the English cases are stated by the learned author in the text renders the same method unnecessary as to the American decisions, and such plan would be quite impracticable without swelling the book to an inconvenient size. The American notes, therefore, are generally limited to a statement of the principles in-

volved in the cases cited, and comparatively few recitals of facts are given, and still fewer extracts from judicial opinions. By this plan, and by the use of a very large page, the whole work is presented in a single volume."

The English Sale of Goods Act, 1893, has been printed as an appendix, and recent English decisions upon the Act are referred to in the foot-notes. Although without the force of statute in this country, the Act is mainly the result of the labors of an eminent draftsman, Judge M. D. Chalmers, in which he "endeavored to reproduce as exactly as possible the existing law." The Act as passed effected very slight changes in the English law, if any, and is consequently in the main a statement of the American law also.

We are indebted to Messrs. Harold N. Eldridge and Lucius R. Eastman, Jr., of the Suffolk bar, for assistance in the preparation of the Table of Cases and of the new Index.

E. H. B.
S. C. B.

Boston, *September* 1, 1899.

TABLE OF CONTENTS.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

AT COMMON LAW.

CHAPTER I.

SECT.

The Contract of Sale of Personal Property, its form, and essential elements 1–4

CHAPTER II.

The Parties 5

Sect. 1. — Who may Sell 6–20

2. — Who may Buy 21–37

CHAPTER III.

Mutual Assent 38

Sect. 1. — At Common Law 38–61

2. — Civil Law 62

3. — American Law 64

CHAPTER IV.

The Thing Sold 76–84

CHAPTER V.

The Price 85–89

PART II.

Under the Statute of Frauds.

CHAPTER I.

SECT.
What Contracts are within the Statute 90–110

CHAPTER II.

What are Goods, Wares, and Merchandise 111–133

CHAPTER III.

"Of the price or value of ten pounds" 134–137

CHAPTER IV.

Acceptance and Receipt 138
Sect. 1. — What is an Acceptance 139–171
2. — What is an actual Receipt 172–188

CHAPTER V.

Earnest or Part Payment 189–200

CHAPTER VI.

The Memorandum or Note in Writing 201–220
Sect. 1. — What is a Note or Memorandum in Writing . 221–231
2. — What is a sufficient Note of the Bargain made . 231–254

CHAPTER VII.

Signature of the Party to be charged . . . . . 255–264 a

CHAPTER VIII.

Agents duly authorized to sign 266–307

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

SECT.
Distinction between Contracts Executed and Executory . . . 308–312

CHAPTER II.

Sale of Specific Chattels unconditionally 313–317

CHAPTER III.

Sale of Specific Chattels conditionally . . . . . 318–351 a

CHAPTER IV.

Sale of Chattel not Specific 352–357

CHAPTER V.

Subsequent Appropriation 358–380

CHAPTER VI.

Reservation of the *jus disponendi* 381–399

CHAPTER VII.

Nature and Effect of a Sale by the Civil, French, and Scotch Law . 400–413

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

Mistake and Failure of Consideration 414–427

CHAPTER II.

SECT.
Fraud 428
Sect. 1. — In General 428–432
2. — On the Vendor 433–451
3. — On the Buyer 452–482
4. — On Creditors — Statute of Elizabeth — Bills of Sale — Fraudulent Preference . . . 483–489

CHAPTER III.

Illegality 490
Sect. 1. — At Common Law 490–528
2. — By Statute 530–559

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

Conditions. 560–609

PART II.

Vendor's Duties.

CHAPTER I.

Warranty 610
Sect. 1. — Express Warranty 610–626
2. — Implied Warranty of Title 627–643
3. — Implied Warranty of Quality . . . . 644–673 a

CHAPTER II.

Delivery 674–698

PART III.

BUYER'S DUTIES.

CHAPTER I.

SECT.
Acceptance 699–705

CHAPTER II.

Payment and Tender 706–757

BOOK V.

BREACH OF THE CONTRACT.

PART I.

RIGHTS AND REMEDIES OF THE VENDOR.

CHAPTER I.

Personal Actions against the Buyer 758
Sect. 1. — Where Property has not passed 758–763
2. — Where Property has passed 764–765

CHAPTER II.

Remedies against the Goods — General Principles 766–781

CHAPTER III.

Remedies against the Goods — Resale 782–795

CHAPTER IV.

Remedies against the Goods — Lien 796–827

CHAPTER V.

SECT.
Remedies against the Goods — Stoppage *in transitu* . . . 828–829
Sect. 1. — Who may exercise the Right 830–836
2. — Against whom it may be exercised . . . 837–838
3. — When does the Transit begin: and end . . 839–858
4. — How is the Right exercised 859–861
5. — How may it be defeated 862–866
6. — What is the Effect of Stoppage *in transitu* . 867–868 a

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

Before obtaining Possession of the Goods 869
Sect. 1. — Where the Contract is Executory . . . 869–882 a
2. — Where the Property has passed. 883–890

CHAPTER II.

After receiving Possession of the Goods 893–904

PAGE
APPENDIX, SALES OF GOODS ACT, 1893 967
TABLE OF CASES 983
INDEX 1045

SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

PART I.

AT COMMON LAW.

CHAPTER I.

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

	Sect.		Sect.
Definition of a bargain and sale of goods	1	Transfer of absolute property	1
The elements of the contract	1	Price in money	2
Parties	1	Form at common law	3
Mutual assent	1	Form by Statute of Frauds	4

§ 1. By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money* (*a*). Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.: (1st) Parties competent to contract; (2d) Mutual assent; (3d) A thing, the absolute or general property in which is transferred from the seller to

(*a*) Blackstone's definition is, "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. By the Indian Contract Act, 1872, s. 77, "sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." Kent's definition is, "a contract for the transfer of property from one person to another for a valuable consideration." 2 Kent, 468 (12th ed.). This definition would include barter, which, though in most respects analogous, is certainly not identical, with sale. Whether the contracts of barter (*permutatio*) and sale (*emptio-venditio*) were essentially different was for a long time a moot point with the two rival schools of Roman jurists. Gaius, professing to be a Sabinian, maintained, from the purely historical point of view, that there was no distinction, barter being only the most ancient form of the contract of sale. Justinian, however, adopted and promulgated the opinion of the school of Proculus, that price was of the essence of the contract of sale; and barter was relegated to the class of real contracts. *Vide* Gaius, lib. iii. 140; Inst. lib. iii. c. 23; D. lib. xviii. c. 3. The dispute was one of some practical importance, owing to the consequences which flowed from the distinction in the Roman law between real and consensual contracts.

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

And in like manner, when goods are delivered in pawn or pledge, the general property remains in the pawner, and a special property is transferred to the pawnee (*c*).

§ 2. So in relation to the element of price. It must be *money*, paid or promised, accordingly as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter. So also goods may be given in consideration of work and labor done, or for rent, or for board and lodging (*d*), or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties, are generally, but not always, the same as in the case of sales (*e*). If no valuable consideration be given for the transfer, it is a gift (*f*), not a sale.

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

(*c*) Halliday *v.* Holgate, L. R. 3 Ex. 299; Harper *v.* Goodsell, L. R. 5 Q. B. 424.

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

(*e*) For cases showing distinction between sale and barter, see Harris *v.* Fowle, cited in Barbe *v.* Parker, 1 H. Bl. 287; Hands *v.* Burton, 9 East, 349; Harrison *v.* Luke, 14 M. & W. 139; Sheldon *v.* Cox, 3 B. & C. 420; Guerreiro *v.* Peile, 3 B. & Ald. 616; Forsyth *v.* Jervis, 1 Stark. 437; Read *v.* Hutchinson, 3 Camp. 352.

(*f*) The law as to gifts of personal chattels is not altogether settled. It is stated by Coke *arguendo*, in a case of Wortes *v.* Clifton (1614), 1 Rolle's Reports, 61 (ed. 1675), that by the civil law a gift of chattels is not good without delivery, but that by the common law it is (*come le civill ley est que un done des biens nest bon sans tradition mes auterment est en nostre ley*). In Irons *v.* Smallpiece, 2 B. & Ald. 551 (1819), it was *decided* by the Court of King's Bench that, in order to transfer property by gift, there must either be a deed or instrument of gift, or an actual delivery of the thing to the donee, and this decision was followed by the Court of Ex-

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

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

chequer in Shower *v.* Pilck, 4 Ex. 478 (1849), but without much argument. Notwithstanding this, Irons *v.* Smallpiece has hardly ever been mentioned without disapproval. Lunn *v.* Thornton, 1 C. B. 379 (1845), per Maule, J., p. 381; Ward *v.* Audland, 16 M. & W. 862 (1847); Winter *v.* Winter, 4 L. T. N. S. 639 (1861); Douglas *v.* Douglas, 22 L. T. N. S. 127 (1870); In re Harcourt, Danby *v.* Tucker, 31 W. R. 578 (1883); Ex parte Ridgway, 15 Q. B. D. 447 (1885), per Cave, J. [Irons *v.* Smallpiece was confirmed after full discussion, in Cochrane *v.* Moore, C. A. 25 Q. B. D. 57 (1890). — E. H. B. See, also, Kiplin *v.* Ratley (1892), 1 Q. B. 582.] There are two valuable notes upon the subject by Sergeant Manning in his reports of the cases of The London & Brighton Railway Company *v.* Fairclough, 2 M. & G., at p. 691, and of Lunn *v.* Thornton, 1 C. B., at p. 381, in which he comes to the conclusion that the rule with respect to gifts of chattels *inter vivos* appears to be this: "Gifts by parol, *i. e.* gifts made verbally or in writing, without deed, are incomplete *until acceptance* (*i. e. acquiescence in the gift*) *by the donee;* but gifts by deed are perfect and complete, and vest the property in the donee until disclaimer; and after acceptance in the former case, and until disclaimer in the latter, the property vests in the donee without any delivery." The learned Sergeant points out that the decision in Irons *v.* Smallpiece was given under the impression that the point had been decided in Bunn *v.* Markham, 2 Marshall, 532, which was the case of a *donatio mortis causa*, where undoubtedly the property does not vest without delivery. The authorities cited by Sergeant Manning for these propositions are, Perkins' Profitable Book, tit. Grant, 57; 2 Roll. Abr., tit. Grants (†); Comyn's Digest, tit. Biens (D. 2); but in none of those authorities have the present editors been able to find anything said with reference to the acceptance or acquiescence in the gift by the donee, where the gift is by parol. The authority for the proposition, that a gift of chattels by deed is good without delivery until disclaimer by the donee, is the Year Book, M. 7, E. 4, fol. 20, pl. 21. So far as the present editors' research has extended, the only authorities upon the point, prior to 1819, are the statement of Lord Coke, and the decision in the Year Book. Whatever may have been the rule formerly, the recent decisions of In re Harcourt, 31 W. R. 578, and Ex parte Ridgway, 15 Q. B. D. 447, seem to show that the question now to be determined in each case is whether the circumstances show an intention on the part of the donor to make an immediate present gift, and an intention on the part of the donee to accept and act upon that gift, and that the retention of possession by the donor is not conclusive proof that there is no immediate present gift, although, unless explained, or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention. Actual delivery to the donee is reqnisite in America. Mahan *v.* United States, 16 Wallace, 143 (1872); Doty *v.* Willson, 47 N. Y. 580 (1872); Young *v.* Young, 80 N. Y. 422 (1880).

As to gifts of money by check, see Bromley *v.* Brunton, 6 Eq. 275, and cases there cited; Jones *v.* Lock, 1 Ch. 25; In re Beak's Estate, 13 Eq. 489; Rolls *v.* Pearce, 5 Ch. D. 730. And as to gift of a bond without delivery, see Morgan *v.* Malleson, 10 Eq. 475, and cases there cited. In Morgan *v.* Malleson, the court treated a gift, which was imperfect by reason of non-delivery, as an effectual declaration of trust; but this decision, although approved by Malins, V.-C., in Baddeley *v.* Baddeley, 9 Ch. D. 113, is opposed to the current of recent authorities. Warriner *v.* Rogers, 16 Eq. 340; Richards *v.* Delbridge, 18 Eq. 11; Moore *v.* Moore, Ih. 474; Heartley *v.* Nicholson, 19 Eq. 233; In re Breton's Estate, 17 Ch. D. 416.

(*g*) 6 Ch. 397; S. C. in H. L., 21 W. R. 465; Ex parte Bright, 10 Ch. D. 566, C. A. As to contract of "sale or return," see *post*, chapter on Conditions.

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

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

§ 4. A very important modification of the common law in respect to a bargain and sale of goods, and to an executory contract, was introduced by the statute 29 Car. II. c. 3, commonly called the Statute of Frauds, and an amendment thereof, the 9 Geo. IV. c. 14, s. 7, known as "Lord Tenterden's Act," which are very fully considered, *post*, Book I. Part 2.

AMERICAN NOTE.

§§ 1–4.

Nature of the Contract. A sale, being a present transfer of the entire title for a consideration, is to be distinguished, —

1st. From a Contract to sell in futuro; since in the latter no title passes immediately, even in case of a distinct and specified chattel. Joyce *v.* Murphy, 8 N. Y. 291. See, also, Blasdell *v.* Souther, 6 Gray, 152; Elliott *v.* Stoddard, 98 Mass. 145; Lester *v.* East, 49 Ind. 588; Cardinell *v.* Bennett, 52 Cal. 476; Olney *v.* Howe, 89 Ill. 556; Dittmar *v.* Norman, 118 Mass. 319; Powder Co. *v.* Burkhardt, 97 U. S. 110; Garbracht *v.* The Commonwealth, 96 Pa. St. 449; Bates *v.* Smith, 83 Mich. 347; Kirven *v.* Pinckney, 47 S. C. 229. This is the reason, as is well known, why a valid sale cannot be made by one who has no present title to transfer. It would be a contradiction in terms. This difficulty does not exist in mere contracts to sell; wherein Hibblewhite *v.* M'Morine, 5 M. & W. 462, is the leading case. But the words, "I hereby agree to sell" and "to buy," do not necessarily import a future sale, especially when the article is already in the vendee's possession. Martin *v.* Adams, 104 Mass. 262. See Brock *v.* O'Donnell, 45 N. J. Law, 441. Conversely, the words "A. buys" and "B. sells" do not necessarily and always constitute a present sale. Other language used may indicate an executory contract to sell. Sherwin *v.* Mudge, 127 Mass. 547; Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315. And see Kelley *v.* Upton, 5 Duer, 340. It is always a question of

intention, gathered from all the circumstances. See McCrae *v.* Young, 43 Ala. 622; Anderson *v.* Read, 19 Jones & Sp. 326, 106 N. Y. 333; Currie *v.* White, 1 Sweeny, 193; Decker *v.* Furniss, 14 N. Y. 615; Stephens *v.* Santee, 49 N. Y. 35; Kost *v.* Reilly, 62 Conn. 57; Johnston *v.* Standard Oil Co. 71 Miss. 397.

2d. From a **Bailment**; in which, at most, only a special or qualified interest passes. And one established test between a bailment and a sale is, that when the identical thing delivered is to be returned, though perhaps in an altered form, it is a bailment, and the title is not changed; but when there is no obligation to return the specific article received, and the receiver is at liberty to return another thing, either in the same or some other form, or else to pay money, he becomes a purchaser; the title is changed; the transaction is a sale; and the property is at the receiver's risk. Therefore, where by the true construction of the contract, however complicated it may be, the article delivered is to be returned, either just as received, or made into other goods, as grain into meal, leather into shoes, lumber into boards, or wool into cloth, the transaction is a bailment, or a contract of agency, and does not become a sale by any subsequent loss, destruction, or conversion of the property by the bailee. See Foster *v.* Pettibone, 7 N. Y. 433; Bretz *v.* Diehl, 117 Pa. St. 589; Jones *v.* Kemp, 49 Mich. 9; Pierce *v.* Schenck, 3 Hill, 28; Barker *v.* Roberts, 8 Greenl. 101; Ashby *v.* West, 3 Ind. 170; Schenck *v.* Saunders, 13 Gray, 37; Mallory *v.* Willis, 4 N. Y. 76; Mansfield *v.* Converse, 8 Allen, 182; Irons *v.* Kentner, 51 Iowa, 88; Eldridge *v.* Benson, 7 Cush. 483; Hyde *v.* Cookson, 21 Barb. 92; Bulkley *v.* Andrews, 39 Conn. 70; Brown *v.* Hitchcock, 28 Vt. 452; Stephenson *v.* Ranney, 2 Upper Can. C. P. 196; Isaac *v.* Andrews, 28 Ib. 40; Bastress *v.* Chickering, 18 Ill. App. 198; 130 Ill. 206 (criticised in 38 W. Va. 158); Woodward *v.* Semans, 125 Ind. 331; Rumpf *v.* Barto, 10 Wash. 382; Peterson *v.* Woolery, 9 Wash. 390; Wright *v.* Barnard, 89 Iowa, 166; Union Stock Yards *v.* Western Land Co. 59 Fed. R. 49. And the mere fact that the bailee agrees to pay a certain sum, "if he does not return the property," does not, *per se*, convert the bailment into a sale. Westcott *v.* Thompson, 18 N. Y. 363.

On the other hand, it is now well settled in America that, if the contract clearly contemplates, either by express provision or by an established usage of the business, that the identical thing received will not be returned, but only its equivalent, either in the same form as received, or in some manufactured condition, or else paid for in money, at the option of the receiver, the transaction is a sale or an exchange; the title passes immediately on delivery, and the risk is on the receiver. This is more evidently true when there is an express right in the receiver to consume, dispose of, or sell the article received. Indiana is entitled to the credit of having first distinctly applied this doctrine to the case of a miller. Ewing *v.* French, 1 Blackf. 354 (1825). There the plaintiff delivered wheat to a miller to be exchanged for flour. The wheat was mixed by the miller with his common stock, and, the wheat having been burned, the plaintiff recovered its value as goods sold and delivered; the court saying, "It was a sale of the wheat, to be paid for in flour." This was nearly fifty years before the Privy Council decided Randell's case, cited by Mr. Benjamin to the same point. The same doctrine was again emphatically asserted in Smith *v.* Clark, 21 Wend. 83 (1839); in which Seymour *v.* Brown, 19 Johns. 44 (1821), and Slaughter *v.* Green,

1 Rand. 3 (1821), to the contrary, were distinctly overruled, after having been already much shaken by the decisions in Hurd *v.* West, 7 Cow. 752, in 1827, and in Buffum *v.* Merry, 3 Mason, 478, in 1824.

This rule has been followed in the following cases, chronologically arranged: Baker *v.* Woodruff, 2 Barb. 520 (1848); Norton *v.* Woodruff, 2 N. Y. 153 (1849); Chase *v.* Washburn, 1 Ohio St. 244 (1853); Tilt *v.* Silverthorne, 11 Up. Can. Q. B. 619 (1854); Carlisle *v.* Wallace, 12 Ind. 252 (1859); Good *v.* Winslow, 4 Allen, N. B. 241 (1859), in which the lessee of cattle agreed to return them in two years, "or others in their stead;" Wilson *v.* Cooper, 10 Iowa, 565 (1860); Ives *v.* Hartley, 51 Ill. 520 (1869); Lonergan *v.* Stewart, 55 Ill. 44 (1870); Butterfield *v.* Lathrop, 71 Pa. St. 226 (1872), a delivery of milk to a cheese factory; Rahilly *v.* Wilson, 3 Dill. 420 (1873); Johnston *v.* Browne, 37 Iowa, 200 (1873); Richardson *v.* Olmstead, 74 Ill. 213 (1874); Marsh *v.* Titus, 3 Hun, 550 (1875); Bailey *v.* Bensley, 87 Ill. 556 (1877); McCabe *v.* McKinstry, 5 Dill. 509 (1878); Grier *v.* Stout, 2 Bradw. 602 (1878); Benedict *v.* Ker, 29 Up. Can. C. P. 410 (1878), expressly following South Australian Ins. Co. *v.* Randell; Jones *v.* Kemp, 49 Mich. 9 (1882); Austin *v.* Seligman, 21 Blatchf. 506 (1883); Woodward *v.* Semans, 125 Ind. 330 (1883); Fishback *v.* Van Dusen, 33 Minn. 111 (1885), where this subject is now regulated by statute.

If, however, the written contract in such cases stipulates, as it often does, that the property remains "at the risk of the owner," it seems equally clear that in such cases the transaction ought not to be considered a sale, but only a bailment. See Nelson *v.* Brown, 44 Iowa, 455, and 53 Ib. 555; Sexton *v.* Graham, 53 Ib. 183; Ledyard *v.* Hibbard, 48 Mich. 421. It may be in some cases a question for the jury whether the transaction was a sale or a bailment. Crosby *v.* Delaware & Hudson Canal Co. 119 N. Y. 334; James *v.* Plank, 48 Ohio St. 255; Weiland *v.* Krejnick, 63 Minn. 314; Weiland *v.* Sunwall, 63 Ib. 320.

And in case of deposits of grain, etc., with warehousemen or in grain elevators, with an understanding that it will be mingled with other similar grain of other parties, all of which may be sold or consumed by the receiver, and other like goods received and substituted, the most modern view of this transaction is to regard it neither a sale nor ordinary bailment exactly, but rather as the creation of a tenancy in common, by which each depositor becomes tenant in common, *pro rata*, with all the other depositors; not only as to that on hand when a particular deposit is made, but also as to all the succeeding deposits, received as a substitute for, or in place of, that existing at the time any deposit is made. See Cushing *v.* Breed, 14 Allen, 376; Sexton *v.* Graham, *supra;* German Nat. Bank *v.* Meadowcroft, 4 Bradw. 640; Rice *v.* Nixon, 97 Ind. 97; Schindler *v.* Westover, 99 Ind. 395; Arthur *v.* Chicago, etc. Railway Co. 61 Iowa, 648; Broadwell *v.* Howard, 77 Ill. 305; Barker *v.* Bushnell, 75 Ill. 220; Lyon *v.* Lenon, 106 Ind. 567; Bretz *v.* Diehl, 117 Pa. St. 604; Woodward *v.* Boone, 126 Ind. 122; Hall *v.* Pillsbury, 43 Minn. 33.

This result might easily enough be reached as to all the grain on hand, with which one's own was actually intermingled, on the ordinary doctrine of a voluntary confusion of goods (Inglebright *v.* Hammond, 19 Ohio, 337; Young *v.* Miles, 20 Wisc. 615; 23 Ib. 643; Dole *v.* Olmstead, 36 Ill. 150; 41 Ib. 344), but to extend the rule to all subsequent additions to, or substitutes for, the original mass would seem to be attended, unless by force

of some agreement, or some general usage or custom allowing it, with considerable difficulties. But the further consideration of this subject would lead us too far from the object of this note.

The reader is referred to a very valuable article on this question in 6 Am. Law Rev. p. 450, understood to be by Mr. Justice Oliver Wendell Holmes, of the Supreme Judicial Court of Massachusetts.

3d. From a Consignment. Ordinarily, if goods are "consigned" for sale it is a bailment, and not a sale to the consignee; the goods do not become his property, or liable to be attached by his creditors: Meldrum *v.* Snow, 9 Pick. 441, a leading case on this point; Blood *v.* Palmer, 11 Me. 414; Audenried *v.* Betteley, 8 Allen, 302; Walker *v.* Butterick, 105 Mass. 237; Selden *v.* Beale, 3 Greenl. 178; Ayres *v.* Sleeper, 7 Met. 45; Brown *v.* Holbrook, 4 Gray, 102; Morss *v.* Stone, 5 Barb. 516; Gooderham *v.* Marlatt, 14 Up. Can. Q. B. 228; Conable *v.* Lynch, 45 Iowa, 84; Bayliss *v.* Davis, 47 Iowa, 340; Williams *v.* Davis, Ib. 363; Dodds *v.* Durand, 5 Up. Can. Q. B. 623; Boston & Maine Railroad *v.* Warrior Mower Co. 76 Me. 251; Barnes Safe Co. *v.* Bloch Tobacco Co. 38 W. Va. 158; even though consigned upon a *del credere* commission: Converseville Co. *v.* Chambersburg Co. 14 Hun, 609. And the fact that the goods consigned were invoiced at a stated price does not itself constitute the transaction a sale (Pam *v.* Vilmar, 54 How. Pr. R. 235), unless the terms of the consignment be such as to make the consignee, *when the goods are sold*, the purchaser and principal debtor for the goods. Nutter *v.* Wheeler, 2 Low. 346; Ex parte White, L. R. 6 Ch. 397; 21 Weekly Rep. 465; In re Linforth, 4 Sawy. 370.

So a delivery of goods with a privilege of purchase or return, or on trial, etc., constitutes a bailment only, until the option has been exercised by the purchaser or receiver. See *post*, Conditions. And see Hunt *v.* Wyman, 100 Mass. 198; Dando *v.* Foulds, 105 Pa. St. 74; Wartman *v.* Breed, 117 Mass. 18. The detention and use beyond a reasonable time, however, is considered an election to make the sale complete and perfect. See Ray *v.* Thompson, 12 Cush. 281; Moss *v.* Sweet, 16 Q. B. 493; Johnson *v.* McLane, 7 Blackf. 501; Jameson *v.* Gregory, 4 Met. (Ky.) 363; Washington *v.* Johnson, 7 Humph. 468; Quinn *v.* Stout, 31 Mo. 160; Moore *v.* Piercy, 1 Jones (N. C.), 131; Fuller *v.* Buswell, 34 Vt. 108. There is a difference, however, between a delivery with an option to purchase, if one likes, and a purchase with an option to return, if one does not like. In one case the title does not pass until the election is exercised (Wilson *v.* Stratton, 47 Me. 120; Chamberlain *v.* Smith, 44 Pa. St. 431; Elphick *v.* Barnes, 5 C. P. Div. 321; Kahn *v.* Klabunde, 50 Wisc. 235; Hall Machine Co. *v.* Brown, 82 Tex. 469); in the other it passes instantly, subject to a right to rescind and return: Schlesinger *v.* Stratton, 9 R. I. 578; Colton *v.* Wise, 7 Bradw. 395; Hotchkiss *v.* Higgins, 52 Conn. 205; Strauss Saddlery Co. *v.* Kingman, 42 Mo. App. 216; Houck *v.* Linn, 48 Neb. 227. Therefore a transfer with a promise by the receiver to pay by a certain day, *or* return the property, is ordinarily a present sale, and the title passes immediately (McKinney *v.* Bradlee, 117 Mass. 321; Buswell *v.* Bicknell, 17 Me. 344; Dearborn *v.* Turner, 16 Me. 17; Perkins *v.* Douglass, 20 Me. 317; Marsh *v.* Wickham, 14 Johns. 167; Holbrook *v.* Armstrong, 10 Me. 31; Walker *v.* Blake, 37 Ib. 373), though a special agreement to the contrary may control this (Crocker *v.* Gullifer, 44 Me. 491, examining the Maine cases

on this point); for this more nearly resembles a sale with a right to repurchase, in which of course the present title fully passes. Slutz *v.* Desenberg, 28 Ohio St. 372; Mahler *v.* Schloss, 7 Daly, 291; Moore *v.* Sibbald, 28 Up. Can. Q. B. 487. And see Hotchkiss *v.* Higgins, 52 Conn. 205. In some cases the transaction between the consignor and the so-called agent is held to be really a sale. Mack *v.* Drummond Tobacco Co. 48 Neb. 397; Osborne Co. *v.* Plano Mfg. Co. 51 Neb. 502. In Arbuckle *v.* Kirkpatrick, Tenn. (1897) 39 S. W. 3, a contract, called a "Special Selling Factor Appointment," was held to be a contract of sale. Many cases are reviewed by Wilkes, J.

4th. From an **Exchange** or **Barter**. Although the word "sale," strictly speaking, means a transfer for money (Williamson *v.* Berry, 8 How. 544; Labaree *v.* Klosterman, 33 Neb. 167), and a power "to sell" ordinarily means to sell only for cash, and not to exchange or barter (Edwards *v.* Cottrell, 43 Iowa, 204), yet, generally speaking, the same rules of law apply to both. See Dowling *v.* McKenney, 124 Mass. 480; Redfield *v.* Tegg, 38 N. Y. 212. Therefore (notwithstanding the contrary decisions in Stevenson *v.* State, 65 Ind. 409; Massey *v.* State, 74 Ib. 368; Robinson *v.* State, 59 Ark. 341), it seems the better rule that an exchange of liquor for goods or labor is a "sale" within a law forbidding sales. Commonwealth *v.* Clark, 14 Gray, 367; Howard *v.* Harris, 8 Allen, 297; Mason *v.* Lothrop, 7 Gray, 355; Commonwealth *v.* Abrams, 150 Mass. 393; Commonwealth *v.* Davis, 12 Bush, 240; Paschal *v.* State, 84 Geo. 326 (pronounced unsound in principle in Black on Intoxicating Liquors, § 403). Although in civil cases a general assumpsit for "goods sold and delivered" is not always supported by proof of a barter or mere exchange, since, if no sum in money has been agreed upon as the value of the articles exchanged, it is still an open question of damages for non-delivery (Harris *v.* Fowle, cited in 1 H. Bl. 287; Campbell *v.* Sewall, 1 Chitty's Rep. 611; Mitchell *v.* Gile, 12 N. H. 390, which carefully analyzes the rule; Slayton *v.* McDonald, 73 Me. 50; Vail *v.* Strong, 10 Vt. 465; Gunter *v.* Leckey, 30 Ala. 596; Fuller *v.* Duren, 36 Ib. 73); yet, if the respective values of the things to be exchanged had been agreed upon by the parties, and there was a default in delivery by the defendant, there seems to be no good reason why the amount fixed could not be recovered in a common count for goods sold. See Forsyth *v.* Jervis, 1 Stark. 437; Picard *v.* McCormick, 11 Mich. 69; Porter *v.* Talcott, 1 Cow. 359; Herrick *v.* Carter, 56 Barb. 41; Clark *v.* Fairchild, 22 Wend. 576; Way *v.* Wakefield, 7 Vt. 228. But this subject is rather a question of pleading.

5th. From a mere **Gift** without consideration. A consideration paid or to be paid is essential to a sale. Commonwealth *v.* Packard, 5 Gray, 101. And it is universally agreed that, at law, a mere gift requires actual delivery to complete it, not only as to gifts *causa mortis* but also *inter vivos*. The authorities are too uniform to warrant a citation of them. See, however, Pickslay *v.* Starr, 149 N. Y. 432, a gift of money by check; Cook *v.* Lum, 55 N. J. L. 373. If the article is already in the possession of the donee, no re-delivery is necessary. Wing *v.* Merchant, 57 Me. 383. For the delivery may precede the gift as well as the gift precede the delivery. Re Alderson, 64 Law T. R. 645 (Ch. D.); 7 Times L. R. 418 (1891);

Champney *v.* Blanchard, 39 N. Y. 116; Tenbrook *v.* Brown, 17 Ind. 410; Cain *v.* Moon (1896), 2 Q. B. 283.

6th. From a **Lease**, in which, whatever title passes, it is only a temporary transfer. The distinction between a bill of sale and a lease is ordinarily obvious enough (see Smith *v.* Niles, 20 Vt. 315); but in recent times personal property, especially musical instruments, sewing machines, and the like, is often transferred and delivered under a written instrument, in the form of a lease, by which the receiver agrees to pay a stated sum per month or quarter for the use of the article, or "as rent" for it, with a provision that after a certain amount is thus paid the property shall belong to the party so paying; and there is a tendency in some courts to hold such a transfer, though under the guise of a lease, to be really a sale. See Greer *v.* Church, 13 Bush, 430; Singer Manuf. Co. *v.* Cole, 4 Lea (Tenn.), 439; Murch *v.* Wright, 46 Ill. 487; Hervey *v.* R. I. Locomotive Works, 93 U. S. 664; Gross *v.* Jordan, 83 Me. 380; Summerson *v.* Hicks, 134 Pa. St. 566; Lucas *v.* Campbell, 88 Ill. 447; Helby *v.* Matthews (1894), 2 Q. B. 262; Shenstone *v.* Hilton, Ib. 452; Cowan *v.* Singer Mfg. Co. 92 Tenn. 376, a sale; Ham *v.* Cerniglia, 73 Miss. 290, a sale; Knittel *v.* Cushing, 57 Tex. 354; Ross *v.* McDuffie, 91 Geo. 120, a sale; Clark *v.* Hill, 117 N. C. 11, a sale; Barrington *v.* Skinner, 117 N. C. 47, a sale; Singer Mfg. Co. *v.* Gray, 121 N. C. 168, a sale; Parke Co. *v.* White River Co. 101 Cal. 37, a sale; Redewill *v.* Gillen, 4 New Mex. 72, a sale; National Car Builder *v.* Cyclone Plow Co. 49 Minn. 125, a sale. And oral evidence is sometimes admitted to show the real transaction, although the so-called lease was in writing. See Domestic Sewing Machine Co. *v.* Anderson, 23 Minn. 57; Singer Sewing Machine Co. *v.* Holcomb, 40 Iowa, 33. In some cases it is a lease with a right to buy. Powell *v.* Eckler, 96 Mich. 538, and cases cited. If, however, such instruments contain a provision, as they often do, that the title shall remain in the former owner until the amount stipulated is fully paid, it would seem that, if the transaction can be called a sale at all, it is only a conditional sale upon a condition precedent, as held in Sargent *v.* Gile, 8 N. H. 325, a carefully considered case; Hervey *v.* Dimond, N. H. (1893) 39 Atl. 331; Goodell *v.* Fairbrother, 12 R. I. 233; Kohler *v.* Hayes, 41 Cal. 456; Singer Manuf. Co. *v.* Graham, 8 Oreg. 17; Hine *v.* Roberts, 48 Conn. 267; Crist *v.* Kleber, 79 Pa. St. 290; Enlow *v.* Klein, Ib. 488; Whitcomb *v.* Woodworth, 54 Vt. 544; Carpenter *v.* Scott, 13 R. I. 474; Loomis *v.* Bragg, 50 Conn. 228; Gibbons *v.* Luke, 37 Hun, 577; Collender Co. *v.* Marshall, 57 Vt. 232; Morris *v.* Lynde, 73 Me. 88; Gerow *v.* Castello, 11 Col. 560; Nichols *v.* Ashton, 155 Mass. 205; Puffer Mfg. Co. *v.* Lucas, 112 N. C. 377; Willcox *v.* Cherry, — N. C. (1898) 31 S. E. 369; Miles *v.* Edsall, 7 Mont. 185; Hays *v.* Jordan, 85 Ga. 749, where many authorities are cited. But this approaches the subject of conditional sales, more fully considered hereafter. §§ 318–351 a, and note.

7th. From a **Mortgage**, in which, although the general title passes at once, yet it is defeasible on performance of the condition, by which act the title reverts, *eo instanti*, to the mortgagor, without any act of reconveyance by the mortgagee. Holman *v.* Bailey, 3 Met. 55; Merrill *v.* Chase, 3 Allen, 339; Merrifield *v.* Baker, 9 Allen, 29. And leases, so called, as well as conditional sales, have been held to be really mortgages. Susman *v.*

Whyard, 149 N. Y. 127, and cases cited; Singer *v.* Smith, 40 So. Car. 529; Perkins *v.* Bank, 43 So. Car. 39, and cases cited. Compare Ludden *v.* Hornsby, 45 So. Car. 111; Ludden *v.* Dusenbury, 27 So. Car. 464, holding that a somewhat similar transaction was a lease. As to whether a given instrument is one of sale or of mortgage, see Damm *v.* Mason, 98 Mich. 237, and note reviewing the Michigan decisions.

8th. From a **Pledge**, in which only a special title passes to the pledgee; leaving the general ownership still in the pledgor, which he can convey subject to the pledgee's rights. Cortelyou *v.* Lansing, 2 Caines Cas. 202; Whitaker *v.* Sumner, 20 Pick. 405. The test of a pledge being that, if the debt is absolutely extinguished by the transfer, either in whole or *pro tanto*, the transfer is a sale; if not, it is only a pledge. It being also universally agreed that at common law a pledge requires delivery, while a sale, as between the parties, does not.

Many transactions, therefore, involve more or less the conveyance of an interest in personal property; but, as they are not "present transfers of the entire title for a consideration," they are not sales.

The question whether a delivery of liquor by a club to its members constitutes a sale has arisen in many cases. Some hold that such a transaction is a sale. Marmont *v.* State, 48 Ind. 21; State *v.* Mercer, 32 Iowa, 405; State *v.* Lockyear, 95 N. C. 333; 59 Am. R. 287; State *v.* Neis, 108 N. C. 787; Martin *v.* State, 59 Ala. 34; United States *v.* Wittig, 2 Lowell, 466; Fed. Cas. No. 16,748; Rickart *v.* People, 79 Ill. 85; 32 Am. R. 433; State *v.* Horacek, 41 Kans. 87; State *v.* Essex Club, 53 N. J. L. 99 (vigorously opposing Graff *v.* Evans); Chesapeake Club *v.* State, 63 Md. 446 (where the court was divided); State *v.* Easton Club, 73 Md. 102 (distinguishing Seim *v.* State); People *v.* Soule, 74 Mich. 250; State *v.* Boston Club, 45 La. Ann. 585; Kentucky Club *v.* Louisville, 92 Ky. 309; State *v.* Bacon Club, 14 Mo. App. 86; People *v.* Andrews, 115 N. Y. 427 (reversing 50 Hun, 591); Nogales Club *v.* State, 69 Miss. 218. Others hold that it is not a sale. Graff *v.* Evans, 8 Q. B. D. 373; 22 Am. L. Reg. N. S. 99; followed in Newell *v.* Hemenway, 58 L. J. M. C. 48; 16 Cox Cr. Cas. 604; Commonwealth *v.* Smith, 102 Mass. 144; Commonwealth *v.* Pomphret, 137 Mass. 564; 50 Am. R. 340; Tennessee Club *v.* Dwyer, 11 Lea, 452; 47 Am. R. 298; Barden *v.* Montana Club, 10 Montana, 330; Piedmont Club *v.* Commonwealth, 87 Va. 540; State *v.* McMaster, 35 So. Car. 1; Seim *v.* State, 55 Md. 566; 37 Am. R. 419; Koenig *v.* State, 33 Tex. Crim. App. 367; State *v.* Austin Club, 89 Tex. 20; People *v.* Adelphi Club, 145 N. Y. 5 (1896), and cases cited; State *v.* St. Louis Club, 125 Mo. 308. And see, further, Commonwealth *v.* Ewig, 145 Mass. 119; Commonwealth *v.* Baker, 152 Mass. 337; Commonwealth *v.* Jacobs, Ib. 276; Commonwealth *v.* Ryan, Ib. 283; Commonwealth *v.* Tierney, 148 Pa. St. 552; Black on Intoxicating Liquors, § 142.

No doubt the difference in the phraseology of statutes in the several jurisdictions accounts to some extent for the divergence in the cases, but it seems impossible to reconcile all of them.

CHAPTER II.

OF THE PARTIES TO THE CONTRACT.

SECTION I. — WHO MAY SELL.

	Sect.
In general, none but owner	6
Effect of outstanding writ on owner's power to sell	7
Exceptions to general rule: —	
Market overt	8
Exceptions	9
Sale by sample	10
Purchase by shopkeeper in London	10
Stolen goods when felon is prosecuted	11
Cases under the statute	11
Reimbursement of innocent purchaser	12
Sale of horses in market overt	14
Negotiable securities	15
Goods pawned	16
Goods taken by sheriffs	17
Goods in wrecked ships	18
Sale by the court	18
Factors and consignees	19
Persons intrusted with possession by owner	19
Law doubtful	20
Secret revocation of intrustment	20 a
Agent must be intrusted for purpose of sale	20 a

SECTION II. — WHO MAY BUY.

	Sect.
Persons generally incompetent: —	
Infants	22
Necessaries	23
Question of law or fact?	24
Evidence of previous supply admissible	24
Married infant	25
Infant tradesman	26
Ratification after majority	27
Infants' Relief Act, 1874	27
Lunatics	29
Drunkards	30
Married women: —	
1. At common law	31
Husband civiliter mortuus	32
Husband alien, abroad	33
Sole trader in London	35
2. In equity	36
3. By statute	37
Protection order	37
Property Acts, 1870 and 1874	37
Married Women's Property Act, 1882	37
Married woman purchaser	37
Bankruptcy	37
Separate trade	37

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

SECTION I. — WHO MAY SELL.

§ 6. In general, no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet* (*a*). A person, therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some special cases presently to be noticed); and

(*a*) Peer *v.* Humphrey, 2 A. & E. 495; Whistler *v.* Forster, 32 L. J. C. P. 161.

even if, in ignorance of the fact that the goods were lost or stolen, he resell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon (*b*). But a man may make a valid *agreement to sell* a thing not yet his, and even a thing not yet in existence; this *executory* contract will be examined in the next chapter, which treats of the things sold.

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

The first and most important exception to the rule, that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in *market overt.*

§ 8. MARKET OVERT in the country is held on special days, provided by charter or prescription (*e*); but in London every day except Sunday is market day (*f*). In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in (*g*).

(*b*) Stone *v.* Marsh, 6 B. & C. 551; Marsh *v.* Keating, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; White *v.* Spettigue, 13 M. & W. 603; Lee *v.* Bayes, 18 C. B. 599. [See 1 Gray, 83, 96; 68 Me. 235, 28 Am. R. 45 and note B.]

(*c*) Woodland *v.* Fuller, 11 Ad. & E. 859.

(*d*) This section is not retrospective in its operation, and does not affect preëxisting rights. Williams *v.* Smith, 26 L. J. Ex. 371; 2 H. & N. 443, and in error, 28 L. J. Ex. 286; 4 H. & N. 559; Flood *v.* Patterson, 30 L. J. Ch. 486; and Jackson *v.* Woolley, 8 E. & B. 778; 27 L. J. Q. B. 181, 448. The subsequent statutes of 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, furnish the rules on this subject, in respect of land, including leasehold titles to land.

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

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

(*g*) 5 Rep. 83 b.

As a London shop is not a market overt for any goods except such as are usually sold there, it was held in the leading case (*gg*) that a scrivener's shop was not a market overt for plate, though a goldsmith's would have been. So Smithfield was held not to be a market overt for clothes, but only for horses and cattle (*h*); and Cheapside not for horses (*i*); and Aldridge's not for carriages (*k*).

A wharf is not a market overt, even in the city of London (*l*).

In Crane *v.* The London Dock Company, in the Queen's Bench, the common law doctrine of market overt was much discussed, and the Chief Justice expressed the opinion that a sale could not be considered as made in market overt "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold" (*m*).

[The privilege of market overt exists for the protection of the innocent purchaser only, and the seller, however innocent, is not relieved from liability by reason of the sale having been made in market overt. Thus in Delaney *v.* Wallis (*n*), before the Court of Appeal in Ireland, public salesmasters who in market overt, and in the ordinary course of their business, innocently sold animals which had been stolen from their owner, were held liable to him in trover for their value.]

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

(*gg*) 5 Rep. 83 b.

(*h*) Moore, 360.

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

(*k*) Marner *v.* Banks, 17 L. T. N. S. 147; 16 W. R. 62.

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

(*m*) Per Cockburn, C. J., in Crane *v.* The London Dock Company, 5 B. & S. 313; 33 L. J. Q. B. 224.

(*n*) 14 L. R. Ir. 31, following Ganly *v.* Ledwidge, Ir. R. 10 C. L. 33.

(*o*) 2 Inst. 713; 2 Bl. Com. 499; Hartop *v.* Hoare, 2 Str. 1187; Wilkinson *v.* King, 2 Camp. 335; Packer *v.* Gillies, 2 Camp. 336, note; cases cited in Crane *v.* The London Dock Company, 33 L. J. Q. B. 226; 5 B. & S. 313.

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

possession of the goods after any number of intervening sales, the right of the original owner revives (*q*).

§ 10. A sale by sample is not a sale in market overt, and in Hill *v.* Smith (*r*), Sir James Mansfield, C. J., said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market." This decision was approved and followed by the Queen's Bench in Crane *v.* The London Dock Company (*s*).

In Lyons *v.* De Pass (*t*), a sale was held to be entitled to the privilege of market overt where made in a shop in the city of London TO the shopkeeper who dealt in such goods; but the point was not raised, and the existence of the privilege in such a case was strongly questioned by the judges in Crane *v.* The London Dock Company (*u*).

§ 11. The security of a purchaser in market overt, who innocently buys stolen goods, is affected by the statute 24 & 25 Vict. c. 96, s. 100, which reënacts and adds to the 7 & 8 Geo. IV. c. 29, s. 57 (*x*). By the terms of this section, it is provided that, "If any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof, in a summary manner."

It has been settled that, on the true construction of this statute, the property in the chattel becomes revested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the court (*y*). But an action was held not to be maintainable against an innocent purchaser in market overt who had disposed of the stolen goods before the conviction of the thief; although he was, while the goods still remained in his possession, notified of the robbery by the original owner (*z*).

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

(*r*) 4 Taunt. 532.

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

(*t*) 11 A. & E. 326.

(*u*) 33 L. J. Q. B. 224; 5 B. & S. 313.

(*x*) See, also, 21 Henry VIII. c. 11, and Parker *v.* Patrick, 5 T. R. 175.

(*y*) Scattergood *v.* Sylvester, 15 Q. B. 506; 19 L. J. Q. B. 447. See, also, Peer *v.* Humphrey, 2 A. & E. 495; Vilmont *v.* Bentley, 12 App. Cas. 471; 18 Q. B. D. 322, C. A.

(*z*) Horwood *v.* Smith, 2 T. R. 750; Lind-

[In Lindsay *v.* Cundy (*a*), one Blenkarn was convicted of obtaining goods by false pretences from the plaintiffs, but the defendants had purchased the goods from Blenkarn and resold them before his conviction. The judges of the Queen's Bench were of opinion that there was a voidable contract of sale which passed the property in the goods to Blenkarn, and, following the authority of Horwood *v.* Smith, they gave judgment in the defendant's favor, on the ground that the statute did not revest the property in the prosecutor until conviction, and that his title did not relate back to the date of the original fraud. On appeal a different view was taken of the true character of the original transaction, both in the Court of Appeal (*b*) and in the House of Lords (*c*). The Lords Justices and the noble and learned Lords who decided the case held that there was no contract, and that the property did not pass; and in that view the defendants were liable for the conversion of the goods before conviction, the sale to them not having been made in market overt. The authority, however, of the views expressed in the Court of Queen's Bench upon the effect of the statute of 1861 remained unimpaired. In Moyce *v.* Newington (*d*), Cockburn, C. J., and the Court of Queen's Bench, misapprehending the effect of the decisions in Lindsay *v.* Cundy and Horwood *v.* Smith, decided that the statute did not apply to a case where the contract of sale had been induced by false pretences so that the property in the goods had passed to the fraudulent buyer. That decision has now been expressly overruled by the House of Lords (affirming the decision of the Court of Appeal) in the very recent case of Vilmont *v.* Bentley (*e*). It was laid down, in accordance with the earlier cases of Horwood *v.* Smith (*f*) and Scattergood *v.* Sylvester (*g*), that when the property in goods has been obtained by means of false pretences, the owner of the goods may, upon conviction of the thief, recover them from the person in whose possession they are at that date, although that person had before the conviction bought them in market overt without notice of the fraud (*h*).

But it is to be observed that the statutory title to the goods only dates from the conviction of the fraudulent buyer, and the order for restoration can only be made against the person who *then* has the

say *v.* Cundy, 1 Q. B. D. 348. The court before which a conviction takes place within the terms of sect. 100 of the statute has jurisdiction to entertain an application for the restitution of the proceeds of the goods as well as of the actual goods. Reg. *v.* Justices of the Central Criminal Court, 17 Q. B. D. 598.

(*a*) 1 Q. B. D. 348.

(*b*) 2 Q. B. D. 96.

(*c*) 3 App. Cas. 459.

(*d*) 4 Q. B. D. 32.

(*e*) 12 App. Cas. 471, *sub nom.* Bentley *v.* Vilmont; 18 Q. B. D. 322, C. A.

(*f*) 2 T. R. 750.

(*g*) 15 Q. B. 506.

(*h*) The case of a purchase of stolen property from a thief in market overt is on all fours with that of a purchase from a seller whose title is voidable on the ground of fraud. Per Lord Watson, in Vilmont *v.* Bentley, 12 App. Cas. at p. 478; per Lord Blackburn, in Lindsay *v.* Cundy, 1 Q. B. D. at p. 356.

goods in his possession. It follows that a *bona fide* purchaser who deals with the goods in the interval between the sale and the conviction is not liable to the real owner (*i*).]

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

§ 13. It was at one time supposed that where goods had been stolen, an owner could not recover them from an innocent vendee who had bought them, *not* in market overt, until he had done his duty in prosecuting the thief. But the cases of Gimson *v.* Woodfull (*k*) and Peer *v.* Humphrey (*l*) were overruled in White *v.* Spettigue (*m*), where it was held on the authority of Stone *v.* Marsh (*n*), and Marsh *v.* Keating (*o*), that the obligation of the plaintiff to prosecute the thief does not apply where the action is against a third party innocent of the felony. And in Lee *v.* Bayes (*p*) the law was stated to be settled in conformity with the decision in White *v.* Spettigue (*pp*).

In Wells *v.* Abrahams (*q*), on the trial of an action of trover, the evidence established a *prima facie* case of felony, and after verdict for plaintiff a new trial was moved for on that ground, and on the further ground, shown by affidavit, that since verdict the plaintiff had prosecuted the defendant criminally. But held that the judge was bound to try the cause on the record as it stood at Nisi Prius, and could not nonsuit the plaintiff, and the verdict was upheld (*r*).

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

The statute of 2 & 3 P. & M. c. 7, passed in 1555, and that of 31

(*i*) Vilmont *v.* Bentley, *ubi supra*, adopting the construction put upon the statute in Lindsay *v.* Cundy, 1 Q. B. D. 348. See per Lush, J., at p. 362. See, also, Walker *v.* Matthews, 8 Q. B. D. 109.

(*k*) 2 C. & P. 41.

(*l*) 2 A. & E. 495; 4 N. & M. 430.

(*m*) 13 M. & W. 603.

(*n*) 6 B. & C. 551.

(*o*) 1 Bing. N. C. 198.

(*p*) 18 C. B. 599.

(*pp*) 13 M. & W. 603.

(*q*) L. R. 7 Q. B. 554.

(*r*) See, also, Wellock *v.* Constantine, 2 H. & C. 146; 32 L. J. Ex. 285; Ex parte Ball, 10 Ch. D. 667, C. A.; Midland Insurance Company *v.* Smith, 6 Q. B. D. 561, where the history of this question and the authorities are elaborately reviewed by Watkin Williams, J.; Roope *v.* D'Avigdor, 10 Q. B. D. 412; Applehy *v.* Franklin, 55 L. J. Q. B. 129. In all these cases, and in Wells *v.* Abrahams, *supra*, the action was brought, not against an innocent vendee, but against the person alleged to have committed the felony. In Ex parte Ball (10 Ch. D. at p. 671), Bramwell, L. J., while admitting that there is abundant authority for the proposition that the felonious origin of a debt is in some way an impediment to its enforcement, points out the difficulties attendant upon the application of the doctrine.

Eliz. c. 12, in 1589, contain the rules and regulations applicable to this subject. The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place; that the parties to the bargain shall be before him present when he takes the toll; and that he shall write in a book, to be kept for that purpose, the names, surnames, and dwelling-places of the parties, and a full description of the animal sold. The property in the horse is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the vendor, and "of his true Christian name, surname, and place of dwelling or resiancy;" or that the vendor shall bring to the keeper one sufficient and credible person that can testify that he knows the vendor, and in such case the name and residence of the person so testifying, as well as those of the vendor, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale is to be void. The act also provides that the original owner may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided the demand on the purchaser be made within six months from the date of the felony.

The decisions on these two statutes are collected in Bacon's Abr. Fairs and Markets, and in Com. Dig. Market, E. Their provisions have been found so effective in putting an end to the mischief which they were intended to prevent, that there are very few modern cases on the subject (*s*).

In Lee *v.* Bayes (*s*), it was held that the sale of a horse at auction, in a repository out of the city of London, was not a sale in market overt, Jervis, C. J., saying that market overt was "an open, public, and *legally constituted* market." On the question, What is a legally constituted market? the reader is referred to the case of Benjamin *v.* Andrews (*t*), decided in the Common Pleas in 1858.

[It seems to be doubtful how far the protection arising from a sale

(*s*) See Josephs *v.* Adkins, 2 Stark. 76; Lee *v.* Bayes, 18 C. B. 599; Moran *v.* Pitt, 42 L. J. Q. B. 47; 21 W. R. 525.

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

in market overt will extend to modern markets established under parliamentary powers (*u*).

The English law as to sales in market overt has never obtained sanction in Scotland (*w*), nor has it been adopted in America (*x*).]

§ 15. The second exception to the rule, that one not the owner cannot make a valid sale of personal chattels, also arises out of the 24 & 25 Vict. c. 96, s. 100, already quoted, which directs that, "If it shall appear, before any award or order made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against this act."

This clause was intended to prevent the statute from operating in such manner as to interfere with a settled rule of the law merchant, namely, that one not the owner, even the thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin, according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case he would be forced to bear the loss (*y*).

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

(*u*) Cf. Cockburn, C. J., in Moyce *v.* Newington, 4 Q. B. D. at p. 34, with Ganly *v.* Ledwidge, Ir. R. 10 C. L. 33.

(*w*) Bell's Commentaries, ss. 527, 1320.

(*x*) Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 470, opinion of Kent, C. J., 480; Dame *v.* Baldwin, 8 Mass. 518; Easton *v.* Worthington, 5 Serg. & Rawle (Penn.), 130; Ventress *v.* Smith, 10 Peters (U. S.), 161, 176; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285, 294; Bryant *v.* Whitcher, 52 N. H. 158, 161; 2 Kent's Commentaries, 324 (ed. 1873).

(*y*) Grant *v.* Vaughan, 3 Burr. 1516; Lang *v.* Smyth, 7 Bing. 284; Gogier *v.* Mieville, 3 B. & Cr. 45; Crook *v.* Jadis, 5 B. & Ad. 909; Backhouse *v.* Harrison, 5 B. & Ad. 1105; Bank of Bengal *v.* M'Leod, 7 Moo. P. C. 35; Goodman *v.* Harvey, 4 Ad. & El. 870; Uther *v.* Rich, 10 A. & E. 784; Raphael *v.* Bank of England, 17 C. B. 161; 25 L. J. C. P. 33; Seal *v.* Dent, 8 Moo. P. C. 319; Gill *v.* Cubitt, 3 B. & Cr. 466; Whistler *v.* Forster, 32 L. J. C. P. 161. See, also, numerous other cases cited in notes to Miller *v.* Race, 1 Sm. L. C. 502 (ed. 1887); Byles on Bills, p. 187 (14th ed.).

(*z*) Pothonier *v.* Dawson, Holt, 385; Tucker *v.* Wilson, 1 P. Williams, 261; Lockwood *v.* Ewer, 9 Mod. 278; Martin *v.* Reid, 11 C. B. N. S. 730, and 31 L. J. C. P. 126;

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

This protection, however, was held by the Court of Queen's Bench not to be available in favor of a purchaser of goods distrained under a warrant issued by two justices of the peace to the constable, *where the warrant was on the face of it illegal* (*b*).

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

[The Rules of the Supreme Court (O. 50, r. 2) provide that "it shall be lawful for the court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner and on such terms as the court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

An order may be made for the sale of goods, although they are not of a perishable nature, "which for any other just or sufficient reason it may be desirable to have sold at once." Thus, in Bartholomew *v.* Freeman (*d*), the sale of a horse was ordered; and orders have also been made for the sale of bonds (*e*), and of a foreign ship (*f*).]

Johnson *v.* Stear, 15 C. B. N. S. 330, and 33 L. J. C. P. 130; Pigot *v.* Cubley, 15 C. B. N. S. 701, and 33 L. J. C. P. 134; 1 Sm. L. C. 229 (ed. 1887); Halliday *v.* Holgate, L. R. 3 Ex. 299. By the above case of Martin *v.* Reid, and by Reeves *v.* Capper, 5 Bing. N. C. 136, and Langton *v.* Waring, 18 C. B. N. S. 315, it appears that there may be a valid pledge although the goods remain in, or are returned to, the actual possession of the pawner as trustee for the pawnee.

(*a*) Anon. 3 Dyer, 363 a. pl. 24; Turner *v.* Felgate, 1 Lev. 95; Manning's case, 8 Co. 97 a; Doe dem. Emmett *v.* Thorn, 1 M. & S. 425; Doe dem. Batten *v.* Murless, 6 M. & S. 110; Farrant *v.* Thompson, 5 B. & Ald. 826; Lock *v.* Sellwood, 1 Q. B. 736. See Order 57, Rule 12, of the Rules of the Supreme Court, as to order for sale of goods seized in execution.

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

(*c*) The Gratitudine, 3 Rob. Adm. 259; Freeman *v.* East India Company, 5 B. & A. 621; Vlierboom *v.* Chapman, 13 M. & W. 239; Underwood *v.* Robertson, 4 Camp. 138; Cannan *v.* Meaburn, 1 Bing. 243; Tronson *v.* Dent, 8 Moo. P. C. 419; Cammell *v.* Sewell, 3 H. & N. 617, and S. C. in Cam. Scacc. 5 H. & N. 728; 29 L. J. Ex. 350; The Australasian Steam Navigation Company *v.* Morse, L. R. 4 P. C. 222; Acatos *v.* Burns, 3 Ex. D. 289, C. A.; The Atlantic Insurance Company *v.* Huth, 16 Ch. D. 474, 481, C. A.; Maude & Pollock on Shipping (ed. 1881), 580.

(*d*) 3 C. P. D. 316.

(*e*) Coddington *v.* T., P., & M. Railway Company, 39 L. T. 12.

(*f*) The Hercules, 11 P. D. 10.

§ 19. By the Factors Act (6 Geo. IV. c. 94), s. 2, "persons (*g*) intrusted with, and in possession (*h*) of, any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be *deemed and taken to be the true owner of the goods so far as to give validity to sales*" made by them to buyers without notice of the fact that such vendors are not owners. By the 4th section of the same act, purchasers from "any agent or agents intrusted with any goods, wares, or merchandise, or to whom the same may be consigned," are protected in their purchases, *notwithstanding notice* that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice, at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment.

And by the Amendment Act, 5 & 6 Vict. c. 39, the possession of the goods themselves is treated as having the same effect as that of bills of lading, or "other documents of title;" and a "document of title" is defined to be "any document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented."

[And by a further Amendment Act passed in the year 1877 (40 & 41 Vict. c. 39), the effect of certain decisions which had created hardship is annulled.[1] This act is set out and considered, Book V. Part I. Ch. 4, Lien.]

These acts apply solely to persons intrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without

(*g*) The word "person" must be read as "agent," Johnson *v.* Crédit Lyonnais Co. 3 C. P. D. at p. 45.

(*h*) The majority of cases under the Factors Acts have turned upon the meaning of these words. The expression varies slightly in the different sections of the Acts, but the construction placed upon it by the courts has been virtually the same, viz.: "*factor or agent intrusted as such, and ordinarily having as such factor or agent a power of sale or pledge.*" Per Bramwell, B., in Cole *v.* The North Western Bank, L. R. 10 C. P. 375; and the definition of Willes, J., in Heyman *v.* Flewker, 13 C. B. N. S. 519, at p. 527. The reader is also referred to the judgments of Willes, J., in Fuentes *v.* Montis, L. R. 3 C. P. at p. 275, and of Blackburn, J., in delivering the judgment of the Exchequer Chamber in Cole *v.* The North Western Bank, L. R. 10 C. P. at p. 357, where very full expositions of the law relating to the factor's power of sale and pledge will be found. The cases are fully considered in a work on the Factors Acts by the editors.

[1] [This act does not require, in order to make section 4 applicable, that there should be a memorandum of the contract for the sale of the goods, so as to satisfy the Statute of Frauds. Hugill *v.* Masker, 22 Q. B. D. 364 (1889). — E. H. B. And see Biggs *v.* Evans (1894), 1 Q. B. 88.]

power to sell (*i*). The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandise, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire. A purchaser in good faith from such vendors would be liable in trover to the true owner (*j*). Mr. Chitty, in his Treatise on Contracts (*k*), has the following passage: "It is said, however, that if the real owner of goods suffer another to have possession thereof, or of those documents which are the indicia of property therein, — thereby enabling him to hold himself forth to the world as having, not the possession only, but the property, — a sale by such person to a purchaser without notice will bind the true owner (per Abbott, C. J., Dyer *v.* Pearson, 3 B. & C. 38; per Bayley, J., Boyson *v.* Coles, 6 M. & S. 14). But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken *prima facie* to have had the right to sell." This limitation suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges was approved by the Barons of the Exchequer in Higgons *v.* Burton (*l*), and, when thus limited, the principle does not differ substantially from the provisions of the Factors Act, as amended by the 5 & 6 Vict. c. 39.

§ 20. But the cases decided under the Factors Acts leave this statement open to grave doubt, and show the extreme difficulty of defining the subject-matter to which it applies.

In Heyman *v.* Flewker (*m*), a picture dealer was held to be an "agent" intrusted with the goods under the act, whose ordinary business was not to sell pictures, but who was authorized to sell the particular pictures in controversy, and instead of so doing pledged them.

In Baines *v.* Swainson (*n*), the circumstances were that one Emsley, who carried on business at Leeds as factor and commission merchant, falsely represented to the plaintiffs that he could sell some of their goods to one Sykes. The plaintiffs thereupon sent to the premises of Emsley the goods, to be by him "perched," or stretched on poles, so that the purchaser could examine them, and then to deliver them. The goods were sent in several successive lots. Emsley sold them to the defendant at a less price than he represented he could get from

(*i*) Monk *v.* Whittenbury, 2 B. & Ad. 484; Wood *v.* Rowcliffe, 6 Hare, 183; Lamb *v.* Attenborough, 1 B. & S. 831; Jaulerry *v.* Britten, 5 Scott, 655; 4 Bingham, N. C. 242; Hellings *v.* Russell, 33 L. T. N. S. 380.

(*j*) Loeschman *v.* Machin, 2 Stark. 311; Cooper *v.* Willomat, 1 C. B. 672.

(*k*) Page 362, 11th ed. 1881.

(*l*) 26 L. J. Ex. 342. See, also, Pickering *v.* Busk, 15 East, 38: Cole *v.* North Western Bank, L. R. 9 C. P. 470; affirmed in Ex. Ch. 10 C. P. 354; and per Cockburn, C. J., in Johnson *v.* Crédit Lyonnais, 3 C. P. D. at p. 39.

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

(*n*) 4 B. & S. 270: 32 L. J. Q. B. 281.

Sykes. The plaintiffs brought trover, and Martin, B., directed the jury to give them a verdict. The Queen's Bench directed a new trial, Wightman and Crompton, JJ., holding Emsley to be an agent within the meaning of the act, and Blackburn, J., thinking that at all events there was a case for the jury to determine that fact, and also to decide whether the sale had taken place in the ordinary course of business. Crompton and Blackburn, JJ., were of opinion that the agencies referred to by the act are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had previously been held by Vice-Chancellor Wigram, in Wood *v.* Rowcliffe (*o*). Crompton, J., said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these Acts of Parliament the difficulty is immense."

§ 20 a. In Fuentes *v.* Montis (*p*), the Court of Common Pleas gave judgment (affirmed in Ex. Ch.) in favor of the plaintiffs, wine merchants, in Spain, for certain casks of sherry which they had consigned for sale to a London factor, who had pledged them as security for advances made by the defendant after revocation of the factor's authority, although the defendant was in good faith, and ignorant of the revocation, and although the wine remained in the factor's possession; the court holding that the words, "intrusted with and in possession of," must be construed as referring to the time when the factor made the pledge, and that he was no longer "intrusted with" the goods after he had been ordered to deliver them to another factor for account of the consignor, although he had disobeyed the order, and remained "in possession."

Under this decision, which the judges, Willes, Keating, and Smith, expressed regret at being constrained to deliver, the confidence felt by merchants in dealing with factors in relation to goods consigned to them, and in their possession, must [have been] greatly shaken; and [down to the year 1877] there seems certainly to [have been] no mode of *making advances* safely to a factor on the security of goods on consignment, for a merchant or banker in London or Liverpool [had] no means of finding out whether the foreign consignor [had] or [had] not revoked the factor's authority. [And accordingly the Factors Act, 1877, provided the remedy for this unsatisfactory condition of affairs by enacting (section 2) that "where any agent or person has been intrusted with, and continues in possession of, any goods, or documents of title to goods, within the meaning of the principal acts as amended

(*o*) 6 Hare, 183.

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

by this act, any revocation of his instrument or agency shall not prejudice or affect the title or 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."]

In Fuentes *v.* Montis, also, Willes, J., expressed his entire concurrence in the following *dictum* of Blackburn, J., reported in Baines *v.* Swainson: "I do not agree with the counsel for the defendant, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an 'intrusting' him as agent; though I think that under that part of section 4 of statute 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put in possession of goods calls upon the person who gave him possession to explain and show that it was not an intrusting." It would seem to result from this that a *purchaser*, even from a factor, would get no title to goods if the consignor could show that he had sent them to the factor merely to be kept in storage, or to be forwarded to another place, although the factor was in possession of them with the consent of the consignor, and was a person whose ordinary business consisted in selling goods sent to him on consignment.

Although this case was affirmed in the Ex. Ch., the *dicta* that the act has reference only to factors *for sale* of the goods are disapproved by Lord Westbury in Vickers *v.* Hertz (*q*), so that no one would venture, in the present state of the authorities, to give a positive opinion as to the true construction of this statute.

[In Vickers *v.* Hertz, Lord Westbury seems to have understood Willes, J., in Fuentes *v.* Montis, as expressing an opinion that the act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made (*r*). If Willes, J., had expressed such an opinion, it would no doubt have been inconsistent with Baines *v.* Swainson (*s*), and have been overruled by the House of Lords in Vickers *v.* Hertz (*t*). But Willes, J., in Fuentes *v.* Montis, expressly says (L. R. 3 C. P. at p. 279), "I do not mean to limit the operation of the statute to agents intrusted with goods for future sale, either generally or in the particular instance," and he proceeds to express his entire assent to Baines *v.* Swainson.

Fuentes *v.* Montis was followed in Cole *v.* The North Western Bank (*u*), where it was contended by the learned author of this treatise that, by the omission of the words "intrusted for sale," and "consignment for sale," in the 1st and 4th sections of 5 & 6 Vict. c. 39, the law

(*q*) L. R. 2 Sc. App. 113, 118.
(*r*) See per Blackburn, J., in Cole *v.* North Western Bank, L. R. 10 C. P. at p. 374.
(*s*) 4 B. & S. 270; 32 L. J. Q. B. 281.
(*t*) L. R. 2 Sc. App. 113.
(*u*) L. R. 9 C. P. 470.

had been altered, but the Court of Common Pleas held, and their decision was affirmed in the Exchequer Chamber (*x*), that to constitute a person "an agent intrusted with the possession of goods," within the meaning of the act, he must have been intrusted with them in the character of such agent, that is to say, for the purpose of sale. Cole *v.* The North Western Bank was followed in Johnson *v.* Crédit Lyonnais Co. (*y*), and also in Hellings *v.* Russell (*z*), where it was held that a forwarding agent was not an agent intrusted within the meaning of the act.]

The subject is further discussed *post*, Book V. Part I. Ch. 4, on Lien.

SECTION II. — WHO MAY BUY.

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

§ 22. *Infants*, that is, persons under the age of twenty-one years, are protected by law from liability on purchases made by them, unless for *necessaries*.

The purchase by an infant, however, was not absolutely void, but only voidable in his favor (*a*). He might maintain an action (*b*) against the vendor during infancy, and he might, on arriving at the age of twenty-one years, confirm his purchase (*c*). An action at law would not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him (*d*); nor would these facts constitute at law a good replication to a plea of infancy (*e*); nor suffice as the basis of a replication on equitable grounds (*f*). But they would entitle the plaintiff to relief if made the subject of a bill in equity (*g*).

(*x*) L. R. 10 C. P. 354.

(*y*) 3 C. P. D. 32, C. A.; affirmed 2 C. P. D. 224.

(*z*) 33 L. T. N. S. 380.

(*a*) Gibbs *v.* Merrell, 3 Taunt. 307; Hunt *v.* Massey, 5 B. & Ad. 902; Holt *v.* Clarencieux, 2 Str. 938; Zouch *v.* Parsons, 3 Burr. 1794; per Abbott, C. J., in The King *v.* Inhabitants of Chillesford, 4 B. & C. at p. 100.

(*b*) Warwick *v.* Bruce, 2 M. & S. 205.

(*c*) Bac. Abr. *Infancy*, (I) 3; Holt *v.* Ward, Str. 939.

(*d*) Price *v.* Hewett, 8 Ex. 146; Johnson *v.* Pye, 1 Sid. 258; S. C. 1 Lev. 169; S. C. 1 Kel. 913.

(*e*) Johnson *v.* Pye, *supra*.

(*f*) Bartlett *v.* Wells, 31 L. J. Q. B. 57.

(*g*) Ex parte Unity Joint Stock Banking Association, 27 L. J. Bank, 33; Nelson *v.* Stocker, 28 L. J. Ch. 760.

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

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

§ 24. The cases in which these principles have been applied are quite too numerous to be reviewed in detail, but some examples may be selected, before considering the question whether it is for the court or jury to determine in each case what are or are not necessaries for the infant.

Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms (fruit, confectionery, etc., etc.) were held not necessaries by the Queen's Bench in Wharton *v.* McKenzie (*m*); and the Exchequer of Pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be nonsuited (*n*).

But where a jury had found that a purchase for the amount of 8*l.* 0*s.* 6*d.* for gold rings, a watch-chain, and a pair of breastpins were "necessaries" for an undergraduate at Cambridge, the son of a gentleman of fortune and a Member of Parliament, the Exchequer refused to set aside the verdict, holding the question to be one for the jury (*o*). Where the defendant, a captain in the army, had ordered livery for his servant and cockades for some of his soldiers, the jury

(*h*) Burghart *v.* Hall, 4 M. & W. 727; Peters *v.* Fleming, 6 M. & W. 42.

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

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

(*l*) 2 Stephen Com. 307 (ed. 1880).

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

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

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

found both to be necessaries; but the court, on motion for new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessaries, Lord Kenyon observing that, as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and, if so, the livery was necessary (*p*). In perilous times, Lord Ellenborough held that regimentals sold to an infant, as a member of a volunteer corps enrolled for the national defence, were necessaries (*q*). But a chronometer costing 68*l.* was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the royal navy (*r*). A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician to ride for exercise (*s*); but a purchase of cigars and tobacco by an infant was held not to bind him (*t*); nor was the plaintiff allowed to recover the cost of a silver goblet sold to an infant for 15*l.* 15*s.*, which the plaintiff knew when he supplied it to be intended by the infant for a present to a friend (*u*).

In the case of Ryder *v.* Wombwell (*x*), it was finally settled that the issue whether goods sold to an infant are necessaries is a question of fact to be left to the jury; but that in this, as in all other like questions, the modern rule is not as formerly that a case must go to the jury if there be a scintilla of evidence, but that the judge is to determine (subject of course to review) whether there is evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established. The facts were, that the defendant, the son of a deceased baronet, was in the enjoyment in his own right of an allowance of 500*l.* a year during his minority, and entitled to 20,000*l.* on coming of age. He had no fixed residence, but lived, when in London, with his mother, and, when in the country, with his eldest brother, free of charge. The plaintiff sought to recover from him the following sums: 1st, 25*l.* for a pair of solitaires, or sleeve-buttons, with rubies and diamonds; 2d, 6*l.* 10*s.* for a smelling-bottle, ornamented with precious stones; 3d, 15*l.* 15*s.* for an antique silver goblet, with an inscription; 4th, 13*l.* 13*s.* for a pair of coral ear-rings. The goblet was wanted, as the plaintiff was told by the defendant, for a present to a friend, at whose house the defendant had been frequently a guest. Kelly, C. B., rejected evidence offered by the defendant to show that, at the time of the purchase of the solitaires, the infant had already purchased articles

(*p*) Hands *v.* Slaney, 8 T. R. 578.
(*q*) Coates *v.* Wilson, 5 Esp. 152.
(*r*) Berolles *v.* Ramsay, Holt N. P. 77.
(*s*) Hart *v.* Prater, 1 Jur. 623.
(*t*) Bryant *v.* Richardson, 14 L. T. N. S. 24; L. R. 3 Ex. 93, in note.
(*u*) Ryder *v.* Wombwell, L. R. 3 Ex. 90; in Cam. Scacc. 4 Ex. 32.
(*x*) L. R. 3 Ex. 90; 4 Ex. 32.

of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned Chief Baron refused to nonsuit, but left it to the jury to say whether all or any of the articles were necessaries suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessaries, the other articles not. Leave was reserved to move for a nonsuit, or for reduction of damages, if the court should be of opinion that there was evidence for the jury that one of the two articles was necessary, and not the other. Bramwell, B., was of opinion that the plaintiff ought to have been nonsuited, or a verdict given for the defendant; and that the evidence to show that the defendant was already supplied with similar articles ought to have been received. Kelly, C. B., delivered the judgment, holding, — first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs*, if he desired it, for the price of the solitaires. On the appeal it was held unanimously that the plaintiff ought to have been nonsuited. In the opinion delivered by Willes, J., he made the following important preliminary observations: "We must first observe that the question in such cases is not whether the expenditure is one which an infant in the defendant's position could not properly incur. There is no doubt that an infant may buy jewelry or plate if he has the money to pay, and pays for it; but the question is, *whether it is so necessary, for the purpose of maintaining himself in his station, that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries.*" In reference to this question the court held that judges know as well as juries what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things; that if the state of things be unusual, new, or exceptional, then a question of fact arises to be decided by a jury under proper direction; *that the judge must determine whether the case is such as to cast on the vendor the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence to satisfy that onus.* In the application of these principles to the case before it, the court held that it was not bound to consider itself so ignorant of every usage of mankind as to be compelled, in the absence of all evidence on the subject, to take the opinion of a jury whether it is so necessary for a gentleman to wear solitaires of this description that, though an infant, he must obtain them on credit rather than go without them.

On the point as to the exclusion of the evidence on the trial, the

Court of Error expressly refused to decide, reserving it "to be determined hereafter."

[The question of the admissibility of the evidence was raised and determined in the quite recent case of Johnstone *v.* Marks (*y*). The court, consisting of Lord Esher, M. R., and Lindley and Lopes, L. JJ., but sitting as a Divisional Court of the Queen's Bench Division, dissented from the Court of Exchequer in Ryder *v.* Wombwell, and preferring the authority of Foster *v.* Redgrave (*z*), in the Court of Queen's Bench, held that evidence of the infant being already provided with goods of a similar description is admissible, the issue being whether the goods supplied are in fact necessaries when supplied to the infant. It is immaterial whether the plaintiff does or does not know of the existing supply (*a*).]

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

§ 26. An infant, being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessaries, whether he be trading alone or in partnership with another (*c*). But if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable for what is so used (*d*).

In Thornton *v.* Illingworth (*e*), a purchase of goods by an infant for the purposes of trade was treated by the Queen's Bench as constituting an exception to the general rule that the contracts of infants are voidable only, not void. Bayley, J., said: "In the case of an infant, a contract made for goods, for the purposes of trade, is abso-

(*y*) 19 Q. B. D. 509, approving Barnes *v.* Toye, 13 Q. B. D. 410. The case was on appeal from a county court. The members of the Divisional Court were prepared to give the same decision when sitting as a court of appeal. This declaration of opinion would be binding on them individually.

(*z*) L. R. 4 Ex. 35, note to Ryder *v.* Wombwell in Exch. Ch. The case was not cited before the Court of Exchequer. See, also, Bainbridge *v.* Pickering, 2 Wm. Bl. 1325; Brayshaw *v.* Eaton, 5 Bing. N. C. 231.

(*a*) Barnes *v.* Toye, *supra*; Foster *v.* Redgrave, *supra*.

(*b*) Turner *v.* Frisby, 1 Stra. 168; Rainsford *v.* Fenwick, Carter, 215.

(*c*) Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480.

(*d*) Turberville *v.* Whitehouse, 1 C. & P. 94.

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

lutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts." Littledale, J., concurred in this view.

But in the previous case of Warwick *v.* Bruce (*f*) (not cited in Thornton *v.* Illingworth), where the infant was plaintiff by his next friend, it appeared that the infant had paid 40*l.*, part of the total price of 87*l.* 10*s.* which he had agreed to give for a quantity of potatoes, and Lord Ellenborough nonsuited the plaintiff on the objection that the contract was a trading contract. A new trial was granted, Lord Ellenborough saying: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant (for he had paid 40*l.*, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment), I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do."

This case is not reconcilable with the *dicta* of the judge in Thornton *v.* Illingworth, for it is plain that, if a contract is *absolutely void*, no action can be maintained on it or for the breach of it by anybody. The facts and circumstances of the two cases are widely dissimilar, and the *decision* in the earlier case seems to be more in accordance with general principles than the *reasoning* in the latter case. This language of the learned judges in Thornton *v.* Illingworth was wider than was required for the decision of the case before them, and another proposition contained in the same opinion has been overruled, as shown by Lord Denman in Bateman *v.* Pinder (*g*), decided in 1842.

[The Infants' Relief Act, 1874, *post*, applies to the trading contracts of an infant; and an infant trader cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for the purposes of trade (*h*).

§ 27. Previous to the Infants' Relief Act] an infant [might], on arriving at the age of twenty-one years, ratify and confirm a purchase made during infancy, but only in writing. By the 9 Geo. IV. c. 14,

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

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

(*h*) Ex parte Jones, 18 Ch. D. 109, C. A., overruling Ex parte Lynch, 2 Ch. D. 227; and a decision to the same effect in Ireland, In re Rainey, 3 Ir. L. R. (Ch.) 459; and see Reg. *v.* Wilson, 5 Q. B. D. 28, C. C. R.

s. 5 (usually called Lord Tenterden's Act), it [was] provided, "that no action shall be maintained whereby to charge any person upon any *promise made after full age*, to pay any debt contracted during infancy, or *upon ratification, after full age, of any promise or simple contract made during infancy*, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

The legal interpretation of the words (also used in the Statute of Frauds), "some writing signed by the party to be charged therewith," is treated of in Part II. Ch. 7 of this Book. On the question of the sufficiency of the words used in the written promise to satisfy the requirement of the statute, Rolfe, B., in delivering the judgment of the Exchequer of Pleas in Harris *v.* Wall (*i*), held that the act distinguished between a *new promise* and a *ratification;* and in the case before the court, the defendant was held liable on the letters written by him, as amounting to a ratification, though not a new promise. And the test of a ratification was given in these words: "Any written instrument, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification." In the report of that case, the reader will find all the previous cases cited and reviewed in the arguments of the counsel (*k*).

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

[However, section 5 of 9 Geo. IV. c. 14 has now been repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66); and by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), it is provided by section 1 as follows: "All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or *for goods supplied or to be supplied* (other than contracts for necessaries),[1] and all accounts stated with

(*i*) 1 Ex. 122.

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

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

[1] [A bill of exchange, though given for necessaries, is void under this act. In re Solty-

infants, shall be *absolutely void:* provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

And by section 2 that: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The 2d section has been held to apply to a ratification after the passing of the act of a contract made during infancy before it (*m*). It would probably also be held that a ratification could not be used as a set-off (*n*). The *ratio decidendi* of Rawley *v.* Rawley, which was decided under 9 Geo. IV. c. 14, s. 5, was that a set-off under the Statutes of Set-off must be of an actionable debt; and that the debt in that case, not having been ratified in writing so as to comply with the provisions of the statute, and therefore not being actionable, could not be used by way of set-off.

Mr. Pollock points out in his work on Contracts (4th ed. at p. 62), that the expression contracts "for goods supplied or to be supplied" is not free from obscurity. Had the words been instead "*for payment for* goods supplied," etc., the meaning would have been clear. No cases relating to sales of goods (*o*) appear to have been as yet decided under the act, but, from a consideration of its language, the effect of the act with reference to this class of contracts seems to be as follows: —

When the infant is *the purchaser* (except where he contracts for the purchase of necessaries), by the 1st section the contract is absolutely void; it therefore follows that the 2d section is superfluous.

When the infant is *the seller*, the 1st section seems to have no application, and the legal effect of the contract remains the same as it was at common law before the act, *i. e.* it is voidable at the infant's option, and he may adopt and enforce it upon attaining his majority, or even before (*p*). But the 2d section, where the words "*No action shall be brought* whereby to charge any person," etc., are to be observed, will have the effect of protecting the infant seller against an

(*m*) Ex parte Kibble, 10 Ch. App. 373.

(*n*) Rawley *v.* Rawley, 1 Q. B. D. 460, C. A.

(*o*) Cf. Coxhead *v.* Mullis, 3 C. P. D. 439; Northcote *v.* Doughty, 4 C. P. D. 385; Ditcham *v.* Worrall, 5 C. P. D. 410, — all cases of breach of promise of marriage.

(*p*) Warwick *v.* Bruce, 2 M. & S. 205.

koff, (1891), 1 Q. B. 413. But a payment by an infant, for the use of a house and furniture, cannot be recovered back. Valentini *v.* Canali, 24 Q. B. D. 166 (1889). — E. H. B.]

action by the purchaser, although the infant may have ratified the contract after reaching full age.]

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

So far as relates to supplies of necessaries to a person of unsound mind, there can be no question that, where no advantage is taken of his condition by the vendor, the purchase will be held valid (*r*).

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

[But a contract entered into by a person who is so drunk as not to know what he is doing is *voidable* only, and not void, and may therefore be ratified by him when he becomes sober (*u*).

§ 31. At common law] a *married woman* is absolutely incompetent to enter into contracts during coverture, and has in contemplation of law no separate existence, her husband and herself forming but one person (*x*). She cannot even, while living apart from her husband

(*q*) Molton *v.* Camroux, 2 Ex. 487; and in Error, 4 Ex. 17. See, also, Niell *v.* Morley, 9 Ves. Jr. 478; Beavan *v.* M'Donnell, 9 Ex. 309; Drew *v.* Nunn, 4 Q. B. D. 661, C. A., where Brett, L. J. (at p. 669), says: "From the mere fact of mental derangement, it ought not to be assumed that a person is incompetent to contract. Mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered."

(*r*) Manby *v.* Scott, 1 Sid. 112; Dane *v.* Kirkwall, 8 C. & P. 679; Wentworth *v.* Tubb, 1 Y. & C., N. C. 171; Nelson *v.* Duncombe, 9 Beav. 211; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170; 62 L. T. R. 342.

(*s*) Molton *v.* Camroux, 4 Ex. 17; Pitt *v.* Smith, 3 Camp. 33; Fenton *v.* Holloway, 1 Stark. 126; Gore *v.* Gibson, 13 M. & W. 623; Cooke *v.* Clayworth, 18 Ves. Jr. 12.

(*t*) Gore *v.* Gibson, 13 M. & W. 623.

(*u*) Matthews *v.* Baxter, L. R. 8 Eq. 132, where the use of the word "void" in Gore *v.* Gibson is commented on.

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

and enjoying a separate maintenance secured by deed, make a valid purchase on her own account, even for necessaries, and when credit is given to her there is no remedy but an appeal to her honor (*y*). The contract with her is not, as in the case of an infant, voidable only, but it is absolutely void, and therefore incapable of ratification after her coverture has ceased (*z*).

§ 32. The common law exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser are well defined. The first is, when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment (*a*). The disability of the wife in such cases is said to be suspended, for her own benefit, that she may be able to procure a subsistence. She may therefore bind herself as purchaser when her husband, a convict sentenced to transportation, has not yet been sent away (*b*), and also when he remains away after his sentence has expired (*c*). But not if he abscond and go abroad in order to avoid a charge of felony (*d*).

§ 33. It was held in some early cases that where a woman's husband was an alien and resided abroad, and she lived in England and contracted debts here, she was liable; Lord Kenyon, in one case, putting the decision "on the principle of the old common law, where the husband had abjured the realm" (*e*). But this principle was held not to apply to the case of Englishmen who voluntarily abandoned the country (*f*). More modern cases seem to throw very strong doubt on the earlier doctrine as regards the capacity of a woman, whose husband is an alien residing abroad, to contract debts for which she can be sued in England. In Kay *v.* Duchesse de Pienne, where Lord Ellenborough's ruling at Nisi Prius was confirmed by the court in Banco (3 Camp. 123), his Lordship confined the doctrine of Lord Kenyon to cases where the husband *has never been in the kingdom*, not simply residing abroad, separate from his wife. And in Boggett *v.* Frier, 11 East, 303, the court observed to counsel that all these old cases were, so far as opposed to Marshall *v.* Rutton (8 T. R. 545), overruled by that case. In Bardon *v.* Keverberg, where the defendant pleaded coverture, plaintiff replied that defendant's husband was an alien residing abroad, and had never been within the United Kingdom; and that the

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

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

(*a*) Ex parte Franks, 7 Bing. 762; Sparrow *v.* Carruthers, cited in n., 1 T. R. p. 6; De Gaillon *v.* L'Aigle, 1 B. & P. 357.

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

(*c*) Carrol *v.* Blencow, 4 Esp. 27.

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

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

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

debt was contracted by the defendant in England, where she was living separate and apart from her husband as a *feme sole*, and that the plaintiff gave credit to her as a *feme sole;* and that she made the promise in the declaration mentioned as a *feme sole*. There was no demurrer, but the case was tried on the facts alleged by the replication, and denied by rejoinder, and the verdict for plaintiff was set aside by the court in Banco. Parke, B., said: "Supposing the replication good, *although I have a strong opinion that it is not* (because the cases in which the wife has been held liable, her husband being abroad, apply only where he is *civiliter mortuus*), you are bound under it to make out that the husband was an alien, that he was resident abroad, and never in this country, which facts are now admitted; and *also* that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her to be a *feme sole;*" and the same learned judge threw doubt upon the report of what Lord Ellenborough said in Kay *v.* Duchesse de Pienne (*g*).

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

§ 35. The only remaining exception to the absolute incapacity of a married woman to bind herself as purchaser during coverture is one which arises under the custom of London, and is confined to the city of London. By that custom, a *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the city courts, in all matters arising out of her dealings in her trade in London. In the well-known

(*g*) Barden *v.* Keverberg, 2 M. & W. 61.

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

case of Beard *v.* Webb (*i*), where Lord Eldon, C. J., delivered the judgment of Cam. Scacc., reversing that of the King's Bench, this custom is elaborately considered, in connection with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft."

§ 36. In equity, where a married woman had separate estate [without restraint on anticipation (*k*)] she was, to a certain extent, considered as a *feme sole* with respect to that property, and might so contract as to render it liable for the payment of her debts. In respect of her purchases the law was that if she, having separate property [without restraint on anticipation], enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and in entering into such engagement she purports to contract not for her husband but for herself, and on the credit of her separate estate, and it is so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable (*l*).

§ 37. [Previous to the Married Women's Property Act, 1882, legislation had already made wide inroads upon the common law rules to which reference has been made. By 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may obtain an order to protect her earnings and property, the effect of which order during its continuance is to place her "in the like position in all respects with regard to property and contracts as she would be under this act if she obtained a decree of judicial separation." And the effect of such a decree is stated by the 26th section to be that "the wife shall while so separated be considered as a *feme sole for the purposes of contract*, and wrongs and injuries, and *suing and being sued* in any civil proceeding" (*m*). Further provision is made by the 21 & 22 Vict. c. 108, ss. 8, 9, 10, for the protection of persons dealing with wives who have obtained the order above described.

The 33 & 34 Vict. c. 93 (amended by 37 & 38 Vict. c. 50) con-

(*i*) 2 B. & P. 93. See, also, Macq., Husband and Wife, 361, ed. 1872, where this custom is set out at length.

(*k*) Pike *v.* Fitzgibbon, 17 Ch. D. 454, C. A.

(*l*) Mrs. Matthewman's case, 3 Eq. 781, 787. See, also, Shattock *v.* Shattock, 2 Eq. 182; [Ankeney *v.* Hannon, 147 U. S. 118, and cases cited. S. C. B.]; Johnson *v.* Gallagher, 3 De G. F. & J. 494; London Chartered Bank *v.* Lemprière, L. R. 4 P. C. 572; Picard *v.* Hine, 5 Ch. App. 274; Pike *v.* Fitzgibbon, 17 Ch. D. 454, C. A.

(*m*) See Ramsden *v.* Brearley, L. R. 10 Q. B. 147.

ferred upon married women a separate estate in certain specified property, including their wages or earnings and the investments thereof, deposits made by them in savings banks, property in the funds, and property devolving upon them on an intestacy, and also conferred upon them the same capacity to contract with reference to this "statutory" separate estate which they possessed in equity with reference to their equitable separate estate; but a creditor could not enforce a claim against the separate estate without joining the husband as a defendant in the action.

And now the 45 & 46 Vict. c. 75 (The Married Women's Property Act, 1882), repealing the earlier acts of 1870 and 1874, except as to any rights acquired or liabilities accruing under them, has entirely altered the position of a married woman at common law, and in some important respects her position in equity. It enables a married woman (section 1, sub-section 1) to acquire, hold, and dispose of every species of property as though she were a *feme sole;* to enter into and render herself liable *in respect of and to the extent of her separate property* on any contract, and (sub-section 2) to sue and be sued apart from her husband; and confers upon her for these purposes an independent status. It appears to destroy, so far as relates to property, the old common law doctrine of conjugal unity (*n*).

§ 37 a. The effect of the act as contained in the first five sections is, that when a married woman is a purchaser, the seller may now bring an action either in the Queen's Bench (*o*) or the Chancery Division of the High Court against her alone, for the purpose of enforcing his claim against her separate property; but it will still be necessary to join the husband as defendant in those cases where alternative relief can be obtained against him. What will be included in the wife's separate property will depend to some extent upon the date of the marriage. It will comprise all property settled to her separate use without restraint on anticipation, and, if the marriage took place after the commencement of the act (section 2), all real and personal property belonging to her at the time of the marriage, or acquired by or devolving upon her after marriage; if the marriage took place before the commencement of the act (section 5), all real and personal property to which her title accrued after the commencement of the act. Her title will be considered as accruing when she *first* acquires her interest in the property. It follows that the reversionary interest, whether vested or contingent, of a married woman, to

(*n*) See In re March, 24 Ch. D. 222; reversed on appeal, 27 Ch. D. 166, C. A., but the dictum of Chitty, J., is not affected by anything said in the Court of Appeal.

(*o*) The Queen's Bench Division now possesses the requisite machinery for taking accounts with all necessary inquiries and directions usual in the Chancery Division.

which she acquired a title before the act, does not become her separate estate when it falls into possession after the act (*p*).

The married woman's capacity to contract is subject to the very important limitation contained in section 1, sub-section 2, of the act. She is capable of entering into and being bound by any contract, but only "in respect of and to the extent of her separate property." It follows that no binding contract is created unless there is some separate property, however small, in existence at the time of the inception of the contract; and the burden of proof rests upon the creditor (*q*). Such proof once established, the presumption will be (section 1, sub-section 3) that the married woman's contract of purchase was made with reference to her separate property, and (section 1, sub-section 4) it will bind not only separate property of which she was possessed or to which she was entitled at the time of the contract, but also all after-acquired separate property (*r*).

The married woman, under the provisions of the act, is not rendered personally liable, but, as in equity before the act, an obligation is incurred which may be discharged, not by reaching her personally, but by reaching her separate property (*s*). In the language of Bowen, L. J., in a recent case (*t*), her liability is a "proprietary" as distinguished from a personal one.

The act expressly states that a married woman may sue and be sued "in all respects as if she were a *feme sole*." Judgment may therefore be obtained against her whether she defends the action or is in default, but execution will only issue against her separate estate, which she is not restrained from anticipating (*u*). The proper form of judgment against the separate estate of a married woman was settled by the Court of Appeal in the very recent case of Scott *v.* Morley (*x*).

A married woman (section 1, sub-section 5) is, in respect of her separate property, rendered subject to the bankruptcy laws in the particular case where she carries on a trade separately from her husband, and not otherwise, and this provision is confirmed by the Bankruptcy Act, 1883 (*y*).

(*p*) Reid *v.* Reid, 31 Ch. D. 402, C. A., overruling Baynton *v.* Collins, 27 Ch. D. 604, and settling a singular conflict of judicial opinion upon the point.

(*q*) Palliser *v.* Gurney, 19 Q. B. D. 519, C. A.; In re Shakespear, 30 Ch. D. 169.

(*r*) Overruling on this point Pike *v.* Fitzgibbon, 17 Ch. D. 454, C. A. (1881). See, also, Bursill *v.* Tanner, 13 Q. B. D. 691. The old law still applies where the contract was made before the date of the act, and judgment cannot then be obtained against the after-acquired separate property. Turnbull *v.* Forman, 15 Q. B. D. 234, C. A.

(*s*) Scott *v.* Morley, 20 Q. B. D. 120, C. A.; Draycott *v.* Harrison, 17 Q. B. D. 147.

(*t*) Scott *v.* Morley, *supra*.

(*u*) Sect. 19 of the act; Bursill *v.* Tanner, 13 Q. B. D. 691; Perks *v.* Mylrea, W. N. 1884, page 64.

(*x*) 20 Q. B. D. 120; and see Bursill *v.* Tanner, *supra*.

(*y*) Sect. 152; Ex parte Coulson, 57 L. J. Q. B. 149. This was the law previous to and under the Act of 1870; see Ex parte Jones, 12 Ch. D. 484, C. A., solving the doubt expressed by Mellish, L. J., in Ex parte Holland, 9 Ch. 307, at p. 311.

As to what constitutes a married woman's separate trade or business, the reader is referred to the cases of Ashworth *v.* Outram (*z*), Lovell *v.* Newton (*a*), and In re Dearmer (*b*).

It is important to observe (section 19) that the act does not affect settlements, nor render inoperative any restraint upon anticipation, present or future.

The principle of law, therefore, so far as regards separate property which is subject to a restraint upon anticipation, is not affected by the passing of the act, and such separate estate cannot be reached by the creditor, except when the restraint exists under a settlement made fraudulently by the married woman herself with the view of defeating her creditors (*c*).

It may be a question how far the presumption which is now raised, that the married woman contracted with respect to her separate property, will be rebutted by proof that she has contracted under circumstances in which, before the act, she would have had implied authority to pledge her husband's credit.[1] Probably it would be held that the act has not affected the wife's position as her husband's agent, and the husband's liability in such cases, but the point is one more properly to be considered under the law of agency.]

AMERICAN NOTE.

§§ 6–37.

WHO MAY SELL. It is hardly necessary to cite American authorities to the general proposition that no person can by a sale give a good title to property which he does not own. See Smith *v.* Clews, 114 N. Y. 190. The exceptions prove the rule.

1. A sale in **market overt** is with us no exception. This was first established in America by the Supreme Judicial Court of Massachusetts in Towne *v.* Collins, 14 Mass. 500 (1785), where a thief sold a pair of oxen to the defendant, and the real owner sustained trover against him therefor. See, also, Hosack *v.* Weaver, 1 Yeates, 478 (1795); Southwick *v.* Harndell, 2 Dane Ab. 286 (1796); Hardy *v.* Metzgar, 2 Yeates, 347; Browning *v.* Magill, 2 Harr. & Johns. 308, where the sale was actually made in a market established by law; Dame *v.* Baldwin, 8 Mass. 518; Hinckley *v.* Merchants' National Bank, 131 Mass. 149; Easton *v.* Worthington, 5 S. & R. 130; Heacock *v.* Walker, 1 Tyler, 338; Wheel-

(*z*) 5 Ch. D. 923, C. A.
(*a*) 4 C. P. D. 7.
(*b*) 53 L. T. N. S. 905.
(*c*) Bursill *v.* Tanner, *supra*. Upon the effect of the section, see In re Whitaker, 34 Ch. D. 227, C. A.

[1] [See the case of Leak *v.* Driffield, 24 Q. B. D. 98, a purchase by a married woman of clothing for herself and her children, in which it was presumed that she was not contracting for herself. — E. H. B.]

wright *v.* Depeyster, 1 Johns. 471; Mowrey *v.* Walsh, 8 Cow. 238; Hoffman *v.* Carow, 20 Wend. 21, and 22 Ib. 285; Bryant *v.* Whitcher, 52 N. H. 158; Ventress *v.* Smith, 10 Pet. 176; Roland *v.* Gundy, 5 Ohio, 202; Fawcett *v.* Osborn, 32 Ill. 425; Jones *v.* Nellis, 41 Ib. 482; Arendale *v.* Morgan, 5 Sneed, 703. Even in England, although the sale in market overt may pass a good title, the vendor himself, though innocent of the theft, is nevertheless liable in trover to the real owner, the sale being a conversion. Delaney *v.* Wallis, 14 L. R. (Ir.) 31 (1883).

It has sometimes been thought that public sales on execution by a sheriff resembled the English sales in market overt, and passed a good title to the buyer, even though the goods sold did not belong to the execution debtor; but the contrary is now well settled. Buffum *v.* Deane, 8 Cush. 41; Griffith *v.* Fowler, 18 Vt. 390; Shearick *v.* Huber, 6 Binn. 2; Champney *v.* Smith, 15 Gray, 512; Bryant *v.* Whitcher, 52 N. H. 158; Symonds *v.* Hall, 37 Me. 358; Coombs *v.* Gorden, 59 Me. 111; Williams *v.* Miller, 16 Conn. 144; Stone *v.* Ebberly, 1 Bay, 317. So of public sales, by officers of the United States government, of property wrongfully taken from the owner, and branded with the mark "U. S." Dawson *v.* Susong, 1 Heisk. 243; Black *v.* Jones, 64 N. C. 318. But a sheriff may sell the property of the *defendant in the execution*, and give a good title thereto, although the execution or judgment on which it was based was erroneous and *voidable*. See Bank of U. S. *v.* Bank of Washington, 6 Pet. 8; Stinson *v.* Ross, 51 Me. 556; Park *v.* Darling, 4 Cush. 197; Gay *v.* Smith, 38 N. H. 171; Jackson *v.* Cadwell, 1 Cow. 623; Woodcock *v.* Bennet, 1 Cow. 711; Feger *v.* Kroh, 6 Watts, 294. Otherwise if the judgment or execution be absolutely void. Camp *v.* Wood, 10 Watts, 118; Caldwell *v.* Walters, 18 Pa. St. 79. And if the judgment or execution had already been duly satisfied, a subsequent sale under it conveys no title, even to an innocent purchaser. The power to sell is absolutely extinguished by the satisfaction. Kennedy *v.* Duncklee, 1 Gray, 65, in which the subject is very carefully examined by Mr. Justice Metcalf. See, also, Laval *v.* Rowley, 17 Ind. 36; State *v.* Salyers, 19 Ib. 432; Hoffman *v.* Strohecker, 7 Watts, 86; Gibbs *v.* Neely, Ib. 305; Wood *v.* Colvin, 2 Hill, 566. Some of these cases, but not all, were sales to the plaintiff in the judgment, who must have known of the previous payment. But any distinction between one having and one not having such knowledge is expressly repudiated in Kennedy *v.* Duncklee, *supra*.

2. As to **negotiable securities** the English common law rule generally still prevails in America, and such instruments pass from hand to hand like coin or bank-bills; so that any holder may sell and transfer a good title thereto, before maturity, to an innocent taker for value, in the ordinary course of business, whether he himself be the true owner or not. Some of the important cases on this point are Wheeler *v.* Guild, 20 Pick. 545; Swift *v.* Tyson, 16 Pet. 1; Brush *v.* Scribner, 11 Conn. 388; Goodman *v.* Simonds, 20 How. 343; Seybel *v.* National Currency Bank, 54 N. Y. 288, containing many authorities. And this rule has been applied to United States bonds payable to bearer. Vermilye *v.* Adams Express Co. 21 Wall. 138; Spooner *v.* Holmes, 102 Mass. 503. But the details of this doctrine belong rather to a treatise on Bills and Notes than to a work on Sales.

3. As to sales by **pledgees**, the American decisions uniformly recognize the power of a pledgee, *after a default*, to make a valid sale of the entire pledge (without judicial process), and pass a good title to the purchaser. See Stearns *v.* Marsh, 4 Denio, 227; Washburn *v.* Pond, 2 Allen, 474; Wheeler *v.* Newbould, 16 N. Y. 392; and many other cases. Good faith and due notice are always requisite, but the mode and manner of making such sales cannot be discussed here. See Story on Bailments, § 308; Schouler on Bailments, §§ 229, 230.

4. The right of a **master of a vessel** to sell the ship and cargo, in case of actual necessity, and only then, is well established in America, the circumstances being held to create an implied agency. See The Amelie, 6 Wall. 26; Post *v.* Jones, 19 How. 150; The Ship Packet, 3 Mason, 255; Pope *v.* Nickerson, 3 Story, 466; The Sarah Ann, 2 Sumn. 215; Myers *v.* Baymore, 10 Pa. St. 114; Howland *v.* India Ins. Co. 131 Mass. 255; Gates *v.* Thompson, 57 Me. 442; Jordan *v.* Warren Ins. Co. 1 Story, 342; and many other cases; but a consideration of what circumstances create such necessity would lead us too far from our present subject.

5. **Factors' acts** have been passed in many American States, with somewhat different phraseology, and the decisions of each State therefore must be considered with reference to the language thereof. Some general considerations apply to them all.

(1.) The person so attempting to sell under a statute power must be really and truly a factor, consignee, or other agent intrusted with the possession by the owner for the purpose of sale; and the authorities are inclined to construe these words somewhat strictly. See Stollenwerck *v.* Thacher, 115 Mass. 224, a case of a broker; Nickerson *v.* Darrow, 5 Allen, 419; Thacher *v.* Moors, 134 Mass. 156; Cairns *v.* Page, 165 Mass. 552; First Bank of Toledo *v.* Shaw, 61 N. Y. 299; Kinsey *v.* Leggett, 71 N. Y. 395; Mechanics', etc., Bank *v.* Farmers', etc., Bank, 60 N. Y. 40; Soltau *v.* Gerdau, 119 N. Y. 380; Dows *v.* National Exch. Bank, 91 U. S. 618. The Factor's Act, 52 & 53 Vict. c. 45, § 2, sub.-s. 1 (1889), has no reference to a salesman authorized only to sell small articles to retail buyers upon commission. If the salesman pledges the articles, the owner may recover them. Hastings *v.* Pearson (1893), 1 Q. B. 62.

(2.) He must have the actual possession of the goods, or the documentary evidence of title. See Howland *v.* Woodruff, 60 N. Y. 73; Bonito *v.* Mosquera, 2 Bosw. 401, containing a very valuable examination of the Factor's Act, though the views of what is meant by "possession," there expressed, appear to have been somewhat modified in the later cases of Pegram *v.* Carson, 10 Bosw. 505, and Cartwright *v.* Wilmerding, 24 N. Y. 521.

(3.) If the act merely authorizes the factor to *sell*, he cannot validly pledge the goods for his own debts even to a *bona fide* pledgee. See De Wolf *v.* Gardner, 12 Cush. 19; Ins. Co. *v.* Kiger, 103 U. S. 352; Michigan State Bank *v.* Gardner, 15 Gray, 374; Wright *v.* Solomon, 19 Cal. 64; Gray *v.* Agnew, 95 Ill. 315; McCreary *v.* Gaines, 55 Tex. 485; Laussatt *v.* Lippincott, 6 S. & R. 391; Hazard *v.* Fiske. 18 Hun, 277, 83 N. Y. 287; Bott *v.* McCoy, 20 Ala. 578. Some statutes expressly give power to pledge.

(4.) These acts do not generally authorize the factor to transfer the

goods in payment of his own preëxisting debt. And an innocent purchaser for such consideration takes no title; nor does *his* vendee. Warner *v.* Martin, 11 How. 209.

(5.) The factor may sell on credit, and pass a good title, in the absence of any instructions or usage to the contrary. Pinkham *v.* Crocker, 77 Me. 563; Greely *v.* Bartlett, 1 Greenl. 172; Goodenow *v.* Tyler, 7 Mass. 36.

(6.) In Jones *v.* Hodgkins, 61 Me. 480, the interesting question arose whether a factor's *bona fide* sale of goods still in his possession, accompanied by actual delivery, was valid, when the principal had previously sold them to another, but had made no delivery, nor given any order on, or notice to, the factor of such prior sale. A majority of the court held the sale valid, a conclusion which seems right enough, on the familiar principles applicable to two sales by the owner himself; in which cases it is clear that, if delivery be first made to the second vendee, he holds the property in preference to the former; at least when he buys in good faith. Cummings *v.* Gilman, 90 Me. 524; Lanfear *v.* Sumner, 17 Mass. 110; Brown *v.* Pierce, 97 Mass. 48.

In analogy to the principle of the factors' acts, there may be some other instances *at common law* where the owner of property has so far intrusted another with the possession and apparent ownership that his sale to a *bona fide* purchaser would pass a good title. In Dias *v.* Chickering, 64 Md. 348, the appellee had consigned a piano to the firm of B. & E. for sale. B., with his partner's assent, removed the instrument to his own home. Some ten months later he sold the piano to the appellant, who was a dealer in furniture, and who bought in good faith, paying a fair price. The appellee brought replevin. The majority of the court held that appellant was to be protected in his title as against appellee. See Crocker *v.* Crocker, 31 N. Y. 507; Nixon *v.* Brown, 57 N. H. 34; Rawles *v.* Deshler, 28 How. Pr. 66, 4 Abb. Ap. Cas. 12; Western Union R. R. *v.* Wagner, 65 Ill. 197. But it requires some act of the owner strongly indicating a power of alienation in such possessor. Quinn *v.* Davis, 78 Pa. St. 15; McMahon *v.* Sloan, 12 Ib. 229, carefully reviewing the authorities; Barker *v.* Dinsmore, 72 Ib. 427; Galvin *v.* Bacon, 11 Me. 28.

6. It is hardly necessary to add that a valid sale of personal property may be made by the real owner, and a perfect title given, although the same is at the time in the adverse possession of another; and the buyer may recover the same in his own name; the doctrine of disseisin (notwithstanding some early views to the contrary) does not apply to personal property. Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Ib. 147; Hubbard *v.* Bliss, 12 Allen, 590; Tome *v.* Dubois, 6 Wall. 554; McKee *v.* Judd, 12 N. Y. 622; Van Hassell *v.* Borden, 1 Hilt. 128; Hall *v.* Robinson, 2 N. Y. 293. And this power of making a valid sale exists although the property is at the time under an actual attachment against the owner, subject of course to the creditor's lien thereon. Fettyplace *v.* Dutch, 13 Pick. 388; Appleton *v.* Bancroft, 10 Met. 231; Storey *v.* Agnew, 2 Bradw. 353; First Ward National Bank *v.* Thomas, 125 Mass. 278; Kliuck *v.* Kelly, 63 Barb. 622; Mumper *v.* Rushmore, 14 Hun, 591.

WHO MAY BUY. 1. A minor may buy, and acquire as good a title as an adult; but his legal liability for his purchases is very different, and first

as to necessaries. These he must pay for; and he may be sued on his note or written promise given to the plaintiff for them. Dubose *v.* Wheddon, 4 McCord, 221; Haine *v.* Tarrant, 2 Hill (S. C.), 400; Smith *v.* Young, 2 Dev. & Batt. 26; Hyman *v.* Cain, 3 Jones (N. C.), 111; the amount recovered being not necessarily the price agreed, but only their reasonable value. Earle *v.* Reed, 10 Met. 387 (the leading case); Gregory *v.* Lee, 64 Conn. 413; Bradley *v.* Pratt, 23 Vt. 385; Guthrie *v.* Morris, 22 Ark. 411; McMinn *v.* Richmonds, 6 Yerg. 9; Rainwater *v.* Durham, 2 N. & McC. 524; Morton *v.* Steward, 5 Bradw. 533. Therefore a minor is not bound by his executory contract even for necessaries, which he never received. Gregory *v.* Lee, 64 Conn. 407. And see Walter *v.* Everard [1891], 2 Q. B. 369. And in any suit for alleged necessaries two questions always arise: 1st. Whether the articles come within the class of things called necessaries, for which an infant can be liable under any circumstances; 2d. Whether the specific articles sued for were actually necessary for the defendant in this particular case. The first is for the court, the second for the jury.

And necessaries for a minor, whatever they may be for other persons, seem to be limited to personal wants, either of body or mind, but it does not follow that all purchases for such wants are necessary; a species of logic which has led some to assume that because an infant is not liable for anything not personally beneficial to him, he is liable for all things which are so beneficial. Both are *non sequiturs*.

Whether the articles sued for were actually necessary or not, is a question of fact, to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively that some articles, as, for instance, diamonds or race horses, cannot be necessaries for any minor. Davis *v.* Caldwell, 12 Cush. at p. 514; Bent *v.* Manning, 10 Vt. 225; Beeler *v.* Young, 1 Bibb, 519; Stanton *v.* Willson, 3 Day, 37; Mohney *v.* Evans, 51 Pa. St. 80; Glover *v.* Ott, 1 McCord, 572. In a clear case, therefore, the court has power to direct authoritatively, as a matter of law, that the infant is not primarily liable, and courts have frequently held that purchases for business purposes do not bind him: such as supplies to his vessel, A. B. *v.* Fogarty, 2 Dane Ab. 25; horses for business purposes, or their board if he has them, Merriam *v.* Cunningham, 11 Cush. 40; Mason *v.* Wright, 13 Met. 306; Grace *v.* Hale, 2 Humph. 27; Beeler *v.* Young, 1 Bibb, 520; Smithpeters *v.* Griffin, 10 B. Mon. 259; Rainwater *v.* Durham, 2 N. & McC. 524; Counts *v.* Bates, Harp. (S. C.) 464; farming supplies, Decell *v.* Lewenthal, 57 Miss. 331 (but Mohney *v.* Evans, 51 Pa. St. 80, leaves such a case to a jury); carriages for carrying passengers for profit, McCarthy *v.* Henderson, 138 Mass. 310; lumber to erect a dwelling-house, Freeman *v.* Bridger, 4 Jones Law (N. C.), 1; necessary repairs on it, Tupper *v.* Cadwell, 12 Met. 559; Wallis *v.* Bardwell, 126 Mass. 366; Phillips *v.* Lloyd, 18 R. I. 99; money borrowed for such purposes, West *v.* Gregg, 1 Grant, 53; Price *v.* Sanders, 60 Ind. 311; insurance on his stock of goods, N. H. Mut. Fire Ins. Co. *v.* Noyes, 32 N. H. 345; wages of his employees, Hughes *v.* Gallans, 10 Phil. Rep. 618; travelling expenses for pleasure, McKanna *v.* Merry, 61 Ill. 177; a college education, Middlebury College *v.* Chandler, 16 Vt. 686, though it seems that this last might be well left to the jury in each particular case; services or expenses of counsel in prosecuting a suit to protect his title to real estate, Phelps *v.* Worcester, 11 N. H. 51; but see

Epperson *v.* Nugent, 57 Miss. 45. Some of these cases may have proceeded upon the ground that the minor had a guardian whose right and duty it was to look after the minor's property.

On the other hand, it is held that things purchased for and adapted to his personal wants may be recovered for, if found by the jury to have been suitable in kind, quality, or degree. Barnes *v.* Barnes, 50 Conn. 572. And courts have allowed recoveries for such things as attorney's services in defending him on a bastardy process, Barker *v.* Hibbard, 54 N. H. 539, a valuable case; or in collecting a note due the infant, Thrall *v.* Wright, 38 Vt. 494; or in prosecuting a suit by a girl for her seduction, Munson *v.* Washband, 31 Conn. 303; for dental services, Strong *v.* Foote, 42 Conn. 203; for a wedding suit, Sams *v.* Stockton, 14 B. Mon. 232; Jordan *v.* Coffield, 70 N. C. 110; for money actually paid by the plaintiff at the minor's request to one who had supplied the necessaries, Swift *v.* Bennett, 10 Cush. 436; Randall *v.* Sweet, 1 Denio, 460; Kilgore *v.* Rich, 83 Me. 305; Conn *v.* Coburn, 7 N. H. 368; necessaries for his wife and children as well as himself, Cantine *v.* Phillips, 5 Harring. 428; Price *v.* Sanders, 60 Ind. 311. One of the important elements which always enters into the inquiry is, whether he had a parent or guardian able and willing to support him. If the minor had, then there could have been no necessity for the supplies furnished him, and his responsibility therefor must fail. Swift *v.* Bennett, 10 Cush. at p. 437; Guthrie *v.* Murphy, 4 Watts, 80; Connolly *v.* Hull, 3 McCord, 6; Wailing *v.* Toll, 9 Johns. 141; Perrin *v.* Wilson, 10 Mo. 451; Kline *v.* L'Amoureux, 2 Paige, 419; Atchison *v.* Bruff, 50 Barb. 381; McKanna *v.* Merry, 61 Ill. 177. Therefore an infant residing at home and under the care of his father is not liable even for things in themselves necessaries. If he were, the father would be deprived of his right to determine what the character of that support should be. And the mere poverty of the father, without any proof of a refusal or neglect to supply his son, does not render the latter liable. Hoyt *v.* Casey, 114 Mass. 397. And if he has sufficient ready money to buy for cash, it may be he is not liable for purchases on credit. Rivers *v.* Gregg, 5 Rich. Eq. 274.

It is for this reason an infant may always show that he was already fully supplied, and therefore, although the articles sued for were suitable in themselves, that they were not necessary for him when bought; this is a good defence, although the vendor had no knowledge of the existing supply. Barnes *v.* Toye, 13 Q. B. D. 410 (1884), a very important case; Johnstone *v.* Marks, 19 Q. B. D. 509. But the same rule had long before been laid down in this country. See Johnson *v.* Lines, 6 W. & S. 80 (1843). In Trainer *v.* Trumbull, 141 Mass. 527, a minor taken from the almshouse with his father's consent, and furnished by the plaintiff with a home and suitable necessaries, was held liable on an implied contract for their reasonable value, although the minor might have still had a home in the almshouse.

Emancipation by his father, and the carrying on of business for himself, does not enlarge his liability for non-necessaries. Mason *v.* Wright, 13 Met. 306. Not even if he falsely represents himself to the seller as of full age. The law of estoppel is not applicable. If not bound by his positive contracts, he certainly cannot be by his mere representations. Merriam *v.* Cunningham, 11 Cush. 40; Sims *v.* Everhardt, 102 U. S. 300; Burley *v.* Russell, 10 N. H. 184; Brown *v.* McCune, 5 Sandf. 224;

Conrad *v.* Lane, 26 Minn. 389; Whitcomb *v.* Joslyn, 51 Vt. 79; Studwell *v.* Shapter, 54 N. Y. 249; Bateman *v.* Kingston, 6 L. R. (Ir.) 328 (1880); Wieland *v.* Kobick, 110 Ill. 16; Baker *v.* Stone, 136 Mass. 405; Nash *v.* Jewett, 61 Vt. 501; Heath *v.* Mahoney, 7 Hun, 100. Whether a minor is or is not liable in tort for his misrepresentations as to his age is not fully agreed, but the full examination of that question does not belong to the law of sales. The burden of proving that the articles were necessaries is always on the plaintiff. Wood *v.* Losey, 50 Mich. 475; Thrall *v.* Wright, 38 Vt. 494; Nicholson *v.* Wilborn, 13 Geo. 475.

The Supreme Court of New Hampshire recently decided that an infant is liable for non-necessaries — goods to trade with — to the extent that they are really beneficial to him; a decision which of course abolishes all distinction between necessaries and other purchases, since he is liable only to the same extent, even for the necessaries of life. The practical application of the above doctrine by ordinary juries will probably do away with the defence of infancy altogether. Perhaps that was intended. Mr. Justice Stanley certainly supports the decision with much force. See Hall *v.* Butterfield, 59 N. H. 354 (1879); Bartlett *v.* Bailey, Ib. 408. After the infant has become of age, however, he may ratify his former purchases, even for non-necessaries, so as to make him liable on the original contract. Minock *v.* Shortridge, 21 Mich. 304. Keeping and using the property bought, or selling it after his majority, is one of the most effectual means of ratification, though not the only one. See Boyden *v.* Boyden, 9 Met. 519; Boody *v.* McKenney, 23 Me. 517; Lawson *v.* Lovejoy, 8 Greenl. 405; Aldrich *v.* Grimes, 10 N. H. 194; Cheshire *v.* Barrett, 4 McCord, 241; Alexander *v.* Heriot, 1 Bailey Eq. 223; Deason *v.* Boyd, 1 Dana, 45; Robinson *v.* Hoskins, 14 Bush, 393; Eubanks *v.* Peak, 2 Bailey, 497; Philpot *v.* Sandwich Man. Co. 18 Neb. 54. In Thing *v.* Libbey, 16 Me. 55, the minor resold the property *before* he was of age, and kept it afterwards as agent or trustee of his vendee; and this was held no ratification. And probably if a minor sold the property before his majority, the mere retention afterwards of the proceeds of such sale would not be a ratification of the original purchase. See Walsh *v.* Powers, 43 N. Y. 23.

As to a silent ratification, the better rule seems to be (notwithstanding some opinions to the contrary), that mere silence or failure to give notice of disaffirmance does not alone constitute at common law a ratification, in the absence of any continued use, benefit, or control of the property purchased. See Smith *v.* Kelley, 13 Met. 309; N. H. Mut. Fire Ins. Co. *v.* Noyes, 32 N. H. 345. This is sometimes regulated by statute. In a few American States a ratification must be in writing (see Hilton *v.* Shepherd, 92 Me. — (1898), 42 Atl. 387; Stimson's Am. Statute Law, § 4147), but in most the common law still prevails. When words alone are relied upon as a ratification of his promise to pay for goods purchased, they must amount to a new promise or positive intention to pay. A mere acknowledgment of the existence or justice of the debt, or that it ought to be paid, will not alone suffice. Proctor *v.* Sears, 4 Allen, 95; Ford *v.* Phillips, 1 Pick. 202; Wilcox *v.* Roath, 12 Conn. 550; Thompson *v.* Lay, 4 Pick. 48; Catlin *v.* Haddox, 49 Conn. 492. But positive proof is not necessary that at the time of the ratification he knew he was not originally liable. He is presumed to know the law on that subject as well as on others. Morse *v.* Wheeler, 4 Allen, 570, the leading case on that point; Taft *v.* Sergeant, 18 Barb. 320; Ring *v.* Jamison, 2 Mo. App.

584, S. C. 66 Mo. 424; Anderson *v.* Soward, 40 Ohio St. 325, also a valuable case; Clark *v.* Van Court, 100 Ind. 113; Bestor *v.* Hickey, 71 Conn. — (1898), 41 Atl. 555. Some dicta and decisions to the contrary no doubt exist. See Baker *v.* Kennett, 54 Mo. 82; Petty *v.* Roberts, 7 Bush, 410; Harmer *v.* Killing, 5 Esp. 102 (1804).

An infant's sales may also be avoided as well as his purchases, even during minority; and if duly avoided he may reclaim his property, wherever he can find it, and some say even in the hands of an innocent purchaser from his vendee. Shipman *v.* Horton, 17 Conn. 481; Stafford *v.* Roof, 9 Cow. 626; Chapin *v.* Shafer, 49 N. Y. 407; Towle *v.* Dresser, 73 Me. 252, a valuable case; Carr *v.* Clough, 26 N. H. 280; Myers *v.* Sanders, 7 Dana, 506.

The consideration of the minor's duty to return the consideration received, and of the other party's rights thereto after avoidance, would lead us too far from our present subject. This note and the foregoing authorities refer solely to an infant's purchases and sales of personal property. The consideration of his general rights and liabilities belongs to a treatise on Contracts, or on Infancy; and his power to bind his father by his purchases comes properly under the head of Agency.

2. The purchases and sales of a lunatic are voidable only, not void. The other party is always bound, even if the contract be wholly executory. Allen *v.* Berryhill, 27 Iowa, 540. The lunatic's purchase of necessaries is not even voidable. La Rue *v.* Gilkyson, 4 Pa. St. 375; Richardson *v.* Strong, 13 Ired. 106; Ex parte Northington, 1 Ala. Sel. Cas. 400; Sawyer *v.* Lufkin, 56 Me. 308; Van Horn *v.* Hann, 39 N. J. Law, 207; Skidmore *v.* Romaine, 2 Bradf. 122; Barnes *v.* Hathaway, 66 Barb. 457; Blaisdell *v.* Holmes, 48 Vt. 492. Even though the plaintiff knew his condition. In re Rhodes, 44 Ch. D. 94, 62 Law T. R. 342 (1890). And perhaps the word "necessaries" has a broader meaning than in case of infants. See Kendall *v.* May, 10 Allen, 59. Counsel fees rendered in good faith to test the question of his insanity come within this class. Hallett *v.* Oakes, 1 Cush. 296. So of medical aid to his wife. Pearl *v.* M'Dowell, 3 J. J. Marsh. 658. And the present tendency is to hold him liable for goods furnished or valuable services rendered, though not necessaries, if furnished in good faith, and without reason to suspect insanity, and he has not been judicially declared insane, and the other party cannot be put in *statu quo*. Young *v.* Stevens, 48 N. H. 133, an important case; Beals *v.* See, 10 Pa. St. 56; Ballard *v.* McKenna, 4 Rich. (S. C.) Eq. 358; Mut. Life Ins. Co. *v.* Hunt, 14 Hun, 169, 79 N. Y. 541, a loan of money; Matthiessen *v.* McMahon, 38 N. J. Law, 536; McCormick *v.* Littler, 85 Ill. 62; Lancaster Co. Bank *v.* Moore, 78 Pa. St. 407, a negotiable note given for borrowed money; Wilder *v.* Weakley, 34 Ind. 181; Fay *v.* Burditt, 81 Ind. 433; Abbott *v.* Creal, 56 Iowa, 175; Campbell *v.* Hill, 23 Up. Can. C. P. 473. But such knowledge or information as would lead a prudent person to suspect insanity may prevent a recovery, even if there was no bad faith. Lincoln *v.* Buckmaster, 32 Vt. 652; and at the second trial of Beavan *v.* McDonnell, cited by the author, the lunatic prevailed, because his demeanor at the time of making the contract was such "as to lead to the inevitable conclusion that he was insane." 10 Exch. 184. And see Alexander *v.* Haskins, 68 Iowa, 73 (1885).

3. That a sale made by one too **intoxicated** to understand the nature of the transaction may be set aside, although such intoxication be voluntary and not attributable to the other party, was abundantly settled in Barrett *v.* Buxton, 2 Aik. 167 (1827), the leading case in America on this subject. See, also, French *v.* French, 8 Ohio, 214; Warnock *v.* Campbell, 25 N. J. Eq. 485. Such sales, however, are only voidable, not void, and may be ratified when the party becomes sober. Carpenter *v.* Rodgers, 61 Mich. 384, and cases cited.

4. As to **married women** the modern statutes have so much enlarged their liabilities for their purchases that the older decisions have now but little application; but where the common law still prevails, a married woman's contracts are generally held absolutely void, — so void that her ratification of them, by a new promise after she becomes sole, is not generally binding. See Smith *v.* Allen, 1 Lans. 101; Watkins *v.* Halstead, 2 Sandf. 311; Waters *v.* Bean, 15 Geo. 358; Hayward *v.* Barker, 52 Vt. 429; Kennerly *v.* Martin, 8 Mo. 698; Musick *v.* Dodson, 76 Mo. 624, examining the authorities; Porterfield *v.* Butler, 47 Miss. 165. But there is much reason and some authority for saying that she might ratify *purchases for her own personal benefit*, such as *necessaries* for herself; or supplies for her own house; or improvements on her own estate. And a new promise to pay for them after she became sole has often been held valid. See Goulding *v.* Davidson, 28 Barb. 438, 26 N. Y. 604, in which the subject is elaborately examined; Hubbard *v.* Bugbee, 55 Vt. 506; Vance *v.* Wells, 8 Ala. 399. Hemphill *v.* McClimans, 24 Pa. St. 367, may perhaps go even too far in this direction.

Want of space prevents us from stating in full the various American statutes on the rights of married women; suffice it to say that many remove the married woman's disability altogether, while a few still provide, expressly or impliedly, that she cannot contract with her husband, or with a firm of which he is a member. See Edwards *v.* Stevens, 3 Allen, 315; Lord *v.* Parker, 3 Allen, 127; Ingham *v.* White, 4 Allen, 412; Plumer *v.* Lord, 7 Allen, 481; Woodruff *v.* Clark, 42 N. J. L. 198; Homan *v.* Headley, 58 N. J. L. 485; Stimson's American Statute Law, §§ 6400–6523; Kelly on the Contracts of Married Women.

CHAPTER III.

MUTUAL ASSENT.

SECTION I. — OF MUTUAL ASSENT.

	Sect.
Assent, express or implied	38
Must be mutual	39
And unconditional	39
And communicated	39
Inquiry as to terms not a rejection	40
Proposal retracted before acceptance	41
Promise to leave proposal open for acceptance	41
Retraction where parties in immediate communication	41
By correspondence	44
Proposer cannot retract offer after letter of acceptance has been posted	46
Proposal retracted before letter reaches destination	46
Revocation must be *received* before letter of acceptance posted	46
Revocation of acceptance	46
Can acceptor retract before his acceptance has been received by proposer?	46
Implied sale	47
Fraudulent third person	48
Sale implied by recovery in trover	49
Mistake in assent	50
As to thing sold	50
As to quantity	50 a
As to price	51
When language of agreement is unintelligible	52
Mistake or error in written contract may be corrected	53
As to collateral facts by one party	54
A party is estopped from denying that an intention *manifested* by him was his *real* intention	55
Mistake by buyer in motive	56
Showing wrong sample by mistake	57
As to person contracted with in general	58
American case	59
When caused by fraud	60
Conditional assent	61
Sale or return	61

SECTION II. — CIVIL AND AMERICAN LAW ON THIS SUBJECT.

	Sect.
Civil law — Quasi-contracts	62
American law	64
Criticisms on Cooke *v.* Oxley	64
Professor Bell	64
Mr. Story	64
Chancellor Kent's Editor	65
Mr. Duer	65
Review of the criticisms	66
American decisions as to bargains by correspondence	68
Civilians on the same question, Pothier	70
His reasoning unsatisfactory	71
Distinction between sale by correspondence, and order for purchase or sale, to an agent by letter	72
Where a letter of acceptance and a subsequent letter withdrawing acceptance reach proposer at the same time	74

SECTION I. — OF MUTUAL ASSENT.

§ 38. THE assent of the parties to a sale need not be express. It may be implied from their language (*a*), or from their conduct (*b*); may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as, if a customer takes up wares off a trades-

(*a*) See a curious case of what one of the judges termed a "grumbling" assent, in Joyce *v.* Swann, 17 C. B. N. S. 84.

(*b*) Brogden *v.* Metropolitan Railway Company, 2 App. Cas. 666, where the parties had *acted upon* the terms of a draft of a proposed agreement, which was intended to form the basis of a formal contract, to be afterwards executed by them both.

man's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods (*c*).

§ 39. But the assent must, in order to constitute a valid contract, be *mutual, and intended to bind both sides.* It must also *coexist at the same moment of time.* A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional.* If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer.

[The assent must either be *communicated* to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication, as, *e. g.*, in contracts by correspondence, the posting of the letter of acceptance; or the assent may be inferred from subsequent conduct; but an assent which is neither communicated to the other party nor followed up by action, a mere "mental assent," as it is termed, is insufficient (*d*).]

The cases are very numerous (*e*) in support of those principles which are common to all contracts. A few only of those peculiarly illustrative of the rules as applied to contracts of sale need be specially noticed.

§ 40. In Hutchinson *v.* Bowker (*f*), the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept, expecting you will give us *fine barley*, and *full weight.*" The defendant wrote back: "You say you expect we shall give you 'fine

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

(*d*) Brogden *v.* Metropolitan Railway Company, 2 App. Cas. 666, where Lord Selborne, at p. 688, and Lord Blackburn, at p. 691, take occasion to dissent from some unreported expressions of opinion on this point by the judges of the Court of Common Pleas.

(*e*) Champion *v.* Short, 1 Camp. 53; Routledge *v.* Grant, 4 Bing. 653; Hutchinson *v.* Bowker, 5 M. & W. 535; Jordan *v.* Norton, 4 M. & W. 155; Wontner *v.* Shairp, 4 C. B. 404; Duke *v.* Andrews, 2 Ex. 290; Chaplin *v.* Clarke, 4 Ex. 403; Forster *v.* Rowland, 7 H. & N. 103, and 30 L. J. Ex. 396; Honeyman *v.* Marryatt, 6 H. L. C. 112; Andrews *v.* Garrett, 6 C. B. N. S. 262; Proprietors of English, &c. Credit Co. *v.* Arduin, L. R. 5 H. L. 64; Addinell's case, 1 Eq. 225, aff. in H. L. *sub nom.* Jackson *v.* Turquand, L. R. 4 H. L. 305; Crossley *v.* Maycock, 18 Eq. 180, and cases there cited; [Jones *v.* Daniel [1894], 2 Ch. 332.—B.]; Appleby *v.* Johnson, L. R. 9 C. P. 158; Stanley *v.* Dowdeswell, L. R. 10 C. P. 102; Wynne's case, 8 Ch. 1002; Beck's case, 9 Ch. 392; Lewis *v.* Brass, 3 Q. B. D. 667, C. A.; Quenerduaine *v.* Cole, 32 W. R. 185.

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

barley.' Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury, although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The court held that it was for the jury to determine the meaning of the words, and for the court to decide whether there had been mutual assent to the contract; and the plaintiff was nonsuited, on the ground that he had not accepted the defendant's offer.

In Hyde *v.* Wrench (*g*), defendant offered to sell his farm to plaintiff for 1000*l.* The plaintiff thereupon offered him 950*l.*, which defendant refused. Plaintiff then accepted the offer at 1000*l.*, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally, answered it by a counter-proposal to purchase at a lower price, "he thereby rejected the offer," and that no contract had ever become complete between the parties.

[But a mere *inquiry* of the proposer, whether he will agree to modify the terms of his offer, is not a counter-proposal entitling him to treat his offer as rejected. Thus, in Stevenson *v.* McLean (*h*), the defendant, being possessed of warrants for iron, wrote to the plaintiffs offering to sell them for "40*s.* nett cash, open till Monday." On the Monday morning the plaintiffs telegraphed to the defendant, "Please wire whether you would accept forty for delivery over two months, or, if not, longest limit you would give." Held, not to be a refusal of the defendant's offer, and, the plaintiffs having afterwards accepted the offer while it remained open, that the defendant was bound, and Hyde *v.* Wrench was distinguished.]

In The Governor, Guardians, etc. of the Poor of Kingston-upon-Hull *v.* Petch (*i*), plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant tendered, and received notice of the acceptance of his tender, and then wrote that he declined the contract. Held that, by the terms of the proposal, the contract was not complete till the terms were put in writing and signed by the parties, and that the defendant had the right to retract.

In Jordan *v.* Norton (*k*), defendant offered to buy a mare, if warranted "sound, and quiet in harness." Plaintiff sent the mare with warranty that she was "sound, and quiet in double harness." Held, no complete contract.

(*g*) 3 Beav. 336.
(*h*) 5 Q. B. D. 346.
(*i*) 10 Ex. 610, and 24 L. J. Ex. 23.
(*k*) 4 M. & W. 155.

§ 40 a. In Felthouse *v.* Bindley (*l*), a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered 30*l.* The uncle wrote back saying, "Your price I admit was thirty guineas; I offered 30*l.*, never offered more, and you said the horse was mine: however, as there may be a mistake about him I will split the difference, 30*l.* 15*s.*, I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at* 30*l.* 15*s.*" This letter was dated on the 2d of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. Held, that there had been no complete contract between the uncle and the nephew, because the latter had never communicated to the former any assent to the sale at 30*l.* 15*s.*; that the uncle had no right to put upon his nephew the burden of being bound by the offer unless rejected; and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was nonsuited on the ground that he had no property in the horse at the date of the alleged conversion (*m*).

[In Appleby *v.* Johnson (*n*), the plaintiff wrote to the defendant proposing to enter his service as salesman upon certain terms, including, amongst others, a commission upon all sales to be effected by him; for which purpose a list of merchants with whom he should deal was to be prepared. The defendant replied as follows: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; *but I think we are quite agreed on all.* We shall, therefore, expect you on Monday;" and in a postscript added, "I have made a list of customers, which we can consider together." Held, not to be an absolute and unconditional acceptance of the plaintiff's proposal.

This decision seems open to some criticism. The defendant's letter may fairly be read as a substantial acceptance of the plaintiff's offer, coupled with the expression of a desire that some of its terms should be more clearly defined and reduced into writing. It would then fall

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

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

(*n*) L. R. 9 C. P. 158.

within the principle of that numerous class of cases (*o*) where the existence of a binding contract has been upheld, although the parties to the contract have contemplated a subsequent formal expression of its terms. Brett, J., appears to have taken this view at the trial of the action; while Honeyman, J., expressed reluctance in concurring in the judgment of the court.]

In Watts *v.* Ainsworth (*p*) will be found a good illustration by Bramwell, B., of the mode of construing a correspondence when a contest arises as to the existence of mutual assent. See, also, the opinions delivered in the House of Lords in the case of The Proprietors of the English and Foreign Credit Company *v.* Arduin, where the unanimous judgments of the Exchequer of Pleas, and of the Exchequer Chamber, were unanimously reversed (*q*).

§ 41. It is a plain inference from these cases, that a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance, there is nothing by which the proposer *can* be bound; and the authorities quite support this inference. Even when on making the offer the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may nevertheless be retracted in the interval, if no consideration has been given for the promise [and provided that the retraction is duly *communicated* to the other party before he has accepted the offer (*r*)].

Cooke *v.* Oxley (*s*) is the leading case on this point. The declaration was that the defendant had proposed to sell and deliver to the plaintiff 266 hhds. of tobacco on certain terms if the plaintiff would agree to purchase them on the terms aforesaid, *and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* Averment, plaintiff did agree, etc., and did give notice, etc., and requested delivery, and offered payment. Judgment arrested after verdict for the plaintiff. Kenyon, C. J., delivering judgment, said: "Nothing can be clearer than that, at the time of entering into this contract, the engagement was all on one side. The other party was not bound. It was, therefore, *nudum pactum.*" Buller, J., said: "It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract (promise?) was first made. Then as to the subsequent time: the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been

(*o*) Crossley *v.* Maycock, 18 Eq. 180; Brogden *v.* Metropolitan Rail Co. 2 App. Cas. at p. 672; Lewis *v.* Brass, 3 Q. B. D. 667, C. A.; Rossiter *v.* Miller, 3 App. Cas. 1124; Bonnewell *v.* Jenkins, 8 Ch. D. 70, C. A.

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

(*q*) L. R. 5 H. L. 64.

(*r*) Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Stevenson *v.* McLean, 5 Q. B. D. 346.

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

argued that this must be taken to be a complete sale, from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." Grose, J., said: "The agreement was not binding *on the plaintiff* before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise."

This decision was afterwards affirmed in the Exchequer Chamber, M. 32 Geo. III. (*t*).

§ 41 a. [The principle of Cooke *v.* Oxley has been affirmed in the most recent cases, with this limitation, that the retractation of the offer must have been in some way communicated to the other party before his acceptance of it (*u*). A tacit retractation is insufficient (*v*). In Dickinson *v.* Dodds (*u*) notice *aliunde* that the defendant had agreed for the sale of the property in question to a third party was held to be sufficient notice to the plaintiff of the retractation of the defendant's offer to him, but there is nothing in the judgment to warrant the statement in the head-note: "Semble, the sale of property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale.*"

It should be observed that Cooke *v.* Oxley, which was a motion in arrest of judgment after verdict for plaintiff, turned solely upon the insufficiency of the plaintiff's allegation. Viewed in the light of subsequent decisions, it is clear that it would have been sufficient for the plaintiff to have alleged that, at the time when he gave notice of acceptance of the defendant's offer, no notice of its withdrawal had been communicated to him.

It is to be remarked that in no case has it yet been decided that, when the parties are in immediate communication with one another, a retractation of an offer, to be effectual, must be communicated. Both in Byrne *v.* Van Tienhoven and in Stevenson *v.* McLean (*ante*, § 41, and *post*, § 46), the parties contracted by correspondence, but the language there used by the judges, to the effect that "an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all," is perfectly general, and it is conceived that the rule would equally apply to a case where the parties were in immediate communication with one another.

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

(*u*) Dickinson *v.* Dodds, 2 Ch. D. 463, C. A.; Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Stevenson *v.* McLean, 5 Q. B. D. 346.

(*v*) Per Lush, J., in Stevenson *v.* McLean, 5 Q. B. D. at p. 351; per Lindley, J., in Byrne *v.* Van Tienhoven, 5 C. P. D. at p. 347.

§ 42. In Routledge *v.* Grant (*x*), which was the case of an offer by defendant to purchase a house, and to give plaintiff six weeks for a definite answer, Best, C. J., nonsuited the plaintiff, on proof that defendant had retracted his offer within the six weeks, and, on the rule to set aside the nonsuit, said: "If six weeks are given on one side to accept an offer, the other has six weeks to put an end to it; one party cannot be bound without the other." The Chief Justice in this case cited Cooke *v.* Oxley with marked approval.

In Payne *v.* Cave (*y*), it was held that a bidder at an auction may retract his bidding any time before the hammer is down; and *per curiam*, "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed" (*z*).

§ 43. In Head *v.* Diggon (*a*), the defendant, on Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under wool, etc., etc., *with three days' grace from the above date.*" These words were put in by the defendant expressly as a promise to wait three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before, — Sunday. Holroyd, J., nonsuited the plaintiff, on the authority of Cooke *v.* Oxley. In the course of the argument for a new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his Lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley, J., concurred, on the ground that "unless both parties are bound, neither is."

[The Great Northern Railway Co. *v.* Witham (*b*) offers a further illustration of the same principle. The defendant sent in a tender to supply the company with iron in such quantities as they might from time to time order. The company accepted his tender, and *the defendant received and executed several orders*, but ultimately the defendant

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

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

(*z*) The ordinary condition of sale which negatives the bidder's right to retract his bidding, and which was suggested to Lord St. Leonards by the decision in Payne *v.* Cave, is, in the opinion of conveyancers, not enforcible unless the sale has taken place under certain special circumstances. See Sugden, V. & P. 14, 4th ed. 1862; and Dart, V. & P. 139, ed. 1888.

(*a*) 3 M. & R. 97; Burton *v.* Great Northern Railway Company, 9 Ex. 507.

(*b*) L. R. 9 C. P. 16; and see Chicago & Great Eastern Railway Company *v.* Dane, 43 N. Y. (4 Hand) 240.

refused to carry out an order which the company had given. Held, that the order given by the company was a sufficient consideration for the defendant's promise. The court, however, pointed out that their decision did not affect the question of the defendant's right, before any order had been given by the company, to withdraw his offer by giving due notice. It is clear that, so far as the agreement was executory, it was unilateral; the company was under no obligation to give any order, and no action would lie against it for not so doing (*c*).]

Another illustration of the same principle is to be found in the case of Smith *v.* Hudson (*d*). There, a quantity of barley had been verbally sold according to sample, and the goods had been actually delivered to the order of the vendee, at the railway station, so as to put an end to the right of stoppage *in transitu*. But the buyer had not yet accepted so as to make the contract valid under the Statute of Frauds, because it was still in his power to exercise the option of accepting or rejecting after examining the quality of the bulk to see if it corresponded with the sample. The buyer became bankrupt, and the seller at once gave notice to the railway company to hold the barley, subject to his orders; and countermanded the order to convey it to the vendee. The assignees of the buyer insisted on their right to accept the goods in his place, on the ground of the actual delivery to him. But the court held that the withdrawal of the offer by the countermand of the vendor, before final acceptance, prevented the completion of the contract.

§ 44. Where parties living at different places are compelled to treat by correspondence through the post, there is a modification of the rule to this extent, that the party making the offer cannot retract after the acceptance by his correspondent has been duly posted, although it may not have reached him (*e*); [or may never reach him (*f*); and the retractation, to be effectual, must reach his correspondent before he has posted his acceptance (*g*);] nor can the party accepting retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received (*h*).

In Adams *v.* Lindsell (*i*), the defendants wrote on the 2d of September to the plaintiff, offering to sell a quantity of wool on specified

(*c*) For this, see Burton *v.* Great Northern Railway Company, 9 Ex. 507.

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

(*e*) Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. C. 381; Potter *v.* Sanders, 6 Hare, 1; Harris' case, 7 Ch. 587.

(*f*) Household Fire Insurance Company *v.* Grant, 4 Ex. D. 216, C. A.

(*g*) Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Stevenson *v.* McLean, 5 Q. B. D. 346.

(*h*) Duncan *v.* Topham, 8 C. B. 225; Potter *v.* Sanders, 6 Hare, 1; Household Fire Insurance Company *v.* Grant, 4 Ex. D. 216, C. A., per Baggallay and Thesiger, L. JJ., but see per Bramwell, L. J., at p. 235; Dunmore *v.* Alexander, 9 Shaw & Dunlop, 190, and see *post*, § 46 a.

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

terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 7th. An answer was sent on the same evening accepting the offer. This answer was received by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants, not having received the answer, which would have been due on Sunday, the 7th, according to the course of the post, if they had not misdirected their letter making the offer, sold the wool to another person. Action for non-delivery, and verdict for plaintiff. On motion for new trial, it was contended on behalf of the defendants, on the authority of Payne *v.* Cave (*k*), and Cooke *v.* Oxley (*l*), that they had a right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiff, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

This case was cited with approval by Lord Cottenham in Dunlop *v.* Higgins (*m*) as a leading case, his Lordship remarking that "common sense tells us that transactions cannot go on without such a rule." In Dunlop *v.* Higgins, a proposal sent by mail on the 28th of January was received on the 30th, and answered on the same day, but not by the first post of the day, so that it reached the proposer on the 1st of February, instead of the 31st of January. It was held that the answer was posted in time, and that the contract was complete by acceptance when the letter of acceptance was posted; the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of his letter of acceptance (*n*).

§ 45. The Court of Exchequer in the British and American Telegraph Co. *v.* Colson (*o*) held, however, that where the defendant had applied for shares in the plaintiff's company, and a letter allotting the shares to him had been posted to his address, but not received by him, the contract was not complete; and the learned Barons held

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

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

(*m*) 1 H. L. C. 381. See, also, Potter *v.* Sanders, 6 Hare, 1, V. C. Wigram's decision.

(*n*) On this point, see, also, Duncan *v.* Topham, 8 C. B. 225; 18 L. J. C. P. 310. But see the remarks on the accuracy of the report of this case in 8 C. B., by Bramwell, B., in Colson's case, L. R. 6 Ex. at p. 120.

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

that the cases cited *supra*, in support of the contrary proposition, do not warrant the inference that has been deduced from them.

But this last case has in its turn been criticised by the Lords Justices in the case of In re The Imperial Land Co. of Marseilles, — Harris' case (*p*), in which their Lordships intimate their inability to reconcile the decision of the Barons of the Exchequer with that of the House of Lords in Dunlop *v.* Higgins (*q*).

[In Harris' case the appellant had applied by letter for shares in the respondent company. After the letter of allotment had been duly posted, but before it had reached him, Harris wrote withdrawing his application. Held, on the authority of Dunlop *v.* Higgins, that the contract was complete and irrevocable from the time that the letter of allotment was posted; but it was unnecessary for the decision of the case to consider the correctness of the judgment of the Court of Exchequer in Colson's case. However, the Court of Appeal has now expressly overruled Colson's case in The Household Fire Insurance Co. *v.* Grant (*r*). The facts were precisely similar to those in Colson's case. The defendant had applied for shares in the plaintiff company, and the letter of allotment, duly addressed and posted, never reached him. It was held by the majority of the court (Baggallay and Thesiger, L. JJ.), that the defendant was liable as a shareholder.

Bramwell, L. J., who dissented, dwelt strongly upon the inconvenience and hardship that must in many instances result to the person making the offer, when, without any default on his part, the letter of acceptance is lost in transmission. Practically, however, this may be avoided by taking the precaution to stipulate, as suggested by Mellish, L. J., in Harris' case, that the contract shall only be complete upon the actual receipt of the letter of acceptance. The rule is restricted to cases where, by reason of general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer through the post is expressly or impliedly authorized (*s*); but this limitation can hardly be of much practical importance.

For the same principle, as applied to the posting of a letter *containing an offer*, see Taylor *v.* Jones (1 C. P. D. 87). And as to the property in a letter and its contents, see Ex parte Cote (9 Ch. 27).]

§ 46. In both the above cases of Adams *v.* Lindsell and Dunlop *v.* Higgins, it will be observed that the acceptance of the offer was complete by the posting of the answer *before* the offer was retracted, in

(*p*) 7 Ch. 587. See, also, Walls' case, 15 Eq. 18.

(*q*) 1 H. L. C. 381.

(*r*) 4 Ex. D. 216, C. A.

(*s*) Household Fire Insurance Company *v.* Grant, 4 Ex. D. at p. 228.

accordance with the principle which makes the bargain complete at the moment when *mutual* and *reciprocal* assent has been given. But the language of the court in Adams *v.* Lindsell is broader than was needed for the decision of that case, for it would extend to an offer sent by mail, and retracted by posting a second letter *before the first reached its destination.*

[Two recent decisions have now covered the point in question (*t*). In Byrne *v.* Van Tienhoven (*t*), the defendants, who carried on business at Cardiff, wrote to the plaintiffs at New York offering goods for sale. Their letter was posted on the 1st of October and received by the plaintiffs on the 11th, who accepted the offer by telegram on the same day, and also by letter on the 15th. Meanwhile, on the 8th of October, three days previous to the arrival in New York of their letter of the 1st, the defendants wrote a second letter withdrawing their offer. This letter was not received by the plaintiffs until the 20th, several days after they had posted their letter of acceptance. Held, that the notice of withdrawal was too late. In considering the question whether a withdrawal of an offer has any effect until it is communicated to the person to whom it has been sent, Lindley, J., said: "I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is, that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. . . . This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier." The learned judge then proceeded to consider the question whether the mere posting of the letter of revocation could be regarded as a communication of it to the plaintiff, and answered it in the negative, on the ground that there was no analogy between the two cases of posting a letter of acceptance and one of withdrawal. It is a principle of law that a person who makes an offer by post must be taken to have assented "to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself;" but there is neither principle nor authority to show that the party accepting has assented to treat the posting of a letter of withdrawal in the same way.

(*t*) Byrne *v.* Van Tienhoven, 5 C. P. D. 344, and Stevenson *v.* McLean, 5 Q. B. D. 346.

But an offer is effectually revoked by the *death* of the party making it; nor is it necessary, it would seem, for the fact of death to be notified to the other party (*u*).

The second proposition submitted in the text, namely, that a party accepting cannot retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received, has not yet been directly decided.

§ 46 a. In Dunmore *v.* Alexander (*v*), before the Court of Sessions in Scotland, it was held that there was no contract where the letters of acceptance and revocation arrived together. In the English courts, however, the principle is now firmly established that the contract is complete and irrevocable upon the posting of the letter of acceptance. It follows, then, that the acceptor, as well as the proposer, is bound from that time and cannot afterwards escape from his obligation. There are *dicta* in support of this view. Lord Blackburn, in Brogden *v.* Metropolitan Railway Company (2 App. Cas. at p. 691), says that the acceptor by posting his letter has "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that *each side* is bound." "The moment one man has made an offer," says James, L. J., in Harris' case (7 Ch. at p. 591), "and the other has done something binding himself to that offer, then the contract is complete, and *neither party* can afterwards escape from it," and this passage was cited with approval by Thesiger, L. J., in the Household Fire Insurance Company *v.* Grant (4 Ex. D. at p. 219). It is true that the argument *ab inconvenienti* has no weight here as in the case of the withdrawal of an offer. The acceptor may notify the revocation by a letter, reaching the proposer at the same time as the letter of acceptance, or by the aid of the telegraph; the revocation of the acceptance may be the first intimation to the proposer that his offer has been originally accepted; and in neither case will the proposer sustain any loss or inconvenience from the other party's change of intention. This is the view of Bramwell, L. J.: "The arrival of the letter of acceptance might," he says, "be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding" (*x*).

Consistently, however, with the view of the finality of the contract consequent upon the posting of the letter of acceptance, — a view adopted in a series of cases closing with the decision of the Court of Appeal in the Household Fire Insurance Company *v.* Grant (from

(*u*) Per Mellish, L. J., in Dickinson *v.* Dodds, 2 Ch. D. at p. 475.

(*v*) 9 Shaw & Dunlop, 190, referred to, *post*.

(*x*) See The Household Fire Insurance Company *v.* Grant, 4 Ex. D. 216, C. A., at p. 235. See, also, per Cockburn, C. J., in Newcomb *v.* De Roos, 2 E. & E. 271.

which Bramwell, L. J., dissented), — there can be little doubt but that the proposition now being considered will, when occasion arises, receive judicial sanction.]

§ 47. Contracts of sale are implied under certain circumstances without any expression of the will or intention of the parties; as where, for example, an express contract has been made, and goods are sent, not in accordance with it, but are nevertheless retained by the purchaser. In such a case a new contract is implied that the purchaser will pay for them their value; as where the purchaser retained 130 bushels of wheat furnished on a contract to supply 250 bushels (*y*); and where 152 tons of coal were delivered and retained on an order for 200 or 300 tons (*z*). The rule was fully recognized by Parke, J., in Read *v.* Rann (*a*), and was well exemplified in the case of Hart *v.* Mills in the Exchequer, in 1846.

In Hart *v.* Mills (*b*), the facts were that the defendant ordered *two* dozen of port and *two* dozen of sherry, to be returned if not approved. Plaintiff delivered next day *four* dozen of each. Defendant, not being satisfied with the quality, sent back the whole, except one bottle of port and one dozen of sherry, with a note, saying: "I should not have been particular about keeping the four dozen if the quality had suited me. I return the four dozen of port, minus one bottle which I tasted, also three dozen of sherry, as neither suit my palate." The plaintiff contended that the defendant was liable for two dozen of each kind, on the ground that the order was entire, and that he could not keep part and reject the rest. Alderson, B., said: "The defendant orders two dozen and you send four; then he had a right to send back all: he sends back part. What is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?" Held, that the plaintiff could only recover for the thirteen bottles retained on the new contract resulting from his keeping them.

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

§ 49. There is also one special case in which a sale takes place by

(*y*) Oxendale *v.* Wetherell, 9 B. & C. 386; approved by the Privy Council in the Colonial Insurance Company of New Zealand *v.* Adelaide Marine Insurance Company, 12 App. Cas. 128, considered *post*, Book II. Ch. 3.

(*z*) Richardson *v.* Dunn, 2 Q. B. 222.

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

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

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

the operation of certain principles of law, rather than by the mutual assent of the parties, either express or implied. The rule is thus stated in Jenkins, 4th Cent. Ca. 88: "A., in trespass against B. for taking a horse, recovers damages: by this recovery, and execution done thereon, the property in the horse is vested in B." Cooper *v.* Shepherd (*d*) was an action in trover for a bedstead. Plea, a former recovery by plaintiff in trover of the same bedstead, in an action against C., and that the conversion by C. was not later than the conversion charged against the defendant; and that C., being possessed of the bedstead, sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The court held that this plea averred a *sale* of the bedstead from the plaintiff to C., the vendor of the defendant. On principle, however, it is plain that the recovery in trover would only have this effect in cases where the value of the thing converted is included in the damages recovered (*e*).

But an *unsatisfied* judgment in trover does not pass the property, and is a mere assessment of damages, on *payment* of which the property vests in the defendant (*f*).

§ 50. From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent.

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

So in Raffles *v.* Wichelhaus (*h*), there was a contract for the sale of "125 bales of Surat cotton, guaranteed middling fair merchants' Dhollerah, to arrive ex Peerless from Bombay," and the defendant pleaded, to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship Peerless, which sailed from Bombay in October, not that which arrived in a ship Peerless that sailed in December, the latter being

(*d*) 3 C. B. 266. See, also, Adams *v.* Broughton, 2 Str. 1078, more fully reported in Andrews, 18; Holmes *v.* Wilson, 10 A. & E. 503; Barnett *v.* Brandao, 6 M. & G. 640, note.

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

(*f*) Brinsmead *v.* Harrison, L. R. 6 C. P. 584, affirmed in Cam. Scacc. L. R. 7 C. P. 547; Ex parte Drake, 5 Ch. D. 866, C. A. [And see Miller *v.* Hyde, 161 Mass. 472. B.]

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

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

the cotton that plaintiff had offered to deliver. On demurrer, held that on this state of facts there was no *consensus ad idem*, no contract at all between the parties (*i*).

[In Henkel *v.* Pape (*k*), there was a mutual mistake as to the *quantity* of the thing sold, but as the defendant did not rely on his right to have the contract rescinded, the decision does not involve the application of the principle now being considered.]

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

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

§ 53. But an agreement is not to be deemed unintelligible because of some error, omission, or mistake in drawing it up, if the real nature of the mistake can be shown, so as to make the bargain intelligible. Thus, in Coles *v.* Hulme (*n*), a bond to pay 7700 was allowed to be corrected by adding the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties.

(*i*) See, also, Smidt *v.* Tiden, L. R. 9 Q. B. 446, a mistake as to charter parties caused by the broker's fraud.

(*k*) L. R. 6 Ex. 7.

(*l*) 2 B. & C. 511. See, also, Cochrane *v.* Willis, 1 Ch. 58.

(*m*) 2 B. & Ad. 232. See, also, Bourne *v.* Seymour, 24 L. J. C. P. 207; and Pearce *v.* Watts, 20 Eq. 492, on a sale of real estate.

(*n*) 8 B. & C. 568.

So in Wilson *v.* Wilson (*o*), Lord St. Leonards said that "both courts of law and courts of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty" (*p*); and his Lordship cited a case in Douglas (*q*) where the condition of a bond declared that it was to be void if the obligor did *not* pay what he promised, and the court struck out the word *not* as a palpable error. And the same principle was established in Lloyd *v.* Lord Say and Seale (*r*), in the King's Bench, and affirmed in the House of Lords; and in Langdon *v.* Goole (*s*): the omitted name of the grantor being supplied by the court in the first case, and that of the obligee in the second.

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

§ 55. And when the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that, whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention (*t*).

This point is treated under the subject of "estoppel," *post*, Book V. Part I. Ch. 2.

§ 56. A mistake by the buyer in supposing that the article bought by him will answer a certain purpose, for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards

(*o*) 5 H. L. C. 40; and see Bird's Trusts, 3 Ch. D. 214; Burchell *v.* Clark, 2 C. P. D. 88, C. A.

(*p*) 5 H. L. C. at p. 66.

(*q*) Anonymous, per Buller, J., in Bache *v.* Proctor, Dong. 384.

(*r*) 10 Mod. 46, and 4 Browne's P. C. 73.

(*s*) 3 Lev. 21.

(*t*) Per Lord Wensleydale, in Freeman *v.* Cooke, 2 Ex. 654; Doe *v.* Oliver, and cases in notes, 2 Smith's L. C. (ed. 1887), 803; Cornish *v.* Abington, 4 H. & N. 549; 28 L. J. Ex. 262; Alexander *v.* Worman, 6 H. & N. 100; 30 L. J. Ex. 198; Van Toll *v.* South Eastern Railway Company, 12 C. B. N. S. 75; 31 L. J. C. P. 241; Carr *v.* London and North Western Railway Company, L. R. 10 C. P. 307, per Brett, J.; Thomas *v.* Brown, 1 Q. B. D. 714; M'kenzie *v.* British Linen Company, 6 App. Cas. 82; Seton *v.* Lafone, 19 Q. B. D. 68, C. A.

to rescind it if the vendor warranted its adaptability to the intended purpose. Thus, in Chanter *v.* Hopkins (*u*), Ollivant *v.* Bayley (*x*), and Prideaux *v.* Bunnett (*y*), the purchasers had ordered specific machines from the patentees, and attempted to justify their refusal to pay, on the ground that the machines had totally failed to answer the purpose intended; but it was held that, in the absence of a warranty by the vendors, the contract was binding on the purchasers, notwithstanding their mistaken belief that the machines would answer their purpose.

§ 57. In Scott *v.* Littledale (*z*), the vendor made a singular mistake. He sold a hundred chests of tea by a wrong sample. A sale by sample imports, as will be seen hereafter, a warranty by the vendor that the bulk equals the sample. On demurrer to a plea on equitable grounds, setting up this mistake as rendering the contract void for want of mutual assent, the Queen's Bench held that the contract was not void; that if the quality of the bulk was inferior to the sample, the buyer had the right to waive the objection; and the court said: "Possibly a court of equity might have given the defendant some relief, but it certainly would not have set aside the contract." It is worth observing, that in this case the defendant made no mistake as to the subject-matter of the contract. He sold the very tea, for the very price, and on the very terms which he intended, but he made a mistake in *giving a warranty* that it was of a particular quality. Now a warranty of quality is not an essential element of a sale, but a collateral engagement attached to or omitted from it, at the pleasure of the parties (*a*). The assent to the *sale* was complete; the assent to the *warranty* was given by *one* of the parties under a mistake, and this mistake might or might not give ground for other relief, but could not prevent the contract from coming into existence.

§ 58. A mistake as to the *person* with whom the contract is made may or may not avoid the sale, according to circumstances. In the common case of a trader who sells for cash, it can make no possible difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract. But where the identity of the person is an important element in the sale, *as if it be on credit, where the solvency of the buyer* is the chief motive *which* influences the assent of the vendor (*b*), or when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price, a mistake

(*u*) 4 M. & W. 399.
(*x*) 5 Q. B. 288.
(*y*) 1 C. B. N. S. 613.
(*z*) 8 E. & B. 815; 27 L. J. Q. B. 201; Megaw *v.* Molloy, 2 Ir. L. R. C. P. D. 530.
(*a*) Chanter *v.* Hopkins, 4 M. & W. 399; Mondel *v.* Steel, 8 M. & W. 858; Foster *v.* Smith, 18 C. B. 156.
(*b*) See Ex parte Barnett, 3 Ch. D. 123.

as to the person dealt with prevents the contract from coming into existence for want of assent.

In Mitchell *v.* Lepage (*c*), in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp, on the ground that he had not contracted with the plaintiff, but with other persons. The broker gave defendant a bought note stating the vendors to be Todd, Mitchell, and Co. It turned out that, without the broker's knowledge, that firm had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plaintiff's firm of Mitchell, Armistead, and Graabner, the last two taking the place of the withdrawn members of the old firm. Gibbs, C. J., told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. . . . If by this mistake the defendant was induced to think that he had entered into a contract with one set of men, and not with any other, and if, owing to the broker, he has been *prejudiced* or *excluded from a set-off*, it would be a good defence." Verdict for plaintiff.

§ 59. In Boulton *v.* Jones (*d*), the plaintiff had bought out the stock-in-trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, the defendant refused, on the ground that he *had a set-off* against Brocklehurst, and had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action was not maintainable. Pollock, C. B., said: "The rule of law is clear, that if you propose to make a contract with A., then B. cannot substitute himself for A. without your consent and *to your disadvantage*, securing to himself all the benefit of the contract."

Martin, B., said: "Where the facts prove that the defendant meant to contract with A. *alone*, B. can never force a contract upon him."

Bramwell, B., said: "It is clear that if the plaintiff were at liberty to sue, it would be *a prejudice to defendant*, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. *And upon that my judgment proceeds.* I do not lay it down that, because a contract was made in one person's name, another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to

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

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

write a book, or paint a picture, or do any work of personal skill, or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with; that he has written the book, or painted the picture, or supplied the goods."

Channell, B., said: "The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant and owed him money, and upon which A. seeks to sue. Without saying that the plaintiff might not have had a *right of action on an implied contract, if the goods had been in existence*, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them" (*e*).

§ 59 a. [The principle of Boulton *v.* Jones has been adopted to its full extent in the case of the Boston Ice Company *v.* Potter (*f*), before the Supreme Judicial Court of Massachusetts, and the fact that the defendant had or had not a right of set-off against the plaintiff's claim, upon which Bramwell, B., rested his judgment in Boulton *v.* Jones, was treated as immaterial. It appeared that the defendant had previously bought ice of the plaintiffs, but, being dissatisfied with them, contracted to buy it from the Citizens' Ice Company. Subsequently the plaintiffs bought up the business of the Citizens' Company, and delivered ice to the defendant without notifying him that they had purchased the business until after the delivery and consumption of the ice. It was held that the plaintiffs could not maintain an action for the price of the ice. An endeavor was made to distinguish Boulton *v.* Jones, upon the ground that there the defendant had a set-off against Brocklehurst, but Endicott, J., in giving judgment, said, at p. 31, referring to Boulton *v.* Jones: "The fact that a defendant in a particular case has a claim in set-off against the original contracting party, shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that, because it does not exist, the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it. . . . It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company."]

(*e*) See further observations on this case, *post*, Book III. Ch. 1.

(*f*) 123 Mass. 28 (1877); 25 Am. Rep. 9.

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

The effect of mistake in preventing the contract from coming into existence, and therefore from being enforced, is the only branch of the subject that appertains to the Formation of the Contract. The effect of mistake on the rights of the parties after the contract has been performed or executed will be considered, *post*, Book III. Ch. 1, *Of Mistake and Failure of Consideration.*

§ 61. The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. If A. deliver his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse. Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return" (*j*) are all instances where the assent is conditional. Most of the reported cases, however, have arisen out of disputes as to the *performance* of the conditions, instead of the *formation* of the contract, and the subject can be more intelligibly treated as a whole. The reader is therefore referred to Ch. 1 of Book IV. Part I., *post.*

CIVIL LAW.

§ 62. The principles of the common law upon the subject embraced in this chapter do not in general differ from those recognized in America and in countries governed by the civil law.

There is, however, one striking exception. The civil law permits what are termed *quasi-contracts*, and enforces obligations resulting from them. The *negotiorum gestor*, the man who voluntarily assumed

(*g*) Hardman *v.* Booth, 1 H. & C. 803; 32 L. J. Ex. 105; Lindsay *v.* Cundy, 3 App. Cas. 459, reported *sub nom.* Cundy *v.* Lindsay, S. C. 2 Q. B. D. 96, C. A.; and 1 Q. B. D. 348, *post*, chapter on *Fraud.*

(*h*) Higgons *v.* Burton, 26 L. J. Ex. 342. And see Bush *v.* Fry, 15 Ont. Rep. 124.

(*i*) For an instance of which, see Ex parte Barnett, 3 Ch. D. 123.

(*j*) For instances of which, see Moss *v.* Sweet, 16 Q. B. 493; Ex parte Wingfield, 10 Ch. D. 591, C. A., where it was held that goods sent to a person "on sale or return" do not pass on his bankruptcy under the reputed ownership clause. The law on this subject is the same in America. Hunt *v.* Wyman, 100 Mass. 198; Carter *v.* Wallace, 35 Hun (N. Y.), 189.

to take charge of another's business in his absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorized interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the creditor's place. The *quasi-contract*, in a word, produced the effect of creating obligations *ultro citroque*, in the language of the civilians. These principles of the Roman law still prevail unimpaired over Continental Europe, and are found expressly sanctioned in the French Civil Code, articles 1570–1575. Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbor's inclosure (*l*), or furnish food to his cattle, without request, he could maintain an action on the *quasi-contract* implied by the law there. At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven (*m*). The principle in our law is invariable that no liability can be established against a man by the mere voluntary payment or expenditure of money in his behalf by a third person; that no man can become the creditor of another without the latter's knowledge or assent. It is of course otherwise where the payment is under compulsion, or in discharge of a liability imposed on the party paying (*n*).

§ 63. The text of the Institutes laying down the principles of the Roman law on this point was not an innovation but a condensation of the numerous texts of the preëxisting law. "Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones quæ appellantur negotiorum gestorum. Sed domino quidem rei gestæ adversus eum qui gessit, *directa* competit actio, negotiorum autem gestori, *contraria*. Quas ex nullo contractu proprie nasci, manifestum est, quippe ita nascuntur istæ actiones, si *sine mandato* quisque alienis

(*l*) Pothier, Obl. sec. 114–15.

(*m*) But under the new Rules of Pleading, a simple averment of the request will only suffice where there has been an express request made by the defendant. Where the request is to be implied from the facts and circumstances of the case, those facts and circumstances, so far as material, must be set forth. R. S. C. 1875, Order XIX. rules 4, 27; and see Bullen & Leake, Prec. of Plead. ed. 1882, p. 279.

(*n*) Stokes *v.* Lewis, 1 T. R. 20; Child *v.* Morley, 8 T. R. 610; Lord Gallway *v.* Mathew, 10 East, 264; Durnford *v.* Messiter, 5 M. & S. 446; 1 Wms. Saund. 356, note on Osborne *v.* Rogers; England *v.* Marsden, L. R. 1 C. P. 529; 35 L. J. C. P. 259. And see a very singular case, Johnson *v.* Royal Mail Steam Packet Company, L. R. 3 C. P. 38.

negotiis gerendis se obtulerit; ex quâ causâ, ii quorum negotia gesta fuerint, *etiam ignorantes* obligantur." The equity of the law is then stated as follows: "Idque utilitatis causa receptum est, ne absentium qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quia sane nemo curaturus esset, si de eo quod quis impendisset, nullam habiturus esset actionem" (*o*). Our action for money had and received, to recover back what has been paid by mistake, is one of those that the Roman lawyers considered as arising *quasi ex contractu*. "Item is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur" (*p*). This action was termed *condictio indebiti*. "Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem, condictitia actio" (*q*).

AMERICAN LAW.

§ 64. In the text-books in America, there has been a singular and almost unanimous attack upon the authority of Cooke *v.* Oxley (*r*), and Professor Bell, in his Inquiries into the Contract of Sale, also disapproves it, as contrary to the principles of the civil law and of the law of Scotland (*s*). This is the more remarkable, as it is hardly contested that the decisions accord, in the United States at least, with the principles established in the English courts.

Mr. Story, in his Treatise on Sales (*t*), while citing the American authorities (*u*), which are perfectly in accord with the English law on this point, concurs with Professor Bell in the opinion that the rule in Cooke *v.* Oxley (*x*) is unjust and inequitable. In his strictures on the decision, he denies that the grant of time to accept the offer is made without consideration. He suggests, as one sufficient legal consideration, the expectation or hope that the offer will be accepted. This appears to be more fanciful than serious. The hope of A. that his offer will be accepted, if he gives B. time to consider it, is not a consideration moving from B. to A., but is the spontaneous emotion of A. arising out of his own act; for in the case supposed, B. is bound to nothing, does nothing, gives nothing, promises nothing to raise this hope. The second consideration suggested by Mr. Story is, that "the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer." This

(*o*) Inst. lib. 3, tit. 27, § 1.
(*p*) Inst. 3, 27, 6.
(*q*) Inst. 3, 14, 1.
(*r*) 3 T. R. 653.
(*s*) Bell's Inq. 32 *et seq.*
(*t*) Story on Sales, § 127.
(*u*) Eskridge *v.* Glover, 5 Stew. & Port. 264; Faulkner *v.* Hebard, 26 Vermont, 452; Beckwith *v.* Cheever, 1 Foster (N. H.), 41.
(*x*) 3 T. R. 653.

argument assumes as a fact the exact reverse of the facts alleged in the declaration. It takes for granted that "an inconvenience is *assumed*" by the party to whom the offer is made; and it is precisely on the absence of this consideration that the decision was put, Buller, J., saying: "In order to sustain a promise, there must be *either a damage to the plaintiff*, or an advantage to the defendant, but here was neither."

§ 65. In Kent's Commentaries it is said in the note to vol. ii. p. 478 (12th edition), that the "criticisms which have been made upon the case of Cooke *v.* Oxley are sufficient to destroy its authority" (*y*). Mr. Duer, in his Treatise on Insurance (*z*), goes still further and says that Cooke *v.* Oxley decides "that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and has been accepted within the limited period; to constitute a valid agreement there must be proof that the party making the offer assented to its terms after it was accepted." If this were indeed the decision, nothing could be more surprising than to find it upheld as sound law by a series of eminent English judges. But Cooke *v.* Oxley has been totally misapprehended by those who have thus criticised it, and there is nothing to warrant the suggestion that it is misreported, or that Bayley, J., stated it to be misreported in the observations made by him in Humphries *v.* Carvalho (*a*). It is difficult to see how the case *could* be misreported, for it was a motion in arrest of judgment, which presents the question exactly as on a general demurrer (*b*), and was decided on the ground that the declaration, which is copied in the report, showed no cause of action. An examination of it shows that the plaintiff alleged, — first, an offer by the defendant to sell at a certain price; second, a promise to leave the offer open till four o'clock, *if plaintiff would agree to purchase, and would give notice to the defendant before the hour of four o'clock;* third, that the plaintiff did agree, and did give notice *before four o'clock.* There was no *allegation that the defendant actually left the offer open till four o'clock, but* only that he *promised* to do so. The plaintiff's action was tested by the court on two theories, — first, that it was for a breach of promise to leave the offer open; or, secondly, that it was for a breach of a contract that became complete by the plaintiff's acceptance of an offer that had actually remained open. On the first theory, it was

(*y*) Other American decisions, in which the authority of Cooke *v.* Oxley is impugned, are Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224; M'Culloch *v.* Eagle Ins. Co. 1 Pick. 281; and Hallock *v.* Commercial Ins. Co. 2 Dutcher (26 N. J. L.), 268.

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

(*a*) 16 East, 45.

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

held that the declaration was insufficient, because it alleged no consideration for the *promise*. On the second theory, it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The court did not decide that the contract would not have been completed if the offer, *remaining open*, had been accepted, but that nothing showed that the offer was open when accepted. Lord Kenyon, C. J., construed the declaration as proceeding on the first theory, that is, breach of promise to keep the offer open, and he said that this promise was *nudum pactum*. Buller, J., took both grounds, saying that the promise in the morning was without consideration; and that it was *not stated* that the defendant agreed afterwards, or even that the goods were kept; in other words, that the plaintiff had not *alleged* a binding legal promise in the morning, nor a complete contract in the afternoon; and Grose, J., also said that the defendant was not bound before four o'clock, and *it is not stated* that they came to a subsequent agreement.

That this was really the decision is shown by what was said by Mr. Justice Bayley in Humphries *v.* Carvalho (*c*), which is strangely construed by Mr. Duer into an assertion that Cooke *v.* Oxley was misreported. This is the language: "The question in Cooke *v.* Oxley arose upon the record, and a writ of error was afterwards brought upon the judgment of this court, by which it appears that the objection made was, that there was only a proposal of sale by the one party, and *no allegation* that the other party had acceded to the contract of sale."

§ 66. Both the learned American authors, Mr. Story and Mr. Duer, refer to Adams *v.* Lindsell (*d*), as overruling Cooke *v.* Oxley, the latter writer saying that "its authority is directly overthrown" by Adams *v.* Lindsell. Certainly the King's Bench did not in this last case say a word in disparagement of Cooke *v.* Oxley; and when this very point was urged by counsel in Routledge *v.* Grant (*e*), Best, C. J., pointed out that there was no conflict between the cases, for Adams *v.* Lindsell proceeded expressly on the ground that a treaty by correspondence through the post rested on exceptional principles, because the separation of the parties prevented assent at the same instant and, *ex necessitate rei*, some point of time must be fixed when the contract should be considered complete; for otherwise the interchange of letters would go on *ad infinitum*. The court was therefore driven to determine either that no contract was possible by correspondence between distant parties, or to fix some point at which the contract became perfect. The rule adopted was in entire accordance with sound

(*c*) 16 East, 45. (*d*) 1 B. & Ald. 681. (*e*) 4 Bing. 653.

principle, and declared that the offer by letter was a continuing offer in contemplation of law until it reached the other party, so that when an answer of acceptance was placed in the post, addressed to the party making the offer, the *aggregatio mentium*, the mutual assent, was complete. But in Cooke *v.* Oxley, it did not appear that this mutual assent ever took place. There was no *continuing offer* till four o'clock, but only a *promise* to continue it, not binding for want of consideration. The court held that Oxley had a right to retract, up to the moment when Cooke announced his assent to the offer. So the court would no doubt have held in Adams *v.* Lindsell that the latter had a right to retract up to the moment when Adams accepted; but Lindsell's withdrawal of his offer, and resale of the wool, occurred *after acceptance*, though he was ignorant of the fact of acceptance. In a word, Oxley withdrew his offer *before* acceptance, Lindsell *after* acceptance, and the contract was held incomplete in the former case and complete in the latter, both decisions being consistent applications of one and the same principle, namely, that a contract becomes complete only when the mutual assent of the parties concurs at the *same moment of time;* and that no number of *alternate* offers and withdrawals, refusals and acceptances, can ever suffice to conclude a bargain.

To these remarks may be added the fact that in 1829 the King's Bench decided Head *v.* Diggon (*f*) on the authority of Cooke *v.* Oxley, without any intimation that it had been overruled, and in accordance with the point really decided in that case.

§ 67. In an American case (*g*), the principle under discussion received a further illustration. The defendant wrote an offer to carry for the plaintiffs "not exceeding 6000 tons gross, in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified," and on the next day the plaintiffs answered, "We assent to your agreement and will be bound by its terms." Held to be no binding contract, because the plaintiffs were not bound to furnish anything for carriage; that the offer was a mere promise of an *option* to them, for which promise no consideration was given; and that the defendant had the right to withdraw from his offer at any time before such an acceptance as imposed *some* obligation on the company as a consideration: the acceptance would have been good if the company had agreed to furnish *any* specified quantity not exceeding the 6000 tons, but not otherwise, because the defendant could not be bound while the plaintiffs were left free.

§ 68. On the question of the mode of completing a bargain by cor-

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

(*g*) Chicago & Great Eastern Railway Company *v.* Dane, 43 N. Y. 240; and see Great Northern Railway Company *v.* Witham, L. R. 9 C. P. 16.

respondence, the American authorities are not only in accordance with the decisions of our own courts, but they [preceded them in covering the point] left undecided in Adams *v.* Lindsell, though included in the *dicta* [and recently set at rest by the decisions in Byrne *v.* Van Tienhoven and Stevenson *v.* McLean, *ante*, § 46].

In Mactier *v.* Frith (*h*), the Court of Errors of New York decided, after a full review of the authorities, that, where the dealing is by correspondence, "the acceptance of a written offer of a contract of sale consummates the bargain, *provided the offer is standing at the time of the acceptance.*"

The point was still left open as to the effect of a revocation of the offer not communicated to the party accepting at the time of acceptance.

§ 69. In the more recent case of Tayloe *v.* Merchants' Fire Insurance Company (*i*), the Supreme Court of the United States has closed this last point in America by holding that, under such circumstances, "an offer prescribing the terms of insurance is intended and is to be deemed a valid undertaking by the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail accepting them; and *that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.*" Although this decision was given on an insurance contract, the reasoning of the court was quite applicable to all other bargains between parties. Nelson, J., who delivered the opinion, said: "On the acceptance of the terms proposed, transmitted in due course of mail to the company, the minds of both parties have met on the subject, *in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for *their* approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would *defeat the object which both had in view in entering upon the correspondence.* . . .

(*h*) 6 Wendell (N. Y.), 104; Batterman *v.* Morford, 76 N. Y. 622.

(*i*) 9 How. 390; approved by Lindley, J., in Byrne *v.* Van Tienhoven, 5 C. P. D. 344, 347.

"The fallacy of the opposite argument, in our judgment, consists in the assumption that the contract cannot be consummated without a *knowledge* on the part of the company that the offer has been accepted. . . . But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. . . . The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor for the same reason can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of *some* interval of time; and if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other."

§ 70. The civilians do not accord with these views. Pothier says: "If I write to a merchant of Leghorn a letter, in which I purpose to purchase of him a certain quantity of merchandise at a certain price, and before my letter can have reached him I write a second letter withdrawing my proposal, although the merchant of Leghorn, in ignorance of the change of my intentions, answers that he accepts the proposed bargain, yet there is no contract of sale between us; for, my intention not having continued until the time at which my letter was received and my proposal accepted, the assent or concurrence of our wills necessary to form a contract of sale has not occurred. It must be observed, however, that if my letter causes the merchant to be at any expense in proceeding to execute the contract proposed, or if it occasion him any loss, as, for example, if, in the intermediate time between the receipt of my first and that of my second letter, the price of the merchandise falls, and my first letter has made him miss the opportunity to sell it before the fall of the price, — in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity that no person shall suffer for the act of another: *Nemo ex alterius facto prægravari debet.* I ought, therefore, to indemnify him for the expense and loss which I occasion by making him a proposition which I afterwards refused to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, ships for my account and forwards the merchandise, though in that case there has not properly been a contract of sale between us, yet he will have a right to compel me to execute the proposed contract, not in virtue of any contract of

sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned" (*k*).

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

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

(*k*) Pothier, Contrat de Vente, No. 32, and see the judgment of Lindley, J., in Byrne *v.* Tienhoven, 5 C. P. D. 344, where Pothier's opinion is stated to be not in accordance with English law.

(*l*) Mr. Story is of a contrary opinion, and lands this doctrine as "by far the fairest and most intelligible that can be found." § 130, note.

governed by totally different principles; for in agencies a revocation of authority by the principal cannot take effect till it reaches the agent (*m*).

§ 73. But although this is a different contract, the analogy is very strong between it and a bargain and sale by correspondence. If A. send an agent to B. with a proposal for sale, even the civilians admit that A. cannot revoke the authority of the agent to make the offer until the revocation reaches him. So that if A. despatched C. with an order recalling the authority, even before the agent had made the offer, A. would still remain bound by a bargain made before C.'s arrival with the countermand. Why should there be any difference when the proposer sends his proposal by the public post, which he authorizes to deliver it? A., by sending a letter from London, addressed to B. in Manchester, really gives to the public post authority to hand to B. a written offer, and to receive an answer in behalf of A. Even on the doctrines of the civil law, it would seem to be permissible under such circumstances to hold that A.'s revocation comes too late, if it only arrives after the completion of the bargain thus authorized to be made in his behalf. In reality the true theory of the case seems to be, that an offer sent by mail is an authority to the party to whom it is sent to bind the sender by acceptance, and includes an implied promise that no revocation is to take effect till received by the agent.

§ 74. The cases that arise in attempts to contract by correspondence present at times very singular complexity. In Dunmore *v.* Alexander (*n*), to which reference has already been made, *ante*, § 46 a, the party to whom the proposal was made wrote and posted a letter of acceptance; and then wrote and posted a letter recalling the acceptance, and *both letters reached the proposer at the same time.* The majority of the Court of Session in Scotland held that there was no contract, reversing the judgment of the lower court; and a very similar case is cited by Merlin, Repert. tit. Vente, sec. 1, art. 3, No. 11, where an offer was sent by letter to buy goods on certain condi-

(*m*) Story on Agency, § 470, 9th ed.; per Buller, J., in Salte *v.* Field, 5 T. R. 215. A revocation by the death of the principal operates instantly at common law. (See cases in note to Smart *v.* Sandars, 5 C. B. at p. 917.) By the civil law, acts done by the agent while ignorant of the principal's death are valid, unless the other contracting party knew of the death. Dig. L. 17, T. 1, L. 26, 58. The French code is to the same effect. Acts 2008-9. The Bank of England protects itself against the risk resulting from the common law rule by special clauses in its forms for powers of attorney. Kiddill *v.* Farnell, 26 L. J. Ch. 818. By sect. 81, sub-s. 3, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), no sale of a ship *bona fide* made by an agent under a certificate of sale to a purchaser for valuable consideration shall be impeached by reason of the death of the principal before the making of the sale. By 22 & 23 Vict. c. 35, s. 26, trustees, executors, and administrators are discharged from liability in respect of payments made *bona fide* to an agent whose principal is dead, but whose death is at the time unknown.

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

tions. The offer was accepted by letter, but by a subsequent letter the unconditional acceptance was recalled, the writer proposing some modifications in the conditions. Both letters reached the original proposer together, and he declined to execute the contract. It was held that the proposer could not be forced to perform the bargain, the second answer to his proposal authorizing him to consider the acceptance as withdrawn.

§ 75. In the case of M'Culloch *v.* The Eagle Insurance Company (*o*), A. wrote to ask B. on what terms he would insure a vessel. B. wrote on the 1st of January that he would insure at a specified rate, and on the 2d of January wrote a letter retracting his offer. A. had written an acceptance of the offer before receiving the second letter, *but after B. had posted the second letter*, and it was held that there was no contract; but this case is disapproved by the American text-writers, and is in conflict with the decision of the Supreme Court of the United States in Tayloe *v.* Merchants' Fire Insurance Company, 9 How. 390.

AMERICAN NOTE.

§§ 38–75.

MUTUAL ASSENT. 1. The American authorities uniformly recognize as elementary law, that an assent may be implied as well as express; and must be mutual or reciprocal, and concurrent in time.

If the fair import of the defendant's correspondence and acts is that he assents to the plaintiff's proposal, or if the plaintiff believes and has reason to believe that he assents, his secret intention not to assent is immaterial. Bohn Mfg. Co. *v.* Sawyer, 169 Mass. 477.

A proposal or offer, therefore, must in some way be accepted to constitute a sale. For this reason the bidder at auction may retract before the property is "struck off" to him. Fisher *v.* Seltzer, 23 Pa. St. 308, directly in point; Grotenkemper *v.* Achtermeyer, 11 Bush, 222. The delicate question often is, Was there really an acceptance? Did the language used amount to a positive and definite assent? See Craig *v.* Harper, 3 Cush. 158; Falls *v.* Gaither, 9 Port. 605; Tucker *v.* Woods, 12 Johns. 190; McDonald *v.* Bewick, 51 Mich. 79; Johnston *v.* Fessler, 7 Watts, 48; Fenno *v.* Weston, 31 Vt. 345; Johnson *v.* Filkington, 39 Wisc. 62. In Manier *v.* Appling, 112 Ala. 663, plaintiff offered to buy shoes upon certain specified terms. The defendants replied that plaintiff's letter "should have prompt attention." Held, no acceptance. Merely naming

(*o*) 1 Pick. 283. And in Hallock *v.* Commercial Insurance Company, 2 Dutcher, 268, 283, Vredenburgh, J., referring to M'Culloch *v.* The Eagle Insurance Company, says: "This case is against the whole current of authorities, both in England and in this country;" and the principle of the decision is directly controverted in the cases recently before the English courts which have been already referred to. [And the case has been directly overruled by the same court which decided it in Brauer *v.* Shaw, 168 Mass. 198. E. H. B.]

a price does not necessarily import an assent to sell to the inquirer at that price. In a late case S. wrote G., "How many rags have you on hand, and your price for them?" G. replied, "We have about a ton, and our price is 3½ cents." S. answered, "We will take the rags at the price you name." To which G. made no answer, but, when called upon, refused to send the rags. Held, no sale; the first real *offer* being from S. that he would take the rags, and G. never having agreed to send them. Smith *v.* Gowdy, 8 Allen, 566. And see very similar cases in Slaymaker *v.* Irwin, 4 Whart. 369, and State *v.* Peters, 91 Me. 31. See, also, Moulton *v.* Kershaw, 59 Wisc. 316; Beauprè *v.* Pacific, &c. Telegraph Co. 21 Minn. 155; Kinghorne *v.* Montreal Tel. Co. 18 Up. Can. Q. B. 60; Sanders *v.* Pottlitzer, 144 N. Y. 209. In Harvey *v.* Facey [1893], App. Cas. 552, H. telegraphed to F., "Will you sell us B. H. P.? Telegraph lowest cash price." F. replied by telegraph, "Lowest price for B. H. P., £900." H. then telegraphed, "We agree to buy B. H. P. for £900 asked by you. Please send us your title deeds, in order that we may get early possession." F. did not reply. It was held that the final telegram was not the acceptance of an offer to sell, for none had been made. That telegram was itself an offer to buy. An acceptance thereof must be expressed, and could not be implied. There was no contract.

The necessity for coexistence of assent allows an offer to be retracted at any time before acceptance, though time is given in which to accept. Larmon *v.* Jordan, 56 Ill. 204; School Directors *v.* Trefethren, 10 Bradw. 127. Thus in Eskridge *v.* Glover, 5 Stew. & Port. 264, G. offered to exchange horses with E. and pay $50 difference. E. reserved the right of deciding within two or three days. They actually exchanged to enable E. to decide; but before the time was out, or any decision by E., G. gave E. notice that he withdrew his offer. Held, no bargain, and that E. could not recover the $50 of G. And see Faulkner *v.* Hebard, 26 Vt. 452; Thompson Mfg. Co. *v.* Perkins, 97 Iowa, 607.

Conversely, also, an assent may be given and the bargain closed at any time before retraction, though the period allowed for such acceptance has not expired. The proposer, not having withdrawn his offer, cannot object that the other does not require all the allotted time. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224; Cooper *v.* Lansing Wheel Co. 94 Mich. 272.

The assent must also be communicated to the proposer, either actually or in legal contemplation. Emerson *v.* Graff, 29 Pa. St. 358; Jenness *v.* Mt. Hope Iron Co. 53 Me. 20; Borland *v.* Guffey, 1 Grant, 394. Preparations to act upon an offer as if duly accepted, unknown to the other party, do not, in cases of a mere offer, suffice to bind the offerer. In Beckwith *v.* Cheever, 21 N. H. 41, A. offered to sell B. a lot of timber. B. said he would accept if his brother would assist him to pay for it. A. said he need not give a decided answer then, but might do so thereafter. B.'s brother agreed to assist him, but no notice was given to A., and he sold the timber to C. Held, no sale to B. In White *v.* Corlies, 46 N. Y. 467, C. wrote to W. (after negotiations between them), "Upon an agreement to fit up my office, 57 Broadway, in two weeks, you can begin at once." W., without any reply, bought lumber and commenced work, and C., not knowing it, countermanded the order. Held, no complete contract for want of notice of acceptance by W. Of course a proposal or offer may be couched in such terms that the mere doing of some act is itself

an acceptance, without any communication to the offerer; but sales of goods do not usually come within that class.

An acceptance must be made known to the other *within the time* allowed by his offer. Potts *v.* Whitehead, 20 N. J. Eq. 55; Curtis *v.* Blair, 26 Miss. 325; Longworth *v.* Mitchell, 26 Ohio St. 334. Or, if none is stated, within a reasonable time, Loring *v.* Boston, 7 Met. 409; Averill *v.* Hedge, 12 Conn. 424; Martin *v.* Black, 21 Ala. 721; Patterson *v.* Delorme, 7 Manitoba, 594; McCormick Harvesting Machine Co. *v.* Richardson, 89 Iowa, 525; Dawley *v.* Potter, 19 R. I. 372; Peru *v.* Turner, 10 Me. 185; Minnesota Oil Co. *v.* Collier Lead Co. 4 Dill. 431, a valuable case; Chicago, &c. Railroad Co. *v.* Dane, 43 N. Y. 240; which is a question of law for the court; Craft *v.* Isham, 13 Conn. 41; Loring *v.* Boston, 7 Met. 409; Averill *v.* Hedge, 12 Conn. 424.

For similar reasons a retraction must be made known to the offeree before it has any effect. And if an acceptance be duly signified or mailed, before any knowledge of a retraction, though one had been really sent, the sale is closed. This was decided in America long before Byrne *v.* Van Tienhoven, cited in the text, viz., in The Palo Alto, Daveis, 344 (1847), 2 Ware, 344; and also in Wheat *v.* Cross, 31 Md. 99 (1869); Whitman Agricultural Co. *v.* Strand, 8 Wash. 647. To the same effect is Patrick *v.* Bowman, 149 U. S. 411, 424 (1893). This was the real point involved in Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390. And see also Brauer *v.* Shaw, 168 Mass. 198 (1897), an important case. There the defendants telegraphed an offer from Boston at 11.30 A. M. The telegram was received by the plaintiffs in New York at 12.16 P. M., and at 12.28 they telegraphed their acceptance. This message was not received by defendants in Boston until 1.20 P. M. Meantime, at 1 P. M., defendants had telegraphed a message revoking their offer, which message was received in New York at 1.41 P. M. It was held that there was a completed contract.

2. That an assent must be **unconditional** in order to have a binding effect is also well agreed. It must exactly conform to the offer, neither more nor less; at least, must not add any material condition. Carr *v.* Duval, 14 Pet. 77; Jones *v.* Daniel [1897], 2 Ch. 332; Potts *v.* Whitehead, 23 N. J. Eq. 514; Myers *v.* Smith, 48 Barb. 614; Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80; Uhlman *v.* Day, 38 Hun, 298; Eggleston *v.* Wagner, 46 Mich. 610; Robinson *v.* Weller, 81 Ga. 704; Myers *v.* Trescott, 59 Hun, 395; North Western Iron Co. *v.* Meade, 21 Wisc. 474; Maynard *v.* Tabor, 53 Me. 511; Maclay *v.* Harvey, 90 Ill. 525; Snow *v.* Miles, 3 Cliff. 608; Decker *v.* Gwinn, 95 Geo. 518; Insurance Co. *v.* Lasher Stocking Co. 66 Vt. 441. P. wrote to B. to send him six hogsheads of rum, and other things. B. sent only three hogsheads, which were lost on the way. Held, no sale. Bruce *v.* Pearson, 3 Johns. 534. Of course a party is not bound to receive and pay for a *larger* quantity than ordered. Rommel *v.* Wingate, 103 Mass. 327. But the mere fact that the quantity sent slightly exceeds the amount ordered may not excuse one from receiving and paying for the true amount in the absence of any fraud. And see Corning *v.* Colt, 5 Wend. 253; Jenness *v.* Mt. Hope Iron Co. 53 Me. 20; Plant Seed Co. *v.* Hall, 14 Kans. 553; Shrimpton *v.* Warmack, 72 Miss. 208. On the 14th of the month A. wrote B. from H. for a lot of flour, saying, "Please write by return of

wagon whether you accept our offer." B. accepted by *mail* on the 19th, addressed to A. *at the town of G.*, which A. there received, but he had in the mean time bought all he wanted. Held, no valid sale by B. to A. Eliason *v.* Henshaw, 4 Wheat. 225. An offer calling for a reply by telegraph upon receipt of the offer cannot be accepted by sending a letter by mail two days later. Horne *v.* Niver, 168 Mass. 4 (1897). In Johnson *v.* Stevenson, 26 Mich. 63, an offer to sell and deliver goods at a certain time and place was held not duly accepted by an answer changing the time of delivery, though in all other respects corresponding with the offer. An offer to sell 100 kegs of butter at 20 cents is not accepted by a reply, "Will take your butter at 20 cents *if good.*" McIntosh *v.* Brill, 20 Up. Can. C. P. 426. And see Carter *v.* Bingham, 32 Ib. Q. B. 615. Minneapolis, &c. Railway *v.* Columbus Rolling Mill, 119 U. S. 149, holds that an offer to sell "2000 to 5000 tons of iron rails" is not made binding by a reply ordering 1200 tons. Such modified acceptance closes the negotiations, and the offeree cannot afterwards accept the original offer unless renewed. Id.; Hyde *v.* Wrench, 3 Beav. 334. See, also, Cartmel *v.* Newton, 79 Ind. 1; Merriam *v.* Lapsley, 2 McCrary, 606; McCotter *v.* Mayor, 37 N. Y. 325; Baker *v.* Holt, 56 Wisc. 100; Salomon *v.* Webster, 4 Col. 353; Fox *v.* Turner, 1 Bradw. 153; Fulton Brothers *v.* Upper Canada Furniture Co. 9 Ont. App. 211 (1883), an interesting case.

3. As to sales by letter, the prevailing rule (notwithstanding the logical arguments to the contrary) is, that if a definite proposition made by letter is accepted by letter, within a reasonable time and before knowledge of any retraction, the contract is closed by the mailing of the acceptance, duly addressed, and some say even if the letter of acceptance never reaches the other party. See Mactier *v.* Frith, 6 Wend. 103 (1830), a leading case; Brisban *v.* Boyd, 4 Paige, 17 (1832); Chiles *v.* Nelson, 7 Dana, 281 (1838); Hamilton *v.* Lycoming Ins. Co. 5 Pa. St. 339 (1847); Levy *v.* Cohen, 4 Geo. 1 (1848); Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390 (1849); Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 97 (1854); Vassar *v.* Camp, 11 N. Y. 441 (1854), a prominent case; Hallock *v.* Ins. Co. 26 N. J. Law, 282 (1857); Moore *v.* Pierson, 6 Iowa, 279 (1858); Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80 (1860); Abbott *v.* Shepard, 48 N. H. 14 (1868); Stockham *v.* Stockham, 32 Md. 196 (1869); Bryant *v.* Booze, 55 Geo. 438 (1875); Lungstrass *v.* German Ins. Co. 48 Mo. 204 (1871); Winterport, &c. Co. *v.* Schooner Jasper, 1 Holmes, 101 (1872); Washburn *v.* Fletcher, 42 Wisc. 152 (1877); Ferrier *v.* Storer, 63 Iowa, 484 (1884); Haas *v.* Myers, 111 Ill. 421 (1885); Hunt *v.* Higman, 70 Iowa, 406; Gipps Brewing Co. *v.* De France, 91 Iowa, 108; Kempner *v.* Cohn, 47 Ark. 519; Linn *v.* M'Lean, 80 Ala. 360; Otis *v.* Payne, 86 Tenn. 663; Haarstick *v.* Fox, 9 Utah, 110 (1893). On this principle, in Howard *v.* Daly, 61 N. Y. 362, a deposit of an acceptance in a letter-box in the defendant's place of business was held to complete the contract, even if never received by him. The above cases are not all sales, but the same general principles usually apply. In some of them other considerations enter into the decisions. If an offer is *sent* by mail, it may imply a request or authority to return the acceptance in the same way; in which case it is easier to see that the mail is the agent of the party sending the proposal than in some other cases. *This may account for some of the foregoing decisions.* But in the late case of Henthorn *v.* Fraser [1892], 2 Ch. 27, it was held that,

although an offer was sent by special messenger, it might be duly accepted by mailing a letter of acceptance. It is always easy for the offerer to make his liability depend upon the actual receipt of the acceptance, as was done in Lewis *v.* Browning, 130 Mass. 173; Haas *v.* Myers, 111 Ill. 421; Union Bank *v.* Miller, 106 N. C. 347; Atlee *v.* Bartholomew, 69 Wisc. 43. M'Culloch *v.* Eagle Ins. Co. 1 Pick. 283, did not decide exactly, as some seem to suppose, that an acceptance by letter was not effectual until received by the offerer, but rather that a retraction of an offer not then accepted took effect from the time it was posted, although not received by the offeree until after he had mailed an acceptance, and so no contract existed; on the ground that, at the moment the acceptance was sent, the mind of the offerer had changed, and he had mailed his retraction. Perhaps this was an error, but not the error usually attributed to the case. And the exact point has since been ruled differently in Massachusetts. Brauer *v.* Shaw, 168 Mass. 198. The courts, which hold that a contract by letter is closed by mailing the acceptance, also hold that an acceptance by telegraph is sufficient when deposited at the office of the company. Trevor *v.* Wood, 36 N. Y. 307; Perry *v.* Mt. Hope Iron Co. 15 R. I. 380; Minnesota Linseed Oil Co. *v.* Collier Lead Co. 4 Dillon, 431; Thorne *v.* Barwick, 16 Up. Can. C. P. 369; Marshall *v.* Jamieson, 42 Up. Can. Q. B. 120. If the prevailing doctrine applies to *every* contract by letter, it seems to follow that a proposal of marriage by letter is duly accepted and the contract closed when the acceptance is duly mailed; and if the proposer marry another because he never received the letter of acceptance of his first offer, he is liable at once to a suit for a breach of promise! But to thoroughly discuss this question on principle and analogy would lead us too far from our present purpose. The reader is referred to a very able article on this subject by Professor Langdell, the learned Dean of the Harvard Law School, in 7 Am. Law Rev. p. 433; to an article in 9 Law Quarterly Rev. 318–320; and to the dissenting opinion of Baron Bramwell in 4 Ex. Div. 216.

4. With us also it has been frequently held, in conformity with Oxendale *v.* Wetherell, that, if part of an entire order for goods is accepted and retained *after* or with knowledge that the whole will not be furnished, an implied contract arises to pay *pro rata*, subject in some courts to a counter claim for damages for non-completion. Bowker *v.* Hoyt, 18 Pick. 558, an excellent illustration; Richards *v.* Shaw, 67 Ill. 222; Flanders *v.* Putney, 58 N. H. 358; Harralson *v.* Stein, 50 Ala. 347; Sentell *v.* Mitchell, 28 Geo. 196; Goodwin *v.* Merrill, 13 Wisc. 658; Booth *v.* Tyson, 15 Vt. 518; Shaw *v.* Badger, 12 S. & R. 275; Ruiz *v.* Norton, 4 Cal. 355; Saunders *v.* Short, 86 Fed. R. 225, and cases cited. But some courts have apparently declined to apply the rule adopted in Oxendale *v.* Wetherell. In some of these cases it does not appear whether there was any acceptance of part *after* knowledge of an intended non-fulfilment, though that is not made the prominent ground of the decision. See Champlin *v.* Rowley, 13 Wend. 258, and 18 Wend. 187; Mead *v.* Degolyer, 16 Wend. 632; Paige *v.* Ott, 5 Denio, 406; Kein *v.* Tupper, 52 N. Y. 555; Witherow *v.* Witherow, 16 Ohio, 238. The peculiar language of the contracts in some of these may also have had much to do with the conclusion. See Tipton *v.* Feitner, 20 N. Y. 423. And the later cases in New York imply that if the vendee accepts part, then knowing that the whole will not be delivered, he thereby waives full performance and becomes

liable for the part accepted, which is perhaps all that Oxendale *v.* Wetherell intended to decide. See Avery *v.* Willson, 81 N. Y. 341 (1880), Silberman *v.* Fretz, 12 App. Div. (N. Y.) 328. And he is liable for the contract price, less damages resulting from failure to deliver the balance. Brady *v.* Cassidy, 145 N. Y. 171; Churchill *v.* Holton, 38 Minn. 519. So if goods are sent to one without any order, and he receives and consumes them, knowing that the sender expects him to pay for them, this constitutes an implied sale. Wellauer *v.* Fellows, 48 Wisc. 105. But mere physical receipt of unordered goods does not constitute an implied sale.

5. As to a sale by a suit, it is equally clear that a judgment in trover for goods, *followed by payment*, transfers the plaintiff's title to the defendant; the acceptance of the value being an implied assent to a change of ownership. The plaintiff could not expect to have his money and the goods also. See Hepburn *v.* Sewell, 5 H. & J. 211; Lovejoy *v.* Murray, 3 Wall. 16; Osterhout *v.* Roberts, 8 Cow. 43; Brady *v.* Whitney, 24 Mich. 154; Fox *v.* Prickett, 34 N. J. Law, 13; Marsden *v.* Cornell, 62 N. Y. 220; Thayer *v.* Manley, 73 N. Y. 309; Terry *v.* Munger, 121 Ib. 165. Some courts seem to have adopted a rule that the title passes upon the mere recovery of a judgment in trover therefor against the wrongdoer without any satisfaction. Floyd *v.* Browne, 1 Rawle, 121; Marsh *v.* Pier, 4 Ib. 287. But it is difficult to see how. See Atlanta *v.* Tappan, 48 Conn. 141; Brinsmead *v.* Harrison, L. R. 9 C. P. 547 and cases; White *v.* Philbrick, 5 Greenl. 152, 2d ed., and note by the editor. See Miller *v.* Hyde, 161 Mass. 472, for able opinions on both sides of this question.

In some courts, if property is taken by a tort, and converted to the use of the wrongdoer, the owner may waive the tort, and recover its value upon an implied assumpsit. Terry *v.* Munger, 121 N. Y. 165, and many cases cited. In others it is necessary that the property should have been converted into money by the wrongdoer, in which event assumpsit for money had and received will lie. Jones *v.* Hoar, 5 Pick. 285.

6. That a sale founded upon a material mistake of fact as to the person dealt with, or as to the existence, identity, species, or kind of the subject matter, or the price, is not binding, see Mudge *v.* Oliver, 1 Allen, 74; Harvey *v.* Harris, 112 Mass. 32; Gardner *v.* Lane, 9 Allen, 492; Gibson *v.* Pelkie, 37 Mich. 380; Decan *v.* Shipper, 35 Pa. St. 239; Greene *v.* Bateman, 2 W. & M. 359; Allen *v.* Hammond, 11 Peters, 63; Kyle *v.* Kavanagh, 103 Mass. 356; Hartford, &c. Railroad *v.* Jackson, 24 Conn. 514; Utley *v.* Donaldson, 94 U. S. 29; Meyer *v.* Richards, 163 U. S. 385, 410, and cases cited; Rovegno *v.* Defferari, 40 Cal. 459; Ketchum *v.* Catlin, 21 Vt. 191; Webb *v.* Odell, 49 N. Y. 585; Hills *v.* Snell, 104 Mass. 173; Calkins *v.* Griswold, 11 Hun, 208; Byers *v.* Chapin, 28 Ohio St. 300; McGoren *v.* Avery, 37 Mich. 120; Barker *v.* Dinsmore, 72 Pa. St. 427; Winchester *v.* Howard, 97 Mass. 304. In Schutz *v.* Jordan, 141 U. S. 213, by collusion between plaintiffs and an employee of defendants, the goods had been placed among defendants' stock and sold by them without knowledge of the fact. They were held not liable for goods sold and delivered. In Consumers Ice Co. *v.* Webster, 32 App. Div. (N. Y.) 592 (1898), there had been for some years a partnership doing business under

the name and style of "The Consumers' Ice Co." A few days before the contract in suit was made, this partnership was dissolved, and a corporation was formed under the same name, the partners in the old firm becoming stockholders in the new corporation; it was held that defendant could show that, at the time of making the contract, plaintiffs had stated that it was for the benefit of the old firm, and that the defendant, upon discovering that the vendee was the new corporation and not the old firm, could repudiate the contract; Schaeffer *v.* Bond, 70 Md. 482; Shingleur *v.* Telegraph Co. 72 Miss. 1030. In Sheldon *v.* Capron, 3 R. I. 171, it was held that if, at an auction sale of goods catalogued in lots by numbers, A. bids off one lot, No. 24, supposing it to be lot 25, no sale is complete of either lot. In Rupley *v.* Daggett, 74 Ill. 351, the vendor gave the price as $165; the buyer understood him $65, and received the property with that understanding. Held, no sale. In Chapman *v.* Cole, 12 Gray, 141, C., intending to pay F. fifty cents, gave him by mistake a gold coin of the value of $10, supposing it was a half dollar; and F., by a like mistake, paid it to the defendant. Held, that the mistake of fact prevented it from being a binding transaction, and that C., having tendered fifty cents, could recover of the defendant. It is partly on this ground of mistake that a sale of a piece of furniture, with valuables in a concealed drawer, does not pass the title to such unknown and really unsold articles. See Huthmacher *v.* Harris, 38 Pa. St. 491; Livermore *v.* White, 74 Me. 452. And see Durfee *v.* Jones, 11 R. I. 588; Ray *v.* Light, 34 Ark. 421; Bowen *v.* Sullivan, 62 Ind. 281; Hogue *v.* Mackey, 44 Kans. 277.

While *some* mistakes, therefore, avoid a sale, a mistake as to the quality, quantity, or fitness for some intended but unexpressed purpose will not usually have that effect. Williams *v.* Hathaway, 19 Pick. 387; Smith *v.* Ware, 13 Johns. 257; Wheat *v.* Cross, 31 Md. 99; Taylor *v.* Fleet, 4 Barb. 95. But see Wheadon *v.* Olds, 20 Wend. 174. A mistake as to the solvency of the maker of a note which is being sold in market is a mistake as to its *quality*, and does not avoid the sale. Hecht *v.* Batcheller, 147 Mass. 335, disapproving Harris *v.* Hanover Nat. Bank, 15 Fed. Rep. 785. In Sample *v.* Bridgforth, 72 Miss. 293, a note was sold, which both parties to the sale believed was secured by a first trust deed. In this they were mistaken, but rescission was not allowed. So if A. sells goods to B., really supposing he was buying as agent for C., and would not have sold to B. on his own credit, and B. afterwards sells them in good faith to C., there being no fraud, concealment, or misrepresentation in either transaction, A. cannot recover them of C. It is not a case of mistaken identity, as A. in no way indicated his understanding that B. was an agent. Stoddard *v.* Ham, 129 Mass. 383, distinguishing Boston Ice Company *v.* Potter, 123 Mass. 28, fully stated in the text. So if A. fraudulently assumes the name of B., and in person buys goods of E., the sale is not *void*, but only voidable, and E. therefore cannot maintain an action against a carrier to whom he has delivered them for carriage to A. Edmunds *v.* Merchants' Transportation Co. 135 Mass. 283; and see Samuel *v.* Cheney, 135 Mass. 278. But if A. buys goods falsely representing himself to be the brother of a reputable merchant in a certain town, and *buying for him*, and the vendor therefore intends to sell to the alleged principal and no other, there is no sale; the property does not pass to the swindler. Aborn *v.* Merchants' Transportation Co. 135 Mass. 283; and see Barker *v.* Dinsmore, 72 Pa. St. 427;

Dean *v.* Yates, 22 Ohio St. 388; Hamet *v.* Letcher, 37 Ib. 356; McCrillis *v.* Allen, 57 Vt. 505; Randolph Iron Co. *v.* Elliott, 34 N. J. Law, 184; Rodliff *v.* Dallinger, 141 Mass. 1; Roof *v.* Morrisson, 37 Ill. App. 37; Mayhew *v.* Mather, 82 Wis. 355. And see note on Fraud, *infra*, §§ 428–489, subtitle, "Sales by Fraudulent Purchaser."

Sales, also, may be void for uncertainty, or if really unintelligible. See Whelan *v.* Sullivan, 102 Mass. 204; Buckmaster *v.* Consumers' Ice Co. 5 Daly, 313; Cummer *v.* Butts, 40 Mich. 322; Marble *v.* Standard Oil Co. 169 Mass. 553.

CHAPTER IV.

OF THE THING SOLD.

	Sect.
Sale of a thing which has ceased to exist	76
Sale of a thing not yet existing, or not yet acquired by vendor	77
Equitable assignments of after-acquired property	81
Goods not belonging to vendor	82
In America, executory agreement becomes executed as soon as vendor acquires title	83
Sale of a hope dependent on a chance	84
Venditio spei	84

§ 76. As there can be no sale without a thing, transferred to the purchaser in consideration of the price received, it follows that if at the time of the contract the thing *has ceased to exist*, the sale is void.

In Strickland *v.* Turner (*a*), a sale was made of an annuity dependent upon a life. It was afterwards ascertained that the life had already expired at the date of the contract, and not only was the sale held void, but *assumpsit* by the purchaser to recover back the price paid as money had and received was maintained.

In Hastie *v.* Couturier (*b*), a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn, having become heated, had been discharged by the master at an intermediate port, and sold on the 21st of the preceding month of April: held, that the sale of the 15th of May was properly repudiated by the purchaser.

§ 77. These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold; sometimes on the want of consideration for the purchaser's agreement to pay the price. Another and perhaps the true ground is, rather, that there has been no contract at all, for the assent of the parties, being founded on a mutual mistake of fact, was really no assent, there was no subject-matter for a contract, and the contract was therefore never completed. This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase turned out to be for six years instead of eight and a half; and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase

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

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

a less term than that offered by the vendor (*c*). This is also the opinion of the civilians. Pothier (*d*) says: "There must be a thing sold, which forms the subject of the contract. If, then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if, when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null because the house, which was the subject of it, did not exist: the site and what is left of the house are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words: "There is no valid assent where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

§ 78. In relation to things *not yet in existence*, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be *sold*, while the other can only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month (*e*), and the sale is valid. But he can only make a *valid agreement to sell, not an actual sale*, where the subject of the contract is something to be afterwards acquired (*f*), as the wool of any sheep, or the milk of any cows, that he may buy within the year, or any goods to which he may obtain title within the next six months. This distinction involves very important consequences, as will be pointed out hereafter (Book II.). For the present it suffices to say, that in an actual sale, the property passes, and the risk of loss is in the purchaser; while in the agreement to sell, or executory contract, the risk remains in the vendor.

§ 79. The leading modern case on the subject is Lunn *v.* Thornton (*g*), decided in 1845. The action was *trover* for bread, flour, etc. The plaintiff, in consideration of a sum lent to him, had by deed-poll covenanted that he "sold and *delivered* unto the defendant all and singular his goods, household furniture, etc., then remaining and being, or *which should at any time thereafter remain and be in his dwelling-house*," etc. Tindal, C. J., in delivering the opinion of the court, said: "It is not a question whether a deed might not have been so

(*c*) Farrer *v.* Nightingal, 2 Esp. 639.

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

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

(*f*) Per Mansfield, C. J., in Reed *v.* Blades, 5 Taunt. 212, 222.

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

framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." *Held* in the negative. Subsequent cases are to the same effect (*h*).

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

See Brown *v.* Bateman (L. R. 2 C. P. 272), where the bargain was in relation to such materials as might be subsequently brought upon the premises under a building contract.

§ 81. It is well to observe that in equity a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee. The whole doctrine with its incidents, both at common law and in equity, was twice argued, and thoroughly discussed and settled, in the case of Holroyd *v.* Marshall (*i*), where Lord Westbury and Lord Chelmsford gave elaborate opinions, concurred in by Lord Wensleydale, although his Lordship's first impressions had been adverse to their conclusions. The Barons of the Exchequer held, however, in Belding *v.* Read (*j*), that the doctrine of Holroyd *v.* Marshall only applies to subsequently acquired property when so specifically described as to be identified.

[The effect of an equitable assignment of after-acquired property was explained by Jessel, M. R., in a passage which has since been frequently cited: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property

(*h*) Gale *v.* Burnell, 7 Q. B. 850; Congreve *v.* Evetts, 10 Ex. 298, and 23 L. J. Ex. 273; Hope *v.* Hayley, 5 E. & B. 830, and 25 L. J. Q. B. 155; Chidell *v.* Galsworthy, 6 C. B. N. S. 471; Allatt *v.* Carr, 27 L. J. Ex. 385. See, also, Moakes *v.* Nicolson, 34 L. J. C. P. 273; 19 C. B. N. S. 290.

(*i*) 10 H. L. C. 191. And see judgment in Reeve *v.* Whitmore, 33 L. J. Ch. 63, as to distinction between a present transfer of future property and a mere power to seize it.

(*j*) 3 H. & C. 955; 34 L. J. Ex. 212.

which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment (*k*). By this the learned judge means a complete assignment in *equity*, not at law, so that the assignee acquires an equitable not a legal title (*l*). And this equitable title will not prevail against a person obtaining the legal title without notice (*m*).

The law relating to assignments of future property requires authoritative exposition, and it will be necessary, when occasion arises, for the Court of Appeal to lay down some more definite conclusion for the profession than that arrived at in Holroyd *v.* Marshall. In *In re* Clarke (*n*) in 1887, the cases since Holroyd *v.* Marshall, which are cited in the note below (*o*), were all reviewed, and the Court of Appeal treated an assignment of after-acquired property as divisible, and enforced that part of it which related to property capable of being identified, although the other part of the assignment was possibly too wide to be enforced, a point upon which the court expressed no opinion. All the Lords Justices questioned the correctness of the decision in Belding *v.* Read, on the ground that the Court of Exchequer were wrong in construing the contract in that case as indivisible. Both Cotton and Bowen, L. JJ., were of opinion that it was immaterial that the property was incapable of identification at the time when the contract was made, and held it to be sufficient that it was capable of being identified when it was sought to be enforced. It is conceived, therefore, that the limitation to the doctrine of Holroyd *v.* Marshall, which was set up in Belding *v.* Read, is too narrow, and that this class of assignments will receive in the future a more liberal interpretation. At the same time it is probable that there are contracts falling within this class which, either for uncertainty or for latitude in respect of the subject-matter agreed to be assigned, will still be incapable of being enforced (*p*). And in the late case of Tailby *v.* The Official Receiver, 13 App. Cas. 523 (1888), the House of Lords overruled the cases of Belding *v.* Read, 3 H. & C. 955, and *In re* D'Epineuil, 20 Ch. Div. 758, and approved that of Coombe *v.* Carter, 36 Ch. D. 348, and held that an assignment of future book debts, though not limited to book debts in any particular business, was

(*k*) In Collyer *v.* Isaacs, 19 Ch. D. at p. 351.

(*l*) See per Brett, M. R., in Joseph *v.* Lyons, 54 L. J. Q. B. at p. 3.

(*m*) Joseph *v.* Lyons, *ubi supra*.

(*n*) 36 Ch. D. 348, C. A. See the remarks of Bowen, L. J., at p. 356.

(*o*) Leatham *v.* Amor, 47 L. J. Q. B. 581; Lazarus *v.* Andrade, 5 C. P. D. 318; In re D'Epineuil, 20 Ch. D. 758; Clements *v.* Matthews, 11 Q. B. D. 808; Reeves *v.* Barlow, 12 Q. B. D. 436; Joseph *v.* Lyons, 54 L. J. Q. B. 1; Official Receiver *v.* Tailby, 18 Q. B. D. 26, C. A.

(*p*) See per Cotton, L. J., 36 Ch. D. at p. 352.

sufficiently definite to pass the equitable interest in any future debts, whether in the particular business carried on by the assignor at the time of the assignment, or in some other business subsequently undertaken by him.]

§ 82. In relation to executory contracts for the sale of goods not yet belonging to the vendor, Lord Tenterden held, in an early case (*q*) at Nisi Prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract, but a mere wager on the price of the commodity. But this doctrine is quite exploded, and Bryan *v.* Lewis was expressly overruled by the Exchequer of Pleas in Hibblewhite *v.* M'Morin (*r*), and Mortimer *v.* M'Callan (*s*), after being questioned in the Common Pleas in Wells *v.* Porter (*t*).

The law in relation to time bargains for the sale of chattels not belonging to the vendor, when merely colorable devices for gambling in the rise and fall of prices, is treated *post*, Book III. Chapter 3.

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

§ 84. The civilians held that an expectation dependent on a chance may be sold, and the illustration usually given is that of the fisherman who agrees to sell a cast of his net for a given price (*y*); and this is adopted by Mr. Story (*z*). The illustration is perhaps not very well chosen. The case supposed is rather one of work and labor done than of sale. The fisherman owns nothing but the tools

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

(*r*) 5 M. & W. 462.

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

(*t*) 2 Bing. N. C. 722, and 3 Scott, 141. And see per Bramwell, L. J., in Borrowman *v.* Free, 4 Q. B. D. at p. 502.

(*u*) Frazer *v.* Hilliard, 2 Strobh. (So. Car.) 309; Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439. But the prevailing American doctrine on this subject seems to be essentially the same as the English one. See Story on Sales, § 186, and cases cited in the notes.

(*x*) Hotchkiss *v.* Oliver, 5 Denio (N. Y.), 314.

(*y*) Dig. L. 8, § 1, de Contr. empt. Pothier, Vente No. 6.

(*z*) Story on Sales, § 185. But Low *v.* Pew, 108 Mass. 347, appears to be a direct decision to the contrary. There it was held that a contract to sell fish which might afterwards be caught did not vest the property in the fish, when caught, in the purchaser.

of his trade, *i. e.* his net. What is in the sea is as much the property of anybody else as of himself. If a third person gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labor in fishing for an employer. It is no more a contract of sale when he is paid by the job or piece for a single cast than when he is paid by the month for all his casts (*a*). But though the illustration may be questioned, the rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the purchaser to pay the price, even if no pearls were found; for, as was said by Lord Chief Baron Richards in Hitchcock *v.* Giddings (*b*), "If a man will make a purchase of a chance, he must abide by the consequences" (*c*).

The rules of law applicable to the sale of things immoral, noxious, or illegal, are discussed *post*, Book III. Chapter 3, on Illegality.

AMERICAN NOTE.

§§ 76–84.

THE THING SOLD. 1. To transfer and deliver an article which has really ceased to exist being an impossibility, the law imposes no liability for its non-performance. This is so whether such impossibility exists at the time of the sale, as in the cases cited by the author, or arises afterwards before the contract is to be in fact executed, as in Dexter *v.* Norton, 47 N. Y. 62. The same principle was applied in Young *v.* Bruces, 5 Litt. 324, where the death of a hired slave excused his non-return. Harris *v.* Nicholas, 5 Munf. 483, is similar; so is Carpenter *v.* Stevens, 12 Wend. 589.

2. As to a sale of things not yet acquired by the vendor, the American law generally agrees with the English, that *at law* one cannot transfer by a present sale what he does not then own, although he expects to afterwards

(*a*) The vexed subject of the true test by which to determine whether certain contracts are in their nature contracts of sale, or contracts for work and labor, and materials furnished, is discussed *post*, Part II. Ch. 1, §§ 90 *et seq.*

(*b*) 4 Price, 135.

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

acquire it, and in fact does so. This is more usually applied in favor of second purchasers, or attaching creditors of the vendor, whose rights accrue after such property has been acquired; whereas such transfer may often be effectual against the grantor, or his voluntary assignee in bankruptcy, either by way of estoppel or otherwise. Some of the leading authorities on this elementary proposition are Jones *v.* Richardson, 10 Met. 481 (1845), in which the subject is elaborately considered, and Lunn *v.* Thornton (*supra*, § 79) is fully adopted; Moody *v.* Wright, 13 Met. 17; Rice *v.* Stone, 1 Allen, 569; Head *v.* Goodwin, 37 Me. 182; Williams *v.* Briggs, 11 R. I. 476, citing many authorities; Emerson *v.* European, etc. Railway Co. 67 Me. 387; Gittings *v.* Nelson, 86 Ill. 591; Shaw *v.* Gilmore, 81 Me. 396; Cressy *v.* Sabre, 17 Hun, 120. And in Chesley *v.* Josselyn, 7 Gray, 489, it was held that if A. purports to mortgage after-acquired property, and after it is acquired sells it to B. with the other mortgaged property, B. may claim it against the mortgagee, although his bill of sale describes the property as "subject to a mortgage," since the mortgage could not legally apply to the after-acquired property. And the fact that the parties expressly provide that a bill of sale or mortgage shall apply to after-acquired property is generally held, at law, to make no difference. It is not a question of intention, but of power. Barnard *v.* Eaton, 2 Cush. 295; Codman *v.* Freeman, 3 Cush. 306; Chapin *v.* Cram, 40 Me. 561; Hunter *v.* Bosworth, 43 Wisc. 583, citing many other cases in the same court; Otis *v.* Sill, 8 Barb. 102; Gardner *v.* McEwen, 19 N. Y. 123; Rochester Distilling Co. *v.* Rasey, 142 N. Y. 570; Hamilton *v.* Rogers, 8 Md. 301; Crocker *v.* Hopps, 78 Md. 260; First Natl. Bank. *v.* Lindenstruth, 79 Md. 136; Milliman *v.* Neher, 20 Barb. 37; Wright *v.* Bircher, 5 Mo. App. 327; though most hold in such last cases that if the grantee duly takes possession of such after-acquired property, *before the rights of third persons have intervened*, he thereby acquires a good title against them, even at law, without any new or additional conveyance from the grantor. The inchoate title arises at the time of the contract, which is consummated by taking possession with the consent of the vendor. Cook *v.* Corthell, 11 R. I. 482; Chase *v.* Denny, 130 Mass. 566; Rowley *v.* Rice, 11 Met. 333; Chapman *v.* Weimer, 4 Ohio St. 481; Rowan *v.* Sharps' Rifle Co. 29 Conn. 283; Walker *v.* Vaughn, 33 Conn. 577; Chynoweth *v.* Tenney, 10 Wisc. 397. In Perkins *v.* Bank, 43 S. C. 39, the buyer gave back a mortgage on the property bought, and upon after-acquired property also. He afterwards bought other property of another vendor and gave back a mortgage to him. Before this second vendor recorded his mortgage, the first vendor took possession of the property in the buyer's hands. It was held that the first vendor acquired a lien in equity as soon as the property was purchased, and a legal title as soon as he took possession. Some declare that, as between *the parties themselves*, the title vests in the grantee immediately upon its subsequent acquisition by the grantor, without any new act on the part of either, certainly where the after-acquired goods are bought with proceeds of the original goods, and take the place of the latter in the general stock. See Allen *v.* Goodnow, 71 Me. 420; Deering *v.* Cobb, 74 Me. 334; Sawyer *v.* Long, 86 Me. 541; Dexter *v.* Curtis, 91 Me. 505. Blackmore *v.* Shelby, 8 Humph. 439, cited by the author (p. 88) to this point, hardly sustains the proposition deduced from it. The question was simply whether, if one in good faith contracts to sell real estate to which

he has no title, but subsequently acquires one, the purchaser is bound to pay his notes given for the land, to which he can now obtain a perfect title.

A sale by a son of his expected interest as heir to his father's estate, made to a stranger without his father's knowledge, is not valid *at law*. Needles *v.* Needles, 7 Ohio St. 433; Wheeler *v.* Wheeler, 2 Metc. (Ky.) 474; Boynton *v.* Hubbard, 7 Mass. 112. Possibly a covenant to convey might be good. Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Jenkins *v.* Stetson, 9 Allen, 128; Stover *v.* Eycleshimer, 4 Abb. (N. Y.) App. D. 309, in equity. And see McDonald *v.* McDonald, 5 Jones Eq. 211; Mastin *v.* Marlow, 65 N. C. 695; Fitzgerald *v.* Vestal, 4 Sneed, 258; Steele *v.* Frierson, 85 Tenn. 430; Powers' Appeal, 63 Pa. St. 443.

3. **In Equity** the American cases generally agree that after-acquired property may be conveyed, especially as between the parties. Mitchell *v.* Winslow, 2 Story, 630 (1843), long prior to Holroyd *v.* Marshall, cited (p. 86) by Mr. Benjamin. See, also, Brett *v.* Carter, 2 Low. 458, a very valuable case, disapproving of Moody *v.* Wright, 13 Met. 17, containing some expressions to the contrary; Pennock *v.* Coe, 23 How. 117; Morrill *v.* Noyes, 56 Me. 458, also an elaborate case; Sawyer *v.* Long, 86 Me. 543, and cases cited; Benjamin *v.* Elmira R. R. Co. 49 Barb. 441; Philadelphia, etc. Co. *v.* Woelpper, 64 Pa. St. 366; Phillips *v.* Winslow, 18 B. Monr. 431; Sillers *v.* Lester, 48 Miss. 513; Pierce *v.* Milwaukee R. R. Co. 24 Wisc. 551; Barnard *v.* Norwich, etc. R. R. Co. 4 Cliff. 351; Butler *v.* Rahm, 46 Md. 541; Smithurst *v.* Edmunds, 14 N. J. Eq. 408, an interesting case; McCaffrey *v.* Woodin, 65 N. Y. 459; Williams *v.* Winsor, 12 R. I. 9; Butt *v.* Ellett, 19 Wall. 544; Apperson *v.* Moore, 30 Ark. 56; Braxton *v.* Bell, 92 Va. 229, 235. But even this is not always agreed to. Phelps *v.* Murray, 2 Tenn. Ch. 746 (1877); Hunter *v.* Bosworth, 43 Wisc. 583; Case *v.* Fish, 58 Wisc. 56. In Blanchard *v.* Cooke, 144 Mass. 225 (criticised in 107 Mich. 22, 25), the case of Holroyd *v.* Marshall was apparently not approved. In England the equity rule of Holroyd *v.* Marshall is now applied in law, by force of statute. See Lazarus *v.* Andrade, 5 C. P. Div. 318 (1880). And see, also, Leatham *v.* Amor, 47 L. J. Q. B. 581 (1878), 38 L. T. R. 785, and apparently not elsewhere reported. The only question in such cases in England now seems to be: Was the transfer absolute, or was it a mere agreement to assign? and was the future property sufficiently described? The latter question is important. See Banks *v.* Robinson, 15 Ont. Rep. 618; Pennington *v.* Jones, 57 Iowa, 37.

But where property is purchased upon condition that title is to remain in vendor until payment, such property does not pass to a mortgagee, as between him and the vendor, under a mortgage including after-acquired property. Cumberland Banking Co. *v.* Maryport Iron Co. [1892] 1 Ch. 415.

Most of the foregoing cases arose under mortgages, but it is supposed the same principles apply to absolute sales.

4. As to **Potential Existence**, it is clear that the unborn young of animals then owned by a vendor may be sold, at least, during gestation, and some say even before. Hull *v.* Hull, 48 Conn. 250; M'Carty *v.* Blevins, 5

Yerg. 195; Fonville *v.* Casey, 1 Murph. (N. C.) 389; Sawyer *v.* Gerrish, 70 Me. 254; Maize *v.* Bowman, 93 Ky. 205. So of a crop *then* sown or growing on the land of the grantor. Cotten *v.* Willoughby, 83 N. C. 75; Stephens *v.* Tucker, 55 Geo. 543; Sanborn *v.* Benedict, 78 Ill. 309; Wilkinson *v.* Ketler, 69 Ala. 435; Hansen *v.* Dennison, 7 Bradw. 73. And some say, even if not yet planted or sown; Briggs *v.* United States, 143 U. S. 346, 354; especially where the grantee takes possession before the rights of third persons intervene; or where the parties are lessor and lessee of a farm, the future crops of which are pledged to the lessor as security for rent. Rawlings *v.* Hunt, 90 N. C. 270; Hurst *v.* Bell, 72 Ala. 336; Watkins *v.* Wyatt, 9 Baxter, 250; Van Hoozer *v.* Cory, 34 Barb. 9; McCown *v.* Mayer, 65 Miss. 537; Everman *v.* Robb, 52 Ib. 653; Conderman *v.* Smith, 41 Barb. 404, a mortgage in May of all "the butter and cheese to be made this season" by a lessee of the cows; Heald *v.* Builders' Ins. Co. 111 Mass. 38; Smith *v.* Atkins, 18 Vt. 461; Arques *v.* Wasson, 51 Cal. 620; Headrick *v.* Brattain, 63 Ind. 438; Moore *v.* Byrum, 10 S. C. 452; see Parker *v.* Jacobs, 14 Ib. 112. But this is not always admitted. See Hutchinson *v.* Ford, 9 Bush, 318; Collier *v.* Faulk, 69 Ala. 58; Milliman *v.* Neher, 20 Barb. 38; Redd *v.* Burrus, 58 Geo. 574; Comstocks *v.* Scales, 7 Wisc. 159; Gittings *v.* Nelson, 86 Ill. 591; Welter *v.* Hill, 65 Minn. 273. A sale of "all the hay that is to be cut on the farm I have bought of ——" is not good against a *bona fide* purchaser of the fifth year's crop, after the same had been harvested. Shaw *v.* Gilmore, 81 Me. 396.

Although a present sale of unowned property passes no title, an executory contract to *bona fide* sell and deliver at a future day some article which the party can acquire is valid and binding; and damages may be recovered for its breach, following Hibblewhite *v.* M'Morin (*ante*, p. 88) in this respect. Stanton *v.* Small, 3 Sandf. 230; Clarke *v.* Foss, 7 Biss. 541, a valuable case; Cassard *v.* Hinman, 1 Bosw. 207; Phillips *v.* Ocmulgee Mills, 55 Geo. 633; Tyler *v.* Barrows, 6 Robertson (N. Y.), 104; Appleman *v.* Fisher, 34 Md. 551; Blackwood *v.* Cutting Packing Co. 76 Cal. 212; Duryea *v.* Bonnell, 18 App. Div. (N. Y.) 151.

As to contracts void as wagers, see *post*, note on Illegality, §§ 503–559.

CHAPTER V.

OF THE PRICE.

	Sect.		Sect.
Where no price has been fixed . .	85	Responsibility of valuers	88
What is meant by a "reasonable price"	86	Customs Consolidation Act, 1876 . .	88
Price to be fixed by valuers . . .	87	Civil law as to price	89
Valuation is not arbitration . . .	88		

§ 85. It has already been stated that the price must consist of *money*, paid or promised. The payment of the price in sales for cash or on credit will be the subject of future consideration, when the Performance of the Contract is discussed. We are now concerned solely with the agreement to make a contract of sale.

Where the price has been expressly agreed on, there can arise no question; but the price of goods sold may be determined by other means. If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In Acebal *v.* Levy (*a*), the Court of Common Pleas, while deciding this to be the rule of law in cases of *executed* contracts, expressly declined to determine whether it was also applicable to *executory* agreements. But in the subsequent case of Hoadly *v.* M'Laine (*b*), the same court decided that in an executory contract, where no price had been fixed, the vendor could recover in an action against the buyer, for not accepting the goods, the reasonable value of them; and this is the unquestionable rule of law (*c*).

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

(*a*) 10 Bing. 376.
(*b*) 10 Bing. 482.
(*c*) Valpy *v.* Gibson, 4 C. B. 837; 2 Saund. 121 e, n. 2, by Williams, Serj., to Webber *v.* Tivill. And see the American case of Shealy *v.* Edwards, 73 Ala. 175, 49 Amer. Rep. 43.

§ 87. It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much part of the contract as if fixed by themselves. But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement; and if the persons appointed as valuers fail or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation (*d*). But if the agreement has been executed by the delivery of the goods, the vendor will be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in Clarke *v.* Westrope (*e*), where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant thereupon consumed the goods, so that a valuation became impossible.

§ 88. Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to "arbitration," within the Common Law Procedure Act (*f*) (17 & 18 Vict. c. 125, s. 12); and it was therefore held in Bos *v.* Helsham (*g*), that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the 13th section of the act did not apply so as to authorize the valuer appointed to act by himself as a sole arbitrator.

It has been held, however, that if the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties (*h*).

[The 39 & 40 Vict. c. 36, s. 20 (Customs Consolidation Act, 1876), provides that in the event of any increase, decrease, or repeal of customs duties upon any goods or commodities, after the making of any contract or agreement for the sale or delivery of such goods duty-paid, it shall be lawful for the seller, or the buyer, as the case may be, to add the amount of increased duty to, or to deduct the amount of decreased or repealed duty from, the contract price.]

§ 89. In the civil law it was a settled rule that there could be no

(*d*) Thurnell *v.* Balbirnie, 2 M. & W. 786; Cooper *v.* Shuttleworth, 25 L. J. Ex. 114; Vickers *v.* Vickers, 4 Eq. 529; Milnes *v.* Gery, 14 Ves. Jr. 400; Wilks *v.* Davis, 3 Mer. 507.

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

(*f*) Collins *v.* Collins, 26 Beav. 306; 28 L. J. Ch. 184; Vickers *v.* Vickers, 4 Eq. 529; Turner *v.* Goulden, L. R. 9 C. P. 57.

(*g*) L. R. 2 Ex. 72; 36 L. J. Ex. 20. But see Re Hopper, L. R. 2 Q. B. 367; Re Anglo-Italian Bank, L. R. 2 Q. B. 452.

(*h*) Jenkins *v.* Betham, 15 C. B. 189; 24 L. J. C. P. 94; Cooper *v.* Shuttleworth, 25 L. J. Ex. 114. And see Turner *v.* Goulden, L. R. 9 C. P. 57, where the distinction is drawn between a valuer and an arbitrator.

sale without a price certain. ["It seems to be of the very essence of a sale," says Story, J., "that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense" (*i*).] "Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest; sed et certum esse debet," was the language of the Institutes (*k*). And it was a subject of long contest among the earlier jurisconsults whether the necessity for a *certain* price did not render invalid an agreement that the price should be fixed by a third person; but Justinian put an end to the question by positive legislation: "Alioquin si inter aliquos ita convenerit, ut quanti Titius rem æstimaverit tanti sit empta, inter veteres satis abundeque hoc dubitabatur sive constat venditio, sive non. Sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio, *quanti ille æstimaverit*, sub hac conditione staret contractus: ut si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, et venditio ad effectum perducatur, emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere" (*l*).

These rules have been adopted into the Code Napoléon: — Art. 1591: "Le prix de la vente doit être déterminé et désigné par les parties." 1592: "Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

AMERICAN NOTE.

§§ 85–89.

THE PRICE. 1. The necessity that a price — one of the most important elements in a sale — should be in some way fixed, is obvious. This price may be agreed upon *indirectly*, as "ten cents a bushel less than the Milwaukee price, on any future day the vendor might name;" and if the property is delivered, and destroyed by fire before such day has been named, the sale is complete and the loss is on the purchaser. McConnell *v.* Hughes, 20 Wisc. 537. Or "for the same as similar articles may bring afterwards at auction." Cunningham *v.* Brown, 44 Wisc. 72. See Ames *v.* Quimby, 96 U. S. 324; Phifer *v.* Erwin, 100 N. C. 60. So where the parties agreed on the "highest market price, whenever the ven-

(*i*) Flagg *v.* Mann, 2 Sumner, 538.
(*k*) Lib. iii. tit. xxiii. s. 1.
(*l*) Lib. iii. tit. xxiii. s. 1.

dor may demand payment." McBride *v.* Silverthorne, 11 Up. Can. Q. B. 545. So for a "reasonable price to be afterwards agreed upon." Greene *v.* Lewis, 85 Ala. 222. If a sale is made *provided* the price is afterwards agreed upon by the parties and this is never done, the sale is not complete so as to pass the title. Wittkowsky *v.* Wasson, 71 N. C. 451. Especially without a delivery. Bigley *v.* Risher, 63 Pa. St. 152. If the parties disagree at the trial what price had been agreed upon, evidence of the real value of the article is always admissible as *tending* to show which party is right. Bradbury *v.* Dwight, 3 Met. 31; Rennell *v.* Kimball, 5 Allen, 365; Saunders *v.* Clark, 106 Mass. 331; Brewer *v.* Housatonic R. R. 107 Mass. 277; Johnson *v.* Harder, 45 Iowa, 677; Parker *v.* Coburn, 10 Allen, 82; Norris *v.* Spofford, 127 Mass. 85.

2. That, if no price is fixed, the law implies it shall be what the article is reasonably worth, is elementary law; Taft *v.* Travis, 136 Mass. 95; James *v.* Muir, 33 Mich. 224; McEwen *v.* Morey, 60 Ill. 32; which is *ordinarily* the market price at the time and place of delivery; McEwen *v.* Morey, 60 Ill. 32; Fenton *v.* Braden, 2 Cranch C. C. 550; but not when the market is shown to be unnaturally inflated; Kountz *v.* Kirkpatrick, 72 Pa. St. 376, containing some valuable observations on this point. Therefore, if the seller and all other makers of an article have combined for the purpose of controlling the price, the price so fixed is not necessarily the amount to be paid for it, but the price is only what it is reasonably worth. Lovejoy *v.* Michels, 88 Mich. 15.

3. Of course the parties may agree that others may fix the price, Brown *v.* Bellows, 4 Pick. 189; Norton *v.* Gale, 95 Ill. 533; in which case the sale is not ordinarily complete, and the title is not passed, until the price has been so fixed; Fuller *v.* Bean, 34 N. H. 290; Hutton *v.* Moore, 26 Ark. 382; unless, as in Clarke *v.* Westrope, 18 C. B. 675, the buyer prevents such determination of the price (see Humaston *v.* Tel. Co. 20 Wall. 20); prevention of performance being equivalent in its effects to actual performance. Smyth *v.* Craig, 3 Watts & Serg. 14.

The author remarks in section eighty-eight that, if the arbitrators accept the office for reward or compensation, they are liable to the parties for neglect or default in performing their duties. But they are liable for *gross* neglect, even if they act gratuitously; precisely the same as other unpaid agents, though they would not be for declining to act at all after having once agreed to do so. Balfe *v.* West, 13 C. B. 466. But this subject has little to do with the law of sales.

PART II.

SALES UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

	Sect.
History of the statute	90
The 17th section	91
What contracts embraced in it	92
Lord Tenterden's Act	93
"Valne" and "price" of 10*l*.	93
Distinction between "sales" and "work and labor done," etc.	94
Furnishing a chattel to be affixed to a freehold	108
Law in America on this subject	109
Rule in Lee *v.* Griffin not generally approved	109
Sales at auction	110

§ 90. THE common law which recognized the validity of verbal contracts of sale of chattels, for any amount, and however proven, was greatly modified by the statute of 29 Chas. II. c. 3. This celebrated enactment, familiarly known as the "Statute of Frauds," is now in force not only in England and most of our colonies, but exists, with some slight variations, in almost every State of the American Union. Its history was but imperfectly known till the year 1823, when Lord Eldon gave to Mr. Swanston, the reporter of his decisions, the MSS. of Lord Nottingham (*a*), among which was his Lordship's report of the case of Ash *v.* Abdy (*b*), in which he said, on the 13th of June, 1678, less than two years after the passage of the law, that he overruled a demurrer to a bill which "was to execute a parol agreement before the late act for prevention of frauds and perjuries, but the bill itself was exhibited since the act." The ground of the decision was, that the statute was intended to be prospective solely, and not retrospective, "and I said that I had some reason to know the meaning of this law; for it had its first rise from me, who brought

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

(*b*) 3 Swans. 664, Appendix. In North's Life of Lord Keeper Guilford, vol. i. p. 108, he states of his Lordship: "He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Jnstice Hale had the preëminence and was chief in the fixing of that law, although the urging part lay upon him, and I have reason to think it had the first spring from his Lordship's notice." Lord Mansfield doubted the statement as to Sir Matthew Hale, who died before the bill was introduced. 1 Burr. 418.

in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and the civilians" (*c*).

§ 91. The section of the statute which is specially applicable to the subject of this treatise is the 17th. In the examination of its provisions, and of the rules for its construction and application, the arrangement of Lord Blackburn will be followed, as not susceptible of improvement. The language of the 17th section is as follows: —

"And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandises, for the *price* (*d*) of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." [1]

---

§ 92. The first question that obviously presents itself under this enactment is, what contracts are embraced under the words "contracts for the sale of any goods," etc. A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general estate of the other in case of default, but having no effect to transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities, of an owner; and this is an "Executory Agreement."

Or it may be a perfect sale, as already defined, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves, independently of any personal remedy against the vendor for breach of contract, and rendering him liable to the risk of loss in case of their destruction; and this is a "Bargain and Sale of Goods."

§ 93. The distinction between these two agreements will be more fully considered hereafter; but for the present it suffices to remark that, until the year 1828, the decisions were somewhat contradictory, and perhaps irreconcilable, on the question whether the words "con-

(*c*) As to the traditions of the aid and co-operation of Lord Hale and Sir Leoline Jenkins, see Wain *v.* Warlters, 5 East, 10; Wyndham *v.* Chetwynd, 1 Burr. 419; Wynn's Life of Sir Leoline Jenkins, vol. i. p. 3.

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

[1] [Sections fifteen and sixteen (commonly cited as sections sixteen and seventeen) of the Act of 29 Chas. II. c. 3, are repealed by the Sale of Goods Act, 1893. So, also, is section seven of the Act of 9 Geo. IV. c. 14. See Appendix. — S. C. B.]

tracts for the sale of any goods," etc., in this section, were applicable to agreements for future delivery, that is to say, to executory agreements, or only to such as were equivalent to the common-law contract, known as a bargain and sale. The decisions excluding such contracts from the operation of the statute were principally Towers *v.* Osborne (*e*), in 1724, Clayton *v.* Andrews (*f*), in 1767, and Groves *v.* Buck (*g*), in 1814. Those which upheld the contrary rule were Rondeau *v.* Wyatt (*h*), in 1792, Cooper *v.* Elston (*i*), in 1796, and Garbutt *v.* Watson (*k*), in 1822. The question is no longer open, for the legislature intervened, and in 9 Geo. IV. c. 14, s. 7, known as "Lord Tenterden's Act," recited, that "it has been held that the said recited enactments" (*i. e.* the 17th sect. of the Statute of Frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeded to enact that the provisions of the 17th section "shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

It is settled in Scott *v.* Eastern Counties Railway Company (*l*), and in Harman *v.* Reeve (*m*), that this enactment must be construed as incorporated with the Statute of Frauds, and that its effect is to substitute the word "value" for "price" in the 17th section.

§ 94. There have been numerous decisions, and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale," etc., under the 17th section, or contracts for work and labor done and materials furnished. A review of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent judges.

Towers *v.* Osborne (*n*) was on an agreement to make and furnish a chariot. Held, not within the statute. But the ground of decision in this case was, that the 17th section did not apply to executory agreements, and on this point the case is met by Lord Tenterden's Act.

In Clayton *v.* Andrews (*o*), a contract for the future delivery of wheat not yet threshed was held not within the statute, under the authority of the preceding case.

(*e*) 1 Strange, 506.
(*f*) 4 Burr. 2101.
(*g*) 1 M. & S. 178.
(*h*) 2 H. Bl. 63.
(*i*) 7 T. R. 14.
(*k*) 5 B. & Ald. 613.
(*l*) 12 M. & W. 33.
(*m*) 18 C. B. 587, and 25 L. J. C. P. 257.
(*n*) 1 Strange, 506.
(*o*) 4 Burr. 2101.

§ 95. In Groves *v.* Buck (*p*), the agreement was for the purchase by defendant of a quantity of oak pins, *not then in existence*, but that were to be cut by plaintiff out of slabs owned by him, and to be delivered at a future time. This agreement was held not to be embraced in the 17th section of the Statute of Frauds. Lord Ellenborough put his opinion on the ground that "*the subject-matter of this contract did not exist in rerum naturâ:* it was incapable of delivery and of part acceptance, and where that is the case, the contract has been considered not within the statute." This ground is again met by the 9 Geo. IV. c. 14, s. 7; but Dampier, J., in declining to apply the case of Rondeau *v.* Wyatt (presently noticed), said that this last-mentioned case was distinguishable, because in the other cases cited "some work was to be performed."

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

§ 97. In Garbutt *v.* Watson (*s*), where a sale of flour, to be manufactured out of wheat yet unground, was held to be within the statute, Abbott, C. J., said that in Towers *v.* Osborne "the chariot which was ordered to be made, *would never, but for that order, have had any existence.*" This expression, as well as the similar one by Lord Ellenborough in Groves *v.* Buck (*ante*, § 95), would imply that the distinction between a "contract for sale" and one for "work, labor, and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. Bayley, J., however, put his opinion on the ground that "this was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labor and materials found. I think it was the former, and if so, it falls within the Statute of Frauds."

(*p*) 3 M. & S. 178.
(*q*) 2 H. Bl. 63.
(*r*) 4 Burr. 2101.
(*s*) 5 B. & Ald. 613.

Holroyd, J., concurred "that this was a contract for the sale of goods," but neither of the judges gave a reason for this opinion (undoubtedly correct), and thus no aid is afforded by their language in furnishing a test for distinguishing the two contracts from each other.

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

§ 99. In Atkinson *v.* Bell (*u*) the whole subject was much discussed. The action was in assumpsit for goods sold and delivered, goods bargained and sold, work and labor done, and materials found and provided. The facts were, that one Kay had patented a certain machine, and the defendants, thread manufacturers, desiring to try it, wrote him *an order to procure to be made for them as soon as possible* some spinning-frames in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames; and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Sleddon's premises. On the 23d of June, Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th of August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action was brought. The judges were all of opinion that the property in the goods had not vested in the defendants (*x*), and that a count for goods bargained and sold could not be maintained; but Bayley and Holroyd, JJ., expressed the opinion that a count for not accepting would have supported the verdict in the plaintiff's favor. On the count for work and labor and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendant's, that is to say, that the contract was an executory agreement for sale, and not one for work, etc. Bayley, J., said: " If you employ a man

(*t*) 9 B. & C. 568.
(*u*) 8 B. & C. 277.
(*x*) On this subject, see *post*, Book II.

to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor done. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work, but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labor, *because his labor was bestowed on his own materials*, and for himself, and not for the person who employed him."

The concluding passage of this opinion is no doubt too broadly expressed, for, although true generally, it is not universally the case that an action for work and labor will not lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of Atkinson *v.* Bell (*y*), subjecting it to the criticism of Maule and Erle, JJ., in Grafton *v.* Armitage (*z*), and of Pollock, C. B., in Clay *v.* Yates (*a*), but it was fully recognized in the subsequent case of Lee *v.* Griffin (*b*).

§ 100. Grafton *v.* Armitage (*c*) was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for work, labor, and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan drawing of, a machine, etc., engaged three days, at one guinea per day, 3*l.* 3*s.*; for workman's time in making, etc., and experimenting therewith, 1*l.* 5*s.*; for use of lathe for one week, 12*s.*; for wood and iron to make the drum, and for brass tubing for the experiments, 5*s.*" Defendant insisted, on the authority of Atkinson *v.* Bell, that the action should have been case for not accepting the goods, not debt for work and labor, etc., citing the *dictum* at the close of Bayley, J.'s, opiuion. But Maule, J., said: "In order to sustain a count for work

(*y*) See remarks on another point decided in Atkinson *v.* Bell, *post*, Book II. Ch. 5.
(*z*) 2 C. B. 336; 15 L. J. C. P. 20.
(*a*) 25 L. J. Ex. 237; 1 H. & N. 73.
(*b*) 30 L. J. Q. B. 252; 1 B. & S. 272.
(*c*) 2 C. B. 336; 15 L. J. C. P. 20.

and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the *plaintiff* (*sic*, plainly meaning *defendant*), or that are to be handed over to him." Erle, J., said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink: might he not maintain an action for work and labor in preparing it?" In delivering the decision, Tindal, C. J., pointed out as the distinction, that in Atkinson *v.* Bell the substance of the contract was, that the machines to be manufactured were to be sold to the defendant, but that in the case before the court the substance of the contract was not that the plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labor, and materials in devising for the use of defendant a mode of attaining a given object. Coltman, J., concurred, and said that the opinion of Bayley, J., was on "precisely the same ground as the Lord Chief Justice puts this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labor bestowed by him in the fabrication of them."

§ 101. In Clay *v.* Yates (*d*), the subject was treated by Pollock, C. B., in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the defendant a second edition of a work previously published by the defendant, the plaintiff to find the materials, including the paper. Held, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor, furnishing the materials; and that the case was not governed by Lord Tenterden's Act. Pollock, C. B., said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing, within the 17th section of the Statute of Frauds, I am of opinion that this is properly an action for work and labor, and materials found. I believe it is laid down in the commencement of Chitty on Pleading, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing. The point made in the case cited, in which Bayley, J., gave an opinion (Atkinson *v.* Bell), I think may be answered by the opinion of Maule, J., in the Court of Common Pleas (Grafton *v.* Armitage); and then we have to decide the matter as if it were now without any authority at all. It may be that, in all these cases, part of the materials is found by the party for whom the work is done, and the other part found by the person who

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

is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me *the true rule is this, whether the work and labor is of the essence of the contract, or whether it is the materials that are found.* My impression is, that in a case of work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labor of the highest description, and the material is of no sort of importance as compared with the labor, and therefore that all this would be recoverable as work and labor, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered; but still it would not prevent the price being recovered as work and labor, and materials found. It appears to me, therefore, that this was properly sued for as work and labor, and materials found, and that the Statute of Frauds does not apply; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the Act of Lord Tenterden applies;* and one of the reasons why you find no cases on this subject in the books is, that, before Lord Tenterden's Act passed, the Statute of Frauds did not apply to the case of a thing begun, whatever it might be."

Alderson, B., concurred, and Martin, B., said: "There are three matters of charge well known in the law, — for labor simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant, having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that he shall print the work on paper, and that the paper shall be submitted to the author; that the author shall correct it and send it back to the printer, and then the latter shall exercise labor again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labor, and supply materials for it, and he is to be paid for it; and it really seems to me *that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered,* would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to

be paid for his work and labor, and for the materials he had used upon the work; and, therefore, this is a case of work, labor, and materials done and provided by the printer for the defendant." The learned Baron also put the case: "Suppose an artist paints a portrait for three hundred guineas, and supplies the canvas for it worth 10*s.*, surely he might recover on a count for work and labor."

§ 102. In Lee *v.* Griffin (*d*), the foregoing *opinions* of the Chief Baron and Baron Martin were questioned, and not followed, though the *decision* was approved. This action was brought by a dentist to recover 21*l.* for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. When Clay *v.* Yates was quoted by the plaintiff in support of the position that the skill of the dentist was the thing really contracted for, that the materials were only auxiliary, and that the count for work and labor was therefore maintainable, Hill, J., said: "Clay *v.* Yates is a case *sui generis*. The printer, the plaintiff there, in effect does work chiefly on the materials which the defendants supplied; although, to a certain extent, the plaintiff may be said to supply materials; *moreover, the printer could not sell the book to any one else.*"

Crompton, J., said: "*When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.* The case of Clay *v.* Yates turned, as my brother Hill pointed out, upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision, but we should be bound by it in a case precisely similar in its circumstances, which the present is not. *I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labor, and not for the sale of a chattel.* It may be the cause of action is for work and labor when the materials supplied are merely auxiliary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, viz., *the teeth, are the principal subject-matter;* and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

Hill, J., said: "I think the decision in Clay *v.* Yates perfectly correct, according to the particular subject-matter of the contract in that case, which was not the case of a chattel ordered by one of another, thereafter to be made by the one and afterwards to be delivered to the other; but *when the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor.* In my opin-

(*d*) 30 L. J. Q. B. 252; 1 B. & S. 272. The rule laid down in Lee *v.* Griffin was applied in Isaacs *v.* Hardy, 1 Cababé & Ellis, 287, a Nisi Prius decision.

ion, Atkinson *v.* Bell is good law, subject only to the objection to the *dictum* of Bayley, J., which has been repudiated by Maule, J., and Erle, J., in Grafton *v.* Armitage."

Blackburn, J., said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But *if the work and labor be bestowed in such* a manner as that *the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy.* In Clay *v.* Yates, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel. . . . I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel."

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

§ 104. The principles suggested as affording a test on this subject prior to the case of Lee *v.* Griffin were the following: —

1st. That if the subject-matter of the contract was not in existence, not *in rerum natura*, as Lord Ellenborough expressed it, the contract

(*e*) In an article in 1 Law Quarterly Review, 1 (January, 1885), Mr. Justice Stephen and Mr. F. Pollock point out that in Clay *v.* Yates, and in the case of the solicitor and the deed suggested by Blackburn, J., in Lee *v.* Griffin, *post*, the author's copyright in the book and the client's interest in the deed qualify the proprietary rights of the printer or the solicitor respectively. In fact there is no sale, because the employer has a previous property in the chattel.

was not "for the sale of goods." This was the opinion of Lord Ellenborough in Groves *v.* Buck (*f*); of Abbott, C. J., as shown by his comment on Towers *v.* Osborne, in the opinion delivered in Garbutt *v.* Watson (*g*); and may be inferred from Rondeau *v.* Wyatt (*h*) to have been the opinion of Lord Loughborough.

That the decision in Towers *v.* Osborne was wrong, if it went upon the ground that Lord Loughborough states, viz., that the order for the chariot was not a contract or agreement for the sale of a chattel, is no longer questionable. The familiar example put by the judges in several of the cases, of an order to a tailor or shoemaker for a garment or pair of shoes, both of which are treated as undoubted cases of contracts for the sale of chattels, is exactly the same as the order in Towers *v.* Osborne. The intention of the parties was that the result should be a transfer for a price, by Towers to Sir John Osborne, of a chattel in which Sir John had no previous property, and this was clearly a contract for a sale.

§ 105. 2d. The second principle suggested as the true test was by Bayley, J., first in Smith *v.* Surman (*i*), afterwards more fully developed in Atkinson *v.* Bell (*j*), viz., that if the materials be furnished by the employer, the contract is for work and labor, not for a sale; but if the material be furnished by the workman who makes up a chattel, he cannot maintain "work and labor," because his labor was bestowed on his own materials and for himself, and not for the person who employed him. The first branch of this rule is undoubtedly correct, as shown by the principles settled in Lee *v.* Griffin, because, where the materials are furnished by the employer, there can be no transfer to him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing *can* be due from him save compensation for labor; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labor done, and materials furnished. But the second part of the rule is inaccurate, as pointed out in Grafton *v.* Armitage and Lee *v.* Griffin. A man may be responsible for damage done to another's chattel, as, for example, to a coachmaker's vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labor done, and materials furnished by the coach-builder, although bestowed on a thing which is his, and is to remain his after being repaired at another's expense.

(*f*) 3 M. & S. 178.
(*g*) 5 B. & A. 613.
(*h*) 2 H. Bl. 63.
(*i*) 9 B. & C. 561, 568.
(*j*) 8 B. & C. 277.

§ 106. 3d. The third attempt to supply the true test on this matter, previously to its satisfactory settlement in Lee *v.* Griffin, was made by Pollock, C. B., in Clay *v.* Yates (*k*). The proper rule, in his opinion, is this, "Whether the work and labor is of the essence of the contract, or whether it is the materials that are found." This test was decisively rejected by Crompton and Blackburn, JJ., in Lee *v.* Griffin. It cannot be supported, even in the extreme case put by Martin, B., of a portrait worth 300 guineas on a canvas worth 10*s.* If the employer owned nothing whatever that went into the composition of the picture, — if neither materials, nor skill, nor labor were supplied by him, — it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided; it is not the less true, that none of these elements were owned by the employer before the contract, and that the chattel composed of them is by the terms of the contract to be transferred for a price by the former owner to the employer. The test suggested by Martin, B., in his opinion as found in the Law Journal Report, is accurate as far as it goes, but it does not cover more than the point in the case before the court. The learned Baron said: "Suppose the plaintiff had brought an action to recover the value of that which he had delivered, would that be the value of the book? I apprehend not, for the book might not be worth half the value of the paper it was written on." This is true, and why? Because a part of the materials of the book — its chief materials, indeed, to wit, the composition — had been furnished by the employer, belonged to him already, and therefore *could* not be sold to him by the printer. The only remedy then remaining was an action for work and labor and materials.

§ 107. Cases are sometimes put, as a test of principles, that are so extreme as to be best disposed of by the application of the familiar rule, "*de minimis non curat lex.*" Thus the example of an attorney employed to draw a deed is dismissed by Blackburn, J., in Lee *v.* Griffin, with the simple remark that it is an abuse of language to say that the paper or parchment are goods sold and delivered. So, if a man send a button or a skein of silk to be used in making a coat, it would be mere trifling to say that he was part owner of the materials, and that an action for goods sold would not therefore lie in favor of the tailor who furnished the garment. Such matters cannot be considered as having entered into the contemplation of parties when

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

contracting, nor as forming any real part of the consideration for the mutual stipulations.

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

[And the same rule applies when the substance of the contract is to make improvements to a chattel already in existence, *e. g.* to make and fix boilers to a ship (*m*).]

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

In Mr. Hilliard's Treatise on Sale, the contradictory decisions are given without any attempt on the part of the learned author to reconcile them, or deduce any general principles applicable to the controverted question (*p*).

[The rules adopted by the courts of the American States for determining whether a contract is one of sale or for work and labor are in direct conflict with one another; and it will suffice to mention that in Massachusetts the established rule is based upon the distinction

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

(*m*) Anglo-Egyptian Navigation Company *v.* Rennie, L. R. 10 C. P. 271.

(*n*) 12 Metcalf (Mass.), 356. See, also, the case of Smith *v.* The N. Y. Central Railroad Company, 4 Keyes (N. Y.), 180, in which all the authorities are reviewed.

(*o*) Story on Sales, § 260 c. See, however, note to 4th edition by Bennett (1871).

(*p*) Hilliard on Sales, pp. 464–7.

referred to by Shaw, C. J., in Lamb *v.* Crafts (*ante*, § 109), viz., whether the manufacturer produces the article in the general course of his business, or as the result of a special order; and in the most recent case on the subject in that State the rule was defended on the ground of its justice and convenience, while the rule laid down in Lee *v.* Griffin was referred to but not followed (*q*). On the other hand, in New York the rule is different, and the test is that which was adopted by some of the English judges in cases prior to Lee *v.* Griffin, among others by Lord Ellenborough in Groves *v.* Buck (*ante*, § 95), and by Abbott, C. J., in Garbutt *v.* Watson (*ante*, § 97), viz., whether the subject-matter of the contract of sale existed at the time when the contract was made. It has been held in that State, in a long series of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put into a condition to be delivered, *e. g.* flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The contrast between this rule and that in Lee *v.* Griffin is, that in the former the sale is referred to the time of entering into the contract; in the latter, to the time of delivery as contemplated by the parties (*r*). In a recent case in the State of New Hampshire (*s*), the rule of distinction as laid down by Blackburn, J., in Lee *v.* Griffin, was cited with approval, and apparently followed.]

§ 110. It was at one time questioned whether sales of goods by public auction were embraced within the statute. Lord Ellenborough's strong *dicta* in Hinde *v.* Whitehouse (*t*), in 1806, seem to have put an end to the doubt, and the authority of that case was recognized in Kenworthy *v.* Schofield (*u*); so that the question suggested on this point by Lord Mansfield, in Simon *v.* Motivos (*x*), has long been at rest.

AMERICAN NOTE.

§§ 90–110.

WHAT CONTRACTS ARE WITHIN THE STATUTE. 1. In America, also, it is generally agreed that the statute applies to executory contracts for future

(*q*) Goddard *v.* Binney, 115 Mass. 450. The Massachusetts rule prevails in the States of Maine, Iowa, and New Jersey.

(*r*) Cooke *v.* Millard, 65 N. Y. 352, 359, where the different rules obtaining in England, Massachusetts, and New York respectively are contrasted. Parsons *v.* Loucks, 48 N. Y. 17, 19.

(*s*) Prescott *v.* Locke, 51 New Hampshire, 94; and the English rule appears to be adopted in the States of Minnesota and Connecticut.

(*t*) 7 East, 558.

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

(*x*) 3 Burr. 1921, and 1 W. Bl. 599. And see per Lord Blackburn, in Maddison *v.* Alderson, 8 App. Cas. at p. 488.

delivery, as well as to present sales. Newman *v.* Morris, 4 H. & McH. 421, in 1799, is perhaps the earliest case. See, also, Bennett *v.* Hull, 10 Johns. 364; Jackson *v.* Covert, 5 Wend. 139; Hight *v.* Ripley, 19 Me. 137; Ide *v.* Stanton, 15 Vt. 685; Edwards *v.* Grand Trunk R'y Co. 48 Me. 379; Atwater *v.* Hough, 29 Conn. 513; Carman *v.* Smick, 15 N. J. L. 252; Finney *v.* Apgar, 31 Ib. 270; Burrell *v.* Highleyman, 33 Mo. App. 183. The statute applies, also, to contracts of exchange. Ash *v.* Aldrich, N. H. (1894), 39 Atl. 442; Kuhns *v.* Gates, 92 Ind. 66; Rutan *v.* Hinchman, 30 N. J. L. 255; Browne, St. Frauds, § 293 (4th ed.).

2. **Sale or Manufacture.** But as to the distinction between a sale and a manufacture of some article, or for work and labor on new materials, there is considerable difference of opinion. While all agree that a simple contract "to manufacture" an article is not, and a mere contract "for the sale" is, within the statute, the difficulty is in the application of this simple rule. Higgins *v.* Murray, 73 N. Y. 252; Donnell *v.* Hearn, 12 Daly, 230. The Massachusetts doctrine, so called, first distinctly applied in Mixer *v.* Howarth, 21 Pick. 205 (1838), continues to be the law in that and many other States. In that case the plaintiff, a carriage-maker, had several unfinished buggies on hand. The defendant selected a particular lining of the plaintiff, with which the latter agreed to finish a buggy in a fortnight for $250. In an action for the price, this was held not "a sale" of the buggy, but "an agreement to build one for the defendant, and on his part to accept and pay for it," and therefore not within the statute. This was followed by Spencer *v.* Cone, 1 Met. 283 (1840), in which the plaintiff specially agreed "to make for the defendants ten stave machines, and find the materials therefor, for $150 each." This was held (more obviously than the former) not a sale, but a contract to manufacture, and not within the statute; although there is no indication that the machines in this case differed from those usually made by the plaintiff for others. A later illustration, and one of the best in Massachusetts in support of this view, is that of Goddard *v.* Binney, 115 Mass. 450 (1874), which has probably settled the question in that State. The plaintiff was a carriage-maker. The defendant came to the plaintiff's place of business and requested him to make a buggy for him (the defendant), and gave directions that the lining should be drab, the outside seat of cane, with his initials and monogram, the buggy to be done in four months, for the sum of $675. This was held to be not a contract for the sale of the buggy, but for labor, services, and materials, and so not within the statute. See, also, Dowling *v.* McKenney, 124 Mass. 480. On the other hand, even by the Massachusetts rule, if the article ordered by the purchaser is exactly such as the plaintiff makes and keeps on hand for sale to any one, and no change or modification of it is made at the defendant's request, it is a contract of sale, and within the statute, even though it may be entirely made after, and in consequence of, the defendant's order for it. Thus, where G., in April, orally bargained with J., a sperm-candle manufacturer, for 100 boxes of candles at 21 cents a pound, and J. said they were not then manufactured, but he would make and deliver them in the course of the summer, this was held a contract of sale, and not of manufacture, and therefore within the statute, expressly approving Garbutt *v.* Watson, 5 B. & Ald. 613. Gardner *v.* Joy, 9 Met. 177 (1845). This was followed in Lamb *v.* Crafts, 12 Met. 353 (1847), sufficiently stated in the text. See, also, Waterman *v.* Meigs,

4 Cush. 497 (1849); Clark *v.* Nichols, 107 Mass. 547; May *v.* Ward, 134 Mass. 127. And see Orman *v.* Hager, 4 New Mex. 331, 9 Pac. Rep. 363; Turner *v.* Mason, 65 Mich. 662. A contract by a lithographer to furnish designs of defendants' buildings and trade-marks is one for work and manufacture. Beck Lithographing Co. *v.* Colorado Milling Co. 52 Fed. Rep. 700; Central Engraving Co. *v.* Moore, 75 Wisc. 170; Hinds *v.* Kellogg, 13 N. Y. Supp. 922; Puget Sound Machinery Depot *v.* Rigby, 13 Wash. 264.

The law of Maine seems to correspond with that of Massachusetts on both points. Hight *v.* Ripley, 19 Me. 137, a contract by defendants "to furnish as soon as practicable from 1000 to 1200 malleable iron hoe-shanks, *agreeable to patterns left with them*, on terms as follows," etc., is not within the statute; Abbott *v.* Gilchrist, 38 Me. 260, a contract "to procure and deliver, at a certain time and place, one half of a frame for a vessel, to be hewn and fashioned *according to certain moulds:*" Crockett *v.* Scribner, 64 Me. 447, a bargain "to manufacture barrel staves out of a *particular lot of timber* at $12.50 per thousand." On the other hand, again, following Gardner *v.* Joy, a contract for "all the wood the plaintiff would put on the line of the road that season" is within the statute, although to be wholly executed in the future. Edwards *v.* Grand Trunk Railway, 48 Me. 379, 54 Ib. 105. New Hampshire, also, is apparently in substantial accord with Massachusetts. Pitkin *v.* Noyes, 48 N. H. 294, contains a careful statement of the decisions on this point, and it was there there held that a contract to raise three acres of potatoes that year, and deliver them at the mill of the plaintiff for twenty cents a bushel, might or might not be within the statute, "*according to whether the defendant was bound to raise the potatoes himself, or only to deliver good, merchantable potatoes in quantity equal to the ordinary product of three acres.*" In Prescott *v.* Locke, 51 N. H. 94, the plaintiff owned a sawmill; the defendants, carriage-builders, agreed to buy of the plaintiff what walnut spokes he should saw at his mill, at $40 per thousand, to be delivered at the mill in lots of about 10,000 each, subject to the defendants' selection as to culls, etc. This was held a sale of spokes to be manufactured, and not a contract for plaintiff's labor, and so within the statute, following Garbutt *v.* Watson, 5 B. & Ald. 613. And see Gilman *v.* Hill, 36 N. H. 311. Vermont, also, seems to be on the same side. Ellison *v.* Brigham, 38 Vt. 64, in which a contract by defendant to cut into logs all the butternut trees then on a certain part of his farm, that were suitable for logs, and deliver them, together with a few logs already cut, to the plaintiff's mill, for which plaintiff was to pay a specified price per cord when measured at the mill, was held a contract of sale, and not for labor, following Smith *v.* Surman, 9 B. & C. 561. Whereas a contract to furnish a granite monument for the State of Minnesota to erect on the battlefield of Gettysburg is one for manufacture, although defendant was under no obligation to bestow his own personal skill and labor upon the monument. Forsyth *v.* Mann, 68 Vt. 116 (1895). In Connecticut, Allen *v.* Jarvis, 20 Conn. 38, merely follows the universal doctrine that a contract to manufacture certain articles out of one's own materials is not within the statute; whereas in Atwater *v.* Hough, 29 Conn. 509, it seems to have been thought that a contract by defendants to deliver to plaintiff 100 sewing machines which they had already engaged another party to build in their ordinary course of business, was a contract for the sale of the machines, and within the statute; and

Gardner *v.* Joy was apparently approved. See, also, Finney *v.* Apgar, 31 N. J. L. 271; Hardell *v.* McClure, 1 Chandl. (Wisc.) 271; Cason *v.* Cheely, 6 Geo. 554; Phipps *v.* McFarlane, 3 Minn. 109; Brown *v.* Sanborn, 21 Ib. 402, followed in 39 Ib. 148; Pawelski *v.* Hargreaves, 47 N. J. L. 334; O'Neil *v.* New York, &c. Co. 3 Nev. 141; Bird *v.* Muhlinbrink, 1 Rich. Law, 199; Gadsden *v.* Lance, 1 McMullan Eq. 87; Meincke *v.* Falk, 55 Wisc. 427. In Brown *v.* Wunder, 64 Minn. 450, a contract to sell glass which was to be manufactured and of a particular design not suitable for the general trade, was held to be not a contract for the sale of chattels. Rhode Island has no section on this subject in its Statute of Frauds. Hobart *v.* Littlefield, 13 R. I. 341. Mighell *v.* Dougherty, 86 Iowa, 480, reviewing many cases. Iowa at an early day wisely settled this question by statute; the Code, sec. 3664, providing that the statute shall not apply when the article is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessary to be expended in producing or procuring the same. See Bennett *v.* Nye, 4 Greene, 410; Partridge *v.* Wilsey, 8 Iowa, 459; Brown *v.* Allen, 35 Ib. 306, for a practical construction of the statute. The New York rule, according to the usual exposition of it, seems to be, that a contract to make an article upon order *wholly out of raw materials* is a contract for manufacture and not of sale, even though it is to be made, not according to any particular pattern, order, or description, but entirely similar to those which the vendor " habitually makes " and keeps on hand for sale in his regular course of business; contrary to Gardner *v.* Joy, 9 Met. 177. Whereas, on the other hand, if the article ordered is already substantially in existence at the time of the order, and merely requires some alteration, modification, or adaptation to the buyer's wishes or purposes, it is a contract of sale, and within the statute, quite contrary to Mixer *v.* Howarth, 21 Pick. 205. The first portion of the New York rule, so called, is supported by many cases. The first was Crookshank *v.* Burrell, 18 Johns. 58 (1820), a contract "to make the woodwork of a wagon;" Sewall *v.* Fitch, 8 Cow. 215 (1828), "to make 300 casks of Thames Manufactory cut nails, at $5\frac{1}{2}$ cents per pound," none of which were then made; Robertson *v.* Vaughn, 5 Sandf. 1 (1850), "for the manufacture of 1000 molasses shooks and heads;" Bronson *v.* Wiman, 10 Barb. 406 (1851), to deliver 2000 barrels of flour, to be ground from wheat not yet on hand, though contracted for by the vendor. See, also, Courtright *v.* Stewart, 19 Barb. 455 (1854); Donovan *v.* Willson, 26 Barb. 138 (1857), an agreement by a beer manufacturer "to manufacture, furnish, and deliver 60 barrels of beer every week" for a specified time. See, also, Parker *v.* Schenck, 28 Barb. 38 (1858), though here the article was to be made in a special manner, somewhat different from those ordinarily kept by the manufacturer, and therefore this case would agree with Mixer *v.* Howarth. The same may be said of Mead *v.* Case, 33 Barb. 202 (1860), an agreement for a monument, which was then substantially in existence, but which the maker was to "polish, *letter*, and finish, and set up for the defendant, for $200." The lettering was a special adaptation, of course, to the party's own order. Parsons *v.* Loucks, 4 Robertson, 216, 48 N. Y. 17 (1871), a prominent case, was upon a contract by a paper-maker to make and deliver 20,000 pounds of paper at 13 cents a pound, similar to other paper previously made by the defendant for the plaintiff, of such sizes and weights as the plaintiff should by letter direct. Performance would require about three weeks.

None of the paper was then in existence, and it is said there was no evidence that the rags, of which it was to be made, were. This was held not a contract of sale, although Gray, Commissioner, dissented in a vigorous opinion. This was followed in Deal *v.* Maxwell, 51 N. Y. 652 (1873), in which the plaintiff agreed to procure the materials, of a specified quality, and to manufacture and deliver to the defendant two tons of "stocking shoddy," at 20 cents per pound. Maryland, also, seems to favor this portion of the New York rule, holding that contracts for the sale and future delivery of a crop, then ungathered, is not a sale, but a contract for work and labor, and not within the statute. Eichelberger *v.* M'Cauley, 5 H. & J. 213; Rentch *v.* Long, 27 Md. 188; Bagby *v.* Walker, 78 Md. 239. On the other hand, in 1840 the courts of New York, seemingly not entirely satisfied with all the earlier cases in that State, commenced a line of decisions to be carefully distinguished therefrom. The first was Downs *v.* Ross, 23 Wend. 270 (1840), in which the contract was for 700 bushels of wheat, at 10*s.* per bushel. The defendant had the wheat, but it was not all threshed, and he was to thresh out the balance, and clean over what he then had. This was held a sale of the wheat and within the statute, notwithstanding the work and labor he was to apply to it. So in Seymour *v.* Davis, 2 Sandf. 239 (1848), it was held that a verbal contract for 100 barrels of cider, which the plaintiff was to buy of farmers, refine, and deliver to the defendant at different times, was a contract for the sale of the cider and within the statute, approving Downs *v.* Ross. So in Smith *v.* New York Central R. R. Co. 4 Keyes, 180 (1868), a contract for the delivery of a quantity of cordwood, then in standing trees, was held a sale, and within the statute, and not an "agreement to manufacture firewood out of standing trees." The distinction between this and a contract to make paper out of rags, or flour out of wheat, though perceptible, is not very broad. In Fitzsimmons *v.* Woodruff, 1 Thomp. & C. (N. Y.) 3 (1873), the defendant selected a marble mantel from the plaintiff's stock, for which the plaintiff was to furnish different jambs, or wall-pieces, from those then belonging to it, and put it up in the defendant's house, with certain fixtures, for $80. This was held a sale, and not a contract to manufacture a mantel. In Bates *v.* Coster, 1 Hun, 400, 3 Thomp. & C. (N. Y.) 580 (1874), the defendant, negotiating for a horse, said to the plaintiff: "If you will alter him, and keep him until he gets well, I will give you $1000 for him." Held, a contract of sale, and not a contract for work and labor, examining the New York cases. So in Kellogg *v.* Witherhead, 6 Ib. 525, 4 Hun, 273 (1875), the plaintiff, a smoker of hams, had a quantity in the smoke-house, partially smoked, when the defendant examined them, directed them to be smoked more and with birch wood, and agreed to take them at ten cents a pound. Learned, P. J., said: "This was a contract of sale, not for work and labor. The plaintiff was not to make the hams, only to smoke them." The same was again decided in the carefully considered case of Cooke *v.* Millard, 5 Lans. 243, 65 N. Y. 352 (1875), to which the reader is especially referred. So in Flint *v.* Corbitt, 6 Daly, 429 (1876), it was held that, if one selects furniture from a stock manufactured and on hand ready for covering, chooses the material with which it shall be covered, and agrees on the price of the article when so covered, it is a sale and within the statute. This is, of course, in direct conflict with Goddard *v.* Binney. And see Dedrich *v.* Leonard, 3 N. Y. St. Rep. 780 (not elsewhere reported).

The true ground of many of the earlier New York decisions, though not distinctly brought out in them all, is recently said to be that, if goods are to be manufactured by the *vendors themselves*, the transaction impliedly requires their care, skill, and knowledge, and consequently is not a simple sale and purchase, but of manufacture; and the later cases assume that if the goods are to be manufactured by other parties than the vendors, though on their order, it is a contract of sale as between them and the vendees, and so within the statute. See this view elaborately maintained in Passaic Man. Co. *v.* Hoffman, 3 Daly, 495; and Millar *v.* Fitzgibbons, 9 Daly, 505; Joy *v.* Schloss, 12 Daly, 533 (1885).

In Heintz *v.* Burkhard, 29 Oreg. 55 (1896), the plaintiff orally agreed to supply iron work for a building about to be erected by defendant, the iron work to be of special design and measurements, and suitable only for the building specified. The court said that, in the absence of a statute substantially the same as Lord Tenterden's Act, it was unwilling to go to the extent of the doctrine of Lee *v.* Griffin, and it was held that the contract in question was valid under either the Massachusetts or the New York rule, and that it was unnecessary to give preference to either.

From the foregoing review of the Massachusetts and the New York decisions, it is evident they are directly opposed to each other, both as to what contracts are, and what contracts are not, within the statute; and also that both differ from the recent English rule laid down in Lee *v.* Griffin, 1 B. & S. 272, stated in the text. But it should not be overlooked that the decision in Lee *v.* Griffin is sustained, if not absolutely required, by the particular words of the English statute on this subject, viz., 9 Geo. IV. c. 14, sec. 7, which expressly includes all contracts of sale, "notwithstanding the goods may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." It would seem impossible that Lee *v.* Griffin could have been differently decided; and it is certainly remarkable that the same result had not been reached long before, the statute having been passed in 1830. Whereas few if any American States have a precisely similar statute, and therefore the American authorities all turn upon the true construction of the phrase "contract for the *sale*," etc. This difference between the English and the American acts does not seem to have always been kept in mind, and Lee *v.* Griffin may have been dissented from or approved, without considering the different phraseology of the enactments on this subject. See Fairbanks *v.* Richardson Drug Co. 42 Mo. App. 272, and the next case.

Long before Lee *v.* Griffin, however, the Supreme Court of Wisconsin had adopted the statute of 9 Geo. IV. as a practical construction of their own statute, which, however, does not contain the clause above quoted. See Hardell *v.* McClure, 1 Chandl. 271 (1849). So in Brown *v.* Sanborn, 21 Minn. 402, it was held that a contract for the flax straw to be raised from forty-five bushels of flaxseed, the straw to be delivered in a dry condition, free from grass, weeds, and all foreign substances, was a sale of the straw, and not a contract for labor. See Burrell *v.* Highleyman, 33 Mo. App. 183, approved in Pratt *v.* Miller, 109 Mo. 78, where the defendants ordered goods to be manufactured, but like those in plaintiffs' general stock. Lee *v.* Griffin was expressly adopted in Wolfenden *v.* Wilson, 33 Up. Can. Q. B. 442 (1873), the court being governed by a statute similar to Lord

Tenterden's Act. And see Canada Bank *v.* Toronto Railway Co. 22 Ont. Ap. 462 (1895), a contract by printers to print a lot of bonds and coupons on their own paper, but in a special form and with special words, held within the statute. This difference between the States gives rise to some delicate questions involving the conflict of laws. Thus, a contract is made in one State where there is no Statute of Frauds, or where the limit is a certain sum, for the sale of goods then situated in another State, where the law is quite different, and where the sale would be invalid. Can such contract be enforced in the latter State? It has been held it could, and that the *lex loci contractus* and not the *lex fori* governed. See Dacosta *v.* Davis, 24 N. J. Law, 319; Allen *v.* Schuchardt, 10 Am. Law. Reg. 13 (1861), and note by Professor Dwight; Fed. Cas. No. 236; affirmed in 1 Wall. 359; Houghtaling *v.* Ball, 20 Mo. 563; Low *v.* Andrews, 1 Story, 38; Green *v.* Lewis, 26 Up. Can. Q. B. 618. See Clark *v.* Labreche, 63 N. H. 397.

3. **Rescission.** If A. sells and delivers property to B., and orally agrees to take it back on request and repay the purchase-money, this last promise is binding, though oral. It is a part of the original bargain, and made valid by the original delivery and payment therefor. Fay *v.* Wheeler, 44 Vt. 292; Johnston *v.* Trask, 40 Hun, 415, 116 N. Y. 141, and cases cited, distinguishing Hagar *v.* King, 38 Barb. 200; to which Chamberlain *v.* Jones, 32 App. Div. (N. Y.) 237, is like. And see Allen *v.* Aguirre, 3 Seld. 543. But a *subsequent* agreement to take back the goods in payment of the bill is within the statute. Rankins *v.* Grupe, 36 Hun, 481.

4. **Auction Sales.** As to auction sales, there is but one opinion in America, viz., that the statute applies to them as well as to private sales. Davis *v.* Rowell, 2 Pick. 64, a leading case; Morton *v.* Dean, 13 Met. 385; Pike *v.* Balch, 38 Me. 302; Johnson *v.* Buck, 35 N. J. L. 338; Davis *v.* Robertson, 1 Mills Const. R. (So. Car.) 71; Sanderlin *v.* Trustees, R. M. Charlt. (Ga.) 551. And a special promise by an auctioneer to the plaintiff to strike off the property to him if he is the highest bidder, is equally within the statute, and, if the sale itself must be in writing, a promise to make a valid sale is equally so. Boyd *v.* Greene, 162 Mass. 567, commenting on Warlow *v.* Harrison, 1 El. & El. 295.

CHAPTER II.

WHAT ARE GOODS, WARES, AND MERCHANDISE.

	Sect.
Choses in action are not	111
Interest in land — 4th section of the statute	112
Stamp laws	112
4th and 17th sections compared	113
What is an interest in land under the 4th section	114
First principle. Where growing crop is to be severed before property passes	118
Second principle. Where property passes before severance	120
If *fructus naturales*, 4th section applies	120
If *fructus industriales*, 17th section applies	121
General proposition as to growing crops	126
Are *fructus industriales* "goods, etc.," while growing?	127
Sale of tenant's fixtures	127
To the landlord or incoming tenant not within 17th section	127
Quære as to a sale to a third person	127
Intermediate class of crops	128
Crop not yet sown	131
Crops when mere accessories to the land	132

§ 111. The 17th section of the statute applies to contracts for the sale of "goods, wares, and merchandise," words which comprehend all corporeal movable property.

The statute, therefore, does not apply to shares, stocks, documents of title, choses in action (*a*), and other incorporeal rights and property. The following cases have been decided on this point: —

The statute does not apply to a sale of shares in a joint stock banking company (*b*);

[Nor of scrip in a railway company (*c*);]

Nor of stock of a foreign state (*d*);

Nor of railway shares (*e*);

Nor of shares in a mining company on the cost-book principle (*f*);

[Nor of tenant's fixtures to the landlord (*g*).]

§ 112. Most of the foregoing decisions went upon the ground that the sales were of choses in action, not property embraced in the words "goods, wares, and merchandise," but some turned upon other enactments, to which it will now be convenient to refer. These are *first*, the 4th section of the Statute of Frauds, and, *secondly*, the exemption

(*a*) See per Lindley, L. J., in Colonial Bank *v.* Whinney, 30 Ch. D. at p. 283.

(*b*) Humble *v.* Mitchell, 11 A. & E. 205.

(*c*) Knight *v.* Barber, 16 M. & W. 66; 16 L. J. Ex. 18.

(*d*) Heseltine *v.* Siggers, 1 Ex. 856.

(*e*) Tempest *v.* Kilner, 3 C. B. 249; Bowlby *v.* Bell, 3 C. B. 284; Bradley *v.* Holdsworth, 3 M. & W. 422; and Duncuft *v.* Albrecht, 12 Sim. 189.

(*f*) Watson *v.* Spratley, 10 Ex. 222, and 24 L. J. Ex. 53; Powell *v.* Jessopp, 18 C. B. 336, and 25 L. J. C. P. 199.

(*g*) Lee *v.* Gaskell, 1 Q. B. D. 700.

in the Stamp Act of agreements relating to the sale of goods, wares, and merchandise.

§ 113. The 4th section (*h*) of the Act of 29 Car. II. c. 3, enacts "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; *or upon any contract or sale of lands*, tenements, or hereditaments, *or any interest in or concerning them;* or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The Stamp Act, 55 Geo. III. c. 184, in the schedule (reënacted in the Stamp Act, 1870), title Agreements, exempts from stamp duties every "memorandum, letter, or agreement made for or relating to the sale of any goods, wares, and merchandise."

§ 114. It is often important to determine whether a sale of certain articles attached to the soil, such as fixtures and growing crops, is governed by the 17th section as being a sale of "goods, wares, and merchandise," or by the 4th section, as a sale of an "interest in or concerning land." Though these two sections, on a cursory perusal, might seem to be substantially the same, both requiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under the 4th section require a written note or memorandum, under all circumstances, and for any amount or value. But under the 17th section, the necessity for the writing does not exist when the value is under 10*l.*, and it may be dispensed with in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under the 17th section is exempt from stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

§ 115. Complaint has been made at different times of the unsatis-

(*h*) It was held in Leroux *v.* Brown, 12 C. B. 801, and 22 L. J. C. P. 1, that this section is applicable to a contract made in a foreign country. See remarks on this case by Willes, J., in Gibson *v.* Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 5, and *per eundem* in Williams *v.* Wheeler, 8 C. B. N. S. 299, 316.

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

§ 116. Before entering upon an examination of the decisions, it will conduce to a proper understanding of the subject to transcribe in full the remarks of Lord Blackburn on the general principles of law involved in the question.

"The statutes are now applicable to all contracts for the sale of 'goods, wares, and merchandise,' words which, as has been already said, comprehend all tangible movable property. I say movable property, for things attached to the soil are not goods, though when severed from it they are: thus, growing trees are part of the land, but the cut logs are goods; and so, too, bricks or stones, which are goods, cease to be so when built into a wall, — they then become a part of the soil. Fixtures, and those crops which are included amongst emblements, though attached to the soil, are not for all purposes part of the freehold.

§ 117. "It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. IV. c. 14 (*k*), if not of the 29 Car. II. c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold: it is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. IV. c. 14, a contract for the sale of goods, wares, and merchandise within the seventeenth section. On the whole, the cases are

(*i*) Rodwell *v.* Phillips, 9 M. & W. 505. (*k*) Lord Tenterden's Act, *ante*, § 93.

very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the seventeenth section of the Statute of Frauds (*l*), and a good deal of authority that such a sale is not a sale of an interest in land within the fourth section, which may, however, be the case, though it is not a sale of goods, wares, and merchandise within the seventeenth" (*m*).

Nothing is to be found in the cases reported since this perspicuous exposition was published to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities then extant. There can be little hazard, therefore, in laying down the rules that govern this subject, supporting them by the appropriate decisions, and calling attention to such cases as seem to conflict with the general current of authority.

§ 118. *The first principle then is*, that an agreement to transfer the property in anything attached to the soil at the time of the agreement, *but which is to be severed from the soil and converted into goods* BEFORE *the property is transferred to the purchaser*, is an agreement for the sale of goods, an executory agreement, governed by Lord Tenterden's Act, and therefore within the 17th section.

In Smith *v.* Surman (*o*) the agreement was to sell standing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. Held to be within the 17th section. Bayley, J., in referring to this case, in Earl of Falmouth *v.* Thomas (*p*), lays stress on the fact "that the *seller* was to cut down; the timber was to be made a chattel by the *seller*" [but this distinction has since been held to be immaterial] (*q*).

In Parker *v.* Staniland (*r*) the sale was by the plaintiff of all the potatoes on a close of two acres, at 4*s.* 6*d.* a sack, and the defendant was to get them immediately. Here, also, it was held that there was a sale of chattels, and no transfer of any interest in the land; but both Lord Ellenborough and Mr. Justice Bayley put the case on the ground that the potatoes were to be taken away *immediately*, and to gain nothing by further growth in the soil (*s*); and they made this fact the ground for distinguishing the case from Crosby *v.* Wadsworth (*t*) and Waddington *v.* Bristow (*u*), where sales of growing crops of grass had been held to come under the 4th section.

(*l*) This, however, is not Lord Blackburn's own opinion, *post*.

(*m*) Blackburn on Sale, 9, 10.

(*o*) 9 B. & C. 561; 7 L. J. K. B. (O. S.) 296, and see Marshall *v.* Green, 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 404; 24 Weekly R. 175.

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

(*q*) Marshall *v.* Green, *supra*.

(*r*) 11 East, 362.

(*s*) See Marshall *v.* Green, 1 C. P. D. 35.

(*t*) 6 East, 602.

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

In Warwick *v.* Bruce (*x*), decided by the King's Bench in 1813, which was followed by Sainsbury *v.* Matthews (*y*), in the Exchequer, in 1838, the sale was of potatoes *not mature*, and that were to be dug by the *purchasers* when ripe, in the former case for a gross sum, and in the latter at 2*s.* per sack; and in both cases the distinctions suggested in Smith *v.* Surman and Parker *v.* Staniland were disregarded; and the sale in Warwick *v.* Bruce was held not to be of an interest in land under the 4th section, while the decision in the Exchequer case went the full length of deciding that the sale was one of goods and chattels, governed by the 17th section. The distinction between crops of mature and immature *fructus industriales* was also expressly repudiated by Littledale, J., in Evans *v.* Roberts (*z*).

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

§ 119. In most of the foregoing cases it will be observed, that under the contracts the property in the thing sold remained in the vendor till after severance. In Smith *v.* Surman, the price depended on the measurement of the timber after cutting it, for it was sold at so much a foot; and in Parker *v.* Staniland, and Sainsbury *v.* Matthews, the potatoes were also to be measured after being gathered, in order to determine the price. If the thing sold had been destroyed before the measurement, the loss would have fallen on the vendor, because the property remained in him. *Post*, Book II., Chap. 3. The bargain, therefore, was simply that the things sold were to be severed and converted into chattels before the sale took effect, and fell under the first principle above stated. But Warwick *v.* Bruce is governed by the rule next to be stated.

§ 120. The second principle on this subject is, that where there is

(*x*) 2 M. & S. 205.
(*y*) 4 M. & W. 343.
(*z*) 5 B. & C. 836.
(*a*) 1 Ex. 107.
(*b*) See per Grove, J., in Marshall *v.* Green, 1 C. P. D. at p. 44.

a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, as grass, timber, fruit on trees, etc., etc., which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labor of man, in sowing and reaping, planting and gathering. The former [where the purchaser is to derive some benefit from their further growth in the soil (*bb*)] are an interest in land, embraced in the 4th section; the latter are chattels, for at common law a growing crop, produced by the labor and expense of the occupier of lands, was, as the representative of that labor and expense, considered an independent chattel (*c*).

§ 121. The first and leading case in which this distinction was fully considered was Evans *v.* Roberts (*c*). A verbal contract was made, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l*., and the defendant paid one shilling earnest. The action was assumpsit "for crops of potatoes bargained and sold," and it was objected that this was a contract of sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds.

Bayley, J., said: "I am of opinion that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale or delivery of things, which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; *the vendor was to raise the potatoes from the ground*, at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument to show that this contract gave the vendee an interest in the land, within the meaning of the fourth section of the Statute of Frauds, are distinguishable from the present case. In Crosby *v.* Wadsworth (*d*), the buyer did acquire an interest in the land, for by the terms of the contract *he* was to mow the grass, and must therefore have had possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within

(*bb*) The limitation is suggested by Marshall *v.* Green, *post*.

(*c*) Per Bayley, J., in Evans *v.* Roberts, 5 B. & C. 836.

(*d*) 6 East, 602.

the description of goods and chattels, and cannot be seized as such under a *fi. fa.;* it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold (*e*), and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant; and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the Statute of Frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them." And again (at p. 835): "It has been insisted that the right to have the potatoes remain in the ground is an interest in the land, but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice, 1039, it is laid down, that under a *fieri facias* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executor, or fixtures, which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the heir. The former may be seized and sold under the *fi. fa.*, the latter cannot. *The former must, therefore, in contemplation of law, be considered chattels.*"

At the close of his opinion, the learned judge said: "I am of opinion that there was not in this case any contract or sale of lands, etc., *but that there was a contract for the sale of goods, wares, and merchandise, within the meaning of the 17th section*, though not to the amount which makes a written note or memorandum of the bargain necessary."

Holroyd, J., said: "The contract, being for the sale of the *produce* of a given quantity of land, was a contract to render what afterwards would become a chattel."

Littledale, J., was as explicit as Bayley, J., in taking the distinction above pointed out. He said (at page 840): "This contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. . . . Lord Coke in all cases distinguishes between the land and the growing produce of the land: he considers the latter as a personal chattel independent of, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any grow-

(*e*) Com. Dig. tit. *Biens* (G).

ing produce of the earth (reared by labor and expense), in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land within the meaning of the 4th section of the Statute of Frauds; *but a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute.*"

§ 122. In Jones *v.* Flint (*f*), decided in 1839, Evans *v.* Roberts was followed and approved, on the ground of the distinction between *fructus industriales*, which are chattels, and the natural growth of grass, etc., which are part of the freehold; and any distinction between crops mature and immature, as well as between cases where the buyer or the seller is to take the crop out of the ground, was expressly rejected. In both cases, also, the earlier *dictum* (*g*) of Sir James Mansfield in Emmerson *v.* Heelis (*h*) is practically overruled.

The two cases of Evans *v.* Roberts and Jones *v.* Flint have remained unquestioned to the present time as authority for the rule that *fructus industriales*, even when growing in the soil, are chattels; while another series of decisions has maintained the principle that the natural growth of the land is part of the freehold, and that contracts for the sale of it, transferring the property before severance, are governed by the 4th section.

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

§ 124. In Carrington *v.* Roots (*k*), plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain close, to be cleared by the end of September, at 5*l.* 10*s.* per acre, half the price to be paid down before any of the grass was cut. Held, by all the judges, to be void under the 4th section. This case is in entire conformity with Crosby *v.* Wadsworth (*l*), where Lord Ellenborough held a similar contract to be an agreement for the sale of an interest in land, "conferring an exclusive right to the vesture of the land during a limited time and for given purposes."

(*f*) 10 A. & E. 753.

(*g*) But see Blackburn on Sale, p. 19, note, where the author shows that it is not merely a *dictum* but a decision.

(*h*) 2 Taunt. 38.

(*i*) 9 M. & W. 502.

(*k*) 2 M. & W. 248; 6 L. J. Ex. 95. The view that the contract is void under the 4th section is now overruled. See Maddison *v.* Alderson, 8 App. Cas., per Lord Blackburn, at p. 488, and Britain *v.* Rossiter, 11 Q. B. D., per Brett, L. J., at p. 127.

(*l*) 6 East, 602.

In Scorell *v.* Boxall (*m*), a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in Teal *v.* Auty (*n*), an unstamped agreement for the sale of growing poles, were held to be agreements for the sale of an interest in land. In the former case Hullock, B., cited with approval, and recognized as authority, the case of Evans *v.* Roberts (*o*).

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

§ 126. From all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz.: —

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th and not by the 4th section of the statute.

[In Marshall *v.* Green (*p*) the facts were very similar to those in Smith *v.* Surman (*ante*, § 118). The sale was of standing timber, which was, however, to be cut down by the *purchaser* and removed by him *as soon as possible* (*q*). Held, that the agreement was not a contract for an interest in land within the 4th section, and that, as there was no intention that the purchaser should derive any benefit from the continuance of the timber in the soil, it was immaterial whether the seller felled and delivered the timber to the purchaser, or the purchaser entered upon the land and felled it for himself.

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

(*n*) 2 Br. & B. 101.

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

(*p*) 1 C. P. D. 35. [This case was examined and criticised in Lavery *v.* Purell, 39 Ch. D. 508, 57 L. J. Ch. D. 570, 58 L. T. 846, 37 Weekly R. 163, where it was held by Chitty, J., that a sale of old building materials, in a building to be taken down and removed by the purchaser, was within the Statute of Frauds, sect. 4. — E. H. B.]

(*q*) It is to be observed, however, that in Smith *v.* Surman the contract was not one for the sale of growing timber, but for the sale of timber *at so much per foot*, *i. e.* after its conversion into chattels.

In the judgment of Brett, J., will be found an exposition of the tests applicable to this class of cases (*r*).

The decision in Marshall *v.* Green seems open to some criticism. It must be supported either on the ground that it falls within the first principle (*ante*, § 118), viz., that the property in the timber was not to pass until it had been severed, and that this was the inference drawn from the words "to be cut down as soon as possible," or it must be taken to have introduced a limitation upon the second principle (*ante*, § 120), viz., that even when the property passes before severance in *fructus naturales*, yet if the evidence shows that the purchaser is to derive no benefit from their further growth in the soil, then to sell them as they stand is not a sale under the 4th but under the 17th section.

Brett, J., says (p. 42): "Where the things are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section."

And Grove, J. (at p. 44): "Here the trees were to be cut down as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a '*warehouse*' for the trees during that period."]

§ 127. Whether *fructus industriales* while still growing are not only chattels, but "goods, wares, and merchandise," has not, it is believed, been directly decided (*s*). Both Bayley, J., and Littledale, J., expressed an opinion in the affirmative in Evans *v.* Roberts (*supra*, § 121), and Mr. Taylor, in his Treatise on Evidence (*t*), treats the proposition as being perfectly clear in the same sense. Lord Blackburn, on the contrary (*u*), says that the proposition is "exceedingly questionable," and that no authority was given for it in Evans *v.* Roberts. Mr. Taylor cites no authority for his opinion. The cases bearing on this point are Mayfield *v.* Wadsley (*x*), and Hallen *v.* Runder (*y*). In the former, an outgoing tenant obtained a verdict, which was upheld, on a count for crops bargained and sold against an incoming tenant, who had agreed to take them at valuation; and in the latter, counts for fixtures bargained and sold were held sufficient,

(*r*) Following Wms. Saund. vol. i. p. 394, notes to Duppa *v.* Mayo.

(*s*) See Glover *v.* Coles, 1 Bing. 6; and Owen *v.* Legh, 3 B. & Ald. 470, both being cases of distress for rent.

(*t*) Taylor on Ev. 894, s. 1043, ed. 1885.

(*u*) Blackburn on Sale, pp. 19, 20.

(*x*) 3 B. & C. 357.

(*y*) 1 C. M. & R. 266.

but Lord Blackburn observes on these cases, *first*, that in Hallen *v.* Runder the court expressly decided that an agreement for the sale of fixtures, between the landlord and the outgoing tenant, was not a sale of *goods*, either within the Statute of Frauds, or the meaning of a count for goods sold and delivered; and, *secondly*, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor's right to diminish the value of the land than a sale of anything. The learned author, in another passage (*z*), says that "they are certainly chattels, but they are not *goods*, but are so far a part of the soil that larceny at common law could not be committed on them;" and Lord Ellenborough was also of this opinion (*a*). This point must, it is apprehended, be considered as still undetermined.

[In Lee *v.* Gaskell (*b*), upon a tenant's bankruptcy his trustee sold the fixtures, which were above the value of 10*l.*, to the plaintiff, who resold them to the defendant, the bankrupt's landlord. Held, following Hallen *v.* Runder, that the sale did not fall within either the 4th or the 17th section of the statute. "Fixtures," says Cockburn, C. J., "although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord *or any one else* as goods and chattels, because they are not severed from the freehold, so as to become goods and chattels." And by an interlocutory observation (at p. 701), he indicates the opinion that the sale of fixtures is only the sale of the right to sever them.

Both in Lee *v.* Gaskell and in Hallen *v.* Runder, the fixtures were bought by the landlord, the only distinction being that in the former case there had been an intermediate sale by the tenant's trustee, which was treated as immaterial. Lee *v.* Gaskell only decides that a bargain and sale to the landlord of fixtures, while unsevered, is not a sale of "goods, wares, and merchandise" within the meaning of the 17th section. It is submitted with deference that, in spite of the above-cited *dictum* of Cockburn, C. J., it is possible by an executory contract of sale to dispose of fixtures to a stranger, a person not having an interest in the land, and that such an executory agreement falls within the first principle stated by Mr. Benjamin on p. 115, and is clearly a contract for the sale of goods, wares, and merchandise, within the 17th section of the statute. When the purchaser is not either the landlord or the incoming tenant, as in the decided cases above referred to, there is no presumption that the fixtures are to remain in the land, which is

(*z*) Blackburn on Sale, p. 17.

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

(*b*) 1 Q. B. D. 700; 45 L. J. Q. B. 540.

the basis of the reasoning of Cockburn, C. J., in Lee *v.* Gaskell; on the contrary, the intention is to sever and to convert the fixtures into goods, and the property in them will not pass to the purchaser until after severance. As regards a bargain and sale of fixtures to a third person, not having an interest in the land, it is submitted that assuming the analogy between fixtures and *fructus industriales* to be a close one, — the view taken by Bayley and Littledale, JJ., in Evans *v.* Roberts (*c*), and by Parke, B., in Hallen *v.* Runder (*d*), — the second principle stated at § 120 will apply, and the sale is certainly one of chattels, and possibly of "goods, wares, and merchandise," within the 17th section of the statute (*e*).]

§ 128. It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil, not annual, as emblements, not permanent, as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, etc. The only reported case on this subject is Graves *v.* Weld (*f*), which was argued by very able counsel, and decided, after consideration, by Lord Denman, who delivered the unanimous judgment of the court, consisting of himself and Littledale, Parke, and Patteson, JJ. The facts were that the plaintiff was possessed of a close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830 the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th of July, 1830, the reversion being then in defendant. In January, 1831, plaintiff delivered up the close to the defendant, but in the mean time had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June *of the following year*. The clover in question was cut by defendant about the end of May, 1831, more than a twelvemonth after the seed had been sown. The defendant also took, according to the common course of husbandry, a second

(*c*) 5 B. & C. at pp. 835 and 841. It is right to note that this analogy is treated as remote by Cockburn, C. J., in Lee *v.* Gaskell, 1 Q. B. D. at p. 702. The chief distinction appears to be that pointed out by Littledale, J., viz., that while fixtures, in the case of a lessee for years, may be seized under a writ of *fi. fa.*, but not in the case of an owner in fee, on the ground that they go to the heir and not to the executor; *fructus industriales*, on the other hand, can in either case be seized, because in both cases they go to the executor and not to the heir.

(*d*) 3 L. J. Ex. at p. 264.

(*e*) The learned editors of the last edition of Amos and Ferard on Fixtures (ed. 1883), p. 333, appear to take a different view.

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

crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st, that the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2d, That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not in the long run and on the average repay himself in the autumn for the extra cost he had incurred in the spring.

The case was argued by Follett for plaintiff, and Gambier for defendant, and Lord Denman, in delivering the judgment of the whole court, said: "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law.*"

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

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

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

§ 131. A singular case of the sale of crop not yet sown was determined in Watts *v.* Friend (*h*). The bargain was, that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the 17th section of the Statute of Frauds. The amount of the seed produced turned out to be 240 bushels, and as the agreement was that the crop should be severed before the property was transferred, it was clearly not a sale of an interest in land; but the reporter, in a note to the case, calls attention to a point not discussed in it, viz., that when the bargain was made, it was *uncertain* whether the value of the seed to be produced would reach 10*l.*, and that under the 4th section it has been held that cases depending on contingencies, which may or may not happen within the year, are not within that section, though the event does not in fact happen within the year.

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

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

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

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

AMERICAN NOTE.

§§ 111–133.

WHAT ARE GOODS, ETC. 1. The American authorities generally adopt a broader construction than the English, of the phrase "goods, wares, and merchandise;" holding those words to include incorporeal property, choses in action, etc., as well as visible and tangible property. Thus, accounts, Walker *v.* Supple, 54 Geo. 178; bank bills, Gooch *v.* Holmes, 41 Me. 523; Riggs *v.* Magruder, 2 Cranch C. C. 143; corporate stocks, Tisdale *v.* Harris, 20 Pick. 9, a leading case; Boardman *v.* Cutter, 128 Mass. 388; North *v.* Forest, 15 Conn. 400; Pray *v.* Mitchell, 60 Me. 430; Banta *v.* Chicago, 172 Ill. 204; Colvin *v.* Williams, 3 H. & J. 38; Southern Life Ins. Co. *v.* Cole, 4 Florida, 359 (though the statute of that State includes "any personal property" as well as goods, etc.); Fine *v.* Hornsby, 2 Mo. App. 61; but see Thompson, Corp. § 1068; Rogers *v.* Burr (Ga. 1898), 31 S. E. 483; notes of third persons. Baldwin *v.*

(*i*) 1 Crom. & M. 89; 2 L. J. Ex. 57.
(*k*) 3 B. & C. 366.
(*l*) Page 20.
(*m*) 2 Bos. & P. 452.
(*n*) 9 M. & W. 503.

Williams, 3 Met. 367; Hudson *v.* Weir, 29 Ala. 294; Greenwood *v.* Law, 55 N. J. L. 168, — have all been held to be within the statute. Whittemore *v.* Gibbs, 24 N. H. 484, is *contra* to Met. 367. So is Vawter *v.* Griffin, 40 Ind. 600, though the Indiana statute has only the word "goods," and not "wares and merchandise." And see Beers *v.* Crowell, Dudley (Ga.), 28, as to checks. The statute of New York, and some other States, expressly adds the words "things in action" to the phrase "goods, wares, and merchandise." See Artcher *v.* Zeh, 5 Hill, 200; People *v.* Beebe, 1 Barb. 379; Doty *v.* Smith, 62 Hun, 598; Truax *v.* Slater, 86 N. Y. 630; Bowery Bank *v.* Wilson, 1 N. Y. Supp. 473 (48 Hun, 621, mem. dec.). And see Peabody *v.* Speyers, 56 N. Y. 230. In Somerby *v.* Buntin, 118 Mass. 285, it was held the statute did not apply to a contract to dispose of an interest in an invention before letters patent had been obtained. And see Blakeney *v.* Goode, 30 Ohio St. 350. Neither, of course, would a contract to sell shares of stock in a company not yet organized be within the statute. Gadsden *v.* Lance, McMullan Eq. (So. Car.) 87; Green *v.* Brookins, 23 Mich. 48. And see Meehan *v.* Sharp, 151 Mass. 566.

2. As to **Fixtures, Growing Crops, etc.**, the reader will remember the question as to them is not whether a sale thereof is governed by the Statute of Frauds, for all agree as to that; but under which provision of the statute do they come, — "an interest in real estate," so that the contract must always be in writing? or are they "goods, wares, and merchandise," and so a sale is made valid by part payment, or acceptance and receipt? And first as to fixtures, or things artificially annexed to the freehold. A sale of these to be severed and carried away is a sale of personal property, and not a sale of real estate. Bostwick *v.* Leach, 3 Day, 476, a sale of the millstones, running gear, etc., in a grist-mill, an important case; Strong *v.* Doyle, 110 Mass. 92, manure on a farm. In Scales *v.* Wiley, 68 Vt. 39 (1895), the contract provided that a building then standing on plaintiff's land should be taken down by him, the materials hauled by the defendant to his land, and there re-erected by the plaintiff, after defendant had supplied whatever new material might be necessary. It was held not to be a sale of an interest in land. Compare Lavery *v.* Pursell, 39 L. R. Ch. 508, 37 Weekly R. 163 (1888), where it was held that the sale of old building materials then standing as a house upon the vendor's land, but to be taken down and removed by the purchaser within two months, was a contract for an interest in land. The cases between lessor and lessee resemble Strong *v.* Doyle. See Ross's Appeal, 9 Pa. St. 491; Powell *v.* McAshan, 28 Mo. 70. The same rule applies to buildings temporarily placed on the land of another by his previous consent. These continue to be, as between the parties, the personal property of the builder, and may be sold by him as such under the 17th section of the English statute, and do not come under the 4th section, as an interest in land. Shaw *v.* Carbrey, 13 Allen, 462; Dame *v.* Dame, 38 N. H. 429, collecting many cases; Howard *v.* Fessenden, 14 Allen, 124; Foster *v.* Mabe, 4 Ala. 402; Scoggin *v.* Slater, 22 Ala. 687; Morris *v.* French, 106 Mass. 326; Rogers *v.* Cox, 96 Ind. 157; Central Branch R. R. *v.* Fritz, 20 Kans. 430; Long *v.* White, 42 Ohio St. 59. It should be remembered, however, that they are so far attached to the land that the deed of the landowner to a *bona fide* grantee, ignorant of the separate ownership of the buildings, will convey them, even as against the true owner, and he must look to the

grantor for his redress. Landon *v.* Platt, 34 Conn. 517; Gibbs *v.* Estey, 15 Gray, 587; Dolliver *v.* Ela, 128 Mass. 559; Southbridge Savings Bank *v.* Exeter Machine Works, 127 Mass. 542. So an absolute deed of land will ordinarily convey such fixtures as incidents thereto, notwithstanding an *oral* reservation by the grantor at the time of making his deed; but this doctrine does not conflict with what has been before said. See Conner *v.* Coffin, 22 N. H. 538, a sale of manure on a farm, in which case the subject is elaborately examined; Austin *v.* Sawyer, 9 Cow. 39; Bond *v.* Coke, 71 N. C. 97, a cotton-gin; Noble *v.* Bosworth, 19 Pick. 314. Pea *v.* Pea, 35 Ind. 387, to the contrary, is questionable. Smith *v.* Odom, 63 Geo. 499, seems to have been influenced by the code of that State. In Strong *v.* Doyle, 110 Mass. 92, the oral agreement reserving the manure on a farm was made *prior* to the deed. It is foreign to this treatise to discuss this subject further.

3. As to **natural productions (fructus naturales)**, such as grass, fruit, growing trees, etc., the prevailing and better rule now is that if, by the fair interpretation of the contract, the thing sold is to be immediately or within a reasonable time severed from the soil and carried away, and is not to be left to grow and attain additional strength and increase from the earth, the sale is that of personal property and not of an interest in land. And it seems to be immaterial who is to sever it from the soil. The time it is to continue to grow therein is more important, though it may be more obvious if the grantor is to sever the article and convert it into some other form, as trees into cordwood, for example. For this reason a sale of nursery trees and shrubs, to be removed the following spring or autumn after the sale, was held a sale of personal property in Whitmarsh *v.* Walker, 1 Met. 313, a leading case. And the same rule has been applied to other standing wood, trees, and timber, Claflin *v.* Carpenter, 4 Met. 580; Nettleton *v.* Sikes, 8 Met. 34; Erskine *v.* Plummer, 7 Greenl. 447; Cutler *v.* Pope, 13 Me. 377; to grass ready to be cut, Banton *v.* Shorey, 77 Me. 48; to trees, McClintock's Appeal, 71 Pa. St. 365; Sterling *v.* Baldwin, 42 Vt. 306; Smith *v.* Bryan, 5 Md. 141; Leonard *v.* Medford, 85 Md. 666; to a crop of fruit, Purner *v.* Piercy, 40 Md. 212; Brown *v.* Stanclift, 20 Alb. Law J. 55 (1879), affirmed in 80 N. Y. 627; to an ice crop, Higgins *v.* Kusteren, 41 Mich. 318. See Cain *v.* McGuire, 13 B. Monr. 340; Byassee *v.* Reese, 4 Metc. (Ky.) 372; Marshall *v.* Ferguson, 23 Cal. 65; Davis *v.* McFarlane, 37 Ib. 636; Vulicevich *v.* Skinner, 77 Ib. 239; Killmore *v.* Howlett, 48 N. Y. 569; Boyce *v.* Washburn, 4 Hun, 792. In Hirth *v.* Graham, 50 Ohio St. 57 (1893), the question first came before the Ohio court. In that case there had been an oral sale of standing timber to be felled presently, but nothing had been done. It was held that the sale was within the fourth section of the statute as of an interest in lands, and that the question depended upon the legal character of the subject-matter and not upon the intention of the parties. Marshall *v.* Green is distinguished upon the ground that in that case the work of felling had commenced: many cases are cited and examined. Clark *v.* Guest, 54 Ohio St. 298, follows the prior decision, and declares the law to be settled in that State. In such cases as 4 Met. 580 the title to the trees passes; Wilson *v.* Fuller, 58 Minn. 149; with a license to the vendee to enter and remove them, which license is irrevocable as to trees already cut, though not carried away; Nelson *v.* Nelson, 6 Gray, 385; Douglas *v.*

Shumway, 13 Gray, 498; Green *v.* North Carolina Railroad Co. 73 N. C. 524; Pierrepont *v.* Barnard, 6 N. Y. 279, an important case; Cool *v.* Peters Box Co. 87 Ind. 531; but revocable as to those still standing at the time of revocation, leaving the buyer, perhaps, some form of remedy for the disappointment. Giles *v.* Simonds, 15 Gray, 441; Drake *v.* Wells, 11 Allen, 141; Putney *v.* Day, 6 N. H. 430; Owens *v.* Lewis, 46 Ind. 488, in which the subject is elaborately examined; Armstrong *v.* Lawson, 73 Ib. 498; Fletcher *v.* Livingston, 153 Mass. 390. See, also, N. B. & N. S. Land Co. *v.* Kirk, 1 Allen (N. B.), 443; Murray *v.* Gilbert, 1 Hannay, 545; Kerr *v.* Connell, Berton (N. B.), 133. On the other hand, if the contract clearly contemplates that growing trees are to remain in the soil, either for a fixed time or indefinitely at the pleasure of the vendee, and so derive future benefit therefrom, the transaction does involve "an interest in land," and the sale must be in writing, as much as the sale of the fee itself. See Green *v.* Armstrong, 1 Denio, 550, a leading case; White *v.* Foster, 102 Mass. 375; Kingsley *v.* Holbrook, 45 N. H. 313; Howe *v.* Batchelder, 49 N. H. 204; Olmstead *v.* Niles, 7 N. H. 522; Buck *v.* Pickwell, 27 Vt. 157; Pattison's Appeal, 61 Pa. St. 294; Huff *v.* McCauley, 53 Ib. 206; Slocum *v.* Seymour, 36 N. J. L. 138; Daniels *v.* Bailey, 43 Wisc. 566; Bent *v.* Hoxie, 90 Wis. 625, and other cases in that State; Lillie *v.* Dunbar, 62 Ib. 198; Warren *v.* Leland, 2 Barb. 613; Vorebeck *v.* Roe, 50 Ib. 302; Harrell *v.* Miller, 35 Miss. 700; Macdonell *v.* McKay, 15 Grant (Ont.), 391; Summers *v.* Cook, 28 Ib. 179, a valuable case on this point. In Stuart *v.* Pennis, 91 Va. 688, a bill for specific performance of a contract for the sale of growing trees was sustained.

It may be the above distinction has not always been kept in mind, and possibly some of the cases are not reconcilable with each other. The difference in the two classes of cases may be manifest from this simple illustration. If the owner of one of two adjoining houses buys a tree on his neighbor's lot, because its shade annoys him by darkening his windows, and both parties understand the tree is to be cut down at once, such sale is not for an interest in land, and need not be in writing to bind the owner of the tree. On the other hand, if the purchaser wanted the tree to remain for the benefit of its shade, and bought it to prevent the owner from cutting it down, that is a bargain for an interest in land, and must be in writing. And see an article upon Sales of Standing Trees, by Edmund H. Bennett, in 8 Harv. Law Rev. 367 (1895).

4. As to **artificial** or annual crops (**fructus industriales**), the law is quite clear that a sale thereof, in whatever state of maturity, and however long they are to remain in the soil in order to complete their growth, is a sale of personal property, and not of an interest in land. Dunne *v.* Ferguson, Hayes (Ir.), 540, a crop of turnips; Bricker *v.* Hughes, 4 Ind. 146, growing corn; Marshall *v.* Ferguson, 23 Cal. 65, standing grain; Brittain *v.* McKay, 1 Ired. L. 265; Bull *v.* Griswold, 19 Ill. 631; Moreland *v.* Myall, 14 Bush, 474; Westbrook *v.* Eager, 16 N. J. L. 81; Erickson *v.* Paterson, 47 Minn. 525, where an attachment of crops was upheld as against a fraudulent grantee of the land. Similar to it is Polley *v.* Johnson, 52 Kans. 478, reviewing the Kansas cases. And see Bank *v.* Beegle, 52 Kans. 709.

CHAPTER III.

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

	Sect.		Sect.
Several articles sold on one occasion	134	Uncertain value	136
Auction sales of several lots	135	Different contracts for a single consideration	137

§ 134. In several cases, questions have been raised as to the construction of the words, "for the price of 10*l*., and upwards," and "of the value of ten pounds and upwards," as used in the 17th section of the Statute of Frauds and in Lord Tenterden's Act.

In Baldey *v.* Parker (*a*), the plaintiffs were linendrapers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of 10*l*. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to 70*l*., and he demanded a discount of 20*l*. per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. Held, that this was one entire contract within the 17th section. All the judges, Abbott, C. J., Bayley, Holroyd, and Best, JJ., gave separate opinions. Abbott, C. J., said: "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley, J., said: "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l*. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l*. within the 17th section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said: "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l*., but in the course of the dealing it grew to a contract for a much larger

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

amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds, *it being the intention of that statute that, where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of* 10*l.*, it should not bind, unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount."

Best, J., said: "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."

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

§ 136. Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of 10*l.*, according to the terms of the contract, yet, if in the result it turn out that the value actually exceeds 10*l.*, the statute applies. This point was involved in the decision in Watts *v.* Friend (*c*), where the sale was of a future crop of turnip-seed which might or might not amount to 10*l.*, the price stipulated being a guinea a bushel. But the point was not argued nor mentioned by counsel or by the court.

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

(*b*) 2 Taunt. 38. Also per Le Blanc, J., in Rugg *v.* Minett, 11 East, 218; Roots *v.* Lord Dormer, 4 B. & Ad. 77; and per the law Lords in Couston *v.* Chapman, L. R. 2 H. L. Sc. 250.

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

(*d*) 25 L. J. C. P. 257; 18 C. B. 587.

(*e*) See, also, Wood *v.* Benson, 2 Cr. & J. 95; and Astey *v.* Emery, 4 M. & S. 263; Cobbold *v.* Caston, 1 Bing. 399; 8 Moo. 456.

AMERICAN NOTE.

§§ 134–137.

PRICE OR VALUE. 1. The word "price" might well have been held synonymous with "value" without the aid of a legislative enactment. "The *price* of a virtuous woman is far above rubies;" and Milton speaks of "the soul's high *price*." Some American statutes use one word, some the other; while others still adopt the word "amount." This amount varies considerably in different States. Commencing with "any value" in Florida and Iowa, it gradually rises in Arkansas, Maine, Missouri, and New Jersey to $30; in New Hampshire, to $33; in Vermont, to $40; in most States, to $50; in Arizona, $100; in California and Idaho, $200; in Montana and Utah, $300; while in Rhode Island no such provision exists.

2. **Several Articles combined.** As to sales of different articles, no one of which exceeds the statutory limit, though all combined do, the question whether they are within the statute depends very much upon the circumstances of each particular case; the question being whether the items were all consolidated into one sale, or were distinct and separate sales. If one gross sum was to be paid for the whole, of course it is ordinarily an entire sale. But if a separate price was fixed for each, it does not necessarily follow that there were so many separate sales, especially if all the articles were of the same kind; as 100 bushels of corn at one dollar a bushel. See Gilman *v.* Hill, 36 N. H. 318; Allard *v.* Greasert, 61 N. Y. 1; Brown *v.* Hall, 5 Lans. 177; Gault *v.* Brown, 48 N. H. 183, citing many cases. Differences in the terms of the contract as to the mode of payment, time of delivery, etc., or other variations, tend far to make the purchase separate and not entire. See Aldrich *v.* Pyatt, 64 Barb. 391; Barclay *v.* Tracy, 5 W. & S. 45. And in many cases of the sale of several separate articles at the same time, for a separate price as to each, the sale has been held so far divisible that, if some are lawfully sold and others not, the price of the former may be recovered unaffected by the latter. See Walker *v.* Lovell, 28 N. H. 138; Carleton *v.* Woods, Ib. 290; Coburn *v.* Odell, 30 Ib. 557; Goodwin *v.* Clark, 65 Me. 280, and cases cited.

3. **Auction Sales of Lots.** As to sales at auction of different lots of goods bid off separately, each having no natural or necessary connection with the other, it would seem, especially if other sales to other parties intervened, that each sale should be considered separate and distinct. See Robinson *v.* Green, 3 Met. 159; Wells *v.* Day, 124 Mass. 38; Van Eps *v.* Schenectady, 12 Johns. 436; Stoddart *v.* Smith, 5 Binn. 355. Although these were sales of real estate, it is difficult to see any distinction between real and personal property in this respect. There is, however, some authority to the contrary. See Jenness *v.* Wendell, 51 N. H. 63, in which, after a full examination of the authorities, it was held that successive purchases at auction, even though on different days, for different prices, aggregating over $33, constituted only one contract, so far at least that a receipt and acceptance of one lot would take the whole out of the operation of the statute. See, also, Mills *v.* Hunt, 17 Wend. 333, 20 Ib.

431; Coffman *v.* Hampton, 2 W. & S. 377; Tompkins *v.* Haas, 2 Pa. St. 74; Kerr *v.* Shrader, 1 Weekly N. C. 33 (Penn. 1874).

4. **Unfixed Price.** As to sales of goods, where the price to be paid is uncertain, owing to the uncertainty of the quantity to be delivered, it is clear that, if the amount contracted for *finally* proves to exceed the statutory limit, the sale is within the statute, although no one item or portion was of that amount. See Bowman *v.* Conn, 8 Ind. 58, a sale of all the broom-corn that should be raised the next year on twenty-five acres, at $60 a ton, approving Watts *v.* Friend, *supra*, § 136. Brown *v.* Sanborn, 21 Minn. 402, is similar. And see Carpenter *v.* Galloway, 73 Ind. 418. It does not distinctly appear in the report of some of these cases exactly how much the articles actually exceeded in the aggregate the statute limit; and the court use language indicating that a sale would be invalid if the amount might *possibly* exceed the limit; but that is contrary to principle and analogy in other parts of the statute. See Cox *v.* Bailey, 6 M. & G. 193; Gault *v.* Brown, 48 N. H. 183; Hodges *v.* Richmond Man. Co. 9 R. I. 482, and cases cited.

5. **Entire Contracts.** As to oral sales of goods above the statute limit, with an agreement to do something else, *all for one entire consideration*, of course the whole is invalid, and the latter stipulation cannot be enforced, though if it stood alone it might be. See instances in Irvine *v.* Stone, 6 Cush. 508, a leading case; McMullen *v.* Riley, 6 Gray, 500. But this is only remotely connected with the law of sales, and this work is not a treatise on the Statute of Frauds.

CHAPTER IV.

OF ACCEPTANCE AND RECEIPT.

SECTION I. — ACCEPTANCE.

	Sect.
General observations	139
American law the same	141
Acceptance of sample as part	141
Constructive acceptance	144
Question of fact, not of law	144
When buyer does an act of ownership	145
Formation of contract distinct from performance	150
Judicial criticism of Morton *v.* Tibbett	151
Acceptance may be inferred from act of buyer which admits evidence of a contract	156 a
There may be acceptance although buyer may afterwards reject goods as not equal to sample	156 a
Examination of goods as an act admitting the existence of a contract	156 b
Acceptance and actual receipt are distinct	156 b
Acceptance may precede receipt	157
Acceptance after action brought	159
Carrier has no authority to accept	160
Curtis *v.* Pugh reviewed	161
Silence and delay as proofs of acceptance	162
Marking the goods	166
Where part of the goods not in existence	167
Where goods are of different kinds	168
Where the bargain is for sale and resale	169
Effect of proof of acceptance and receipt	170
Acceptance after disaffirmance by vendor	171

SECTION II. — WHAT IS AN ACTUAL RECEIPT.

When goods are already in buyer's possession	173
When goods are in possession of a third person	174
When goods are on premises of third persons not bailees	178
When goods are in possession of vendor	180
When goods are delivered to a common carrier	181
Vendor may become bailee of purchaser	182
Actual receipt tested by loss of vendor's lien	183

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

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

(*a*) The effect of these words, it would seem, is not to make a contract void which does not comply with the provisions of the section. See per Lord Blackburn, in Maddison *v.* Alderson, 8 App. Cas. at p. 488: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." A different construction had been placed upon the words "shall be allowed to be good" in earlier cases, and they were held to refer to the validity of contracts falling within the 17th section, and

1. "The buyer shall accept part of the goods so sold, and actually receive the same;"
2. "Or give something in earnest to bind the bargain, or in part payment;"
3. "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

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

SECTION I. — WHAT IS AN ACCEPTANCE.[1]

§ 139. In commenting on this clause, Lord Blackburn makes the following remarks (*b*): —

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

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

a distinction was drawn between them and the corresponding words, "no action shall be brought," in the 4th section. Leroux *v.* Brown, in 1852, 12 C. B. 801, decided that the 4th section relates to procedure, and does not affect the validity of the contract, but there is no direct decision upon the effect of the 17th section.

(*b*) Blackburn on Sale, 22, 23.

[1] [See St. 1893, 56 & 57 Vict. c. 71 (*infra*, Appendix); Abbott *v.* Wolsey [1895], 2 Q. B. 97. — E. H. B.]

for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods."

And this is also the law in the United States (*bb*).

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

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

(*bb*) Caulkins *v.* Hellman, 47 N. Y. 449. See *post*, §§ 160, 181.

(*c*) 7 East, 558.

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

§ 143. In Gardner *v.* Grout (*e*), *after* the sale agreed on, the buyer went to the vendor's warehouse and got samples of the goods sold, which he promised to pay for when he took away the bulk; and the samples so taken were weighed and entered against him in the vendor's book. The vendor then refused to complete the sale. But *held* that there had been a part acceptance, making the bargain complete.

In this case the defendant cited Simonds *v.* Fisher, not reported, in which Wightman, J., had nonsuited the plaintiff, the facts being that plaintiff showed defendant samples of wine which the latter agreed to buy, and, after the bargain was concluded, the buyer asked for the samples and wrote on the labels the prices agreed on; and this taking of the samples was relied on as a part acceptance, so as to take the case out of the statute. But the court, in deciding Gardner *v.* Grout, distinguished it from Simonds *v.* Fisher, saying: "There the buyer never saw the bulk; the things handed to him really were mere samples (*f*). But here the plaintiff receives part of the very things which he has already bought."

So in Foster *v.* Frampton (*g*), the drawing of samples by a vendee from hogsheads of sugar forwarded to him by the vendor, when the sugar was in the carrier's warehouse at the place of destination, was held to be a taking possession of part of the goods, "a complete act of ownership" (per Littledale, J.), putting an end to the vendor's right of stoppage *in transitu*.

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

§ 144. It is quite well settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the

(*e*) 2 C. B. N. S. 340. See, also, Klinitz *v.* Surry (*supra*); Talver *v.* West, Holt N. P. 178.

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

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

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

court" (*i*). The acceptance must be clear and unequivocal, but "it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance" (*j*). All the cases proceed on this principle.

§ 145. The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as owner, when he does an act which he would have authority to do as owner, but not otherwise. In the language of an eminent judge (*k*): "If the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them."

Thus in Chaplin *v.* Rogers (*l*), where the purchaser of a stack of hay resold part of it, and in Blenkinsop *v.* Clayton (*m*), where the purchaser of a horse took a third person to the vendor's stable, and offered to resell the horse to the third person at a profit, the buyer was held in both instances to have done an act inconsistent with the continuance of a right of property in his vendor, and to have accepted within the meaning of the statute.

§ 146. In Beaumont *v.* Brengeri (*n*), where the defendant bought a carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, *held*, that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop.

But in Maberley *v.* Sheppard (*o*), the action was for goods sold *and delivered*, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the progress of the work furnished the ironwork and sent it to plaintiff, and sent a man to help plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to acceptance. The court took time to consider, and Tindal, C. J., delivered the decision that the plaintiff had been rightly nonsuited, because the acts of the defend-

(*i*) Per Denman, C. J., in Edan *v.* Dudfield, 1 Q. B. 302.

(*j*) Per Coleridge, J., in Bushel *v.* Wheeler, 15 Q. B. 442, quoted and approved by Campbell, C. J., in Morton *v.* Tibbett, 15 Q. B. 428, and 19 L. J. Q. B. 382. See, also, Parker *v.* Wallis, 5 E. & B. 21; [White *v.* Harvey, 85 Me. 213. — B.]

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

(*l*) 1 East, 192.

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

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

(*o*) 10 Bing. 99.

ant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in plaintiff's yard for further work till it was finished. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance."

§ 147. In Parker *v.* Wallis (*p*), the defendants received some turnip-seed under a verbal contract of sale, but sent word at once to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags, and laid it out thin, alleging that it was hot and mouldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was nonsuited by Wightman, J., and leave reserved to enter a verdict for 140*l.*, the price of the seed, if the evidence sufficed to show acceptance and actual receipt of any part of the goods. The court made the rule absolute for a new trial, but refused to enter verdict for plaintiff. Held, that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff had authorized it. But, as the evidence stood when the nonsuit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a wrongful act, if the defendants had not accepted as owners. This was a question for the jury.

In Kent *v.* Huskinson (*q*), there was an actual receipt but no acceptance. The buyer gave an order for sponge at 11*s.* per pound. On arrival of the package it was examined, and judged to be worth not more than 6*s.* per pound. He at once returned it by the same carrier. Held, no acceptance.

§ 148. A dealing with goods, so as to justify a jury in finding a constructive acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves (*r*).

§ 149. Very deliberate consideration was given to the whole subject by the Queen's Bench, in the important case of Morton *v.* Tibbett (*s*). The facts were that, on the 25th of August, defendant made a verbal agreement with plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a certain specified weight. Defendant, by agreement, sent a general carrier next morning to a place named, and the wheat was then and there

(*p*) 5 E. & B. 21.
(*q*) 3 B. & P. 233.
(*r*) Currie *v.* Anderson, 29 L. J. Q. B. 87, and 2 E. & E. 592; Meredith *v.* Meigh, 22 L. J. Q. B. 401, and 2 E. & B. 364.
(*s*) 19 L. J. Q. B. 382, and 15 Q. B. 428.

received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the mean time, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier who had received it without its being weighed, and neither defendant, nor any one in his behalf, had seen it weighed. The action was debt for goods sold and delivered, and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for nonsuit. The judgment of the court was unanimous after taking time for consideration, the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods, and actually received the same, so as to render him liable as buyer.

Lord Campbell said that it would be very difficult to reconcile the cases on the subject, and that the exact words of the 17th section had not always been kept in recollection. After referring to the language, he added: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the Act of Parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the *residue;* and, even where the sale is by sample, that the residue offered does not correspond with the sample." His Lordship then continued by announcing that: "We are of opinion that there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The *acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*"

§ 150. The distinction pointed out in this last clause is important, and should not be lost sight of. The question presented to the court may be whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half pound of sugar in Hinde *v.* Whitehouse) (*t*), in order that

(*t*) 7 East, 558; *supra*, § 141.

the contract may "be allowed to be good;" and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the vendor fails to comply with the contract as proven.

The decision of Lord Campbell then closed with declaring: "We are therefore of opinion that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it."

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

§ 152. On the other hand, Blackburn, J., in delivering the opinion of the court in Cusack *v.* Robinson (*z*), on the 25th of May, 1861, just ten days after this observation of the Chief Justice in Castle *v.* Sworder, cites Morton *v.* Tibbett as authority for the proposition, "that the acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined." The court, on this occasion, was composed of only two judges, Blackburn and Hill, JJ. In the same court, in February, 1860, Crompton, J., had stated, in the case of Currie *v.* Anderson (*a*), that "before the case of Morton *v.* Tibbett, there was authority for saying that there could have been no acceptance and receipt within the Statute of Frauds until the vendee had been placed in such connection with the goods that he could not object to them on account of their quantity and quality; and in that case Lord Campbell says, if that is the law, it would be decisive against the plaintiff; but after a careful review of the cases, the court

(*u*) 8 Ex. 814.
(*x*) 3 H. & N. 510; 27 L. J. Ex. 401.
(*y*) 6 H. & N. 832; 30 L. J. Ex. 310.
(*z*) 1 B. & S. 299, and 30 L. J. Q. B. 261.
(*a*) 2 E. & E. 592; 29 L. J. Q. B. 87.

came to the conclusion (which, in this court, must be considered to be the law of the land) that, in order to make an acceptance and receipt within the Statue of Frauds, *it is not necessary that the vendee should have done anything to preclude himself from objecting to the goods.* That was the decision in Morton *v.* Tibbett, and, from the discussion to-day, I have more reason than ever to be satisfied with it."

§ 153. It is fair to assume from the foregoing review, that, notwithstanding the observation of Cockburn, C. J., in Castle *v.* Sworder, the law [was] considered to be settled in the Court of Queen's Bench in conformity with the decision in Morton *v.* Tibbett, and that the authority of that case remain[ed] unshaken in that court.

§ 154. In the Exchequer, however, the leaning of the judges [was] evidently adverse to the construction placed in the Queen's Bench upon this clause of the statute, though in no case has there been a decided rejection of the authority of Morton *v.* Tibbett.

Hunt *v.* Hecht (*b*) was decided in 1853, and, therefore, prior to the more recent cases in which the judges of the Queen's Bench showed what was, in the opinion of that court, the full extent of the decision in Morton *v.* Tibbett. The facts were, that a number of bags of bone were sent by defendant's order to his wharfinger, in compliance with a verbal contract with plaintiff. The defendant went to plaintiff's warehouse, and there inspected a heap of ox-bones mixed with others inferior in quality. Defendant objected to the latter, but verbally agreed to purchase a quantity of the others, to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, as soon as he heard of their being sent to the wharf, and he at once refused to accept them. Held, no acceptance. All the judges put the case on the ground of the goods sold having been mixed in bulk with others, so that no acceptance was possible till after separation, and there was no pretence that there had been an acceptance after separation, otherwise than by the wharfinger's receipt, which was insufficient for that purpose, but Martin, B., said: "There are various authorities to show that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the articles sent. Morton *v.* Tibbett has been cited as an authority to the contrary, but in reality that case decides no more than this, that, where the purchaser of goods takes upon himself to exercise dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court,

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

indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; *it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.*"

§ 155. In the case of Coombs *v.* The Bristol & Exeter Railway Company (*c*), decided in 1858, the same court had occasion to review the subject, and Pollock, C. B., said that Hunt *v.* Hecht had decided "that the vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance." Martin, B., said: "No doubt in Morton *v.* Tibbett the Court of Queen's Bench carried out the principle of constructive acceptance to an extent which in that case was correct; but I adhere to that which I said in Hunt *v.* Hecht, that much that was there said is doubtful, and that acceptance, to satisfy the statute, must be after the opportunity of exercising an option, or after the doing of some act waiving it." Bramwell, B., said without qualification: "The cases establish that there can be no acceptance where there has been no opportunity of rejecting." Watson, B., concurred.

§ 156. The subject of acceptance under the statute again arose in Smith *v.* Hudson (*d*), decided in the Queen's Bench in Easter Term, 1865. All the cases were reviewed by able counsel, and commented on by the judges in the course of the argument. The plaintiffs were assignees of Willden, a bankrupt. The defendant, on the 3d of November, 1863, sold to Willden by verbal contract a quantity of barley, according to sample. The bulk was conveyed by the vendor in his own wagons to the railway station, on the 7th of November, and he gave orders to convey and deliver it to the purchaser. It was admitted that by the custom of the trade the purchaser, notwithstanding the delivery of the bulk at the station, had the power of rejecting the goods if found not equal to sample. On the 9th of November Willden was adjudicated a bankrupt on his own petition, without having given any orders or directions about the barley, which still remained at the railway station, *nor had he examined it* (*e*) or given any notice whether he accepted or declined it. Nothing had been paid on account of the price, and on the 11th of November the vendor gave notice to the railway company not to deliver the goods to any one but himself. The corn was given up to the vendor by the company, and the assignees of Willden claimed it as the property of the bank-

(*c*) 3 H. & N. 510; 27 L. J. Ex. 401.
(*d*) 6 B. & S. 431; 34 L. J. Q. B. 145.
(*e*) Upon this point see *post*, pp. 152, 153.

rupt. On the question whether there had been an acceptance under the Statute of Frauds, held by all the judges, Cockburn, C. J., Blackburn, Mellor, and Shee, JJ., that the contract could not be allowed to be good. The Chief Justice held Hunt *v.* Hecht to be binding on the court as an authority that, where the buyer has a right to inspect the articles sold to see whether they are in accordance with the contract, there is no acceptance till he has time to make the inspection. Blackburn, J., said: "There must be both acceptance and receipt to bind both purchaser and vendor under the statute." And in all the opinions it was held that the countermand of the vendor before the goods had been delivered according to his order, and before acceptance, put an end to the contract, and deprived the assignees of the power to accept on behalf of the bankrupt.

§ 156 a. [By the later decisions, which we shall now proceed to review, the law is well settled in accordance with Morton *v.* Tibbett, that an acceptance to satisfy the 17th section of the statute may be inferred from any act of the buyer with reference to the goods, which involves the admission of the existence of a contract, and that such an acceptance is distinct from one which admits that the contract has been fulfilled.

In Kibble *v.* Gough (*ee*), the plaintiff verbally agreed to sell barley to the defendant, the same to be well dressed and equal to sample. In the defendant's absence his foreman received the barley, which was delivered in several instalments, examined it, and gave a receipt for each instalment, with the words, "not equal to sample." The defendant afterwards personally examined the barley, and rejected it on the ground that it was not properly dressed and not equal to sample. In an action for goods sold and delivered the jury found, in answer to questions left to them by Pollock, B., at the trial: 1st, that there was an acceptance by the defendant of part of the barley; and, 2dly, *that the barley was equal to sample* and properly dressed. Upon the argument of a rule for a new trial, obtained on the ground of misdirection, and that the verdict was against the weight of evidence, it was argued for the defendant that there was misdirection on the part of the judge in holding that there was any evidence to go to the jury of acceptance under the Statute of Frauds, apparently upon the ground (*f*) that the defendant's foreman, having given a receipt with the words "not equal to sample" upon it, could not be held to have accepted it within the meaning of the statute, and that the question therefore, whether it was equal to sample or not, never arose, because there was no valid

(*ee*) 38 L. T. N. S. 204. See, also, Grimoldby *v.* Wells, L. R. 10 C. P. 391, where, however, the decision turned upon another point.

(*f*) The report is somewhat involved.

contract between the parties. The authority of Morton *v.* Tibbett was attacked, but all the Lords Justices (Bramwell, Brett, and Cotton) referred with approval to the principle there laid down, and held that there was evidence for the jury of an acceptance sufficient to satisfy the statute. That being so, the question whether the barley was equal to sample or not was clearly one for the jury to decide, and they had answered it in favor of the plaintiff. Lord Justice Brett refers in these terms to the acceptance necessary under the statute: "There must be an acceptance and an actual receipt; *no absolute acceptance, but an acceptance which could not have been made except on admission of the contract, and that the goods were sent under it.* I am of opinion there was a sufficient acceptance under the Statute of Frauds, although there was (still) a power of rejection." And then, after reviewing the cases and referring with approval to Morton *v.* Tibbett, he adds: "The goods then were sold by valid contract, actually delivered and received, and after this the vendee objects to them. *If they had not been equal to the sample, I say that it was not even then too late to object;* but they were equal to sample and they were (properly) dressed."

And Cotton, L. J., says: "All that is wanted is a receipt, and such an acceptance of the goods as shows that it has regard to the contract; but the contract may yet be left open to objection, so that it would not preclude a man from exercising such a power of rejection."

In Rickard *v.* Moore (*g*), decided in the same year, the plaintiff verbally sold by sample to the defendant six bales of wool. The goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken home by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff that two bales were inferior to sample, asking what was to be done in the matter. Plaintiff replied denying that the bales were not equal to sample. The defendant was away from home when this letter arrived. Four days afterwards he returned home, and, after reading the plaintiff's letter, sent the goods back to the railway station, and telegraphed to the plaintiff rejecting them. During these four days the defendant admitted that he had offered the goods for sale in the market, stating, however, that he had not accepted them, and that he would have to make other arrangements before he could sell. In an action for goods sold and delivered the defendant (*inter alia*) pleaded, first, that there was no acceptance or actual receipt to take the case out of the Statute of Frauds; and, secondly, that he had properly rejected the goods as not equal to sample. The jury found at the trial *that two of the bales were not equal to sample*, and Hawkins, J., thereupon directed a ver-

(*g*) 38 L. T. N. S. 841, C. A.

dict, and gave judgment for the defendant. On appeal, Bramwell, L. J., held both points in the defendant's favor, distinguishing Kibble *v.* Gough upon the question of acceptance within the Statute of Frauds, upon the ground that in that case the jury had found that there was in fact an acceptance of the goods by the defendant, and that there was evidence to justify that finding. In this judgment Baggallay, L. J., concurred. Thesiger, L. J., while not differing from the judgment of Bramwell, L. J., preferred to rest his judgment upon the second point taken, viz., that whether or not there was an acceptance to satisfy the statute, the defendant had done nothing to waive his right to reject the goods as not equal to sample, and the jury had found as a fact that the goods were not equal to sample. Morton *v.* Tibbett, though cited in the argument, is not directly referred to in the judgments, but it is quite clear from what was said by Bramwell and Thesiger, L. JJ., that both recognized and adopted the distinction between an acceptance such as would satisfy the Statute of Frauds, or in other words a conditional acceptance, and an acceptance of the goods as equal to sample.

The point of distinction between the two preceding cases is clear. In Kibble *v.* Gough, the jury having found that the goods were equal to sample, it became necessary to decide whether there had been an acceptance and receipt within the meaning of the statute; while in Rickard *v.* Moore, the jury having found that the goods were not equal to sample, the only question was as to the buyer's right to reject them.

§ 156 b. In the more recent case of Page *v.* Morgan (*h*), the authority of Morton *v.* Tibbett and of Kibble *v.* Gough was again fully recognized by the Court of Appeal, and the decision in Rickard *v.* Moore distinguished upon the ground stated in the text.

The facts were as follows: The defendant, a miller, bought of the plaintiff by verbal contract eighty-eight quarters of wheat. The sale was by sample. The wheat was shipped by the plaintiff's agent on a barge for carriage to the defendant's mill. Upon the arrival of the barge, some of the sacks were by the direction of the defendant's foreman drawn up into the mill and examined by him. The foreman then sent for the defendant, who came to the mill and examined the contents of the sacks already delivered, and also of some others, which he caused to be drawn up out of the barge for examination. He then directed the bargeman not to send up any more, as the wheat was not equal to sample. The same day he informed the plaintiff's agent that he rejected the wheat as not being equal to sample. The sacks taken into the mill were subsequently, by defendant's order, returned to the barge, and having remained there for some weeks were sold by order of the court.

(*h*) 15 Q. B. D. 228, C. A.

At the trial, the jury were directed that there was evidence of an acceptance by the defendant sufficient to satisfy the statute, although the defendant was not thereby precluded from rejecting the wheat, if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the Statute of Frauds, and accordingly gave a verdict for the plaintiff.

A rule for a new trial or to enter judgment for the defendant was moved for on the ground that there was no evidence for the jury of an acceptance to satisfy the statute, but the Queen's Bench Division refused the application, and their decision was confirmed by the Court of Appeal (consisting of Brett, M. R., Baggallay and Bowen, L. JJ.). Brett, M. R., in giving judgment, said (*i*): "It seems to me that the case of Kibble *v.* Gough lays down the governing principle with regard to the question whether there is evidence of an acceptance to satisfy the 17th section of the statute. It was there pointed out that there must be under the statute *both* an acceptance *and* actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and the goods were sent to fulfil that contract." And then, after pointing to the evidence in the present case, he proceeded (*j*): "I can conceive of many cases in which what is done with regard to the delivering and receipt of the goods may not afford evidence of an acceptance. Suppose that the goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out, or refuses to have anything to do with them. There would be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purposes of my judgment in the present case on the fact that *the defendant examined the goods to see if they agreed with the sample.* I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract."

This case, as well as those of Kibble *v.* Gough (*k*) and] Smith *v.* Hudson (*l*), already referred to *ante*, § 156, and *post*, is worthy of note, also, on another ground. It clearly recognizes and maintains the long-established doctrine that the acceptance and actual receipt are distinct things, both of which are essential to the validity of the contract. This would seem sufficiently clear from the language of the

(*i*) 15 Q. B. D., at page 230.
(*j*) At page 231.
(*k*) 38 L. T. N. S. 204.
(*l*) 6 B. & S. 431; 34 L. J. Q. B. 145.

statute, but on more than one occasion remarks had been made by eminent judges suggesting doubt upon the question. Thus, in Castle *v.* Sworder (*m*), Crompton, J., said: "I have sometimes doubted whether there is much distinction between receipt and acceptance;" and Cockburn, C. J., said, "I think those terms (*i. e.* acceptance and receipt) are equivalent." In Marvin *v.* Wallace (*n*), also, Erle, J., said, according to one report: "I believe that the party who inserted the words had no idea what he meant by acceptance. That opinion I found on the everlasting discussion which has gone on, as if possession according to law could mean only manual prehension." It is probable, however, both from the context and from the point in dispute, that his Lordship is more correctly represented in another report as saying: "I believe that the persons who framed the statute, and inserted the words 'actually received the same,' had no clear idea of their meaning," etc. It may confidently be assumed, however, that the construction which attributes distinct meanings to the two expressions, "acceptance" and "actual receipt," is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in Smith *v.* Hudson [Kibble *v.* Gough, and Page *v.* Morgan].

§ 156 bb. [In Taylor *v.* Smith, 61 Law J. Q. B. 331 (1891) (*nn*), goods bought at Liverpool were conveyed by a carrier, designated by the purchaser, to the carrier's wharf in Manchester, and an advice note was sent to the purchaser containing the same description of the goods as in the invoice sent to him by the vendor. The purchaser twice inspected the goods on the carrier's wharf, and then wrote across the advice note the words, "Refused. Not according to representation. John Smith," and handed the same to the carrier, who informed the vendor of the refusal. A few days later the purchaser wrote to the vendor as follows: "With reference to the deals refused by me now lying at Kenworthy's, they are not according to representation, and much inferior in quality to any St. Johns spruce deals I have seen. I consider them fully 10*s.* per standard below average value, and therefore cannot accept the same." It was held 1st, that, there was no sufficient connection between the advice note, and the refusal on it, with the invoice sent to the purchaser by the vendor to constitute a memorandum of the contract; 2d, that there was no acceptance, although there was a receipt. The real point in Kibble *v.* Gough, 38 Law T. Rep. 205, and in Page *v.* Morgan, 15 Q. B. Div. 228, was not whether there *was* an acceptance, but whether there was *any evidence to go before the jury* of an acceptance. And Page *v.* Morgan was distinguished. — E. H. B.]

(*m*) 6 H. & N. 832; 30 L. J. Ex. 310.
(*n*) 6 E. & B. 726; 25 L. J. Q. B. 369.
(*nn*) 67 L. T. 39; 40 Weekly R. 486; [1893] 2 Q. B. 65.

§ 157. Acceptance by the vendee may be prior to the actual receipt of the goods, as, for instance, when he has inspected and approved the specific goods at or before the time of purchasing. Thus, in Cusack *v.* Robinson (*o*), where the buyer was shown a lot of 156 firkins of butter in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the goods were then forwarded to the purchaser by a carrier according to his directions, it was held that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded was a compliance with the statute. This question was raised, but not decided, in Saunders *v.* Topp (*p*), which is referred to by Blackburn, J., in delivering the opinion of the court in Cusack *v.* Robinson.

§ 158. In deciding Cusack *v.* Robinson, the court distinguished it from Nicholson *v.* Bower (*q*), because in the latter case there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of about 140 quarters of wheat, by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and, after inspecting it, told him not to cart the wheat home at present. The purchasers were really in insolvent circumstances, and immediately after the interview with the carman determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. All the judges held that there had been no acceptance in fact, and the assignees of the purchasers were not allowed to retain a verdict in their favor.

In Saunders *v.* Topp (*r*), the defendant had selected forty-five couple of ewes and lambs at the plaintiff's farm, and ordered them to be sent to his own farm, where they were received by his agent. He then ordered them to be sent to another place, where he saw them and counted them over, and said, "It is all right." The court declined to decide whether the previous selection was equivalent to an acceptance (a point subsequently decided in the affirmative in Cusack *v.* Robinson, *ut supra*), but held that the subsequent action of the defendant was sufficient to justify the jury in finding an acceptance after delivery.

§ 159. In one case (*s*), Maule, J., seems to have been strongly of opinion that it was sufficient to prove acceptance of part of the goods

(*o*) 1 B. & S. 299; 30 L. J. Q. B. 261.
(*p*) 4 Ex. 390.
(*q*) 1 E. & E. 172; 28 L. J. Q. B. 97.
(*r*) 4 Ex. 390.
(*s*) Fricker *v.* Thomlinson, 1 M. & G. 772.

by the buyer, *after action brought*, but the court declined to decide the point without further argument, and the case was settled. All the recent authorities are adverse to this *dictum*, which rested upon the assumption that the fact of acceptance was a mere question of evidence, whereas the statute makes it essential to the validity of the contract in a court of justice (*t*). The report of the case shows that the judges had not the language of the statute before them. The point is also ruled adversely to this opinion of Maule, J., in Bill *v.* Bament (*u*) [and in Lucas *v.* Dixon, 22 Q. B. D. 357].

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

§ 161. Among the numerous cases in which the courts have set aside verdicts on the ground that the jury had found acceptance by the buyer without sufficient evidence, some may be fouud which are not readily reconcilable with the principle that a dealing with the article in a manner inconsistent with the continuance of the right of property in the vendor is a constructive acceptance.

Curtis *v.* Pugh (*x*) is an instance of this class. The action was debt, for goods sold and delivered. The purchaser had given a verbal order for three hogsheads of Scotch glue, to be of the description called "Cox's best." The plaintiff, the vendor, sent two hogsheads, all that he was able to deliver at the time, to a wharf in London. Defendaut removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior to the quality ordered, and so informed plaintiff's agent on the next day. The plaintiff's brother admitted, on inspection two days later, that part of the glue, but not an unusual proportion, was inferior, and offered to make an allowance, but refused to take it back because it had been unpacked and put into bags, which was not necessary for the purpose of examination, and because the glue, when once unpacked, could not be replaced in the same condition in the hogsheads. Lord Denman, C. J., was of opinion that the defendant had not in fact intended to accept the glue, but told the jury that, "if the defendant had done any act *altering the*

(*t*) But Maule's, J., opinion accords with the more recent view taken as to the effect of the 17th section, *q. v.*, *ante*, § 138, note (*a*).

(*u*) 9 M. & W. 36.

(*v*) Astey *v.* Emery, 4 M. & S. 262; Hanson *v.* Armitage, 5 B. & Ald. 557; Johnson *v.* Dodgson, 2 M. & W. 656; Norman *v.* Phillips, 14 M. & W. 277; [Hopton *v.* M'Carthy, 10 L. R. Ir. 266 (1882) — B.]; Hunt *v.* Hecht, 8 Ex. 814; Acebal *v.* Levy, 10 Bing. 376; Meredith *v.* Meigh, 2 E. & B. 370, and 22 L. J. Q. B. 401, in which Hart *v.* Sattley, 3 Camp. 528, is overruled; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E. B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145.

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

condition of the article, that was an acceptance, and that the question for them was whether or not the act of putting the glue into the bags had altered its condition." The Lord Chief Justice then left it to the jury to say "whether the glue was 'Cox's best,' and whether the defendant *had dealt with it so as to make it his own*," or had done no more than was necessary to examine the quality. All these questions were decided in plaintiff's favor by the jury, but the court, on motion, pursuant to leave reserved, directed a nonsuit, Lord Denman saying: "In what I stated I certainly carried the doctrine, as to acceptance, a step further than I ought." Patteson, J., said: "My Lord Chief Justice went a step further in his ruling than the authorities warrant," and Coleridge and Wightman, JJ., concurred.

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

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

§ 163. In Bushel *v.* Wheeler (*z*), in the Court of Queen's Bench, defendant ordered certain machinery to be sent to him at Hereford by the Hereford sloop. It was sent on the 23d of April, and an invoice for the goods at three months' credit was forwarded in a letter of advice to defendant on the 25th of April. The carrier placed the goods in a warehouse on his own wharf on their arrival at Hereford, and notice was given to defendant. No communication on the subject of the goods was made by defendant till the 7th of October, when they were rejected. The defendant proved, however, that after the arrival of the goods at the warehouse, he had seen them, and informed the warehouseman that he did not intend to take them. Erskine, J., directed a verdict for defendant, with leave to move to enter a verdict for plaintiff. The court refused to enter a verdict for plaintiff, but held that there was evidence of acceptance to go to the jury, and ordered a new trial. Lord Denman said that the "lapse of time, connected with the other circumstances, might show an *acceptance*, and

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

(*z*) 15 Q. B. 442.

this was a question of fact for the jury." Williams, J., said that there might be a constructive *receipt* as well as delivery; and "it being once established that there may be an *actual receipt* by acquiescence, wherever such a case is set up, it becomes a question for the jury." Coleridge, J., said that the goods were carried by vendee's orders within a reasonable time to a particular warehouse. "That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods and return them if they did not correspond to order. But here the vendee took no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary" (*a*).

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

§ 165. In Nicholle *v.* Plume (*e*), a quantity of cider was sent to

(*a*) [See Hobbs *v.* Massasoit Whip Co. 158 Mass. 194, 197. — B.]
(*b*) 14 M. & W. 277.
(*bb*) 5 E. & B. 21.
(*c*) 34 L. J. Q. B. 145.
(*d*) 6 Ex. 906.
(*e*) 1 C. & P. 272.

defendant, who had ordered it verbally, but he refused to receive it, and caused it to be lodged in a warehouse in the neighborhood not belonging to him. The cider was not returned to plaintiff, nor did defendant send him any notice of his intention not to use it. Best, C. J., held that there had been no acceptance under the statute. The report does not show the length of the delay which elapsed, nor was the question raised whether there had been constructive acceptance by unreasonable delay.

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

§ 167. The acceptance of part of the goods bought makes the contract good for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured.

In Scott *v.* The Eastern Counties Railway Company (*g*), the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, was of a very peculiar construction, and was not ready for delivery until nearly two years after the order. In the mean time, and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was objected on action brought that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of that lamp. The court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them made the contract good for all.

§ 168. In Elliott *v.* Thomas (*h*), there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the

(*f*) Bill *v.* Bament, 9 M. & W. 36; Baldey *v.* Parker, 2 B. & C. 37; Proctor *v.* Jones, 2 C. & P. 532; Hodgson *v.* Le Bret, 1 Camp. 233; Boulter *v.* Arnott, 1 C. & M. 334; Anderson *v.* Scott, in note to Hodgson *v.* Le Bret, 1 Camp. 235, in which Lord Ellenborough held that the cutting off the pegs by which the wine in casks was tasted, and the marking of defendant's initials on the cask in his presence, was an incipient *delivery*, sufficient to take the case out of the statute. But this case was disapproved by Best, C. J., in Proctor *v.* Jones, *sup.*, and by Alderson, B., in Saunders *v.* Topp, 4 Ex. 390.

In Mr. Chitty's valuable Treatise on Contracts, he cites the foregoing authorities in support of the principle that "in no case can the marking of goods with the name of the purchaser, by his consent, constitute an acceptance within the act, unless it appear from the evidence that the goods have been delivered to the purchaser." P. 375, 11th ed. It is submitted that a thorough examination of the cases will show the true principle to be more accurately stated as given in the text above than in the foregoing passage in the Treatise on Contracts.

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

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

acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke, B., in giving the decision, explained Thompson *v.* Maceroni (*i*), in which the language of the opinion seemed adverse to the view taken by the court, by showing that this last-named case turned entirely on the form of the action, which was for goods *sold and delivered*, an action clearly not maintainable for such part of the goods as had not been actually delivered to the buyer.

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

§ 170. The effect of the acceptance and actual receipt of the goods, or part of them, is to prove that there was a contract of sale, and this effect is produced, although there may be a dispute between the parties as to the terms of the contract. Such dispute is to be determined on the parol evidence, as all other questions of fact are, by the jury. Where the goods have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptance were to be given, etc. This point may not only be inferred from the decisions already referred to, especially that in Morton *v.* Tibbett, but was expressly decided in Tomkinson *v.* Staight (*l*).

The defendant in that case was alleged to have bought a piano from the plaintiff, which was delivered to him at his house and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiff. The defendant refused to let the plaintiff take back the piano, and kept it. Held that, the acceptance being fully proven, the statute was satisfied, and that the dispute about the terms of the contract thus proven to exist was matter of fact for decision by the jury on the parol evidence which was properly let in at the trial.

§ 171. An acceptance by the purchaser can have no effect to satisfy the statute after the vendor has disaffirmed the parol contract. In Taylor *v.* Wakefield (*m*), there was a verbal agreement between the owner of goods and his tenant, who had possession of them, that the latter might purchase them at the expiration of his tenancy, but was

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

(*k*) Williams *v.* Burgess, 10 A. & E. 499.

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

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

not to take them till the money was paid. At the termination of the tenancy the buyer tendered the price, but the vendor refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the vendor prevented him. Trover by the buyer against the vendor. Held, no evidence for the jury of acceptance and delivery, because the vendor had disaffirmed the contract before the buyer took away the goods.

SECTION II. — WHAT IS AN ACTUAL RECEIPT.

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

1. Of the buyer as bailee or agent of the vendor;
2. Of a third person, whether or not bailee or agent of the vendor;
3. Of the vendor himself, and this is the most usual case.

§ 173. 1. When the goods at the time of the contract are already in possession of the purchaser, it may be difficult to prove actual receipt. But wherever it can be shown that the purchaser has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner. The principle is illustrated in the case of Edan *v.* Dudfield (*n*).

In that case the defendant, agent of plaintiff, had in his possession goods which he had entered at the custom house in his own name, but which belonged to the plaintiff. He agreed to buy them at a discount on the invoice cost, and afterwards sold them. On action for the price it was strenuously maintained by Sir Fitzroy Kelly that, where the goods exceeding 10*l.* in value were already in possession of the alleged buyer, there could be no valid sale, under the Statute of Frauds, without a writing; because, although there might be a *virtual*, there could not possibly be an *actual* receipt. But the court, after time to consider, held that there was evidence to justify the jury in finding an actual receipt, saying: "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (receipt?). And the effect of such acts, necessarily to be proven by parol evidence, must be submitted to a jury."

In Lillywhite *v.* Devereux (*o*), the Exchequer Court observed: "No

(*n*) 1 Q. B. 306.

(*o*) 15 M. & W. 285.

doubt can be entertained after the case of Edan *v.* Dudfield, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury; and that, if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds; as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like." In this case, however, the court disagreed with the jury, and set aside their verdict, as not justified by the evidence.

§ 174. 2. When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself (*p*). But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods, or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor.

§ 175. In Bentall *v.* Burn (*q*), the King's Bench held that a delivery order given to the purchaser of wine did not amount to an actual acceptance (receipt?) by him, until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as agents of the vendee." A distinction was suggested in the case, because the warehousemen were the Dock Company, bound by law to transfer goods from seller to buyer, when required to do so, but the court said: "This may be true, and they might render themselves liable to an action for refusing to do so; but if they did wrongfully refuse to

(*p*) Blackburn on Sale, 28.

(*q*) 3 B. & C. 423. See, also, Lackington *v.* Atherton, 7 M. & G. 360; Bill *v.* Bament, 9 M. & W. 36; Lucas *v.* Dorrien, 7 Taunt. 278; Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. Ex. 185; Harman *v.* Anderson, 2 Camp. 243.

transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."

§ 176. In Farina *v.* Home (*r*), the foregoing case was followed by the Exchequer of Pleas. There the wharfinger gave the vendor a delivery warrant making the goods deliverable to him or to his assignee by indorsement on payment of rent and charges. The vendor forthwith indorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. Held, to be no actual receipt, but sufficient evidence of acceptance to go to the jury.

§ 177. In Godts *v.* Rose (*s*), the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer and asked for a check for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again, but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman; but the purchaser had already got part of the goods, and the warehouseman, thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the court held that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a check; that the actual receipt therefore had not taken place, the tripartite contract not being complete.

§ 178. But the goods may be lying on the premises of third persons who are not bailees of them, as timber cut down and lying, at the disposal of the vendor, on the land of the person from whom he bought it, or lying, at his disposal, at a free wharf; and in such cases the delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them, as in the cases of Tansley *v.* Turner (*t*) and Cooper *v.* Bill (*u*), *post*, Book II. Ch. 3.

[In Marshall *v.* Green (*x*), where the buyer of timber growing on land *in the possession of the seller's tenant* cut down some of the trees, and agreed to sell the tops and stumps to a third person, and

(*r*) 16 M. & W. 119.
(*s*) 17 C. B. 229, and 25 L. J. C. P. 61.
(*t*) 2 Bing. N. C. 151.
(*u*) 34 L. J. Ex. 161; 3 H. & C. 722.
(*x*) 1 C. P. D. 35.

the seller afterwards countermanded the sale, before any of the trees had been removed from the land, it was held that there was evidence of actual receipt, as well as of acceptance of a part of the goods within the meaning of the 17th section.

From the judgments of Coleridge, C. J., and Brett, J., it would appear that they relied solely upon the early Nisi Prius decisions of Hodgson *v.* Le Bret and Anderson *v.* Scott as to marking and acts of ownership, which, as we have seen (*ante*, § 166, note (*f*)), have been practically overruled by the later authorities of Bill *v.* Bament and Baldey *v.* Parker, and Grove, J. (at p. 44 of the report), alone alludes to the true ground upon which, it is submitted, the decision must rest, viz., that the land was throughout in the possession, not of the vendor, but of his tenant.]

§ 179. In America the language of the decisions is, that in such cases there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price," in order to take the contract out of the operation of the statute (*y*).

§ 180. 3. Usually at the time of the sale the goods are in possession of the vendor himself, and the dealings of men are so infinitely diversified, circumstances vary so much, and the acts of parties so frequently admit of more than one construction, that it is extremely difficult to point out *à priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the vendee. Of course, if the purchaser remove the goods from the vendor's possession and take them into his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to the *validity*, not the *performance*, of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase (*z*), is an actual receipt sufficient to make the contract good, although a serious question may and often does arise at a later period whether there has been actual receipt of the bulk.

§ 181. It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose (*a*).

(*y*) Marsh *v.* Rouse, 44 N. Y. 643.

(*z*) Klinitz *v.* Surry, 5 Esp. 267.

(*a*) Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Nor-

It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not *accepting*, the goods (*b*).

The law in the United States is the same (*c*).

§ 182. It is also now finally determined that the goods may remain in the possession of the vendor, *if he assume a changed character*, and yet be actually received by the vendee. It may be agreed that the vendor shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the vendor into that of the vendee through his agent.

The first case was that of Chaplin *v.* Rogers (*d*), in 1800, where a stack of hay remaining on the vendor's premises was held to have been actually received by the purchaser, on the ground that he had resold part of it to a sub-vendee, who had taken away the part so purchased by him.

§ 183. But the case usually cited as the leading one on this point is Elmore *v.* Stone (*e*), where the purchaser of horses from a dealer left them with the dealer to be kept at livery for him, the purchaser. Sir James Mansfield delivered the judgment of the Common Bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held, not as owner, but as any other livery-stable keeper might have done.

§ 184. Nearly half a century later, in 1856, the case of Marvin *v.* Wallis (*f*), on facts almost identical with those in Elmore *v.* Stone, was decided by the Queen's Bench on the authority of the latter. The facts as found by the jury were that, after the completion of the bargain, the vendor borrowed the horse for a short time, and, with the purchaser's assent, retained it as a borrowed horse. Held, that there had been an actual receipt by vendee; that there had been a *change of character* in the vendor from owner to bailee and agent of the purchaser. The Bench on this occasion was composed of Campbell, C., J., and Coleridge and Erle, JJ.

So in Beaumont *v.* Brengeri (*g*), the carriage bought by the defendant remained in the shop of the plaintiff the vendor, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for account of the vendee. Held, an actual receipt.

man *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364, and 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E. B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 34 L. J. Q. B. 145; 6 B. & S. 431.

(*b*) *Supra*, § 160.

(*c*) Cross *v.* O'Donnell, 44 N. Y. 661; Caulkins *v.* Hellman, 47 N. Y. 449; Allard *v.* Greasert, 61 N. Y. 1, 5; Wilcox Silver Plate Company *v.* Green, 72 N. Y. 17, 20. [And see note, *infra*, to §§ 358–380.]

(*d*) 1 East, 192, referred to with approval by Coleridge, C. J., in Marshall *v.* Green, 1 C. P. D. at p. 41.

(*e*) 1 Taunt. 458.

(*f*) 6 E. & B. 726; 25 L. J. Q. B. 369.

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

§ 185. Two cases decided in the King's Bench, in 1820 and 1822, may seem at first sight to trench upon the doctrine established in Elmore *v.* Stone and Marvin *v.* Wallis. In the first, Tempest *v.* Fitzgerald (*h*), the purchaser of a horse agreed, in August, to give forty-five guineas for it and to take it away in September. *The parties understood it to be a ready-money bargain.* The purchaser returned on the 20th of September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plantiff's son to keep it for another week, which was assented to as a favor. The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. Held, that there was no actual receipt. The ground of the decision was that defendant had no right of property in the horse *until the price was paid ;* that, if he had gone away with the horse, vendor might have maintained trover: and the case was distinguished by the judges from Chaplin *v.* Rogers (*i*), and Blenkinsop *v.* Clayton (*k*), on this basis. In the second case, Carter *v.* Toussaint (*l*), the plaintiffs, who were farriers, sold defendant a racehorse which required firing, and this was done in defendant's presence and with his approbation. It was agreed that the horse should be kept by plaintiffs for twenty days without charge. At the end of that time, by defendant's orders, the horse was taken by plaintiffs to a park to be turned out to grass. It was entered in plaintiffs' name, and this was also done by the direction of defendant, who was anxious that it should not be known that he kept a racehorse. *No time was specified in the bargain for the payment of the price.* Held, that there had been no actual receipt, because the seller was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of defendant and by his request, that would have amounted to an actual receipt of it by the purchaser; but on the facts the purchaser could not have maintained trover against the park-keeper on tendering the keep.

It is apparent, from the reasoning of the judges in both the above cases, that there is nothing irreconcilable between the principles on which they were decided and those which had been sanctioned in the cases previously quoted. Both these cases went distinctly upon the ground that in a cash sale the vendor has a right to demand payment of the price concurrently with delivery of possession, and that, as

(*h*) 3 B. & Ald. 680.
(*i*) 1 East, 192.
(*k*) 7 Taunt. 597.
(*l*) 5 B. & Ald. 855.

nothing had been assented to by the vendors which impaired this right, there had been no actual receipt by the vendees (*m*).

§ 186. In Cusack *v.* Robinson (*n*), the court treated the rule as settled that "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute."

The subject was very thoroughly discussed in Castle *v.* Sworder (*o*), in which an unanimous decision of the Exchequer of Pleas, composed of Martin, Channell, and Bramwell, BB., was reversed by a decision, also unanimous, of the Exchequer Chamber, composed of Cockburn, C. J., and Crompton, J., of the Queen's Bench, and Willes, Byles, and Keating, JJ., of the Common Pleas.

This was an action to recover 80*l.* 2*s.* 2*d.*, the price of some rum and brandy, for which the defendant gave a verbal order at a price agreed on, *with six months' credit.* The plaintiffs' clerk wrote off, and transferred into the defendant's name, in the books kept in plaintiffs' bonded warehouse, two specific puncheons of rum and a hogshead of brandy, marked, and described in an invoice sent by post to defendant. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the custom-house officers another. This was the usual mode of selling in bond in Bristol, where plaintiffs were carrying on business as spirit merchants. An invoice, describing the marks of the packages, the ships by which they had been imported, and the contents, was inclosed to defendant in a letter, saying: "The above remain in bond, and which you will find of a very good quality, and hope will merit the continuance of your favors." After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked plaintiffs' traveller to sell the goods for him. He was referred to plaintiffs, and wrote to them, saying: "You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it."

On these facts Bramwell, B., directed a nonsuit, with leave to plaintiff to move, the defendant having objected that there was no delivery nor acceptance to satisfy the Statute of Frauds. Held by the Court of Exchequer, that there had been no delivery nor actual receipt; that as the goods remained under control of the vendor, and in his possession till after the credit had expired, his lien had revived; and that in the interval, while the credit was running, there had been nothing done to constitute actual receipt by the purchaser.

(*m*) See, also, Holmes *v.* Hoskins, 9 Ex. 753.
(*n*) 30 L. J. Q. B. 264; 1 B. & S. 299.
(*o*) 29 L. J. Ex. 235; 30 L. J. Ex. 310, and 6 H. & N. 828.

On the appeal to the Exchequer Chamber, Cockburn, C. J., in giving his opinion said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises whether the possession, which actually remained in the sellers, was a possession in the sellers *by virtue of their original property in the goods, or whether it had become a possession as agents and bailees of the buyers.*" The learned Chief Justice then went on to point out that there was sufficient evidence of a change of character in the possession to go to the jury, in the facts proven, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and, failing in that request, in asking the plaintiffs to sell the goods for him."

Crompton, J., pointed out that the court did not differ from the Court of Exchequer save on one point, namely, that "there was some evidence that the character of plaintiffs was changed to that of warehousemen," and said that "according to the authorities there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own."

§ 187. It will already have been perceived that, in many of the cases, the test for determining whether there has been an actual receipt by the purchaser has been to inquire whether the vendor has lost his lien (*p*). Receipt implies delivery (*q*), and it is plain that, so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by Holroyd, J., in his decision in Baldey *v.* Parker (*r*): "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." No exception is known in the whole series of decisions to the propositions here enunciated, and it is safe to assume as a general rule that, whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note (*s*).

(*p*) See *post*, Book V. Part I. Ch. 4, on Lien of Vendor, §§ 796–827.

(*q*) Per Parke, B., in Saunders *v.* Topp, 4 Ex. 394.

(*r*) 2 B. & C. 37.

(*s*) Howe *v.* Palmer, 3 B. & Ald. 321; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Carter *v.* Toussaint, 5 B. & Ald. 855; Baldey *v.* Parker, 2 B. & C. 37; Smith *v.* Surman, 9 B. & C. 561; Bill *v.* Bament, 9 M. &

§ 188. It may be useful here to advert to one case in which the circumstances were very peculiar.

In Dodsley *v.* Varley (*t*), wool was bought by the defendant from the plaintiff. The price was agreed on, but the wool would have to be weighed. It was sent to the warehouse of a person employed by the defendant, was weighed, and packed up with other wools in sheeting provided by the defendant. It was the usual course for the wool to remain at this warehouse till paid for, and this wool had not been paid for. The defendant insisted that the vendor's lien remained, and that the wool therefore had not been actually received by him as purchaser. But the court held that the property had passed, that the goods had been delivered, and were at the risk of the purchaser. In relation to the vendor's right, the court said: "The plaintiff had not what is called a lien, determinable on the loss of possession, but a special interest, sometimes but improperly called a lien, growing out of his original ownership, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment." It is plain that there is nothing in this case which conflicts with the rule, that there can be no actual receipt by purchaser while the vendor's lien continues, for the court held that the lien was gone. It may, however, be remarked, that the effect attributed by the court to the special agreement, that the goods should remain in the defendant's warehouse without removal till paid for, is much greater than was accorded to a similar stipulation, in the case of Howes *v.* Ball (*u*), where the question was raised in a more direct form than in Dodsley *v.* Varley. In this last-mentioned case, where the litigation was between the vendor and the administrator of the deceased purchaser, the court held that the property had passed in the thing sold, and that the special stipulation between the parties might, perhaps, amount to a personal license in favor of the vendor to retake the thing sold, if not paid for at the expiration of the credit allowed; but that such license could not be available against a transferee of the thing, as a sub-vendee, or the administrator of the vendee.

W. 37; Phillips *v.* Bistolli, 2 B. & C. 511; Hawes *v.* Watson, 2 B. & C. 540; Maberley *v.* Sheppard, 10 Bing. 101; Holmes *v.* Hoskins, 9 Ex. 753; Cusack *v.* Robinson, 30 L. J. Q. B. 264, 1 B. & S. 299; Castle *v.* Sworder, 29 L. J. Ex. 235; S. C. 30 L. J. Ex. 310, and 6 H. & N. 832; Morton *v.* Tibbett, 15 Q. B. 428, and 19 L. J. Q. B. 382.

(*t*) 12 A. & E. 632.

(*u*) 7 B. & C. 481.

AMERICAN NOTE.

§§ 138–188.

ACCEPTANCE AND RECEIPT. The term "acceptance and receipt" must be carefully distinguished from the word "delivery," with which it is sometimes erroneously confounded; since there may be, and often is, a complete and perfect delivery at common law without either an acceptance or receipt under the statute. Delivery is the act of the seller; acceptance and receipt, that of the buyer. The common law regulates the one in all sales; the statute superadds the other in special cases.

Most of the reported decisions turn upon the question of acceptance *and* receipt, without considering each by itself; but in some respects they are distinguishable, and may be examined separately. We can best do so by considering the words of the statute *seriatim*.

1. "Except the buyer shall accept," etc. Of course the buyer's authorized agent may accept. Snow *v.* Warner, 10 Met. 132; Jones *v.* Mechanics' Bank, 29 Md. 287; Outwater *v.* Dodge, 6 Wend. 397; Barkley *v.* Rensselaer R. R. Co. 71 N. Y. 205; Schroder *v.* Palmer Hardware Co. 88 Geo. 578. And perhaps the seller *could* be agent to accept; but this is not yet so satisfactorily established as that he may be agent to *receive*, and some hold that the same person cannot be agent for both parties, for the vendor to sell and for the vendee to accept and receive. Caulkins *v.* Hellman, 14 Hun, 330, 47 N. Y. 449. A common carrier, to whom the goods are delivered in the ordinary course of business and without special powers, is not an agent "to accept" in the full sense of the word; Frostburg Mining Co. *v.* New England Glass Co. 9 Cush. 115; Maxwell *v.* Brown, 39 Me. 98; Rodgers *v.* Phillips, 40 N. Y. 519; Loyd *v.* Wight, 20 Geo. 578; Grimes *v.* Van Vechten, 20 Mich. 410; Rindskopf *v.* De Ruyter, 39 Mich. 1, and cases cited. Denmead *v.* Glass, 30 Geo. 637; Hausman *v.* Nye, 62 Ind. 485; Atherton *v.* Newhall, 123 Mass. 141; Daley *v.* Marks, Berton (N. B.), 346; even though specially designated by the buyer himself. Johnson *v.* Cuttle, 105 Mass. 447; Allard *v.* Greasert, 61 N. Y. 1; Jones *v.* Mechanics' Bank, 29 Md. 287. Selection of the particular carrier does not alone enlarge his powers of acceptance, though Spencer *v.* Hale, 30 Vt. 314, seems *contra;* and so does Strong *v.* Dodds, 47 Vt. 348. See Agnew *v.* Dumas, 64 Vt. 147.

2. "Except the buyer shall accept," etc. The word "accept," from *ad* and *capere*, to take to, or to receive with favor, approbation, or satisfaction, implies a mental condition manifested by some outward and visible sign. And see Schmidt *v.* Thomas, 75 Wisc. 529. The existence of this mental satisfaction must be proved. Sending a message to the vendor, therefore, declining to accept, is competent evidence of non-acceptance, even though the message never reaches the other party. It shows the mental status of the buyer. Caulkins *v.* Hellman, 47 N. Y. 449, an instructive case. So where a telegram refusing to accept was sent by the buyer while the goods were in transit. Hudson Furniture Co. *v.* Freed Furniture Co. 10 Utah, 31.

It is sometimes said that mere words can never constitute an acceptance;

but the cases cited to support this proposition (Bailey *v.* Ogden, 3 Johns. 421, and the like) seem merely to decide that words are not alone sufficient to constitute an acceptance *and receipt;* which, to be sure, usually accompany each other, but which may occur at different times and places. Indeed, acceptance is often indicated by a mere selection of the specific thing bought; as in Vietor *v.* Stroock, 15 Daly, 329; perhaps not always; see Ham *v.* Van Orden, 4 Hun, 709.

That the duty of clearly proving an acceptance is on the party alleging it (ordinarily the vendor), is well illustrated by the following among many other cases: Denny *v.* Williams, 5 Allen, 1; Prescott *v.* Locke, 51 N. H. 94; Howard *v.* Borden, 13 Allen, 299; Remick *v.* Sandford, 120 Mass. 309; Quintard *v.* Bacon, 99 Mass. 185; Shepherd *v.* Pressey, 32 N. H. 49; Young *v.* Blaisdell, 60 Me. 272. So if the buyer sues the seller for non-delivery of part of the goods, and, in order to avoid the defence of the statute, set up by the seller, relies upon the fact that he had received and accepted part (as in Marsh *v.* Hyde, 3 Gray, 331), the burden is on him to prove that the goods he received were part of the same purchase as those for the non-delivery of which he sues. Davis *v.* Eastman, 1 Allen, 422; and see Bowers *v.* Anderson, 49 Geo. 143.

Ordinarily the question of acceptance is one of fact for the jury, upon all the evidence. Garfield *v.* Paris, 96 U. S. 563; Hinchman *v.* Lincoln, 124 U. S. 38; Schwartz *v.* Church of the Holy Cross, 60 Minn. 183; Reinhart *v.* Gregg, 8 Wash. 191; Raymond *v.* Saunders, 27 N. B. 38, citing Bushel *v.* Wheeler, *ante*, § 163; Galvin *v.* MacKenzie, 21 Oreg. 184. But when, upon all the admitted or proved facts, there is clearly not enough to warrant the finding of an acceptance, the court may take the case from the jury and direct a verdict accordingly. Denny *v.* Williams, 5 Allen, 5; Howard *v.* Borden, 13 Allen, 299; Stone *v.* Browning, 68 N. Y. 598; Belt *v.* Marriott, 9 Gill, 331; Kealey *v.* Tenant, 13 Ir. C. L. 394 (1861); Pinkham *v.* Mattox, 53 N. H. 604.

The mere manual reception of the goods does not, in and of itself, necessarily constitute an acceptance, even if the goods are fully up to the order. The buyer has a right to keep them a reasonable time in which to decide whether he will or will not accept. He is not bound to accept merely because the goods sent are entirely in accordance with the contract, and therefore he ought to accept. Stone *v.* Browning, 51 N. Y. 211, and 68 N. Y. 598, an important case; Remick *v.* Sandford, 120 Mass. 309; Hewes *v.* Jordan, 39 Md. 472; Bacon *v.* Eccles, 43 Wisc. 227; Gibbs *v.* Benjamin, 45 Vt. 124; Brewster *v.* Taylor, 63 N. Y. 587. Where there is unreasonable delay in notifying the seller of dissatisfaction, an acceptance may be inferred. Rosenfield *v.* Swenson, 45 Minn. 190.

A resale by the buyer is of course plenary proof of acceptance. Hill *v.* McDonald, 17 Wisc. 97; Phillips *v.* Ocmulgee Mills, 55 Geo. 633; Marshall *v.* Ferguson, 23 Cal. 65; Robinson *v.* Gordon, 23 Up. Can. Q. B. 143. A mere effort or *offer to sell*, without having received the goods, is not so satisfactory proof of a real acceptance, since the buyer might intend to accept if he should succeed in making a satisfactory sale; otherwise not. See Clarkson *v.* Noble, 2 Up. Can. Q. B. 361; Jones *v.* Mechanics' Bank, 29 Md. 287; Walker *v.* Boulton, 3 Up. Can. Q. B. (O. S.) 252; Gorham *v.* Fisher, 30 Vt. 431. Other acts of ownership consistent only with an intent to keep the property are also sufficient and often conclusive evidence of acceptance. Gray *v.* Davis, 10 N. Y. 285; Pinkham *v.* Mattox, 53

N. H. 606; Tower *v.* Tudhope, 37 Up. Can. Q. B. 200; Dollard *v.* Potts, 6 Allen (N. B.), 443. A lease of the article to a third person is an acceptance. Allen *v.* Grove Springs Co. 85 Hun, 537. The acceptance and receipt of a certificate of stock, indorsed in blank by the seller, with an implied authority to write an assignment over the signature, is a constructive acceptance of the stock. Meehan *v.* Sharp, 151 Mass. 564; St. Paul Trust Co. *v.* Howell, 59 Minn. 295.

The acceptance need not be simultaneous with the receipt; it may precede or follow it. Cross *v.* O'Donnell, 44 N. Y. 661; Hewes *v.* Jordan, 39 Md. 484; In re Downing, 2 Low. 563, Fed. Cas. No. 12,212; U. S. Reflector Co. *v.* Rushton, 7 Daly, 410; Austin *v.* Boyd, 23 Mo. App. 317. Under the English Sale of Goods Act of 1893, s. 4, sub-sect. 1, 3 (see Appendix), a judge *may* find an acceptance where the goods are delivered, and the buyer takes a sample from the bulk and examines it, although he inform the vendor that the goods are not equal to the sample, and that he will not keep them. Abbott *v.* Wolsey [1895], 2 Q. B. 97.

3. "**And actually receive** the same." Preparations to receive are not enough. Harris *v.* Rounsevel, 61 N. H. 250. The goods must have been in whole or in part actually received by the buyer, Michael *v.* Curtis, 60 Conn. 363; even though of a bulky nature, like a pile of lumber, Shindler *v.* Houston, 1 Comst. (N. Y.) 261, a leading case; or a shipload of coal, Brand *v.* Focht, 3 Keyes (N. Y.), 409; Waite *v.* McKelvy, — Minn. 73 N. W. 727; or stacks of hay, Corbett *v.* Wolford, 84 Md. 426, followed in Leonard *v.* Medford, 85 Md. 666. There a purchaser of growing timber, having been put in possession of the land, had cut some of the trees, and there was held to be a sufficient acceptance and receipt to satisfy the statute. Here, also, a receipt by a duly authorized agent will suffice. Dean *v.* Tallman, 105 Mass. 443; Dows *v.* Montgomery, 5 Robertson (N. Y.), 445. In Fort Worth Co. *v.* Consumers' Co. 86 Md. 635, the defendant's agent bought a carload of dressed beef and saw the cattle killed, dressed, and packed, expressed himself satisfied with its quality and condition and agreed to pay for it upon arrival in Baltimore. It was shipped to the consignor's order, and a draft for the price drawn upon the defendant company, which declined to accept the draft. It was held that there had been no actual receipt, and that the contract could not be enforced.

A common carrier, named by the vendee, is agent "to receive," if the vendee otherwise manifests his acceptance. In other words, a designated carrier is agent to receive, but not, as such, an agent to *accept*. See Cross *v.* O'Donnell, 44 N. Y. 661; Pierson *v.* Crooks, 115 Ib. 539; Fontaine *v.* Bush, 40 Minn. 141, and cases cited. Apparently no acceptance is necessary under the Iowa statute, and a receipt by a common carrier is sufficient to take the case out of the statute. Leggett Tobacco Co. *v.* Collier, 89 Iowa, 144, although here there was in fact an acceptance. Of course, delivery to a carrier of *unordered* goods is no delivery to, or acceptance and receipt by, the alleged buyer, as sometimes argued. *A fortiori*, delivery to the seller's own private carrier or teamster cannot affect the buyer. Grey *v.* Cary, 9 Daly, 363.

The vendor may undoubtedly be agent for the vendee to receive the goods (even if not to *accept* them); so that, if the vendee has personally accepted, he may constitute the vendor his agent to receive, or keep them if already in his possession. Whenever, therefore, the evidence clearly

shows that the parties agreed that the vendor should retain possession a while, as agent or bailee for the vendee, this particular requisite of the statute as to "receiving" would be fully satisfied. Weld *v.* Came, 98 Mass. 152; Rappleye *v.* Adee, 65 Barb. 589; Janvrin *v.* Maxwell, 23 Wisc. 51; Green *v.* Merriam, 28 Vt. 801; Means *v.* Williamson, 37 Me. 556; Jackson *v.* Watts, 1 McCord, 288; Ross *v.* Welch, 11 Gray, 236; Barrett *v.* Goddard, 3 Mason, 107. But the vendor must really hold the goods entirely as agent or bailee of the vendee. If he is holding them to enforce his lien as seller, and refuses to deliver them until paid the purchase-money, and they are destroyed by fire in his hands, there is no receipt of them so as to bind the buyer. Safford *v.* McDonough, 120 Mass. 290; Knight *v.* Mann, 118 Mass. 143; Rodgers *v.* Jones, 129 Mass. 422; Marsh *v.* Rouse, 44 N. Y. 643; Edwards *v.* Grand Trunk R. R. 54 Me. 105; Messer *v.* Woodman, 22 N. H. 182; Hart *v.* Anderson, 24 Nova Scotia, 157; Spear *v.* Bach, 82 Wisc. 192. There must be acts of a character to unequivocally place the property within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all liens for the price. Hinchman *v.* Lincoln, 124 U. S. 49. And see Dole *v.* Stimpson, 21 Pick. 384. Kirby *v.* Johnson, 22 Mo. 354, may perhaps be reconciled with the former cases, on the ground that the vendor still had his lien for the price, although he does not seem to have detained the goods for that purpose, but resold them to other parties at a higher price.

In Houdlette *v.* Tallman, 14 Me. 400, T. agreed to sell H. all the hay in his barn at $11.50 per ton, estimated at 38 tons. The hay had been screwed, weighed, and labelled with the weight. By the bargain it was not to be taken away until June 5th, when it was to be paid for before being removed. The exact amount was not then actually ascertained. Before June 5th, and while the hay was still in his barn, T. sold it to other parties, and H. was not allowed to maintain trover for it against T., as there had been no acceptance and receipt under the statute. Where M. bought a lot of calfskins at K.'s store, which he was to take away, and M. subsequently called at the store, took a bill of them, asked if they were ready, was told they were and in the doorway for him, and he passed out saying he would send for them, but never did, this was held not necessarily as a matter of law a receipt, although abundant evidence of a delivery. Knight *v.* Mann, 120 Mass. 219, being the same case reported in 118 Mass. 143, with one additional fact.

A third person, in whose possession the goods are at the time of sale, as bailee, warehouseman, etc., may be constituted agent of the vendee to receive and hold the same for him; and if such bailee agrees to the arrangement, his possession becomes the vendee's possession, and the "receipt" is sufficient; and the many cases which hold this to be a sufficient delivery at common law, as against creditors of the vendor, seem also to lead to the same result under the statute. That such is the common-law rule as to "delivery," see, among many others, Tuxworth *v.* Moore, 9 Pick. 347; Carter *v.* Willard, 19 Pick. 1, an important case; Hatch *v.* Bayley, 12 Cush. 29; Barney *v.* Brown, 2 Vt. 374; Gibson *v.* Stevens, 8 How. 384; Bullard *v.* Wait, 16 Gray, 55; Cushing *v.* Breed, 14 Allen, 376; Linton *v.* Butz, 7 Pa. St. 89; Caulfield *v.* Van Brunt, 173 Pa. St. 428; Warren *v.* Milliken, 57 Me. 97; Chase *v.* Willard, Ib. 157. And that such facts constitute a receipt under the statute, see King *v.* Jarman, 35 Ark. 190.

But (in Massachusetts at least) notice of the sale to the warehouseman,

or bailee, is essential to constitute him agent for the buyer. Boardman *v.* Spooner, 13 Allen, 353, a well-considered case; and see Burge *v.* Cone, 6 Allen, 412; Bassett *v.* Camp, 54 Vt. 232; Clark *v.* Tucker, 2 Sandf. 157. Some say the bailee must actually *agree* to hold as agent of the buyer; but such agreement might be ordinarily inferred from notice of the sale, and silent acquiescence of the bailee in the changed circumstances. Of course, if the bailee to whom the order is addressed has no right, or is not bound, to deliver the goods to the *vendor himself*, the acceptance of such order, and even agreement of the bailee to deliver to the vendee, does not constitute an acceptance and receipt; as, where the goods are in the government warehouse *with duties unpaid*, and a sale is made, and an order given for delivery, which is accepted, but the duties still remain unpaid, this does not pass the property to the buyer. In re Clifford, 2 Sawy. 428, Fed. Cas. No. 2893. It might be different if the custodian had the power to waive, and intended to waive, the prepayment of the duties. See Dunham *v.* Pettee, 1 Daly, 112.

Of course the acceptance and receipt may be after the sale, even long after, if made in pursuance of it. Nothing in the act requires them to be simultaneous with the sale. McKnight *v.* Dunlop, 5 N. Y. 537; Sprague *v.* Blake, 20 Wend. 63; Bush *v.* Holmes, 53 Me. 417; Marsh *v.* Hyde, 3 Gray, 331, a leading case; Richardson *v.* Squires, 37 Vt. 640; Davis *v.* Moore, 13 Me. 424; Schmidt *v.* Thomas, 75 Wisc. 529; Amson *v.* Dreher, 35 Wisc. 615; Buckingham *v.* Osborne, 44 Conn. 133; McCarthy *v.* Nash, 14 Minn. 127; Sale *v.* Darragh, 2 Hilt. 184; Riley *v.* Bancroft, 51 Neb. 864.

4. "Some part of the goods so sold." The buyer must accept and receive some part of the goods sold. See Damon *v.* Osborn, 1 Pick. 476; Gilbert *v.* Lichtenberg, 98 Mich. 417. Therefore a receipt of a sample sent only as a specimen, and not as a portion of the goods bought, is not alone sufficient; and see Carver *v.* Lane, 4 E. D. Smith, 168. And the part received must have been received on behalf of, and as representing, the whole, and with intent to accept the whole; a question ordinarily for the jury. Pratt *v.* Chase, 40 Me. 269; Simpson *v.* Krumdick, 28 Minn. 352. If the buyer, at the time of receiving and accepting part, declines to receive any more, and expressly declares he will not pay for more, he will not be liable for not taking the balance. Atherton *v.* Newhall, 123 Mass. 141. But if he accepts and receives part in the name of and on behalf of the whole, he is bound to pay for the whole, although the balance had been destroyed by fire while in the seller's hands and never were delivered to him. Townsend *v.* Hargraves, 118 Mass. 325, an important case.

So if by the contract the balance is not to be delivered until long after the delivery and acceptance of the first instalment. Gault *v.* Brown, 48 N. H. 183; Rickey *v.* Tenbroeck, 63 Mo. 563; Farmer *v.* Gray, 16 Neb. 401. And the same rule would seem to apply if the balance had not yet been manufactured, but should afterwards be duly tendered according to the contract.

The due acceptance and receipt of part of the goods sold seems to bind both parties *to the whole bargain;* and if a part of the bargain is that the vendor shall repurchase the property in a certain contingency, the acceptance and receipt by the original buyer would bind the seller to retake them,

although the bargain was wholly oral. Fay *v.* Wheeler, 44 Vt. 292; Lumsden *v.* Davies, 11 Ont. App. 585, a valuable case. But this is solely because the contract for a resale was part of the original sale. Rankins *v.* Grupe, 36 Hun, 481; Wulschner *v.* Ward, 115 Ind. 223. See Hagar *v.* King, 38 Barb. 200; Chamberlain *v.* Jones, 32 App. Div. (N. Y.) 237, and Rescission, *ante*, p. 116.

Acceptance and receipt is as necessary to bind the seller as the buyer. This would be ordinarily manifested by a delivery, as that implies assent of the seller; but the seller would not be bound by the buyer's unlawful seizure of the goods without his assent, for the purpose of holding the other to the contract. Acceptance and receipt implies mutual assent. See Washington Ice Co. *v.* Webster, 62 Me. 341, an important case; Clark *v.* Tucker, 2 Sandf. 157.

CHAPTER V.

OF EARNEST OR PART PAYMENT.

	Sect.
Earnest and part payment distinct things	189
Either suffices to make the contract good	190
Something must be actually given to constitute earnest	191
Part payment	192
Agreement to set off debt due to the buyer	193
Analogous decisions under Statute of Limitations	194
Goods supplied "on account" of a debt	194
Board and lodging supplied in part payment	194
Giving a bill or note on account	194
Civil law doctrine of earnest	198
Pothier	199
French Code	200

§ 189. THE giving of earnest, however common in ancient times, has fallen so much into disuse that the two expressions in this clause of the statute, "giving something in earnest" and "giving something in part payment," are often treated as meaning the same thing, although the language clearly intimates that the earnest is "*something*" that "binds the bargain," whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed (*a*). Earnest may be money, or some gift or token (among the Romans usually a ring), given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England (*b*).

Examples are found in Bach *v.* Owen (*c*), in 1793, and Goodall *v.* Skelton (*d*), in 1794, in the former of which a halfpenny, and in the latter a shilling, was given in earnest of the bargain.

§ 190. Whether giving earnest has the effect of passing the property in the thing sold from vendor to vendee will be considered in a subsequent part of this treatise (*e*), but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The giving of earnest and the part payment of the price are two facts independent of the bargain, capable of proof by parol, and the framers of the statute have said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing.

(*a*) The nature of earnest is considered by Fry, L. J., in the recent case of Howe *v.* Smith, 27 Ch. D. at pp. 101–2. [And see Donahue *v.* Parkman, 161 Mass. p. 413. — B.]

(*b*) Bracton, 1, 2, c. 27.

(*c*) 5 T. R. 409.

(*d*) 2 H. Bl. 316.

(*e*) *Post*, Book II. Ch. 4, § 355.

§ 191. The former of these facts, that of giving something in earnest to "bind the bargain," has been the subject of only one reported case, that of Blenkinsop *v.* Clayton (*f*), in which the buyer drew a shilling across the vendor's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to the vendor, the court necessarily held that the statute had not been satisfied.

There is another case (*g*) in which the plaintiff was nonsuited in an action on a contract of sale, where a shilling earnest money was actually given by the buyer to bind the bargain, but the case turned entirely on the form of action, which was for goods *sold and delivered*, under circumstances where the court was of opinion that there had been no delivery. A count for goods bargained and sold would no doubt have been sustained.

§ 192. On the subject of part payment, there is but one important decision under this clause of the statute; but the cases which have arisen under analogous clauses in the Statutes of Limitations and the Bankruptcy Acts may be considered with advantage in this connection.

§ 193. An agreement for the purchase of goods exceeding 10*l.* in value was made with the understanding, and as part of the contract, that the vendor should deduct from the price the amount of a debt previously due by him to the purchaser. The vendor then sent the goods to the purchaser with an invoice charging him with the price, 20*l.* 18*s.* 11*d.*, under which was written, "By your account against me, 4*l.* 14*s.* 11*d.*" The purchaser returned the goods as inferior to sample. It was contended, on behalf of the vendor, who brought an action for goods sold and delivered, that this credit of 4*l.* 14*s.* 11*d.* was a part payment of the price of the goods, sufficient to take the case out of the statute. Held, not to be so. Platt, B., said: "You rely on part of the contract itself as being part performance of it." Pollock, C. B., said: "Here was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides." Parke, B., said: "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract,

(*f*) 7 Taunt. 597.

(*g*) Goodall *v.* Skelton, 2 H. Bl. 316.

it was not a giving something to the plaintiff by way of earnest or in part payment then or subsequently." Alderson, B., said: "The 17th section of the Statute of Frauds implies that, to bind a buyer of goods of 10*l.* value without writing, he must have done *two* things: first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment" (*h*).

From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the statute, if made subsequently to the sale, or by an *independent* contract at the time of the sale, such as the giving of a receipt by the buyer for the debt previously due to him; but the decision is express on the point that such an agreement, when part of the bargain for the purchase, one of the terms of the contract of sale itself, is not such a part payment as is required to make a parol sale valid for an amount exceeding 10*l.*

§ 194. Under the Statute of Limitations, it has been held that where goods are supplied by agreement "on account" of a debt, this is part payment of the debt. The decision to this effect given by the Exchequer in Hart *v.* Nash (*i*) was followed by the Queen's Bench in Hooper *v.* Stephens (*j*). And the decisions under the Bankruptcy Acts have been to the same effect (*k*).

So, also, in Blair *v.* Ormond (*l*), it was held, under the Statute of Limitations, that an agreement by the debtor to board and lodge the creditor at a fixed price per week, in deduction of the debt, was a part payment constituting a sufficient acknowledgment of the debt to take it out of the statute.

There seems, therefore, no reason to doubt that the part payment required by the Statute of Frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that anything of value, which by mutual agreement is given by the buyer and accepted by the seller "on account" or in part satisfaction of the price, will be equivalent to part payment. The transfer to the vendor of a bill or note "on account," or in part payment, would seem also to suffice to render the bargain valid (*m*).

In Maber *v.* Maber (*n*), a gift of the interest due was held to be a part payment.

(*h*) Walker *v.* Nussey, 16 M. & W. 302; 16 L. J. Ex. 120.

(*i*) 2 Cr. M. & R. 337.

(*j*) 4 A. & E. 71.

(*k*) Wilkins *v.* Casey, 7 T. R. 713; Cannan *v.* Wood, 2 M. & W. 465.

(*l*) 17 Q. B. 423, and 20 L. J. Q. B. 444.

(*m*) Chamberlyn *v.* Delarive, 2 Wils. 353; Kearslake *v.* Morgan, 5 T. R. 513; Griffiths *v.* Owen, 13 M. &. W. 58.

(*n*) L. R. 2 Ex. 153.

§ 195. The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood unless careful discrimination be observed. Earnest was of two kinds: one was an independent contract anterior to the agreement of sale; the other was accessory to the contract of sale after it had been agreed on, and was, like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractûs facti.*

§ 196. The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. If the sale afterwards took place, the earnest money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest money, and an equivalent amount by way of forfeiture for disappointing the other in his option (*o*).

§ 197. The other species of earnest of the Roman law was the same as that of the common law. It might consist of a thing, as a ring, *annulus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the conclusion of the bargain (*p*), and when money was given in earnest it was considered as being in part payment of the price (*q*). Varro gives this as the etymology of the word (*r*): "Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum à Græco arrabou, reliquum, ex eo quod debitum reliquit;" and the Institutes of Gaius (*s*) give its true nature: "Quod sæpe arræ nomine pro emptione datur, non eo pertinet quasi sine arra conventio nihil proficiat; sed *ut evidentius probari possit convenisse de pretio.*"

§ 198. At a later date, however, the Emperor Justinian made by statute an important change in the law of earnest, by providing that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest money. The whole text is a remarkable one, giving full rules as to *form of the sale*, the *assent*, the *giving of earnest*, and the *right of rescission.* "Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem

(*o*) L. 17, Cod. de Fid. Instr.; Pothier, Vente, Nos. 497, 8, 9. The doctrine of the forfeiture of earnest still survives in English law. See Howe *v.* Smith, 27 Ch. D. at p. 101.

(*p*) Dig. 19, 1, de Act. Emp. et Vend. 11, 6, Ulp.

(*q*) Dig. 18, 3, de Lege Commissoria, 8 Scæv.

(*r*) De Lingua Latina, lib. 5, § 175. The Greek ἀρραβών and the Latin arra are both modifications of the Hebrew 'érábón, a pledge, Gen. xxxviii. 17. This word was introduced by the Phœnicians into Greece and Italy. See Skeat's Etm. Dict. p. 184.

(*s*) Com. 3, § 139.

data fuerit; nam quod arræ nomine datur, argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus quæ *sine scriptura* consistunt obtinere oportet, nam nihil a nobis *in hujusmodi venditionibus* innovatum est. In iis autem quæ *scriptura conficiuntur*, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahentibus autem subscripta; et si per tabelliones fiant, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor, sine pœna recedere ab emptione. Ita tamen *impune eis recedere concedimus*, nisi jam arrarum nomine aliquid fuerit datum. Hoc etenim subsecuto, *sive in scriptis*, *sive sine scriptis* venditio celebrata est, is qui recusat adimplere contractum, si quidem est *emptor*, *perdit quod dedit:* si vero *venditor*, *duplum restituere* compellitur, *licet super arris nihil expressum est*" (*t*). This text not only changed the antecedent law, by allowing either party to rescind the bargain by forfeiting the value of the earnest, but it made a further innovation, by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been finally completed; in derogation of the ante-Justinian law, which made the contract perfect by mutual assent before the writings were drawn up (*u*).

§ 199. Pothier struggles, on the authority of Vinnius, to escape from the apparently plain meaning of this text of the Institutes, and maintains the old distinction that, after earnest given to bind the bargain, neither party can escape from his obligations as vendor or purchaser by the sacrifice of the amount of the earnest (*x*). But his reasoning is scarcely satisfactory, and later authors consider the language of the text too absolute to be explained away (*y*).

§ 200. The French Civil Code seems to reject Pothier's doctrine, and provides, art. 1590: "Si la promesse de vendre a été faite avec des arrhes, chacun des contractants est maître de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double." Singularly enough, however, the same discussion has sprung up under this text as under that of Justinian, and the commentators are divided, Toullier, Maleville, Duranton, and some others taking the side of Pothier, while Duvergier, Coulon, Devilleneuve, and Ortolan are of the contrary opinion (*z*).

(*t*) Inst. lib. iii. xxiii. 1.

(*u*) Dig. 18, 1, de Contrah. Empt. 2, § 1, Paul; Gaius, Comm. 3, § 139.

(*x*) Pothier, Vente, No. 508.

(*y*) Ortolan, Explication Hist. des Inst. vol. iii. p. 269.

(*z*) The references are given in Sirey & Gilbert, Code Annoté, art. 1590.

AMERICAN NOTE.

§§ 189–200.

EARNEST OR PART PAYMENT. 1. The subject of "earnest" has given rise to but little legal discussion in America. It was an old common-law mode of binding a bargain, taken from the civil law (Güterbock on Bracton, 145), to show that the parties were in "earnest;" and the Statute of Frauds simply adopted it, or recognized it as still effectual. See Glanvil, ch. xiv.

In Howe *v.* Hayward, 108 Mass. 54, it was held that a deposit of money by the buyer in the hands of a third party, as a "forfeiture" in case he should refuse to take the goods, was not "giving something in earnest," and did not bind the bargain. Much less would a deposit of a check with such third person have that effect. Noakes *v.* Morey, 30 Ind. 103.

2. As to part payment, it is clear that something of value must be really given and received towards payment. A promise to pay, however oft repeated, cannot have that effect. See Artcher *v.* Zeh, 5 Hill, 205; Krohn *v.* Bantz, 68 Ind. 277. And if the parties verbally agree that the amount of the purchase-money may be credited on a larger claim which the buyer has against the seller, *but this has not been actually done, nor any receipt or voucher given*, this is not an actual payment, sufficient alone to bind the buyer to the bargain. See Ely *v.* Ormsby, 12 Barb. 570; Brand *v.* Brand, 49 Barb. 346; Teed *v.* Teed, 44 Barb. 96; Brabin *v.* Hyde, 32 N. Y. 519; Walrath *v.* Richie, 5 Lans. 362. And of course a *promise* by the buyer to pay some part of the purchase-money to a third person, a creditor of the vendor, in discharge of such person's claim against the vendor, would not be a payment; Artcher *v.* Zeh, 5 Hill, 200, p. 205; though an actual payment of such debt of the vendor's would be. Brady *v.* Harrahy, 21 Up. Can. Q. B. 340; Furniss *v.* Sawers, 3 Ib. 77. So if the vendor's creditor accepts the promise of the buyer to pay him (the creditor), and thereupon *actually discharges the vendor* from liability to him, this might operate as a part payment. Cotterill *v.* Stevens, 10 Wisc. 422. But in such case the knowledge and acquiescence of such creditor of the vendor is essential. Paine *v.* Fulton, 34 Wisc. 83.

Neither will an *actual tender* of part payment, unaccepted by the vendor, bind him to fulfil. Edgerton *v.* Hodge, 41 Vt. 676, where the buyer sent a partial payment by mail, which the seller returned. And see Hicks *v.* Cleveland, 48 N. Y. 84; Walrath *v.* Ingles, 64 Barb. 265. But part payment may be made by anything of value, given and received as such; a chattel, for instance, Dow *v.* Worthen, 37 Vt. 108; a third person's note, Combs *v.* Bateman, 10 Barb. 573; or his check, Hunter *v.* Wetsell, 17 Hun, 135. See White *v.* Drew, 56 How. Pr. R. 57.

In most States the time of payment is unimportant, if made before action brought. Thompson *v.* Alger, 12 Met. 435; Davis *v.* Moore, 13 Me. 424; Gault *v.* Brown, 48 N. H. 189. It is not yet authoritatively settled that the payment *must* be made before suit commenced, but only that it would be sufficient. New York, and perhaps some other States, require the payment to be made at the time of making the contract. Artcher *v.* Zeh, 5 Hill, 200; Ely *v.* Ormsby, 12 Barb. 570; Bissell *v.* Balcom, 39 N. Y.

275; Allis *v.* Read, 45 N. Y. 142. Or that, at the time of payment, the original contract should be substantially renewed or re-made. See Hunter *v.* Wetsell, 57 N. Y. 375; 84 N. Y. 549; Webster *v.* Zielly, 52 Barb. 482; Jackson *v.* Tupper, 30 Hun, 220. If a check is given at the time, and is duly paid upon subsequent presentation to the bank, it is a payment "at the time," within the meaning of that phrase. Hunter *v.* Wetsell, 84 N. Y. 549.

CHAPTER VI.

OF THE MEMORANDUM OR NOTE IN WRITING.

Sect.

Law of evidence as to written contracts not changed by the statute . . . 201
Common-law principles 202
Parol evidence, when admissible where there is a written note of the bargain . 207
True theory of the statute 208
Parol evidence admissible to show that the writing is not a note of any bargain 208
Or that it is not a note of the *whole* bargain 209
Inadmissible to supplement an imperfect note 210
Inadmissible to connect separate written papers 211
Relaxation of this rule . . . 211
Admissible to identify the subject-matter of the note 213
Admissible to show the situation and circumstances, and to explain mercantile language and show date 213
Also alterations assented to by the other party 213
Also to show the meaning of words, according to a trade usage . . 213
Evidence in support of a trade usage must be clear and consistent . 213
Also mistake in omitting goods in bought and sold notes . . . 213
Also to show that writing was intended only to take effect conditionally 214
And to explain latent ambiguity . 214
As to particular commercial usages 215
Admissibility of parol evidence to change or annul written note . . 216
Admissible to show buyer's order for alterations in chattel to be manufactured 217
Admissible to prove substituted mode of performance . . . . . 217 a
Delivery by altered route . . . 217 a
Postponed delivery . . . . . 217 a
Parol evidence to show abandonment of the contract 218
Admissible in equity 218
Rule where note is signed by agent in his own name 219

SECTION I. — WHAT IS A NOTE OR MEMORANDUM IN WRITING.

Sect.

Must be made before action brought . 221
Need not be written at one time, nor on one piece of paper 222
Separate papers not to be connected by parol 222
Where the reference is ambiguous, parol evidence admissible to identify document referred to . . . . 222 a
Doctrine now extended . . . . 222 a
Separate papers must be consistent . 223
4th and 17th sections of statute compared 224
Cases reviewed 225
Note in writing may be addressed to a third person 230
Writing in pencil 231

SECTION II. — WHAT IS A SUFFICIENT NOTE OF THE BARGAIN MADE.

4th section rigorously construed . 231
17th section more liberally construed . 233
Note must contain names or description of the parties 234
Description suffices instead of name . 237
But description must be sufficient to identify the person described . . 237
Where agent signs his own name . . 238
Agent for foreign principal . . 238
When agent is personally bound . . 239
When broker can sue or be sued personally 240
Agents for non-existent principal . . 244
Kelner *v.* Baxter criticised . . . 244
When *terms* of the bargain must be contained in the note 245
Distinction between "agreement" and "bargain" 245
Price when agreed on must be stated . 247
Price need not be stated when not fixed by the terms agreed on . 248
General rule as to stating price in note . 249
Other terms of contract must be so expressed as to be intelligible . 250
A letter repudiating a contract may be a sufficient note of it 252
A mere written proposal is a sufficient note, if supplemented by parol proof of acceptance by the party seeking to enforce it 253
Decisions in the United States . . 254

§ 201. This clause of the statute is as follows: "Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."

For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the statute have in no way interfered with these principles. They have simply said that if the parties to be charged have signed some written note or memorandum of the contract, it shall be allowed to be good. What the legal effect of such a note or memorandum is to be in all other respects, is left entirely as it was at common law.

§ 202. Now at common law, parties entering into any contract may either reduce its terms to writing, or may refer to some other writing already in existence as containing the terms of their agreement; and when they do so, they are bound by what is written, whether signed by them or not; and they are not allowed to say that there was a mistake in the writing, and that they intended to agree to something different from its contents, for the very object of putting the agreement in writing is to prevent disputes about what they intended. This rule of law is very inflexible. If, by the agreement, the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a preëxisting writing, neither party is allowed to offer proof that any additional terms were agreed to, although, of course, whenever a duty or obligation of any sort results by virtue of the law or of local customs, or the usages of particular trades, from the written stipulations, such duty or obligation may not only be enforced as though it were expressly included among the written terms, but is as carefully guarded by the rule now under consideration as if expressed in the written paper, and cannot be contradicted or qualified by parol evidence (*a*).

§ 203. But the common law does not prohibit parties from making contracts of which only part is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing and the price may be agreed on by parol, or *vice versâ*, or the parties may say in substance, "We agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth." And there is no legal objection to this. Parol evidence may be used to show what were the additions and exceptions, and the writing is conclusive as to the rest.

§ 204. When either a part or the whole of an agreement is thus

(*a*) Per Blackburn, J., in Burges *v.* Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17. But see the language of Williams, J., in giving the decision of the Exchequer Chamber in Clapham *v.* Langton, 34 L. J. Q. B. 46; see also, Fawkes *v.* Lamb, 31 L. J. Q. B. 98.

made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that, independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. But this result only takes place when the writing is by the consent of both parties agreed to be that which settles and contains their contract in whole or in part. The case is different if one of the parties chooses to write down for himself, without the concurrence and assent of the other, or if a bystander, without the authority of both, should write out what they said. The writing of the bystander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be receivable in evidence against him as an admission, and the same would be the case as to what one party had written down for himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

§ 205. The Statute of Frauds leaves all this law quite as it was before. If the contract be in writing, in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed, or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment, or of part acceptance and receipt, to establish the validity of the contract. The writing in such a case is as indispensable in contracts for the sale of goods of less value than 10*l.* as in those above that limit, and is as conclusive in settling what the terms of the bargain are as if the Statute of Frauds had never been passed. And where a party has signed a paper which is not a writing agreed upon between the two, as containing the terms of their agreement, his adversary may use the paper, if he please, as an admissison made in his favor; but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written any greater than that of a verbal admission. In a word, it is always necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one* (*b*).

§ 206. The two cases of Ford *v.* Yates (*c*), and Lockett *v.* Nicklin (*d*), afford an illustration of the effect of the Statute of Frauds taken in connection with the common-law rules of evidence on this

(*b*) The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Lord Blackburn.

(*c*) 2 M. & G. 549; 10 L. J. C. P. 117.

(*d*) 2 Ex. 93; 19 L. J. Ex. 403.

subject. In Ford *v.* Yates, the memorandum of the sale made between the parties said nothing as to credit; it was a sale of two parcels of hops, one of 39 pockets, and the other of 5 pockets, both at 78 shillings. The vendor delivered the smaller parcel, but refused to deliver the 39 pockets without payment; and the court held parol evidence inadmissible to show that the hops were sold at six months' credit, and that this had been the usual course of dealing between the parties. But in Lockett *v.* Nicklin, where the goods were ordered in a letter containing a reference to a conversation between the parties, and were supplied with an invoice, nothing being said either in the letter or the invoice about the terms of payment, parol evidence was received of an agreement to give six months' credit. The distinction made was, that in Ford *v.* Yates the action was based on a *written contract* contained in the memorandum which could not be varied by parol evidence; while in Lockett *v.* Nicklin the *sale was really by parol*, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods, so that the purchaser was at liberty to supplement the proof of the bargain by showing that there was an additional stipulation, namely, an agreement for six months' credit.

§ 207. It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but the examination of this clause of the statute would be very incomplete without some reference to the decisions which determine in what cases, for what purposes, and to what extent, parol evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing of the bargain sufficient to satisfy the 17th section.

§ 208. It must be steadily borne in mind that the statute was not enacted for cases where the parties, either in person or by agents, have signed a written contract; for in those cases the common law affords by its rules quite a sufficient guaranty against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some* written *note* or *memorandum* of the bargain — not the bargain itself — could be shown (*e*). The existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum.

[It is a simple deduction from this theory of the statute that parol

(*e*) See the remarks of Erle, J., in Sievewright *v.* Archibald, 17 Q. B. 104; 20 L. J. Q. B. 529; of Williams, J., in Bailey *v.* Sweeting, 9 C. B. N. S. 843; 30 L. J. C. P. 150; and of Lord Wensleydale in Ridgway *v.* Wharton, 6 H. L. C. 305. The statement in the text is to be found *passim* in the cases on this subject.

evidence is always admissible to show that the writing which purports to be a note or memorandum of the bargain is not the record of any antecedent parol contract at all (*f*), for, as was said by Lord Selborne in Jervis *v.* Berridge (*g*), the Statute of Frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."]

§ 209. On the same principle, parol evidence is admissible for the purpose of showing that the written paper is *not* a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view.

Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and the writing is thus shown not to be a note of the agreement, but only of some of its terms (*h*).

So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was admitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation (*i*).

[And in a recent Irish case, where the writing offered in evidence was the auctioneer's sales-book which contained no statement that the sale was by sample, parol evidence was admitted, on behalf of the defendant, to prove that the sale was by sample, and that therefore the auctioneer's book was not a memorandum of the whole contract (*k*).]

§ 210. And the same principle which permits the defendant to offer parol evidence showing that the written note is imperfect, and therefore *not* such a note as satisfies the statute, forbids him who sets up the writing, for the purpose of binding the other, from supplementing the writing by parol proof of terms or stipulations not contained in it; for it is manifest that, by offering such proof, he admits that the writing does not contain a note of the bargain, but only of part of it (*l*).

§ 211. It is also on this principle, that when the bargain is to be made out by separate written papers, parol evidence is not allowed to

(*f*) Pym *v.* Campbell, 6 E. & B. 370; Wake *v.* Harrop, 6 H. & N. 768; Clever *v.* Kirkman, 24 W. R. 159; 33 L. T. N. S. 672; Hussey *v.* Horne-Payne, 4 App. Cas. 311, per Lord Cairns, at p. 320.

(*g*) 8 Ch. App. at p. 360.

(*h*) Elmore *v.* Kingscote, 5 B. & C. 583; Goodman *v.* Griffiths, 1 H. & N. 574; S. C. 26 L. J. Ex. 145; Acebal *v.* Levy, 10 Bing. 376.

(*i*) Pitts *v.* Beckett, 13 M. & W. 743.

(*k*) M'Mullen *v.* Helberg, 4 L. R. Ir. 94, on app. 6 L. R. Ir. 463.

(*l*) Boydell *v.* Drummond, 11 East, 142; Fitzmaurice *v.* Bayley, 9 H. L. C. 78, Holmes *v.* Mitchell, 7 C. B. N. S. 361, and 28 L. J. C. P. 301; Harnor *v.* Groves, 15 C. B. 667; 24 L. J. C. P. 53. The statement of the law in the text was approved by O'Brien, J., in the Irish case of M'Mullen *v.* Helberg, 4 L. R. Ir. at p. 110.

connect them, but they must either be physically attached together, so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other (*m*).

[The later cases have, however, effected a relaxation of this rule. A reference in a signed document which is ambiguous, in the sense that it may apply either to a verbal or to a written communication, may be proved by parol evidence to apply to a written document, if on production it appears that that document answers to the reference (*n*). The cases are considered *infra*, § 222 a.]

§ 212. But where a purchaser agreed to pay by a check (*o*) on his brother, the court held that this was not one of the terms which need appear in the writing; and further, that parol proof that under the contract certain candlesticks were to be made with a gallery to receive a shade, did not affect the sufficiency of the writing which described them as "candlesticks complete" (*p*).

§ 213. Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers (*q*). Thus, where the written letter contained an agreement to purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool" (*r*).

Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances (*s*); to explain the language, as for instance to show that the bought and sold notes have the same meaning among merchants, though the language

(*m*) Hinde *v.* Whitehouse, 7 East, 558; Kenworthy *v.* Scofield, 2 B. & C. 945; Peirce *v.* Corf, L. R. 9 Q. B. 210; Rishton *v.* Whatmore, 8 Ch. D. 467.

(*n*) Ridgway *v.* Wharton, 6 H. L. C. 238; Baumann *v.* James, 3 Ch. 508; Long *v.* Millar, 4 C. P. D. 450, C. A.; Cave *v.* Hastings, 7 Q. B. D. 125; Shardlow *v.* Cotterell, 18 Ch. D. 280; S. C. 20 Ch. D. 90, C. A.; Studds *v.* Watson, 28 Ch. D. 305, where North, J., also decided that it was unnecessary to connect two signed documents, if each referred to a parol agreement of which one or other contained all the terms. *Sed quære.* [Two documents, both signed by the party to be charged, may be connected together by oral testimony, so as to make out a complete memorandum, although neither writing in terms refers to the other. Oliver *v.* Hunting, 62 L. T. R. 108; 44 Ch. D. 205.]

(*o*) *Secus*, as to payment by a bill, Mahalen *v.* The Dublin and Chapelizod Distillery Company, 11 Ir. R. C. L. 83.

(*p*) Sarl *v.* Bourdillon, 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(*q*) Bateman *v.* Phillips, 15 East, 272; Shortrede *v.* Cheek, 1 A. & E. 57; Mumford *v.* Gething, 7 C. B. N. S. 305, and 29 L. J. C. P. 105; Chambers *v.* Kelly, 7 Ir. R. C. L. 231.

(*r*) Macdonald *v.* Longbottom, 28 L. J. Q. B. 293; S. C. on appeal, 1 E. & E. 977, and 29 L. J. Q. B. 256; and see Shardlow *v.* Cotterell, 20 Ch. D. 90, C. A.; reversing S. C. 18 Ch. D. 280, a case under the 4th section, where the word "property" was held to be a sufficient description.

(*s*) Per Tindal, C. J., in Sweet *v.* Lee, 3 M. & G. 466.

seems to vary (*t*); and to show the date when the bargain was made (*u*).

[It is also admissible to show that alterations which have been made in the document signed by one of the parties were assented to by the other party; the effect of the evidence being, not to vary the written instrument, but to show what was its condition when it became the memorandum of the contract (*x*).]

Parol evidence was likewise admitted to show that a sale of fourteen pockets of Kent hops, at 100*s.*, meant 100*s.* per cwt., according to the usage of the hop trade (*y*).

[But it should be remembered that when the evidence in support of a trade usage seeks to alter the natural meaning and construction of the words as written, it must in every case be clear and consistent (*z*).]

Parol evidence is also admissible to show a mistake in drawing up the bought and sold notes (whereby certain goods were omitted), in an action of trover by the vendors against the purchaser for the goods so omitted after they had been paid for, and taken into possession by the purchaser (*a*).

§ 214. Also to show that a written document, purporting to be an agreement and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a future event (*b*); or was even to be modified upon some future contingency (*c*).

Also to explain a latent ambiguity in a contract of sale, as where a bargain was made for the sale of cotton, "to arrive ex Peerless from Bombay," parol evidence was held admissible to show that there were two ships Peerless from Bombay, and that the ship Peerless intended by the vendor was a different ship Peerless from that intended by the buyer, so as to establish a mistake defeating the contract for want of a *consensus ad idem* (*d*).

§ 215. The admissibility of parol evidence of particular *commercial usages* to engraft terms into the bargain, or even to introduce conditions apparently at variance with the implication resulting from the written

(*t*) Bold *v.* Rayner, 1 M. & W. 343; and per Erle, C. J., in Sievewright *v.* Archibald, 17 Q. B. 104; 20 L. J. Q. B. 529.

(*u*) Edmunds *v.* Downes, 2 C. & M. 459; Hartley *v.* Wharton, 11 Ad. & E. 934; Lobb *v.* Stanley, 5 Q. B. 574.

(*x*) Stewart *v.* Eddowes, L. R. 9 C. P. 311.

(*y*) Spicer *v.* Cooper, 1 Q. B. 424.

(*z*) Bowes *v.* Shand, 2 App. Cas. 455.

(*a*) Steele *v.* Haddock, 10 Ex. 643; 24 L. J. Ex. 78.

(*b*) Pym *v.* Campbell, 6 E. & B. 370; 25 L. J. Q. B. 277; Furness *v.* Meek, 27 L. J. Ex. 34; Davis *v.* Jones, 25 L. J. C. P. 91.

(*c*) Rogers *v.* Hadley, 2 H. & C. 227; 32 L. J. Ex. 241.

(*d*) Raffles *v.* Wichelhaus, 2 H. & C. 906; 33 L. J. Ex. 160.

stipulations (as was done in Field *v.* Lelean (*e*), where evidence was admitted of a usage in the sale of mining shares not to make delivery before payment, although the written terms were for a price payable *in futuro*), is too large a branch of the subject to be here treated in detail, and the reader must be referred to the decisions which are collected and classed in the notes to Wigglesworth *v.* Dallison, in the first volume of Smith's Leading Cases (*f*).

[Alexander *v.* Vanderzee (*g*), and Ashforth *v.* Redford (*h*), are recent cases, which illustrate the method of construing particular mercantile terms apart from any trade usage.]

§ 216. After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the statute, the question often arises as to the admissibility of parol proof of a subsequent agreement to change or annul it.

At common law it is competent to the parties, at any time after an agreement (not under seal) has been reduced to writing and signed, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or qualify its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement (*i*).

But this principle of the common law is not applicable to a contract for the sale of goods under the Statute of Frauds. No verbal agreement to abandon it in part, or to add to, or omit or modify, any of its terms, is admissible.

Thus parol evidence is not admissible to change the place of delivery fixed in the writing (*k*); nor the time for the delivery (*l*); nor to prove a partial waiver of a promise to furnish a good title (*m*); nor a modification of a stipulation for a valuation (*n*); nor a change in any of the terms; for the courts can draw no distinctions between stipulations that are material and those that are not (*o*).

(*e*) 6 H. & N. 617; 30 L. J. Ex. 168. See, also, Bissell *v.* Beard, 28 L. T. N. S. 740.

(*f*) Vol. i. 9th ed. 569 *et seq.*; and see Johnson *v.* Raylton, 7 Q. B. D. 438, C. A.

(*g*) L. R. 7 C. P. 530.

(*h*) L. R. 9 C. P. 20.

(*i*) Per Denman, C. J., in Goss *v.* Lord Nugent, 5 B. & Ad. 65; *per eundem* in Stead *v.* Dawber, 9 L. J. Q. B. at p. 102.

(*k*) Moore *v.* Campbell, 10 Ex. 323, and 23 L. J. Ex. 310; Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 A. & E. 57. See these cases reviewed by Lindley, J., in Hickman *v.* Haynes, L. R. 10 C. P. at p. 601, and the remarks of Blackburn, J., on Stead *v.* Dawber, in Ogle *v.* Earl Vane, L. R. 2 Q. B. at p. 282.

(*l*) Noble *v.* Ward, L. R. 1 Ex. 117; 35 L. J. Ex. 81.

(*m*) Goss *v.* Lord Nugent, 5 B. & Ad. 65.

(*n*) Harvey *v.* Grabham, 5 A. & E. 61.

(*o*) Per Parke, B., in Marshall *v.* Lynn, 6 M. & W. 116. See, also, Emmet *v.* Dewhirst, 21 L. J. Ch. 497. The cases in the notes to this paragraph overrule Cuff *v.* Penn, 1 M. & S. 21; Warren *v.* Stagg, cited in Littler *v.* Holland, 3 T. R. 591; and Thresh *v.* Rake, 1 Esp. 53. It is, however, submitted that after the decisions in Ogle *v.* Earl Vane and Hickman *v.* Haynes, *supra*, the authority of Cuff *v.* Penn has been restored; cf. Sanderson

§ 217. But where there was an executory contract for the building of a landaulet described in the agreement, parol evidence was admitted of alterations and additions ordered by the purchaser from time to time, Gaselee, J., saying that "otherwise every building contract would be avoided by every addition" (*p*).

In Brady *v.* Oastler (*q*), the action was for damages for breach of contract in not delivering certain goods within the time fixed by a written contract, and the plaintiff offered parol evidence to prove, as an element of consideration for the jury in estimating damages, that the price fixed in the contract was above the market price, and that he had assented to pay this extra price because of the short term allowed for delivery; but the evidence was rejected by Bramwell, B., at Nisi Prius, and his ruling was approved by Pollock, C. B., and Channell, B.; a strong dissenting opinion, however, was delivered by Martin, B.

§ 217 a. [Parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performing the original contract, *when that performance is completed*, is admissible. Thus, in The Leather Cloth Co. *v.* Hieronimus (*r*), the contract was for the sale of goods to be forwarded to the purchaser by Ostend, and the goods were afterwards forwarded by Rotterdam, and evidence was admitted to show that the defendant *by his conduct* had assented to the substituted mode of delivery.

A distinction has also been drawn between an agreement to vary or enlarge the time of performance of a contract, and a voluntary forbearance by the one party at the request of the other, which does not prevent the party who has forborne from at any moment determining such forbearance, and reverting to his rights under the original contract, and parol evidence of such forbearance may be given. This was decided in the two cases of Ogle *v.* Earl Vane (*s*), and Hickman *v.* Haynes (*t*), where the earlier cases upon this point are considered in the judgment of the court. The effect of such evidence, where the request for forbearance has come from the defendant, is to estop him from averring that the plaintiff was not ready and willing to deliver according to the terms of the original contract (*u*).

The case is different, however, where the request for forbearance has come from the plaintiff, who then seeks to enforce his rights under

v. Graves, L. R. 10 Ex. 234, a case under the 4th section.

(*p*) Hoadly *v.* M'Laine, 10 Bing. 489; but see remarks of Bramwell, B., upon this *dictum*, in Sanderson *v.* Graves, L. R. 10 Ex. at p. 237.

(*q*) 3 H. & C. 112; 33 L. J. Ex. 300.

(*r*) L. R. 10 Q. B. 140.

(*s*) L. R. 3 Q. B. 272, affirming S. C. L. R. 2 Q. B. 275.

(*t*) L. R. 10 C. P. 598.

(*u*) Hickman *v.* Haynes, L. R. 10 C. P. at p. 607.

the original contract, after the contract time has expired. He is not then able to aver and prove that he was ready and willing to deliver according to the terms of the original contract, and is, therefore, logically driven to rely upon a substituted contract, which must be in writing so as to satisfy the statute (*x*).

Tyers *v.* The Rosedale Iron Co. (*y*) offers an example of a request for postponement on the part of the plaintiffs, and a subsequent demand by them for delivery within the contract time. In this case it was held by the Court of Exchequer Chamber, overruling a decision of the majority of the Court of Exchequer, that the original contract had not been rescinded, and that the plaintiffs could maintain their action upon it.]

§ 218. Whether or not parol evidence is admissible to show a subsequent agreement for a waiver and abandonment of the *whole* contract, proven by a written note or memorandum under the statute, has not been decided, and the *dicta* on the subject are uncertain and contradictory (*z*). Where, however, the agreement to rescind the first contract forms part of or results from a new parol agreement which itself is invalid and cannot be enforced under the statute, it is held that the new parol agreement cannot have the effect of rescinding the first bargain (*a*).

[It is a settled rule of equity that a contract required to be in writing to satisfy the statute may be rescinded by a parol agreement; and such rescission would be a sufficient defence to an action by either party for specific performance (*b*).]

§ 219. Parol evidence may be offered to show that a signature to a note or memorandum, though made by A. in his own name, was really made on behalf of B., his principal, when the action is brought for the purpose of charging B. (*c*); but it is not admissible on behalf of A. in such a contract, for the purpose of showing that he is not personally bound, and had acted only as agent of B. (*d*). Where the

(*x*) Plevins *v.* Downing, 1 C. P. D. 220.

(*y*) L. R. 10 Ex. 195, in Ex. Ch., reversing S. C. L. R. 8 Ex. 305. It is submitted that the *dictum* of Martin, B., whose dissentient judgment was upheld on the main point by the Court of Exchequer Chamber, that "a contract respecting the delivery of goods already sold is not within section 17 of the Statute of Frauds," must be considered to be overruled in Plevins *v.* Downing.

(*z*) *Dicta* of Lord Denman in Goss *v.* Lord Nugent, 5 B. & Ad. 65, and in Harvey *v.* Grabham, 5 A. & E. 61; of Sir Wm. Grant in Price *v.* Dyer, 17 Ves. Jr. 356; and of Lord Hardwicke in Bell *v.* Howard, 9 Mod. 305.

(*a*) Moore *v.* Campbell, 10 Ex. 323; and 23 L. J. Ex. 310; Noble *v.* Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135, in error; 35 L. J. Ex. 81.

(*b*) See Fry on Specific Performance, 2d ed. 1881, p. 445. And since the Judicature Act, 1873, s. 25, sub-s. 11, it is submitted that the rule of equity would be followed in all the divisions of the High Court. See per Earl Cairns in Pugh *v.* Heath, 7 App. C. at p. 237.

(*c*) Trueman *v.* Loder, 11 A. & E. 589.

(*d*) Higgins *v.* Senior, 8 M. & W. 834; Cropper *v.* Cook, L. R. 3 C. P. 194; Fawkes *v.* Lamb, 31 L. J. Q. B. 98; Calder *v.* Dobell, L. R. 6 C. P. 486.

paper was signed "D. M. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was held admissible of a usage in such cases, that the brokers became personally liable (*e*). [So, where the contract was expressed to be made and was signed by the defendants "as agents to merchants," parol evidence was admitted of a usage by which the agent became personally liable if the principal's name was not disclosed within a reasonable time (*f*). And, in a later case, where a sold note was signed by brokers "for and on account of owner," parol evidence of a custom, by which brokers who do not disclose the names of their principals at the time of making the contract become personally liable, was held admissible on the ground that such a custom was not in contradiction of the written contract, but only gave the buyer a remedy against the brokers, as well as against the principals (*g*).]

In Wake *v.* Harrop (*h*) (not under the Statute of Frauds), it was held that parol evidence was admissible to show that by *mistake* the written contract described the agent as principal, contrary to express agreement between the parties.

§ 220. We may now proceed to the examination of this clause of the statute, dividing the inquiry into two sections: —

1. What is a note or memorandum in writing?
2. When is it a sufficient note of the bargain made?

SECTION I. — WHAT IS A NOTE OR MEMORANDUM IN WRITING.

§ 221. It may be premised that the note or memorandum must be one made and signed before the action brought. To satisfy the statute, there must be a *good contract* in existence at the time of action brought (*i*).

(*e*) Humfrey *v.* Dale, 7 E. & B. 266; and 26 L. J. Q. B. 137; E. B. & E. 1004; 27 L. J. Q. B. 390; Robinson *v.* Mollett, L. R. 7 H. L. 802, reversing L. R. 5 C. P. 646; L. R. 7 C. P. 84; Fleet *v.* Murton, L. R. 7 Q. B. 126; Southwell *v.* Bowditch, 1 C. P. D. 374, C. A., reversing Ibid. 100. See, also, 2 Sm. L. C. 9th ed. p. 498, for the authorities on this subject.

(*f*) Hutchinson *v.* Tatham, L. R. 8 C. P. 482.

(*g*) Pike *v.* Ongley, 18 Q. B. D. 708, C. A.

(*h*) 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

(*i*) Bill *v.* Bament, 9 M. & W. 36; [Lucas *v.* Dixon, 22 Q. B. D. 357, a recent express decision on the point]. If, as appears to be the better opinion, the section applies only to the evidence required before the court will enforce the contract, there seems to be no reason why that evidence should not be obtained after action brought. The remarks of Willes, J., in Gibson *v.* Holland, L. R. 1 C. P. at pp. 8, 9 (35 L. J. C. P. at p. 6), show that he was not altogether satisfied with the decision in Bill *v.* Bament. He there says: "There is another difficulty. It has been held that the memorandum must exist before the action is brought. Bill *v.* Bament. This would seem to show that the memorandum is in some way to stand in the place of a contract. But I cannot help thinking that the courts, in deciding cases of that description, considered the intention of the legislature to be of a mixed character, — that it was intended to protect persons from actions being brought against them to

§ 222. But the statute does not require that the whole of the terms of the contract should be agreed to at one time, nor that they should be written down at one time, nor on one piece of paper; accordingly it is settled that, where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the *signed* paper make such reference to the other written paper or papers as to enable the court to construe the whole of them together as constituting all the terms of the bargain. And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature.*

But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute.

§ 222 a. [But where the reference contained in the signed paper is ambiguous, parol evidence will be admitted to explain the ambiguity, and identify the document to which the signed paper must and does refer. Thus, parol evidence was held admissible to identify the documents which were respectively referred to by the following expressions: "instructions" (*k*), "terms agreed upon" (*l*), "purchase" (*m*), "our arrangement" (*n*), "purchased" (*o*), "balance" (*p*). It is submitted, therefore, that since the decision in Baumann *v.* James (*l*), the principle of which case has been adopted in the most recent cases illustrating this subject, and cited in the notes *infra*, the rule as laid down by the earlier authorities must be taken to have been enlarged to the following extent: it is no longer necessary for the signed paper to refer to any unsigned paper as such; it is sufficient to show that a particular unsigned paper and nothing else can be referred to, and parol evidence is admissible for this purpose. In Long *v.* Millar (*q*), where the same principle was carried even further than in Baumann *v.* James, Thesiger, L. J., on the question of the admissibility of parol evidence in these cases, says (at page 456): "When it is proposed to prove the existence of a contract

enforce contracts of which there was no evidence in writing, and that the written evidence should be existing at the time when the action is instituted. It is too late, however, now, to object to those cases."

(*k*) Ridgway *v.* Wharton, 6 H. L. C. 238.

(*l*) Baumann *v.* James, 3 Ch. 508.

(*m*) Long *v.* Millar, 4 C. P. D. 450, C. A.

(*n*) Cave *v.* Hastings, 7 Q. B. D. 125.

(*o*) Shardlow *v.* Cotterell, 18 Ch. D. 280; S. C. 20 Ch. D. 90, C. A.

(*p*) Studds *v.* Watson, 28 Ch. D. 305. This decision seems to go some way further than the earlier ones.

(*q*) 4 C. P. D. 450.

by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in Ridgway *v.* Wharton; there 'instructions' were referred to: now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity."]

§ 223. Further, in order to satisfy the statute, when the memorandum relied on consists of separate papers, which it is attempted to connect by showing from their contents that they refer to the same agreement, these separate papers must be consistent and not contradictory in their statement of the terms, for otherwise it would be impossible to determine what the bargain was, without the introduction of parol testimony to show which of the papers stated it correctly.

§ 224. The authorities are believed to be quite consistent in maintaining these principles. In citing them, it will be observed that some of the cases were under the 4th section of the statute, the language of which is, on this subject, almost identical with that of the 17th. The two clauses are here placed in juxtaposition for comparison.

Fourth section. — "Unless the *agreement* on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the *party* to be charged therewith, or some other person thereunto by him lawfully authorized."

Seventeenth section. — "Except that some note or memorandum in writing of the said *bargain* be made, and signed by the *parties* to be charged with such contract, or their agents thereunto lawfully authorized."

It will be noticed hereafter that the question, whether there is any distinction in meaning between the respective words quoted in italics, viz., "agreement" and "bargain," on the one hand, and "party" and "parties," on the other hand, has been mooted on several occasions."

§ 225. The leading case in which it was held that the intention of the signer to connect two written papers not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the present century.

Hinde *v.* Whitehouse (*r*), in 1806, was the case of a sale by auc-

(*r*) 7 East, 558; and see Peirce *v.* Corf, L. R. 9 Q. B. 210.

tion. The auctioneer, who, as will be shown hereafter (*post*, Ch. 8, §§ 268–270), is by law an agent authorized to sign for both parties, had a catalogue, headed "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to the catalogue was not sufficient to satisfy the statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms.

Kenworthy *v.* Schofield (*s*), in the King's Bench in 1824, was decided in the same way, on circumstances precisely the same. Lord Westbury, in 1863, stated the general principle, in a case which arose under a similar clause in the Railway and Canal Traffic Act, in these words: "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing that, by force of the reference, the writing itself becomes part of the instrument it refers to" (*t*). [Which refers to it?]

§ 226. The first reported case decided in banc, in which a signed paper referring to another writing was deemed sufficient to satisfy the statute, was that of Saunderson *v.* Jackson (*u*), in 1800; but the case does not state how this connection between the two papers was made apparent, and can therefore give little aid in construing the clause of the statute, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper.

In Allen *v.* Bennet (*x*), decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently the defendant wrote to his agent, mentioning the plaintiff's name, and authorizing his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." Held, that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain.

In 1812, Cooper *v.* Smith (*y*) was distinguished from the foregoing case, because the letter offered to prove the contract, as entered

(*s*) 2 B. & C. 945.
(*t*) Peek *v.* North Staffordshire Railway Company, 10 H. L. C. 473, at p. 568.
(*u*) 2 B. & P. 238.
(*x*) 3 Taunt. 169.
(*y*) 15 East, 103.

on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. Le Blanc, J., tersely said: "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case" (*z*).

In Jackson *v.* Lowe (*a*), the Common Pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters, the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality; and the second from the defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month.

§ 227. Richards *v.* Porter (*b*) was decided in the King's Bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th of January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers.

A month later, on the 27th of February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23d of last month are not yet arrived, nor have I ever heard of them. *I received the invoice.* The last was much longer than they ought to have been on the road. However, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The plaintiff was nonsuited, and the King's Bench held the nonsuit right, Lord Tenterden saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the

(*z*) See Haughton *v.* Morton, 5 Ir. C. L. Rep. 329, where also it is stated by Crampton, J., at p. 342, that since the case of Jackson *v.* Lowe, 1 Bing. 9, *supra*, it is for the jury, in case of dispute, to decide whether the signed does or does not refer to the unsigned document. And see on this M'Mullen *v.* Helberg, 4 L. R. Ir. 94, at p. 104.

(*a*) 1 Bing. 9.

(*b*) 6 B. & C. 437.

contract sufficient to satisfy the statute." The facts as reported certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plaintiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was, not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In Wilkinson *v.* Evans (*c*), decided in 1866, the judgment in Richards *v.* Porter is said to be reconcilable with the current of decisions by Erle, C. J., on the ground "that the letter stated that the contract contained a term not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned Chief Justice to be contained in it. The decision in Richards *v.* Porter seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee (*d*).

§ 228. The case of Smith *v.* Surman (*e*) followed in the King's Bench, in 1829. The written memorandum was contained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased of him. . . . The value, at 1*s.* 6*d.* per foot, amounts to the sum of 17*l.* 3*s.* 6*d.* I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior," etc., etc. The defendant replied: "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, *to be sound and good*, which I have some doubts whether it is or not, but he promised to make it so, *and now denies it.*" Held, that the letters were not consistent, and did not satisfy the statute. Bayley, J., said: "What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of

(*c*) L. R. 1 C. P. 407; 35 L. J. C. P. 224.

(*d*) Richards *v.* Porter seems also irreconcilable with the opinion of the court as expressed by Erle, C. J., in Bailey *v.* Sweeting, 9 C. B. N. S. 843.

(*e*) 9 B. & C. 561. See, also, Archer *v.* Baynes, 5 Ex. 625; 20 L. J. Ex. 54.

the contract, and that object is not satisfied by defendant's letter." The other judges concurred (*f*).

§ 228 a. [Peirce *v.* Corf (*g*), which, like Hinde *v.* Whitehouse, arose out of a sale by auction, was an action to recover from an auctioneer damages for negligence in not making a binding contract for the sale of the plaintiff's mare. The defendant had a sales' ledger, which was headed "Sales by auction, 28th March, 1872," in which the mare was numbered 49. A printed catalogue of the horses to be sold, with conditions of sale annexed, was circulated, and the mare was therein also numbered 49, but neither the catalogue nor the conditions were annexed to the sales' ledger nor referred to therein. The mare was put up for sale and knocked down to one Thomas Macquire for thirty-three guineas. Thereupon the defendant's clerk wrote in the columns of the sales' ledger, left blank for the purpose, the name of the purchaser and the price. The purchaser afterwards refused to take the mare. Held, that the catalogue and sales' ledger were not sufficiently connected to form a memorandum sufficient to satisfy the statute (*h*).]

§ 229. The leading case under the *fourth* section of the Statute of Frauds, usually cited in all disputes as to the construction of the words now under consideration, is Boydell *v.* Drummond (*i*), decided in the King's Bench in 1809. The defendant was sued as one of the subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled "Shakespeare Subscribers, their Signatures." But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain, without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was nonsuited at Nisi Prius, and the nonsuit was confirmed by the unanimous opinion of the judges, Lord Ellenborough, C. J., Grose, Le Blanc, and Bayley, JJ.

In Dobell *v.* Hutchinson (*k*), in 1835, the King's Bench held, under the 4th section of the act, that in a sale at auction where the letters of the defendants, the purchasers, referred distinctly to the conditions of sale signed by the plaintiff, and which they had in their hands, the clause of the statute was completely satisfied, because no parol evi-

(*f*) See Buxton *v.* Rust, L. R. 1 Ex. 1; in Ex. Ch. ib. 279.

(*g*) L. R. 9 Q. B. 210. See, also, McCaul *v.* Strauss, Cababé & Ellis, 106.

(*h*) See, also, Rishton *v.* Whatmore, 8 Ch. D. 468.

(*i*) 11 East, 142. See, also, Fitzmaurice *v.* Bayley, 9 H. L. C. 78; and Crane *v.* Powell, L. R. 4 C. P. 123.

(*k*) 3 A. & E. 370.

dence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases.

So in Laythoarp *v.* Bryant (*l*), in 1836, the Exchequer of Pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, the agreement having been written on the back of a paper containing the terms and conditions.

§ 230. It has been held that the note or memorandum required by the statute need not be addressed to or pass between the parties, but may be addressed *to a third person.* In Gibson *v.* Holland (*m*), decided in 1865, one of the pieces of paper relied on as constituting the written note of the bargain was a letter written by the defendant to his own agent. Held, to be sufficient by Erle, C. J., and Willes and Keating, JJ. This case was decided principally upon the authority of Lord St. Leonards' Treatise on Vendors and Purchasers (*n*), in which he says: "A note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will (subject to the before-mentioned rules) be a sufficient agreement to take a case out of the statute," and on the authorities in the Chancery Reports there cited.

§ 231. No case has arisen under the statute on the question whether the writing is required to be in ink, but there seems to be no reason to doubt that the common-law rule would apply, and that a writing in pencil would be held sufficient to satisfy the 17th section (*o*).

SECTION II. — WHAT IS A SUFFICIENT NOTE OR MEMORANDUM OF THE BARGAIN MADE?

§ 232. After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is, whether the contents of the writing so proven form a sufficient note "of the bargain made."

So far as the 4th section of the statute is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In Wain *v.* Warlters (*p*), which was the case of a promise in writing to pay the debt of a third person, but where the consideration for the promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the statute,

(*l*) 2 Bing. N. C. 735.
(*m*) L. R. 1 C. P. 1; 35 L. J. C. P. 5.
(*n*) At p. 139, par. 39, in 14th ed. See, also, 1 Sm. L. C. p. 334, ed. 1887, notes to Birkmyr *v.* Darnell.
(*o*) See Geary *v.* Physic, 5 B. & C. 234.
(*p*) 5 East, 10.

and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties were to do, not the mere "promise" of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the statute required the whole "agreement," or some note or memorandum of it, to be in writing, the court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient to satisfy the statute. The judges were Lord Ellenborough, C. J., and Grose, Lawrence, and Le Blanc, JJ.

Although this case was strongly controverted, chiefly in the courts of equity, as will be seen by reference to the argument of Taunton in the case of Phillipps *v.* Bateman (*q*), where he sums up all the objections to the decision, it was upheld and followed in subsequent cases (*r*), and the law now remains settled as it was propounded in Wain *v.* Warlters, except so far as guarantees are concerned, in relation to which the legislature intervened and made special provision in 19 & 20 Vict. c. 97, s. 3 (Mercantile Law Amendment Act, 1856).

§ 233. But under the 17th section of the statute the decisions have not maintained so rigorous a construction, and the judges have repeatedly referred to the distinction between the word "agreement" in the fourth section and "bargain" in the seventeenth. The cases will now be considered with reference exclusively to the contract of sale under the latter section, and to the inquiry whether and to what extent it is necessary that the writing should show, 1st, the names of the parties to the sale; 2dly, the terms and subject-matter of the contract.

§ 234. On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him, save to the person to whom the promise was made, and until that person's name is shown it is impossible to say that the writing contains a memorandum of the bargain.

(*q*) 16 East, 356, at p. 368.

(*r*) Saunders *v.* Wakefield, 4 B. & Ald. 595; Jenkins *v.* Reynolds, 3 B. & B. 14; and Lyon *v.* Lamb, there cited at p. 22; Morley *v.* Boothby, 3 Bing. 107; Fitzmaurice *v.* Bayley, 9 H. L. C. 79. And see the authorities under the 4th section collected in Sugden's V. & P. p. 134, 14th ed.

§ 235. In Champion *v.* Plummer (*s*), the plaintiff, by his agent, wrote down in a memorandum-book the terms of a verbal sale to him by the defendant, and the defendant signed the writing, but the words were simply "Bought of W. Plummer, etc.," with no name of the person who bought. Sir James Mansfield, C. J., said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. *It would prove a sale to any other person as well as to the plaintiffs.*"

In Allen *v.* Bennet (*t*), the agreement was written in a book belonging to the plaintiff, and was signed by the defendant's agent. But the plaintiff's name was not in the book, and was not mentioned in the written memorandum. This was considered insufficient, but the defect was afterwards supplied by other writings showing the plaintiff to be the person with whom the bargain was made.

In Williams *v.* Lake (*u*), which was under the 4th section, the defendant wrote a note binding himself as guarantor, and gave it to a third person for delivery. But the name of the person to whom the note was addressed was not written in the note. Held, by all the judges, insufficient to satisfy the statute, and this decision was approved and followed in Williams *v.* Byrnes (*x*).

In Sarl *v.* Bourdillon (*y*), under the 17th section, the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient under the statute.

§ 236. Vandenbergh *v.* Spooner (*z*) was a case in which the facts were peculiar. The plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than 10*l.* The defendant signed this memorandum, "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot." After the defendant had signed this document, he wrote out what he alleged to be a copy of it, which, at his request, the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month." Held, that the note signed by the purchaser, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods so as to identify them, but

(*s*) 1 B. & P. (New Reports), 252.
(*t*) 3 Taunt. 169. See, also, Cooper *v.* Smith, 15 East, 103; and Jacob *v.* Kirke, 2 M. & Rob. 222.
(*u*) 29 L. J. Q. B. 1; 2 E. & E. 349.
(*x*) 1 Moo. P. C. C. N. S. 154.
(*y*) 26 L. J. C. P. 78; 1 C. B. N. S. 188.
(*z*) L. R. 1 Ex. 316; 35 L. J. Ex. 201.

did not mention the plaintiff as *seller* of the goods, and that the memorandum was therefore insufficient.

Newell *v.* Radford (*a*) was in the Common Pleas on these facts. The defendant was a flour dealer, and the plaintiff a baker. The defendant's agent entered in the plaintiff's book the following words: "Mr. Newell, 32 sacks, culasses, at 39*s.* 280 lbs. To await orders. John Williams."

The defendant insisted, on the authority of Vandenbergh *v.* Spooner, that as it was impossible to tell from this memorandum which was buyer and which was seller, the memorandum was insufficient, but the court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the baker was the buyer of the flour. There was also some correspondence referred to, showing who was the buyer and who the seller.

§ 237. But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the statute. But if the writing shows by a description with whom the bargain was made, then the statute is satisfied, and parol evidence is admissible to *apply the description;* that is, not to show with whom the bargain is made, but who is the person described, so as to enable the court to understand the description. This is no infringement of the statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject-matter in controversy.

[The difficulty arises in determining upon the sufficiency of the description given in each particular case. There have been numerous decisions on this point. Thus, it was held by Jessel, M. R., in a case under the 4th section, that a vendor was sufficiently described by the term "proprietor," there being but one (*b*). The description is then, in the language of Lord Cairns, "a statement of matter of fact, as to which there can be perfect safety, and none of the dangers struck at by the Statute of Frauds can arise" (*c*). On the other hand, the descriptions "vendor" or "client" or "friend" of a named agent have been held to be insufficient (*d*), the reason being that, in order

(*a*) L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*b*) Sale *v.* Lambert, 18 Eq. 1; and Rossiter *v.* Miller, 46 L. J. Ch. 228; 5 Ch. D. 648, C. A.; S. C. 3 App. Cas. 1124, reversing the C. A. upon another point. See, also, Commins *v.* Scott, 20 Eq. 11; Catling *v.* King, 5 Ch. D. 660, C. A.

(*c*) In Rossiter *v.* Miller, 3 App. Cas. at p. 1141.

(*d*) Potter *v.* Duffield, 18 Eq. 4; Jarrett *v.*

to identify the contracting party from the description, it would be necessary to rely upon parol evidence on which there might possibly be a conflict.

In every case there must be sufficient evidence to identify from the description, and, to use the language of Jessel, M. R., in Commins *v.* Scott (*e*), "the court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury would not identify."]

§ 238. The cases in which this principle has been most clearly illustrated are those which arise in a very common course of mercantile dealing, where an agent signs a contract in his own name and without mentioning his principal.

It is settled that though in dealings of this kind it is not competent for the agent thus contracting to introduce parol proof to show that he did not intend to bind himself, because this would be to contradict what he had written, it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name.

[But a commission agent acting here for a foreign principal is not, in the absence of express authority, entitled to pledge the foreign principal's credit. In such a case the agent renders himself personally liable, and the foreign principal cannot sue or be sued upon the contracts entered into by the agent (*f*). This apparent exception to the rule arises from the peculiar character of the relationship existing between the commission agent and his foreign constituent, a relationship which for some purposes is treated as one, or analogous to one, of vendor and vendee (*g*). It is for this reason that the commission agent, after shipment of the goods, is in the position of a vendor, and may exercise the right of stoppage *in transitu* upon the insolvency of his foreign constituent. See *post*, Book V. Part I. Ch. 5, sec. 1, *Stoppage in Transitu*, §§ 828–868 a.]

In Trueman *v.* Loder (*h*), the defendant was sued on a broker's sold note in these words: "London, 28th April, 1835. Sold for Mr. Edward Higginbotham, etc., etc." The proof was that in 1832 the

Hunter, 34 Ch. D. 182. See the *dicta* of the judges in Thomas *v.* Brown, 1 Q. B. D. 714, and the remarks of Jessel, M. R., dissenting therefrom in Rossiter *v.* Miller, reported in 46 L. J. Ch. 228, at p. 232.

(*e*) 20 Eq. at p. 16.

(*f*) Armstrong *v.* Stokes, L. R. 7 Q. B. 598, *per cur.*, at p. 605; Elbinger Co. *v.* Claye, L. R. 8 Q. B. 313; Hutton *v.* Bulloch, Ibid. 331, affirmed in Ex. Ch. L. R. 9 Q. B. 572.

(*g*) See the opinion of Blackburn, J., in Ireland *v.* Livingston, L. R. 5 H. L. at p. 408; and Cassaboglou *v.* Gibb, 11 Q. B. D. 797, C. A., where Lord Blackburn's language is examined and explained by Brett, M. R., at p. 803, and Fry, L. J., at p. 807.

(*h*) 11 A. & E. 589.

defendant, a merchant of St. Petersburg, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit under his instructions. The case was argued by very able counsel in Michaelmas Term, 1838, and the judges took time to consider till the ensuing term, when Lord Denman delivered the opinion of the court, composed of himself and Patteson, Williams, and Coleridge, JJ. On the question made, that the name of the defendant was not in the written contract, the court said: "Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own" (*i*).

§ 239. The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving that he did not intend to bind himself, but only his principal, is Higgins *v.* Senior (*k*), decided in the Exchequer in 1841, in which also the judges took time to consider until the ensuing term, when Parke, B., delivered the judgment of the court, composed of himself and Alderson, Gurney, and Rolfe, BB. The opinion states the question submitted to be: "Whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant and to be subscribed by him, for the sale and delivery by him of goods above the value of 10*l.*, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when this agreement was made and signed." Held, in the negative. The learned Baron then proceeded to lay down the principles on which this conclusion was reached, as

(*i*) See, also, 2 Sm. L. C. ed. 1887, in notes to Thompson *v.* Davenport, p. 408 *et seq.*; and Calder *v.* Dobell, L. R. 6 C. P. 486, 499.

(*k*) 8 M. & W. 834.

follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal.

"But, on the other hand, to allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done" (*l*).

§ 240. Where the broker bought expressly for his principals, but without disclosing their names in the sold note, he was held liable to the vendor on evidence of usage that the broker was liable personally when the name of the principal was not disclosed at the time of the contract (*m*).

In Fleet *v.* Murton (*n*), the contract note was, "We have this day sold for your account to our principal," (Signed) M. & W., Brokers; and the brokers were held personally liable on proof of usage of the trade to the same effect as that given in Humfrey *v.* Dale (*m*).

§ 241. [Somewhat similar customs have been alleged and proved to exist in the shipping trade, in the case of a charter party (*o*), in the London dry goods market (*p*), in the London rice trade (*q*), and in the hop trade (*r*). An attempt to prove a similar custom

(*l*) See 2 Sm. L. C. p. 408, ed. 1887, in notes to Thompson *v.* Davenport, where the whole subject is more fully treated than comports with the design of the present treatise.

(*m*) Humfrey *v.* Dale, 7 E. & B. 266; E. B. & E. 1004; 26 L. J. Q. B. 137; 27 L. J. Q. B. 390. See, also, Tetley *v.* Shand, 20 W. R. 206; 25 L. T. N. S. 658.

(*n*) L. R. 7 Q. B. 126.

(*o*) Hutchinson *v.* Tatham, L. R. 8 C. P. 482, where the reasons for the existence of such a custom are explained by Bovill, C. J., at p. 485.

(*p*) Imperial Bank *v.* London and St. Katharine Dock's Company, 5 Ch. D. 195.

(*q*) Bacmeister *v.* Fenton, 1 Cababé & Ellis, 121.

(*r*) Pike *v.* Ongley, 18 Q. B. D. 709, C. A. In this case the custom alleged was, that if the principal was not disclosed *at the time of making the contract*, the broker is in fact regarded as the principal, and is held liable. The Divisional Court held that evidence of the primary liability of the brokers would contradict the written document, and was therefore inadmissible; but the Court of Appeal came to the conclusion that the meaning of the evidence was, not that the principal was discharged from liability, but that the liability of the broker was superadded, which was not inconsistent with the contract. Some remarks of Lord Esher (then Brett, J.), in Hutchinson *v.* Tatham, L. R. 8 C. P. at p. 487, in apparent conflict with this decision, were expressly withdrawn by that learned judge.

upon the London Stock Exchange fell short of satisfying a special jury (*s*).

The decisions in all these cases turned upon the evidence of usage, and in Humfrey *v.* Dale, in the Exchequer Chamber, there was much difference of opinion among the learned judges as to whether the evidence of usage was explanatory or contradictory of the written document, it being conceded that, if explanatory, it was admissible, if contradictory, inadmissible (*t*).

It is clear that, in the absence of satisfactory evidence of such usage, the law is that a broker as such, merely dealing as a broker, makes a contract between the buyer and seller, and does not render himself liable either as purchaser or seller of the goods (*u*).

And the evidence is, as before said, inadmissible where it is inconsistent with any clause in the contract (*x*).]

In Robinson *v.* Mollett (*y*), the circumstances were these: The plaintiffs, tallow brokers, were employed by the defendant to purchase 50 tons of tallow in the London market, and had like orders from other purchasers. The plaintiffs bought in their own names, without disclosing their principals, tallow enough for all the orders which they had received, and divided it among the principals who had employed them, — sending to the defendant a bought note, signed by themselves as "sworn brokers," stating 50 tons of tallow to have been bought "for his account," with quality, price, etc., but no vendor's name given. There was no corresponding sold note delivered to any one, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage of the London market; but the defendant was not aware of the usage, and refused to accept the tallow when he learned how the business had been conducted. Held, in the Common Pleas, by Bovill, C. J., and Montague Smith, J., that the defendant was bound to accept; by Willes and Keating, JJ., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale to the defendant without the latter's consent, and there was no other principal

(*s*) Wildy *v.* Stephenson, 1 Cababé & Ellis, 3.

(*t*) See explanation and discussion of Humfrey *v.* Dale, and Fleet *v.* Murton, by Jessel, M. R., in Southwell *v.* Bowditch, 45 L. J. Q. B. at p. 632; and the remarks of Brett, J., in Hutchinson *v.* Tatham, L. R. 8 C. P. at p. 487.

(*u*) Fairlie *v.* Fenton, L. R. 5 Ex. 169; Fleet *v.* Murton, L. R. 7 Q. B. 126, per Blackburn, J., at p. 131; Southwell *v.* Bowditch, 1 C. P. D. 374, C. A.; reversing the decision of the Divisional Court, Ibid. 100; S. C. 45 L. J. Q. B. 374, 630. The judgment of Jessel, M. R., is given at greater length in the Law Journal Report.

(*x*) Barrow *v.* Dyster, 13 Q. B. D. 635, where an unsuccessful attempt was made to argue that the custom, being annexed to the employment of the broker, and not to the contract or sale, was not inconsistent with that contract.

(*y*) L. R. 7 H. L. 802, reversing S. C. L. R. 7 C. P. 84, and L. R. 5 C. P. 648.

than the plaintiffs. In the Exchequer Chamber, Kelly, C. B., Channell, B., and Blackburn, J., agreed in opinion with Bovill, C. J., and Smith, J., while Mellor and Hannen, JJ., and Cleasby, B., were of the opposite opinion.

[The judgments of the Court of Common Pleas and of the Exchequer Chamber were unanimously reversed by the House of Lords (*z*). It is now, therefore, settled law that when the usage of trade set up is such as goes to alter the *intrinsic character* of the contract, as *e. g.* in Mollett *v.* Robinson, by converting a broker, employed to buy for his employer, into a principal to sell to him (*a*), such usage will not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him on the particular market where it prevails (*b*).]

§ 242. Where a broker gives a contract note describing himself as acting for a named principal, he cannot sue personally on the contract (*c*). And *semble*, not even if principal was undisclosed (*d*).

But if the broker contract in his own name, even though he is known to be an agent, he may sue or be sued on the contract (*e*). [And the same rules apply to auctioneers (*f*).]

And if the broker, though signing as broker, be really the principal, his signature will not bind the opposite party (*d*), and he [the broker] cannot sue on the contract (*d*).

Where a person describes himself as agent in the body of the contract but signs his own name, he is personally liable on the contract (*g*).

§ 242 a. [There has been a long series of decisions upon this subject, which are not all consistent, and the law is not in a very satisfactory state. According to the earlier authorities, it required very strong internal evidence to rebut the presumption of liability arising from an unqualified signature of the contract; while the later authorities appear to warrant the proposition that, in the absence of usage, the question is one of the construction of the contract as a whole, together with all the surrounding circumstances, and that the signature being made without qualification is only one fact to be considered in construing

(*z*) L. R. 7 H. L. 802, *sub nom.* Robinson *v.* Mollett. Of the learned judges summoned by the house, who had previously expressed an opinion on the case, Brett and Grove, JJ., dissented from, and Amphlett, J., supported, the judgments of the court below. The opinion of Brett, J., will well repay perusal.

(*a*) As to which see Waddell *v.* Blockey, 4 Q. B. D. 678, C. A., and *per cur.* in De Bussche *v.* Alt, 8 Ch. D. 286, C. A.

(*b*) See per Lord Chelmsford in L. R. 7 H. L. at p. 832.

(*c*) Fawkes *v.* Lamb, 31 L. J. Q. B. 98; Fisher *v.* Marsh, 6 B. & S. 416, per Blackburn, J., 34 L. J. Q. B. 178; Bramwell *v.* Spiller, 21 L. T. N. S. 672; Fairlie *v.* Fenton, L. R. 5 Ex. 169.

(*d*) Sharman *v.* Brandt, L. R. 6 Q. B. 720, in Ex. Ch.

(*e*) Short *v.* Spackman, 2 B. & Ad. 962; Jones *v.* Littledale, 6 A. & E. 486; Reid *v.* Dreaper, 6 H. & N. 813; 30 L. J. Ex. 268.

(*f*) Franklyn *v.* Lamond, 4 C. B. 637; Fisher *v.* Marsh, 6 B. & S. 411; 34 L. J. Q. B. 177; Woolfe *v.* Horne, 2 Q. B. D. 355.

(*g*) Paice *v.* Walker, L. R. 5 Ex. 173, and cases there cited.

the contract. It is beyond the scope of this treatise to discuss the subject at length, but in the note *infra* (*h*) will be found most of the decisions relating thereto in order of date.

Where the signature of the agent is followed by qualifying language, his freedom from liability is undoubted (*i*), And where the agent is a broker or middleman, the presumption is that, though he has signed without qualification, he intended only to make a contract between the parties, and in the absence of proof of usage he will not be held personally liable (*k*).]

§ 243. An extremely able discussion on the subject of a broker's responsibility is found in the remarkable case of Fowler *v.* Hollins (*l*). The facts were that the plaintiffs, after refusing to sell to a broker personally, sold thirteen bales of cotton to him on his stating that he was acting for a principal, and the sale note was made to the principal. This was a fraud of the broker, who had no authority from the principal, and the broker immediately resold the cotton for cash to the defendants, who were also brokers, and were really acting for principals (*m*), but who took a purchase note in their own names, addressed to themselves as follows: "We sell you," etc. The defendants on the same day sent a delivery order for the cotton in favor of their principals, whom they named in the order, and paid for it. They were reimbursed the price by their principals, together with their commissions and charges. All these transactions took place on the 23d of

(*h*) Macbeath *v.* Haldimand (1786), 1 Term R. 182; Appleton *v.* Binks (1804), 5 East, 148; Burrell *v.* Jones (1819), 3 B. & Ald. 47; Iveson *v.* Conington (1823), 1 B. & C. 160; Norton *v.* Herron (1825), Ry. & Moo. 229; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Tanner *v.* Christian (1855), 4 E. & B. 591; Lennard *v.* Robinson (1855), 5 E. & B. 125; 24 L. J. Q. B. 275; Cooke *v.* Wilson (1856), 1 C. B. N. S 153; Parker *v.* Winslow (1857), 7 E. & B. 943; Oglesby *v.* Yglesias (1858), 27 L. J. Q. B. 356; Paice *v.* Walker (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109; Weidner *v.* Hoggett (1876), 1 C. P. D. 533; Gadd *v.* Houghton (1876), 1 Ex. D. 357, C. A.; Adams *v.* Hall (1877), 37 L. T. N. S. 70; Ogden *v.* Hall (1879), 40 L. T. N. S. 751; Hough *v.* Manzanos (1879), 4 Ex. D. 104; Hutcheson *v.* Eaton (1884), 13 Q. B. D. 861, C. A. The decision in Gadd *v.* Houghton, which is the most recent case in which this question engaged the attention of the Court of Appeal (for it was not the principal point decided in Hutcheson *v.* Eaton), appears to be inconsistent with Tanner *v.* Christian, Lennard *v.* Robinson, Parker *v.* Winslow, and Weidner *v.* Hoggett; and although Paice *v.* Walker is distinguished, and was upon that ground followed with reluctance by Pollock, B., in Hough *v.* Manzanos, yet, after the *dictum* of James, L. J., in Gadd *v.* Houghton, that "the decision in that case ought not to stand," Paice *v.* Walker can only be looked upon as of very doubtful authority. The reader is also referred upon this subject to the notes to Thompson *v.* Davenport, 2 Smith's Leading Cases, at p. 417 (ed. 1887).

(*i*) Deslandes *v.* Gregory, 2 E. & E. 602; S. C. in error, Ibid. 610.

(*k*) Humfrey *v.* Dale, 7 E. & B. 266; E. B. & E. 1004; Fleet *v.* Murton, L. R. 7 Q. B. 126, per Blackburn, J., at p. 131, as explained by Jessel, M. R., in Southwell *v.* Bowditch, 1 C. P. D. 374, C. A.; reversing the decision of the Divisional Court, Ibid. 100. See, also, S. C. 45 L. J. Q. B. 630, 631, where the judgment of Jessel, M. R., is reported at greater length.

(*l*) L. R. 7 Q. B. 616.

(*m*) This is not quite correct. At the time of the sale to them by Bayley, the frandulent broker, the defendants had no principals. See *post*, § 243 a.

December, 1869. The cotton was at once sent by the defendants to the railway station, whence it was taken to the mills of the principals at Stockport, and there manufactured into yarn. On the 10th of January, 1870, the defendants received a letter from the plaintiffs stating the fraud that had been committed on them, and demanding delivery back to themselves of the cotton. This was the first intimation to the defendants that any fraud had been committed on the plaintiffs, and they replied to the plaintiffs' demand, saying: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas & Co., for cash, and has been made into yarn long ago, and, as everything is settled up, we regret we cannot render your clients any assistance."

The plaintiffs thereupon brought trover, and it was left to the jury by Willes, J., to say whether the defendants had acted only as agents in the course of the business, and whether they had dealt with the goods only as agents for their principals. The jury found these facts in favor of the defendants, and a verdict was entered for them with leave reserved to the plaintiffs to move to enter a verdict for the value of the thirteen bales. The rule was made absolute in the Queen's Bench (Mellor, Lush, and Hannen, JJ.); and in the Exchequer Chamber the judgment was affirmed by Martin, Channell, and Cleasby BB. (diss. Kelly, C. B., and Byles and Brett, JJ.).

The reason given for affirming the judgment was that, although the defendants had acted as brokers, they had assumed the responsibility of principals by dealing in their own names for an undisclosed principal; Martin and Channell, BB., being also of opinion that the plaintiffs were entitled to recover whether the defendants had acted as principals or agents, and that the "facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley [the fraudulent broker], whether it was to the defendants or to Micholls. I think they are entitled to treat the defendants as wrongdoers, wrongfully intermeddling with their cotton, which they had no legal right to touch; and that when they removed the cotton from the warehouse where it was deposited to the railway station, to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a conversion." Per Martin, B., pp. 634–5.

Brett, J., on the other hand, delivered a powerful judgment, which the Chief Baron characterized as "logical and exhaustive," and in which both he and Byles, J., concurred. The following passages are extracted as a very instructive exposition of the subject under consideration: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract

which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as *his*, but only because it is in contemplation of law the signature of *one or both of the principals*. No effect passes *out of the broker* to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed he passes it to the vendee. In so doing, he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other. He is throughout merely the negotiator between the parties; and therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there was some fraud on their part (Story on Agency, sec. 30). And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a document [*i. e.* the delivery order], without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf or on behalf of any one else. Obedience or disobedience to the contract, and its effect upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and in no way within his cognizance. Under such circumstances and so far, it seems to me clear that a broker cannot be sued with effect by any one. If

goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say that for such a delivery he could be held liable by the real owner of the goods for a wrongful conversion. But then in some cases a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so, also, may his undisclosed principal; and, although the agent *may be liable upon the contract*, yet I apprehend *nothing passes to him by the contract.* The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable *as a contractor on the contract*, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor — even though the contract should be in a form which passes property in goods by the contract itself — by a *third person*, as if he, the broker, were the owner of the goods; as if, for instance, the goods were a nuisance or an obstruction, or as it were trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal till then undisclosed. If he could not be sued *for any other tort*, merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely *on that ground* by the real owner of the goods as for a wrongful conversion of the goods to his own use." The learned judge then, after a review of the authorities upon the subject of conversion (*o*), further held that the mere *asportation* of the goods through the agency of the defendants *before knowledge* of the plaintiff's claim or rights was not sufficient to constitute a conversion, because unaccompanied with any *intention* to deprive the plaintiff of the goods, though that

(*o*) See, on Conversion, Stephens *v.* Elwall, 4 M. & S. 259; Hardman *v.* Booth, 1 H. & C. 803; both of which cases were approved and followed by the House of Lords in Hollins *v.* Fowler, *supra;* and England *v.* Cowley, L. R. 8 Ex. 126. As to an auctioneer's liability for conversion, see Cochrane *v.* Rymill, 40 L. T. N. S. 744; 27 W. R. 776; and Turner *v.* Hockey, 56 L. J. Q. B. 301.

asportation would have been a conversion if made *after* notice of the plaintiff's claim.

§ 243 a. [This case was carried on appeal to the House of Lords (*p*), and the learned judges were summoned. Of those who attended, the majority (Blackburn, Mellor, and Grove, JJ., and Cleasby, B.) were in favor of affirming the decision of the courts below, while Brett, J., again delivered a dissentient opinion, in which Amphlett, B., concurred. Their lordships unanimously affirmed the judgments of the Court of Queen's Bench and of the Exchequer Chamber. Some difficulty arose in considering the effect which ought to be given to the findings of the jury at the trial. The jury had found, as we have already seen, that the cotton was bought by the defendants *as agents in the course of their business as brokers*, and that they had dealt with it only as agents to their principals. In point of fact the defendants had no principals at the time when they purchased the goods, although they intended them for Micholls & Co.; but it was only after the completion of the contract that Micholls & Co. adopted it. There was evidence at the trial that, in the course of their business as brokers, the defendants purchased cotton in the expectation of being able to find a client to take it off their hands, although they never intended to retain the goods as principals, but to pass them on to the purchaser when found, receiving their broker's commission on the sale. All their lordships explained the findings of the jury with regard to this course of dealing (*q*), and held that, as the defendants had at the time of the sale assumed the responsibility of principals, they had by the transfer of the goods to Micholls & Co. exercised an act of dominion over them which was inconsistent with the rights of the plaintiffs, the true owners, to whom, therefore, they were liable for conversion.

Lord Cairns says (at p. 797): "I agree with what is said by Mr. Justice Grove, that the jurors appear to have meant that the appellants never bought intending to hold or to make a profit, but with a view to pass the goods over to Micholls & Co., or, if Micholls & Co. did not accept them, to some other customer, and that therefore, in one sense, they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods, or dealing with them as buyers and sellers. But, as Mr. Justice Grove continues, 'this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act and did act

(*p*) L. R. 7 H. L. 757; reported *sub nom.* Hollins *v.* Fowler.

(*q*) Per Lord Chelmsford, at p. 794; per Lord Cairns, at p. 796; per Lord Hatherley, at p. 798; per Lord O'Hagan, at p. 800.

in one respect as brokers, not making a profit by resale, but only getting brokers' commission, they did not intend to act, and did not act, in relation to the sellers, in a character beyond mere intermediates, and not as mere conduit pipes.' In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents; they exercised a volition in favor of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion."

It should be remarked, with regard to the judgment of Brett, J., delivered in the Exchequer Chamber, *ante*, § 243, that although their lordships differed from that learned judge in the interpretation which they gave to the findings of the jury, the effect of their opinions in no way detracts from the value of that judgment as an exposition of the law as to brokers' liabilities.]

§ 244. Where a party contracts in writing as agent for a non-existent principal he will be personally bound, and no subsequent ratification by the principal afterwards coming into existence can change this liability, nor is evidence admissible to show that a personal liability was not intended. Thus, in Kelner *v.* Baxter (*r*), the plaintiff wrote to the three defendants, addressing them "on behalf of the proposed Gravesend Royal Alexandria Hotel Company, Limited," proposing to sell certain goods for 900*l.*, which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandria Hotel Company, Limited," and the goods were thereupon delivered and consumed by the company, which was not incorporated till after the date of the contract, and which ratified the purchase made on its behalf. It was held that the defendants were personally liable, because there was no principal existing at the date of the contract, for whom they could by possibility be agents, and that for the same reason no ratification was possible; that the company might have bound itself by a *new* contract to buy and pay for the goods, but such new contract would require the assent of the vendor, who could not be deprived of his recourse against those who dealt with him by any action of the company to which he was no party; and that parol evidence was not admissible to affect the inferences legally resulting from the written contract.

§ 244 a. [The decision in Kelner *v.* Baxter appears open to criticism. From a consideration of the written contract, it is manifest that it was the intention, both of the plaintiff and the defendants, that the contract was to be between the plaintiff and the proposed

(*r*) L. R. 2 C. P. 174. See, also, Scott *v.* Lord Ebury, L. R. 2 C. P. 255.

Gravesend Royal Alexandria Hotel Company, Limited, and it is difficult to conceive what stronger language could have been found to express that intention. The company having no existence, the agreement failed to become effectual. But the evidence was clear that the goods were handed over to the company and consumed by them in the business of the hotel, and as was pointed out by Byles, J., *arguendo* (at p. 179), this would have rendered them liable upon a *quantum meruit* (*s*). But the company having collapsed, it was necessary for the plaintiff, in order to recover the price of the goods, to make his claim against the defendants. The judgment must, it is conceived, be confined to the facts of the particular case, and does not warrant the broad proposition stated in the head-note, that "where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable upon it." Such a state of facts may give rise to an action against the agent (*t*) for false representation, or for breach of warranty of authority to enter into a contract, but cannot, it is submitted, render him liable as principal, where that was not the intention of the contract.

This appears to have been the view taken by Watkin Williams, J., in Hollman *v.* Pullin (*u*), where, however, Kelner *v.* Baxter is distinguished. In that case an agreement had been entered into between the plaintiff "as chairman, and on behalf of the Tunbridge Wells, etc., Association," and the defendant, whereby the latter, in consideration of his appointment as medical officer to the association, covenanted, *inter alia*, not to practise within a prescribed area after leaving the service of the association, and the plaintiff agreed, on behalf of the association, to pay the defendant the amount of salary and other fees, and the document was signed "F. B. Pullin, James Hollman, chairman." The association was one requiring registration under the Friendly Societies Act, and was not so registered. Pullin afterwards left the service of the association, and practised within the prescribed area. The plaintiff, "as chairman of and on behalf of the association," claimed an injunction to restrain the defendant from practising as a medical practitioner contrary to the terms of the agreement, and it was contended on his behalf that, inasmuch as the association was

(*s*) See, also, upon this point, In re Hereford and South Wales Waggon Company, 2 Ch. D. 621, C. A., at p. 624, and the observations of James, L. J., In re Empress Engineering Company, 16 Ch. D. 125, at p. 130, where the same result is stated upon equitable grounds.

(*t*) Collen *v.* Wright, 8 E. & B. 647; 27 L. J. Q. B. 217; and see a valuable note appended by the learned reporter to the case of Hollman *v.* Pullin, Cababé & Ellis, at p. 259.

(*u*) Cababé & Ellis, 254.

without any legal existence, and without any capacity to covenant according to law, the covenant must be regarded as having been made by and with the plaintiff personally, and Kelner *v.* Baxter was cited as an authority for that contention.

Williams, J., in giving judgment for the defendant, said (at p. 256): "There is, however, no authority for laying down such a proposition as a rule of law. If an alleged agent professes to conclude a covenant in the name and on behalf of an alleged principal, and without using language expressing that he contracts personally, no rule of law can convert his position into that of a contracting party, by reason only of there not having been at the time any principal in existence who could be bound. The agent may be liable for a false representation, or for a breach of warranty of authority, if the true facts would sustain either cause of complaint."]

§ 245. We now come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject-matter of the contract, in order to be deemed a sufficient note or memorandum "of the bargain."

It has already been seen that the decisions establish the necessity under the fourth section of proving the whole "agreement" in writing, in order to satisfy the statute. Independently of authority, one would think that "bargain" and "agreement" are words so identical in meaning, when applied to a contract for the sale of goods, as to admit of no possible distinction; but the authorities do, nevertheless, distinguish them in a manner too plain to permit a doubt as to the law.

§ 246. In Egerton *v.* Mathews (*x*), the plaintiff had been nonsuited at Guildhall, by Lord Ellenborough, on the authority of Wain *v.* Warlters (*y*). The writing was, "We agree to give Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete." It was signed and dated.

Lord Ellenborough is reported, when granting a rule *nisi*, to have assented to a distinction between the two cases, and to have said on cause shown: "This was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires." This last expression would seem to indicate that the difficulty in his Lordship's mind was, that the bargain was not complete because the plaintiff had not signed (a point not fully settled by authority till 1836, in Laythoarp *v.* Bryant (*z*), as will be seen hereafter (*a*)).

(*x*) 6 East, 307.
(*y*) 5 East, 10.
(*z*) 2 Bing. N. C. 735; 3 Scott, 238.
(*a*) *Post*, § 255.

But Lawrence, J., said: "The case of Wain *v.* Warlters proceeded on this, that, in order to charge one man with the debt of another, the *agreement* must be in writing, which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* made by, the party to be so charged." The learned judge, however, did not explain why the word "bargain" does not also include the terms on both sides, as was observed by Holroyd, J., when he said: "It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it;" and by Bayley, J., when he held in the same case (*b*) that the language of the two sections of the statute was in substance the same, and that the word "*bargain*" means "the terms upon which parties contract."

In Hinde *v.* Whitehouse (*c*), the memorandum consisted of the auctioneer's catalogue, signed by him as agent of both parties, showing the goods sold, their marks, weight, and price; but the court held this insufficient, because there was another paper containing the conditions of the sale, which had been read, but was not made a part of the written note of the bargain by internal evidence contained in the signed paper.

In Laythoarp *v.* Bryant (*d*), in 1836, which was on the 4th section, Tindal, C. J., said: "Wain *v.* Warlters was decided on the express ground that an agreement under the 4th section imports more than a bargain under the 17th." Park, J., said: "The cases on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the 4th."

In Sarl *v.* Bourdillon (*e*), the written note was for the sale of "candlesticks, complete." It was proven that the parol bargain was that the candlesticks should be furnished with a gallery to carry a shade, and defendant insisted that the written note was insufficient; but after time to consider, the decision of the court was delivered by Cresswell, J., who said: "We do not feel obliged to yield to this argument. The memorandum states all that *was to be done by the person charged*, viz., the defendant, and, according to the case of Egerton *v.* Mathews (*f*), that is *sufficient to satisfy the* 17*th* section of the Statute of Frauds, though *not to make a valid agreement in cases within the* 4*th section.*"

§ 247. In Elmore *v.* Kingscote (*g*), there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from defendant to plaintiff, in the following words: "Mr. Kingscote begs to inform

(*b*) Kenworthy *v.* Schofield, 2 B. & C. 948.

(*c*) 7 East, 558. See, also, Peirce *v.* Corf, L. R. 9 Q. B. 210; Rishton *v.* Whatmore, 8 Ch. D. 467.

(*d*) 2 Bing. N. C. 735; 3 Scott, 238.

(*e*) 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(*f*) 6 East, 307.

(*g*) 5 B. & C. 583.

Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The court held this insufficient, saying, "The price agreed to be paid constituted a material part of the bargain."

In Ashcroft *v.* Morrin (*h*), defendant ordered certain goods to be sent him, saying, "Let the quality be fresh and good, and on moderate terms." On objection made that the price was not stated, the court said: "The order is to send certain quantities of porter and other malt liquor, on moderate terms. Why is not that sufficient? That is the contract between the parties;" and set aside the nonsuit according to leave reserved.

In Acebal *v.* Levy (*i*), there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. Plaintiff, not being successful in establishing the validity of the contract by satisfactory proof of delivery and acceptance, then attempted to support his case by a letter which did not state the price, and by insisting that a contract of sale was valid without statement of price, because the law would imply a promise to pay a reasonable price. But the court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient to satisfy the statute.

§ 248. In Hoadly *v.* M'Laine (*k*), the same court was called on to decide, in the ensuing term, the very point which had been left undetermined in Acebal *v.* Levy. The defendant gave plaintiff an order in these words: "Sir Archibald M'Laine orders Mr. Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments, etc., . . . the whole to be ready by the 1st of March, 1833." Nothing was said about price. The judges were all of opinion that, as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal, C. J., said: "This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park, J., said: "It is only necessary that price should be mentioned *when price is one of the ingredients of the bargain*, . . . and it is admitted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient."

(*h*) 4 M. & G. 450.

(*i*) 10 Bing. 376; and see Jeffcott *v.* North British Oil Company, 8 Ir. R. C. L. 17.

(*k*) 10 Bing. 482.

In Goodman *v.* Griffiths (*l*), the plaintiff showed defendant an invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote an order: "Please to put to my account four mechanical binders," and signed it. Held that, as there had been a parol agreement as to price, which was not included in the note of the bargain, the statute was not satisfied.

§ 249. It is plainly deducible from the foregoing decisions that, so far as price is concerned, the rule of law is, that, where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the statute; and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price.

§ 250. As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the court to understand what they actually were, in order to satisfy the statute.

§ 251. It has already been shown that, where these terms are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not contradictory (*m*). In Jackson *v.* Lowe (*n*), and Allen *v.* Bennet (*o*), the different writings were held consistent, so as to form a sufficient memorandum, while the reverse was held as to the written evidence offered in Cooper *v.* Smith (*p*), Richards *v.* Porter (*q*), Smith *v.* Surman (*r*), and Archer *v.* Baynes (*s*).

In Thornton *v.* Kempster (*t*), the broker's bought note described the article bought as "sound and merchantable Riga Rhine hemp," and the sold note as "St. Petersburg clean hemp," the former description being of an article materially different in quality and value from the latter. Held, that the *substance of the contract* was not shown by the written bargain evidenced by two papers that materially varied from each other.

In Archer *v.* Baynes (*s*), the court held the correspondence between the parties an insufficient note of the bargain, because not containing all the terms of the contract. The court say of the defendant: "It

(*l*) 26 L. J. Ex. 145, and 1 H. & N. 574.
(*m*) *Ante.*
(*n*) 1 Bing. 9.
(*o*) 3 Taunt. 169.
(*p*) 15 East, 103.
(*q*) 6 B. & C. 437.
(*r*) 9 B. & C. 561.
(*s*) 5 Ex. 625; 20 L. J. Ex. 54; Haughton *v.* Morton, 5 Ir. C. L. R. 329.
(*t*) 5 Taunt. 786.

is clear, from the letters, that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing."

In Valpy *v.* Gibson (*u*), in which the Statute of Frauds was not in question, it was contended on behalf of the plaintiffs that the terms of the contract did not appear, because the mode and time of payment had not been specified. But the court said: "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." And the court held, in the case before it, that the contract between the parties was one of the nature above described, and was valid.

[But if the mode of payment has been agreed upon, it must be mentioned in the memorandum. In Mahalen *v.* Dublin and Chapelizod Distillery Company (*x*), there had been a parol agreement for the purchase of whiskey, the purchaser to have the option of paying in cash or by his acceptance at four months, and the exact quantity of the whiskey was to be ascertained by re-dip. Invoices were made out which represented the sales to be for "net cash," and of an ascertained quantity of whiskey. It was held by the Court of Queen's Bench in Ireland that the invoices did not contain the material terms of the bargain within the meaning of the statute (*y*).]

§ 252. It was decided in the Common Pleas, in opposition to the intimation of opinion in Blackburn on Sale (*z*), that a letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain to satisfy the 17th section. In Bailey *v.* Sweeting (*a*), the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which

(*u*) 4 C. B. 837.

(*x*) 11 Ir. R. C. L. 83.

(*y*) The 13th section of the Irish Statute of Frauds (7 Will. III. c. 12) corresponds with the 17th section of the English Act.

(*z*) Page 66. In Buxton *v.* Rust (in Ex. Ch.), L. R. 7 Ex. at p. 282, Blackburn, J., stated that the point in question has been settled by the decisions of the Common Pleas in Bailey *v.* Sweeting, and Wilkinson *v.* Evans, *supra*, and assented to the rule as there laid down, as being, in his opinion, as logical and more convenient than that suggested by himself.

(*a*) 30 L. J. C. P. 150; 9 C. B. N. S. 843.

goods I have never received, and have long since declined to have, for reasons made known to you at the time," etc., etc. Erle, C. J., in his opinion, said the letter "in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney-glasses at the sum of 38*l.* 10*s.* 6*d.*, but I decline to have them because the carrier broke them.' Now the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that, if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned Chief Justice then referred to the passage from Blackburn on Sale, and declared his inability to assent to it, and in this the other judges, Williams, Willes, and Keating, concurred (*b*).

In Wilkinson *v.* Evans (*c*), the defendant also refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." Held, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Nonsuit set aside.

[In Elliott *v.* Dean (*d*), the plaintiff sent to the defendant an invoice containing all the terms of the contract. The defendant thereupon wrote: "I return invoice that you sent us. I must also inform you that it is no use now. We have cancelled the order, and I shall be surprised if you persist in sending either the spun or the invoice again, for we shall not have it under any circumstances whatever." Held, that this constituted a sufficient note or memorandum of the bargain, and that the true test was whether the defendant by his writing recognized and adopted the writing as embodying the terms which the parties had previously agreed upon.

In the Leather-Cloth Company *v.* Hieronimus (*e*), the defendant wrote a letter admitting the purchase, and referred to the plaintiff's letter containing the invoice, but repudiated any liability because the goods had been sent by a wrong route, and it was held that there was a sufficient note of the bargain to satisfy the 17th section.]

§ 253. A note or memorandum of the bargain is sufficient, although it contain a mere proposal, if supplemented by parol proof of accept-

(*b*) See *ante*, remarks on Richards *v.* Porter, § 227.

(*c*) L. R. 1 C. P. 407; 35 L. J. C. P. 224.

(*d*) Cababé & Ellis, 283.

(*e*) L. R. 10 Q. B. 140. [And see Leadlay *v.* M'Roberts, 13 Ont. App. 383; Hanbner *v.* Martin, 22 Ont. App. 468 (1895), a valuable case; affirmed in 26 Can. S. C. R. 142, where the defendant's letter and an invoice therein referred to contained all the terms of the sale, but the writer denied the authority of the agent who had acted in the matter. It was held that the case was taken out of the statute. Taylor *v.* Smith [1893], 2 Q. B. 65. — B.]

ance. This had been held, by Kindersley, V. C., in Warner *v.* Willington (*f*), and that case was followed by the Court of Common Pleas, in Smith *v.* Neale (*g*), and by the Exchequer, in Liverpool Borough Bank *v.* Eccles (*h*). The question came before the Exchequer Chamber in Reuss *v.* Picksley (*i*), and after full argument the judges, six in number, unanimously confirmed the cases just cited, and expressed their approval of the reasoning of the Vice-Chancellor in Warner *v.* Willington.

[And the same rule has been applied, after much consideration, in America (*k*).]

§ 254. In the United States it has been held that if terms of credit have been agreed on, or a time for performance fixed by the bargain, the memorandum will be insufficient if these parts of the bargain be omitted (*l*).

AMERICAN NOTE.

§§ 201–254.

OF THE MEMORANDUM OR NOTE IN WRITING. The first portion of Chapter VI. is devoted by the author to the admissibility of oral evidence to affect written contracts at common law; the principles governing which should, indeed, be steadily borne in mind in examining the statute law of sales, but which, as they have no special reference to that subject, properly belong to a treatise on the law of evidence, where they can be more elaborately stated. It should not, however, be forgotten that the common-law rule forbidding the contradiction by parol of a complete, formal, written contract has no application to a mere memorandum of sale under the Statute of Frauds, since oral evidence is constantly admitted to show that the memorandum produced is not a complete and perfect record of the whole bargain as actually made, but only of part of it, and so not sufficient to render the contract valid. We pass, therefore, to the subsequent portions of the chapter in the order of the author, and —

I. WHAT IS A NOTE OR MEMORANDUM.

1. When made. The opinion expressed by Baron Parke in Bill *v.* Bament, 9 M. & W. 36 (now apparently settled in England, Lucas *v.* Dixon,

(*f*) 3 Drew. 523, and 25 L. J. Ch. 662; and see Clarke *v.* Gardiner, 12 Ir. C. L. R. 472.

(*g*) 2 C. B. N. S. 67, and 26 L. J. C. P. 143.

(*h*) 4 H. & N. 139; 28 L. J. Ex. 123.

(*i*) L. R. 1 Ex. 342; 35 L. J. Ex. 218.

(*k*) Justice *v.* Lang, 42 N. Y. 493; 52 N. Y. 323, after two new trials. The objection in this case was want of mutuality and consideration, which was decided to be a question of fact, but, *indirectly*, the case does decide the point under consideration. Mason *v.* Decker, 72 N. Y. 595; Sanborn *v.* Flagler, 9 Allen (91 Mass.), 474; opinion of Bigelow, C. J.

(*l*) Davis *v.* Shields, 26 Wendell, 341; Salmon Falls Company *v.* Goddard, 14 Howard (U. S.), 446; Morton *v.* Dean, 13 Metcalf, 388; Soles *v.* Hickman, 20 Penn. State, 180; Buck *v.* Pickwell, 27 Vt. 167; Elfe *v.* Gadsden, 2 Rich. (So. Car.), 373.

22 Q. B. D. 357, cited *ante*, §§ 159, 221), that a memorandum must be made before the suit is commenced, though sometimes quoted with approbation in this country, as by Peters, J., in Bird *v.* Munroe, 66 Me. 347, and perhaps others, can hardly yet be considered the established rule in America. And if such memorandum, whenever it be made, is not the contract itself, but only evidence of it, — the defendant's written admission of it, — it is not easy to see why that written admission is not competent like other declarations of the party, if made at any time before trial, whether before or after action brought. The statute is silent as to the time of making; the declaration is always upon the oral contract, as of the time when and place where it was made, and not upon the note or memorandum when *it* was made. The Statute of Limitations begins to run from the former and not from the latter period. The memorandum relates back to the oral bargain. Leadlay *v.* M'Roberts, 13 Ont. App. 383. If the sale was made by an agent whose agency terminates before he makes any memorandum, he still may make and deliver a statement of the former contract, and bind his principal thereby. Williams *v.* Bacon, 2 Gray, 387. Nay, it is not necessary that the note or memorandum pass between the parties, or be addressed to the plaintiff or to his agent. It is quite sufficient if it is in a letter addressed to a third person (Moore *v.* Mountcastle, 61 Mo. 424), even to the writer's own agent (Kleeman *v.* Collins, 9 Bush, 467), and never comes to the knowledge of the plaintiff at all; or it may be merely an entry on the defendant's own private books never communicated to any one. Gibson *v.* Holland, L. R. 1 C. P. 1; Peabody *v.* Speyers, 56 N. Y. 230; Johnson *v.* Trinity Church, 11 Allen, 123; Tufts *v.* Plymouth Gold Mining Co. 14 Ib. 407; Argus Co. *v.* Mayor of Albany, 55 N. Y. 495. And the memorandum may even repudiate the contract, and express a refusal to be bound by it, and yet be sufficient. Drury *v.* Young, 58 Md. 546; Louisville Co. *v.* Lorick, 29 So. Car. 533. Oral evidence is always admissible to show that the memorandum does not correctly recite the actual bargain. All of which shows that the memorandum is not the contract, but only the evidence of it; absolutely essential evidence, indeed, but still only evidence or record of a prior contract. If a defendant sees fit, after he has been sued, to send the plaintiff a full written statement of the contract, over his own signature, why should he not be allowed to do so, and why should it not be admissible against him? To insist that a suit cannot be maintained merely because the memorandum, otherwise perfect, was made after service of the writ, would simply involve the discontinuance of the first suit, and the commencement of another after the memorandum has been obtained. Is that worth while? If "acceptance and receipt," or a "partial payment" made after action brought, be effective, why should not a memorandum so made be equally efficient? But the question in all these cases cannot be considered as fully settled.

2. **Different Papers.** The American authorities quite agree with the English, that the note or memorandum need not be made at one time, or on one paper. Lerned *v.* Wannemacher, 9 Allen, 412; Rhoades *v.* Castner, 12 Allen, 132; Peck *v.* Vandemark, 99 N. Y. 29; Coe *v.* Tough, 116 N. Y. 273; Toomer *v.* Dawson, Cheves, 68; Greeley, &c. Co. *v.* Capen, 23 Mo. App. 301. It is well established that the contract may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that

they may be fairly said to constitute one paper relating to the contract. Ryan *v.* United States, 136 U. S. 83; Bayne *v.* Wiggins, 139 U. S. 210. And see Lee *v.* Mahony, 9 Iowa, 344; Jelks *v.* Barrett, 52 Miss. 315; Fisher *v.* Kuhn, 54 Ib. 480; Pitcher *v.* Lowe, 95 Geo. 423; Kingsley *v.* Siebrecht, Me. (1898); 42 Atl. 249.

If on several papers, *each one duly signed* by the party to be charged, they need not in terms refer to each other, for each is duly authenticated by itself; and by simply adding them together the whole contract is made out. Oral evidence may be indeed necessary, not to connect them together, but to show that they all apply to the subject-matter of the pending suit, and not to some other sale; but this is equally so in case of only one paper. See Thayer *v.* Luce, 22 Ohio St. 62. On the other hand, if only one paper be duly signed, no other unsigned paper can be considered unless it be *in some way* referred to in the signed paper; oral evidence alone to connect them will not suffice. The signed paper must incorporate and draw down into itself the unsigned one; otherwise there is no complete memorandum "duly signed," etc. Moale *v.* Buchanan, 11 Gill & J. 322; Frank *v.* Miller, 38 Md. 461; Wilson *v.* Lewiston Mill Co. 74 Hun, 612; Jenness *v.* Mt. Hope Iron Co. 53 Me. 20; Fowler Elevator Co. *v.* Cottrell, 38 Neb. 512. and cases cited. It is not enough that the *unsigned* paper, if unannexed to the signed one and not referred to in it, refers to the signed one; for an unsigned paper would be only like oral additions to the signed document, and all the evils would exist which the statute was designed to avoid. This distinction it is important to keep in mind. See Brown *v.* Whipple, 58 N. H. 209, an interesting case on this point; Johnson *v.* Buck, 35 N. J. L. 339; Freeport *v.* Bartol, 3 Greenl. 340; Morton *v.* Dean, 13 Met. 388; Ridgway *v.* Ingram, 50 Ind. 148; Smith *v.* Jones, 66 Geo. 338; Beckwith *v.* Talbot, 95 U. S. 289. It may not always have been observed. See Louisville Co. *v.* Lorick, 29 So. Car. 533. If the papers are physically attached to each other even with a pin, the two may be taken together. Tallman *v.* Franklin, 14 N. Y. 584. So a letter and envelope inclosing it may be taken together. Pearce *v.* Gardner [1897], 1 Q. B. 688. See the late interesting case of Oliver *v.* Hunting, 44 Ch. Div. 205, and Ballantine *v.* Harold, 19 Vict. L. R. 465.

II. OF THE SUFFICIENCY OF THE MEMORANDUM.

1. **The Consideration.** As to the necessity for expressing the consideration, the American authorities are not agreed even as to the other sections of the statute than the 17th, and Wain *v.* Warlters (*ante*, § 232) is far from being universally approved; but the examination of the other clauses of the statute is foreign to a work strictly on sales. Suffice it to say that all courts which consider it unnecessary, under the other provisions of the statute, to express the consideration, *à fortiori* so declare in contracts of sale; while, on the other hand, some which hold it necessary in the former do not apply the same rule to the latter, since the word "agreement," on which Wain *v.* Warlters is based, does not usually exist in the provision as to sales in the American statutes, but the word "bargain" or "contract" is more usually found.

The statutes of some States may require that the consideration be expressed in the note or memorandum of sale as well as in agreements not to be performed in a year, or agreements to answer for the debt of another,

etc. Such was (until 1863, 97 N. Y. 230) the law in New York, Oregon, and possibly in other States. The Alabama Code of 1887, § 1732, requires that the consideration be expressed. Rigby *v.* Norwood, 34 Ala. 129; Moses *v.* Lawrence County Bank, 149 U. S. 298. So in Minnesota, Oregon, and Nevada. See Stimson's Am. Statute Law, § 4142. In some States it is distinctly provided that the consideration need not be expressed in the memorandum. In many the statute is silent on the subject; and it may, we think, now be safely assumed that, unless the statute expressly requires that the consideration be expressed in the memorandum of a sale, it is no longer necessary. The many cases on this subject upon other clauses of the statute are therefore omitted.

In further considering the sufficiency of the memorandum, whether on one paper or more, it is obvious that the same must contain all the essential elements or particulars of the contract, or it is defective. Stone *v.* Browning, 68 N. Y. 598; Nichols *v.* Johnson, 10 Conn. 198; Drake *v.* Seaman, 27 Hun, 63.

2. **Names of Parties.** And the first requisite is that it must in some way describe the party in whose favor it is made, as well as that of the party to be bound. Grafton *v.* Cummings, 99 U. S. 100, a valuable case on this point; Lincoln *v.* Erie Preserving Co. 132 Mass. 129; Anderson *v.* Harold, 10 Ohio, 399; Calkins *v.* Falk, 38 How. Pr. R. 62; McElroy *v.* Seery, 61 Md. 397; O'Sullivan *v.* Overton, 56 Conn. 102; Lewis *v.* Wood, 153 Mass. 321. "Mr. Lee" may do as the name of the buyer. Lee *v.* Cherrey, 85 Tenn. 707. Abbreviations, if intelligible and complete, are often held sufficient. Smith *v.* Jones, 7 Leigh, 165; Foot *v.* Webb 59 Barb. 38; Mentz *v.* Newwitter, 14 Daly, 524; Maurin *v.* Lyon, Minn. (1898), 72 N. W. 72.

It is often said that the memorandum should show who is the buyer and who is the seller, without the aid of oral evidence. Bailey *v.* Ogdens, 3 Johns. 419; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 458, Mr. Justice Curtis; Coddington *v.* Goddard, 16 Gray, 443, Bigelow, C. J.; Sherburne *v.* Shaw, 1 N. H. 157. In Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446, the following memorandum was held sufficient by a bare majority of the Supreme Court of the United States, viz.: "Sept. 19 — W. W. Goddard, 12 mos., 300 bales S. F. Drills . . . $7\frac{1}{4}$ — 100 cases blue do. . . . $8\frac{3}{4}$ R. M. M., W. W. S.;" and it being shown *aliunde* that R. M. M. was the agent of the plaintiff company to sell, and that the defendant bought the goods of him, the action for the price was maintained; but this case in all it says is open to some doubt. See Grafton *v.* Cummings, 99 U. S. 111; Mentz *v.* Newwitter, 122 N. Y. 497, the latter quite disapproving of it. If that case was rightly decided, still more clearly is this memorandum sufficient: "Will deliver S. R. & Co. best refined iron 50 tons within 90 days, at 5 cts. p. lb., 4 off cash. J. H. F., J. B. R.;" it being proved *aliunde* that J. H. F. was written by the defendant as his initials, and J. B. R. written by the plaintiff for his firm; and the defendant was held liable for not delivering the iron accordingly. Sanborn *v.* Flagler, 9 Allen, 474. Still less free from doubt is this: "W. W. Goddard to T. B. Coddington, 200 pounds Chili pig copper, $24\frac{1}{4}$ @ 9 mos. from delivery," etc., made on the broker's book who negotiated the sale. It clearly enough indicates a sale from Goddard to Coddington, and

is susceptible of no other interpretation. Coddington *v.* Goddard, 16 Gray, 436. See, also, Coate *v.* Terry, 24 Up. Can. C. P. 571, which seems to favor the admission of oral testimony to show which was the buyer and which the seller. A broker's note duly signed, saying, "Sold for A. B. to C. D.," etc., sufficiently shows who is buyer and who is seller, and C. D. is bound as purchaser although he had no bought note corresponding. There could not be a sale without a purchase, nor a seller without a buyer; and the word "sold" is alone sufficient. Butler *v.* Thomson, 92 U. S. 412, an interesting case on this point. A memorandum as follows is sufficient: "New York, Nov. 10, 1886. B 10, ac. Albert, 10 ac. Alexander, 5 ac. Andrew. Seller, — —. Buyer, Zerega and White. On contract, subject to rules and regulations of New York Cotton Exchange. Twenty-five hundred bales cotton. Jan. 1, delivery. Price 8.99. X. Per Z. & White, seventy-five." Parol evidence is competent to show that these fictitious names, "Albert, Alexander, Andrew," which defendant had adopted, represented them as the parties for whose account the sales were made. Bibb *v.* Allen, 149 U. S. 481–495, 496. See, also, Newberry *v.* Wall, 84 N. Y. 576; McIntosh *v.* Moyniham, 18 Ont. App. 237.

Of course a memorandum is not defective merely because the apparent seller or buyer is only an agent for the real party in interest. The latter may enforce, or be bound by, the memorandum as much as if his own name had been used. Gowen *v.* Klous, 101 Mass. 449; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446; Williams *v.* Bacon, 2 Gray, 387; Lerned *v.* Johns, 9 Allen, 419; Hunter *v.* Giddings, 97 Mass. 41; Dykers *v.* Townsend, 24 N. Y. 61; Wiener *v.* Whipple, 53 Wisc. 302; Kingsley *v.* Siebrecht, Me. (1898); 42 Atl. 249. But this leads us too far into the law of Agency.

3. **Subject-matter.** A designation of the article sold must be sufficiently contained in the memorandum. May *v.* Ward, 134 Mass. 127; Waterman *v.* Meigs, 4 Cush. 497; McElroy *v.* Buck, 35 Mich. 434; New England Co. *v.* Standard Worsted Co. 165 Mass. 328, 331, 332, and cases cited. A memorandum of "39 bales of cotton, at 40 cents," was held sufficient, though the weight was not specified. Penniman *v.* Hartshorn, 13 Mass. 87. See, also, Carr *v.* Passaic Land Co. 19 N. J. Eq. 424; Morton *v.* Dean, 13 Met. 385; Gowen *v.* Klous, 101 Mass. 449; Eggleston *v.* Wagner, 46 Mich. 610; Pulse *v.* Miller, 81 Ind. 190; Holmes *v.* Evans, 48 Miss. 247; Fisher *v.* Kuhn, 54 Miss. 481; Hazard *v.* Day, 14 Allen, 487; Whelan *v.* Sullivan, 102 Mass. 204, — cases relating to real estate, but which shed much light on sales of personal property.

4. **The Price.** If any was actually agreed upon, that must appear. Ide *v.* Stanton, 15 Vt. 685, a leading case; Smith *v.* Arnold, 5 Mason, 416; Phelps *v.* Stillings, 60 N. H. 505; Ashcroft *v.* Butterworth, 136 Mass. 511; Kinloch *v.* Savage, Speer's Eq. 472; Adams *v.* McMillan, 7 Porter, 73; Soles *v.* Hickman, 20 Pa. St. 180; Hanson *v.* Marsh, 40 Minn. 3. Some courts seem to hold that the memorandum need not state the price agreed upon. The J. K. Armsby Co. *v.* Eckerly, 42 Mo. App. 306; O'Neil *v.* Crain, 67 Mo. 250, but this is clearly wrong. In Gowen *v.* Klous, 101 Mass. 449, a sale of land at auction, the price was stated as "$9\frac{1}{2}$ cents," and this was held sufficient, upon proof that this meant $9\frac{1}{2}$ cents per square foot. And James *v.* Muir, 33 Mich. 224, seems to hold

that in executory contracts the memorandum must state the price even though none is agreed upon, but it is left to be afterwards arranged by parol. But see The Argus Co. *v.* Mayor, etc., of Albany, 55 N. Y. 495; Norton *v.* Gale, 95 Ill. 538.

5. **Time of Payment.** If credit was actually given, that also must be stated, or the memorandum is imperfect. In addition to the cases cited by Mr. Benjamin, see Wright *v.* Weeks, 25 N. Y. 158; Norris *v.* Blair, 39 Ind. 90; Williams *v.* Robinson, 73 Me. 186. If no time of payment was expressly agreed upon, it is usually understood to be a cash transaction, and the memorandum may be silent on the subject. Hawkins *v.* Chace, 19 Pick. 502. In O'Donnell *v.* Leeman, 43 Me. 158, the memorandum said one third "cash down," but was silent as to when the rest was payable. Held insufficient.

6. **Delivery.** If a special time and place of delivery was fixed upon, the memorandum must truly state that part of the contract. Kriete *v.* Myer, 61 Md. 558; Smith *v.* Shell, 82 Mo. 215. But if no time of delivery was stipulated for, the law presumes it to be on demand or on payment of the price, and consequently the memorandum need make no allusion to the subject. Hawkins *v.* Chace, 19 Pick. 502.

7. **Any other terms or conditions** actually made a part of the bargain must find their faithful record in the note or memorandum, otherwise the sale cannot be enforced. Riley *v.* Farnsworth, 116 Mass. 223; Oakman *v.* Rogers, 120 Mass. 214. Thus, if the goods were sold "subject to the buyer's approval," that condition must be in the memorandum. Boardman *v.* Spooner, 13 Allen, 353, an important case. If really sold "by sample," that fact must appear in the memorandum. McMullen *v.* Helberg, 6 L. R. (Ir.) 463, a valuable case. And see Remick *v.* Sandford, 118 Mass. 102. So if sold with an express warranty. Peltier *v.* Collins, 3 Wend. 459; Pratt *v.* Rush, 5 Vict. R. 421 (1879).

But a provision, that the vendor might add more goods at the same price on the next day if he should desire, need not be incorporated into the memorandum, if that right was not a term or condition on which the present sale was made.

CHAPTER VII.

OF THE SIGNATURE OF THE PARTY.

	Sect.
Only signature required is that of the party to be charged	255
Contract good or not, at election of the party who has not signed	255
Signature not confined to actual subscription	256
Mark sufficient, or pen held by a third person	256
Description of himself by the writer of the note insufficient	257
Signature by initials	257
Signature may be in print, or by stamping the name, and in any part of the writing	259
When not subscribed, a question of fact whether it was intended as a signature	260
Signature may be referred from what is signed in one part of a paper to what is unsigned, not reversely	263
Signature affixed *alio intuitu*	264 a
4th and probably 17th sections relate only to evidence	264 a

§ 255. The 17th section requires the writing to be "signed by the *parties* to be charged," etc., and the 4th section, "by the *party* to be charged," etc. Under both sections it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not, at the election of the party who has not signed.

In Allen *v.* Bennet (*a*), in 1810, the Court of Common Pleas considered the question as already settled under the 17th section by authority and practice. And in Thornton *v.* Kempster (*b*), the same court declared that contracts may subsist which, by reason of the Statute of Frauds, could be enforced by one party, though not by the other.

In Laythoarp *v.* Bryant (*c*) the point was decided under the 4th section, after full argument.

The foregoing decisions have never since been questioned, and the law on the subject is settled not only by them, but by the more recent case of Reuss *v.* Picksley (*d*), in the Exchequer Chamber, and the decisions quoted *ante*, § 255, in which it was held that a written proposal, signed by the party to be charged, was a sufficient note of the bargain, if supplemented by parol proof of acceptance by the other party.

§ 256. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged.

(*a*) 3 Taunt. 169.
(*b*) 5 Taunt. 786.
(*c*) 2 Bing. N. C. 735, and 3 Scott, 238.
(*d*) L. R. 1 Ex. 342; 35 L. J. Ex. 218.

Thus, a mark made by a party as his signature is sufficient if so intended. And in Baker *v.* Dening (*e*), where the question arose under the 5th section of the statute, which relates to wills and devises, the court held that it was not necessary to show that the party signing by a mark was unable to write his name; and the judges expressed the opinion that a mark would be a good signature even if the party signing was able to write his name.

In Helshaw *v.* Langley (*f*), the signature of a party was decided to be sufficient when he, being unable to write, held the top of the pen while another person wrote his signature.

§ 257. But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is insufficient. Thus, a letter by a mother to her son, beginning, "My dear Robert," and ending, "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother (*g*).

Whether a signature by initials would suffice seems not to have been decided expressly.

In Hubert *v.* Moreau (*h*), the question was raised under the act 6 Geo. IV. c. 16, s. 131, which made void a promise by a bankrupt to pay a debt from which he had been discharged, unless the promise was made in writing, "signed by the bankrupt." The report states that the letter had no name attached to it, but something that looked like an M. Best, C. J., said, on looking at it: "It may be an M, or it may be a waving line; but if it be an M, I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject." His Lordship refused the plaintiff permission to prove by parol that the defendant usually signed in that way. Afterwards a witness was called, who stated as his opinion that the mark which was taken to be an M was nothing but a flourish, and the plaintiff was thereupon nonsuited. The court in banc afterwards refused a rule to set aside the nonsuit, the rule being taken on the ground that the M was a sufficient signing, because it was the sign used by the party to denote that the instrument was his.

In the report of the same case (as given in 12 Moore C. P. 216), the language of the court, in refusing the new trial, would indicate that as a question of *fact* there was no mark appended to the writing, and placed there by the writer with the intention of making it his signature. The Chief Justice put the case as follows: "Undoubtedly

(*e*) 8 A. & E. 94. See, also, Harrison *v.* Elvin, 3 Q. B. 117.
(*f*) 11 L. J. Ch. 17.
(*g*) Selby *v.* Selby, 3 Mer. 2.
(*h*) 2 C. & P. 528.

the signing by a mark would satisfy the meaning of the statute, *but here there is nothing intended to denote a signature*, nor does the name of the defendant appear in any part of the letter."

§ 258. In Sweet *v.* Lee (*i*), the writing was signed with the initials T. L., but in the writing were the words "Mr. Lee," in the handwriting of defendant, and nothing was decided as to the sufficiency of the signature. And the same observations apply to the Nisi Prius cases of Phillimore *v.* Barry (*k*) and Jacob *v.* Kirk (*l*).

There seems to be no doubt that if the initials are intended as a signature by the party who writes them, this shall suffice, but not otherwise (*m*).

§ 259. The signature may be in writing or in print (and the writing may be in pencil, Geary *v.* Physic (*n*), or by stamping the name, Bennett *v.* Brumfitt (*o*)), and it may be in the body of the writing, or at the beginning or end of it. But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.

§ 260. In Saunderson *v.* Jackson (*p*), the plaintiff, on giving to the defendants an order for goods, received from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson and Hanson, distillers, No. 8 Oxford Street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin, 7*s*., £350." There was also a letter, signed by the defendants, in which they wrote to plaintiff, about a month later: "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds." Thus far the case would not amount to much as an authority on the point under discussion. His Lordship went on to say: "It has been decided (*q*) that if a man draw up an agreement in his own

(*i*) 3 M. & G. 452.
(*k*) 1 Camp. 513.
(*l*) 2 Moo. & Rob. 221.
(*m*) See remarks of Lord Westbury in Caton *v.* Caton, L. R. 2 H. L. 127, 143; Chichester *v.* Cobb, 14 L. T. N. S. 433; Sugden V. & P. 144 (ed. 1862).
(*n*) 5 B. & C. 234.
(*o*) L. R. 3 C. P. 28.
(*p*) 2 B. & P. 238.
(*q*) The case referred to by his Lordship is Knight *v.* Crockford, 1 Esp. N. P. 190. See, also, Lobb *v.* Stanley, 5 Q. B. 574; and Durrell *v.* Evans, 1 H. & C. 174, and 31 L. J. Ex. 337.

handwriting, beginning, 'I, A. B., agree,' and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of Lens, Sergt., who admitted that the printed name might have amounted to a signature if the bill of parcels had been intended to express the contract, *quà* contract, but contended that this was not the intention.

§ 261. In Schneider *v.* Norris (*r*), the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own handwriting, and all the judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. Lord Ellenborough said: "If this case had rested merely on the printed name, unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, 'I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract.'" Le Blanc, J., compared the case to one where a party should stamp his name on a bill of parcels. Bayley, J., put his opinion on the ground that the defendant had signed the plaintiffs' names as purchasers, and thereby recognized his own printed name as that of the seller. And Dampier, J., on much the same idea, that is, that the defendant, by writing the name of the buyer on a paper in which he himself was named as the seller, recognized his name sufficiently to make it a signature.

§ 262. In Johnson *v.* Dodgson (*s*), the defendant wrote the terms of the bargain in his own book, beginning with the words, "Sold John Dodgson," and required the vendor to sign the entry. The court held this to be a signature by Dodgson, Lord Abinger saying that: "The

(*r*) 2 M. & S. 286.

(*s*) 2 M. & W. 653.

cases have decided that, though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." Parke, B., concurred, on the authority of Saunderson *v.* Jackson, and Schneider *v.* Norris, which he recognized and approved.

In Durrell *v.* Evans, in the Exchequer Chamber (*t*), *post*, § 267, the cases of Saunderson *v.* Jackson, Schneider *v.* Norris, and Johnson *v.* Dodgson were approved and followed.

[In Tourret *v.* Cripps (*u*), under the 4th section, a letter containing proposed terms of a contract between the defendant and the plaintiff, written out by the defendant upon paper bearing a printed heading, "Memorandum from Richard L. Cripps," and *sent by him to the plaintiff*, was held to be a sufficient note in writing to charge the defendant.]

§ 263. In Hubert *v.* Treherne (*v*), which also arose under the 4th section, it appeared that an unincorporated company, called The Equitable Gas Light Company, accepted a tender from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, etc., was read and approved, and a fair copy there of directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, etc., of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, showed that the intention was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. Maule, J., said: "The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the Statute of Frauds, no one could have entertained a doubt upon that point. Since the statute, the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. . . . If a party writes, 'I, A. B., agree,' etc., with no such conclusion as is found here, 'as witness our hands,' it may be that this is a sufficient signature within the statute to bind A. B. . . . But it would be going a great deal further than any of

(*t*) 1 H. & C. 174; 31 L. J. Ex. 337. (*u*) 48 L. J. Ch. 567. (*v*) 3 M. & G. 743.

the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A. B. that he *would* sign a particular paper."

§ 264. The most full and authoritative exposition of the law on this subject is to be found in Caton *v.* Caton (*w*), decided in the House of Lords in May, 1867. The paper there relied on was a memorandum of the terms of a marriage settlement, drawn up in the handwriting of the future husband, and taken to a solicitor's for execution, but the settlement was waived by the parties, and the memorandum was subsequently set up as containing the agreement. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials. It was held that, although to satisfy the Statute of Frauds it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the court, the name of the party, when found in the instrument, appeared in such a way that it referred in each instance only to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury, whose opinion on this particular point was the most comprehensive of those delivered in the case, was as follows: "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of Stokes *v.* Moore (*x*), the language of the learned judge is, that the signature must authenticate every part of the instrument; or, again, that it must give authenticity to every part of the instrument. Probably the phrases 'authentic' and 'authenticity' are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir William Grant, in Ogilvie *v.* Foljambe (*y*), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum."

(*w*) L. R. 2 H. L. 127. (*x*) 1 Cox, 219. (*y*) 3 Mer. 53.

His Lordship then criticised the different clauses of the memorandum for the purpose of showing the insufficiency of the signature when tested by these rules, and proceeded: "Now an ingenious attempt has been made at the bar to supply that defect by fastening on the antecedent words, 'In the event of marriage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found, and treat it as if it were found with the words of reference. My lords, if we adopted that device, we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a different signification and effect from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which, by virtue of that reference, is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature not only to the thing (writing?) originally given, but also to that which, by force of the reference, is, by the very context of the origiual, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and, by force of the reference to a part of that document, you would be making it applicable to the whole of the document, to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply."

The effect of these principles seems to be substantially that the reference, to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse.

§ 264 a. [Signatures of directors to articles of association which contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, were held in Eley *v.* The Positive Assurance Company (*z*) not to be signatures to a memorandum of the contract within the Statute of Frauds, on the ground that they had been affixed *alio intuitu.* But in Jones *v.* The Victoria Graving Dock Company (*a*) the signature of the chairman of a company to the minutes was held to be a sufficient signature, although put *alio intuitu*, viz., to notify the proceedings of the Board under the Companies Act, 1862 (25 & 26 Vict. c. 89, s. 67). In this case, Eley *v.* The Positive Assurance Company was not cited, and the two decisions appear to be irreconcilable. Both these cases were under the 4th section, and the reasoning upon which the latter case

(*z*) 1 Ex. D. 20. (*a*) 2 Q. B. D. 314.

proceeds, viz., that the requirements of the 4th section of the statute relate only to the *evidence* of the contract (*b*), is undoubtedly sound. And the same reasoning seems now to apply to a case under the 17th section, for, as Lord Blackburn said (in 1883): "I think it is now finally settled that the true construction of the Statute of Frands, both the 4th and the 17th sections, is not to render the contract within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract" (*c*).]

AMERICAN NOTE.

§§ 255–264 a.

Of the Signature of the Party. It is a necessary conclusion, from the fact that the statute requires a signature only by the party "to be charged," that an oral acceptance of a written proposition, sufficient at common law, is all that is required to complete the contract and bind the signer of the written document. Justice *v.* Lang, 7 J. & Sp. 283, 42 N. Y. 493, a leading case; Sanborn *v.* Flagler, 9 Allen, 474; Williams *v.* Robinson, 73 Me. 186; Mason *v.* Decker, 72 N. Y. 598; Smith *v.* Smith, 8 Blackf. 208; Barstow *v.* Gray, 3 Greenl. 409; Penniman *v.* Hartshorn, 13 Mass. 87; Old Colony R. R. Co. *v.* Evans, 6 Gray, 25; Shirley *v.* Shirley, 7 Blackf. 452; Lowber *v.* Connit, 36 Wisc. 176; Ivory *v.* Murphy, 36 Mo. 534; Lowry *v.* Mehaffy, 10 Watts, 387; DeCordova *v.* Smith, 9 Tex. 129; Gartrell *v.* Stafford, 12 Neb. 552; Sabre *v.* Smith, 62 N. H. 663; Ide *v.* Leiser, 10 Mont. 6; Cunningham *v.* Williams, 43 Mo. App. 631; and many other cases. Some authorities, however, hold that if the memorandum note is signed by only one party, he is not bound for want of mutuality. Wilkinson *v.* Heavenrich, 58 Mich. 574, 55 Am. Rep. 708, and cases cited. But this clearly is untenable.

To be sure, the common law requires that a written offer to sell or buy must be accepted by the other either orally or in writing, and the statute requires, in addition, if the amount is over a certain sum, that such writing contain all the essentials of the contract. But an oral or ineffectual promise may often be a good consideration for a written or more valid promise on the other side, of which the voidable promise of a minor is a familiar illustration.

The signature may be in pencil; Clason *v.* Bailey, 14 Johns. 484, a leading case; Merritt *v.* Clason, 12 Johns. 102; Draper *v.* Pattina, 2 Speers, 292; or even by a printed or stamped name, though in such cases some evidence would be necessary to show that it was authorized by the party as and for his signature; Boardman *v.* Spooner, 13 Allen, 353; Brayley *v.* Kelly, 25 Minn. 160; but that is only like requiring evidence of the handwriting, if it were wholly written. Signing merely by initials is sufficient; Sanborn *v.* Flagler, 9 Allen, 474, in which the defendant signed "J. B. F.;"

(*b*) Per Lush, J., in delivering the judgment of the court, 2 Q. B. D. at p. 323.

(*c*) In Maddison *v.* Alderson, 8 App. Cas. at p. 488, and the same opinion is expressed by Brett, L. J., in Britain *v.* Rossiter, 11 Q. B. D. at p. 127.

Palmer *v.* Stephens, 1 Denio, 478; Merchants' Bank *v.* Spicer, 6 Wend. 443; or by any other mark or cross *intended* as a signature, as in other contracts; Bickley *v.* Keenan, 60 Ala. 293; Tagiasco *v.* Molinari, 9 La. (O. S.) 512; Madison *v.* Zabriskie, 11 Ib. 247. The omission of the defendant's middle name or initial is not fatal if the defendant was the person really intended; Fessenden *v.* Mussey, 11 Cush. 127. An agent's initials may suffice; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446, in which the plaintiff's agent, Robert M. Mason, signed the memorandum "R. M. M." So signing by a fictitious name, as "Seam" for "Couture;" Augur *v.* Couture, 68 Me. 427. And see Brown *v.* Butchers' Bank, 6 Hill, 443, where "1, 2, 3" was held a good signature, being so intended.

The signature need not ordinarily be at the bottom or end of the memorandum. If placed anywhere in the writing, for the purpose of authenticating it, it is sufficient. Therefore, in Hawkins *v.* Chace, 19 Pick. 502, this bill of parcels, written by the vendor's agent (assumed to be with authority), was held sufficient to bind him to deliver the goods: "W. H. Hawkins & Co. bought of Wm. H. Chace, 20 bbls. flour at $5\frac{1}{2}$, $110," though not otherwise signed by the vendor. And see Penniman *v.* Hartshorn, 13 Mass. 87; Drury *v.* Young, 58 Md. 546; New England Co. *v.* Standard Worsted Co. 165 Mass. 331, and cases cited. This is only in accord with other decisions as to the signing of other documents. If, however, the statute requires the memorandum to be "subscribed" instead of "signed," it seems the signature must be at the end. See Davis *v.* Shields, 26 Wend. 341; Vielie *v.* Osgood, 8 Barb. 130; James *v.* Patten, 6 N. Y. 9. But in California Co. *v.* Scatena, 117 Cal. 447, the memorandum was signed across the face, and the statute, which required the memorandum to be subscribed, was thought to be complied with. And see Coon *v.* Rigden, 4 Colo. 275, 282.

CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

	Sect.
Agent must be a third person, not the other contracting party	266
What evidence sufficient to prove authority	266
Auctioneer is agent of both parties to sign the contract at public sale	268
But is the agent of vendor alone at a the private sale	268
Parol evidence admissible to rebut presumption of auctioneer's agency for buyer	269
Auctioneer's agency for the buyer only begins when goods are knocked down to him as last bidder	270
Signature, clerk of auctioneer	270
Signature, clerk of Telegraph Co.	271
Signature of agent as a *witness* is not a signature of the party	272
Auctioneer's clerk as witness	272
Brokers, — their general authority	273
Brokers in city of London	274
Brokers' Relief Acts, 1870 and 1884	274
Contract notes	275
Brokers in London bound by customs of trade	275
Bought and sold notes, their form and purport	276
Signed entry in broker's book — conflict of authority as to its real effect — cases reviewed	279
No variance that principals are named in one note and not in the other	294
General propositions deduced from the authorities	294
Broker's signed entry constitutes the contract	294
The bought and sold notes do not constitute the contract	295
But they suffice to satisfy the statute when complete and not inconsistent	296
Either note will suffice, unless variance shown	297
If plaintiff offers only one note, defendant may offer the other to show variance	298
Where there is a variance between signed entry and bought and sold notes	299
Variance between written correspondence and bought and sold notes	300
Where there is variance between bought and sold notes, and there is no signed entry	301
Where note signed by party himself varies from that signed by his broker	301
Where sale is made by broker on credit, vendor may retract if dissatisfied with buyer's solvency	302
Where sold note is delivered by broker employed by buyer only	303
Variance where broker employed by sellers only	303
No variance between bought and sold notes if meaning is the same, although language differs	304
Revocation of broker's authority	305
Alteration of bought or sold note after delivery	306
Broker's clerk	307

§ 265. It is not within the scope of this treatise to enter into the general subject of the law of agency, which is in no way altered by the statute. The agency may be proven by parol as at common law, and may be shown by subsequent ratification as well as by antecedent delegation of authority (*a*). But such ratification is only possible in the case of a principal in existence when the contract was made.

(*a*) Maclean *v.* Dunn, 4 Bing. 722; Gosbell *v.* Archer, 2 A. & E. 500; Acebal *v.* Levy, 10 Bing. 378; Fitzmaurice *v.* Bayley, 6 E. & B. 868, afterwards reversed, 9 H. L. C. 78, but not on the point stated in the text. Sudg. V. & P. 145, ed. 1862.

It is necessary that the agent be a third person, and not the other contracting party (*b*).

§ 266. The decisions as to the sufficiency of the evidence to prove authority for the agent's signature have not been numerous under the 17th section.

In Graham *v.* Musson (*c*), the plaintiff's traveller, Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Maurs. at 71*s.*; cash, two months. Fenning's Wharf. (Signed) JOSEPH DYSON."

It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing; but the court held on the evidence that Dyson was the agent of the vendor, and that the request by the purchaser that the vendor's agent should sign a memorandum of the bargain was no proof of agency to sign the purchaser's name; that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name.

This case was decided by Tindal, C. J., Vaughan, Coltman, and Erskine, JJ., in 1839, and was followed by the same court in 1841, in Graham *v.* Fretwell (*d*), with the concurrence of Maule, J., who had succeeded Vaughan, J., on the bench.

§ 267. The whole subject was fully discussed in Durrell *v.* Evans, decided in the Exchequer by Pollock, C. B., and Bramwell and Wilde, BB., in 1861 (*e*), and reversed by the unanimous opinions of Crompton, Willes, Byles, Blackburn, Keating, and Mellor, JJ., in the Exchequer Chamber in 1862 (*f*).

The facts were these: The plaintiff, Durrell, had hops for sale, in the hands of his factor, Noakes, and the defendant failed in an attempt to bargain for them with Noakes. Afterwards, the plaintiff and the defendant went together to Noakes's premises, and there concluded a bargain in his presence. Noakes made a memorandum of the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away. Before taking away the memorandum, the defendant requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit), and the plaintiff and Noakes assented to this, and the alteration was accordingly made. The memorandum was in the following words: —

(*b*) Sharman *v.* Brandt, in Ex. Ch. L. R. 6 Q. B. 720.

(*c*) 5 Bing. N. C. 603.

(*d*) 3 M. & G. 368.

(*e*) 30 L. J. Ex. 254; S. C. *nom.* Darrell *v.* Evans, 6 H. & N. 660.

(*f*) 31 L. J. Ex. 337; 1 H. & C. 174.

"Messrs. Evans.
"Bought of J. T. & W. Noakes.
"Bags. Pockets. T. Durrell. } 16*l.* 16*s.*
33 Ryarsh & Addington. }
Oct. 20th, 1860."

The entry on the counterfoil was as follows: —

"Sold to Messrs. Evans.
"Bags. Pockets. T. Durrell. } 16*l.* 16*s.*
33 Ryarsh & Addington. }
"Oct. 20th, 1860."

On the trial, before Pollock, C. B., the defendant contended that he had never signed or authorized the signature of his name as required by the 17th section to bind the bargain. The plaintiff contended that the name "Messrs. Evans" written on the counterfoil was so written by Noakes as the defendant's agent; that, if written by himself, it would have been a sufficient signature according to the authority of Johnson *v.* Dodgson (*ante*, § 262); and that he was as much bound by the act of his agent in placing the signature there as if done by himself.

The Court of Exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the vendor, and that the request of the defendant that the memorandum should be changed from the 19th to the 20th was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They therefore made absolute a rule for a nonsuit, for which leave had been reserved at the trial.

The Court of Exchequer Chamber, with equal unanimity, distinguished the case from Graham *v.* Musson (*ante*, § 266), and held that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and, if so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole current of authority.

The grounds for distinguishing the case from Graham *v.* Musson were stated by the different judges: —

Crompton, J.: "I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice, and that all the defendant did was simply taking an invoice and asking to have it altered; and if the jury had found that, a nonsuit would have been right. But, on the contrary, I think that there was plenty of evidence to go to the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have

found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence for the jury that Noakes was the agent of both parties.

Byles, J.: "What does the defendant do? First of all, he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant."

Blackburn, J.: "The case in the court below proceeded on what was thrown out by my brother Wilde, and I agree with the decision of that court, if this document were a bill of parcels, or an invoice in the strict sense, viz., a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance, I cannot as a matter of course look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps I should draw the inference that it was, but it is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides. . . . In Graham *v.* Musson, the name of the defendant, the buyer, did not appear on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and, unless the name of Dyson was used as equivalent to Musson, there was no signature by the defendant: but, in point of fact, 'J. Dyson' was equivalent to 'for or per pro. North & Co., J. Dyson.'"

§ 267 a. [In Murphy *v.* Boese (*g*), before the Court of Exchequer, in 1875, the plaintiff sought to recover the price of goods sold to the defendant. It appeared that the plaintiff's traveller wrote out the order for the goods in duplicate upon printed headings in the defendant's presence, handed to him the duplicate memorandum, and retained the original. Held, that there was no evidence that the traveller had authority to sign the memoranda as the defendant's agent, so as to bind him within the 17th section. The court, bound of course by the decision of the Exchequer Chamber in Durrell *v.* Evans, distinguished it upon the ground that in that case there was some evidence of the

(*g*) L. R. 10 Ex. 126.

factor's authority to sign on the defendant's behalf; at the same time Bramwell, B., who was a party to the judgment of the Court of Exchequer in Durrell *v.* Evans, which was afterwards reversed by the Exchequer Chamber, and Pollock, B., expressed their doubts as to the correctness of that decision. The latter learned judge said (*h*): "I think Durrell *v.* Evans can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties in drawing a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent."]

§ 268. It will have been observed that, in some of the cases already referred to, it is taken for granted that an auctioneer is an agent for both parties *at a public sale*, for the purpose of signing. This has long been established law (*i*). Sir James Mansfield, in Emmerson *v.* Heelis (*i*), thus gave the reasons for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser."

[It would seem that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute (*k*).]

It follows from this reasoning that the rule does not apply in a case where the auctioneer sells the goods of his principal at private sale, for then he is the agent of the vendor alone, and in no sense that of the purchaser. And such was accordingly the decision of the Exchequer Court in Mews *v.* Carr (*l*).

§ 269. And on the same principle it has been held that the circumstances of the case may be used to rebut the general inference that the

(*h*) L. R. 10 Ex. at p. 131.

(*i*) Hinde *v.* Whitehouse, 7 East, 558; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 B. & C. 945; Walker *v.* Constable, 1 B. & P. 306; Farebrother *v.* Simmons, 5 B. & Ald. 333; Durrell *v.* Evans, 31 L. J. Ex. 337; 1 H. & C. 174.

(*k*) See per Malins, V. C., in Beer *v.* London and Paris Hotel Company, 20 Eq. 412, 426, and per Jessel, M. R., in Rossiter *v.* Miller, 46 L. J. Ch. 228, 231.

(*l*) 26 L. J. Ex. 39; 1 H. & N. 484.

auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions of the sale. Thus, in Bartlett *v.* Purnell (*m*), the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy of 200*l.* to which the defendant was entitled under the will of the deceased. The conditions of the sale were, that the purchasers were to pay a certain percentage at the sale, and the rest on delivery. The auctioneer put the defendant's name, like that of all other purchasers, on his catalogue, as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions of the sale. But the court held that the real purchase was not a purchase at auction; that the sale was made before the auction, and that the public bidding was only used for the purpose of settling the price at which the purchaser was to take the goods under the antecedent bargain; and that the auctioneer was not the agent of the purchaser; Denman, C. J., saying: "We do not overrule the former cases, but we consider them inapplicable."

§ 270. But the agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the vendor exclusively. It is only when the bidder has become the purchaser that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the vendor (*n*).

In Bird *v.* Boulter (*o*), the person who signed the purchaser's name was not the auctioneer, but his clerk. Held to be sufficient. [But in that case there were special circumstances from which the clerk's authority to sign was inferred; under ordinary circumstances the auctioneer's clerk is not the purchaser's agent (*p*).]

§ 271. The signature of a clerk of a telegraph company to a dispatch was held to be sufficient, where the original instructions had been signed by the party, in Godwin *v.* Francis (*q*).

§ 272. The signature required by the statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *quà* agent, but only in the capacity of witness to the writing, it will not suffice.

In Gosbell *v.* Archer (*r*), the clerk of the auctioneer, who had

(*m*) 4 A. & E. 792.

(*n*) Warlow *v.* Harrison, 28 L. J. Q. B. 18; 1 E. & E. 295.

(*o*) 4 B. & Ad. 443.

(*p*) Peirce *v.* Corf, L. R. 9 Q. B. 210, per Blackburn, J., at p. 215. See, also, M'Mullen *v.* Helberg, 4 L. R. Ir. 94, per O'Brien, J., at p. 105; [Bell *v.* Balls [1897], 1 Ch. 663. — B.]

(*q*) L. R. 5 C. P. 295.

(*r*) 2 A. & E. 500.

authority to act for his master, signed a memorandum of the sale, as witness to the signature of the buyer, and an attempt was made to set up the clerk's signature as that of a duly authorized agent of the vendor. The attempt was unsuccessful, and a *dictum* of Lord Eldon (*s*) to the contrary was said by Denman, C. J., to be open to much observation. The *dictum* of Lord Eldon was that, "where a party or principal or person to be bound signs as, *what he cannot be*, a witness, he cannot be understood to sign otherwise than as principal."

[As to the personal liability of the auctioneer for the delivery of goods sold by him, see Wolfe *v.* Horne (*t*).]

§ 273. There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers. These persons, as a general rule, are agents for both parties (*u*), and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute.

The authority of a broker to bind his principals may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law merchant, or the custom of merchants. There are still, however, some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties (*x*).

§ 274. Before entering into an examination of the authorities, it will be convenient to give a short summary of the statutes in relation to brokers in the city of London, as many of the cases turn upon their dealings.

Until the year 1870, the brokers of London had from very early times been under the control of the corporation of the city. The statutes of 6 Anne, c. 16, 10 Anne, c. 19, s. 121, and 57 Geo. III. c. 60 (*y*), contain provisions for the regulation of brokers, and for defining the power of the corporation. Under these acts the city formerly required a bond and an oath, the form of which, prior to the year 1818, may be found given in Kemble *v.* Atkins (*z*). The regulations imposed, and form of the bond as altered in 1818, are printed at length in the appendix to Russell on Factors and Brokers. It is

(*s*) In Coles *v.* Trecothick, 9 Ves. Jr. 251; and see the observations of Lord St. Leonards, Sugd. V. & P. p. 143, ed. 1862.

(*t*) 2 Q. B. D. 355.

(*u*) Thompson *v.* Gardiner, 1 C. P. D. 777.

(*x*) See, for example, Dickinson *v.* Lilwall, 4 Camp. 279; Baines *v.* Ewing, L. R. 1 Ex. 320; 35 L. J. Ex. 194.

(*y*) These statutes will be found at p. 450 of vol. i. of Chitty's Collection of Statutes, ed. 1880.

(*z*) 7 Taunt. 260; S. C., Holt N. P. 431.

imposed as a duty on the broker that he shall "keep a book or register intituled 'The Broker's Book,' and therein truly and fairly enter all such contracts, bargains, and agreements, on the day of the making thereof, together with the christian and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively containing therein a true copy of such entry; and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements."

But by the London Brokers' Relief Act, 1870 (*a*), most of these powers were taken away, the bonds are no longer required, the rules and regulations are no longer to be enforced by the corporation, and now brokers are only required to be admitted by the corporation, and a List of Brokers is kept, from which any broker may be removed for fraud or other offences in the manner specified in the act.

[And by a further Relief Act, passed in the year 1884 (*b*), brokers are now relieved from the necessity of admission by the corporation, and from the payments to the chamberlain of the corporation required by the earlier acts, and the corporation is relieved from the duty of keeping the list of brokers required by the Act of 1870.]

§ 275. Lord Blackburn (*c*) warns his readers not to confound the contract notes here mentioned, which are a copy of the entry, with the bought and sold notes, which are or ought to be made out at the time of making the contract, and generally as soon as, or before, it is entered in the book, and he remarks that no mention is made of the bought and sold notes in the bonds or regulations. But Lord Ellenborough expressly says, in Hinde *v.* Whitehouse (*d*), and Heyman *v.* Neale (*e*), that the bought and sold notes are "transcribed from the book," are "copies of the entry," and this may be found repeated *passim* in the reported cases, although no doubt these notes are very frequently made in the manner stated by Lord Blackburn, as is also apparent in the reported cases.

(*a*) 33 & 34 Vict. c. 60. The reasons for passing this act are given in the note at p. 452 of Chitty's Statutes, vol. i. ed. 1880.

(*b*) 47 Vict. c. 3. The effect of the Act of 1870, together with this act, is to put an end to the control exercised by the corporation over London brokers. It appears, however, to be customary among brokers to keep a brokers' book, and enter therein the contracts which they have effected, and generally to carry on their business in the same way as they were required to do under the earlier acts. The summary, therefore, given in the text of the statutes relating to brokers in the city of London, is material to a proper understanding of the law upon this subject.

(c) Blackburn on Sale, p. 98.

(*d*) 7 East, 558.

(*e*) 2 Camp. 337.

The brokers in London are bound by the customs of trade just as all other brokers are, and such customs are valid in spite of anything to the contrary in the bonds and regulations, which are purely municipal (*f*).

§ 276. When a broker has succeeded in making a contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note; to the buyer, the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice.

The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then in substance says, "Sold for A. B. to C. D.," and sets out the terms of the bargain; the bought note begins "Bought for C. D. of A. B.," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply "Bought for C. D.," and "Sold for A. B."

The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, "Bought for you by me," he gives it in this form, "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible (*ante*, § 239, and *post*).

The *fourth* form is where the broker professes to sign as a broker, but is really a principal, as in the cases of Sharman *v.* Brandt, and Mollett *v.* Robinson, *ante*, § 241, in which case his signature does not bind the other party, and he cannot sue on the contract.

§ 277. According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, "I have bought for you," or "I have sold for you," plainly admits that the broker acted by his authority and as his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note (*g*); but according to the third form, the broker says in effect, "I myself sell to you," and the acceptance of a paper, describing the broker as the principal who sells, plainly repels

(*f*) Ex parte Dyster, 2 Rose, 349.

(*g*) Thompson *v.* Gardiner, 1 C. P. D. 777.

any inference that he is acting as agent for the party who buys, and, in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note; and by the fourth form, the language of the written contract is at variance with the real truth of the matter.

These observations (many of which are extracted from Blackburn on Sale) have a direct bearing on points long in dispute, and some of which are yet vexed questions, as will abundantly appear on a review of the authorities.

§ 278. Where the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of the courts, but sometimes great change in the opinions of the same judge. As regards the signed entry in the broker's book, it has been held at different times that it did and that it did not constitute the contract between the parties; and it has also been held that it was not even admissible in evidence, or, at all events, not without proof, that the entry was either seen by the parties when they contracted, or was assented to by them. The most convenient method of reviewing the decisions will be to follow the leading cases in order of time, and then deduce the propositions fairly embraced in them.

§ 279. In 1806 there was this *dictum* of Lord Ellenborough in Hinde *v.* Whitehouse (*h*) on the subject: "In all sales made by brokers acting between the parties buying and selling, *the memorandum in the broker's book, and the bought and sold notes transcribed therefrom*, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute." His Lordship here speaks of bought and sold notes as mere copies of the book, and the inference would be that he considered the book, as the original, to be of more weight than copies from it.

§ 280. In 1807 he gave this opinion expressly in Heyman *v.* Neale (*i*), saying: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. *The bought and sold note is not sent on approbation, nor does it constitute the contract.* The entry made and signed by the broker, who is the agent of both parties, *is alone the binding contract.* What is called the bought and sold note *is only a copy of the other*, which would be valid and binding although no bought or sold note was ever sent to

(*h*) 7 East, 558. (*i*) 2 Camp. 337.

the vendor and purchaser." In this case the bought and sold notes were sworn by the broker to be copies of the entry in his book, and the buyer had, soon after receiving the bought note, objected and said he would not be bound by it.

§ 281. In 1810, in Hodgson *v.* Davies (*k*), the sale was through a broker, who rendered bought and sold notes showing that payment was to be by bills at two and four months. Five days afterwards the defendant, being called on for delivery of the goods sold, objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, *unless his authority was limited by writing of which the purchaser had notice.* But the gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed this to be a valid and reasonable usage, but left it to the jury whether the delay of five days in objecting was not unreasonable according to the usual commercial practice, and the jury found that it was.

§ 282. In 1814, the Court of Common Pleas decided the case of Thornton *v.* Kempster (*l*) (*ante*, § 251), where the broker's sold note described a sale of St. Petersburg hemp, and the bought note described the goods as Riga Rhine hemp, a different and superior article. The court considered the case as though no broker had intervened, and the parties had personally exchanged the notes, holding that there never had been any agreement as to the subject-matter of the contract, and therefore no contract at all between the parties.

In 1816, Cumming *v.* Roebuck (*m*) was tried before Gibbs, C. J., at Nisi Prius, and it appeared that the bought and sold notes differed. The learned Chief Justice said: "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted."

It has been surmised that the case alluded to was that of Heyman *v.* Neale (*n*), but no case has been found in the Reports justifying the assertion of the Chief Justice that Heyman *v.* Neale had been contradicted.

§ 283. In 1826, the subject first came before the full court in the Queen's Bench in two cases.

In the first, Grant *v.* Fletcher (o), there was a material variance

(*k*) 2 Camp. 530.
(*l*) 5 Taunt. 786.
(*m*) Holt N. P. 172.
(*n*) 2 Camp. 337.
(*o*) 5 B. & C. 436.

betweed the bought and sold notes, and the broker had made an unsigned entry in his "memorandum-book," which entry was incomplete, not naming the vendor. The plaintiff was nonsuited at the assizes on the ground that there was no valid contract between the parties. Abbott, C. J., delivered the opinion of the court on the motion for a new trial. "The broker is the agent of both parties, and, as such, may bind them by signing the *same contract* on behalf of buyer and seller; but if he does not sign the *same* contract for both parties, neither will be bound. . . . The entry in the broker's book is, *properly speaking, the original, and ought to be signed by him.* The bought and sold notes delivered to the parties *ought to be copies of it.* A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed; but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

§ 284. In Goom *v.* Aflalo (*p*), the other case, the decision was express that the bought and sold notes suffice to satisfy the statute, if otherwise unobjectionable, even though the entry in the broker's book be unsigned. The broker in this case made his entry complete in its terms on the 23d of February as soon as he had concluded the contract, but did not sign it. On the same evening he sent to the parties bought and sold notes signed by him, copied from the entry in his books. Next morning the defendant objected to and returned the sold note, and refused to deliver the goods. The court held the contract binding, notwithstanding the absence of signature to the entry in the book; Abbott, C. J., saying: "The entry in the book has been called the original, and the notes copies; but there is not *any actual decision that a valid contract may not be made, by notes duly signed, if the entry be unsigned.* . . . We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But *if we were to hold such a signature essential to the validity of a contract, we should go further than the courts have hitherto gone*, and might possibly lay down a rule that would be followed by serious inconvenience, *because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed*, and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure."

§ 285. In Thornton *v.* Meux (*q*), in 1827, tried before Chief Justice Abbott, at Guildhall, there was a variance between the bought and sold notes, and plaintiff offered in evidence the entry in the broker's book to show which of the two was correct, but on objection the evi-

(*p*) 6 B. & C. 117. (*q*) Moo. & M. 43.

dence was excluded, the Chief Justice saying: "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the rest of the court, that the copies delivered to the parties were the evidence of the contract they enter into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion and refuse the evidence."

§ 286. It will be apparent from the foregoing cases how completely the opinion of the learned Chief Justice had been changed, his view being *first*, in Grant *v.* Fletcher, that the book was the original, though *probably*, if the bought and sold notes were perfect, the book might be dispensed with; *secondly*, in Goom *v.* Aflalo, that the broker's signature in his book was *not essential* to the validity of the contract; and *thirdly*, in Thornton *v.* Meux, that the signed entry was not even admissible in evidence, and that the bought and sold notes were the *sole* evidence of the contract between the parties.

§ 287. Hawes *v.* Forster (*r*) was twice tried; first in 1832, and again in 1834. On the first trial, the plaintiff put in the bought note, and proved by the broker that he had made the contract entered in his book, signed the entry, and sent the bought and sold notes to the parties on the same evening; but the broker could not tell which was first written, the entry or the notes. Plaintiff closed his evidence without calling for the sold note, and thereupon the defendant moved for nonsuit, but Lord Denman held that the plaintiff was not bound to give any evidence of the sold note. The defendant then offered to prove by the broker's book a variance from the bought note put in, contending that the entry was the original contract; but this was objected to on the authority of Thornton *v.* Meux (*supra*, § 285), and the evidence was rejected; Lord Denman saying: "I am of opinion that the plaintiffs have proved a contract by producing the bought note. . . . It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs; had that been the case, it would have been very material. But in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, *and to that alone*, as the evidence of the terms of the contract."

The defendants afterwards moved for a nonsuit before the court in banc, on the ground of the non-production of the sold note, but failed. They also moved for a new trial, on the ground of the exclusion of the broker's book, and succeeded, the Lord Chief Justice saying, "that the court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz., how

(*r*) 1 Moo. & Rob. 368.

the broker's book was treated by those who dealt with him." On the second trial the sold note was produced, and corresponded with the bought note, and proof was given by merchants that the broker's book was never referred to, and that they always looked to the bought and sold notes as the contract. The broker's book showed a material variance from the bought and sold notes, and Lord Denman put the question to the jury, "Whether the bought and sold notes constituted the contract, or whether the entry in the broker's book, which in this instance differed from the bought and sold notes, constituted it?" His Lordship intimated his own opinion to be that in law the note delivered by the broker was the real contract (*s*); but said that it had been thought better to take the opinion of the jury as to the usage of trade as a matter of fact, and told them: "If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract, then you will find a verdict for the plaintiffs." The jury found for the plaintiffs, and the defendants at first indicated the intention of carrying the case to a higher court, but afterwards submitted to the verdict.

§ 288. In 1842 the Exchequer Court had the subject, together with the decision in Hawes *v.* Forster, under consideration. In the case of Thornton *v.* Charles (*t*), Parke, B., and Lord Abinger held opposite opinions. Parke B., said: "I apprehend it has never been decided that the note entered by the broker in his book, and signed by him, would not be good evidence of the contract so as to satisfy the Statute of Frauds, there being no other. The case of Hawes *v.* Forster underwent much discussion in the Court of King's Bench when I was a member of that court, and there was some difference of opinion among the judges; but ultimately it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. . . . *Certainly it was the impression of part of the court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract.* The jury found that the bought and sold notes were evidence of the contract, but on the ground that these documents, having been delivered to each of the parties after signing the entry in the book, constituted evidence of a *new* contract made between the parties on the footing of those notes (*u*). That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (and?) there be a memorandum in the book made according to the intention of the parties, that memoran-

(*s*) See *dictum* of Denman, C. J., also, in Trueman *v.* Loder, 11 A. & E. 589.

(*t*) 9 M. & W. 802.

(*u*) See statement of Patteson, J., to same effect, *infra*, § 291.

dum signed by the broker would not be good evidence to satisfy the Statute of Frauds." Lord Abinger said: "I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other there is no contract, unless it be shown that the broker's book was known to the parties."

§ 289. In Pitts *v.* Beckett (*x*), in 1845, the plaintiff, who had wool for sale in the hands of a wool broker, took the defendant to the broker's office, and there sold the wool by sample in the broker's presence, it being part of the bargain that the wool was to be *in good, dry condition*. In the afternoon of the same day the broker wrote to the plaintiff: "Dear Sir, — We have this day sold on your account, Messrs. Beckett and Brothers" (here followed a description of the terms), "brokerage, 1 per cent. Hughes and Ronald." A machine copy of this communication was made in the broker's book. The broker did not write at all to the purchasers, nor send them any note of the contract. The note to the plaintiff said nothing about the stipulation that the bulk should be in good, dry condition. The defendants rejected the wool when sent to them, on the ground that it was not in good condition, and the jury found this to be true. The evidence offered was the note written to the plaintiff, and the machine copy of it as being the entry in the broker's book. Held, that the authority given to the broker by the defendant was, not to make a bargain for him, but to reduce to writing and sign the bargain actually made; that the broker, therefore, was without authority from the defendant to sign a bargain which omitted one of the material stipulations, viz., that the wool should be in good, dry condition; and that the paper offered in evidence against defendants was therefore not signed by them or their agent. The judges also intimated very strongly the opinion, that the broker's signature was not intended by him to represent the buyer's signature, and that the paper was a mere letter of advice, written in his character of agent of the plaintiff, copied by machine into his letter-book, and not intended as one of the bought and sold notes usually delivered by brokers.

§ 290. In 1851 the subject was elaborately considered, in the Queen's Bench, in the case of Sievewright *v.* Archibald (*y*), before Lord Campbell, C. J., and Erle, Patteson, and Wightman, JJ. The case was tried at Guildhall before the Chief Justice, and there was a verdict for the plaintiff, with leave reserved to move to set it aside and enter a verdict for the defendant. The declaration set out an alleged "sold note," and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought and sold notes, and an amendment alleging the bought note was allowed,

(*x*) 13 M. & W. 743.

(*y*) 20 L. J. Q. B. 529; 17 Q. B. 103.

on its being stated to the learned Chief Justice that the plaintiff could give evidence of a subsequent ratification of the bought note by the defendant. The sold note was for a sale to the defendant of "500 tons *Messrs. Dunlop, Wilson & Co.'s* pig iron." The bought note was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop, Wilson & Co.'s iron; that their iron was Scotch iron, and that they were manufacturers of iron in Scotland; and that the agreement with the defendant was, that he purchased from the broker 500 tons of *Dunlop, Wilson & Co.'s* iron. The name of the sellers was given to the purchaser. The bought and sold notes were complete in every respect, and corresponded, save in the variance between the words "Scotch iron" and "Dunlop, Wilson & Co.'s iron." *There was no entry in the broker's books signed by him.*

§ 291. The views of the judges differed so widely, and their observations on every branch of this vexed subject are so important, that it is necessary to transcribe them at considerable length. Lord Campbell's judgment was concurred in entirely by Wightman, J., who heard the argument in April, but was unable to be present at the decision in the following June.

His Lordship first held that there was not sufficient evidence to justify the verdict of the jury that the defendant had ratified the contract expressed in the bought note; next, that there was no parol agreement shown by the evidence, antecedent to the bought note, and of which that bought note could properly be said to be a memorandum, but that *the agreement itself was intended to be in writing, and was understood by the parties to have been reduced to writing when made;* and his Lordship then continued his reasoning on the supposition that this view was erroneous, and that there had been an antecedent parol agreement, in these words: "Can this (the bought note) be said to be a true memorandum of the agreement? We are here again met by the question of the *variance*, which is as strong between the parol agreement and the bought note as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected to, and the declaration was amended. I by no means say that, where there are bought and sold notes, they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold without hesitation, notwithstanding some

dicta and a supposed ruling by Lord Tenterden in Thornton *v.* Meux to the contrary, *that this entry is the binding contract between the parties*, and that a mistake made by him when sending a copy of it in the shape of a bought or sold note would not affect its validity. Being authorized by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both according to the Statute of Frauds, as if both had signed it with their own hands. The duty of the broker requires him to do so, and until recent times this duty was scrupulously performed by every broker. What are called the bought and sold notes are sent by him to his principals by way of information that he has acted upon their instructions, *but not as the actual contract which was to be binding on them.* This clearly appears from the practice still followed of sending the bought note to the buyer and the sold note to the seller, whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; *if there be any material variance between them, they are both nullities, and there is no binding contract.* This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases that I could not venture to contravene it if I did not assent to it. . . . In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient mention of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict."

Patteson, J., said that the sole question was whether there was a note or memorandum in writing of the bargain signed by the defendant or his agent, it being quite immaterial whether there was one signed by the plaintiff; that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made, embodying the contract, and signed by one party or his agent, he being the party to be charged, the statute was satisfied. Still, if the original contract was in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. The

learned judge considered that in the case before the court the contract was not in writing; that it was made by the broker, acting for both parties, but was not signed by him or them, and that the statute therefore could not be satisfied unless there was some *subsequent* memorandum, signed by the defendant or his agent. His Lordship then continued: "There are subsequent memoranda signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant; the sold note to the seller, the plaintiff. Each of them in the language used purports to be a representation by the broker, to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract, signed by the buyer's agent, in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer, and *vice versâ* as to the sold note. Can, then, the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his books and sign all contracts made by him; and if the broker has made such signed entry, *I cannot doubt, notwithstanding the cases and dicta apparently to the contrary, that such memorandum would be the binding contract on both parties.*" The learned judge then went on to say that he had been one of the judges of the court that granted the new trial in Hawes *v.* Forster, and he confirmed the account given of that case by Parke, B., in Thornton *v.* Charles (*supra*, § 288). He then continued: "However, in the present case there was no signed memorandum in the broker's book. Therefore the bought and sold notes together, or one of them, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. The court cannot possibly say, nor can a jury say, which of them is to prevail over the other. Read together, they are inconsistent; assuming the variance between them to be material, and if one prevails over the other, that one will be the memorandum, and not the two together. If, on the other hand, only one of these notes is to be considered as the memorandum in writing signed by the defendant's agent, and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them by itself can be so treated. . . . If this

were *res integra*, I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds, but I consider the point to be too well settled to admit of discussion. Yet there is no case in which they have varied in which the court has upheld the contract, plainly showing that the two together have been considered to be the memorandum binding both parties, the reason of which is, I confess, to my mind, quite unsatisfactory, but I yield to authority."

Erle, J., stated the question raised in the case as follows: "The defendant contends, *first*, that in cases where a contract is made by a broker, and bought and sold notes have been delivered, they alone constitute the contract, that all other evidence of the contract is excluded, and that if they vary a contract is disproved." The learned judge held that the defendant had failed to establish this proposition, and then observed: "The question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and *that the point is whether such evidence is inadmissible because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing. I think they are not.* If bought and sold notes which agree are delivered and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes, but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof if they constituted a contract in writing. . . . The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done in his behalf. . . . No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. . . . It seems to me, therefore, that upon principle *the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree.*" The learned judge then pointed out the distinction between proof of a contract and proof of a compliance with the statute, saying: "The question of a compliance with the statute does not arise till the contract is in proof. In case of a

written contract, the statute has no application. In case of other contracts, the compliance may be proved by part payment and part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing in that it may be made at any time after the contract, if before the action commenced, and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement."

His Lordship then held that, upon a review of the evidence in the case, there was sufficient parol proof to show that the bought note was a correct statement of the terms of the bargain, and that defendant had acquiesced in and was satisfied with it.

§ 292. The next case was Parton *v.* Crofts (*z*), in 1864, where the contract note delivered to the purchaser was alone produced in evidence, and it was held that it sufficed to prove the contract between the two parties, and that the presumption was that the bought and sold notes did not vary; if they did, it was for the defendant to prove the variance by giving in evidence the note sent to the seller.

In Heyworth *v.* Knight (*a*), the same court decided in the same year that, where the contract appears in a correspondence to have been completed between the brokers, and the bought and sold notes show a variance from that contract, the parties are bound by the agreement contained in the correspondence; that the bought and sold notes are to be disregarded; and that the purchaser was bound by the agreement made in the correspondence in accordance with the authority given to his broker, although the broker had signed without authority a different contract in the bought and sold notes. In this case the decision of the Privy Council in Cowie *v.* Remfry (*b*) was very strongly disapproved by Willes, J.

§ 293. The next case, in 1868, was Cropper *v.* Cook (*c*). It decides that it is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold note states, "Sold to our principals," etc., without naming the buyers. It was proven in the case that a special usage in the wool trade, in Liverpool, that the buyer's broker may contract in the name of the principal, or at his discretion, without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the vendor; and that the broker may do this, without communicating the fact to the buyer. The court held this usage reasonable and valid.

(*z*) 16 C. B. N. S. 11; 33 L. J. C. P. 189.
(*a*) 17 C. B. N. S. 298; 33 L. J. C. P. 298.
(*b*) 5 Moore P. C. C. 232.
(*c*) L. R. 3 C. P. 194.

[The last case was Thompson *v.* Gardiner (*d*), in 1876. A broker who acted only for the plaintiff, the seller, entered into a contract for the sale of butter to the defendant, sending a contract note to each party, but only signing the note sent to the plaintiff. *He, however, duly entered and signed both notes in his broker's book.* The defendant kept the bought note, but when called upon to accept the butter declined to do so, on the ground that the bought note was unsigned. The court held, first (Grove, J., *dubitante*), that the defendant by his conduct in retaining the note had acknowledged the broker's authority to sign the contract on his behalf; and, secondly, that even if the defendant were not bound by the broker's signature to the sold note, the signature in the broker's book was sufficient to satisfy the statute. "The broker being a broker authorized to make a memorandum of the contract on the defendant's behalf, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the Statute of Frauds to bind the defendant." Per Cur. at p. 780.]

§ 294. The following propositions are submitted as fairly deducible from the authorities just reviewed, and others quoted in the notes, though some of these points cannot be considered as finally settled.

First. — The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. This proposition rests on the authority of Lord Ellenborough in Heyman *v.* Neale (*e*), of Parke, B., in Thornton *v.* Charles (*f*), and of Lord Campbell, C. J., and Wightman and Patteson, JJ., in Sievewright *v.* Archibald (*g*), [and of the court in Thompson *v.* Gardiner (*h*).]

Gibbs, C. J., in Cumming *v.* Roebuck (*i*); Abbott, C. J., in Thornton *v.* Meux (*k*); Denman, C. J., in Townend *v.* Drakeford (*l*); and Lord Abinger, in Thornton *v.* Charles (*f*), are authorities to the contrary, but they seem to have been overruled in Sievewright *v.* Archibald (*g*).

§ 295. *Secondly.* — The bought and sold notes do not *constitute* the contract. This is the opinion of Parke, B., in Thornton *v.* Charles (*m*); of Lord Ellenborough, in Heyman *v.* Neale (*n*), and was the unanimous opinion of the four judges in Sievewright *v.* Archibald (*o*). The decision to the contrary, in the Nisi Prius case of Thornton *v.* Meux (*p*), and the *dicta* in Goom *v.* Aflalo (*q*) and

(*d*) 1 C. P. D. 777.
(*e*) 2 Camp. 337.
(*f*) 9 M. & W. 802.
(*g*) 20 L. J. Q. B. 529; 17 Q. B. 103.
(*h*) 1 C. P. D. 777.
(*i*) Holt N. P. 172.
(*k*) M. & M. 43.
(*l*) 1 Car. & K. 20.
(*m*) 9 M. & W. 802.
(*n*) 2 Camp. 337.
(*o*) 20 L. J. Q. B. 529; 17 Q. B. 103.
(*p*) M. & M. 43.
(*q*) 6 B. & C. 117.

Truman *v.* Loder (*r*), are pointedly disapproved in the case of Sievewright *v.* Archibald (*z*).

§ 296. *Thirdly.* — But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. This was first settled by Goom *v.* Aflalo (*q*), and reluctantly admitted to be no longer questionable in Sievewright *v.* Archibald (*z*).

§ 297. *Fourthly.* — Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in Hawes *v.* Forster (*s*), of the Common Pleas in Parton *v.* Crofts (*t*), [and of the Common Pleas Division in Thompson *v.* Gardiner (*u*).]

§ 298. *Fifthly.* — Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. Hawes *v.* Forster (*s*) is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in Parton *v.* Crofts, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

§ 299. *Sixthly.* — As to *variance.* This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions that this entry will in general control the case, because it constitutes the contract, of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a *new* contract modifying that which was entered in the book. This is the point established by Hawes *v.* Forster (*s*), according to the explanation of that case first given by Parke, B., in Thornton *v.* Charles (*y*), afterwards by Patteson, J., in Sievewright *v.* Archibald (*z*), and adopted by the other judges in this last-named case.

(*q*) 6 B. & C. 117.
(*r*) 11 A. & E. 589.
(*s*) 1 Mood. & Rob. 368.
(*t*) 16 C. B. N. S. 11; 33 L. J. C. P. 189.
(*u*) 1 C. P. D. 777.
(*y*) 9 M. & W. 802.
(*z*) 17 Q. B. 103; 20 L. J. Q. B. 529.

§ 300. *Seventhly.* — If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes, as decided in Heyworth *v.* Knight (*a*).

§ 301. *Eighthly.* — If the bought and sold notes vary, and there is no signed entry in the broker's book nor other writing showing the terms of the bargain, there is no valid contract. This is settled by Thornton *v.* Kempster (*b*), Cumming *v.* Roebuck (*c*), Thornton *v.* Meux (*d*), Grant *v.* Fletcher (*e*), Gregson *v.* Ruck (*f*), and Sievewright *v.* Archibald (*g*). The only opinion to the contrary is that of Erle, J., in the last-named case. In one case, however, at Nisi Prius, Rowe *v.* Osborne (*h*), Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor which did not correspond with the note signed by the broker and sent to the defendant.

§ 302. *Lastly.* — If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. This was decided in Hodgson *v.* Davies (*i*), and as the special jury spontaneously intervened in that case, and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof (*k*), but it would certainly be more prudent to offer evidence of the usage.

§ 303. A singular point was decided in Moore *v.* Campbell (*l*). A broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing, "I have this day sold through you to Mr. Moore," etc., etc. The terms stated in this letter varied from those in the sold note sent to the defendant. The court held that these were not bought and sold notes by a broker of both parties, and that the broker was acting for the plaintiff alone. The plaintiff's counsel contended that the defendant's letter was sufficient proof of the contract to bind him, and

(*a*) 17 C. B. N. S. 298; 33 L. J. C. P. 298.
(*b*) 5 Taunt. 786.
(*c*) Holt N. P. 172.
(*d*) M. & M. 43.
(*e*) 5 B. & C. 436.
(*f*) 4 Q. B. 747.
(*g*) 17 Q. B. 103; 20 L. J. Q. B. 529.
(*h*) 1 Stark. 140.
(*i*) 2 Camp. 531.
(*k*) See Brandao *v.* Barnett, 3 C. B. 519, on appeal to H. of L.; S. C. 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, notes to Wigglesworth *v.* Dallison, 1 Sm. L. C. 577, ed. 1887.
(*l*) 23 L. J. Ex. 310; 10 Ex. 323.

must be taken to be his own correction of the sold note made by the broker, and binding on him. But the court held that although this was true if the intention of the parties was that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff was also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury.

[In McCaul *v.* Strauss (*m*), a broker employed by the seller only effected a contract by means of a note sent to and accepted by the purchaser, and it was held by Stephen, J., that a variance between this note and a note sent by the broker to the seller was immaterial, such note amounting to nothing more than a report by an agent to his principal of a contract effected on his behalf.]

§ 304. A mere difference in the *language* of the bought and sold notes will not constitute a variance, if the *meaning* be the same, and evidence of mercantile usage is admissible to explain the language, and to show that the meanings of the two instruments correspond. The cases in illustration are collected in the note (*n*).

And where the contract made by the broker was one for the exchange or barter of goods, and he wrote out the contract in the shape of bought and sold notes, giving to each party on a single sheet a bought note for the goods he was to receive, and a sold note for the goods he was to deliver, it was held no variance that the day of payment was specified at the end of both notes on one sheet, and at the end of the bought note only on the other (*o*).

§ 305. The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed in behalf of the party so revoking (*p*); but after the signature of the duly authorized broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be that mentioned *supra*, where a credit sale has been made to an unnamed purchaser, in which event custom allows the vendor to retract if, on inquiry within reasonable time after being informed of the name, he disapproves the sufficiency of the purchaser.

§ 306. And where a broker had, reluctantly and after urgent persuasion by the vendor, made an addition to the sold note, after both the bought and sold notes had been delivered to the parties and taken away, the vendor's contention that this addition was simply inopera-

(*m*) Cababé & Ellis, 106.

(*n*) Bold *v.* Rayner, 1 M. & W. 343; and per Erle, J., in Sievewright *v.* Archibald, 20 L. J. Q. B. 529; 17 Q. B. 103; Rogers *v.* Hadley, 2 H. & C. 227; 32 L. J. Ex. 227; Kempson *v.* Boyle, 3 H. & C. 763; 34 L. J. Ex. 191.

(*o*) Maclean *v.* Dunn, 4 Bing. 722–724.

(*p*) Farmer *v.* Robinson, 2 Camp. 339 n.; Warwick *v.* Slade, 3 Camp. 127.

tive was overruled, and the court held the fraudulent alteration of the note destroyed its effect, so that the vendor could not recover on it (*q*). And the effect would be the same in the case of a material alteration even not fraudulent (*r*).

§ 307. In Henderson *v.* Barnewall (*s*), where the parties contracted in person in presence of the broker's clerk, who had brought them together on the Exchange, and one, in the hearing of the other, dictated to him the terms of the agreement, it was *held* by all the Barons of the Exchequer that the agency of the clerk was *personal*, and that neither an entry of the bargain in the broker's books nor a sale note signed by him would satisfy the statute, because the clerk could not delegate the agency to his employer.

AMERICAN NOTE.

§§ 265–307.

AGENTS DULY AUTHORIZED TO SIGN. It is hardly necessary to cite authorities to the plain proposition that an agent may be authorized to sign a memorandum in the same manner as to do any other act for his principal. But, however appointed, it is clear an agent need not express in the memorandum, either in the body or the signature, the name of his principal, or make any allusion to him, or indicate in any way that he himself was contracting or signing for another. If, in fact, he had authority to make, and did actually make, the contract in question, on behalf of and for his principal, though undisclosed, he may sign the memorandum in his own individual name merely, and it will bind the principal or inure to his benefit. The statute simply says, "signed by some agent duly authorized." It does not require nor intimate that the memorandum must be signed in the name of the principal. See Williams *v.* Bacon, 2 Gray, 387, an important case on this point; Yerby *v.* Grigsby, 9 Leigh, 387; Conaway *v.* Sweeney, 24 W. Va. 649; Kingsley *v.* Siebrecht, Me. (1898), 42 Atl. 249, and cases cited.

It seems to be settled in England that it is not within the power of one party to authorize the other to act as his agent in signing the memorandum. Sharman *v.* Brandt, L. R. 6 Q. B. 720, Farebrother *v.* Simmons, 5 B. & Ald. 333; Wright *v.* Dannah, 2 Camp 203; Tetley *v.* Shand, 25 L. T. N. S. 662, *ante*, § 241. The same view has been taken in this country. Wilson *v.* Lewiston Mill Co. 150 N. Y. 314, 325, affirming 74 Hun, 612, and citing Browne, St. of Frauds, § 367; Reed, St. of Frauds, § 369. And it is clear that a vendor, selling his own goods as auctioneer, is not made such agent *solely from his office* as auctioneer, as he would be if disinterested. See Bent *v.* Cobb, 9 Gray, 397; Smith *v.* Arnold, 5 Mason, 414; Tull *v.* David, 45 Mo. 444. Although his clerk might be authorized. Frost *v.* Hill, 3 Wend. 386; Johnson *v.* Buck, 35 N. J. L. 342. But this is quite different from saying that one party never *can* expressly authorize

(*q*) Powell *v.* Divett, 15 East, 29.
(*r*) Mollett *v.* Wackerbath, 5 C. B. 181; 17 L. J. C. P. 47.
(*s*) 1 Y. & J. 387.

the other to sign for him, if he chooses to trust in the other s integrity so to do.

Ordinarily at private sales, neither a party, nor his clerk or agent, is authorized to sign for the other party without his knowledge or consent. It is consent alone that makes the act valid in any case. Sewall *v.* Fitch, 8 Cow. 215; Bamber *v.* Savage, 52 Wisc. 110; Ijams *v.* Hoffman, 1 Md. 435; Carmack *v.* Masterson, 3 Stew. & Port. 411; Entz *v.* Mills, 1 McMullan, 453; Meadows *v.* Meadows, 3 McCord, 458; Cathcart *v.* Keirnaghan, 5 Strob. 129. But as to a disinterested auctioneer, it is easy to see that he is authorized to sign for the vendor who employs him to sell, and therefore to make a valid sale, and consequently to execute any paper necessary for that purpose. See Gill *v.* Hewett, 7 Bush, 10. And so is his clerk, in his presence and that of the parties. Alna *v.* Plummer, 4 Greenl. 258; Smith *v.* Jones, 7 Leigh, 165; Price *v.* Durin, 56 Barb. 647; Harvey *v.* Stevens, 43 Vt. 653. But his authority to sign for the *buyer* rests on entirely different grounds. Ordinarily the auctioneer cannot act for the buyer, as to bid for him, and then strike off the goods on such bid, for this is inconsistent with his duty to the seller. Randall *v.* Lautenberger, 16 R. I. 158. His authority to make a memorandum to bind the buyer seems to be implied from the fact that the memorandum is made by the auctioneer, or more usually by his clerk, in the buyer's presence, at the time and place of sale, and in accordance with custom and usage in such cases; and his assent therefore is implied. See Gill *v.* Bicknell, 2 Cush. 355; Crooks *v.* Davis, 6 Grant (Ont.), 317; M'Comb *v.* Wright, 4 Johns. Ch. 659; Batchelder *v.* Libbey, 66 N. H. 175; McBrayer *v.* Cohen, 92 Ky. 479. On this ground, therefore, it is essential that the memorandum, in order to bind the buyer, be made at the time of sale, when and where the presumption of silent assent may arise. But there should be some evidence that the buyer actually assented in some way to the act of the clerk. See Hill *v.* Willis, 6 Vict. R. 193.

And it is now settled that the auctioneer himself has no implied authority to make such memorandum long after the sale is over, and without the knowledge and acquiescence of the buyer. Horton *v.* McCarty, 53 Maine, 394, the leading case; Flintoft *v.* Elmore, 18 Up. Can. C. P. 274; Story, J., in Smith *v.* Arnold, 5 Mason, 414; Bell *v.* Balls [1897], 1 Ch. 663; Cole, C. J., in Bamber *v.* Savage, 52 Wisc. 113. In some States the statute expressly requires that at auction sales the memorandum must be made at the time and place of sale, in a "sale book," in order to bind the buyer. In such cases an entry on a piece of paper, afterwards transferred to a sale book, is not sufficient. See Hicks *v.* Whitmore, 12 Wend. 548; Craig *v.* Godfroy, 1 Cal. 415.

Brokers also have authority to sign a memorandum of sales duly made by them, and bind both parties. See Butler *v.* Thomson, 92 U. S. 412; Newberry *v.* Wall, 84 N. Y. 576; Coddington *v.* Goddard, 16 Gray, 436. So have brokers' clerks in their presence and by their direction. Williams *v.* Woods, 16 Md. 220.

In Shaw *v.* Finney, 13 Met. 453, one H., a broker, who bought fish for himself and also for the plaintiffs, bought a lot of fish of the defendant, part for himself and part for the plaintiffs, but without so informing the defendant, and made this note of the bargain on his book, not in defendant's presence: "F. agrees to sell H. his fish at $2.50 per quintal," etc. It was held that H. was not agent for the defendant to bind him by the

memorandum, and that the *plaintiffs* could not enforce the contract, whether H. could or not. Of course the party may deny the broker's authority to make the particular sale which he has inserted in his book or note. Peltier *v.* Collins, 3 Wend. 467; Remick *v.* Sandford, 118 Mass. 107. And a broker who does not in fact make the contract, but merely brings the parties together, who themselves make the sale, has no authority to bind either by his memorandum made on his own book without their assent. Aguirre *v.* Allen, 10 Barb. 74.

As to a variance between bought and sold notes. In Butters *v.* Glass, 31 Up. Can. Q. B. 379, the sold note made the wheat deliverable "during the first half of August next." The bought note read, "during the first half of August next, at *seller's option.*" Held, a fatal variance, and that the purchaser was not bound to accept. And see Suydam *v.* Clark, 2 Sandf. 133; Canterberry *v.* Miller, 76 Ill. 355; Bacon *v.* Eccles, 43 Wisc. 241; Phippen *v.* Hyland, 19 Up. Can. C. P. 416; Calkins *v.* Falk, 1 Abb. App. Dec. 291.

BOOK II.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

	Sect.		Sect.
Preliminary remarks	308	Division of the subject	312

§ 308. AFTER a contract of sale has been formed, the first question which presents itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement?

We have already seen (*a*) that the distinction between the two contracts consists in this, that, in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor; whereas, in the executory agreement, the goods remain the property of the vendor till the contract is executed. In the one case, A. sells to B.; in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods themselves as soon as the contract is completed by mutual assent; if they are lost or destroyed he is the sufferer. In the other case, as he does not become the owner of the goods he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has at common law no other remedy for breach of the contract than an action for damages.

§ 309. Both these contracts being equally legal and valid, it is obvious that, whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them so imper-

(*a*) *Ante*, Bk. I. Ch. 1.

fectly as to leave it doubtful what they really mean, and when this is the case the courts have applied certain rules of construction which in most instances furnish conclusive tests for determining the controversy.

§ 310. When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract;* that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B., and to have become the property of A.

§ 311. But, on the other hand, goods sold may be specific, as if there be in the case supposed only ten sheep in a flock, and A. agrees to buy them all. In such case, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the vendor's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions; because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case, there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield

to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession and is not ready for delivery, as an unfinished ship; or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel.

§ 312. The authorities which justify these preliminary observations (*b*) will now be reviewed, thus placing before the reader the means of arriving at an accurate knowledge of this important branch of the law relating to the sale of personal property. They will be considered in five chapters, having reference to cases, —

1. Where the sale is of a specific chattel unconditionally.
2. Where the chattels are specific, but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

The effect of obtaining goods by fraud, upon the transfer of the property in them, will be considered in Book III., Ch. 2, On Fraud.

AMERICAN NOTE.

§§ 308–312.

CONTRACTS EXECUTED OR EXECUTORY. The American authorities quite generally agree in the three propositions stated in this chapter: —

1. That a sale is to be considered executed or executory, according to the real intention of the parties as manifested by their language and the surrounding circumstances; there being, of course, no question involved as to the Statute of Frauds or rights of creditors. See, for instance, Elgee Cotton Cases, 22 Wall. 187; Hatch *v.* Oil Co. 100 U. S. 131; Terry *v.* Wheeler, 25 N. Y. 525; Callaghan *v.* Myers, 89 Ill. 570; Sewell *v.* Eaton, 6 Wisc. 490; Fletcher *v.* Ingram, 46 Wisc. 201; Weed *v.* Boston Ice Co. 12 Allen, 377; Leggatt *v.* Clarry, 13 Ont. R. 105; Lingham *v.* Eggleston, 27 Mich. 324; Hurd *v.* Cook, 75 N. Y. 454; Stone *v.* Peacock, 35 Me. 388; Rail *v.* Little Falls Co. 47 Minn. 422; Hoover *v.* Maher, 51 Minn. 269; Cunningham Iron Co. *v.* Warren Mfg. Co. 80 Fed. R. 878; Russell *v.* Abbott, 91 Geo. 178. And this intention is ordinarily a matter of fact to be found by the jury upon the evidence. Dyer *v.* Libby,

(*b*) In Heilbutt *v.* Hickson, L. R. 7 C. P. 438, Bovill, C. J., laid down the general law on the subject, substantially as it is stated in the above text.

61 Me. 45; Fuller *v.* Bean, 34 N. H. 290; Riddle *v.* Varnum, 20 Pick. 280; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 296, and cases cited; Wilkinson *v.* Holiday, 33 Mich. 386; Kelsea *v.* Haines, 41 N. H. 253; Kent Iron Co. *v.* Norbeck, 150 Pa. St. 559; Lobdell *v.* Horton, 71 Mich. 681. Unless the evidence should be so clear one way as not to justify a finding to the contrary, in which case the court may, as in other cases, direct the jury how to find; see Wigton *v.* Bowley, 130 Mass. 254; or set aside the verdict. Restad *v.* Engemoen, 65 Minn. 148.

2. If the actual intention of the parties cannot be determined as a fact, the law generally presumes the sale to be an actual present sale, whenever the exact thing is specified, designated, or agreed on, and is then ready for immediate delivery. Riddle *v.* Varnum, 20 Pick. 283; Chapman *v.* Shepard, 39 Conn. 413; Bethel Steam Mill Co. *v.* Brown, 57 Me. 18.

3. But if no particular goods have been specified, set apart, or designated, or if they have, and something remains yet to be done upon them by the vendor to get them ready for delivery or to ascertain the price, then it is an executory sale. Stephens *v.* Santee, 49 N. Y. 35.

CHAPTER II.

SALE OF SPECIFIC CHATTELS UNCONDITIONALLY.

	Sect.
Common-law rules — Shepherd's Touchstone	313
Noy's Maxims	314
Modern rules; the consideration for the transfer is the promise to pay, not the actual payment of price	315
In bargain and sale of specific goods property passee immediately	315
Even though vendor retains possession	315

§ 313. SHEPHERD'S Touchstone (*a*) gives the common-law rules as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, *First*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or, *Secondly*, all; or, *Thirdly*, part of the money is paid in hand; or, *Fourthly*, I give earnest money, albeit it be but a penny, to the seller; or, *Lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, — in all these cases there is *a good bargain and sale of the thing to alter the property thereof.* In the *first* case, I may have an action for the thing, and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money."

§ 314. In Noy's Maxims (*b*), the rules are given thus: "In all agreements there must be *quid pro quo presently*, except a day be expressly given for the payment, or else *it is nothing but communication.* . . . If the bargain be that you shall give me 10*l.* for my horse, and you gave one penny in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is 4*l.*, and you say you will give me 4*l.* and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract;* but if you begin directly to tell your money, if I sell her to another you shall have your action on the case against me. . . . If I sell my horse for money I may keep him until I am paid, but I cannot have

(*a*) P. 224. (*b*) Pp. 87–89.

an action of debt until he be delivered, *yet the property of the horse is by the bargain in the bargainee or buyer;* but if he presently tender me my money and I refuse it, he may take the horse, or have an action of detinue; and if the horse die in my stables between the bargain and delivery, I may have an action of debt for the money, because *by the bargain the property was in the buyer.*"

§ 315. The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy, that unless the money be paid "presently" there is no sale except a day be *expressly* given for the payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days, the actual payment of the price; but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention. In Simmons *v.* Swift (*c*), Bayley, J., said: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." So in Dixon *v.* Yates (*d*), Parke, J., said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. . . . Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where, by the contract itself, *the vendor appropriates to the vendee a specific chattel*, and *the latter thereby agrees to take that specific chattel* and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is *equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.*"

§ 316. The principles so clearly stated by these two eminent judges are the undoubted law at the present time (*e*). Thus, in Tarling *v.* Baxter (*e*), the defendant agreed to sell to the plaintiff a certain stack of hay for 145*l.*, payable on the ensuing 4th of February, and to be

(*c*) 5 B. & C. 862.

(*d*) 5 B. & Ad. 313, 340.

(*e*) Hinde *v.* Whitehouse, 7 East, 558; Tarling *v.* Baxter, 6 B. & C. 360; Martindale *v.* Smith, 1 Q. B. 389; Spartali *v.* Benecke, 10 C. B. 212; Gilmour *v.* Supple, 11 Moo. P. C. 551; The Calcutta Company *v.* De Mattos, 32 L. J. Q. B. 322; Wood *v.* Bell, 6 E. & B. 355; 25 L. J. Q. B. 148, and in Ex. Ch. 321; Chambers *v.* Miller, 10 C. B. N. S. 125; 32 L. J. C. P. 30; Turley *v.* Bates, 2 H. & C. 200; 33 L. J. Ex. 43; Joyce *v.* Swan, 17 C. B. N. S. 84.

allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, although there was also a stipulation that the hay was not to be cut till paid for. Bayley, J., said: "The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, *the property in the thing sold vests in the vendee.*" This case was followed by one presenting very similar features in the Queen's Bench in 1841 (*f*).

§ 317. In Gilmour *v.* Supple (*g*), Sir Cresswell Cresswell, in giving an elaborate judgment of the Privy Council, says: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." In The Calcutta Company *v.* De Mattos (*h*), in 1863, Blackburn, J., pronounced this to be "a very accurate statement of the law." [And in Seath *v.* Moore (*i*), in 1886, the same learned judge (then Lord Blackburn) said: "A contract for valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England to change the property."

AMERICAN NOTE.

§§ 312–317.

UNCONDITIONAL SALE OF SPECIFIC CHATTELS. The American authorities are too uniform to require citation that, *if* a sale is really of a "specific" article, *if* it be really unconditional, *if* there be no special agreement or understanding as to the delivery or the payment, the title passes, and consequently the risk, immediately upon the close of the negotiations, even before any delivery or any payment. The difficulty is always in determining whether the sale be of this complete and unconditional character; but the cases which are not of this character are fully presented elsewhere, and it is unnecessary to present them here. See *post*, Ch. 3, American note, §§ 318–351 a, pp. 293–312.

(*f*) Martindale *v.* Smith, 1 Q. B. 389. See, also, Chinery *v.* Viall, 5 H. & N. 288, and 29 L. J. Ex. 180; Sweeting *v.* Turner, L. R. 7 Q. B. 310.

(*g*) 11 Moo. P. C. 566.

(*h*) 32 L. J. Q. B. 322, 328.

(*i*) 11 App. Cas. at p. 370.

CHAPTER III.

SALE OF SPECIFIC CHATTELS CONDITIONALLY.

	Sect.
Two rules given by Lord Blackburn:	
First — When vendor is to do anything to the goods before delivery, property does not pass	318
Second — Where goods are to be tested, weighed, or measured, property does not pass	319
A third rule given — Where buyer is bound to the performance of a condition, property does not pass, even by actual delivery, before performance of condition	320
Goods measured by buyer for his own satisfaction	322
Where buyer assumes risk of delivery, he must pay price, even where property has not passed, if destruction of goods prevents delivery	328
But intention must be clearly indicated	329 a
Contract f. o. b.	329 c
Goods sold to be paid for on delivery at a particular place	330
Goods put in buyer's packages	330
Where something is to be done by vendor to the goods after delivery	331
Where something is to be done to the goods by the buyer	332
Where chattel is unfinished or incomplete, property does not pass unless contrary intention be proved	335
Where payment for a ship is to be made by fixed instalments as work progresses	336
When property passes in the materials provided for completing the chattel	340
Authorities for third rule above given	343
Agreement for hire and conditional sale	345 a
American cases on the subject of this chapter	346
American criticisms on the rule in Clarke *v.* Spence	351
A question of intention arising upon the interpretation of the contract	351 a

§ 318. Two rules on this subject are stated by Lord Blackburn (*a*), as follows: —

First. — Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

§ 319. *Secondly.* — Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

§ 320. *Third Rule.* — To these may be added, *Thirdly* — Where

(*a*) On Sale, pp. 151, 152.

the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

The authorities in support of these propositions will now be considered.

§ 321. In Hanson *v.* Meyer (*b*), the defendant sold a parcel of starch at 6*l.* per cwt., and directed the warehouseman to weigh and deliver it. Part was weighed and delivered, and then the purchaser became bankrupt, whereupon the vendor countermanded the order for delivery of the remainder, and took it away. In an action for trover, brought by the assignees of the bankrupt purchaser, Lord Ellenborough said that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because "the price is made to depend upon the weight."

§ 322. In Rugg *v.* Minett (*c*), a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the vendors out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but a few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The court held that the property had passed in those lots only which had been filled up, because, as Lord Ellenborough said, "everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bailey, J., said that it was incumbent on the buyer "to make out that something remained to be done to the goods by the sellers at the time when the loss happened."

§ 323. In Zaguary *v.* Furnell (*d*), the property was held not to have passed in a sale of "289 bales of goat-skins, from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57*s.* 6*d.* per doz.," because, by the usage of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, and this had not been done when the goods were destroyed by fire. This was a decision of Lord Ellenborough

(*b*) 6 East, 614.
(*c*) 11 East, 210.
(*d*) 2 Camp. 240.

at Nisi Prius, and the reporter states that after the plaintiff's nonsuit he brought another action in the Common Pleas, and was again nonsuited by Sir James Mansfield, C. J., who concurred in opinion with Lord Ellenborough.

In Simmons *v.* Swift (*e*), the sale was of a specified stack of bark, at 9*l.* 5*s.* per ton, and a part was weighed and taken away and paid for. Bayley, J., and the majority of the court, held that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary."

§ 324. In Logan *v.* Le Mesurier (*f*), the sale was on the 3d of December, 1834, of a quantity of red-pine timber, then lying above the rapids, Ottawa River, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes at ninety days from the date of sale, at the rate of 9½*d.* per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at 9½*d.*, and if it fell short the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet, before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive the raft was broken up by a storm, and a great part of the timber lost, before it was measured and delivered. Held, that the property was not transferred until measured, and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

§ 325. In Gilmour *v.* Supple (*g*), where the facts were identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were: "Sold Allan, Gilmour & Co. a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole, 7¾*d.* per foot." The raft *was delivered* to the buyers' servant, at the appointed place, and broken up by a storm the same night. The court held, in this case, that the property had passed, because it was proven that the raft *had been measured before delivery*, by a public officer, and it was not to be *measured again by the vendor*. The buyer was at liberty to measure it for his own satisfaction, as in Swanwick *v.* Sothern (*h*), but the vendor had lost

(*e*) 5 B. & C. 857.

(*f*) 6 Moo. P. C. 116. See, also, Wallace *v.* Breeds, 13 East, 522; Busk *v.* Davis, 2 M. & S. 397; Austen *v.* Craven, 4 Taunt. 644; Shepley *v.* Davis, 5 Taunt. 617; Withers *v.* Lyss, 4 Camp. 237; Boswell *v.* Kilborn, 15 Moo. P. C. 309.

(*g*) 11 Moo. P. C. 551.

(*h*) 9 A. & E. 895.

all claim on the timber, and all lien for price, and there was nothing further for him to do, either alone or concurrently with the purchaser.

§ 326. In Acraman *v.* Morrice (*i*), the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was that, after the trees were felled, the purchaser measured and marked the portions that he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own expense, conveying them from Monmouth to Chepstow. The timber in controversy had been bought, measured, and paid for, but the rejected portions had not yet been severed by Swift when he became bankrupt, and the felled trees then lay on his premises. Defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover, by the assignees of the bankrupt. Held, that the property had not passed to the buyer; Wilde, C. J., saying, that "several things remained to be done by the seller; . . . it was his duty to sever the selected parts from the rest, and convey them to Chepstow, and deliver them at the purchaser's wharf."

§ 327. But in Tansley *v.* Turner (*k*) the sale by the plaintiff was as follows: "1833. Dec. 26. Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, say 1*s.* 7½*d.* Payment on or before 29 Sept. 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled;" and some trees were measured and taken away the same day. The remaining trees were marked and measured some time afterwards, and the number of cubic feet in the several trees was taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement and send it to Jenkins. This was not done, but it was held that the property had passed, nothing remaining to be done by the vendor to the thing sold.

Cooper *v.* Bill (*l*) was very similar to the above case in the facts, and was decided in the same way, Tansley *v.* Turner, however, not being cited by the counsel or the court.

§ 328. In Castle *v.* Playford (*m*), the contract was for the sale of a cargo of ice to be shipped, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser *takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever*, and the said Playford to *buy and receive the said ice on its arrival at ordered port*, . . . and to pay for the same in cash *on delivery at* 20*s. per ton, weighed on board during*

(*i*) 8 C. B. 449.
(*k*) 2 Scott, 238; 2 Bing. N. C. 151.
(*l*) 34 L. J. Ex. 161; 3 H. & C. 722.
(*m*) L. R. 5 Ex. 165; 7 Ex. 98.

delivery." Declaration for the price by the vendor, and plea that the cargo did not arrive at the ordered port, and the plaintiffs were not willing and ready to deliver. On demurrers to the declaration and the plea, Martin and Channell, BB., were of opinion (Cleasby, B., diss.) that the property did not pass by the terms of the contract, that the time for payment had not arrived, and that the defendant was not liable; but in the Exchequer Chamber the judgment was unanimous for the plaintiff, Cockburn, C. J., and Blackburn, J., expressing a very decided opinion that the property passed by the agreement, but the case was not decided on that point, but on the ground that, whether the property passed or not, the defendant undertook to pay for it if delivery was prevented by dangers of the sea; and that in cases where property is to be paid for on delivery, and where the risk of delivery is assumed by the purchaser, if the destruction of the property prevents the delivery, the payment is still due, as decided in the cases below cited (*n*).

§ 329. Similar questions were involved in Martineau *v.* Kitching (*o*), where sugars were sold by the manufacturer to a broker. The terms were, "Prompt at one month: goods at seller's risk for two months." The goods had been marked, and paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitely adjusted and settled when the goods came to be weighed on delivery; and part of them had been taken away by the purchaser. The residue was destroyed by fire after the lapse of the two months, and before being weighed. Held by Cockburn, C. J., that the property had passed to the purchaser; and the other members of the court seemed to agree with him, but the case was decided on the same ground as that of Castle *v.* Playford, *supra*.

§ 329 a. [But in such cases the intention, that the purchaser shall assume the risk before the property in the goods has vested in him, must be either expressed in the written contract between the parties, as in Castle *v.* Playford and Martineau *v.* Kitching, or clearly to be inferred from the circumstances of the case, the presumption being that the risk and the property go together.

Thus, in Anderson *v.* Morice (*p*), the plaintiff sought to recover the value of a cargo of rice which he had insured with the defendant, an underwriter at Lloyd's. The plaintiff had bought the rice under a contract, the material parts of which were as follows: "Bought *the cargo* of Rangoon rice, per Sunbeam, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight,

(*n*) Alexander *v.* Gardner, 1 Bing. N. C. 671; Fragano *v.* Long, 4 B. & C. 219.

(*o*) L. R. 7 Q. B. 436.

(*p*) 1 App. Cas. 713, in Ex. Ch. L. R. 10 C. P. 609; S. C. Ib. 58.

with documents attached." The sellers advised the plaintiff to effect an insurance on the rice per Sunbeam, and the plaintiff accordingly effected a policy of insurance with the defendant, which described the adventure as "Beginning upon the goods and merchandises from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon." The Sunbeam, of which the *sellers were the charterers*, arrived at Rangoon, and had taken on board 8878 bags of rice, the remaining 400 bags, which would have completed her cargo, being in lighters alongside, when she sank and was lost with the cargo on board of her. The captain afterwards signed bills of lading for the cargo shipped, which were indorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff. It was held in the Exchequer Chamber (diss. Quain, J.), and afterwards affirmed by the House of Lords (the Lords being, however, equally divided in opinion), reversing an unanimous decision of the Common Pleas, —

1st, that by the terms of the contract of sale, the property in the rice did not vest in the plaintiff until a full cargo was shipped. The first rule laid down by Lord Blackburn, cited *ante*, § 318, was referred to with approval, and it was held that the completion of the loading, so that shipping documents could be made out, was a thing to be done by the vendor for the purpose of putting the goods into a deliverable state.

2dly, that there was no sufficient intention manifested, by the fact of insurance and the terms of the policy, that the purchaser should assume the risk of loss before the property had vested in him, and that, therefore, he had no insurable interest in the goods at the time when they were lost.

Upon this second point the reader is referred to the observations of Blackburn, J. (*q*).

§ 329 b. Anderson *v.* Morice was carefully distinguished in the Colonial Insurance Co. of New Zealand *v.* The Adelaide Marine Insurance Co. (*r*), before the Privy Council in 1886. In that case, Morgan, Connor & Glyde, the purchasers, chartered a vessel, The Duke of Sutherland, and agreed to purchase a cargo of wheat for her at Timaru in New Zealand, free on board, from the New Zealand Grain Agency. The plaintiffs, having agreed with Morgan, Connor & Glyde to insure the cargo, applied to the defendants to hold them covered for a portion of the sum insured. The defendants replied that they would hold the plaintiffs insured to a certain amount on wheat cargo now on board or to be shipped in The Duke of Sutherland. The delivery of the wheat

(*q*) Anderson *v.* Morice, L. R. 10 C. P. at p. 619.

(*r*) 12 App. Cas. 128.

on board at Timaru was commenced, but before it was completed the vessel with the wheat already shipped was lost during a gale. Morgan, Connor & Glyde paid the vendors for the wheat which they had already delivered on board, and the plaintiffs, having paid Morgan, Connor & Glyde for the loss of the wheat in accordance with their contract of insurance, claimed indemnity from the defendants. The defendants contended *inter alia* that the plaintiffs had no insurable interest. This depended upon whether Morgan, Connor & Glyde, the vendees, had an insurable interest or not; for if they had not, the payment to them by the plaintiffs under the policy of insurance was a merely voluntary one. Great stress was laid upon the decision in Anderson *v.* Morice. The Privy Council, however, while admitting the authority of that case to the fullest extent, considered that it was not applicable to the circumstances of the case under consideration, and they decided that the plaintiffs had an insurable interest. It will be observed that in both cases the insurance was effected upon a "cargo," but it was pointed out that the word is susceptible of different meanings, and must be interpreted with reference to the particular contract in which it occurs. In Anderson *v.* Morice the vendors sold a particular cargo on board a ship chartered by themselves; the goods when delivered on board remained in their possession, and they retained possession of the shipping documents until the lading was completed. In the present case the purchasers were the charterers of the vessel, no time or mode was fixed for payment, and nothing was said as to the place to which the cargo when supplied and delivered on board was to be carried, nor to the effect that the sellers were to have anything to do with the shipping documents. The court therefore held upon the facts of the case that the delivery of the wheat from time to time was a delivery to the purchasers, vesting in them the right of possession as well as the right of property, and that at the time of the loss the wheat was therefore at the purchasers' risk.

§ 329 c. The question of the buyer's assumption of the risk of delivery apart from the transfer of the property in the goods was involved in the case of Inglis *v.* Stock (*s*), in relation to a contract for the sale of sugar "free on board" at Hamburg, and the judgment of Brett, M. R. (*t*), would seem to warrant the proposition that the meaning to be attributed to the words "free on board," even where the contract is not for the sale of specific goods, and the goods have not been appropriated to answer the contract (as in the case under consideration), is that the goods when put on board are at the

(*s*) 10 App. Cas. 263; aff. the decision of the Court of Appeal, 12 Q. B. D. 564, which had reversed the decision of Field, J., 9 Q. B. D. 708.

(*t*) 12 Q. B. D. at p. 573.

risk of the purchaser, and that the shipment under such circumstances will have the effect of passing the risk though not the property in the goods to the purchaser (*u*).]

§ 330. A statement is made by the learned editors of Smith's Leading Cases (*x*), that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported) that the property in a specified chattel bought in a shop, to be paid for upon being sent home, did not pass before delivery;" and in accordance with this is the *dictum* of Cockburn, C. J., in The Calcutta Company *v.* De Mattos (*y*), that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that *the thing sold was to be in the mean time at the risk of the buyer*, the contract is not fulfilled by the seller unless he delivers it accordingly."

In both these instances, as in Acraman *v.* Morrice (*z*), something remained to be done by the seller to the thing sold in order to make the agreement an executed contract.

In Langton *v.* Higgins (*a*), it was held that where the buyer had purchased in advance *all* the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him.

§ 331. But the property in goods will pass, even though something remain to be done by the vendor in relation to the goods sold, *after their delivery to the vendee*. Thus, where by the custom of the trade, if the goods sold continued to lie at the wharf after the sale, the vendor was bound to pay for the warehousing during fourteen days: *held*, that this did not prevent the property from passing from the moment of the delivery (*b*). And the same point was held in Greaves *v.* Hepke (*c*), where by the usage at Liverpool the vendor was bound to pay warehouse rent for two months after the sale, and the goods were distrained during that interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser.

This decision would no doubt be the same in other familiar cases, as if a vendor should engage to keep in good order for a certain time after the sale a watch or clock sold: or to do certain repairs to a ship after the sale and delivery.

(*u*) It is right to point out that the judgment of the Court of Appeal turned largely upon the course of dealing between the parties, and that the judgment of the House of Lords proceeded upon different grounds. Per Lord Blackburn, 10 Ap. Cas. at p. 275. Lord Selborne (Ib. at p. 267) seems to have been of opinion that the property had under the circumstances of the case passed to the purchaser. The case is again considered *post*, Chapter on Delivery, § 682.

(*x*) 1 Sm. L. C. p. 166, ed. 1887.

(*y*) 32 L. J. Q. B. 322, 355.

(*z*) 8 C. B. 449; 19 L. J. C. P. 57.

(*a*) 28 L. J. Ex. 252; 4 H. & N. 402.

(*b*) Hammond *v.* Anderson, 1 B. & P. N. R. 69.

(*c*) 2 B. & Ald. 131.

§ 332. In Turley *v.* Bates (*d*), (also reported *sub nom.* Furley *v.* Bates) (*e*), the jury found that the bargain between the parties was for an entire heap of fire-clay, at 2*s.* per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not by the seller, but by the buyer.* Without determining this point, the conclusion was drawn that, from the terms of the contract as established by the verdict of the jury, the intention of the parties was that the property should pass, and this was what the court must look to in every case (*f*).

§ 333. In Kershaw *v.* Ogden (*g*), the facts as found by the jury were that the defendants purchased four specific stacks of cotton waste, at 1*s.* 9*d.* per lb., the defendants to send their own packer, and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the eighty-one sacks. Two days afterwards twenty-one of the sacks were weighed and taken to defendants' premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the quality. The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent its spoiling. Held, in an action on counts for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiff was entitled to recover, Pollock, C. B., saying the case was not distinguishable in principle from Furley *v.* Bates, and Martin, B., saying that on the finding "the property in the four stacks *became the property of the buyers*, and the plaintiff became entitled to the price in an action for *goods bargained and sold.*" This *dictum* was not necessary to the decision, because there was a special count for non-accepting, under which the recovery could be supported, even if the contract was executory. The *dicta* of the learned Barons in this case may, perhaps, be reconciled with the decision in Simmons *v.* Swift (*h*), on the ground that the purchasers, by their return of the sacks weighed, and refusal to take any, had waived the condition that the remainder should be weighed by the vendor.

§ 334. In Young *v.* Matthews (*i*), a purchaser of 1,300,000 bricks

(*d*) 2 H. & C. 200.
(*e*) 33 L. J. Ex. 43.
(*f*) Logan *v.* Le Mesurier, 6 Moo. P. C. 116; Hinde *v.* Whitehouse, 7 East, 558.
(*g*) 34 L. J. Ex. 159; 3 H. & C. 717.
(*h*) 5 B. & C. 857.
(*i*) L. R. 2 C. P. 127.

sent his agent to the vendor's brickfield to take delivery, and the vendor's foreman said that the bricks were under distraint for rent, but if the man in possession were paid out, he would be ready to deliver the bricks; and he pointed out three clumps *from which* he should make the delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; the court, however, laying stress on some other circumstances to show that this was the intention of the parties. This case is only reconcilable with the authorities on the ground that, as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule.

§ 335. Another class of cases illustrative of the rules now under consideration are those in which the subject of the contract is an unfinished or incomplete thing, a chattel not in a deliverable state, as a partly built carriage or ship. Leaving out of view the cases (*k*) where no specific chattel has been appropriated (to be considered, *post*, Ch. 5), it will be found that the courts have held it necessary to show an express intention in the parties that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule that governs where goods are not in a deliverable state.

§ 336. In the case of Woods *v.* Russell (*l*), decided in 1822, the shipbuilder had contracted with defendant to build a ship for him, and to complete her in April, 1819; the defendant was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched. The ship was measured *with the builder's privity*, while yet unfinished, in *order that defendant might get her registered in his name;* the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third instalment. On the 30th the builder committed an act of bankruptcy, and on the 2d of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the shipbuilder's privity*, for a voyage. An

(*k*) Mucklow *v.* Mangles, 1 Taunt. 318; Bishop *v.* Crawshay, 3 B. & C. 418; Atkinson *v.* Bell, 8 B. & C. 277.

(*l*) 5 B. & Ald. 942.

action in trover was brought by the assignees of the bankrupt, and it was held that the property had passed, "because the shipbuilder signed the certificate to enable the defendant to have the ship registered in the defendant's name, and by that act consented, as it seems to us, that the general property in the ship should be considered *from that time* as being in the defendant." It is thus clearly intimated that, in the absence of some special evidence of intention, the property would have remained in the builder.

§ 337. In Clarke *v.* Spence (*m*) the defendants were the assignees of a bankrupt shipbuilder named Brunton. In February, 1832, Brunton had agreed to build a ship (not the one in question in the action) for the plaintiff, according to certain specifications, under the superintendence of an agent appointed by plaintiff, for 3250*l.*, payable as follows: 400*l.* when the ship was rammed, 400*l.* when timbered, 400*l.* when decked, 500*l.* when launched, the residue, 1500*l.*, half at four and a half at six months. In July he agreed to build another vessel, of specified dimensions, for 3400*l.*, to be finished like the previous ship, and "the vessel to be launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Howard (plaintiff's agent) to superintend the building, and to be paid 40*l.* for the same." Brunton proceeded to build the vessel, and before his bankruptcy she was rammed and timbered, and two instalments paid accordingly; 200*l.* were also paid by anticipation on account of the third instalment. When Brunton became bankrupt, 1200*l.* 11*s.* had been paid him on account, and the frame of the vessel was then worth 1601*l.* 13*s.* 7*d.*, that being the value of the timber and work done on her. The case was elaborately argued in November, 1835, and held under advisement till the ensuing February, when Williams, J., delivered the judgment. Much stress has been laid, in argument, on a passage in the opinion delivered by Bayley, J., in Atkinson *v.* Bell (*n*), in which he said that "the foundation of the decision in Woods *v.* Russell (*o*) was that as, by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price *the ship was irrevocably appropriated to the person paying the money;* that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams, J., showed that in Woods *v.* Russell (*o*) the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests

(*m*) 4 A. & E. 448. See, also, Reid *v.* Fairbanks, 13 C. B. 692; 22 L. J. C. P. 206.

(*n*) 8 B. & C. 277, 282.

(*o*) 5 B. & Ald. 942.

the property in the person who gives the order, the proposition in so general a form may be doubtful. . . . Until the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that, while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of Woods *v.* Russell."

The court, however, held that the passage cited from Woods *v.* Russell was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and *is equivalent to an express provision that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser.*" The court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this *dictum* from Woods *v.* Russell as a *rule of construction* by which, in similar shipbuilding contracts, the parties are held to have by implication evinced *an intention that the property* shall pass, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time (*p*).

§ 338. The next case was Laidler *v.* Burlinson (*q*), in the Exchequer, in 1837, in which the court recognized the authority of Woods *v.* Russell and Clarke *v.* Spence, but held those cases not applicable to the contract before it. A shipbuilder having a vessel in his yard about one third completed, a paper was drawn up describing her build and materials, ending with the words "for the sum of 1750*l.*, and payment as follows, opposite to each respective name." This was signed by James Laing, the shipbuilder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing simply "Thomas Laidler, one fourth." The whole number of shares was not made up till after the shipbuilder had committed an act of bankruptcy. The plaintiff proved some payments made on account, and the shipbuilder became a bankrupt while the vessel was still unfinished. Held, that

(*p*) See per Mellish, L. J., in Ex parte Lambton, 10 Ch. 405, 414; and per Lord Bramwell, in Seath *v.* Moore, 11 App. Cas. at p. 385.

(*q*) 2 M. & W. 602.

there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in Woods *v.* Russell or Clarke *v.* Spence. I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and, by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The court held that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. Suppose the builder had died after the first instalment was paid, the ship in its then state would have become the property of the purchaser, and not of the executor. A party may agree to purchase a ship when finished, or as she stands." Parke, B., said: "If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (*r*). But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. . . . Is this a contract for an article to be finished? In that case, the article must be finished before the property vests."

§ 339. In Wood *v.* Bell (*s*), in 1856, the plaintiff contracted with Joyce, a shipbuilder, for a steamer to be built by the latter for 16,000*l.* The contract was in March, 1854, and the price was payable, 4000*l.*, in four equal parts, on days named in March, April, May, and June; 3000*l.* on the 10th August, 1854, "providing the vessel is plated and decks laid;" 3000*l.* on the 10th October, "providing the vessel is ready for trial;" 3,000*l.* on the 10th January, 1855, "providing the vessel is according to contract, and properly completed;" and 3000*l.* on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame, not decked, and about two thirds plated. The instalments contracted for were paid by the plaintiff in advance. The plaintiff had a superintendent, who supervised the building, objected to materials, and ordered alterations, which were submitted to by Joyce. In July the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the plaintiff's name was, at his own instance, punched on a plate riveted to the keel of the ship. It also appeared that in November the plaintiff urged

(*r*) Langfort *v.* Tiler, 1 Salk. 113.

(*s*) 5 E. & B. 772, and 25 L. J. Q. B. 148; S. C. in Ex. Ch. 6 E. & B. 355, and 25 L. J. Q. B. 321.

Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of everything he possessed;" but during the discussion he admitted that the ship was the property of the plaintiff. On these facts the court of Queen's Bench, and the Exchequer Chamber, on writ of error, held that the property in the vessel had passed to the plaintiff, Lord Campbell saying, when giving the judgment of the court, that the terms, which made the payments dependent on the vessel's being built to certain specific stages on the days appointed, were, "as an indication of intention, substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." The case was determined mainly on the authority of Woods *v.* Russell (*t*) and Clarke *v.* Spence (*u*).

§ 339 a. [In Seath *v.* Moore (*v*), in 1887, a Scotch appeal to the House of Lords, the foregoing authorities of Woods *v.* Russell (except as to the rudder and cordage), Clarke *v.* Spence, and Wood *v.* Bell are fully recognized, and the principle they established is stated in the following terms by Lord Watson (*x*): "Where it appears to be the intention, or in other words the agreement of the parties to a contract for building a ship, that at a particular stage of its construction the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular time, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf."]

§ 340. It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel.

In Woods *v.* Russell (*y*), the builder became bankrupt on the 30th of June, and on the 2d of July the purchaser of the ship took from the builder's yard and warehouse a rudder and cordage, "which the builder had bought for the ship." All that the court said was: "As

(*t*) 5 B. & Ald. 942; Anglo-Egyptian Navigation Company *v.* Rennie, L. R. 10 C. P. 271.

(*u*) 4 A. & E. 468.

(*v*) 11 App. Cas. 350.

(*x*) At p. 380.

(*y*) 5 B. & Ald. 942.

to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not specifically attached to it at the time his act of bankruptcy was committed, they seem to us to stand on the same footing as the ship; and that if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof."

This point did not arise in Clarke *v.* Spence, but in 1839 Tripp *v.* Armitage (*z*) was decided in the Exchequer. In that case there was a contract for building an hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys belonging to the hotel owners, with directions to fit the pulleys into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builder became bankrupt. The court held that the property in the frames had not passed out of the builder. Lord Abinger put it on the ground "that there had been no contract for the sale and purchase of goods as movable chattels, but a contract to make up materials and fix them, and until they are fixed, by the nature of the contract the property will not pass" (*a*). His Lordship put as a test that, if the sashes had been destroyed by fire, the builder would have lost them, for the hotel owners were *not bound to pay for anything till put up and fixed.* Parke, B., said also: "In this case there is no contract at all with respect to these particular chattels: *it is merely parcel of a larger contract.*"

§ 341. In Goss *v.* Quinton (*b*), in 1842, an unfinished ship, which the builder had contracted to deliver, was conveyed to the purchaser and registered in his name, but the rudder intended for the ship remained in the builder's yard, incomplete, when he became bankrupt. The court held that proof that the builder *intended* the rudder for the ship, coupled with proof of the buyer's approval of this purpose, *though not given till after the bankruptcy*, was evidence for the jury that the rudder was part of the ship, and the right of property would be governed by the same considerations as would apply to the body of the ship. But this decision is much questioned, as will presently appear, and could not have been made if the test suggested by Lord Abinger in Tripp *v.* Armitage had been applied; for it is manifest that the incomplete rudder in the builder's yard was at his own risk, and if he had remained solvent there would have been no pretext, in case of its destruction by fire, to call on the shipowner to supply another rudder at his own expense.

(*z*) 4 M. & W. 687.
(*a*) See *ante*, § 108.
(*b*) 3 M. & G. 825.

§ 342. In Wood *v.* Bell (*c*), the contest turned upon valuable materials as well as upon the frame of the ship, and the decision of the Queen's Bench on this part of the case was reversed in the Exchequer Chamber. The facts were, that steam engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam engines, were spoken of constantly by the builder, before his bankruptcy, as belonging to the Britannia engines, that being the name of the ship. There was also a quantity of iron plates and iron angles, specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured, and prepared expressly for the ship, but not yet fixed or attached to her. The Queen's Bench, after holding that the property in the ship had passed, simply added: "And if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and planking, designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in Woods *v.* Russell." But in the Exchequer Chamber (*d*) the decision was reversed, Jervis, C. J., giving the judgment of the court, composed of himself, Pollock, C. B., Alderson and Bramwell, BB., and Cresswell, Crowder, and Willes, JJ. It was held that it did not at all follow, because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The Chief Justice said: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that *those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel.* But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. *Nothing that has not gone through the ordeal of being approved as part of the ship passes, in my opinion, under the contract.*" The other judges concurred, and the case was sent back to the arbitrator for a new award on these principles, which must now be taken to be the settled law on the point under consideration (*e*).

In the opinion delivered by Jervis, C. J., Woods *v.* Russell was doubted on the question of the rudder and cordage, and Goss *v.* Quin-

(*c*) 5 E. & B. 772; 6 E. & B. 355; 25 L. J. Q. B. 148, 321.

(*d*) 6 E. & B. 355; 25 L. J. Q. B. 321.

(*e*) See Baker *v.* Gray, 17 C. B. 462; 25 L. J. C. P. 161; Brown *v.* Bateman, L. R. 2 C. P. 272; cf., also, Anglo-Egyptian Navigation Company *v.* Rennie, L. R. 10 C. P. 271.

ton was not only doubted by the learned Chief Justice, but was unfavorably mentioned by other judges during the argument. Cresswell, J., also said: "I am not now better satisfied with the ruling respecting the rudder and cordage in Woods *v.* Russell than I was years ago."

§ 342 a. [In the Anglo-Egyptian Navigation Co. *v.* Rennie (*f*), in 1875, the defendants, a firm of engineers, had contracted to make and supply new boilers and machinery for a steamship belonging to the plaintiff company, and to make alterations in the engines of the steamship according to specification. The engines and boilers, and connections, were to be completed in every way ready for sea, so far as specified, and tried under steam by the defendants before being handed over to the company, the result of the trial to be to the satisfaction of the company's inspector. *The price was to be paid by the company by instalments as the work progressed* in the following manner, viz., 2000*l.* when the boilers were plated, 2000*l.* when the whole of the work was ready for fixing on board, and 1800*l.*, the balance, when the steamship was fully completed and tried under steam. The work was to be executed to the satisfaction of the company's inspector, *upon whose certificate alone the payments were to be made.* The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery by the defendants on board the vessel, and the adaptation of the old machinery to the new. The defendants completed the boilers and other new machinery, which were ready to be fixed on board, and one instalment of 2000*l.* had already been paid by the plaintiffs, when the vessel was lost by perils of the sea. Afterwards the plaintiffs, who knew of the loss of the vessel, although the defendants did not, paid the second instalment of 2000*l.* The plaintiffs then claimed delivery of the boilers and machinery, and upon the defendants' refusal to deliver them brought an action for their detention, or in the alternative to recover back the 4000*l.* paid by them to the defendants. It was contended on behalf of the plaintiffs that the property in the boilers and machinery had passed to them upon payment of the instalments, and Clarke *v.* Spence, Woods *v.* Russell, and Wood *v.* Bell, *ante*, were cited in support of this contention. The court distinguished these cases on the ground that they were all of them cases not of contracts for work and materials to be supplied to a ship by way of repairs or alterations, but contracts for building or supplying a ship, and the question which arose in all those cases was, whether the ship itself and the materials ready to be fitted to it had or had not passed to the purchaser at the time of the builder's bankruptcy. In this case the court held that the contract was in substance one for work and labor to be done by the defendants for the plaintiffs,

(*f*) L. R. 10 C. P. 271.

and not a contract of sale; that it was an entire contract, and that the parties did not intend the property in any part of the boilers and machinery to pass to the plaintiffs until the whole of the work contracted to be done had been completed; and that, as the completion of the contract had been rendered impossible by the destruction of the vessel, the plaintiffs were not entitled either to the boilers and machinery or to recover, as on a failure of consideration, the 4000*l.* which they had already paid.

§ 342 b. In Seath *v.* Moore (*g*), in 1887, the principle to be deduced from the foregoing authorities on the point now under consideration was stated by Lord Watson (at p. 381): "Materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold,' unless they have been affixed to or in a reasonable sense made part of the *corpus*. That appears to have been matter of direct decision by the Court of Exchequer Chamber in Wood *v.* Bell. In Woods *v.* Russell, the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in (*sic*) property to the purchaser as an accessory of the vessel; but that decision was questioned by Jervis, L. C. J., delivering the judgment of the court in Wood *v.* Bell, who stated the real question to be 'what is the ship, not what is meant for the ship,' and that only the things can pass with the ship, 'which have been fitted to the ship, and have once formed part of her, although afterwards removed for convenience.' I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in Tripp *v.* Armitage."]

§ 343. Upon the third proposition stated at the beginning of this chapter, the reported case most directly in point is Bishop *v.* Shillito (*h*). It was trover for iron that was to be delivered under a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery and brought *trover* for what had been delivered. Abbott, C. J., left it to the jury to say whether the delivery of the iron and the re-delivery of the bills were to be contemporary, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. Held, on the facts as found by the jury, that the delivery was conditional only, and, the condition being broken, trover would lie. Bayley, J., added: "If a tradesman sold goods, to be paid for on delivery, and his servant by mistake delivers them without

(*g*) 11 App. Cas. 350.

(*h*) 2 B. & Ald. 329, note (*a*).

receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

§ 344. The principle of this decision is fully recognized by the judges in Brandt *v.* Bowlby (*i*), when holding that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the bargain he was to accept bills for the price as a condition concurrent with the delivery, and had refused to perform this condition (*k*). So in Swain *v.* Shepherd (*l*), it was held by Parke, B., that if goods are sent on an order, to be returned if not approved, the property remains in the vendor till approval.

§ 345. To the same effect was the judgment of Lord Ellenborough in Barrow *v.* Coles (*m*). This was trover for 100 bags of coffee shipped by Norton & Fitzgerald of Demerara. They drew for the value upon one Voss, in favor of Barrow the plaintiff, and sent to the latter the bill of lading attached to the bill of exchange. The bill of lading was indorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. When the bill of exchange was sent with the bill of lading to Voss, he accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he indorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the indorsement on the bill of lading, and that by the dishonor of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns.

In a very old case, Mires *v.* Solebay (*n*), the agreement was that one Alston should take home some sheep and pasture them for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase.

§ 345 a. [Under the now common form of agreement for the hire and conditional sale of furniture, the price to be paid by instalments, the property in the furniture does not pass until all the instalments have been paid.

(*i*) 2 B. & Ad. 932. And see Shepherd *v.* Harrison, L. R. 4 Q. B. 196, 493; L. R. 5 H. L. 116, — more fully referred to, *post*, Ch. 6, § 398.

(*k*) See, also, 2 Wms. Saund. 123 m, note.

(*l*) 1 Mood. & Rob. 223.

(*m*) 3 Camp. 92.

(*n*) 2 Mod. 243.

Thus in Ex parte Crawcour (*o*), where there was an agreement between Crawcour and one Robertson for the hire of some furniture, under which, if Robertson paid certain instalments of money month by month, the furniture was to become his property, he undertaking at the same time to deposit with Crawcour, as collateral security, promissory notes to the full amount of the instalments to be paid, it was held, until the payment of all the instalments, the property in the furniture did not pass to Robertson.

It should be noted that the agreement in question expressly provided that the property should not pass until the payment of all the instalments, but it is submitted that the result would have been the same even in the absence of such a provision.]

§ 346. The cases in America upon the subject of this chapter are not in all respects identical with those decided in our courts.

In Crofoot *v.* Bennett (*p*), a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee, that he might take the quantity bought. Held, that the property had passed in the number sold. Strong, J., in delivering the opinion, said: "It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. . . . The reason is that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular bricks belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The

(*o*) 9 Ch. D. 419, C. A. As to this custom of furniture dealers, see Ex parte Powell, 1 Ch. D. 504, C. A.; Crawcour *v.* Salter, 18 Ch. D. 30, C. A.; and Ex parte Brooks, 23 Ch. D. 261, C. A.

(*p*) 2 N. Y. 258.

distinction in all these cases does not depend so much upon what is to be done *as upon the object which is to be effected by it.* If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected" (*q*).

§ 347. In Kimberly *v.* Patchin (*r*), the owner of a large mass of wheat lying in bulk gave the vendee a receipt acknowledging himself to hold 6000 bushels, sold for a specified price, subject to the vendee's order; and the title was held to have passed by the sale. Whitehouse *v.* Frost (12 East, 614) was followed and approved.

In Russell *v.* Carrington (*s*), the Court of Appeals of New York applied the same principle to similar facts.

§ 348. In Olyphant *v.* Baker (*t*), the vendor sold barley in bulk at a certain price per bushel, the quantity to be afterwards ascertained. The barley being in the vendor's storehouse, which was to be surrendered to another person at a future day, it was agreed that the barley should be allowed to remain in the storehouse till the vendor transferred the possession of the building; and the purchaser agreed with the transferee of the building to pay storage after that time. The goods were destroyed by fire before being measured, but after the building had passed out of the possession of the vendor. Held, that the facts showed an intention to pass the property in the barley, notwithstanding it had not yet been measured, and that the loss must fall on the buyer.

§ 349. In Rourke *v.* Bullens (*u*), the vendor sold a hog on credit, the hog to be kept and fattened till the buyer called for it, and then to be paid for at the current market price according to its weight when called for, and this was held to be a contract purely executory, not passing the property to the buyer.

§ 350. In Cushman *v.* Holyoke (*x*), where the property had actually passed to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to the removal according to the common course of conveyance.

[In Groat *v.* Gile (*y*), the same distinction was maintained which had been enunciated by Strong, J., in Crofoot *v.* Bennett.

In Kein *v.* Tupper (*z*), however, the English rule, that where any-

(*q*) See, also, Bradley *v.* Wheeler, 44 N. Y. 495; Groat *v.* Gile, 51 N. Y. 431; 2 Kent Comm. 496.

(*r*) 19 N. Y. 330. See, also, Foot *v.* Marsh, 51 N. Y. 288, where Kimberly *v.* Patchin was distinguished.

(*s*) 42 N. Y. 118.

(*t*) 5 Denio (N. Y.), 379.

(*u*) 8 Gray (74 Mass.), 549. See Marble *v.* Moore, 102 Mass. 443.

(*x*) 34 Maine, 289.

(*y*) 51 N. Y. 431, at p. 437.

(*z*) 52 N. Y. 553.

thing remains to be done by the seller to ascertain the identity, quantity, or quality of the property, no title passes, was strictly accepted.

And in The Elgee Cotton Cases (*a*), a decision of the Supreme Court of the United States, the three rules already given, *ante*, § 318, are referred to with approval (*b*), and said to furnish conclusive tests in most cases for ascertaining the intention of the parties, and, though not supported by all the decisions, to be accepted by most of the courts in the United States. Crofoot *v.* Bennett, Kimberly *v.* Patchin, and Russell *v.* Carrington were disapproved. "These decisions," said Strong, J., in delivering the opinion of the court (*c*), "we think are not in accordance with the authorities generally in this country, and they are in conflict with later decisions in New York." It may fairly, therefore, be presumed that for the future the rules of law upon this subject will be the same in America as in England (*d*).]

§ 351. The cases of Woods *v.* Russell and Clarke *v.* Spence have not met with universal acceptance in America. Thus, in Andrews *v.* Durant (*e*), the New York Court of Appeals held, in a case where the facts were similar to those in the above cases, that the property did not pass to the party ordering the goods till the completion of the work; and the same decision was given in Massachusetts in Williams *v.* Jackman (*f*), decided in the Supreme Judicial Court in January, 1861. In these two cases the decision of the Exchequer Chamber in Wood *v.* Bell (*g*) was not before the courts, not being cited in the latter case, and the former case bearing date in 1854, three years before the decision in the Exchequer Chamber.

§ 351 a. [In Briggs *v.* A Light Boat (*h*), the contract was to build three light vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building by the directions of an agent of the United States, and the work to be performed to his satisfaction, for a price to be paid after their completion; and it was provided that the United States might at any time declare the contract null. It was held that under this contract no title to the vessels passed to the United States until their completion and delivery. Bigelow, C. J., in an exhaustive judgment, says (at p. 292 of the report): "Upon established principles of law, we think it clear that no property in the vessel, which is the subject of controversy in this action, vested in the United States until the vessel was completed and delivered, in pursuance of the contract with

(*a*) 22 Wallace, 180.
(*b*) At p. 188.
(*c*) Page 192.
(*d*) See, also, 2 Kent's Commentaries, 496, ed. 1873; and Harkness *v.* Russell, 118 U. S. at p. 667, where the three rules, *ante*, § 318, are again cited with approval by Bradley, J., in delivering the opinion of the court.
(*e*) 11 N. Y. (1 Kernan) 35.
(*f*) 16 Gray (82 Mass.), 514.
(*g*) 6 E. & B. 355; 25 L. J. Q. B. 321.
(*h*) 7 Allen (89 Mass.), 287.

the builder. The general rule of law is well settled and familiar, that, under a contract for building a ship or making any other chattel, not subsisting *in specie* at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, *founded for the most part on express stipulations in contracts*, by which the property is held to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular agreement in a contract concerning the mode or time of making payment of the purchase-money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text-writers, that an agreement to pay the purchase-money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work, and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant, as indicating the intention of the parties, but they are not in all cases decisive. Both of them may coexist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction under a contract passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him. *It is a question of intent arising on the interpretation of the entire contract in each case* (*i*). If, taking all the stipulations together, it is clear that the parties intended that the property should vest in the purchaser during the progress of the work, and before its completion, effect will be given to such intention, and the property will be held to pass accordingly; but, on the other hand, it will not be deemed to have passed out of the builder, unless such intent is clearly manifested, but the general rule of law will prevail." And he then proceeded to show that, upon the contract before him, no intention was indicated to take the case out of the general rule, but, on the contrary, there were several stipulations which clearly showed a different intention.]

(*i*) Cf. Lord Blackburn in Seath *v.* Moore, 11 App. Cas. at p. 370. "It is, I think, a question of construction of the contract in each case, at what stage the property shall pass."

AMERICAN NOTE.

§§ 318–351 a.

Conditional Sale of Specific Chattels. 1. In America, also, it is well settled that if by the terms of the contract anything is to be done by the vendor, by way of finishing the goods, or getting them ready for delivery (not now speaking of weighing, measuring, or counting merely), the title does not pass until this is done, unless the contrary intention clearly appears from the terms of the sale, the language and conduct of the parties as applied to known usages, and the subject-matter of the contract. Thus, where R. bought of H. a "fare" of fish (about 800 quintals), at six dollars per quintal, which H. was to put on the flakes to dry half a day or more, and then to weigh before delivery to R., it was held that the title did not pass before the drying and weighing, so as to enable the vendor to sue for goods sold and delivered. Foster *v.* Ropes, 111 Mass. 10, approving Rugg *v.* Minett, 11 East, 210, and Acraman *v.* Morrice, 8 C. B. 449. There was no question here of separation from a larger mass. See, also, Halterline *v.* Rice, 62 Barb. 593; West Jersey Railroad Co. *v.* Trenton Car Works, 32 N. J. L. 517; Groff *v.* Belche, 62 Mo. 400; Bond *v.* Greenwald, 4 Heisk. 453; Ballantyne *v.* Appleton, 82 Me. 570; New Haven Wire Co. Cases, 57 Conn. 385; Edwards *v.* Glancy, 1 Ohio C. C. R. 458; Jennings *v.* West, 40 Kans. 373; Yockey *v.* Norn, 101 Mich. 193; Murray *v.* Goodridge, Newfoundland Dec. 760, following Rugg *v.* Minett; Welter *v.* Hill, 65 Minn. 273; Matter of Non-Magnetic Watch Co. 89 Hun, 196.

In Hale *v.* Huntley, 21 Vt. 147, H. sold C. all the charcoal in several pits he was burning, at $3.50 per 100 bushels, and by the contract H. was to finish burning, and deliver the coal at C.'s place of business. When the burning was about done, but before the coal had been measured, or any of it delivered to C., it was attached by H.'s creditors. Held, that the title had not passed to C., even as between the parties. So where G. sold P. a quantity of cider, which G. was to deliver in barrels to the carrier, take his receipt therefor, and forward it to P. with a draft on him for the price, and a portion of the barrels had been delivered to the carrier, but not being a carload the carrier had not given a receipt for them, and some barrels were lost or stolen before the transit began, it was held that the title had not so far vested in the buyer as to prevent the seller from recovering the value of the lost barrels from the carrier. Gilbert *v.* N. Y. Central R. R. Co. 4 Hun, 378; Allen *v.* Chapman (N. Y.), 17 Weekly Dig. 515. See, also, Gibbs *v.* Benjamin, 45 Vt. 124; Fuller *v.* Bean, 34 N. H. 290, where the authorities are fully collected. Prescott *v.* Locke, 51 N. H. 94, also contains a valuable discussion of this subject, although the decision turned upon the question whether there had been an "acceptance and receipt" under the Statute of Frauds, rather than upon the point whether the title passed at common law. See, also, Messer *v.* Woodman, 22 N. H. 172; Towne *v.* David, N. H. (1891), 22 Atl. 450.

So if at the time of sale it is understood and intended by the parties that some other act is to be done to complete the sale, such as a formal delivery of a bill of sale, the transfer is not complete until such act is done; not because a formal bill of sale is ordinarily necessary, but because the parties

in that particular case agreed it should be done before the sale was to be complete. Higgins *v.* Chessman, 9 Pick. 10. See, further, Keeler *v.* Vandervere, 5 Lans. 315, and cases cited; Blackwood *v.* Cutting Packing Co. 76 Cal. 212. So, in a sale of cotton to be ginned or bailed by the seller, the title may not pass until that is done, even though the price be fully paid. See Smith *v.* Sparkman, 55 Miss. 649; Pritchett *v.* Jones, 4 Rawle, 260; Screws *v.* Roach, 22 Ala. 675; Holderman *v.* Smith, 3 Kans. App. 423.

In Comfort *v.* Kiersted, 26 Barb. 472, D. agreed to manufacture for K. a quantity of shingles, "to be the property of K. as fast as made," and D. was to deliver them at K.'s store. D. made a part of the shingles, but did not deliver them, and they were sold to C. on an execution against D. K. then took away the shingles from C.; but it was held that no title to the shingles vested in K. before delivery.

Ordinarily, in a sale of a large quantity of goods to be finished and delivered at the buyer's place of business, if part are finished and delivered, the title to such may so far pass as to make them attachable as the property of the buyer. Hyde *v.* Lathrop, 2 Abb. App. Cas. 436; Thompson *v.* Conover, 32 N. J. L. 466; Dunning *v.* Gordon, 4 Up. Can. Q. B. 399.

2. **Weighing and Measuring.** Whenever, by a fair construction of the contract, the vendor is to weigh or measure the articles sold, in order to ascertain the whole sum to be paid, as where an unknown quantity is sold by the pound, yard, etc. (not yet speaking of separation), the title does not generally pass until the vendor has done his part, unless the contrary intent sufficiently appears; not because weighing or measuring is, in and of itself, important, but because the parties have agreed that the vendor should do it *before* the title passes; therefore it must be done. See Kein *v.* Tupper, 52 N. Y. 550; The Elgee Cotton Cases, 22 Wall. 180; McClung *v.* Kelley, 21 Iowa, 508; Robertson *v.* Strickland, 28 Up. Can. Q. B. 221; O'Neil *v.* McIlmoyle, 34 Ib. 236; Rosenthal *v.* Kahn, 19 Oregon, 571; Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315; Blackwood *v.* Cutting Packing Co. 76 Cal. 212; Jennings *v.* Flanagan, 5 Dana, 217; Nicholson *v.* Taylor, 31 Pa. St. 128; Sherwin *v.* Mudge, 127 Mass. 547; Frost *v.* Woodruff, 54 Ill. 156; McDonough *v.* Sutton, 35 Mich. 1; Pike *v.* Vaughn, 39 Wisc. 499; Smith *v.* Evans, 36 So. Car. 69. In Devane *v.* Fennell, 2 Ired. 37, S. bought a raft of timber of D. at four dollars per thousand, "when inspected and measured." The timber was lying in the timber pen with other timber of S.; but before any inspection or measurement, it was wrongfully taken away by F. Held, that D. could maintain trespass against F., as the title had not passed to S. And see Allman *v.* Davis, 2 Ired. 12. In Davis *v.* Hill, 3 N. H. 382, the defendant sold the plaintiff "three tons of hay, to be weighed out of the large mow in my barn, any time when said Davis may see fit to move the same, at eight dollars per ton." D. subsequently demanded the hay, and on refusal brought trover. Held, that the contract clearly contemplated that the vendor should in part at least do the weighing, and until that was done no property passed. Compare Ryan *v.* Conroy, 85 Hun, 544, a sale of all the hay in vendor's barn, at $9 per ton, buyer to press and bale the hay, seller to draw it to railroad station when requested. The hay was burned before it had been removed. Held, that the title had passed to the buyer. See, also, Gilman *v.* Hill, 36 N. H. 311; Abat *v.* Atkinson, 21 La. An. 414. In Nesbit *v.* Burry, 25 Pa. St. 209, it was held, that if by the

contract the weighing was to take place before the sale was completed, and the mode of weighing agreed upon failed, and the vendor refused to have the articles weighed in any other way, or to deliver them, the title did not pass. In Joyce *v.* Adams, 8 N. Y. 291, A. sold J. 259 bales of cotton at 13½ cents a pound, and J. paid down $5 per bale. By the bargain, J. was also to pay for storage, insurance, and interest, the cotton being "deliverable thirty days from date, cash on delivery." The custom was for the seller to weigh the cotton at his own expense, and repair the bales if need be, and send the weigher's certificate to the buyer, with a bill of the parcels, weight, and price. Before this was done, the cotton was destroyed by fire, in the possession of A., and J. brought suit to recover back his advance of $5 per bale. Held, the title had not passed, and that he could recover. So, in Straus *v.* Ross, 25 Ind. 300, R. sold S. his entire crop of wool for 1864 at 80 cents a pound. S. paid $20 down, and was by a certain day to call on R., go to a neighboring town, have the wool weighed, and pay the balance of the purchase-money. S. did not call on R. at the time stated, and R. sold the wool at an advance to other parties. Held, that the title did not vest in S., and that he could not recover damages of R. for non-delivery of the wool. In Restad *v.* Engemoen, 65 Minn. 148, the vendor of cattle was to fatten them, and weigh them at a future time. The buyer was to pay a certain price per pound. It was held that the title did not pass until the cattle had been fattened and weighed.

In Hamilton *v.* Gordon, 22 Oreg. 557, there was an agreement for the sale of all the grain harvested upon the vendor's farm at 65 cents per bushel, delivery to be made at the vendee's warehouse. It was held that the quantity must be ascertained and delivery made before title passed. See, also, Lester *v.* East, 49 Ind. 588, and cases cited; Commercial Nat. Bank *v.* Gillette, 90 Ib. 268. In Smart *v.* Batchelder, 57 N. H. 140, B. had about 80,000 feet of pine boards, part round-edged and part square-edged. He sold to W., at $19.50 per M, all the merchantable boards of the square-edged pile. By the contract, B. was to deliver the boards at Dover, where they could be sawed, and they were to be paid for when all were delivered and the quantity ascertained. After part had been delivered at D. and surveyed, but not paid for, the rest were attached by a creditor of B., and it was held that the title had not passed to W. See, also, Warren *v.* Buckminster, 24 N. H. 336; Uhlman *v.* Day, 38 Hun, 298; Wilkinson *v.* Holiday, 33 Mich. 386; Hays *v.* Pittsburgh Co. 33 Fed. Rep. 553; Jones *v.* Pearce, 25 Ark. 545; Galloway *v.* Week, 54 Wisc. 608; Home Ins. Co. *v.* Heck, 65 Ill. 111. Lingham *v.* Eggleston, 27 Mich. 324, is a very interesting case on this point. It was a sale of a large quantity of lumber which was specifically designated, so that no question of identity arose, but which contained different qualities, at different prices, the amount of each quality being unknown. The vendor was to deliver it on board the cars at the place of sale, whenever requested by the vendees. The contract did not provide how and by whom the inspection and measurement should be made; and as to the quantity of each quality, and consequently as to the amount to be paid, there were great differences of opinion. Part of the purchase-money had been paid, and part of the lumber loaded on the cars; but the great bulk of it had not been assorted, inspected, or measured, when the whole was consumed by fire. Held, that the sale was not so complete that the vendor could recover the price. See, also, First Na-

tional Bank *v.* Crowley, 24 Mich. 492; Begole *v.* McKenzie, 26 Ib. 470; Hahn *v.* Fredericks, 30 Ib. 223.

In M'Donald *v.* Hewett, 15 Johns. 349, N. sold M. a lot of timber on the bank of the Hudson River. N. was to deliver the same in New York city, and M. was to pay for the same when delivered, inspected, and measured in New York. N. sent the timber to New York, but refused to deliver it to M., and transferred it to other parties. Held, the sale was not complete, as the timber had not been inspected and measured. See, also, Rapelye *v.* Mackie, 6 Cow. 250, where part had been delivered; Bank of Huntington *v.* Napier, 41 W. Va. 481; Outwater *v.* Dodge, 7 Cow. 85, which, however, also involved an acceptance and receipt.

For a similar reason, although delivery is not ordinarily necessary to pass the title as between the parties, yet they may expressly or even impliedly make it a condition precedent, and if so it governs. Mason *v.* Thompson, 18 Pick. 305; Brown *v.* Childs, 2 Duvall, 314, an excellent illustration; Tompkins *v.* Tibbits. 1 Hannay (N. B.), 317; McLellan *v.* North British Ins. Co. 30 N. B. Rep. 363; Hays *v.* Pittsburgh Co. 33 Fed. Rep. 553; Sneathen *v.* Grubbs, 88 Pa. St. 147; Braddock Glass Co. *v.* Irwin, 153 Ib. 440; Thompson *v.* Cincinnati, &c. R. R. Co. 1 Bond, 152; Congar *v.* Galena, &c. R. R. Co. 17 Wisc. 477; The Venus, 8 Cranch, 275; Suit *v.* Woodhall, 113 Mass. 394; Devine *v.* Edwards, 101 Ill. 138.

On the other hand, the language of the contract *may* be such as to clearly indicate that the parties intended that the title should pass instantly, although something is still to be done by the vendor to make the goods deliverable, or to deliver them. Sprague *v.* King, 1 Pugsley & B. (N. B.) 241; Hanington *v.* Cormier, 3 Pugsley, 216; Gibson *v.* McKean, Ib. 299; Bank of Upper Canada *v.* Killaly, 21 Up. Can. Q. B. 9; Burnett *v.* McBean, 16 Ib. 466; Lynch *v.* O'Donnell, 127 Mass. 311; Terry *v.* Wheeler, 25 N. Y. 520; McElwee *v.* Metropolitan Lumber Co. 69 Fed. R. 302; Weld *v.* Came, 98 Mass. 152; Dyer *v.* Libby, 61 Me. 45; Boynton *v.* Veazie, 24 Ib. 286; Underhill *v.* Boom Co. 40 Mich. 660; Muskegon Booming Co. *v.* Underhill, 43 Ib. 629; Rail *v.* Little Falls Lumber Co. 47 Minn. 422; Hagins *v.* Combs, Ky. (1897), 43 S. W. 222. So it may be apparent from the nature of the contract that the title shall pass as fast as the goods are delivered, or when delivered, even though by the contract the vendor is bound to measure the goods. Pike *v.* Vaughn, 39 Wisc. 499, and cases cited. Or even to do something else to the property after it has been delivered. Mt. Hope Iron Co. *v.* Buffinton, 103 Mass. 62.

So, also, there is abundant authority for saying that, although a large and unknown quantity of goods may be sold by the pound, foot, or yard, yet, if the vendor is not bound to measure or weigh before delivery, *but delivers the whole to the buyer*, the mere fact that the precise quantity is not then known, and so the whole price not ascertained, does not prevent the title from passing; and if the buyer afterwards does the weighing, or if the vendor can ascertain the weight in any way, he can recover for goods sold and delivered. These cases proceed largely on the ground that the particular contract did not require that the articles should be weighed or counted before the title should pass, but that the same might be as well done by the buyer, or by any one, after delivery. It is simply a question of intention. Scott *v.* Wells, 6 Watts & Serg. 357, a leading case in Pennsylvania; Bigley *v.* Risher, 63 Pa. St. 155; Burrows *v.* Whitaker, 71 N. Y. 291; Dennis *v.* Alexander, 3 Pa. St. 51; Adams Mining Co. *v.* Senter, 26

Mich. 74; Southwestern Freight Co. *v.* Stanard, 44 Mo. 71; Ober *v.* Carson, 62 Ib. 209; Tyler *v.* Strang, 21 Barb. 198; Crofoot *v.* Bennett, 2 Comst. (N. Y.) 258, an important case on this point; Hyde *v.* Lathrop, 2 Abb. App. Cas. 436; Bradley *v.* Wheeler, 44 N. Y. 495; Allen *v.* Maury, 66 Ala. 10; Kaufman *v.* Stone, 25 Ark. 337; Upson *v.* Holmes, 51 500; Bell *v.* Farrar, 41 Ill. 400; Shelton *v.* Franklin, 68 Ill. 333, and Conn. cases cited; Straus *v.* Minzesheimer, 78 Ill. 493; Odell *v.* Boston & Maine R. R. Co. 109 Mass. 50; Barr*v.* Borthwick, 19 Oreg. 578; Farmers' Phosphate Co. *v.* Gill, 69 Md. 548, a valuable case; Martz *v.* Putnam, 117 Ind. 401; Magee *v.* Billingsley, 3 Ala. 679; Seckel *v.* Scott, 66 Ill. 106, reviewing the cases; Chamblee *v.* McKenzie, 31 Ark. 155; Baldwin *v.* Doubleday, 59 Vt. 7; Burke *v.* Shannon, Ky. (1897), 43 S. W. 223; Lassing *v.* James, 107 Cal. 348; Riddle *v.* Varnum, 20 Pick. 280 (1838), is a leading case on this subject in Massachusetts. In this it was distinctly held that where the property sold was in a state ready for delivery, and payment is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected, and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a case presents a question of the intention of the parties to the sale. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the whole price of the articles sold at the rate agreed upon.

In the case of Riddle *v.* Varnum, cited above, there was a sale of a large quantity of timber, at $26 per M, in a mill-pond, which timber the seller agreed in writing to deliver to the buyer. The parties agreed that the *buyer* might procure the timber to be measured by a certain surveyor, and the seller agreed to abide by such measurement. The timber was attached by a creditor of the buyer, and the seller brought trover against the attaching officer; but it was held that a jury might well find that it was not a condition precedent to the passing of the title that the timber should be first measured, and, if so, that the property could be attached as the buyer's. This case has been cited with approval in a great number of cases, among them Welch *v.* Spies, 103 Iowa, 389, citing many cases. In that case there was a sale of corn in two cribs, from one of which some corn had been removed. The second crib remained intact. From the former crib the vendor was to remove three hundred bushels for his own use. Nothing was to be done to the contents of the second crib except to ascertain the number of bushels. Both cribs with their contents were destroyed by fire. It was held that title to the contents of the second crib had passed to the buyer at the time of the contract, but that title to the contents of the first crib had not passed. Wadhams *v.* Balfour, 32 Oreg. 313 (1898), 51 Pac. Rep. 642, examining the cases. See, also, Cushman *v.* Holyoke, 34 Me. 289. So, in Macomber *v.* Parker, 13 Pick. 175, a sale of a portion of the bricks in a brick-kiln, at a certain price per M, all of which were delivered to the buyer, it was held not necessary that the counting should have taken place before the title would pass. The counting was not a condition of the sale, but only for afterwards determining the exact amount to be paid. And see Sahlman *v.* Mills, 3 Strobh. 385; Frazer *v.* Hilliard, 2 Ib. 309; Sanger *v.* Waterbury, 116 N. Y. 371; Groat *v.* Gile, 51 Ib. 431.

Where the whole thing sold is delivered, it is reasonable to expect that the vendee will do the weighing, measuring, etc., and the title may pass

even before he has done it. See Cunningham *v.* Ashbrook, 20 Mo. 553, an excellent illustration; Bogy *v.* Rhodes, 4 Greene (Iowa), 133; Sedgwick *v.* Cottingham, 54 Iowa, 512; Leonard *v.* Davis, 1 Black, 476; Whitcomb *v.* Whitney, 24 Mich. 486; Haxall *v.* Willis, 15 Gratt. 434; Brewer *v.* Michigan Salt Association, 47 Mich. 526; Weld *v.* Cutler, 2 Gray, 195; Sewell *v.* Eaton, 6 Wisc. 490; Morrow *v.* Reed, 30 Ib. 81; Colwell *v.* Keystone Iron Co. 36 Mich. 51; Morgan *v.* Perkins, 1 Jones (N. C.), 171; Martin *v.* Hurlbut, 9 Minn. 142; Burrow *v.* Whitaker, 71 N. Y. 291, distinguishing Kein *v.* Tupper, 52 Ib. 550.

But the language of a contract may be such that, whether the weighing is to be done by the seller or by the buyer, the title does to pass until that is done. It is not important who is to do the weighing or measuring, except as that fact may indicate the intention of the parties as to the time the title is to pass. Thus, where the sale is for cash, to be paid for as soon as weighed, and no provision for unconditional delivery, the weighing, and consequently determining the price to be paid, is a condition precedent to a completed sale. Hoffman *v.* Culver, 7 Bradw. 450; and many other cases. In Ward *v.* Shaw, 7 Wend. 404, W. sold to C. a pair of cattle, which C. was to take into his possession, slaughter them, take the quarters to market, weigh them, and pay $7.50 for each 100 weight. Immediately after C. took possession, his creditors attached the cattle as his, but the title was held not to pass before the slaughtering and weighing; things to be done by the vendee. And see Andrew *v.* Dieterich, 14 Wend. 36; Slade *v.* Lee, 94 Mich. 130. In Pfistner *v.* Bird, 43 Mich. 14, A. sold B. all the pine-trees he might choose to take from A.'s land, and B. agreed to pay $1.00 per M, "for said pine, so cut, hauled, and scaled." Before B. had cut any, A. sold the whole to other parties, who took it all away. Held, that B. could not sustain trespass against A.'s vendees.

3. **Payment by Instalments.** Passing from the subject of weighing, measuring, etc., before the title passes, we come to another point. In America the prevailing rule is, that, in the sale or manufacture of things to be paid for by instalments, or as the work of manufacture progresses, the title does not pass as fast as the instalments are paid, but only when they are all fully paid, unless the facts and circumstances show that a different intention existed. The first is illustrated by the frequent sale of furniture, musical instruments, etc., on the "instalment plan," so called, in which it is quite generally agreed no title passes until payment of the last instalment. The other illustration is the building of a vessel, house, or other structure, in which payment is to be made as the work progresses; and it is generally held that no title passes as payments are made, but only when the work is fully done, unless the contract clearly manifests a different intention. See Clarkson *v.* Stevens, 106 U. S. 505; Wright *v.* Tetlow, 99 Mass. 397; Elliott *v.* Edwards, 35 N. J. L. 265, and 36 Ib. 449; Bacon *v.* The Poconoket, 67 Fed. R. 262, a vessel; Lang's Appeal, 81 Pa. St. 18; Coursin's Appeal, 79 Ib. 220; Scull *v.* Shakespear, 75 Ib. 297; Green *v.* Hall, 1 Houst. 506. But see Sandford *v.* The Wiggins Ferry Co. 27 Ind. 522; Scudder *v.* The Calais Steamboat Co. 1 Cliff. 370; Bank of Upper Canada *v.* Killaly, 21 Up. Can. Q. B. 9.

4. **Prepayment of Price.** As to the third rule of the text, stated in § 320, that the title will not pass if anything is to be done by the *buyer* as

a condition precedent thereto, the American authorities furnish numerous illustrations. The most frequent is that of payment of the price. It being clear that, in the absence of any credit expressly or impliedly allowed, payment is a condition precedent, or at least concurrent, it necessarily follows that the right of property does not pass until that is done, even though the article is delivered, unless the circumstances show that the vendor thereby waived his right to immediate payment. And taking a check of the buyer does not ordinarily operate as payment, to prevent the seller from retaking the goods if the check is not paid. Nat. Bank *v.* Railroad Co. 44 Minn. 224; Johnson Co. *v.* Central Bank, 116 Mo. 558. So as to taking the buyer's note. Davison *v.* Davis, 125 U. S. 91; National Cash Register Co. *v.* Coleman, 85 Hun, 125.

Where such prepayment is the *express* condition of the sale, there is no doubt that the vendor could retake the goods from the vendee if the condition is not performed. Barrett *v.* Pritchard, 2 Pick. 512, a good illustration; Meeker *v.* Johnson, 3 Wash. 247, where vendor broke open the cars in which the goods had been placed by the buyer, and retook possession of them. Ayer *v.* Bartlett, 9 Pick. 156; Reed *v.* Upton, 10 Ib. 522; Booraem *v.* Crane, 103 Mass. 522; Whitwell *v.* Vincent, 4 Pick. 449, where the buyer was to give an indorsed note for the price, but took away the goods without doing so, and without any waiver by the vendor. Bauendahl *v.* Horr, 7 Blatchf. 548, is similar. So is Adams *v.* Roscoe Lumber Co. 2 App. Div. (N. Y.) 47. Where a mortgage upon real estate is given as additional security for the price of machinery sold upon condition, the foreclosure of the mortagge is not a waiver of the condition. Montgomery Iron Works *v.* Smith, 98 Ala. 644; Matthews *v.* Lucia, 55 Vt. 308.

The vendor is entitled to possession of the goods in case of default, even though the right is not specifically given by the contract. Richardson Drug Co. *v.* Teasdall, 52 Neb. 698 (1897), 72 N. W. 1028, citing many cases; Hodson *v.* Warner, 60 Ind. 214; Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991. And, as between the parties, undoubtedly the same rule would apply when the condition of prepayment is only implied. See Fishback *v.* Van Dusen, 33 Minn. 111; 33 Am. Law Reg. 506 and note; Empire State Type Co. *v.* Grant, 114 N. Y. 40. And apparently also the same rule would apply to third parties, claiming under the vendee, except perhaps as to them a waiver of the condition would be more readily inferred from the delivery, if there was no express reservation of the title, than where there was. See Nat. Bank *v.* Railroad Co. 44 Minn. 224. But the vendor does not waive the condition by advising the vendee's creditor to accept a mortgage upon the property. Ames Iron Works *v.* Richardson, 55 Ark. 642. If a sale was simply a "cash sale," no express reservation of title being made, a voluntary delivery without payment might well be considered, at least *prima facie*, a waiver of prepayment, especially as to third parties. See Smith *v.* Dennie, 6 Pick. 262; Carleton *v.* Sumner, 4 Ib. 516; Farlow *v.* Ellis, 15 Gray, 229; Scudder *v.* Bradbury, 106 Mass. 422; Hammett *v.* Linneman, 48 N. Y. 399; Bowen *v.* Burk, 13 Pa. St. 146; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Mixer *v.* Cook, 31 Me. 340; Freeman *v.* Nichols, 116 Mass. 309; Haskins *v.* Warren, 115 Ib. 514; Goodwin *v.* Boston & Lowell R. R. 111 Ib. 487; Oester *v.* Sitlington, 115 Mo. 247, where the vendor brought replevin against the officer who had attached the goods; Pinkham *v.* Appleton, 82 Me. 577; Peabody *v.* Maguire, 79 Me. 586, an elaborately argued case; Furniture Co. *v.* Hill,

87 Me. 23; Johnson Co. *v.* Central Bank, 116 Mo. 558, 572; Stone Co. *v.* Carey's Adm'r, 42 W. Va. 276, 284, and cases cited.

And as to third persons, creditors of or purchasers from the vendee or his assignee in insolvency, it is equally clear, where the condition of prepayment is *express*, no absolute title passes until payment, and therefore the vendee can give none to others; Coggill *v.* Hartford, &c. R. R. Co. 3 Gray, 545, a leading case; even though the goods were purchased for resale. Sargent *v.* Metcalf, 5 Gray, 306. And where title is reserved in the vendor until payment the subject-matter does not become, as between the parties, an "improvement" upon the homestead within the meaning of the homestead laws, even though affixed to the realty. Marshall *v.* Bacheldor, 47 Kans. 442. See, also, Blanchard *v.* Child, 7 Gray, 155; Burbank *v.* Crooker, Ib. 158; Deshon *v.* Bigelow, 8 Ib. 159; Hirschorn *v.* Canney, 98 Mass. 150; Zuchtmann *v.* Roberts, 109 Ib. 53; Benner *v.* Puffer, 114 Ib. 378; Armour *v.* Pecker, 123 Ib. 145; Chase *v.* Pike, 125 Ib. 117; Beach's Appeal, 58 Conn. 464; Mack *v.* Story, 57 Conn. 414; Rogers *v.* Whitehouse, 71 Me. 222; Stone *v.* Waite, 88 Ala. 604; Gayden *v.* Tufts, 68 Miss. 691; Wentworth *v.* Woods Machine Co. 163 Mass. 32; Hawkins *v.* Hersey, 86 Me. 395. But if the vendor authorizes his vendee to resell, the sub-vendee takes a title good as against the original vendor. Columbus Buggy Co. *v.* Turley, 73 Miss. 529.

The relation of the parties in such sales, previous to any breach of the condition, is somewhat peculiar. The seller still retains an interest which he can sell and convey, or which can be attached by his creditors, subject of course to the buyer's right to pay at the time stipulated, and so retain the property. Burnell *v.* Marvin, 44 Vt. 277; Everett *v.* Hall, 67 Me. 497; McMillan *v.* Larned, 41 Mich. 521; Hubbard *v.* Bliss, 12 Allen, 590, though in the last case the sale was *after* breach of condition, but without previous retaking. And the risk of loss from casualty seems to be still on the vendor. Swallow *v.* Emery, 111 Mass. 355. And see Boston Ice Co. *v.* Royal Insurance Co. 12 Allen, 381. Under the English Sale of Goods Act of 1893, s. 25, sub-s. 2, a purchaser on condition that title does not pass until paid for may still be able to give a good title to a *bona fide* purchaser from him, as against the original vendor. Payne *v.* Wilson [1895], 1 Q. B. 653; [1895], 2 Q. B. 537; Helby *v.* Matthews [1894], 2 Q. B. 262; [1895], Ap. Cas. 471; Lee *v.* Butler [1893], 2 Q. B. 318.

On the other hand, the buyer also immediately acquires an interest, a defeasible interest, which he can sell or convey at any time prior to breach of condition; and if he does so, and afterwards *duly* pays or tenders the price to his vendor, or the latter waives the payment, the sub-vendee's title will become perfect without any new transaction or bill of sale. Day *v.* Bassett, 102 Mass. 445; Crompton *v.* Pratt, 105 Ib. 255; Currier *v.* Knapp, 117 Ib. 324; Chase *v.* Ingalls, 122 Ib. 381; Carpenter *v.* Scott, 13 R. I. 477; Beach's Appeal, 58 Conn. 464. The buyer has an attachable interest. And upon tender by the attaching creditor of the amount due, the title passes to the buyer subject to the attachment. Hervey *v.* Dimond, 39 Atl. 331, N. H. (1893). And if the goods are wrongfully taken from a conditional vendee by a third party, even after breach of condition, he can recover their full value of the wrongdoer. Harrington *v.* King, 121 Mass. 269. For such vendee is still an owner, and being an owner he must pay the full price agreed upon, although the goods are destroyed by fire or otherwise while in his possession, and without his fault.

Tufts *v.* Griffin, 107 N. C. 49; Burnley *v.* Tufts, 66 Miss. 48; Osborn *v.* South Shore Lumber Co. 91 Wisc. 526. And see Brewer *v.* Ford, 54 Hun, 116.

But the conditional vendor cannot recover the property or its value of the sub-vendee *before* a breach of the condition, unless some such right was reserved to him by the contract. Newhall *v.* Kingsbury, 131 Mass. 445; Fairbank *v.* Phelps, 22 Pick. 535; Vincent *v.* Cornell, 13 Ib. 294; Hurd *v.* Fleming, 34 Vt. 169; Lambert *v.* McCloud, 63 Cal. 162. If the buyer is allowed to retain possession after the price becomes due and remains unpaid, and the vendor then accepts a part payment, he thereby waives the forfeiture. The buyer has the right to acquire title by payment of the balance due. And this right continues until demand for payment by the vendor and refusal by the vendee. French *v.* Row, 77 Hun, 380; Hutchings *v.* Munger, 41 N. Y. 155; O'Rourke *v.* Hadcock, 114 Ib. 541, 550; Cushman *v.* Jewell, 7 Hun, 525; Cunningham *v.* Hedge, 12 App. Div. (N. Y.) 212, 215.

But if the condition of payment is not fully complied with or is waived, the original vendor's rights become perfect and absolute, and he may follow the property into whosever hands it is, or recover its *full value*, and without any deduction for any partial payments made by the original vendee; at law they are all forfeited. Angier *v.* Taunton Paper Co. 1 Gray, 621; Colcord *v.* McDonald, 128 Mass. 470; Brown *v.* Haynes, 52 Me. 578; Sage *v.* Sleutz, 23 Ohio St. 1; Sanders *v.* Keber, 28 Ib. 630; Hughes *v.* Kelley, 40 Conn. 148, replevin; Porter *v.* Pettengill, 12 N. H. 299; Duke *v.* Shackleford, 56 Miss. 552; Fleck *v.* Warner, 25 Kans. 492.

And the buyer could not recover back, at least in law, the partial payments made. Haviland *v.* Johnson, 7 Daly, 297; Singer Mach. Co. *v.* Treadway, 4 Bradw. 57; Latham *v.* Sumner, 89 Ill. 233; Polson *v.* De Geer, 12 Ont. Rep. 280, 11 Ib. 749; Tufts *v.* D'Arcambal, 85 Mich. 191 (1891); Wheelan *v.* Couch, 25 Grant's Ch. (Ont.) 74, where only $9.00 was unpaid on a sale for $1078. In some States the buyer is protected to some extent by statute. Speyer *v.* Baker, Ohio (1898), 51 N. E. 442. Some cases incline to hold that the vendee could *equitably* have some benefit from the partial payments. See Preston *v.* Whitney, 23 Mich. 267; Johnston *v.* Whittemore, 27 Mich. 470; Ketchum *v.* Brennan, 53 Miss. 596; Foundry Co. *v.* Pascagoula Ice Co. 72 Ib. 608; Hays *v.* Jordan, 85 Geo. 750. And see Latham *v.* Davis, 44 Fed. Rep. 862. Marston *v.* Baldwin, 17 Mass. 606, decides that the vendor may bring replevin against a creditor of the vendee who has taken the goods, without tendering back partial payments received.

But, whether actual payments could or could not be recovered back, it is clear that a note given for some partial payments could not afterwards be collected by the payee if he had retaken the property for failure of some subsequent payment. The consideration of the notes fails. Hine *v.* Roberts, 48 Conn. 267; Third Nat. Bank *v.* Armstrong, 25 Minn. 530; Minneapolis Harvester Works *v.* Hally, 27 Ib. 495; Loomis *v.* Bragg, 50 Conn. 228; Aultman *v.* Olson, 43 Minn. 409. And Sawyer *v.* Pringle, 18 Ont. App. 218 (1890), holds that the vendor could not after retaking the property recover the unpaid balance of the price. The vendor may retake the property in case of default, or sue upon the notes to recover the contract price. He cannot do both. Parke *v.* White River Lumber Co. 101 Cal. 37, and cases cited; Aultman *v.* Fletcher, 110 Ala. 452. Where

he has accepted part payment and proved his claim for the balance against the buyer's estate, he has exercised his election and cannot retake the goods. Holt Mfg. Co. *v.* Ewing, 109 Cal. 353.

If the conditional vendee sells the property *before* breach of condition, and a breach afterwards occurs, some hold the original vendor cannot recover the property or its value of an innocent sub-vendee without a previous demand and refusal; since the original vendee had then a right to convey his own interest, more or less, and the sale and purchase were not tortious. All agree that, if sold after breach of condition, or if removed contrary to the agreement of purchase, no previous demand is necessary to make the sub-vendee liable, since the purchase and taking by him was tortious at the very time. Whitney *v.* McConnell, 29 Mich. 12. In Hill *v.* Freeman, 3 Cush. 257, it was held that the original vendor might bring replevin against an attaching creditor in such a case without any previous demand. So in Stone *v.* Perry, 60 Me. 48; and see Carter *v.* Kingman, 103 Mass. 517; Gilmore *v.* Newton, 9 Allen, 171. And in Salomon *v.* Hathaway, 126 Mass. 482, replevin was sustained against the *original vendee*, after breach, without any other demand.

If, by the contract of sale, the vendor assumes the right to retake the goods on breach of the condition, he may do so, and will not be liable for trespass, using no unreasonable or unnecessary violence. Heath *v.* Randall, 4 Cush. 195; Walsh *v.* Taylor, 39 Md. 592; McClelland *v.* Nichols, 24 Minn. 176. But see Van Wren *v.* Flynn, 34 La. An. 1158.

Sales of articles to be affixed to the freehold of the buyer, with the knowledge of the vendor, may give rise to a different rule, and a purchaser in good faith may sometimes take a good title as against the original vendor, although the articles were sold by him on an agreement that the price be paid before title should pass. See Jenks *v.* Colwell, 66 Mich. 420, and cases cited.

Let us consider the decisions of each State separately, though in many of them the common-law rule has been modified by statute requiring the conditional sale to be in writing, and recorded like a mortgage.

The United States courts are in accord with the general doctrines before stated. Harkness *v.* Russell, 118 U. S. 663 (1886), containing a masterly and exhaustive opinion by Mr. Justice Bradley, though the sub-vendee here had notice of the non-performance of the condition. And see Copland *v.* Bosquet, 4 Wash. C. C. 588; Fed. Cas. No. 3212; In re Binford, 3 Hughes, 300, Fed. Cas. No. 1411, where many authorities are collected. So in Homans *v.* Newton, 4 Fed. Rep. 880, by Sewall, J.; Truman *v.* Hardin, 5 Sawy. 115, Fed. Cas. No. 14,205; Blackwell *v.* Walker, 5 Fed. Rep. 419 (Ark.); Gaylor *v.* Dyer, 5 Cranch C. C. 461; The Marina, 19 Fed. Rep. 760.

ALABAMA. In Alabama, the later view seems to be that, where the case is unaffected by the Code, the title of the vendor is superior to all others. Holman *v.* Lock, 51 Ala. 287, vendor's title good against mortgagee of vendee. Leigh *v.* Mobile, &c. R. R. Co. 58 Ala. 165; Fairbanks *v.* Eureka Co. 67 Ib. 109; Sumner *v.* Woods, Ib. 139, overruling Sumner *v.* Woods, 52 Ib. 94, and Dudley *v.* Abner, Ib. 572. And see McCall *v.* Powell, 64 Ala. 254; Weinstein *v.* Freyer, 93 Ib. 257.

ARKANSAS. The title of the vendor is good, certainly against a sub-vendee who had notice of the condition. Carroll *v.* Wiggins, 30 Ark. 402. And even against innocent sub-vendees. McIntosh *v.* Hill, 47 Ark. 363

(1886); McRea *v.* Merrifield, 48 Ib. 160 (1886); Simpson *v.* Shackelford, 49 Ib. 63. See, as to a demand, Nattin *v.* Riley, 54 Ark. 30.

CALIFORNIA favors the claims of the vendor over those of the vendee, or any one claiming under him with notice. Putnam *v.* Lamphier, 36 Cal. 151; Kohler *v.* Hayes, 41 Ib. 455. Cardinell *v.* Bennett, 52 Cal. 476, holds vendor's claim good against his vendee. And the same rule was applied in Hegler *v.* Eddy, 53 Cal. 597; Seré *v.* McGovern, 65 Ib. 244; Vermont Marble Co. *v.* Brow, 109 Ib. 236; Rodgers *v.* Bachman, 109 Ib. 552. But suit for the price, carried to judgment, waives the vendor's right to enforce the condition. Parke Co. *v.* White River Co. 101 Cal. 37, following Bailey *v.* Hervey, 135 Mass. 172.

COLORADO. The vendor's title is not good as against third persons. Harper *v.* People, 2 Colo. App. 177; nor as against attaching creditors. Weber *v.* Diebold Safe Co. 2 Ib. 68. But the sale is valid as against a purchaser with notice. Jones *v.* Clark, 20 Colo. 353 (overruling George *v.* Tufts, 5 Ib. 162); Singer Mfg. Co. *v.* Converse, 23 Ib. 247; Gerow *v.* Castello, 11 Ib. 560.

CONNECTICUT. Forbes *v.* Marsh, 15 Conn. 384, an elaborate case, sustains the vendor's title against creditors of the vendee. Hart *v.* Carpenter, 24 Conn. 427; Cragin *v.* Coe, 29 Ib. 51; Hughes *v.* Kelly, 40 Ib. 148; Brown *v.* Fitch, 43 Ib. 512; Lewis *v.* McCabe, 49 Ib. 141; Appleton *v.* Norwalk Library Co. 53 Ib. 4; Cooley *v.* Gillan, 54 Ib. 80; Beach's Appeal, 58 Ib. 464; Mack *v.* Story, 57 Ib. 414, which applies the rule although the buyer has an express right to resell the goods. A valuable review of the Connecticut decisions may be found in 23 Am. L. Rev. p. 1011. See Crompton *v.* Beach, 62 Conn. 25; Acts 1895, c. 212; In re Wilcox Co. 70 Conn. 220, 39 Atl. 163.

DELAWARE holds the title of the vendor superior to creditors of the vendee. Williams *v.* Connoway, 3 Houst. 63; Watertown *v.* Davis, 5 Ib. 192. As to *bona fide* purchasers for value, see Mears *v.* Waples, 4 Houst. 62. The vendor must exercise his rights within a reasonable time after default. A delay of nine months precludes him from exercising them against a *bona fide* purchaser. Mathews *v.* Smith (1889), 31 Atl. 879.

FLORIDA adopts the prevailing rule. Campbell Press Co. *v.* Walker, 22 Fla. 412. Under the statute (Rev. Sts. § 1994) an attaching creditor of a vendee who has had possession for two years is preferred to the original vendor, unless the instrument of sale is recorded. Hudnall *v.* Paine, 39 Fla. 67 (1897), 21 So. 791, examining the decisions in Alabama, Virginia, and Kentucky under similar statutes.

GEORGIA. The title of the vendor is good against mortgagees of the vendee. Goodwin *v.* May, 23 Geo. 205. And certainly as against the purchaser himself. Jowers *v.* Blandy, 58 Geo. 379; Flanders *v.* Maynard, Ib. 57. And trover was held to lie by the original vendor against an innocent sub-vendee, even before breach of condition. Sims *v.* James, 62 Geo. 260. But this is questionable. And see Savannah Cotton-Press Asso. *v.* MacIntyre, 62 Geo. 166.

ILLINOIS. Numerous *dicta* seem to consider the condition operative against the vendee, but *bona fide* purchasers and attaching creditors without notice are preferred to the original vendor. Jennings *v.* Gage, 13 Ill. 610, seems to favor the vendor over purchasers from the vendee; but the opposite rule was adopted in Brundage *v.* Camp, 21 Ib. 330, a leading case. McCormick *v.* Hadden, 37 Ill. 370, prefers creditors of the vendee over

the original vendor; followed in Murch *v.* Wright, 46 Ib. 487, a case much cited, and also in Mich. Cent. R. R. Co. *v.* Phillips, 60 Ib. 190, and in Lucas *v.* Campbell, 88 Ib. 447; Van Duzor *v.* Allen, 90 Ib. 499; Peoria Mfg. Co. *v.* Lyons, 153 Ib. 427. A conditional sale need not be recorded in order to be good against the purchaser's assignee. Hooven *v.* Burdette, 153 Ill. 672, and cases cited. Waters *v.* Cox, 2 Bradw. 129, applies the Michigan rule over its own. See Fosdick *v.* Schall, 99 U. S. 235; Hervey *v.* Rhode Island Locomotive Works, 93 Ib. 664.

INDIANA. The rule here seems to agree with that of Massachusetts. Chissom *v.* Hawkins, 11 Ind. 316; Thomas *v.* Winters, 12 Ib. 322, an action between vendor and sub-vendee, followed in Shireman *v.* Jackson, 14 Ib. 459, and Plummer *v.* Shirley, 16 Ib. 380. Hanway *v.* Wallace, 18 Ib. 377, between vendor and creditors of vendee; Dunbar *v.* Rawles, 28 Ib. 225, between vendor and sub-vendee. Hodson *v.* Warner, 60 Ind. 214, and McGirr *v.* Sell, 60 Ib. 249, apply the rule alike against creditors and sub-vendees, and all are approved in Domestic Sewing Machine Co. *v.* Arthurhultz, 63 Ib. 325; Baals *v.* Stewart, 9 N. E. Rep. 403, 109 Ind. 371. In the late case, however, of Winchester Co. *v.* Carman, 109 Ind. 31, 58 Am. Rep. 382, in sales by a wholesale dealer to a retailer, for the purpose of resale, a provision that the title shall remain in the wholesale dealer is held void as to sub-vendee, citing Devlin *v.* O'Neill, 6 Daly, 305; Ludden *v.* Hazen, 31 Barb. 650. And see Fitzgerald *v.* Fuller, 19 Hun, 180; Leigh *v.* Mobile, &c. R. R. 58 Ala. 165.

IOWA. The common law here is the same as in Massachusetts. Bailey *v.* Harris, 8 Iowa, 331, between vendor and sub-vendee; approved in Robinson *v.* Chapline, 9 Ib. 91, and followed in Baker *v.* Hall, 15 Ib. 277. But in 1872 a statute required such conditional sales to be in writing and recorded, in order to be good against third persons without notice. Code, § 1922. Though this did not affect previous sales. Knowlton *v.* Redenbaugh, 40 Iowa, 114; Moseley *v.* Shattuck, 43 Ib. 540. See Thorpe *v.* Fowler, 57 Iowa, 541. The conditional sale must be recorded in order to give notice to sub-vendees. Pash *v.* Weston, 52 Iowa, 675; Wright *v.* Barnard, 89 Ib. 166. See Budlong *v.* Cottrell, 64 Iowa, 234, and Singer Sewing Co. *v.* Holcomb, 40 Ib. 33; Vorse *v.* Loomis, 86 Ib. 522. But although the sale be unrecorded, the vendor's right is superior to that of the buyer's mortgagee who claims under a preëxisting mortgage, which assumes to include after-acquired property. Manhattan Trust Co. *v.* Sioux City Ry. Co. 76 Fed. R. 658, following Myer *v.* Car Co. 102 U. S. 1. Upon the facts in Ellsworth *v.* Campbell, 87 Iowa, 532, the vendor was estopped to deny that the sale was unconditional.

KANSAS. Condition good, even as against innocent purchasers. Sumner *v.* McFarlan, 15 Kans. 600; Hallowell *v.* Milne, 16 Ib. 65; Hall *v.* Draper, 20 Ib. 137. Fleck *v.* Warner, 25 Ib. 492, holds that the vendor may retake the article from the vendee, without tendering or returning partial payments received; they are forfeited. The vendor's title is good as against a mortgagee to whom the vendee has transferred the property as security for a preëxisting debt. Standard Co. *v.* Parlin Co. 51 Kans. 544. A wholesale dealer who sells to a retail dealer in such goods cannot recover the goods from a sub-vendee who buys from mortgagees of the original vendee. Poorman *v.* Witman, 49 Kans. 697. The Statute of 1889, c. 255, provides that such contracts must be recorded.

KENTUCKY. The condition is here good between parties, but inoperative

as to innocent purchasers from the vendee. Vaughn *v.* Hopson, 10 Bush, 337 (overruling Patton *v.* McCane, 15 B. Monr. 555); Greer *v.* Church, 13 Ib. 430. And by statute (Gen. Sts. c. 24, § 10) such sales must be recorded as against purchasers. Barney & Smith Man. Co. *v.* Hart, 1 So. W. Rep. 414 (1886), following 93 U. S. 664 and 102 Ib. 235.

MAINE. At common law the Massachusetts rule prevailed. Sawyer *v.* Shaw, 9 Greenl. 47, against sub-vendee; Tibbetts *v.* Towle, 3 Fairf. (12 Me.) 341; vendor's title good against *third* vendee. Whipple *v.* Gilpatrick, 19 Me. 427, sustains trover against sub-vendee without a demand; and Leighton *v.* Stevens, 22 Ib. 252, replevin against attaching officer; Sawyer *v.* Fisher, 32 Ib. 28; Crocker *v.* Gullifer, 44 Ib. 491; Hotchkiss *v.* Hunt, 49 Ib. 219. In Brown *v.* Haynes, 52 Me. 578, the vendor recovered the whole value from the sub-vendee without any deduction for partial payments. Allen *v.* Delano, 55 Me. 113, holds, if the vendor's title remains until payment, he owns all the increase before that day, as the colt of a mare sold on condition. And see Elmore *v.* Fitzpatrick, 56 Ala. 400; Bunker *v.* McKenney, 63 Me. 529; Stone *v.* Perry, 60 Ib. 48, that vendor may replevy from attaching creditor without demand; Everett *v.* Hall, 67 Ib. 497. By Rev. St. c. 111, § 5, if a note is given for the price, the condition must be inserted in the note, and if over $30 it must be recorded. Unless that is done, the condition is invalid against subsequent vendees. Boynton *v.* Libby, 62 Me. 253. But such conditions are valid, though not recorded, against the purchaser and his assignee in insolvency. Rogers *v.* Whitehouse, 71 Me. 222. A vendor who has sold goods, title not to pass until payment, estops himself from enforcing the condition against a *bona fide* purchaser for value and retaking the goods, where such vendor delivers possession of the goods knowing that his vendee intends to offer them for sale. Lewenberg *v.* Hayes, 91 Me. 104, and cases cited.

The Maine courts fully recognize that a sale, with a promise *to return* if not paid for as agreed, differs from sales where the title is expressly reserved in the vendor until payment. Such vendees can sell and give a good title. See Holbrook *v.* Armstrong, 1 Fairf. (10 Me.) 31; Dearborn *v.* Turner, 16 Me. 17; Buswell *v.* Bicknell, 17 Ib. 344; Perkins *v.* Douglass, 20 Ib. 317; Southwick *v.* Smith, 29 Ib. 228.

MARYLAND. The validity of such conditional sales, as between the parties, seems necessarily to follow from the case of Walsh *v.* Taylor, 39 Md. 592, that trespass will not lie by the purchaser against the vendor for taking away the article because the price was not paid. And in Central Trust Co. *v.* Arctic Ice Co. 77 Md. 202, it was declared that the validity of such sales as between vendor and vendee was settled beyond dispute. But *bona fide* purchasers of such vendee without notice are protected. Hall *v.* Hinks, 21 Md. 406; Butler *v.* Gannon, 53 Ib. 333. So are mortgagees of such vendee. Lincoln *v.* Quynn, 68 Md. 304.

MASSACHUSETTS. The common law is fully stated already. By a recent statute of Massachusetts, St. 1884, c. 313, such conditional sale of "furniture or other household effects" must be in writing. Suing for the price and recovering judgment and execution, and collecting part thereon, may be a waiver of the condition in favor of the buyer. Bailey *v.* Hervey, 135 Mass. 172.

MICHIGAN. Couse *v.* Tregent, 11 Mich. 65, holds the condition valid as to sub-vendees. So does Fifield *v.* Elmer, 25 Mich. 48. Dunlap *v.* Gleason, 16 Mich. 158, allows the vendor to recover of the sub-vendee if the

vendee removes it contrary to the written agreement. Preston *v.* Whitney, 23 Mich. 260, inclines to think that partial payments ought to be allowed the vendee; and see Johnston *v.* Whittemore, 27 Ib. 463. Whitney *v.* McConnell, 29 Mich. 12, holds that trover will lie against the sub-vendee without a demand. Deyoe *v.* Jamison, 33 Mich. 94, recognizes that the vendor may waive his right, and, if so, cannot afterwards enforce it. Smith *v.* Lozo, 42 Mich. 6, affirms the general doctrine, and is followed in Marquette Man. Co. *v.* Jeffery, 49 Ib. 283; Fuller *v.* Bryne, 102 Ib. 461. Many cases are cited in Brewery Co. *v.* Merritt, 82 Mich. 199. Such a conditional sale does not become absolute, although the note given for the purchase-price is secured by mortgage. Pettyplace *v.* Groton Bridge Co. 103 Mich. 155, and see the reporter's note reviewing the Michigan decisions. And see Hudson *v.* McKale, 107 Mich. 22; Lansing Iron Works *v.* Wilbur, Mich. (1898), 69 N. W. 667. Tufts *v.* D'Arcambal, 85 Mich. 185, 191, declares that buyer cannot recover back partial payments made if he fail to pay the balance.

Minnesota. The condition was held good between the parties in M'Clelland *v.* Nichols, 24 Minn. 176. And see Bjork *v.* Bean, 56 Minn. 244; Medicke *v.* Sauer, 61 Ib. 15, where the title of the conditional vendor was upheld, as against the vendee's landlord, upon whose premises the vendee had left the goods. The statute does not apply to cash sales. Freeman *v.* Kraemer, 63 Minn. 242.

Missouri. The condition is valid between the parties; Dannefelser *v.* Weigel, 27 Mo. 45; or sub-vendees, Parmlee *v.* Catherwood, 36 Ib. 479; Little *v.* Paige, 44 Ib. 412; Griffin *v.* Pugh, Ib. 326; Ridgeway *v.* Kennedy, 52 Ib. 24; unless the vendor loses his right by laches or waiver; Robbins *v.* Phillips, 68 Ib. 100; Wangler *v.* Franklin, 70 Ib. 659; Sumner *v.* Cottey, 71 Ib. 121; Matthews *v.* McElroy, 79 Ib. 202; Kingsland Mfg. Co. Culp, 85 Ib. 548; Dwyer *v.* Denny, 6 Mo. Ap. 578; Willard *v.* Sumner, 7 Ib. 577. But see Rev. Sts. § 2507, requiring the contract to be written and recorded. This did not protect creditors who take in payment of a preëxisting debt. They are not "purchasers." Weston Land, &c. Co. *v.* Plumb, 27 Fed. Rep. 598 (1886). See now St. 1877, p. 320, and 38 Mo. App. 55; 39 Ib. 318; 108 Mo. 451, 459; 86 Ib. 533. See Rogers Locomotive Works *v.* Lewis, 4 Dillon, 161; Heryford *v.* Davis, 102 U. S. 235, where the contract might well have been held a conditional sale, according to Judge Bradley's dissenting opinion. In Fosdick *v.* Schall, 99 U. S. 235, a railroad company mortgaged all the property it then had, or "should thereafter acquire." Subsequently it bought cars of A., on condition they should remain his property until paid for, and put them upon their road. It was held that the claim of A. for the price of his cars was paramount to the claim of the mortgagees under their mortgage; and an exhaustive collection of the authorities on conditional sales may be found on p. 248, cited by Mr. Roberts. See, also, Fosdick *v.* Car Co. 99 U. S. 256.

Mississippi. Mount *v.* Harris, 1 Sm. & Mar. 185, holds the condition valid against creditors of the vendee; affirmed in Ketchum *v.* Brennan, 53 Miss. 597, which expressly prefers Patton *v.* McCane, 15 B. Monr. 555 (*supra*, Ky.), to the later cases in the same State overruling it. In Dederick *v.* Wolfe, 68 Miss. 500, the vendor was allowed to recover the balance due, although he had retaken the property for an overdue instalment, and sold it, duly applying the proceeds towards the amount due. A note given for the

purchase-money need not be returned *before* the seller can retake the property for non-payment. Volking *v.* Huckabay, 67 Miss. 206. In Tufts *v.* Stone, 70 Miss. 54, it was held that such a conditional sale was really a mortgage, and, being properly recorded, would protect the vendor as against an attaching creditor of the vendee.

MONTANA also holds the vendor's title superior to that of a purchaser from the vendee. Heinbockle *v.* Zugbaum, 5 Mont. 344 (1885), containing a full citation of authorities. Silver Bow Mining Co. *v.* Lowry, 12 Pac. Rep. 652, 6 Mont. 288 (1887), holds that merely taking a note for the price is not necessarily a waiver of the condition.

NEBRASKA. Aultman *v.* Mallory, 5 Neb. 178, declares the vendor's claim superior to that of a sub-vendee, unless he has waived it, or encouraged the second sale. Albright *v.* Brown, 23 Neb. 136; Norton *v.* Pilger, 30 Ib. 860. The law of 1877, requiring the contract to be recorded, was designed to protect *bona fide* purchasers and creditors without notice. Compiled Sts. c. 32, § 26; Peterson *v.* Tufts, 34 Neb. 8. A sub-purchaser with notice is not protected. McCormick *v.* Stevenson, 13 Neb. 70; Osborne Co. *v.* Plano Mfg. Co. 51 Ib. 502. The vendee's mortgagee is not a purchaser within the meaning of the statute. McCormick Machine Co. *v.* Callen, 48 Neb. 849.

NEVADA. Cardinal *v.* Edwards, 5 Nev. 36, holds the condition good against creditors of the buyer.

NEW HAMPSHIRE. Luey *v.* Bundy, 9 N. H. 298, favors the general rule; Clark *v.* Greeley, 62 Ib. 394. So does Davis *v.* Emery, 11 N. H. 230, but holds that, if no time of payment is fixed, the vendor must demand it before taking the property. Porter *v.* Pettengill, 12 N. H. 299, a leading case, holds the vendor's claim good against creditors of the vendee. So does McFarland *v.* Farmer, 42 N. H. 386. Kimball *v.* Jackman, 42 N. H. 242, applies the rule to sub-vendees. King *v.* Bates, 57 N. H. 446, allows the vendor to reclaim against the sub-vendee, and so does Weeks *v.* Pike, 60 Ib. 447, citing many cases. By statute such sales must be recorded. Laws 1885, c. 30; Gerrish *v.* Clark, 64 N. H. 492. But even if unrecorded, they are valid against attaching creditors with notice. Batchelder *v.* Sanborn, N. H. (1890), 22 Atl. 535. Sargent *v.* Gile, 8 N. H. 325, sometimes cited in favor of this general doctrine, rather involved the case of a positive bailment, with a right to buy, than a case of a present sale reserving the title. So in Holt *v.* Holt, 58 N. H. 276.

NEW JERSEY. Cole *v.* Berry, 42 N. J. L. 308, is generally relied upon as supporting the general doctrines before stated; and they are fully approved in the late case of Marvin Safe Co. *v.* Norton, 48 N. J. L. 410. So in Campbell Mfg. Co. *v.* Rockaway Pub. Co. 56 N. J. L. 676. By statute of 1889, p. 421, such sales must be recorded, Knowles Loom Works *v.* Vacher, 57 N. J. L. 490, in order to be valid against subsequent purchasers and mortgagees. But such conditional sales, although unrecorded, are still valid against the vendee's creditors, as at common law. Woolley *v.* Geneva Wagon Co. 59 N. J. L. 278.

NEW MEXICO, in a very recent and well-considered opinion, adopts the prevailing rule on this subject. Redewill *v.* Gillen, 4 N. Mex., 12 Pac. Rep. 872 (1887). The vendor's right is not in the nature of a lien within the meaning of the Act of 1889, c. 73, and hence need not be recorded. Maxwell *v.* Tufts, N. Mex. (1896), 45 Pac. Rep. 979, citing many cases, and

declaring that the rule in Texas under a similar statute is the same, while that in Colorado and Illinois is contra.

NEW YORK. It may not be easy to reconcile all the decisions on this subject, but they apparently warrant these conclusions: —

1. A condition of prepayment, whether express or implied, is always valid between the parties, and although the goods are delivered, they may be retaken from the vendee, unless such delivery is intended as a waiver, which is a question for the jury. This is fairly deducible from the following cases, which sometimes contain *dicta* going still farther: Russell *v.* Minor, 22 Wend. 659; Acker *v.* Campbell, 23 Ib. 372; Van Neste *v.* Conover, 8 Barb. 509; Leven *v.* Smith, 1 Denio, 571; Herring *v.* Hoppock, 15 N. Y. 409; Fleeman *v.* McKean, 25 Barb. 474; Strong *v.* Taylor, 2 Hill, 326; Chapman *v.* Lathrop, 6 Cow. 110; Smith *v.* Lynes, 5 N. Y. 41; Buck *v.* Grimshaw, 1 Edw. 140; Powell *v.* Preston, 3 T. & C. 644; Dows *v.* Dennistoun, 28 Barb. 393; Lupin *v.* Marie, 6 Wend. 77.

2. The better considered cases in New York hold that if, by the express terms of the sale, the title is not to pass until full payment, and this has not been waived or complied with, the conditional purchaser cannot give a good title even to a *bona fide* purchaser or attaching creditors; Ballard *v.* Burgett, 40 N. Y. 314 (1869), a leading case; Austin *v.* Dye, 46 Ib. 500; Hasbrouck *v.* Lounsbury, 26 Ib. 598 (1863); Puffer *v.* Reeve, 35 Hun, 480 (1885); Cole *v.* Mann, 62 N. Y. 1 (1875); Boon *v.* Moss, 70 Ib. 473 (1877); Payne *v.* Batterson, 37 Hun, 639; Rathbun *v.* Waters, 1 City Ct. Rep. 36; Brown *v.* Thurber, Ib. 322; unless it was the understanding that the vendee was to sell again, when it might be supposed by third persons he had a right to do so. Ludden *v.* Hazen, 31 Barb. 650; Fitzgerald *v.* Fuller, 19 Hun, 180; Cole *v.* Mann, 3 T. & C. 380.

3. But if the *delivery* merely is conditional, there being no provision that the *title* shall not pass, such purchaser can give a good title to others though he has not performed the condition. This distinction has been thought to reconcile some of the apparently conflicting authorities in that State. See Comer *v.* Cunningham, 77 N. Y. 391, the leading case on that view, followed in Hintermister *v.* Lane, 27 Hun, 497. And see Wait *v.* Green, 36 N. Y. 556; Rawls *v.* Deshler, 3 Keyes, 572; Smith *v.* Lynes, 5 N. Y. 41; Dows *v.* Kidder, 84 Ib. 128; Parker *v.* Baxter, 86 Ib. 587. This subject is now regulated by statute. See St. 1884, c. 315; 1885, c. 488; 1888, c. 225, to which the learned reader is referred. And see 49 Hun, 92; 57 Ib. 551; 114 N. Y. 541; 106 Ib. 32.

NORTH CAROLINA. Ellison *v.* Jones, 4 Ired. 48; Parris *v.* Roberts, 12 Ib. 268; Clayton *v.* Hester, 80 N. C. 275 (modifying anything to the contrary in Deal *v.* Palmer, 72 N. C. 582); Vasser *v.* Buxton, 86 Ib. 335, favor the vendor. Frick *v.* Hilliard, 95 N. C. 117. A recent statute requires registration to affect subsequent purchasers. See Perry *v.* Young, 105 N. C. 463; Harrell *v.* Godwin, 102 Ib. 330. The statute affects sales only as to creditors and purchasers for value. Kornegay *v.* Kornegay, 109 N. C. 188.

OHIO. The vendor's rights are superior to all others. And the creditor of the vendee cannot obtain a good title by tendering the amount still due. Sage *v.* Sleutz, 23 Ohio St. 1. And see Sanders *v.* Keber, 28 Ohio St. 630, a leading case, reviewing the decisions; Call *v.* Seymour, 40 Ib. 670. A modern statute now regulates the matter. See Case Man. Co. *v.* Garven, 45 Ohio St. 289.

OREGON declares the conditional vendee cannot sell to others. Singer Mfg. Co. *v.* Graham, 8 Oreg. 17; Rosendorf *v.* Hirschberg, Ib. 240.

PENNSYLVANIA. In this State it has always been held, as elsewhere, that in cases of *strict bailment* or lease of personal property with a right to buy thereafter on payment of a stated price, the bailee or lessee acquires no power, by the delivery and possession, to give a good title to others as against the former owner. Myers *v.* Harvey, 2 P. & W. 481 (1831); Clark *v.* Jack, 7 Watts, 375 (1838); Lehigh Co. *v.* Field, 8 W. & S. 241; Chamberlain *v.* Smith, 44 Pa. St. 431 (1863); Rowe *v.* Sharp, 51 Ib. 26 (1865); Henry *v.* Patterson, 57 Ib. 346 (1865); Becker *v.* Smith, 59 Ib. 469 (1868); Enlow *v.* Klein, 79 Ib. 488 (1875), which, however, borders closely on a conditional sale, and may perhaps have been decided on its own special circumstances. Christie's Appeal, 85 Pa. St. 463; Dando *v.* Foulds, 105 Ib. 74; Edwards' Appeal, 105 Ib. 103; Ditman *v.* Cottrell, 125 Ib. 606; Brown *v.* Billington, 163 Ib. 76, reaffirming Rowe *v.* Sharp, *supra*, and reviewing the cases; Monjo *v.* French, 163 Ib. 107; Goss Printing Press Co. *v.* Jordan, 171 Ib. 474. There the parties first made a contract for a conditional sale, and afterwards substituted for it a contract of bailment. The subject-matter — a press — was attached by the bailee's creditors. The court held that if there had been no delivery or acceptance until after the making of the second contract, which was clearly one of bailment, delivery under it passed no title subject to levy by the bailee's creditors, although the press had been physically in the bailee's possession before the making of the second contract. Whether or not there had been any delivery under the first contract was for the jury. And see the late case of Wheeler & Wilson Mfg. Co. *v.* Heil, 115 Ib. 487 (1887). But they seem not to have applied the same principle to clear cases of a present sale and *delivery* of the property, though with a condition that the title shall not pass until payment. It is held a species of fraud against *bonâ fide* purchasers and even creditors of the conditional vendee. Martin *v.* Mathiot, 14 S. & R. 214 (1826); Jenkins *v.* Eichelberger, 4 Watts, 121; Prichett *v.* Cook, 62 Pa. St. 193; Peek *v.* Heim, 127 Ib. 500; Rose *v.* Story, 1 Ib. 190 (1845); Haak *v.* Linderman, 64 Ib. 499 (1870); Stadtfeld *v.* Huntsman, 92 Ib. 53 (1879), examining the cases; Brunswick, &c. Co. *v.* Hoover, 95 Ib. 508 (1880); Forrest *v.* Nelson, 108 Ib. 481 (1885); Ott *v.* Sweatman, 166 Ib. 217, reviewing the Pennsylvania cases; Dearborn *v.* Raysor, 132 Ib. 231; Farquhar *v.* McAlevy, 142 Ib. 234, distinguishing some of the earlier cases. The condition is, however, valid between the parties; and if the vendee refuses or neglects to pay after receiving the property, the vendor may retake it from him; Henderson *v.* Lauck, 21 Pa. St. 359 (1855); Krause *v.* Commonwealth, 93 Ib. 421; Brunswick *v.* Hoover, 95 Ib. 512; and even enter his house, if without force, for this purpose. North *v.* Williams, 120 Pa. St. 109 (1888). A valuable examination of the Pennsylvania decisions may be found in 21 Am. Law Reg. (N. S.) p. 224, a note to the case of Lewis *v.* McCabe, 49 Conn. 141. And see Hineman *v.* Matthews, 138 Pa. St. 204.

RHODE ISLAND agrees with Massachusetts. Goodell *v.* Fairbrother, 12 R. I. 233.

SOUTH CAROLINA also. Dupree *v.* Harrington, Harp. 391; Reeves *v.* Harris, 1 Bailey, 563; Bennett *v.* Sims, Rice, 421. But by statute 1843

(Gen. Sts. ch. xcviii. § 6), the reservation must be in writing to affect subsequent purchasers. Herring *v.* Cannon, 21 So. Car. 212, explaining Talmadge *v.* Oliver, 14 Ib. 522. In Cochran *v.* Roundtree, 3 Strobh. 217, even before the statute, an oral reservation of title was held invalid as to sub-vendees.

TENNESSEE. Houston *v.* Dyche, Meigs, 76 (1838); Gambling *v.* Read, Ib. 281; Bradshaw *v.* Thomas, 7 Yerg. 497; Buson *v.* Dougherty, 11 Humph. 50; Price *v.* Jones, 3 Head, 84; Harding *v.* Metz, 1 Tenn. Ch. 610, favor the prevailing rule. Apparently the agreement need not be registered. The original owner may follow the property into the hands of the sub-vendee. McCombs *v.* Guild, 9 Lea, 81 (1882).

TEXAS holds the same general doctrine, except as modified by the statute. Sacra *v.* Semple, May, 1881, 12 Rep. 507; Sinker *v.* Comparet, 62 Tex. 470; City Nat. Bank *v.* Tufts, 63 Ib. 113; Tufts *v.* Cleveland, Tex. 1887, 3 So. W. 288; Joseph *v.* Cannon, 11 Tex. Civ. App. 295.

UTAH. The validity of such sales as to parties claiming under the purchaser is upheld in Shoshonetz *v.* Campbell, 7 Utah, 46. And the rule is declared to be settled in accordance with the weight of authority in Hirsch *v.* Steele, 10 Utah, 18, citing the cases, and applying the rule to a case where the goods were purchased for resale, and were attached by vendee's creditors. Lima Machine Works *v.* Parsons, 10 Utah, 105.

VERMONT, although holding that continued possession by a vendor after the sale warrants his creditors in attaching it as still his, yet steadfastly declines to allow the same effect to the possession by a vendee in a conditional sale, and maintains the superior rights of the conditional vendor over any and all other parties: see West *v.* Bolton, 4 Vt. 558, which was between the original parties. Bigelow *v.* Huntley, 8 Vt. 151, holds that the vendor may recover of the sub-vendee, even before the default in payment, but this may not be free from doubt: see 34 Ib. 169; though, if not entitled to the possession, he might sue for injury to the property. Kent *v.* Buck, 45 Vt. 18. See Smith *v.* Foster, 18 Vt. 182; Grant *v.* King, 14 Ib. 367. Bradley *v.* Arnold, 16 Vt. 382, affirms West *v.* Bolton. So does Davis *v.* Bradley, 24 Vt. 55, and Chaffee *v.* Sherman, 26 Ib. 238. Buckmaster *v.* Smith, 22 Vt. 203, gives the original vendor of a mare her foal after the sale, as well as herself. See, also, Clark *v.* Hayward, 51 Vt. 14. Root *v.* Lord, 23 Vt. 568, holds that, although the vendor has recovered judgment for the price, he could still retake the property if the judgment is unpaid; though how the vendor could sue for the price if the goods still belong to him, at least without waiving his title, it is not easy to see. Armington *v.* Houston, 38 Vt. 448, applies the rule, even though the vendee has a right to "consume" the goods. Matthews *v.* Lucia, 55 Vt. 308, holds no demand is necessary in trover by vendor against vendee if condition is not performed; and that a breach of condition is not waived merely by accepting subsequent partial payments. Child *v.* Allen, 33 Vt. 476, allows the vendor to recover the goods from the sub-vendee, although the vendee had much increased their value, and although the original vendor had himself once attached the goods as the property of the original vendee. See Clark *v.* Wells, 45 Vt. 4. Such was the common-law rule in Vermont, but now by statute, originally passed in 1854 (Rev. Sts. 1880, § 1186), the creditor of the conditional vendee in possession may attach the property as his by paying the original vendor the whole amount due within ten days after notice of the amount due; and by another statute such sale is invalid as to

creditors unless recorded; Whitcomb *v.* Woodworth, 54 Vt. 544; The Collender Co. *v.* Marshall, 57 Ib. 232; or unless there be actual notice, as in Kelsey *v.* Kendall, 48 Ib. 24. If it be duly recorded, trover lies by the vendor against any subsequent purchaser. Church *v.* McLeod, 58 Vt. 541. See Rowan *v.* Union Arms Co. 36 Vt. 124, 45 Ib. 160. The unpaid price must be tendered by the attaching creditor, although not fully due; Fales *v.* Roberts, 38 Vt. 503; otherwise he is liable to the vendor for the full value of the goods. Duncans *v.* Stone, 45 Vt. 118; Towner *v.* Bliss, 51 Ib. 59. And see Hefflin *v.* Bell, 30 Vt. 134. The property still being the vendor's, he may sell and give a good title to a third person; and if he does so, any action for the property must be in the name of such purchaser, and not in the name of the vendor. Burnell *v.* Marvin, 44 Vt. 277. If the sale is in writing, and absolute in its terms, the vendor cannot, in an action against a sub-vendee, show it was conditional; he is estopped. Sanborn *v.* Chittenden, 27 Vt. 171; Dixon *v.* Blondin, 58 Ib. 689.

VIRGINIA seems to favor the vendor even over *bonâ fide* purchasers from the vendee without notice. McComb *v.* Donald, 82 Va. 903, citing Old Dominion Steamship Co. *v.* Burckhardt, 31 Gratt. 664. And see Fidelity Ins. Co. *v.* Shenandoah R. R. 86 Va. 1.

WASHINGTON also. De Saint Germain *v.* Wind, 3 Wash. Ter. 189, 13 Pac. Rep. 753; Quinn *v.* Parke Machinery Co. 5 Wash. 276, following Harkness *v.* Russell, 118 U. S. 663.

WEST VIRGINIA holds such conditions valid, certainly as between the parties. McGinnis *v.* Savage, 29 West Va. 362.

WISCONSIN. The case of Wheeler & Wilson Mfg. Co. *v.* Teetzlaff, 53 Wisc. 211, holds that vendor cannot maintain replevin against vendee, without a demand, even though there has been a breach of condition; citing Cushman *v.* Jewell, 7 Hun, 525; Smith *v.* Newland, 9 Ib. 553. In Bent *v.* Hoxie, 90 Wisc. 625, there was a sale of standing timber, title to remain in the vendor until payment. The contract was held to be one for an interest in lands, and not a conditional sale within the meaning of the statute which requires such sales to be recorded. The original vendor was allowed to recover the property from a sub-vendee who had manufactured it into lumber. In Wadleigh *v.* Buckingham, 80 Wisc. 230, the conditional sale was properly recorded, and the unpaid vendor's rights were upheld as against the vendee's assignee. In Crosby Co. *v.* Trester, 90 Wisc. 412, a subvendee was not allowed to recover the property from the unpaid vendor; but in that case there had been neither payment to nor delivery by the original vendor. By statute, such sales are not good against parties without notice unless in writing, signed by the parties and filed in town clerk's office. S. L. Sheldon Co. *v.* Mayers, 81 Wisc. 627.

CANADA. The Canadian law agrees with the current of authorities in the United States: Stevenson *v.* Rice, 24 Up. Can. C. P. 245 (1874), between vendor and vendee's creditors; Mason *v.* Johnson, 27 Ib. 208 (1876), between vendor and vendee. Tuffts *v.* Mottashed, 29 Ib. 539 (1879), holds that replevin, however, would not lie against an innocent subvendee, without a previous demand. In Walker *v.* Hyman, 1 Ont. App. 345 (1877), the vendor of a safe was allowed to maintain trover against an innocent sub-vendee, although such vendor had painted the name of the original vendee on the front of the safe. It was held no estoppel. And see Mason *v.* Bickle, 2 Ont. App. 91 (1878). Sutherland *v.* Mannix, 8 Manitoba R. 541; Boyce *v.* McDonald, 9 Ib. 297, support the general rule.

The above-stated differences in the several States give rise to some interesting questions on the conflict of laws Thus, suppose A. buys property of B. in Pennsylvania (where the conditional buyer may sell and give a good title to a *bona fide* purchaser, though he has not paid his own vendor), and afterwards moves with all his property into New Jersey, where the contrary rule prevails, and there sells the property to a citizen of New Jersey: can the Pennsylvania vendor come into New Jersey and there reclaim by suit the property from the sub-vendee, when he could not do so by the law of New Jersey? It has recently been held in New Jersey that he could. Marvin Safe Co. *v.* Norton, 48 N. J. L. 410 (1886); followed in Weinstein *v.* Freyer, 93 Ala. 257; The Marina, 19 Fed. Rep. 760. And see Cronan *v.* Fox, 50 N. J. L. 420. And the statute (requiring recordation) of a State in which the property is situated applies to such conditional sales, although the contract of sale was made in another State. Knowles Loom Works *v.* Vacher, 57 N. J. L. 490.

In Waters *v.* Cox, 2 Bradw. 129, a conditional sale of a piano was made in Michigan, where the law holds it valid against all parties, and the buyer afterwards removed with the piano to Illinois and mortgaged it to secure a debt; but the original vendor was allowed to recover it of the mortgagee, contrary to the law of Illinois, and solely on the ground that the *lex loci contractus* of the original sale should govern, and not the *lex fori*. A conditional sale was made in Kansas, where their validity is upheld. The vendee removed to Colorado, where such sales are not good as against third persons. In the latter State the property was attached by the vendee's creditors. It was held that, as they could acquire no interest under the Kansas law, they could not do so in Colorado. Harper *v.* People, 2 Colo. App. 177. In Baldwin *v.* Hill, 4 Kans. App. 168, the sale was in Indiana, recordation not being necessary. The vendee sold the property in Kansas, where recordation is necessary. The original vendor was allowed to recover the property from the sub-vendee. See, also, Dixon *v.* Blondin, 58 Vt. 689; Barrett *v.* Kelley, 66 Ib. 515; Cobb *v.* Buswell, 37 Ib. 337. For valuable articles on this general subject, see 24 Am. Law Rev. p. 64; 9 Pac. Coast Law J. p. 49; 16 Irish Law Times, 638; 3 Am. St. Rep. 184–198.

From this review of the many authorities on this subject we deduce the following conclusions: —

First. All agree that in simple bailments, or leases with a right to buy on paying a stated price, the bailee or lessee does not acquire by the delivery any power to transfer a title to *bona fide* purchasers or attaching creditors before the payment of the price.

Second. The vast majority apply the same rule to actual sales and delivery when the title is expressly reserved in the vendor until payment of the price.

Third. Most hold that, in case of attempted sales by such conditional purchasers, the vendor, if not paid according to the terms of the contract, may then bring trover against the sub-vendee, without any prior demand or notice of the condition, or of its non-performance.

Fourth. In such action the vendor may recover the full value of the property without any deduction for partial payments by the first vendee made before the second sale.

Fifth. All agree that such conditional sales are valid between the parties, and that the vendor may retake the property from his vendee on non-performance of the condition.

CHAPTER IV.

SALE OF CHATTEL NOT SPECIFIC.

	Sect.		Sect.
This is an executory agreement . .	352	Submitted that it does not . . .	357
Does giving of earnest alter property ? .	355		

§ 352. WHEN the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass. There is but little difficulty in the application of this rule.

In Wallace *v.* Breeds (*a*), the sale was of fifty tons of Greenland oil, "allowance for foot-dirt and water as customary." The vendors gave an order on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfingers, and the order was thus countermanded by the vendors, nothing having been done on it. Held, that the property had not passed.

So in Busk *v.* Davis (*b*), the vendor had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and sold ten tons of it, giving an order to the purchaser on defendant for "ten tons Riga PDR. flax, ex Vrow Maria." In order to ascertain what portion of the flax was to be appropriated to this order, it was necessary to weigh the mats, and this had not been done, when the buyer became insolvent, and the vendor thereupon countermanded the order. Held, that the property had not passed.

§ 353. In White *v.* Wilks (*c*), the sale was of twenty tons of oil, out of the vendor's stock in his cisterns. In Austen *v.* Craven (*d*), the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In Shepley *v.* Davis (*e*), of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing.

In Gillett *v.* Hill (*f*), Bayley, J., stated the law very perspicu-

(*a*) 13 East, 522.
(*b*) 2 M. & S. 397.
(*c*) 5 Taunt. 176.
(*d*) 4 Taunt. 644.
(*e*) 5 Taunt. 617.
(*f*) 2 Cr. & M. 530.

ously in the following words: "The cases may be divided into two classes: one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable till that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided*" (*g*).

[In Gabarron *v.* Kreeft (*h*), the sale was of all the iron ore, the produce of a certain mine in Spain. The contract provided that the price should be paid by the defendants' acceptances, to be given on a certificate that the quantity of ore drawn for was in stock, and that thereupon the property in the ore so drawn for should vest in the defendants. In carrying out the contract, the defendant's acceptances at a particular time exceeded the amount of all the ore already shipped, so that the defendants were entitled to a further quantity of the ore then in stock, as to which, however, no certificate had been given. Held, that in the absence of any specific appropriation of the ore by the seller in fulfilment of the contract, no property in any of the ore in stock could vest in the defendants.

§ 354. The only case to be found in the reports, in apparent contradiction to this principle of the law of sale, is Whitehouse *v.* Frost (*i*), which, notwithstanding explanations by the judges in subsequent cases, is scarcely ever mentioned without suggestion of doubt or disapproval. In that case the contract was as follows: "Mr. J. Townsend bought of J. & L. Frost, ten tons of Greenland oil, in Mr. Stainforth's cisterns, *at your risk*, at 39*l.* — 39*0l.*" There were then in the cistern forty tons of oil, which had belonged to Dutton & Bancroft, and they had sold ten tons of it to Frost & Co., and these were the ten tons which the latter sold to Townsend, giving Townsend an order on Dutton & Bancroft for "the ten tons of oil we purchased from you, 8th Nov. last." The order was taken to Dutton & Bancroft by the purchaser, and accepted by them in writing, on the face of the order. Townsend left the oil in the custody of Dutton & Bancroft, and it was not severed from the bulk in the cisterns. It was held that the property had passed, as between Frost & Townsend. Lord Ellen-

(*g*) See, also, Campbell *v.* Mersey Docks Company, 14 C. B. N. S. 412.

(*h*) L. R. 10 Ex. 274, more fully considered *post*, § 398 a.

(*i*) 12 East, 614.

borough put it on the ground that all right in the seller was gone by the acceptance of his delivery order in favor of Townsend, the seller never having had himself possession, but only a right to demand possession from the bailees, which right he had assigned to Townsend, just as it had been assigned to himself by his vendors. Grose, J., was of opinion that, as the *risk was in the buyer*, and the delivery complete so far as the *vendor* was concerned, the property had passed. It was the *purchaser's* business to act with Dutton & Bancroft in drawing off the ten tons of oil. Le Blanc, J., put it on the ground that the sale was complete between Frost & Townsend, because nothing remained to be done *between them*. The vendor had given to the purchaser the only possession that the vendor ever had, and the purchaser had accepted this, and Dutton & Bancroft were bailees of the oil for the purchaser's use. All that remained to be done was between the purchaser and *his* bailees. Bayley, J., was very much of the same opinion, considering the purchaser's acceptance of an order on Dutton & Bancroft, his presentation of it to them, and obtaining their assent to be his bailees, as equivalent to a consent that the goods should be deemed to have been delivered to him. This case was much questioned in subsequent decisions (*j*). In Wallace *v.* Breeds (*k*), Lord Ellenborough again said of Whitehouse *v.* Frost, "There nothing remained to be done by the seller to complete the sale between him and the buyer." And in the subsequent case of Busk *v.* Davis (*l*), where three of the judges (Lord Ellenborough, and Le Blanc, and Bayley, JJ.) who decided Whitehouse *v.* Frost were still on the bench, they adherred to the decision, both Le Blanc and Bayley saying, however, that the sale was of an "undivided quantity," and that delivery had been made of that undivided quantity so far as in the nature of things it was possible for the vendor to deliver it.

The cases in which these contracts are considered, by which the vendor agrees to make and deliver a chattel, are reviewed in the next chapter, on Subsequent Appropriation.

§ 355. This seems to be an appropriate occasion for considering the question whether earnest has any, and what, effect in altering the property in the goods which are the subject-matter of the contract.

In former times, when the dealings between men were few and simple, and consisted for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest the property passed. Thus we have seen, in the second chapter of this

(*j*) See White *v.* Wilks, 5 Taunt. 176; Austen *v.* Craven, 4 Taunt. 644; Campbell *v.* Mersey Company, 14 C. B. N. S. 412; Blackburn on Sale, 125.

(*k*) 13 East, 525.

(*l*) 2 M. & S. 397.

book, that Shepherd's [1] Touchstone contains this rule (*m*): "If one sell me his horse, or any other thing for money, . . . and I give earnest money, albeit it be but a penny, to the seller, . . . there is a good bargain and sale of the thing to alter the property thereof." And Noy says (*n*): "If the bargain be that you shall give me 10*l.* for my horse, and you give me one penny in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows very plainly that the authors were considering the subject of the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A. to buy, and B. to sell, did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, *in whatever form*, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale.

So in Bach *v.* Owen (*o*), the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered to deliver the colt; but Buller, J., said: "The payment of the halfpenny vested the property of the colt in the defendant," and the tender was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which altered the property as soon as the earnest given prevented either party from retracting.

§ 356. In Hinde *v.* Whitehouse (*p*), Lord Ellenborough, in considering the mode of passing the property in the sugar sold, rejected a defence founded on the fact that the goods were not ready for delivery because the duties had not yet been paid, and said, *arguendo:* "Besides, after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His Lordship, after quoting this *dictum* from Holt, C. J., in Langfort *v.*

(*m*) *Ante*, § 313.
(*n*) *Ante*, § 314.
(*o*) 5 T. R. 409.
(*p*) 7 East, 558.

[1] Often written Sheppard.]

Administratrix of Tiler (*q*), and Noy's Maxims, as above, continued: "On this latter ground, therefore, *I do not think that the sale is incomplete.*" This, again, was the sale of a specific chattel, and the mind of that great judge was plainly intent on the question whether there had been a "*complete* sale," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also (*r*), if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain and thus furnishing proof of such a complete contract of sale as suffices to pass property in a specific chattel.

§ 357. No case, however, has been found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing or any other sufficient manner, would not equally have altered the property. It is difficult to conceive on what principle it could be contended that the giving of earnest would pass the property, for example, in fifty bushels of wheat, to be measured out of a larger bulk. In the cases of Logan *v.* Le Mesurier (*s*), and Acraman *v.* Morrice (*t*), it was held, as we have already seen (*ante*, §§ 324, 326), that where the *whole purchase-money* had been paid at the time of the contract, the property did not pass in the timber, which was to be afterwards measured on delivery, and it is scarcely conceivable that a penny, delivered under the name of "earnest," could be more effective in altering the property than the payment of the entire price.

It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest.

AMERICAN NOTE.

§§ 352–357.

SALE OF CHATTEL NOT SPECIFIC. 1. In America there is substantial uniformity in holding that a sale of an article "to be manufactured" is executory, and no title ordinarily passes until the thing is completely executed. Indeed, it is difficult to see how it could be otherwise; and it is even held that the title does not vest *immediately* upon completion, but only after notice to the vendee, or some act of the vendor, setting it apart, marking it, or some other similar act. First Nat. Bank *v.* Crowley, 24 Mich. 492;

(*q*) Salk. 113.
(*r*) 2 Black. Com. 447–449.
(*s*) 6 Moo. P. C. 116.
(*t*) 8 C. B. 449.

Ballentine *v.* Robinson, 46 Pa. St. 177; The Moline Scale Co. *v.* Beed, 52 Iowa, 307; Fordice *v.* Gibson, 129 Ind. 7. But when the article is completed, and the buyer notified thereof, the title passes, unless the seller is bound to deliver elsewhere; and therefore be can recover the price. Higgins *v.* Murray, 4 Hun, 565, 73 N. Y. 252; Goddard *v.* Binney, 115 Mass. 450; Moore *v.* Perrott, 2 Wash. 1.

2. **Appropriation.** So where there is a general sale of goods already on hand in stock, or to be procured by the vendor, as where a merchant receives an order for a certain quantity of goods, although he accepts the order and actually charges the goods on his books, it is clear no title passes to any particular goods until they have been set apart, marked, or in some way designated for the buyer; and this is so, even though the order embraced the whole quantity the vendor had of the description called for. This is "appropriation" in the strict sense of that word. See Banchor *v.* Warren, 33 N. H. 183; Winslow *v.* Leonard, 24 Pa. St. 14; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184; Moss *v.* Meshen, 8 Bush, 187; Foote *v.* Marsh, 51 N. Y. 288, and Higgins *v.* Del. L. & W. R. R. 60 N. Y. 553; Ormsbee *v.* Machir, 20 Ohio St. 295; McCandlish *v.* Newman, 22 Pa. St. 460; May *v.* Hoaglan, 9 Bush, 171; Lewis *v.* Lofley, 60 Geo. 559; Black *v.* Webb, 20 Ohio, 304; Pew *v.* Lawrence, 27 Up. Can. C. P. 402. As to what is sufficient appropriation, etc., see the cases cited in the next note.

3. **Portion of a Mass.** But as to the sale of a portion of a larger quantity of the same kind, — an unselected part of a particular mass, as where the buyer says, "I will take 100 bushels out of that bin," which in fact contains a thousand bushels, — the American authorities appear to be in hopeless conflict whether or not some separation, designation, or identification is necessary in order to pass the property in any portion of the whole. Let us consider first those cases which seem to uphold such sales without any such act.

In Damon *v.* Osborn, 1 Pick. 476 (1823), D. sold O. 2000 bricks at $4 per thousand, out of 40,000 in his yard. O. took away 800, but the others were never separated from the rest of the kiln, although D. was ready to deliver them as he had agreed to do whenever called for by O. The 1200 were never received by O., but remained in D.'s kiln, never having been called for. Held, that D. could recover for goods "bargained and sold," as he was to do nothing more until O. called for them. The partial delivery here may have had some weight in the decision, as the main question raised was the "acceptance and receipt" under the Statute of Frauds. See 2 Pick. 213; 6 Ib. 283.

In Pleasants *v.* Pendleton, 6 Rand. 473 (1828), the defendant bought 119 barrels of flour out of 123, all of similar kind and marks, and in the same warehouse, and gave his check for the amount, taking a receipted bill and order on the warehouseman for their delivery. No separation or designation of any kind had been made, nor had the order on the bailee been presented, and on the next day the whole were destroyed by fire. The plaintiff recovered the price of the 119 barrels upon proof of a custom so to sell flour in store. The subject was elaborately examined in this leading case, and Jackson *v.* Anderson, 4 Taunt. 24, was much relied on.

In Crofoot *v.* Bennett, 2 N. Y. 258 (1849), H. sold B. 43,000 bricks, out of a kiln of a larger quantity, then unburnt, and B. *took possession of*

the yard and the whole kiln, and gave H. directions about burning them, but no separation was made. A few days afterwards H. sold the whole kiln to C., and two days later B. opened the kiln and took away the 43,000 bricks, for which C. sued him in trespass; but it was held that the title to the 43,000 had passed to B. previous to the sale of the whole to C., and the fact of a delivery of the yard and of the whole kiln to B. was much relied on by the court. Two judges, however, dissented. If separation were "*actually necessary*," it is not exactly easy to see why delivery of the whole, but without any separation by the vendee, would make any difference.

In Waldron *v.* Chase, 37 Me. 414 (1854), W. bought 500 bushels of corn, out of 15,000 bushels, and paid for them. He took away part, and by custom had the right to take away the balance as he might wish, from day to day, without any other act by the vendor. All the rest of the corn was destroyed by fire. In an action by the buyer to recover for that not delivered, it was held the title and risk had passed to the purchaser. The fact of full payment apparently had much weight. See 63 Me. 556. But it is not easy to see why payment of the price could aid in vesting the title, if otherwise some other act would be necessary, like weighing, measuring, or separating. See Nesbit *v.* Burry, 25 Pa. St. 208.

In Weld *v.* Cutler, 2 Gray, 195 (1854), G. mortgaged to W. 200 tons of coal out of 500 then on G.'s wharf. W. took possession of the whole pile; gave G. notice required by law to foreclose his mortgage for non-payment of the mortgage debt, which notice was duly recorded, and G. agreed to sell the coal for W. Before doing so, his assignee in insolvency sold all the coal to other parties. In trover by W. against the assignee, it was held the title sufficiently passed, because the mortgagee had, in performance of the contract, taken possession of the whole "for the purpose of separating and securing his part;" and Scudder *v.* Worster, 11 Cush. 573, was approved but distinguished. See, also, Brewer *v.* Salisbury, 9 Barb. 511.

In Horr *v.* Barker, 8 Cal. 603 (1857), and 11 Ib. 393, W., having a quantity of barrels of flour, all of the same quality and marks, in a warehouse, sold it all to different parties, and the warehouseman was notified of each sale, accepted the orders, and gave each purchaser a new receipt for his own purchase, and charged the vendor with them as delivered to the vendees, but no separation was made. The whole being wrongfully taken away by B., one of the buyers sustained trover against B. for his share of the flour; but the fact that the vendor here sold all he had, and that the warehouseman credited each buyer with his own portion on his books, was evidently considered as entitled to much weight. See 27 Cal. 463.

In Kimberly *v.* Patchin, 19 N. Y. 330 (1859), D. sold S. 6000 bushels of wheat out of two piles of 6249 bushels, giving him a bill of parcels and this warehouse receipt: "Received in store 6000 bushels of wheat, subject to S.'s order free on board." No separation took place, but S. made a partial payment, and sold the 6000 bushels to P., assigning him the bill of parcels and receipt. Soon afterwards, and before any separation, D. sold the whole quantity in both piles to the plaintiffs, and forwarded it to them on board vessel. P. replevied 6000 bushels, and took that amount away from the vessel, for which the plaintiffs brought trover. Held, that the title to 6000 so far passed to P. that trover would not lie; either because P. had become sole owner of 6000 bushels, or that he was tenant in common with the plaintiffs of the whole, and in either case trover would not lie for merely replevying the 6000 bushels. Two judges, however,

dissented. This is a leading and very important case. See, also, Hoyt *v.* Hartford Ins. Co. 26 Hun, 416; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86. In Young *v.* Miles, 20 Wisc. 615 (1866), the doctrine of Kimberly *v.* Patchin was fully approved by Judge Dillon, and that of Scudder *v.* Worster, 11 Cush. 573, repudiated. And this was sustained on appeal in 23 Wisc. 643 (1869). See, also, Nash *v.* Brewster, 39 Minn. 533.

In Mackellar *v.* Pillsbury, 48 Minn. 396, A. sold to B. 12,384 barrels, part of a larger quantity, from which they were not separated. B. afterwards sold and delivered to C. 11,531 of the barrels, and then sued C. for the price. A.'s assignee intervened, claiming that the sale by A. to B. was fraudulent for want of delivery. It was held that there was no fraud, and that separation was not necessary, the barrels being alike in kind and quality. A. and B. became tenants in common under the first sale.

In Anderson *v.* Crisp, 5 Wash. 178, the contract was for the sale of 162,000 merchantable bricks, to be selected from a larger mass. It was held that title did not pass until separation. The case was distinguished from Kimberly *v.* Patchin, which was discussed.

In Coffey *v.* The Quebec Bank, 20 Up. Can. C. P. 110 (1869), and 20 Ib. 555, a sale of 2000 bushels of wheat out of 3000, all in the same warehouse, the warehouseman gave a receipt agreeing to hold the 2000 bushels for the buyer, and, the whole being wrongfully taken away by the defendant, the buyer of the 2000 bushels sustained trover for the same. Much weight was given to the fact of the receipt by the warehouseman, and the agreement of the latter not to deliver the wheat to any one but the buyer.

In Watts *v.* Hendry, 13 Fla. 523 (1869–71), W. bought 100 cattle out of a herd of 4000 running at large, paid the price, and took an order on the vendor's agent; but subsequently the vendor resold the whole to H., who, after once requesting W. to take away his 100 head, refused to give them up on demand; but he was held liable in trover by W.; and Pleasants *v.* Pendleton, *ante*, was approved.

In Russell *v.* Carrington, 42 N. Y. 118 (1870), R. bought 400 bushels of corn of C., part of a cargo then stored in an elevator in charge of W. The buyer paid for the corn, taking a receipted bill, and C. sent W. an order, unknown to R., for the delivery. Before any delivery or separation, the whole was burned or greatly damaged, and R., after demanding his corn, brought suit to recover back the purchase-money; but he was not allowed to do so, the title and risk having passed, and Kimberly *v.* Patchin was approved. Two judges dissented. See, also, Lobdell *v.* Stowell, 51 N. Y. 75.

In Chapman *v.* Shepard, 39 Conn. 413 (1872), S. sold 600 bags of meal to A. for cash, but which was not paid, and S. kept possession. A. resold 500 to C., who paid him for them and took part away, S. telling him he might remove the rest when he wished. Subsequently S. refused to deliver any more to C., because of the suspected insolvency of A., and C. was allowed to maintain trover for such refusal; Whitehouse *v.* Frost, and Pleasants *v.* Pendleton, being approved.

In Hurff *v.* Hires, 39 N. J. L. 4, 40 Ib. 581 (1878), a sale of 200 bushels of corn out of 500, for which the full price was paid and the corn inspected and approved. Before delivery or separation the whole was levied on by a creditor of the vendor, and afterwards the vendor delivered the 200 bushels to the buyer. In trover by the sheriff it was held, after

thorough consideration, that the property *might* pass before separation, if such was the intention of the parties, and that such question was for the jury. And see Smith *v.* Friend, 15 Cal. 124. So in Phillips *v.* The Ocmulgee Mills, 55 Geo. 633 (1876), the question was said to be one of intention of the parties. And see Aderholt *v.* Embry, 78 Ala. 185; Anderson *v.* Levyson, 1 Tex. Civ. App. 520 (1883); Cloke *v.* Shafroth, 137 Ill. 393.

In Lamprey *v.* Sargent, 58 N. H. 241 (1878), it was held that if the vendee of part of an entire mass of bricks is *allowed to take possession of the whole* to enable him to separate the part purchased, the title passes according to the contract between the parties, and he may maintain replevin for his part against the vendor who has taken the whole away. See, also, Page *v.* Carpenter, 10 N. H. 77.

In Carpenter *v.* Graham, 42 Mich. 191 (1879), the owner of 7000 barrels in a warehouse sold C. 1000 barrels, which the warehouseman agreed to hold for him. No designation or separation was made, and in fact the stock of barrels was constantly changing, sales being made and new barrels constantly added. Creditors of the vendor levied on the whole mass, then under 3000 barrels, and the buyer was allowed to recover for the conversion of his 1000 barrels, as they were all alike in quantity and quality. And see Crapo *v.* Seybold, 35 Mich. 169, 36 Ib. 444; Merchants' Bank *v.* Hibbard, 48 Ib. 118.

In Piazzek *v.* White, 23 Kans. 621 (1880), the defendant put 300 bushels of the plaintiff's corn into his corn-cribs, and agreed with the plaintiff to measure out to him on demand either the same corn or the same amount of like quality. The plaintiff was allowed to maintain replevin for 300 bushels of corn, and there does not appear to have been any demand or refusal to deliver it; but this is easily distinguishable from a sale of 300 bushels out of a large mass. Young *v.* Miles, 20 Wisc. 615, was relied upon; Howell *v.* Pugh, 27 Ib. 702. See, also, Kaufmann *v.* Schilling, 58 Mo. 218 (1874); Andrews *v.* Richmond, 34 Hun, 24; Clark *v.* Griffith, 24 N. Y. 595; Wooster *v.* Sherwood, 25 Ib. 278; Foot *v.* Marsh, 51 Ib. 288, as more or less favoring the same view. See Galloway *v.* Week, 54 Wisc. 604; Hoffman *v.* King, 58 Ib. 314. In Sanger *v.* Waterbury, 116 N. Y. 371, — a valuable case, — a sale of a given number of bags of coffee, by the pound, out of a larger mass, was held valid, because those sold had specific marks upon them clearly distinguishing them from those not sold, although those sold were to be afterwards weighed, in order to determine the full amount of the purchase-money.

On the other hand, an equal if not greater number of cases adopt principles apparently in conflict with the foregoing adjudications, and some are directly opposed on a similar state of facts.

In Brewer *v.* Smith, 3 Greenl. 44 (1824), T. agreed to burn B.'s kiln of bricks, for which as compensation B. was to deliver him at the kiln, after they were burned, 10,000 good hard-burnt bricks. The burning was completed, but without any separation being made. A creditor of T. attached and took away 10,000 of the bricks after B.'s refusal to set any apart. Held, that no title had passed to T., and that B. could maintain trespass against the attaching officer.

In Young v. Austin, 6 Pick. 280 (1828), A. sold G. a quantity of slate in a large pile at $30 per ton, to be paid for as taken away, one half to be

taken in three and one half in four months, and G. paid $250 as earnest money, and a few days after $420 (the price of 14 tons), and it was agreed that G. should subsequently call for the slate, when they should be weighed off to him by a weigher employed by A. No weigher appeared at the time and place stated, and A.'s clerk refused to measure or weigh off the quantity or deliver to G. any slate in lieu of 14 tons, and G. agreed to call again in a few days and have the slate weighed off. Before that event G. sold the 14 tons to Y. by a bill of sale, but subsequently G. and A. made a new agreement by which all the slate except 23 tons were delivered to G.; and subsequently Y. demanded the 14 tons of A., which he refused to deliver, and Y. brought trover. Held, that no complete title in any 14 tons had become vested in G. when he sold to Y., and that the action could not be maintained for the want of any weighing or delivery to G.

In Merrill *v.* Hunnewell, 13 Pick. 213 (1832), G. sold M. a part of his brick-kiln, by a written instrument, but no delivery, separation, or identification was made, when the whole were attached by H. as the property of G., and M. brought trespass *de bonis* against H. Held, that the action could not be maintained for want of some designation or separation of the quantity sold to M.

In Woods *v.* M'Gee, 7 Ohio, 467 (1836), S. had 1500 barrels of flour in M.'s possession, "varying in value from 25 to 70 cents a barrel." He sold W. 600 barrels, and gave him an order on M. for the delivery, but only 300 were delivered; and in trover by W. against M. for the other 300 barrels it was held the title was not changed until some separation had taken place, and Pleasants *v.* Pendleton was not approved. This is considered a leading case on this side. But see Newhall *v.* Langdon, 39 Ohio St. 87, that usage may modify the rule.

In Dunlop *v.* Berry, 4 Scam. 327 (1843), a sale of bricks by the thousand in a kiln, it was held that if they remained in the kiln with others, to be separated and counted, the bricks were the vendor's until such separation. But see Morrison *v.* Woodby, 84 Ill. 192.

In Field *v.* More, Hill & Denio, 418 (1844), the plaintiff bought 1000 flour barrels out of a particular lot of 2000 barrels, to be delivered by the vendor at the will of the purchaser, in good order, when requested; a few barrels had been delivered, when the rest were burned, before any separation or designation. Held, that the sale was incomplete, and no title passed to any barrels not delivered; and Whitehouse *v.* Frost was declared to be overruled.

Hutchinson *v.* Hunter, 7 Pa. St. 140 (1847), was a sale of 100 barrels of molasses, parcel of 115 barrels varying somewhat in quantity; all were destroyed by fire, and the vendor was not allowed to recover the price, and Whitehouse *v.* Frost was disapproved. Compare Hutchinson *v.* Commonwealth, 82 Pa. St. 480. See, also, Golder *v.* Ogden, 15 Pa. St. 528 (1850), a sale of 2000 pieces of wall-paper, of which 1000 were delivered, but no separation or designation of the rest from a larger mass was made, when the vendor failed and assigned all his property to his creditors, and it was held the last 1000 pieces belonged to the assignees, although the buyer had given his note for the whole 2000 when he bought them. See, also, Leonard *v.* Winslow, 2 Grant, 139, 24 Pa. St. 14.

In Pollok *v.* Fisher, 1 Allen (N. B.), 515 (1849), B. sold R. 500 tons of timber, in the possession of F., a pond-keeper, and gave R. an order on F. for the same, which F. accepted, and put 500 tons to the credit of R.

on his books. R. then assigned to P., and P. brought trover against F. for the timber, but he was not allowed to recover, for the want of any "individuality" in the timber sold.

In Stevens *v.* Eno, 10 Barb. 95 (1850), a tax-collector sold three tons of the plaintiff's hay for non-payment of taxes, saying to the purchaser if there was not enough in one stack he must make it up from another, but nothing at the time was done to separate any. Subsequently the purchaser took away part of the first stack and part of another, and had it weighed; but he was held liable to the owner, because the sale was not completed by the collector for want of separation.

In Waldo *v.* Belcher, 11 Ired. 609 (1850), W. sold B. 2800 bushels of corn out of 3100 bushels on storage with F., and gave B. an order on F. for the same, which was presented to F.; but no change was made on the books of F., and the whole remained to the credit of W. as before, and no separation took place. The whole was destroyed by fire. Held, that W. could not recover the price of B., as the title never passed, and that the intention of the parties made no difference; an intention could not change an indefinite into a definite thing. This is a very strong case on this side of the question. And see Blakeley *v.* Patrick, 67 N. C. 40; Austin *v.* Dawson, 75 Ib. 523; Dunkart *v.* Rineheart, 89 Ib. 357.

In Gardiner *v.* Suydam, 7 N. Y. 357 (1852), C., a warehouseman, had in store over 2000 barrels of flour, all of the same brand, quality, and value, belonging to H., and gave H. a receipt for 530 barrels subject to his order. H. indorsed the order to A., and took from A. a receipt for the flour, with an engagement to forward it to G., and H. drew on G. for an advance on the flour, which G. accepted and paid; but no flour was sent or separated from the mass, but some of it was sent to S., of whom G. demanded the 500 barrels, and after refusal brought trover. Held, he could not recover, for want of separation or identification of the flour; citing Austin *v.* Craven, 4 Taunt. 643, and White *v.* Wilks, 5 Taunt. 167.

Scudder *v.* Worster, 11 Cush. 573 (1853), is a leading case on this side. A. sold B. 250 barrels of pork, part of a larger lot, all of the same quality, having the same marks, and all stored in the same cellar of A., but no separation was made. B. sold and delivered C. 100 barrels of the same pork, and afterwards sold D. the remaining 150 barrels, and gave him an order on A. therefor, which being presented to A., he assented to hold the same on storage for D., but nothing was done to distinguish or separate the 150 barrels from the other pork of similar brand still in A.'s cellar. While the pork remained so stored B. became insolvent, and A. then refused to deliver the 150 barrels to D. on said order. Held, that the 150 barrels were not so specified and separated from the whole mass that D. could maintain replevin therefor against A.; distinguishing if not overruling Gardner *v.* Dutch, 9 Mass. 427. Scudder *v.* Worster was approved in Ropes *v.* Lane, 9 Allen, 510 (1865), and in many other cases cited in New England, etc. Co. *v.* Standard Worsted Co. 165 Mass. 329 (1896).

In Cook *v.* Logan, 7 Iowa, 142 (1858), the plaintiffs were joint owners of 300 bushels of wheat stored with the defendant; one of the plaintiffs sold the defendant 20 bushels, for which the defendant gave him credit on account, but no separation took place. The plaintiffs then claimed the right to remove the whole 300 bushels, to which the defendant objected unless he received his 20 bushels, and the plaintiffs brought replevin for the whole 300 bushels, which was sustained, because no title had vested in the

defendant for want of separation, not because the vendor was only a joint owner of the wheat.

In McDougall *v.* Elliott, 20 Up. Can. Q. B. 299 (1860), B. sold S. 100 tons of coal in his yard. The pile supposed to contain that quantity proved to contain only 78 tons, and S. took away the other 22 tons out of a larger pile, without any act of separation or designation by the vendor, but previous to such carrying away B. had made an assignment to M. for the benefit of his creditors. Held, that M. could sustain trover for the 22 tons so taken away. So in Ockington *v.* Richey, 41 N. H. 275 (1860), it was clearly held that a sale of lumber to be taken and measured from a larger bulk, and to be an average lot as to thickness and quality, is not complete, even as between parties, until separated and measured. See, also, Fuller *v.* Bean, 34 N. H. 290; Warren *v.* Buckminster, 24 Ib. 337; Messer *v.* Woodman, 22 Ib. 172.

In Courtright *v.* Leonard, 11 Iowa, 32 (1860), M. sold C. 25,000 bricks "off the west end of my kiln," which contained over 100,000, and said to him, "I deliver you 25,000 off this west end," but they were not removed, marked, or designated. M.'s creditors levied on the whole, and C. brought replevin against the sheriff, but it was held that no title had passed to him. And see Rosenthal *v.* Risley, Ib. 541.

In Bailey *v.* Smith, 43 N. H. 141 (1861), the defendant wanted to buy 2000 telegraph poles; the plaintiff had a lot of 2130 of such poles ready for delivery at the time and place designated, and so notified the defendant, but before anything more was done they were carried away by a freshet. Held, that the title had not passed so that the plaintiff could recover the price, even on a count for "goods bargained and sold." See, also, Stone *v.* Peacock, 35 Me. 385.

In McLaughlin *v.* Piatti, 27 Cal. 463 (1865), it was declared to be a fundamental principle of the law of sales that if goods be sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified; and Hutchinson *v.* Hunter, Woods *v.* McGee, etc., are cited in support of the proposition.

In Haldeman *v.* Duncan, 51 Pa. St. 66 (1865), H. sold D. 300 barrels of oil to be delivered at Oil City, and D. paid for it. H. showed him a large lot of oil ready for shipment at Oil City, and requested him to select his 300 barrels. D. tested several barrels, expressed himself satisfied, but did not select or mark any. A few days afterwards the whole was swept away by a flood, and D. was allowed to recover back his purchase-money, on the ground that the title had not passed and the risk was still on the vendor.

In Rodee *v.* Wade, 47 Barb. 53 (1866), it was held to be a question for the jury whether the parties intended the title to pass or not, when it was not separated from the mass; and if they found it was not the intention to pass it before separation, full effect should be given to that intention, and the title and risk would be still with the vendor. From this decision some have argued that, if it were the intention that the title should pass without separation or identification, it would do so; but that is a *non sequitur*.

In Box *v.* The Provincial Ins. Co. 15 Grant Ch. 337 (1868), B. bought of T. 3500 bushels of wheat, forming a part of a much larger mass then in store. B. paid for it and received a warehouse receipt, and subsequently, without any separation taking place, insured it in the defendant company

as his property. Being subsequently destroyed by fire with the whole mass, it was held he could not recover, because no property had passed to him. See, also, 5 Bennett's Fire Ins. Cas. 197. This decision was reversed on appeal, in 18 Grant, 280, but solely on the ground that the plaintiff had an "insurable interest" in the wheat, even though it had not been separated so as to pass the complete title, as was also held in Cumberland Bone Co. *v.* Andes Ins. Co. 64 Me. 466.

In Browning *v.* Hamilton, 42 Ala. 484 (1868), A. sold B. thirty bales, or 15,000 pounds of cotton, "a portion of a larger mass of unginned cotton lying in bulk in the seed at the gin-house of the vendor." Held, that without separation or identification the vendee could not sustain trover against the vendor for its non-delivery. Baldwin *v.* McKay, 41 Miss. 358, is very similar; so is Upham *v.* Dodd, 24 Ark. 545. And see Mobile Savings Bank *v.* Fry, 69 Ala. 350; Gresham *v.* Bryan, 103 Ib. 629; Thomas *v.* The State, 37 Miss. 353; Beller *v.* Block, 19 Ark. 566; Warten *v.* Strane, 82 Ala. 311; Jeraulds *v.* Brown, 64 N. H. 606.

In Caruthers *v.* McGarvey, 41 Cal. 15 (1871), the defence to a note was payment in corn; the evidence being that the parties agreed that the payee should take enough corn to pay the note out of a large quantity husked and in heaps on the maker's field, at $1.50 per bushel, and each party was to help haul it away to the payee's crib, but that had never been done, as the payee, when notified, declined to come for the corn. Held, the sale was incomplete and the note not paid.

In Keeler *v.* Goodwin, 111 Mass. 490 (1873), B. bought of G. 1000 bushels of corn, parcel of a larger quantity lying in bulk in a warehouse. B. did not pay for the corn, but took an order for its delivery upon the warehouseman which he indorsed for value to K. Before the order was presented to the bailee, B. failed, and G. countermanded the order on the bailee and removed the corn. Held that, for want of separation, no title passed to K. to enable him to maintain trover against G., although there was a usage in the grain trade to consider an order on a warehouse as a delivery.

In Foot *v.* Marsh, 51 N. Y. 288 (1873), M. sold F. 100 barrels of oil at 12 shillings, and 4000 gallons at 18 cents, for which F. paid in full, "to be delivered when called for, the quality of the oil to be like sample delivered." Afterwards M. delivered 100 barrels, but which, owing to leakage occurring after the contract, contained only 1821 gallons. F. was allowed to recover for the deficiency, as the sale was executory only and not executed; and Kimberly *v.* Patchin was distinguished.

In Morrison *v.* Dingley, 63 Me. 553 (1874), W. had a cargo of 250 tons of coal on the wharf. He sold M. 125 tons, and the rest to D., but no bill of sale or receipt was given, nor any payment made. M. took away part, and D. forbade him to take any more until *he* had removed the same amount, and asserted that the balance should be divided equally between them. Held, that M. had no such title to any coal still unweighed, or unseparated, that he could sustain trover against D. for preventing him from taking it away. Scudder *v.* Worster was approved, and Kimberly *v.* Patchin distinguished. See, also, Lawry *v.* Ellis, 85 Me. 500; Elgee Cotton Cases, 22 Wall. 180.

In Hahn *v.* Fredericks, 30 Mich. 223 (1874), F. sold H. 200 cords of hard wood, out of several piles containing over 350 cords. There was some soft wood scattered through the piles. The purchasers were to remove the

wood, which was to be measured on the scows. A part had been removed and measured, but the rest was still in the piles, when they were wholly destroyed by fire. Held, that the vendor could not recover the price of the balance as on a complete sale, and the cases are distinguished on this point. And see Crapo *v.* Seybold, 35 Mich. 169; England *v.* Mortland, 3 Mo. App. 490 (1877); Robbins *v.* Chipman, 1 Utah, 335, 2 Ib. 347 (1877), a sale of 144 sheep out of a flock of 2000.

In Huntington *v.* Chisholm, 61 Ga. 270 (1878), it was held that a sale of 1500 pounds out of an expected cotton crop, no particular portion being specified or identified, was invalid against a second purchase of the entire crop. And see Central Railroad Co. *v.* Burr, 51 Ga. 553. The subject was carefully examined in Ferguson *v.* Northern Bank, 14 Bush, 555 (1879), and many cases cited on both sides. The decision of Scudder *v.* Worster, 11 Cush. 573, was fully approved, and that of Kimberly *v.* Patchin, 19 N. Y. 330, denied; the court saying, at p. 566, that the intention, though expressed in so many words, does not necessarily pass the title. The intention may be to make a sale, and still the facts may not constitute a sale. The intention is manifested by the nature and character of the contract, but the rules of law determine what constitutes a sale, and what a mere agreement to sell. In Kansas the law is in harmony with that of Scudder *v.* Worster. See Bailey *v.* Long, 24 Kans. 90 (1880); Williams *v.* Feiniman, 14 Ib. 288. Though see Howell *v.* Pugh, 27 Ib. 702. Cleveland *v.* Williams, 29 Texas, 204 (1867), is in the same direction.

In Block *v.* Maas, 65 Ala. 211 (1880), S. sold B. his entire stock of goods, "reserving and excepting $1000 worth hereby selected by me under the law as exempt" from attachment. Before S. made any actual selection his creditors levied upon the entire stock, and it was held that no title passed to B. until the selection had been made by S. See, also, Pierson *v.* Spaulding, 67 Mich. 640 (1888). In Reeder *v.* Machen, 57 Md. 56 (1881), a sale of 385 tons of coal out of a yard, it was held no title passed until separation, and a separation in which the vendor concurred, but that the title to the whole did pass to the receiver of the vendor appointed at the request of the creditors.

In Commercial Bank *v.* Gillette, 90 Ind. 268 (1883), the Supreme Court of Indiana somewhat warmly vindicated the general rule so often stated; citing many authorities, and disapproving of Pleasants *v.* Pendleton, and Kimberly *v.* Patchin. In Fry *v.* Mobile Savings Bank, 75 Ala. 473 (1883), C. sold F. 1000 bundles of cotton ties, which were in bulk with other ties of like quality, character, and size, and received pay for the whole. Subsequently he delivered all but 252 bundles, which were not separated from the bulk of about 400 bundles. While in this condition, C. sold the whole to M., who took them away, and F. brought trover against M., but it was held that he had no title to them. And see 69 Ala. 348. Such also seems to be the law in Missouri. Ober *v.* Carson, 62 Mo. 213 (1876); 6 Mo. App. 598; 9 Ib. 578. So in Tennessee. Fitzpatrick *v.* Fain, 3 Coldw. 15. In Steaubli *v.* Blaine Bank, 11 Wash. 426, A. loaned money to a manufacturer of shingles, and was given a statement reciting that the latter held, subject to A.'s order, 150,000 shingles then in the manufacturer's dry-house. At the time, the shingles were in fact in process of manufacture. They were afterwards sold to a third party, from whom A. claimed them. Held, that A. could not recover.

We have cited more cases on this point than was perhaps necessary,

partly on account of Mr. Ralston's very clever and interesting monograph, inclining to the opposite view, and favoring what he calls the "new rule," though our examination leads us to believe that the newer cases "prefer the old way."

Some of the foregoing cases suggest a distinction between an action for the price of goods by the vendor and an action of trover or replevin by the vendee, but it may well be doubted whether there be any valid distinction between them, and that in either case the title must have equally passed. A vendor cannot recover the price of goods sold unless they have become the vendee's goods; and if they have, the vendee must be able to protect his title by trover or replevin. Whether the title of unseparated goods from a mass has in fact passed, may be tested by a simple illustration. A. buys of B. 100 barrels out of 1000, and nothing is done to distinguish or separate them. C. steals one barrel from the mass; can he be safely indicted for stealing the goods of A.?

It does not follow, however, in such a sale, that the parties are under no obligations and have no rights as to each other before separation. If the goods are still in the possession of the vendor, he may separate at his election and recover the price. If he declines to do so, the vendee, upon paying or tendering the price, may have an action for damages for such refusal to separate and deliver, in which he could recover the whole loss sustained. The only substantial loss to which the vendee is exposed is, that, if an irresponsible vendor should resell to another party who gets possession, the vendee could not recover the goods of the second vendee, nor entire satisfaction against the vendor; but this is incident to all executory sales of personal property.

From the foregoing review of the cases we seem to be justified in these conclusions: —

First. In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that is done, so as to enable the vendor to recover the price, even for goods "bargained and sold." Approved in New England Co. *v.* Standard Worsted Co. 165 Mass. 328, 329.

Second. Nor to enable the vendee to maintain trespass, trover, or replevin against the vendor, or any one wrongfully taking away the goods from the vendor's possession.

Third. If the vendee has paid the price, and the vendor refuses to separate or set apart the portion sold, the vendee may recover back the amount paid; if not paid, damages for non-fulfilment.

Fourth. In case the whole mass is delivered to the vendee, with a right and power in him to make the separation, the title sufficiently passes to render him liable for the price, or enable him to sue any one for the wrongful conversion of the goods, even before he has separated them.

Fifth. A constructive delivery may be sufficient for this purpose, as where a bailee of the goods agrees to hold them on the order of the vendor, for the benefit of the vendee.

Elevator Cases. There is a large class of cases — called the grain-elevator cases — which are sometimes cited as being in conflict with the foregoing conclusions, but, rightly understood, are not at all so. They all rest on this plain ground, viz.: When several parties store grain in an ele-

vator, to be put into one mass, they become tenants in common of the entire mass, according to a well-established usage to that effect, to which each must be deemed to have assented. The voluntary intermixture by separate owners of their separate property, all of the same kind and quality, does not destroy their individual rights of property, but each one can at will draw out his own amount without any consent of the others; and if they refuse to allow him to do so, they are liable for conversion. See Inglebright *v.* Hammond, 19 Ohio, 337; Henderson *v.* Lauck, 21 Pa. St. 359. If he sells his property still unseparated, the buyer succeeds to all his rights of separation. And the same rule applies, although not quite so obviously, to a sale of a *portion* of each one's share. When one, therefore, sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary for him to take it away in order to complete the sale. If the vendor gives an order to the elevator company for the delivery to the vendee of the quantity sold, and he accepts the order, and agrees to hold the amount for him, the delivery is sufficient, the sale is complete, and the title sufficiently passes to the new tenant in common so that he is liable for the price. See Cushing *v.* Breed, 14 Allen, 380 (1867), in which the doctrine of Scudder *v.* Worster is fully approved, but satisfactorily distinguished; and see Morrison *v.* Woodley, 84 Ill. 192; Dole *v.* Olmstead, 36 Ib. 150; McPherson *v.* Gale, 40 Ib. 368. See, also, *ante*, p. 6, Warren *v.* Milliken, 57 Me. 97; Ferguson *v.* Northern Bank, 14 Bush, 555. In Massachusetts, and perhaps other States, this subject is somewhat regulated by statute. See Mass. Pub. Sts. c. 72, § 7.

CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

	Sect.
Executory agreement converted into bargain and sale by subsequent appropriation	358
When vendor is to appropriate the goods	358
Rule as to determination of election	359
Point of time at which property passes	360
Review of the authorities	361
Remarks on Bryans *v.* Nix	368
Conditional appropriation	369
Observations on *dicta* in Campbell *v.* Mersey Docks	371
Great diversity of opinion in Calcutta Company *v.* De Mattos	374
Vendor's election must conform to contract	376
Cannot elect more than contract requires and leave purchaser to select	376
Seller's right to make a second appropriation within time limited by contract, where first tender has been rejected	376 a
Subsequent appropriation of chattels ordered to be manufactured	377

§ 358. After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in Rohde *v.* Thwaites (*a*), "the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

The only difficulty that can arise on this question is in cases where the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor is, by the express or implied terms of the contract, entitled to make the selection. A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty to *appropriate the goods to the contract.* The difficulty is to determine what constitutes the appropriation, — to find out at what precise point the vendor is no longer at

(*a*) 6 B. & C. 388.

liberty to change his intention. It is plain that the vendor's act, in simply selecting such goods as he *intends* to send, cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him, and no longer revocable.

§ 359. The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind (*b*).

For example, suppose A. sell out of a stack of bricks one thousand to B., who is to send his cart and fetch them away. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind, until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A. should load the bricks into B.'s carts, A.'s election would be determined as soon as that act was done, and not before.

§ 360. It follows from this, says Lord Blackburn, that where from the terms of an executory agreement to sell unspecified goods the vendor is to *dispatch* the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the dispatch or other act has commenced*, for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and, in Lord Coke's language, "the certainty, and thereby the property, begins by election" (*c*). But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet, until the act has actually

(*b*) Heyward's Case, 2 Co. 36; Comyn's Dig. Election; Blackburn on Sale, 128.

(*c*) Heyward's Case, 2 Co. 36.

commenced, the appropriation is not yet final, for it is not made by the authority of the other party, nor binding on him (*d*).

§ 361. A review of the authorities will show the subtle distinctions to which this subject gives rise, and the infinite diversity of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the vendor, although appropriating the goods to the contract by dispatching them, still retains control by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the vendor, although appropriating the goods, has reserved expressly or by implication a special property in them, will be separately examined, after disposing of those which are free from this element of controversy.

§ 362. In 1803, in the case of Dutton *v.* Solomonson (*e*), it was treated as already settled law that, where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and *the property vests immediately.*

And in the United States the law is established to the same effect (*f*).

§ 363. In 1825, Fragano *v.* Long (*g*) was decided in the King's Bench. The plaintiff sent an order from Naples to M. & Sons, at Birmingham, for merchandise "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the vendors in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier by being allowed to fall into the water while loading them, and the action was assumpsit against the carrier. It was contended by the defendant that the property had not passed because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the vendors, and they would therefore have been entitled to the bill of lading. But the court held that the property had passed to the plaintiff from the time *the goods left the vendor's warehouse.* Holroyd, J., said the principle

(*d*) Blackburn on Sale, p. 128. The accuracy of this statement of the law was attested by Erle, J., in Aldridge *v.* Johnson, 7 E. & B. 885, 901; 26 L. J. Q. B. 296.

(*e*) 3 B. & P. 582, per Lord Alvanley, Ch. J.; and see Cork Distilleries Company *v.* Great Southern, &c. Railway Company, L. R. 7 H. L. 269; and Johnson *v.* The Lancashire and Yorkshire Railway Company, 3 C. P. D. 499, where, under somewhat curious circumstances, the same rule was applied.

(*f*) Krulder *v.* Ellison, 47 N. Y. 36; Pacific Iron Works *v.* Long Island Railroad Company, 62 N. Y. 272; Mee *v.* McNider, 39 Hun (N. Y.), 345.

(*g*) 4 B. & C. 219.

was that "when goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off." The words above printed in italics suggest that where the vendor pays the charges it is presumed that he retains the property in the goods. On this point the reader will find a very full exposition of the law in the elaborate opinion of Lord Cottenham, delivering the judgment of the House of Lords in Dunlop *v.* Lambert (*h*).

§ 364. In Rohde *v.* Thwaites (*i*), the appropriation by the vendor was assented to by the purchaser. The purchaser bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the vendor. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated to the contract by the vendor, who gave notice to the purchaser to take them away, which the latter promised to do. Held, that this was an assent to the appropriation, that the contract was thereby converted into a bargain and sale, and that the property passed.

§ 365. In Alexander *v.* Gardner (*k*), decided in 1835, the property in a parcel of butter was held to have passed from the plaintiff to the defendant by subsequent appropriation with mutual assent under the following circumstances. The original contract was for "200 firkins Murphy & Co.'s Sligo butter at 71*s.* 6*d.* per cwt. free on board; payment, bill at two months from the date of lading; to be shipped this month. 11 Oct., 1833." On the 11th of November the plaintiff received from Murphy an invoice and bill of lading for these butters, which had not been shipped till the 6th of November. Defendant waived the delay, and consented to take the invoice and bill of lading, which described the butter, the weights and marks of the casks, etc. The butter was afterwards lost by shipwreck. Held, that the subsequent appropriation was complete by mutual assent; that the property had passed, and the buyer must suffer the loss. The case was decided directly on the authority of Fragano *v.* Long, and Rohde *v.* Thwaites.

§ 366. The same principle governed Sparkes *v.* Marshall (*l*), decided by the same court in the following year. Bamford, a corn merchant, sold to plaintiff "500 to 700 barrels of prepared black oats, at 11*s.* 9*d.* per barrel, to be shipped by Thomas John & Son, of Youghal." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiffs that Messrs. John & Son had engaged "room in the schooner Gibraltar Packet of Dartmouth

(*h*) 6 Cl. & Fin. 600.

(*i*) 6 B. & C. 388.

(*k*) 1 Bing. N. C. 671. See, also, Wilkins *v.* Bromhead, 6 M. & G. 963; S. C. 7 Scott, N. R. 921; [Mitchell *v.* Le Clair, 165 Mass. 308. — B.]

(*l*) 2 Bing. N. C. 761.

to take about 600 barrels of black oats on your account." Plaintiff next day ordered insurance, "400*l.* on oats per the Gibraltar Packet of Dartmouth," etc. In this action against the underwriters it was contended by them that the property had not passed, but the court held the contrary. Tindal, C. J., said that Bamford's letter to the plaintiff "was an unequivocal appropriation of the oats on board the Gibraltar Packet," and "this appropriation is assented to and adopted by the plaintiff, who, on the following day, gives instructions to his agent in London to effect the policy on oats per Gibraltar Packet."

§ 367. In Bryans *v.* Nix (*m*), decided in the Exchequer in 1839, the facts were, that one Tempany, in Longford, drew a bill of exchange on the plaintiff at Liverpool against two cargoes of oats, per boats Nos. 604 and 54, represented by two boat receipts or bills of lading, whereby the masters of the boat acknowledged to have received the oats on board, deliverable in Dublin to the plaintiff's agents, for shipment thence to the plaintiff at Liverpool. The plaintiff received, on the 7th of February, a letter from Tempany, dated the 2d, containing these two boat receipts, dated the 31st of January, and thereupon accepted the bill of exchange which Tempany stated in a letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its cargo, but, although the master's receipt for boat 54 was dated on the 31st of January, the loading of it was only begun on the 1st of February, and on the 6th it had received only about 400 barrels out of the 530 barrels called for by the receipt. On that day, the 6th, Tempany, pressed by the importunity of the defendant, to whom he was largely indebted, gave to the defendant an order for both the boat-loads, addressed to Tempany's agent in Dublin, and the latter accepted the order and agreed to forward the cargoes to the defendant in London. The defendant obtained possession of the oats in Dublin, and the plaintiff demanded them from him, and brought action on his refusal to deliver them. The loading of the boat No. 54 was completed on the 9th of February. On these facts, after elaborate argument and time for advisement, Parke, B., delivered the judgment of the Exchequer of Pleas, holding that the property in the cargo No. 604 had vested in the plaintiff, but not in the cargo No. 54. In relation to the first cargo, the decision was on the ground that "the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier; and the case resembles that of Haille *v.* Smith (*n*), where the bill of lading, being transmitted for a valuable consideration, operated as a change of property instanter when the goods were shipped; and it is also governed by the same principle upon which I know that of Anderson *v.* Clark (*o*) was

(*m*) 4 M. & W. 775. (*n*) 1 B. & P. 563. (*o*) 2 Bing. 20.

decided, where a bill of lading making the goods deliverable to a factor was, upon proof from correspondence of the intention of the principal to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery." In relation to the cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case is submited in full, because it does not seem altogether reconcilable with the subsequent case of Aldridge *v.* Johnson (*p*), so far as regards the 400 barrels that had actually been put on board, destined for the plaintiff, *before* Tempany was persuaded to give an order for them in favor of the defendant. The learned Baron said (p. 792): "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st of January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no specific chattels which were held for them. The undertaking of the boat-master had nothing to operate upon; and though Miles Tempany had prepared a quantity of oats to be put on board, those oats still remained his property: he might have altered their destination and sold them to any one else; the master's receipt no more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should probably have held that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded (*q*), and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant to put on board for him a full cargo for No. 54, by way

(*p*) *Post*, § 368.

(*q*) The reporter's statement, p. 778, is that on the 6th of Febrnary, when defendant's agent first pressed Tempany for security, "boat 54 was still in the canal harbor at Longford, partly loaded, the loading having begun on the 1st of February, and about 400 barrels being then on board."

of satisfaction for the debt due to him, for such is the effect of the delivery order of the 6th, and the agreement with Walker of the same date to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory; on the 9th this appropriation took place by the boat receipt for the 530 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiff's*, but he did not do so."

§ 368. The difficulty felt in receiving this decision as satisfactory arises chiefly from the difference between the facts as stated by the reporter and found by the jury, and the facts as assumed in the opinion of the court. The trial at Nisi Prius was before Williams, J., who told the jury to consider, as regards the cargo of No. 54, "whether, although the loading was not complete, the oats to be put on board were *designated and appropriated to the plaintiff*, as, if they were, he was of opinion that they were entitled to recover that cargo also." The jury found for the plaintiff, finding also, as a fact, "that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete." But in the opinion of Parke, B., the quantity loaded at the time, when Tempany assumed the power of diverting it to a new consignee, is treated as a trifle, "only a small quantity," instead of about three fourths of the whole as stated by the reporter, and no notice is taken of the ruling of Williams, J., or the finding of the jury, although in some earlier passages of the opinion it is expressly stated to be the law that "if the intention of the parties to pass the property, *whether absolute or special*, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or shipmaster, *employed by the consignor* or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected: nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." The court, however, drew the *legal inference*, notwithstanding the verdict of the jury, that the oats which had been prepared for shipment on No. 54, for which the master had given a receipt in advance agreeing to deliver them to the plaintiff's agent, and of which about three fourths had actually been put on board

before the defendant made his appearance in Longford, *were not received on account of the plaintiff*, and *had not been appropriated to the plaintiff in whole or in part.* In the case of Aldridge *v.* Johnson (*q*), as will presently be seen, it was held that where the vendor had filled 155 out of 200 sacks of grain for the vendee, in the vendor's own warehouse, and then emptied them again into the bulk, his election was determined as soon as he had filled each sack, and that the property had passed so far as regarded the 155 sacks. But it is remarkable that in Bryans *v.* Nix there is no suggestion, in the argument or in the decision, that there was any difference in the consignee's rights to the 400 barrels already loaded into the boat and the residue which had not been received by the master in fulfilment of the agreement that he was to deliver them to the plaintiff's agent in Dublin; nor was Bryans *v.* Nix quoted or referred to in Aldridge *v.* Johnson.

§ 369. In Godts *v.* Rose (*r*), in 1854, there was a conditional appropriation, which was held not to pass the property, because the vendee had not complied with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, who was the vendor, sent to his wharfinger an order to transfer eleven specified pipes to the purchaser, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment to the buyer by a clerk, who also took an invoice of the oils, and asked for a check in payment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned to him, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest the vendor countermanded his order on the wharfinger. The latter, however, thinking that the property had passed, delivered the whole to the purchaser, against whom the action was then brought in trover. All the judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the check, and that he said so at the time.

§ 370. Aldridge *v.* Johnson (*s*) was decided by the Queen's Bench in 1857. The plaintiff agreed to take from one Knight one hundred quarters of barley out of the bulk in Knight's granary at 2*l.* 3*s.* a quarter, in exchange for thirty-two bullocks, at 6*l.* apiece, the difference to be paid to Knight in cash. The bullocks were delivered. The

(*q*) 7 E. & B. 885, and 26 L. J. Q. B. 296.
(*r*) 17 C. B. 229, and 25 L. J. C. P. 61.
(*s*) 7 E. & B. 885, and 26 L. J. Q. B. 296.

plaintiff was to send his own sacks, which Knight was to fill, to take to the railway for conveyance to the plaintiff, and to place upon trucks free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks to be filled, some of them with his name marked on them. Knight filled one hundred and fifty-five of the sacks, leaving in the bulk more than enough to fill the other forty-five sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. The plaintiff afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight, finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again, so as to make it undistinguishable. The action was detinue and trover against the assignees of Knight for the barley and the sacks. Held, that the property in the barley, in the one hundred and fifty-five sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. Campbell, C. J., said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in plaintiff. I conceive there was here an *à priori* assent; not only was there a sale of barley, but it was a sale of part of a specific bulk, which the plaintiff had seen, and he sends the sacks to be filled out of that bulk, and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His Lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle, J., said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the *election rested with Knight alone:* he had to fill the sacks, which were to be sent to him for that purpose by the vendee, and *as soon as he had done an outward act, indicating his election*, viz., by filling the sacks and directing them to be sent to the railway, *the property passed.*"

The decision in Aldridge *v.* Johnson was followed by the Exchequer of Pleas, in 1857, in Langton *v.* Higgins (*t*).

§ 371. In 1863, Campbell *v.* The Mersey Docks (*u*) was decided in the Common Pleas. A cargo of cotton, ex Bosphorus, consisting of five hundred bales, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought two hundred and fifty bales, and sold the remainder to other parties. All had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the *13th* of Sep-

(*t*) 4 H. & N. 402, and 28 L. J. Ex. 252, *ante*, § 330.

(*u*) 14 C. B. N. S. 412.

tember, a certificate or warehouse warrant was sent to the plaintiff for two hundred and fifty bales, "numbered from 1 to 250, entered by J. P. Campbell, on the 10th of September, 1862; rent payable from the 15th of September." The plaintiff thereupon paid for the two hundred and fifty bales, getting the warrant indorsed to him with a delivery order, "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff resold the cotton, and sent the warrant, indorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the samples. The plaintiff then demanded back the warrant, and was told by the defendants, for the first time, that two hundred of the bales, numbered from 1 to 250, had been inadvertently delivered on the *11th* and *13th* of September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought suit for the value of the two hundred and fifty bales. On the trial the defendants insisted that the appropriation by the company of the two hundred and fifty bales, out of the larger number, was not sufficient to vest the property in those specific bales in the plaintiff without his assent, and Keating, J., sustained this view. One of the jury then asked his Lordship if the plaintiff's indorsement of the warrant (on the resale) did not amount to such assent, and the learned judge said it was not conclusive, but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and the court refused to order a new trial. Erle, C. J., said: "There certainly was some evidence of appropriation, and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question." Willes, J., also said: "The real question was, whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found that it was. No property in the goods, therefore, ever vested in the plaintiff." But both the learned judges expressed an extra-judicial opinion upon the point, confessedly "not material," to which attention must be directed. Erle, J., said: "It has been established by a long series of cases, of which it will be enough to refer to Hanson *v.* Meyer (*x*), Rugg *v.* Minett (*y*), and Rohde *v.* Thwaites (*z*), that the purchaser of an *unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there has been an assent, expressed or implied, on the part of the vendee.*" Willes, J., assented to this state-

(*x*) 6 East, 614. (*y*) 11 East, 210. (*z*) 6 B. & C. 388.

ment of the law, and said: "Perhaps the case of Godts *v.* Rose (*a*) is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance."

Care must be taken not to misconstrue the true sense of these *dicta*. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the vendor is necessary. Willes, J., states this plainly, and Erle, J., says that there must be an assent of the vendee express or implied. This assent is implied, as shown by the language of Erle, J., himself, in Aldridge *v.* Johnson, and in several of the cases already quoted, where by the terms of the contract the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made. That this is the real signification of these *dicta* is also fully shown in the strongly contested case of Browne *v.* Hare (*b*), in which the unanimous decision of the Exchequer Chamber was likewise delivered by Erle, J.

§ 372. In this case the defendant, at Bristol, bought from the plaintiffs, merchants of Rotterdam, through their broker, residing at Bristol, "20 tons of best oil, at 47*s*." The plaintiffs wrote to the broker on the 19th of April that they had secured ten tons for the defendant, deliverable in September, and the defendant wrote back, "Send them by next steamer." The oil was to be shipped "free on board." On the 7th of September the plaintiffs from Rotterdam wrote to the broker to inform the defendant, which he did, that they had shipped "five tons of rape oil for defendant," and on the 8th they forwarded the invoices and bill of lading. The bill of lading was for delivery to the plaintiffs' "order or assigns," and was indorsed by them on the 8th of September, "Deliver the goods to the order of Hare & Co." (the defendants). The invoices specified the casks by marks and numbers; and the bill of lading also identified them in the same way. The letter to the broker containing the invoices and bill of lading thus indorsed reached him on the 10th, after business hours, and on the 11th he sent them to the defendant. The ship was actually lost before the documents were received by the broker, and he knew it, but the defendant did not hear of the loss till about two hours after receiving the bill of lading, and he then immediately returned it to the broker. Bramwell, B., dissented from the majority of the

(*a*) 17 C. B. 229.
(*b*) 3 H. & N. 484, and 27 L. J. Ex. 372; afterwards in Ex. Ch. 4 H. & N. 822, and 29 L. J. Ex. 6.

court, thinking that there had been no appropriation to pass the property, but Pollock, C. B., delivered the judgment, holding that the property had passed, and that the buyer must bear the loss; on the ground, *first*, that the contract to deliver "free on board" meant that it was to be for account of the defendant as soon as delivered on board (*c*); *secondly*, that taking the bill of lading to the shippers' own order, and then indorsing it to the defendant, was precisely the same in effect as taking the bill of lading to the order of the defendant; *thirdly*, that the bill of lading having been forwarded to the broker only that he might get the defendant's acceptance on handing it over as provided in the contract, this did not prevent the property from passing, the goods represented by the bill of lading being in the same legal state as if in a warehouse, subject to the purchaser's order, but not to be taken by him without payment of the price.

In error to Exchequer Chamber, this judgment was unanimously affirmed, the court consisting of Erle, Williams, Crompton, Crowder, and Willes, JJ. Erle, J., in giving the opinion, said that "the contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to, and under that we think *the property passed when the goods were placed free on board in performance of the contract.* In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, *or on the act of the vendor alone.* If the bill of lading had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances" (*d*).

§ 373. In Tregelles *v.* Sewell (*e*), in 1863, both buyer and seller

(*c*) See, also, per Brett, M. R., in Stock *v.* Inglis, 12 Q. B. D. at p. 573.

(*d*) And see Ogg *v.* Shuter, as reported in the Court of Common Pleas, L. R. 10 C. P. 159. The decision was reversed on appeal, 1 C. P. D. 47, C. A., and is fully considered *post*, § 398 a.

(*e*) 7 H. & N. 574.

were residents of London, and the contract was made there. The purchaser bought "300 tons Old Bridge rails, at 5*l.* 14*s.* 6*d.* per ton, delivered at Harburg, cost, freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." Held, by all the judges in the Exchequer, and afterwards in the Exchequer Chamber, that by the true construction of this sale the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser.

§ 374. The difficulty that sometimes exists, in construing contracts involving the subject now under consideration, could hardly be illustrated by a more striking example than the case of The Calcutta Company *v.* De Mattos (*f*), argued by very eminent counsel in the Queen's Bench in Michaelmas Term, 1862, and held under advisement till the 4th of July, 1863, when the judges were equally divided in opinion; Cockburn, C. J., and Wightman, J., differing from Blackburn and Mellor, JJ. When the cause was heard in error in the Exchequer Chamber (*g*), the diversity of opinion was still more marked; for while three judges (Erle, C. J., Willes, J., and Channell, B.) concurred in opinion with Blackburn and Mellor, JJ., and one judge (Williams, J.) agreed with Cockburn, C. J., and Wightman, J., two other judges (Martin and Pigott, BB.) differed from both.

The facts were these. On the 1st of May, 1860, defendant wrote to the company, proposing to supply them with "1000 tons of any of the first-class steam-coals on the Admiralty list, at my option, delivered over the ship's side at Rangoon at 45*s.* per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer. Payment of one half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, and balance by like payment on delivery," etc., etc.

The reply of the 4th of May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option, . . . half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month, . . . payment one half of each invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash under discount at the rate of 5*l.* per centum per annum, at your option, and the balance

(*f*) 32 L. J. Q. B. 322. (*g*) 33 L. J. Q. B. 214, in Ex. Ch.

in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and defendant in performance of it chartered the ship Waban for Rangoon, the company being no party to the charter, and loaded her with 1166 tons of coal, taking a bill of lading which expressed that the coal was shipped by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid by the charterer as per charter party. The charter party stipulated that the freight was "to be paid in London on unloading and right delivery of the cargo at 40*s.* per ton on the quantity delivered, . . . one quarter by freighter's acceptance at three months, and one quarter by like acceptance at six months from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination; and the remainder by a bill at three months from the date of the delivery at the freighter's office in London of the certificate of the right delivery of the cargo."

The defendant also effected insurance for 1400*l.*, and handed the bill of lading and policy to the company, in pursuance of the contract, together with this letter: "5th of July, 1860. Herewith I hand you Ocean Marine policy for 1400*l.* for this ship, as collateral security against the amount payable by you on account of the invoice order, say 1311*l.* 15*s.*, receipt of which please own." The answer acknowledged the receipt of the policy "to be held as collateral security for the payment to you of 1311*l.* 15*s.* on account of the invoice of that shipment."

The invoice value of the coals was 2623*l.* 10*s.*, of which the company paid half to defendant on the 5th of July, and the vessel sailed on the 8th, but never arrived at her destination, nor were the coals delivered in conformity with the contract.

On these facts it became necessary to decide what was the effect of the contract on the property in the goods, and the right to the price from the time of the handing over the shipping documents and paying half the invoice value.

The opinion of Blackburn, J., was the basis of the final judgment, and was approved by the majority of the judges. It is so instructive on the whole subject as to justify copious extracts. The learned judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the

common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier; and if the goods perish in the carrier's hands, the vendor is discharged, and the purchaser is bound to pay him the price. See Dunlop *v.* Lambert (*h*). If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See Dunlop *v.* Lambert. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." Referring to the terms of the contract under consideration, the learned judge proceeded to remark: "It is clear that the coals are to be shipped in this country, on board a vessel to be engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as De Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. After this he could never have been required nor would he have had the right to ship another cargo for the company; so that from that time, what had originally been an agreement to supply *any* coals answering the description became an agreement relating to those coals only, just as much as if the coals had been specified from the first. . . . In construing this contract, the *prima facie* construction is that the parties intended that the *property in the coals vested in the company*, and the right to the price in De Mattos, *as*

(*h*) 6 Cl. & Fin. 600.

soon as it came to relate to specific ascertained goods, that is, on the handing over of the documents, and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one half of the price, the intention that it should only be paid 'on completion of the delivery at Rangoon' seems to me as clearly declared as words could possibly declare it, and consequently I think as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos, so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that the *goods were sold and delivered*, though the payment of half the price was contingent on the delivery at Rangoon, and this I think is the true legal construction of the contract."

Wightman, J., was of opinion that on the true construction of the contract the *whole cargo remained the property of the vendor, and at his risk;* that he was bound to deliver the whole at Rangoon; and that the transfer of the policy and bill of lading to the company was a security to protect the company in recovering back their advance of one half the price in the event of De Mattos's failure to make delivery at Rangoon.

Cockburn, C. J., thought that the *property in the coals passed to the company*, subject to the vendor's lien for the payment of the price; that the coals, when shipped, were *specifically appropriated* to the company; and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure; but that De Mattos remained bound to make delivery in Rangoon, and by breach of that contract was bound to return the half of the price already paid, and to lose his claim for the remainder.

In the Exchequer Chamber, Erle, C. J., expressed his concurrence with the opinion of Blackburn, J., as to the true meaning and effect of the contract, and Willes, J., and Channell, B., did the same. Williams, J., merely expressed his assent to the views of Cockburn, C. J.

Martin, B., gave his view of the true intention of the parties, without declaring whether and when, if at all, the property passed, but remarked: "I cannot say that I agree with my brother Blackburn's judgment;" and Pigott, B., expressed his concurrence with the interpretation of the contract by Martin, B.

§ 375. In Jenner *v.* Smith (*i*), where the sale was made by sample,

(*i*) L. R. 4 C. P. 270.

and was of two pockets of hops out of three that were lying at a specified warehouse, the vendor instructed the warehouseman to set apart two out of the three pockets for the purchaser, and the warehouseman thereupon placed on two of them a "wait-order card," that is, a card on which was written, "To wait orders," and the name of the vendee: but no alteration was made in the warehouseman's books, and the vendor remained liable for the storage. The vendor then sent an invoice with the numbers and weights to the buyer of these two pockets, with a note at the foot, "The two pockets are lying to your order." Held, that the property had not passed, because the buyer had not made the vendor his agent for appropriating the goods to the contract, nor abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

In Ex parte Pearson (*k*), the purchaser had ordered and paid for the goods, and the company loaded the goods on a railway to his address, and sent him the invoice *after* the presentation of a petition for winding up the company, but *before* order made; and it was held that the property had passed to the purchaser, and could not be taken by the official liquidator as assets of the company.

§ 375 a. [In Stock *v.* Inglis (*l*), the plaintiff sought to recover, under a marine policy on goods, the value of bags of sugar lost at sea. The defendant resisted upon the ground (among others) that the property in the sugar had not passed to the plaintiff. There were two separate contracts made with different purchasers for the sale of sugar f. o. b. Hamburg, and the vendor had shipped bags of sugar in the aggregate to answer both contracts, but had not specifically appropriated the sugar as between the two contracts prior to the loss. The question was much discussed whether the property had passed by virtue of the shipment, but the decision of the Court of Appeal and the opinion of Lord Blackburn in the House of Lords were in favor of the plaintiff upon the distinct ground of insurable interest. The language, however, used by Lord Selborne (*m*), seems to indicate that he was of opinion that the title of the vendors had been divested by the appropriation of the goods to the aggregate of the two contracts, and that the property had passed to the respective purchasers in an undivided portion of the goods; *sed quære.*]

§ 376. Before leaving this branch of the subject, it is well to notice that the property does not pass even when the vendor has the power to elect, unless he exercise it in conformity with the contract. He

(*k*) 3 Ch. 443.
(*l*) 10 App. Cas. 263; 12 Q. B. D. 564, C. A.; 9 Q. B. D. 708.
(*m*) 10 App. Cas. at pp. 267, 268.

cannot send a larger quantity of goods than those ordered, and throw the selection on the purchaser. Thus in Cunliffe *v.* Harrison (*n*), it was held that where an order was given for ten hogsheads of claret, and the vendor sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract, and thus no property had passed. And in Levy *v.* Green (*o*), the goods sent in excess of those ordered were articles entirely different, but packed in the same crate; the order being for certain earthenware teapots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. In the court below (*p*), there was an equal division of the judges, Lord Campbell and Wightman, J., holding that the defendant had a right to reject the whole on account of the articles sent in excess, and Coleridge and Erle, JJ., being of a different opinion; but in the Exchequer Chamber, Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding with Lord Campbell, and Wightman, J., that the property had not passed, and that the purchaser had the right to reject the whole.

§ 376 a. [In Gath *v.* Lees (*q*), the defendants agreed to buy from the plaintiff cotton "to be delivered *at seller's option* in August or September, 1864, payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendants that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated from that day. And it was held that the plaintiff, having exercised his option, was bound to deliver the cotton in August; and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton; Martin, B., saying during the course of the argument: "The seller could not give two notices. When the notice was given, *the buyer was bound to be ready with the money, which he might have had difficulty in getting;* then is the seller to say, 'I will not deliver the cotton according to my notice, but will put you off until next month'?"

But an appropriation and tender of goods not in accordance with the contract, and in consequence rejected by the purchaser, does not prevent the vendor from afterwards, within the time limited for so doing, appropriating and tendering other goods which are in accordance with the contract.

This was decided in Borrowman *v.* Free (*r*), where the plaintiffs,

(*n*) 6 Ex. 903. See, also, Hart *v.* Mills, 15 M. & W. 85; and Dixon *v.* Fletcher, 3 M. & W. 146.

(*o*) 1 E. & E. 969, and 28 L. J. Q. B. 319; Tarling *v.* O'Riordan, 2 L. R. Ir. 82, C. A.

(*p*) 27 L. J. Q. B. 111.

(*q*) 3 H. & C. 558.

(*r*) 4 Q. B. D. 500, C. A.

being bound by contract to tender a cargo of maize to the defendants, tendered a cargo which was rejected by the defendants, as not being in accordance with the contract, and afterwards and within the time limited for so doing the plaintiffs tendered a cargo which was in accordance with the contract, and it was held that this second tender was good, and that the defendants were bound to accept it. Gath *v.* Lees was distinguished upon the grounds that there the seller's option was exercised in a proper manner, and that the purchasers, acting upon the vendor's notice, had altered their position for the worse. It remains open for decision whether the buyer can, by assenting to an appropriation made by the seller which is not in conformity with the contract, render that appropriation irrevocable. Brett, L. J., observes (*s*): "A different rule might have been applied *if the defendants had accepted the cargo of the Charles Platt* (the cargo which had been first tendered). It is possible that the tender of the plaintiffs could not in that case have been withdrawn. I wish it, however, to be understood that this is a point upon which I express no opinion."]

§ 377. The decisions as to subsequent appropriation, in cases where the agreement was for the delivery of a chattel to be manufactured, begin with Mucklow *v.* Mangles (*t*), in 1803. Pocock ordered a barge from one Royland, a barge-builder, and advanced him some money on account, and paid more as the work proceeded, to the whole value of the barge. When nearly finished, Pocock's name was painted on the stern, but by whom and under what circumstances is not stated in the report. The barge was finished and seized on execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. Held, that the property had not passed, Heath, J., saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of the goods so sold."

§ 378. In Bishop *v.* Crawshay (*u*), it was held by the Queen's Bench, in 1824, that no property passed to the defendant in goods which he had ordered from a manufacturer in the country, and on account of which he had accepted a bill of exchange for 400*l.* The manufacturer had received the bill on the 26th of January, had committed an act of bankruptcy not known to the defendant on the 5th of

(*s*) At page 505. (*t*) 1 Taunt. 318. (*u*) 3 B. & C. 415.

February, and on the 6th drew the above-mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and on the 15th a commission issued against the bankrupt, by whose assignees the action of trover was brought. Holroyd, J., said: "The goods were made, but until the money paid was appropriated to these particular goods the defendant could not have maintained trover for them if they had been even sold to another person."

§ 379. In Atkinson *v.* Bell (*x*), already fully explained (*ante*, § 99), the purchaser had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the vendor had written to ask the purchaser by what conveyance they were to be sent, but had received no answer, when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods *bargained and sold*, this form of action not being maintainable where the property has not passed. Held, that the form of action was misconceived; it should have been for not accepting the goods; the property had not passed, for, although the vendor *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another at any time before the buyer assented to the appropriation. This is perhaps the strongest case in the books on this subject, for the conduct of the vendor was as near an approximation to a determination of election, without actually becoming so, as one can well conceive. It is distinguishable from Fragano *v.* Long (*y*) only on the ground that in this latter case the order was to *dispatch* the goods for the buyer's account, and when the goods were dispatched it was really the act of the buyer through his agent the seller, and this act of the buyer constituted an implied assent to the appropriation made by the seller, which then became no longer revocable. In Atkinson *v.* Bell this element was deficient. But there was another circumstance in that case, adverted to in the judgment of the court, which renders it almost impossible to distinguish it from Rohde *v.* Thwaites (*z*). The defendant had made Kay his agent to *procure the machines;* and the report states that they were altered so as to suit Kay, and then packed up by *Kay's directions*, which is equivalent to their being packed up by the buyer's own directions; and surely, if the buyer, after goods have been completed on his order, is informed by the seller that they are ready for him, and then examines and directs them to be packed up for him, this constitutes as strong an assent to the appropriation as was given by the purchaser in Rohde *v.* Thwaites, when he said, without seeing the sugar that had been

(*x*) 8 B. & C. 277. (*y*) 4 B. & C. 219. (*z*) 6 B. & C. 388.

packed up for him, that he would send for it. Many attempts have been made to reconcile Atkinson *v.* Bell with the principles recognized in the other cases on the subject, but it is very difficult to avoid the conclusion that a conflict really exists, and that, if correctly reported, the case would not, *on this particular point*, be now decided as it was in 1828.

§ 380. In Elliott *v.* Pybus (*a*), in 1834, a machine was ordered by defendant, and he deposited with plaintiff 4*l.* on account of the price. When completed he saw it, paid 2*l.* more on account, but made no final settlement. In reply to a demand for 10*l.* 19*s.* 8*d.*, the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. This was held an assent to the appropriation, and a count for goods bargained and sold was maintained.

The cases in relation to the appropriation of an unfinished chattel, paid for by instalments during the progress of the work, have already been examined in Chapter III. of this book (*b*).

AMERICAN NOTE.

§§ 358–380.

SUBSEQUENT APPROPRIATION. The American law fully agrees with the English that a delivery to a carrier, as directed by the purchaser, or as warranted by custom and usage, is such an appropriation as to bind the vendor, and make the goods the property of the vendee from the moment of such delivery, and the risk thenceforth is on him. This is so obvious as hardly to need any reference to the authorities, but see The Mary and Susan, 1 Wheat. 25; Stanton *v.* Eager, 16 Pick. 467; Magruder *v.* Gage, 33 Md. 344; Bailey *v.* Hudson River R. R. Co. 49 N. Y. 70; Gutwillig *v.* Zuberbier, 41 Hun (N. Y.) (1886); Stafford *v.* Walter, 67 Ill. 83; Whiting *v.* Farrand, 1 Conn. 60; Ranney *v.* Higby, 4 Wisc. 154; 5 Ib. 62; Blum *v.* The Caddo, 1 Woods, 64; Wing *v.* Clark, 24 Me. 366; Schmertz *v.* Dwyer, 53 Pa. St. 335; Putnam *v.* Tillotson, 13 Met. 517; Griffith *v.* Ingledew, 6 S. & R. 429; Waldron *v.* Romaine, 22 N. Y. 368; Grove *v.* Brien, 8 How. 438; Hunter *v.* Wright, 12 Allen, 548; Kelsea *v.* Ramsey Mfg. Co. 55 N. J. L. 320; Lawrence *v.* Minturn, 17 How. 107; Claflin *v.* Boston & Lowell R. R. Co. 7 Allen, 341; Odell *v.* Boston & Maine R. R. 109 Mass. 50; Johnson *v.* Stoddard, 100 Ib. 306; Torrey *v.* Corliss, 33 Me. 333, 336; Armentrout *v.* St. Louis R. R. Co. 1 Mo. App. 158; Ober *v.* Smith, 78 N. C. 313; Philadelphia, etc. R. R. Co. *v.* Wireman, 88 Pa. St. 264; Summeril *v.* Elder, 1 Binney, 106; Swanke *v.* McCarty, 81 Wisc. 109; Whitman Agricultural Co. *v.* Strand, 8 Wash. 647; Embree Carriage Co. *v.* Lusk, 11 Texas App. 493; Taylor *v.* Victoria Store Co. 26 Nova Scotia, 223, following Fragano *v.* Long;

(*a*) 10 Bing. 512.

(*b*) [§§ 335 *et seq.*]

Falvey *v.* Richmond, 87 Geo. 99, citing the Georgia cases; Mann *v.* Glauber, 96 Ib. 795; Brooks *v.* Paper Co. 94 Tenn. 701. In Dyer *v.* Great Northern Ry. Co. 51 Minn. 345, the plaintiff sold a piano to B., reserving title to himself until payment. B. was named as consignee in the bill of lading which was sent to him. The property was destroyed while still in the possession of the defendant, a common carrier. The latter, believing B. to be the owner, paid him in full. It was held that there is a presumption that title passes to a consignee upon delivery to a carrier, and that in the absence of actual notice the carrier has a right to rely upon the presumption, and was not liable. The rule holds true even though the buyer afterwards becomes insolvent. Leggett Tobacco Co. *v.* Collier, 89 Iowa, 144. Wise *v.* M'Mahon, Longf. & T. (Irish), 192 (1841) is a very interesting case on the point of subsequent appropriation. M. sold to Wise a lot of barley to be shipped from Tralee to Cork, "free on board the Darling, payment cash on receipt of bill of lading and invoice." The barley was put on board the Darling November 9, 1839, and a bill of lading taken to the shipper's order, but not forwarded to Wise. On the 12th of November, the Darling and her cargo was lost; and on the 16th M. exhibited the bill of lading to Wise, who, ignorant of the loss, paid him 800*l.* on the barley, and the bill was indorsed to him. Subsequently ascertaining the loss of the barley, Wise sought to recover back his 800*l.* of the seller, but it was held he could not do so, as the title and risk was on him from the delivery on board the vessel. As to what constitutes a sufficient delivery to the carrier, see Hobart *v.* Littlefield, 13 R. I. 341; Packard *v.* Getman, 6 Cow. 757; Schmertz *v.* Dwyer, 53 Pa. St. 335; Glass *v.* Goldsmith, 22 Wisc. 488. It is for this reason that if goods be ordered in one State, where a sale thereof is illegal, of a vendor who resides in another State, where the sale is legal, and be there delivered to a carrier, directed to the buyer, the sale is complete upon the delivery to a carrier, and is valid; or *vice versa*. Orcutt *v.* Nelson, 1 Gray, 537; Sortwell *v.* Hughes, 1 Curtis, 244; Woolsey *v.* Bailey, 27 N. H. 217; Smith *v.* Smith, Ib. 244; Garland *v.* Lane, 46 Ib. 245; Frank *v.* Hoey, 128 Mass. 263; Arnold *v.* Prout, 51 N. H. 587; Sarbecker *v.* State, 65 Wisc. 171, and cases cited; State *v.* Wingfield, 115 Mo. 428; Commonwealth *v.* Hess, 148 Pa. St. 98. In Kuppenheimer *v.* Wertheimer, 107 Mich. 77, clothing was delivered to a carrier in Chicago to be delivered by him in Detroit. Held, that the title passed in Chicago, although the buyer had the right, under the contract, to inspect the goods in Detroit. The direction to the consignee must be reasonably correct and sufficient, in order to impose the risk on him; Woodruff *v.* Noyes, 15 Conn. 335; which seems to be a question of fact in each case. Finn *v.* Clark, 10 Allen, 479; 12 Ib. 522; Garretson *v.* Selby, 37 Iowa, 529. In some cases it is a question of intention, to be submitted to a jury, whether or not the title passed upon delivery to the carrier, or not until actual receipt by the consignee. See Merchants' National Bank *v.* Bangs, 102 Mass. 291; Wigton *v.* Bowley, 130 Ib. 252; Prince *v.* Boston & Lowell R. Co. 101 Ib. 547; Straus *v.* Wessel, 30 Ohio St. 211. Payment of freight by the seller is *one* circumstance tending to show that the sale is not finally complete until the transit is ended. See Suit *v.* Woodhall, 113 Mass. 391; Gipps Brewing Co *v.* DeFrance, 91 Iowa, 108. Of course a delivery to a carrier of a larger amount of goods than ordered, or at a much later time than ordered, would not be an appropriation of any part so as to bind the purchaser to accept them. See Rommel *v.* Win-

gate, 103 Mass. 327; Reynolds *v.* Spencer, 92 Hun, 275; Barton *v.* Kane, 17 Wisc. 38; Larkin *v.* Mitchell Lumber Co. 42 Mich. 296. And therefore he would not be liable for the price unless accepted. Downer *v.* Thompson, 6 Hill, 208; Downs *v.* Marsh, 29 Conn. 409; Defenbaugh *v.* Weaver, 87 Ill. 132. So where the vendor sends only part of the things ordered, which never come to the hands of the consignee, there is no sale. Bruce *v.* Pearson, 3 Johns. 534; Rochester Oil Co. *v.* Hughey, 56 Pa. St. 322. Especially if such part be sent by a different and more expensive route than that designated by the order. Corning *v.* Colt, 5 Wend. 254. So if ordered goods are sent by a carrier without any direction, express or implied, or any custom or usage how to send them, a delivery to a carrier does not complete the sale if they never come to the possession of the buyer. Loyd *v.* Wight, 20 Geo. 574; Hague *v.* Porter, 3 Hill, 141; Hanauer *v.* Bartels, 2 Colo. 514. And it hardly need be said that sending by a carrier goods not ordered has no tendency to pass any title in them to the consignee, or divest the title of the consignor. See The Francis, 2 Gall. 391; The St. Joze Indiano, 1 Wheat. 208; The Julia, 8 Cranch, 183. So where the goods sent are materially different from those ordered. Gardner *v.* Lane, 9 Allen, 492; 12 Ib. 39; 98 Mass. 517.

Whether a consignment to a factor for sale, or to a mere creditor of the consignor, passes the title until the goods come to the actual possession of the creditor before others intervene, see Elliott *v.* Bradley, 23 Vt. 217; Hodges *v.* Kimball, 49 Iowa, 577, carefully examining the subject; Bonner *v.* Marsh, 10 Sm. & M. 376; Saunders *v.* Bartlett, 12 Heisk. 316; Oliver *v.* Moore, Ib. 482. And Davis *v.* Bradley, 28 Vt. 118, is not in conflict with these cases.

As to articles expressly manufactured for a party, it seems clear that, upon completion according to the contract, and a delivery, or tender of delivery, to the buyer, the appropriation is complete and the title fully passes. Bement *v.* Smith, 15 Wend. 493, a leading case; Higgins *v.* Murray, 4 Hun, 565; Ballentine *v.* Robinson, 46 Pa. St. 177; Shawhan *v.* Van Nest, 25 Ohio St. 490, a well considered case; Mt. Hope Iron Co. *v.* Buffinton, 103 Mass. 62; Goddard *v.* Binney, 115 Ib. 456; Spicers *v.* Harvey, 9 R. I. 582; Johnson *v.* Hibbard, 29 Oreg. 184; McIntyre *v.* Kline, 30 Miss. 361; Gordon *v.* Norris, 49 N. H. 376, containing a full citation of the authorities; Fox *v.* Utter, 6 Wash. 299. And see Collins *v.* Louisiana Lottery Co. 43 La. Ann. 9, where lottery tickets were selected, but for lack of time were not mailed, and were therefore cancelled. It was held that they did not become the property of the person who ordered them, for there had been no appropriation. But the property in goods bought by sample but not then on hand does not pass to the buyer merely upon the seller's subsequent obtaining of the goods, and selecting from them the quantity bought, and marking them with the buyer's name, unless the latter authorized such selection. Andrews *v.* Cheney, 62 N. H. 404, and cases cited.

On the other hand, some seem to hold that some act of acceptance or of acquiescence on the part of the buyer in the appropriation, or at least some setting apart of the article with the consent of the buyer, is necessary to fully pass the title. See Moody *v.* Brown, 34 Me. 107, following Elliott *v.* Pybus, 10 Bing. 512; Rider *v.* Kelley, 32 Vt. 268; Gowans *v.* Consolidated Bank of Canada, 43 Up. Can. Q. B. 318; Stock *v.* Inglis, 9 Q. B. Div. 708.

The case of Bryans *v.* Nix, 4 M. & W. 775, stated by the author, has been repeatedly affirmed and followed in this country. See De Wolf *v.* Gardner, 12 Cush. 26; Hatch *v.* Lincoln, Ib. 34; Grove *v.* Brien, 8 How. 429; Gibson *v.* Stevens, Ib. 384; Prince *v.* Boston & Lowell R. Co. 101 Mass. 547; First National Bank *v.* Dearborn, 115 Ib. 219; Elliott *v.* Bradley, 23 Vt. 217.

CHAPTER VI.

RESERVATION OF THE JUS DISPONENDI.

	Sect.		Sect.
Preliminary observations on the subject	381	Observations on Joyce *v.* Swann . .	395
Review of authorities	382	Principles deduced from the authorities reviewed	399
Remarks on Coxe *v.* Harden . . .	384		

§ 381. It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser are general rules of *construction* adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules from their very nature cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership notwithstanding such appropriation.

§ 382. The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A., in New York, orders goods from B. in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A. on due payment of the bill of exchange. Now, in both these modes of doing the business, it is impossible to infer that B. had the least idea of passing the property to A. at the time of appropriating the goods to the contract. So that, although he may write to A., and specify the packages and marks by which the goods may be identified, and although he may accompany this with an

invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B., or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to A. These are the most simple forms in which the question is generally presented, but we shall see that in this class of cases, as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*.

§ 383. In Walley *v.* Montgomery (*a*), the plaintiff had ordered a cargo of timber from Schumann & Co., and they informed him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading and invoice, advising that they had drawn on him at three months "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley, at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight," etc. Schumann & Co. sent at the same time another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant for the cargo, offering to accept the bills of exchange, but the latter insisted on immediate payment; and, on the plaintiff's refusal, sold the cargo, under direction of Schumann & Co. Trover was brought, and Lord Ellenborough at first nonsuited the plaintiff, who did not prove a tender of the freight, but afterwards joined the other judges in setting aside the nonsuit, on the ground that the property passed by the invoice and bill of lading, and that the vendor had lost all rights over the goods, save that of stoppage *in transitu* (as to which see *post*, Book V. Ch. 5).

§ 384. In Coxe *v.* Harden (*b*), the property was held to have passed under somewhat singular circumstances. Oddy & Co., of London, ordered a purchase of flax from Browne & Co., of Rotterdam, who executed the order, and sent an invoice to Oddy & Co., and a bill of lading, *unindorsed*, by which the goods were made deliverable to Browne & Co., and a letter stating: "We have drawn on you at two usances in favor of Lucas, Fisher & Co., etc. We close this account in course." Browne & Co. then sent another bill of lading of the same set to the plaintiff, *indorsed, for the purpose of securing the amount of their bill upon Oddy & Co.* Oddy & Co. transferred their unindorsed bill to the defendant, in payment of an antecedent debt, and the defendant got delivery of the flax on that bill, and sold it, notwithstanding plaintiff's warning and demand for the goods

(*a*) 3 East, 585.

(*b*) 4 East, 211.

under his indorsed bill. The action was trover, and the court held that, even assuming the plaintiff to have all the rights of the vendor, he could not succeed, because the property in the goods had passed by the shipment for the buyer's account, and no right remained in the vendor save that of stoppage *in transitu*. No notice was taken of the vendor's purpose to retain a *jus disponendi*, Lord Ellenborough saying that *the only thing* which stood between Oddy & Co., and their right to possession, was "the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns." It is to be remarked of this case, that the date at which the bill of lading was indorsed by Browne & Co., to the plaintiff, was not shown; that it was perhaps not so indorsed till after the goods had got into possession of the defendant, and stress was laid on this by one of the judges. At the same time no one of them adverted to the fact, as having any influence on the decision, although printed in italics in the report, that the indorsed bill of lading was sent to the plaintiff by Browne & Co. expressly "for the purpose of securing the amount of their bill upon Oddy & Co." See Moakes *v.* Nicolson (*c*), and Brandt *v.* Bowlby (*d*), *infra*.

§ 385. In Ogle *v.* Atkinson (*e*), it was again held that the property had passed, notwithstanding the vendor's attempted reservation of a *jus disponendi*, but the attempt was fraudulent. The plaintiff ordered goods from Smidt & Co. at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of plaintiff, and as being plaintiff's own goods, according to the statement of Smidt & Co. themselves. They afterwards obtained from the captain, by fraudulent misrepresentation, bills of lading in blank for the goods so shipped, and sent them to their agent, with orders to transfer them to a third person, unless plaintiff would accept certain bills of exchange which Smidt & Co. drew in favor of that third person. Held, that the property had passed by the delivery to the plaintiff's agent, and was not divested nor affected by the subsequent acts of Smidt & Co.

§ 386. In Craven *v.* Ryder (*f*), the vendor maintained his right. The plaintiffs agreed to sell to French & Co. twenty-four hogsheads of sugar, free on board a British ship, two months being the usual credit. They sent it by a lighter, taking a receipt from the ship "for

(*c*) 34 L. J. C. P. 273; 19 C. B. N. S. 290; *post*, § 396.
(*d*) 2 B. & Ad. 932; *post*, § 387.
(*e*) 5 Taunt. 759.
(*f*) 6 Taunt. 433.

and on account of the plaintiffs," which was proven to be *for the purpose of giving the shipper command of the goods* till exchanged for the bill of lading. French & Co. sold the goods, and the defendant gave a bill of lading for them to the vendee of French & Co. without the plaintiff's privity. French & Co. stopped payment without paying the price of the sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill of lading already signed for it in favor of the buyer from French & Co. had been assigned to another vendee, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs for the sugar was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The court held that, without regard to the form of the receipt, the plaintiffs had the right "to refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and had exercised that right. This seems to be but another mode of describing what, in more recent cases, is termed a reservation of the *jus disponendi*.

Ruck *v.* Hatfield (*g*), on similar facts, was decided in conformity with Craven *v.* Ryder (*h*).

§ 387. In Brandt *v.* Bowlby (*i*), the vendor was again successful. The facts were that one Berkeley, of Newcastle, ordered wheat from the plaintiffs, Brandt & Co., of St. Petersburg, through their agent, E. H. Brandt, of London. A dispute arose between Berkeley and E. H. Brandt, and the former countermanded all his orders. In the mean time, however, the plaintiffs had bought a cargo for him, and they put it on board the defendants' ship Helena, which Berkeley had chartered and sent for the wheat. They wrote, requesting Berkeley's approval, and inclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the Helena. . . . An *indorsed* bill of lading we have this day forwarded to Messrs. Harris & Co., of London, at the same time drawing upon them for 673*l.* 15*s.*, and for the balance remaining in our favor, viz., 136*l.* 9*s.* 5*d.*, we value on you, etc., etc." An *unindorsed* bill of lading was inclosed to Berkeley, together with an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London to the address of R. Harris & Sons there, per the Helena." The indorsed bill of lading was forwarded by the plaintiffs to E. H. Brandt, their agent. Berkeley refused to accept, and ordered Harris & Co.

(*g*) 5 B. & Ald. 632.

(*h*) The mate's receipts for goods are valueless after the bills of lading have been signed, and the captain is justified in signing bills of lading without requiring the production of the mate's receipts, if he is satisfied that the goods are on board. See Hathesing *v.* Laing, 17 Eq. 92, at pp. 102, 103; and Maude and Pollock on Shipping, pp. 136, 338, ed. 1881.

(*i*) 2 B. & Ad. 932.

not to accept. Thereupon E. H. Brandt gave Harris & Co. the *indorsed* bill of lading, and desired them to accept for *his* account, which they did. Berkeley then confirmed his revocation, and was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris & Co., as required by the bill of lading, and, when sued in assumpsit, sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The court held the contrary, Parke, B., saying: "That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they *intended that the property should not vest in Berkeley unless the bills were accepted.*"

§ 388. In Wilmshurst *v.* Bowker (*k*), the plaintiffs bought wheat from defendant on a contract by which they promised to pay for it in a banker's draft, *on receipt of invoice and bill of lading.* The wheat was shipped, and the invoice and bill of lading properly made out and *indorsed to the plaintiffs* were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. Plaintiffs remitted a draft, which was not a banker's draft, and defendant sent it back by return of post, as being contrary to the agreement, and kept back the cargo and disposed of it. The plaintiffs had already failed in an action in trover (*l*), and the present action was case for breach of contract. The judgment of the lower court was again for defendant, Tindal, C. J., saying: "There is no doubt that the *property* in the wheat passed to the plaintiffs, . . . but the question is as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession.* And we are of opinion that the intention of the parties under this contract was, that the consignors should *retain the power of withholding the actual delivery* of the wheat in case the consignee failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the delivery of the bill of lading, . . . and we think the object would have been no other than to afford security to the consignors." But on error to the Exchequer Chamber, this decision was unanimously reversed (*m*), the court, composed of Lord Abinger, C. B., Parke, Alderson, and Rolfe, BB., and Patteson, Coleridge, and Wightman, JJ., saying that they acceded to the general principle of the judgment of the Common Pleas, but could

(*k*) 2 M. & G. 792. (*l*) 5 Bing. N. C. 541. (*m*) 7 M. & G. 882.

not agree with it in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property in the plaintiffs. "The delivery of the bill of lading and remitting the banker's draft *could not* be simultaneous acts: the plaintiffs *must* have received the bill of lading and invoice *before* they could send the draft."

§ 389. In Wait *v.* Baker (*n*), which is a leading case, decided in 1848, the facts were that the defendant at Bristol bought from one Lethbridge 500 quarters of barley free on board at Kingsbridge, and in answer to an inquiry about the shipment wrote to Lethbridge: "I took it for granted that you would get a vessel for the barley I bought from you f. o. b., and therefore did not instruct you to seek one. . . . Please advise me when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

By further correspondence, Lethbridge forwarded copy of the charter party which he had taken in his own name; advised the commencement of the loading; and on the 1st of January, 1847, wrote: "I hope to be able to send you invoice and bill of lading on Tuesday or Wednesday." And again on the 6th: "I expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying the freight as per charter." Lethbridge took them to Bristol, called on the defendant, and left at his counting-house, early in the morning, an *unindorsed* bill of lading. At an interview with the defendant at a later hour, on the same day, the defendant made objections to the quality of the cargo, saying that it was inferior to sample, offered to take the cargo, and tendered the amount in money, but said that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to indorse the bill of lading, but took it up from the counter and went to the plaintiffs, from whom he obtained an advance on indorsing the bill of lading to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by defendant. There was a verdict for the defendant at Nisi Prius, and on the motion for new trial, Parke, B., gave the reasons on which the rule was discharged: "It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500

(*n*) 2 Ex. 1.

quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action — the action being for the recovery of the property — that at some subsequent time the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on shipboard is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, *but a delivery to the captain of the vessel, to be carried under a bill of lading*, and that bill of lading *indicated the person for whom they were to be carried.* By that bill of lading, the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and, if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. . . . It is admitted by the learned counsel for the defendant that the property does not pass unless there is a subsequent appropriation of the goods. . . . Appropriation may be used in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. . . . The vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances, which occurred at Bristol afterwards, amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was

to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. . . . There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation in the sense of that term which alone would pass the property.*" This conclusion of the learned judge is substantially a statement that, though the determination of election by the vendor was complete, and the appropriation therefore perfect in one sense, yet the reservation of the *jus disponendi* prevented it from being complete "in that sense of the term which alone would pass the property." The case is quite in harmony with all the later decisions on the subject.

§ 390. Van Casteel *v.* Booker (*o*) was decided by the same court in the same year. The goods in that case had been placed by the vendor on board of a vessel sent for them by the vendees, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of leading was indorsed in blank by the vendor and sent to the vendees. On the different questions arising in the case, which were numerous, it was held, —

First, that the decisions in Ellershaw *v.* Magniac (*p*) and Wait *v.* Baker (*q*) had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor was decisive to show *that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act.*

Second, that, notwithstanding the *form* of the bill of lading, the contract may be really made by the consignor as agent of the vendee and in his behalf, and *it was a question for the jury*, in the case before the court, what, under all the circumstances, was the real intention of the consignors or vendors. On the new trial, the jury found that the goods were put on board for, and on account of, and at the risk of, the buyer, and the court refused to set aside the general verdict for the defendants which had been entered on this finding of the jury.

§ 391. In 1850, the case of Jenkyns *v.* Brown (*r*) was decided in

(*o*) 2 Ex. 691.

(*p*) 6 Ex. 570. The case was not reported till some years after it had been decided.

(*q*) 2 Ex. 1.

(*r*) 14 Q. B. 496, and 19 L. J. Q. B. 286.

the Queen's Bench. Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of plaintiffs, and taken a bill of lading for it, deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a New Orleans banker, to whom he also indorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. Held, that the property did not pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that, by delivering the indorsed bill of lading to the buyer of the bills of exchange, he had conveyed to them "a special property" in the cargo; and by the invoice and letter of advice to the plaintiffs, he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' rights to the goods would not arise till the bills of exchange were paid by them.

§ 392. The case of Turner *v.* Trustees of Liverpool Docks (*s*) was decided in the Exchequer Chamber in 1851, the court being composed of Patteson, Coleridge, Wightman, Erle, Williams, and Talfourd, JJ. A cargo of cotton had been purchased in Charleston, on the order of Higginson & Dean, of Liverpool, and put on board their own vessel, which had been sent for it. Bills of exchange for the price were drawn by Menlove & Co. on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading, which had been signed by the master. The bills of lading made the goods deliverable "to order, or to our (Menlove & Co.'s) assigns, he or they paying freight, *nothing, being owner's property.*" The question was, whether by delivery on board the purchaser's own vessel, and by the statement in the bill of lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to the Charleston bankers. The court took time to consider, and the decision was given by Patteson, J., who said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still *reserved to themselves*, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and

(*s*) 6 Ex. 543. See, also, Schotsmans *v.* Lancashire and Yorkshire Railway Company, 2 Ch. 332, and other cases cited *post*, Book V. Ch. 5, on Stoppage in Transitu.

without which it may be assumed that the vendors would not have delivered them at all. . . . The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owner's property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove & Co. of the 23d of October, show too clearly for doubt that, notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts."

§ 393. Ellershaw *v.* Magniac (*t*) was decided prior to Van Casteel *v.* Booker (*u*), and is referred to in that case, but was not reported till 1851. There the plaintiff had contracted with C. & Co., of London and Odessa, for the purchase of 1700 quarters of Odessa linseed, had paid half the price, and had sent the Woodhouse, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1700 quarters of linseed in bulk;" and a quantity of linseed was put on board the vessel at Odessa, the partner there writing to the London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the Woodhouse;" and again, "By Friday's post you shall have the bill of lading of the linseed, by the Woodhouse." The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and, being in difficulties, got advances by transferring the bills of lading to the defendant. Held by the court (Lord Abinger, C. B., and Parke and Alderson, BB.) that the shippers, by making the linseed deliverable to order by the bill of lading, clearly showed *the intention to preserve the right of property and possession in themselves* until they had made an assignment of the bill of lading to some other person; and the property, therefore, had not passed to the plaintiff.

§ 394. In Joyce *v.* Swann (*x*), a decision was rendered in 1864, by the Common Pleas, on the following facts: McCarter, of Londonderry, on the 14th of February, 1863, ordered one hundred tons of guano from Seagrave & Co., of Liverpool, with whom he had been in the habit of dealing, and was on very intimate terms. On the 26th, he was informed that the Anne and Isabella had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at 10*l.* per ton. . . . Please say if you purpose effecting insurance at your end." On the 2d of March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him, "1200*l.*, on guano, valued at 1200*l.*, per Anne

(*t*) 6 Ex. 570. (*u*) 2 Ex. 691, 702. (*x*) 17 C. B. N. S. 84.

and Isabella, from Liverpool to Derry." Then, on the 3d of March, McCarter wrote to Seagrave & Co. in relation to the price of 10*l.*: "I really cannot understand this, when I know that Mr. Lawson supplies your guano, in Scotland, at 9*l.* 15*s.* nett, there, to dealers; besides, I look for the special allowance made to me at the origin of our transactions, and now, that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry, indeed, to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you." The letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave & Co. received this letter on the 4th of March, and, fearing from its tenor that McCarter would not accept the cargo, insured it in their own name on that day, and took a bill of lading "to order of Seagrave & Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter by Seagrave & Co., per Anne and Isabella."

The invoice and bill of lading were forwarded in a letter to the senior partner of Seagrave & Co., who was then in Ireland, and on the evening of Saturday, the 7th of March, he went on a friendly visit to McCarter's private house near Londonderry, and there told him that he had received these papers from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning they went into town together, and at McCarter's office Seagrave indorsed the bill of lading to McCarter and obtained from him an acceptance for the price, which he at once inclosed to his firm at Liverpool. After this, and on the same day, they heard that the Anne and Isabella had been wrecked on the *evening of Saturday the 7th.* The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that the property had not passed to the purchaser, and that he had therefore no insurable interest.

Erle, J., charged the jury that it was not a necessary condition of the passing of the property that the price should be agreed on; that there might be a contract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave & Co. with the intention of passing the property, they must find for plaintiff; but *if they intended to keep it in their own hands* and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the court. The letter of McCarter was construed by the judges as a "grumbling" assent to the price.

§ 395. It is to be remarked that this case is not at all in conflict with Turner *v.* Liverpool Docks, or Wait *v.* Baker, in holding that, although the shipper took the bill of lading to his own order, yet the property had passed when the goods were put on board. The distinction is a plain one. In the former cases the shipper had taken the bill of lading to his own order, for the purpose of *retaining control* of the goods for his own security; but in Joyce *v.* Swann, the shippers and vendors had no purpose nor desire to keep any control of the goods, but, on the contrary, wished the buyer to take them. They were doubtful of the buyer's meaning, and therefore took a precaution against leaving the property uninsured and uncared for if his letter meant that he refused the purchase; but they were acting as his agents and intended to *reserve nothing, no jus disponendi*, if his meaning was that he assented to the price. The buyer interpreted his own language just as the court did; he had meant to take the goods even at the price of 10*l.*, and, that being so, the vendors were his agents in taking the bills of lading; and the case is exactly in accord with Van Casteel *v.* Booker (*y*), where it was left to the jury to decide, as a question of fact, what was the intention of the vendor under all the circumstances of the case; and with Browne *v.* Hare (*z*), where it was held that the question of intention must be considered as having been disposed of by the verdict of the jury, because it was one of the facts for their decision on the trial.

§ 396. In Moakes *v.* Nicolson (*a*), the facts were, that a sale was made by one Josse to Pope, for cash, of a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on board of a vessel chartered by Pope, in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th of December, and received by him on the 20th. Josse, being unable to get the price from Pope, sent the stamped bill to his agent, the defendant. In the mean time, on the 13th of December, Pope had sold the coal on the London Exchange, but before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coals before action brought. The defendant induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. Held, *first*, that the plaintiff had no better right than his vendor, Pope, because at the time

(*y*) 2 Ex. 691.

(*z*) In Ex. Ch. 4 H. & N. 822; 29 L. J. Ex. 6.

(*a*) 34 L. J. C. P. 273; 19 C. B. N. S. 290.

of his purchase the goods were not ascertained and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title; *secondly*, that no title had passed to Pope from Josse, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the *jus disponendi; thirdly*, that the intention of Josse was a fact to be determined by the jury. But *semble*, per Byles and Keating, JJ., that if Pope's sale had been made after his receipt of the bill of lading by indorsing it over, although unstamped, to a *bona fide* purchaser, the result might have been different. The *ratio decidendi* of the case was clearly that Pope's sale was of a thing not yet his, of property not yet acquired, and therefore inoperative to pass the property. *Ante*, Ch. 4.

§ 397. In Falke *v.* Fletcher (*b*), the plaintiff, a merchant of Liverpool, acting in behalf of De Mattos, of London, had chartered from the defendant a vessel to load a complete cargo of salt for Calcutta. The plaintiff had put on board about 1000 tons of salt, for which he took receipts in his own name, when De Mattos failed, and the plaintiff declined to continue loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1000 tons, on the ground that they belonged to De Mattos. It was proven that the plaintiff was in the habit of buying such cargoes for De Mattos, and charged him no commission, but an advance on the cost of the salt to remunerate himself for his trouble; that the plaintiff always paid for the salt and loaded it at his own expense, and when the cargo was completed sent invoices to De Mattos and received the acceptances of the latter for the cost. Held, under these circumstances, a question of intention for the jury, whether the plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favor of the plaintiff that he had not parted with the goods was maintained.

§ 398. In Shepherd *v.* Harrison (*c*), the facts were that Paton, Nash & Co., merchants of Pernambuco, bought for the plaintiff, a merchant of Manchester, certain cotton, and shipped it on the defendant's steamship Olinda, taking a bill of lading. Then they wrote to the plaintiff, saying, "Inclosed please find invoice *and bill of lading* of 200 bales cotton shipped per Olinda, costing 851*l.* 2*s.* 7*d.*" The letter also announced that a draft had been drawn for the price in favor of George Paton & Co., the agents in Liverpool of Paton, Nash & Co., "to which we beg your protection." The invoice was headed "Invoice, etc., on account and risk of Messrs. John Shepherd & Co. (the purchaser)." The bill of lading, however, was *not*

(*b*) 18 C. B. N. S. 403; 34 L. J. C. P. 146.
(*c*) L. R. 4 Q. B. 196; in Eq. Ch. Ibid. 493; in the House of Lords, L. R. 5 H. L. 116.

inclosed in the letter to the plaintiff, but was, together with the bill of exchange, inclosed to George Paton & Co., of Liverpool, who at once sent a letter to the plaintiff inclosing the bill of lading and the bill of exchange drawn on him, and stating: "We beg to inclose bill of lading for 200 bales of cotton, shipped by Paton, Nash & Co., per Olinda S. S., on your account. We hand also their draft on your good selves for cost of the cotton to which we beg your protection." The plaintiff refused to accept the bill of exchange, but retained the bill of lading, and demanded the cotton from the master of the ship, who, however, delivered the goods to George Paton & Co., on a duplicate bill of lading held by them, and on receiving an indemnity against the plaintiff's claim. The plaintiff's action was trover against the master, but all the courts were unanimous in favor of the defendant, and it was held in the House of Lords: 1st. That the *jus disponendi* had been reserved by the vendors; 2dly. That where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading which is the symbol of the property in the goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange; that, if he does so retain it, he thereby acquires no right to the bill of lading or the goods.

§ 398 a. [In Gabarron *v.* Kreeft (*d*), the defendants had bought from one Munoz all the ore of a certain mine in Spain, to be shipped by Munoz f. o. b. at Cartagena, on ships to be chartered by the defendants, or by Munoz. The ore was to be paid for by acceptances against bills of lading, or on the execution of a charter party, in which latter case a certificate that there was enough ore in stock to load the ship was to accompany the drafts. On being so paid for, the ore was to become the property of the defendants. Various vessels had been loaded and others chartered, and various payments made up to March, 1872, when the Trowbridge, one of the ships chartered by the defendants, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that, had Munoz shipped ore on the Trowbridge, he would have been entitled to no payments from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, before any ore was put on board the Trowbridge, he picked a quarrel with the defendants, telegraphed to them that he would not load the Trowbridge on their account, and, though they telegraphed back to him threatening him if he did not, he loaded the Trowbridge, *and took bills of lading making the shipment to be by one Sabadie, and the cargo*

(*d*) L. R. 10 Ex. 274.

deliverable to Sabadie's order. He then indorsed Sabadie's and his own name on the bills of lading, and pledged them for value with the plaintiffs. No certificate in relation to this ore was given by Munoz to the defendants. The captain was justified in giving the bills of lading, as the charter party contained a clause authorizing him "to sign bills of lading as presented." It was agreed that at the time of shipment Munoz had no intention to ship the ore for the defendants. The question was, whether the plaintiffs, or the defendants, were entitled to the cargo, and this depended for its decision on whether the property became vested in the defendants upon the ore being paid for, as the contract provided it should, or upon shipment on board the vessel chartered by the defendants. The Court of Exchequer held that the plaintiffs were entitled. Bramwell and Cleasby, BB., rested their decisions upon the following grounds: That, notwithstanding the provision in the contract to that effect, the payment of the price could not *per se* operate to transfer the property in the ore to the defendants, so long as the ore had not been separated from the bulk of the stock; that there was no evidence of a specific appropriation of the ore in fulfilment of the contract previous to shipment (*e*); and that shipment on board a vessel chartered by the defendants did not vest the property in them, when the shipper in dealing with the bills of lading has manifested his intention to reserve the *jus disponendi.* Kelly, C. B., came to the same conclusion upon a quite distinct ground, viz., that, as the defendants by the terms of the charter party had authorized the master to sign bills of lading as presented, they were estopped from disputing plaintiff's title as *bona fide* indorsees for value.

It will be observed that, although the agreement provided that the ore was to become the property of the defendants upon being paid for, yet, since the sale was not one of specific goods, it was necessary that there should be some subsequent appropriation by Munoz for the defendants before the property could actually vest in them. In the absence of any evidence of such appropriation previous to shipment, the question was reduced to this: Did the property pass on actual shipment, the shipper having no right to ship, except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he did take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable? and after a careful review of the authorities cited in the text, it was held that the property did not pass. After commenting on Ellershaw *v.* Magniac, Turner *v.* Trustees of the Liverpool Docks, Falke *v.* Fletcher, Wait *v.* Baker, and Moakes *v.* Nic-

(*e*) See *ante*, Bk. II. Ch. 4.

olson, Bramwell, B., says, at p. 281: "The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that, if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him." And Cleasby, B., at p. 285, referring to Turner *v.* Trustees of the Liverpool Docks, and Shepherd *v.* Harrison, as being respectively an early and the latest authority on the subject, says: "The effect of these decisions is, that the delivering of goods contracted for, on board a ship when a bill of lading is taken, is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee."

In Ogg *v.* Shuter (*f*), the facts were that the plaintiffs had made a contract for the purchase of 20 tons of potatoes to be delivered *free on board* at Dunkirk, price to be paid in *cash against bill of lading*, and the plaintiffs were to pay *part of the price* in earnest of the bargain. The potatoes were shipped under the contract in the *plaintiff's own sacks* under a bill of lading which made them deliverable to the vendor's order, and the plaintiffs paid 30*l.* in part payment of the price. The vendor indorsed the bill of lading to the defendant, who was his agent in London, and he upon the arrival of the ship presented to the plaintiffs a draft for the balance of the purchase-money with the bill of lading annexed. The plaintiffs, believing that the shipment was short, declined to accept the draft for the full amount, and thereupon the defendant *sold* the potatoes to another party. In an action against the defendant for conversion, a verdict was entered by consent for the plaintiffs, leave being reserved to the defendant to move that it should be entered for him, the court to draw inferences of fact. It was held by the Court of Common Pleas that the property in the potatoes had passed to the plaintiffs, on the ground that any evidence of the vendor's intention to reserve the *just disponendi* manifested by the expression in the contract, "cash against bill of lading," and by the fact of the vendor taking the bill of lading to his own order, was overriden by the other terms of the contract, viz., that the potatoes should be delivered "free on board," and that there should be part payment of the price, coupled with the fact that the potatoes were delivered into the plaintiff's own sacks.

The decision was reversed on appeal, the Court of Appeal holding, —

First, that the retention by the vendor in his agent's hands of the bill of lading in the form in which it was taken was effectual to reserve the *jus disponendi*.

(*f*) 1 C. P. D. 47, C. A., reversing S. C. L. R. 10 C. P. 159.

Secondly, that the right so reserved was not merely a vendor's lien on the goods, but involved *the right to dispose of the goods by sale* or otherwise, so long at least as the buyer remained in default.

§ 398 b. In Ex parte Banner (*g*), the firm of Christiansen & Co., who carried on business at Para, in South America, acted as commission agents in the purchase and consignment of goods for Tappenbeck & Co., at Liverpool. The course of dealing between the parties was as follows: Christiansen & Co., in order to provide funds for the purchase of goods, drew bills of exchange on Tappenbeck & Co., which they discounted at Para. They then purchased the goods with the proceeds, and shipped them for Liverpool, and sent the *bills of lading making the goods deliverable to Tappenbeck & Co.*, and the invoices of the goods by post direct to Tappenbeck & Co. At the same time Tappenbeck & Co. were advised of the bills drawn upon them, which, in the ordinary course, they accepted on presentment, and paid at maturity. Both Christiansen & Co. and Tappenbeck & Co. stopped payment. At the time of Tappenbeck & Co.'s stopping payment, considerable quantities of goods were in transit between Para and Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills, out of the proceeds of which the goods had been purchased, were accepted, and others refused acceptance by Tappenbeck & Co., but none of them were paid at maturity. Held, by the Court of Appeal, reversing the decision of Bacon, C. J., that the property in the goods had passed unconditionally to Tappenbeck & Co., and through them to their trustee, and that the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. Shepherd *v.* Harrison was expressly distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the indorsed bill of lading, together with the bill of exchange, to an agent of his own. Mellish, L. J., in delivering the judgment of the court, said (at p. 288): "We think that as soon as the goods were put on board ship at Para, and the bills of lading making the goods deliverable to Tappenbeck & Co. *were put into the post directed to Tappenbeck & Co., and were placed beyond the control of Christiansen & Co.*, the property in the goods passed to Tappenbeck & Co. We conceive it is perfectly settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods whilst at sea, from passing to the consignee, he must by the bill of lading make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods

(*g*) 2 Ch. D. 278, C. A.

in transitu, but subject to that right the property in the goods and the right to the possession of the goods is in the consignee."

§ 398 c. In Mirabita *v.* Imperial Ottoman Bank (*h*), the facts, so far as material, were these: The vendors shipped a cargo of umber on board a ship chartered for the plaintiff, and took bills of lading making the cargo deliverable "to order or assigns." They drew a bill of exchange for the price upon the plaintiff, which they discounted with the defendant bank, at the same time handing over to them the bills of lading to be given up to the plaintiff upon his meeting the bill of exchange at maturity. A fresh bill of exchange was afterwards substituted and transferred to the bank in exchange for the original bill. On the arrival of the cargo the plaintiff at first declined to accept the bill, *but he subsequently tendered the amount for which it was drawn*, and demanded the delivery of the bills of lading. The defendants refused to accept the amount of the bill and sold the cargo. The question was, whether under these circumstances the property in the goods had passed to the plaintiff so as to entitle him to maintain an action of trover against the defendants (*i*). The Court of Appeal was unanimously of opinion that it had. It was clear that the intention of the vendors was that the property should vest in the plaintiff, subject only to his acceptance and payment of the bill of exchange, and that the defendants were bound to give up the bills of lading to the plaintiff upon his so doing. Cotton, L. J. (*j*), gives so clear an exposition of the principles that run through the decisions that we have ventured to transcribe it in full: "Under a contract for sale of chattels not specific, the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattel to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract, the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on ship-

(*h*) 3 Ex. D. 164, C. A.

(*i*) The action was commenced before the Judicature Acts, and therefore dealt with as a legal question, and not upon the equitable rights of the parties. See per Cotton, L. J., at p. 171.

(*j*) Page 172.

ment pass to the purchaser. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly, in Wait *v.* Baker, Ellershaw *v.* Magniac, and Gabarron *v.* Kreeft (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner *v.* Trustees of Liverpool Docks, Shepherd *v.* Harrison, and Ogg *v.* Shuter. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs, there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances the property does, on payment or tender of the price, pass to the purchaser."]

§ 399. The following seem to be the principles established by the foregoing authorities: —

First. — Where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee (*k*).

Secondly. — Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. This principle runs through all the cases, and is clearly

(*k*) Wait *v.* Baker, 2 Ex. 1. See, also, Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; London and North Western Railway Company *v.* Bartlett, 7 H. & N. 400, and 31 L. J. Ex. 92; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Cork Distilleries Company *v.* Great Southern Railway Company, L. R. 7 H. L. 269.

enunciated by Parke, B., in Wait *v.* Baker (*l*), by Byles, J., in Moakes *v.* Nicolson (*m*), [by Bramwell and Cleasby, BB., in Gabarron *v.* Kreeft (*n*), and by Cotton, L. J., in Mirabita *v.* Imperial Otttoman Bank (*o*).]

And the above two points were approved as an accurate statement of the law by Lord Chelmsford in Shepherd *v.* Harrison, *supra.*

Thirdly. — The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee (*p*).

Fourthly. — The *prima facie* conclusion, that the vendor reserves the *jus disponendi* when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was (*q*).

Fifthly. — That although as a general rule the delivery of goods by the vendor, on board the purchaser's own ship, is a delivery to the purchaser, and passes the property, yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of freight, because owner's property (*r*). [And on a sale of goods which are not specific, although the goods have been delivered on board a ship of, or chartered for, the purchaser, yet, in the absence of any appropriation of the goods in fulfilment of the contract previous to shipment, the fact that the vendor has taken a bill of lading, making the goods deliverable to his own order, or that of a third person, will prevent the property in them from passing to the purchaser (*s*).]

Sixthly. — That where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of

(*l*) 2 Ex. 1.

(*m*) 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*n*) L. R. 10 Ex. at pp. 281 and 285.

(*o*) 3 Ex. D. C. A. at p. 172.

(*p*) Wilmshurst *v.* Bowker, 2 M. & G. 792; Ellershaw *v.* Magniac, 6 Ex. 570; Wait *v.* Baker, 2 Ex. 1; Van Casteel *v.* Booker, 2 Ex. 691; Jenkyns *v.* Brown, 14 Q. B. 496, and 19 L. J. Q. B. 286; Shepherd *v.* Harrison, L. R. 4 Q. B. 196; in Ex. Cb. Ibid. 493; L. R. 5 H. L. 116; Gabarron *v.* Kreeft, L. R. 10 Ex. 274; Ogg *v.* Shuter, 1 C. P. D. 47, C. A.; Ex parte Banner, 2 Ch. D. 278, C. A.

(*q*) Van Casteel *v.* Booker, 2 Ex. 691; Browne *v.* Hare, 4 H. & N. 822, and 29 L. J. Ex. 6; Joyce *v.* Swann, 17 C. B. N. S. 84; Moakes *v.* Nicolson, 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*r*) Turner *v.* Liverpool Dock Trustees, 6 Ex. 543; Ellershaw *v.* Magniac, 6 Ex. 570; Brandt *v.* Bowlby, 2 B. & Ad. 932; Van Casteel *v.* Booker, 2 Ex. 691; Moakes *v.* Nicolson, 19 C. B. N. S. 290; 34 L. J. C. P. 273; Falk *v.* Fletcher, 18 C. B. N. S. 403; 34 L. J. C. P. 146; Schotsmans *v.* Lancashire and Yorkshire Railway Company, 2 Ch. 332; Gumm *v.* Tyrie, 33 L. J. Q. B. 97; in error, 34 L. J. Q. B. 124.

(*s*) Gabarron *v.* Kreeft, L. R. 10 Ex. 274.

exchange; and if he refuse acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol (*t*). [And the vendor may exercise his *jus disponendi* by selling or otherwise disposing of the goods, so long at least as the buyer remains in default (*u*).

Seventhly. — But although the vendor may intend the transfer of the property to be conditional upon the buyer's acceptance of the bill of exchange, yet, if he puts into the post addressed to the buyer a bill of lading making the goods deliverable to the buyer's order, he thereby abandons all control over the goods, and the property thereupon vests unconditionally in the buyer, and does not revest in the vendor on the buyer's failure or refusal to accept the bill of exchange (*x*).

Eighthly. — When the vendor deals with the bill of lading only to secure the contract price, as *e. g.* by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price (*y*).]

AMERICAN NOTE.

§§ 381–399.

RESERVATION OF THE JUS DISPONENDI. It being uniformly agreed, as stated in the last note, that a delivery to the carrier of goods duly directed to the buyer, either with or without a bill of lading in his favor, ordinarily passes the title instantly, but that the seller may avoid this conclusion by appropriate acts or words, it remains to consider what will or will not have this effect.

The most usual and appropriate mode of thus preserving the title in the seller, notwithstanding such delivery, is for the seller to consign the goods with a bill of lading in his own favor or that of his agents, instead of to the buyer himself. In such case, mere delivery to the carrier does not, in and of itself, divest the seller's title. The inference is strong that it is not so intended, but such inference may possibly be controlled. The St. Joze Indiano, 1 Wheat. 208; Merchants' Bank *v.* Bangs, 102 Mass. 291, an important case; Dows *v.* National Exchange Bank, 91 U. S. 618; Farmers' and Mechanics' Bank *v.* Logan, 74 N. Y. 568; Hobart *v.* Littlefield, 13 R. I. 341; Emery *v.* Irving National Bank, 25 Ohio St. 360; The John K. Shaw, 32 Fed. Rep. 491; Seeligson *v.* Philbrick, 30 Ib. 601; Berger *v.* State, 50 Ark. 20; Bergman *v.* Indianapolis, etc. R. R. 104 Mo. 77; Bellefontaine *v.* Vassaux, 55 Ohio St. 323; Charles *v.* Carter, 96 Tenn. 607;

(*t*) Shepherd *v.* Harrison, L. R. 4 Q. B. 196; in Ex. Ch. Ibid. 493; 5 H. L. 116; Ogg *v.* Shuter, 1 C. P. D. 47, C. A.; Rew *v.* Payne, 53 L. T. 932.

(*u*) Ogg *v.* Shuter, 1 C. P. D. 47, C. A.

(*x*) Ex parte Banner, 2 Ch. D. 78, C. A., distinguishing Shepherd *v.* Harrison, L. R. 4 Q. B. 196 and 493; L. R. 5 H. L. 116.

(*y*) Mirabita *v* Imperial Ottoman Bank, 3 Ex. D. 164, C. A., determining a point left undecided by Lord Cairns in Ogg *v.* Shuter, 1 C. P. D. at p. 51.

Erwin *v.* Harris, 87 Geo. 333. The bill of lading in such cases is regarded as the symbol of the property itself, and a valid transfer thereof by the party in whose favor it runs, made before the property actually reaches the possession of the buyer, passes the title to such assignee of the bill of lading. The Bank of Rochester *v.* Jones, 4 Comst. 497, a leading case; Matter of Non-Magnetic Watch Co. 89 Hun, 196; Marine Bank *v.* Wright, 48 N. Y. 1; First Nat. Bank *v.* Dearborn, 115 Mass. 219; Michigan Cent. R. R. Co. *v.* Phillips, 60 Ill. 190; First Nat. Bank *v.* Bayley, 115 Mass. 230; First Nat. Bank *v.* Crocker, 111 Ib. 163, an important case; Schumacher *v.* Ehy, 24 Pa. St. 521; St. Paul Co. *v.* Great West. Co. 27 Fed. Rep. 434; Union Pacific R. R. Co. *v.* Johnson, 45 Neb. 57; Sheppard *v.* Newhall, 47 Fed. R. 468; Means *v.* Randall, 146 U. S. 620.

But it is foreign to the present treatise to follow out all the distinctions arising on consignments by a principal to his factor, agent, or commission merchant, on which the latter has either made special advances, or is only generally indebted to the consignor on account. On this subject see, in addition to the cases before cited, De Wolf *v.* Gardner, 12 Cush. 19; Bailey *v.* Hudson River R. R. Co. 49 N. Y. 70; Straus *v.* Wessel, 30 Ohio St. 211; Nelson *v.* Chicago, etc. R. R. Co. 2 Bradw. 180; Grosvenor *v.* Phillips, 2 Hill, 147; Redd *v.* Burrus, 58 Geo. 574; Frechette *v.* Corbet, 5 Lower Canada, 211; Holmes *v.* German Security Bank, 87 Pa. St. 525; Clark *v.* Bank of Montreal, 13 Grant, 211; Mason *v.* Great Western R. R. 31 Up. Can. Q. B. 73; Holmes *v.* Bailey, 92 Pa. St. 57; First Nat. Bank *v.* Pettit, 9 Heisk. 447.

A shipment of ordered goods "C. O. D.," the buyer to pay freight, seems not to be a reservation of the *title* in the vendor, but only of the *possession* until payment, and therefore the seller could recover the price of goods sent according to order, though the goods never reached the buyer; the loss, if any, being on him. Higgins *v.* Murray, 73 N. Y. 252 (modifying anything to the contrary in Baker *v.* Bourcicault, 1 Daly, 23); Commonwealth *v.* Fleming, 130 Pa. St. 138, by a divided court. If that view is correct, and the goods are in fact delivered by the carrier without collecting the price, it is only a wrongful delivery of *possession*, the title is passed by the prior sale, and the buyer may therefore give a good title to a *bona fide* purchaser. Norfolk R. R. Co. *v.* Barnes, 104 N. C. 25. See, also, State *v.* Carl, 43 Ark. 353; Pilgreen *v.* The State, 71 Ala. 368; State *v.* Intoxicating Liquors, 73 Me. 278, holding that the title passes at the time and place of sale; affirmed in State *v.* Peters, 91 Me. 31.

The above construction of the phrase " C. O. D." is not, however, yet fully settled, and in State *v.* O'Neil, 58 Vt. 140, it was held, after exhaustive argument on the subject, that in such cases the *title* does not pass until delivery by the carrier to the purchaser, and the payment of the price, and therefore that the *sale is not made until that time.* The case was brought before the Supreme Court of the United States upon a writ of error, where it was held that the record did not present a federal question, and that consequently the United States Supreme Court had no jurisdiction. O'Neil *v.* Vermont, 144 U. S. 323, 334. And see, also, The People *v.* Shriver, 31 Albany L. J. 163.

Of course, however, the buyer has no right to the possession of the goods sent "C. O. D." until he pays the price, and therefore cannot maintain replevin against the carrier who refuses to deliver without payment. Lane *v.* Chadwick, 146 Mass. 68.

CHAPTER VII.

EFFECT OF A SALE BY THE CIVIL FRENCH AND SCOTCH LAW.

	Sect.
Discovery of the Institutes of Gaius	401
Sale the offering of exchange	402
Dare, facere, præstare	403
Civil, prætorian, and natural obligations	403
Four stages in mode of making sales in Rome	404
Nexum stipulatio, literarum obligatio seu expensilatio, and mutual consent	404
Four contracts *juris gentium*	404
Bilateral or synallagmatic contracts	404
Distinctions between sales in Rome and at common law	405
In Rome, price certain required	405
In Rome, sale was not a transfer of ownership	405
Vendor bound only to deliver possession	405
Where vendor knew he was not owner	405
What was meant by eviction	406
Remedies of evicted purchaser	407
Actio Ex Empto and *actio De Stipulatione duplæ*	408
Vendor bound as *auctor* to make good his warranty	409
Things sold at risk of buyer before delivery	410
Vendor bound *præstare custodiam*	411
French law	412
Scotch law	413

§ 400. An attempt must now be made to give a summary, necessarily very imperfect, of the principles of the Civil Law in regard to the nature of the contract of sale, and its effect in passing the property in the thing sold. The subject is the more difficult because there is a marked distinction between the modern civil law and the Roman law, and because the doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods in their history.

§ 401. The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and d'Aguesseau, Cujas and Vinnius, Domat and Dumoulins. The Digest, Code, and Institutes of Justinian, compiled in the sixth century, during the reign of that emperor (A. D. 527–565), formed, prior to the year 1816, the almost exclusive source from which was derived a knowledge of Roman jurisprudence; and in that famous *corpus juris civilis*, the name of Gaius was confounded with those of the other eminent jurists, whose responses (or, as we should call them, opinions on cases submitted) were adopted by the imperial lawgiver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modelled on those of Gaius, who lived nearly four centuries earlier, during the reigns of Antoninus Pius and Marcus Aurelius. But the works of Gaius were believed to be irretrievably lost till the year 1816, when Niebuhr discovered in

a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers of the fifth century (*a*). Savigny recognized the old writing to be the text of Gaius, and after several months of patient labor the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century of our era. By means of this invaluable addition to former sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure, and it is from their works that the following summary is chiefly extracted.

§ 402. Sale was considered as the offspring of exchange, and for many centuries it was disputed whether there was any difference in the nature of these contracts. "Origo emendi, vendendique a permutationibus cæpit, olim enim non ita erat nummus; neque aliud *merx*, aliud *pretium* vocabatur" (*b*). And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the things were either exchanged by the *permutatio*, or *given* for a price by the venum*datio*.

§ 403. Afterwards, when the idea of binding one party to another, by consent, and thus forming an obligation (juris vinculum), was entertained, the whole body of possible engagements between man and man was included in the three expressions, dare, facere, præstare: *dare*, to give, that is, *to transfer ownership; facere*, to do, or even abstain from doing, an act; *præstare*, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of obligation were *civil* obligations, which gave a right of action at law; *prætorian* or *honorary* obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the prætor (*c*); and *natural* obligations, for which there was no action at law or in equity, but which might be used in defence, as in *compensatio* or set-off: "Etiam quod natura debetur, venit in compensationem" (*d*).

(*a*) See a very interesting account of this discovery in the preface to the first edition of Gains.

(*b*) Dig. 18, 1, De Contrah. Emptione. And see *ante*, p. 1, note (*a*).

(*c*) For these two classes giving rights of action, see Inst. 3, 13, 1.

(*d*) Dig. 16, 2, 6, Ulp.

The vendee then, like all other contracting parties, had certain actions (*e*), which alone he was permitted to institute against the vendor. The Institutes of Gaius give us the form of declaration in an action *in personam*. "In personam actio est, quotiens cum aliquo agimus, qui nobis ex contractu, vel ex delicto obligatus est: id est, cum intendimus, *dare*, *facere*, *præstare* oportere."

§ 404. Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange from hand to hand: 1st. The *nexum*, which was effected *per æs et libram*, and consisted in weighing out a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when men had not learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*, all of which had fallen into disuse and derision long before the time of Gaius (*f*), who says, "in odium venerunt." 2d. The sale by certain sacramental words alone, and dispensing with the *æs et libram:* this was the *stipulation* (*g*), which bound only *one side*, from its very nature, because it consisted in a promise made in response to the stipulator. A stipulation, therefore, might bind the vendor or the vendee; it required *two* stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites were upheld with strictness by the Patricians and Priests, so that by an exaggerated technicality the words "Spondes? Spondoo," forming a stipulation, were not allowed to be used by any but Roman citizens (*h*), foreigners and barbarians being compelled to adopt other words, as "Promittis," "Dabis," "Facies," for the same purpose, these latter expressions being deemed *juris gentium*. But Justinian tells us that this form of contract was obsolete in his day (*i*). 3d. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register, or account-book (tabulæ, codex accepti et depensi). The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should

(*e*) Com. 4, § 2.

(*f*) Gai. 4, 30.

(*g*) The etymology of this word is doubtful. Paulus derives it from Stipulum, an old word, meaning firm. Sent. 5, 7, § 1. See, also, Inst. 3, 15. Festus, in his Abridgment of Valerius Flaccus, says: "Stipem esse nummum signatum, testimonio est et id, quod datur stipendium militi, et quum spondetur pecunia, quod stipulari dicitur;" and Isidor of Seville (lib. 4, Orig. c. 24) says: "Dicta stipulatio a stipula. Veteres enim quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum jungentes sponsiones suas agnoscebant." This last etymology seems to be merely an invention, as the French say *après coup*. Such a mode of contracting, and such a derivation, if true, could scarcely have been known to Paulus and Festus. The word is probably akin to *stipes*, a post, — from √STAP to make firm, an extension of √STA to stand.

(*h*) Gai. Com. 3, 93.

(*i*) Inst. 3, 15, 1.

constitute not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month from a diary or blotter (adversaria), and was treated as a proof of the highest character, Cicero saying of the *tabulæ* that they are "*æternæ, sanctæ, quæ perpetuæ existimationis fidem et religionem amplectuntur*" (*k*). This contract was said also to be an *expensilatio*, from the entries in these books, the party who paid money entering it under this head as *pecunia expensa lata*, and the one who received it as *pecunia accepta relata*. 4th. The fourth and last stage was the contract by mutual consent alone; and it is again a remarkable instance of the strict technicality of the Roman law (*l*) that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are sale (*emptio-venditio*), letting for hire (*locatio-conductio*), partnership (*societas*), and agency or mandate (*mandatum*). They are also the only contracts of the Roman law that were termed bilateral, or synallagmatic, or reciprocal, that is, binding the parties *mutually* (*ultro-citroque*), every other form of contract being unilateral, *i. e.* binding one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.

[The historical development of the form of contract is treated in the ninth chapter of Maine's Ancient Law. The class of real contracts, comprising loan (*mutuum*), pledge (*pignus*), and deposit (*depositum*), is there placed in order of time between the literal and the consensual contracts, the links in the chain being: (1) *nexum*, (2) *stipulatio*, and (3) *literal*, (4) *real*, (5) *consensual* contracts.]

§ 405. The sale being at last permitted by mutual consent, its elements were the same as at the common law, with the exceptions now to be considered.

1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos;* or for what it cost you, *quantum tu id emisti;* or for what money I have in my coffer, *quantum pretii in arca habeo* (*m*). The common-law rule, that in the absence of express agreement a reasonable price is implied, did not exist in the Roman law.

2dly. It was a received maxim in the Roman law that the vendor did not bind himself to transfer to the buyer the property in the thing sold; his contract was not *rem dare*, but *præstare emptori rem habere*

(*k*) Pro Roscio, 3, § 2.

(*l*) Gaius thus complains: "Namque ex nimia subtilitate veterum qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem perderet." — L. 4, § 30.

(*m*) Dig. 18, 1, De Contrah. Empt. 7, §§ 1 & 2.

licere. The texts abound in support of this statement. "Qui vendidit, necesse non habet fundum emptoris facere," unless he made a special and unusual stipulation to that effect, for the text goes on to say, "ut cogitur qui fundum stipulanti spopondit" (*n*). If the vendor was owner, the property passed by virtue of his promise to guarantee possession and enjoyment; but if not, the sale was still a good one, and its effect was simply to bind the vendor to indemnify the buyer, if the latter was "evicted," that is, dispossessed *judicially* at the suit of the true owner. Ulpian's explanation is entirely lucid: "Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum" (*o*). It resulted, therefore, that, on the completion of a contract of sale, the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred was something more than the mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; "vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fideive commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet Vacui appellatio" (*p*). And if the vendor knew that he was not the owner, and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorized to bring an equitable suit, *Ex Empto*, without waiting for the eviction. "Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur, utiliter (*q*) me Ex Empto acturum putavit [Africanus] in id, quanti meâ intersit, meam esse factam. Quamvis enim alioquin verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat; quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignoranti vendidit" (*r*).

(*n*) Dig. 18, 1, 25, § 1, Ulp.

(*o*) Dig. 19, 1, 11, § 1, Ulp.

(*p*) Dig. 19, 1, 2, § 1, Paulus.

(*q*) Utiliter, that is, in equity, before the Prætor.

(*r*) Dig. 19, 1, 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law: "If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that, even before eviction, an equitable suit *ex empto* might be maintained by me for damages (literally, for as much interest as I had, that the thing should become mine). For, although it would otherwise be true that the vendor is only bound to guarantee possession to the buyer, not also that the thing should become the buyer's, yet, because he ought also to warrant the absence of fraud, a man is held responsible who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

§ 406. The eviction against which the vendor was bound to warrant the buyer was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed. In Pothier's edition of the Pandects, he thus states the rule and cites a response of Gaius: "Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel abductam rem sine successore decesserit, ita ut neque ad fiscum bona pervenire possint, neque privatim a creditoribus distrahi, tunc enim nulla competit emptori ex stipulatu actio, quia rem habere ei licet. L. 57, Gaius, lib. 2 ad Ed. Ædil. Curul" (*s*).

§ 407. The evicted purchaser had two actions, — one *Ex Empto*, which was the *actio directa*, resulting from the very nature of the contract, and in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it, the true principle in this action being to restore the buyer to the condition in which he would have been, not if he had never bought, but if he had not been dispossessed (*t*).

§ 408. The second action was *De Stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given. This stipulation became so general that, under an Edictum Ædilium-Curulium, it was considered to be implied in all sales, unless expressly excluded: "Quia assidua est Duplæ stipulatio, idcirco placuit ex Empto agi posse si duplam venditor mancipii non caveat. EA ENIM QUÆ SUNT MORIS ET CONSUETUDINIS, IN SONÆ FIDEI JUDICIIS DEBENT VENIRE" (*u*). The whole of the second title of the 21st Book of the Digest is devoted to this subject, De Evictionibus et Duplæ Stipulatione.

§ 409. In consequence of the peculiar obligations of the vendor as warrantor against eviction, he was called the *auctor*, who was bound, *auctoritatem præstare*, to make good his warranty; and the form of procedure was, that, whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his vendor, and make him party to the action, so as to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare*, or *auctorem laudare*, *auctorem interpellare;* and the

(*s*) Pothier, Pandectæ Justinianæ, lib. 21, tit. 2, De Evict. Pars 2, No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise. — Ib. No. XVI.

(*t*) The texts are collected in Pothier, Pand. Just. lib. 19, tit. 1, ch. 1, Nos. 43 to 47, under the head, "Quanti teneatur venditor emptori, evictionis nomine, hac actione ex Empto."

(*u*) Dig. lib. 21, tit. 2, l. 31, § 20, Ulp. De Ædil. Edict.

buyer who failed to cite in warranty his vendor, without a legal excuse for his default, lost his remedy. "Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio, neque Ex stipulatu, neque Ex dupla, neque Ex empto actionem contra venditorem vel fidejussorem ejus habet" (*x*).

§ 410. It would seem the natural consequence of these principles that a vendor who did not even profess to transfer title must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But, on the contrary, the rule was explicitly laid down in conformity with ours at common law, as exemplified in Rugg *v.* Minett (*y*), where the buyer of the turpentine was held bound to suffer the loss of the goods destroyed before delivery on the ground that the ownership had vested in him. The reasoning by which this result was reached in the Roman law is thus explained by an eminent French jurist. After citing the text of the Institutes (*z*), which is in these words, "Cum autem emptio et venditio contracta sit, quod effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit," the commentator says: "Quel sont les effets de la vente? C'est de produire des obligations: le vendeur est obligé de livrer et de faire avoir la chose à l'acheteur. Eh bien! si depuis la vente il y a eu de fruits, des accroissements, il sera obligé de même de livrer et de faire avoir ces fruits, ces accroissements. (Dig. 19, 1, de Action. Empt. 13; §§ 10, 13, et 18, Ulp.) Si la chose a diminuée, s'est détériorée sans sa faute, il ne sera obligé de la livrer, de la faire avoir, qu'ainsi diminuée, ainsi détériorée; et si la chose a péri sans sa faute, son obligation aura cessé d'exister. Voilà tout ce que signifie cette maxime, que la chose, du moment de la vente, est aux risques de l'acheteur. C'est-à-dire que l'obligation du vendeur de livrer et de fair avoir, s'appliquera à la chose telle qu'elle se trouvera par suite des changements qu'elle aura pu éprouver. Il ne s'agit en tout ceci que de l'obligation de vendeur. Et s'il y a perte totale nous ne ferons qu'appliquer cette règle commune de l'extinction des obligations, que le débiteur d'un corps certain (*species*) est libéré, lorsque ce corps a péri sans son fait ou sans sa faute. (Dig. 45, 1, de Verb. Oblig. 23, Pomp.) Mais que deviendra l'obligation de l'acheteur relativement au prix? Le prix convenu devra-t-il être augmenté ou diminué, selon que le chose aura reçu des accroissements, ou subi des détériorations? En aucune manière; le prix restera toujours le même. Et si la chose vendue a péri totalement, de sorte que le vendeur se trouve libéré de l'obligation de la

(*x*) Code, tit. de Evic. et Dup. Stip., l. 8.

(*y*) 11 East, 210; *ante*, § 322.

(*z*) Inst. 3, 23, 3.

livrer, l'acheteur le sera-t-il assui de celle de payer le prix? Pas davantage. Les deux obligations, une fois contractées, ont une existence indépendante: la première peut se modifier ou s'éteindre dans son objet, par les variations de la chose vendue — la seconde n'en continue pas moins de subsister, toujours la même. (Dig. 18, 5, de Rescind. Vend. 5, § 2.) Tel était la système Romain — et c'est pour cela qu'il est vrai de dire que du moment de la vente, l'acheteur court les risques de la chose vendue, bien que le vendeur en soit encore propriétaire" (*a*).

§ 411. But although the risk of loss before delivery was thus imposed on the buyer, it was on condition that the vendor should be guilty of no default in taking care of the thing till he transferred it into the buyer's possession, for an accessory obligation of the vendor was *præstare custodiam.* "Et sane periculum rei ad emptorem pertinet dummodo custodiam venditor ante traditionem præstat" (*b*).

§ 412. Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe wherever based on the civil law, till the adoption and spread of the Code Napoleon, first among the Latin races, and more recently among the nations of Central and Northern Europe. The French code says in a few emphatic words, "La vente de la chose d'autrui est nulle," Art. 1599, and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the contract in the Arts. 1582 and 1583 gave some countenance to the idea that such was not the intention of the authors. Instead of defining a sale to be a transfer of the property or ownership, the language is, in Art. 1582, "La vente est une convention par laquelle l'un s'oblige à *livrer* une chose, et l'autre à la payer;" and in 1583, "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur, *à l'égard du vendeur*, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payée." The consequence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the Court of Cassation itself, will be found to furnish authority for the position that a sale transfers only a right of possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion (*c*); and there is a decision of the highest court in France in conformity with it (*d*). But this view seems to be now exploded, and all the recent writers, including such great authorities as Duranton, Zachariæ, and Troplong, insist that the

(*a*) Ortolan, Explic. Hist. des Inst., tome 3, p. 282.

(*b*) Dig. 47, 2, de Furtis, 14, Ulp.

(*c*) Tome 14, No. 240 *et seq.*

(*d*) Sirey, 32, 1, 623.

modern idea of the transfer of ownership is what was really intended by the authors of the civil code (*e*). M. Fréméry gives the following clear exposition of the origin of the difficulty, and adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the Corpus Juris Civilis: —

"The fragments preserved in the Digest conclusively prove that custom had consecrated at Rome an habitual formula for contracts of sale subject to special clauses, which were to be added to suit the circumstances. According to this formula, it was the vendor who spoke, *legem dicebat.* It was customary according to this formula for the vendor, in expressing the engagements which he agreed to assume, to use these words: *præstare emptori rem habere licere;* terms which, strictly construed, are not as wide in their import as the words *rem dare.* The jurists decided on this state of facts that every ambiguous clause was to be interpreted against the vendor, whose fault it was not to have expressed himself more clearly. They further decided that he was not bound to transfer ownership.

"Justinian inserted these decisions in his Digest, and made them the law; so that, deriving their authority from legislation, and not from the special circumstances of fact on which the jurisconsults had reasoned, they became applicable to every contract of sale by its nature, as recognized by the law. If, then, the old formula is abandoned, and the vendor uses the words *rem dare*, and no longer *rem habere licere*, how can one explain a law which declares that the vendor does not bind himself to transfer the ownership? And if, using neither locution, he simply says, 'I sell,' and leaves it to usage to determine the meaning which it has attached to these words, what is to be done if it be manifest that all who use these words attach to them the idea that the vendor binds himself to transfer the ownership?

"This is precisely what has happened. For many centuries it has been taught in our schools that it is of the nature of the contract of sale that the vendor is not bound to make the purchaser the owner of the thing sold: *ipse dixit!* And yet for many centuries, also, the words 'I sell' are no longer paraphrased by the Roman formula which determined their meaning: the man who utters them or hears them understands unhesitatingly that he who sells is to make the purchaser owner of the thing sold; and every one is asking how it is that, by the nature of the contract of sale, the vendor is not bound to transfer the ownership to the purchaser?

(*e*) Favart V° Vente; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4 *et seq.*; tit. 2, add. au même No.; Duvergier, tit. 1, Nos. 10 *et seq.*; Championnière et Rigaud, Dr. d'Enreg. t. 3, No. 1745; Zachariæ, t. 2, § 349.

"Since the Civil Code has appeared, however, and has declared in the Art. 1599, 'The sale of another's thing is null,' many persons have inferred that this must be because the two parties have the intention, one of transferring, the other of acquiring, the property in the thing sold; so that the nature of the contract of sale, which, according to the Roman law, did not impose on the vendor the obligation of transferring the ownership to the purchaser, does, on the contrary, according to the French law, comprehend this obligation" (*f*).

§ 413. In Scotland the property in goods never passes until delivery, and the law was stated by Lord President Inglis in December, 1867, in the case of Black *v.* Bakers of Glasgow (*g*), as follows: "There could be no stoppage *in transitu* in this case, simply because the goods never were in a state of *transitus*. No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitus*, to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer. Unless the seller has parted with the possession, his remedy is not stoppage *in transitu*, but in Scotland *retention*, and in England an exercise of the seller's right of lien. I should think it almost unnecessary, at this time of day, to point out the important distinctions which exist between the laws of Scotland and England as regards the seller's rights in goods sold and not delivered. The seller of goods in Scotland (notwithstanding the personal contract of sale) *remains the undivested owner of the goods, whether the price be paid or not, provided the goods be not delivered; and the property of the goods cannot pass without delivery, actual or constructive;* the necessary consequence is that the seller can never be asked to part with the goods until the price be paid. Nay, he is entitled to *retain them against the buyer and his assignees till every debt due and payable to him by the buyer is paid or satisfied.* The seller's right of retention, thus being grounded on an undivested right of property, cannot possibly be of the nature of a lien, for one can have a lien only over the property of another. In England, on the other hand, the property in the goods passes to the buyer by the personal contract of sale, and the seller's rights thereafter, in relation to the undelivered subject of sale (whatever else they may be), cannot be the rights of an undivested owner. English jurists are not agreed as to the true foundation in principle of the seller's lien. I shall only say that, if it be not an equitable remedy like stoppage *in transitu*, it is certainly not the

(*f*) Fréméry, Etudes du Droit Commercial, p. 5.

(*g*) 40 Jurist, 77; 6 Court Sess. Cas. (3d Ser.), at p. 140. See, also, Bell's Principles, §§ 86, 1300, ed. 1872; Brown on Sale, p. 3, ed. 1821.

assertion of a legal right of ownership like the right of *retention* in Scotland" (*h*).

In Couston *v.* Chapman (*i*) will be found an exposition of the difference between the law of England and that of Scotland in a sale by sample.

(*h*) The difference between the English and the Scotch law is also stated by Lord Blackburn in M'Bain *v.* Wallace, 6 App. Cas. at p. 608; and in Seath *v.* Moore, 11 App. Cas. at p. 371. The Mercantile Law Amendment Act (Scotland), 19 & 20 Vict. c. 60, s. 1, provides that, "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as being the property of the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser." The effect of this is, according to Lord Blackburn, to give the purchaser, in cases where the sale has proceeded so far that he has the right to enforce delivery, substantially the same rights as those possessed by a purchaser in England to whom the property has actually passed. See, however, Wyper *v.* Harveys, 23 Court Sess. Cas. (2d Ser.) 606; 33 Jur. 298, where the effect of this and the two succeeding sections of the act was much discussed. The principle of the common law, that the undelivered goods still remain the property of the seller, is untouched by the statute; and its practical consequences, among others the sellers' right to retain the goods as a security for the balance due to them by the buyer on general account, except in so far as they are expressly modified by the positive enactment (section 2), remain unimpaired. Per Inglis, Lord Justice Clerk, at pp. 611, 612.

(*i*) L. R. 2 Sc. App. 250.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

MISTAKE, AND FAILURE OF CONSIDERATION.

	Sect.
Common mistake	415
No avoidance when *restitutio in integrum* impossible	415
Even where mistake was caused by fraud	415
Observations on Boulton *v.* Jones	416
Mistake of one party not communicated to the other	416
Party estopped from disputing the intention manifested by him	417
Mistake of one party known to the other	418
Mistake must be of fact, not law	419
Line not drawn so sharply in equity	419 a
Innocent misrepresentation of fact	420
Innocent misrepresentation of law	422
Failure of consideration where vendor fails to complete contract	423
Failure where title warranted by vendor fails	423
Failure even without warranty of title	423
Failure in sale of forged securities or shares	
in a projected company	424
or invalid or unstamped bill	424
Consideration does not fail where buyer gets what he intended to buy, though worthless	425
Partial failure of consideration	426
Where contract entire, buyer may reject the whole	426
But not if he has accepted part	426
When thing sold is not severable	427

§ 414. It has already been shown that a party who has given an apparent assent to a contract of sale may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject-matter of the sale, the price, and in some instances the identity of the other contracting party (*a*). The contract in such case has never come into existence for want of a valid assent. We enter now on the consideration of cases where the contract has been carried into effect under a continuance of mistake, and when the party who contracted through error is no longer passive, declining to execute, but active, seeking to set it aside.

[By sect. 34, sub-s. 3 of the Judicature Act, 1873, the rectification, setting aside, and cancellation of deeds or other written instruments are assigned to the Chancery Division of the High Court. But when such relief is claimed *by way of defence* to an action brought in one of the Common Law Divisions, the courts of those divisions have jurisdiction to give effect to the equity at least for the purpose, and to

(*a*) *Ante*, § 50 *et seq.*

the extent of determining the action (*b*), and the fact alone that a counter-claim in an action seeks for rectification of a deed and specific performance of an agreement is not a sufficient ground for having the action transferred to the Chancery Division (*c*). It has not been determined whether the Common Law Divisions have power on such a counter-claim to grant substantive relief.]

The mistake alleged as a reason for avoiding a contract may be that of both parties, or of one alone; it may be a mistake of law or of fact; and when the mistake is that of one party alone, that fact may be known or unknown to the other contracting party.

§ 415. When there has been a common mistake as to some essential fact forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable. If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of the other side, a restoration to the condition in which he was before the contract was made. If that be not possible, the deceived party must be content with a compensation in damages. And this rule is applicable to cases even where the mistake of the complaining party was caused by the fraud of the other (*d*).

In Strickland *v.* Turner (*e*), the sale was of an annuity, dependent on a life that had ceased without the knowledge of either party, and the purchaser paid his money. Held, that he could recover it back as money had and received.

In Cox *v.* Prentice (*f*), the plaintiff bought a bar of silver, and by agreement it was sent to an expert to be assayed, and, on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver was much less than was stated in the report. Held to be a common mistake, and that the plaintiff, on offer to return the bar, could recover the price paid in *assumpsit*, Lord Ellenborough saying, it was just as if an article is sold by weight, and there is an accidental misreckoning of the weight.

§ 416. The case of Boulton *v.* Jones (*g*) was a very singular case

(*b*) Mostyn *v.* West Mostyn Coal Company, 1 C. P. D. 145.

(*c*) Storey *v.* Waddle, 4 Q. B. D. 289, C. A.; but see Holloway *v.* York, 2 Ex. D. 333, C. A.

(*d*) Hunt *v.* Silk, 5 East, 449; Blackburn *v.* Smith, 2 Ex. 783; Sully *v.* Frean, 10 Ex. 535; Clarke *v.* Dickson, E. B. & E. 148; 27 L. J. Q. B. 223; Savage *v.* Canning, 16 W. R. 133; 1 Ir. R. C. L. 434. And see next chapter.

(*e*) 7 Ex. 208. See a similar case in equity, Cochrane *v.* Willis, 1 Ch. 58.

(*f*) 3 M. & S. 344.

(*g*) 2 H. & N. 564; 27 L. J. Ex. 117, followed in the American case of the Boston Ice Company *v.* Potter, 123 Mass. 28. See a criticism on the remarks in the text in Pol-

of mutual mistake, and is well worth consideration. The facts have already been stated at length (*ante*, § 59), and were substantially these: One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop and business to the plaintiff Boulton. On the same day, Jones, ignorant of this sale, sent a written order for goods to the shop, addressed to Brocklehurst, and Boulton supplied them. Jones consumed the goods, still ignorant that they were supplied by Boulton, and, when payment was asked for, declined, on the ground that he had a set-off against Brocklehurst, with whom *alone* he had assented to deal. The action was for goods sold, and the court held that there was no contract by Jones with the plaintiff, and that, inasmuch as he had a set-off against Brocklehurst, the mistake as to the person was sufficient to entitle him to refuse payment. So far the case was in accordance with the rule laid down by Gibbs, C. J., in Mitchell *v.* Lapage (*h*) (not cited in Boulton *v.* Jones), and the plaintiff could not be permitted to recover. But on the principles governing contracts in general, it is submitted that the plaintiff was not wholly without remedy. For aught that appears in the report, there was a clear case of mutual mistake. The plaintiff, who had just bought out the shop and business of Brocklehurst, did nothing wrong, nothing out of the usual course of trade, in supplying goods on a written order sent by a customer to a shop, addressed to the man whose business he had just bought, and in ignorance of the fact that it could be at all material to the buyer whether the goods were supplied by himself or by his predecessor in business. Plaintiff's mistake was his ignorance that the defendant wished to buy *quà* creditor of Brocklehurst, so as to pay for the goods by a set-off. Defendant's mistake was in consuming the goods of the plaintiff in the belief that they were the goods of Brocklehurst. It can hardly be doubted that, if the goods had not been consumed before the discovery of the mistake, the defendant would have been bound on demand to return the goods if he did not choose to pay for them. The very basis of the decision was, that there had been *no contract* between the parties; and if so, on no conceivable ground could the defendant have kept without payment another man's goods sent to his house by mistake. The consumption of the goods prevented the possibility of a simple avoidance of the contract on the ground of mutual mistake. That mistake was in relation to the *mode of payment*. The vendor thought he was to be paid in money; the buyer intended to pay in his claim against Brocklehurst. The real question under the circum-

lock on Contracts, Appendix E., p. 457 (2d ed.). The note is omitted in the subsequent editions; see, however, note at p. 421 of the 4th edition. [Compare Roehm *v.* Horst, 91 Fed. R. 345. — B.]

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

stances, then, was this: Is the buyer to pay as *he* intended, or as the *vendor* intended? for both had intended that the property in the goods should pass, at the price fixed in the invoice. Now, in determining this, which was the real dispute, a controlling circumstance is that the buyer was wholly blameless, whereas the seller had been guilty of some slight negligence. If the seller had sent an invoice or bill of parcels with the goods, showing that *he* was the vendor, the buyer would have been at once informed of the mistake, and might have rejected the goods; but the vendor delayed sending his invoice till the goods were consumed. The true result, therefore, of the whole transaction, it is submitted, is in principle this, that the buyer was bound to pay for the goods in the manner in which he had assented to pay, and the vendor was bound to accept payment in that mode. The buyer was therefore responsible, not at law (for courts of law have no means nor machinery for reforming contracts nor rendering conditional judgments), but in equity, either to make an equitable assignment to the vendor of his claim against Brocklehurst for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against Brocklehurst. He would have no right to retain the whole of his claim against Brocklehurst while refusing to pay for the goods (*i*). The case is manifestly quite distinct from that of a mutual mistake, where a party has consumed what he did not intend to buy. If A. sends a case of wine to B., intending to sell it, but fails to communicate his intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price, either in law or equity, if he be blameless for the mistake.

§ 417. Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A. and B. contract for the sale of the cargo per ship Peerless, and there be two ships of that name, and A. mean one ship and B. intend the other ship, there is no contract (*j*). But if there be but one ship Peerless, and A. sell the cargo of that ship to B., the latter would not be permitted to excuse himself on the ground that he had in his mind the ship Peeress, and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication; and if A.'s proposal were unmistakable, as if it were made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel.

(*i*) See, for illustration of equitable principles in such cases, Harris *v.* Pepperell, 5 Eq. 1.

(*j*) Raffles *v.* Wichelhaus, 2 H. & C. 906; 33 L. J. Ex. 160.

For the rule of law is general that, whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention (*k*).

§ 418. When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud, which is the subject of the next chapter. In the case just supposed of a ship Peerless and a ship Peeress, there can be little doubt that, if the vendor *knew* that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for, by the rule of law just stated, the vendor would not be in a position to show that he had been *induced* to act by a manifestation of the buyer's intention different from his real intention. And if he not only knew the buyer's mistake, but caused it, his conduct would be fraudulent. But, as a general rule in sales, the vendor and purchaser deal at arm's length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. So that, even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract made under the supposed error or mistake. The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other. This topic is more fully considered in the next chapter, on Fraud.

§ 419. The mistake which will justify a party in seeking to avoid his contract must be one of fact, not of law. The universal rule is, *Ignorantia juris neminem excusat.* The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note (*l*). But in Wake *v.* Harrop (*m*) it was held, both in the

(*k*) Per Lord Wensleydale [then Parke, B.] in Freeman *v.* Cooke, 2 Ex. 654; Doe *v.* Oliver, and cases collected in notes to it, 2 Sm. L. C. 803, ed. 1887; Cornish *v.* Abington, 4 H. & N. 549; 28 L. J. Ex. 262; Alexander *v.* Worman, 6 H. & N. 100; 30 L. J. Ex. 198; Van Toll *v.* South Eastern Railway Company, 12 C. B. N. S. 75; 31 L. J. C. P. 241; In re Bahia and San Francisco Railway Company, L. R. 3 Q. B. 584; Carr *v.* London and North Western Railway Company, L. R. 10 C. P. 307, per Brett, J., at p. 316; [Coates *v.* Buck, 93 Wis. 128. — B.]

(*l*) Bilbie *v.* Lumley, 2 East, 469; Stevens *v.* Lynch, 12 East, 38; East India Company *v.* Tritton, 3 B. & C. 280; Milnes *v.* Duncan, 6 B. & C. 671; Stewart *v.* Stewart, 6 Cl. & F. 966; Teede *v.* Johnson, 11 Ex. 840; Platt *v.* Bromage, 24 L. J. Ex. 63.

(*m*) 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

Exchequer of Pleas and in the Exchequer Chamber, that where a party had specially stipulated that he was acting only as agent for another, and had signed as such agent for his absent principal named in the signature, he was at liberty to show, by way of equitable defence, that the agreement, which had been drawn up in such terms as to make him personally liable at law, was so written by mistake, that it did not express the real contract, and that he was not liable as principal. Some of the judges thought the plea a good defence, even at law, but this point, not being raised, was not decided.

In Cooper *v.* Phibbs (*m*), Lord Westbury gave the following very lucid statement of the true meaning of the maxim just quoted: "It is said *ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may also be the result of matter of law: but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties: the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it; the mistake is discovered, and the agreement cannot stand." The case was that of a party, the real owner of a property, agreeing, in ignorance of his right, to take a lease of it from the supposed owners, who were equally ignorant that they had no title to it.

§ 419 a. [And in Earl Beauchamp *v.* Winn (*n*), Lord Chelmsford said: "With regard to the objection that the mistake (if any) was one of law, and that the rule, *Ignorantia juris neminem excusat*, applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake."

In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as by the courts of common law, and there are cases in which equity grants relief against mistakes of law, the ground for the relief being that, in the particular facts of the case, it is inequitable that the one party should profit by the mistake of the other (*o*).

(*m*) L. R. 2 H. L. 149, at p. 170; and see Jones *v.* Clifford, 3 Ch. D. 779.

(*n*) L. R. 6 H. L. at p. 234.

(*o*) Per Turner, L. J., in Stone *v.* Godfrey,

And now it would seem that under the Judicature Act, 1873, sect. 25, sub-s. 11, the rule adopted by courts of equity will prevail.]

§ 420. An innocent misrepresentation of fact or law may give rise to a contract, and thus involve the question, whether the party deceived by such innocent misrepresentation is entitled on that ground to avoid the contract.

The law as to misrepresentation of fact was thus stated by Blackburn, J., in delivering the judgment of the court in Kennedy *v.* The Panama Mail Company (*p*): "There is a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show *that there is a complete difference in substance* between what was supposed to be and what was taken, *so as to constitute a failure of consideration.* For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an *honest misrepresentation* as to its soundness, *though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error*, yet the purchaser *must pay the whole price*, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract. Street *v.* Blay" (*q*). The learned judge then quotes the authorities from the Civil Law to the same effect, and concludes the passage by saying: "And as we apprehend, the principle of our law is the same as that of the Civil Law; and the difficulty in every case is, to determine whether the mistake or misapprehension is *as to the substance of the whole consideration,*

5 D. M. & G. at p. 90; per James, L. J., in Ex parte James, 9 Ch. at p. 614; per Mellish, L. J., in Rogers *v.* Ingham, 3 Ch. D., C. A. at p. 357; *per cur.* in Daniell *v.* Sinclair, 6 App. Cas. at p. 190.

(*p*) L. R. 2 Q. B. 580, at p. 587. It is doubtful how far this statement of the law is correct at the present day, having regard to recent decisions since the Judicature Acts. It appears clear that the right to rescind a contract will be governed by equitable principles, and in equity, as we shall see hereafter, *post*, § 461 a, to obtain rescission of a contract, where *restitutio in integrum* was possible, it was only necessary to prove that it had been entered into upon the faith of a material representation which was false in fact. The inquiry is an interesting one. Suppose the case of the sale of a horse upon a representation which the jury found was made honestly, and upon reasonable grounds, but which turns out to have been in fact false, would the buyer, supposing *restitutio in integrum* to be possible, be entitled to return the horse?

(*q*) 2 B. & Ad. 456.

going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

§ 421. In Torrance *v.* Bolton (*r*), it was held that where a bidder at an auction was misled, by the particulars advertised, as to the property exposed for sale, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe that he was buying the absolute reversion of the freehold, and not an equity of redemption. No fraud was shown, but the court said that the description in the particulars was "improper, insufficient, and not very fair" (*s*).

This subject is further treated in the Chapter on Warranty, Book IV. Part II. Ch. 1.[1]

§ 422. As to mistake or failure of consideration in a contract which was induced by an innocent misrepresentation of law, it was carefully considered by the Common Pleas in the two cases of Southall *v.* Rigg and Forman *v.* Wright (*t*), and held to form a valid ground for avoiding a contract.

It is to be observed, however, that in both those cases the mistake went, in the above-quoted language of Mr. Justice Blackburn, "to the substance of the whole consideration," and it is apprehended that the right of rescinding a contract, on the ground of mistake of law induced by innocent misrepresentations, is subject to the same qualification and limitation as where there is a mistake of fact induced by the same cause, as explained in Kennedy *v.* The Panama Mail Co., *supra.*

In Stevens *v.* Lynch (*u*), the drawer of a bill of exchange, knowing that time had been given to the acceptor without his, the drawer's assent, but ignorant that in law he was thereby discharged, promised to pay the bill, and he was held bound. This case was cited in Forman *v.* Wright, but Williams, J., simply said (*x*), "That is a very different case;" the difference being apparently this, that, in the case of Forman *v.* Wright, the defendant had never owed the money at all, so that his error went "to the substance of the *whole* consideration," whereas, in Stevens *v.* Lynch, the defendant had been indebted to the plaintiff for a good consideration, and, although the law discharges a surety where time is given to the principl debtor without the surety's assent, yet this is done on the ground that the condition of the surety

(*r*) 14 Eq. 124; 8 Ch. 118.
(*s*) Per James, L. R. 8 Ch. at p. 123.
(*t*) Both reported in 11 C. B. 481; 20 L. J. C. P. 145. See, also, Rushdall *v.* Ford, 2 Eq. 750.
(*u*) 12 East, 38.
(*x*) 20 L. J. C. P. at p. 149.

[1] [§§ 610–673 a.]

is generally thereby altered; and *non constat* that, in Stevens *v.* Lynch, the defendant's condition was really altered. Certainly the *whole* consideration of his promise to pay was not the mistake of law, inasmuch as the promise was manifestly based in part on the original consideration received when the bill was drawn.

In the case of Beattie *v.* Lord Ebury (*y*), there is an elaborate discussion of the law on this subject in its application to the case of an agent honestly representing himself to have an authority which he does not possess; and Mellish, L. J., in delivering the judgment of the court, expressed a very strong opinion that, if in such a case the written power was shown by the agent, he would not be responsible for the innocent misrepresentation of its legal effect.

§ 423. As early as in 1797, it was held by the King's Bench to be settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration, and recover in an action for money had and received, if the vendor failed to comply with his entire contract (*z*). A buyer may recover, on the same ground, the price paid to the seller who has warranted title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to deliver them up to the true owner (*a*). And, even without such warranty, it has been said to be the undoubted right of a buyer to recover back his money paid on the ordinary purchase of a chattel, where he does not get that for which he paid (*b*); but this subject of failure of title is more elaborately treated *post*, Book IV. Part II. Ch. 1, Sec. 2, on Implied Warranty of Title.[1] And the same right exists in favor of the buyer where he has paid money for forged scrip in a railway (*c*); or for forged bills or notes (*d*); or for an article different from that which was described in the sale, as is shown *post*, in Book IV. Part I. on Conditions (*e*).[2]

§ 424. Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed (*f*). So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration (*g*); or for an

(*y*) 7 Ch. 777, at p. 800; S. C. L. R. 7 H. L. 102.

(*z*) Giles *v.* Edwards, 7 T. R. 181.

(*a*) Eichholz *v.* Bannister, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

(*b*) *Per cur.* in Chapman *v.* Speller, 14 Q. B. 621, and 19 L. J. Q. B. 239, 241.

(*c*) Westropp *v.* Solomon, 8 C. B. 345.

(*d*) Jones *v.* Ryde, 5 Taunt. 488; Gurney *v.* Womersley, 4 E. & B. 133; 24 L. J. Q. B. 46; Woodland *v.* Fear, 7 E. & B. 519; 26 L. J. Q. B. 202.

(*e*) See notes to Chandelor *v.* Lopus, 1 Sm. L. C. 320 (ed. 1888).

(*f*) Kempson *v.* Saunders, 4 Bing. 5.

(*g*) Burchfield *v.* Moore, 3 E. & B. 683; 23 L. J. Q. B. 261.

[1] [§§ 627–643.]

[2] [§§ 560–609.]

unstamped bill of exchange which purports to be a foreign bill, and turns out to be worthless because really a domestic bill, invalid without a stamp (*h*), he may rescind the contract for failure of consideration.

§ 425. But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out worthless. Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority: upon proof offered that the scrip was the only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, held, that the buyer had got what he really intended to buy, and could not rescind the contract on the ground of a failure of consideration (*i*).

[And so where a person bought the exclusive right of using a patent in a foreign country, being aware at the time of the purchase that no exclusive right to use the process there could be obtained, but desiring an ostensible grant of the exclusive right, with the object of floating a company: it was held that, having obtained what he desired and intended to buy, he could not recover the purchase-money on the ground that the consideration had failed (*k*).]

§ 426. Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, as in Giles *v.* Edwards (*l*), and the buyer is not willing to accept a partial performance, he may reject the performance *in toto* and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some other form of action. Thus, in Harnor *v.* Groves (*m*), a purchaser of fifteen sacks of flour having, after its delivery to him, used half a sack, and then two sacks more, was held not entitled to rescind the contract, on the ground of a failure of consideration, and to return the remainder, although he had made complaint of the quality, as not equal to that bargained for, as soon as he had tried the first half sack. So, if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by

(*h*) Gompertz *v.* Bartlett, 2 E. & B. 849; 23 L. J. Q. B. 65.

(*i*) Lamert *v.* Heath, 15 M. & W. 487. See, also, Lawes *v.* Purser, 6 E. & B. 930; 26 L. J. Q. B. 25.

(*k*) Begbie *v.* Phosphate Sewage Company, L. R. 10 Q. B. 491; affirmed, 1 Q. B. D. 679, C. A.

(*l*) 7 T. R. 181; *ante*, § 423. See Whincup *v.* Hughes, L. R. 6 C. P. 78.

(*m*) 15 C. B. 667; 24 L. J. C. P. 53.

the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration for part of the price paid; not, as in the case of the flour, a *partial* failure of the whole. This was held in Devaux *v.* Conolly (*n*), where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons and the other of 150 tons, and the parcels turned out to be only 24 tons and 132¾ tons respectively.

§ 427. On the other hand, if the thing sold is such in its nature as not to be severable, and the buyer has enjoyed any part of the consideration for which the price was paid, he is no longer at liberty to rescind the contract. Thus, in Taylor *v.* Hare (*o*), where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that he could not maintain an action for rescission of the contract and return of the price, on the ground of failure of consideration; and this case was followed by the King's Bench half a century later in Lawes *v.* Purser (*p*), where the facts as pleaded were almost identical with those in Taylor *v.* Hare.

In Chanter *v.* Leese (*q*), the Exchequer Chamber, in the case of a sale of six patents for one consideration, five of which were valid and one void, held that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore, that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely;* and it follows that no action can be maintained for the money." The court further stated that, even if the five patents had been enjoyed, they were of opinion that no action could be maintained *on the agreement*, though possibly a remedy might exist in some other form of action.

AMERICAN NOTE.

§§ 414–427.

MISTAKE, AND FAILURE OF CONSIDERATION. 1. It seems that the same mistake which excuses a party from performance of his executory contract will enable him to rescind it after execution, if he then first discovers the mistake, and can and does place the other party in *statu quo*. If he has paid for an article under a material mistake of fact, and restores or offers to restore it, he may recover back what he has paid. And the rule is

(*n*) 8 C. B. 640.
(*o*) 1 B. & P. N. R. 260.
(*p*) 6 E. & B. 930; 26 L. J. Q. B. 25.
(*q*) 5 M. & W. 698.

positive that, if the article is or may be of any value to the opposite party, it must be returned, before the amount paid can be recovered back, the same as in cases of fraud or warranty. Kimball *v.* Cunningham, 4 Mass. 502, a leading case; Conner *v.* Henderson, 15 Ib. 319; Moyer *v.* Shoemaker, 5 Barb. 319; Coolidge *v.* Brigham, 1 Met. 547; Babcock *v.* Case, 61 Pa. St. 427; Thayer *v.* Turner, 8 Met. 550, a marked case; Bishop *v.* Stewart, 13 Nev. 41; Bassett *v.* Brown, 105 Mass. 551; Herman *v.* Haffenegger, 54 Cal. 161; Peters *v.* Gooch, 4 Blackf. 515; Vance *v.* Schroyer, 79 Ind. 380; Cook *v.* Gilman, 34 N. H. 560, and cases cited; Dill *v.* O'Ferrell, 45 Ind. 268; Tisdale *v.* Buckmore, 33 Me. 461; Haase *v.* Mitchell, 58 Ind. 213; Burton *v.* Stewart, 3 Wend. 236; Fay *v.* Oliver, 20 Vt. 118; Hammond *v.* Buckmaster, 22 Ib. 375; Potter *v.* Titcomb, 22 Me. 300. But such return is not necessary where the thing bought is clearly of "no value" to the vendor. Brewster *v.* Burnett, 125 Mass. 68, a purchase of *counterfeit* bonds of the United States, an important case; Kent *v.* Bornstein, 12 Allen, 342; Perley *v.* Balch, 23 Pick. 283; Mahone *v.* Reeves, 11 Ala. 345; Sanford *v.* Dodd, 2 Day, 437; Smith *v.* Smith, 30 Vt. 139; Dill *v.* O'Ferrell, 45 Ind. 268. Or where it is absolutely impracticable to return it, as where the party had consumed the article in testing it, as allowed to do by the contract. Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

2. **Failure of Consideration.** A sale of *what does not exist*, either in law or fact, is no consideration for a promise to pay for it. Meyer *v.* Richards, 163 U. S. 385; Thomas *v.* Knowles, 128 Mass. 22; Thrall *v.* Newell, 19 Vt. 208; Wood *v.* Sheldon, 42 N. J. L. 421; Merriam *v.* Wolcott, 3 Allen, 258; Lobdell *v.* Baker, 1 Met. 193; Terry *v.* Bissell, 26 Conn. 23; Aldrich *v.* Jackson, 5 R. I. 218; Dumont *v.* Williamson, 18 Ohio St. 515. This applies to the sale of a patent which is *entirely* void, or not "useful." Dickinson *v.* Hall, 14 Pick. 217; Harlow *v.* Putman, 124 Mass. 556, and cases cited; Shepherd *v.* Jenkins, 73 Mo. 510; Lester *v.* Palmer, 4 Allen, 145. While, if the patent be valid, *i. e.* "new and useful," but merely not adapted to the purpose designed, it is not a failure of consideration, in the legal sense of that word, and the bargain is binding, in the absence of fraud or warranty. Green *v.* Stuart, 7 Baxt. 418; Cowan *v.* Dodd, 3 Coldw. 278; Nash *v.* Lull, 102 Mass. 60, citing many authorities; Palmer's Appeal, 96 Pa. St. 106; Hunter *v.* McLaughlin, 43 Ind. 38. Ordinarily the parties contract for the transfer of the monopoly secured by the letters patent, not for the letters irrespective of their validity. The evidence should be very clear that the latter was the intention of the parties before the contract of sale will be so construed. Herzog *v.* Heyman, 151 N. Y. 587; Gayler *v.* Wilder, 10 How. 493. So in the sales of other property, if the buyer gets the exact thing he ordered and bought, its worthlessness is of itself no failure of consideration. Bryant *v.* Pember, 45 Vt. 487. If the article sold is taken from the vendee by the creditors of the vendor, because of fraud, the note given for the price is no longer binding, on account of the failure of consideration. Bailey *v.* Foster, 9 Pick. 141; Dyer *v.* Homer, 22 Ib. 253. So if retaken by the vendor himself, under some reserved right to do so. Minneapolis Harvester Works *v.* Hally, 27 Minn. 495; Howe Machine Co. *v.* Willie, 85 Ill. 333.

In an *entire* sale, a failure of consideration as to part only, the rest being received and enjoyed, does not authorize a partial rescission, and a recovery back of what has been paid. Miner *v.* Bradley, 22 Pick. 457; Clark *v.* Baker,

5 Met. 452; Morse *v.* Brackett, 98 Mass. 205, 104 Ib. 494; Mansfield *v.* Triggs, 113 Ib. 350. Though the vendee might not be bound to accept a part only. Smith *v.* Lewis, 40 Ind. 98; Bryant *v.* Thesing, 46 Neb. 244. But the purchase of several different articles at the same time with a fixed price for each does not necessarily constitute one entire sale, and a right of rescission may exist as to each article. Young, etc. Man. Co. *v.* Wakefield, 121 Mass. 91; Rubin *v.* Sturtevant, 80 Fed. R. 930, a sale of 173 fur capes at a separate price for each. See Morgan *v.* McKee, 77 Pa. St. 228; Norris *v.* Harris, 15 Cal. 226; Costigan *v.* Hawkins, 22 Wis. 74; Gault *v.* Brown, 48 N. H. 183; Jenness *v.* Wendell, 51 Ib. 66; Raphael *v.* Reinstein, 154 Mass. 180; Holmes *v.* Gregg, 66 N. H. 621; Ming *v.* Corbin, 142 N. Y. 334; McGrath *v.* Cannon, 55 Minn. 457; Potsdamer *v.* Kruse, 57 Minn. 193. In Herzog *v.* Purdy, 119 Cal. 99, there was a sale of hides, calfskins, pelts, and tallow at a fixed price per pound for each. The buyer refused to take the hides, and the seller thereupon sold and delivered all the articles to a third party. The original buyer was allowed to maintain a suit for the non-delivery of the other articles without the hides.

CHAPTER II.

FRAUD.

SECTION I. — IN GENERAL.

Sect.

Fraud renders contract voidable . . 428
Definitions of fraud 428
No fraud unless party deceived . . 429
Nor unless contract is induced thereby . 429
Nor without dishonest intention . . 429
Qualification of this statement, having regard to the nature of the relief claimed 429
Fraud without damage gives no right of action 429
Mistaken belief as to facts caused actively or passively 430
Silence may be equivalent to active misrepresentation 430
Caveat emptor is the general rule . . 430
Buyer can exact warranty, if unwilling to deal on these terms 430
Action of deceit, being founded on *tort*, may exist in favor of third persons, not parties to the sale 431
Limits of liability 431
Quære, whether action of negligence arising out of the contract at suit of third person not party to contract will lie 431
Submitted that in the absence of fraud it will not 431
Law in America 431
Third persons cannot sue *ex contractu* . 432
To entitle any one of the public to bring action in *tort* for deceit where fraudulent representations are published, he must establish a direct connection between himself and the person publishing them 432
An American case on this point . . 432

SECTION II. — ON THE VENDOR.

Effect of fraud on vendo in passing title 433
Depends on vendor's intention to transfer possession and ownership, or possession only 433
Sale obtained by fraud on vendor not *void*, but *voidable* 433
Bona fide third person protected in rights acquired before avoidance of sale 433

Sect.

Not protected where vendor transferred possession only 433
Exception to protection of innocent third person, where frandulent vendee is prosecuted to conviction . . . 434
Earlier cases as to passing property reviewed 434
Doubt suggested as to Duff *v.* Budd and Stephenson *v.* Hart 437
Remarks on Ferguson *v.* Carrington . 439
Intention not to pay for the goods . . 440
Remarks on Parker *v.* Patrick . . 440
Rules which govern the vendor's right of election 442
No judgment necessary to give effect to election 443
General principles laid down in Pease *v.* Gloahec 443
Preventing other persons bidding at auction sale 444
Inducing sale by false representations of solvency 445
False representations by third persons must be proven by writing . . 446
Representation by partner of credit of his firm 446
False representation by buyer to get goods cheaper 447
In equity, purchaser not bound to inform vendor of latent advantages of things sold 448
But purchaser must not mislead vendor 448
At common law — Vernon *v.* Keys . 449
Jones *v.* Franklin — questioned, not reconcilable with Vernon *v.* Keys . 450
American decisions 451

SECTION III. — FRAUD ON THE BUYER.

Buyer defrauded may avoid sale before or after delivery 452
Rules as to buyer's election 452
What elements of fraud required to enable buyer to rescind sale, or to maintain action of deceit . . . 454
1. Action of deceit 454
Review of the cases 454
Motive unimportant 454
Conflict of opinion between the Queen's Bench and Exchequer 456

Sect.
Queen's Bench finally overruled in Exchequer Chamber in Evans *v.* Collins and Ormrod *v.* Huth 459
Subsequent cases 460, 461
Qualification of rule — reckless statements 461
Essential elements of action of deceit . 461 a
2. Recission of contract . . . . 461 a
Differences between the principles of common law and equity . . . 461 a
Grounds of doctrine in equity . . 461 a
Equitable principles now applicable to action for rescission of contract . . 461 a
Second point in Cornfoot *v.* Fowke questioned 462
Liability of principal for false statement innocently made by agent, when principal knew the true state of facts . 462
Fraud of agents . . . . 462 a, 463
Conflicting decisions of House of Lords and Exchequer Chamber . . . 464
Barwick *v.* English Joint Stock Bank in Exchequer Chamber . . . 465
Principal answerable for agent's fraud committed in course of master's business and for his benefit . . . 465
Western Bank of Scotland *v.* Addie in House of Lords 466
Distinction between action against the principal in *tort* for deceit, and action on the contract 466
Principles deduced from the cases as to the effect on principal of fraud in agent 467
Rights of buyer in such cases at law . 467
Further remedy in equity . . . 467
Third principle reconsidered . . . 467 a
Action of deceit against a company by a shareholder in it not maintainable . 467 a
Can such action be maintained against a company by a person not a member? . . . . . 467 a
Shareholders only remedy is rescission of the contract . . . . . 467 a
Principal not liable when agent makes representation for his own benefit . 467 a
Effect of later decisions . . . 467 a
False representation when equivalent to warranty gives right to buyer against innocent vendor . . . . . 467 b
Feret *v.* Hill, converse of Cornfoot *v.* Fowke — lessor defrauded by lessee . 468
Shareholders defrauded by prospectus . 469
Devices held frauds on buyers . . 470
Puffing at auctions 470

Sect.
Auctioneer personally responsible . 471
Auctioneer, when he sells "without reserve," binds himself to the highest *bona fide* bidder 472
Distinction between law and equity as to puffing 474
Act 30 & 31 Victoria, c. 48 . . . 474
Law in America 475
Other frauds on buyer 476
Vessel sold "with all faults" . . 477
Concealing a defect where buyer fails to inspect 478
Pictures sold as if by great artists . 479
Damage to goods not declared, where usage requires it 480
Fraud by collusion between vendor and buyer against third person: vendor cannot recover against buyer . . 482
Case decided in America of knowledge by vendor of concealed defect . . 482

SECTION IV. — FRAUD ON CREDITORS. — STATUTE OF ELIZABETH. — BILLS OF SALE. — FRAUDULENT PREFERENCE.

Statute of Elizabeth 483
Semble protects future creditors . . 483
Twyne's case 484
Conveyance fraudulent or not, question of fact for jury 485
Cases reviewed 485
Notoriety of sale rebuts presumption of fraud 487
No general rule — each case decided on its own circumstances 487
Mere intention to defeat creditor's execution no fraud 488
Confession of judgment not a fraudulent preference 488
Law as to bills of sale 488
Object of legislation 488
Old law — Contract not voidable between the parties 488
Voidable, not void, as to creditors . 488
Title of *bona fide* third persons protected 488
New law. — Contract absolutely void in certain cases 488
Sale which disturbs equality among creditors 488
Return of goods to unpaid vendor . . 488
Early decisions overruled . . . 488
Now only permissible to rescind where property has not completely passed . 488
Or possession not taken 488
Decisions in America 489

SECTION I. — IN GENERAL.

§ 428. Fraud renders all contracts voidable *ab initio* both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract,

and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent.

Although fraud has been said to be "every kind of artifice employed by one person for the purpose of deceiving another," courts and lawgivers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.

The Roman jurisconsults attempted definitions, two of which are here given: "Dolum malum SERVIUS quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud, simulatur, et aliud agitur. LABEO autem, posse et sine simulatione id agi ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena: Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est" (*a*).

The Civil Code of France, without giving a definition, provides, in Art. 1116: "Fraud is a ground for avoiding a contract when the devices (les manœuvres) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

§ 429. However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said at common law to have been defrauded. In the first place it is essential that the means used should be successful in *deceiving*. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi.* If a contract is made under such circumstances, the inducement or motive for making it is *ex concessis*, not the false or fraudulent representations, which are not believed, but some other independent motive. [And even if the one party is unaware of the truth, yet if the artifice adopted by the other has not induced him to enter into the contract, that is to say, if the fraud is not *fraus dans locum contractui*, he will not be entitled to relief.]

Next, it is now well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud*. Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no ground for avoiding it *as obtained by fraud*, if the party making the representa-

(*a*) Dig. l. iv. t. 3, l. 1, § 2.

tion *honestly and on reasonable grounds* believed it to be true; although other remedies are sometimes available to the deceived party, *ante*, § 419 *et seq.*, *post*, Warranty, §§ 610–673 a.

[When we come to consider hereafter the distinction between the remedies available to the party who has been deceived by a false representation, and the essential elements of an action of deceit, and of a claim for rescission of the contract, it will be seen that the foregoing statement now requires to be qualified. If the deceived party prefers a claim for damages in an action of deceit, it rests with him to show not only that the representation made was false in fact, but also fraudulent in intent, or at any rate made recklessly or without reasonable grounds for believing it to be true; if, on the other hand, he claims rescission of the contract, it is sufficient for him to prove that the representation was a material one inducing the contract, and was false in fact (*a*).]

Lastly, there must be damage to the party deceived, even when there is a knowingly false representation, before a right of action can arise. "Fraud without damage, or damage without fraud, gives no cause of action," was the maxim laid down by Croke, J. (*b*), and quoted with approval by Buller, J., in the great leading case of Pasley *v.* Freeman (*c*), to which more particular attention will presently be drawn.

The whole doctrine on the subject was very much discussed in the House of Lords, in the celebrated case of Attwood *v.* Small (*d*); and in Lord Brougham's opinion the principles unanimously conceded to be true by their Lordships are carefully laid down (*e*).

§ 430. The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception (*f*).

[There are, however, cases in which a non-disclosure of a material fact may be equivalent to active misrepresentation, for the withholding of that which is not stated may make that which is stated absolutely

(*a*) See the cases cited in note (*y*), § 461 a, and per Jessel, M. R., in Redgrave *v.* Hurd, 20 Ch. D. at p. 12.

(*b*) 3 Bulst. 95.

(*c*) 3 T. R. 51; 2 Sm. L. C. p. 74 (ed. 1887).

(*d*) 6 Cl. & Fin. 232. The opinions delivered by some of the law lords in this case are considered and explained by Jessel, M. R., in Redgrave *v.* Hurd, 20 Ch. D. at pp. 14–17.

(*e*) 6 Cl. & Fin. pp. 443–447. See, also, per Lord Wensleydale, in Smith *v.* Kay, 7 H. L. C. at p. 774.

(*f*) Smith *v.* Hughes, L. R. 6 Q. B. 597; and see an interesting case before the Supreme Court of the United States, Laidlaw *v.* Organ, 2 Wheat. 178.

false (*g*). Or, again, it may be that, from the nature of the transaction, the fact not disclosed is such that it is impliedly represented not to exist (*h*).

In general, where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are *Caveat emptor* and *Simplex commendatio non obligat.* The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary fault in order to get a good bargain; and the vendor is equally at liberty to praise his merchandise in order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects. If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the vendor a warranty of any matters, the risk of which he is unwilling to take on himself. But the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself.

§ 431. The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided, for convenience, into three parts: 1st, fraud on the vendor; 2d, on the purchaser; 3d, on creditors [including the law on Bills of Sale (*i*).] It will be useful first to point out that a man may make himself liable in an *action founded on tort* for fraud or deceit or [perhaps] negligence (*k*) in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence.

[But the liability is limited in this way, that, to enable a third person, a stranger to the contract, to maintain an action of deceit, it must appear that he has been injured by acting upon the defendant's false representation, made with the *direct* intent that he should act upon it in the manner which has occasioned the injury or loss (*l*).

(*g*) Per Lord Cairns in Peek *v.* Gurney, L. R. 6 H. L. at p. 403. And this statement of the law has been approved and explained by James, L. J., in Arkwright *v.* Newbold, 17 Ch. D. (C. A.) at p. 317, and by Jessel, M. R., in Smith *v.* Chadwick 20 Ch. D. (C. A.) at p. 58.

(*h*) Per Blackburn, J., in Lee *v.* Jones, 17 C. B. N. S. at p. 506, and *per eundem* in Phillips *v.* Foxall, L. R. 7 Q. B. at p. 679.

(*i*) The subject of bills of sale has been omitted in this edition for the reasons given *post.*

(*k*) George *v.* Skivington, L. R. 5 Ex. 1; but see Heaven *v.* Pender, 11 Q. B. D. 503, C. A.; reversing the decision of the Divisional Court, 9 Q. B. D. 302.

(*l*) Langridge *v.* Levy, 2 M. & W. 519; in error, 4 M. & W. 337, as explained and commented upon by Wood, V. C., in Barry *v.* Croskey, 2 J. & H. 17, 18, 23; and by Lord Cairns in Peek *v.* Gurney, L. R. 6 H.

The principles, by which the limits of responsibility for a false representation are to be ascertained, were laid down by Lord Hatherley (then Wood, V. C.) in Barry *v.* Croskey (*m*), as follows: —

"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified.

"Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, *provided it appear that such false representation was made with the intent that it should be acted upon* by such third person in the manner that occasions the injury or loss.

"Thirdly. The injury must be the *immediate* and not the remote consequence of the representation thus made. To render a man responsible for the consequence of a false representation made by him to another, upon which a third person acts, and, so acting, is injured and damnified, it must appear that such false representation was made with the *direct* intent that it should be acted upon by such third person in the manner that occasions the injury or loss." [1]]

The case usually cited as the leading one on this point is Langridge *v.* Levy (*n*), where the defendant offered for sale a gun, on which he put a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty, George IV.: cost 60 guineas; only 25 guineas." The gun was sold to the plaintiff's father, who told the defendant that it was wanted "for the use of himself and his sons. It was warranted to be a good, safe, and secure gun, and to have been made by Nock." The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock's make. Parke, B., delivered the judgment of the court, after time taken for consideration. He said: "If the instrument in question . . . had been delivered by the defendant *to the plaintiff* for the purpose of being used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that

L. 377, 412. See, also, Hosegood *v.* Bull, 36 L. T. N. S. 617.

(*m*) 2 J. & H. at p. 22, adopted by Lord Cairns in Peek *v.* Gurney, L. R. 6 H. L. pp. 412, 413.

(*n*) 2 M. & W. 519; in error, 4 M. & W. 337. This case is treated by Brett, M. R., in Heaven *v.* Pender, 11 Q. B. D. at p. 511, as "a wholly unsatisfactory case to act on as an authority."

[1] [This rule was applied in Andrews *v.* Mockford [1896], 1 Q. B. 372. — B.]

of Pasley *v.* Freeman (*o*), which principle is, that *a mere naked falsehood is not enough to give a right of action;* but if it be a *falsehood told with the intention that it should be acted upon by the party injured, and that act must produce damage to him;* if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the *intermediate person to be communicated* to the plaintiff, and the plaintiff had acted upon it, — there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit."

In the Exchequer Chamber the judgment was affirmed on the ground "that as there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured."

In George *v.* Skivington (*p*), the plaintiffs, Joseph George and Emma, his wife, claimed damages of the defendant, a chemist, for selling to the husband a bottle of a chemical compound to be used by the wife, *as the defendant then knew*, for washing her hair. The declaration charged negligence and unskilfulness of the defendant in making the said compound, and alleged personal injury to the wife resulting from the use of it. Demurrer and joinder. Held, a good cause of action on the authority of Langridge *v.* Levy.

[Since the last edition of this work, the point now under consideration was fully considered by the Court of Appeal in Heaven *v.* Pender (*q*) in 1883. The action did not arise out of a contract of sale, and was decided by the majority of the court upon the distinct ground of a breach of duty arising from the situation in which the parties stood to one another; but the case is important on account of the attempt made by Lord Esher to lay down a broad rule which would cover the case of liability for negligence arising out of a contract of sale, a rule to which Cotton and Bowen, L. JJ., declined to assent.

The action was brought by a ship-painter against a dockowner, who, under a contract with a shipowner, supplied staging to a ship lying in the dock. The plaintiff's employer had contracted with the shipowner to paint the outside of the ship. The plaintiff was injured through a defect in the staging which the defendant supplied. There was evidence of negligence on the defendant's part. The Court of Appeal, reversing a decision of the Queen's Bench Division (*r*), held

(*o*) 3 T. R. 51, and 2 Sm. L. C. 74 (ed. 1887) where all the authorities are collected.
(*p*) L. R. 5 Ex. 1; 39 L. J. Ex. 8.
(*q*) 11 Q. B. D. 503.
(*r*) 9 Q. B. D. 302.

that the defendant was liable. They unanimously considered that the defendant was under an obligation to the plaintiff to take reasonable care, inasmuch as he had come to the dock upon business in which the defendant was interested, and must be considered as having been invited by him to use the dock and the appliances provided therein, and that the defendant was liable for neglect of such duty; but Lord Esher went further, and enunciated a rule (*s*) to cover all the recognized cases of liability. This rule he proceeded to apply, as follows, to the case of a vendor supplying goods to one person, for the purpose of being used by another person with whom there is no contract (*t*): "Whenever one person supplies goods or machinery or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action for negligence." In the light of this rule he criticises Langridge *v.* Levy (*u*), which he pronounces to be a wholly unsatisfactory case to act upon as an authority. On the other hand, he approves of George *v.* Skivington (*v*) as a case in which the rule he lays down was adopted, the ground of that decision being that the article supplied was, *to the knowledge of the defendant*, supplied for the *immediate* use of the plaintiff's wife. Cotton and Bowen, L. JJ., declined to recognize the existence of the rule laid down by the Master of the Rolls. They cited Langridge *v.* Levy as a case in which the supposed rule would have been applicable, and yet, both in that and in several other cases, it was always stated by the judges that fraud was the ground of the decision. No doubt the language used by Cleasby, B., in George *v.* Skivington, appears to afford some support to the rule, but the Lords Justices point out that he decided the case on the ground that the negligence of the defendant was equivalent, *for the purposes of that action*, to fraud. So that George *v.* Skivington was brought within the principle of Langridge *v.* Levy. At the same time, they express no disapproval of the course taken by the judges of the Queen's Bench Division in declining to follow George *v.* Skivington. It is conceived, therefore, that, *in the absence of fraud*, a third person, who is no party to the contract, can only maintain an action

(*s*) At p. 509.
(*t*) At p. 510.
(*u*) 4 M. & W. 337.
(*v*) L. R. 5 Ex. 1.

for negligence in those cases in which he would have a right of action, independently of contract.

In Longmeid *v.* Holliday (*x*), Parke, B., instances the case of an apothecary who administers improper medicines to his patient, or of a surgeon who unskilfully treats him, and who are liable to the patient even where the father or friend of the patient may have been the contracting party. He draws a distinction between an act of negligence imminently dangerous to the lives of others and one that is not so, and says that responsibility may attach in the former case, "when any one delivers to another without notice an instrument in its nature dangerous under particular circumstances, as a loaded gun which he himself has loaded, and that other person to whom it is delivered is injured thereby; or, if he places it in a situation easily accessible to a third person who sustains damage from it."

In America, the liability in such cases is stated to arise from the duty which the law imposes upon every one to avoid acts in their nature dangerous to the lives of others (*v*).]

(*x*) 20 L. J. Ex. 430; 6 Ex. 761.

(*v*) Thomas *v.* Winchester, 6 N. Y. 397 (1852), where the defendant was a dealer in drugs, who had carelessly labelled a deadly poison as a harmless medicine, and so sent it into the market, and was held liable to all persons injured by using it. Brett, M. R., in Heaven *v.* Pender, 11 Q. B. D. at p. 514, says, as to this case: "I doubt whether it does not go too far." [And see State, Hartlove *v.* Fox, 79 Md. 514, citing many cases. It was there held that a vendor who, by false representations, sold to an innocent purchaser a horse known by the vendor to be afflicted with the glanders, was liable in damages for the sickness and death of the buyer's employee who had charge of the horse. And see Lewis *v.* Terry, 111 Cal. 39. There the complaint alleged that a bed containing a latent defect, which rendered the bed dangerous to all who might use it, was sold to A. by the defendant, who knew of the defect and the danger, and who did not warn the buyer, but assured him that the bed was safe for use; that the plaintiff hired of the buyer a room containing the bed, and was injured by the latent defect, a portion of the bed having fallen upon him and broken his arm. A demurrer, which had been sustained in the lower court, was overruled. The court held that the plaintiff's right of action did not rest upon any privity of contract, but upon the proposition that one who delivers to another an article which the former knows to be dangerous, without notice of its nature and qualities, is liable for any injury likely to result, and which does in fact result therefrom to any person not in fault. Longmeid *v.* Holliday, and Winterbottom *v.* Wright, are cited. Compare White *v.* Oakes, 88 Me. 367, also a sale of a bedstead. There the vendor, a dealer, did not know of the defect, and the sale was made after full opportunity for the buyer to inspect. The plaintiff, who was the buyer's wife, was held not entitled to recover. In Schubert *v.* Clark Co. 49 Minn. 331, plaintiff was employed by P. The employer purchased a step-ladder for the plaintiff's use, ordering the same from a retail dealer, and directing that it be sent to the place where plaintiff was at work. The retail dealer did not have in stock a ladder of the size required, and in turn ordered a ladder of the defendant corporation, a manufacturer, giving directions to deliver it as above stated. The defendants delivered a ladder manufactured by them from unsound lumber, and defective by reason thereof. The defects were so concealed by oil, paint, and varnish, that neither the retail dealer, nor the employer, nor the plaintiff could discover the defects, nor was any one of the three aware of them. Nor did it appear that defendant was aware of them. The ladder broke while plaintiff was using it and exercising due care. He was injured by breaking his arm. Held, that the defendant's neglect to disclose the existence of the defect was a breach of duty for which it was liable. The court says that the authorities cited

§ 432. But no action growing *out of the contract* can be maintained in such cases, except by parties or proxies (*x*).

The distinction was clearly illustrated in a case in the Queen's Bench, where there were two counts in the declaration: the first, on contract, which was held bad; the second, in *tort*, which was sustained. The fraud charged was issuing to the public a false and fraudulent prospectus for a company, whereby the plaintiff was deceived into taking shares (*y*).

This principle, that the liability in an action of *tort* may be enforced against a party guilty of fraudulent representations publicly given out and intended to deceive the public at large, by any person who has suffered damages in consequence of them, has since been frequently enforced by the courts (*z*).

[But it is now conclusively settled, overruling some of the earlier decisions, that this liability can only be enforced in cases where the person, who complains that he has been injured by acting in reliance upon the false representations, can establish in the communication of the false representations some direct connection between himself and the person publishing them.

This was decided by the House of Lords in Peek *v.* Gurney (*a*), where it was held that the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, and concealing facts material to be known, does not, *as of course*, follow the shares on their transfer from an allottee to one who afterwards purchases them from him upon the market, the ground of the decision being that, as the object of the prospectus was to induce persons to become original shareholders in the company, its office was fulfilled when the shares were once allotted (*b*).]

The following action was held to be maintainable in the State of

justify the conclusion reached, although there are others tending to an opposite result. Cited in accord: Thomas *v.* Winchester, 6 N. Y. 397; Norton *v.* Sewall, 106 Mass. 143, is like it; Elkins *v.* McKean, 79 Pa. St. 493, 502; Wellington *v.* Oil Co. 104 Mass. 64; Bisbop *v.* Weber, 139 Mass. 411; Heaven *v.* Pender, 11 Q. B. D. 503; George *v.* Skivington, L. R. 5 Ex. 1; Moon *v.* Northern Pacific Ry. Co. 46 Minn. 106.]

(*x*) Winterbottom *v.* Wright, 10 M. & W. 109; Longmeid *v.* Holliday, 6 Ex. 761; Howard *v.* Shepherd, 9 C. B. 297; 19 L. J. C. P. 249; Playford *v.* United Kingdom Telegraph Company, L. R. 4 Q. B. 706.

(*y*) Gerhard *v.* Bates, 2 E. & B. 476; 22 L. J. Q. B. 364.

(*z*) Scott *v.* Dixon, reported in note, 29 L. J. Ex. 62; decided by the Q. B. in 1859; Bagshaw *v.* Seymour, in note, 29 L. J. Ex. 62, and 18 C. B. 903; Bedford *v.* Bagshaw, 4 H. & N. 538; 29 L. J. Ex. 59. But these two last cases are overruled by Peek *v.* Gurney, *infra*. See, also, New Brunswick Railway Company *v.* Conybeare, 9 H. L. C. 712; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. Ap. 145; Henderson *v.* Lacon, 5 Eq. 249 (V. C. W.).

(*a*) L. R. 6 H. L. 377.

(*b*) In this case, Seymour *v.* Bagshaw, and Bedford *v.* Bagshaw (*ubi supra*), were expressly overruled; and Scott *v.* Dixon (*ubi supra*), Gerhard *v.* Bates, Langridge *v.* Levy, and Barry *v.* Croskey, were explained and adopted by Lord Chelmsford, at p. 396, and by Lord Cairns at p. 412.

New York. A. had agreed to bring certain animals for sale and delivery to B., at a specified place. A third person, desirous of making a sale to B., falsely represented to him that A. had abandoned all intention of fulfilling his contract, thereby inducing B. to supply himself by buying from that third person. A. was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A., it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A. and B. was one that could not have been enforced (*c*).

We will now revert to the subject of fraud as specially applied in cases of sale.

SECTION II. — FRAUD ON THE VENDOR.

§ 433. It was not until 1866 that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The cases of Stevenson *v.* Newnham (*d*) in the Exchequer Chamber, and of Pease *v.* Gloahec (*e*), in the Privy Council, confirming the principles asserted by the Exchequer in Kingsford *v.* Merry (*f*), taken in connection with the decision of the House of Lords in Oakes *v.* Turquand (*g*), leave no room for further question. By the rules established in these cases, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*, induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case.

In the former case the contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. But in the mean time and until he elects, *if his vendee transfer the goods in whole or in part*,

(*c*) Benton *v.* Pratt, 2 Wend. 385. See notice of this case by Colt, J., in Randall *v.* Hazleton, 12 Allen (94 Mass.), 412, at p. 417. Benton *v.* Pratt was followed in Rice *v.* Manley, 66 N. Y. 82.

(*d*) 13 C. B. 285, and 22 L. J. C. P. 110.

(*e*) L. R. 1 P. C. 219; 3 Moo. P. C. N. S. 556.

(*f*) 11 Ex. 577, and 25 L. J. Ex. 166.

(*g*) L. R. 2 H. L. 325. See, also, In re Reese River Mining Company, 2 Ch. 604, and L. R. 4 H. L. 64; and Clough *v.* London & North Western Railway Company, L. R. 7 Ex. 26.

whether the transfer be of a general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person (*h*). If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such *possession* by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner.

§ 434. To these common-law rules there is one statutory exception. Where the fraud by which the goods are obtained from the vendor is such as to enable him to succeed in prosecuting to conviction the fraudulent buyer as having been guilty of obtaining the goods by false and fraudulent pretences, he will be entitled, after such conviction, to recover his goods, even from a third person who is a *bona fide* purchaser from the party committing the fraud. The statute and the cases under it have already been reviewed, *ante*, Book I. Part I. Ch. 2, § 11 *et seq.* (*i*).

The early cases are not universally in accord with the principles above stated, and in more than one of them the property was held not to have passed, although it was very plainly the intention of the vendor to transfer the title as well as the possession of the goods.

In Martin *v.* Pewtress (*j*), decided in 1769; Read *v.* Hutchinson (*k*), in 1813; Gladstone *v.* Hadwen (*l*), in the same year; Noble *v.* Adams (*m*), in 1816; and the Earl of Bristol *v.* Wilsmore (*n*), in 1823, *dicta* are to be found, as to the effect of fraud in preventing the property from passing to the purchaser, which are quite in opposition to the later authorities, though in most if not all of these cases the decisions were quite correct.

The last-mentioned case was one in which a check had been given by the buyer on a bank in which he had no funds, and was decided on the authority of Read *v.* Hutchinson, Noble *v.* Adams, *supra;* and of Rex *v.* Jackson (*o*), in which a conviction for obtaining goods under false pretences (under the 30th Geo. II. ch. 24) was upheld on proof that the accused had obtained the goods by giving in payment a check on a banker with whom he had no cash, and which he knew would not be paid.

§ 435. Duff *v.* Budd (*p*) was an action by the vendor against a

(*h*) Attenborough *v.* London and St. Katherine's Dock Company, 3 C. P. D. 450, C. A.; Babcock *v.* Lawson, 4 Q. B. D. 394; 5 Q. B. D. 284, C. A.

(*i*) The property in the goods revests in the original owner upon the conviction without any order for restitution. Bentley *v.* Vilmont, 12 App. C. 471, 477.

(*j*) 4 Burr. 2478.

(*k*) 3 Camp. 352.

(*l*) 1 M. & S. 517.

(*m*) 7 Taunt. 59.

(*n*) 1 B. & C. 514; and see Loughnan *v.* Barry, 6 Ir. R. C. L. 457.

(*o*) 3 Camp. 370.

(*p*) 3 B. & B. 177.

common carrier to whom he had delivered goods, to be forwarded to Mr. James Parker, High Street, Oxford. The goods had been ordered by an unknown person, and there was no *James* Parker in that street, but there was a *William* Parker, a solvent tradesman, who refused the parcel. Soon after, a person came to the defendant's office and claimed the parcel as his own, and on paying the carriage it was delivered to him. He had on previous occasions received goods from the same office, directed to Mr. Parker, Oxford, to be left till called for. One of the grounds of defence taken by Pell, Sergeant, was that the property in the goods had passed out of the plaintiff to the consignee. Dallas, C. J., and Burrough, J., did not notice the point, but Park, J., said that the ground taken did "not apply to a case bottomed in fraud in which there had been no sale;" and Richardson, J., said "there was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."

§ 436. A few years later, a case almost identical in its features came before the same court. Stephenson *v.* Hart (*q*) was, again, an action by a vendor against a common carrier. A purchaser bought goods from the plaintiff, and ordered them to be sent to J. West, 27 Great Winchester Street, London, and gave a spurious bill of exchange in payment. The vendor delivered the goods to the carrier to be forwarded to the above address. No person was found at the address, but a few days after the carrier received a letter signed "J. West," stating that a box had been addressed to him by mistake to Great Winchester Street, and asking that it should be forwarded to him at the Pea Hen, a public house at St. Alban's. The box was so forwarded, and the person who had sent for it said it was for him, and stated its contents before opening it, thus showing that *the box had reached the person to whom it was addressed.* One ground of defence, again, was that upon the delivery to the carriers the property ceased to be in the vendor, and was vested in the consignee. Park, J., held that the property had not passed, because West had never meant to pay for the goods, and the true question was, "not what the *seller* meant to do, but what are the intentions of the *customer.* Did *he* mean to buy?" Burrough, J., said that the property had never passed out of the consignor, giving no reason except that the transaction of West was a gross fraud; but Gaselee, J., doubted strongly whether trover could lie when the carrier had delivered the goods to the person to whom they had been really consigned by the vendor.

§ 437. It is submitted that both these cases against the carriers are very doubtful authorities under the modern doctrine, which clearly holds that the property does pass when the *vendor* intends it to pass,

(*q*) 4 Bing. 476.

however fraudulent the device of the buyer to induce that intention (*r*).

In Heugh *v.* The London and North Western Railway Company (*s*), where the same question was involved under very similar circumstances, it was held that it was a question of fact for the jury whether the carrier had acted with reasonable care and caution with respect to the goods after their refusal at the consignee's address, and the court refused to set aside a verdict for the defendant on that issue.

In M'Kean *v.* M'Ivor (*t*), the decision was also in favor of the carriers, and Bramwell, B., expressed concurrence in the opinion of Gaselee, J., who dissented in Stephenson *v.* Hart (*u*), *supra.*

§ 438. In Irving *v.* Motly (*x*), the facts were, that one Dunn and a firm of Wallington & Co. had been engaged in a series of transactions, in which Dunn, as agent, purchased for them goods on credit, and immediately resold them at a loss, the purpose being to raise money for the business of Wallington & Co. Dunn was also an agent for the defendant Motly, who was entirely innocent of any knowledge of, or participation in, the transactions of Wallington & Co. Under these circumstances, Dunn, in behalf of Wallington & Co., applied to the defendant for an advance, which the latter agreed to make if secured by a consignment of goods. Thereupon Dunn, as agent of Wallington & Co., bought a parcel of wool from the plaintiff on credit, and at once transferred it to Motly as security for the advance. Wallington & Co. became bankrupt a few days after this transaction, and the plaintiff brought trover against Motly for the wool. A verdict was given for the plaintiff, the jury finding that the transaction was fraudulent, and that Motly knew nothing of the fraud, but that Dunn was his agent as well as that of Wallington & Co. The court refused to set aside the verdict, but the judges were not in accord as to the grounds. Tindal, C. J., said: "The ground set up here is that there was an *acting and an appearance of purchase* given to the transfer of these goods, which in truth and justice it did not really possess. Whether Dunn, as the agent of Wallington & Co., went into the market and got these goods into his possession, under such representation as may amount to obtaining goods under false pretences, it is not necessary to say, but it comes very near the case: it is under circumstances that place him and Messrs. Wallington in the light of

(*r*) This expression of doubt is not withdrawn in the fourth edition of this treatise. It seems to be further justified by the three cases since decided in the Exchequer, in all of which the defence of the carriers was successful, though the only one in which the point here suggested was taken into consideration was Clough *v.* London and North Western Railway Company, L. R. 7 Ex. 26.

(*s*) L. R. 5 Ex. 51.

(*t*) L. R. 6 Ex. 36.

(*u*) 4 Bing. 476.

(*x*) 7 Bing. 543.

conspirators to obtain possession of the goods. . . . At all events, it was left to a jury of merchants, and though they have acquitted the defendants of fraud, yet they involved them in the legal consequences, as it was a fraud *committed by their agent with a view to benefit them.*" Park, J., agreed with the Chief Justice, but he expressed anxiety to explain Noble *v.* Adams (*y*), saying that the court did not hold, nor mean to hold in that case, that obtaining goods under false pretences was the *only* ground upon which the transaction could be held void. Gaselee, J., was careful to confine the doctrine of the case before the court to the special circumstances, saying that it was "maintainable against the defendants, because they had constituted Dunn their agent, for the purpose of securing themselves, by getting a consignment of wool made to them from Wallington & Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the defendants may have acted, they cannot take any benefit from the misconduct of that agent." Alderson, J., however, thought that the case was confused by treating it as one of principal and agent; that Dunn and Wallington were principals in a conspiracy to get the goods from the plaintiff, and therefore *no property passed out of Messrs. Irving.*

§ 439. In Ferguson *v.* Carrington (*z*), goods were sold to defendant on credit, whereupon he immediately resold them at lower prices, and the vendor brought *assumpsit* for the price before the maturity of the credit, on the ground that the defendant had manifestly purchased with the preconceived design of not paying for them. Lord Tenterden, C. J., nonsuited the plaintiff, on the ground that by bringing an action on the contract he affirmed it, and was therefore bound to wait till the end of the credit, but that, "if the defendant had obtained the goods with the *preconceived design of not paying for them, no property passed to him* by the contract of sale, and it was competent to the plaintiff to bring trover, and treat the contract as a nullity, and the defendant, not as a purchaser of the goods, but as a person who had obtained tortious possession of them." Park, J., concurred in this view.

It should not be overlooked that in this, as in several of the preceding cases, the action was between the true owner and the fraudulent buyer; that the language of the judges was intended to apply only to the case before them, and was not therefore so guarded, in relation to the effect of the contract in transferring the property, as it would doubtless have been if the rights of innocent third parties had been in question.

§ 440. In Load *v.* Green (*a*), the buyer purchased the goods on the 1st of July, they were delivered on the 4th, and a *fiat* in bankruptcy

(*y*) 7 Taunt. 59. (*z*) 9 B. & C. 59. (*a*) 15 M. & W. 216.

issued on the 8th. It was uncertain whether the act of bankruptcy had been committed prior to the purchase. The jury found that the buyer purchased with the fraudulent intention of not paying for the goods; and it was held that, even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt."

[In Ex parte Whittaker (*b*), the buyer had committed an act of bankruptcy on the 1st of December, and on the 3d a bankruptcy petition had been filed. On the 5th of December the buyer purchased wool at an auction, and the vendor, being unaware of his pecuniary circumstances, allowed him to remove it without paying the price. The buyer made no representation at the time as to payment. Held, on these facts, that it was not clear that the buyer purchased with the intention of not paying for the goods, and that the vendor therefore was not entitled to have the contract rescinded.]

In the early case of Parker *v.* Patrick (*c*), the King's Bench held, in 1793, that where goods had been obtained on false pretences, and *the guilty party had been convicted*, the title of the original owner could not prevail against the rights of a pawnbroker who had made *bona fide* advances on them to the fraudulent possessor. This case has been much questioned, but the only difficulty in it may be overcome by adopting the suggestion made by Parke, B., in Load *v.* Green, namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the judges made remarks on the case, in White *v.* Garden (*d*), and it was cited by the court as one of the acknowledged authorities on this subject in Stevenson *v.* Newnham (*e*).

§ 441. In Powell *v.* Hoyland (*f*), decided in 1851, Parke, B., expressed a strong impression that trespass would not lie for goods obtained by fraud, "because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

In White *v.* Garden (*g*), the innocent purchaser from a fraudulent vendee was protected against the vendor, and all the judges expressed approval of the opinion given by Parke, B., in Load *v.* Green.

In Stevenson *v.* Newnham (*h*), in 1853, Parke, B., again gave the unanimous opinion of the Exchequer Chamber, that the effect of fraud

(*b*) 10 Ch. 446.
(*c*) 5 T. R. 175.
(*d*) 20 L. J. C. P. 166, and 10 C. B. 919.
(*e*) 13 C. B. 285, and 22 L. J. C. P. 110; and see Moyce *v.* Newington, 4 Q. B. D. 35.
(*f*) 6 Ex. 67–72.
(*g*) 20 L. J. C. P. 166, and 10 C. B. 919.
(*h*) 13 C. B. 285, and 22 L. J. C. P. 110.

"is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind.* In the first instance, *the property passes* in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it though it is *voidable* between the original parties."

This decision was not impugned when the Exchequer Chamber, in Kingsford *v.* Merry (*i*), in 1856, held that the defendant, an innocent third person who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case the party obtaining the advance had procured the delivery of the goods to himself by falsely representing that a sale had been made to him by the owner's agents; the court saying on these facts that the parties "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." This decision reversed the judgment of the Exchequer of Pleas (*k*), but it was explained by Bramwell, B., in Higgins *v.* Burton, *infra*, and by Lord Chelmsford in Pease *v.* Gloahec, *infra*, that this was only by reason of a changed state of facts, and that the principles on which both courts proceeded were really the same.

§ 442. In Clough *v.* The London and North Western Railway Company (*l*), the Exchequer Chamber gave an important decision upon several questions involved in the subject now under examination. The decision was prepared by Blackburn, J., though delivered by Mellor, J. (*m*). The facts were, that the London Pianoforte Company sold certain goods to one Adams, on the 18th of May, 1866, for which he paid 68*l.* in cash, and gave his acceptance at four months for 135*l.* 8*s.*, the whole residue of the price. He directed the vendors to forward the goods by the defendants' railway to the address of the plaintiff at Liverpool, whom he represented to be his shipping agent. On the arrival of the goods in Liverpool the defendants could not find Clough at the address given by Adams, and in a letter to the vendors, the Pianoforte Company, the defendants stated this fact, and asked for instructions. Almost at the same time the vendors learned that Adams was a bankrupt, and at 9.30 A. M., on the 22d of May, they sent notice to the defendants *in London* to stop the goods *in transitu;* but before this notice reached *Liverpool*, the plaintiff had *there* demanded the goods, and the defendants had agreed to hold them as warehousmen for him, thus putting an end to the transitus. The

(*i*) 1 H. & N. 503; 26 L. J. Ex. 83.
(*k*) 11 Ex. 577; 25 L. J. Ex. 166.
(*l*) L. R. 7 Ex. 26.
(*m*) So stated to the author by Mellor, J., in the presence of Blackburn, J., on the argument of a cause in the Exchequer Chamber.

vendors nevertheless gave an indemnity to the defendants, and obtained delivery of the goods to themselves, so that they were the real defendants in the case. The plaintiff demanded the goods of the defendants, and, on hearing that they had been returned to the vendors, brought his action on the second of June, in three counts: 1, trover; 2, against them as warehousemen; 3, as carriers. Up to the date of the trial, the vendors were *treating the contract as subsisting*, and relying on the right to stop *in transitu;* but on the cross-examination of the plaintiff and Adams at the trial, the defendants elicited sufficient facts to show a strong case of concerted fraud between the two to get possession of the goods in order to sell them at auction, and retain the proceeds without paying for them. They were allowed to file a plea to that effect, and the jury found that the fraud was proved.

The Exchequer of Pleas decided in favor of the plaintiff, on the ground that the vendors had not elected to set aside the contract, nor offered to return the cash and acceptance, before delivering the plea of fraud at the trial after the cross-examination, and had up to that time treated the contract as subsisting; and further, on the ground that the rescission came too late after the plaintiff had acquired a vested cause of action against the defendants.

On these facts it was held, —

1st. That the property in the goods passed by the contract of sale; that the contract was not void, but only voidable, at the election of the defrauded vendor.

2d. That the defrauded vendor has the right to this election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts.

3d. That the vendor *may keep the question open* as long as he does nothing to affirm the contract; and that so long as he has made no election he retains the right to avoid it, subject to this, that if, while he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, he will lose his right to rescind.

4th. That the vendor's election was properly made by a plea claiming the goods on the ground that he had been induced to part with them by fraud, and there was no necessity for any antecedent declaration or act *in pais*.

5th. That the vendor was not bound in his plea to tender the return of the money and acceptance, because they had been received, not from the plaintiff, but from Adams, who was no party to the action.

And, finally, that on the whole case the defendants were entitled to the verdict (*n*).

(*n*) These principles were reaffirmed by the Exchequer Chamber in Morrison *v.* The

§ 443. It is not necessary that there should be a judgment of court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party (*nn*). Thus, in The Reese River Company *v.* Smith (*o*), the House of Lords held the defendant entitled to have his name removed from the list of contributory shareholders in the plaintiff's company, although his name was on the register when the company was ordered to be wound up; on the ground that he had, prior to the winding-up order, notified his rejection of the shares, and commenced proceedings to have his name removed. On this ground the case was distinguished from Oakes *v.* Turquand (*p*).

In Higgons *v.* Burton (*q*), a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs goods in the name and as being for the account of the customer, and sent them at once to defendant, an auctioneer, for sale. Held, that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences, that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer.

In Hardman *v.* Booth (*r*), the plaintiff went to the premises of Gandell & Co., a firm not previously known to him, but of high credit, to make sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell & Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he was selling to "Gandell & Co." The goods were pledged by Gandell & Todd with the defendant, an auctioneer, who made *bona fide* advances on them. The plaintiff's action was trover, and was maintained, all the judges holding that there had been no contract, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for the conversion.

[And in Lindsay *v.* Cundy (*s*), the same principle was applied. It appeared that a person named Alfred Blenkarn had hired a room

Universal Marine Insurance Co. L. R. 8 Ex. 197, reversing the judgment of the Court of Exchequer, Ibid. 40.

[(*nn*) Borgfeldt *v.* Wood, 92 Hun, 260. — B.]

(*o*) L. R. 4 H. L. 64; 2 Ch. 604.

(*p*) L. R. 2 H. L. 325.

(*q*) 26 L. J. Ex. 342. [And see Bush *v.* Fry, 15 Ont. Rep. 124.]

(*r*) 1 H. & C. 803; 32 L. J. Ex. 105; Hollins *v.* Fowler, L. R. 7 H. L. 757; Ex parte Barnett, 3 Ch. D. 123.

(*s*) 3 App. Cas. 459; *sub nom.* Cundy *v.* Lindsay, S. C. 2 Q. B. D. 96, C. A.; 1 Q. B. D. 348.

in a house looking into Wood Street, Cheapside, and from there had written to the plaintiffs, who were manufacturers, proposing to purchase goods of them. The letters were headed "37 Wood Street, Cheapside," and the signature, "Blenkarn & Co.," was written so as to resemble the name "Blenkiron & Co." There was a firm of good repute who carried on business at 123 Wood Street, under the style of "W. Blenkiron & Son." The plaintiffs, who were aware of the reputation of the firm of W. Blenkiron & Son, but did not know the number of their house of business, sent the goods addressed to "Messr. Blenkiron & Co., 37 Wood Street, Cheapside." Blenkarn sold some of the goods thus fraudulently obtained to the defendants, who were *bona fide* purchasers for value, and who resold them in the ordinary course of business. Blenkarn was afterwards convicted of the fraud. In an action for the conversion of the goods, it was held by the House of Lords, affirming the decision of the Court of Appeal, that as the plaintiffs had no knowledge of, and never intended to deal with, Blenkarn, no contract of sale had ever existed between them; that the only persons with whom they had intended to deal were the well-known firm of Blenkiron & Co.; that the property in the goods, therefore, remained in the plaintiffs, and the defendants were liable for their value.]

In 1866, Pease *v.* Gloahec (*t*), on appeal from the Admiralty Court, was twice argued by very able counsel. After advisement, the Privy Council, composed of Lord Chelmsford, Knight Bruce, and Turner, L. JJ., Sir J. T. Coleridge, and Sir E. V. Williams, delivered a unanimous decision.

The principle laid down in Kingsford *v.* Merry, as stated by the Court of Exchequer (and not affected by the reversal of their judgment in the Exchequer Chamber), was affirmed to be the true rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possessiou, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

[Babcock *v.* Lawson (*u*), where the plaintiffs were pledgees and not owners of the goods, illustrates the same principle. The plaintiffs had made advances to Denis Daly & Sons on the security of

(*t*) L. R. 1 P. C. 219; 3 Moo. P. C. N. S. 566. And see Oakes *v.* Turquand, L. R. 2 H. L. 325.

(*u*) 4 Q. B. D. 394; affirmed 5 Q. B. D 284, C. A.

certain flour, warehoused in the plaintiffs' name. The defendants subsequently made advances to Denis Daly & Sons on the security of a pledge of the same flour, in ignorance of the prior transaction with the plaintiffs, and Denis Daly & Sons, by a fraudulent representation that they had sold the flour to the defendants, obtained a delivery order for it, which they gave to the defendants. The defendants accordingly obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for conversion. Held that, assuming the plaintiffs, as pledgees, to have ever had a special property in the flour, they must be taken to have intended to revest the whole property in Denis Daly & Sons, in order that they might transfer it to the defendants as purchasers; and that, although the plaintiffs might have revoked the delivery order as being procured by fraud, so long as the flour remained in the hands of Denis Daly & Sons, yet, when the property in the flour had been transferred to the defendants for good consideration, the title of the latter was indefeasible. Cockburn, C. J., held the analogy between the case under consideration and one where a vendor is induced to part with the property by fraud to be complete; and the decision of the Queen's Bench Division was affirmed on appeal. And in this case, and in Moyce *v.* Newington (*x*), Cockburn, C. J., lays down in the broadest possible manner that the courts were prepared to hold that, when one of two innocent parties must suffer from the fraud of a third, the loss ought to fall on him who enabled such third person to commit the fraud, citing with approval the decision of the Supreme Court of the State of New York in Root *v.* French (*y*), where the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and based on the above-mentioned principle of equity.]

§ 444. It is a fraud on the vendor to prevent other persons from bidding at an auction of the goods sold; and where the buyer had, by an address to the company assembled at the auction, persuaded them that he had been wronged by the vendor, and that they ought not to bid against the buyer, the purchase by him was held to be fraudulent and void (*z*).

§ 445. Where the fraud on the vendor consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from that third person, the price may be recovered from the defendant as though he had bought

(*x*) 4 Q. B. D. 32. This case is overruled by the decision of the House of Lords in Vilmont *v.* Bentley, 12 App. Cas. 471. The *dictum*, however, of Cockburn, C. J., upon this point, remains unaffected.

(*y*) 13 Wendell, 570. And see the American decisions, cited *post*, § 451.

(*z*) Fuller *v.* Abrahams, 3 B. & B. 116.

directly in his own name; for his possession of the vendor's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence (*a*).

In Biddle *v.* Levy (*b*), the defendant told plaintiff that he was about to retire from business in favor of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiff, who sold to the son goods to the value of 800*l*. The representations were false and fraudulent, and Gibbs, C. J., held an action *for goods sold and delivered* to be maintainable against the father.

These two cases probably rest on the principle that the nominal purchasers were secret agents buying for the parties committing the fraud, who were really the undisclosed principals (*c*).

§ 446. Where, however, the fraud on the vendor is effected by means of assurances given by a third person of the buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by the 6th section of Lord Tenterden's Act (9 Geo. IV. c. 14), which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon (*d*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The construction of this section was much debated in the case of Lyde *v.* Barnard (*d*), in which the judges of the Exchequer were equally divided, but the case had no reference to a sale of goods. In Haslock *v.* Furgusson (*e*), the action was against the defendant for an alleged fraudulent declaration to the plaintiff that one Barnes was of fair character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The court held that parol evidence of the alleged representation was inadmissible, overruling a distinction which Sir John Campbell for the plaintiff attempted to support, "that the gist of the action was not the misrepresentation of character, but the wrongful acquisition of property by the defendant."

In Devaux *v.* Steinkeller (*f*), it was held that a representation

(*a*) Hill *v.* Perrott, 3 Taunt. 274.

(*b*) 1 Stark. 20.

(*c*) Thompson *v.* Davenport, 2 Sm. L. C. at p. 406, ed. 1887.

(*d*) This word "upon" is perhaps a mistake for "thereupon:" perhaps the words ought to be "money or goods upon credit." See remarks of the judges in Lyde *v.* Barnard, 1 M. & W. 101.

(*e*) 7 A. & E. 86.

(*f*) 6 Bing. N. C. 84.

made by a partner of the credit of his firm was a representation of the credit of "another person" within the meaning of this statute; and in Wade *v.* Tatton (*g*), in the Exchequer Chamber, that, where there were both verbal and written representations, an action will lie if the written representations were a material part of the inducement to give credit.

§ 447. The effect of concealment or false representations made by the buyer, with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the courts. Chancellor Kent carries the doctrine on the subject of fraud much further than could be shown to be maintainable by decided cases, and states it in broader terms than are deemed tenable by the later editors of his Commentaries (*h*). Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."

§ 448. The courts of equity even fall far short of this principle, and both Lord Thurlow and Lord Eldon held that a *purchaser* was not bound to acquaint the vendor with any latent advantage in the estate. In Fox *v.* Mackreth (*i*), Lord Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, of *which he knew the seller was ignorant*, and that a court of equity could not set aside the sale, though the estate was purchased for a price of which the mine formed no ingredient. Lord Eldon approved this ruling in Turner *v.* Harvey (*k*). But in the latter case Lord Eldon also held that, if the least word be dropped by the purchaser to *mislead* the vendor in such a case, the latter will be relieved; and his Lordship accordingly decided that the agreement for the sale in that case should be given up to be cancelled. The facts were, that the purchaser of a reversionary interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

§ 449. At common law, the only case decided in banco that has been found on this point is Vernon *v.* Keys (*l*), in which the declaration was in case, and a verdict was given for the plaintiff on the third

(*g*) 25 L. J. C. P. 240. See, also, Swann *v.* Phillips, 8 A. & E. 457; Turnley *v.* McGregor, 6 M. & S. 46; Pasley *v.* Freeman, 3 T. R. 51.

(*h*) 2 Kent, 483, 12th ed.

(*i*) 2 Bro. C. C. 400; 1 W. & T. Leading Cases in Equity, 141, ed. 1886. For the judgment of Lord Thurlow, see 2 Cox Eq. Cas. 320.

(*k*) Jacob, at p. 178.

(*l*) 12 East, 632, and in Ex. Ch. 4 Taunt. 488. [And see Byrd *v.* Rautman, 85 Md. 414. — B.] And see p. 470, *infra*.

count, which alleged that the plaintiff, being desirous of selling his interest in the business, stock in trade, etc., in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale, that the defendant was about to enter into partnership to carry on the business with other persons *whose names defendant refused to disclose*, and that *these persons* would not consent to give plaintiff a larger price than 4500*l.* for his share, while the truth was that these persons were willing that the defendant should give as much as 5291*l.* 8*s.* 6*d.* The judgment in favor of plaintiff was arrested, Lord Ellenborough giving the opinion of the court after advisement. His Lordship said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer, and that this could not maintain the verdict, unless it was shown "that in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A *seller* is unquestionably liable to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars which the *buyer has not equal means with himself of knowing*, or if he do so in such manner as to *induce the buyer to forbear making the inquiries* which, for his own security and advantage, he would otherwise have made. But is a *buyer* liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognized principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum*, by the bidder, in respect to which the bidder was under *no legal pledge or obligation to the seller* for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance, therefore, he can maintain no action."

When the case came before the Exchequer Chamber (*m*), Puller, in argument, insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*, and that there was no case in which it had been held that an action would not lie under such circumstances; but the court would hear no reply, and at once confirmed the judgment, Sir James Mansfield, C. J., simply saying: "The question is, whether the defendant is bound to disclose the highest price he

(*m*) 4 Taunt. 488.

chooses to give, or whether he be not at liberty to do that as a purchaser which every seller does in this town every day who tells every falsehood he can to induce a buyer to purchase."

§ 450. In Jones *v.* Franklin (*n*), *coram* Rolfe, B., at Nisi Prius, the action was *trover*, and the circumstances were, that the plaintiffs, assignees of a bankrupt, were owners of a policy for 999*l.* on the life of one George Laing, and early in 1840 had endeavored through their attorney to sell it for 40*l.*, but could find no purchaser. Defendant knew this fact. On the 15th of August Laing became suddenly very ill, and he died on the 20th. On the 18th defendant employed one Cook to buy the policy for the defendant, and to give as much as sixty guineas for it. The vendor asked Cook, when he applied to buy it, what he thought it would be worth, and Cook said about sixty guineas. Cook and the defendant both knew Laing was in imminent danger, but did not inform the vendor, who was ignorant of it, and sold the policy at that price, supposing Laing to be in good health. Rolfe, B., said: "There could be no doubt such conduct was grossly dishonorable. But he had no difficulty in going further than this, and telling the jury that, if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired."

It does not seem possible to reconcile this case with Vernon *v.* Keys. In both cases the purchasers made a false representation. But in Vernon *v.* Keys the falsehood was *volunteered*, and misrepresented a *fact;* whereas in Jones *v.* Franklin the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the vendor as to his *opinion*, and according to Lord Ellenborough the buyer was "under no legal duty or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for "the consequences of his own indiscretion in relying on it." There was, perhaps, enough in the case to bring it within the principle of *equity* laid down by Lord Eldon in Turner *v.* Harvey (*o*); but, dishonorable and unfair as was the conduct of the buyer, it would be difficult to show, on authority, that it was in law such a fraud as vitiated the sale.

§ 451. In America it has been held that, if a purchaser make false and fraudulent misrepresentations as to his own solvency and means of payment, and thereby induces the vendor to sell to him on credit, no right either of property or possession is acquired by the purchaser, and the vendor would be justified in retaking the property, provided he could do so without violence (*p*).

(*n*) 2 Moo. & R. 348.
(*o*) Jacob, 169.
(*p*) Hodgeden *v.* Hubbard, 18 Vermont, 504; Johnson *v.* Peck, 1 Wood. & Min. 334; Mason *v.* Crosby, 1 Wood. & Min. 342.

[And the Supreme Court of the United States has decided that a purchaser of goods who, without making any fraudulent representations as to his solvency, conceals from the vendor his insolvent condition [*and his intent not to pay*], and thereby induces him to sell the goods on credit, is guilty of such a fraud as entitles the vendor to disaffirm the contract and recover the goods, if in the mean time no innocent person has acquired an interest in them (*q*). It would seem, therefore, that, in America as in England, the contract is treated as voidable and not void. Some of the decisions, however, given in the States, proceed upon the principle that, where the buyer does not intend to pay for the goods, the contract is absolutely void (except by estoppel as against the buyer, if the vendor chooses to affirm it), because it is not the intention of both parties to be bound by it (*r*). In both countries, however, the rights of innocent purchasers from a fraudulent vendee are protected; and it seems to be of no practical importance whether the protection is granted on the ground that the original contract of sale is valid until disaffirmed, or whether this result follows from the equitable doctrine that, when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.]

SECTION III. — FRAUD ON THE BUYER.

§ 452. In every case where a buyer has been imposed on by the fraud of the vendor, he has a right to repudiate the contract, a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. The buyer under such circumstances may refuse to accept the goods, if he discover the fraud before delivery, or return them if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods in the same state in which he received them (*s*). And this ability to restore the thing purchased unchanged in condition is indispensable to the exercise of the right to rescind, so that, if the purchaser has innocently changed that condition while ignorant of the fraud, he cannot rescind (*t*).

But the contract is *only voidable, not void*, and if after discovery of the fraud he acquiesces in the sale by express words, or by any unequivocal act, such as treating the property as his own, his election

(*q*) Donaldson *v.* Farwell, 93 U. S. 631 (1876); cited *infra*, p. 471; see, also, Root *v.* French, 13 Wendell, 570.

(*r*) Per Doe, J., in Stewart *v.* Emerson, 52 New Hampshire, 301, at p. 318, where all the authorities, English and American, are discussed; and see the remarks of Cockburn, C. J., in Moyce *v.* Newington, 4 Q. B. D. 35.

(*s*) Clarke *v.* Dickson, E. B. & E. 148, and 27 L. J. Q. B. 223; Murray *v.* Mann, 2 Ex. 538; Street *v.* Blay, 2 B. & Ad. 456.

(*t*) Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145.

will be determined, and he cannot afterwards reject the property. Mere delay also may have the same effect, if, while deliberating, the position of the vendor has been altered (*u*); and the result will not be affected by the buyer's subsequent discovery of a new incident in the fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.

§ 453. These principles are well illustrated in the case of Campbell *v.* Fleming (*x*). The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. After the purchase he discovered the fraud, and that the whole scheme of the company was a deception. The action was brought to recover the purchase-money that he had paid. But it appeared that, subsequently to the discovery of the fraud, the plaintiff had treated the shares as his own by consolidating them with other property in the formation of a new company, in which he sold shares, and realized a considerable sum. The plaintiff then endeavored to get rid of the effect of the confirmation of the contract resulting from his dealing with the shares as his own, by showing that at a still later period he had discovered another fact, namely, that only 5000*l.* had been paid for the purchase of property by the mining company, although it was falsely represented to the plaintiff when he took the shares that the outlay had been 35,000*l.* The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the judges held the nonsuit right. Littledale, J., said: "After the plaintiff learned that an imposition had been practised on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained, *he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.*" Parke, J., said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; *and the fraud could do no more than entitle him to rescind.*" Patteson, J., concurred, and said: "Long afterwards he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and *it cannot revive the right of repudiation which has been once waived.*" Lord Denman, C. J., said: "There is no authority for saying that a party must know *all the incidents of a fraud before he deprives himself of right of rescinding*" (*y*).

§ 454. The rules of law defining the elements which are essential

(*u*) Clough *v.* London and North Western Railway Company, *ante*, § 442.

(*x*) 1 A. & E. 40.

(*y*) See, *ante*, as to election, and the case of Clough *v.* London and North Western Railway Company, L. R. 7 Ex. 26, there cited.

to constitute such fraud as will enable a purchaser to avoid a sale were long in doubt, and there was specially a marked conflict of opinion between the Court of Queen's Bench and the Exchequer, until the decisions of the Exchequer Chamber in Evans *v.* Collins (*z*) in 1844, and Ormrod *v.* Huth (*a*) in 1845, established the true principle to be that, a *representation false in fact* gives no right of action if *innocently made* by a party who believes the truth of what he asserts; and that, in order to constitute fraud, there must be a false representation *knowingly made, i. e. a concurrence of fraudulent intent and false representation. And a false representation is knowingly made, when a party for a fraudulent purpose states what he does not believe to be true, even though he may have no knowledge on the subject.* These decisions bring back the law almost exactly to the point at which it was left by the King's Bench in the great leading cases of Pasley *v.* Freeman (*b*), and Haycraft *v.* Creasy (*c*), decided in 1789 and 1801.

[In the foregoing passage, Mr. Benjamin does not perhaps sufficiently distinguish between a claim by the buyer to have the contract rescinded and a claim by him for damages in an action of deceit. The above rules, so far as they relate to an action of deceit, must be taken subject to the qualification hereinafter noticed (*d*) with regard to reckless statements. The right of the buyer to rescind the contract is considered *post.*]

The effect of innocent misrepresentation as causing Mistake or Failure of Consideration has been treated *ante.*

In Pasley *v.* Freeman (*b*), it was held that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. Pasley *v.* Freeman was an action brought against a party for damages for falsely representing a third person to be one whom the plaintiff could safely trust, the *defendant well knowing* that this was not true.

In Haycraft *v.* Creasy (*c*), it was held that an action of deceit would *not* lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if *the representations were made bona fide with a belief in their truth.*

After a series of intervening cases, that of Foster *v.* Charles (*e*) came twice before the Common Pleas in 1830 and 1831, and was

(*z*) 5 Q. B. 820.
(*a*) 14 M. & W. 651.
(*b*) 3 T. R. 51; 2 Sm. L. C. 66, 8th ed.
(*c*) 2 East, 92.
(*d*) *Post*, § 461.
(*e*) 6 Bing. 396, and 7 Bing. 105.

deliberately approved and followed by the Queen's Bench in Polhill *v.* Walter (*f*) in 1832. In was held in these cases unnecessary to prove "a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. It is enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is *calculated to induce another to act on the faith of it* in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a *fraud*."

[And upon the question of motive, the judgment in Polhill *v.* Walter is fully confirmed by the observations of Lord Cairns in Peek *v.* Gurney (*g*), who says: "In a *civil* proceeding of this kind, all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? and if there was, *however innocent the motive may have been*, your Lordships will be obliged to arrive at the consequences which properly would result from what was done."]

§ 455. While the authorities stood in this condition, the cases of Cornfoot *v.* Fowke (*h*) and Fuller *v.* Wilson (*i*) were decided, the former in the Exchequer, in 1840, and the latter in the Queen's Bench, in 1842, the judges in the latter case expressly declining to follow the ruling in the former, and adopting in preference the dissenting opinion of Lord Abinger.

Cornfoot *v.* Fowke (*k*) was a case in which the defendant refused to comply with an agreement to take a furnished house, on the ground that he had been defrauded by the plaintiff and others in collusion with him. The house had been represented to the defendant by plaintiff's agent as being entirely unobjectionable, whereas the adjoining house was a brothel and a nuisance, which was compelling people in the neighborhood to leave their houses. This fact was *known to the plaintiff*, but was *not known to his agent*, who made the representation, and the *plaintiff did not know* that the representation had been made. All the cases, from the leading one of Pasley *v.* Freeman (*l*), were cited in argument, and the majority of the court, Rolfe, Anderson, and Parke, BB., held the defence unavailing; while Lord Abinger, C. B., said that the opposite conclusion was so plain as not to admit a doubt in his mind, but for the dissent of his brethren.

Rolfe, B., held the question to be one as to the power of an agent "to affect his principal by a representation *collateral to the contract.*

(*f*) 3 B. & Ad. 122.
(*g*) L. R. 6 H. L. at p. 409, and see Leddell *v.* McDougal, 29 W. R. 403, C. A.; and Smith *v.* Chadwick, 9 App. Cas. 187, per Lord Blackburn, at p. 201.
(*h*) 6 M. & W. 358.
(*i*) 3 Q. B. 58.
(*k*) 6 M. & W. 358.
(*l*) 3 T. R. 51.

To do this, it is essential . . . *to bring home fraud to the principal*, and . . . all the facts are consistent with the hypothesis that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself."

Alderson, B., said: "Here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud. . . . It is said that the knowledge on the part of the principal is sufficient to establish the fraud. If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit; but this fact also fails. . . . I think it impossible to sustain a charge of fraud when neither principal nor agent has committed any, — the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bona fide*."

Parke B., pointed out that the representation was no part of the contract, which was in writing, and therefore it could not affect the rights of the parties, except on the ground that it was fraudulent. On the simple facts, each person was innocent, because the plaintiff made no false representation himself, and, although his agent did, the agent did it innocently, not knowing it to be false; and the proposition seemed untenable that, if each was innocent, the act of either or both could be a fraud. It was conceded that an innocent principal would be bound if his agent committed a fraud; but in the case presented, the agent acted without fraudulent intent. It was also conceded that, "if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and at the same time suspecting or believing that it would by reason of such ignorance be answered in the negative, the plaintiff would unquestionably be guilty of a fraud" (*m*). His Lordship deemed it immaterial whether the making of such representations as were made by the agent was within the scope of his authority or not, as they could not affect the contract unless *fraudulent*. Lord Abinger, C. B., gave an elaborate dissenting opinion, in which he held "that it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude; . . . the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said in the language of the law to be fraudulent, although the party mak-

(*m*) See Ludgater *v.* Love, 44 L. T. N. S. 694, C. A.

ing them suppose them to be correct;" that there was not a total absence of moral turpitude in the agent, even upon the presumption that he was wholly ignorant of the matter; that "nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation;" that it did not follow, because the plaintiff was not bound by the representation of the agent, even if made without authority, that "he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. *It is one thing to say* that he may avoid a contract if his agent without his authority has inserted a warranty in the contract, and *another to say that he may enforce a contract obtained by means of a false representation made by his agent*, because the agent had no authority." (See observations on this case, *post*, § 462.)

§ 456. In Fuller *v.* Wilson (*n*), which was an action on the case for a false representation, the Queen's Bench, through Lord Denman, C. J., declined to take any ground other than the broad proposition of Lord Abinger, which they adopted, "that whether there was a moral fraud or not, if *the purchaser was actually deceived in his bargain, the law will relieve him from it.* We think the principal and his agent are for this purpose completely identified, and that the question is not what was passing in the mind of either, but *whether the purchaser was in fact deceived by them or either of them.*"

The conflict of opinion cannot be more plainly stated. The Queen's Bench thought the sole test was whether the *purchaser was deceived by an untrue statement into making the bargain.* The Court of Exchequer thought it further necessary that the party making the untrue statement *should know it to be untrue.*

Fuller *v.* Wilson was reversed in error (*o*), solely on the ground that the facts of the case did not show any misrepresentation on the part of the vendor, but only the purchaser's own misapprehension; and Tindal, C. J., in delivering the opinion, stated that the court did "not enter into the question discussed in Cornfoot *v.* Fowke."

§ 457. In Moens *v.* Heyworth (*p*), in 1842, the question again came before the Exchequer of Pleas (the case of Fuller *v.* Wilson not being yet reported), and Lord Abinger renewed the expression of his dissent from Parke, B., and Alderson, B., repeating that "the fraud which vitiates a contract . . . does not in all cases necessarily imply moral turpitude." His Lordship instanced the sale of a public house, and an untrue statement by the seller that the receipts of the house were larger than was the fact, but the untrue statement might be made

(*n*) 3 Q. B. 58. (*o*) Wilson *v.* Fuller, 3 Q. B. 1009. (*p*) 10 M. & W. 147.

without dishonest intent, as if proper books had not been kept. In such case his Lordship insisted that the purchaser might maintain an action on the false representation, even though the vendor did not know that it was false when made. The other judges held the contrary, Parke, B., saying distinctly that in such cases "it is essential that there should be moral fraud."

§ 458. In the next year, 1843, Taylor *v.* Ashton (*q*) came before the same court, and the judgment of the Queen's Bench in Fuller *v.* Wilson was relied on by the plaintiff; but Parke, B., said when it was cited: "I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud, and Lord Denman seems to admit that to be so. If the party *bona fide believes* the representation he made to be true, though he does not *know* it, it is not actionable." The learned Baron afterwards delivered the judgment of the court, *holding* that "it was not necessary, in order to constitute fraud, to show that the defendants *knew* the fact to be untrue: it was enough that the fact was untrue *if they communicated that fact for a deceitful purpose ;* . . . if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

§ 459. In 1843 the Queen's Bench had before them the case of Evans *v.* Collins (*r*), which was an action by a sheriff to recover damages against an attorney for falsely representing a certain person to be the person against whom a *ca. sa.* had been sued out by the attorney, so that the sheriff had been induced to take the wrong person into custody, and had thereby incurred damage. The jury found that the defendant had probable reason for believing that the person pointed out to the sheriff was really the person against whom the *ca. sa.* was issued, so that there was clearly a total absence of moral turpitude. It had, however, been previously held, in Humphrys *v.* Pratt (*s*), in the House of Lords, that an execution creditor was bound to indemnify a sheriff who had seized goods pointed out by the creditor, and upon his requisition and false representation that they belonged to his debtor, although the counts in the declaration did not aver any knowledge or belief on the part of the execution creditor that his representation was false. On the authority chiefly of this decision in the House of Lords, Lord Denman, C. J., held the action in Evans *v.* Collins maintainable, but he added: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in mak-

(*q*) 11 M. & W. 401. (*r*) 5 Q. B. 804. (*s*) 5 Bligh N. S. 154.

ing any, which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation *that the defendant knew his representation to be false is therefore immaterial:* without it, the declaration discloses enough to maintain the action."

This case was reversed in the Exchequer Chamber (*t*), after time taken for consideration, by the unanimous judgment of Tindal, C. J., Coltman, Erskine, and Maule, JJ., and Parke, Alderson, Gurney, and Rolfe, BB. The court stated the question to be distinctly "whether a statement or representation which is *false in fact, but not known to be so by the party making it*, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action." The court held that, on the whole current of authority, "*fraud* must concur *with the false statement* in order to give a ground of action." The court explained the decision in Humphrys *v.* Pratt (*u*), in which no reasons were assigned for the judgment, as having proceeded on the ground that the execution creditor in that case had made the sheriff his agent, and was bound to indemnify him for the consequences of acts done under the principal's instructions.

§ 460. The next case was Ormrod *v.* Huth (*v*), in the Exchequer Chamber, in 1845, on error from the Exchequer of Pleas, so that the judges of the Queen's Bench must have taken part in the judgment. Tindal, C. J., laid down the rule, which he said was supported both by the early and later cases, so clearly as to render it unnecessary to review them, in the following words: "Where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false *to the knowledge of the party making it*, this would in general be *conclusive evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, *we think this does not amount to fraud in law.*"

Finally the Queen's Bench abandoned their former doctrine in express terms in 1846, Lord Denman, C. J., delivering the opinion in Barley *v.* Walford (*x*) in these words: "The judgment which was given in this court in Evans *v.* Collins (*y*), affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance

(*t*) 5 Q. B. 820.
(*u*) 5 Bligh N. S. 154.
(*v*) 14 M. & W. 650.
(*x*) 9 Q. B. 197.
(*y*) 5 Q. B. 804.

for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber (*z*), . . . and we must admit the reasonableness of the doctrine there at length laid down."

§ 461. The law thus settled has since remained unshaken, and in 1860 the Queen's Bench held that it was established by Collins *v.* Evans, and numerous other authorities, that, "to support an action for false representation, the representation must *not only have been false in fact*, but *must also have been made fraudulently*" (*a*).

[And in Dickson *v.* Reuter's Telegram Company (*b*), Bramwell, L. J., said: "The general rule of law is clear that no action is maintainable for a mere statement although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it."

But the rule thus laid down is subject to the important qualification to which reference has already been made, *ante*, § 454. A person, without knowing that he is stating that which is false, may take upon himself to state that as true as to which he is ignorant, whether it be true or false, and he will then incur, in the event of the statement proving to be false, whatever may be his guilt *in foro conscientiæ* (*c*), the same legal responsibility as though he had made the statement with a knowledge of its falsity. An honest and well-grounded belief in the truth of that which is stated affords the only claim to protection, and the absence of any reasonable grounds for such a belief will guide the court to the conclusion that the belief was never honestly entertained. These reckless statements may be made either in wilful ignorance of their truth or falsity, or may be due to forgetfulness of that which it is a man's duty to remember (*d*). In either case the same

(*z*) 5 Q. B. 829.

(*a*) Childers *v.* Wooler, 2 E. & E. 287, and 29 L. J. Q. B. 129. See, also, judgment of Lord Campbell in Wilde *v.* Gibson, 1 H. L. C. 633.

(*b*) 3 C. P. D. 1, 5, C. A.

(*c*) It is this distinction between the moral complexion and the legal consequences of a statement that has given rise to the unfortunate expressions "legal fraud" or "constructive fraud," expressions which were denounced by Bramwell, L. J., in Weir *v.* Bell, 3 Ex. D. at p. 243: "I do not understand legal fraud. It has no more meaning than legal heat or legal cold, legal light or legal shade. There can never be a well-founded complaint of legal fraud, or anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty." See Joliffe *v.* Baker, 11 Q. B. D. 255, 270; and Peek *v.* Derry, 37 Ch. D. 541, where the expression "legal fraud" was very recently considered and explained by the Court of Appeal, per Cotton, L. J., at p. 567; per Sir James Hannen, at p. 582; per Lopes, L. J., at p. 585.

(*d*) Burrowes *v.* Lock, 10 Vesey, Jr. 470; Slim *v.* Croucher, 1 De G. F. & J. 518. From an early period, equity exercised a concurrent jurisdiction in cases of false representation, and entertained suits which were analogous to the common-law actions of deceit. Evans *v.* Bicknell, 6 Vesey, Jr. 174, per Lord Eldon; Ramshire *v.* Bolton, 8 Eq. 294. It seems clear that equity applied the same principles to such suits as were applied at common law (see per Lord Chelmsford in Peek *v.* Gurney, L. R. 6 H. L. at p. 390; and per Cot-

consequences will result to the person making them. The court will not enter into any question as to the state of a man's mind if it be proved that the statement was untrue to his knowledge (*e*).

The rule was thus laid down in 1853 by Maule, J., in a passage which has now become classical (*f*): "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."]

In the Western Bank of Scotland *v.* Addie (*g*), the charge to the jury was, that "if the directors took upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which *they did not believe, or had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." In the House of Lords, the Lord Chancellor (Lord Chelmsford) approved this direction, saying: "Suppose a person makes an untrue statement which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." But Lord Cranworth thought this was going rather too far, and said: "I confess that my opinion was that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

ton, L. J., in Schroeder *v.* Mendl, 37 L. T. N. S. 452, at p. 454); but the question is one of historical interest only since the Judicature Acts.

(*e*) Hine *v.* Campion, 7 Ch. D. 344.

(*f*) Evans *v.* Edmonds, 13 C. B. 777, at p. 786; 22 L. J. C. P. 211, 214. See per Sir James Hannen in Peek *v.* Derry, 37 Ch. D. at p. 581.

(*g*) L. R. 1 Sc. App. 145.

In the Reese River Company *v.* Smith (*gg*), it was said by Lord Cairns that the settled rule of law was, "that, if persons take upon themselves to make assertions as to which they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." In this Lords Hatherley and Colonsay concurred.

§ 461 a. [In Weir *v.* Bell (*h*), Cotton, L. J., stated it to be a well-established rule, that "in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly, that is, *without any reasonable grounds for believing them to be true*, or under circumstances which show that he was careless whether they were in fact true or false."

And in Smith *v.* Chadwick (*i*), Lord Bramwell said: "An untrue statement, as to the truth or falsity of which the man who makes it has no belief, is fraudulent; for in making it he affirms he believes it, which is false."

These statements of the law confirm the opinion of Lord Chelmsford in The Western Bank of Scotland *v.* Addie, and accurately define the principle which runs through numerous decisions (*k*).

Before leaving this branch of the subject, it is important to observe that all the following circumstances must concur in order to support an action of deceit: —

1. The representation must be made to the plaintiff, or with the direct intent that it shall be communicated to him, and that he shall act upon it (*l*).

2. It must be false in fact. A false representation of intention may be equivalent to a false representation of fact (*m*).

3. It must be false to the knowledge of the defendant, or made by him recklessly; that is to say, without reasonable grounds for believing it to be true, or under circumstances which show that he was careless whether it was in fact true or false (*n*).

4. It must be a material one.

5. The plaintiff must have acted upon the faith of it, and thereby suffered damage (*o*).

(*gg*) L. R. 4 H. L. 64, 79.

(*h*) 3 Ex. D. 238, C. A. at p. 242.

(*i*) 9 App. Cas. at p. 203; see, also, per Lord Mansfield in Pawson *v.* Watson, 2 Cowper, at p. 788.

(*k*) Rawlins *v.* Wickham, 3 De G. & J. 304, 316; Hart *v.* Swaine, 7 Ch. D. 42; Leddell *v.* McDougal, 29 W. R. 403, C. A.; Redgrave *v.* Hurd, 20 Ch. D. 1, C. A., per Jessel, M. R., at p. 12; Smith *v.* Chadwick, Ibid. 27, *per eundem*, at p. 44, and per Cotton, L. J., at p. 68; Mathias *v.* Yetts, 46 L. T. N. S. 497, C. A.; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, C. A.; Peek *v.* Derry, 37 Ch. D. 541, C. A.

(*l*) Barry *v.* Croskey, 2 J. & H. 1, 22.

(*m*) Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 479, C. A.

(*n*) Weir *v.* Bell, 3 Ex. D. 238, C. A.; Smith *v.* Chadwick, 9 App. Cas. 187.

(*o*) Per Cotton, L. J., in Arkwright *v.* Newbold, 17 Ch. D., at p. 324, and per Lord

(i.) Where the representation is one which from its nature *may* induce the plaintiff to enter into the contract, it is a fair inference of fact (*p*) that he was actually induced thereby, and as such it forms evidence proper to be left to a jury as proof that he was so induced. This inference may be in some cases irresistible, but in others it is liable to be displaced by evidence that the plaintiff either had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms or showed by his conduct that he did not rely upon the representation, but acted upon his own judgment. The fact that the plaintiff may now be called as a witness on his own behalf is important in assisting the jury to arrive at a conclusion (*q*).

(ii.) Where the plaintiff *has* relied on the representation, he is not deprived of his right to relief because he had the means of discovering that the representation was false (*r*), or because he was also influenced by his own mistake (*s*), or by other additional motives also (*ss*).

(iii.) Where the meaning of the representation is ambiguous, it is for the plaintiff to show that he understood it in the sense in which it is false (*t*).

Finally, it is important to remember that the action of deceit is a common-law action, and will be decided upon the same principles, whether it is brought in the Chancery or in the Queen's Bench Division (*u*).

This subject, and the authorities bearing upon it, were exhaustively examined by the House of Lords in the late case of Derry *v.* Peek (*v*), in which it was declared that, to sustain an action of deceit, actual fraud must be proved, and that false statements, made simply through carelessness, or even without reasonable grounds for believing them to be true, do not, in and of themselves, constitute fraud, although they may be evidence of it; but if such statements are made

Blackburn, in Smith *v.* Chadwick, 9 App. Cas. at p. 196.

(*p*) Jessel, M. R., is reported to have stated that the inference was one of *law*; see Redgrave *v.* Hurd, 20 Ch. D. at p. 21; but this opinion was repudiated by Lord Blackburn in Smith *v.* Chadwick, 9 App. Cas. at p. 196.

(*q*) Per Jessel, M. R., in Redgrave *v.* Hurd, 20 Ch. D. at p. 20, and in Smith *v.* Chadwick, Ibid. at p. 44, with the observations of Lord Blackburn thereon in Smith *v.* Chadwick, 9 App. Cas. at p. 196.

(*r*) Redgrave *v.* Hurd, *ubi supra.*

(*s*) Edgington *v.* Fitzmaurice, 29 Ch. D. 459, C. A.

(*ss*) Peek *v.* Derry, 37 Ch. D. 541, C. A.

(*t*) Smith *v.* Chadwick, 9 App. Cas. 187; 20 Ch. D. 27, 44 C. A.

(*u*) Per Cotton, L. J., in Arkwright *v.* Newbold, 17 Ch. D. at p. 320, adopted by Lord Blackburn in Smith *v.* Chadwick, 9 App. Cas. at p. 193.

(*v*) 14 App. Cas. 337 (1889), reversing the decision of the Court of Appeal in 37 Ch. D. 541. See Arnison *v.* Smith, 41 Ch. D. 348 (1889). — E. H. B.

in the honest belief of their truth, they are not fraudulent so as to make the authors of them liable to an action of deceit (*w*). On the other hand it was conceded that, if such false statements were made recklessly, without caring whether they were true or false, and without an honest belief in their truth, they would constitute a legal fraud.

So much with regard to the action of deceit. As to the buyer's right to rescind a contract induced by false representation, the principles adopted and applied by courts of equity had, before the Judicature Acts, a much wider scope than those of the common law. At common law, except in the case of an innocent misrepresentation affecting the substance of the contract (*x*), the buyer's right to rescind was governed by the same considerations as would have entitled him to maintain an action of deceit; but it seems clear that to obtain relief in equity it was sufficient for the buyer to prove that the representation was a material one inducing the contract, and was *false in fact* (*y*). As we have already stated (*ante*, § 451), relief was only granted, as a general rule (*z*), where *restitutio in integrum* was possible, and where the buyer had elected to rescind within a reasonable time after discovering that the representation was false.

The grounds of the doctrine in equity were stated by Jessel, M. R., in a recent case (*a*). He says: "According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew, at the time when the representation was made, that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; *he ought to have found that out before he made it.*' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, *having obtained a beneficial contract*

(*w*) See, also, the still later case of Angus *v.* Clifford [1891], 2 Ch. 449.

(*x*) *Ante*, § 420.

(*y*) Rawlins *v.* Wickham, 3 De G. & J. 304; Leather *v.* Simpson, 11 Eq. 398–406, per Malins, V. C.; Hart *v.* Swaine, 7 Ch. D. 42; Schroeder *v.* Mendl, 37 L. T. N. S. 452, per Cotton, L. J., at p. 454; Redgrave *v.* Hurd, 20 Ch. D. 1, C. A.

(*z*) An apparent exception to the rule that a contract of sale cannot be rescinded if *restitutio in integrum* has become impossible, is to be found in the case of the contract for "sale or return" (*e. g.* of a horse), where it has been held that the intending buyer may return the horse within the time limited, or may refuse to pay the price, although it has been injured or has died in the meanwhile. Head *v.* Tattersall, L. R. 7 Ex. 7; Elphick *v.* Barnes, 5 C. P. D. 321, *post*, Chapter on Conditions, § 599. [See also par. 11 in Am. Note.] The exception is only apparent, the better opinion being that in such cases there has been no sale of the goods, the contract remaining one of bailment until, by the exercise of the buyer's option, the sale is complete.

(*a*) Redgrave *v.* Hurd, 20 Ch. D. at p. 12.

by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements'" (*b*).

And since the Judicature Acts, the variance which before existed between the rules of common law and of equity has disappeared, and the equitable principles with reference to the rescission of a contract induced by false representation are applicable, whether relief is claimed in the Chancery Division or in one of the Common Law Divisions (*c*).

It is to be observed that, although a person who claims rescission of a contract cannot recover damages as in an action of deceit, yet he is entitled to be relieved from all the obligations and consequences of the contract which is set aside (*d*).

The nature and effect of the right to indemnity upon rescission of a contract is very fully considered by the Court of Appeal in the recent case of Newbigging *v.* Adam (*e*).]

§ 462. It is necessary to guard the reader against concluding that the case of Cornfoot *v.* Fowke (*f*) has remained unquestioned upon the point that the principal will not be liable for the consequences of false representations made by his agent, with full belief in their truth, when the principal himself has a knowledge of the real facts. In The National Exchange Company of Glasgow *v.* Drew (*g*), it was commented on by Lords Cranworth and St. Leonards, the latter learned Lord saying, distinctly: "I should feel no hesitation, if I had myself to decide that case, in saying that, although the representation was not fraudulent, — the agent not knowing that it was false, — yet that as it in fact was false, and false to the knowledge of the principal, it ought to *vitiate the contract*" (*h*). Lord Campbell, also, in Wheelton *v.* Hardisty (*i*), said: "As to Cornfoot *v.* Fowke, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether that case was well decided by the majority of the judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favor of the dissentient Chief Baron."

And in Barwick *v.* The English Joint Stock Bank (*k*), Willes, J.,

(*b*) Cited with approval by Bowen, L. J., in Newbigging *v.* Adam, 34 Ch. D. at p. 593; 13 App. Cas. 308. And see per Lord Blackburn in Brownlie *v.* Campbell, 5 App. Cas. at p. 950.

(*c*) See per Jessel, M. R., in Redgrave *v.* Hurd, 20 Ch. D. at p. 12.

(*d*) Redgrave *v.* Hurd, 20 Ch. D. 1 C. A.; Newbigging *v.* Adam, 34 Ch. D. 582, C. A.; 13 App. Cas. 308.

(*e*) 34 Ch. D. 582.

(*f*) 6 M. & W. 358.

(*g*) 2 Macq. 103.

(*h*) And the principle as thus stated was adopted by Lord Selborne in Ludgater *v.* Love. 44 L. T. N. S. 694, C. A., *post*, § 462 a.

(*i*) 8 E. & B. 270; 26 L. J. Q. B. 265–275.

(*k*) L. R. 2 Ex. 259; 36 L. J. Ex. 147.

said, "I should be sorry to have it supposed that Cornfoot *v.* Fowke turned upon anything but a point of pleading."

§ 462 a. [In Ludgater *v.* Love (*l*), the defendant's son, acting as the defendant's agent, had innocently represented that certain sheep which he sold to the plaintiff were sound. The defendant had previously *instructed* his son to represent that the sheep were sound, *knowing* that they were in fact affected with disease, but fraudulently withholding from his son knowledge of the truth. Held, by the Court of Appeal, following the *dicta* of the judges (Rolfe, Alderson, and Parke, BB.) in Cornfoot *v.* Fowke (*m*), that the defendant was liable in an action for damages for the fraudulent misrepresentation.

Lord Selborne cited at length (*n*) the observations of Lord St. Leonards in The National Exchange Company *v.* Drew (*o*), and pointed out that the case under consideration was identical with the one there suggested by that learned lord.]

§ 463. The subject was much discussed in Udell *v.* Atherton (*p*), which, it is submitted, has been misunderstood to some extent (*q*). The facts were these: The defendant's traveller sold a log of mahogany to the plaintiff, and warranted it sound, without authority, and *knowing that it was defective.* The buyers gave two bills of exchange for the price, at four and six months. The first bill was paid; before the maturity of the second bill, the plaintiff, who had been in possession of the log from the time of the sale, ordered it to be cut up, and then discovered that there was a defect, which reduced its value one half. This defect was patent on inspection, for it had been pointed out to the traveller on a previous occasion, when he attempted to sell the log to another person. The defendant was wholly innocent, knowing nothing either of the defect, or of the fraudulent representation of the traveller. The purchaser, on the defendant's refusal to make an allowance, brought an action *for deceit.* The court was equally divided, Pollock, C. B., and Wilde, B., holding the action to be maintainable, and Bramwell and Martin, BB., holding the contrary. But the two last-named judges dissented solely on the ground that the defendant was not liable *in that form of action;* and Martin, B., very distinctly admitted that the buyer would have had the right to *rescind the contract*, on the ground of fraud committed by the agent, if the plaintiff had not deprived himself of this remedy by cutting up and using the log, so that he could not restore it. All the judges were of opinion that the fraud of the agent would affect the validity of the

(*l*) 44 L. T. N. S. 694, C. A.
(*m*) 6 M. & W. 358.
(*n*) At p. 697.
(*o*) 2 Macq. 103, at p. 145.
(*p*) 7 H. & N. 172; 30 L. J. Ex. 337.
(*q*) See note at p. 751 of Broom's Leg. Max., 6th ed., and 2 Sm. L. C. p. 100, ed. 1887.

contract, but Martin, B., pointed out, as the true distinction, that, "in an action *upon the contract*, the representation of the agent is the representation of the principal, but in an *action on the case for deceit* the misrepresentation or concealment must be proved against the principal."

§ 464. In the year 1867, two decisions, apparently not reconcilable, were rendered at about the same time by appellate courts, each being ignorant of the case pending in the other.

In Barwick *v.* The English Joint Stock Bank (*r*), the case was argued in the Exchequer Chamber on the 8th of February, and the judgment rendered on the 18th of May by Willes, J., in behalf of himself and Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.

In the Western Bank of Scotland *v.* Addie (*s*), the case was argued in the House of Lords in the beginning of March, and judgment was rendered on the 20th of May, just two days after the decision in the Exchequer Chamber.

§ 465. In Barwick *v.* The English Joint Stock Bank (*r*), the fraud was committed by the manager of the defendant's bank acting in the course of his business, and the third count in the declaration was for fraud and deceit by the defendants, to which they pleaded not guilty. Held, that the fraud committed by the manager was properly charged in the declaration as the fraud of the defendants, and that the defendants were liable for the fraud of their agents. The fraud committed was the giving of a guaranty by the manager in behalf of the bank, *he* knowing and intending that the guaranty should be unavailing, and fraudulently concealing from the plaintiff the facts which would make it so.

Willes, J., in delivering the judgment (*t*) declared that "in so deciding, we conceive that we are in no respect overruling the opinions of my brothers Martin and Bramwell in Udell *v.* Atherton (*u*), the case most relied on for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, — a question which was settled as early as Lord Holt's time (*v*), — but in applying that principle to the peculiar facts of the case; the act which was relied upon there, as constituting a liability in the sellers, having been an act adopted by them

(*r*) L. R. 2 Ex 259; 36 L. J. Ex. 147.
(*s*) L. R. 1 Sc. App. 146.
(*t*) L. R. 2 Ex. at p. 265.
(*u*) 7 H. & N. 172; 30 L. J. Ex. 337.
(*v*) Hern *v.* Nichols, 1 Salk. 289.

under peculiar circumstances, and the author of that act not being their *general* agent in business, as the manager of a bank is."

As to the distinction here pointed out between the responsibility of the principal for the fraud of an agent employed to effect *one* sale, and that of an agent to do business *generally*, it is not easy to appreciate how the principle can differ in the two cases, if in each the agent is acting in the business for which he was employed by the principal; but the observation of the learned judge on this point is of course no part of the decision in the cause.

§ 466. On the other hand, in The Western Bank of Scotland *v.* Addie (*w*), at the close of the argument on the 12th of March, the Lords intimated that, "as the decisions conflicted, they would take time to consider the case, *with a view to the laying down of some general rules*," and it was not till the 20th of May that the decision was given.

The plaintiff's action was based on the allegation that he had been induced to buy *from the company* a number of its shares, by the fraudulent representation of its *agents, the directors.* The demand, according to the forms of the Scotch law, was in the alternative for a *restitutio in integrum*, or for damages. The principles governing the case were laid down by the Lord Chancellor (Lord Chelmsford), and by Lord Cranworth, in entire conformity with the opinion of Martin, B., in Udell *v.* Atherton. Lord Chelmsford said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to *enforce that contract*, or the person who has been deceived institutes a suit against the company to *rescind the contract* on the ground of fraud, the misrepresentations are *imputable to the company*, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers *to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.* . . .

"It may seem a hardship on the pursuer that he should be compelled to keep the shares, because, in ignorance of the fraud practised on him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares, he may

(*w*) L. R. 1 Sc. App. 146.

still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible."

Lord Cranworth first concurred in deciding that the plaintiff had lost his right to rescind the contract, because he was unable to put the adverse parties in the same situation in which they stood when the contract was entered into. On the other point, his Lordship said: "The appellants *are not the persons who are guilty of the fraud*. . . . An incorporated company cannot in its corporate character be called on to answer *in an action for deceit*. But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed, from what I said when the case of Ranger *v.* Great Western Railway Company (*x*) was decided in this House, I meant to give as my opinion that the company could in that case have been made to *answer as for a tort in an action for deceit*, I can only say I had no such meaning. . . In what I said, I merely wished to guard against its being supposed that I assented to the argument that there would be *no means of reaching the company* if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion.

"An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to *the extent to which the companies have profited from these frauds, but that they cannot be sued as wrongdoers by imparting to them the misconduct of those whom they have employed*. A person defrauded by *directors*, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, *must seek his remedy against the directors personally*." The plaintiff was therefore held not entitled to recover on either ground.

§ 467. It is submitted that, this being the tribunal of the last resort, this case must be considered as settling conclusively that, where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may, —

1st. Rescind the contract, if he can return the thing bought in the condition in which he received it, but not otherwise; or he may,

2dly. Maintain an action for deceit against the agent personally; but,

(*x*) 5 H. L. C. 72.

3dly. Cannot maintain that, or any action in *tort*, against the innocent principal. [But see *post.*]

Further, that, though he would have a claim against the principal for a return of the price to the extent to which the latter has profited by the fraud of his agent, his remedy would be in equity; for it was admitted on all sides in Udell *v.* Atherton that, if the action for deceit would not lie, the purchaser was remediless at law, when not in a condition to sue for a rescission, there being no form of action at law applicable to the case.

§ 467 a. [The *dicta* of Lords Cranworth and Chelmsford in The Western Bank of Scotland *v.* Addie, although probably intended to be decisive, see *ante*, § 461, have not been followed in later cases, and it becomes necessary to reconsider the 3d principle above laid down in the light of more recent decisions.

The classical authority on this point is a passage from the judgment of Willes, J., in delivering the judgment of the Exchequer Chamber in Barwick *v.* The English Joint Stock Bank (*y*). He expresses the principle of law as follows (*z*): "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. *The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.*" He then proceeds to illustrate the application of the principle to various cases, and adds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts (*a*), and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (*b*).

This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by the Privy Council in Mackay *v.* The Commercial Bank of New Brunswick (*c*), and in Swire *v.* Francis (*d*), by Lord Selborne in

(*y*) L. R. 2 Ex. 259.

(*z*) At p. 265.

(*a*) The expression, "class of acts," is not appropriate in all cases. See British Mutual Banking Co. *v.* Charnwood Forest Railway Co. 18 Q. B. D. at p. 718, per Bowen, L. J.

(*b*) The principle of law applied to these cases is examined by Lord Esher, M. R., in Blackburn *v.* Vigors, 17 Q. B. D. at p. 553, and stated by him to be, "that a man cannot, by delegating to an agent to do what he might do himself, obtain greater rights than if he did the thing himself."

(*c*) L. R. 5 P. C. 394.

(*d*) 3 App. Cas. 106.

Houldsworth *v.* The City of Glasgow Bank (*e*), and by Bowen, L. J., in The British Mutual Banking Co. *v.* Charnwood Forest Railway Co. (*f*).

In Swift *v.* Winterbotham (*g*), decided in 1873, the Court of Queen's Bench (Cockburn, C. J., and Quain, J.), following Barwick *v.* The English Joint Stock Bank, held the Gloucestershire Banking Company liable for the false representation of its manager, made in the course of conducting the business of the bank.

In Mackay *v.* The Commercial Bank of New Brunswick (*h*), decided in 1874, Sancton, the cashier of the defendant bank, *whose duty it was to obtain the acceptance of bills in which the bank was interested*, sent a telegram to the plaintiffs whereby he falsely, but without the knowledge of the president and directors of the bank, made a representation to the plaintiffs which, by omitting a material fact, misled them, and induced them to accept certain bills in which the bank was interested, which bills the plaintiffs had to pay, and *of which the defendant bank obtained the benefit.* It was held, contrary to the *dicta* of Lords Chelmsford and Cranworth in the case of The Western Bank of Scotland *v.* Addie, that the bank was liable in an action of deceit, the false representation having been made by Sancton within the scope of his authority and for the benefit of the bank, and they having profited by it.

Their Lordships, however, refrained from stating what their decision would have been —

(1) If the plaintiffs had not proved that the bank had profited by the fraud of their agent;

(2) If they had not proved the representations of Sancton to have been made within the scope of his authority, but had proved that the defendants accepted the benefit of it with notice of the fraud.

In Houldsworth *v.* The City of Glasgow Bank and Liquidators, decided in 1880 (*i*), the plaintiff had bought from The City of Glasgow Bank, a copartnership registered with unlimited liability under the Companies Act, 1862, 4000*l.* of its stock in 1877. He was registered

(*e*) 5 App. Cas. 317.

(*f*) 18 Q. B. D. 714. In Weir *v.* Bell, 3 Ex. D. 238, C. A., Bramwell, L. J., criticised the reasoning of Willes, J., on the ground that there is the obvious distinction between fraud and any other tort, that the former is wilful, and a master, as a rule, is not liable for the wilful wrong of his servant. At the same time, he admitted that the rule proposed was a useful one, and might be supported on another ground, viz., that any person authorizing another to act for him, in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given.

(*g*) L. R. 8 Q. B. 244, overruled in Ex. Ch. L. R. 9 Q. B. 301 (*sub nom.* Swift *v.* Jewsbury), upon another point, without impugning the general doctrine. Per Coleridge, C. J., at p. 312.

(*h*) L. R. 5 P. C. 394.

(*i*) 5 App. Cas. 317; and see In re Addlestone Linoleum Company, 37 Ch. D. 191, C. A.

as a partner, received dividends, and acted as a partner until the liquidation. In October, 1878, the bank went into liquidation, and the plaintiff was entered on the list of contributories and paid calls. In December, 1878, he brought this action, in the nature of an action of deceit, against the bank and its liquidators to recover damages in respect of the sum he had paid for the stock, the money he had already paid for calls, and the estimated amount of future calls. He founded his claim to relief on the ground that he was induced to buy the stock by reason of the fraudulent misrepresentations and concealments of the manager and directors. He admitted that, after the winding-up had commenced, it was too late for him to claim rescission of his contract and *restitutio in integrum*. It was held by the House of Lords that the action was irrelevant and not maintainable. The distinction between shares in a company and any other chattels, viz., that a shareholder in a company is a partner in it, was pointed out, and it was shown that any attempt, while he remains a partner in the company, to throw upon the assets of the company and the other contributories the loss he had sustained, was at variance with the contract he had entered into with his partners, viz., that the assets and contributions shall be applied in payment of the debts and liabilities of the company, which contract he had, by remaining in the company until its liquidation, chosen to affirm. The *decision* in The Western Bank of Scotland *v.* Addie was approved and followed. But on the question whether a corporation can be called on to answer in an action of deceit by a person other than a shareholder, the reader is referred to the judgments of Lord Selborne (*k*) and Lord Blackburn (*l*), where the previous cases are discussed, particularly Barwick *v.* The English Joint Stock Bank, The Western Bank of Scotland *v.* Addie, and Mackay *v.* The Commercial Bank of New Brunswick.

Lord Selborne (*k*) adopts the principle laid down by Mr. Justice Willes in Barwick's case, and adds: "That principle received full recognition from this house in The National Exchange Co. *v.* Drew (*m*) and New Brunswick Railway Co. *v.* Conybeare (*n*), and was certainly not meant to be called in question by either of the learned lords who decided The Western Bank of Scotland *v.* Addie." It is a principle, not of the law of torts or of fraud or deceit, but of the law of agency, *equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual*, and the decision in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but

(*k*) 5 App. Cas. 326.
(*l*) At p. 338.
(*m*) 2 Macq. 103.
(*n*) 9 H. L. C. 711.

because (as it was well put by Mr. Justice Willes in Barwick's case), "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." And Lord Blackburn (*o*) points out that Lord Chelmsford, in The Western Bank of Scotland *v.* Addie, laid down no general position as to all contracts, and that his *dicta* and those of Lord Cranworth (who *does* use language applicable to all contracts) are reconcilable with Barwick's and Mackay's cases, if confined to the particular and peculiar contract then under consideration, viz., a contract to take shares, adding in conclusion (*p*): "I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is, that, if such a case arises, the consideration of the question whether it is decided by Addie *v.* The Western Bank is not meant to be prejudiced by anything I now say."

The effect of the decisions in The Western Bank of Scotland *v.* Addie and Houldsworth *v.* The City of Glasgow Bank is, that the only remedy of *a shareholder* in a joint stock company, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum.* If he is once debarred from seeking that relief by the declared insolvency of the company or from any other cause, there is no other remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud.

The last reported case on this subject is The British Mutual Banking Co. *v.* Charnwood Forest Railway Co. (*q*) in 1887. The action was one to recover damages for fraudulent misrepresentations alleged to have been made by the defendants through their secretary with reference to the validity of certain debenture stock of the company. The secretary made the statements in his own interest, and not in the interest of the company, which derived no benefit from them. Held by the Court of Appeal that the defendants were not liable. Bowen, L. J., adopted the definition of liability laid down by Willes, J., in Barwick's case (*r*).

It is submitted, therefore, that the 3d proposition above laid down (*ante*, § 467) must be modified thus: —

3dly. The purchaser can maintain an action of deceit against the innocent principal, where the fraud of the agent has been committed within the scope of his authority, and the principal has benefited by it (*s*).

(*o*) 5 App. Cas. 339.
(*p*) At p. 341.
(*q*) 18 Q. B. D. 714, C. A.
(*r*) *Ante*, § 465.
(*s*) Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Mackay *v.* The Commercial Bank of New Brunswick, L. R. 5 P. C. 394; per Fry, J., in Cargill *v.* Bower, 10 Ch.

4thly. In this respect it makes no difference whether the principal be a corporation or an individual (*t*).

5thly. A shareholder in a joint stock company, who has been induced to purchase his shares by the fraud of the agent of the company, cannot bring an action of deceit against the company, so long as he is a member of it (*u*).]

§ 467 b. It must not be concluded from this review of the authorities that the purchaser, who has been induced by false representations to make the contract, is always without remedy because the vendor believed the statements to be true, and was innocent of any fraudulent intent. These cases only establish that the vendor has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on *tort*. But, in very many instances, a representation made by the vendor amounts in law to a *warranty*, and when this is the case the purchaser has remedies on the *contract* for breach of the warranty. The rules of law by which to determine when a representation is a warranty, and what are the rights of the buyer for a breach of this warranty when the representation is false, are treated *post*, Book IV. Part II. Ch. 1, on Warranty, [§§ 610–673 *a*.] The law as to the effect of innocent misrepresentation of law or of fact, [and the buyer's right to rescind a contract induced by false statements on the part of the seller, have] been discussed, *ante*, § 420.

§ 468. The case of Feret *v.* Hill (*x*) has been omitted in the foregoing review, in order not to interrupt the exposition of the point directly under discussion, but the case well deserves consideration. It was in its facts the converse of Cornfoot *v.* Fowke. The defendant Hill was the owner of a tenement, and the plaintiff sent an agent to him to give assurances of the plaintiff's good character and reputation, in order to induce the defendant to let the premises to the plaintiff. The agent was innocent, and was honest in his assurances of the plaintiff's good character, but in point of fact the plaintiff, who pretended that he wanted the premises for carrying on business as a perfumer, intended to convert them into a brothel. The plaintiff was let into possession and used the premises as a brothel, and the defendant, discovering the fraud practised on him, ejected the plaintiff forcibly from the apartments, after having given him a notice to quit, which he disregarded. The plaintiff then brought ejectment to recover pos-

D. at p. 514; British Mutual Banking Company *v.* Charnwood Forest Railway Company, in 18 Q. B. D. 714, C. A.; and see Shaw *v.* The Port Philip Gold Mining Company, 13 Q. B. D. 103.

(*t*) Mackay *v.* The Commercial Bank of New Brunswick, *ubi supra*; Houldsworth *v.* The City of Glasgow Bank, 5 App. Cas. 317, per Lord Selborne, at p. 326, and the more guarded remarks of Lord Blackburn, at pp. 339, 340.

(*u*) Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 146; Houldsworth *v.* The City of Glasgow Bank, 5 App. Cas. 317.

(*x*) 15 C. B. 207; 23 L. J. C. P. 185.

session of the apartments, and the jury found, first, that the plaintiff, at the time he entered into the agreement, intended to use the premises for a brothel; and, secondly, that he had induced the defendant to enter into the agreement *by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises.* The verdict was for the defendant, and Crowder, J., reserved leave to the plaintiff to move to enter the verdict in his favor, if the court should be of opinion that the agreement, notwithstanding this finding, was valid. The motion prevailed, and the plaintiff was held entitled to enforce the agreement, on the ground that the misrepresentation was of a fact *collateral to the agreement*, Jervis, C. J., saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing, when in fact he was doing another." The other judges also put the case upon the ground that the court was not called on to enforce any agreement at all, but to replace premises in the possession of a man who had an executed legal title to the possession; that it was impossible to say that nothing passed under the demise, simply because it was obtained by fraudulent misrepresentation.

The effect of this decision seems to be, that a defrauded lessor, who has actually executed a demise, cannot treat it as a nullity, but must proceed to have it rescinded on the ground of the fraud by an appropriate tribunal, before treating it as non-existent; such appropriate tribunal not being a court of law, but one of equity (*y*).

§ 469. In further illustration of the effect of fraudulent representations to the prejudice of the purchaser, the reader is referred to the series of decisions rendered in cases where shareholders in companies have attempted to relieve themselves from responsibility by showing that they had been induced to take the shares through fraudulent representations of the directors. These cases are all reviewed in Oakes *v.* Turquand (*z*), decided in the House of Lords in August, 1867, in which it was settled that such contracts are voidable only, not void, and that the defrauded shareholders cannot relieve themselves from responsibility to creditors by disaffirming the contract after the company has failed, and has been ordered to be liquidated in Chancery, [and the same principle applies to a voluntary winding-up (*a*).]

§ 470. It would be an onerous and scarcely useful task to enume-

(*y*) And now, under the Judicature Acts, when such relief is sought by the plaintiff, the Chancery Division of the High Court is the appropriate tribunal. Judicature Act, 1873, s. 34, sub-s. 3, § 414.

(*z*) L. R. 2 H. L. 325. See, also, Tennent *v.* The City of Glasgow Bank, 4 App. Cas. 615, and Houldsworth *v.* The City of Glasgow Bank, 5 App. Cas. 317; and Burgess' case, 49 L. J. Ch. 541.

(*a*) Stone *v.* City and County Bank, 3 C. P. D. 282, C. A.

rate the various devices which, in adjudicated cases, have been held by the courts to be frauds on purchasers. The principles stated in this chapter have been illustrated in numerous decisions (*b*). Some of those which have most frequently occurred in practice will be presented as examples.

In Bexwell *v.* Christie (*c*), it was held to be fraudulent in the vendor to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and, if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield also in that case held it to be a fraud on the public, and therefore on the buyer, for the vendor falsely to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor."

The foregoing case was highly eulogized, and followed by Lord Kenyon and the King's Bench in Howard *v.* Castle (*d*); and the employment of "puffers," as they are termed, that is, persons engaged to bid in behalf of the vendor in order to force up the price against the public, has ever since been held fraudulent (*d*).

§ 471. In the case of Warlow *v.* Harrison, decided in Queen's Bench (*e*), and afterwards in the Exchequer Chamber (*f*), the law on the subject of the auctioneer's responsibility in such cases was examined on the following state of facts: The defendant was an auctioneer, having a horse repository, and he advertised for sale a mare, "the property of a gentleman, *without reserve*." The plaintiff attended the sale, and bid 60 guineas, and another person bid 61 guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at 61 guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bona fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, 60 guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following: "*First.* The highest bidder to be the buyer, and, if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be

(*b*) Early *v.* Garret, 9 B. & C. 928; Duke of Norfolk *v.* Worthy, 1 Camp. 337; Hill *v.* Gray, 1 Stark. 434; Jones *v.* Bowden, 4 Taunt. 847; Barber *v.* Morris, 1 Mood. & R. 62; Tapp *v.* Lee, 3 B. & P. 367; Corbett *v.* Brown, 8 Bing. 33; Hill *v.* Perrott, 3 Taunt. 274; Abbotts *v.* Barry, 2 B. & B. 369.

(*c*) 1 Cowp. 395.

(*d*) 6 T. R. 642. See, also, Wheeler *v.* Collier, M. & M. 123; Crowder *v.* Austin, 3 Bing. 368; Rex *v.* Marsh, 3 Y. & J. 331; Thornett *v.* Haines, 15 M. & W. 367; Green *v.* Baverstock, 14 C. B. N. S. 204, and 32 L. J. C. P. 181; Parfitt *v.* Jepson, 46 L. J. C. P. 529.

(*e*) 28 L. J. Q. B. 18.

(*f*) 1 E. & E. 295; 29 L. J. Q. B. 14.

put up again, or the auctioneer may declare the purchaser. *Third.* The purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5*s.* in the pound on account of the purchase, and pay the remainder before such lot is delivered. *Eighth.* Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of 2*l.* per cent." As the judgment of the Exchequer Chamber turned much upon the pleadings, it is necessary to state that the plaintiff's declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract;* and then charged a breach of the defendant's duty to the plaintiff *as the plaintiff's agent* in failing to complete the contract in behalf of the plaintiff. The defendant pleaded: First, not guilty; secondly, that the plaintiff was not the highest bidder; thirdly, that the defendant did not become the plaintiff's agent as alleged.

In the plaintiff's argument the following civil law authorities were cited: Cicero de Officiis, lib. 3, s. 15, "Tollendum est igitur ex rebus contrahendis omne mendacium; non licitatorem venditor, nec qui contra se liceatur (*g*), emptor apponet;" and Huberus, lib. 18, tit. 2, s. 7, Prælectiones: "Sed hoc facile constabit, si venditor falsum emptorem inde ab initio subornet, qui plus aliis offerat, ut veris emptoribus præmium maximæ licitationis, vulgo, stryckgelt, quo nihil usitatius, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia, hoc est contra fidem conventionis perfectæ quâ statutum est ut maximo licitatori præmium daretur."

Lord Campbell, C. J., delivered the unanimous judgment of the Queen's Bench, holding, —

First. — That it was not true in point of law that the auctioneer is the agent of the purchaser until the acceptance of his bid as being the highest, which acceptance is shown by knocking down the hammer; and that till then the auctioneer is exclusively the agent of the vendor.

Secondly. — That both parties may retract till the hammer is knocked down; that no contract takes place between them till that is done; and that the auctioneer cannot be bound when both the vendor and bidder remain free.

The learned Chief Justice then said in the name of the court: —

Thirdly. — "We are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has

(*g*) The better reading is, qui contra reliceatur, "a person to bid back," or lower than some one has already bid, in order to produce the impression that the property is not worth what has been offered for it. The reading se liccatur is condemned by Zümpt.

been determined by the vendor before the hammer has been knocked down."

§ 472. Although this judgment of the Queen's Bench was not reversed in the Exchequer Chamber, because approved on the pleadings as they stood, the third proposition above quoted was not affirmed, and the Court of Error gave leave to the plaintiff to amend, so as to enforce a liability against the auctioneer. The Exchequer Chamber, composed of Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding the auctioneer liable, and in giving leave to amend; but Willes, J., and Bramwell, B., without dissenting from the opinion of the majority, as delivered by Martin, B., preferred putting their judgment on a different ground, on which they felt themselves more clearly justified in their conclusions. Martin, B., first declared that the judgment of the Queen's Bench was right upon the pleadings, but that the Court of Appeal being now vested with power to amend, and the object of the law being to determine the real question in controversy, the power ought to be "largely exercised" for that purpose; and that upon the facts the plaintiff was entitled to recover.

The learned Baron then proceeded as follows: "In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be '*without reserve.*' This, according to all the cases both at law and in equity, means that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position, see the case of Thornett *v.* Haines (*h*). We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway publishing a time-table stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Denton *v.* The Great Northern Railway Company (*i*). Upon the same principle, it seems to us *that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve.* We think that the auctioneer, who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that

(*h*) 15 M. & W. 367.

(*i*) 5 E. & B. 860; 25 L. J. Q. B. 129.

this contract is made with the highest bona fide bidder, and in case of a breach of it he has a right of action against the auctioneer. . . . We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

§ 473. In reference to the conditions of the sale, the learned Baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a reason that the sale was without reserve; and that the court was inclined to differ from the Queen's Bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that, if the owner acted contrary to the conditions of the sale, he must pay the usual commissions. The court was therefore ready to give judgment for the plaintiff if he chose to amend his declaration.

Willes, J., and Bramwell, B., preferred putting their assent to the judgment on the grounds that the facts furnished strong evidence to show that the auctioneer had received no authority from the owner to advertise a sale "without reserve;" and that the plaintiff ought to be allowed to amend by adding a count alleging an undertaking by the auctioneer that he had such authority, and a breach of that authority.

§ 474. It was said at one time that the rule in equity differs from that at common law on the subject of puffers to this extent: that in equity it is allowable to employ one puffer, but no more, for the purpose only of preventing the property from being sold below a limit fixed by the vendor (*j*). Willes, J., in Green *v.* Baverstock (*k*), however, expressed the opinion that the rule in equity was confined to sales under the order of the court, in conformity with "an inveterate practice." But the existence of any such rule in equity appears to have been still a moot point, even in 1865, as is shown in the opinion of Lord Cranworth in Mortimer *v.* Bell (*l*). By the new act, however, 30 & 31 Vict. c. 48, passed at the instance of Lord St. Leonards (but applicable only to sale of land), it is provided in the fourth section that, "whereas there is at present a conflict between her Majesty's courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circum-

(*j*) See Conolly *v.* Parsons, 3 Ves. Jr. 625, n.; Bramley *v.* Alt, 3 Ves. Jr. 620; Smith *v.* Clarke, 12 Ves. 477.

(*k*) 14 C. B. N. S. 204; 32 L. J. C. P. 181.

(*l*) 1 Ch. 10.

stances giving effect to them, but even in courts of equity the rule is unsettled; and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, that from and after the passing of this act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

§ 475. The statute further directs that, where land is stated to be sold without reserve, it shall not be lawful for the seller to bid, or the auctioneer to accept a bid from him, or any one employed by him; and where the sale is subject to the right of a seller to bid, it shall be lawful for the seller or any *one* person in his behalf to bid (*m*).

The act also forbids the courts of equity from continuing the practice of opening biddings in sales made under their orders; so that in future the highest *bona fide* bidder at such sales shall be the purchaser in the absence of fraud or improper conduct in the management of the sale.

In a case (*n*) just before the passing of this act, it was announced that the sale was "without reserve," *and* that the parties interested had liberty to bid. It was held by Lords Justices Turner and Cairns that on these terms a purchaser was bound by his bid for 19,000*l.*, the only bids higher than 14,000*l.* having been made by the purchaser and a mortgagee in possession of the estate.

[In Parfitt *v.* Jepson (*o*), the law was thus summed up by Lindley, J.: "Apart from the Act of Parliament, there are three sorts of sales by auction.

"*First:* One is a sale without reserve; and, when it was expressly made without reserve, the employment of a puffer would render the sale void both at law and in equity.

"*Secondly:* Another is a sale with a condition that the highest bidder shall be the purchaser, nothing being said about a reserve price. That has been considered, as I understand, at common law, as a sale without reserve, and that therefore the employment of a puffer would make the sale void. The Court of Equity took a different view, and considered that the employment of one puffer only, in order to prevent the property being sold at a ruinous price, was permissible. The legislature thought that the Court of Equity took a wrong view, and the statute has accordingly altered this, and made it correspond with the common-law doctrine.

"*Thirdly:* The third kind of sales is when the right to bid is re-

(*m*) See Gilliat *v.* Gilliat, 9 Eq. 60, as to the construction of this clause.

(*n*) Dimmock *v.* Hallett, 2 Ch. 21.

(*o*) 46 L. J. C. P. 529, at p. 533. It should be observed that the sale in this case was of land. See, also, 1 Dart's V. & P. p. 224, ed. 1888; Sugden's V. & P. 9–11, ed. 1862.

served to the vendor. The 6th section of the Act of Parliament which applies to that class seems to curtail the vendor's right, and to cut it down to a bid by only one person on his behalf."

In the case then under consideration, a stipulation in the conditions of sale "that the vendor should have the right by himself or his agent of bidding once for the property" was strictly construed, and, the vendor having bid three times, the sale was held to be voidable at the option of the purchaser.

In America the law on the subject appears to be still unsettled. It was thus stated by Chancellor Kent (*p*) in 1840: "It would seem to be the conclusion from the latter cases (*q*) that the employment of a bidder by the owner would or would not be a fraud, according to circumstances tending to show innocence of intention or a fraudulent design. If he was employed *bona fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner to mislead the judgment and influence the zeal of others, it would be a fraudulent and void sale" (*r*). But immediately afterwards he proceeds to express his preference for the rule laid down by Lord Mansfield, and approved by Lord Kenyon. "The original doctrine of the King's Bench is the more just and salutary doctrine. In sound policy, no person ought in any case to be employed secretly to bid for the owner against the *bona fide* bidder at a public auction. It is a fraud in law on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of sale, and such a doctrine has been recently declared in Westminster Hall" (*s*).

The law as laid down by Chancellor Kent received the high approval of Mr. Justice Story in Veazie *v.* Williams (*t*), in delivering a judgment of the United States Circuit Court for the District of Maine, but to this judgment Mr. Justice Ware delivered a very learned dissentient opinion, and the decision was overruled by the Supreme Court of the United States (*u*), and the English Common Law Rule approved (*x*). The point under consideration was not, however, directly involved in that case, and the rule has apparently not been

(*p*) 2 Kent's Commentaries, vol. 2, p. 539, 4th ed. 1840.

(*q*) Conolly *v.* Parsons, 3 Vesey, Jr. 625, n.; Bramley *v.* Alt, 3 Vesey, Jr. 620; Smith *v.* Clarke, 12 Vesey, 477; Steele *v.* Ellmaker, 11 Sergeant & Rawle (Penn.), 86 (1824).

(*r*) Hazul *v.* Dunham, N. Y. Mayor's Court, 1 Hall, 655 (720, ed. 1866); Morshead *v.* Hunt, 1 Dev. Eq. Rep. N. C. 35; Woods *v.* Hall, Ibid. 411; Wolfe *v.* Luyster, 1 Hall's N. Y. Rep. 146 (167, ed. 1866).

(*s*) Crowder *v.* Austin, 3 Bing. 368.

(*t*) 3 Story, 621, 623.

(*u*) 8 Howard, 134.

(*x*) At p. 153.

followed to its full extent in the States of New York (*y*) and Massachusetts (*z*). Upon the other hand, the English rule seems to be now firmly established in Pennsylvania (*a*) and in West Virginia (*b*).]

§ 476. In The Queen *v.* Kenrick (*c*), the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady deceased, were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable; all these statements being false, and the vendor knowing that nothing but a belief in their truth would induce the buyer to make the purchase.

In Dobell *v.* Stevens (*d*), the fraud consisted in falsely telling the buyer that the receipts of a public house were 160*l.* per month, and the quantity of porter sold seven butts per month, and that the tap was let for 82*l.* per annum, and two rooms for 27*l.* per annum, whereby the plaintiff was induced to buy; and similar deceits were employed in Lysney *v.* Selby (*e*), and Fuller *v.* Wilson (*f*).

§ 477. In Schneider *v.* Heath (*g*), a vessel was sold, "hull, masts, yards, standing and running rigging, *with all faults*, as they now lie." There was, however, a false statement, that "the hull was nearly as good as when launched," and means were taken to conceal the defects that the vendor knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser; but in Baglehole *v.* Walters (*h*), Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale of a vessel under exactly the same description, "with all faults," where the seller, although knowing the latent defects, used no means for concealing them from the purchaser. In this decision, Lord Ellenborough expressly overruled Mellish *v.* Motteux (*i*), and in Pickering *v.* Dowson (*k*) the Common Pleas followed Lord Ellenborough's decision, as one "never questioned at the bar;" and concurred in overruling Mellish *v.* Motteux.

(*y*) 17 Hun (N. Y.), 370 (1879).

(*z*) Curtis *v.* Aspinwall, 114 Mass. 187, 196 (1873).

(*a*) Pennock's Appeal, 14 Penn. St. 446, 450 (1850), where the earlier decision of the same court in Steele *v.* Ellmaker, 11 Sergeant & Rawle, 86, is expressly overruled, with the concurrence of Gibson, C. J., who had been a party to that decision. Staines *v.* Shore, 16 Penn. St. 200, 203 (1851); Yerkes *v.* Wilson, 81½ Penn. St. 9, 17 (1870).

(*b*) Peck *v.* List, 48 Am. R. 398, 416; 23 W. Va. 338 (1883), where all the English and American authorities are reviewed, and it is said "that the weight of the authorities in the United States sustains the rules in reference to the effect of puffing laid down by the English common-law courts rather than those laid down by the English chancery courts."

(*c*) 5 Q. B. 49.

(*d*) 3 B. & C. 623; 5 D. & R. 490.

(*e*) 2 Lord Raymond, 1118.

(*f*) 3 Q. B. 58.

(*g*) 3 Camp. 506.

(*h*) 3 Camp. 154.

(*i*) Peake, 156.

(*k*) 4 Taunt. 779.

Baglehole *v.* Walters was also followed by the King's Bench in deciding Bywater *v.* Richardson (*l*), in 1834.

§ 478. In Horsfall *v.* Thomas (*m*), the defence to an action on a bill of exchange was, that the buyer had been defrauded in the purchase of a steel gun, for which the bill was given. The gun was made by defendant's order, and he was informed when it was ready, but made no examination of it, and sent the bill of exchange in part payment. There was a defect in the gun, and a metal plug was inserted, which would have concealed the defect from any person inspecting the gun. It was received by the defendant, fired several times, answered the purpose as long as it was entire, but afterwards burst in consequence of the defect. Held, *that the defendant had not been influenced in his acceptance of the gun by the artifice used, for he had never examined it;* that the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of a defect which would make the gun worthless, and failed to inform him of it, was not a fraud. The learned judge, Bramwell, B., who delivered the judgment of the court, said that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true and which it is the duty of the party to make known." In the case before the court there was no affirmance; and there was no duty on the part of the maker to point out a defect where the buyer has an opportunity for inspection and does not choose to avail himself of it (*n*).

This decision is questioned and disapproved by Cockburn, C. J., in Smith *v.* Hughes (*o*), and it certainly seems that the artifice used to conceal the defect comes within the definition usually given of fraud.

§ 479. The case of Hill *v.* Gray (*p*), decided by Lord Ellenborough at Nisi Prius in 1816, would seem to conflict with the general rule in relation to concealment. The facts were, that the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was: the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant labored under this delusion, but did not remove it." The price was 1000*l.*, the picture being said to be a Claude, and proof was offered

(*l*) 1 A. & E. 508. See, also, Freeman *v.* Baker, 5 B. & Ad. 797; Ward *v.* Hobbs, 4 App. Cas. 13; S. C. 3 Q. B. D. 150, C. A., overruling 2 Q. B. D. 331.

(*m*) 1 H. & C. 90, and 31 L. J. Ex. 322.

(*n*) See Keates *v.* Earl Cadogan, 10 C. B. 591, and 20 L. J. C. P. 76; also Hill *v.* Gray, 1 Stark. 434.

(*o*) L. R. 6 Q. B. 597.

(*p*) 1 Stark. 434.

that it was genuine, and that after the defendant knew that it was not one of Sir Felix Agar's pictures he had objected to paying on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation that he should not communicate the name of the proprietor, and *not to have let in a suspicion on* the part of the purchaser *which he knew enhanced the price.* He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. . . . This case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point *which he thought material to influence his judgment.*" This judgment, on a first perusal, seems certainly not reconcilable with the received principles on the subject, but in Keates *v.* Earl Cadogan (*q*) the case was explained by the Common Pleas by construing the language of Lord Ellenborough in the italicised passages as intimating that there "had been a positive aggressive deceit." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived and did not remove.

§ 480. In the earlier case of Jones *v.* Bowden (*r*), an action upon the case for deceit in a sale was maintained under the following circumstances: The defendant bought pimento at an auction sale as sea-damaged. *It is usual in such sales of this article to declare it to be sea-damaged*, and, when nothing is said, it is supposed to be sound. Defendant then repacked it, and it was included, in a catalogue of the auction sale, as "187 bags pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36 Camomile Street." Defendant drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea-damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition nor comment on what was stated in the catalogue, and the plaintiff became the purchaser at 13*d.* per pound, which was *not more than a reasonable price, after taking into consideration the fact that it had been sea-damaged and repacked.*

(*q*) 10 C. B. 591, at p. 600; 20 L. J. C. P. 76. And see per Lord Chelmsford in Peek *v.* Gurney, L. R. 6 H. L. at p. 390, who doubts whether the mere silence of the agent could be so interpreted, but attributes the explanation to the anxiety of the court to reconcile the case with established principles.

(*r*) 4 Taunt. 847.

The jury said: "That the state of the goods *ought* to have been communicated by the defendant to the plaintiff," and found a verdict for him, subject to the point whether the action was maintainable. A rule to set aside the verdict was discharged. The grounds are not intelligibly given, but it may be fairly inferred from the language of Mansfield, C. J., that he considered the verdict of the jury as establishing a usage which imposed on the vendor the duty of disclosing the defect, thus bringing the case within the general principle stated by Bramwell, J., in Horsfall *v.* Thomas (*s*).

§ 481. In Smith *v.* Hughes (*t*), the action was by the plaintiff, a farmer, to recover the price of certain oats sold to the defendant, an owner and trainer of race-horses. The plaintiff's account of the transaction was, that he took a sample of the oats to the defendant and asked if he wished to buy oats, to which the latter answered, "I am always a buyer of good oats." The plaintiff asked thirty-five shillings a quarter, and *left the sample* with the defendant, who was to give an answer next day. The defendant wrote to say he would take the oats at thirty-four shillings a quarter, and they were sent to him by the plaintiff. But the defendant's account was, that to the plaintiff's question he answered, "I am always a buyer of good *old* oats;" and that the plaintiff then said, "I have some good *old* oats for sale." There was no difference of testimony as to the other facts; and it was further sworn by the defendant that as soon as he discovered that the oats were new he sent them back; that trainers use old oats for their horses, and never buy new when they can get old. There was also evidence to the effect that thirty-four shillings a quarter was a very high price for new oats, more than a prudent business man would have given, and that old oats were then very scarce.

The judge told the jury that the question was whether the word "old" had been used in the bargain as stated by the defendant, and, if so, the verdict must be for him; but if they thought the word "old" had not been used, then the second question would be "whether the plaintiff believed the defendant to believe or to be under the impression that he was contracting for the purchase of old oats." If so, the verdict would also be for the defendant. The jury found for the defendant. The question for the Queen's Bench was whether the second direction to the jury was right, for they had not answered the questions separately, and it was not possible to say on which of the two grounds they had based their verdict. In testing the second question it was plainly necessary to assume that the word "old" had not been used, and on that assumption the court ordered a new trial.

(*s*) 1 H. & C. 90; 31 L. J. Ex. 322. See, also, Parkinson *v.* Lee, 2 East, 314.

(*t*) L. R. 6 Q. B. 597; and see the case of Laidlaw *v.* Organ, 2 Wheat. 178, before the Supreme Court of the United States.

Cockburn, C. J., said that, assuming the vendor to know that the buyer believed the oats to be old oats, but that he had done nothing directly or indirectly to bring about that belief, but simply offered his oats, and exhibited his sample, the passive acquiescence of the vendor in the *self-deception* of the buyer did not entitle the latter to rescind the sale.

Blackburn, J., concurred, saying that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." The learned judge further doubted whether the jury had been made to understand the difference between agreeing to take the oats under the belief that they were old (for in that case there would be no defence), and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old, for in this case the parties would not be *ad idem* as to their bargain, and there would therefore be no contract.

Hannen, J., also thought that the second question was probably misunderstood by the jury, and concurred with Blackburn, J., in the distinction above pointed out. He said, that to justify a verdict for the defendant it was not enough for the jury to find that the "plaintiff believed the defendant to believe that he was buying old oats," but that what was necessary was, to find that "the plaintiff believed that the defendant believed that the plaintiff was *contracting* to sell old oats."

§ 482. In the following very exceptional case, where the fraud of the vendor was committed, not on the buyer, but by collusion with the buyer against another person, the vendor was not permitted to recover against the buyer.

In Jackson *v.* Duchaire (*u*), the facts were, that the plaintiff sold the goods in a house to the defendant for 100*l.*, but she could not raise the money; she applied to one Walsh to aid her in the purchase, and he at her request agreed to buy them from the plaintiff for 70*l.*, which he did, taking a bill of sale to himself. By agreement between the plaintiff and the defendant, she was to pay the deficiency of 30*l.* to him, in two notes of 15*l.* each, and this was concealed from Walsh. On action brought by plaintiff on one of the two notes, Lord Kenyon, at Nisi Prius, and the Court in Banc afterwards, held the transaction to be a fraud on Walsh, and that plaintiff could not recover. The principal was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency, are held fraudulent and void (*x*).

In the Supreme Court of the State of Vermont it was held to be

(*u*) 3 T. R. 551.

(*x*) Dauglish *v.* Tennent, L. R. 2 Q. B. 49.

fraudulent in a vendor to sell a horse having an internal malady of a secret and fatal character, not apparent by any external indications, but known to the seller, and known by him to be unknown to the buyer, if the malady was such as to render the horse of *no value* (*y*).

SECTION IV. — FRAUD ON CREDITORS — STATUTE OF ELIZABETH — BILLS OF SALE — FRAUDULENT PREFERENCE.

§ 483. Sales made by debtors in fraud of creditors are usually considered as being governed by the statute 13 Eliz. c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in Cadogan *v.* Kennett (*z*), Lord Mansfield said that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud."

The 13 Eliz. c. 5 was intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, *alienations*, etc., etc., as well of lands and tenements as of *goods and chattels*, . . . devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to *delay*, *hinder*, *or defraud creditors*, . . . to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The statute, therefore, provides that all alienations, bargains, and conveyances of lands and tenements, or goods and chattels, made for any such intent and purpose as is above expressed, shall be "deemed and taken (only against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect." This statute was confirmed by 14 Eliz. c. 11, s. 1, and made perpetual by 29 Eliz. c. 5, s. 2. And it *seems* that it protects against fraudulent sales, subsequent creditors, as well as those having claims at the date of the fraudulent conveyance (*a*).

(*y*) Paddock *v.* Strobridge, 29 Vt. 470.

(*z*) 2 Cowp. 432.

(*a*) Graham *v.* Furber, 14 C. B. 410, and 23 L. J. C. P. 51. It is now settled that subsequent creditors may, under certain circumstances, maintain an action to set aside a

§ 484. In Twyne's case (*b*), the celebrated leading case on this subject, the debtor had made a secret conveyance to Twyne by general deed of all his goods and chattels, worth 300*l*., in satisfaction of a debt of 400*l*., pending an action brought by another creditor for a debt of 200*l*. The debtor continued in possession of the goods, and sold some of them; and shore the sheep and marked them with his own mark. The second creditor took the goods in execution, but Twyne resisted the sheriff, and Coke, the Queen's Attorney-General, thereupon filed an information against him in the Star Chamber. The learned author says in his report that "In this case divers points were resolved: —

"1. That this gift had the signs and marks of fraud, because the gift is general without exception of his apparel, or of anything of necessity, for it is commonly said, *quod dolosus versatur in generalibus.*

"2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

"3. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

"4. It was made pending the writ.

"5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

"6. The deed contains that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuetæ semper inducunt suspicionem.*

"Secondly, it was resolved that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, . . . yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* . . . which is accompanied with any trust." Lord Coke therefore advises: "Reader, when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also, 1. Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Presently after the gift, take the possession of them, for continuance of possession in the donor is a sign of trust. . . .

"And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, *that*

fraudulent conveyance, and are in any case entitled to share in the benefit of proceedings taken by creditors having claims at the date of the conveyance. The cases are collected in Robson on Bankruptcy, p. 139, ed. 1887.

(*b*) 3 Coke, 80 a; 1 Sm. L. C. 1.

all statutes made against frauds should be liberally and beneficially expounded to suppress the fraud: —

"'Quæritur, ut crescunt tot magna volumina legis
In promptu causa est, crescit in orbe dolus.'"

§ 485. In the application of the statute, a question of fact for the jury is constantly presented; namely, whether the transfer of the goods was *bona fide* or fraudulent, that is, "with the end, purpose, and intent to delay, hinder, or defraud creditors," as the act expresses it. It was, indeed, held in some early cases, of which the leading one is Edwards *v.* Harben (*c*), that under certain circumstances this was a question of law for the court. The decision was given in that case by Buller, J., who said: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: *that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent*" (*d*). As this case does not appear ever to have been overruled (*e*), though frequently mentioned unfavorably, it may be assumed that the law would be held to be the same at the present time; but it is to be observed that, in the guarded form in which the principle is announced, a case could scarcely arise in which it would be applicable, for it is difficult to suppose that an action would be tried where *nothing* would be shown beyond a bare conveyance without possession; where something of the relation of the parties, and the circumstances of their dealings, would not appear. Apart from this very exceptional case, the authorities are all in accordance in treating the question of *Fraus vel non* as one of fact for the jury, even where the vendor remains in possession.

§ 486. In Latimer *v.* Batson (*f*), an execution had been levied on the household furniture, wine, etc., of the Duke of Marlborough at Blenheim, and an officer remained in possession some time, and then executed a bill of sale to the execution creditor, but the duke prevailed on the latter to leave him in possession. The execution creditor afterwards sold the goods to the plaintiff, Latimer, for 700*l.*, and the plaintiff put a man-servant into the house. The duke also remained there, and used the goods, as if no execution had been put in; but the execution was known in the neighborhood. The goods were then seized by a second creditor and carried away. On these facts, Jervis

(*c*) 2 T. R. 587, and see *post*, § 489.

(*d*) See, also, Paget *v.* Perchard, 1 Esp. 205; Martin *v.* Podger, 2 W. Bl. 702.

(*e*) It was said to be good law by Lawrence, J., in Steel *v.* Brown, 1 Taunt. 382; see, however, the remarks of Lefroy, C. J., in the Irish case of Macdona *v.* Swiney, 8 Ir. C. L. R. 73, at pp. 84–86.

(*f*) 4 B. & C. 652.

contended that the judge ought to have directed the jury that if they thought the duke remained in possession, the sale was void, citing Wordall *v.* Smith (*g*), where Lord Ellenborough said that "to defeat an execution by a bill of sale, there must appear to have been a *bona fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable. There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors." But the court refused a new trial, affirming the propriety of the judge's charge, he having told the jury that if they thought the sale to the plaintiff was *bona fide*, and the purchase-money really paid by him, he was entitled to a verdict; but if the purchase-money was really paid by the duke, and the sale to the plaintiff colorable, they should find for defendant. Bayley, J., also held, in conformity with Leonard *v.* Baker (*h*), Watkins *v.* Birch (*i*), and Jezeph *v.* Ingram (*k*), that "*if goods seized under an execution are bona fide sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions if the circumstances under which he has the possession are known in the neighborhood.*"

In Martindale *v.* Booth (*l*), all the judges were of opinion that the continuance of possession in the vendor is not of itself sufficient to render void a sale of goods as fraudulent, especially where the possession is consistent with the deed which provides only for the future entry into possession by the purchaser, conditioned on the vendor's default; and in addition to the numerous cases there cited, those in the note (*m*) sufficiently establish the proposition that the *continued possession by the vendor of goods sold is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se.*

§ 487. That the notoriety of the sale is a strong circumstance to rebut the presumption of fraud, even when the vendor retains possession, is shown by the cases quoted in the above opinion, delivered by Bayley, J., in Latimer *v.* Batson, to which may be added Kidd *v.* Rawlinson (*n*), Cole *v.* Davies (*o*), [and Macdona *v.* Swiney (*p*).]

In Hale *v.* Metropolitan Omnibus Company (*q*), Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were

(*g*) 1 Camp. 332.
(*h*) 1 M. & S. 251.
(*i*) 4 Taunt. 823.
(*k*) 8 Taunt. 838.
(*l*) 3 B. & Ad. 498.
(*m*) Lady Arundell *v.* Phipps, 10 Ves. Jr., 145; per Buller, J., in Haselinton *v.* Gill, 3 T. R. 620, note *a*; Lindon *v.* Sharp, 6 M. & G. 895–898; Pennell *v.* Dawson, 18 C. B. 355.
(*n*) 2 Bos. & P. 59.
(*o*) 1 Ld. Raym. 724.
(*p*) 8 Ir. C. L. R. 73.
(*q*) 28 L. J. Ch. 777, 779.

indelible badges of fraud, but in truth every case must stand upon its own footing, and the court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a valuable consideration."

§ 488. It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bona fide* for a valuable consideration (*r*). Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor (*s*); nor to confess a judgment in favor of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained (*t*).

[The legislation with reference to bills of sale has rendered obsolete a part of the law under the statute of 13 Eliz. c. 5, so far as relates to the transfer of chattels. The statutes now in force are the 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878), and the 45 & 46 Vict. c. 43 (Bills of Sale Act (1878), Amendment Act, 1882). By the Bills of Sale Act, 1878, the 17 & 18 Vict. c. 36 (Bills of Sale Act, 1854), and the 28 & 29 Vict. c. 96 (Bills of Sale Act, 1866), were repealed, except as to bills of sale executed before the 1st of January, 1879 (the day when the act came into operation), and even as to such bills of sale the rules with respect to construction, and to the renewal of registration, were to be those of the Act of 1878.

The object of the legislation on this subject, as appears by the preamble to the Act of 1854, was to put an end to frauds which were frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons were enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale had the power of taking possession of the property of such persons to the exclusion of the rest of the creditors (*u*).

Accordingly registration, as well as certain other forms and requisites, were prescribed by the statutes, with a view to affording creditors and parties interested a true idea of the position in life of the grantor, and to giving such information as would enable persons interested to ascertain the *bona fides* of the transaction.

It should be observed that neither the statutes of Elizabeth nor the earlier Bills of Sale Acts rendered the contract *void between the par-*

(*r*) Wood *v.* Dixie, 7 Q. B. 892; Riches *v.* Evans, 9 C. & P. 640; Hale *v.* Metropolitan Omnibus Company, 28 L. J. Ch. 777.

(*s*) Darvill *v.* Terry, 6 H. & N. 807, and 30 L. J. Ex. 355.

(*t*) Holbird *v.* Anderson, 5 T. R. 235.

(*u*) See a discussion of the history and policy of the Bills of Sale Acts by Lord Blackburn in Cookson *v.* Swire, 9 App. Cas. at p. 664; 54 L. J. Q. B. at p. 254.

ties (*x*), and the 8th section of the Act of 1878 carefully enumerated those third persons who should remain unaffected by the contract, where the forms and requisites rendered necessary by the acts had not been complied with. Without these provisions, however, it would not have been competent to either party to impeach the provisions of such a contract, on the ground that it was intended as a fraud on creditors (*y*), for the general principle of law, that no man shall set up his own fraud as the basis of a right or claim for his own benefit, would clearly apply (*z*). But even as to creditors, such conveyances were not *void* but *voidable*, and the creditors must, as in all analogous cases, have elected whether they would treat their debtor's conveyance as valid or defeasible. If the transferee had made a conveyance to a *bona fide* third person for a valuable consideration before the bill of sale had been impeached by creditors as being in fraud of their rights, the title of such *bona fide* third person would not have been disturbed (*a*).

But the legislature thought fit to put still further restrictions upon transactions of this kind, and the Act of 1882 has made an important change in this respect. It repeals the 8th section of the Act of 1878, above referred to, and renders any bill of sale given *by way of security for the payment of money* (*b*) *absolutely void*, unless it complies with the provisions contained in the 8th, 9th, and 12th sections of the act.

In the third edition of this work (1884), the decisions under the Bills of Sale Acts were reviewed at some length, but under the Act of 1882 they have now become so numerous that the editors, bearing in mind the paramount importance of keeping the size of the work within a moderate compass, have decided to omit a review of these decisions in the present edition. The subject, moreover, is one which, strictly speaking, falls under the law of mortgage and not of sale. Mr. Benjamin's work, in the 2d edition (1873) (*c*), necessarily comprised a reference to the decisions under the repealed Acts of 1854 and 1866 only, and to have left that work as it stood would have been misleading. The editors have therefore felt themselves justified in omitting that portion of the 2d edition (*d*). In this relation the

(*x*) Davis *v.* Goodman, 5 C. P. D. 128, C. A.; overruling Div. Ct. Ibid. 20.

(*y*) Bessey *v.* Windham, 6 Q. B. 166; Doe d. Roberts *v.* Roberts, 2 B. & Ald. 367.

(*z*) Ibid.; Phillpotts *v.* Phillpotts, 10 C. B. 85 20 L. J. C. P. 11.

(*a*) Morewood *v.* South Yorkshire Railway Company, 3 H. & N. 798; 28 L. J. Ex. 114.

(*b*) The effect of the Bills of Sale Act, 1882, seems to be to divide bills of sale into three classes. The provisions of the Bills of Sale Act, 1882, rendering bills of sale absolutely void in certain cases, do not apply to any bills of sale executed before the commencement of the Act of 1882, nor to bills of sale executed after that date, but not given by way of security for the payment of money. Robson on Bankruptcy, pp. 531, 546, ed. 1887; Swift *v.* Pannell, 24 Ch. D. 210; 53 L. J. Ch. 341.

(*c*) Pp. 395–401.

(*d*) With this exception, and a few other necessary and immaterial verbal alterations,

reader must be referred to the numerous treatises dealing especially with bills of sale.]

Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles on which the bankrupt and insolvent laws of the country are based, the object of these laws being to secure an equal ratable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *pari passu ;* and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share (*d*).

In this connection it may be useful to refer to a class of cases which will again come under consideration in the chapter treating of *Stoppage in transitu.* The equity in favor of returning goods to an unpaid vendor, by a buyer who finds that he is insolvent and will be unable to pay for them is so strong in its appeal to the conscience of honest men, that cases have frequently arisen where the buyer, on becoming insolvent, has attempted to prevent the goods from being fused into the common mass of assets by rejecting them, or rescinding the sale and returning the goods.

In some early cases, before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy. The earliest case on the subject was Atkin *v.* Barwick (*e*), variously reported, and of which a full account was given by Lord Abinger in his dissenting opinion in James *v.* Griffin (*f*). But although this case subsequently received countenance in Alderson *v.* Temple (*g*), in Harman *v.* Fishar (*h*), and various other cases, and was made the basis of the

the whole of the 2d edition, the last which came entirely from the hand of Mr. Benjamin, has been reproduced in this.

(*d*) Dauglish *v.* Tennent, L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; Howden *v.* Haigh, 11 A. & E. 1033; Higgins *v.* Pitt, 4 Ex. 312; Wilson *v.* Ray, 10 A. & E. 82; Leicester *v.* Rose, 4 East, 372; Mallalieu *v.* Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339; Britten *v.* Hughes, 5 Bing. 460; Coleman *v.* Waller, 3 Y. & J. 212; Wells *v.* Girling, 1 B. & B. 447; Elliott *v.* Richardson, L. R. 5 C. P. 744. See, also, Jackson *v.* Duchaire, 3 T. R. 551; and Nunes *v.* Carter, L. R. 1 P. C. 342, for an instructive opinion of Lord Westbury on the construction of statutes setting aside sales made in contemplation of bankruptcy. The law is now governed by the 48th section of the Bankruptcy Act, 1883, and the authorities prior to that statute are only guides in construing that section. See Robson on Bankruptcy, p. 155 *et seq.* ed. 1887; Ex parte Griffith, 23 Ch. D. 69, C. A.; Ex parte Hill, Ibid. 695, C. A.

(*e*) 1 Stra. 165; 10 Mod. 432; Fortes. 353.

(*f*) 2 M. & W. 623–639.

(*g*) 4 Burr. 2235.

(*h*) 1 Cowp. 117.

decision in Salte *v.* Field (*i*), yet the *ratio decidendi* was constantly questioned, and it is now perfectly well settled that, if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraudulent preference in favor of the vendor. This was first distinctly held by Lord Kenyon and the King's Bench in Barnes *v.* Freeland (*j*), almost immediately after the decision given by them in Salte *v.* Field (*k*), and the question now always turns upon the point whether — First, the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or, secondly, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods.

An instance of the first kind is given in Nicholson *v.* Bower (*l*), where wheat was purchased by sample, and forwarded to the purchaser by railway, and on arrival at the railway warehouse a bulk sample was taken to the purchaser by his orders, and found to correspond, but the purchaser, knowing himself to be insolvent, told his carman, "Don't cart it home at present." The sale was by parol, and the impression of the judges evidently was that the transit was at an end, so that the vendor's right of stoppage was gone; but the value being over 10*l*., the sale was incomplete under the Statute of Frauds, unless the vendee had *accepted* as well as received the goods; and although it might be his duty to accept when he found that the bulk accorded with the sample according to his verbal agreement, yet if he chose not to accept, the sale was incomplete, and his object of returning the goods to his vendor would thus be accomplished. In the language of Erle, J., commenting on the buyer's action, "The meaning of all this seems to be this: 'I will hold my hand; in honesty the wheat ought to go back, as I cannot pay for it;' and he sends the next day a notice to the vendor, and is willing that it should go back to him, if by law it might. The bankrupt broke his contract, mayhap, by not accepting, but that does not show that there *was* an acceptance" (*m*).

(*i*) 5 T. R. 211.

(*j*) 6 T. R. 80. See, also, Neate *v.* Ball, 2 East, 123; Richardson *v.* Goss, 3 B. & P. 119; Heinekey *v.* Earle, in Ex. Ch. 8 E. & B. 410; 28 L. J. Q. B. 79.

(*k*) 5 T. R. 211.

(*l*) 1 E. & E. 172; 28 L. J. Q. B. 97; and see Richardson *v.* Goss, 3 B. & P. 119; and Ex parte Cote, 9 Ch. 27; [Schloss *v.* Feltus, 96 Mich. 623. — B.]

(*m*) As to what amounts to a rescission of a contract by an insolvent purchaser, see Morgan *v.* Bain, L. R. 10 C. P. 15.

But even if the *property* has passed, it may be that the *possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others. The different cases in which buyers have adopted this course, and thus kept unimpaired the vendor's right of stoppage *in transitu*, are referred to in the note (*n*).

The reader is also referred to a very singular case, that of Dixon *v.* Baldwen (*o*), where the King's Bench decided that although the transit was at an end, and although both the property and possession were confessedly in the vendee, yet under the special circumstances of the case the buyer had not laid himself open to a charge of fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of his intention to do so, made to his creditors at a meeting called by him, and not done with the voluntary intention of giving an undue advantage. The judges were not unanimous, and the question was considered by the majority rather as one of fact than of law.

§ 489. In America it is somewhat remarkable that the ruling of the King's Bench in Edwards *v.* Harben (*p*) has not only been followed to its full extent, but the doctrine has been pushed even beyond the principle there established. Chancellor Kent erroneously supposes the English law to be unsettled on the question (*q*), but he states it to be the established law in the Federal Courts of the United States that an absolute bill of sale is *itself* a fraud in law unless possession accompanies and follows the deed; and in the case of the schooner Romp in 1845 (*r*) it was even decided that the *bona fides* of the transaction between the parties, and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid.

[But the modern English doctrine was approved by the Supreme Court of the United States so long ago as 1857, in Warner *v.* Norton (*s*), where McLean, J., said (*t*): "Few questions in the law have given rise to a greater conflict of authority than the one under consid-

(*n*) Atkin *v.* Barwick, 1 Str. 165; 10 Mod. 432; Fortes. 353; Salte *v.* Field, 5 T. R. 211; Bartram *v.* Farebrother, 4 Bing. 579; Smith *v.* Field, 5 T. R. 402; James *v.* Griffin, 2 M. & W. 623; Siffken *v.* Wray, 6 East, 371; Heinekey *v.* Earle, 28 L. J. Q. B. 79, and 8 E. & B. 410; Bolton *v.* Lancashire and Yorkshire Railway Company, L. R. 1 C. P. 431; 35 L. J. C. P. 137; Whitehead *v.* Anderson, 9 M. & W. at p. 529. See remarks of Parke, B., in Van Casteel *v.* Booker, 18 L. J. Ex. 9, at p. 14; 2 Ex. 691, at p. 706.

(*o*) 5 East, 175.

(*p*) 2 T. R. 587.

(*q*) 2 Kent, 521.

(*r*) Olcott's Adm. 196, [Fed Cas. No. 12,030,] cited in note at p. 520, 2 Kent, 12th ed. See, also, Hamilton *v.* Russel, 1 Cranch, 309, where a decision of the Supreme Court of the United States was delivered by Marshall, C. J., in 1803, to the same effect.

(*s*) 20 Howard, 448.

(*t*) At p. 460.

eration. But for many years past the tendency has been, in England and the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of the goods does not accompany the deed, it is *prima facie* fraudulent, but open to the circumstances of the transaction, which may have an innocent purpose."

In the State of New York, the statute relating to fraudulent conveyances and contracts (*u*) contains an express provision upon the subject. The construction put upon the section, after much conflict of opinion, has settled the law substantially in accordance with the English rule (*x*).

The English doctrine is now also established in Virginia (*y*), New Jersey (*z*), North and South Carolina (*a*), Rhode Island (*b*), and several other States; while in Massachusetts (*c*), Pennsylvania (*d*), Maine (*e*), Connecticut (*f*), New Hampshire (*g*), Vermont (*h*), Illinois (*i*), and others, the retention of possession is treated as *per se* fraudulent. In many of these States, as in that of New York, the matter is regulated by statute, and the decisions are given upon its construction.]

(*u*) New York Revised Statutes, chap. VII. s. 5 (ed. 1836). The Act was passed on the 4th of December, 1827, and took effect on the 1st of January, 1830. Prior to the statute, in Sturtevant *v.* Ballard, 9 Johnson, 337 (1812), Chancellor Kent had laid down the law in accordance with the decision in Edwards *v.* Harben; but the authority of this case had been subverted by a later decision of the same court in 1824, Bissell *v.* Hopkins, 3 Cowen, 166, where see a learned note of the reporter at p. 189.

(*x*) Smith *v.* Acker, 23 Wendell, 653; Hanford *v.* Artcher, 4 Hill, 271; Mitchell *v.* West, 55 N. Y. 107; May *v.* Walter, 56 N. Y. 8; Tilson *v.* Terwilliger, 56 N. Y. 273; Blaut *v.* Gabler, 77 N. Y. 461. The construction put upon the language of the statute in Randall *v.* Cook, 17 Wendell, 56, and Beekman *v.* Bond, 19 Wendell, 444, is overruled in Smith *v.* Acker, *supra*. In Butler *v.* Van Wyck, 1 Hill, 438, the court (Bronson, J., who had delivered the opinion of the court in Randall *v.* Cook, and Beekman *v.* Bond, *supra*, dissenting) reluctantly felt themselves bound by the decision of Smith *v.* Acker.

(*y*) The Baltimore and Ohio Railroad Company *v.* Glenn, 28 Maryland, 287, at pp. 324, 325, where the Virginian authorities are reviewed.

(*z*) Miller *v.* Pancoast, 29 N. J. L. 250.

(*a*) Boone *v.* Hardie, 83 N. C. 470; Smith *v.* Henry, 2 Bailey, 118.

(*b*) Sarle *v.* Arnold, 7 R. I. 582.

(*c*) Lanfear *v.* Sumner, 17 Mass. 110, 113; Dempsey *v.* Gardner, 127 Mass. 381.

(*d*) Clow *v.* Woods, 5 Sergeant & Rawle, 275; McKibbin *v.* Martin, 64 Penn. 352.

(*e*) McKee *v.* Garcelon, 60 Maine, 165.

(*f*) Swift *v.* Thompson, 9 Conn. 63, 69; Hatstat *v.* Blakeslee, 41 Conn. 301.

(*g*) Coburn *v.* Pickering, 3 N. H. 415; Lang *v.* Stockwell, 55 N. H. 561.

(*h*) Weeks *v.* Prescott, 53 Vermont, 57, 72.

(*i*) Thompson *v.* Yeck, 21 Ill. 73; Allen *v.* Carr, 85 Ill. 388.

AMERICAN NOTE.

§§ 428–489.

FRAUD. The general principles governing fraudulent contracts are too elementary to require discussion here. We have space to consider them only so far as they apply to sales, and first as to

FRAUD ON THE SELLER.

This most usually consists in misstatements by the buyer as to his ability to pay, or means of payment. Here the rule is this : If he fraudulently misstates the facts, material facts, the sale is voidable. False statements as to what property he owns, what debts he owes, what amount of business he is doing, that his property is unincumbered, etc., come within this class. Cary *v.* Hotailing, 1 Hill, 311; Olmsted *v.* Hotailing, Ib. 317; Van Neste *v.* Conover, 20 Barb. 547; Hunter *v.* Hudson River Iron Co. Ib. 494; Stephenson *v.* Weathersby, Ark. (1898), 45 S. W. 987. See Gregory *v.* Schoenell, 55 Ind. 101; Eaton *v.* Avery, 83 N. Y. 31; Naugatuck Cutlery Co. *v.* Babcock, 22 Hun, 481; Gainesville Bank *v.* Bamberger, 77 Tex. 48; Reid *v.* Cowduroy, 79 Iowa, 169, and a valuable note thereto in 18 Am. St. R. 359; Work *v.* Jacobs, 35 Neb. 772. False statements to a commercial agency (or to another merchant, McKenzie *v.* Weinnan, Ala. (1897), 22 So. 508), intended to be communicated to the plaintiff, and on which he relies, may be a fraud, as if made to himself directly. Eaton *v.* Avery, 83 N. Y. 31; Mooney *v.* Davis, 75 Mich. 188; Macullar *v.* McKinley, 99 N. Y. 353; Cantor *v.* Claflin, 12 N. Y. Supp. 759; Claflin *v.* Flack, 13 N. Y. Supp. 269; Kelly *v.* Gould, 19 N. Y. Supp. 349. No liability attaches to such statements unless reliance was placed upon them within a reasonable time after they were made. Four months was held to be a reasonable time in Humphrey *v.* Smith, 7 App. Div. (N. Y.) 442; eight months in Bliss *v.* Sickles, 142 N. Y. 647, affirming 21 N. Y. Supp. 273; five months in Naugatuck Cutlery Co. *v.* Babcock, 22 Hun, 481. Such statements must have been made within a reasonable time before the sale. Two and one half years was held to be too long in Sharpless Bros. *v.* Gummey, 166 Pa. St. 199. So false statements as to one's identity, connection with some particular firm, agency for some particular person, or the like, are fraudulent. Barker *v.* Dinsmore, 72 Pa. St. 427; Hardman *v.* Booth, 32 Law J. (N. S.) Ex. 105; Kingsford *v.* Merry, 1 H. & N. 503; Aborn *v.* Merchants' Despatch Co. 135 Mass. 283; McCrillis *v.* Allen, 57 Vt. 505; Alexander *v.* Swackhamer, 105 Ind. 81; Peters Box Co. *v.* Lesh, 119 Ib. 98; Rodliff *v.* Dallinger, 141 Mass. 1. So a false statement by a buyer as to his age, if he afterwards successfully refuses to pay on the ground of infancy, may avoid a sale. Badger *v.* Phinney, 15 Mass. 359. So in an exchange by A. with B., if B. knowingly gives in exchange stolen property, the contract is voidable by A. Titcomb *v.* Wood, 38 Me. 561. Or if the buyer pays in known counterfeit money. Williams *v.* Given, 6 Gratt. 268; Green *v.* Humphry, 50 Pa. St. 212; and see Harner *v.* Fisher, 58 Ib. 453. So where the buyer pays with the notes of a third person whom the buyer knows to be insolvent, but of whose solvency he professes to know nothing. Henry *v.* Allen, 93 Ala. 197; Sebastian May Co. *v.* Codd, 77 Md. 293, is like it. In Andrews *v.* Jackson, 168 Mass. 266, the buyer

represented that certain notes of a third party given by the buyer in payment were "as good as gold." A finding that the statement was a false representation of fact was sustained. A false statement by a buyer that he has just bought other similar goods at a certain price, if really the inducement to the sale, enables the vendor to avoid. Smith *v.* Countryman, 30 N. Y. 655, an interesting case. So a false statement by a vendee to a dealer that the latter's competitor in business had actually offered similar goods at a certain price to the vendee justifies a rescission of the contract. Smith *v.* Smith, 166 Pa. St. 563, doubting Graffenstein *v.* Epstein, 23 Kans. 443, *infra*, p. 480. In Elerick *v.* Reid, 54 Kans. 579, a retail dealer sold his stock, stating to the buyer that the private mark on the goods represented cost and carriage. The buyer intended to pay what the mark represented. In fact it represented selling price. Held, a fraud on the buyer.

It has been held not a legal fraud to untruly say to the seller, "That is all I will give," or for an agent to say, "That is all my principal authorized me to pay." Humphrey *v.* Haskell, 7 Allen, 498; Vernon *v.* Keyes, 12 East, 632, 4 Taunt. 488. But Pollock says this English case may not be considered now to be sound. Pollock on Torts (4th ed.), p. 262; on Contracts (6th ed.), p. 544. False statements as to what one will do in future do not authorize a rescission for fraud. Cohn *v.* Broadhead, 51 Neb. 834; Perkins *v.* Lougee, 6 Neb. 220; Dawe *v.* Morris, 149 Mass. 188.

For similar reasons, statements which in their nature involve only opinion, belief, judgment, estimates of value, etc., do not avoid a sale. Roberts *v.* Applegate, 153 Ill. 210. That the buyer is "worth so much," or that his property is of a certain value, etc., come under this head. Belcher *v.* Costello, 122 Mass. 189; Lynch *v.* Murphy, 171 Mass. 307; Ellis *v.* Andrews, 56 N. Y. 83; Van Epps *v.* Harrison, 5 Hill, 63; Watts *v.* Cummins, 59 Pa. St. 84. But it would be a fraud for a buyer to falsely say "he was out of debt," that he owned six acres of land and other property free from incumbrance. McClellan *v.* Scott, 24 Wis. 81. And even statements as to the value of property may be couched in such language as to be an affirmation, and not merely an opinion. Titus *v.* Poole, 145 N. Y. 414, 426; 73 Hun, 383. If the language used by the vendee be susceptible of two meanings, one as asserting a fact, and the other as merely expressing an opinion, the jury are to judge in what sense it was in fact used. Morse *v.* Shaw, 124 Mass. 59; Homer *v.* Perkins, Ib. 431; Stubbs *v.* Johnson, 127 Ib. 219; Simar *v.* Canaday, 53 N. Y. 298.

Purchasing, not intending to pay. Another well-established species of fraud by a vendee is purchasing with a *positive intention not to pay* for the goods. If such intention were known to the vendor, he certainly would not sell. Its suppression, therefore, is a legal fraud; and such design may be often inferred from the conduct and circumstances of the buyer. ALABAMA: Loeb *v.* Flash, 65 Ala. 526; Maxwell *v.* Brown Shoe Co. 114 Ala. 304 (1897), citing many Alabama decisions. ARKANSAS: Taylor *v.* Mississippi Mills, 47 Ark. 247, and cases cited; Bugg *v.* Wertheimer Shoe Co. 64 Ib. 12. ILLINOIS: Wabash R. R. Co. *v.* Shryock, 9 Bradw. 323; Farwell *v.* Hanchett, 120 Ill. 573; 128 Ib. 9. INDIANA: O'Donald *v.* Constant, 82 Ind. 212; Brower *v.* Goodyer, 88 Ind. 572; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105. IOWA: Oswego Starch Factory *v.* Lendrum, 57 Iowa, 573. KENTUCKY: Reager *v.* Kendall, 39 S. W. 257 (1897). MAINE: Burrill *v.* Stevens, 73 Me. 395. MARYLAND:

Powell *v.* Bradlee, 9 G. & J. 220. MASSACHUSETTS: Dow *v.* Sanborn, 3 Allen, 181; Watson *v.* Silsby, 166 Mass. 57. MICHIGAN: Shipman *v.* Seymour, 40 Mich. 274; Ross *v.* Miner, 67 Mich. 410; Zucker *v.* Karpeles, 88 Mich. 413; Frisbee *v.* Chickering, 73 N. W. 112 (1897). MINNESOTA: Slagle *v.* Goodnow, 45 Minn. 531. MISSOURI: Fox *v.* Webster, 46 Mo. 181. NEW HAMPSHIRE: Stewart *v.* Emerson, 52 N. H. 301, an elaborate opinion by Doe, C. J. NEW YORK: King *v.* Phillips, 8 Bosw. 603; Durell *v.* Haley, 1 Paige, 492; Ash *v.* Putnam, 1 Hill, 302; Buckley *v.* Artcher, 21 Barb. 585; Byrd *v.* Hall, 2 Keyes, 646; Nichols *v.* Michael, 23 N. Y. 264; Hennequin *v.* Naylor, 24 Ib. 139. NORTH CAROLINA: Des Farges *v.* Pugh, 93 N. C. 31; Wallace *v.* Cohen, 111 Ib. 103. RHODE ISLAND: Mulliken *v.* Millar, 12 R. I. 296; Swift *v.* Rounds, 19 R. I. 527, citing many cases and holding that an action of tort for deceit will lie. UNITED STATES: Jaffrey *v.* Brown, 29 Fed. Rep. 485; Fechheimer *v.* Baum, 37 Fed. Rep. 175; Donaldson *v.* Farwell, 93 U. S. 631. It is not enough that a fraudulent intent not to pay was formed after the sale; it must have existed at the time. Starr *v.* Stevenson, 91 Iowa, 684.

A few courts hold that even a positive intention not to pay, if unaccompanied with any "artifice intended and fitted to deceive," will not avoid a sale; in which position Pennsylvania is prominent. Smith *v.* Smith, 21 Pa. St. 367; Bunn *v.* Ahl, 29 Ib. 390; Backentoss *v.* Speicher, 31 Ib. 324; Wessels *v.* Weiss, 156 Pa. St. 591; Rodman *v.* Thalheimer, 75 Ib. 232; Bughman *v.* Central Bank, 159 Pa. St. 94 (1893), where it is declared that the earlier Pennsylvania doctrine (see 3 Whart. 369, 396) was like that of the majority of the courts, which the opinion commends, while it condemns the doctrine of Smith *v.* Smith as unsound, although established in Pennsylvania. Perlman *v.* Sartorius, 162 Pa. St. 320. In Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, there was a positive fraudulent representation of solvency. Smith *v.* Smith is approved. Wilson *v.* White, 80 N. C. 280. As to what constitutes such artifice, see Kline *v.* Baker, 99 Mass. 253; Harner *v.* Fisher, 58 Pa. St. 453.

But all agree, on the other hand, that mere knowledge by the vendee that he is insolvent, and that his ability to pay is, to say the least, extremely doubtful, will not alone, unattended with a positive intention not to pay, avoid the sale. One who intends to pay, and in the exercise of average judgment believes that he will be able to do so, is not guilty of fraud, even though he proves to be mistaken. Diggs *v.* Denny, 86 Md. 116, where the question is carefully considered.

The difference between buying with no reasonable expectation of being able to pay, and buying with an intention not to pay, is not, however, very broad, to the average mind. See Jaffrey *v.* Brown, 29 Fed. Rep. 485; Elsass *v.* Harrington, 28 Mo. App. 300; 38 Ib. 425. And some courts hold it to be quite equivalent. See Talcott *v.* Henderson, 31 Ohio St. 162; Wilmot *v.* Lyon, 49 Ib. 296. However, mere non-disclosure of insolvency, "hoping against hope," is not a legal fraud. CALIFORNIA: Bell *v.* Ellis, 33 Cal. 620. CONNECTICUT: Morrill *v.* Blackman, 42 Conn. 324. DELAWARE: Truxton *v.* Fait, etc. Co. 42 Atl. 431 (1899). DISTRICT OF COLUMBIA: Morrison *v.* Shuster, 1 Mackey, 190. INDIANA: Thompson *v.* Peck, 115 Ind. 513. IOWA: Franklin, etc. Co. *v.* Collier, 89 Iowa, 69. KANSAS: Kelsey *v.* Harrison, 29 Kans. 143. MAINE: Cross *v.* Peters, 1 Greenl. 378, a carefully considered case. MICHIGAN: Ross *v.* Miner, 101 Mich. 1; Reeder Shoe Co. *v.* Prylinski, 102 Ib. 468; Illinois Leather Co.

v. Flynn, 108 Ib. 91. MINNESOTA: Slagle *v.* Goodnow, 45 Minn, 531. MISSOURI: Bidault *v.* Wales, 19 Mo. 36; 20 Ib. 547. NEW YORK: Hall *v.* Naylor, 6 Duer, 71; Mitchell *v.* Worden, 20 Barb. 253; Fish *v.* Payne, 7 Hun, 586; Swarthout *v.* Merchant, 47 Hun, 106; Wheeler, etc. Mfg. Co. *v.* Keeler, 65 Hun, 508; Pinckney *v.* Darling, 3 App. Div. 553; Nichols *v.* Pinner, 18 N. Y. 295; Morris *v.* Talcott, 96 Ib. 100; Hotchkin *v.* Third National Bank, 127 Ib. 329; Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206–213. NOVA SCOTIA: Small *v.* Glasel, 28 Nova Scotia, 245. OHIO: Talcott *v.* Henderson, 31 Ohio St. 162. PENNSYLVANIA: Labe *v.* Bremer, 167 Pa. St. 15. RHODE ISLAND: Dalton *v.* Thurston, 15 R. I. 418. UNITED STATES: Conyers *v.* Ennis, 2 Mason, 236; Biggs *v.* Barry, 2 Curt. 259; Carnahan *v.* Bailey, 28 Fed. Rep. 519. WISCONSIN: Garbutt *v.* The Bank, 22 Wis. 384. Nor is it a legal fraud for the buyer not to inform the seller he intends to pay by a set-off of a counter-claim. Baker *v.* Fisher, 19 Ont. Rep. 650. Perhaps it would be if the buyer positively told the seller he would pay for the goods the next morning, and actually showed him a check as proof of his ability to do so, when in fact he intended to get possession of the property and not pay for it, but to credit the amount on a counter-claim he had against the vendor. Blake *v.* Blackley, 109 N. C. 257. An intention and expectation to pay for goods which are bought upon fraudulent misrepresentation of facts does not, however, prevent the seller from avoiding the sale. Judd *v.* Weber, 55 Conn. 267.

It is not ordinarily a fraud on a vendor for the buyer not to inform him of certain facts which if known to him would greatly enhance the price, there being no deception or artifice used, and no confidential relations existing between the parties, especially if knowledge of the facts is equally open to both parties. Laidlaw *v.* Organ, 2 Wheat. 178, a leading case, in which the buyer of tobacco knew of the Treaty of Ghent, between England and America, which suddenly raised the market price of the article, but he did not inform the vendor, although asked, "Is there any news?" See, also, Harris *v.* Tyson, 24 Pa. St. 347; Butler's Appeal, 26 Ib. 63; Kintzing *v.* McElrath, 5 Ib. 467; Smith *v.* Beatty, 2 Ired. Eq. 456; Burns *v.* Mahannah, 39 Kans. 87; Pennybacker *v.* Laidley, 33 W. Va. 624; Matthews *v.* Bliss, 22 Pick. 48. But if he positively misleads, it is a fraud, in equity at least. Livingston *v.* Peru Iron Co. 2 Paige, 390. In Bench *v.* Sheldon, 14 Barb. 66, the plaintiff lost a flock of twenty-one sheep. A neighbor found them in the highway and informed the defendant, who went to the plaintiff, asked if he had found his sheep, and, being told he had not, said, "I suppose you never will," and then bought them for ten dollars. He was held liable for the full value of the sheep ($80), not because he did not inform the plaintiff of the finding, but because he said something to mislead him. See, also, Stewart *v.* Wyoming Ranche Co. 128 U. S. 383.

At auction sales it is a legal fraud for the buyer to corruptly prevent or dissuade others from bidding, or to combine with others not to bid; though most of the cases seem to have arisen in equity between vendor and vendee, or in suits between the parties to the corrupt agreement, seeking to enforce it against each other. Very few instances, if any, exist in which a vendor who has sold and delivered property under such circumstances has retaken it from the vendee because of such corrupt agreements. See Jack-

son *v.* Morter, 82 Pa. St. 291; Cocks *v.* Izard, 7 Wall. 559; Doolin *v.* Ward, 6 Johns. 194; Wilbur *v.* How, 8 Ib. 444; Thompson *v.* Davies, 13 Ib. 112; Jones *v.* Caswell, 3 Johns. Cas. 29, 529; De Baun *v.* Brand, 60 N. J. L. 283 (1897); Gulick *v.* Ward, 10 N. J. L. 87; Slingluff *v.* Eckel, 24 Pa. St. 472; Gardiner *v.* Morse, 25 Me. 140.

Although combinations among buyers to prevent competition and "chill the sale," as it is called, are unlawful, yet associations of persons enabling one to buy for all, for the purpose of division, when no one person would probably buy the whole, are not illegal, since the natural effect would be to enhance the price and not depress it. Phippen *v.* Stickney, 3 Met. 387; Smith *v.* Greenlee, 2 Dev. 126; Kearney *v.* Taylor, 15 How. 521.

Whenever, therefore, there has been a fraud in the legal sense, the sale may be avoided or ratified by the vendor at his option. Commencing an action for the price of the goods, *with full knowledge of the fraud*, ordinarily ratifies and affirms the sale. Butler *v.* Hildreth, 5 Met. 49, a leading case; Bulkley *v.* Morgan, 46 Conn. 393; Dibblee *v.* Sheldon, 10 Blatchf. 178; MacKinley *v.* M'Gregor, 3 Whart. 369; Dellone *v.* Hull, 47 Md. 112; Emma Min. Co. *v.* Emma Co. 7 Fed. Rep. 421, an important case; Lloyd *v.* Brewster, 4 Paige, 537, where, however, the vendor had proceeded to judgment. So in Marsh *v.* Pier, 4 Rawle, 273; Stoutenburgh *v.* Konkle, 15 N. J. Eq. 33. And see Dalton *v.* Hamilton, 1 Hannay (N. B.), 422; Bryan *v.* Block, 52 Ark. 458. Of course knowledge of the fraud is essential. Equitable Foundry Co. *v.* Hersee, 103 N. Y. 25; Kraus *v.* Thompson, 30 Minn. 64; Hays *v.* Midas, 104 N. Y. 602; Rochester Distilling Co. *v.* Devendorf, 72 Hun, 428, and cases cited. In Albany Hardware Co. *v.* Day, 11 App. Div. (N. Y.) 230, the plaintiffs had brought an action for the price and recovered judgment. Execution issued thereon, but was returned wholly unsatisfied. The plaintiffs then learned for the first time that fraud had been practised upon them in the sale, and thereupon brought this action to recover damages for the fraud. It was held that the existence of the judgment in the former action was not a bar to the maintenance of this action. The case is distinguished from one where the plaintiff seeks to avoid the contract and recover possession of the goods for fraud.

Where the judgment for the purchase-price has been satisfied, the vendor cannot avoid the sale and recover the goods. Caylus *v.* N. Y. etc. R. R. Co. 76 N. Y. 609; Rochester Distilling Co. *v.* Devendorf, 72 Hun, 622, 625.

While knowledge is essential, this does not mean that the vendor must then have known all the evidence existing to prove such fraud, in order to effect his alleged ratification. Bach *v.* Tuch, 126 N. Y. 53.

It is hardly necessary to add that a vendor cannot, on account of fraud, properly sue for the price before the agreed time of credit has expired. The fraud does not shorten the contract time of payment any more than it enlarges the contract price of the goods. See Kellogg *v.* Turpie, 2 Bradw. 55, 93 Ill. 265, and cases cited; Adler *v.* Fenton, 24 How. 407; Dellone *v.* Hull, 47 Md. 112; Allen *v.* Ford, 19 Pick. 217. New York, and perhaps some other States, however, seem to allow this to be done. Wigand *v.* Sichel, 3 Keyes, 120; Roth *v.* Palmer, 27 Barb. 652; Mann *v.* Stowell, 3 Chandl. (Wis.) 243. But it is not easy to see how this can be, unless the vendee has actually sold the goods and received the money; in which

case an action for money had and received might lie, but not for goods sold and delivered, as that action is founded upon the contract of sale.

Commencing an action for deceit against the vendee may be sufficient proof of an affirmance, as held in Kimball *v.* Cunningham, 4 Mass. 505, and Bacon *v.* Brown, 4 Bibb, 91. But perhaps it is not absolutely conclusive. Emma Mining Co. *v.* Emma Co. 7 Fed. Rep. 420; Bonaparte *v.* Clagett, 78 Md. 87. But if the vendor has recovered full damages sustained for the fraud, it is difficult to see how he can afterwards rescind the sale and take the property also.

Taking security for the price also ratifies the sale. Joslin *v.* Cowee, 52 N. Y. 90. Proving a claim for the price against the vendee in bankruptcy may also be an affirmance. Seavey *v.* Potter, 121 Mass. 297; Ormsby *v.* Dearborn, 116 Ib. 386; Roan *v.* Winn, 93 Mo. 503. But see McBean *v.* Fox, 1 Bradw. 177, that the vendor might still sue for the deceit. If the creditor avoids by bringing replevin for a part of the goods, but afterwards proves his claim for the balance in bankruptcy, no one objecting thereto, this does not prevent him from prosecuting his replevin suit. Raphael *v.* Reinstein, 154 Mass. 178. Once duly affirmed, a vendor cannot avoid; once duly avoided, he cannot affirm. Moller *v.* Tuska, 87 N. Y. 166; Pence *v.* Langdon, 99 U. S. 582; Morris *v.* Rexford, 18 N. Y. 552; Sanger *v.* Wood, 3 Johns. Ch. 416. Perhaps if he rescinded and recovered only part of the goods, he might still sue and recover the price of the balance. Powers *v.* Benedict, 88 N. Y. 605; Kinney *v.* Kiernan, 49 N. Y. 164; Hersey *v.* Benedict, 15 Hun, 282; Sleeper *v.* Davis, 64 N. H. 59; Raby *v.* Frank, 12 Texas Civ. App. 125. And see Morford *v.* Peck, 46 Conn. 384. Farwell *v.* Myers, 64 Mich. 234, 34 Am. Law Reg. 243, is *contra*. See the valuable note thereto by Mr. Charles A. Robbins, of the Chicago bar. If the vendor has in no way affirmed the sale, he may, within a reasonable time thereafter, avoid it and replevy the goods from the vendee, or bring trover for their value, without any previous demand. Seaver *v.* Dingley, 4 Greenl. 306 (2d ed.); Norton *v.* Young, 3 Ib. 34, and note; Lynch *v.* Beecher, 38 Conn. 490; Farwell *v.* Hanchett, 120 Ill. 573; Converse *v.* Sickles, 146 N. Y. 200; Thurston *v.* Blanchard, 22 Pick. 18, and many other cases, though some hold a demand necessary; Pangborn *v.* Ruemenapp, 74 Mich. 572. Or he may retake them himself, using no unnecessary force for that purpose. Hodgeden *v.* Hubbard, 18 Vt. 504. But this right of rescission does not vest in a vendor's creditors, nor in his assignee or second vendee. Brown *v.* Pierce, 97 Mass. 46.

Of course, if the vendor rescinds, he must first return anything of value he has received from the vendee: Kimball *v.* Cunningham, 4 Mass. 502; Norton *v.* Young, 3 Greenl. 30; Weed *v.* Page, 7 Wis. 503; Stevens *v.* Hyde, 32 Barb. 171; Parks *v.* Lancaster, Tex. 38 S. W. 262 (1896); Evans *v.* Gale, 18 N. H. 397; Wilcox *v.* San Jose Co. Ala. (1897), 21 So. 376; Building Association *v.* Cameron, 48 Neb. 124; Snow *v.* Alley, 144 Mass. 555; as the note of some third person, for instance: Baker *v.* Robbins, 2 Denio, 136; Coolidge *v.* Brigham, 1 Met. 547; Evans *v.* Gale, 17 N. H. 573; Wheaton *v.* Baker, 14 Barb. 594; Cushman *v.* Marshall, 21 Me. 122; Estabrook *v.* Swett, 116 Mass. 303; Spencer *v.* St. Clair, 57 N. H. 9. But the buyer's own unsecured and unnegotiated note for the price need not be returned until the trial of the rescinding suit. Thurston *v.* Blanchard, 22 Pick. 18; Duval *v.* Mowry, 6 R. I. 479; Frost *v.* Lowry, 15 Ohio, 200; Dayton *v.* Monroe, 47 Mich. 193; Wood *v.* Garland, 58

N. H. 154; Pangborn *v.* Ruemenapp, 74 Mich. 572. It is not necessary to delay the action until maturity of the note. Thomas *v.* Dickinson, 65 Hun, 5; 67 Hun, 350. A thing of no value need not be returned. Withers *v.* Greene, 9 How. 213; Van Buren *v.* Digges, 11 How. 461; Boggs *v.* Wann, 58 Fed. R. 681, 686. The vendor may recover in equity from the buyer's assignee, the proceeds of the goods, when they have been resold by the buyer. Am. Sugar Ref. Co. *v.* Fancher, 145 N. Y. 552. Some hold that if the vendor cannot recover all of the goods sold, he is not bound on rescission to restore the price of those he does not get, but may retain as much of the money received as will represent the price of the goods unrecovered. Raby *v.* Sweetzer, 12 Tex. Civ. App. 38; Pearse *v.* Pettis, 47 Barb. 285; Symns *v.* Benner, 31 Neb. 597; Tootle *v.* Bank, 34 Neb. 863; Ladd *v.* Moore, 3 Sandf. 589; Armstrong *v.* Tuffts, 6 Barb. 432; Nichols *v.* Michael, 23 N. Y. 264. And the vendor need not tender a part payment made by the purchaser, when the latter has resold a part of the goods of greater value than the amount paid; Farwell Co. *v.* Hilton, 84 Fed. R. 293; or where the purchaser has damaged them to a greater amount than the part payment. Phœnix Iron Co. *v.* McEvony, 47 Neb. 228. And see Symnes *v.* Benner, 31 Neb. 593. So much for the immediate parties to the sale.

Sales by Fraudulent Purchaser. Whether a fraudulent purchaser can, before avoidance by the seller, give a good title to a *bona fide* vendee, depends somewhat upon the nature and character of the fraud. If the fraud went only to the motive or inducement of the sale, he could; if, on the other hand, it related to the origin and foundation of the contract, he could not. A fraudulent statement by A. that he is buying as agent for B. when he is not, or that he is partner in a well-known solvent firm when he is not, goes to the very existence of the contract, and a sale and delivery to a person under such circumstances gives him no title which he can transfer to another. It is not, indeed, a sale at all, but only the semblance of a sale. This distinction was clearly stated by Mr. Justice Holmes in the late case of Rodliff *v.* Dallinger, 141 Mass. 1. There the plaintiff, after refusing to sell to C., a broker, on his own personal credit, was induced, by such broker's fraudulent representations that he was really buying for some other party, and that such other party (undisclosed) was as good as P. & Co. (who were in good standing and credit with the plaintiff), to part with the goods to the broker. to charge them to him on the books, and give him a bill of sale as sold to him. The broker then pledged the goods to the defendant, who in good faith advanced a fresh loan to the broker upon the goods. It was held, notwithstanding these facts, that the plaintiff could replevy the goods from such *bona fide* pledgee, Judge Holmes saying: "The invalidity of the transaction does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract. not to its existence, as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses and dealt with as the person so identified, says that he is A. when in fact he is B. But when one of the formal constituents of a legal transac-

tion is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake." Wyckoff *v.* Vicary, 75 Hun, 409.

The same distinction seems to be involved, though not so clearly stated, in Edmunds *v.* Merchants' Transportation Co., and Aborn *v.* The Same, 135 Mass. 283. In the first case the plaintiff sold goods to a swindler in person, who falsely represented himself to be E. P., who was a reputable and responsible merchant, *though not personally known to the plaintiff*, and it was held that the sale was only voidable but not void, and that the property passed in the first instance to the buyer; the sale was really made to the person actually present, though induced by a misrepresentation, whereas, in the second case, the same swindler falsely represented to the plaintiff that he was a brother of the same E. P. and *was buying for him*, and it was held that the alleged sale was void, and that no title whatever passed. The plaintiff understood he was selling, and intended to sell, only to E. P.; and as the swindler was not E. P. nor his agent, there was no sale to any one. See, also, Barker *v.* Dinsmore, 72 Pa. St. 427; Peters Box Co. *v.* Lesh, 119 Ind. 98; McCrillis *v.* Allen, 57 Vt. 505; Baehr *v.* Clark, 83 Iowa, 313 (1891), though here there was not even a sale to the defendant's vendor, but only a bailment. 1 N. Y. Supp. 875.

The distinction above noted as to sales of chattels prevails also in commercial paper; for if a person, without fault or laches on his part, is induced to sign a negotiable note upon the fraudulent assurance of the payee that it is only a receipt or some other paper, such note is not valid even in the hands of a *bona fide* indorsee for value. The essential and fundamental element of a contract is wanting. See Foster *v.* Mackinnon, L. R. 4 C. P. 704 (1869); Whitney *v.* Snyder, 2 Lans. 477; Walker *v.* Ebert, 29 Wis. 194; Gibbs *v.* Linabury, 22 Mich. 479; Briggs *v.* Ewart, 51 Mo. 245. If, on the other hand, the note is obtained merely by fraudulent "inducements" by the payee, though sufficient to make it entirely worthless in his hands, he may still give a good title to a *bona fide* indorsee. This is elementary law.

So if, in the sale of merchandise, the fraud consists only of false inducements, promises, statements even, held out to the seller to persuade him to sell, and he does really intend to sell to the very purchaser, then the sale is at most only voidable, a title passes, and such fraudulent vendee may, before avoidance by the seller, transfer a good title to a *bona fide* purchaser for value; the burden of proof being, of course, on such sub-vendee that he was such a purchaser. Easter *v.* Allen, 8 Allen, 7; Pringle *v.* Phillips, 5 Sand. 157; Devoe *v.* Brandt, 53 N. Y. 462; Levy *v.* Cooke, 143 Pa. St. 607; Whitaker Iron Co. *v.* Preston Bank, 101 Mich. 146, and cases cited; Sawyer *v.* Almand, 89 Geo. 314; Starr *v.* Stevenson, 91 Iowa, 684; Neff *v.* Landis, 110 Pa. St. 204 (1885), and many other cases.

It may be that in some of the cases the distinction above noted, as to when a fraudulent vendee can or cannot give a good title to another, has not always been kept in mind (as in Craig *v.* Marsh, 2 Daly, 61, and Hawkins *v.* Davis, 5 Baxt. 698), but the general doctrine, that such a vendee may usually resell and bind his vendor, is well established.

Some of the more important cases in favor of the rule are: Mowrey *v.* Walsh, 8 Cow. 238; Benedict *v.* Williams, 48 Hun, 125; Somes *v.* Brewer, 2 Pick. 183, a sale of real estate, but in which the rule was elabo-

rately vindicated; Rowley *v.* Bigelow, 12 Pick. 307; Neal *v.* Williams, 18 Me. 391; Bean *v.* Smith, 2 Mason, 252; Hoffman *v.* Noble, 6 Met. 68. Followed in ALABAMA: Le Grand *v.* Nat. Bank, 81 Ala. 123 (1886); Scheuer *v.* Goetter, 102 Ala. 313; Johnston *v.* Bent, 93 Ala. 160. CALIFORNIA: Paige *v.* O'Neal, 12 Cal. 483; Sargent *v.* Sturm, 23 Ib. 359. CONNECTICUT: Lynch *v.* Beecher, 38 Conn. 490; 39 Ib. 406. DELAWARE: Mears *v.* Waples, 3 Houst. 602; 4 Ib. 62. GEORGIA: Kern *v.* Thurber, 57 Geo. 172. ILLINOIS: Ohio, etc. R. R. Co. *v.* Kerr, 49 Ill. 458, citing the cases; 90 Ib. 499; 94 Ib. 154. INDIANA: Bell *v.* Cafferty, 21 Ind. 411; 87 Ib. 437; 100 Ib. 247. KENTUCKY: Arnett *v.* Cloudas, 4 Dana, 299; 15 B. Monr. 270; 3 Bibb, 510. MAINE: Ditson *v.* Randall, 33 Me. 202; 38 Ib. 561; 74 Ib. 418. MARYLAND: Powell *v.* Bradlee, 9 G. & J. 278. MASSACHUSETTS: Easter *v.* Allen, 8 Allen, 7. MINNESOTA: Cochran *v.* Stewart, 21 Minn. 435. MISSISSIPPI: Lee *v.* Portwood, 41 Miss. 109. MISSOURI: Wineland *v.* Coonce, 5 Mo. 296. NEW HAMPSHIRE: Kingsbury *v.* Smith, 13 N. H. 109; Comey *v.* Pickering, 63 N. H. 127. NEW YORK: Malcom *v.* Loveridge, 13 Barb. 372; 16 Ib. 73; 3 Duer, 373; 6 Bosw. 299; 44 N. Y. 371. PENNSYLVANIA: Sinclair *v.* Healey, 40 Pa. St. 417. TENNESSEE: Arendale *v.* Morgan, 5 Sneed, 703; 8 Baxt. 506. VIRGINIA: Williams *v.* Given, 6 Gratt. 268, where the only fraud was in knowingly paying in counterfeit money. WISCONSIN: Singer Man. Co. *v.* Sammons, 49 Wisc. 316.

But the rule favoring second purchasers does not apply if the fraudulent vendee *has wrongfully obtained possession of the goods* from the defrauded vendor; for it is a vendor's own delivery only which can prevent him from retaking the goods from a *bona fide* sub-vendee. Dean *v.* Yates, 22 Ohio St. 388. And of course notice of the fraud will vitiate the sub-vendee's title. Gage *v.* Epperson, 2 Head, 669; Meacham *v.* Collignon, 7 Daly, 402; Rateau *v.* Bernard, 3 Blatchf. 244; Dows *v.* Kidder, 84 N. Y. 121. The burden of proving that the sub-vendee had notice is upon the original vendor, but upon the sub-vendee to prove that he is a purchaser for value. Peterson *v.* Steiner, 108 Ala. 629. Although the first sub-vendee had knowledge of the fraud, probably *his* sub-vendee might acquire a good title if he himself had no such knowledge. London *v.* Youmans, 31 So. Car. 147.

Who are Purchasers. Some difference of opinion exists as to who are "purchasers." *Usually* attaching creditors of such fraudulent vendee are not considered purchasers, whether their claims accrued before or after such fraudulent sale was made to their debtor. The distinction in this respect sometimes suggested is not now recognized, and Gilbert *v.* Hudson, 4 Greenl. 345 (1826), was apparently erroneously decided, although it does not appear that the case has been overruled. See, also, Buffington *v.* Gerrish, 15 Mass. 158; Ayers *v.* Hewett, 19 Me. 281; Bradley *v.* Obear, 10 N. H. 477; Thompson *v.* Rose, 16 Conn. 71; Wiggin *v.* Day, 9 Gray, 97; Fitzsimmons *v.* Joslin, 21 Vt. 129; Atwood *v.* Dearborn, 1 Allen, 483; Jordan *v.* Parker, 56 Me. 557; Oswego Starch Factory *v.* Lendrum, 57 Iowa, 573; Thaxter *v.* Foster, 153 Mass. 151; Sleeper *v.* Davis, 64 N. H. 61; Henderson *v.* Gibbs, 39 Kans. 684, and cases cited; Scott *v.* McGraw, 3 Wash. 675. But it seems that in Pennsylvania creditors whose debts are contracted subsequent to a vendee's possession under a voidable title stand on the same footing with *bona fide* purchasers. Smith *v.* Smith, 21 Pa. St.

367, 373, citing 4 Greenl. 345, *supra;* Schwartz *v.* McCloskey, 156 Pa. St. 258 (1893). In that case, however, the vendor, who sought to rescind for fraud, had not tendered back a certain $100 in cash which he had received in part payment, although he did tender certain notes received by him at the same time. His right to avoid was denied in part at least on account of his failure to return all that he had received. In Delaware, attaching creditors whose claims accrued prior to the fraudulent sale are no longer regarded as *bona fide* purchasers, and England *v.* Forbes, 7 Houst. 306, has been overruled. Truxton *v.* Fait, etc. Co. Del. (1899), 42 Atl. 431. A pledgee or mortgagee to whom such fradulent vendee transfers the property merely as security for a prëexisting debt is not a purchaser. Goodwin *v.* Massachusetts Loan Co. 152 Mass. 199 and 200, and cases cited; Dinkler *v.* Potts, 90 Geo. 103; Phœnix Iron Co. *v.* McEvony, 47 Neb. 228; Asher *v.* Deyoe, 77 Hun, 531. And it seems that, if prëexisting creditors of the vendee could not hold *by attachment*, they could not by a voluntary delivery of the goods by such fraudulent vendee in payment of his preëxisting debt. Barnard *v.* Campbell, 58 N. Y. 73, examining the cases; Root *v.* French, 13 Wend. 570; Ames Iron Works *v.* Kalamazoo Pulley Co. 63 Ark. 87 (1896), passing upon the question for the first time in that State; Poor *v.* Woodburn, 25 Vt. 235; Pope *v.* Pope, 40 Miss. 516; Weaver *v.* Barden, 49 N. Y. 286; Sargent *v.* Sturm, 23 Cal. 359; Stevens *v.* Brennan, 79 N. Y. 258; Hyde *v.* Ellery, 18 Md. 501; Schloss *v.* Feltus, 96 Mich. 622, affirmed upon rehearing in 103 Mich. 525, where the cases are reviewed; Schulein *v.* Hainer, 48 Kans. 249; Reed *v.* Brown, 89 Iowa, 454, where the question was presented for the first time in that State, and many cases are cited; Starr *v.* Stevenson, 91 Iowa, 684; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29; Slagle *v.* Goodnow, 45 Minn. 531; Avery *v.* Mansur, 37 S. W. 466; Tex. App. 000; McGraw *v.* Solomon, 83 Mich. 442, and cases cited; Morrison *v.* Adoue, 76 Tex. 255; Hurd *v.* Bickford, 85 Me. 219, apparently questioning Titcomb *v.* Wood, 38 Me. 561, which seems *contra*, as do also Green *v.* Kennedy, 6 Mo. App. 577; Butters *v.* Haughwout, 42 Ill. 18; and Shufeldt *v.* Pease, 16 Wis. 659. In Pennsylvania it is the established rule that one who takes in *payment* takes for value. Dovey's Appeal, 97 Pa. St. 153. And in Bughman *v.* Central Bank, 159 Pa. St. 94 (1893), the court declares the rule to be not open in that Commonwealth, although questioning its soundness, citing Root *v.* French, *supra;* and the same case declares that the burden is upon the purchaser to show that the property was not taken as *security*. The *dictum* in Longdale Iron Co. *v.* Swift's Iron Works, 91 Ky. 191, supports the Pennsylvania rule, although the decision is that an assignee for benefit of creditors is not a purchaser for value. Nor is an assignee in insolvency a " purchaser." Ratcliffe *v.* Sangston, 18 Md. 384; Burnett *v.* Bealmear, 79 Md. 36; Donaldson *v.* Farwell, 93 U. S. 631; Singer *v.* Schilling, 74 Wis. 369; Belding *v.* Frankland, 8 Lea, 67; Bussing *v.* Rice, 2 Cush. 48; Am. Sugar Ref. Co. *v.* Fancher, 145 N. Y. 552; 81 Hun, 56; Colbert *v.* Baetjer, 4 App. Div. 416. An assignee for the benefit of creditors is not a purchaser. See Goodwin *v.* Mass. Loan Co. 152 Mass. 199; but it seems that a mortgagee without notice of the fraud who takes the mortgage as security for money loaned after the purchase, and in consideration of extending the time of payment on an antecedent debt, is a purchaser for value. Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105, and cases cited. But see Wickham *v.* Martin,

13 Gratt. 427, said in Oberdorfer *v.* Meyer, 88 Va. 384, to be much like it. In the latter case, the goods had been transferred, together with the rest of the vendee's estate, to a trustee for the benefit of creditors, who had no notice of the fraud, nor did the trustee. It was held that the vendor had no remedy against the trustee.

As to other instances of who are or are not *bona fide* purchasers, see Peabody *v.* Fenton, 3 Barb. Ch. 451; 3 Duer, 341; 6 Ib. 232; 7 Daly, 402; 37 Barb. 509; 4 Abb. N. Y. 42; 42 Mich. 477; Spira *v.* Hornthall, 77 Ala. 137; Hooser *v.* Hunt, 66 Wis. 71; 39 Mo. App. 319; 46 Hun, 19. In New York the sub-purchaser must have actually paid value to be protected. If he bought on credit and has not paid, he cannot hold the goods as against the original vendor. Partridge *v.* Rubin, 15 Daly, 344, and many cases cited; Eaton *v.* Davidson, 46 Ohio St. 355. One who has paid in part by discharge of an old debt and in part by cash is a purchaser *pro tanto*. Cooper Mfg. Co. *v.* DeForest, 5 App. Div. 43. A sub-vendee who paid partly in cash and partly by cancellation of an existing debt due him from the original vendee was held to be a *bona fide* purchaser in Woolridge *v.* Thiele, 55 Ark. 45.

Fraud on the Buyer.

In considering this branch of the subject, the natural order seems to be, 1st, to ask what does or does not constitute a legal fraud on the buyer; and, 2d, what is the effect thereof on his rights. And in determining what is a legal fraud, a fraudulent intention is the first requisite. An intention to deceive is absolutely essential. Legal fraud cannot exist if there be moral honesty, notwithstanding some early *dicta* to the contrary. Honest belief, therefore, is ordinarily a defence to a charge of fraud. Guilty knowledge, or at least guilty intention, is essential. Joliffe *v.* Baker, 11 Q. B. Div. 255 (1883), critically examining all the English cases; Stone *v.* Denny, 4 Met. 151, a valuable case; Tryon *v.* Whitmarsh, 1 Met. 1; King *v.* Eagle Mills, 10 Allen, 548; Weir *v.* Bell, 3 Ex. Div. 243; Binney's Appeal, 116 Pa. St. 169; Cowley *v.* Smyth, 46 N. J. L. 380; Lord *v.* Goddard, 13 How. 198; Young *v.* Covell, 8 Johns. 23; Hartford Ins. Co. *v.* Matthews, 102 Mass. 226; Kountz *v.* Kennedy, 147 N. Y. 124, 129; Scroggin *v.* Wood, 87 Iowa, 497, and many other cases. See Cummings *v.* Cass, 52 N. J. L. 84, and cases cited. In Michigan, actual intention to defraud seems unnecessary. Holcomb *v.* Noble, 69 Mich. 396. Although both countries agree that an actual intention to defraud must exist, the proposition that a different standard of fraud exists in actions at law by a purchaser for deceit in a sale, and in proceedings in equity by him to rescind the sale, sometimes advanced in England (see §§ 454–461 a), and underlying the recent case in the House of Lords of Derry *v.* Peek, 14 App. Cas. 337, has not generally been received with favor in this country. See 23 Am. Law Rev. 1007; 24 Ib. 155; Goodwin *v.* Mass. Loan Co. 152 Mass. 201; 5 Law Quarterly Rev. p. 410 (Oct. 1889), by Sir F. Pollock. And such a distinction seems hardly necessary or tenable. See the case of Derry *v.* Peek, explained in Tomkinson *v.* Balkis Consol. Co. [1891], 2 Q. B. 620. And see Low *v.* Bouverie [1891], 3 Ch. (C. A.) 82–105. Although in both instances a fraudulent intent must exist, and be affirmatively shown, yet it ordinarily may be inferred from the knowledge that the statements made were false. See the late important case of Stewart *v.* Stearns, 63 N. H. 105. And see O'Donnell *v.* Clinton, 145 Mass. 462.

The same inference may arise where untrue statements are recklessly made *as of one's own knowledge*, when the party knows nothing on the subject either way. If the statements are in fact untrue, it is a legal fraud, although not then known to be untrue, for the falsehood consists in stating that the party knew the facts when he did not; the statements, of course, being of facts susceptible of personal knowledge, and not matters of opinion, estimate, or judgment. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 404; Hadcock *v.* Osmer, 153 N. Y. 604; Litchfield *v.* Hutchinson, 117 Mass. 195; Beebe *v.* Knapp, 28 Mich. 55; Tucker *v.* White, 125 Mass. 347; Cabot *v.* Christie, 42 Vt. 121; Savage *v.* Stevens, 126 Mass. 208; Bower *v.* Fenn, 90 Pa. St. 359; Bennett *v.* Judson, 21 N. Y. 238; Sharp *v.* Mayor of New York, 40 Barb. 257; Indianapolis, etc. R. R. Co. *v.* Tyng, 63 N. Y. 653; Smith *v.* Newton, 59 Geo. 113; Foard *v.* McComb, 12 Bush, 723; Lehigh Zinc Co. *v.* Bamford, 150 U. S. 665. See, also, 37 Ind. 1; 54 Miss. 174; 57 Ib. 607; 63 Mo. 181; 64 Ib. 201; 40 N. Y. 569; 35 Ala. 252; 56 Ib. 202; 58 Ib. 153; 23 Hun, 553; 14 Pa. St. 139; 85 Ib. 238; 54 Tex. 511; 52 N. J. L. 77. Some of these cases lay down even a broader rule than above stated. Perhaps some of them go too far. But "reason to believe" that statements are untrue is not equivalent to a belief or knowledge that they are so, and would not alone be a fraud if the person really did believe they were true, though without good reason. Pearson *v.* Howe, 1 Allen, 207; Salisbury *v.* Howe, 87 N. Y. 129; McKown *v.* Furgason, 47 Iowa, 637.

The falsehood must relate to facts, material facts, and not to mere opinions or belief. See Hazard *v.* Irwin, 18 Pick. 95; Stone *v.* Robie, 66 Vt. 245; and the very important case of Medbury *v.* Watson, 6 Met. 246. The materiality of a false representation is ordinarily a question of law for the court, and not of fact for the jury. Caswell *v.* Hunton, 87 Me. 280; Penn. Ins. Co. *v.* Crane, 134 Mass. 56.

Falsehoods such as these are legal frauds: selling property with knowledge that it has no real existence. Wardell *v.* Fosdick, 13 Johns. 325. Or that one does not own it, or has no right to sell it. Ketletas *v.* Fleet, 7 Johns. 324; Oliver *v.* Sale, Quincy (Mass.), 29; Case *v.* Hall, 24 Wend. 102. Or selling a note which the vendor knows has been paid. Neff *v.* Clute, 12 Barb. 466; Sibley *v.* Hulbert, 15 Gray, 509. False statements that there are no incumbrances on the property sold. Ward *v.* Wiman, 17 Wend. 193; Masson *v.* Bovet, 1 Denio, 69; Haight *v.* Hayt, 19 N. Y. 464. That a farm last year produced a stated quantity of hay. Coon *v.* Atwell, 46 N. H. 510; Martin *v.* Jordan, 60 Me. 531. In a sale of a patent, that the vendor had already received large sums for its sale in other States. Somers *v.* Richards, 46 Vt. 170; Crosland *v.* Hall, 33 N. J. Eq. 111, and a valuable note by the reporter; Miller *v.* Barber, 66 N. Y. 558. So, in a sale of letters patent, a statement as to the cost of manufacture of the patented article, the vendor having already manufactured some. Braley *v.* Powers, Me. (1898), 42 Atl. 362. By the vendor of a note, that the makers thereof were "wealthy and responsible men." Alexander *v.* Dennis, 9 Porter, 174. But see Belcher *v.* Costello, 122 Mass. 189. Of railroad bonds, that they are selling in market at a certain price, especially if accompanied by exhibiting a newspaper containing false quotations thereof. Manning *v.* Albee, 11 Allen, 520 (apparently not approved in Graffenstein *v.* Epstein, 23 Kans. 443; in that case there was an absence of any confidential relation between the parties. The

subject-matter of the sale — wool — was one whose market price, so it was said, was matter of public knowledge, and could be ascertained by any one upon reasonable inquiry). Maxted *v.* Fowler, 94 Mich. 109, and cases cited; Peck *v.* Jenison, 99 Mich. 326. That a bond is "A. No. 1" and well secured. Deming *v.* Darling, 148 Mass. 504. A statement that a bond was good, of full value, a good investment, and secured by certain specified real estate of the obligor of a stated value. Held, to be more than statements of opinion and to be actionable. Whiting *v.* Price, 169 Mass. 576, and cases cited. So a statement by the vendor of stock that one C, who was president of the corporation whose stock the vendor was offering, would not sell at less than par. Wilcox *v.* Ellis, 5 Hawaii, 335. That bonds sold by directors of a corporation are "First Mortgage Bonds" when they are not such. Clark *v.* Edgar, 84 Mo. 106. That a quantity of carpets then laid down in various rooms of a house measured "about nine hundred yards," when the seller knew there were only six hundred. Lewis *v.* Jewell, 151 Mass. 345. In a sale of one's stock, business, and good-will, that the "business is profitable." Cruess *v.* Fessler, 39 Cal. 336. And see Fonda *v.* Lape, 8 N. Y. Supp. 792; Byrne *v.* Stewart, 124 Pa. St. 450.

False statements by a vendor as to how much he had been offered by others, or how much he paid for the article, how much business he was doing, have often been held not legal frauds; not exactly because they are not statements of fact calculated and intended to deceive, but that they come within the indulgence of "dealers' talk," and ought not to deceive, because "too preposterous to be believed." See Bishop *v.* Small, 63 Me. 14; Holbrook *v.* Connor, 60 Me. 578, citing many cases; Way *v.* Ryther, 165 Mass. 229; Deming *v.* Darling, 148 Mass. 504; Mosher *v.* Post, 89 Wisc. 602; Hank *v.* Brownell, 120 Ill. 161; Poland *v.* Brownell, 131 Mass. 138. See Lilienthal *v.* Suffolk Brewing Co. 154 Mass. 185; Hemmer *v.* Cooper, 8 Allen, 334; State *v.* Paul, 69 Me. 215; Cooper *v.* Lovering, 106 Mass. 79. And in Bourn *v.* Davis, 76 Me. 223, the doctrine was pushed so far as to hold that fraudulent statements by the vendor to the vendee of what appraisal the official appraisers appointed by the Probate Court had put on the property would not avoid the sale. But it must be confessed some of these decisions go to the extreme verge of the law. See the dissenting opinion of Judge Dickerson in 60 Me. 585. And in the late case of Richardson *v.* Noble, 77 Me. 392, it is said (though the rule itself was followed), that "its application should be carefully guarded, and there may be exceptions to the rule." See, also, that this rule ought not to be extended, Roberts *v.* French, 153 Mass. 63; Way *v.* Ryther, 165 Mass. 229.

A more wholesome rule was adopted in Van Epps *v.* Harrison, 5 Hill, 63, in which a statement that the property cost $32,000, when it cost only $16,000, was held a legal fraud. And this decision was approved in Page *v.* Parker, 43 N. H. 369, which, however, turned on another point. See, also, Sandford *v.* Handy, 23 Wend. 269, Nelson, C. J.; Weidner *v.* Phillips, 39 Hun, 1; Teachout *v.* Van Hoesen, 76 Iowa, 113. In Conlan *v.* Roemer, 52 N. J. L. 53, it was held a legal fraud for a seller to falsely state that the price he asked was the same as A. and B. in the same business asked, whereby a sale at that price was effected. So it has been held that a vendor of corporation shares cannot safely misrepresent the amount which the corporation has received for the stock, or that the stock was fully

paid for, and that no more assessments or payments were to be made for it, and that he was selling the stock to the plaintiff for precisely what it cost. Hoxie *v.* Small, 86 Me. 23; and see Coolidge *v.* Goddard, 77 Me. 578.

Nor will false representations as to what the vendor will or will not do authorize a rescission for fraud. Tufts *v.* Weinfeld, 88 Wis. 647.

Concealment of material facts may sometimes be fraudulent, as well as positive misstatements; *suppressio veri, suggestio falsi.* Prentiss *v.* Russ, 16 Me. 30; Milliken *v.* Chapman, 75 Ib. 322. Thus, to conceal (*i. e.* not to disclose) a material fact known to the vendor, and which cannot be discovered by the buyer, as, for instance, hidden diseases in animals sold, may be a fraud. Dixon *v.* M'Clutchey, Add. 322 (1797); Stevens *v.* Fuller, 8 N. H. 463; Paddock *v.* Strobridge, 29 Vt. 471, a marked case; Cardwell *v.* McClelland, 3 Sneed, 150; McAdams *v.* Cates, 24 Mo. 223; Barron *v.* Alexander, 27 Ib. 530; Hough *v.* Evans, 4 McCord, 169; Duvall *v.* Medtart, 4 H. & J. 14; Grigsby *v.* Stapleton, 94 Mo. 423; Downing *v.* Dearborn, 77 Me. 457. And see Stewart *v.* Wyoming Ranche Co. 128 U. S. 383. Beninger *v.* Corwin, 24 N. J. L. 257, is questionable. Of course an intention to deceive by the non-disclosure is essential. Hanson *v.* Edgerly, 29 N. H. 343; Binnard *v.* Spring, 42 Barb. 470.

So a concealment of the vendor's knowledge, that the article is not really what it appears or purports to be, is a fraud. Cornelius *v.* Molloy, 7 Pa. St. 293. Or that it was already mortgaged to another. Junkins *v.* Simpson, 14 Me. 364; Merritt *v.* Robinson, 35 Ark. 483; Stevenson *v.* Marble, 84 Fed. R. 23.

Selling an animal for breeding purposes, known by the vendor to be impotent, has been held in Vermont to be a fraud, unless the fact be disclosed to the buyer. Maynard *v.* Maynard, 49 Vt. 297; Hadley *v.* Clinton Co. Imp. Co. 13 Ohio St. 502; Raeside *v.* Hamm, 87 Iowa, 720. The case of Paul *v.* Hadley, 23 Barb. 521, so far as it conflicts with this view, can hardly be supported. In Brown *v.* Montgomery, 20 N. Y. 287, it was held a legal fraud for the holder of a third person's check to sell it without disclosing the known fact that other checks of the same party had already gone to protest, and that the maker was insolvent. Approved in Sebastian May Co. *v.* Codd, 77 Md. 293. See, also, Gough *v.* Dennis, Hill & Den. 55; Carpenter *v.* Phillips, 2 Houst. 524; Rothmiller *v.* Stein, 143 N. Y. 581, 591.

This non-disclosure of hidden facts is the more objectionable when any artifice is employed to throw the buyer off his guard; as by telling half the truth, etc. See Baker *v.* Seahorn, 1 Swan, 54; Croyle *v.* Moses, 90 Pa. St. 250; Gough *v.* Dennis, Hill & Den. 55. In Stevenson *v.* Marble, 84 Fed. R. 23, bonds were sold, the seller representing that there was but one mortgage upon them. This was true, but the further fact that there were other incumbrances or liens prior to the mortgage was not disclosed. The buyer was allowed to rescind for fraud, even though the seller, after the suit was brought, removed the prior incumbrances. Where the buyer of a horse asked the seller if the horse was balky, to which he replied, "He balked with the man I had him of *once*," but did not tell the buyer that he had him "as a balky horse," and that he had used him very carefully, as he would any balky horse, this was held sufficient evidence of fraud. Nickley *v.* Thomas, 22 Barb. 652; Moncrief *v.* Wilkinson, 93 Ala. 373. If the sale is "with all faults," the vendor is not bound to disclose any defects,

hidden or otherwise, though he must not resort to artifice to conceal them. Smith *v.* Andrews, 8 Ired. 6; Pearce *v.* Blackwell, 12 Ib. 49. And see Whitney *v.* Boardman, 118 Mass. 242.

Expressions, by the seller, of untrue opinions, recommendations, and the like, though intended to deceive, are not fraudulent in law.

Untrue and unbelieved statements of the value of the property sold ordinarily come under this head, especially when the buyer had equal opportunities of inquiring. Ellis *v.* Andrews, 56 N. Y. 83, a very important case on this point; Davis *v.* Meeker, 5 Johns. 354; Parker *v.* Moulton, 114 Mass. 99; Chrysler *v.* Canaday, 90 N. Y. 272; Watts *v.* Cummins, 59 Pa. St. 84; Shade *v.* Creviston, 93 Ind. 591; Poland *v.* Brownell, 131 Mass. 138; Gordon *v.* Butler, 105 U. S. 553; Holbrook *v.* Connor, 60 Me. 578. A more strict rule is suggested in Hickey *v.* Morrell, 102 N. Y. 454. So, by the seller of a note and mortgage, that "the security of the mortgage was undoubted; that the property mentioned therein was of great value above all incumbrances; that the mortgage was amply worth the amount of the note and interest, and could be sold for its face any time." Veasey *v.* Doton, 3 Allen, 380; Gustafson *v.* Rustemeyer, 70 Conn. 125 (1898); Bain *v.* Withey, 107 Ala. 223.

That a horse is "sound and kind" may be an affirmation of a fact, or merely an expression of opinion; in one case it is a legal fraud, in the other not, though not believed to be true by the vendor. Commonwealth *v.* Jackson, 132 Mass. 16; Whitworth *v.* Thomas, 83 Ala. 308. Many expressions may be ambiguous, and if so it is for the jury to judge. Sledge *v.* Scott, 56 Ala. 202; State *v.* Tomlin, 29 N. J. L. 13; Bigler *v.* Flickinger, 55 Pa. St. 279; Bradley *v.* Luce, 99 Ill. 234; State *v.* Hefner, 84 N. C. 751; Sharp *v.* Ponce, 74 Me. 470. See, also, Conlan *v.* Roemer, 52 N. J. L. 56. And a false and fraudulent *warranty* of the value of property may amount to a legal deceit, when a mere false representation of value might not. Handy *v.* Waldron, 18 R. I. 567, and cases cited.

Fraudulent promises as to the future as to what the vendee could do with the property, how much he could make on it, etc., do not constitute legal fraud. Gordon *v.* Parmelee, 2 Allen, 212; Long *v.* Woodman, 58 Me. 52, and cases cited; Pedrick *v.* Porter, 5 Allen, 324; Mooney *v.* Miller, 102 Mass. 217; Southern Development Co. *v.* Silva, 125 U. S. 248; Holton *v.* Noble, 83 Cal. 7.

Representations regarding the validity of a patent right are statements of opinion and not of facts. Reeves *v.* Corning, 51 Fed. R. 774, 781; Dillman *v.* Nadlehoffer, 119 Ill. 567.

Fraud by Agents. In regard to sales made by the untrue representation of agents, where perhaps the principal did not know of the falsity of the statements but the agent did, or *vice versa*, as in Cornfoot *v.* Fowke, the simplest way of treating the subject is to consider the two individuals, the principal and the agent, as only one person in law, and to hold the knowledge of the agent to be the knowledge of the principal, the fraud of the agent in legal contemplation the fraud of the principal; that the one is only the *alter ego* of the other, and therefore the sale is equally voidable by the vendee in case of fraudulent statements of either principal or agent. Accordingly the American cases are quite harmonious that, if the principal is honest but the agent not, or the principal dishonest but the

agent not, the vendee may still rescind, return the property, and refuse to pay, or, if he has paid, recover back the price from the principal. Veazie *v.* Williams, 8 How. 134, a very important case; Concord Bank *v.* Gregg, 14 N. H. 331; Jewett *v.* Carter, 132 Mass. 335, a marked case; Hunter *v.* Hudson River Co. 20 Barb. 493; Lamm *v.* Port Deposit Ass'n, 49 Md. 233; Sharp *v.* Mayor of New York, 40 Barb. 256, a valuable case; Chester *v.* Dickerson, 52 Barb. 350; Bergeman *v.* Indianapolis, etc. R. R. 104 Mo. 78; Presby *v.* Parker, 56 N. H. 409; Graves *v.* Spier, 58 Barb. 349.

Logic also seems to require, if the foregoing premises are correct, and there be a complete unity of person between the principal and the agent, that the vendee should also, if he chooses to keep the property, have the same right to an action of deceit against the principal for the fraudulent statements of his agent as for his own individual utterances, especially if the principal did not at once repudiate the transaction upon hearing of the fraud. Some of the cases here cited are frauds by one partner for which the other was holden, but the rule is supposed to be the same in agency. Locke *v.* Stearns, 1 Met. 560; White *v.* Sawyer, 16 Gray, 586; Fitzsimmons *v.* Joslin, 21 Vt. 139, disapproving Cornfoot *v.* Fowke; Jeffrey *v.* Bigelow, 13 Wend. 518; Bennett *v.* Judson, 21 N. Y. 239; Griswold *v.* Haven, 25 N. Y. 595; Indianapolis, etc. R. R. Co. *v.* Tyng, 63 N. Y. 653; Durst *v.* Burton, 2 Lans. 137; 47 N. Y. 174; Durant *v.* Rogers, 87 Ill. 511; Craig *v.* Ward, 3 Keyes, 387; Elwell *v.* Chamberlin, 31 N. Y. 619; Reed *v.* Peterson, 91 Ill. 297; Tagg *v.* Tennessee Nat. Bank, 9 Heisk. 479; Law *v.* Grant, 37 Wis. 548; Reynolds *v.* Witte, 13 So. Car. 5; Wolfe *v.* Pugh, 101 Ind. 294. But some respectable authorities deny this, unless the principal, after knowing of his agent's fraud, has distinctly affirmed and approved of it; holding that an action of deceit will not lie against him, but only against the agent personally. See Kennedy *v.* McKay, 43 N. J. L. 288; Titus *v.* Cairo R. R. 46 N. J. L. 393, 420; Decker *v.* Fredericks, 47 N. J. L. 469, 472. An able article favoring the decision in Cornfoot *v.* Fowke may be found in 3 Am. Law. Rev. 430, understood to be by Clement Hugh Hill, Esq. But this subject belongs to the law of agency.

In auction sales the use by the owner or auctioneer of any unfair means to enhance the bids, by which a buyer is misled, enables him to avoid the purchase. Thus, if the auctioneer announces false bids, or if he or the owner employs by-bidders and thus stimulates the bidding, a subsequent bidder may repudiate his bid, even after it be struck off to him. Veazie *v.* Williams, 8 How. 134, is a notable case of the first kind of fraud. There the owner of real estate authorized the auctioneer to sell at $14,500. When the real bidding stood at $20,000, the auctioneer commenced announcing unreal bids until the sum of $40,000 was bid by the plaintiff, at which price it was struck off to him, and he paid the amount. On a bill in equity for relief, he was allowed to recover back all above the $20,000, the last real bid made before his own.

So it is a fraud on the other bidders for the auctioneer to have secret signals with some persons as to their bids. The essence of an auction sale is that everything should be open and above-board. Conover *v.* Walling, 15 N. J. Eq. 173. So it is a fraud on buyers to advertise that the goods belonged to the estate of A. B., deceased, when they did not. Thomas *v.* Kerr, 3 Bush, 619.

Many cases recognize the similar species of fraud, viz., that of employing puffers or by-bidders, and declare a sale made thereby invalid. This is especially obvious where the auction is advertised to be "without reserve," or "positive," etc. Curtis *v.* Aspinwall, 114 Mass. 187; Moncrieff *v.* Goldsborough, 4 H. & McH. 282; Morehead *v.* Hunt, 1 Dev. Eq. 35; Woods *v.* Hall, Ib. 411; Walsh *v.* Barton, 24 Ohio St. 29; Baham *v.* Bach, 13 L. A. (O. S.) 287; Pennock's Appeal, 14 Pa. St. 446; Staines *v.* Shore, 16 Ib. 200; Flannery *v.* Jones, 180 Pa. St. 338; Fisher *v.* Hersey, 17 Hun, 370; Trust *v.* Delaplaine, 3 E. D. Smith, 219; Tomlinson *v.* Savage, 6 Ired. Eq. 430; Yerkes *v.* Wilson, 81½ Pa. St. 9; Donaldson *v.* McRoy, 1 Browne, 346; Peck *v.* List, 23 West Va. 338, containing an exhaustive and valuable review of the authorities by Mr. Justice Green; National Bank *v.* Sprague, 20 N. J. Eq. 159; Bowman *v.* McClenahan, 20 App. Div. (N. Y.) 346 (1897), and cases cited, a valuable case. The common notion that the auctioneer or owner is allowed one bid seems to be contrary to the true spirit of an auction sale, unless some such right is expressly reserved, or has become so well established by custom as to be fairly implied. See, also, Hartwell *v.* Gurney, 16 R. I. 78, 79.

It is difficult, also, without yielding the whole principle, to maintain, as some do, that an owner may employ a by-bidder "for the purpose of preventing a sacrifice of the property," or its sale below a certain price. That is what a by-bidder is always employed for, in the opinion of the owner; and, if that exception prevailed, no by-bidder would ever be employed to obtain a fictitious price for the property, but only "to prevent its unreasonable sacrifice"! But see the distinction recognized in Veazie *v.* Williams, 3 Story, 624; Reynolds *v.* Dechaums, 24 Tex. 174. And see Latham *v.* Morrow, 6 B. Monr. 630; Jenkins *v.* Hogg, 2 Treadw. Const. R. 821, going much further. The whole theory of an auction sale proceeds upon the ground that the highest responsible *bona fide* bidder is entitled to the goods. Otherwise an auction is a farce. Towle *v.* Leavitt, 23 N. H. 360. Of course the owner may name a minimum price *before* the goods are once set up, which is simply declining to offer them at auction unless started at a stated price. Wolfe *v.* Luyster, 1 Hall, 146; Steele *v.* Ellmaker, 11 S. & R. 86. Doubtless the auctioneer must have the right, for his own protection, to reject the bid of any irresponsible party, as held in Den *v.* Zellers, 7 N. J. L. 153; Kinney *v.* Showdy, 1 Hill, 544; Holder *v.* Jackson, 11 Up. Can. C. P. 543; Gray *v.* Veirs, 33 Md. 18. And see Taylor *v.* Harnet, App. Div. (N. Y.), Feb. 1899, 55 N. Y. Suppl. 988. There the defendant, an auctioneer, advertised ten shares of stock for sale at auction on a certain day. The plaintiff attended and bid $100 per share; another bidder offered $110 per share. Plaintiff then offered $111. The defendant replied that he would not accept a "raise of one point on stock," and said, "I am bid 110." Plaintiff again bid 111. The auctioneer then said, "Sold at 110," and dropped his hammer. Plaintiff immediately claimed the stock. Defendant denied the claim, and said, "I will give you a chance to buy the stock," and added "I am bid 125;" but he did not again drop his hammer, nor again declare the stock sold. Apparently no buyer claimed the stock either at $110 per share or at $125 per share. Held, that it was within the defendant's discretion to reject the plaintiff's bid of $111, and that there was no sale to plaintiff. Apparently the opinion of Martin, B., in Warlow *v.* Harrison, *ante*, §§ 471, 472, pp. 423, 424, is not wholly approved. But if the auctioneer once accepts and acts upon a bid, announces it as a bid,

and calls for more, the party has a legal right, if no one bids higher, to have the property struck off to him. In no other way can an auction sale be vindicated.

Of course the buyer must repudiate on account of fraud at an auction sale within a reasonable time after the notice of it, the same as in other cases; for it may be affirmed by acquiescence. McDowell *v.* Simms, 6 Ired. Eq. 278, 430; Backenstoss *v.* Stahler, 33 Pa. St. 251; Upper Canal Co. *v.* Roach, 78 Cal. 552. And see an article upon Auction Sales, by the senior editor, in 22 Am. L. Reg. N. S. 1 (1883).

Whenever there has been a legally sufficient fraud, according to the principles before laid down, the buyer has a choice of remedies: —

(1) To wholly rescind and promptly return the property and refuse to pay, or, if he has paid, recover back the amount; or (2) keep the property, and, when sued for the price, show the fraud in reduction of the contract price; or (3) keep the property and sue in tort for the fraud (see Cheongwo *v.* Jones, 3 Wash. C. C. 359); or (4) bring a bill in equity to set aside the sale. Doggett *v.* Emerson, 3 Story, 700. In McCulloch *v.* Scott, 13 B. Monr. 172, this last right is recognized in purchases of personal property, though disallowed in that case for other reasons.

1. If he rescinds he must do so wholly, and return the property within a reasonable time after discovering the fraud, or he loses that right. Strong *v.* Strong, 102 N. Y. 69; Hammond *v.* Pennock, 61 N. Y. 145; Hallahan *v.* Webber, 7 App. Div. (N. Y.) 122. And when the facts are undisputed the question of reasonableness is for the court. Roth *v.* Buffalo, etc. Co. 34 N. Y. 548, 553; Martin Barris Co. *v.* Jackson, 24 App. Div. 354. This is elementary law, especially applicable to cases of speculative property liable to great fluctuations in value. See Grymes *v.* Sanders, 93 U. S. 62; Pence *v.* Langdon, 99 U. S. 578.

Alabama. Jemison *v.* Woodruff, 34 Ala. 143; 31 Ib. 303; 66 Ib. 206.

California. Blen *v.* Bear River Co. 20 Cal. 602; 29 Ib. 589; 39 Ib. 381; 55 Ib. 459; 58 Ib. 608.

Illinois. Buchenau *v.* Horney, 12 Ill. 336; 13 Ib. 610; 69 Ib. 448; 75 Ib. 205; 81 Ib. 85; 98 Ib. 188; 120 Ib. 208; 120 Ib. 573; Rigdon *v.* Wolcott, 141 Ill. 649; 141 Ib. 661.

Indiana. Shaw *v.* Barnhart, 17 Ind. 183; 39 Ib. 77; 53 Ib. 357; 58 Ib. 212; 81 Ib. 350; Tarkington *v.* Purvis, 128 Ind. 182.

Iowa. Evans *v.* Montgomery, 50 Iowa, 337; 48 Ib. 274.

Maine. Herrin *v.* Libbey, 36 Me. 357.

Massachusetts. Perley *v.* Balch, 23 Pick. 283; Ewing *v.* Composite Brake Shoe Co. 169 Mass. 72.

Michigan. Foster *v.* Rowley, 110 Mich. 63, and cases cited.

Minnesota. Parsons *v.* McKinley, 56 Minn. 464.

Nebraska. First Nat. Bank *v.* Yocum, 11 Neb. 329.

New Hampshire. Cook *v.* Gilman, 34 N. H. 560, and cases cited; 42 Ib. 316; 47 Ib. 305; 52 Ib. 232; 51 Ib. 426; 58 Ib. 618; 50 Ib. 33.

New York. Burton *v.* Stewart, 3 Wend. 236; 67 N. Y. 304; 83 Ib. 300; 86 Ib. 75; 4 Hun, 128, and 415, 550.

Ohio. Parmlee *v.* Adolph, 28 Ohio St. 10.

Pennsylvania. Leaming *v.* Wise, 73 Pa. St. 173.

Vermont. Gates *v.* Bliss, 43 Vt. 299; 45 Ib. 336; 52 Ib. 382.

Wisconsin. Becker *v.* Trickel, 80 Wis. 484.

2. If the vendee keeps the property and is sued for the price, or on a note for the price, he may set up the fraud and reduce the amount claimed. Harrington *v.* Stratton, 22 Pick. 510; Perley *v.* Balch, 23 Ib. 283; Westcott *v.* Nims, 4 Cush. 215; Foulk *v.* Eckert, 61 Ill. 318; Kendall *v.* Wilson, 41 Vt. 567; Weaver *v.* Shriver, 79 Md. 530; Lukens *v.* Aiken, 174 Pa. St. 152.

3. The vendee may keep the property and sue the vendor for the fraud.

No return or offer of the property is necessary to sustain an action for deceit, since that recognizes the existence of a sale, and if alleged it need not be proved. Miller *v.* Barber, 66 N. Y. 558; Hubbell *v.* Meigs, 50 Ib. 487; Lexow *v.* Julian, 14 Hun, 152; Krumm *v.* Beach, 25 Ib. 293; Gustafson *v.* Rustemeyer, 70 Conn. 125 (1898). If the vendee has had in any form the proper discount made on account of the fraud, he cannot claim it in another form; thus, if when sued for the price he has set up the fraud and obtained a reduction on that account, he cannot afterwards sue for deceit and recover more, albeit the jury in the first case did not give him sufficient discount. Burnett *v.* Smith, 4 Gray, 50.

Frauds on Creditors.

Sales fraudulent as to creditors involve very different considerations from those governing sales between the parties. In the latter one party is never bound, in the former both are always bound to each other. Harvey *v.* Varney, 98 Mass. 118; Ybarra *v.* Lorenzana, 53 Cal. 197; Hill *v.* Pine River Bank, 45 N. H. 300; Sherk *v.* Endress, 3 W. & S. 255; Barrow *v.* Barrow, 108 Ind. 345; Neely *v.* Wood, 10 Yerger, 486; Williams *v.* Lowe, 4 Humph. 62; Chapin *v.* Pease, 10 Conn. 69; Burgett *v.* Burgett, 1 Ohio, 469; Walton *v.* Bonham, 24 Ala. 513; Springer *v.* Drosch, 32 Ind. 486, containing a valuable collection of cases; Douglas *v.* Dunlap, 10 Ohio, 162. The vendor cannot rescind and retake the property, nor can the vendee refuse to pay, or recover back what he has paid. That the vendor cannot regain his property, and is even liable to a suit for it by the vendee, see Osborne *v.* Moss, 7 Johns. 161; Jackson *v.* Garnsey, 16 Johns. 189; Murphy *v.* Hubert, 16 Pa. St. 50; Broughton *v.* Broughton, 4 Rich. 491; Telford *v.* Adams, 6 Watts, 429. So the sale is valid against the grantor's heirs or representatives. Drinkwater *v.* Drinkwater, 4 Mass. 354; Dearman *v.* Radcliffe, 5 Ala. 192; Stephens *v.* Harrow, 26 Iowa, 458; Clapp *v.* Tirrell, 20 Pick. 247; Beebe *v.* Saulter, 87 Ill. 518; Garner *v.* Graves, 54 Ind. 188; Reichart *v.* Castator, 5 Binn. 109.

The title so far passes in such sales that the vendee may insure the property as his, and keep the insurance money paid on its loss. Lerow *v.* Wilmarth, 9 Allen, 385. And the vendee's creditors may hold it against the grantor. Maher *v.* Swift, 14 Nev. 324. That the vendee is bound on his promise or note given for the price (notwithstanding the cases of Church *v.* Muir, 33 N. J. L. 318; Nellis *v.* Clark, 4 Hill, 424; Niver *v.* Best, 10 Barb. 369), see Butler *v.* Moore, 73 Me. 151; Dyer *v.* Homer, 22 Pick. 253; Davy *v.* Kelley, 66 Wis. 457, and cases cited; Bryant *v.* Mansfield, 22 Me. 360; Carpenter *v.* McClure, 39 Vt. 9; Gary *v.* Jacobson, 55 Miss. 204; Findley *v.* Cooley, 1 Blackf. 262. Though, if the property is afterwards taken from the vendee by creditors of the vendor, it would constitute

a subsequent failure of consideration. Dyer *v.* Homer, *supra*. The only parties who can object are creditors or purchasers of the vendor.

Let us consider (1) what constitutes a fraud on creditors; (2) who are creditors in the eye of the law; and (3) the rights of such creditors to avoid.

Some of the cases cited below are sales of real estate, but many of the principles illustrated by them apply equally to sales of personal property. And first, it is essential that the sale should have been made with "intent to delay, hinder, or defraud" creditors. And ordinarily both parties must share in that intent in order to make the sale voidable by creditors. Unless the buyer participated in that intent, his title is good. A conveyance to one creditor, therefore, in payment of his debt, made in good faith, is valid, at common law, though the effect of it is to prevent other creditors from receiving anything. This is too well settled to need authorities.

Whenever, therefore, the buyer pays valuable consideration for the property, he must have known and participated in the fraudulent intent of the seller in order to affect his title. Swinerton *v.* Swinerton, 1 Dane Ab. 628 (Mass. 1797); Bridge *v.* Eggleston, 14 Mass. 245; Kimball *v.* Thompson, 4 Cush. 447; Foster *v.* Hall, 12 Pick. 89; Dalglish *v.* McCarthy, 19 Grant's Ch. 578; Green *v.* Tanner, 8 Met. 411; Spring Lake Iron Co. *v.* Waters, 50 Mich. 13; Sexton *v.* Anderson, 95 Mo. 373; Hirsch *v.* Richardson, 65 Miss. 227; Anderson *v.* Warner, 5 Bradw. 416; Hessing *v.* McCloskey, 37 Ill. 341. And taking it for a preëxisting debt is paying a valuable consideration. Dudley *v.* Danforth, 61 N. Y. 626; Windmiller *v.* Chapman, 38 Ill. App. 277 and 438. A reasonable cause to suspect or believe such intent existed in the grantor would not alone be sufficient. Carroll *v.* Hayward, 124 Mass. 121; Kyle *v.* Ward, 1 So. Rep. 468; Tuteur *v.* Chase, 66 Miss. 476; State *v.* Merritt, 70 Mo. 275. See 55 Geo. 497; Lyons *v.* Hamilton, 69 Iowa, 47; Dyer *v.* Taylor, 50 Ark. 319. Bartles *v.* Gibson, 17 Fed. Rep. 293, seems to use language inconsistent with this.

And although a sale be originally made with a fraudulent purpose, the grantee may afterwards purge the fraud, as it is called, by matter *ex post facto*, whereby the fraudulent intent is finally abandoned, and the property fully paid for by the grantee. In such cases the title is afterwards invulnerable. Bean *v.* Smith, 2 Mason, 252, an elaborate opinion by Mr. Justice Story; Oriental Bank *v.* Haskins, 3 Met. 332, an important case; Hutchins *v.* Sprague, 4 N. H. 469; Thomas *v.* Goodwin, 12 Mass. 140; Lynde *v.* McGregor, 13 Allen, 172. And the cases of Merrill *v.* Meachum, 5 Day, 341; Preston *v.* Crofut, 1 Conn. 527; Roberts *v.* Anderson, 3 Johns. Ch. 371, have not been generally approved.

Voluntary conveyances, however, are void as to creditors if made with intent *in the donor* to defraud them, though the donee had no knowledge or notice of such intent; wherein they differ from conveyances on consideration. Blake *v.* Sawin, 10 Allen, 340; Young *v.* Heermans, 66 N. Y. 374; Wise *v.* Moore, 31 Ga. 149, citing many cases in same court. Voluntary conveyances without consideration made for meritorious cause, such as blood or affection, have apparently sometimes been held voidable by the donor's existing creditors, whether the donor had or had not any dishonest intention, not exactly on the ground of actual fraud, but because a man

must be just before he is generous, and creditors have superior claims to beneficiaries. It is sometimes called a "constructive fraud." Reade *v.* Livingston, 3 Johns. Ch. 481; Wadsworth *v.* Havens, 3 Wend. 412; Early *v.* Owens, 68 Ala. 171. But the better opinion seems to be, that in such cases no absolute presumption "of law" exists of a fraudulent intent, from the mere want of pecuniary consideration, although the grantor happened to be indebted at that time, but that such a conveyance under such circumstances affords only *prima facie* or presumptive evidence of fraud, which may be rebutted and controlled; and if so, the conveyance may be valid. Lerow *v.* Wilmarth, 9 Allen, 386, and cases cited; Hinde *v.* Longworth, 11 Wheat. 199; Genesee River Bank *v.* Mead, 92 N. Y. 637. This is more clearly so as to *subsequent* creditors or purchasers. Thacher *v.* Phinney, 7 Allen, 146; Beal *v.* Warren, 2 Gray, 447, containing an excellent opinion by Thomas, J.; Babcock *v.* Eckler, 24 N. Y. 623; Dygert *v.* Remerschnider, 32 N. Y. 648; Carpenter *v.* Roe, 10 N. Y. 227; Pelham *v.* Aldrich, 8 Gray, 515; Hessel *v.* Fritz, 124 Pa. St. 229; Driggs *v.* Norwood, 50 Ark. 42. Voluntary conveyances, therefore, or gifts without pecuniary consideration, etc., are not *per se* void as to future creditors, by one not indebted at the time. Sexton *v.* Wheaton, 8 Wheat. 229, a leading case; Howe *v.* Ward, 4 Greenl. 195. Consequently it would be necessary to show either that the grantor was then indebted beyond his probable means of payment, or that he had an actual intention to defraud subsequent creditors, in order to enable the latter to set it aside. Winchester *v.* Charter, 12 Allen, 606, a valuable case. And see 97 Mass. 143.

The existence of a fraudulent intent is ordinarily a question for the jury, from all the facts of the case: Jackson *v.* Mather, 7 Cow. 301; Clark *v.* Morrell, 21 Up. Can. Q. B. 600; 5 Ib. 561; Jamison *v.* King, 50 Cal. 132; Harris *v.* Burns, Ib. 140: the burden of proof, being of course on the party alleging the fraudulent intent. Elliott *v.* Stoddard, 98 Mass. 145; Tompkins *v.* Nichols, 53 Ala. 197; Webb *v.* Darby, 94 Mo. 621; Erb *v.* Cole, 31 Ark. 554; Jewett *v.* Cook, 81 Ill. 260; Morgan *v.* Olvey, 53 Ind. 6. And a fraudulent intent may possibly exist, although the vendee actually paid for the property. Payment is not conclusive proof that the sale was *bona fide*, though evidently stringent evidence. Nugent *v.* Jacobs, 103 N. Y. 125 (1886); Howe *v.* Ward, 4 Greenl. 195; Roeber *v.* Bowe, 26 Hun, 554; Wadsworth *v.* Williams, 100 Mass. 126; Johnston *v.* Dick, 27 Miss. 277; Sexton *v.* Anderson, 95 Mo. 373; Ayres *v.* Moore, 2 Stew. 336; Peck *v.* Land, 2 Kelly, 1; Singer *v.* Jacobs, 3 McCrary, 638; Billings *v.* Russell, 101 N. Y. 226 (1886), examining many cases.

Continued Possession. As to the effect of continued possession of the vendor after an absolute sale of chattels, three views seem to prevail in America: —

1. That such possession, use, and apparent ownership is a conclusive badge of fraud as a *rule of law*, and that no evidence of good faith, payment of full consideration, etc., can affect this legal conclusion.

2. That such possession is *prima facie* a fraud in law, and if unexplained becomes conclusive as a rule of law for the court to lay down in all cases, and not for the jury.

3. That such possession is *prima facie* evidence of fraud for the jury sufficient to warrant, but not necessarily to require, them to find the sale fraudulent, and therefore that all evidence on the subject either way is

solely for the jury, and not a question of law for the court, which may, however, set aside a verdict either way, when contrary to the evidence, as in other cases. Some courts incline not to infer fraud from continued possession by a *mortgagor* so much as in the case of an absolute vendor, since it is not so apparently inconsistent with the conveyance; others make no distinction in this respect. In some, also, a distinction has been established between private sales and judicial or public auction sales. In sales of real estate, there is not so much reason for requiring a change of possession as in personal property, since the recorded deed in the former gives notice of a change of title. In some States the subject is regulated by statute. The different views will appear in the following list of States: —

ALABAMA holds it to be only *prima facie* evidence of fraud, and not fraud *per se*. Hobbs *v.* Bibb, 2 Stew. 54 (1820); Ib. 162, 336; 3 Ib. 96; 3 Port. 196; 4 Ib. 252; 24 Ala. 220; 29 Ib. 195; 58 Ib. 282; 40 Ib. 269.

ARKANSAS. Field *v.* Simco, 7 Ark. (2 Eng.) 269 (1847), declares non-delivery to be only *prima facie* evidence of fraud. 23 Ark. 128; 50 Ib. 42; 50 Ib. 289; 55 Ib. 116; Hight *v.* Harris, 56 Ib. 98; 17 S. W. 362.

CALIFORNIA. The sale is conclusively presumed to be fraudulent unless there be an actual and continued change of possession. Civ. Code, § 3440. See Watson *v.* Rodgers, 53 Cal. 401; 28 Ib. 14; 29 Ib. 466; 50 Ib. 285; 55 Ib. 224; 56 Ib. 330; 58 Ib. 193; 63 Ib. 494; 64 Ib. 78; and many other cases, among which is Young *v.* Poole, 13 Pac. Rep. 492 (1887). And see 76 Cal. 457; 77 Ib. 544; 84 Ib. 169; 89 Ib. 501; 99 Ib. 340; 102 Ib. 658; 102 Ib. 457; 109 Ib. 107; 107 Ib. 144; 98 Ib. 455; Henderson *v.* Hart, 122 Cal. 332; 101 Cal. 238; 107 Cal. 67; and Levy *v.* Scott, 115 Cal. 39; Adams *v.* Weaver, 117 Cal. 42; O'Brien *v.* Ballou, 116 Cal. 318; Brown *v.* Cline, 109 Cal. 156; in each of which the requirements of the statute were complied with.

COLORADO has a similar statute to California. Gen. Sts. of 1883, § 1523; McCraw *v.* Welch, 2 Colo. 285 (1874). See, also, Bassinger *v.* Spangler, 9 Colo. 175; Sweeney *v.* Coe, 12 Ib. 485; Finding *v.* Hartman, 14 Ib. 596; Baur *v.* Beall, Ib. 383; Felt *v.* Cleghorn, 2 Colo. App. 4; Goard *v.* Gunn, Ib. 66; Burchmill *v.* Weinberger, 4 Colo. App. 6.

CONNECTICUT. Ever since the case of Patten *v.* Smith, 5 Conn. 196 (1824), it has been firmly maintained that continued possession is usually a conclusive proof of fraud. See 6 Ib. 277; 16 Ib. 247; 14 Ib. 219, 241; Osborne *v.* Tuller, 14 Ib. 530, reviewing the cases; 20 Ib. 23; 21 Ib. 615; 31 Ib. 495; 32 Ib. 405; 39 Ib. 318; 40 Ib. 452; 41 Ib. 301; 44 Ib. 487; 48 Ib. 258.

DELAWARE has an early statute (14 Geo. 2) requiring a delivery to, and continued possession by, the vendee. Bowman *v.* Herring, 4 Harr. 458 (1847). But not in public auction sales. Perry *v.* Foster, 3 Ib. 293.

FLORIDA. Gibson *v.* Love, 4 Fla. 237 (1851), declares it to be fraud in law. See 10 Ib. 258. But the later cases declare that retention of possession is only *prima facie* evidence of fraud. Briggs *v.* Weston, 36 Fla. 629; Holliday *v.* McKinne, 22 Ib. 153. See, also, Mayer *v.* Wilkins, 37 Fla. 244.

GEORGIA now follows the rule of *prima facie* proof of fraud only, for the jury. Peck *v.* Land, 2 Kelly, 1 (1847); 6 Geo. 104; 8 Ib. 557; 29 Ib. 217; 57 Ib. 355.

ILLINOIS favors the rule that it is a fraud in law. Thornton *v.* Daven-

port, 1 Scam. 296 (1836); Ib. 301; 3 Gilm. 464; 18 Ib. 396; 21 Ib. 73; 22 Ib. 377; 24 Ib. 591; 37 Ib. 362; 78 Ib. 492; 81 Ib. 356; 82 Ib. 334; 84 Ib. 474; 85 Ib. 388; 4 Bradw. 376.

INDIANA. Under a statute (Rev. Stats. of 1881, § 4911) fraud is a question of fact, continued possession being presumed to be fraudulent. Rose *v.* Colter, 76 Ind. 590; 88 Ib. 310; 57 Ib. 274, 374; 27 Ib. 29; 9 Ib. 88; 4 Blackf. 26, 35, 420; 99 Ind. 548; 100 Ib. 247; Seavey *v.* Walker, 108 Ib. 78.

IOWA. By the Code, § 1923, a sale is not valid if the vendor retains possession, unless the sale is recorded. Hesser *v.* Wilson, 36 Iowa, 152; 40 Ib. 104; 46 Ib. 577; 47 Ib. 418; 50 Ib. 174; 51 Ib. 655; Harris *v.* Pence, 93 Ib. 481.

KANSAS. By statute the sale is fraudulent unless good faith and sufficient consideration are shown. Comp. Laws, c. 431, § 3. When these are both shown the sale is valid, though possession be retained. Wolfley *v.* Rising, 8 Kans. 297; Phillips *v.* Reitz, 16 Ib. 396; 24 Ib. 763. This is about as satisfactory a criterion as has been anywhere established.

KENTUCKY favors the view that in absolute sales continued possession is a fraud in law, unless the sale is public and the delivery impossible. Hundley *v.* Webb, 3 J. J. Marsh. 643 (1830); 2 Bibb, 101, 605; 4 J. J. Marsh. 2355; Ib. 545, 574; 3 Dana, 135; 6 Ib. 182; 7 Ib. 257; 2 B. Monr. 298; 8 Ib. 111; 1 Duvall, 28; 2 Dana, 87; 5 Bush, 334; 1 Ib. 86, 112; 78 Ky. 456.

LOUISIANA presumes "simulation" from continued possession. Spivey *v.* Wilson, 31 La. Ann. 653; 32 Ib. 1132.

MAINE, *prima facie* only. Reed *v.* Jewett, 5 Greenl. 96, 309; 3 Ib. 425; 8 Ib. 326; 31 Me. 95; 39 Ib. 496; 40 Ib. 73; 60 Ib. 168, 377; 64 Ib. 74; 70 Ib. 504.

MARYLAND. Non-delivery, unless the bill of sale be recorded, is proof of fraud. See Bruce *v.* Smith, 3 H. & J. 499 (1814); 4 Ib. 443; 2 H. & J. 416; 3 Md. 28; 5 Gill, 101; 49 Md. 24; 77 Ib. 100.

MASSACHUSETTS. Ever since the case of Waite *v.* Hudson, 1 Dane Ab. 635 (1792), it has been uniformly held in Massachusetts that, although continued possession by the vendor is very strong evidence of fraud, it is not conclusive; and the vendee may prove that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor was in pursuance of some agreement not inconsistent with an honest transaction. Brooks *v.* Powers, 15 Mass. 244; and see 1 Pick. 399; 2 Ib. 610; 3 Ib. 257; 4 Ib. 104; 8 Ib. 447; 10 Ib. 202; 14 Ib. 464, 497; 2 Met. 263; 3 Ib. 338; 4 Gray, 127.

MICHIGAN. It was held to be for the jury, and only *prima facie* evidence of fraud. Molitor *v.* Robinson, 40 Mich. 200 (1879) and 641; 42 Ib. 81, 191, 554. It is now regulated by statute. See 67 Mich. 623; 78 Ib. 221; 81 Ib. 299; 91 Ib. 328.

MINNESOTA. Continued possession is *prima facie* evidence of fraud for the jury. Blackman *v.* Wheaton, 13 Minn. 326 (1868); 19 Ib. 367. See 40 Ib. 421; 42 Ib. 457; Mackellar *v.* Pillsbury, 48 Minn. 396.

MISSISSIPPI. *Prima facie* evidence of fraud, and the vendee must prove good faith. Carter *v.* Graves, 6 How. 9 (1841); 3 S. & M. 614; 12 Ib. 369; 5 Cush. 277; 42 Miss. 749; 46 Ib. 309.

MISSOURI. After much fluctuation of judicial opinion and legislative enactment, it seems that continued possession is now conclusive evidence of

fraud. See Claflin *v.* Rosenberg, 42 Mo. 448 (1868); 43 Ib. 593; 56 Ib. 158; 67 Ib. 426; 68 Ib. 262; 2 Mo. App. 225; 3 Ib. 472; 40 Ib. 562, and cases cited. As to the effect of a delivery long subsequent to the sale, see 41 Mo. App. 635.

MONTANA. Under Rev. Sts. 169, non-delivery is conclusive evidence of fraud. Botcher *v.* Berry, 6 Mont. 448.

NEBRASKA. By statute, possession is only *prima facie* evidence of fraud for the jury, conclusive if not shown to be in good faith. Robinson *v.* Uhl, 6 Neb. 333 (1877); 11 Ib. 118, 121; Morgan *v.* Bogue, 7 Ib. 433; Fitzgerald *v.* Meyer, 25 Ib. 81; Powell *v.* Yeazel, 46 Neb. 225.

NEVADA. The sale is void unless there is an actual and continued change of possession. Carpenter *v.* Clark, 2 Nev. 243; 4 Ib. 361; 10 Ib. 416. But if the vendee has taken possession, and long afterwards restores the possession to the vendor, it is not void under the statute, but voidable if the jury find as a fact that it was done with fraudulent design. Chamberlain *v.* Stern, 11 Nev. 268.

NEW HAMPSHIRE steadily adheres to the doctrine of Edwards *v.* Harben, as stated in the text. Coburn *v.* Pickering, 3 N. H. 424 (1826). If the vendee fails to explain the want of change, it is conclusive. Trask *v.* Bowers, 4 Ib. 145; 8 Ib. 288; 9 Ib. 145; 10 Ib. 236; 22 Ib. 7; 38 Ib. 438. Coolidge *v.* Melvin, 42 N. H. 510, contains a valuable review of the authorities; 55 Ib. 561; 56 Ib. 253; 50 Ib. 253; 52 Ib. 148.

NEW JERSEY. Possession in the vendor is *prima facie* evidence of fraud, but may be explained. Miller *v.* Pancoast, 29 N. J. L. 250; 14 Ib. 8; 12 N. J. Eq. 86.

NEW YORK, after an interesting and spirited conflict of opinion, seems to have settled down that, since Rev. Sts. of 1830, the possession raises a presumption of fraud, which may be rebutted by evidence of good faith, and, if any such evidence be offered, the question is for the jury. See Hanford *v.* Artcher, 4 Hill, 271 (1842); 55 N. Y. 107; 56 Ib. 8, 273; 77 Ib. 461; 5 Hun, 277; 9 Ib. 138; 23 Ib. 218; 42 Barb. 194; 65 Barb. 359; 5 Duer, 220; 7 Daly, 550; 57 Hun, 229, and cases cited; Brown *v.* Harmon, 29 App. Div. (N. Y.) 31.

NORTH CAROLINA. Only evidence of fraud, not fraud in law. Rea *v.* Alexander, 5 Ired. 644; 83 N. C. 470.

NORTH DAKOTA. Under the earlier statute, fraud was conclusively presumed unless there was change of possession. Under the later statute the presumption is rebuttable. Conrad *v.* Smith, 6 N. Dak. 337.

OHIO. In sales of land it has been held only *prima facie* evidence of fraud. Barr *v.* Hatch, 3 Ohio, 527 (1828); 16 Ohio St. 88.

OREGON. By statute, non-delivery is now only *prima facie* fraudulent. Civ. Code, 262, 766, sub-sect. 20; McCully *v.* Swackhamer, 6 Oreg. 438; 4 Ib 101; Elder *v.* Rourke, 27 Oreg. 363.

PENNSYLVANIA, among others, firmly declares that when practicable a delivery is indispensable, or the sale is fraudulent in law if no honest or fair reason can be given. Clow *v.* Woods, 5 S. & R. 275 (1819); 10 Ib. 419; 2 Whart. 302; 5 Ib. 545; 3 Pa. St. 328; 8 Ib. 407; 40 Ib. 357; 43 Ib. 104; 69 Ib. 134; 73 Ib. 378; 89 Ib. 136; 91 Ib. 438; 94 Ib. 156; 96 Ib. 31; 98 Ib. 235. The shades of opinion in this State are various and delicate. As said in Garman *v.* Cooper, 72 Pa. St. 32, the goods must either pass away from the seller to the buyer, or the seller must pass away from the goods and leave them in the hands of the buyer. McKibbin *v.* Martin, 64 Ib.

352 (1870), contains a remarkably clear and able opinion by Justice Sharswood, which leaves little to be said on this subject. Buckley *v.* Duff, 114 Ib. 596. See, also, Stephens *v.* Gifford, 137 Pa. St. 219, a valuable case; McGuire *v.* James, 143 Ib. 521; 99 Ib. 576; 113 Ib. 70; 128 Ib. 524; Garretson *v.* Hackenberg, 144 Pa. St. 107. But judicial sales do not come under this rule. 13 Pa. St. 515; 77 Ib. 448; 80 Ib. 496.

RHODE ISLAND. Retention of possession is a badge of fraud. Anthony *v.* Wheaton, 7 R. I. 490, 582; Mead *v.* Gardiner, 13 Ib. 257.

SOUTH CAROLINA. Only *prima facie* evidence of fraud. Terry *v.* Belcher, 1 Bailey, 568 (1830), 575; 2 Ib. 118; 9 Rich. 407; 10 Ib. 253; Pregnall *v.* Miller, 21 S. C. 385 (1884), reviewing the cases.

SOUTH DAKOTA. By statute, fraud is conclusively presumed unless there be a delivery. Longley *v.* Daly, 1 S. Dak. 257.

TENNESSEE. Now only such *prima facie* evidence of fraud as to require proof of good faith. Callen *v.* Thompson, 3 Yerg. 475 (1832), 504; 4 Ib. 164; 7 Ib. 440; 8 Humph. 717; 5 Coldw. 160.

TEXAS. Possession by vendor only presumptive evidence of fraud admitting explanation. Bryant *v.* Kelton, 1 Tex. 415, 431 (1846); 2 Ib. 279; 7 Ib. 33; 19 Ib. 272; 21 Ib. 228; 23 Ib. 51; 24 Ib. 508; 28 Ib. 59; 39 Ib. 544; 46 Ib. 384; 53 Ib. 92; Edwards *v.* Dickson, 66 Tex. 613; Traders Bank *v.* Day, 87 Tex. 101.

UNITED STATES. Notwithstanding the rule adopted in Russell *v.* Hamilton, 1 Cranch, the modern view appears to be that possession is *prima facie* fraudulent, but open to proof of an honest purpose. Warner *v.* Norton, 20 How. 460 (1857). And see Smith *v.* Craft, 123 U. S. 436.

UTAH. By statute, unless there is actual change of possession, there is a conclusive presumption of fraud. Everett *v.* Taylor, 14 Utah, 242.

VERMONT is also understood to hold non-delivery a conclusive badge of fraud. Weeks *v.* Wead, 2 Aik. 64 (1825), a leading case, by Prentiss, J.; 1 Aik. 116, 162; 5 Vt. 527; 8 Vt. 352; 10 Ib. 346; 11 Ib. 395, 683; 12 Ib. 515, 653; 13 Ib. 281; 14 Ib. 141; 19 Ib. 609; 27 Ib. 388; 33 Ib. 332; 46 Ib. 65; 53 Ib. 57, 687. Whether there was a change of possession is a question of fact for the jury. Rothchild *v.* Rowe, 44 Vt. 389.

VIRGINIA. Here, also, after other views had obtained, it was settled in 1848 that possession is only *prima facie* evidence of fraud. Davis *v.* Turner, 4 Gratt. 422, containing a valuable examination of the cases by Justice Baldwin. And see 6 Ib. 197; 7 Ib, 185; 11 Ib. 778; 26 Ib. 563; 28 Md. 324.

WASHINGTON. A statute provides that unless there is a change of possession, or a written memorandum of the sale is recorded, it is not valid as against third persons. Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615.

WEST VIRGINIA seems to follow Virginia. Bindley *v.* Martin, 28 W. Va. 792, where many cases are collected; Curtin *v.* Isaacsen, 36 W. Va. 391; Poling *v.* Flanagan, 41 W. Va. 191.

WISCONSIN. By statute, retention of possession is *prima facie* fraudulent, but it may be rebutted. Rev. St. § 2310; Bullis *v.* Borden, 21 Wisc. 136; 15 Ib. 221; 10 Ib. 91; 41 Ib. 422; 76 Ib. 526.

In most of these cases it is understood, except where a statute has differently provided, that, even if the vendee does not take *immediate* possession, yet, if he does so before any seizure by creditors of the vendor, the delay in doing so is not to be held a fraud.

As to what constitutes a sufficient delivery, see *post*, Ch. 2, on Delivery.

As to who are Creditors. The term includes: (1.) Those whose claims have fully *matured* before the fraudulent sale. (2.) Those whose claims have been *created*, but have not fully matured. (3.) Those whose claims originate after the sale. (4.) The term "creditors" includes not only contract creditors, but those whose claims arise out of tort, or even some statute liability.

As to those whose claims not only originate but fully mature before the sale, if *any* creditors ever could avoid the sale, their right to do so is indisputable; but the law is now equally clear that creditors whose claims had been created, but not matured, stand in the same position. And this class includes persons who had a valid tort claim against the vendor, but which had not yet been liquidated, or prosecuted to judgment; especially where the statute makes the conveyance void as to creditors "and others," as some do. Jackson *v.* Myers, 18 Johns. 425; Fox *v.* Hills, 1 Conn. 295; Ford *v.* Johnston, 7 Hun, 568; Westmoreland *v.* Powell, 59 Geo. 256; Wise *v.* Moore, 31 Ib. 148; Wilcox *v.* Fitch, 20 Johns. 472; Walradt *v.* Brown, 6 Ill. (1 Gilman), 397. (In Evans *v.* Lewis, 30 Ohio St. 11, such a person was held to be a "subsequent" creditor. So in Ford *v.* Johnston, 7 Hun, 567. And see Hill *v.* Bowman, 35 Mich. 191.) So as to *contingent* creditors, such as guarantors or sureties, whose liability had not become fixed and absolute at the time of sale. Jackson *v.* Seward, 5 Cow. 67; Howe *v.* Ward, 4 Greenl. 195. So of a claim under the bastardy act for the support of an illegitimate child, although no order of affiliation had been made at the time of the alleged fraudulent sale. Damon *v.* Bryant, 2 Pick. 411. So of the claim of a wife against the husband for alimony and support in a proceeding for divorce, the cause of which existed but had not been prosecuted at the time of the sale. If she was not strictly a creditor at the time of sale, she was one of the "others" for whom the statute of Elizabeth provided. Livermore *v.* Boutelle, 11 Gray, 217; Chase *v.* Chase, 105 Mass. 385; Bayless *v.* Bayless, 1 Coldw. 96. In other words, the phrase "creditors" embraces all who have a *cause of action*, or embryo creditors, as well as others. And see Mattingly *v.* Wulke, 2 Bradw. 172, and cases cited; Welde *v.* Scotten, 59 Md. 72.

As to creditors whose claims wholly originate after the alleged fraudulent sale, the uniform rule is that, if the conveyance is made with actual intent in both parties to defraud existing creditors, it may be avoided by subsequent as well as by existing creditors. Parkman *v.* Welch, 19 Pick. 237; Day *v.* Cooley, 118 Mass. 524; Dodd *v.* Adams, 125 Mass. 398; Howe *v.* Ward, 4 Greenl. 195; McConihe *v.* Sawyer, 12 N. H. 396; McLane *v.* Johnson, 43 Vt. 48, citing many cases; Carter *v.* Grimshaw, 49 N. H. 100; Jones *v.* King, 86 Ill. 226; Warren *v.* Williams, 52 Me. 343; Hook *v.* Mowre, 17 Iowa, 197. See Crawford *v.* Beard, 12 Oreg. 447; Silverman *v.* Greaser, 27 W. Va. 550.

Subsequent *bona fide* purchasers for value of the same vendor come in under the head of subsequent "creditors and others," and may avoid a prior sale made with actual fraudulent intent. Wadsworth *v.* Havens, 3 Wend. 412; Kimball *v.* Hutchins, 3 Conn. 450; Carter *v.* Castleberry, 5 Ala. 277; Anderson *v.* Roberts, 18 Johns. 516. But as to these their title would generally be good, whether the first sale was fraudulent or not; since a second purchaser in good faith who first obtains delivery always holds against a former one without delivery. Cummings *v.* Gilman, 90 Me. 524.

Consequences of the Fraud. That a fraudulent grantee may, previous to any avoidance of his title by creditors or purchasers of the vendor, convey a good title to a *bona fide* purchaser for value, ignorant of the fraud, is now well-settled law. Anderson *v.* Roberts, 18 Johns. 515; Hoffman *v.* Noble, 6 Met. 68; Jackson *v.* Henry, 10 Johns. 187; Green *v.* Tanner, 8 Met. 411; Jackson *v.* Walsh, 14 Johns. 415; Neal *v.* Williams, 18 Me. 391; Sleeper *v.* Chapman, 121 Mass. 404; Neal *v.* Gregory, 19 Fla. 356; Comey *v.* Pickering, 63 N. H. 126; Zoeller *v.* Riley, 100 N. Y. 102; Gordon *v.* Ritenour, 87 Mo. 54; Lehman *v.* Kelly, 68 Ala. 192. But if the sub-vendee has knowledge of the fraud in both parties to the original sale, his title is defective. Smith *v.* Conkwright, 28 Minn. 23. If the first vendee has no knowledge of any fraudulent intent in the vendor, he acquires so perfect a title that he can convey a good title to one who did have notice of such fraud. Bergen *v.* Producers' Marble Yard, 72 Tex. 53.

CHAPTER III.

ILLEGALITY.

SECTION I. — AT COMMON LAW.

Sect.

Sale void when for illegal purpose . 503
Where the unlawful agreement is executory, money or goods recoverable . 503 a
Law same in America . . . . 503 a
Illegal act unavailable for defence as well as for action 504
Part of consideration illegal . . . 505
Separable contract 505
Where vendor knows thing bought, though innocent in itself, is intended for illegal purpose 506
No distinction between *malum in se* and *malum prohibitum* 506
Sale to an alien enemy 516
Sale to smuggler 510
Sale against public policy . . . 512
Forestalling, segrating, and engrossing . 514
Common-law rules abolished by statute 515
Law in America 515
Sale of office, or emoluments of office . 516
Sale of pension — distinction of past and future service 519
Officer's retiring pension inalienable by statute 519
Restraint of trade, when general . . 520
Restraint of trade as to place . . 521
Doubts expressed as to existence of any rule . . . . . 523 a
Restraint as to time unimportant . . 525
Courts will not investigate adequacy of consideration 526
Restraint must be reasonable . . 527
Or will be annulled as to excess . 527
Valid if restraint reasonable when contract made 527
Trade secret 527
Covenant not to carry on business under a particular name valid . . . 527
Sale of lawsuits — champerty — maintenance 528

SECTION II. — BY STATUTE.

Prohibition express or implied . . 530
Implied by impositions of penalty . 530
Distinction between statutes passed for revenue purposes and others . . 531
General rules on this subject . . . 538
Act relative to printers, sales of butter, bricks, etc. 539
Weights and Measures Acts . . . 540
Sale of game 540
Gaming or wagering sales . . . 541
Tippling Acts 543
Cattle salesmen in London . . . 545
Sales of Offices Acts 546
Exceptions to prohibitions . . 547
Deputation of office to be paid for out of the profits 548
Goods delivered without permit . . 551
Sales on Sunday 552
Not void at common law . . . 552
Statute 29 Car. II. c. 7. — decisions 552
Other statutes relating to sales . . 555
American decisions 556
French Code 559

SECTION I. — AT COMMON LAW.

§ 503. THE contract of sale, like all other contracts, is void when entered into for an illegal consideration, or for purposes violative of good morals or prohibited by the lawgiver. The thing sold may be such as in its nature cannot form the subject of a valid contract of sale, as an obscene book or an indecent picture, which are deemed by the common law to be evil and noxious things. The article sold may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly sold for the purpose, prohibited by

law, of adulterating food or drink. Or the sale may be prohibited by statute for revenue purposes, or other motive of public policy. In all these cases the law permits neither party to maintain an action on such a sale.

§ 503 a. [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 his money or goods. The action is then founded, not upon the unlawful agreement, but upon its disaffirmance. 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."

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

§ 504. The subject will be considered in two parts: 1st, with reference to the common law; 2d, the Acts of Parliament.

At common law the rule is invariable: *Ex turpi causâ non oritur actio.* And this rule is as applicable to a [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*). Sales are therefore void, and neither party can maintain an action on them, if the thing sold be contrary to good morals or public decency. Sales of an obscene book (*e*) and of indecent prints or pictures (*f*) have been held illegal and void at common law (*g*).

(*a*) 1 Q. B. D. 291, C. A.; and see Symes *v.* Hughes, 9 Eq. 475, 479.

(*b*) Spring Co. *v.* Knowlton, 103 U. S. (13 Otto), 49 (1880).

(*c*) 1 Wm. Bl. 363; and see, also, *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. p. 398, ed. 1887.

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

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

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

§ 505. Even where part only of the consideration of a contract is illegal, the whole contract is void and cannot be enforced. This was treated as established law by Tindal, C. J., in Waite *v.* Jones (*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*).

[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 upon the face of the agreement that the parties intended it to be carried into effect piecemeal, the illegality of the consideration for one part will not prevent the legal part of the contract from being enforced (*k*).]

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.

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*).

§ 507. 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.

In Faikney *v.* Reynous (*o*), which came before the King's Bench in

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

(*i*) 1 Cro. Eliz. 199.

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

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

(*l*) 3 Taunt. 226.

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

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

(*o*) 4 Burr, 2070.

1767, a party had paid, at the request of another, money on a contract which was illegal, and sued for its recovery. Judgment was given for the plaintiff, Lord Mansfield saying: "One of these two persons has paid money for the other, and on his account, and he gives him his bond to secure the *repayment* of it. *This* is not prohibited. *He is not concerned in the use which the other makes of the money.*"

The 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.*

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

§ 507. In 1803, the case of Bowry *v.* Bennet (*v*) 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.*"

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 a 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 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.*"

(*p*) 3 T. R. 418.
(*q*) 6 T. R. 405.
(*r*) 2 Bos. & P. 371.
(*s*) 2 H. Bl. 379.
(*t*) 3 Taunt. 6.
(*u*) 1 M. & S. 594.
(*v*) 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.

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*).

§ 508. 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 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.

In M'Kinnell *v.* Robinson (*b*), in the Exchequer, in 1838, it was held, that money knowingly lent or 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.

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

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

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

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

§ 509. 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.

§ 509 a. [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 of judgment of Field, J. (*d*).]

§ 510. By the common law, a sale to an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the sovereign (*e*).

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

(*c*) L. R. 1 Ex. 213. See, also, Taylor *v.* Chester, L. R. 4 Q. B. 309; and Bagot *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.

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

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

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

England, but were actually delivered in the foreign country, and that the plaintiff was therefore entitled to recover (*h*).

§ 511. 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.

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*).

§ 512. 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, etc. 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

(*h*) Holman *v.* Johnson, 1 Cowp. 341.
(*i*) 5 T. R. 599.
(*k*) 2 C. M. & R. 311.
(*l*) See Westlake, Private International Law (1880), § 203.
(*m*) 2 Bing. 242.
(*n*) 24 L. J. Q. B. 353; 6 E. & B. 47.

may lead you from the sound law. It is never argued at all but when other points fail."

§ 513. 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 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."

§ 513 a. [There is now a strong tendency towards controlling the exercise of judicial discretion in laying down fresh principles of public policy, and limiting the application of the doctrine to certain well-defined 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*).]

§ 514. 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 (*q*). In The King *v.* Waddington (*r*), the defendant was sentenced to a fine of 500*l.* and

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

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

(*q*) 4 Black. Com. 159; and Mr. Chitty's note, ed. 1844.

(*r*) 1 East, 143.

four months' imprisonment (*i. e.* a further term of one month in addition to his previous confinement of three months) for the offence of trying to raise the price of hops in the market by telling sellers that hops were too cheap, and planters that they had not a fair price for their hops; and contracting for one fifth of the produce of two counties when he had a stock in hand and did not want to buy, but merely to speculate how he 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."

§ 515. The common-law rules on the subject of these offences were abolished by the statute 7 & 8 Vict. c. 24, and, although no legislation on the subject has taken place in America, Mr. Story says (*s*): "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

Notwithstanding these observations, it is quite beyond doubt that there are various well-defined cases where contracts of sale are still held illegal at common law as being violative of public policy and the interests of the state. These are chiefly — 1st. Contracts for the sale of offices, or the fees or emoluments of office; 2d. Contracts of sale in restraint of trade; and, 3d. Contracts for the sale of lawsuits, or interests in litigation.

§ 516. Contracts for the sale or transfer of public offices or appointments, or the salary, fees, or emoluments of office, have in many cases been prohibited by statute, as will presently be shown; but, by common law antecedent to these enactments, such sales were held to be subversive of public policy, as opposed to the interests of the people and to the proper administration of government. *Nullâ aliâ re magis*

(*s*) Story on Sales, § 490.

Romana respublica interiit, quam quod magistratûs officia venalia erant (*t*). 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 (*u*), 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, 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."

In Parsons *v.* Thompson (*v*), 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.

§ 517. In equity, a perpetual injunction was granted against enforcing a bond for the purchase of an office, as opposed to public policy, although the sale was not within the prohibitions of the statutes (*w*). And in Law *v.* Law (*x*), a bond was held to be illegal by which a party covenanted to pay 10*l.* per annum, as long as he enjoyed an office in the excise, to a person who by his interest with the commissioners had obtained the office for him.

§ 518. In Blachford *v.* Preston (*y*), the sale by the owner of a ship

(*t*) Co. Litt. 234 a.

(*u*) 1 H. Bl. 327.

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

(*w*) Hanington *v.* Du Chatel, 1 Bro. C. C. 124; Methwold *v.* Walbank, 2 Ves. Sen. 238.

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

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

in the East India Company's service, of the place of master of the vessel, was held illegal, as being in violation of the laws and regulations of the company and of public policy, and Lord Kenyon said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori;* on principles of public policy, no money consideration ought to influence the appointment to such offices."

In Card *v.* Hope (*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 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.*

In Hanington *v.* Du Chatel (*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.

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 appointer or to anybody else.

[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.]

(*z*) 2 B. & C. 661.
(*a*) 1 Bro. C. C. 124.
(*b*) 28 L. J. Ch. 868; S. C. Johnson, 359.
(*c*) 10 Ir. R. C. L. 226.

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 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.

§ 519. 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."

[And the retiring pension of an officer of her Majesty's forces, even where it has been granted exclusively in respect to past services, has now been rendered inalienable by the Army Act, 1881 (*g*), which provides as follows: "Every assignment of, and every charge on, and every agreement to assign or charge, any . . . pension payable to an officer or soldier of her Majesty's forces, or any pension payable to any such officer, . . . or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto, or as may be authorized by an act for the time being in force, be void" (*h*).]

§ 520. A contract of sale, by the terms of which the vendor is restrained *generally* in the carrying on of his trade, is against public policy, and is void. 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.

(*d*) 2 Br. & B. 673.

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

(*f*) 8 M. & W. 149; see, also, Willcock *v.* Terrell, 3 Ex. D. 323, C. A., per Cotton, L. J., at p. 334. And the same rule applied in Chancery. Spooner *v.* Payne, 1 De G. M. & G. 383, 388.

(*g*) 44 & 45 Vict. c. 58, s. 141.

(*h*) See Lucas *v.* Harris, 18 Q. B. D. 127, C. A., where Dent *v.* Dent, 1 P. & D. 366, was distinguished, and Birch *v.* Birch, 8 P. D. 163, preferred and followed.

[This was laid down so long ago as the Year Book of 2 Henry V. (*i*), where a bond given by one John Dyer, the condition of which was that he should not use the dyer's craft for two years, was held void, the reason given by Hull, J., with great warmth of expression, being that such a condition was against the common law.

This case is mentioned with approval in the Ipswich Tailors case (*k*), where it was resolved that at common law no man could be prohibited from working at any lawful trade. The resolution of the court is expressed in the following terms: "That at the common law no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater*, and especially in young men, who ought in their youth (which is their (seed-time to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade; . . . so for the same reason, if an husbandman is bound that he shall not sow his land, the bond is against the common law; . . . and the statute of 5 Eliz. ch. 4, which prohibits any person from using or exercising any craft, mystery, or occupation unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades, and thereby it appears that without an Act of Parliament none can be in any manner restrained from working in any lawful trade." The action in this case was by the Master, Wardens, and Society of the Tailors of Ipswich against one William Sheninge for penalties, due under their constitutions, for having exercised the trade of tailor in Ipswich without having first presented himself to the society for admission. But the language used by the court in dismissing the action shows broadly that the law sets its face against restraints of trade (*l*).]

The leading case on this subject is Mitchel *v.* Reynolds (*m*), in the Queen's Bench, 1711, and republished in Smith's Leading Cases (*n*). The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messnage and bakehouse in Liquorpond Street, Parish of St. Andrews, for five years, and the defendant covenanted that he would not exercise the trade of a baker within that parish during the said term under penalty of 50*l*. The defendant pleaded that he was a baker by trade, that he had served

(*i*) 2 Henry V. 5 b, pl. 26.
(*k*) 11 Rep. 53 B.
(*l*) Per Bowen, L. J., in Davies *v.* Davies, 36 Ch. D. at p. 390.
(*m*) 1 P. Wms. 181.
(*n*) Vol. 1, p. 430, ed. 1887.

an apprenticeship to it, *ratione cujus* the said bond was void in law *per quod* he did trade, *prout ei bene licuit.* Demurrer in law. Held, a valid bond. In a very elaborate judgment, Parker, C. J., laid down, as settled rules, that voluntary restraints of trade 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 (*o*) 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 (*p*).

§ 521. In Homer *v.* Ashford (*q*), 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."

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 (*r*); not to practice as attorney within London and 150 miles from thence (*s*); 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 (*t*); not to carry on trade as a horsehair manufacturer within 200 miles of Birmingham (*u*); not to carry on trade as a milkman for twenty-four months within five miles from Northampton Square (*v*); not to supply bread to the customers of a baker's shop, of which the lease and good-will were sold (*x*); not to travel for any other commercial firm than that of the employers, within the district for which the traveller was employed (*y*); not to run a coach within certain specified hours upon a particular road (*z*).

(*o*) Overruled as to adequacy of consideration, *post.*

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

(*q*) 3 Bing. 322.

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

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

(*t*) Whittaker *v.* Howe, 3 Beav. 383; this was on the ground of limitation of time (*sed quære?*), *post*, § 525. See remarks on this case by Cotton, L. J., in Davies *v.* Davies, 36 Ch. Div. at p. 384.

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

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

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

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

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

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

1. Down to the year 1854, in a tabular statement annexed to the report of Avery *v.* Langford (*a*).
2. From the year 1854 up to date, in Pollock on Contracts (4th ed.), page 315.]

§ 522. Where there is a partial restraint as to *space*, the distance is to be measured from the place designated in a straight line on the map (*b*), in the absence of any expressions indicating the intention of the parties to adopt a different mode of measurement (*c*).

§ 523. On the other hand, where the restraint was general as to *place*, the agreements have been held void; as in a covenant not to be employed in the business of a coal merchant for nine months (*d*). 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 (*e*), 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."

In Hinde *v.* Gray (*f*), a covenant, in a demise by a brewer of his premises and business in Sheffield for ten years, that he would not during the continuance of the demise carry on the business of a brewer, or merchant or agent for the sale of ale, beer, or porter in Sheffield *or elsewhere*, was held void. But in the later cases, as will presently appear, such stipulations have been held *divisible;* and valid, so far as the particular place was concerned, although illegal as to the general restraint.

§ 523 a. [In The Leather Cloth Company *v.* Lorsont (*g*), 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. But it is to be observed, that the covenant in the case was connected with the disclosure of a trade secret, as to which it is well settled that a restraint, though general as to space, may be enforced (*h*).

(*a*) Kay, 667, 668.
(*b*) Mouflet *v.* Cole, L. R. 7 Ex. 70; 8 Ex. 32, in Ex. Ch.
(*c*) Atkyns *v.* Kinnier, 4 Ex. 776; Leigh *v.* Hind, 9 B. & C. 774.
(*d*) Ward *v.* Byrne, 5 M. & W. 548.
(*e*) 6 A. & E. 438, 454.
(*f*) 1 M. & G. 195.
(*g*) 9 Eq. 345.
(*h*) Bryson *v.* Whitehead, 1 Sim. & St. 74;

Accordingly, in Allsopp *v.* Wheatcroft (*i*), 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 Rousillon *v.* Rousillon (*k*), 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, as relating only to cases where, from the circumstances and subject-matter of the contract, the restraint was in fact unreasonable.

The subject was recently considered by the Court of Appeal in Davies *v.* Davies (*l*), but unfortunately no authoritative decision was given upon the point in question. The court had to construe a covenant by a retiring partner in the following terms: "James Davies to retire wholly and absolutely from the partnership, and, *so far as the law allows, from the trade or business thereof in all its branches.*" Two methods of interpreting the clause italicised were suggested, — either that the covenant was one to retire absolutely from the trade if the law allow such a covenant to be entered into (*i. e.* a general restraint, if legal), or a covenant to retire from the trade so far as the law allows (*i. e.* a partial restraint so far as legal). The Court of Appeal interpreted the covenant in the latter sense, and held that it was too vague to be enforced; it therefore became unnecessary for them to determine the question of the validity of a general restraint. But Kekewich, J., from whose decision the appeal was brought, adopting the first-mentioned interpretation, held that in consequence of the altered conditions of commercial intercourse, the old rule as to the invalidity of covenants in general restraint of trade ought no longer to be treated as the law of the court, and upon this point the judgments of the Lords Justices, although not decisive, are very instructive. Cotton, L. J., after a careful review of the cases, decided that the rule still exists, and that the test of the reasonableness of the restraint is only applicable when the covenant is limited as to space or time. Bowen, L. J., also reviewed the authorities from the earliest times, and, after pointing out that there was no evidence in favor of an unlimited restraint as to space (except in the special class of contracts of which The Leather Cloth Co. *v.* Lorsont is an instance), declined to decide whether the rule of common law ought to be modified with reference to the requirements of modern society. If it was done, it must be for

see per Cotton, L. J., in Davies *v.* Davies, 36 Ch. D. at p. 384.

(*i*) 15 Eq. 59. [Mills *v.* Dunham [1891], 1 Ch. 576, virtually overrules Allsopp's case.]

(*k*) 14 Ch. D. 351; 49 L. J. Ch. 338.

(*l*) 36 Ch. D. 379, C. A.

one of two reasons, either that it was for the benefit of the public, or reasonably necessary for the protection of the covenant, and there were no materials for arriving at either conclusion with reference to the covenant under consideration. At the same time the inclination of his opinion was that the rule "was too much ingrained in our history to be changed at this moment at all events, except by the highest court of the country." Fry, L. J., still inclined to the view which he had expressed in Rousillon *v.* Rousillon, and, while admitting that the inquiry was still open and worthy of great consideration, indicated his opinion to be that the rule might no longer find support on the ground of public policy, and that the reasonableness of the restraint ought possibly now to be the only rule of limitation. In this state of the authorities, and pending a decision of the House of Lords, it would perhaps be premature to express any decided opinion as to the abrogation of the rule.]

§ 524. The restraint may be general or limited as to *time*, as well as *space*. In Ward *v.* Byrne (*m*), the covenant was, that "the said Thomas Byrne shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he shall have left the employment of the said W. Ward." There was a verdict for plaintiff, and motion in arrest of judgment, on the ground that the agreement was void in law as against public policy. Parke, B., commenting on the limitation of time, said: "When a *general* restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and, looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a *total* restriction in trade, limited only as to *time*." All the judges concurred in this view of the subject.

In Hitchcock *v.* Coker (*n*), the Exchequer Chamber held that the restraint might be indefinite as to time, might extend to the whole lifetime of the party, when the restriction was otherwise reasonable; and the judges considered this point as settled law in Mumford *v.* Gething (*o*), 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."

§ 525. It would appear from these cases that the question of time is unimportant in determining whether a contract is void as being in restraint of trade. The decision of Lord Langdale, M. R., therefore,

(*m*) 5 M. & W. 548.

(*n*) 6 A. & E. 438. See, also, Pemberton *v.* Vaughan, 10 Q. B. 87.

(*o*) 29 L. J. C. P. 105, 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.

in Whittaker *v.* Howe (*p*) (*ante*, § 521), has been practically overruled in the later cases (*q*).

§ 526. It has already been seen that in the leading case of Mitchel *v.* Reynolds (*r*), Parker, C. J., laid down the proposition that, to render a particular or partial restraint legal, it was necessary that the contract should be made "upon a good and adequate consideration, so as to make it a proper and useful contract."

The earlier cases went upon this doctrine, and the courts took into contemplation the *adequacy* of the consideration for the restraint. In Young *v.* Timmins (*s*), Lord Lyndhurst, C. B., and Bayley and Vaughan, BB., held the contract void, on the express ground that the consideration was inadequate, though no doubt the contract was also entirely unreasonable for want of mutuality, as pointed out by Bolland, B., inasmuch as the agreement bound the workman to work for no one but his employers, and left them at liberty to employ him or not at their discretion.

In Wallis *v.* Day (*t*), 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.

But in Pilkington *v.* Scott (*u*), 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 (*x*), a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."

The learned Baron had himself been a member of the court in Exchequer Chamber, in 1837, which reversed the judgment of the King's Bench in Hitchcock *v.* Coker, and in that case Tindal, C. J., delivered the unanimous opinion of the Court of Error. Upon the

(*p*) 3 Beav. 383.

(*q*) See per Patteson, J., in Nicholls *v.* Stretton, 10 Q. B. at p. 353; and per Cotton, L. J., in Davies *v.* Davies, 36 Ch. D. at p. 384; 56 L. J. Ch. at p. 965.

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

(*s*) 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.

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

(*u*) 15 M. & W. 657.

(*x*) 6 A. & E. 438.

point now under consideration, the language of the opinion is as follows: "Undoubtedly in most if not all the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, *such consideration as is essential to support any contract not under seal*, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, *we feel ourselves bound to differ from that doctrine.* A duty would thereby be imposed on the court, in every particular case, which it has no means whatever to execute."

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

[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 (*z*).]

§ 527. But even though the restraint be partial, and founded upon good consideration, the courts will refuse to enforce the contract if unreasonable; and this is a question of law for the court, not of fact for the jury.

The whole doctrine on the subject, and the authorities, were reviewed in Mallan *v.* May (*a*), where the promise was not to carry on, as principal, assistant, or agent, the profession of surgeon dentist, or any branch thereof, in London, *or in any of the towns or places in England or Scotland* where the other parties may have been practising, etc., etc.

The principles of law were declared by Parke, B., who gave the opinion of the court, after time for consideration, to be as follows: —

(*y*) 6 A. & E. 959, 966. See, also, Sainter *v.* Ferguson, 7 C. B. 716, and Hartley *v.* Cummings, 5 C. B. 247.

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

(*a*) 13 M. & W. 511, and 11 M. & W. 653. See remarks on this case in Davies *v.* Davies, 36 Ch. D. per Cotton, L. J., at p. 383.

"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, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry."

The learned Baron discussed the question whether the limits assigned by the covenant before the court were reasonable, and adopted as safe law the proposition of Tindal, C. J., in Horner *v.* Graves (*b*), that "*whatever restraint is larger than is necessary for the 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 stipluation as to not practising in London (*c*) was *valid, and was not affected by the illegality of the other part.*

This decision was followed in Green *v.* Price (*d*), 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 (*e*).

(*b*) 7 Bing. 743.

(*c*) The court held that "London" means the city of London, and did not include Great Russell St., Middlesex. 13 M. & W. 517.

(*d*) 16 M. & W. 346; 16 L. J. Ex. 108.

(*e*) 16 M. & W. 346. See, also, Nicholls *v.* Stretton, 7 Beav. 42; 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 [and the latter was affirmed in the late case of Mills *v.*

[Covenants also of this kind have similarly been held divisible in regard to time (*f*).]

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 (*g*).

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

On the sale of a business, a covenant by the seller not to carry on business under a particular name or style does not fall within the rule as to covenants in restraint of trade (*i*).]

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

Champerty (*campi partititio*) is a contract for the purchase of another's suit or right of action; or a bargain by which a person agrees to carry on a suit at his own expense, for the recovery of another's property on condition of dividing the proceeds. This, as well as *maintenance*, are offences at common law, and cannot, therefore, form the subject of a valid contract. Maintenance, according to Lord Coke (*k*), "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."

§ 529. In Stanley *v.* Jones (*l*), 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 (*m*).

Dunham [1891], 1 Ch. 576. — E. H. B.] See, also, Collins *v.* Locke, 4 App. Cas. 674, 686; and Baines *v.* Geary, 56 L. J. Ch. 935.

(*f*) Nicholls *v.* Stretton, 7 Beav. 42; S. C. at law, 10 Q. B. 346, followed by North, J., in the very recent case of Baines *v.* Geary, 56 L. J. Ch. 935.

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

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

(*i*) Vernon *v.* Hallam, 34 Ch. D. 748; 35 W. R. 156.

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

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

(*m*) See further, as to maintenance and champerty, In re Masters, 1 H. & W. 348;

In Hutley *v.* Hutley (*n*), it was held that mere relationship between the parties, or even some collateral interest, could not render valid an agreement, otherwise champertous, for dividing the proceeds of an action.

Taking a transfer of an interest in litigation as a security is not champertous, and is a valid contract (*o*); [and a fair 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" (*p*).]

SECTION II. — CONTRACTS ILLEGAL BY STATUTE.

§ 530. When contracts are prohibited by statute, the prohibition is sometimes express, and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract; and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced. Of this there is no doubt (*q*).

§ 531. But the question frequently arises whether, on the true construction of a statute, the contract under consideration has really been prohibited, and in determining this point much weight has been attributed to a distinction held to exist between two classes of statutes, — those passed merely for revenue purposes, and those 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.

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; Bainbrigge *v.* Moss, 3 Jur. N. S. 58; In re Attorneys and Solicitors Act, 1 Ch. D. 573; In re 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; Plating Co. *v.* Farquharson, 17 Ch. D. 49, C. A.; Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, where the cases are reviewed by Coleridge, C. J.; Metropolitan Bank *v.* Pooley, 10 App. Cas. 210; Harris *v.* Briscoe, 17 Q. B. D. 504, C. A.

(*n*) L. R. 8 Q. B. 112.

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

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

(*q*) 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 Company, 5 B. & S. 588; 33 L. J. Q. B. 268; In re Cork and Youghal Railway Company, 4 Ch. 748.

§ 532. The leading case on this point is Johnson *v.* Hudson (*r*), decided by the King's Bench in 1809. Different statutes had provided, 1st, that all persons dealing in tobacco should, before dealing therein, take out a license under penalty of 50*l.*; and 2dly, that no tobacco should be imported, either wholly or in part manufactured, under penalty of forfeiture of the tobacco, the package, and the ship. In this state of the law, the plaintiffs, who had never before dealt in that article, received a consignment of tobacco manufactured into cigars, *which they duly entered at the custom house*, and then sold to defendant without taking out a license. The court held that the action was maintainable, observing "that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; *nor any clause making the contract of sale illegal*, but, at most, it was *the breach of a mere revenue regulation* which was protected by a specific penalty; and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the act."

§ 533. Next, in 1829, Brown *v.* Duncan (*s*) 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 the 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 distiller's 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 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

(*r*) 11 East, 180.

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

of the act of Parliament had *not for their object to protect the public, but the revenue only*" (*t*).

§ 534. In 1836, Cope *v.* Rowlands (*u*) was decided in the Exchequer, and it was held that a city of London broker could not maintain an action for his commissions in buying and selling stock unless duly licensed according to the 6 Anne, c. 16, s. 4, which provides that if any person should act as a broker in making sales, etc., without such license, he shall forfeit 25*l.* "for every such offence." In the course of the argument Parke, B., said: "Very considerable doubt was thrown on the distinction which has been taken between breaches of laws passed for revenue purposes, and others, in the case of Brown *v.* Duncan, and, when it comes to be considered, I think that distinction will be overruled." The court took the case under consideration, and the decision was delivered by the same learned Baron, who again said: "It may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statute *means to prohibit the contract.*" Notwithstanding this statement, the learned Baron went on to say that the question before the court was, whether the 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, 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.

§ 535. Again, in 1845, the same point was discussed in the same court in Smith *v.* Mawhood (*x*), where the defence in an action for goods sold and delivered was based on the allegation that the goods were tobacco, and that the plaintiff had not complied with the law requiring him to have his name painted on the house in which he carried on his business, in the manner specified in the law, under penalty that the person so offending should forfeit 200*l.* Held, that 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

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

(*u*) 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.

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

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.

§ 536. In the Court of Common Pleas, in 1847, all the foregoing cases were cited and considered in Cundell *v.* Dawson (*y*). 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 of coals, and the defence was, that the plaintiff had violated the statute 1 & 2 Vict. cap. ci. by failing to deliver the defendant a ticket, as required by that statute, stating the quantity and description of the coals delivered. The statute directed such delivery, under penalty, in case of default, of 20*l.* "for every such offence." The Chief Justice said: "The statutes which have given rise to the question of the right to recover the price of goods, by sellers who have not complied with the terms of such statutes, are of two classes, — the one class of statutes having for their *object the raising and protection of the revenue;* the other class of statutes being directed either to the *protection of buyers* and consumers, or to some *object of public policy.* The present case arises upon a statute included in the latter class. . . . The class of statutes enacted simply for the security of the revenue do not apply to the present case; and various determinations which are contained in the books, upon the construction of those statutes, and the effect of a non-compliance with their enactments by the seller of goods, rest upon principles not applicable to the present case." The court then held, on the authority of Little *v.* Poole (*z*), that the Coal Acts (*a*) were

(*y*) 4 Com. 376.
(*z*) 9 B. & C. 192.
(*a*) The City Coal Act, 1 & 2 Vict. cap. ci. (local and personal) does not apply where

intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

§ 537. In 1848, the same court adverted to the same distinction in Ritchie *v.* Smith (*b*). 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 (*c*) inflicted a penalty, when liquor was sold to be drunk on the premises without such license, of not more than 20*l.* nor less than 5*l.* "for every such offence." Wilde, C. J., said that "it is impossible to look at this agreement without seeing that the parties contemplated doing an illegal thing, in the infraction of a law enacted *not simply for revenue purposes*, but for the safety and protection of the public morals." All the judges, Coltman, Maule, and Williams, put the judgment on the same ground, that the law was made *not merely for revenue purposes*, but for the protection of the public morals (*d*).

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

First. — That where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that Parliament has prohibited it, and it is therefore void.

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 lawgiver, 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 con-

coals are unloaded directly from the vessel in which they were shipped on to the wharf of the purchaser. Blandord *v.* Morrison, 15 Q. B. 724, and 19 L. J. Q. B. 533.

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

(*c*) The penalties now in force for the sale of intoxicating liquors without license are those imposed by 35 & 36 Vict. c. 94, s. 3 (Licensing Act, 1872). See, also, sect. 4–8 of the same Act, and sect. 9 of 37 & 38 Vict. c. 49 (Licensing Act, 1874).

(*d*) It is not a frand 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.

tract is therefore void; but in the former case such is not the intention, and the contract will be enforced.

§ 539. It is quite in accordance with these principles that in Bensley *v.* Bignold (*e*) it was held by the Common Pleas that a printer who had omitted to affix his name to a book, in violation of 39 Geo. III. c. 79, s. 27 (*f*), which punishes such omission by a penalty of 20*l. for every copy published*, could not recover for work and labor done and materials furnished. The statute was declared to have been enacted for public purposes.

So, also, in Forster *v.* Taylor (*g*), 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. 86, s. 3 (*h*); and in Law *v.* Hodson (*i*) 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 (*k*). In both these statutes a penalty was imposed *for every offence*.

In Lightfoot *v.* Tenant (*l*), the sale was of lawful goods, but they were sold knowingly for the purpose of being shipped on board of foreign ships trading to the East Indies, and by the 7 Geo. I. c. 21, s. 2 (*m*), all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

§ 540. There have been numerous decisions, also, under the various statutes which have been passed, modified, and repealed from time to time, for ascertaining and establishing uniformity of weights and measures, all of which are quite in accordance with those above reviewed (*n*).

[The law on this subject is now consolidated by the 41 & 42 Vict. c. 49, The Weights and Measures Act, 1878.]

The statute 1 & 2 Will. IV. c. 32, s. 4, 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 (*o*). The 17th section authorizes every person who shall have obtained a game certificate to sell game to a licensed dealer, with a proviso that no gamekeeper shall

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

(*f*) This section is now repealed by the 32 & 33 Vict. c. 24.

(*g*) 5 B. & Ad. 887; 3 L. J. K. B. 137.

(*h*) Repealed by 7 & 8 Vict. c. 48. But see the Margarine Act, 1887 (50 & 51 Vict. c. 29).

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

(*k*) Repealed by 19 & 26 Vict. c. 64.

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

(*m*) Repealed by Statute Law Revision Act, 1867, 30 & 31 Vict. c. 59.

(*n*) See The King *v.* Major, 4 T. R. 750; The King *v.* Arnold, 5 T. R. 353; Tyson *v.* Thomas, 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. 393; Watts *v.* Friend, 10 B. & C. 446.

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

sell any game, except for account and on the written authority of his master, whenever his game certificate has cost less than 3*l.* 13*s.* 6*d.*

The 25th section prohibits, under penalty of not more than 2*l.* for each head of game, the offence of selling game by an unlicensed person who has not obtained a game certificate, or of selling, even when possessed of a game certificate, to any other person than a licensed dealer; but by the 26th section, the prohibition does not extend to an innkeeper or tavern-keeper who sells to his guests, for consumption in his house, game bought from a licensed dealer. The 27th section imposes penalties on the buyer of game who buys from one not a licensed dealer, unless the purchase be made *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 & 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.]

§ 541. The statute 8 & 9 Vict. c. 109, s. 18, provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

§ 542. At common law, wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited (*p*). Since the passing of the above statute, however, cases have arisen which present the question whether an executory contract for the sale of goods is not a device for indulging in the spirit of gaming which the statute was intended to repress. It has already been shown (*ante*, § 78, etc.) 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

(*p*) Sherbon *v.* Colebach, 2 Vent. 175; Johnson *v.* Lansley, 12 C. B. 468; Dalby *v.* India Life Assurance Company, 15 C. B. 365; 24 L. J. C. P. 2, 6.

nothing more than a wager, and is null and void under the statute.

In Grizewood *v.* Blane (*q*), where the contract was for the future delivery of railway shares, Jervis, C. J., left it to the jury to say "what was the plaintiff's intention, and what was the defendant's intention, at the time of making the 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 (*r*).

[But the statute affects only the contract which actually makes the bet or wager, and 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 (*s*), 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 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 & 9 Vict. c. 109, s. 18, and that the plaintiff was entitled to recover. 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.

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 & 9 Vict. c. 109; for instance, the sale of the next year's crop of a specified orchard (*t*).]

(*q*) 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.* Cambers and Knight *v.* Fitch, 15 C. B. 562 and 566; Jessopp *v.* Lutwyche, 10 Ex. 614.

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

(*s*) 4 Q. B. D. 685, C. A.; 48 L. J. Q. B. 289, where the findings of the jury in Grizewood *v.* Blane are criticised by Brett, L. J., at p. 695, and by Cotton, L. J., at p. 696. See, also, Cooper *v.* Neil, 27 W. R. 159; W. N. 1878, p. 128; Read *v.* Anderson, 13 Q. B. D. 779; Bridger *v.* Savage, 15 Q. B. D. 363.

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

In the case of Rourke *v.* Short (*u*), 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 (*x*).

§ 543. By the statute 24 Geo. II. c. 40, s. 12 (usually termed the Tippling Act), as amended by the 25 & 26 Vict. c. 38, no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bona fide* to the amount of 20*s.* or upwards, except in cases when sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser, in quantities not less at one time than a reputed quart.

And now by 30 & 31 Vict. c. 142, s. 4, "No action shall henceforth be brought or be maintainable in any court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given" for obtaining the said articles.

§ 544. In construing the Tippling Acts it has been held, that the prohibition extends to sales made to a retail dealer who bought for the purpose of selling again to his customers (*y*); but in Spencer *v.* Smith (*z*), Lord Ellenborough would not allow this defence to prevail, where a bill of exchange for 6*l.* had been given by a lieutenant in the recruiting service for spirits supplied to him at different times, not for consumption at the house of vendor, but for use by recruits and others under the officer's command. In Burnyeat *v.* Hutchinson (*a*), 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 (*b*), that the enactment did not apply to the case of spirits supplied to a

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

(*x*) *Quære* — unenforcible. The statute makes gaming contracts null and void, but not illegal. See Fitch *v.* Jones, 5 E. & B. 238.

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

(*z*) 3 Camp. 9.

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

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

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 (*c*).

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 (*d*).

Some cases (*e*), in which the price of spirits sold in contravention of the Tippling Acts formed only part of the consideration of the contract sued on, are cited in the note. See, also, *ante*, § 305, as to consideration partly illegal.

§ 545. By the 31 Geo. II. c. 40, s. 11, cattle salesmen in London, and others who sell cattle there on commission, are forbidden to buy live cattle, sheep, or swine [on their own account], either in London or while on the road to London (except for actual use by themselves and family), or to sell [on their own account] 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.

§ 546. The statutes passed in relation to the sales of offices are the 5 & 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 houses or houses* (*f*), 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" (*g*); 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,

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

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

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

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

(*g*) 5 & 6 Edw. VI. c. 16, s. 2.

commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the Lord High Treasurer, or Commissioners of the Treasury, the Secretary of State, the Lords Commissioners for executing the office of Lord High Admiral, the Master-General, and principal officers of his Majesty's Ordnance, the Commander-in-Chief, the Secretary 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 Victualling, the Commissioners of Transports, the Commissary-General, the Storekeeper-General, and also the principal officers of any other public department or office of his Majesty's Government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations which now belong, or may hereafter belong, to his Majesty, and also 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" (*g*).

§ 547. The exceptions to these prohibitions provide that they shall not be applicable "to any office or offices whereof any person or persons is or shall be seized of any estate of inheritance; nor to any office of parkership or the keeping of any park, house, manor, garden, chase, or forest, or to any of them" (*h*). 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" (*i*).

It was also provided that "nothing in this act contained shall extend or be construed to extend to any purchases, sales, or exchanges of any commissions or appointments in the honorable band of gentlemen pensioners, or in his Majesty's yeoman guard, or in the Marshalsea, and the court of the king of the palace of the King at Westminster, or to extend to any purchases, sales, or exchanges of any commission in his Majesty's forces, for such prices as shall be regulated and fixed by any regulation made or to be made by his Majesty in that behalf" (*k*), but this section is repealed by the Statute Law Revision Act, 1872 (No. 2) (*l*).

(*g*) 49 Geo. III. c. 126, s. 1.
(*h*) Stat. 5 & 6 Edw. VI. c. 16, s. 4.
(*i*) Ibid. s. 7, repealed by the Statute Law Revision Act, 1863; and see 6 Geo. 4, cc. 83 and 84.
(*k*) 49 Geo. III. c. 126, s. 7.
(*l*) 35 & 36 Vict. c. 97.

Another section (*m*) excludes from the operation of the Act of 49 Geo. III. "any office which was legally saleable before the passing of this act, and in the gift of any person by virtue of any office of which such person is or shall be possessed, under any patent or appointment for his life."

The act, also, shall "not extend or be construed to extend to prevent or make void any deputation to any office in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance lawfully made in respect of any allowance, salary, or payment made or agreed to be made by or to such principal or deputy respectively, out of the fees or profits of such office" (*mm*); 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" (*n*).

§ 548. On these statutes, it has been held that a contract by A. to resign an office, with the intent of B.'s obtaining the appointment, was void.

In Sir Arthur Ingram's case (*nn*), the report of Coke is as follows: "Sir Robert Vernon, Knight, being coferer (*o*) 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 surrendered it accordingly: and thereupon sir A. was, by the king's appointment, admitted and sworn coferer. And it was resolved by sir Thomas Egerton, lord chancellour, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute (*p*), and that sir A. was disabled to have or to take the said office."

It was also held, in the case of Godolphin *v.* Tudor (*q*), in the Queen's Bench and affirmed in the House of Lords (*r*), that where the salary of an office within the statute 5 & 6 Edw. VI. was certain, a deputation by the principal, reserving to himself a certain lesser sum

(*m*) 49 Geo. III. c. 126, s. 9.
(*mm*) Ib. s. 10.
(*n*) Ib. s. 11.
(*nn*) Co. Lit. 234 a. See, also, Huggins *v.* Bambridge, Willes, 241.
(*o*) Coferer, or treasurer, from "coffer."
(*p*) 5 & 6 Edw. VI. c. 16.
(*q*) 2 Salk. 467, and 6 Mod. 234; also Willes, p. 575, n.
(*r*) 1 Bro. P. C. 135.

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 (*q*). And the case was not affected by the fact that it appeared on the record that the payment was to be 200*l.* a year, and that the profits of the office had amounted to 329*l.* 10*s.* a year. See the comments of Lord Loughborough in Garforth *v.* Fearon (*r*). See, also, the cases of Juxton *v.* Morris, and Law *v.* Law, as reported in the same opinion of Lord Loughborough.

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

In the case of Aston *v.* Gwinnell (*t*), 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" (*u*).

In Hopkins *v.* Prescott (*v*), an agreement for the sale of a law-stationer's business, he being also *sub-distributor of stamps*, and *collector of assessed taxes*, coupled with a stipulation that the vendor should not do business as a law-stationer within ten miles, *nor collect any of the assessed taxes*, but would do his best to introduce the purchaser to the said business *and offices*, was held void under these statutes.

§ 550. In Harrington *v.* Kloprogge (*y*), it was held that the office of private secretary was not within the statute. The following officers have been held to come within their provision. Officers of Spiritual Courts, as chancellor, registrar, and commissary (*z*), clerk of the fines to a justice in Wales (*a*), surrogate (*b*), gaolers (*c*), under-sheriffs (*d*),

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

(*r*) 1 H. Bl. 327.

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

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

(*u*) But see Palmer *v.* Bate, 2 Br. & B. 673, *ante*, § 518.

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

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

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

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

(*b*) 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.

(*c*) Stockwith *v.* North, Moore, 781; Huggins *v.* Bambridge, Willes, 241.

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

stewards of courtleets (*e*), but not the bailiff of a hundred (*f*), or the under-marshal of the city of London (*g*).

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 (*gg*).

In Graeme *v.* Wroughton (*h*), 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.

§ 551. By the 2 Will. IV. c. 16, s. 7, the buyer may resist payment of the price of goods (spirits), for the removal of which a permit is required by that statute, by pleading and proving that the goods were delivered without a permit (*i*).

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

By the 29 Charles 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 persons or persons 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" (*l*).

§ 553. The first reported case under this statute seems to have been Drury *v.* Defontaine (*k*), in 1808, more than 130 years after its passage. There the private sale of a horse on a Sunday, made by a horse-auctioneer, was held valid, as not within the ordinary calling of the vendor, his business being to sell at public, not private sale.

Next, in 1824, in Bloxsome *v.* Williams (*m*), 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

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

(*f*) Godbolt's case, 4 Leon. 33.

(*g*) Ex parte Bulter, 1 Atk. 210.

(*gg*) Regina *v.* Charretie, 13 Q. B. 447, and 18 L. J. M. C. 100.

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

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

(*k*) 1 Taunt. 131.

(*l*) As to the mode of instituting proceedings under this act, see 34 & 35 Vict. c. 87. This last act is continued until the 31st of December, 1888, by 50 & 51 Vict. c. 63 (Expiring Laws Continuance Act).

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

sale was not complete on the Sunday; and, 2dly, that it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own ordinary calling of a horse dealer on Sunday, to set up his own contravention of the law against the plaintiff, an innocent person, *who was ignorant of the fact that the defendant was a horse dealer.* Holroyd and Littledale, JJ., concurred.

In 1826, Fennell *v.* Ridler (*n*) was decided by the same judges. Plaintiffs were horse dealers, who bought a horse, with warranty, on Sunday; and the action was for breach of warranty. The plaintiffs were nonsuited, Bayley, J., again delivering the opinion, and saying that he had given too narrow a construction to the act in the previous case, and that it was intended to regulate private conduct as well as to promote public decency.

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

§ 554. In Williams *v.* Paul (*p*), decided in 1830, it was held that where a sale was made on Sunday, and the buyer retained the thing bought, and afterwards made a new promise to pay, he was liable, not for the price agreed on in the void bargain, but for a *quantum meruit* on the new promise.

But in Simpson *v.* Nicholls (*q*), Parke, B., expressed the opinion that the decision in Williams *v.* Paul could not be supported in law (*r*). In Simpson *v.* Nicholls, the defendant pleaded the nullity of the sale made on Sunday, and the plaintiff replied "*precludi non*," because, although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defendant *after the sale and delivery of the said goods kept and*

(*n*) 5 B. & Cr. 406.
(*o*) 4 Bing. 84.
(*p*) 6 Bing. 653.
(*q*) 3 M. & W. 240, and S. C. corrected report in 5 M. & W. 702.
(*r*) See the American cases referred to, *post.*

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," etc. 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 (*s*), 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.

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

Other important statutes have been passed regulating the sale of food and drugs (*t*), of margarine or substances sold as imitations of butter (*u*), of shares in a joint-stock banking company (*v*), of chain-cables and anchors (*x*), of intoxicating liquors (*y*), of spirits (*z*), of explosives (*a*), of poisons (*b*), and of goods to which any trade mark or description has been applied (*c*).]

§ 556. In America, the law in general upon the subjects embraced in this chapter is in accordance with the English law.

The cases in our courts upon contracts of sale where the thing sold was intended by both parties for illegal purposes, or was transferred with a knowledge on the part of the vendor that the buyer intended to

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

(*t*) 38 & 39 Vict. c. 63; Sale of Food and Drugs Act, 1875, amended by 42 & 43 Vict. c. 30. By the 8th section the seller may protect himself by giving notice to the purchaser. See Sandys *v.* Small, 3 Q. B. D. 449. The decisions under this act are given *post*, Chapter on Warranty.

(*u*) 50 & 51 Vict. c. 29; The Margarine Act, 1887.

(*v*) 30 & 31 Vict. c. 29, commonly called Leeman's Act. See Nelson Mitchell *v.* City of Glasgow Bank, 4 App. Cas. 624; Neilson *v.* James, 9 Q. B. D. 546, C. A.; Seymour *v.* Bridge, 14 Q. B. D. 460; Perry *v.* Barnett, 15 Q. B. D. 388.

(*x*) 37 & 38 Vict. c. 51. See *post*, Chapter on Warranty.

(*y*) The Licensing Acts, 1872, 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49).

(*z*) The Spirits Act, 1880 (43 & 44 Vict. c. 24).

(*a*) The Explosives Act, 1875 (38 Vict. c. 17).

(*b*) The Pharmacy Act, 1868 (31 & 32 Vict. c. 121, s. 17, amended by 32 & 33 Vict. c. 117, s. 3).

(*c*) 50 & 51 Vict. c. 28; The Merchandise Marks Act, 1887. By section 11 it is made an offence for any person in this country to order goods to be made and falsely marked in a foreign country. It is submitted that the same reasoning would be applied in a case arising out of a sale made illegal by this section, which has been already applied to smuggling contracts (see *ante*, § 510), with this distinction, that, even in the case of a contract completed abroad, proof of knowledge on the part of the vendor that the goods were falsely marked would render the contract illegal and unenforcible in the courts here, the act not being passed for revenue purposes, but being one of international obligation. See the International Convention for the Protection of Industrial Property (signed at Paris March the 20th, 1883, and acceded to by Great Britain March the 17th, 1884), Article II. This act is further considered *post*, Chapter on Warranty.

use it for illegal purposes, were elaborately reviewed and discussed in the Supreme Court of the United States in Armstrong *v.* Toler (*d*) and McBlair *v.* Gibbes (*e*). 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.

[As to wagering contracts, the accepted doctrine in America is in accordance with the English rule, and the correctnesss of the statement made by Mr. Benjamin, *ante*, § 542, was recently attested by the Supreme Court of the United States (*f*).]

§ 557. 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 those statutes. In many of the States the law makes no distinction between sales made by a party in his ordinary calling and any other sale, but forbids all secular business on Sunday. A note given for property sold on Sunday is held of course to be invalid in the hands of the payee; but it is not settled whether such a note is void in the hands of an innocent indorsee (*g*).

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 (*h*). And a note, though signed on Sunday, may be enforced if delivered on some other day (*i*); 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 (*k*).

(*d*) 11 Wheaton, 258.

(*e*) 17 Howard, 232.

(*f*) Irwin *v.* Williar (1883), 110 U. S. 499.

(*g*) Allen *v.* Deming, 14 N. Hamp. 133; Saltmarsh *v.* Tuthill, 13 Ala. 390. It has been decided in Massachusetts that an indorsee 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; State Capital Bank *v.* Thompson, 42 N. Hamp. 369.

(*h*) Stackpole *v.* Symonds, 23 N. Hamp. 229; Smith *v.* Bean, 15 N. Hamp. 577; Sumner *v.* Jones, 24 Verm. 317; Goss *v.* Whitney, 24 Verm. 187; Butler *v.* Lee, 11 Ala. 885; Gibbs & Sterrett Manufacturing Company *v.* Brucker, 111 U. S. 597, 602.

(*i*) Hilton *v.* Houghton, 35 Maine, 143; Lovejoy *v.* Whipple, 18 Verm. 379; Clough *v.* Davis, 9 N. Hamp. 500; Hill *v.* Dunham, 7 Gray (73 Mass.), 543.

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

§ 558. There is great conflict of decisions on the question whether the vendee becomes liable (either under a new contract or by reason of a ratification of the old one) when he takes possession of the thing sold on some other day, after making a purchase of it on Sunday. The case of Williams *v.* Paul (*l*), and the observations of Parke, B., seriously questioning its authority (*m*), have been much discussed in the American courts. In the case of Adams *v.* Gay (*n*), 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 Sargeant *v.* Butts (*o*) 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 (*p*), where a note was given on Sunday for the price of a horse sold that day, and the buyer afterwards made payments on account of the note, it was held that these payments, coupled with his retaining the horse in his possession, were a ratification of the contract, entitling the vendor to recover the sum remaining due on the note. In Alabama (*q*), however, New Hampshire (*r*), [Massachusetts (*s*), and Maine (*t*),] 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 (*r*), the New Hampshire court expressly held that an illegal contract is incapable of ratification, or of forming a good consideration for a subsequent promise.

[In a recent case before the Supreme Court of the United States, in error from the State of Wisconsin (*u*), the law was thus stated by Woods, J., in delivering the opinion of the court: "The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's Day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction (*x*). If, therefore, the evidence shows a good cause of action, without any participation of the plaintiff in an illegal transaction, he may recover, the law simply refusing its aid to either party in giving effect to an illegal transaction in which he has taken part" (*y*).]

(*l*) 6 Bing. 653.

(*m*) *Ante*, § 554.

(*n*) 19 Verm. 358.

(*o*) 21 Verm. 99.

(*p*) 24 Verm. 317.

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

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

(*s*) Day *v.* McAllister, 15 Gray (81 Mass.), 433; Tuckerman *v.* Hinkley, 9 Allen (91 Mass.), 452, 454.

(*t*) Pope *v.* Linn, 50 Maine, 83; Tillock *v.* Webb, 56 Maine, 100.

(*u*) Gibbs & Sterrett Company *v.* Brucker, 111 U. S. 597, 601 (1884).

(*x*) Cranson *v.* Goss, 107 Mass. 439; Holman *v.* Johnson, Cowper, 341; cf. also Gray *v.* Hook, 4 N. Y. 449, 459; Woodworth *v.* Bennett, 43 N. Y. 273, 278.

(*y*) Tuckerman *v.* Hinkley, 9 Allen (91 Mass.), 452; Stackpole *v.* Symonds, 23 N. H.

§ 559. 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 (*z*), 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 (*a*).

AMERICAN NOTE.

ILLEGALITY.

§§ 503–559.

1. At Common Law. The common law of America is believed to be like that of England as to unlawful sales, some illustrations of which are here given.

Here, as there, it is illegal to sell or let property with knowledge "and intent" that it shall be used for an immoral or illegal purpose. Commonwealth *v.* Harrington, 3 Pick. 26; Updike *v.* Campbell, 4 E. D. Smith, 570; Mitchell *v.* Scott, 62 N. H. 596. In Pringle *v.* Corporation of Napanee, 43 Up. Can. Q. B. 285 (1878), it was held upon careful consideration that a lease of a lecture hall was not binding on the lessor after he had learned it was to be used for the delivery of lectures attacking the fundamental principles of Christianity; following Cowan *v.* Melbourne, L. R. 2 Ex. 230.

Here, as there, a sale of a public office, or of official influence, is illegal, and no action lies for the price to be paid, or on a note given for such consideration. Spencer *v.* Jones, 6 Gray, 502, a sale of a constable's office at auction by the town; and see Meredith *v.* Ladd, 2 N. H. 518; 5 Ib. 196; 7 Ib. 140; Ferris *v.* Adams, 23 Vt. 136, a note by a deputy to a sheriff for his appointment, examining the cases; and see Hager *v.* Catlin, 18 Hun, 448; Filson *v.* Himes, 5 Pa. St. 452, sale of a postmastership; Davison *v.* Seymour, 1 Bosw. 88, sale of one's influence to procure a contract for defendant; Nichols *v.* Mudgett, 32 Vt. 546, a sale of a vote; Swayze *v.* Hull, 8 N. J. L. 54, of the plaintiff's influence to elect the defendant as sheriff; Gaston *v.* Drake, 14 Nev. 175, influence to elect the promisor as district attorney; and Martin *v.* Wade, 37 Cal. 168, is like it; Eddy *v.* Capron, 4 R. I. 394, to pay a person to resign in defendant's favor. So in Cunningham *v.* Cunningham, 18 B. Monr. 24; Gray *v.* Hook, 4 N. Y. 449; Bowers *v.* Bowers, 26 Pa. St. 74; Hunter *v.* Nolf, 71 Ib. 282; Ham *v.* Smith, 87 Ib. 63; Outon *v.* Rodes, 3 A. K. Marsh. 432.

So selling a "recommendation" for a private contract, supposed by the

229; Bloxsome *v.* Williams, 3 B. & C. 232; Roys *v.* Johnson, 7 Gray (73 Mass.), 162.

(*z*) Pp. 280–282, ed. 1859.

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

person addressed to be a disinterested opinion, is illegal, and no recovery can be had therefor. Holcomb *v.* Weaver, 136 Mass. 265. Bollman *v.* Loomis, 41 Conn. 581, a contract by a trader to pay for recommending a customer. Wyburd *v.* Stanton, 4 Esp. 179, is much like it.

Here, as there, a sale of goods to the public enemy, with knowledge that they are to be used for war purposes, is invalid at common law. Hanauer *v.* Doane, 12 Wall. 342, a leading case; Carlisle *v.* United States, 16 Wall. 147; Sprott *v.* United States, 20 Wall. 459; Whitfield *v.* United States, 92 U. S. 165; 96 Ib. 195; Clements *v.* Yturria, 14 Hun, 151.

Here, as there, contracts in general restraint of trade are invalid; but though so fully discussed by the author, they do not seem to fall strictly within the purview of this treatise. The sale in such cases is always valid. The property is transferred, the vendor can recover his price: the only question is, whether he is liable to the vendee for violating his collateral agreement not to carry on a like business elsewhere; but that subject belongs more properly to a treatise on contracts. The leading cases, that a general or unlimited restraint of trade is invalid, are Alger *v.* Thacher, 19 Pick. 51; Lange *v.* Werk, 2 Ohio St. 519; Chappel *v.* Brockway, 21 Wend. 157; Dunlop *v.* Gregory, 10 N. Y. 241; Taylor *v.* Blanchard, 13 Allen, 370. But that a partial restraint, limited in time, or circumscribed in space, is not illegal, see Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64; Nobles *v.* Bates, 7 Cow. 307; Whitney *v.* Slayton, 40 Me. 224; Sander *v.* Hoffman, 64 N. Y. 248; Perkins *v.* Clay, 54 N. H. 518; Hedge *v.* Lowe, 47 Iowa, 137; National Benefit Co. *v.* Union Hospital Co. 45 Minn. 272. And the whole doctrine has some marked limitations, as explained in Morse Twist Co. *v.* Morse, 103 Mass. 73. And see the elaborate opinion of Vice-Chancellor Grey in Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680 (1898), reviewing many cases; the Maxim-Nordenfeldt Case [1893], 1 Ch. D. 630, Bowen, L. J.; Diamond Match Co. *v.* Roeber, 106 N. Y. 485.

Here, as there, contracts are often held void for champerty, but that subject is even farther removed from the law of sales than is that of restraint of trade. The common-law rule has been most notably upheld in Lathrop *v.* Amherst Bank, 9 Met. 489; Martin *v.* Clarke, 8 R. I. 389; Thurston *v.* Percival, 1 Pick. 415; Stearns *v.* Felker, 28 Wisc. 594; Peck *v.* Heurich, 167 U. S. 625; Hamilton *v.* Gray, 67 Vt. 233; Ackert *v.* Barker, 131 Mass. 436; while in some States it is much modified, or substantially abolished. See Sedgwick *v.* Stanton, 14 N. Y. 301; Schomp *v.* Schenck, 40 N. J. L. 195; Lytle *v.* The State, 17 Ark. 663; Bentinck *v.* Franklin, 38 Tex. 458; Matthewson *v.* Fitch, 22 Cal. 86; Schaferman *v.* O'Brien, 28 Md. 565; Duke *v.* Harper, 66 Mo. 51.

Wagers. In America also, **wagers**, especially on elections, being generally forbidden, either by common law or by statute, a sale which amounts to an indirect wager is also void. This is so where the price is made to depend in whole or in part upon some future contingent event. Thus, a sale of a horse for $150 if H. G. is elected President, and $500 if U. S. G. is, has been held invalid, and the seller not allowed to recover the $500, although U. S. G. was elected. Bates *v.* Clifford, 22 Minn. 52; Lucas *v.* Harper, 24 Ohio St. 328; Shumate *v.* The Commonwealth, 15 Gratt. 653; 1 Minn. 94; Harper *v.* Crain, 36 Ohio St. 338; Danforth *v.* Evans, 16 Vt. 538.

Speculating in Futures. So sales, nominal sales, speculating in futures, are illegal. And if both parties understand that the thing nominally sold is not to be delivered or received, but only that the loser shall pay the difference between the sale price and the market price on some future day, the transaction is illegal, and neither party can enforce the contract; and Grizewood *v.* Blane is generally followed in America. Ex parte Young, 6 Biss. 53; Cassard *v.* Hinman, 1 Bosw. 207; Pickering *v.* Cease, 79 Ill. 328; In re Green, 7 Biss. 338; Bruas' Appeal, 55 Pa. St. 294; Waterman *v.* Buckland, 1 Mo. App. 45; Lyon *v.* Culbertson, 83 Ill. 33; Fareira *v.* Gabell, 89 Pa. St. 89; Swartz's Appeal, 3 Brewst. 131; Gregory *v.* Wendell, 39 Mich. 337; Yerkes *v.* Salmon, 11 Hun, 473; Melchert *v.* Am. Union Tel. Co. 11 Fed. Rep. 193, and a valuable note by Dr. Francis Wharton; Barnard *v.* Backhaus, 52 Wisc. 593; Everingham *v.* Meighan, 55 Ib. 354; Lowry *v.* Dillman, 59 Ib. 197; Whitesides *v.* Hunt, 97 Ind. 191, citing many cases; Cobb *v.* Prell, 15 Fed. Rep. 774; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Cockrell *v.* Thompson, 85 Mo. 510; Lyons Bank *v.* Oskaloosa Packing Co. 66 Iowa, 41; Dunn *v.* Bell, 85 Tenn. 581; Beadles *v.* McElrath, 85 Ky. 231; Lawton *v.* Blitch, 83 Geo. 663; Stewart *v.* Schall, 65 Md. 289; Burt *v.* Myer, 71 Md. 467; Billingslea *v.* Smith, 77 Md. 504; Mohr *v.* Miesen, 47 Minn. 228.

If, however, the *plaintiff* honestly intended a sale, he can recover although the defendant did not. Williams *v.* Tiedemann, 6 Mo. App. 269; Murry *v.* Ocheltree, 59 Iowa, 435; Wall *v.* Schneider, 59 Wisc. 352; Perryman *v.* Wolffe, 93 Ala. 290; 97 Ind. 210; 65 Me. 570; 80 N. C. 289; 39 Mich. 344; Conner *v.* Robertson, 37 La. Ann. 814; Sondheim *v.* Gilbert, 117 Ind. 74; Jones *v.* Shale, 34 Mo. App. 303. And it must therefore clearly appear that it was understood by both parties that no delivery was contemplated. 108 U. S. 269; Barnes *v.* Smith, 159 Mass. 344, 346; Dillaway *v.* Alden, 88 Me. 236, and cases cited. The fact that the buyer intended to sell again, before the time fixed for future delivery to him, does not necessarily prove it. Sawyer *v.* Taggart, 14 Bush, 727, a valuable case. And see Tomblin *v.* Callen, 69 Iowa, 229. A mere option to deliver or not, on the part of a seller, does not, in and of itself, necessarily constitute the transaction an illegal one. Bigelow *v.* Benedict, 70 N. Y. 202; Kingsbury *v.* Kirwan, 77 N. Y. 612; Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438. Much less a mere option as to the precise day of delivery. White *v.* Barber, 123 U. S. 392. Neither is a "straddle," so called, viz., a contract to either buy *or sell* at a certain price, at the other's option, necessarily void. It depends upon the intent of the parties. Story *v.* Salomon, 71 N. Y. 420; 6 Daly, 531; Harris *v.* Tumbridge, 83 N. Y. 92. Courts apparently differ, however, as to who has the burden of proof in such cases, but analogy seems to indicate that the burden of showing illegality is on the party alleging it. The rule to that effect is declared to be well settled in Bibb *v.* Allen, 149 U. S. 481, 492.

It is beyond the scope of this work to consider the vexed question of the rights of an agent who has advanced money for such transactions to recover of his principal, or of the right of partners to compel a division of the profits arising from such dealings. But it is not easy to see how an agent who has knowingly advanced money to enable another to carry on an illegal transaction can be aided by the law to recover it back. See Higgins *v.* McCrea, 116 U. S. 671; White *v.* Barber, 123 Ib. 392; Embrey *v.* Jemison, 131 Ib. 336; Harvey *v.* Merrill, 150 Mass. 1, 11; Cashman *v.* Root, 89

Cal. 373; Boyd *v.* Hanson, 41 Fed. Rep. 174; Irwin *v.* Williar, 110 U. S. 499, where the subject is elaborately examined by Mr. Justice Matthews; McCormick *v.* Nichols, 19 Bradw. 334. This subject is sometimes regulated by statute. See Lester *v.* Buel, 49 Ohio St. 250.

Frequent instances exist in America of sales of some species of property to enable the vendee to violate some statute law. And generally the vendor of an article, which may be lawfully sold or used for some purpose, can recover the price, although it be bought to use for some unlawful purpose, unless the vendor *participated* in and intended to aid in carrying out that unlawful use. Mere knowledge on his part that the vendee intended and expected to use it for an unlawful purpose (if the two elements can be distinguished from each other) will not avoid the sale. Bishop *v.* Honey, 34 Tex. 245; Hubbard *v.* Moore, 24 La. Ann. 591; Cheney *v.* Duke, 10 G. & J. 11; Mahood *v.* Tealza, 26 La. Ann. 108; Gambs *v.* Sutherland's Est. 101 Mich. 355; Chamberlain *v.* Fisher, Mich. (1898); 75 N. W. 931. This has been more distinctly asserted in sales of liquor at wholesale, made in a place where lawful or by a person authorized to sell, but to be resold in a place where the resale is unlawful, or by a person not authorized to sell. Green *v.* Collins, 3 Cliff. 494, reviewing the cases; Knowlton *v.* Doherty, 87 Me. 521; Kreiss *v.* Seligman, 8 Barb. 439; M'Intyre *v.* Parks, 3 Met. 207; Sortwell *v.* Hughes, 1 Curtis, 244; Smith *v.* Godfrey, 28 N. H. 379; McGavock *v.* Puryear, 6 Coldw. 34; Wallace *v.* Lark, 12 S. C. 578; Hill *v.* Spear, 50 N. H. 253, elaborately considered; Durkee *v.* Moses, N. H. (1892), 23 Atl. 793; Tracy *v.* Talmage, 14 N. Y. 162; Michael *v.* Bacon, 49 Mo. 474; Tuttle *v.* Holland, 43 Vt. 542; Tedder *v.* Odom, 2 Heisk. 68; 4 Ib. 668; Webber *v.* Donnelly, 33 Mich. 469; Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Frohlich *v.* Alexander, 36 Ill. App. 428, citing many cases; Anheuser *v.* Mason, 44 Minn. 318; Brunswick *v.* Valleau, 50 Iowa, 120; Kerwin *v.* Doran, 29 Mo. App. 397; McKinney *v.* Andrews, 41 Tex. 363; Bickel *v.* Sheets, 24 Ind. 1; Curran *v.* Downs, 3 Mo. App. 468; Hedges *v.* Wallace, 2 Bush, 442. But the distinction between *knowing* that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, very subtle, and appears sometimes to have been disregarded, especially in cases of great enormity, such as treason, murder, and the like; but the boundary line in such cases is not very satisfactorily established, nor always observed. See Territt *v.* Bartlett, 21 Vt. 184; McConihe *v.* McMann, 27 Ib. 95; Roquemore *v.* Alloway, 33 Tex. 461; Steele *v.* Curle, 4 Dana, 385; Milner *v.* Patton, 49 Ala. 423; Lewis *v.* Latham, 74 N. C. 283; State *v.* Blakeman, 49 Mo. 604; McMurtry *v.* Ramsey, 25 Ark. 238, 349, 376; 26 Ib. 660; Alexander *v.* Lewis, 47 Tex. 481; Railey *v.* Gay, 20 La. Ann. 158.

Perhaps a sale made " for the express purpose " of enabling the buyer to violate the law by a resale would invalidate the first sale, without any other aid or participation in the unlawful purpose. See Graves *v.* Johnson, 156 Mass. 211, with note in 15 L. R. A. p. 834; White *v.* Buss, 3 Cush. 448; Jones *v.* Surprise, 64 N. H. 243; Ruckman *v.* Bryan, 3 Denio, 340; Galligan *v.* Fannan, 7 Allen, 255. Therefore it was held in Webster *v.* Munger, 8 Gray, 584, that, if the first sale was made " with a view " to an unlawful resale by the buyer, the transaction was illegal. And see Graves *v.* Johnson, 156 Mass. 211. So if sold "with intent" to enable

the buyer to violate the law of his own State. Davis *v.* Bronson, 6 Iowa, 410, a very valuable case. Some sales may be so inseparably connected with the unlawful purpose that knowledge thereof necessarily aids in accomplishing the purpose, as was well stated in Tatum *v.* Kelly, 25 Ark. 209. And in Foster *v.* Thurston, 11 Cush. 322, a sale made "in a manner to aid" the buyer in violating the law by a resale was held void. Any active participation by the seller, however slight, in the unlawful purpose, is enough. Hubbell *v.* Flint, 13 Gray, 277; Kottwitz *v.* Alexander, 34 Tex. 689; Gaylord *v.* Soragen, 32 Vt. 110; Banchor *v.* Mansel, 47 Me. 58; Aiken *v.* Blaisdell, 41 Vt. 656; Arnot *v.* Pittston Coal Co. 68 N. Y. 558. Packing or marking an article so as to deceive officers of the law, or the buyer, would be sufficient. Skiff *v.* Johnson, 57 N. H. 475; Hull *v.* Ruggles, 56 N. Y. 424; Fisher *v.* Lord, 63 N. H. 514; Kohn *v.* Melcher, 43 Fed. Rep. 641.

On this principle it was held in Materne *v.* Horwitz, 18 Jones & Sp. 41, 101 N. Y. 469, that a wholesale vendor of American sardines, packed in boxes with labels representing that they were put up in France, could not recover the price of the buyer. And see Honegger *v.* Wettstein, 15 Jones & Sp. 125. But whether "knowledge" of an intended unlawful use by the buyer would or would not render a sale unlawful at common law, nothing less than such knowledge — as a "reasonable cause to believe" — will ordinarily suffice. Adams *v.* Couilliard, 102 Mass. 167; Ely *v.* Webster, Ib. 304 (Bligh *v.* James, 6 Allen, 570, in the same court, was under a statute); Lindsey *v.* Stone, 123 Mass. 332; Hotchkiss *v.* Finan, 105 Mass. 86. Nor even "actual belief." Corning *v.* Abbott, 54 N. H. 469. But see Dunbar *v.* Locke, 62 N. H. 442.

2. Under Statutes. Sales are made illegal by statute, by three forms of enactment: (1.) Where the statute positively declares the sale to be "null and void." (2.) Where it merely prohibits the sale and affixes a penalty, but does not expressly say the sale shall be void. (3.) Where it does neither, but only imposes a penalty on the seller. And by the overwhelming weight of recent decisions the latter method of prohibition makes the sale illegal between the parties, as well as the former. Some of the more important American cases establishing that proposition are: Bancroft *v.* Dumas, 21 Vt. 456; Roby *v.* West, 4 N. H. 285; 10 Ib. 377; 30 Ib. 552; Mitchell *v.* Smith, 1 Binn. 110; Woods *v.* Armstrong, 54 Ala. 150, and cases cited; Miller *v.* Post, 1 Allen, 435; Buxton *v.* Hamblen, 32 Me. 348; Griffith *v.* Wells, 3 Denio, 227; Barton *v.* Port Jackson, etc. Ice Co. 17 Barb. 404.

In considering the subject of sales prohibited by statute, care should be exercised in determining whether the statute really prohibits or punishes "the sale," or only some act closely connected with the sale but not necessarily the sale itself. Therefore a sale by a peddler is not illegal merely because the law prohibits such persons, under a penalty, from "offering for sale," "carrying for sale," "or exposing for sale," the article sold. Williams *v.* Tappan, 23 N. H. 385; Brackett *v.* Hoyt, 29 Ib. 264; Jones *v.* Berry, 33 Ib. 209; Banks *v.* McCosker, 82 Md. 518, 523, and cases cited. That penalty might be fully incurred even though no sale had actually taken place. And a private sale therefore would not be in contravention of such a statute. Eberle *v.* Mehrbach, 55 N. Y. 682. On this principle, it was held in Aiken *v.* Blaisdell, 41 Vt. 655, that an act of Congress, requiring

certain persons to obtain a license or pay a tax before carrying on a specified kind of business, did not make a sale unlawful by one not licensed or not paying the tax, as the law was intended for revenue. So in Larned *v.* Andrews, 106 Mass. 435; following Smith *v.* Mawhood, 14 M. & W. 452, cited by Mr. Benjamin. Corning *v.* Abbott, 54 N. H. 469, is like it. So is Rahter *v.* First Nat. Bank, 92 Pa. St. 393; and Mandlebaum *v.* Gregovich, 17 Nev. 87, a carefully considered case. See, also, Harris *v.* Runnels, 12 How. 79, an important case; Miller *v.* Ammon, 145 U. S. 421, 426; Lindsey *v.* Rutherford, 17 B. Monr. 245; Vining *v.* Bricker, 14 Ohio St. 331; Curran *v.* Downs, 3 Mo. App. 468, seems contra to Larned *v.* Andrews, cited above. And see Best *v.* Bauder, 29 How. Pr. R. 489; Creekmore *v.* Chitwood, 7 Bush, 317; Swords *v.* Owen, 43 How. Pr. R. 176; Learoyd *v.* Bracken [1894], 1 Q. B. 114.

It may not be possible or desirable to give a full statement of all the sales forbidden by statute in America. But some of the more prominent illustrations are: a sale of shingles under statute dimensions, Wheeler *v.* Russell, 17 Mass. 258, a leading case; a sale of unmeasured wood, Pray *v.* Burbank, 10 N. H. 377; unsurveyed lumber, Knight *v.* Burnham, 90 Me. 294; unweighed coal, Libby *v.* Downey, 5 Allen, 299; uninspected or unbranded fertilizers, Woods *v.* Armstrong, 54 Ala. 150; 66 Ib. 582; 63 Geo. 215; 65 Ib. 129; 69 Ib. 761; 20 So. Car. 430; unculled hoops, Durgin *v.* Dyer, 68 Me. 143; of grain sold by the bag and not by the bushel, Eaton *v.* Kegan, 114 Mass. 433; bread by the loaf, instead of by the pound, Johnson *v.* Kolb, 3 W. N. C. (Penn.) 273; sales by unlicensed peddlers, Bull *v.* Harrigan, 17 B. Monr. 349; 7 Dana, 337; 10 Cush. 45; a sale by unsealed weights or measures, Miller *v.* Post, 1 Allen, 434; 106 Mass. 269; 109 Ib. 220; 111 Ib. 320; of stocks not then owned by the vendor, Stebbins *v.* Leowolf, 3 Cush. 137; Ward *v.* Van Duser, 2 Hall, 162; of refreshments for voters on election day, Duke *v.* Asbee, 11 Ired. 112; of intoxicating liquors, the authorities on which are too numerous to mention. A statute prohibiting a mortgagor from selling the mortgaged property without the mortgagee's written consent does not prevent the title from passing. Chase *v.* Willard, 39 Atl. 901 N. H. (1893), although in that case the mortgagee had given his oral consent. Gage *v.* Whittier, 17 N. H. 312; Patrick *v.* Meserve, 18 N. H. 300; Roberts *v.* Crawford, 54 N. H. 532; Bank *v.* Raymond, 57 N. H. 144. A statute similar to that of New Hampshire exists in most of the States. Stimson, Am. St. Law, § 4543. As to sales of stocks on margin and for future delivery, see Sheehy *v.* Shinn, 103 Cal. 325; Baldwin *v.* Zadig, 104 Ib. 594; Kullman *v.* Simmens, 104 Ib. 595.

As to whether an exchange of liquors is *a sale* within the meaning of the statutes, see *ante*, p. 8. As to whether a delivery of liquor by a club to its members is contrary to the statutes, see *ante*, p. 10.

Sunday Sales. Sales on **Sunday** have often been declared valid in America when not forbidden by some statute. Bloom *v.* Richards, 2 Ohio St. 387, a valuable case; Merritt *v.* Earle, 29 N. Y. 120; Moore *v.* Murdock, 26 Cal. 526; Eberle *v.* Mehrbach, 55 N. Y. 682; Johnson *v.* Brown, 13 Kans. 529; Horacek *v.* Keebler, 5 Neb. 358; Kaufman *v.* Hamm, 30 Mo. 387; O'Rourke *v.* O'Rourke, 43 Mich. 58; Batsford *v.* Every, 44 Barb. 618. But if all Sunday contracts were lawful at the early common law, they began to be affected by statute very early in English history, much earlier than the statute

of 29 Chas. II. cited by Mr. Benjamin. In or about A. D. 693, the Code of Ine, king of the West Saxons, punished servile labor on Sunday by a fine of thirty shillings; Thorpe's Anc. Laws of England, vol. i., page 105; and the laws of Edw. and Guthr. prohibited "Sunday marketing" on forfeiture of the chattel and thirty shillings. Ib. 171. Ethelred declared the same. Ib. p. 309, 327, 345. In A. D. 876, Alfred the Great prohibited all "work, traffic, and legal proceedings" on Sunday. And Henry VI. in 1448 (27 Hen. VI. c. 5) prohibited "all manner of fairs and markets, and shewing any goods or merchandizes (necessary victual only except) upon pain of forfeiture of all the goods." And in 1604 James I. (22 Jac. I. c. 22) forbade any person "to shew, to the intent to put to sale, any shoes, boots, buskins, startups, slippers, or pantofles upon the Sunday, upon pain of forfeiting 3*s*. 4*d*. for every pair so sold or shewed, or put to sale, and also the value of the goods." Then came the great statute of 29 Chas. II. so generally reënacted in this country.

As to the effect of the American statutes upon Sunday sales, different views prevail. As to contracts wholly executory on both sides, — mere contracts to sell and to buy, — all agree that neither party is bound. Nearly all agree that if the sale is wholly executed on both sides, and the property is delivered and the money paid, both parties are bound. The seller cannot by suit at law recover his property, nor the buyer his money. The law leaves both parties where it finds them. Horton *v*. Buffinton, 105 Mass. 399; Myers *v*. Meinrath, 101 Mass. 366; 107 Ib. 411, and cases cited; Hazard *v*. Day, 14 Allen, 487, 494; Moore *v*. Murdoch, 26 Cal. 514; Block *v*. McMurry, 56 Miss. 217; Kelley *v*. Cosgrove, 83 Iowa, 229; Cohn *v*. Heimbauch, 86 Wisc. 176; Shuman *v*. Shuman, 27 Pa. St. 90; Greene *v*. Godfrey, 44 Me. 25; Foster *v*. Wooten, 67 Miss. 540; Chestnut *v*. Harbaugh, 78 Pa. St. 473; Ellis *v*. Hammond, 57 Geo. 179. Creditors of the vendor cannot attach the property as his. Blass *v*. Anderson, 57 Ark. 483.

For the same reason, if a debtor makes and delivers a pledge on Sunday to secure a valid preëxisting debt, he cannot recover the pledge without paying the debt. King *v*. Green, 6 Allen, 139. Or if he makes a payment on Sunday of a prior debt, he cannot recover it back, nor can the creditor collect the claim again. Johnson *v*. Willis, 7 Gray, 164; Shields *v*. Klopf, 70 Wisc. 69. In Kinney *v*. McDermot, 55 Iowa, 674, a sale was made and the property delivered on Sunday. The seller retook it on a week day, but the buyer was allowed to maintain replevin for it; but this may be doubtful. And see Cohn *v*. Heimbauch, 86 Wisc. 176.

As to a vendor's inability to recover a specific chattel, which he has sold and delivered on Sunday, this would undoubtedly be so where the vendor is obliged to show the Sunday contract in order to make out his case, since whichever party depends wholly upon the Sunday sale must fail; but why must a Sunday vendor in a replevin suit against a Sunday vendee necessarily prove the Sunday transaction at all? Why may he not safely rely upon his former title and possession, a complete and perfect title, and an absolute and lawful possession up to Saturday night? True, the defendant in replevin can show possession, — simply possession, — but that is all. The moment he undertakes to prove *title*, he must show the Sunday purchase.

The question then comes, will the defendant's bare possession prevail against the plaintiff's prior possession and proof of lawful and complete original ownership? The contrary was held upon full consideration in

Magee *v.* Scott, 9 Cush. 148. This view may sustain the result in Tucker *v.* Mowrey, 12 Mich. 378, in which the vendor was allowed to maintain replevin against a Sunday vendee and recover the property. And see Winfield *v.* Dodge, 45 Mich. 355. Some courts, however, do not agree to this view. Kelley *v.* Cosgrove, 83 Iowa, 229. But, however this may be, all agree that where the property is sold and delivered on Sunday, but not paid for, the vendor cannot recover the price on the *Sunday bargain*, whether it be an oral promise or the note of the buyer; nor will even general assumpsit lie for the fair value. O'Donnell *v.* Sweeney, 5 Ala. 467; Foreman *v.* Ahl, 55 Pa. St. 325; Pike *v.* King, 16 Iowa, 49; Adams *v.* Hamell, 2 Dougl. 73; Meader *v.* White, 66 Me. 90, a loan of money; Finn *v.* Donahue, 35 Conn. 216; Troewert *v.* Decker, 51 Wisc. 46, a well-considered case; Tucker *v.* West, 29 Ark. 386.

And many hold that this is so, even though the buyer keep the property when demanded on a week day, or even if he ratifies the Sunday contract; such courts holding the Sunday promise to be *void*, and incapable of ratification. Day *v.* McAllister, 15 Gray, 433, where the reasons are forcibly stated by Mr. Justice Hoar; Stewart *v.* Thayer, 168 Mass. 520; Ladd *v.* Rogers, 11 Allen, 209; Pope *v.* Linn, 50 Me. 83; Shippey *v.* Eastwood, 9 Ala. 198; Vinz *v.* Beatty, 61 Wisc. 645; Gwinn *v.* Simes, 61 Mo. 335; Reeves *v.* Butcher, 31 N. J. L. 224; Ryno *v.* Darby, 20 N. J. Eq. 231; Nibert *v.* Baghurst, 47 Ib. 201; Kountz *v.* Price, 40 Miss. 341; Troewert *v.* Decker, 51 Wisc. 46; Catlett *v.* Trustees, 62 Ind. 365; Parker *v.* Pitts, 73 Ib. 597. In Thompson *v.* Williams, 58 N. H. 248, the vendor retook the goods from the vendee; the vendee sued him in trespass and recovered the value of the goods; but even then he was allowed to defend an action for the price, because the sale was on Sunday.

On the other hand, some maintain that the Sunday note or promise is only voidable and not void, and may be ratified on a week day, and, if so, be considered valid and binding *ab initio*, and be declared on as a valid contract of that date. Adams *v.* Gay, 19 Vt. 358, a leading case on this point; 21 Ib. 99; 23 Ib. 317; 51 Ib. 334; Sayles *v.* Wellman, 10 R. I. 465; Smith *v.* Case, 2 Oreg. 190; Campbell *v.* Young, 9 Bush, 240; Tucker *v.* West, 29 Ark. 386, carefully reviewing the cases; Kuhns *v.* Gates, 92 Ind. 66; Russell *v.* Murdock, 79 Iowa, 101.

Though, again, all agree that, if what takes place on a week day amounts to an entirely new sale and a new promise, the vendor can recover; but the right of action must be founded on the new transaction, and not on the original Sunday bargain, as held in Winchell *v.* Carey, 115 Mass. 560; Melchoir *v.* McCarty, 31 Wisc. 252; Harrison *v.* Colton, 31 Iowa, 16; Hopkins *v.* Stefan, 77 Wisc. 45; Aspell *v.* Hosbein, 98 Mich. 120. There is no good reason why parties cannot make a valid contract on a week day merely because they had ineffectually tried to make one on a Sunday. The retention of the consideration received on Sunday is said to be a good consideration for the subsequent week day promise to pay for it. But if the Sunday buyer can securely keep the property without a new promise; if the vendor cannot retake it, either with or without legal process, — it is not easy to see exactly what is the consideration for the subsequent week day promise to pay for it.

Of course, if a bargain is merely *negotiated* on Sunday, and the goods be delivered and accepted on a week day, the buyer may be liable, either on a new special promise therefor, or on an implied assumpsit for their market value, but not necessarily for the exact price agreed upon on Sunday, nor on

the note given on Sunday therefor. Bradley *v.* Rea, 14 Allen, 20; 103 Mass. 188; Dodson *v.* Harris, 10 Ala. 566; Foreman *v.* Ahl, 55 Pa. St. 325; Kountz *v.* Price, 40 Miss. 341; Provonchee *v.* Piper, N. H. (1894), 36 Atl. 552; and see Smith *v.* Bean, 15 N. H. 577.

So where a sale or exchange is negotiated on a week day, but nothing is done then to satisfy the Statute of Frauds, an acceptance and receipt on Sunday does not make the contract valid. Ash *v.* Aldrich, 39 Atl. 442 N. H. (1894).

Wherever, therefore, the Sunday sale is held "void," the law does not recognize its existence for any purpose of enforcement in a court, either in whole or in part, by either party. The buyer cannot maintain an action for a deceit or warranty made in the Sunday sale, any more than for non-delivery of the property. Robeson *v.* French, 12 Met. 24, a leading case; Northup *v.* Foote, 14 Wend. 248; Hulet *v.* Stratton, 5 Cush. 539; Lyon *v.* Strong, 6 Vt. 219; Cardoze *v.* Swift, 113 Mass. 250; Plaisted *v.* Palmer, 63 Me. 576; Howard *v.* Harris, 8 Allen, 297; Finley *v.* Quirck, 9 Minn. 194; Murphy *v.* Simpson, 14 B. Monr. 419; Gunderson *v.* Richardson, 56 Iowa, 56; Grant *v.* McGrath, 56 Conn. 333.

Some general principles apply to all illegal sales: —

(1.) The burden is on the party who alleges the illegality to prove it. Wilson *v.* Melvin, 13 Gray, 73; 14 Ib. 522; 1 Allen, 481; 97 Mass. 97; 155 Mass. 101.

(2.) If a sale is valid by the common law, it is presumed to be valid in every other State where the common law prevails, although illegal by statute in the State where the case is tried; and therefore the party alleging the illegality must produce and prove the statute law of the State where the sale was made, showing the illegality. Adams *v.* Gay, 19 Vt. 358; O'Rourke *v.* O'Rourke, 43 Mich. 58; Doolittle *v.* Lyman, 44 N. H. 608; Tuttle *v.* Holland, 43 Vt. 542; Corning *v.* Abbott, 54 N. H. 469.

(3.) If the sale is valid by the law of the State where it is completely made and finished, it will be held valid in another State when it would not be if made in the latter State. Orcutt *v.* Nelson, 1 Gray, 536; Dater *v.* Earle, 3 Gray, 482; M'Intyre *v.* Parks, 3 Met. 207; Torrey *v.* Corliss, 33 Me. 333; Read *v.* Taft, 3 R. I. 175; Swann *v.* Swann, 21 Fed. Rep. 299; Portsmouth Brewing Co. *v.* Smith, 155 Mass. 100.

And ordinarily the sale is completed in the State where the vendor lives, and where he delivers the goods to a common carrier duly addressed to the vendee in another State, even though the written order for the goods comes from the latter by mail from his own State. Tuttle *v.* Holland, 43 Vt. 542; Mack *v.* Lee, 13 R. I. 293; Garland *v.* Lane, 46 N. H. 245; Merchant *v.* Chapman, 4 Allen, 364; Finch *v.* Mansfield, 97 Mass. 89; Kline *v.* Baker, 99 Mass. 253; Abberger *v.* Marrin, 102 Mass. 70; Boothby *v.* Plaistead, 51 N. H. 436; Torrey *v.* Corliss, 33 Me. 336; Frank *v.* Hoey, 128 Mass. 263; Dame *v.* Flint, 64 Vt. 533; McCarty *v.* Gordon, 16 Kan. 35; Kling *v.* Fries, 33 Mich. 275; Sullivan *v.* Sullivan, 70 Mich. 583; and many other cases. In Perlman *v.* Sartorius, 162 Pa. St. 320, the seller lived in Maryland, by the laws of which the contract was fraudulent; the buyer lived in Pennsylvania. Under the laws of this State the evidence would not have sustained a finding of fraud. The goods were bought in Maryland and shipped to the buyer at his home. Held, that the title passed when the goods were delivered to the carrier in Maryland, and hence

the seller could avoid the contract. So if the order for the goods be delivered by the purchaser in his own State to the travelling agent of the seller, who sends the goods by carrier from his State, the sale takes place in the seller's State, and not in the buyer's. Dunn *v.* The State, 82 Geo. 29; Herron *v.* The State, 51 Ark. 133.

On the other hand, if, by the fair terms of the contract, the vendor is bound to deliver the goods to the vendee in the latter's own State, or, which is the same thing, pay the freight on them to such place, then the sale is completed in the latter State, and if such sales are there illegal, then the vendor cannot recover, although such sales be lawful when made and completed in his own State. Suit *v.* Woodhall, 113 Mass. 391; Tolman *v.* Johnson, 43 Iowa, at p. 129; Gipps Brewing Co. *v.* De France, 91 Iowa, 108. But see Commonwealth *v.* Hess, 148 Pa. St. 98. There liquors were sold and delivered by the vendor in his own conveyance. The sale was legal at the vendor's place of residence, but illegal at the vendee's. Held, that title passed when the goods were set apart, and that the sale was legal although the vendor himself delivered the goods at the vendee's residence.

For this reason it was held, in State *v.* O'Neil, 58 Vt. 140, that, if the goods are ordered by a buyer in Vermont, where the sale is illegal, of a seller in New York, where the sale is legal, and they be sent "C. O. D.," the sale is not complete and the title does not pass until delivery and payment in Vermont, and so the sale is illegal. The error in this case, if any, is in holding that the *title* does not pass until payment; no doubt a right to possession would not pass until such payment. See State *v.* Carl, 43 Ark. 353; Pilgreen *v.* State, 71 Ala. 368; State *v.* Intoxicating Liquors, 73 Me. 278; Higgins *v.* Murray, 73 N. Y. 252; Commonwealth *v.* Fleming, 130 Pa. St. 138. It is more clear that, if the goods be delivered to a carrier in a State where the sale is legal, and, by the contract, the buyer in another State has a right to accept them or not, if they do not suit him, the sale is not complete until he exercises his election, and so the validity of it is governed by the law of the buyer's residence. Wilson *v.* Stratton, 47 Me. 120; but this was decided solely on the ground that the fact of satisfaction was a condition precedent to the completion of the sale, as was well pointed out by Durfee, C. J., in Schlesinger *v.* Stratton, 9 R. I. 578, where the decision was different. See, also, Wassonboehr *v.* Boulier, 84 Me. 168. For if goods be sent in one State on certain conditions, and be accepted by the vendee in another State on different conditions, the sale is complete only in the latter State. Collender Co. *v.* Marshall, 57 Vt. 232.

(4.) If several articles, some forbidden and some not, are sold at one time, for *one entire price*, the whole sale is tainted, and no recovery can be had for any of the articles. Therefore, in an illegal sale of spirituous liquor at a stated price per barrel, no recovery can be had for the value of the barrels, any more than for the contents. Holt *v.* O'Brien, 15 Gray, 311; Bligh *v.* James, 6 Allen, 570; Wirth *v.* Roche, Me. (1899), 42 Atl. 794. And if a separate price be fixed upon each article, the legal and the illegal, and a single note be given for the entire amount, either at the time or subsequently, the whole *note* is invalid, whether a separate action would or would not lie for the value of the legal items. This is now settled law. Perkins *v.* Cummings, 2 Gray, 258; Deering *v.* Chapman, 22 Me. 488; Brigham *v.* Potter, 14 Gray, 522; Coburn *v.* Odell, 30 N. H. 540, and cases cited; Widoe *v.* Webb, 20 Ohio St. 431; Warren *v.* Chapman, 105 Mass. 87; Woodruff *v.* Hinman, 11 Vt. 592. In Shaw *v.* Carpenter, 54

Vt. 155, a mortgage to secure notes, part of the consideration of which was illegal, was held valid in equity to the amount of the legal consideration; *sed quære.* Ordinarily, if a mortgage note is void for illegality in the consideration, the mortgage falls within it; the incident follows the principal. The same defences (the statutes of limitations only excepted) may generally be made to a mortgage as to the note it is given to secure. There seems to be no good reason why equity should enforce a note in whole or in part, any more than a court of law. See Atwood *v.* Fisk, 101 Mass. 363; Vinton *v.* King, 4 Allen, 562; Den *v.* Moore, 5 N. J. L. 470. If, however, the buyer has given his note to the seller "on account," but for a *less sum* than the legal items, the note may be recovered; for the illegal items do not enter into the consideration at all. The note cannot "apply" to them. Had the buyer paid so much money, instead of a note, the seller could not lawfully apply it to the illegal items. Some cases *seem* to favor a recovery upon the note to the extent of the legal consideration. Hynds *v.* Hays, 25 Ind. 32; and see Frazier *v.* Thompson, 2 W. & S. 235; Yundt *v.* Roberts, 5 S. & R. 139.

But whether a partial recovery could or could not be had in a suit upon the instrument itself, it seems that, notwithstanding a note had been given, yet, it being void, the vendor could recover for the legal items of his account in assumpsit for goods sold and delivered, though the legal and illegal were sold at the same time. Coburn *v.* Odell, 30 N. H. 557; Foreman *v.* Ahl, 55 Pa. St. 325; Carleton *v.* Woods, 28 N. H. 290; Walker *v.* Lovell, 28 Ib. 138. And if the suit is brought for both, it seems the plaintiff may strike out the illegal items and recover for the others. Towle *v.* Blake, 38 Me. 528; Boyd *v.* Eaton, 44 Me. 51; 58 Ib. 61; Goodwin *v.* Clark, 65 Ib. 280, and cases cited.

(5.) If a sale is void by statute when made, no subsequent repeal of the statute will validate the contract and enable the vendor to recover. Roby *v.* West, 4 N. H. 285; Hathaway *v.* Moran, 44 Me. 67; Woods *v.* Armstrong, 54 Ala. 150; Banchor *v.* Mansel, 47 Me. 58; 48 Ib. 186; Decell *v.* Lewenthal, 57 Miss. 331. And a subsequent promise to pay after such repeal is inoperative; there is no legal consideration. Dever *v.* Corcoran, 3 Allen (N. B.), 338; Ludlow *v.* Hardy, 38 Mich. 690; Handy *v.* St. Paul Globe Pub. Co. 41 Minn. 188.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS.

	Sect.
Preliminary remarks	560
General principles and definitions	561
Conditions and independent agreements, how distinguished	561
Condition precedent may be changed, *ex post facto*, into warranty	564
Must be strictly performed	565
Performance, how waived	566
Waiver of performance, when implied	567
Impossibility as an excuse for non-performance	570
Vendor excused from delivery if goods perish without his fault	570
Same rule in America	570
Legal impossibility	571
Sale conditioned on act of third person	574
If performance of condition rendered impossible by buyer, vendor may recover on *quantum valebat*	576
Sale conditional on happening of an event	377
Rule as to giving notice of the happening	577
Test of the necessity of notice	577
Sale of goods "to arrive"	578
Cases reviewed	578
Results of decisions classified	586
Duty of vendor to give notice in sales "to arrive"	588
Sale of goods "to be shipped"	588 a
What is meant by "a cargo"	589
Order for goods at price to cover cost, freight, and insurance	590
Vendor's obligations on such order	590
Commission agent's duty on such order	590
Where order is capable of two constructions, principal bound by either if adopted *bona fide* by agent	590
Sale of cargo by bill of lading	591
Concurrent conditions in executory agreements	592
Agreement for cross sales	592
To entitle seller to rescind, buyer must expressly refuse or be completely unable to perform	592 a
Conditions as to time	593
Deliveries by instalments	5 3
Decisions reviewed	593
No absolute rule. Test proposed by Coleridge, C. J., the true one	593 s
Question of fact depending upon the nature of the contract, and the circumstances in each case	593 a
Law in America	593 a
Sale by sample, condition that buyer may inspect bulk implied	594
Sales "on trial," "on approval," and "sale or return"	595
Where trial involves consumption	596
Fact for jury whether more is done or consumed than is required for trial	596
Sale or return of goods consigned, *del credere* agency	598
Sale or return of a horse injured or dying while in buyer's possession	599
Sale by description involves condition precedent, not warranty	600
Sale of securities implies condition that they are genuine	607
Fact for jury whether thing is really what was intended by the parties	609
Reservation of power to resell on buyer's default renders sale conditional	609

§ 560. THE rules of law on the subject of conditions in contracts are very subtle and perplexing. Whether a promise made or an obligation assumed by one party to a contract is dependent on, or

independent of, the promise made by the other; whether it be a condition to be performed before or concurrently with any demand on the other party for a compliance with his promise; or whether it may be neglected, at the peril indeed of a cross-action [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*).

§ 561. 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 if it be untrue, the contract in general is not broken, nor is the untruth any cause of action, unless made fraudulently. To this general rule there is a special exception, in the case of marine policies of insurance, founded on reasons w ich need not be here discussed. The false *representation* becomes a *fraud*, as has been already explained (*b*), when the untrue statement was made with a knowledge of its untruth or dishonesty, or with reckless ignorance whether it was true or false (*c*); or when it differs from the truth so grossly and unreasonably as to evince a dishonest purpose (*d*). When the representation is made in writing, instead of words, it is plain that its *nature* is not thereby altered, and in either case a question may arise whether the statement be not something more than a mere *nil* representation, whether it be not *part of the contract.* On a written instrument this is a question of construction, one of law for the court, not one of fact for the jury. Whenever it is determined that a statement is really a substantial part of the contract, then comes the nice and difficult question, Is it a

(*a*) For the general subject, see the notes to Pordage *v.* Cole, 1 Wms. Saund. 548, and to Peeters *v.* Opie, 2 Wms. Saund. 742; Cutter *v.* Powell, 2 Sm. L. C. 1, and the numerous authorities in the notes; Leake, Dig. of the Law of Contract, Part III. chap. 2, p. 649, ed. 1878.

(*b*) Book III. ch. 2, *ante*, §§ 428–489.

(*c*) Elliott *v.* Von Glehn, 13 Q. B. 632; 18 L. J. Q. B. 221; Wheelton *v.* Hardisty, 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.; Smith *v.* Chadwick, 9 App. C. 187.

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

condition precedent? or is it an *independent agreement?* a breach of which will not justify a repudiation of the contract, but only a counterclaim 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." And the rules for discovering the intention are mainly these: —

§ 562. 1. Where a day is appointed for doing any act, and the day *is* to happen or *may* happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent: *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed 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

(*d*) Glaholm *v.* Haye, 2 M. & G. 257; Oliver *v.* Fielden, 4 Ex. 135; Crookewit *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.

(*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.

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*).

§ 563. In applying these rules of construction, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration. The same statement may, under certain circumstances, be merely a description or representation, and under others the most substantial stipulation in the contract; as, for instance, if a vessel were described in a charter party as a "French vessel," these words would be merely a description in time of peace, but if England were at war, and France at peace, with America, they would form a condition precedent of the most vital importance (*l*).

§ 564. Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favor, the *condition precedent changes its character* and *becomes a warranty, or independent agreement*, affording no defence to an action, but giving right to a [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*).

(*i*) These rules are (in substance) given in 1 Sannd. 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.

(*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; [McGregor *v.* Harris, 30 N. B. 456. — S. C. B.]

(*n*) Jonassohn *v.* Young, 4 B. & S. 296;

§ 565. 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 fulfilment is incumbent can call on the other to comply with his promise.

§ 566. 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 fulfil the condition.

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

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

§ 567. If a man offer to perform a condition precedent in favor of another, and the latter refuse to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashhurst, J., in delivering the opinion of the King's Bench, in Hotham *v.* East India Company (*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*). On the same principle, a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent: as if A. engage B. to write articles for a specified term in a periodical publication belonging to A.,

32 L. J. Q. B. 385; Graves *v.* Legg, 9 Ex. 709; 23 L. J. Ex. 228; White *v.* Beeton, 7 H. & N. 42; 30 L. J. Ex. 373; Hoare *v.* Rennie, 5 H. & N. 19; 29 L. J. Ex. 73; Pust *v.* Dowie, 5 B. & S. 20; 32 L. J. Q. B. 179; Ellen *v.* Topp, 6 Ex. 424; Behn *v.* Burness, 3 B. & S. 751; 32 L. J. Q. B. 204; Dimech *v.* Corlett, 12 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.

(*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.

and before the end of the term A. should discontinue the publication; or if he agree to sell to B. a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should send them abroad on a different vessel, it is plain that it would be futile for B., in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit* (*q*).

§ 568. But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end (*r*). The authorities will be found collected and considered in the notes to Cutter *v.* Powell (*s*).

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

§ 569. The whole law on this subject has been reëxamined and conclusively settled in the Exchequer Chamber, in Frost *v.* Knight (*u*), in which the doubts intimated by the lower court as to the principle of Hochster *v.* De la Tour were held to be ill-founded, and the decision of that court reversed by an unanimous judgment.

In New York, also, the Court of Appeals, in the case of Burtis *v.* Thompson (*x*), which, like Frost *v.* Knight, was an action based on a positive refusal to fulfil a promise of marriage, the action being brought in advance of the time fixed for the marriage, decided in favor of the plaintiff; and the case of Hochster *v.* De la Tour was cited in the

(*q*) Cort *v.* The Ambergate Railway Co. 17 Q. B. 127; 20 L. J. Q. B. 460; Bowdell *v.* Parsons, 10 East, 359; 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. 711; 33 L. J. C. P. 145; Franklin *v.* Miller, 4 A. & 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.

(*r*) Barrick *v.* Buba, 2 C. B. N. S. 563; 26 L. J. C. P. 280; Ripley *v.* M'Clure, 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; Phillpots *v.* Evans, 5 M. & W. 475; Leeson *v.* The North British Oil Co. 8 Ir. R. C. L. 309; Johnstone *v.* Milling, 16 Q. B. D. 460, where the doctrine of Hochster *v.* De la Tour, *supra*, is considered by the Court of Appeal.

(*s*) 2 Smith's Leading Cases, 1.

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

(*u*) L. R. 5 Ex. 322; 7 Ex. 111.

(*x*) 42 N. Y. 246. See, also, Crist *v.* Armour, 34 Barbour, 373 (1861), an earlier case, where Hochster *v.* De la Tour was approved.

judgment; [but although it may be surmised that the opinion of the judges in this case inclined towards the English rule, both of them (*y*) expressly refrained from giving a judgment upon the question without further consideration.

In Howard *v.* Daly (*z*), Commissioner Dwight, after a full review of all the authorities, expressed his opinion in favor of the rule laid down in Hochster *v.* De la Tour, but the other commissioners concurred upon another ground.

In Freer *v.* Denton (*a*), it was stated that the doctrine of Hochster *v.* De la Tour, "while it may not be regarded as settled, has received some countenance in this State."

And in Shaw *v.* Republic Life Insurance Co. (*b*), it was laid down as a well-established rule, that when one party to a contract declares to the other that he will not perform it on a fixed future day, and does not, before the time arrives for an act to be done by the other, withdraw his declaration, the other party is excused from performance or offer to perform, and may then maintain his action for breach of the contract, but the court again declined for the present to go further and adopt the English rule to its full extent.]

§ 570. It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfil it, if the performance be in its nature possible. But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God (*c*), 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 (*d*).

In Taylor *v.* Caldwell (*e*), the whole law on this subject was reviewed by Blackburn, J., who gave the unanimous decision of the court after advisement. It was an action for breach of a promise to give to the plaintiff the use of a certain music hall for four specified days, and the defence was that the hall had been burnt down before the appointed days, so that it was impossible to fulfil the condition. This excuse was held valid. The learned 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 deliv-

(*y*) Ingalls, J., at p. 248; Grover, J., at p. 250; the decision is not a satisfactory one. The opinions of the two judges do not proceed upon the same theory.

(*z*) 61 N. Y. 362, 374.

(*a*) 61 N. Y. 492, 496.

(*b*) 69 N. Y. 286, 292.

(*c*) 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.

(*d*) Shep. Touch. 173, 382; Co. Lit. 206 a; Faulkner *v.* Lowe, 2 Ex. 595; Williams *v.* Hide, Palm. 548; Laughter's case, 5 Rep. 21 b; Hall *v.* Wright, 1 E. B. & E. 746; 27 L. J. Q. B. 145; Tasker *v.* Shepherd, 6 H. & N. 575; 30 L. J. Ex. 207.

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

ered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of English law is established by the case of Rugg *v* Minett" (*f*). 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.*" This case was followed in Appleby *v.* Meyers, in the Exchequer Chamber (*g*). And in Robinson *v.* Davison (*g*), the same principle was applied to excuse the defendant, a lady, for breach of a promise to play upon the piano at a concert, when she was too ill to perform; the court holding that the promise was upon the implied condition that she should be well enough to play.

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

[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 (*i*).]

(*f*) 11 East, 210.

(*g*) 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.

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

(*i*) Howell *v.* Coupland, L. R. 9 Q. B. 462; S. C. affirmed, 1 Q. B. D. 258, C. A. [In a still later case, Turner *v.* Goldsmith, 64 Law T. R. 301 (Q. B. 1891), it was held that an agreement by a manfacturer of furnishing goods to employ an agent to travel and sell them on commission, for a period not less than five years, was not determined by the

§ 571. And a party is equally excused from the performance of his promise when a *legal impossibility* supervenes. If, after promise made, an act of Parliament is passed rendering the performance illegal, the promise is at an end, and the obligor no longer bound (*k*).

But if the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfil a promise, when he might have guarded himself by the terms of his contract (*l*).

Thus, in Kearon *v.* Pearson (*m*), the defendant undertook to deliver a cargo of coals on board of a vessel with the usual dispatch. The defendant commenced the delivery, but a sudden frost occurred, so that no more coal could be brought from the colliery by the "flats" navigating the canal. The delivery was thus delayed about thirty days, and the court was unanimous in holding that the defendant was not excused from performing his promise.

So in Barker *v.* Hodgson (*n*), the defendant attempted to excuse 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."

total destruction by fire of the buildings in which the manufacturing of the goods was carried on; since the employer might have bought the goods elsewhere, and so supplied his agent. And Taylor *v.* Caldwell was distinguished. — E. H. B.]

(*k*) 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 Company, 5 Ex. 420; Brown *v.* Mayor of London, 9 C. B. N. S. 726, and 31 L. J. C. P. 280; Baily *v.* De Crespigny, L. R. 4 Q. B. 180, where the whole subject is elaborately 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.

(*l*) See per Mellish, L. 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.

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

(*n*) 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.

So in Kirk *v.* Gibbs (*o*), 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.

§ 572. There are two old cases in which the vendors took advantage of the buyers' ignorance of arithmetic to impose on them conditions practically impossible.

In Thornborow *v.* Whitacre (*p*), the declaration was in case, and alleged that the defendant, in consideration of 2*s.* 6*d.* paid, and of 4*l.* 17*s.* 6*d.* promised to be paid on the defendant's performance, agreed to deliver to the plaintiff two grains of rye-corn on the following Monday, four grains on the Monday after, eight grains on the Monday after, "*et progressu sic deliberaret quolibet alio die Lunæ successive 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

(*o*) 1 H. & N. 810; 26 L. J. Ex. 209. (*p*) 2 Lord Raym. 1164.

court to be adverse to the defendant, offered the plaintiff to return the half-crown and give him his costs, which was accepted, and no judgment was delivered.

The reporter says that, in arguing this case, the old case of James *v.* Morgan (*q*) 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*l.*; and so they did, and it was afterwards moved in arrest of judgment (*r*), 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 (*s*). 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 (*t*).

§ 573. A strong illustration of the rigor of the rule by which parties are bound to the performance of a promise deliberately made is furnished by the case of Jones *v.* St. John's College (*u*), 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.

[The same rule has been enforced in America (*v*).]

(*q*) 1 Levinz, 111.

(*r*) 1 Keble, 569.

(*s*) Foss' Tab. Cur. 66.

(*t*) 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 Company, 5 C. B. N. S. 492; Mills *v.* Auriol, 1 H. Bl. 433, and 4 T. R. 94, in error; Jervis *v.* Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41; Paradine *v.* Jane, Aleyn, 27 (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. 237 (ed. 1884).

(*u*) L. R. 6 Q. B. 115.

(*v*) Beebe *v.* Johnson, 19 Wendell, 500 (1838); Harmony *v.* Bingham, 12 N. Y. 99, 107, 115 (1854); School District No. 1 *v.*

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

It is not uncommon to make the performance of a sale dependent on an act to be done by a third person. Such conditions must be complied with before rights dependent on them can be enforced, and if the third party refuse, even unreasonably, to perform the act, this will not dispense with such compliance. Thus in Brogden *v.* Marriott (*x*), the vendor sold a horse for one shilling cash, and a further payment of 200*l.* provided the horse should trot eighteen miles within one hour, the task to be performed within one month, and "J. N. to be the judge of the performance." It was held to be no defence to the buyer's action for the delivery of the horse that J. N. refused to be present at the trial, and Tindal, C. J., said it was a "condition which the defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party."

So in Thurnell *v.* Balbirnie (*y*), 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, etc. 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.

§ 575. On the same principle it has been held, in other contracts on conditions of this kind, that the party who claims must show the performance of the condition on which his claim depends, or that the opposite party prevented or waived the performance. On an agreement to do work which is to be settled for according to the measurement of a named person, the measurement by that person is a condition precedent to the claim for payment (*z*); on an insurance where the claim for payment was made to depend on a certificate from the

Dauchy, 25 Conn. 530, 535 (1857); Dermott *v.* Jones, 2 Wallace, 1, 7 (1864); Booth *v.* Spuyten Duyvil Mills Company, 60 N. Y. 487, 490, 491 (1875), where Dexter *v.* Norton (*ante*, § 570) was distinguished, and the limits of the rule are laid down by Church, C. J., in delivering the opinion of the Court. Jones *v.* United States, 96 U. S. 24, 29 (1877).

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

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

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

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 (*a*); 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 (*b*).

§ 576. If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in Clarke *v.* Westrope (*c*), 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. 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 (*d*).

§ 577. The condition on which a sale depends may be the happening of some event, and then the question arises as to the duty of the obligee to give notice that the event has happened. As a general rule, a man who binds himself to do anything on the happening of a particular event is bound to take notice, at his own peril, and to comply with his promise when the event happens (*e*). 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 (*f*), 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 vendor should get for the barley from J. S. (*g*), for the party bound in this event is suffi-

(*a*) Worlsey *v.* Wood, 6 T. R. 720.

(*b*) 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.

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

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

(*e*) 2 Saund. 62 a, n. 4.

(*f*) *S. n.* Henning's Case, Cro. Jac. 432; Viner's Abr. Condition (A. d) pl. 15, 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.

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

ciently 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. Therefore, in Vyse *v.* Wakefield (*h*), 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, etc., in order to enable the plaintiff to insure his life, and *would not afterwards do any act to prejudice the insurance*, the declaration alleged that the defendant did, in part performance of his covenant, appear at a certain insurance office, and that plaintiff insured the defendant's life, and that the policy contained a proviso by which it was to become void if the defendant went beyond the limits of Europe. Breach, — that the defendant went beyond the limits of Europe, to wit, to Canada. Special demurrer, for want of averment, that the plaintiff had given notice to the defendant, that he had effected an insurance on the life of the defendant, and that the policy contained the proviso alleged in the declaration. Held that the declaration was bad.

§ 578. A very frequent contract among merchants is a sale of goods "to arrive" (*i*). It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at Nisi Prius, but in recent times these contracts have been multiplied to a great extent.

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

In Idle *v.* Thornton (*m*), 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, etc., ex Catherina, Evers."

(*h*) 6 M. & W. 442; 9 L. J. Ex. 274; see Makin *v.* Watkinson, L. R. 6 Ex. 25; Stanton *v.* Austin, L. R. 7 C. P. 651; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Armitage *v.* Insole, 14 Q. B. 728; 19 L. J. Q. B. 202.

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

(*k*) 2 Camp. 326.

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

(*m*) 3 Camp. 274.

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.

In Lovatt *v.* Hamilton (*n*), the contract was, "We have sold you 50 tons of palm oil, *to arrive* per Mansfield, etc. 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. 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.

§ 579. In Alewyn *v.* Pryor (*o*), 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*," etc. 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.

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

§ 580. In Gorrissen *v.* Perrin (*q*), 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*,

(*n*) 5 M. & W. 639.
(*o*) Ry. & M. 406.
(*p*) 9 M. & W. 600.
(*q*) 27 L. J. C. P. 29 ; 2 C. B. N. S. 681.

but it was proven that the contents were far short of the agreed number of *bales*, the latter word meaning in the trade a compressed package of two hundred weight. There was also on board the vessels a quantity of gambier consigned to other parties, sufficient to make up the whole quantity sold. The plaintiff, who had bought the goods, claimed in two counts; the first, on the theory that the words of the contract imported a *warranty* that there were 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 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 (*r*), 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 (*s*).

§ 581. In Vernede *v.* Weber (*t*), 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 11*s.* for *Larong*, the latter quality not to exceed 50 tons, or else at the option of buyers to reject any excess." 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

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

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

(*t*) 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.

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 (*u*), that the buyer had no right to the *Larong* rice, because the contract was entire: it contemplated the sale of a whole cargo of *Necrensie* rice; the *Larong* 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.

§ 582. In Simond *v.* Braddon (*x*), 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 Necrenzie 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," etc. 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.

§ 583. In Hale *v.* Rawson (*y*), 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, *on safe arrival of a certain ship* or vessel called the *Countess of Elgin*, then alleged to be on her passage from Calcutta to London;" that the sale was by sample, that the vessel had arrived, etc., etc., and that the defendant refused to deliver. Plea, that neither the tallow nor any part thereof arrived by the Countess of Elgin, whereby, etc. 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.

§ 584. In Smith *v.* Myers (*z*), the contract was for the sale of

(*u*) 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.

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

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

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

"about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per Precursor, at 12*s.* 9*d.* per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." The vendors (the defendants), when the 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 cancelled by the Valparaiso house; the vendors in England being ignorant of these facts when they made the contract with the plaintiff on the 8th 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.

§ 585. In Covas *v.* Bingham (*a*), 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 100 kilos., — payment cash *on handing shipping documents and policy of insurance.*" The contract was made on

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

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.

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

First. — Where the language is that goods are sold "*on arrival* per ship A. or ex ship A.," or "*to arrive* per ship A. or ex ship A." (for these two expressions mean precisely the same thing) (*b*), 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 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 which 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

(*b*) Per Parke, B., in Johnson *v.* M'Donald, 9 M. & W. 600–604.

a particular description, as "400 tons *Aracan Necrensie* rice," and the cargo turns out on arrival to be rice of a different description (*c*), the condition precedent is not fulfilled, and neither party is bound by the bargain.

§ 587. In Neil *v.* Whitworth (*d*), an attempt was made to convert a stipulation introduced in the vendor's favor into a condition precedent which he was bound to fulfil. A sale was made of cotton, "to arrive in Liverpool," and a clause was inserted: "*The cotton to be taken from the quay;* customary allowance of tare and draft, and the invoice to be dated from date of delivery of last bale." This was construed to be a stipulation *against* the buyer, not a condition in his *favor;* the purpose being probably to save warehouse charges, as it was shown that, by the dock regulations in Liverpool, goods must be removed from the quay within twenty-four hours, in default whereof they are removed and warehoused by the dock authorities.

§ 588. In sales of goods "to arrive," it is quite a usual condition that the vendor shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract.

In Buck *v.* Spence (*e*), 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.

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 (*f*), 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

(*c*) See *post*, Part 2, Ch. 1, Warranty (§§ 610 *et seq.*) for the effect of a *description* of the thing sold.

(*d*) 18 C. B. N. S. 435; 34 L. J. C. P. 155.
(*e*) 4 Camp. 329.
(*f*) 9 Ex. 709; 23 L. J. Ex. 228.

the usage of that market, such notice to the broker was equivalent to notice to his principal, and the Court of Exchequer, as well as the Exchequer Chamber, held that this was a compliance with the condition (*g*).

§ 588 a. [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 (*h*) and Shand *v.* Bowes (*i*).

In Alexander *v.* Vanderzee (*h*), 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 fulfilment 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 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 (*k*). 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, 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

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

(*h*) L. R. 7 C. P. 530.

(*i*) 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.

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

whole quantity of grain was to be put on board within these months, and that it was properly left to the jury to decide. Kelly, C. B., on the other hand, was of the 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.

But the authority of this case is shaken by the later decision of the House of Lords in Shand *v.* Bowes (*l*). 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.

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 begun before the end of the month of May, and had been proceeded with *continuously* with reasonable dispatch and in the ordinary way, but the shipment having been completed in June, although

(*l*) 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. And see McLean *v.* Brown, 15 Ont. Rep. 313.

commenced in May, it might therefore well be a question for the jury whether it was a May or a June shipment. On the other hand, in the case 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, and therefore as to the great bulk of the goods it was a February and not a March shipment.

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 fulfilment 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 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 (*m*), 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. As 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 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 com-

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

pelled to take anything in fulfilment 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."]

§ 589. There is not an entire concordance in the authorities as to the true construction of a contract for the sale of "a cargo." In Kreuger *v.* Blanck (*n*), 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, etc., etc., in all about 60 cubic fathoms, which you will please to effect on opportunity for my account, at 6*l.* 15*s.* c. f. and i. (*o*) per cubic fathom, discharged to the Bristol Channel." The plaintiffs, being unable to get a vessel of the exact size for such a cargo, chartered a ship and loaded her with 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.

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

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*

(*n*) L. R. 5 Ex. 179.

(*o*) The initials mean, "cost, freight, and insurance." As to the meaning and effect of these words, see *post*, § 590 *et seq.*

(*p*) L. R. 2 Q. B. 99; 5 Q. B. 516; L. R. 5 H. L. 395–410.

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*l.* 15*s.* to 3*l.* 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 of 2*l.* 10*s.* per ton for a voyage direct to London, and ascertained that at this rate of freight the sugar could be purchased so as to bring the cost, freight, and insurance within the limit. It was impossible to purchase the sugar in one lot from the same person, and the plaintiffs purchased from several brokers fourteen distinct parcels of the specified quality.

The plaintiffs used due diligence, but could not obtain more than 5778 bags, weighing about 392 tons, within the limit, and reduced their own commissions by a sum of 163*l.* 19*s.* 4½*d.*, in order not to exceed the limit.

They shipped this quantity to the defendants; and being unable to fill up the vessel with any further quantity on the 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.

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 fulfilment of the order was made conditional upon its being so executed as to send the whole order as one cargo.

In the House of Lords, Martin and Cleasby, BB., adhered to their opinions expressed in the Exchequer Chamber, and Blackburn, Hannen, and Byles, JJ., were all of opinion that the case was one of principal and agent, not of vendor and vendee (as held by Martin, B.), and that the true construction of the order did not impose the condition of shipment as one cargo in one vessel. Although the case as decided by the Lords did not involve all the considerations upon which the judgment of Blackburn, J., in behalf of himself and Hannen, J., 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 : —

"The terms, at a price 'to cover cost, freight, and insurance, payment by acceptance on receiving shipment 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 shipowner 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 (*q*). 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 shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way.

"If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission

(*q*) 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.

is charged. In such a case it is obvious that, if freight is high, the consignor gets the less for the goods he supplies; if low, he gets the more. But inasmuch as he has contracted to supply the goods at this price, he is bound to do so, though, owing to the rise in prices at the port of shipment, making him pay more for the goods, or of freight, causing him to receive less himself, because the shipowner 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 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.

"But it is also very common for a consignor to be an agent who does not bind himself absolutely to supply the goods, but merely accepts an order, by which he *binds himself to use due diligence to fulfil the order.* In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the *actual cost* and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a *positive fraud* if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit.

"The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering, the freight being in no way an element in the limit. But, when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. If, by due exertions, he can execute the order within those limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission, because *there is a contract of agency.* . . . It is quite true that the agent who in thus executing an order

ships goods to his principal *is a vendor to him.* The persons who supply goods to a commission agent sell them to *him*, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. . . . The property in the goods passes from the country producer to the commission merchant; and then when the goods are shipped from the commission merchant to his consignee, and the *legal effect* of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and consequently *the commission merchant is a vendor*, and has the right of one as to stoppage *in transitu* (*r*).

"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 superadded sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered, as much below the limit as they could."

The learned judge then went on to show that the question of usage of the market did not really arise; that the commission merchant as an agent must use reasonable exertions to buy *as cheaply as he can*, and to buy them either in small parcels or one large lot, according to the advantage which would be gained in price by the one or the other mode of purchase.

It is very remarkable that after the thorough discussion of this case the only point, upon which the judges had given opinions, that was decided in the Lords (*s*) was, that the contract was one of agency, as explained by Blackburn, J.

(*r*) This *dictum* of Lord Blackburn was criticised by the Court of Appeal in Cassaboglou *v.* Gibb, 11 Q. B. D. 797. Both Brett, M. R., and Fry, L. J., stated the contract between a commission agent and his foreign principal to be not one of vendor and purchaser, but a contract analogous thereto, placing the commission agent *after shipment of the goods* in the position of a *quasi*-vendor for certain purposes. Accordingly they held that, upon breach of a contract by a commission agent to supply his correspondent with goods of a specific description, the damages were to be assessed as between principal and agent, and not as between vendor and vendee. See *ante*, § 238.

(*s*) The lords present were Chelmsford, Westbury, and Colonsay.

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 his 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.*"

[In Borrowman *v.* Drayton (*t*), 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 (*u*).

But in The Colonial Insurance Co. of New Zealand *v.* Adelaide Marine Insurance Co. (*x*), the Privy Council declared the word "cargo" to be susceptible of different meanings, which must be interpreted with reference to the context of the particular contract in which it occurs.]

§ 591. Sometimes the sale of the cargo is made by bill of lading, and the condition imposed by the contract on the vendor must be strictly complied with, in order to enable him to enforce the bargain.

In 1859 the two cases of Tamvaco *v.* Lucas were decided, both in favor of the purchaser, on the ground that the vendors' proffer of delivery was not in accordance with the conditions of the contract. In the first case (*y*), 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, etc.*" In an action for

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

(*u*) See, also, Anderson *v.* Morice, L. R. 10 C. P. 58, *ante*, § 329 a.

(*x*) 12 App. Cas. 128; see interlocutory observation of Lord Bramwell, at p. 129, and per Sir Barnes Peacock, in delivering the opinion of the court, at p. 134.

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

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 plaintiffs 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.

The second case (*z*), 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 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.

§ 592. The general rule in executory agreements for the sale of goods is, that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the

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

other without showing performance (*a*), or offer to perform, or averring readiness and willingness to perform, his own promise (*b*).

In Atkinson *v.* Smith (*c*), 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*l.*, 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.

In Withers *v.* Reynolds (*d*), 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, 1830, at the rate of three loads in a fortnight, at 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.

In Bankart *v.* Bowers (*e*), 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.

(*a*) 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; King *v.* Reedman, 49 L. T. N. S. 473.

(*b*) Rawson *v.* Johnson, 1 East, 203; Jackson *v.* Allaway, 6 M. & G. 942; Boyd *v.* Lett, 1 C. B. 222.

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

(*d*) 2 B. & Ad. 882. See the interlocutory observations of Jessel, M. R., and Bowen, L. J., on this case in The Mersey Steel Company *v.* Naylor, 9 Q. B. D. at p. 655; 51 L. J. Q. B. at p. 581; and the judgment of Lord Blackburn, S. C. 9 App. Cas. at p. 442.

(*e*) L. R. 1 C. P. 484.

§ 592 a. [But it is to be borne in mind that, to entitle the seller to rescind the contract, the acts or conduct of the buyer must either amount to an *express refusal* or manifest a complete inability to perform his part of the contract. Thus in Corcoran *v.* Prosser (*f*), 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 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.

In Bloomer *v.* Bernstein (*g*), 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 negotiation, during which the second parcel was sold, the defendants' agent wrote on the 14th of February that he considered the contract cancelled. 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 reassigned 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 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, whether the defendants, by reason of the plaintiff's conduct, had reasonable ground for believing, and did believe, that the plaintiff would be unable to pay for the future bills of lading to be presented

(*f*) 22 W. R. 222 (Ir. Ex. Ch.). (*g*) L. R. 9 C. P. 588.

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 (*h*).

The effect of the purchaser's bankruptcy as an act entitling the seller to treat the contract as abandoned is considered *post*, Book V. Part I. Ch. 1, s. 1.]

§ 593. In determining whether stipulations as to the *time* of performing a contract of sale are conditions precedent, the court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent (*i*).

In Hoare *v.* Rennie (*k*), the defendant agreed to buy from the plaintiff 667 tons of iron, to be shipped from Sweden, *in about equal portions*, in each of the months of June, July, August, and September. The plaintiff shipped only twenty-one tons in June, which the defendant refused to accept as part compliance with the contract, and it was held that the delivery at the time specified was a condition precedent, and that plaintiff could not on these facts maintain an action against the defendant for not accepting. But this case has been much questioned, particularly in Simpson *v.* Crippin, *infra*.

In Jonassohn *v.* Young (*l*), 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 defend-

(*h*) 2 B. & Ad. 882, *ante*, § 592.

(*i*) 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 Company, 60 N. Y. at p. 557. [See, also, Sun Publishing Co. *v.* Minnesota Type Foundry Co. 22 Or. 49. — B.]

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, s. 25, sub-s. 7; Jud. Act 1875, s. 10. But the effect of these acts is not to extend to a sale of chattels the rule of equity which provides that on a contract for the sale of land, unless a contrary intention appears, time is not presumed to be an essential condition. To apply this rule to mercantile contracts would be "dangerous and unreasonable." Per Cotton, L. J., in Reuter *v.* Sala, 4 C. P. D. at p. 249. The rule as to mercantile contracts is the same in America. Norrington *v.* Wright, 115 U. S. 188, where it is etated by Gray, J., in delivering the opinion of the court, at p. 203, that "in the contracts of merchants time is of the essence." The rule, however, is probably confined to mercantile contracts properly so called, and does not extend to all sales of chattels. See per Lord Denman in Martindale *v.* Smith, 1 Q. B. at p. 395; and Wolfe *v.* Horne, 2 Q. B. D. 355.

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

(*l*) 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.

ant 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.

In Simpson *v.* Crippin (*m*), 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 first of August the defendants wrote that the contract was cancelled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be cancelled, and the action was brought on the defendants' refusal to go on with it. Held that, although the plaintiff had committed a breach of the contract by failing to send wagons in sufficient number the first month, the breach was a good ground for compensation, but did not justify the defendants in rescinding the contract, under the rule established by Pordage *v.* Cole (*n*). Two of the judges (Blackburn and Lush, JJ.) declared that they could not understand Hoare *v.* Rennie, and declined to follow it.

§ 593 a. [In Freeth *v.* Burr (*o*), 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 the 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 the 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

(*m*) L. R. 8 Q. B. 14. (*n*) 1 Wms. Saund. 319. (*o*) L. R. 9 C. P. 208.

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" (*p*).

In Brandt *v.* Lawrence (*q*), there were two contracts, each for 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 fulfilment 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.

In Reuter *v.* Sala (*r*), the contract was for the sale, by the plaintiffs to the 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 a 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 dis-

(*p*) Another explanation of the decision in Hoare *v.* Rennie was offered by Bowen, L. J., in the case of The Mersey Steel Company *v.* Naylor, 9 Q. B. D. at p. 671; 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."

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

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

sentient 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 fulfil 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 fulfil 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 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 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.

In Honck *v.* Müller (*s*), 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 cancelled 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 of Appeal that the plaintiff's refusal to accept in November justified the defendant in refusing to continue to carry out the contract, for otherwise the plaintiff, having undertaken to accept 2000 tons, would be able to demand delivery of two thirds only, or of 1333$\frac{1}{3}$ tons. On the other hand, Bramwell and Baggallay, L. JJ., approved Hoare *v.* Rennie; the former learned judge distinguishing Simpson *v.* Crippin upon the ground that the breach there was not with respect to the first instalment, and the contract having been part performed could not be undone, the latter finding it impossible to reconcile Simpson *v.* Crippin with Hoare *v.* Rennie, and preferring to adopt the latter; Brett, L. J., on the other hand dissented, and was of opinion that it was immaterial whether the breach was in respect of the first or any other delivery. He assented to the doctrine laid down in Simpson *v.*

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

Crippin, and contained in the notes to Pordage *v.* Cole (*t*), resting his judgment mainly upon the view taken by merchants of the class of contracts in question.

Finally, in 1884, the question was considered by the House of Lords in the Mersey Steel and Iron Co. *v.* Naylor (*u*). The action was brought by the plaintiff company for the price of goods delivered, and the defendants raised a counter-claim for damages for non-delivery. The defendants had agreed to purchase from the plaintiffs 5000 tons of steel blooms, "delivering 1000 tons monthly, commencing January next, payment net cash within three days after receipt of shipping documents." The plaintiff company delivered about half of the first instalment, but before payment became due a winding-up petition was presented. Thereupon the defendants, acting under a mistake of law, refused, pending the bankruptcy petition, to pay for the steel already delivered. The plaintiffs thereupon informed the defendants of their intention to treat the refusal to pay as a breach of contract releasing them from any obligation to make future deliveries. It appeared from the correspondence that the defendants were neither unable nor unwilling to pay the amount due to the plaintiffs, but erroneously considered that they could not do so with safety. They afterwards offered to accept and pay for all further deliveries subject to a right of set-off which they claimed. The plaintiffs, however, declined to make further deliveries, and brought their action for the price of the steel delivered. Held by the House of Lords, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the defendants had not, by postponing payment under mistaken advice, acted so as to show an intention to repudiate the contract, or so as to release the plaintiff company from further performance. All their Lordships, as well as the Lords Justices, accepted the principle stated by Lord Coleridge in Freeth *v.* Burr (*ante*, § 593 a), as the true test to be applied in cases of this description; or, as it was expressed in the words of Lord Selborne (*x*): "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not

(*t*) 1 Wms. Saund. 548, ed. 1871.
(*u*) 9 App. Cas. 434, affirming 9 Q. B. D. 648, C. A.
(*x*) 9 App. Cas. p. 438.

performing his part." Lord Blackburn approves the decision in Withers *v.* Reynolds (*ante*, § 592), and adopts the rule laid down in the notes to Pordage *v.* Cole, that the failure to perform must go to the root of the contract, and both he and Lord Bramwell treat the decisions in Hoare *v.* Rennie and Honck *v.* Müller as given, and possibly rightly given, upon the construction of the particular contracts in those cases, and consider it unnecessary to reconcile them with the case under consideration. Lord Bramwell refers to his own observations in Honck *v.* Müller, in distinguishing that case from Simpson *v.* Crippin (*ante*, § 593), and repudiates the construction which Jessel, M. R., in the Court of Appeal, had placed upon them.

An intelligible principle having been arrived at which is to guide the courts for the future, it is unnecessary to attempt to reconcile the conflicting decisions in Hoare *v.* Rennie, Simpson *v.* Crippin, and Honck *v.* Müller. Each case may possibly be supported upon the particular facts there presented. In The Mersey Co. *v.* Naylor, there are *dicta* of the Lords Justices showing disapproval both of Hoare *v.* Rennie and Honck *v.* Müller, and the judgment indirectly affirms 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 by itself, and in the absence of special circumstances, evidence of an intention to abandon the contract.

In the last edition of this treatise it was stated that in America the law appeared to be fairly settled in accordance with the English rule upon this subject, viz., that in the case of a contract for the sale of goods to be delivered and paid for by instalments, in the absence of any expressed intention of the parties (*y*), the failure to accept or deliver one instalment will not *per se* entitle the other party to rescind the contract, and to refuse delivery or acceptance of the instalments which remain (*z*).

But the recent decision of the Supreme Court of the United States in Norrington *v.* Wright (*a*) leaves this statement open to grave doubt. In that case it was held that the seller's breach in respect of the *first* two deliveries under a contract justified the buyer in rescinding the contract. The action was for damages for non-acceptance of

(*y*) Higgins *v.* Delaware Railroad Company, 60 N. Y. 553.

(*z*) Winchester *v.* Newton, 2 Allen (84 Mass.), 492, 494 (1861); Scott *v.* Kittanning Coal Company, 89 Pa. St. 231 (1879), where it is treated as settled law in that State by Trunkey, J., at p. 237; Haines *v.* Tucker, 50 N. H. 307, 309 (1870). See, also, an article by Mr. Landreth, 21 American Law Register, 398, in which he comes to the conclusion that the weight of American authority supports the English rule. *Contra:* King Philip Mills *v.* Slater, 34 Am. R. 603; 12 Rhode Island, 82 (1878), which approves and follows Hoare *v.* Rennie.

(*a*) 115 U. S. 188, approved in Cleveland Rolling Mills *v.* Rhodes, 121 U. S. 255 (1886); Pope *v.* Porter, 102 N. Y. 366 (1886).

goods. The contract, made in Philadelphia, was for 5000 tons of iron rails for shipment from a European port or ports at the rate of about 1000 tons per month during the five months, February to June inclusive, the balance, if any, to be delivered in July at $45 per ton. The vendors shipped 400 tons in February, and 885 tons in March. The defendant received and paid for the February shipment, but before receiving more was for the first time informed of the amounts shipped in February and March, and at once refused to accept any more under the contract. On these facts the defendant was held entitled to a verdict. The reasons given for the judgment are not, it is submitted, satisfactory. The court reviewed the English cases, and decided in the defendant's favor on the ground that the rule laid down in Hoare *v.* Rennie and Coddington *v.* Paleologo, as well as in Reuter *v.* Sala and Honck *v.* Müller, was supported by a greater weight of authority than that in Simpson *v.* Crippin and Brandt *v.* Lawrence, and accorded better with the general principles affirmed by the House of Lords in Bowes *v.* Shand. It is submitted that Bowes *v.* Shand is not in point; in that case the contract was not one for the sale of goods to be delivered by instalments, but of goods to be shipped in particular months, when the time of shipment was held to be descriptive of the subject-matter, and therefore a condition precedent. The court regarded the decision in The Mersey Co. *v.* Naylor as confined to the case of the *buyer's* failure to pay for an instalment, and not applicable to that of the *seller's* failure to deliver; but this appears to be an entire misapprehension of the *ratio decidendi* of that case both in the House of Lords and in the Court of Appeal, which lies in the application of a general principle which is equally applicable, whether the breach of contract is committed by one or other of the parties to the contract.]

§ 594. In a sale of goods by sample, it is a condition implied by law that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this is a breach which justifies the purchaser in rejecting the contract. In Lorymer *v.* Smith (*b*), 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. 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

(*b*) 1 B. & C. 1. [If by the contract the goods are to be "laid down" at a stated place, such place is the proper place for inspection. Oelrichs *v.* Trent Valley Co. 20 Ont. Ap. 673 (1893). — B.]

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, sec. 3, Implied Warranty of Quality.

§ 595. Other instances of sales dependent on conditions precedent are afforded by "sales on trial," or "approval," and by the bargain known as "sale or return." In the former class of cases there is no sale till the approval is given, either expressly or by implication resulting from keeping the goods beyond the time allowed for trial (*c*). In the latter case the sale becomes absolute, and the property passes only after a reasonable time has elapsed without the return of the goods.

In sales "on trial," the mere failure to return the goods within the time specified for trial makes the sale absolute (*d*), 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 (*e*).

§ 596. Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial; for if so, the sale will have become absolute by the approval implied from thus accepting a part of the goods. This was ruled by Parke, B., in Elliott *v.* Thomas (*f*), and approved by the Court in Banc, in that case, as well as by Martin and Bramwell, BB., in Lucy *v.* Mouflet (*g*).

In Okell *v.* Smith (*h*), 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.

§ 597. The bargain called "sale or return" was explained by the Queen's Bench, in Moss *v.* Sweet (*i*), to mean a sale with a right on

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

(*d*) Humphries *v.* Carvalho, 16 East, 45. [In Esterly *v.* Campbell, 44 Mo. App. 624, this statement is said to be too broad, for "the mere failure to return" will not make the sale absolute, unless there was some agreement to return; for an offer to return, or a notice of dissatisfaction, might operate to prevent the sale from becoming complete. And Humphries *v.* Carvalho, 16 East, 45, and Elphick *v.* Barnes, 5 C. P. Div. 321, were declared not to support the text. — E. H. B.]

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

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

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

(*h*) 1 Starkie, 107. And see Street *v.* Blay, 2 B. & Ad. 456.

(*i*) 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.

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 (*k*) was overruled, and Lyons *v.* Barnes (*l*) 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 (*m*).

§ 598. In a case before the Lords Justices, Ex parte White (*n*), the facts were that Alfred Nevill was a partner in a firm of Nevill & Co. He also did business *on his individual account* with Towle & Co., cotton manufacturers. His dealings with Towle & Co. were conducted as follows: they consigned goods to him accompanied by a price list, and he sent to them monthly an account of the goods which he had sold, debiting himself *with the price given in the price list*, giving no particulars whatever as to his sales; and in the next month he paid according to his accounts thus rendered. He frequently had the goods received from Towle & Co. dyed or bleached before selling them, but he gave no account of this to Towle & Co., and did not charge them with the expense. By an arrangement between Nevill and his partners, he paid to the credit of the firm's general account the money received by him from the sale of Towle & Co.'s goods, and when he made payments to Towle & Co. he sent them either bills received from the purchasers of the goods, subject to a discount which Towle & Co. charged against him in their books, or checks, or both; and when checks 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 acccount, and Towle & Co. claimed that this was trust money improperly paid by Nevill to his firm, with knowledge by the latter of the trust; and it was not disputed that the balance in Nevill's favor on the private account arose chiefly from the proceeds of the goods received from Towle & Co.

On these facts both the Lords Justices (James and Mellish) decided that the true contract between Nevill and Towle & Co. was not an

593. See, also, remarks on the case of Moss *v.* Sweet, in Ray *v.* Barker, 4 Ex. D. 279, C. A.

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

(*l*) 2 Starkie, 39. In Johnson *v.* Kirkaldy, 4 Jurist, 988 (1840), Denman, C. J., said that Lyons *v.* Barnes was in effect overruled in Studdy *v.* Sanders, 5 B. & C. 628.

(*m*) 1 M. & W. 546. And see Bailey *v.* Gouldsmith, Peake, 56, 78; Beverly *v.* Lincoln Gaslight Company, 6 A. & E. 829.

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

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 puts 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.*"

§ 599. In Head *v.* Tattersall (*o*), the plaintiff on Monday the 13th

(*o*) L. R. 7 Ex. 7.

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 was, "horses not answering the description must be returned before five o'clock on Wednesday evening next; otherwise the purchaser shall be obliged to keep the lot with all faults." Although the plaintiff had heard of the above-stated misdescription, he took away the horse on trial, as he did not buy it for hunting, and the horse while on its way to the plaintiff's premises, in charge of the plaintiff's servant, took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before five o'clock on Wednesday evening, and the action was brought to recover back the price paid to the auctioneer. The jury found that the injury to the horse *was not caused by any default of plaintiff*. Held, that 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.

[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 (*p*), 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.

§ 599. In Hinchcliffe *v.* Barwick (*q*), 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 five 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.

The law in America is to the same effect, and, pending the completion of the sale, the contract is one of bailment (*r*).]

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

(*q*) 5 Ex. D. 177, C. A. But see Chapman *v.* Withers, 20 Q. B. D. 824, where it was held that the non-return of a disabled horse was no bar to an action for breach of warranty.

(*r*) Hunt *v.* Wyman, 100 Mass. 198 (1868); Carter *v.* Wallace, 35 Hun, 189 (1885).

§ 600. When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying: "A good deal of confusion has arisen, in many of the cases upon this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of 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 fulfil: 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" (*s*). 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.

§ 601. In Nichol *v.* Godts (*t*), 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."

(*s*) In Chanter *v.* Hopkins, 4 M. & W. 399. See, also, per Lord Blackburn, in Shand *v.* Bowes, 2 App. Cas. at § 480, *ante*, § 588 a. [One who agrees to buy valves manufactured in Boston is not bound to accept valves manufactured in Pittsburg, although equally useful for the contemplated purpose. King *v.* Rochester, 39 Atl. 256, N. H. (1893). "An agreement to sell a black horse is not ordinarily fulfilled by a tender of a white horse of equal or even of greater value." Iron Foundry *v.* Harvey, 23 N. H. 395, 409. — B.]

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

§ 602. In Shepherd *v.* Kaine (*u*), 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. But in the very similar case of Taylor *v.* Bullen (*x*), 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.

In Allan *v.* Lake (*y*), 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."

In Wieler *v.* Schilizzi (*z*), 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*.

§ 603. In Hopkins *v.* Hitchcock (*a*), 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

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

(*x*) 5 Ex. 779.

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

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

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

having negatived that the mark was of any consequence, the plaintiffs had delivered the goods in conformity with the description in the contract.

§ 604. In Bannerman *v.* White (*b*), the sale was of hops, and there was a known objectionable practice of using sulphur in their growth, and both parties knew that the merchants had notified the growers of their objection to buy such hops. At the time of the sale the buyers inquired, before asking the price, if sulphur had been used, and the seller answered, No. The sale was then made by sample, and the delivery corresponded, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. It was uncontroverted that the defendant would not have bought if the fact had been known to him, and that he could not sell the hops as they were, in his usual dealings with his customers. The jury found that the misrepresentation as to the use of sulphur was not wilful, thus repelling fraud, but that "the affirmation that no sulphur had been used was intended between the parties as a part of the contract of sale, and a warranty by the plaintiff." Erle, C. J., in delivering the decision of the court, said that, in deciding the effect of this finding, "We avoid the term 'warranty,' because it is used in two senses, and the term 'condition,' because the question is, whether the term is applicable. Then the effect is, that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation, and, if it had not been given, the defendant would not have gone on with the treaty, which resulted in the sale. In this sense, it was the condition upon which the defendant contracted." Held, that plaintiff had not fulfilled the condition, and could not enforce the sale.

§ 605. In Josling *v.* Kingsford (*c*), 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.

§ 606. In Azémar *v.* Casella (*d*), the plaintiff sold cotton to the

(*b*) 10 C. B. N. S. 844; 31 L. J. C. P. 28.
(*c*) 13 C. B. N. S. 447; 32 L. J. C. P. 94.
(*d*) L. R. 2 C. P. 431–677 in error; 36 L. J. C. P. 124.

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. A. Casella & Co., the following cotton, viz., $\frac{D\,C}{C}$ 128 bales at 25*d.* per pound, expected to arrive in London per Cheviot, from Madras. The cotton *guaranteed equal to sealed sample in our possession*," etc. The sealed sample was a sample of "Long-staple Salem cotton;" the cotton turned out, when landed, to be not in accordance with the sample, being "Western Madras." The contract contained a clause, "Should the quality prove inferior to the guaranty, a fair allowance to be made." It was admitted that Western Madras cotton is inferior to Long-staple Salem, *and requires machinery for its manufacture different from that used for the latter.* Held, that this was not a case of inferiority of *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.

§ 607. Lord Tenterden held, in two cases (*e*) at Nisi Prius, that a vendor could not recover for books or maps sold by a description or prospectus, if there were any material difference between the book or map furnished and that described in the prospectus.

Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates, and other securities is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.

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

In Young *v.* Cole (*g*), the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds in April, *1836*, and it was shown that, in *1829*, unstamped Guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the Stock Exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. Held, that the defendant was bound to restore the price received; Tindal, C. J., saying that the contract was for real

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

(*f*) 5 Taunt. 488.

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

Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters instead. "It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

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

§ 608. In Gompertz *v.* Bartlett (*i*), 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 (*k*), where the plaintiff bought foreign bills from the defendant, and by the Stamp Act, 1854 (*l*), it was the duty of the seller to cancel the stamp before he delivers, and of the buyer to see that this is done before he receives, and both parties neglected this duty, so that the buyer was unable to recover on the bills, Erle, C. J., and Keating, J., were of opinion that the buyer, who was equally in fault with the vendor under the law, could not avail himself of the principle laid down in Gompertz *v.* Bartlett; but Williams, J., dissented on that point, though the court was unanimous in holding that the purchaser had by his own laches and delay lost all right to complain, under the special circumstances.

In Gurney *v.* Womersley (*m*), a bill of exchange was sold to the plaintiffs, on which all the signatures were forged except that of the last indorser, who had forged all the preceding names, and Bramwell, for defendant, made a strenuous effort to distinguish the case, on the ground that in Jones *v.* Ryde, and Young *v.* Cole, *supra*, the thing sold was *entirely* false and valueless; whereas in this case the last indorser's signature was genuine, and the bill therefore of *some* value. But it was held that a party offering a bill for sale offers in effect an instrument drawn, accepted, and indorsed according to its purport.

§ 609. But it is a question for the jury, whether the thing delivered be what was really intended by both parties as the subject-matter of the sale, although not very accurately described.

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

(*i*) 2 E. & B. 849; 23 L. J. Q. B. 65. The 33 & 34 Vict. c. 97, s. 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.

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

(*l*) 17 & 18 Vict. c. 83, s. 5. See now 33 & 34 Vict. c. 97, s. 24.

(*m*) 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 Company, L. R. 2 Q. B. at p. 587.

Thus, in Mitchell *v.* Newhall (*n*), the sale was of "fifty shares" in a foreign railway company. The buyer refused to receive from the plaintiff, his stock-broker, delivery of a *letter of allotment* for fifty shares. Held, that he was bound by his bargain, proof having been made to the satisfaction of the jury that no shares in the railway had yet been issued, and that letters of allotment were commonly bought and sold as shares in this company on the Stock Exchange. And in Lamert *v.* Heath (*o*) 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."

In Lamond *v.* Davall (*p*), 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 rescisssion 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.

AMERICAN NOTE.

CONDITIONS.

§§ 560–609.

1. This is not the most satisfactory chapter in Mr. Benjamin's excellent work, partly from the fact that he has already discussed one class of conditional sales in Book II. Ch. 3, §§ 318–351 a; partly because many incidents of a sale, which are called "conditions" in England, are in this country generally considered as implied warranties, and their more appropriate place for the American reader is in the following chapter on Warranty; and not a little, also, because, to use his own words, of the "very subtle and perplexing nature" of the subject itself, leading one to discuss here what might with propriety be considered elsewhere. But, following somewhat the order of the author, for want of a better, the first step is always to determine whether or not there *is* any condition in the sale; whether that which is relied upon

(*n*) 15 M. & W. 308. (*o*) 15 M. & W. 487. (*p*) 9 Q. B. 1030.

as a condition is really such, or only a counter agreement or stipulation, in its nature independent, giving a cause of action indeed if it be violated, but not affecting, by its non-performance, the binding nature of the contract upon the other party.

In determining whether certain duties, liabilities, or stipulations, either express or implied, on the one side, are strictly conditions essential to the liability of the other party on his stipulations or promises, or are only independent and separate covenants, the breach of which may give a right of action, or counter-claim, but which does not prevent or extinguish a cause of action against the other, no other rule — worthy of the name of rule — can be laid down than that it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract, and read in the light of surrounding circumstances. Every other rule, suggestion, or principle is useful only as it bears upon this fundamental and controlling criterion. And previous cases are not of much value in deciding upon subsequent contracts of different phraseology. The question does not depend on any particular form of words, or upon any particular collocation of the different stipulations; but the whole contract is to be taken together, and a careful consideration had of the various things to be done, to enable one to decide correctly the order in which they are to be done. This involves the doctrine of dependent and independent covenants, a subject too broad to be discussed in its general aspect here. See Cutter *v.* Powell, 2 Smith's Lead. Cas. 1 and notes. Its application to cases of sales is well illustrated, both as to what are and what are not dependent obligations, by the cases of Goldsborough *v.* Orr, 8 Wheat. 217; Tipton *v.* Feitner, 20 N. Y. 423; Isaac *v.* N. Y. Plaster Works, 67 Ib. 124; Gill *v.* Weller, 52 Md. 8; Kane *v.* Hood, 13 Pick. 281.

2. **Concurrent or Mutual Conditions.** The dependency or independency of conditions is most forcibly illustrated in case of conditions precedent; but to a certain extent, mutual or concurrent conditions are of the same character. It is a familiar law in America that a plaintiff cannot recover on an agreement to buy, unless he is ready and offers to sell and deliver, and so alleges in his declaration. The same rule applies to the buyer, recognized among others by the following cases: Dana *v.* King, 2 Pick. 155; Howe *v.* Huntington, 15 Me. 350; Jones *v.* Marsh, 22 Vt. 144; Swan *v.* Drury, 22 Pick. 485; Gazley *v.* Price, 16 Johns. 267; Smith *v.* Lewis, 26 Conn. 110; Williams *v.* Healey, 3 Denio, 363; Cornwall *v.* Haight, 8 Barb. 327; Campbell *v.* Gittings, 19 Ohio, 347; Summers *v.* Sleeth, 45 Ind. 598; Simmons *v.* Green, 35 Ohio St. 104; Robison *v.* Tyson, 46 Pa. St. 286; Hanson *v.* Slaven, 98 Cal. 377; Leslie *v.* Casey, 59 N. J. L. 6. The rule in regard to the sale of portable articles being that, if by the contract neither time nor place of performance is stipulated, the articles are deliverable on demand, and at the place where they are at the time of sale, viz., the store of the merchant, the shop of the manufacturer, the home or barn of the farmer; and the seller is not in default until the buyer has come and demanded them. Lobdell *v.* Hopkins, 5 Cow. 516; Wilmouth *v.* Patton, 2 Bibb, 280; Phelps *v.* Hubbard, 51 Vt. 489. But where the vendor agrees positively to deliver at a certain future day, he must seek the vendee and actually tender the articles to him, even though the place of delivery was not distinctly mentioned. Barr *v.* Myers, 3 W. & S. 299; Goodwin *v.* Holbrook, 4 Wend. 377; Roberts *v.* Beatty, 2 Pen. & Watts,

63; Hapgood *v.* Shaw, 105 Mass. 276. And see Wisecarver *v.* Adamson, 118 Pa. St. 53.

Having thus considered the general necessity of performing dependent conditions on one side, before any liability to perform arises on the other, let us look at some of the excuses or defences for non-performance, and,—

3. **Obstruction of Performance.** That an obstruction of performance by one party releases the other from performing, or is a waiver of such performance, is too clear to need the citation of authorities. But see Tone *v.* Doelger, 6 Roberts, 256; Fleming *v.* Gilbert, 3 Johns. 528; Wolf *v.* Marsh, 54 Cal. 228; Ketchum *v.* Zeilsdorff, 26 Wisc. 514; Bolton *v.* Riddle, 35 Mich. 13; United States *v.* Peck, 102 U. S. 64; Sullings *v.* Goodyear Dental Co. 36 Mich. 313.

In such cases, if a part of the goods called for by the contract have been delivered, the vendor may recover their value. Hartlove *v.* Durham, 39 Atl. 617, Md. (1898), and cases cited.

4. **Refusal by One Party.** What is the effect of it? No doubt a positive and unqualified refusal by the vendor to fulfil an executory order of sale releases the buyer from his obligation, and he may safely buy elsewhere. Textor *v.* Hutchings, 62 Md. 150; Follansbee *v.* Adams, 86 Ill. 13; Chamber of Commerce *v.* Sollitt, 43 Ill. 519. And it is quite immaterial whether such refusal is made before or after the time of performance fixed by the contract, provided always it is to be fairly understood as a positive refusal, and be continued down to the time when performance is due. McPherson *v.* Walker, 40 Ill. 372; Crist *v.* Armour, 34 Barb. 378. For possibly a withdrawal of the refusal before the time of the performance, and before it had been acted upon by the adverse party, might reinstate the parties in *statu quo*, so that, if the party so refusing should be ready and willing to fulfil when the time of performance arrives, he might have the right to do so. See Westlake *v.* Bostwick, 3 Jones & Sp. 256; Zuck *v.* McClure, 98 Pa. St. 541; Smoot's case, 15 Wall. 36; Coffin *v.* Reynolds, 21 Minn. 456. But whether such refusal *prior* to the time of stipulated performance gives a right of *immediate action* to the other party, or whether he must wait until that time has arrived, is not agreed in the American courts. In some contracts it has been held that a right of action accrues immediately upon an absolute refusal to perform, even though the time of performance has not arrived. Burtis *v.* Thompson, 42 N. Y. 246, a contract to marry. Holloway *v.* Griffith, 32 Iowa, 409, is similar. And see Freer *v.* Denton, 61 N. Y. 496; Howard *v.* Daily, Ib. 374; Shaw *v.* Republic Life Ins. Co. 69 Ib. 293; Fox *v.* Kitton, 19 Ill. 519; Dugan *v.* Anderson, 36 Md. 582; Crabtree *v.* Messersmith, 19 Iowa, 179; Lee *v.* Pennington, 7 Bradw. 248; James *v.* Adams, 16 W. Va. 245; Grau *v.* McVicker, 8 Biss. 13 Fed. Cas. No. 5708; Nichols *v.* Scranton Steel Co. 137 N. Y. 471; M'Cormick *v.* Basal, 46 Iowa, 235.

If a contract of sale is repudiated and "cancelled" by the vendor before the time fixed for its completion, the vendee *may* treat the contract as broken, and sue at once upon it; or he may treat the notice as null, and, after the time of completion arrives, may sue for its non-fulfilment, but he must fulfil all the conditions precedent required by him in the contract. Dalrymple *v.* Scott, 19 Ont. Ap. 477 (1892), carefully examining the authorities.

In Roehm *v.* Horst, 91 Fed. R. 345 (C. C. A.), a firm consisting of three partners contracted to supply H. with 1000 bales of hops, the deliveries to extend through a term of five years. After 600 bales had been delivered, one partner retired from the firm. H. immediately sent notice that he considered his contract cancelled by the dissolution, and should refuse to accept any future deliveries. The firm brought suit at once. It was held, 1, that the dissolution of the firm did not terminate the contract, Lumber Co. *v.* Bradlee, 96 Ky. 494; Fish *v.* Gates, 133 Mass. 441; Holmes *v.* Shands, 27 Miss. 40; and, 2, that the action might be maintained. Hochster *v.* De la Tour is approved, and the general consensus of opinion said to be in accordance therewith. Marks *v.* Van Eeghen, 85 Fed. 853.

But if these cases be sound law as applied to some transactions, it does not necessarily follow that the same rule applies in all contracts of sale. The subject received the most elaborate consideration in the late case of Daniels *v.* Newton, 114 Mass. 530, in which it was held that an absolute refusal of one party to an agreement "ever to take" the real estate he had agreed to buy at a future day would not sustain an action by the vendor *before* the expiration of the time it was to be conveyed; and the authorities were critically examined by Mr. Justice Wells, and Frost *v.* Knight and Hochster *v.* De la Tour, cited by Mr. Benjamin, were not approved. And see Stanford *v.* McGill, No. Dak. (1897), 72 N. W. 938; 38 L. R. A. 760, reviewing the cases at length and disapproving the English doctrine. In the United States courts, as elsewhere, it is well settled that where one party to an executory contract "puts it out of his power" to perform it, the other party may regard it as terminated, and at the *proper time* demand whatever damages he has sustained thereby. United States *v.* Behan, 110 U. S. 339; Lovell *v.* St. Louis Mut. Life Ins. Co. 111 Ib. 274. For it is clear that if one party to an executory contract positively notifies the other party before the time of performance arrives that he never will perform it, or absolutely disables himself from performing it, the other need not go through the useless ceremony of offering to perform it on his part, before he brings an action for the breach. Canda *v.* Wick, 100 N. Y. 127; Bunge *v.* Koop, 48 N. Y. 225; Hawley *v.* Keeler, 53 Ib. 114; Crist *v.* Armour, 34 Barb. 378; Parker *v.* Pettit, 43 N. J. L. 517; Grove *v.* Donaldson, 15 Pa. St. 128; Woolner *v.* Hill, 93 N. Y. 576; Lowe *v.* Harwood, 139 Mass. 135; Reusens *v.* Mexican, etc. 22 Fed. Rep. 522, a valuable case. But the question is, Can he sustain such action *before* the time of performance has arrived? It has never yet been decided by the Supreme Court of the United States that an action will lie for refusal to perform an executory contract brought before the stipulated time of such performance has arrived. See Dingley *v.* Oler, 117 U. S. 503.

But whether a refusal to fulfil a contract before the time of performance has arrived will or will not give the opposite party a right of immediate action for a breach, it is clear that nothing less than a distinct, unequivocal, and absolute refusal will have such effect; a refusal which is treated and acted upon as such by the other party. Dingley *v.* Oler, 117 U. S. 490, a very important case on this point; Gray *v.* Green, 9 Hun, 334; Smoot's case, 15 Wall. 36; Hines Lumber Co. *v.* Alley, 73 Fed. R. 603. Johnstone *v.* Milling, 16 Q. B. Div. 460, contains also a very valuable discussion of this subject. A mere notice of an intention not to perform a contract, given before the time of performance, does not necessarily amount to a breach, until accepted and acted upon by the other party. Zuck *v.* Mc-

Clure, 98 Pa. St. 541. In such case the party receiving the notice may decline to accept the notice as a breach, and insist upon performance. Roebling *v.* Lockstitch Fence Co. 130 Ill. 660; Kadish *v.* Young, 108 Ib. 170.

5. **Impossibility of Performance.** While absolute and inherent impossibility of performance, in its true sense, is always an excuse, as in contracts for the sale of specific property which then has ceased to exist, or which perishes or is destroyed before the time of performance (as in Dexter *v.* Norton, 47 N. Y. 62; Wells *v.* Calnan, 107 Mass. 514; Thomas *v.* Knowles, 128 Mass. 22; Gould *v.* Murch, 70 Me. 288; Thompson *v.* Gould, 20 Pick. 139; McMillan *v.* Fox, 90 Wisc. 173; and cases cited *ante*, p. 89, note), yet it is equally clear that what is often called an impossibility is not legally such, and is no excuse for non-performance. *Disability is a very different thing from impossibility.* A contract to make and deliver a quantity of goods by a stated time may become in one sense impossible by the destruction of the vendor's mill or factory where they are to be made, but that would be no excuse. It a thing is possible in itself to be done, — possible in the nature of things to be done, — a positive contract to do it is binding, though some unforeseen contingency, accident, or calamity may prevent its performance by the promisor. It must be a *real impossibility*, and not merely a very great inconvenience, hardship, or impracticability. See Oakley *v.* Morton, 11 N. Y. 25; Smoot's case, 15 Wall. 36; Booth *v.* Spuyten Duyvil Rolling Mill, 60 N. Y. 487. In Jones *v.* The United States, 96 U. S. 24, a contract to make and deliver a quantity of clothing by a stated time was not completed because the contractor's mill was destroyed by fire, but it was held no excuse. Booth *v.* Spuyten Duyvil Rolling Mill, 60 N. Y. 487, is much like it. So is Summers *v.* Hibbard, 153 Ill. 102. Had the contract been to produce so many goods *in the vendor's own mill*, the destruction of it might have had more effect as an excuse. This implied element or condition in the contract may explain Howell *v.* Coupland, cited by the author, § 570; for the instances of implied conditions which excuse non-performance are numerous in the law, among which is the example cited in the text, that contracts for personal service, even for common labor, are on the implied condition of the continued health or physical ability to perform the service. See Fenton *v.* Clark, 11 Vt. 563; Knight *v.* Bean, 22 Me. 536; Dickinson *v.* Calahan, 19 Pa. St. 227; Fuller *v.* Brown, 11 Met. 440; Caden *v.* Farwell, 98 Mass. 137; Dickey *v.* Linscott, 20 Me. 453; Lorillard *v.* Clyde, 142 N. Y. 456; Harrison *v.* Conlan, 10 Allen, 86, applies the same rule where the *promisee* dies before the personal service of the other party has been fully rendered.

But to return to contracts absolute in their character, and without any implied condition. A contract to furnish lumber by a stated time, which was prevented by a drought which stopped all the sawmills, is broken by non-delivery, and the impracticability of it is no excuse. Eddy *v.* Clement, 38 Vt. 486. In Anderson *v.* May, 50 Minn. 280, there was a contract to sell and deliver beans, but the contract did not provide that they were to be raised upon any particular piece of land. Performance was prevented by early frosts. Held, that the defendant was not excused. Howell *v.* Coupland was distinguished. So of a contract to transport a quantity of corn by a railroad, which could not be done because the government took possession of the railroad for the transportation of army supplies. Bacon

v. Cobb, 45 Ill. 47. So of a contract to transport goods from New York to Missouri in twenty-six days, and the canal by which they were usually transported became impassable by an unforeseen freshet. Harmony *v.* Bingham, 12 N. Y. 99, an important case. Huling *v.* Craig, Add. 342, in 1797, is similar. Contracts to erect buildings by a stated time are broken, although the failure to complete them within the time was wholly owing to destruction of the same by fire or flood when nearly completed, and when too late to finish them by the specified time. Adams *v.* Nichols, 19 Pick. 275; Tompkins *v.* Dudley, 25 N. Y. 272; School Dist. *v.* Dauchy, 25 Conn. 530; School Trustees *v.* Bennett, 27 N. J. L. 514; Dermott *v.* Jones, 2 Wall. 1; Stees *v.* Leonard, 20 Minn. 494. In Gilpins *v.* Consequa, Pet. C. C. 86, Fed. Cas. No. 5452 (1813), it was considered no defence to a contract to deliver a quantity of teas "to be fresh, prime, and of the finest chop," that the season of the year when they were to be delivered was unfavorable to the best teas being in the market. So where a lessee agreed to insure the leased building for a certain sum, and afterwards was unable to procure the insurance, and the building was destroyed by fire, the lessee was held liable for the full amount for which he had agreed to insure. Jacksonville, etc. Railway *v.* Hooper, 160 U. S. 514, 527.

Although a promisor will be held liable where the impossibility might have been foreseen and guarded against in the contract, or where it arises from his own act or default, he will not be held by general words in the contract where the event was not in contemplation of the contracting parties. Chicago, etc. Ry. *v.* Hoyt, 149 U. S. 1, 15.

6. **Sales dependent upon Acts of Others.** Undoubtedly the usual rule in contracts for labor and services, manufacturing, building, etc., applies to sales; and if an act of third persons is made a condition precedent to the sale, or to the liability for payment, it must be performed, or some excuse given for non-performance.

If the condition of the sale be that the article shall accomplish a certain result in the opinion of some third person, his decision, in the absence of fraud, is final. Robbins *v.* Clark, 129 Mass. 145; Nofsinger *v.* Ring, 71 Mo. 149; Flint *v.* Gibson, 106 Mass. 391. And see United States *v.* Robeson, 9 Pet. 319; Conn. Granite Co. *v.* N. Y. etc. Bridge, 32 App. Div. (N. Y.) 83. The necessity of procuring the architect's certificate in building contracts, or that of a justice of the peace in insurance cases, when these conditions are a part of the contract, is clear, and such conditions are very strictly enforced *at law*, here as well as in England. See Smith *v.* Briggs, 3 Denio, 73; Kirtland *v.* Moore, 40 N. J. Eq. 106; Johnson *v.* Phœnix Ins. Co. 112 Mass. 49; Leadbetter *v.* Ætna Ins. Co. 13 Me. 265; Roumage *v.* Mechanics' Fire Ins. Co. 13 N. J. L. 110; Protection Ins. Co. *v.* Pherson, 5 Ind. 417; Noonan *v.* Hartford Ins. Co. 21 Mo. 81; Inman *v.* Western Ins. Co. 12 Wend. 452; Scott *v.* Phœnix Ins. Co. Stuart (Can.), 354.

As to the duty of giving notice of the happening of some contingent event, before the liability of the other party becomes perfect, the rule is familiar enough. If the event is equally open to the knowledge or information of both parties, it is not necessary to give notice; both are bound to take notice. If the fact or contingency is specially or peculiarly within the knowledge or information of the plaintiff, he must give notice before the

liability of the defendant becomes fixed and absolute. Tasker *v.* Bartlett, 5 Cush. 364; Watson *v.* Walker, 23 N. H. 491; Clough *v.* Hoffman, 5 Wend. 500. Of course, if the contract expressly requires notice by one party, it is a condition precedent, whether the other part did or did not know the fact *aliunde*.

7. Sales to arrive. A sale of goods "to arrive," or "on arrival," is conditional or executory in its character. No title passes, and no obligation on either side arises, unless the goods arrive. Shields *v.* Pettie, 2 Sandf. 262; 4 N. Y. 122; Benedict *v.* Field, 4 Duer, 154; 16 N. Y. 595; Reimers *v.* Ridner, 2 Robertson, 22. And see Clark *v.* Fy, 121 N. Y. 470. And if the goods which do arrive are not of the kind or quality stipulated for, the contract is equally at an end. The buyer is, of course, not bound to take them, nor the seller liable for not furnishing them according to the contract. Shields *v.* Pettie, *supra;* Neldon *v.* Smith, 36 N. J. L. 154. For the words "to arrive by" a stated time do not ordinarily import a positive warranty that they shall arrive at that time, but are rather words of condition and description only. Rogers *v.* Woodruff, 23 Ohio St. 632, an excellent case, holding also that oral evidence is not admissible of a custom that those words meant actually "deliverable" at the time stated. And see Russell *v.* Nicoll, 3 Wend. 112. But if there is an express warranty as to the quality of the goods which are to arrive, or that they shall be equal to sample, the warranty is absolute, and not conditioned upon the fact of the arrival of such a quality of goods, and the seller is liable on his warranty if the goods which arrive are not equal to the warranty. Dike *v.* Reitlinger, 23 Hun, 242. In Smith *v.* Pettee, 70 N. Y. 13, the buyer of goods to arrive "by the Christopher" refused to receive them because they arrived by the *St.* Christopher, but, it is hardly necessary to say, unsuccessfully. A sale of goods "to be shipped" in certain months, or by stated routes, is not complied with by shipments in other and later months and by other conveyances. Bidwell *v.* Overton, 13 N. Y. Supp. 274; Hill *v.* Blake, 97 N. Y. 216. But the contract may require shipment in a vessel named, and allow transshipment to another vessel, in which the goods arrive, as in Harrison *v.* Fortlage, 161 U. S. 57.

In connection with a sale of goods to arrive, the question often arises, What is meant by the sale of a "cargo" to arrive by a certain ship? The general understanding of that term is, "*all that the vessel is capable of carrying;*" the entire load of the vessel. The buyer is entitled to all she in fact carries, and is not bound to accept less. Barrowman *v.* Drayton, 2 Ex. Div. 15; Flanagan *v.* Demarest, 3 Robertson, 173. And a sale of a "cargo about 300 or 350 tons" is complied with by a delivery of all the vessel named could carry, when seaworthy and in good order, although it be only 227 tons. Pembroke Iron Co. *v.* Parsons, 5 Gray, 589. In Standard Sugar Refinery *v.* Castano, 43 Fed. Rep. 279, a sale of a cargo of sugar of "700–800 tons" was held complied with by a delivery of 700 tons, although the whole cargo was 841 tons.

8. Successive Deliveries. The preponderance of reason as well as of authority in America is in favor of the rule that a failure to deliver the first instalment of goods according to an entire contract, if unexcused or unwaived, is such a breach of the contract as to excuse the buyer from receiving any successive instalment, and discharges him from any liability for not

accepting the balance when tendered by the vendor. No doubt, for some purposes, these contracts for successive deliveries and successive payments may be considered as so many separate contracts; but still, for other purposes, they are entire, and a wrongful breach of one part may authorize a complete rescission of the remainder. This question received the most careful consideration both by counsel and court in the late case of Norrington *v.* Wright, 115 U. S. 188 (1885), in which the critical judgment of Mr. Justice Gray is worthy of careful perusal. There the contract was for 5000 tons iron rails, to be shipped from a European port or ports "at the rate of about 1000 tons per month, beginning February, 1880, but the whole to be shipped before August 1, 1880, at $45 per ton, to be paid for in cash on presentation of bills, with the custom-house certificate of weight." The vendor shipped only 400 tons in February, which arrived and was paid for in March, before any knowledge that no more had been shipped; 885 tons in March, which arrived in May; and 1571 tons in April, which had not arrived in May when the vendee first learned of the amount shipped in February, March, and April, and declined to accept the March and April shipments, because not in accordance with the contract. Thereupon the vendors, having shipped the whole 5000 tons before August 1, sued the vendees for not accepting; the price of iron having steadily fallen in the market since the first shipment. It was held that the failure to ship "about 1000 tons" in February and March released the buyer from the contract, and that the receipt of and payment for 400 tons shipped in February, before he knew of the failure to ship the quantity stipulated for, was not a waiver of his rights. See, also, The Elting Woollen Co. *v.* Martin, 5 Daly, 417, to the same effect. This subject had previously been elaborately examined in King Philip's Mills *v.* Slater, 12 R. I. 82 (1878), in which the contract was for the manufacture of cotton goods, to be delivered in lots of 1000 pieces each, of a certain "width, weight, and quality." Two lots of 1000 pieces were delivered, but they were deficient in width and weight; and it then appearing that the seller could not make the goods as ordered without obtaining new machinery, the buyer gave him notice of rescission; but the seller, having succeeded in making the other goods of the description called for by the contract, sought to recover of the buyer for not accepting the same, but the court held that the failure in the earlier deliveries excused the buyer from accepting any subsequent goods, though conformable to the order. The opinion of Mr. Justice Potter in this case is also valuable. Possibly the deficiency in the quality of the goods was entitled to more weight than mere delay in delivery. In Bollman *v.* Burt, 61 Md. 415, the contract was to deliver 200 tons of pig iron, "in quantities of about 18 tons per month." After *several* failures to deliver according to the contract, the buyer was held justified, unless he had waived his right, in declaring the contract at an end; and it was thought that an action at law by him against the vendor for damages would not give him adequate compensation for such breaches, approving Withers *v.* Reynold and Curtis *v.* Gibney, 59 Md. 131, and distinguishing Maryland Fertilizing Co. *v.* Lorentz, 44 Ib. 218, on the ground that in that case the failure to deliver had been "condoned."

In Catlin *v.* Tobias, 26 N. Y. 217 (1863), it was held that if a vendor, under a contract for the sale and delivery of a stated quantity of goods in three successive months, delivers a less quantity in one month, which the vendee receives and uses before knowing that the whole will not be delivered,

this is such a breach of the contract on the part of the vendor that he cannot recover even for the value of that which has been delivered and used by the vendee. And see Smith *v.* Brady, 17 Ib. 173. *A fortiori*, it would seem he could not compel the vendee to receive and pay for any subsequent instalments. See Welsh *v.* Gossler, 89 N. Y. 540; Hill *v.* Blake, 97 Ib. 216; Lehigh Zinc Co. *v.* Trotter, 42 N. J. Eq. 678.

Time is often of the essence of commercial contracts, as in the sale and delivery of goods the actual use of which is important, or the fluctuations in the price or salability of which are very rapid. See Jones *v.* United States, 96 U. S. 24; Pope *v.* Porter, 102 N. Y. 366; Slater *v.* Emerson, 19 How. 224; Filley *v.* Pope, 115 U. S. 213; Brusie *v.* Peck, 54 Fed. R. 820; Cresswell *v.* Martindale, 63 Fed. R. 84. See, also, Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, in which Mr. Justice Gray says: "When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of the iron and the time of shipment are essential terms of the agreement: the seller does not perform his agreement by shipping part of that amount at the time appointed, and the rest from time to time afterwards, and the buyer is not bound to accept any part of the iron so shipped." See, further, under what circumstances time is or is not of the essence of the contract, Brown *v.* Guarantee Trust Co. 128 U. S. 403 (1888).

In Rouse *v.* Lewis, 2 Keyes, 352, 4 Abb. App. Dec. 121, L. agreed to build two mowing-machines for R., to be delivered within two weeks, and R. paid for them in advance. They were not done until a week after the stipulated time, when R. refused to receive them, and recovered back his purchase-money. On the same principle it was held in Woodward *v.* Burton, 113 Mass. 81, that the purchaser of a building, to be removed in five days, forfeited the same if he did not remove it within that time, although he had paid for it in advance; and the vendor was held not liable in trover for reselling it. And see Holton *v.* Goodrich, 35 Vt. 19. But this was thought in Davis *v.* Emery, 61 Me. 140, to be such a strict application of the law of conditions that four out of seven judges declined to follow it, holding that the buyer did not lose his property, but was merely liable in damages for not complying with the terms of his contract to remove the property within the stipulated time.

There are, however, many respectable authorities opposed to Norrington *v.* Wright, before cited, which maintain that a failure to deliver one instalment, at the time or in the quantity stipulated, does not in and of itself release the buyer from the contract, or his obligation to receive the rest when tendered according to the contract. See Myer *v.* Wheeler, 65 Iowa, 390; Osgood *v.* Bauder, 75 Iowa, 550. Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351, is a leading case on this side of the question. And see a very interesting note to the case of Norrington *v.* Wright in the Circuit Court by Mr. Landreth, of the Philadelphia bar, 30 Am. Law Reg. 398, in favor of the same view. So in Blackburn *v.* Reilly, 47 N. J. L. 290 (where Mersey Steel Co. *v.* Naylor, 9 App. Cas. 434, was fully approved), the vendor delivered several cartloads of tan-bark, which the vendee received and paid for; but on trying to use it the vendee found it, as he said, unfit for use, and notified the vendor not to send any more, "as he was overcrowded," but subsequently in a personal interview adding that it was unmerchantable. In a suit by the vendor for not taking the rest of the bark, the failure to deliver the quality required was held no such

breach of the contract as to excuse the vendee from his liability to take the balance; but there are some reasons to suppose there was a waiver here. Morgan *v.* McKee, 77 Pa. St. 228; Scott *v.* Kittanning Coal Co. 89 Ib. 237, also support the same view. But the buyer's right to rescind because of non-delivery of one instalment was denied in the first case because it had been waived by delay for an unreasonable time in asserting it, viz., about a month; and in the second, where the failure was in delivering the proper quality of coal, the rescission was not allowed, because the buyer had accepted, used, and paid for the imperfect coal, and so could not object to receiving the rest merely because some of the prior coal had not been according to contract. And see a similar case in Miller *v.* Moore, 83 Geo. 685; Vallens *v.* Tillman, 103 Cal. 187, supports this view. See further, as to waiver, Hasberg *v.* McCarty, 127 N. Y. 655; Marston *v.* Simpson, 54 Cal. 189. In Clark *v.* Wheeling Steel Works, 53 Fed. R. 494, there was a contract for the sale of steel billets, to be delivered by instalments. The contract was held to be entire, but the facts showed a waiver by the buyer of his right to rescind.

There must be evidence of an intention by the defaulting party to abandon his contract, otherwise the party not in default remains bound. Otis *v.* Adams, 56 N. J. L. 38, approving Blackburn *v.* Reilly; Trotter *v.* Hecksher, 40 N. J. Eq. 612; Gerli *v.* Poidebard Silk Mfg. Co. 57 N. J. L. 432, approving Blackburn *v.* Reilly, and questioning Norrington *v.* Wright. (Three judges dissented.) And see 9 Harvard L. Rev. 148.

Conversely, the refusal of the buyer to receive and accept one instalment may release the vendor from his obligation to deliver more. In Higgins *v.* Delaware, etc. R. R. Co. 60 N. Y. 553, the defendant, in September, 1870, sold the plaintiff by auction 100 tons of coal, which by the terms of the sale the purchaser was to take away in October following, or, if he failed to do so, the seller had his option to deliver no more, and to retain the earnest-money paid on the day of sale, or to resell the coal for the buyer's account and risk. The plaintiff paid for the coal, and the defendant was ready and willing to deliver it in October and November, but the plaintiff did not call for it until the following February, when, in consequence of a strike among the coal-miners, the defendant was unable to deliver it. It was held that, under the circumstances, the demand for the coal in October was a condition precedent, and relieved the seller of his obligation to deliver the coal. In Haines *v.* Tucker, 50 N. H. 307, the plaintiff sold the defendant 5000 bushels of malt, which the defendant was to accept and pay for at the rate of 1000 bushels per month. In fact the defendant did not call for, and the plaintiff did not deliver, though ready and willing to do so, quite 1000 bushels in three months, and the plaintiff requested him to accept and pay for the malt according to the original contract, which the defendant positively refused to do, malt having fallen in value; and the plaintiff was allowed his suit for damages for not accepting, viz., the difference between the contract price and the market price; and it was held unnecessary for him to set apart 1000 bushels every month and offer to deliver the same. In Providence Coal Co. *v.* Coxe Bros. 19 R. I. 380, defendants contracted to sell 10,000 tons of coal, one barge load to be shipped immediately, the balance in equal monthly proportions before February following. The plaintiffs did not take the coal, which the agreement stated was to be shipped during the months from July to December. Their failure to do so was held to be a breach which justified the defendants in cancelling the contract. It

was also held that the contract was entire. This question received careful examination in Cresswell Ranch Co. *v.* Martindale, 63 Fed. R. 84 (C. C. A.). There the vendor agreed to deliver 5021 steers, in lots of about 1000 per week, the buyer having the right to reject any steers which weighed less than 900 pounds each. Three lots were delivered and paid for. When the fourth lot was tendered, the buyer accepted and paid for 698 steers, but rejected the remainder on the ground that they weighed less than 900 pounds each. He was mistaken in this estimate of their weight. The vendor refused to deliver any more cattle, claiming that buyer had broken the contract. In a suit by him for damages, the lower court ruled that if he rejected the 282 steers in good faith, believing that they were under weight, his action did not justify the vendor in refusing to deliver the remaining lots. On appeal it was held that the contract was entire, and that the vendee's refusal to receive and pay for the 282 steers, although made in good faith, was none the less a breach of the contract which justified the vendor in refusing to deliver the remaining lots.

9. Successive Payments. It does not so readily follow *that a failure to pay* for one instalment, when delivered according to the contract, equally releases the vendor from delivering the balance, since prompt payment is not necessarily so important or material a feature in the contract as prompt delivery. Its breach may be more readily compensated by a suit for the amount, and interest from the time of default; the damages are liquidated and certain. Time of payment is naturally not so much of the "essence of the contract" as time of delivery. It may be or it may not be. Neglect in making payment may or may not be consistent with a desire and intention on the part of the buyer to really fulfil the contract, or else to pay the equivalent. It may more easily result from forgetfulness or neglect. If the circumstances show that the buyer not only fails to pay for the first instalment, but does not intend to pay for any more if he can help it, this may show such a repudiation and abandonment of the contract on his part as to justify the vendor in refusing to deliver any more; and this distinction between prompt payment and prompt delivery may tend to reconcile some (perhaps not all) of the conflicting cases on this subject. This is what was really decided in the great case, in the House of Lords, of Mersey Steel Co. *v.* Naylor, 9 App. Cas. 434 (1884), in which the failure to pay was owing to a misunderstanding merely, and not to a wanton and wilful refusal to conform to any plain stipulation of the contract. In conformity with this distinction, it was held, in Midland Railway Co. *v.* Ontario Rolling Mills, 10 Ont. App. 677 (1884), that a refusal by the buyer to pay a draft drawn by the seller for a portion of the goods, on the erroneous ground that he had not received that quantity, would not justify the seller in treating the contract as repudiated, and himself as relieved therefrom; and Freeth *v.* Burr, and Mersey Steel Co. *v.* Naylor, 9 App. Cas., were fully approved. See Hime *v.* Klasey, 9 Bradw. 166, 190. In like manner, in Winchester *v.* Newton, 2 Allen, 492 (1861), the Supreme Judicial Court of Massachusetts held that a refusal by the vendee to pay for a portion which had been delivered, on the erroneous ground that the time for such payment had been extended by a supplementary agreement, did not necessarily show an abandonment of the contract, or any "prospective refusal" of its terms, so as to release the vendor from delivering the balance; and he was held liable to the vendee

for not doing so. This is an instructive case, and distinguishes it from Withers *v.* Reynolds, 2 B. & Ad. 822. The defendant in the above action had previously recovered of the plaintiff for the price of a portion of the goods before the whole were delivered. See Newton *v.* Winchester, 16 Gray, 208. Shinn *v.* Bodine, 60 Pa. St. 182, sometimes cited as supporting this view, really turns upon another point. The defendant there had agreed to deliver 800 tons of coal, at $6 per ton, on board vessels as sent for during months of August and September. No time of payment was mentioned in the contract; and the court held the contract an entire one, and that the buyer was not bound to pay for any until the whole was delivered, and consequently that his refusal to pay for the first cargo as delivered was not a breach of the contract, and therefore no excuse to the vendor for not delivering the balance according to the contract; and he was held liable for not doing so. A similar remark may be made of West Republic Mining Co. *v.* Jones, 108 Pa. St. 55 (1885). See Gill *v.* Benjamin, 64 Wis. 362; Palmer *v.* Breen, 34 Minn. 39. In Erwin *v.* Harris, 87 Geo. 333 (1891), it was held that a seller of five carloads of oats, who had shipped two carloads, was not justified in refusing to ship the remainder, merely because the buyer refused to pay the vendor's draft for the first two carloads until he had an opportuuity to inspect them. There was no agreement for payment by instalments. Refusing to deliver an instalment of goods until a former instalment had been paid for was held not to be a breach of contract on part of vendors in Raabe *v.* Squier, 148 N. Y. 81.

On the other hand, there is abundant authority in America as in England that, if the buyer not only refuses to pay for one instalment, *but puts his refusal on such ground as justifies the inference that he repudiates the entire contract*, or insists upon new terms different from the original agreement, the vendor may be released from any subsequent delivery. Thus in Stephenson *v.* Cady, 117 Mass. 6, C. sold S. two lots of yarn, by two successive agreements, payable on delivery, and by the terms of the contracts the delivery under the second was to commence when all had been shipped under the first. The whole of the first having been delivered and payment demanded, S. refused to pay "unless C. would give security for the entire fulfilment of the contracts," which C. declined to do, and did not ship any under the second agreement. Held, that S.'s refusal to pay for the yarns on the ground stated would justify the inference that he did not himself intend to be bound by the original contract, and so he could not hold the other liable for non-completion of it. Curtis *v.* Gibney, 59 Md. 131, is much like it. In McGrath *v.* Gegner, 77 Md. 331, the contract was for 200,000 bushels of oyster shells to be delivered between September and May following, all shells delivered during a week to be paid for on the Monday following. Defendants delivered the shells from September until the end of December, and then refused to deliver any more, the plaintiff having made no payments. Held, that the defendants were not liable for refusing to deliver more shells. So a refusal to pay for one instalment because of an alleged counter-claim for damages, for some previous default of the vendor's in another matter, may justify the vendor in rescinding. Bradley *v.* King, 44 Ill. 339. In Rugg *v.* Moore, 110 Pa. St. 236 (1885), the buyer of six carloads of corn refused to pay for the second carload (as he was bound to do), "because he wanted to see if the vendor would ship all the corn purchased." As he did not ship any more after receiving this

word, the buyer sued for non-delivery; but it was held that the vendor was justified in refusing to send any more corn, and many cases were cited. A continued refusal or neglect to pay, by one who is pecuniarly irresponsible, and where evidently payment is of the essence of the contract, might well excuse the other party from continuing to send and so increase the indebtedness of the buyer. Stewart *v.* Many, 7 Bradw. 508, furnishes an excellent illustration. See, also, Reybold *v.* Voorhees, 30 Pa. St. 116; Hess Co. *v.* Dawson, 149 Ill. 138; Stokes *v.* Baars, 18 Fla. 656; Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92; Cresswell Ranch Co. *v.* Martindale, 63 Fed. Rep. 84 (1894); Branch *v.* Palmer, 65 Geo. 210; Landéche *v.* Sarpy, 37 La. An. 835; Dwinel *v.* Howard, 30 Me. 258; Robson *v.* Bohn, 27 Minn. 333; Florence Mining Co. *v.* Brown, 124 U. S. 385, where the buyer became insolvent, and unable to pay for the prior instalment. A refusal to pay, accompanied by a refusal *to receive and accept* any more goods, even if tendered according to the contract, would be still more satisfactory evidence of a repudiation or abandonment of a contract, and authorize the vendor to treat it as no longer binding on him. See Fletcher *v.* Cole, 23 Vt. 114; Haines *v.* Tucker, 50 N. H. 309.

10. **Sales on Trial.** In sales on trial, or a delivery with a right to buy if one likes, the party has a reasonable time for trial, if none is expressly mentioned, and until that time, or the expiration of the limited time, the title and risk is in the vendor. Hunt *v.* Wyman, 100 Mass. 198, an important case, where the horse, purchased on trial, ran away and injured himself before a reasonable time for trial had elapsed; Lyons *v.* Stills, 97 Tenn. 514, is similar; Mowbray *v.* Cady, 40 Iowa, 604; Pitt's Son's Man. Co. *v.* Poor, 7 Bradw. 24; Hall Machine Co. *v.* Brown, 82 Tex. 469. Such sale may ripen into an absolute sale if the article be kept and used beyond the time allowed for the trial, or for an unreasonable time, and no notice is given to the vendor. Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Fairfield *v.* Madison Manuf. Co. 38 Wisc. 346; Dewey *v.* Erie, 14 Pa. St. 211; Spickler *v.* Marsh, 36 Md. 222; Prairie Farm Co. *v.* Taylor, 69 Ill. 440; Thompson Electric Co. *v.* Brush Swan Co. 31 Fed. Rep. 536; Golden Gate Co. *v.* Caplice, 23 Jones & Sp. 439; Aultman *v.* Theirer, 34 Iowa, 272; Kahn *v.* Klabunde, 50 Wisc. 235; Butler *v.* School District, 149 Pa. St. 355; Turner *v.* Machine Co. 97 Mich. 174; Columbia Rolling Co. *v.* Beckett Foundry Co. 55 N. J. L. 391. Whether the time within which the article was returned is a reasonable time is for the jury. Keeler *v.* Jacobs, 87 Wisc. 545. As to the duty of giving the vendor notice of the result of the trial, see Gibson *v.* Vail, 53 Vt. 476; Smalley *v.* Hendrickson, 29 N. J. L. 371; Aiken *v.* Hyde, 99 Mass. 183.

11. **Sale or return.** A purchase with a right of return differs somewhat from a sale on trial, since in the former the title and risk immediately pass to the vendee with a right to resell, and an obligation on the vendor to rebuy within the time stipulated for the return, or within a reasonable time if none be mentioned. Dearborn *v.* Turner, 16 Me. 17; McKinney *v.* Bradlee, 117 Mass. 321; Buswell *v.* Bicknell, 17 Me. 344; Perkins *v.* Douglas, 20 Me. 317; Southwick *v.* Smith, 29 Me. 228; Walker *v.* Blake, 37 Me. 373; Crocker *v.* Gullifer, 44 Me. 491; Stevens *v.* Cunningham, 3 Allen, 491; Martin *v.* Adams, 104 Mass. 262; Scroggin *v.* Wood, 87 Iowa, 497; Foley *v.* Felrath, 98 Ala. 176. In Gay *v.* Dare, 103 Cal.

454, a bank sold one hundred shares of stock under an agreement that the buyer might return the same within a year and receive back the price paid and ten per cent. interest. The bank became insolvent and refused to take back the stock. Thereafter an assessment to satisfy debts was levied on the stock. The buyer was held entitled to recover the price of the stock, interest at the agreed rate, and the amount of assessments.

If the right of return is not duly exercised, and the property is retained, the right is forfeited, and the sale becomes absolute, like any other sale. Ray *v.* Thompson, 12 Cush. 281; Jones *v.* Wright, 71 Ill. 61; Childs *v.* O'Donnell, 84 Mich. 533; McCormick Machine Co. *v.* Martin, 32 Neb. 723; Gale Harrow Mfg. Co. *v.* Moore, 46 Kans. 324; Minnesota Thresher Mfg. Co. *v.* Lincoln, 4 No. Dak. 410; Henderson *v.* Wheaton, 139 Ill. 581; House *v.* Beak, 141 Ill. 290, where the goods were retained over three years; Palmer *v.* Banfield, 86 Wisc. 441; Forsaith Machine Co. *v.* Mengel, 99 Mich. 280; Brown *v.* Ellis, Ky. (1898), 45 S. W. 94. The right to return is forfeited when the buyer fails to give written notice of the defects as the contract requires. Fahey *v.* Esterley Machine Co. 3 No. Dak. 220; Sandwich Mfg. Co. *v.* Feary, 34 Neb. 411; or when he refuses to allow the vendor to repair the defect, when the contract gives the latter that right; McCormick Machine Co. *v.* Brower, 88 Iowa, 607; or when the buyer mortgages the property; In re Ward's Estate, 57 Minn. 377. But retention of the property does not cut off the right of action on a warranty, where one has been given. Fitzpatrick *v.* Osborne, 50 Minn. 261. Compare Moline Plow Co. *v.* Rodgers, 53 Kans. 743, a sale with option by vendor to retake unsold goods. Held, that until option was exercised title was in vendee, and goods were subject to attachment by his creditors.

And under the English Sale of Goods Act of 1893, if the buyer pledges the goods to another, he so far "adopts the transaction that a good title passes to the pledgee, and the original owner cannot recover them of such pledgee." Kirkham *v.* Allenborough [1897], 1 Q. B. 201. See *ante*, p. 7.

12. **Sales to be satisfactory.** This question arises more frequently in contracts to make an article according to some special order than in ordinary sales of what is already on hand, subject to the inspection and examination of the buyer. And in the former cases it is clear that a condition, that the article to be made shall be satisfactory to the buyer, is a valid condition, and if it is not so, and the article is not accepted, the vendor has no remedy. It is immaterial whether the article does or does not conform to the order; the other is not bound to accept, or to be satisfied. Brown *v.* Foster, 113 Mass. 136, a suit of clothes; McCarren *v.* McNulty, 7 Gray, 139, a bookcase; Zaleski *v.* Clark, 44 Conn. 218, a plaster bust; Gibson *v.* Cranage, 39 Mich. 49, a portrait; Hoffman *v.* Gallaher, 6 Daly, 42, also a portrait; Gray *v.* Central R. R. Co. 11 Hun, 70, a steamboat; Goodrich *v.* Van Nortwick, 43 Ill. 445, a fanning-mill; McCormick Machine Co. *v.* Chesrown, 33 Minn. 32, a harvester; Hartman *v.* Blackburn, 7 Pitt. Leg. Journal, 140 (1859), a set of teeth; Exhaust Ventilator Co. *v.* Chicago R. R. Co. 66 Wisc. 218, exhaust-fans; Warder *v.* Whitish, 77 Wisc. 434; Seeley *v.* Welles, 120 Pa. St. 69; Stulz *v.* Loyalhanna Co. 131 Ib. 273; Platt *v.* Broderick, 70 Mich. 580, and cases cited; Sulsbury Manuf. Co. *v.* Chico, 24 Fed. Rep. 893, a steam-engine; Hallidie *v.* Sutter St. R. R. Co. 63 Cal. 575, a steel rope; Wood Reaping Machine Co. *v.* Smith, 50 Mich. 565, an agricultural machine; Osborne *v.* Francis, 38

W. Va. 312, a binder, where the question is examined at length, and many cases cited; Pierce *v.* Cooley, 56 Mich. 552, a spoke machine; McClure *v.* Briggs, 58 Vt. 82, an organ, in which the court say the buyer was bound to give the article a fair trial; but if he did, and was really dissatisfied, and his dissatisfaction was real and unfeigned, honest and not pretended, it is enough, and the vendor cannot recover. This is the real doctrine of Hartford Manuf. Co. *v.* Brush, 43 Vt. 528, and of Daggett *v.* Johnson, 49 Ib. 345, although some expressions used in them have been thought to be more favorable to the vendor; but in those cases the words of the contract might have imposed on the buyer the duty of giving the articles a fair trial. And see Manny *v.* Glendinning, 15 Wis. 50; School Furniture Co. *v.* Warsaw, 130 Pa. St. 93. A warranty that the thing sold shall be "satisfactory *or* do what is claimed for it," is complied with if it does what is claimed for it, whether it be satisfactory or not to the purchaser. Clark *v.* Rice, 46 Mich. 308. And see Hawkins *v.* Graham, 149 Mass. 284. A provision that the buyer must give notice of dissatisfaction within five days, or the sale will be considered absolute, is valid and binding. Aultman *v.* Wykle, 36 Ill. App. 293. Keeping and using the article may estop the buyer from setting up a want of satisfaction. Campbell Press Co. *v.* Thorp, 36 Fed. Rep. 414; C. & C. Electric Co. *v.* D. Frisbie Co. 66 Conn. 67. (And see note, *post*, §§ 699–705, Acceptance.)

This rule, requiring full satisfaction before *any* recovery can be had, may not be so rigidly enforced in contracts to make repairs, or do other work *on another's real estate*, to his satisfaction or acceptance. In such cases there is more reason in allowing the plaintiff to recover, on a *quantum meruit*, what his work was reasonably worth to the defendant, although not satisfactory, for it has become attached to and inseparable from the latter's estate, and the plaintiff cannot be put *in statu quo*. See Walker *v.* Orange, 16 Gray, 193; Atkins *v.* Barnstable, 97 Mass. 428; Iron Co. *v.* Best, 14 Mo. App. 503; Sloan *v.* Hayden, 110 Mass. 141; West *v.* Suda, 69 Conn. 60; Doll *v.* Noble, 116 N. Y. 230. This distinction may sustain the decision in Duplex Safety Co. *v.* Garden, 101 N. Y. 387, a contract to alter the boilers in the defendants' premises, to be paid for when the defendants were satisfied that, as changed, the boilers were a success. The alterations were made and used for some time, without objection or complaint, and the plaintiff was allowed to recover the full price. In Singerly *v.* Thayer, 108 Pa. St. 291, it seems to be held that a person who had put an elevator in another's building, "warranted satisfactory in every respect," could not recover anything if the article was not satisfactory to the buyer, even though he ought to have been satisfied with it. And see a valuable note to that case in 34 Am. Law. Reg. 18, by Mr. Charles Chauncey Savage, of the Philadelphia bar. See Howard *v.* Smedley, 140 Pa. St. 81, ruled by Singerly *v.* Thayer.

The latter part of this chapter, on Conditions, Descriptions, etc., will be considered under the next head of Implied Warranty, where the American courts generally place it. The Canadian authorities, however, follow the English, and consider a failure to conform in identity to be only a breach of condition. Hedstrom *v.* Toronto Car Wheel Co. 31 Up. Can. C. P. 475.

PART II.

VENDOR'S DUTIES.

CHAPTER I.

WARRANTY.

SECTION I. — EXPRESS WARRANTY.

Sect.

What is warranty 610
Antecedent representations . . . 610
Warranty after sale requires new consideration 611
No warranty of quality implied by mere fact of sale 611
Caveat emptor is general rule . . . 611
Many exceptions to the rule . . . 611
Warranty of title 612
No special form of words necessary to create a warranty 613
Whether a warranty was intended by a representation made, is a question of fact for the jury 613
Interpretation of express warranties . 614
Examples of construction of express warranty 615
General warranty does not extend to defects apparent on simple inspection . 616
Meaning of "soundness" in warranty of horses 619
Defects which have been held to constitute unsoundness 620
Parol evidence inadmissible to prove warranty where sale is in writing . 621
Warranty of future soundness . . 623
Warranties by agents, general rule . 624
Servant of seller, who is not a dealer in horses, has no implied authority to warrant a horse 625
Aliter, where the sale is at a fair . . 625
Or where the seller is a horse dealer . 626
Or where the seller is a person who, from the nature of his business, buys and sells horses from time to time . 626

SECTION II. — IMPLIED WARRANTY OF TITLE.

Exists in executory agreements . . 627
Is implied when vendor affirms the chattel to be his 627
This affirmation may be implied from vendor's conduct, or from the nature and circumstances of the sale . . 627
If vendor knows he has no title, and conceals that fact, he is liable for the fraud 627
Only one controverted question . . 628
Discussion of the subject, and review of the authorities 628
Submitted that the general rule is now changed 639
Decisions in America on this point . 641
Civil law 642
French law 643

SECTION III. — IMPLIED WARRANTY OF QUALITY.

Caveat emptor is general rule . . 644
Rule without exception where the sale is of an existing specific chattel which buyer has inspected 644
Warranty of quality implied where goods are supplied to order . . 645
Where chattel sold by description, it is not warranty but condition . . 645
Warranty implied on sale by sample . 648
All sales where samples are shown are not necessarily sales by sample . . 649
Sample shown by manufacturer must be taken as free from secret defects . 651
Buyer's right of rejection after inspection 651
Ineffective inspection is no inspection, if caused by vendor's fault . . . 651
Various rights of buyer when goods not equal to sample 652
Buyer cannot accept part and reject part of an entire lot 652
Buyer's duty when goods not equal to sample 652
Buyer not bound to return goods, but must give seller notice of rejection . 652

	Sect.
American law as to sale by sample	653
Average sample	654
Warranty implied from usage	655
Warranty that goods are merchantable	656
How far the implied warranty extends to depreciation during transit	659
Warranty does not extend to the packages in which the goods are contained	660
Implied warranty on sale of goods by a manufacturer that goods are of his own make	660
Implied warranty where an article is bought for a special purpose known to vendor and buyer relies on vendor's skill in supplying it	661
Warranty extends to latent defects	661 a
Cases of sales of provisions	662
Sale of animals infected with disease	664
Implied warranty is excluded where there has been an express warranty given	666
On a sale of goods by sample, there may be an implied warranty that the goods are also merchantable	667
No implied warranty in favor of a *third person*	668
The existence of the thing sold is the subject not of warranty, but of condition	669
Is there an implied warranty in sale of provisions?	670
Submitted that there is not	672
Sale of Food and Drugs Act	672 a
Implied warranty resulting from marks on packages under Merchandise Marks Act, 1887	673
On sale of chain cables under 37 & 38 Vict. c. 51	673
Law in America	673 a

SECTION I. — EXPRESS WARRANTY.

§ 610. A WARRANTY in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, *forming part of the contract* by the agreement of the parties express or implied (*a*). It follows, therefore, that antecedent 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. 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

(*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.

(*b*) 15 C. B. 130; 23 L. J. C. P. 162; and see per Martin, B., in Stuckey *v.* Bailey, 1 H. & C. 405; 31 L. J. Ex. 483; and Camac *v.* Warriner, 1 C. B. 356.

the auctioneer put up the horse without warranty. But all the judges held that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse; that it was a representation of the seller's opinion and judgment about the horse, for which he could not be made responsible if he was honest when expressing it. See further, as to innocent misrepresentation, *ante*, Book III. Ch. 2.

§ 611. It also follows from what precedes, that a warranty given after a sale has been made is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given (*c*).

It further follows, and such is the general rule of law, that no warranty of the *quality* of a chattel is implied from the mere fact of sale. The rule in such cases is *caveat emptor*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself (*d*), and has no remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent. To this rule there are many exceptions (*e*).

§ 612. In regard to warranty of *title*, inasmuch as it is an essential element of the contract of sale that there should be a transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that, by the very act of selling the chattel, the vendor undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell, and it is believed that such is the true rule of law, but the question is still open to doubt, as will presently be shown.

§ 613. 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*).

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

(*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. 928; Morley *v.* Attenborough, 3 Ex. 500; Ormrod *v.* Huth, 14 M. & W. 664; Hall *v.* Conder, 2 C. B. N. S. 22; 26 L. J. C. P. 138 and 288; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J. C. P. 162.

(*e*) *Post*, Warranty of Quality, §§ 644 *et seq.*

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

(*g*) 1 Lord Raym. 593; 1 Salk. 210.

(*h*) 3 T. R. 51, at p. 57; 2 Sm. L. C. p. 74 (ed. 1887).

(*i*) See, also, Power *v.* Barham, 4 A. & E. 473; 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.

And in determining whether it was so intended, a decisive test is, whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter not (*j*).

But in Chalmers *v.* Harding (*k*), the Exchequer of Pleas held, that a statement to a farmer by the vendor, who was the patentee's agent for sale of an agricultural machine, that it would "cut wheat, barley, oats, etc., sufficiently," was not a warranty, but a mere representation of Wood's Patent Reapers generally.

This intention is a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case, as will appear *passim* in the authorities to be reviewed (*l*).

§ 614. In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect, and in some cases, even where the alleged warranty was expressed in writing, it has been left 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.*

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 Denham, 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.

162; Taylor *v.* Bullen, 5 Ex. 779; Powell *v.* Horton, 2 Bing. N. C. 668; Allan *v.* Lake, 18 Q. B. 560; Simon *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.

(*j*) Per Buller, J., in Pasley *v.* Freeman, 3 T. R. 51; Power *v.* Barham, 4 A. & 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; [Powell *v.* Chittick, 89 Iowa, 513, 517. — B.]

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

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

(*m*) 2 Esp. 572.

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

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

§ 615. In a sale of "a horse, five years old; has been constantly driven in the plough, warranted," the warranty was held to refer to soundness only (*p*); and where the sale was in these words, "Received £10 for a gray 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*).

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 bought the pictures believing them, from the plaintiff's representation, to be genuine; for if so, he was not bound to take them unless genuine.

In Wood *v.* Smith (*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*.

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.

(*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.* Halstead, 37 L. T. N. S. 433.
(*t*) 4 Car. & P. 15. Poussin died in 1665. See, also, De Sewhanberg *v.* Buchanan, 5 Car. & P. 343.
(*u*) 5 M. & R. 124.
(*v*) 2 Bing. N. C. 668.

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 be considered "prime bacon," but the evidence was held rightly rejected.

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 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.

§ 616. A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect.

In Liddard *v.* Kane (*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.

§ 617. 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 have been worth 500*l.* if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for 90*l.* The defendant refused to give a warranty that the horse would stand training, and refused to sign a warranty that the horse was "sound, wind and limb," without adding the words, "at this time." Six months afterwards the horse broke down in training, and Park, J., told the jury that the express warranty rendered the defendant responsible for the consequences of the splint, though it was known to the purchaser; but that the addition of the words, "at this time," was intended to exclude

(*x*) 6 Taunt. 446.
(*y*) 1 A. & 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.
(*a*) 2 Bing. 183.
(*b*) 7 Bing. 603; 8 Bing. 454.

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*).

§ 618. 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, 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."

§ 619. The meaning of the word "sound," when used in the sale of horses, has been the subject of several decisions, and it is settled that the interpretation of a warranty to that effect depends much on

(*c*) See, also, Butterfield *v.* Burroughs, 1 Salk. 211; Southern *v.* Howe, 2 Rolle, 5; 2 Bl. Com. 165, 166.

(*d*) 3 Camp. 462.

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 a 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 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 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."

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

(*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.

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

(*h*) Elton *v.* Brogden, 4 Camp. 281; Elton *v.* Jordan, 1 Stark. 127.

calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness (*i*).

§ 620. It may be convenient to state some of the defects which have been held to constitute unsoundness. Any *organic* defect, such as that a horse had been *nerved* (*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*).

Mere badness of shape that is likely to produce unsoundness, and which really does produce unsoundness, is not a breach of warranty of soundness if the unsoundness does not exist at the time of the sale. As where a horse's leg was so ill-formed that he could not work for any length of time without cutting, so as to produce lameness (*u*); or 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 cornea of the eye, which caused short-sightedness, and a habit of shying. The direction to the jury was, that "if they thought the habit of shying arose from defectiveness of vision, caused by natural malformation of the eye, this was unsoundness." All the judges held this direction correct, and concurred in the doctrine of Kiddell *v.* Burnard (*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*).

§ 621. Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmis-

(*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, Ryan & 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 A. & E. 508.

(*o*) Atkinson *v.* Horridge, Oliphant, Law of Horses, 472, Appendix.

(*p*) Joliff *v.* Bendell, Ryan & Moo. 136.

(*q*) Bassett *v.* Collis, 2 Camp. 523.

(*r*) Onslow *v.* Eames, 2 Stark. 81.

(*s*) Brennenburgh *v.* Haycock, Holt N. P. 630.

(*t*) Scholefield *v.* Robb, 2 Mood. & Rob. 210.

(*u*) Dickinson *v.* Follett, 1 M. & 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, pp. 70 *et seq.*

sible to prove the existence of a warranty in the former case, or to extend it in the latter, by inference or implication.

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 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*).

§ 622. But where the written paper was in the nature of an informal receipt merely, held that parol evidence of a warranty was admissible (*d*).

In Dickson *v.* Zizinia (*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.

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.

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

(*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.

(*e*) 10 C. B. 602; 20 L. J. C. P. 73.

(*f*) 7 H. & N. 955; 31 L. J. Ex. 301, in Ex. Ch.

(*g*) *Post*, Implied Warranty of Quality.

(*h*) 1 A. & E. 508.

the buyer's knowledge of the rules (*i*), 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.

§ 623. 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" (*j*). 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 passage was cited, said: "There is no doubt but you may warrant a future event."

§ 624. Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual (*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.

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."

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."

§ 625. In Brady *v.* Todd (*o*), the Common Pleas had before it the subject of warranty of a horse by a servant authorized to sell, and

(*i*) Knowledge of (and assent to) the rules in such case will now be presumed. Watkins *v.* Rymill, 10 Q. B. D. 178.

(*j*) 3 Bl. Com. 166.

(*k*) Eden *v.* Parkinson, 2 Doug. 735.

(*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.

(*m*) 2 Camp. 555. This ruling, by Lord Ellenborough, at Nisi Prius, decides, in effect, the point which was afterwards expressly kept open by the Court of Common Pleas in Brady *v.* Todd, 9 C. B. N. S. 592, and subsequently decided by Brooks *v.* Hassall, 49 L. T. N. S. 569. But the distinction between a warranty given by an agent on behalf of a horse-dealer and an agent on behalf of a private individual had not, in Lord Ellenborough's day, been so well established. 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.

Erle, C. J., gave the unanimous decision of the judges after advisement. As this is the most authoritative exposition of the present state of the law on this point, full extracts are given. The facts were, that the plaintiff applied to the defendant, who *was not a dealer in horses*, but a tradesman in London, having also a farm in Essex, in order to buy the horse, and the defendant thereupon sent his farm-bailiff with the horse to the plaintiff, with authority to sell, but none to warrant. The bailiff warranted the horse to be sound and quiet in harness; and it was contended that "an authority to an agent to sell and deliver imports an authority to warrant," which the court held to be an undecided point. After referring to Helyear *v.* Hawke, and Alexander *v.* Gibson, *supra*, and Fenn *v.* Harrison (*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 case there would be by law the authority here contended for.* . . . It is also contended that a *special* agent, without any express authority in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority as against the party who believed what was held out and acted on it (see Pickering *v.* Busk (*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 Greigg (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 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

(*p*) 3 T. R. 759. (*q*) 15 East, 38.

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."

[But in Brooks *v.* Hassall (*r*), the servant of a private owner, who was not a dealer in horses, was held to have an implied authority to warrant where the sale was at a fair, thus deciding a point left open in Brady *v.* Todd.]

§ 626. In Howard *v.* Sheward (*s*), 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.

[And the same rule would seem to be applicable where, although not a horse-dealer strictly so called, the master from the nature of his business must necessarily be buying and selling horses from time to time. This was held by Huddleston, B., in the case of Baldry *v.* Bates (*t*), where the defendant kept a riding-school; and the learned judge goes so far as to add (*u*): "I should almost be inclined to hold, if it were necessary to do so, that a private gentleman known to have very extensive stables, and who was continually buying and selling horses, would come within the rule."]

SECTION II. — IMPLIED WARRANTY OF TITLE.

§ 627. The law in relation to the implied warranty of title in chattels sold was in an unsettled state until a recent decision in the Common Pleas, which has gone far 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.

First. — It is well settled that in an executory agreement the ven-

(*r*) 49 L. T. N. S. 569. [And see Taylor *v.* Gardiner, 8 Manitoba, 310 (1892), limiting Brady *v.* Todd, 9 C. B. N. S. 592. — B.]

(*s*) L. R. 2 C. P. 148.

(*t*) 52 L. T. N. S. 620.

(*u*) At p. 622.

dor warrants, by implication, his title in the goods which he promises to sell. Plainly, nothing could be more untenable than the pretension that if A. promised to sell 100 quarters of wheat to B., the contract would be fulfilled by the transfer, not of the *property* in the wheat, but of the *possession* of another man's wheat.

Secondly. — It is also universally conceded that, in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel *is his* is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale.

But it has been said, *thirdly*, that in the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title and ability to sell, though all again admit,

Fourthly, — That if in such case the vendor *knew* he had no title, and concealed that fact from the buyer, he would be liable on the ground of *fraud.*

§ 628. The one controverted question is thus narrowed to this point, whether in the sale of a chattel an innocent vendor by the mere act of sale asserts that he is owner; for, if so, he warrants according to the second of the foregoing rules (*x*).

The negative is stated to be the true rule of law on this point in recent text-books of deservedly high repute (*y*). Undoubtedly, in some of the ancient authorities on the common law, the rule is substantially so stated. In Noy's Maxims, c. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor;*" 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 (*z*), "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 (*a*), where the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case.

§ 629. It is, however, the fact that no direct decision has ever been given in England to the effect that where a man sells a chattel he does

(*x*) See Raphael *v.* Burt, *post*, § 639.

(*y*) 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).

(*z*) 2 Bl. C. 451.

(*a*) 3 Ex. 500.

not thereby warrant the title (*b*). It has been often said in cases that such was the rule of law, but no case has been decided directly to that effect. Since the decision in Morley *v.* Attenborough, there have been repeated references to the *dicta* contained in the opinion of Parke, B., on this point, and dissatisfaction with them has been more than once suggested. It will be quite sufficient to confine the review of the decisions to Morley *v.* Attenborough and the subsequent cases, as they contain a full discussion of the whole subject, and reference to all the old authorities, except one to be specially noticed.

§ 630. Morley *v.* Attenborough (*c*) 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*: —

"The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law) undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey. 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 (*d*). 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

(*b*) Per Byles, J., in Eichholz *v.* Bannister, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

(*c*) 3 Ex. 500; 18 L. J. Ex. 149.

(*d*) As to the implied warranty of title upon an executory contract of sale, see Raphael *v.* Burt, Cababé & Ellis, 325, *post*, § 639.

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 (*e*), cited by Littledale, J., in Early *v.* Garrett (*f*), and in Williamson *v.* Allison (*g*), 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 undertakes that the commodity he sells is his own;' and Mr. Woodeson, in his Lectures, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

"At all times, however, the vendor was liable, if there was a warranty *in fact;* and at an early period, the affirming those goods to be his own by a vendor in possession appears to have been deemed equivalent to a warranty. Lord Holt, in Medina *v.* Stoughton (*h*), 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 (*i*), 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 Ormrod *v.* Huth (*k*), 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

(*e*) Aleyn, 91.
(*f*) 9 B. & C. 932.
(*g*) 2 East, 449.
(*h*) 1 Salk. 210; 1 Ld. Raymond, 593.
(*i*) 3 T. R. 57.
(*k*) 14 M. & W. 664.

engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. . . . We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that *the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased.* In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title.

"But in the case now under consideration, the defendant can be made responsible only *as on a sale of a forfeited pledge, eo nomine,* . . . and the question is, whether, on such a sale, accompanied with possession, there is *any assertion of an absolute title to sell*, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." Held, that the latter was the true meaning of the contract. The learned judge continued as follows: "It may be that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, *some circumstances must be shown* to enable the plaintiff to recover *for money had and received.* This case was not made at the trial, and the only question is, whether there was an implied warranty."

§ 631. 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 (*l*). The case is mentioned in 1 Peere Williams, 318, as a decision by Holt, C. J., on a different point. But when it was cited as an authority in Ryall *v.* Rowles (*m*), 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" (*n*).

§ 632. Next came Hall *v.* Conder (*o*). The written sale stated that

(*l*) It had likewise escaped the research of the author of this Treatise when the first edition was published.

(*m*) 1 Ves. Ssn. at p. 351. Also reported *sub. nom.* Ryall *v.* Rolle, 1 Atk. 165.

(*n*) See the case of Ryall *v.* Rowles, 2 W. & Tud. L. C. in Eq. (6th ed.) at p. 803, for this report by Lee, C. J., of the decision in L'Apostre *v.* L'Plaistrier.

(*o*) 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288.

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 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 (*p*), 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.

§ 633. In Chapman *v.* Speller (*q*), the plaintiff gave the defendant 5*l.* profit on a purchase made by the defendant at a sheriff's sale under a writ of *fi. fa.* and the defendant handed to the plaintiff the receipt, which he had got from the auctioneer, in order to enable the plaintiff to claim the goods. The goods were afterwards taken under a superior title, and the plaintiff brought action, alleging a warranty of title by the defendant; but the court refused to consider the point of law, saying that the defendant had only sold "the right, whatever it was, that he had acquired by his purchase at the sheriff's sale." The court, however, added: "We wish to guard ourselves *against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel*, where the purchaser does not have that for which he paid."

§ 634. In Sims *v.* Marryat (*r*), there were affirmations by the

(*p*) 2 C. B. N. S. 67; 26 L. J. C. P. 143.

(*q*) 14 Q. B. 621; 19 L. J. Q. B. 241.

(*r*) 17 Q. B. 281; 20 L. J. Q. B. 454.

defendant, which were construed to amount to an express warranty, and the question now under consideration was not decided; but Lord Campbell said: "It does not seem necessary to inquire what is the general law as to implied warranty of title on sales of personal property, *which is not quite satisfactorily settled.* According to Morley *v.* Attenborough, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawnor. Beyond that the decision does not go, but *a great many questions are suggested in the judgment, which still remain open.*"

§ 635. Then came Eichholz *v.* Bannister (*s*), 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. Bannister, job-warehouseman.

Prints, gray fustians, etc., job and perfect yarns, in hanks, cops, and bundles.

17 *pieces of prints*, 52 *yards, at* 5¼*d. per yard*	£19 6 0
1½ *per cent. for cash*	0 6 0
	19 0 0

The price was paid and the goods delivered, but it turned out that they had been stolen, and the buyer was compelled to restore them to the true owner, and brought action on the *common money counts*, to which the defendant pleaded *never indebted.* Defendant insisted at the trial that he had not warranted title, and the point was reserved. The judges gave separate opinions, all concurring in the existence of a warranty of title.

Erle, C. J., said that the rule was taken on a point of law that "a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. . . . I decide in accordance with the current of authorities that, if the vendor of a chattel at the time of the sale either by

(*s*) 17 C. B. N. S. 708; 34 L. J. C. P. 105

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*, § 628, 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 Morley *v.* Attenborough, when he said (*t*): 'It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply; but if so, there are many exceptions stated in the judgment which well-nigh eat up the rule.'"

Byles, J., concurred and said: "It has been stated over and over again that the mere sale of chattels does not involve a warranty of title, *but certainly such statement stands on barren ground, and is not supported by one single decision;* and it is subject to this exception, that if the vendor by his acts, or by surrounding circumstances, affirm the goods to be his, then he does warrant the title. Lord Campbell

(*t*) In Sims *v.* Marryat, 17 Q. B. 281; 20 L. J. Q. B. 454.

was right when he said that the exceptions to the application of *caveat emptor* had well-nigh eaten up the rule."

Keating, J., concurred.

§ 636. It is impossible to read the judgment of Erle, C. J., in this case without yielding assent to the assertion that in modern times, in all ordinary sales, the vendor by exercising the highest act of dominion over the thing in offering it for sale thereby leads 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*, § 631. This being equivalent to a warranty, the result would be, in modern times, that as a general rule the mere sale of a chattel implies a warranty of title; whereas the old rule is accounted for by Parke, B., on the ground that in the olden days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market overt, where the title obtained by the buyer was good against everybody but the sovereign. It should also be remembered, when inferences are drawn from very ancient decisions, that there formerly existed statutory provisions which have long grown obsolete. The law 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 (*u*).

§ 637. The question was alluded to by the Lord Chancellor (Chelmsford) in delivering the opinion of the court in Page *v.* Cowasjee Eduljee (*x*), 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 the special character of master *and not as owner*, and acted upon a *bona fide* belief of his authority to sell."

§ 638. The subject was again considered in the Common Pleas in Trinity Term, 1867, in Bagueley *v.* Hawley (*y*), 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,

(*u*) Wilkins' Leg. Anglo-Sax. Ll. Ethel. 10, 12; Eadg. 80.

(*x*) L. R. 1 P. C. 127–144; 3 Moo. P. C. N. S. 499.

(*y*) L. R. 2 C. P. 625; 36 L. J. C. P. 328.

but when he went to remove it, persons claiming to be mortgagees had it at work, and refused to allow its removal, stating that it had been illegally distrained. The plaintiff insisted that there was a warranty of title, and a warranty that he should be allowed to remove the boiler; the defendant contended that he merely sold such title as he had. Blackburn, J., left it as a question of fact to the jury, who found that the sale was absolute and unconditional, and that there was an understanding that the plaintiff was to have effectual possession of the boiler, and they gave a verdict for the plaintiff. On leave reserved, a rule was made absolute for a nonsuit, by Bovill, C. J., and M. Smith, J.; *dissentiente* Willes, J. Bovill, C. J., put his opinion on the ground that by the general rule of law no warranty is implied in the sale of goods; but Smith, J., on the principle of Chapman *v.* Speller; while Willes, J., agreed with the jury and Blackburn, J., that "the thing which the defendant sold was a boiler and not a lawsuit." The circumstances were so peculiar, and the opinions of the judges so little in accord, that the case has not much value as a precedent.

§ 639. On the whole, it is submitted that, since the decision in Eichholz *v.* Bannister, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, "of having been well-nigh eaten away." The rule at present would seem to be stated more in accord with the recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.*

Eichholz *v.* Bannister 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.

[This statement of the rule has recently been confirmed in the case of Raphael *v.* Burt (*z*), where the plaintiffs, foreign bankers, had purchased from the defendants certain bonds of the Government of the United States. These bonds, which were known as "called" bonds, the United States Government having given notice that they would be paid on presentation, were dealt with in England for the purpose of making remittances to America. By the course of business, the sale

(*z*) Cababé & Ellis, 325.

was not of any particular bonds, but the seller supplied the buyer with bonds or coupons to a specified amount, and the buyer paid the stipulated price upon delivery. It was afterwards proved that the bonds had been originally stolen from American holders, and the United States Government refused payment of them. The defendants had no knowledge of the defect in their title, and acted throughout in good faith. The American Court of Claims held that the defendants could not give a good title to the bonds, and that they were liable in the holders' hands to any infirmity in the sellers' title. The plaintiff sued to recover the price of the bonds upon the ground (*inter alia*) of a breach of an implied warranty of title, and Stephen, J., held that they were entitled to succeed. He referred to the foregoing passage in italics as containing a correct statement of the law, but extended the application of the principle from a sale of personal chattels to all sales of personal property, so as to include such instruments as the bonds in question, and he treated the rule as now established, both in regard to a bargain and sale, as well as to an executory agreement for the sale of personal property, that there is an implied warranty of title by the vendor, which may in all cases be rebutted by circumstances.]

§ 640. Before leaving this subject, it should be noted that in Dickenson *v.* Naul (*a*), and in Allen *v.* Hopkins (*b*), 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; the decisions being directly opposed to the maxim in Noy, quoted *ante*, § 628.

§ 641. 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 (*c*), and by the judges in Eichholz *v.* Bannister (*d*), and in Morley *v.* Attenborough (*e*), 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 (*f*); 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 his peril (*g*). And in the

(*a*) 4 B. & Ad. 638.
(*b*) 13 M. & W. 94.
(*c*) 3 T. R. 58.
(*d*) 17 C. B. N. S. 708.
(*e*) 3 Ex. 500.
(*f*) Bennett *v.* Bartlett, 6 Cush. (60 Mass.) 225: Vibbard *v.* Johnson, 19 Johnson, 78; Case *v.* Hall, 24 Wendell, 102; Dorr *v.* Fisher, 1 Cush. (55 Mass.) 273; Burt *v.* Dewey, 40 N. Y. 283.

(*g*) Huntingdon *v.* Hall, 36 Maine, 501; McCoy *v.* Archer, 3 Barbour, 323; Dresser *v.* Ainsworth, 9 Barbour, 619; Edick *v.* Crim, 10 Barbour, 445; Long *v.* Hickingbottom, 28 Miss. 772. See, however, Whitney *v.* Heywood, 6 Cush. (60 Mass.) 82, 86, where it is said that "Possession must here be taken in its broadest sense, and as including possession by a bailee of the vendor. The excepted cases must be substantially

note of the learned editor of the last edition of Story on Sales (*h*), 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 laws of the United States (*i*).

§ 642. By the civil law, the warranty against eviction exists in all cases. The law 3 ff. de act. empt. gives the maxim in the words of Pomponius as follows: "*Datio possessionis quæ a venditore fieri debet talis est ut si quis eam possessionem jure avocaverit, tradita possessio non intelligatur.*"

Pothier gives the rule in these words: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale, to warrant and defend the buyer against eviction from that possession. This obligation is called warranty" (*k*).

§ 643. In the French law, so deeply implanted is the obligation of warranty against eviction, that it exists so far as to compel return of the price, even though it has been expressly agreed that there shall be no warranty. The articles of the Civil Code are as follows: 1625. The warranty due by the vendor to the purchaser has two objects: *first*, the peaceful possession of the thing sold; *secondly*, the concealed defects or redhibitory vices of the thing.

1626. Although at the time of sale there may have been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (charges prétendues sur cet objet), and not mentioned at the time of the sale.

1627. The parties may, by special convention, add to this legal obligation, or diminish its effect, and may even stipulate that the vendor shall be liable to no warranty.

1628. Although it be stipulated that the vendor shall be liable to no warranty, he remains bound to a warranty against his own act: any contrary agreement is void.

1629. In the same case, of a stipulation of no warranty, the vendor remains bound to return the price to the purchaser in the event of eviction, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril.

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;" approved in Shattuck *v.* Green, 104 Mass. 42, 45.

(*h*) § 367, p. 436, 4th ed., by E. H. Bennett.

(*i*) Vol. 2, p. 478, 12th ed.

(*k*) Vente, 2 Part, Ch. 1, Sec. 2, No. 82.

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.

§ 644. The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale.

A representation anterior to the sale, and forming no part of the contract when made, is, as already shown (*ante*, § 610), no warranty; but a representation, even though only an inducement to the contract, and forming no part of it, will, if false to the knowledge of the vendor, be a ground for rescinding the contract as having been effected through fraud.

So far as an ascertained specific chattel *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied* warranty of quality (*l*).

§ 645. But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer if that purpose be communicated to the vendor when the order is given, as is shown by the authorities now to be reviewed. If the specific existing chattel, however, is sold by description, and does not correspond with that description, the vendor fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent, as explained *ante*, § 600.

This was strongly exemplified in Josling *v.* Kingsford (*m*), 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.

§ 646. 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 (*n*). The defendant sold to the plaintiff, on the 21st of October, 1836, "all

(*l*) Parkinson *v.* Lee, 2 East, 314; Chanter *v.* Hopkins, 4 M. & W. 399, and cases cited *ante*, § 611.

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

(*n*) 3 M. & W. 390.

that ship or vessel called the Sarah, of Newcastle," etc., covenanting in the deed-poll by which the conveyance was made that he "had good right, full power, and lawful authority" to sell. It turned out that the ship, which was on a distant voyage, had got ashore on the coast of Prince of Wales 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*l*. Patteson, J., left it to the jury to say whether, at the time of the sale to the plaintiff, the vessel was or was not a *ship*, or a mere bundle of timber, and the jury found she was *not* a ship. On a rule to set aside the verdict, which was thereupon given for the plaintiff, Parke, B., said (*o*): "The question is not what passed by the deed, but what is the meaning of the covenant contained in it.

§ 647. "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship *does not imply a contract that it is then seaworthy, or in a serviceable condition;* and the express covenant that the defendant has full power to bargain and sell does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, *does imply a contract that the article sold is of that description;* for which the cases of Bridge *v.* Wain (*p*), and Shepherd *v.* Kain (*q*), 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

(*o*) At p. 399. (*p*) 1 Stark. 504. (*q*) 5 B. & Ald. 240.

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 that, 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 (*q*).

§ 648. Of implied warranties in sales of chattels, there are several recognized by law.

The first and most general is, that, in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. The rule is so universally taken for granted that it is hardly necessary to give direct authority for it. The cases are very numerous in which it has been applied as a matter of course. In Parker *v.* Palmer (*r*), 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 (*s*), Lawrence, J., in a sale of hops by sample, said that the contract was "no more than that the bulk should agree with the sample," and the latter is the phrase used by the judges, *passim*.

In a sale of goods by sample, it is an implied condition, as shown *ante*, § 594, that the buyer shall have a fair opportunity of comparing the bulk with the sample; and an improper refusal by the vendor to allow this will justify the buyer in rejecting the contract (*t*).

§ 649. It must not be assumed that, in all cases where a sample is exhibited, the sale is a sale "by sample." 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*" (*u*).

Thus, in Tye *v.* Fynmore (*v*), where the vendor exhibited a sample

(*q*) See cases cited *ante*, § 600 *et seq.*

(*r*) 4 B. & Ald. 387.

(*s*) 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.

(*t*) Lorymer *v.* Smith, 1 B. & C. 1.

(*u*) And see per May, C. J., in McMullen *v.* Helberg, 4 L. R. Ir. at p. 119.

(*v*) 3 Camp. 462.

of "sassafras wood," and the buyer inspected it, and had skill in the article, and the vendor then warranted the goods to be "fair merchantable sassafras wood," it was held not to be a sale by sample with implied warranty, but a sale with express warranty.

So in Gardiner *v.* Gray (*x*), the sale was of waste silk, and a sample was shown, but Lord Ellenborough said it was not a sale "by sample." "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity."

So in Powell *v.* Horton (*z*), where a sample of the goods sold was exhibited, but the written contract was construed to contain a warranty that they should be "Scott & Co.'s mess pork," it was held not to be a sale "by sample," but a sale with express warranty.

So, also, have we seen in the very stringent case of Josling *v.* Kingsford (*a*), 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."

§ 650. So, on the other hand, where the sold note in writing was silent as to quality, the buyer was not permitted by Lord Ellenborough (*b*) to show that a sample had been exhibited to him before he bought, because it was not a sale "by sample."

In Carter *v.* Crick (*c*), 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.

In Russell *v.* Nicolopulo (*d*), there was a written sale in London of a cargo of wheat then lying in Queenstown, which closed with these words: "The above cargo is accepted on the report and samples of Messrs. Scott & Co., of Queenstown." Mellish, in arguing a demurrer to the declaration, insisted that this clause only warranted that the report of Scott & Co. was a genuine report, and the samples the genuine samples taken by them, but was not a warranty either that the statements in the report were true, or that the cargo was equal to the samples. But all the judges held that the true meaning of the clause

(*x*) 4 Camp. 144.
(*z*) 2 Bing. N. C. 668.
(*a*) 13 C. B. N. S. 447; 32 L. J. C. P. 94; and see Mody *v.* Gregson, L. R. 4 Ex. 49.
(*b*) Meyer *v.* Everth, 4 Camp. 22.
(*c*) 4 H. & N. 412; 28 L. J. Ex. 238.
(*d*) 8 C. B. N. S. 362.

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.

§ 650 a. [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 (*e*).]

§ 651. A very full discussion of the law as to sales by samples is found in Heilbutt *v.* Hickson (*f*), decided on the 5th of July, 1872; and a further authority on the subject is Couston *v.* Chapman, *infra*, § 652, decided in the House of Lords on the 19th of the same month.

In Heilbutt *v.* Hickson, the plaintiffs, merchants in London, on the 30th of December, 1870, contracted on behalf of correspondents at Lille, in France, with the defendants, *manufacturers* of shoes, for the purchase of 30,000 pairs of black army shoes, *as per sample*, at four shillings and eightpence per pair, less $2\frac{1}{2}$ per cent. discount, to be delivered free at a wharf in weekly quantities; *to be inspected and quality approved before shipment;* payment in *cash on each delivery.* Both parties knew that the shoes were required for the French army for a winter campaign. A sample shoe was deposited.

The plaintiffs appointed a skilled person to inspect the shoes on their behalf. A number were rejected, but a large number were inspected and approved. On the inspection the soles were not opened, and it is not usual to open them; but without opening, it could not be known of what substance the filling 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 plaintiffs' evidence also went to show that many assurances had been given to them by the defendants that there was no paper in the soles of the shoes. The plaintiffs accordingly accepted and paid for 4950 pairs, which were shipped to destination at Lille, where they arrived on the 10th of February.

In the mean time the plaintiffs had sent in advance to Lille one

(*e*) Towerson *v.* Aspatria Agrienltural Society, 27 L. T. N. S. 276, Ir. Ex. Ch. reversing the Court of Exchequer on the question whether there was any warranty of the bulk being equal to the analysis.

(*f*) 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 mean time 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; 2dly, of expenses for cartage and warehouse at Lille; 3dly, of loss of profit on the quantity delivered; and 4thly, of loss of profit on the quantity remaining to be delivered. And a verdict was entered for the whole, amounting to 4214*l.* 5*s.*, leave being reserved to the defendants to move to reduce the damages by any sum that the court might think right.

It will be seen by this statement that the principal questions involved turned upon the assessment of damages, and the case as to this point will be again referred to in the concluding chapter of this treatise; but it is convenient to state the facts here fully, in order to avoid repetition, and then to extract from the opinions of the judges the principles applicable to the subject now under consideration.

Bovill, C. J., delivered the judgment of the court, and, upon the point in relation to the sample shoe, said: "It was contended for the defendants that as the sample shoe contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect, the damages, and especially the loss of profits, did not result from the breach of warranty in the shoes not being equal to the sample. But the fact of the improper fillings in the sole of the sample shoe *was a hidden defect*, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes, and the letter of the 11th 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* (*g*).

The judgment of the court was put by the Chief Justice on the interpretation of the whole contract as originally made and as subsequently modified by the letter of the 11th 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

(*g*) This point was decided by the House of Lords in Drummond *v.* Van Ingen, 12 App. Cas. 284; see per Lord Macnaughten, at p. 296 *et seq.*

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;* 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 (*h*). . . . 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 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. . . . 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 they were entitled to throw the shoes upon the hands of the defendants *at Lille*."

§ 652. In Couston *v.* Chapman (*i*), 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 10th of March, 1870, and the delivery was completed on the 11th of April. The purchasers had the wine examined, and on the 21st 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

(*h*) Affirmed and restated by Brett, J., in Grimoldby *v.* Wells, L. R. 10 C. P. at p. 396, *q. v. post*, § 652 a.

(*i*) L. R. 2 Sc. App. 250.

lots of wine, and had paid for none of them when the action was brought. He was of course condemned to pay for the whole, and it was stated in the various opinions given, —

1st, that the sale of each lot was a separate contract.

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.

"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 argument) *to retain the good wine and return the bad, but to rescind the contract for those lots altogether.* The contracts being entire *for each lot*, the only way in which the appellants could discharge themselves from their obligation was by returning or offering to return the whole of [each of] the lots."

His Lordship then held that there had been improper delay, because the condition of the wine could have been discovered in the course of a week, and then went on to say: "Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a distinct offer to return, or in fact to return the goods, by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that

the purchaser rejects them, that he throws them back on the vendor's hands, and that the contract is rescinded."

[In Grimoldby *v.* Wells (*k*), 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.

Brett, J., adhered to the opinion which he had before expressed in Heilbutt *v.* Hickson (*ante*, § 651): "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 vendor's risk. No particular form is essential: it is sufficient if he does any unequivocal act showing that he rejects them."]

As to the effect of a sale per sample, in modifying the implied warranty that goods are merchantable, the cases of Mody *v.* Gregson (*l*) [and Drummond *v.* Van Ingen (*m*)], *infra*, § 667, may be consulted.

§ 653. In the case of Barnard, appellant, *v.* Kellogg, respondent (*n*), 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 fur-*

(*k*) L. R. 10 C. P. 391, and see the *dicta* of Martin and Bramwell, BB., in Lucy *v.* Monflet, 5 H. & N. 229, at p. 233.

(*l*) L. R. 4 Ex. 49.

(*m*) 12 App. Cas. 284.

(*n*) 10 Wall. 383.

nished, and this offer was accepted, *provided that the respondents examined the wool on the succeeding Monday, and reported on that day whether or not they would take it.* The respondents agreed to this, and went to Boston and examined four bales in the broker's office, as fully as they desired, and were offered an opportunity to examine all the bales and to have them opened for inspection. They declined to do this, and concluded the purchase. Some months afterwards, on opening the bales, it was found that some were falsely and deceitfully packed, by 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.

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 labor and delay, and for these reasons impracticable; that by the custom of merchants and dealers in foreign wools, in Boston and New York, the principal markets of the country where such wool is sold, there is an implied warranty against false packing, and that as matter of law the custom was binding on the parties to this contract; and judgment was given for the purchaser. But the judgment was reversed on appeal, the Supreme Court holding, —

1st. That the sale was not by sample, as shown by the fact that the purchaser went to Boston to inspect the goods for himself, — which was unnecessary if the sale was by sample, — and had assented to the condition that the sale was only to take place after his own examination of the goods.

2d. That by the rule of the common law, where a purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and *is neither the manufacturer nor grower* of the goods sold, the maxim of *caveat emptor* applies.

3d. That inasmuch as the law in such a case implies no warranty of quality, evidence of custom that such warranty is implied is inadmissible, and the custom or usage is invalid and void, especially so in the

case before the court, as the parties were shown to have had no knowledge of the custom, and could not have dealt with reference to it.

§ 654. Where an average sample was taken of a large quantity of goods (beans) contained in a number of packages, by drawing samples from many of the packages and then mixing them together, it was held by the Court of Appeal of the State of New York, in Leonard *v.* Fowler (*o*), 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.

[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 (*p*).]

§ 665. An implied warranty may result from the usage of a particular trade. Thus, in Jones *v.* Bowden (*q*), 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 Queen's Bench. The case referred to by the learned judge was probably Weall *v.* King (*r*), decided on a different point.

§ 656. In a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the *condition precedent* that the goods shall answer the description, an *implied warranty* (*s*) that they shall be salable or merchantable. The rule was first clearly stated by Lord Ellenborough in Gardiner *v.* Gray (*t*), where the defendant made a sale of twelve bags of "waste silk." The declaration contained a count alleging a sale by sample, but on this the proof

(*o*) 44 N. Y. 289.

(*p*) Schnitzer *v.* Oriental Print Works, 114 Mass. 123.

(*q*) 4 Taunt. 847.

(*r*) 12 East, 452.

(*s*) This implied warranty is in the nature of a *condition*. The editors venture to think that the separate treatment of the subjects of "Condition" and "Warranty," the distinction between which is so clearly expounded, Book IV. Part I., is not strictly adhered to by Mr. Benjamin. The warranties implied by law upon an executory contract for the sale of goods, to the discussion of which the greater part of this chapter is devoted, are essentially conditions on the non-fulfilment of which the buyer is entitled to reject the goods.

(*t*) 4 Camp. 144.

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."

§ 657. This rule has been followed in a long series of decisions (*u*), and the law on the subject was reviewed, and the cases classified, in Jones *v.* Just (*v*), 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: *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. Parkinson *v.* Lee (*x*). 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

(*u*) 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.; Gorton *v.* Macintosh & Co. W. N. 1883, p. 103, C. A., reversing a decision of the Divisional Court, W. N. 1882, 178; 31 W. R. 232, where it was held that a condition that there should be "no allowance for imperfections" did not override the implied warranty that the goods should be merchantable.

(*v*) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

(*x*) 2 East, 314.

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 (*y*). *Secondly.* — Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. Barr *v.* Gibson (*z*). *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. Chantor *v.* Hopkins (*a*); Ollivant *v.* Bayley (*b*). *Fourthly.* — Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. Brown *v.* Edgington (*c*); Jones *v.* Bright (*d*). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own (*e*). *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. Laing *v.* Fidgeon (*f*). 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 (*g*)."

§ 658. In the same case the learned judge explained the *ratio decidendi* of Turner *v.* Mucklow (*h*), 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

(*y*) 7 H. & N. 586; 31 L. J. Ex. 139.
(*z*) 3 M. & W. 390.
(*a*) 4 M. & W. 399.
(*b*) 5 Q. B. 288.
(*c*) 2 M. & G. 279.
(*d*) 5 Bing. 533.
(*e*) See Drummond *v.* Van Ingen, 12 App. Cas. 284; Randall *v.* Newson, 2 Q. B. D. 102, C. A., *post*, § 661 a. See, also, Johnson *v.* Raylton, 7 Q. B. D. 438, C. A., § 609 a, as to an implied warranty by a manufacturer that the goods are *his own make.*
(*f*) 4 Camp. 169; 6 Taunt. 108.
(*g*) 3 M. & G. 868.
(*h*) 8 Jur. N. S. 870; 6 L. T. N. S. 690. A perusal of the judgments of the Court of Exchequer shows that the *ratio decidendi* of Turner *v.* Mucklow was that the seller was not a manufacturer of the article sold. The ground mentioned by Mellor, J., that the madder was open to the vendee's inspection, is not referred to by any of the judges.

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.

§ 659. But in Bull *v.* Robison (*i*), 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.

[In Beer *v.* Walker (*k*), 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 consumption when they reached the defendant. It was proved that they were sent in the ordinary course of business, and that nothing exceptional had occurred in the transit. It was held by Grove, J., on the authority of Bigge *v.* Parkinson, *post*, § 664, 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 reached the defendant at Brighton, and he had had a reasonable opportunity of dealing with them in the usual way of business.

The decision in this case must be carefully considered in connection with that in Bull *v.* Robison, *supra*, which latter case was not cited in Beer *v.* Walker. The question they raise is whether, when goods are to be dispatched to a distant place, the warranty implied by law upon the sale of goods by a manufacturer or dealer, that the goods shall be merchantable, extends so as to cover deterioration of the goods taking place during their transit to the buyer. The following propositions seem to be justified from a consideration of these cases: —

1. Where a manufacturer or dealer contracts for the sale of goods manufactured by him, or in which he deals, to be supplied to a pur-

(*i*) 10 Ex. 342; 24 L. J. Ex. 165. A better report will be found 2 C. L. R. 1276.

(*k*) 46 L. J. C. P. 677; 25 W. R. 880.

chaser at a distant place, there is an implied warranty that the goods shall be merchantable upon their arrival at that place, and until the purchaser shall have had a reasonable opportunity of dealing with them in the ordinary course of business (*l*).

2. If the goods are unmerchantable upon arrival by reason of deterioration, which is the *necessary* and *inevitable* result of the transit, the warranty will not be implied. This is upon the ground that the law implies only a reasonable warranty, and not one therefore which it is physically impossible to comply with (*m*).

3. If the deterioration results from *exceptional* or *accidental* causes during the transit, the loss must be borne by the person to whom the goods belong, according to the maxim *res perit domino* (*n*).

It is submitted that the question when the property passes under the contract is quite apart from the question whether the warranty will be implied by law. In Bull *v.* Robison, the seller undertook to deliver the hoop-iron at Liverpool; the carrier was his agent, and the property did not pass until delivery. In Beer *v.* Walker, the contract was a continuing contract that the plaintiff should send the rabbits by railway from London to the defendant at Brighton, the carriage to be paid by the defendant. Here the carrier was clearly the buyer's agent, and the property in the rabbits passed to the defendant when they were delivered to the carrier in London. Yet in both cases the court assumed the existence of the warranty.]

§ 660. In Gower *v.* Von Dedalzen (*o*), an attempt was made to extend this implied warranty to the packages or vessels in which the merchandise was contained. The dispute arose out of a sale of a cargo of oil, alleged in the declaration to be good, merchantable Gallipoli oil, *the said cargo consisting of* 240 *casks*, and the defendant pleaded that the casks "were not well seasoned and proper casks for the purpose of containing good, merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement." On special demurrer, held ill, Tindal, C. J., saying, however: "I can conceive cases in which the state of the receptacle of the articles 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."

(*l*) See Platt, B.'s, charge to the jury in Bull *v.* Robison, 10 Ex. at p. 343; and per Alderson, B., 10 Ex. at p. 345; and Beer *v.* Walker, 46 L. J. C. P. 677.

(*m*) Judgment of the Exchequer in Bull *v.* Robison, delivered by Alderson, B., 10 Ex. 342.

(*n*) This, it is submitted, is the meaning of Alderson, B.'s, language in Bull *v.* Robison, 10 Ex. at p. 346, where the property in the goods remained in the vendor until delivery at Liverpool. And see and compare Ullock *v.* Reddelein, Dans. & L. 6, per Lord Tenterden; and a Scotch case, Walker *v.* Langdale's Chemical Manure Company, 11 C. of Session Cases, 906, 3d series (1873).

(*o*) 3 Bing. N. C. 717.

[A reference should be made here to the important decision in Johnson *v.* Raylton (*p*), where the majority of the Court of Appeal held, in opposition to two decisions of the Court of Session in Scotland (*q*), 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 warranty 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.]

§ 661. If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter* if the buyer purchases on his own judgment.

This rule was stated by Tindal, C. J., in Brown *v.* Edgington (*r*), to be the result of the authorities as they then stood. Jones *v.* Bright (*s*) had previously settled the rule that a 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 (*t*) had settled that where the buyer had bought a specific article from the manufacturer on his own judgment, believing it would answer a particular purpose. he was bound to pay for it although disappointed in the intended use of it. In Brown *v.* Edgington (*u*), 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 (*x*).

§ 661 a. [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 (*y*), the defendant, a carriage-builder, supplied a pole for the plaintiff's carriage, which broke when the plaintiff was driving, in consequence of which

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

(*q*) West Stockton Iron Company *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.

(*r*) 2 M. & G. 279.

(*s*) 5 Bing. 533.

(*t*) 4 M. & W. 399; followed by the Q. B. in Ollivant *v.* Bayley, 5 Q. B. 288.

(*u*) 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.

(*x*) See authorities in preceding note. See, also, the observations of the judges on this general principle, in Readhead *v.* Midland Railway Company, 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*, § 431 *et seq.*, as to the liability of the vendor, when manufacturer, to *third* persons for negligent and improper manufacture.

(*y*) 2 Q. B. D. 102, C. A.

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 of the fracture, in which event the defendant would be liable for such damage. All the cases were 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 (*z*), was confined to contracts of carriage. The Lord Justice says (*a*): "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."]

§ 662. In Shepherd *v.* Pybus (*b*), 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 (*c*), 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 (*d*), but Tindal, C. J., said in the judgment that there was not "any evidence of distinct notice or of a declaration to the defendant at the time the plaintiff inspected the barge, or entered into the contract, of the precise service or use for which the barge was purchased by the plaintiff."

Next came Burnby *v.* Bollett (*e*) in 1847. The defendant, a farmer,

(*z*) L. R. 2 Q. B. 412; in error, L. R. 4 Q. B. 379.

(*a*) At p. 109. See the observations 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.

(*b*) 3 M. & G. 868.

(*c*) See, also, Camac *v.* Warriner, 1 C. B. 356.

(*d*) Page 871.

(*e*) 16 M. & W. 644.

bought a pig exposed for sale by a butcher: the plaintiff, another farmer, went to the defendant and offered to purchase the pig which the latter had just bought, and the sale was made without any express warranty. The meat turned out to be diseased, and it was held that there was no implied warranty that it was fit for food (although the vendor must have known it was intended for that purpose), because the vendor was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent, and who is bound to supply a good and merchantable article. Here, plainly, the purchaser bought on his own judgment.

§ 663. In 1862, Emmerton *v.* Matthews (*f*) 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 carcase 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.

§ 664. In the same year the case of Bigge *v.* Parkinson (*ff*) 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, etc., at 6*l.* 15*s.* 6*d.* per head, *guaranteed to pass survey of the Honourable 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 implied by

(*f*) 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.

(*ff*) 7 H. & N. 955; 31 L. J. Ex. 301, Ex. Ch. See, also, Beer *v.* Walker, 46 L. J. C. P. 677; 25 W. R. 880, *ante*, § 659; and cf. McClelland *v.* Stewart, 12 L. R. Ir. 125.

law in such a sale; but the court held that the rule now under consideration (and which was quoted from Chitty on Contracts (*g*)) 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" (*h*).

[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 (*i*).]

§ 665. In Macfarlane *v.* Taylor (*k*), which was a Scotch appeal, the House of Lords decided, under the 5th section of the Act 19 & 20 Vict. c. 60, which places the law of Scotland upon the 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.

§ 666. But to this general rule there is this exception, that no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound. Thus, in the early leading case of Parkinson *v.* Lee (*kk*), where the goods were hops, sold

(*g*) Page 417, ed. 1881.

(*h*) And see *post*, § 669 *et seq.*

(*i*) Ward *v.* Hobbs, 4 App. Cas. 13; and 3 Q. B. D. 150, C. A., overruling S. C. 2 Q. B. D. 331.

(*k*) L. R. 1 Sc. App. 245.

(*kk*) 2 East, 314. In Shepherd *v.* Pybus, 3 M. & G. 868, Tindal, C. J. (at p. 880), observes that two of the judges of the Court of King's Bench, in participating in

by a fresh sample drawn from the bulk, it was held that the warranty resulting from the sale by sample, and which was satisfied when the bulk equalled the sample, could not be supplemented by a further implied warranty that the goods were merchantable. And in Dickson *v.* Zizinia (*l*), 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.*"

§ 667. But although goods sold by sample are not in general deemed to be sold with an implied warranty that they are merchantable, the facts and circumstances of the case may justify the inference that this implied warranty is superadded to the contract.

In Mody *v.* Gregson (*m*), the defendants agreed to *manufacture* and supply 2500 pieces of gray 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 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, 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 exclude an inquiry whether the thing supplied was otherwise in accordance with the contract; that if the

the decision of Parkinson *v.* Lee, laid great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had as full an opportunity of judging of their quality as the seller himself had; and in Randall *v.* Newson, 2 Q. B. D. 102, C. A., 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."

(*l*) 10 C. B. 602; 20 L. J. C. P. 73.

(*m*) L. R. 4 Ex. 49.

sellers in this case had *expressly* agreed to deliver *merchantable* gray shirting according to sample, without disclosing that the goods were rendered unmerchantable by the mixture of the foreign ingredient, they would have been liable; and that the facts that the goods were not specific, ascertained, nor inspected, and that the sample did not disclose the defect, but, on the contrary, falsely represented on its face a merchantable article (*n*), taken in connection with the stipulation that the goods should be of a specified weight, which, if properly complied with, would have insured a merchantable article, amounted altogether to a contract *describing* the goods, and *asserting* their merchantable quality. The 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*" (*o*).

[This principle, that the fact of the sale having been made by sample does not necessarily exclude the implied warranty that the goods shall be merchantable, has very recently received the sanction of the House of Lords in Drummond *v.* Van Ingen (*p*). As this case affords the most authoritative exposition of the present state of the law on this subject, the editors have ventured to give very full extracts from the judgments delivered. The defendants, who were cloth merchants, had ordered from the plaintiffs, worsted cloth manufacturers at Bradford, goods described as "mixed worsted coatings," which were to be in "quality and weight" equal to certain numbered samples, which the plaintiffs had previously furnished to the defendants. The goods were of a class well known in the trade as "corkscrew twills." They were delivered to the defendants, whose object, which was known to the plaintiffs, was to sell them to clothiers in the United States. They were returned upon the defendants' hands by their customers as not being suitable for the purposes of that trade, and were afterwards sold by auction at a loss. In an action for the price brought by the plaintiffs, a counter-claim was raised by the defendants to recover damages, on the ground that the goods were not merchantable. The goods in fact corresponded exactly with the samples, and the defect which existed in them, viz., that of "slipperiness" (*i. e.* such a want of

(*n*) See, however, the remarks of Grove, J., on the state of the sample, in Smith *v.* Baker, 40 L. T. N. S. 262.

(*o*) At p. 57 of the reports. Compare *dicta* of the judges in Heilbutt *v.* Hickson, *ante*, § 651.

(*p*) 12 App. Cas. 284; 56 L. J. Q. B. 563; [followed in Leggett *v.* Young, 29 N. B. 675, a sale of lobsters. — B.]

cohesion between the warp and the weft as caused them to give way under the strain of ordinary wear when made up into coats), existed equally in the samples; but this defect was latent, and not apparent or discoverable upon such inspection as was ordinary and usual in sales of worsted cloths of this class. An order having been made for the trial of certain preliminary questions of fact before Day, J., without a jury, that learned judge found the facts substantially as above stated. The Court of Appeal declined to interfere with these findings.

In the House of Lords (constituted of Lords Selborne, Herschell, and Macnaghten), this decision was unanimously affirmed. Upon the questions of fact, viz., the existence of the alleged defect in the cloth, and the latent character of that defect, their Lordships considered themselves bound by the decision of Day, J., and their opinions were directed entirely to the question whether or not the defect of quality was one against which there was, under all the circumstances of the case, an implied warranty by the plaintiffs.

Lord Selborne (*q*) admitted that the defect was one of quality, which, if it had been known to Van Ingen & Co. when they gave the order, or if they had had means, which they ought to have used, of discovering from the samples, he would have held was covered by the word "quality" as used in the contract, and that there was no implied warranty on the part of Drummond & Sons against it; but he held that the word "quality" ought to be restricted to such qualities as were patent or discoverable from such examination and inspection of the samples as under the circumstances Van Ingen & Co. might reasonably be expected to make. He said: "I think it sufficient to say (*r*) that, while the doctrine of implied warranty ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them, yet I think it does extend to such a case as the present, if the goods, being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them when supplied a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended. If it would be unreasonable on the one hand to expect from the manufacturer a more exact knowledge than in the ordinary course of business would be likely to reach him of the processes and modes of treatment through which manufactured goods may pass, in the hands of the merchant or

(*q*) At p. 287. (*r*) At p. 288.

his customers, before being adapted to their ultimate uses, it would be not less unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business, and will use such methods as may be proper to produce a good article of the kind ordered. The burden of ascertaining beforehand that this can be done, or how it is to be done, does not rest upon him." And he then proceeded to consider the nature of the defect in the present case, and pointed out that there was nothing outwardly observable in the samples furnished by the plaintiffs from which the defect could have been discovered, and for that purpose the application of some kind of test would have been necessary.

Lord Herschell (*s*), after stating that the principles of law to be applied were well settled, and expressing his approval of the decision in Mody *v.* Gregson (*t*), proceeded (*u*) to say that, apart from the samples, upon an order for "worsted coatings" given by a merchant to a manufacturer, "the merchant trusts to the skill of the manufacturer, and there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used." He then considered whether the furnishing of samples made any difference (*x*), and held that, although the implied warranty would be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience, yet "when a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimen; and I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty."

Lord Macnaghten (*y*) rendered an opinion to the same effect. "The real question, as it seems to me," he said, "is whether there is anything in the special circumstances of this case to exclude or qualify the implied undertaking on the part of a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required,

(*s*) At p. 290.
(*t*) L. R. 4 Ex. 49, *ante*, § 667.
(*u*) At p. 293.
(*x*) At p. 294.
(*y*) At p. 295.

to supply goods fit for the purpose in view." Referring to the argument raised on the plaintiffs' behalf that the goods corresponded to sample, and that therefore any implied warranty was excluded, he described the nature and purpose of a sample in the following language (*z*): "Does this exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligations to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests, which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be between merchant and manufacturer. In matters exclusively within the province of the manufacturer, the merchant relies on the manufacturer's skill, and he does so all the more readily when, as in this case, he has had the benefit of that skill before" (*a*).]

§ 668. Before leaving this point the case of Longmeid *v.* Holliday (*b*) 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 shopkeeper in selling a dangerous article, which was said to give a right of action in favor

(*z*) At p. 297.

(*a*) [In a still later case on this subject, — Jones *v.* Padgett, 24 Q. B. D. 650, — the plaintiff was a tailor, and also a woollen merchant. The defendant, a woollen manufacturer, engaged to supply him, as a woollen merchant, with indigo-blue cloth, according to sample, which he did, but the same was not suitable for making into servants' liveries, the purpose for which as a tailor the plaintiff intended to use it; but this fact was not known to the defendant, nor even that the plaintiff was a tailor. One of the ordinary uses of such cloth was for servants' liveries, though used for other purposes. In an action for breach of an implied warranty of merchantability, it was held to be the true question for the jury whether the cloth was merchantable as supplied to a woollen merchant, and not whether an ordinary and usual use of such cloth of that description was the making of it into liveries; and it was said that it was not intended, in the case of Drummond *v.* Van Ingen, 12 App. Cas. 284, to carry the law of warranty further than it was laid down in Jones *v.* Bright. — E. H. B.]

(*b*) 6 Ex. 761.

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 (*b*), referred to *ante*, § 431, such action by third persons being an action of *deceit*, founded on *tort*, and not on *contract*.

§ 669. It is said that there is an implied warranty that the subject-matter of the sale exists, and is capable of transfer to the purchaser, but this seems rather to come under the definition of a condition precedent than a warranty, for clearly it is not *collateral* to a contract of sale that there should be a subject-matter on which it can take effect. The cases have already been referred to *ante*, Book I. Part I. Ch. 4, Of the Thing Sold.

§ 670. Blackstone says (*c*), in contracts for provisions it is always implied that they are wholesome, and that, if they be not, an *action on the case for deceit* lies against the vendor. He gives no authority, and the proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, as settled in Pasley *v.* Freeman (*d*), and the cases there cited, and others which have since been determined on its authority. In Chitty on Contracts (*e*), 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 (*f*), so far as it contradicts this proposition, is not law.

§ 671. In Burnby *v.* Bollett (*g*), however, all the old authorities are collected, and were cited in argument, and Rolfe, B., said that the cases in the Year Books turned on the *scienter* of the seller, or on the peculiar duty of a taverner. In rendering judgment in that case, the point decided was, that the farmer who sold the pig was not liable on an implied warranty, because none of the authorities suggested the existence of such a warranty except in cases of "victuallers, butchers, and other common dealers in victuals;" 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

(*b*) 2 M. & W. 519.
(*c*) Vol. 3, p. 166.
(*d*) 3 T. R. 51, and 2 Sm. L. C. 74, ed. 1887.
(*e*) Page 419, ed. 1881.
(*f*) 7 H. & N. 586; 31 L. J. Ex. 139.
(*g*) 16 M. & W. 644.

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, etc. 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 (*h*), butchers), et les gents que de usage vendent a tres-passants (passengers) mauvaise vians corrumpus et wacrus et autrement perillous 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. (*i*), 'that if a man sell corrupt victuals without warranty, an action lies because it is against *the commonwealth;*' and also explains the note of Lord Hale, in 1st Fitzherbert's Natura Brevium, 94, that there is a diversity between selling corrupt wines as *merchandise, for there an action on the case does not lie without warranty;* otherwise, if it be for a taverner or victualler, *if it prejudice any*" (*k*).

§ 672. It is submitted that it results clearly from these authorities that the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute (*l*), 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 (*m*).

§ 672 a. An instance of statutory responsibility is that imposed upon sellers of food by the 38 & 39 Vict. c. 63 (Sale of Food and Drugs

(*h*) Macellarii, rather, sellers of meat in shambles; but "macegriefs," by Termes de la Ley, means those who sell *wittingly* stolen meat.

(*i*) Cro. Jac. 197.

(*k*) See, also, remarks of Mellor, J., on Emmerton *v.* Matthews, *ante*, § 671.

(*l*) All the old statutes referred to by Parke, B., and many others of a similar kind, were swept away by the Repealing Act, 7 & 8 Vict. c. 24.

(*m*) See Smith *v.* Baker, 40 L. T. N. S. 261.

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 (*m*).]

§ 673. An implied warranty has been imposed on the vendor in certain sales by the "Merchandise Marks Act, 1887" (*n*), of which the 17th section is in the following language: —

"On the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade-mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee."

The 3d, 4th, and 5th sections of the act define carefully the meaning of the expressions "goods," "trade-mark," "trade description," "false trade description," "forging of a trade-mark," "the application of a trade-mark or mark or trade description," and "the false application of a trade-mark or mark to goods," used in the 17th section. These sections are of great length and the definitions are given with great minuteness, and it is not thought necessary to set them out at length here. They supersede the 19th and 20th sections of the "Merchandise Marks Act, 1862" (*o*), which act is by the 23d section of the Act of 1887 repealed.

By the Chain Cables and Anchors Act, 1874 (*p*), every contract for the sale of a chain cable shall, in the absence of an express stipulation to the contrary (proof whereof shall lie on the seller), be deemed to imply a warranty that the cable has been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts, 1864 to 1874 (*q*).

(*m*) The statute is amended by the 42 & 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, Ib. 209; Francis *v.* Maas, 3 Q. B. D. 341; Sandys *v.* Small, Ib. 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; Harris *v.* May, 12 Q. B. D. 97; Knight *v.* Bowers, 14 Q. B. D. 845; Betts *v.* Armstead, 20 Q. B. D. 771; [Laidlaw *v.* Wilson, [1894] 1 Q. B. 74. — B.]

(*n*) 50 & 51 Vict. c. 28.

(*o*) 25 & 26 Vict. c. 88. The passage in the last edition which set out these two sections has been omitted. Section 23 of the Act of 1887 provides that the repeal of the Act of 1862 shall not affect rights or liabilities acquired or incurred under the repealed enactment.

(*p*) 37 & 38 Vict. c. 51, s. 4.

(*q*) 27 & 28 Vict. c. 27, s. 11; 34 & 35 Vict. c. 10, ss. 7, 9; 35 & 36 Vict. c. 30. The implied warranty applies to every contract for the sale of a chain cable, and is not

§ 673 a. In America the law as to implied warranty appears to be quite in accord with the English decisions. In Kellogg Bridge Company *v.* Hamilton (*q*), before the Supreme Court of the United States in 1883, the English authorities were reviewed, and the rule was stated in the following language (*r*): "According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be, whether under the circumstances of the particular case the buyer had the right to rely, and necessarily relied, upon the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently the buyer in such cases — the seller giving no express warranty, and making no representations tending to mislead — is holden to have purchased entirely on his own judgment. But when the seller is the maker or the manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted for the purposes for which such or similar articles are designed (*s*). When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

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

limited by section 3 to one for the sale of a chain cable for use on a British ship. See Hall *v.* Billinham, 34 W. R. 122.

(*q*) 110 U. S. 108; and see Hoe *v.* Sanborn, 21 N. Y. 552; Cunningham *v.* Hall, 4 Allen (86 Mass.), 275; Howard *v.* Hoey, 23 Wendell, 350; Story on Sales, § 366 *et seq.*

(*r*) At p. 116.

(*s*) This was the view taken of the obligation of the manufacturer by the House of Lords in Drummond *v.* Van Ingen, 12 App. Cas. 284.

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*).]

AMERICAN NOTE.

WARRANTY.

§§ 610–673 a.

1. **Nature of.** A warranty — from the same root as guaranty — is an assurance of some fact, coupled with an agreement, express or implied, to make the assurance good, or pay for the deficiency. It is no necessary part of a sale, though usually given on the occasion of a sale, and with reference to it, and so in one sense forms a part of it. If made honestly with belief of its truth, the only remedy is contract-wise; if fraudulent, the buyer may sue in contract or in tort, at his option. Bostwick *v.* Lewis, 1 Day, 250; Hillman *v.* Wilcox, 30 Me. 170; Dye *v.* Wall, 6 Geo. 584; Vail *v.* Strong, 10 Vt. 457; Wardell *v.* Fosdick, 13 Johns. 325; Larey *v.* Taliaferro, 57 Geo. 443.

In an action of contract upon an express warranty, it is not necessary to prove any fraud, though it be alleged in the declaration. Shippen *v.* Bowen, 122 U. S. 575 and cases cited; House *v.* Fort, 4 Blackf. 295; Lassiter *v.* Ward, 11 Ired. 444; Trice *v.* Cockran, 8 Gratt. 450; Dillman *v.* Nadelhoffer, 119 Ill. 567; Reeves *v.* Corning, 51 Fed. R. 774; Gartner *v.* Corwine, 57 Ohio St. 246; Brown *v.* Doyle, Minn. (1897), 72 N. W. 814; Williamson *v.* Allison, 2 East, 446; Lewis *v.* Doyle, 13 App. Div. (N. Y.) 291, 292; Wilson *v.* Fuller, 58 Minn. 149.

A warranty need not be in writing, although the value of the article sold brings it within the Statute of Frauds. If the *sale* is made binding by any compliance with the statute, the warranty will be valid. Northwood *v.* Rennie, 3 Ont. App. 37 (1878). Unless it be to warrant some event beyond a year, when the warranty must be written. Nicholls *v.* Nordheimer, 22 Up. Can. C. P. 48.

It is hardly necessary to say that an action on a general warranty cannot be maintained unless the property has passed to the purchaser. Therefore a person who buys an article, the price to be paid in instalments, and the property not to pass until fully paid for, cannot sustain an action on a warranty until that event, even though he has possession of the property, and has paid some of the instalments. Frye *v.* Milligan, 10 Ont. R. 509 (1885). And see Tomlinson *v.* Morris, 12 Ont. R. 311; *contra*, Copeland *v.* Hamilton, 9 Manitoba, 143 (1893).

(*s*) Van Bracklin *v.* Fonda, 12 Johns. 468; Divine *v.* McCormick, 50 Barbour, 116. See, however, the limits of the implication laid down by Bronson, C. J., in Moses *v.* Mead, 1 Denio, at p. 387; by Shaw, C. J., in a case in the Supreme Judicial Court of Massachusetts, Winsor *v.* Lombard, 18 Pick. (35 Mass.) at p. 61; and by Morton, J., in Howard *v.* Emerson, 110 Mass. 321.

A breach of warranty, being matter of defence only, must be proved by the defendant. Dorr *v.* Fisher, 1 Cush. 271; Noble *v.* Fagnant, 162 Mass. 286.

2. **Consideration of a Warranty.** A warranty, therefore, being a contract, requires, like all other contracts, a consideration to support it. If made at the time of sale, or as a part of or inducement to the sale, no other consideration is necessary. The price to be paid for the article sold is a sufficient consideration for the additional contract of warranty, since one and the same consideration will support two promises as well as one. For this reason (viz., the necessity of a consideration) it necessarily follows that a warranty made long before a sale, and not as a part of or inducement to it, is not binding in law. Bryant *v.* Crosby, 40 Me. 9; Zimmerman *v.* Morrow, 28 Minn. 367; James *v.* Bocage, 45 Ark. 284. But an offer to warrant when the parties commence negotiating might be sufficient, although some days elapse before a final consummation of the bargain. Wilmot *v.* Hurd, 11 Wend. 584; Way *v.* Marten, 140 Pa. St. 499; Hobart *v.* Young, 63 Vt. 363 (1891). A private representation by the owner of property advertised at auction, made to the plaintiff, who bids off the property relying upon it, may be a warranty. Crossman *v.* Johnson, 63 Vt. 333 (1891). A warranty in a printed catalogue of an auction sale would not ordinarily enter into the sale, if the auctioneer, at the sale and in the presence of the purchaser, distinctly announces that the seller warrants nothing. Craig *v.* Miller, 22 Up. Can. C. P. 348 (1872). A statement as to the age of a horse does not amount to a warranty when contained in a "Supplemental Catalogue," which is a continuation of a larger and more formal catalogue containing the conditions of sale, one of them being that ages of horses offered for sale are not guaranteed. Henry *v.* Salisbury, 14 App. Div. (N. Y.) 526. Still more obviously, a warranty made after a sale has been fully made and completed, and not before promised or understood, is invalid unless there be a new consideration. Hogins *v.* Plympton, 11 Pick. 99, Shaw, C. J.; Bloss *v.* Kittridge, 5 Vt. 28; Towell *v.* Gatewood, 2 Scam. (Ill.) 24; Summers *v.* Vaughn, 35 Ind. 323; Grant *v.* Cadwell, 8 Up. Can. Q. B. 161; Morehouse *v.* Comstock, 42 Wisc. 626. If a warranty has been promised at the sale, and one is subsequently given, even after the sale is completed, it is not void for want of consideration. Collette *v.* Weed, 68 Wisc. 428 (1887). If the warranty be given at any time before the sale be fully completed, it is valid. Thus, when the goods were ordered and delivered, but no price fixed, and afterwards, when the price was finally agreed upon, a warranty was given, it was held valid. Vincent *v.* Leland, 100 Mass. 432. So where part of the purchase-money had been paid and there was a dispute as to the form of the warranty, and the parties then agreed upon the words in the instrument in suit, and the balance of the price was paid, the warranty was held binding. McGaughey *v.* Richardson, 148 Mass. 608. Douglas *v.* Moses, 89 Iowa, 40. So if one lot of goods be sold with a warranty, and a second order be given, "same as you sent us before," the previous warranty may well be understood as applying to the second sale also. Moore *v.* King, 57 Hun, 224.

The question of consideration usually arises only in express warranties, as implied warranties always arise, if at all, at the time of sale, and so the consideration always exists; whereas express warranties may be made before or after the sale. A slight new consideration will always suffice to

support a subsequent warranty. Porter *v.* Pool, 62 Geo. 238. Thus, where the goods were not delivered at the proper time, justifying the vendee in refusing to accept them, and the seller said, if the buyer would accept, he would warrant them against freezing, this was held binding. Congar *v.* Chamberlain, 14 Wisc. 258.

3. **What constitutes an Express Warranty.** Some propositions on this subject are too well settled to require the citation of authorities. They can be accumulated by the page.

(1.) All agree that neither the word "warrant" nor any other particular word or form of words is necessary.

(2.) All agree that mere words of praise and commendation, or which merely express the vendor's opinion, belief, judgment, or estimate, do not constitute a warranty.

(3.) All agree that any positive affirmation of a material fact as a fact, *intended by the vendor* as and for a warranty, and relied upon as such, is sufficient; and some hold the actual intent to warrant unnecessary.

(4.) All agree that whether a particular assertion is an affirmance of a positive fact, or, on the other hand, only praise and commendation, opinion or judgment, is a question for the jury, where the meaning is ambiguous, and the intention of the parties may be gathered from surrounding circumstances. Shippen *v.* Bowen, 122 U. S. 575, 581, and cases cited. And the jury's finding that a statement as to value is a warranty may be sustained. Titus *v.* Poole, 145 N. Y. 414.

To consider some particular instances of warranties, in Baum *v.* Stevens, 2 Ired. 411, the vendor of slaves by auction, in selling one, said "he would not warrant *that* negro, as he was unsound," and immediately offered another, saying: "Here is a young, likely, healthy negro; what is bid for him?" Held, that it was for the jury whether the latter words were a mere expression of opinion, or a positive affirmation, and so a warranty of health. See, also, Foggart *v.* Blackweller, 4 Ib. 238; Ayres *v.* Parks, 3 Hawks, 59; Erwin *v.* Maxwell, 3 Murphey, 241; Horton *v.* Green, 66 N. C. 596. An assertion by a vendor that a horse was not lame, that he would not be afraid to warrant that he was sound every way so far as the vendor knew, was held to amount to a warranty. Cook *v.* Moseley, 13 Wend. 277. In Tuttle *v.* Brown, 4 Gray, 457, a statement by the vendor of a cow, that "she was all right," was held sufficient to justify a jury in finding a warranty of soundness (whatever that may be in a cow). In Stevens *v.* Bradley, 89 Iowa, 174, the vendor said the animals sold were "as thrifty and healthy a lot of hogs as he had ever owned in his life, and he had been in the hog business a good many years." This was held to be a warranty of soundness. So, that a mule was "as sound as a dollar." Riddle *v.* Webb, 110 Ala. 599. So of a statement that the tobacco sold was "sound, redried, and would certainly keep." Herron *v.* Dibbrell, 87 Va. 289. See, also, McClintock *v.* Emick, 87 Ky. 160. The plaintiffs sold to defendant an upright boiler in place of the horizontal one used by the latter. The contract recited that the new boiler would evaporate ten pounds of water from one pound of coal, "which result we guaranty to be a saving of at least 20% in fuel over any horizontal tubular boiler." Held that the words quoted amounted to a warranty. Hazelton Boiler Co. *v.* Fargo Gas Co. 4 No. Dak. 365. And in Briggs *v.* Rumely Co. 96 Iowa,

202, a statement that a certain machine "would do as good work as any other separator in the United States" was held equivalent to a warranty that the machine was reasonably fit for the work it was intended to perform. In Kircher *v.* Conrad, 9 Mont. 191, the buyer of wheat, to be used for seed, asked the seller if it was spring wheat. The seller said, "It is spring wheat." The buyer said, "Are you sure it is spring wheat?" The seller said, "What do you take me for?" This was held not to be a warranty, but this is close to the line. Merely showing to a vendee the testimonials of others as to the quality of the goods does not necessarily amount to a warranty that they conform to the testimonials, unless something is said which expressly or impliedly guarantees that they shall equal the praise of the testimonials. Richey *v.* Daemicke, 86 Mich. 647 (1891). In Roberts *v.* Morgan, 2 Cow. 438, R. said to M. he would not exchange horses unless M. would warrant his horse to be sound, to which M. replied: "He is a sound horse, except the bunch on his leg." The horse had the glanders, and the vendor was held liable. See Foster *v.* Caldwell, 18 Vt. 176.

A statement that a corn-sheller was as good as new; would do as good work as any corn-sheller, and would do first-class work in every particular, was found by the jury to be a warranty in Unland *v.* Garton, 48 Neb. 202.

In Starnes *v.* Erwin, 10 Ired. 1, 226, this power of the jury was carried so far that, although the defendant actually used the word "warrant" in the trade, the jury were allowed to say whether he used the word "as a word of high commendation and praise, or as an undertaking to make good in damages" if the result anticipated did not follow; but this was not a sale of personal property, but of a gold mine, with a warranty that the vendee would make $100 out of it in ten days.

(5.) Many respectable cases seem to hold that a positive affirmation of a material fact, though made and relied upon as such, does not constitute a warranty, unless the vendor either actually intended thereby *to warrant*, or to have the vendee so understand him.

This is fairly inferred from the language used by the court in Beeman *v.* Buck, 3 Vt. 53; House *v.* Fort, 4 Blackf. 294; Foster *v.* Caldwell, 18 Vt. 176; Ender *v.* Scott, 11 Ill. 35; Figge *v.* Hill, 61 Iowa, 430, and many other cases. In McFarland *v.* Newman, 9 Watts, 55, the judge below instructed the jury that "a positive agreement, made by the defendant at the time of the contract, of a material fact (soundness of a horse), *is* a warranty, and is part or parcel of the contract." This was held erroneous, and it was thought to be a question for the jury whether the vendor "intended it as a warranty," and the court declared that a naked affirmation is not to be dealt with as a warranty, merely because the vendee gratuitously relied upon it. Holmes *v.* Tyson, 147 Pa. St. 305.

(6.) The better class of cases hold that a positive affirmation of a material fact, as a fact, intended to be relied on as such, and which is so relied upon, constitutes *in law* a warranty, whether the vendor mentally intended to warrant or not; and that his intention is immaterial. Reed *v.* Hastings, 61 Ill. 266; Hawkins *v.* Pemberton, 51 N. Y. 198; Kenner *v.* Harding, 85 Ill. 268; Ingraham *v.* Union Railroad Co. 19 R. I. 356; Zimmerman *v.* Holliday, 103 Iowa, 144; Barnes *v.* Burns, 81 Wisc. 232.

If, therefore, the language will admit of but one meaning, the court may

declare it to be a warranty without leaving it to a jury. Daniells *v.* Aldrich, 42 Mich. 58. In Stroud *v.* Pierce, 6 Allen, 413, the vendor of a piano affirmed that "it was well made, and would stand up to concert pitch." This was held to be absolutely a warranty, and that it was not to be left to the jury to find whether this language was used with the intention of affirming a fact, or of merely expressing an opinion; the court saying, "The intent of the parties is immaterial." The true rule seems to be this: that the jury may judge whether the words used were words of commendation and praise or as expressions of opinion and judgment; or whether, on the other hand, they were used as words of positive affirmation, and intended so to be understood and relied upon by the buyer: and if the latter, they constitute a warranty in law, whether the seller *intended* to *warrant* or not. See Commonwealth *v.* Jackson, 132 Mass. 16; Beals *v.* Olmstead, 24 Vt. 114; McClintock *v.* Emick, 87 Ky. 167; Ormsby *v.* Budd, 72 Iowa, 80; Drew *v.* Ellison, 60 Vt. 401; Powell *v.* Chittick, 89 Iowa, 513. In Enger *v.* Dawley, 62 Vt. 165, the rule in Vermont is declared to be, that either the representation must have been intended as a warranty and so understood by both parties, *or* intended by the parties as a part of the contract, *or* must have formed the basis of the contract, citing many cases.

4. **Oral Warranties.** If the article is sold by a formal written contract, or a regular bill of sale, which is silent on the subject of warranty, no oral warranty made at the same time, or even previously, can be shown, since the writing is conclusively supposed to embody the whole contract. For the same reason, no additional oral warranty can be engrafted on, or added to, one that is written. Lamb *v.* Crafts, 12 Met. 353; Pender *v.* Fobes, 1 Dev. & Bat. 250; Reed *v.* Wood, 9 Vt. 286; Wood *v.* Ashe, 1 Strobh. 407; Boardman *v.* Spooner, 13 Allen, 353; Dean *v.* Mason, 4 Conn. 432; Frost *v.* Blanchard, 97 Mass. 155; Mumford *v.* McPherson, 1 Johns. 414; Merriam *v.* Field, 24 Wisc. 640; McQuaid *v.* Ross, 77 Wisc. 470; Milwaukee Boiler Co. *v.* Duncan, 87 Wisc. 120; DeWitt *v.* Berry, 134 U. S. 312; Eighmie *v.* Taylor, 98 N. Y. 288; Mayer *v.* Dean, 22 Jones & Sp. 315; Van Ostrand *v.* Reed, 1 Wend. 424; Randall *v.* Rhodes, 1 Curtis C. C. 90; Galpin *v.* Atwater, 29 Conn. 93; Whitmore *v.* South Boston Iron Co. 2 Allen, 58; Shepherd *v.* Gilroy, 46 Iowa, 193; Jones *v.* Alley, 17 Minn. 292; Thompson *v.* Libby, 34 Ib. 374; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281; Humphrey *v.* Merriam, 46 Minn. 413; Johnson *v.* Truesdale, 46 Minn. 347; McCray Refrigerator Co. *v.* Wood, 99 Mich. 269; Nichols *v.* Crandall, 77 Mich. 401; Vierling *v.* Iroquois Furnace Co. 170 Ill. 189; McCormick Machine Co. *v.* Thompson, 46 Minn. 15. Thus, where the written warranty was only to the age and soundness of a horse, oral statements as to his "docility" were held not admissible. Mullain *v.* Thomas, 43 Conn. 252. A written warranty gratuitously given after a sale, and therefore void, will not limit an oral and different one given at the time of sale. Aultman *v.* Kennedy, 33 Minn. 339. And where there is a written warranty in the contract which an illiterate buyer has been induced by fraud to sign, he may avoid this written warranty and sue upon an oral one which was given at the time of sale. Aultman *v.* Falkum, 51 Minn. 562.

But this rule excluding oral evidence of a warranty does not apply to an informal "bill of parcels," as it is called, as, "A. B. bought of C. D. one bay horse." Atwater *v.* Clancy, 107 Mass. 369; Filkins *v.* Whyland, 24

N. Y. 338; Koop *v.* Handy, 41 Barb. 454; Perrine *v.* Cooley, 39 N. J. L. 449; Gordon *v.* Waterous, 36 Up. Can. Q. B. 321 (1875); McMullen *v.* Williams, 5 Ont. App. 518 (1880). Much less does a mere receipt for the price, which contains no allusion to a warranty, prevent the vendee from proving the existence of one. Hersom *v.* Henderson, 21 N. H. 224; Filkins *v.* Whyland, 24 Barb. 379. So a bought note signed only by the buyer does not prevent him, after the goods have been fully delivered, from setting up a warranty when sued for the price, although the memorandum is silent on the subject. Curtis *v.* Soltau, 16 Daly, 490 (1891), citing Routledge *v.* Worthington Co. 119 N. Y. 592. Such memoranda are not considered contracts so as to exclude any oral terms or conditions of the real bargain. Hazard *v.* Loring, 10 Cush. 267; Boorman *v.* Jenkins, 12 Wend. 566; Cassidy *v.* Begoden, 6 Jones & Sp. 180; Sutton *v.* Crosby, 54 Barb. 80; Wallace *v.* Rogers, 2 N. H. 506; Schenck *v.* Saunders, 13 Gray, 37; Fletcher *v.* Willard, 14 Pick. 464; Hildreth *v.* O'Brien, 10 Allen, 104; Stacy *v.* Kemp, 97 Mass. 168; Phelps *v.* Whitaker, 37 Mich. 72; Weiden *v.* Woodruff, 38 Mich. 131; Wood Machine Co. *v.* Gaertner, 55 Mich. 453. And see Emmett *v.* Penoyer, 151 N. Y. 564, and cases cited.

5. **Interpretation of Warranties.** It is frequently said that the interpretation or construction of a written warranty is for the court, and of an oral one for the jury: but it is conceived that this means only that it is for the jury to find what words were in fact used by the parties, and under what circumstances and intent, and, that being established, the construction, or "effect of it," is as much for the court in an oral warranty as in a written one; the only difference being that in the one there is no uncertainty about the language used, while in the other there may be. See Short *v.* Woodward, 13 Gray, 86.

A statement in a bill of sale of a horse, that he was "*considered* sound," was held not to import an absolute warranty. Wason *v.* Rowe, 16 Vt. 525. Exactly otherwise if the statement be, "he is sound and kind." Hobart *v.* Young, 63 Vt. 366. In Snow *v.* Schomacker Man. Co. 69 Ala. 111, it was held that the words, "every piano warranted for five years," constituted a warranty that each piano sold had no inherent defects of materials or workmanship that would cause it to break or give way in five years, but was not a warranty of style or grade. On a warranty that a horse is "all right, except that he will sometimes shy," a recovery may be had for partial blindness; the two are not necessarily synonymous. Kingsley *v.* Johnson, 49 Conn. 462. In a sale of wine "in merchantable order, to be approved by the buyer in three days after delivery," there is no absolute warranty of its merchantability, but only that the buyer may have three days to determine whether it is or not. Gentilli *v.* Starace, 14 N. Y. Supp. 764; on appeal, 133 N. Y. 140. In a sale of sugar to be shipped at Manila for Boston, with a warranty as to weight and color, the warranty is ordinarily complied with if the sugar is of that weight and color *when shipped*, even though it loses somewhat in both respects on the voyage, in the absence of anything to show the warranty was as to the condition on arrival. Lord *v.* Edwards, 148 Mass. 476.

6. **Obvious Defects.** It is sometimes held that a general warranty does not apply to patent and obvious defects. Hill *v.* North, 34 Vt. 604;

Williams *v.* Ingram, 21 Tex. 300; Dillard *v.* Moore, 2 Eng. (Ark.) 166; M'Cormick *v.* Kelly, 28 Minn. 137; Vandewalker *v.* Osmer, 65 Barb. 556; Hudgins *v.* Perry, 7 Ired. 102; Bennett *v.* Buchan, 76 N. Y. 386; Studer *v.* Bleistein, 115 Ib. 316; Jordan *v.* Foster, 6 Eng. (Ark.) 141. In Long *v.* Hicks, 2 Humph. 305, a negro child fifteen months old was sold with a written warranty that it was "sound and well." It was affected from its birth with a disease of the spine, and this diseased condition was apparent to casual observation, and the buyer was told that the child was unsound. Held, that evidence of the buyer's knowledge of the disease was material in a suit on the warranty and ought to have been admitted. Schuyler *v.* Russ, 2 Caines, 202, is like it. In Marshall *v.* Drawhorn, 27 Geo. 275, the slave had a stiff neck, to which the vendor called the buyer's attention at the sale, but gave the buyer a written warranty that he was "sound and healthy in body and mind," the buyer saying, before the bill of sale was given, he would not enforce the warranty. Held, that he could not. See, also, Leavitt *v.* Fletcher, 60 N. H. 182.

But it is conceived that, if obvious defects are not covered by a general warranty, it is simply from the presumption that the buyer does not rely upon it, which is an essential element to make any warranty binding. In the nature of things, one cannot rely upon the truth of that which he knows to be untrue; and, to a purchaser fully knowing the facts in respect to the property, misrepresentation could not have been an inducement or consideration to the purchase, and hence could not have been a part of the contract. But there seems to be no good reason why a warranty *may not* cover obvious defects as well as others, if the vendor is willing to give it, and the buyer is willing to buy defective property on the assurance of the warranty. He must rely upon the warranty in order to recover upon it. Watson *v.* Roode, 30 Neb. 264; Little *v.* Woodworth, 8 Ib. 281; Hahn *v.* Doolittle, 18 Wisc. 196; Reed *v.* Hastings, 61 Ill. 266; Halliday *v.* Briggs, 15 Neb. 219; Abilene Nat. Bank *v.* Nodine, 26 Or. 53; Zimmerman *v.* Morrow, 28 Minn. 367; Torkelson *v.* Gorgenson, 28 Minn. 383; Holman *v.* Dord, 12 Barb. 336. If he relies on his own judgment alone, he does not rely on his warranty; if he relies on the warranty, alone or in part, he is not without remedy merely because the infirmities are apparent. Pinney *v.* Andrus, 41 Vt. 631; First Nat. Bank *v.* Grindstaff, 45 Ind. 158; Fletcher *v.* Young, 69 Geo. 591; Fitzpatrick *v.* D. M. Osborne Co. 50 Minn. 261. See, also, Storrs *v.* Emerson, 72 Iowa, 390; Norris *v.* Parker, 15 Tex. Civ. App. 117, 38 S. W. 259; Fitzgerald *v.* Evans, 49 Minn. 541; Hansen *v.* Gaar, 63 Minn. 94.

It is absolutely true, in regard to *implied* warranties, that no implication of warranty arises when the defect is obvious to the senses, because such defects are, or should be, known by the buyer; but the rule may well be different as to express, and especially as to written, warranties specially covering the defect. Such contracts are to be construed most strongly against the warrantor, and, for aught that is known, the warranty was demanded and given expressly to cover the existing and known defects. Evidence that the defect was obvious and known to the buyer, and so excepted from the operation of a warranty, which in terms is broad enough to cover it, is apparently no less than limiting a written contract by parol agreement. In the one case, the written contract is limited by a mere inference from the facts; in the other, it is controlled by the oral agreement of the parties; in both, the written contract is altered, and an effect is

given to it different from its obvious meaning on its face. But, if a warranty never covers an obvious defect, the rule does not apply unless *the extent*, as well as the mere existence, of the disease or defect is also known to the purchaser. If the want of a tail or an ear or a leg of a horse is not covered by a general warranty, yet a defect in the eye, for instance, or a splint on the leg, though visible, may afterwards prove to be so serious as to be covered by the warranty. Fisher *v.* Pollard, 2 Head, 314; Shewalter *v.* Ford, 34 Miss. 417. The defect, to be obvious, must be discernible by an ordinary observer examining the property with a view to purchase, and not one requiring special skill to detect it. Birdseye *v.* Frost, 34 Barb. 367. And see Meickley *v.* Parsons, 66 Iowa, 63; Vates *v.* Cornelius, 59 Wisc. 615; Thompson *v.* Harvey, 86 Ala. 522; Drew *v.* Ellison, 60 Vt. 401.

In Scarborough *v.* Reynolds, 13 Rich. 98, it was said that an express warranty of soundness in a slave would not cover a crooked arm, caused by a dislocation in infancy, and which was palpable to the naked eye; but the case really turned upon the point that such defect was not unsoundness at all, as it did not diminish the capacity of the slave for work.

In Wallace *v.* Frazier, 2 N. & McC. 516, a negro was sold with a written warranty of soundness. He had at the time a sore on his leg, and the buyer, being suspicious of it, required a written warranty. The sore proved to be a white swelling, and incurable. The knowledge of the buyer was held not to preclude him from recovering on the warranty. In Fitzgerald *v.* Evans, 49 Minn. 541, a horse was sold with a warranty that a small puff then visible on the leg would disappear entirely. The defect proved to be a spavin. The seller was held liable. Hernia in a negro, though known to the buyer, is at least not such an obvious defect as not to be covered by a written warranty of "soundness in body and mind." Stucky *v.* Clyburn, Cheves, 186. So as to a swelling of the abdomen in a negro woman, though plainly visible and known to the purchaser; for such an appearance might be the result of a hidden disease, or owing to other causes which would disappear in the course of nature; and whether it were the one or the other could be known only by a minute examination, and more knowledge than ordinary purchasers possess. Wilson *v.* Ferguson, Cheves, 190. Nor is scrofula in a slave such a defect visible to the senses, or which can be detected by mere inspection, as to be exempt from the operation of a written warranty of soundness. Thompson *v.* Botts, 8 Mo. 710. In Callaway *v.* Jones, 19 Geo. 277, the vendee of a slave sold with a written warranty of soundness was allowed to recover for a defect in the eye, "though the blemish was obvious."

Of course, if the seller uses some artifice to conceal defects otherwise visible, or misrepresents their character, his general warranty may cover them. Chadsey *v.* Greene, 24 Conn. 562; Kenner *v.* Harding, 85 Ill. 264; Gant *v.* Shelton, 3 B. Monr. 423; Robertson *v.* Clarkson, 9 Ib. 507.

7. **Unsoundness in Horses.** A temporary and curable injury existing at the sale, but which does not at the time injuriously affect the natural usefulness and fitness of a horse for service, even if it be a fault, is not a breach of a warranty of soundness. Roberts *v.* Jenkins, 21 N. H. 116. In Kornegay *v.* White, 10 Ala. 255, it was held that any disease which affects the value of the animal, whether permanent or *temporary*, is an unsoundness. Approved in Roberts *v.* Jenkins, 21 N. H. 119. But,

whether this be so or not, it is clear that the disease need not be incurable in order to be an unsoundness. Thompson *v.* Bertrand, 23 Ark. 731. A horse may be unsound at the time of sale if he then has the seeds of disease (the glanders), though it be some time before the disease becomes developed in its most offensive form. It is inchoate glanders at the time of sale. Woodbury *v.* Robbins, 10 Cush. 520, a valuable case. A similar view was taken of "rheumatism" in Crouch *v.* Culbreath, 11 Rich. 9, modifying anything to the contrary in Stephens *v.* Chappell, 3 Strobh. 80; and see Hook *v.* Stovall, 21 Geo. 69; Fondren *v.* Durfee, 39 Miss. 324; Kenner *v.* Harding, 85 Ill. 265.

"Cribbing" is an unsoundness. Washburn *v.* Cuddihy, 8 Gray, 430; Walker *v.* Hoisington, 43 Vt. 608, though here the warranty was that the horse was "sound and *right.*" Dean *v.* Morey, 33 Iowa, 120. Whether "corns" in a horse's foot is unsoundness has been held a question for the jury. Alexander *v.* Dutton, 58 N. H. 282. The fact that a mare sold was with foal is no breach of a warranty that she was "all right every way for livery purposes." Whitney *v.* Taylor, 54 Barb. 536.

Lameness may or may not be unsoundness; if permanent, it is; if only accidental and temporary, it is not. Brown *v.* Bigelow, 10 Allen, 242, an important case. A mere cold, controlled by ordinary remedies, is not unsoundness. Springstead *v.* Lawson, 23 How. Pr. R. 302.

8. **Future Condition.** Ordinarily a warranty is understood to apply only to the state of things existing at the very time of sale. Stamm *v.* Kuhlmann, 1 Mo. App. 296; Miller *v.* McDonald, 13 Wisc. 673; Leggat *v.* Sand's Ale Co. 60 Ill. 158; Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. Rep. 584; Bowman *v.* Clemmer, 50 Ind. 10; English *v.* Spokane Co. 57 Fed. R. 451. In Merrick *v.* Bradley, 19 Md. 50, B. sold M. a slave with a warranty of soundness, and gave M. an order on C., with whom the slave then was, to deliver her to M. While M. was waiting at C.'s door to receive the slave she committed suicide, but it was held the warranty was not broken, as she was alive and well when the order was given and received.

But there is no legal reason why a party may not warrant against future events or future infirmities as well as present, if the language is sufficiently clear and explicit. Fatman *v.* Thompson, 2 Disney, 482. Therefore, where the vendor of a slave, sold in 1861, warranted that "he should be a slave for life," and he was liberated by the emancipation proclamation in 1863, the vendor was held liable. Osborn *v.* Nicholson, 13 Wall. 654. See, also, Richardson *v.* Mason, 53 Barb. 601; Fitzgerald *v.* Evans, 49 Minn. 541. But a warranty that a piano shall continue free from defect for five years must be in writing under the Statute of Frauds. Nicholls *v.* Nordheimer, 22 Up. Can. C. P. 48 (1871).

9. **Warranties by Agents.** Auctioneers, known to be such, have not ordinarily authority to warrant and bind the owner. The Monte Allegre, 9 Wheat. 647; Bigelow, J., in Blood *v.* French, 9 Gray, 198; Schell *v.* Stephens, 50 Mo. 375; Court *v.* Snyder, 2 Ind. App. 440, 28 N. E. Rep. 718. Nor ordinary brokers. Dodd *v.* Farlow, 11 Allen, 426. And generally it may be said that a mere special agent "to sell" has not, in the absence of any express authority, or any usage or custom to that effect, power to warrant and bind the principal in a sale of an article open to

inspection. Cooley *v.* Perrine, 41 N. J. L. 322; 42 Ib. 623, a leading case, approving Brady *v.* Todd, 9 C. B. (N. S.) 592; Smith *v.* Tracy, 36 N. Y. 79, a sale of bank stocks; Wait *v.* Borne, 123 N. Y. 592, 604; Cafre *v.* Lockwood, 22 App. Div. (N. Y.) 11; State *v.* Fredericks, 47 N. J. L. 469; Herring *v.* Skaggs, 73 Ala. 446; Westurn *v.* Page, 94 Wisc. 251. If the articles are usually warranted *when sold by the owner*, it may be that an agent to sell may be supposed to have authority to warrant, and so to sell in the usual way. Ahern *v.* Goodspeed, 72 N. Y. 108; Taylor *v.* Gardiner, 8 Manitoba, 310 (1892); Baldry *v.* Bates, 52 L. T. N. S. 620; Larson *v.* Aultman, 86 Wisc. 281; Mayer *v.* Dean, 115 N. Y. 557; Kircher *v.* Conrad, 9 Mont. 191, a sale by a clerk behind the counter; Herring *v.* Skaggs, 62 Ala. 180: which rule may sustain the cases of Skinner *v.* Gunn, 9 Porter, 305; Gaines *v.* McKinley, 1 Ala. N. S. 446; and Bradford *v.* Bush, 10 Ala. 386. One partner of a firm dealing in horses has power to warrant. Edwards *v.* Dillon, 147 Ill. 14. In sales "by sample," it may be that an agent has implied authority to warrant that the property shall be equal to the sample. Schuchardt *v.* Allens, 1 Wall. 359; Nelson *v.* Cowing, 6 Hill, 336; Andrews *v.* Kneeland, 6 Cow. 354; Randall *v.* Kehlor, 60 Me. 47; but in sales by sample, the law *implies* a warranty of similarity, whether the agent does or does not expressly warrant it.

In Upton *v.* Suffolk County Mills, 11 Cush. 586, a valuable case, it was distinctly held that a general selling agent, in the absence of any usage or custom to that effect, has no authority to warrant that flour sold by him shall keep sweet during a sea voyage from Boston to San Francisco, in which it must twice cross the equator. And in Palmer *v.* Hatch, 46 Mo. 585, it was held that an agent to sell whiskey had no authority to warrant against its seizure for former violation of the revenue laws.

Some American courts certainly seem to hold that a general agent to sell has power to warrant, without any express authority, or any custom or usage to that effect, unless he is positively forbidden to warrant. Deming *v.* Chase, 48 Vt. 382; Murray *v.* Brooks, 41 Iowa, 45; First National Bank *v.* Robinson, 105 Iowa, 463 (1898); Boothby *v.* Scales, 27 Wisc. 635; Talmage *v.* Bierhause, 103 Ind. 270; Flatt *v.* Osborne, 33 Minn. 98. But since a warranty is confessedly no natural or necessary part of a contract of sale, but only a collateral and independent agreement, though given, of course, on the *occasion* of a sale, it is difficult to see where the agent gets such authority, unless expressly or impliedly from his principal, or how a mere authority to "sell" gives power to make another contract not a necessary or usual part of "selling." See Wait *v.* Boone, 123 N. Y. 604; Bierman *v.* City Mills Co. 151 N. Y. 489.

Of course an unauthorized warranty of an agent may be ratified; but a mere receipt of the proceeds of the sale by the principal, in ignorance of an unauthorized warranty, will not be a ratification. Smith *v.* Tracy, 36 N. Y. 79, a very valuable opinion by Mr. Justice Porter. And see Combs *v.* Scott, 12 Allen, 493. As to what circumstances will be sufficient evidence of an authority to warrant by an agent, see the cases of Smilie *v.* Hobbs, 64 N. H. 75; Churchill *v.* Palmer, 115 Mass. 310; Eadie *v.* Ashbaugh, 44 Iowa, 519; Melby *v.* Osborne, 33 Minn. 492; Vogel *v.* Osborne, 32 Minn. 167.

IMPLIED WARRANTIES.

10. General Principles. Implied warranties are created by law, or spring from the facts existing at the time of sale; from what the parties did rather than from what they said. They are contracts, to be sure, but silent contracts; and certain rules prevail as to their existence or non-existence.

No implied warranty of quality ordinarily arises where there is an express warranty of some other quality. The demand by the buyer for one warranty is supposed to indicate an intention to desire no other. *Expressio unius est exclusio alterius.* This is especially enforced where the express warranty is in writing. Jackson *v.* Langston, 61 Ga. 392; International Pavement Co. *v.* Smith, 17 Mo. App. 264; Baldwin *v.* Van Deusen, 37 N. Y. 487; Deming *v.* Foster, 42 N. H. 175; McGraw *v.* Fletcher, 35 Mich. 104; Mullain *v.* Thomas, 43 Conn. 252; DeWitt *v.* Berry, 134 U. S. 313; Chandler *v.* Thompson, 30 Fed. Rep. 38; Case Plow Works *v.* Niles Co. 90 Wisc. 590; Merriam *v.* Field, 24 Wisc. 640. But it has been *thought* in South Carolina that an express warranty of *quality* does not exclude the implied warranty *of title*, nor *vice versa*, and that they can subsist together; one a contract by law, the other by the parties. Wells *v.* Spears, 1 McCord, 421; Wood *v.* Ashe, 3 Strobh. 64; Trimmier *v.* Thomson, 10 S. C. 164; Ober *v.* Blalock, 40 S. C. 31.

11. Of Title. (1.) It is universally agreed in America, also, that in every sale of personal property by one in possession thereof, selling in his own right as absolute owner, there is an implied warranty of ownership; making him liable if he be not owner, whether he made any express assertion of ownership or not, or whether he knew of any defect in his title or not. The sale itself is an assertion of ownership. This applies to sales of incorporeal property, rights and choses in action, as well as of chattels. Some of the leading cases are these: —

ALABAMA. Ricks *v.* Dillahunty, 8 Port. 134, a sale of a slave; Cozzins *v.* Whitaker, 3 Stew. & Port. 322, also a slave; Williamson *v.* Sammons, 34 Ala. 691, a horse.

ARKANSAS. Boyd *v.* Whitfield, 19 Ark. 447, a slave; Lindsay *v.* Lamb, 24 Ark. 224, a wagon.

CALIFORNIA. Gross *v.* Kierski, 41 Cal. 111, a pianoforte; Jeffers *v.* Easton, 113 Cal. 345, a lease.

CONNECTICUT. Starr *v.* Anderson, 19 Conn. 341, a horse.

FLORIDA. Lines *v.* Smith, 4 Fla. 47, a slave.

ILLINOIS. Morris *v.* Thompson, 85 Ill. 16, fat cattle.

INDIANA. Marshall *v.* Duke, 51 Ind. 62, a horse.

KANSAS. Paulsen *v.* Hall, 39 Kans. 365.

KENTUCKY. Chism *v.* Woods, Hardin, 531, a horse; Payne *v.* Rodden, 4 Bibb, 304, also a horse; Scott *v.* Scott, 2 A. K. Marsh. 215, a slave; Chancellor *v.* Wiggins, 4 B. Monr. 201, slaves; Richardson *v.* Tipton, 2 Bush, 202, captured horses.

MAINE. Hale *v.* Smith, 6 Greenl. 420, horses and furniture; Eldridge *v.* Wadleigh, 3 Fairf. 372, a yoke of oxen; Butler *v.* Tufts, 13 Me. 302, oxen; Huntingdon *v.* Hall, 36 Me. 501, a dwelling-house; Thurston *v.* Spratt, 52 Me. 202, a horse.

MARYLAND. Mockbee *v.* Gardner, 2 Harr. & Gill, 176, a slave; Rice *v.* Forsyth, 41 Md. 389, a steam-engine and other machinery.

Missouri. Matheny *v.* Mason, 73 Mo. 677, corn; Dryden *v.* Kellogg, 2 Mo. App. 87, a steam-engine and boiler; Donaldson *v.* Newman, 9 Mo. App. 235, a sale of bonds.

Massachusetts. Emerson *v.* Brigham, 10 Mass. 202, beef; Bucknam *v.* Goddard, 21 Pick. 71, leather; Coolidge *v.* Brigham, 1 Met. 551; Dorr *v.* Fisher, 1 Cush. 273, butter; Bennett *v.* Bartlett, 6 Cush. 225, brass wire; Whitney *v.* Heywood, Ib. 86, an omnibus; Brown *v.* Pierce, 97 Mass. 46, wood; Shattuck *v.* Green, 104 Ib. 42, furniture and fixtures.

Michigan. Hunt *v.* Sackett, 31 Mich. 18, an exchange of horses.

Minnesota. Davis *v.* Smith, 7 Minn. 414, a sale of chattels.

Mississippi. Long *v.* Hickingbottom, 28 Miss. 772; Storm *v.* Smith, 43 Miss. 497, a slave.

Nebraska. Hall *v.* Aitkin, 25 Neb. 366.

New Hampshire. Sargent *v.* Currier, 49 N. H. 310, a horse.

New Jersey. Wanser *v.* Messler, 29 N. J. L. 256, wood; Wood *v.* Sheldon, 42 N. J. L. 421, certificate of stock, a valuable case.

New York. Heermance *v.* Vernoy, 6 Johns. 5, a bark-mill; Vibbard *v.* Johnson, 19 Johns. 78, a chest of tea; Swett *v.* Colgate, 20 Johns. 196, barilla; Case *v.* Hall, 24 Wend. 102, a sale of lumber; Rew *v.* Barber, 3 Cow. 272, a horse; Hoe *v.* Sanborn, 21 N. Y. 556, circular saws; Burt *v.* Dewey, 40 N. Y. 283, a horse; McKnight *v.* Devlin, 52 N. Y. 401, fixtures; McCoy *v.* Artcher, 3 Barb. 323, a promissory note; McGiffin *v.* Baird, 62 N. Y. 329, calves; Cohen *v.* Ammidon, 120 Ib. 398; Flandrow *v.* Hammond, 148 N. Y. 133, a judgment.

North Carolina. Inge *v.* Bond, 3 Hawks, 101, a slave.

Ohio. Darst *v.* Brockway, 11 Ohio, 462, the use of a cement.

Pennsylvania. McCabe *v.* Morehead, 1 W. & S. 513, a sale of timber; Swanzey *v.* Parker, 50 Pa. St. 441, a note; Flynn *v.* Allen, 57 Ib. 482, a chose in action; Whitaker *v.* Eastwick, 75 Ib. 229, coal; Krumbhaar *v.* Birch, 83 Ib. 426, sale of a patent right.

South Carolina. Colcock *v.* Goode, 3 McCord, 513, sale of a slave.

Tennessee. Word *v.* Cavin, 1 Head, 507, sale of a slave, an important case; Trigg *v.* Faris, 5 Humph. 343, also a slave; Gookin *v.* Graham, 5 Humph. 480, is similar.

Vermont. Bank *v.* Bank, 10 Vt. 145, a check; Thrall *v.* Newell, 19 Ib. 202, a note; Patee *v.* Pelton, 48 Vt. 182, an exchange of carpets; Gilchrist *v.* Hilliard, 53 Vt. 592, a sale of accounts.

West Virginia. Byrnside *v.* Burdett, 15 W. Va. 702, an exchange of horses; Jarrett *v.* Goodnow, 39 W. Va. 602, machinery, for which a note was given. Suit on the note was enjoined in equity.

Wisconsin. Lane *v.* Romer, 2 Chand. 61, furniture; Costigan *v.* Hawkins, 22 Wisc. 74, right to manufacture a patent article; Croninger *v.* Paige, 48 Wisc. 229, sale of rights in a patent heater; Edgerton *v.* Michels, 66 Wisc. 124, 34 Am. Law Reg. 260; and a valuable not by Mr. David Stewart, of the Baltimore bar.

Nova Scotia. McFatridge *v.* Robb, 24 Nova Scotia, 506, iron; approving Brown *v.* Cockburn, *infra*.

This implied warranty of title exists although the vendor assigns and delivers to the buyer the bill of sale under which he himself acquired the chattel, which is silent on the subject of warranty. Shattuck *v.* Green, 104 Mass. 42. If the bill of sale to him had contained an express warranty of title, and he had assigned the same to *his* vendee with all the

conditions therein described, that might amount to an express warranty on his part. Long *v.* Anderson, 62 Ind. 537. Of course a warranty of title is a warranty of a *free and perfect* title; and is broken by any prior incumbrances, mortgages, pledges, or liens on the property. Dresser *v.* Ainsworth, 9 Barb. 619; Brown *v.* Cockburn, 37 Up. Can. Q. B. 592 (1876), an important case. Hodges *v.* Wilkinson, 111 N. C. 56, and cases cited. And whatever amount the vendee may be obliged to pay the prior incumbrancer he can recover of his vendor, or deduct it from the price if he has not paid for the goods. Sargent *v.* Currier, 49 N. H. 310; Harper *v.* Dotson, 43 Iowa, 232.

There is no implied warranty of title in a sale by one joint owner to another, the parties being in joint possession, and having equal knowledge of the legal status. Gurley *v.* Dickason, Tex. App. (1898), 46 S. W. 53.

(2.) All agree that by "possession," in order to raise the implied warranty of title, is not meant merely actual custody, occupation, or physical keeping, but the term includes all constructive possession, such as possession by a bailee, or agent of the vendor, etc. The word "possession" must have a broad construction. Whitney *v.* Heywood, 6 Cush. 82; Shattuck *v.* Green, 104 Mass. 45.

(3.) Reason and analogy seem to favor an implied warranty of title although the vendor is not in actual possession, provided he in fact *purports to sell an absolute and perfect title.* If out of possession, actual or constructive, especially if the property is in the possession of an adverse claimant, it is more natural to believe that the vendor is selling only "his interest" in it, be it more or less; in which case the vendee might be supposed to take his own risk, and to understand that he had no claim against the vendor if his title failed. See Penchen *v.* Imperial Bank, 20 Ont. Rep. 325 (1891), a very excellent case, in which Morley *v.* Attenborough, 3 Ex. 500, was commented on, and distinguished. In such cases, therefore, it is reasonable to hold that there is no implied warranty of title by the mere act of sale. See, as tending somewhat to support this view, Jones *v.* Huggeford, 3 Met. 519; Bank of Northampton *v.* Mass. Loan Co. 123 Mass. 330; Bogert *v.* Chrystie, 24 N. J. L. 57; Krumbhaar *v.* Birch, 83 Pa. St. 426; Whitney *v.* Heywood, 6 Cush. 82; Shattuck *v.* Green, 104 Mass. 42; Gould *v.* Bourgeois, 51 N. J. L. 373, a valuable case. For of course, if the vendee assumes the risk of ownership, he could not rely upon any implied warranty. Porter *v.* Bright, 82 Pa. St. 441.

It has been said that the distinction between goods in and not in possession of the vendor is "so deeply rooted in the American law that it cannot easily be eradicated." Our examination of the American cases leads us to doubt whether such distinction can be considered as firmly established, and whether there is any sound distinction between a vendor in and one out of possession, as to this implied warranty of title.

Let us consider the cases usually relied upon in support of such distinction. In Andres *v.* Lee, 1 Dev. & Bat. Eq. 318 (1836), not only was the sale of the slave made by an administrator in his official capacity, but the adverse claimants who had the slave in their possession were present at the sale and made known their claim, and forbade the sale, whereupon the administrator repeatedly declared that he sold "only the right of the heirs of Solomon Lee." Of course a buyer under all those circumstances could

not expect there was any warranty of title; and the price paid, "twenty-five to forty per cent. less than the full value," shows it was a speculation, and that he bought at his own hazard. McCoy *v.* Artcher, 3 Barb. 323 (1848), is one of the most important. It was a sale of a promissory note given by one Arnold nominally to the vendors of the plaintiff, which the vendors not only did not have in their possession, but they had never in fact seen it, and did not believe in its existence, *as they informed the buyer*, who bought it at the same time with other securities of the same parties. The whole were sold at fifty per cent. of their face value, and the court say: "There are other circumstances in this case tending strongly, if not conclusively, to show that Artcher purchased the note *at his own risk;*" and the only decision in the case was, that the court below erred in refusing to submit to the jury what was the actual intention and understanding of the parties; the judge below having told the jury that the "vendor must be deemed in law as warranting the title to the note." And the court added: "If there be an *affirmation of* title where the vendor is not in possession, the vendor should be subjected to the same liability as if he had possession of the property." That is the ground on which a vendor *in possession* is held to warrant the title, not because he expressly affirms the title, but because the sale itself is an affirmation of title.

In Dresser *v.* Ainsworth, 9 Barb. 620 (1850), sometimes cited on this side of the question, A. bought of D. a pair of horses and a cart, then in the possession of a sheriff on an execution against D., and gave the note in suit for them. They were sold on the execution the next day. The vendor was held to have warranted the title, although the property was apparently out of his possession, and in possession of a creditor claiming adversely to the vendor. If this case has any bearing, it tacitly ignores any distinction.

Edick *v.* Crim, 10 Barb. 445 (1851), much relied upon, was an action against a vendor for fraud in misrepresenting that he was the owner; but the vendor proved "that the buyer knew, long before the trade, that he did not own the rifle, and on this ground, beyond all doubt, the jury found for the defendant," though the court proceeded *to say* that the plaintiff could not recover upon an implied warranty, because the vendor was out of possession.

Huntingdon *v.* Hall, 36 Me. 501 (1853), however, seems to be a direct decision in favor of the distinction. The defendant sold the plaintiff a small house for $50, standing on the land of a third person, described "as now occupied by Peabody," and the plaintiff gave his note for it. Without paying the note, the plaintiff sued for breach of an implied warranty of title, and he was not allowed to recover, for the reason that the defendant was not in possession at the sale; but the facts are very meagrely stated in the report. See Budd *v.* Power, 8 Mont. 380.

In Scott *v.* Hix, 2 Sneed, 192 (1854), where the doctrine is briefly stated, a husband and wife had sold the wife's slaves before she came into possession, and while they were lawfully in the possession of another as owner for life; and on a bill in chancery by the vendee to have the sale confirmed, on the ground of implied warranty of title, and a cross-bill by the wife to have her interest protected, the court declined to help the vendee, for one good and sufficient reason: "because the facts show that there was no intention to warrant by Philpot (the grantor), nor any such understanding on the part of Scott (the grantee). It was an adventure for speculation, with a risk of title and all other consequences."

In Long *v.* Hickingbottom, 28 Miss. 773 (1855), the only question was whether the defendant sold the slave as his own property, or as agent of his wife. The slave was in his possession, and there was no occasion for any distinction as to want of possession. Indeed, the judge makes none; he only quotes approvingly, however, the language of Judge Kent, so often cited on this subject in favor of the distinction.

In Hopkins *v.* Grinnell, 28 Barb. 537 (1858), the vendors were not only out of possession, but it "did not appear that the property ever had been in their possession," but the doctrine of non-liability for want of possession was affirmed.

In Scranton *v.* Clark, 39 N. Y. 220 (1868), a sale of a promissory note, although the court fully approves the distinction, yet the facts show that the vendor not only was not in possession of the note at the time of sale, but did not then own it, and only acquired a title to it some time afterward; and, having resold it to another *bona fide* purchaser after obtaining possession under his title, the question was whether the first purchaser would hold, or the second. The court were clearly right in saying the second; for that would be so whether the vendor was or was not in possession when he made the first sale, since a second sale with delivery always takes priority over a former sale without delivery.

In Storm *v.* Smith, 43 Miss. 497 (1870), the only question was whether, in a guardian's sale of a slave under a decree of the probate court made in 1860, the guardian impliedly warranted the title. The buyer had peaceable and undisturbed possession from the time of the purchase until his emancipation in 1863, a period of more than three years, and never offered to return him, but refused to pay his note given therefor. The court held he had no defence, and all that is said about sales out of possession is mere *dicta;* for all agree that, in a sale by a guardian, there is no implied warranty of title, whether he be in or out of possession.

In Sheppard *v.* Earles, 13 Hun, 651 (1878), the only question was whether a mortgagee of a chattel, selling under a power of sale, warrants the mortgagor's title, or only that he is selling such as he himself has acquired under the mortgage. The court, likening it to a sale by an officer or a trustee, held the latter view. In Byrnside *v.* Burdett, 15 W. Va. 702 (1879), it does not appear whether the horse sold was or was not in the vendor's possession at the time of the sale, *but it does appear that he delivered the horse to the vendee*, and the controversy really was on other points, although the court cite approvingly the cases heretofore stated and the rule therein laid down.

If this be a correct analysis of the cases on this subject, it will be seen that in very few of them was the exact point decided, nor was it necessary to the decision; and, considering that all the cases and *dicta* rest on the older cases, which have been shaken in the later English decisions, it may still be open to doubt whether the distinction between a vendor in and one out of possession ought to be, or will be, generally sustained.

(4.) But, whatever may be the implied liability of private vendors not in possession, it is universally agreed that in **official sales**, *i. e.* by sheriffs, executors, guardians, mortgagees, assignees in insolvency, etc., in *autre droit*, there is no implied warranty of title in the party whom they represent. The Monte Allegre, 9 Wheat. 616; Mockbee *v.* Gardner, 2 Harr. & G. 176; Sheppard *v.* Earles, 13 Hun, 651; Neal *v.* Gillaspy, 56 Ind.

451; Ricks *v.* Dillahunty, 8 Port. 133; Baker *v.* Arnot, 67 N. Y. 448; Forsythe *v.* Ellis, 4 J. J. Marsh. 298; Corwin *v.* Benham, 2 Ohio St. 37; Bingham *v.* Maxcy, 15 Ill. 295; Hicks *v.* Skinner, 71 N. C. 539; Harrison *v.* Shanks, 13 Bush, 620; Hensley *v.* Baker, 10 Mo. 157; Bostwick *v.* Winton, 1 Sneed, 525; Johnson *v.* Laybourn, 56 Minn. 332; Barron *v.* Mullin, 21 Min. 374. But a positive affirmation of title by such persons might make them personally liable. Johnston *v.* Barker, 20 Up. Can. C. P. 228 (1869).

(5.) When is a warranty of title broken so as to give a cause of action? At the very time of sale, or only when the buyer has been ousted, or suffered a recovery by the real owner? Some hold that a cause of action exists immediately, whether the buyer has or has not then surrendered the chattel to the real owner. Perkins *v.* Whelan, 116 Mass. 542; Grose *v.* Hennessey, 13 Allen, 389; Payne *v.* Rodden, 4 Bibb, 304; Chancellor *v.* Wiggins, 4 B. Monr. 201. Still more will the remedy exist if the buyer has offered to return the property to the real owner, although not legally ousted. Word *v.* Cavin, 1 Head, 506; Dryden *v.* Kellogg, 2 Mo. App. 87; McGiffin *v.* Baird, 62 N. Y. 329; Matheny *v.* Mason, 73 Mo. 677. While others seem to hold that the buyer must have been ousted, or disturbed in the possession by the true owner, before he can recover on his warranty, or defend an action for the price. Sweetman *v.* Prince, 62 Barb. 256; Case *v.* Hall, 24 Wend. 102; Aken *v.* Meeker, 78 Hun, 387; Vibbard *v.* Johnson, 19 Johns. 77; Krumbhaar *v.* Birch, 83 Pa. St. 426; American Electric Co. *v.* Consumers' Gas Co. 47 Fed. R. 43; Wanser *v.* Messler, 29 N. J. L. 256; Gross *v.* Kierski, 41 Cal. 111; Randon *v.* Toby, 11 How. 493; Linton *v.* Porter, 31 Ill. 107; Burt *v.* Dewey, 40 N. Y. 283; Johnson *v.* Oehmig, 95 Ala. 189; Close *v.* Crossland, 47 Minn. 500; Terrell *v.* Stevenson, 97 Geo. 570; Hull *v.* Caldwell, 3 So. Dak. 451 (under Code).

Kentucky has held an eviction necessary where the warranty of title was *express*, but not where it is implied. Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Scott *v.* Scott, 2 A. K. Marsh. 215; Pusey's Trustees *v.* Wathen, 90 Ky. 473; but the reason for the distinction it is not very easy to see. If there be any difference, it would seem that an ouster was less necessary in an express than in an implied warranty.

12. **Identity of Kind.** There is in America an implied warranty of *identity*, viz., that the article shall be of the kind or species it purports to be or is described to be; that is, that the article delivered shall be the same thing contracted for. This, in England, is called an implied condition; in America, an implied warranty: in the former country, it is called a condition because the vendee has more clearly a right of return in case of breach of condition than he has for breach of warranty, and so it is more favorable for him to hold it a breach of condition. But, as there is in America a generally recognized right of return for breach of warranty, as well as for breach of condition, the practical difference between the two countries is slight. Peckham *v.* Davis, 93 Ala. 474.

Let us consider some of the illustrations of implied warranties of kind or species. The description in Osgood *v.* Lewis, 2 Harr. & Gill, 495 (1829), was "winter-pressed sperm oil." Held, a warranty not only that

the article was "sperm oil," but that it was "winter-pressed," and not summer-pressed, an article of half the value; a valuable case, the words "winter-pressed" being considered not merely as denoting a *quality* of sperm oil, but a separate and distinct *kind* from other oil, in the same way as "Mackerel No. 1" has been thought to indicate a different kind or class from "Mackerel No. 3." Gardner *v.* Lane, 9 Allen, 492; 12 Allen, 39; 98 Mass. 517.

In Walker *v.* Gooch, 48 Fed. R. 656, the contract was for "seventy-five boxes Kingan's Cumberland cut bacon and fifty boxes Thallner's Stafford middles, all to be of choicest quality." The required quantity of "Taylor's Cumberland cut bacon, Indianapolis," and "Empire Packing-House Stafford middles" were sent. These goods were of the same quality and were put up by the same packers as the goods ordered. But in the Liverpool market, for which the buyer wanted the goods, those like the goods ordered commanded a better price than those sent. Held, a breach of warranty.

In Columbian Iron Works *v.* Douglas, 84 Md. 44, the contract called for the steel scrap from the plates of certain United States cruisers built by the Iron Works. Held, that a specific and designated thing had been contracted for, and that the substitution of any other material, no matter what its quality or chemical test, was a breach of the contract. Chanter *v.* Hopkins and Bowes *v.* Shand are cited. The case treats the question as one of condition precedent rather than as one of warranty.

A ticket-broker, who sells a ticket issued by a common carrier, warrants that the ticket is genuine. His liability rests there. He does not contract that the carrier will transport the buyer. Elston *v.* Fieldman, 57 Minn. 70.

In Borrekins *v.* Bevan, 3 Rawle, 23 (1831), the article was described in the bill of parcels as "blue paint." Held to be a warranty that it was such. This was an elaborately considered case. See, also, in this State, Selser *v.* Roberts, 105 Pa. St. 242; Fogel *v.* Brubaker, 122 Ib. 15. In Henshaw *v.* Robins, 9 Met. 87 (1845), the bill of sale was, "H. & Co. bought of T. M. S. & Co. two cases of indigo." The article delivered was not indigo, but a different substance so prepared as to deceive skilful dealers in indigo. It was distinctly held that the description constituted a warranty that the article was real indigo. In Edgar *v.* Canadian Oil Co. 23 Up. Can. Q. B. 333 (1864), it was held that, in a sale by a refining establishment of oil, described as "Rock Oil," there was a warranty that the article delivered should correspond with that usually sold under that name; viz., an oil fit for use as an illuminating oil, and not explosive or dangerous. See, also, Baker *v.* Lyman, 38 Ib. 498 (1876). In Mader *v.* Jones, 1 Russell & Chessley (Nova Scotia), 82, it was held that in a sale of herring branded "Gulf Herring, Split, No. 1," there was a warranty that they were of the character commonly known under that denomination. See, also, in the same court, Hardy *v.* Fairbanks, James, 432; Wier *v.* Bissett, Thomson, 178. In Hawkins *v.* Pemberton, 51 N. Y. 198 (1872), a sale of "blue vitriol, sound and in good order," the article was, in fact, mixed or salzburger vitriol, composed partly of blue vitriol and the larger part of green vitriol, much less valuable. Held, that the description amounted to a warranty that the article was really blue vitriol; modifying somewhat the decision in Seixas *v.* Woods, 2 Caines, 48, and Swett *v.* Colgate, 20 Johns. 196, or at least the application of the law to the facts in those cases.

Wolcott *v.* Mount, 36 N. J. L. 262 (1873), furnishes an excellent ex-

ample of this class of warranties. The article was sold as "early strap-leaf red-top turnip-seed." It proved to be seed of a different kind and description, viz., "Russia turnip-seed," Russia turnips being a much later variety, not salable in market, and only fit for cattle. It was held to be a warranty of the kind of seed; or at least that the court had a right to infer a warranty (if not bound to), as stated in the same case in 38 N. J. L. 496. A similar decision was arrived at in White *v.* Miller, 71 N. Y. 118 (1877), a sale of "large Bristol cabbage-seed," in which the law was carefully considered, and Seixas *v.* Wood and Swett *v.* Colgate were overruled. See, also, Van Wyck *v.* Allen, 69 Ib. 61. In Shisler *v.* Baxter, 109 Pa. St. 443, a less strict rule was adopted.

In Dounce *v.* Dow, 64 N. Y. 411 (1876), the buyer ordered, and the seller billed to him, "XX pipe iron." Held to be a warranty that the article was of that *character*, but not of any certain quality of pipe iron. In Jones *v.* George, 61 Tex. 345, the plaintiff applied to a druggist for "Paris green" to kill cotton-worms. In fact, "chrome-green" was delivered, a different substance, but resembling it in appearance. The vendor was held liable on his implied warranty for the failure of the crop caused thereby; a valuable case, containing a full citation of authorities, especially on the question of damages. The decision in Kingsbury *v.* Taylor, 29 Me. 508 (1849), though supported by Lord *v.* Grow, 39 Pa. St. 88, that the vendor of "spring rye for seed" was not liable, although the article proved to be winter rye and worthless to the buyer, would not generally be followed at the present day; though see Shisler *v.* Baxter, 109 Pa. St. 443.

For other cases, where the use of a certain name for the goods was held a warranty that the goods were such, see Bagley *v.* Cleveland Rolling Mill, 21 Fed. Rep. 159; Flint *v.* Lyon, 4 Cal. 17; Catchings *v.* Hacke, 15 Mo. App. 51; Bach *v.* Levy, 18 Jones & Sp. 519; Lewis *v.* Rountree, 78 N. C. 323, "strained rosin;" Whittaker *v.* McCormick, 6 Mo. App. 114, "No. 2 white mixed corn;" Morse *v.* Moore, 83 Me. 473, "good, clear, merchantable ice;" Holloway *v.* Jacoby, 120 Pa. St. 583, "good, salable corn;" "rust-proof" oats, Gachet *v.* Warren, 72 Ala. 288; Philadelphia Coal Co. *v.* Hoffman, 4 Atl. 848, "neutral iron;" Northwestern Cordage Co. *v.* Rice, 5 No. Dak. 432, "pure Manila twine;" Groetzinger *v.* Kann, 165 Pa. St. 578, "thoroughly tanned leather;" Holt *v.* Pie, 120 Pa. St. 425; Pratt *v.* Paules, Pa. (1886), 4 Atl. R. 751; "Farmers' Standard Phosphate," Ober *v.* Blalock, 40 S. C. 31. A contract for a "perfect" monument of a particular stone is not filled by tendering a monument made perfect by the substitution in one portion of a piece of another stone. Webster Marble Co. *v.* Dryden, 90 Iowa, 37.

Warranty of genuineness in the sale of commercial paper comes under this head; a warranty that it is really what it purports to be, a real note and not a false one. On every such sale the vendor impliedly guarantees:

(1.) That the signatures to the paper are genuine and not forged. Cabot Bank *v.* Morton, 4 Gray, 156; Herrick *v.* Whitney, 15 Johns. 240; Merriam *v.* Wolcott, 3 Allen, 258; Shaver *v.* Ehle, 16 Johns. 201; Thrall *v.* Newell, 19 Vt. 202; Terry *v.* Bissell, 26 Conn. 23; Aldrich *v.* Jackson, 5 R. I. 218; Webb *v.* Odell, 49 N. Y. 583; Worthington *v.* Cowles, 112 Mass. 30; Ledwich *v.* McKim, 53 N. Y. 307; Meriden Nat. Bank *v.* Gallaudet, 120 Ib. 303; Wilder *v.* Cowles, 100 Mass. 487; Ross *v.* Terry, 63 N. Y. 613; Ward *v.* Haggard, 75 Ind. 381; Willson *v.* Binford, 81

Ib. 588; People's Bank *v.* Kurtz, 99 Pa. St. 344; Gilchrist *v.* Hilliard, 53 Vt. 592, accounts; Marshall *v.* Morgan, 58 Vt. 60; Dana *v.* Angel, 1 Hawaii, 180. Though of course no such warranty is implied when the vendor at the sale expressly refuses to warrant the genuineness. Bell *v.* Dagg, 60 N. Y. 528.

The doctrine of Baxter *v.* Duren, 29 Me. 434, and of Fisher *v.* Rieman, 12 Md. 497, that this implied warranty of genuineness of signature does not apply where a note is sold in market, like other goods and effects, as an article of merchandise, but only where it is passed in *payment of a debt*, can hardly be supported. In both cases alike, the thing transferred is not what it purports to be, but only a semblance of it. The question is not one of *quality*, but of kind or species. The thing is not a contract at all if forged. And as goods and chattels sold must conform to their name and description, and be *what they purport to be*, so must a note. See Hussey *v.* Sibley, 66 Me. 192; Merriam *v.* Wolcott, 3 Allen, 258; Meyer *v.* Richards, 163 U. S. 385, 410, citing many cases; Giffert *v.* West, 33 Wisc. 617; Hannum *v.* Richardson, 48 Vt. 508.

(2.) That the signers are competent to contract, and are not minors or married women, or otherwise under disability. Lobdell *v.* Baker, 1 Met. 193, and 3 Met. 469.

(3.) But not ordinarily that they are pecuniarily responsible or solvent, for this is warranting the *quality* of the article. Day *v.* Kinney, 131 Mass. 37; Burgess *v.* Chapin, 5 R. I. 225; Beckwith *v.* Farnum, Ib. 230; Swanzey *v.* Parker, 50 Pa. St. 450; Hecht *v.* Batcheller, 147 Mass. 335, disapproving of Harris *v.* Hanover Bank, 15 Fed. Rep. 786. Nor that such note is not tainted with usury, and so void against the maker. Littauer *v.* Goldman, 72 N. Y. 506, a very interesting and important case reviewing the authorities, though it was not approved in Wood *v.* Sheldon, 42 N. J. L. 425, nor in Meyer *v.* Richards, 163 U. S. 412.

There is no doubt, therefore, that the article delivered must correspond in *species and kind* with that sold. Does the same obligation arise as to the *quality* of the thing, when words are used indicating a particular quality?

If no words of quality *are* used, it is clear enough that words of kind or species do not import any particular quality of that species. Thus, if the article sold be merely described as "tallow," this gives no assurance that it shall be of good quality or color. If it be tallow, that suffices. Lamb *v.* Crafts, 12 Met. 353.

In Winsor *v.* Lombard, 18 Pick. 57 (1836), the bill of parcels described the goods as "No. 1 Mackerel" and "No. 2 Mackerel." This was held to imply only a warranty that they had been duly inspected and branded as No. 1 and No. 2 by the proper authorities, but not that at *the time of sale* they were free from rust, although they would not have been so branded had they at that time been affected with rust. In a sale of "Manilla sugar," if the article answer to that name in market, there is no warranty that it shall be as free from impurities as sugar usually is. Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Peoria Co. *v.* Turner, Ill. (1898), 51 N. E. 587, a sale of "Reed City Lump Coal," affords another illustration of the same rule. If the property sold be certain lots of boards and dimension stuff "now at and about the mills at P.," there is no warranty that the boards shall be merchantable. Whitman *v.* Freese, 23 Me. 212. So of a sale of "500 logs." Dollard *v.* Potts, 6 Allen (N. B.), 443.

In Hyatt *v.* Boyle, 5 Gill & Johns. 110 (1833), the bill of parcels described the article as "24 kegs of tobacco, branded (*Parkin*)." It was properly so branded, but it proved to be unsound, and it was held there was no warranty *of quality;* explaining some of the language in Osgood *v.* Lewis, 2 H. & G. 495.

A sale of "Port wine" or "sherry" does not imply that the articles are "imported," or are of any particular quality. Coate *v.* Terry, 26 Up. Can. C. P. 40 (1876). In Snelgrove *v.* Bruce, 16 Up. Can. C. P. 561 (1866), it was held that a sale of seeds put up by the vendor in packages, and labelled by him with their names, implied only that they were such *kind* of seeds; not that they were "fresh," or "good and fit for growing." See, also, Jennings *v.* Gratz, 3 Rawle, 168, Young Hyson tea; Carson *v.* Baillie, 19 Pa. St. 375, lard grease; Wetherell *v.* Neilson, 20 Ib. 448; Shisler *v.* Baxter, 109 Ib. 443; Mahaffey *v.* Ferguson, 156 Ib. 170.

But suppose that the description contains some adjectives importing some particular quality, is there a warranty of such quality then? Does a sale of "good, fine wine" imply a warranty that it is good and fine, or only that it is wine? It was held only the latter in Hogins *v.* Plympton, 11 Pick. 97, the words being "too uncertain and indefinite;" but perhaps that might properly be left to a jury. So in Barrett *v.* Hall, 1 Aikens, 269 (1826), held a sale of "*good* cooking-stoves" does not imply a warranty of any particular quality in the stoves. It is too indefinite. So the words "first and second rate tobacco" in a bill of sale has been held no warranty of any quality, being but mere words of opinion. Towell *v.* Gatewood, 2 Scam. 22 (1839). Nor are the words "mill iron" any warranty that such iron is *gray* mill iron, instead of *white mottled* mill iron, an inferior quality of mill iron. Carondelet Iron Works *v.* Moore, 78 Ill. 65. So in Fraley *v.* Bispham, 10 Pa. St. 320 (1849), the property sold was "superior sweet-scented Kentucky leaf tobacco." It was held that, if the article furnished was really Kentucky leaf tobacco, it was not necessary that it should be "superior" or "sweet-scented." See, also, Ryan *v.* Ulmer, 108 Pa. St. 332, 137 Ib. 310, an important case. In a sale of a quantity of gunny-cloth, the broker's note contained the words: "Invoice weight, $2\frac{15}{100}$ lbs. average per yard." That was the true invoice weight, but the actual weight was considerably less. This was held to be no warranty that the goods weighed $2\frac{15}{100}$ lbs. per yard, and evidence that such an understanding existed among dealers in that article in Boston, where the sale was made, was held inadmissible. Rice *v.* Codman, 1 Allen, 377. In Wiggin *v.* Butcher, 154 Mass. 447, a statement by the vendor, that "there is an occasional ham sour in the marrow," was held not to constitute a warranty that those so affected were less than a third of the whole lot.

On the other hand, some words of quality may be so positive and definite as not to be merely expressions of opinion or recommendation, but words of positive affirmance. In such cases they may be considered as warranties of quality as well as of kind.

In Hasting *v.* Lovering, 2 Pick. 214 (1824), the sale note read, "2000 gallons prime quality winter oil," and these words were held to import a warranty, not only that the article was winter oil, but also that it was of a prime quality. In Forcheimer *v.* Stewart, 65 Iowa, 593 (1885), the sale was of "choice, sugar-cured canvased hams," and, as the vendee had no opportunity for inspection, the description was held to be a warranty that the hams were as described. The fact that the contract was executory

for future delivery may have had some weight in the decision. In Eagle Iron Works *v.* Des Moines Railway Co. 101 Iowa, 289, an executory contract for boilers, etc., provided that all material furnished should be "of the very best quality." It was held that there was a warranty. In Chisholm *v.* Proudfoot, 15 Up. Can. Q. B. 203 (1857), it was held that if a *manufacturer* of flour brands it as "Trafalgar Mills, Extra Superfine," it is a warranty that it is such. And see Bunnell *v.* Whitlaw, 14 Ib. 241. That a statement that the quality of the article in a sale note or bill of parcels may be a warranty of the quality as well as of the kind, see 14 Pick. 100; 18 Pick. 60; 9 Met. 87; Richmond Trading Co. *v.* Farquar, 8 Blackf. 89; Mader *v.* Jones, 1 R. & C. (Nova Scotia), 82.

13. **Caveat Emptor.** The maxim of *caveat emptor* is universally adopted in America, save perhaps in South Carolina; and therefore, in a sale of an existing specific chattel inspected or selected by the buyer, or subject to his inspection, there is no implied warranty of *quality;* or, as sometimes stated, "a sound price does not, in and of itself, import a sound quality." The doctrine of *caveat emptor*, however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles.

Some of the many cases in support of the general doctrine are: —

ALABAMA. Cozzins *v.* Whitaker, 3 Stew. & Port. 322, a sale of a slave; West *v.* Cunningham, 9 Porter, 104, oranges.

ARKANSAS. Turner *v.* Huggins, 14 Ark. 22, sale of a horse.

CALIFORNIA. Moore *v.* McKinlay, 5 Cal. 471, garden seeds; Byrne *v.* Jansen, 50 Ib. 624, wool; Johnson *v.* Powers, 65 Ib. 181.

CONNECTICUT. Dean *v.* Mason, 4 Conn. 428, deerskins; Frazier *v.* Harvey, 34 Ib. 469, hogs; Drew *v.* Roe, 41 Ib. 50, tobacco.

ILLINOIS. Roberts *v.* Hughes, 81 Ill. 130. The rule *caveat emptor* applies to a judicial sale. Morris *v.* Thompson, 85 Ill. 16, cattle.

INDIANA. Humphreys *v.* Comline, 8 Blackf. 516, molasses; Bowman *v.* Clemmer, 50 Ind. 10, hogs.

IOWA. Dean *v.* Morey, 33 Iowa, 120, applies the rule to the sale of a "cribber;" Richardson *v.* Bouck, 42 Ib. 185, goods.

KENTUCKY. Scott *v.* Renick, 1 B. Monr. 64, sale of a cow for breeding purposes; Standeford's Adm'r *v.* Schultz, 5 Ib. 581, notes.

MAINE. Kingsbury *v.* Taylor, 29 Me. 508, rye.

MARYLAND. Taymon *v.* Mitchell, 1 Md. Ch. 496, slaves; Johnston *v.* Cope, 3 H. & John. 89, linens; Hyatt *v.* Boyle, 5 Gill & J. 110, tobacco.

MASSACHUSETTS. Winsor *v.* Lombard, 18 Pick. 59, sale of fish; Mixer *v.* Coburn, 11 Met. 559, glass.

MISSISSIPPI. Otts *v.* Alderson, 10 Sm. & M. 476, a slave.

NEW YORK. Seixas *v.* Wood, 2 Caines, 48, peachum wood sold for brazilletto; Holden *v.* Dakin, 4 John. 421, white lead; Swett *v.* Colgate, 20 Johns. 196, sale of barilla; Welsh *v.* Carter, 1 Wend. 185, barilla; Wright *v.* Hart, 18 Ib. 449, flour, a valuable case; Moses *v.* Mead, 1 Denio, 378, beef; Beirne *v.* Dord, 2 Sandf. 89, 5 N. Y. 95; Hargous *v.* Stone, 5 N. Y. 73, cotton sheeting; Hawkins *v.* Pemberton, 51 Ib. 198, blue vitriol; Day *v.* Pool, 52 Ib. 416, syrup.

OHIO. Hadley *v.* Clinton, etc. Co. 13 Ohio St. 502, sale of a cow; a valuable case.

PENNSYLVANIA. Jackson *v.* Wetherill, 7 S. & R. 480, mare; McFar-

land *v.* Newman, 9 Watts, 55, horse; Eagan *v.* Call, 34 Pa. St. 236, mare; Weimer *v.* Clement, 37 Ib. 147, canal-boat; Lord *v.* Grow, 39 Ib. 88, grain; Whitaker *v.* Eastwick, 75 Ib. 229, coal; Warren *v.* Philadelphia Coal Co. 83 Ib. 437, also coal; Ryan *v.* Ulmer, 108 Ib. 332, meat, 137 Ib. 310.

South Carolina. In this State, from the earliest times, it has been often held that "selling for a sound price raises, in law, a warranty of the soundness of the thing sold; and this warranty applies to all faults known and unknown to the seller." Timrod *v.* Shoolbred, 1 Bay, 324 (1793), a sale of a negro, seems to be the earliest reported case, although the court says "it has often been decided in our courts." Lester *v.* Graham, 1 Mill, 182; Mitchell *v.* Dubose, 1 Ib. 360; Crawford *v.* Wilson, 2 Ib. 353; Barnard *v.* Yates, 1 Nott & McC. 142; Vaughn *v.* Campbell, 2 Brev. 53; Furman *v.* Miller, Ib. 127; Houston *v.* Gilbert, 3 Brev. 63; Bulwinkle *v.* Cramer, 27 So. Car. 376. The rule applies to auction sales as well as to private sales. Duncan *v.* Bell, 2 Nott & McC. 153; Rose *v.* Beatie, Ib. 538. But not to sales by a sheriff. Thayer *v.* Sheriff, 2 Bay, 169; Davis *v.* Murray, 2 Mill, 143; Yates *v.* Bond, 2 McCord, 382; Harth *v.* Gibbes, 3 Rich. 316; Wingo *v.* Brown, 14 Rich. 103. Nor to judicial sales by a master. Tunno *v.* Fludd, 1 McCord, 121; Robinson *v.* Cooper, 1 Hill, 287. Nor to a sale of an unnegotiable security. Colburn *v.* Mathews, 1 Strobh. 232. Nor to any sale where the defect is known to the buyer. Wood *v.* Ashe, 1 Strobh. 407. Nor where there is a special warranty of soundness, "according to the best of the vendor's knowledge." McLaughlin *v.* Horton, 1 Hill, 383.

Vermont. Stevens *v.* Smith, 21 Vt. 90, a sale of "old potash kettles;" Bryant *v.* Pember, 45 Ib. 487, an exchange of a pair of horses.

Washington. Griffith *v.* Strand, 54 Pac. 613, Wash. (1897).

Wisconsin. Scott Lumber Co. *v.* Hafnerlothman Co. 91 Wisc. 667, lumber.

Manitoba. Rothwell *v.* Milner, 8 Manitoba R. 472, a horse with the glanders.

14. **Sales by Sample.** In all sales by sample — sales really by sample — there is an implied warranty that the bulk shall be of equal quality to the sample. Some of the more important cases are: —

California. Moore *v.* McKinlay, 5 Cal. 471, a sale of garden seeds by sample; Hughes *v.* Bray, 60 Ib. 284, grain.

Connecticut. Merriman *v.* Chapman, 32 Conn. 146, apples.

Georgia. Wilcox *v.* Howard, 51 Geo. 298, sale of guano.

Illinois. Hanson *v.* Busse, 45 Ill. 499, apples; Hubbard *v.* George, 49 Ib. 275, wheat; Webster *v.* Granger, 78 Ib. 230, flaxseed; Converse *v.* Harzfeldt, 11 Bradw. 173, beaver cloth.

Iowa. Home Lightning-rod Co. *v.* Neff, 60 Iowa, 138, lightning-rods; Myer *v.* Wheeler, 65 Ib. 390.

Kansas. Gill *v.* Kaufman, 16 Kan. 571, liquors.

Louisiana. Hall *v.* Plassan, 19 La. Ann. 11, wine.

Maryland. Gunther *v.* Atwell, 19 Md. 157, tobacco.

Massachusetts. Bradford *v.* Manly, 13 Mass. 139, cloves; Hastings *v.* Lovering, 2 Pick. 219; Williams *v.* Spafford, 8 Ib. 250; Henshaw *v.* Robbins, 9 Met. 86; Whitmore *v.* South Boston Iron Co. 2 Allen, 52; Dickinson *v.* Gay, 7 Ib. 29; Lothrop *v.* Otis, 7 Ib. 435; Schnitzer *v.* Oriental Print Works, 114 Mass. 123, Persian berries.

MINNESOTA. Day *v.* Raguet, 14 Minn. 273, liquors.

MISSOURI. Graff *v.* Foster, 67 Mo. 512, a sale of oranges; Voss *v.* McGuire, 18 Mo. App. 477, wool; Hollender *v.* Koetter, 20 Ib. 79, mineral water.

NEW HAMPSHIRE. Morrill *v.* Wallace, 9 N. H. 116, pork; Boothby *v.* Plaisted, 51 Ib. 436, liquors.

NEW YORK. Sands *v.* Taylor, 5 Johns. 395, a cargo of wheat; Oneida Manuf. Co. *v.* Lawrence, 4 Cow. 440, cotton; Andrews *v.* Kneeland, 6 Ib. 354; Gallagher *v.* Waring, 9 Wend. 20, are similar cases; Waring *v.* Mason, 18 Ib. 425; Beebe *v.* Robert, 12 Ib. 413; Howard *v.* Hoey, 23 Ib. 350, ale; Osborn *v.* Gantz, 60 N. Y. 540, cream of tartar; Dike *v.* Reitlinger, 23 Hun, 241, Russia camel's hair; Moses *v.* Mead, 1 Denio, 378, beef; Boorman *v.* Jenkins, 12 Wend. 566, cotton; Beirne *v.* Dord, 5 N. Y. 95, 99, blankets; Brower *v.* Lewis, 19 Barb. 574, cottons; Hargous *v.* Stone, 5 N. Y. 73, cotton sheeting; Leonard *v.* Fowler, 44 Ib. 289, beans.

NORTH CAROLINA. Reynolds *v.* Palmer, 21 Fed. Rep. 433, and a very valuable note by John D. Lawson, Esq.

OHIO. Dayton *v.* Hooglund, 39 Ohio St. 671.

OREGON. Wadhams *v.* Balfour, Or. (1898) 51 Pac. 642.

SOUTH CAROLINA. Rose *v.* Beatie, 2 Nott & McC. 538, a sale of cotton.

TEXAS. Brantley *v.* Thomas, 22 Tex. 270, a sale of tobacco; Whitaker *v.* Hueske, 29 Ib. 355, cotton.

UNITED STATES. Schuchardt *v.* Allens, 1 Wall. 359, Dutch madder; Barnard *v.* Kellogg, 10 Ib. 383, wools.

VIRGINIA. Proctor *v.* Spratley, 78 Va. 254 (1884), peanuts, a valuable case.

WISCONSIN. Getty *v.* Rountree, 2 Chand. 28, a pump; Merriam *v.* Field, 24 Wisc. 640, lumber.

In sales by sample there is no warranty that there is no *latent defect* in the sample or in the bulk. They must be alike, but neither of them need be perfect. We speak of sellers merely, whether it be otherwise or not as to manufacturers. Bradford *v.* Manly, 13 Mass. 139; Dickinson *v.* Gay, 7 Allen, 29; Sands *v.* Taylor, 5 Johns. 404. See Drummond *v.* Van Ingen, 12 App. Cas. 284, *ante*, § 667. But there may be an express warranty of quality in goods sold by sample, as well as in other cases; and in such instances a breach of the warranty of quality is actionable, although the goods might be equal to the sample. Gould *v.* Stein, 149 Mass. 570, where the sale was of "102 bales Ceara scrap rubber, as per samples, of second quality," — an excellent opinion by Mr. Justice Charles Allen. The article was equal to the sample, but was not of second quality, but the decision was by a majority of the court. And see Miller *v.* Moore, 83 Geo. 692. That no implied warranty of quality exists in sales by sample, see De Witt *v.* Berry, 134 U. S. 306.

PENNSYLVANIA, however, has a modified rule on this subject, holding apparently that an ordinary sale by sample does not imply any warranty that the quality of the bulk shall be the same as that of the sample, but only that the bulk must be of the same *species* or *kind* as the sample, and shall also be *merchantable*. Boyd *v.* Wilson, 83 Pa. St. 319, and cases cited; 26 Am. Rep. 176, and note citing cases *contra*. This was a sale of a lot of canned corn, and was so decided on the ground that in that State the sample *is not ordinarily* a standard of *quality*; but the same court

recognizes the fact that it *may be made such* by the dealings of the parties, as where the stipulation was that future deliveries should equal the samples. West Republic Co. *v.* Jones, 108 Pa. St. 55, a valuable case. And see Hoffman *v.* Burr, 155 Pa. St. 218.

To constitute a sale by sample, in the legal sense of that term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood they were dealing with the sample, with an understanding that the bulk was like it. Beirne *v.* Dord, 5 N. Y. 95, blankets in bales; Cousinery *v.* Pearsall, 8 J. & S. 113; Day *v.* Raguet, 14 Minn. 282; Wood *v.* Michaud, 63 Ib. 478. Or, as sometimes stated, to raise the implied warranty of conformity between sample and bulk, it must appear that the alleged sale by sample was really such; that the portion shown was intended and understood to be a *standard of the quality*, and not merely that it was in fact taken from the bulk. If that was all that was understood, it would not raise the implied warranty. Merely showing a portion of the goods, instead of the whole, does not necessarily constitute a "sale by sample." See, Hargous *v.* Stone, 5 N. Y. 73; Ames *v.* Jones, 77 Ib. 614; Selser *v.* Roberts, 105 Pa. St. 242; Proctor *v.* Spratley, 78 Va. 254; Borthwick *v.* Young, 12 Ont. App. 671 (1885), an excellent case. If the seller, though showing the article by a small portion thereof, requests the buyer to examine the bulk for himself and he does so, there is no implied warranty that the whole corresponds with the portion shown to or examined by the buyer. Salisbury *v.* Stainer, 19 Wend. 159; Barnard *v.* Kellogg, 10 Wall. 383, a very interesting case. And see Service *v.* Walker, 3 Vict. R. 348 (1877), citing Sayers *v.* London, etc. Co. 27 L. J. Ex. 294. Accordingly, whether a sale was strictly by sample, or whether the buyer acted on his own judgment, is ordinarily a question for the jury. Jones *v.* Wasson, 3 Baxt. (Tenn.) 211; Waring *v.* Mason, 18 Wend. 425. And a custom among dealers in the article, to consider that there is an implied warranty that the bulk (wool in bales) is not falsely or deceitfully packed, is not admissible, especially if unknown to the parties. Barnard *v.* Kellogg, 10 Wall. 384, reversing, on this point, 6 Blatchf. 279. But evidence of a usage to sell such goods by sample is always competent evidence upon the question whether the goods in controversy were so sold. Atwater *v.* Clancy, 107 Mass. 369. Though, if a written contract of sale be silent on the subject of a sale by sample, it cannot be ordinarily shown by parol that it was so made. Wiener *v.* Whipple, 53 Wisc. 298; Harrison *v.* McCormick, 89 Cal. 327. But such evidence might be admissible when the writing does not distinctly define the article to be delivered, so as to enable its identity to be seen upon the face of the transaction, such as, for instance, a sale of "white willow cuttings." Pike *v.* Fay, 101 Mass. 134.

15. **Merchantability.** Where goods are sold "by description," and not by the buyer's selection or order, and without any opportunity for inspection, there is ordinarily an implied warranty, not only that they conform to the description in kind and species as before stated, but also that they are "merchantable;" not that they are of the first quality or of the second quality, but that they are not so inferior as to be *unsalable* among merchants or dealers in the article; *i. e.* that they are free from any remarkable defect. In such sales the doctrine of *caveat emptor* does not

apply. This is especially true where the vendor is the manufacturer, or the sale is executory for future delivery. Gallagher *v.* Waring, 9 Wend. 28; Sorg Co. *v.* Crouse, 88 Hun, 246; Howard *v.* Hoey, 23 Wend. 350, a valuable case; Peck *v.* Armstrong, 38 Barb. 215; Merriam *v.* Field, 24 Wisc. 640; Brantley *v.* Thomas, 22 Tex. 270; McClung *v.* Kelley, 21 Iowa, 508; Gammell *v.* Gunby, 52 Geo. 504; Misner *v.* Granger, 4 Gilm. 69; Wilcox *v.* Hall, 53 Geo. 635. See Cullen *v.* Bimm, 37 Ohio St. 236; Fogel *v.* Brubaker, 122 Pa. St. 15; Hood *v.* Bloch, 29 W. Va. 245, a valuable case; Mooers *v.* Gooderham, 14 Ont. R. 451; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515; Murchie *v.* Cornell, 155 Mass. 60; Alden *v.* Hart, 161 Ib. 576, 580.

In Owens *v.* Dunbar, 12 Irish L. R. 304 (1848), a sale of a cargo of corn then at sea, on board the Ellen Jane, it was held the contract was for a specific thing, and that there was no warranty implied that the corn would be merchantable on its arrival. And in Rowe *v.* Faren, 8 Irish C. L. R. 46 (1858), it was held that where there was an express warranty of one quality, no implied warranty of merchantability could be added. But see Cleu *v.* McPherson, 1 Bosw. 480, a carefully considered case; Newbery *v.* Wall, 3 Jones & Sp. 106; Fitch *v.* Archibald, 29 N. J. L. 160. An agreement to deliver corn "in merchantable order" was held to mean of merchantable *quality*, that is, sound and ripe, in Hamilton *v.* Ganyard, 3 Keyes, 45. And see Reed *v.* Randall, 29 N. Y. 358.

This implied warranty of merchantability by a *manufacturer* has *sometimes* been implied even when there was an express warranty as to other qualities, which was silent on this particular subject. Wilcox *v.* Owens, 64 Geo. 601; Merriam *v.* Field, 24 Wisc. 640. But in a recent case in the Supreme Court of the United States, it was held that an express warranty of quality excludes any implied warranty of merchantability, especially if accompanied by the delivery and acceptance of a sample as such. De Witt *v.* Berry, 134 U. S. 306. This was a sale of varnish, apparently by the manufacturer; and Mr. Justice Lamar cites International Pavement Co. *v.* Smith, 17 Mo. App. 264; Johnson *v.* Latimer, 71 Geo. 470; Cosgrove *v.* Bennett, 32 Minn. 371; Shepherd *v.* Gilroy, 46 Iowa, 193; McGraw *v.* Fletcher, 35 Mich. 104. Although there might be such a warranty in the absence of any express warranty, as held in Dushane *v.* Benedict, 120 U. S. 630.

The question of merchantability is for the jury. Tahoe Ice Co. *v.* Union Ice Co. 109 Cal. 242.

16. **Fitness for a Particular Use.** In purchases for a particular use *made known to the seller*, if the buyer relies on the vendor's judgment to select and not on his own, there is an implied warranty that the article furnished is reasonably fit and suitable for that purpose. See an excellent application of the rule in Morse *v.* Union Stock Yards, 21 Oreg. 289, 14 L. R. A. 157 (1891), a sale of "good beef cattle." This is more obvious when the seller is also the manufacturer, but it is equally true when he is only a merchant, provided always the buyer in fact relies upon the seller's judgment, and does not inspect and select for himself. See Dushane *v.* Benedict, 120 U. S. 630; Little *v.* Van Syckle, Mich. (1898), 73 N. W. 554, a sale of a piano; Omaha Coal Co. *v.* Fay, 37 Neb. 68, a sale of lime by a dealer; McCaa *v.* Elam Drug Co. Ala. (1897), 21 So. 479, and cases cited.

Thus, in Brown *v.* Sayles, 27 Vt. 227, it was held that in a contract to build, sell, and deliver a buggy wagon at a fixed price, there was an im-

plied warranty even against all secret and latent defects in the materials of which it was constructed, although they could not be discovered on the most careful examination. In Hoe *v.* Sanborn, 21 N. Y. 552, a sale of circular saws by the manufacturer, it was held in an elaborate opinion that there was an implied warranty against any latent defects growing out of the process of manufacture, but not for the defects in the materials used, unless it was proved or was to be presumed that the vendor was aware of the defect. Somewhat similar views led to a similar decision in Bragg *v.* Morrill, 49 Vt. 45, and in McKinnon Mfg. Co. *v.* Alpena Fish Co. 102 Mich. 221, following the last two cases. In Carleton *v.* Lombard, 149 N. Y. 137 and 601, a refiner of petroleum was held liable upon an implied warranty against latent defects arising in the process of manufacture. The contract of sale was in writing and contained a full description of the goods to be supplied. The question received careful consideration, and many cases are cited. This case was cited and followed in Bierman *v.* City Mills Co. 151 N. Y. 482. There the defendants were manufacturers of felt cloth. Plaintiff was a tailor. Defendants sold the cloth knowing that it was to be used for making overcoats. Defendants were held liable on an implied warranty that the cloth was fit for the purpose, and free from any latent defect arising from the process of manufacture. Ordinarily a vendor is held liable on this warranty for the quality of the materials used in the article he manufactures and sells. In Rodgers *v.* Niles, 11 Ohio St. 48, a manufacturer of steam-boilers was held to impliedly warrant them free of all defects either of workmanship or *material*, latent or otherwise, which would render them unfit for the usual purpose of such boilers, going a little beyond Hoe *v.* Sanborn. And see Tennessee River Co. *v.* Leeds, 97 Tenn. 574. So in Cunningham *v.* Hall, 1 Sprague, 404, a builder of a ship was held liable for defective materials. So, also, a manufacturer of pianos impliedly warrants not only that the workmanship, but also that the materials, shall reasonably be fit for the purposes to which they shall be applied. Snow *v.* Schomacker Man. Co. 69 Ala. 111. In White *v.* Miller, 71 N. Y. 118, a grower and vendor of garden seeds was held to warrant that they were "free from any latent defect arising from the mode of cultivation."

In Gammell *v.* Gunby, 52 Geo. 504, a dealer in guano who sold to plaintiff, a farmer, was held to impliedly warrant that the article sold for guano "was reasonably suited to the uses intended." But compare Farrow *v.* Andrews, 69 Ala. 96, also a sale of guano by a dealer to a farmer, where it was held that there was no implied warranty of fitness. But the report does not show that there was any evidence that the buyer informed the seller of the purpose for which the guano was intended. See, also, Wilcox *v.* Owens, 64 Geo. 601; Wilcox *v.* Hall, 53 Geo. 635; Robson *v.* Miller, 12 So. Car. 586. In Ober *v.* Blalock, 40 S. C. 31, an express warranty that a phosphate contained certain ingredients was held to exclude any implied warranty that favorable results would follow its use. Wilcox *v.* Owens, *supra*, was said to have been decided under the Georgia Code, which changed the general law. On the same ground exactly in French *v.* Vining, 102 Mass. 132, the vendor of hay sold for feeding to a cow was held liable for her loss caused by eating it, because, as he knew, white lead had been spilt upon it, although he had carefully endeavored to separate the injured part from the other, and thought he had done so. His knowledge of the injury to the hay was certain and positive. His belief that he had removed the danger was conjectural and uncertain, and proved to be wholly

erroneous. In Best *v.* Flint, 58 Vt. 543, it was held that in the sale of hogs purchased for market there is an implied warranty that they are fit for the purpose, when the vendee, having no opportunity for inspection, trusts to the vendor to select them, knowing for what use they are intended. In Gerst *v.* Jones, 32 Gratt. 518 (1879), the rule was applied to a manufacturer of tobacco-boxes made for and sold to manufacturers of tobacco, which, in consequence of using green timber, caused the tobacco packed in them to mould. In an excellent opinion the case of Jones *v.* Just was fully approved. A sale of barrels to be filled with whiskey implies that they will not leak. Poland *v.* Miller, 95 Ind. 387.

For other cases of warranty of fitness, see —

ALABAMA. Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

ARKANSAS. Curtis Man. Co. *v.* Williams, 48 Ark. 325; Weed *v.* Dyer, 53 Ib. 155.

CALIFORNIA. Fox *v.* Harvester Works, 83 Cal. 333.

CANADA. Bigelow *v.* Baxall, 38 Up. Can. Q. B. 452, a sale of a furnace for heating certain offices.

CONNECTICUT. Pacific Iron Works *v.* Newhall, 34 Conn. 67.

INDIANA. Brenton *v.* Davis, 8 Blackf. 317, a boat; Robinson Mach. Works *v.* Chandler, 56 Ind. 575, a sawmill.

IRELAND. Wilson *v.* Dunville, 4 L. R. Ir. 249; 6 Ib. 210, distilling-grains sold to feed to cattle.

KANSAS. Craver *v.* Hornburg, 26 Kans. 94, a "header machine."

MAINE. Downing *v.* Dearborn, 77 Me. 457, leather for shoes.

MARYLAND. Rice *v.* Forsyth, 41 Md. 389, an important case.

MASSACHUSETTS. Whitmore *v.* South Boston Iron Co. 2 Allen, 52; Cunningham *v.* Hall, 4 Ib. 273.

MINNESOTA. Breen *v.* Moran, 51 Minn. 525.

MISSOURI. Armstrong *v.* Johnson Tobacco Co. 41 Mo. App. 258.

NEW BRUNSWICK. Spurr *v.* Albert Mining Co. 2 Hannay, 361.

NEW YORK. Howard *v.* Hoey, 23 Wend. 350, an important case; Wood Mower Co. *v.* Thayer, 50 Hun, 517; Dounce *v.* Dow, 64 N. Y. 411.

NORTH CAROLINA. Thomas *v.* Simpson, 80 N. C. 4, shingles.

OHIO. Byers *v.* Chapin, 28 Ohio St. 300, oil barrels.

PENNSYLVANIA. Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149.

TENNESSEE. Overton *v.* Phelan, 2 Head, 445.

UNITED STATES. Dawes *v.* Peebles, 6 Fed. Rep. 856, soda apparatus; Ottawa Bottle Co. *v.* Gunther, 31 Fed. Rep. 209, "export beer bottles;" English *v.* Spokane Com. Co. 57 Ib. 454; Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108, reviewing the leading cases (cited *ante*, 673 a).

VERMONT. Beals *v.* Olmstead, 24 Vt. 114; Pease *v.* Sabin, 38 Ib. 432, a sale of cheese by the maker; Harris *v.* Waite, 51 Ib. 480, gas meters.

WISCONSIN. Getty *v.* Rountree, 2 Chand. 28, a pump; Fisk *v.* Tank, 12 Wisc. 276; Merrill *v.* Nightingale, 39 Ib. 247; Boothby *v.* Scales, 27 Ib. 626, a fanning mill; Baumbach *v.* Gessler, 79 Ib. 567.

Under the English Sale of Goods Act of 1893, s. 14, it has been thought that an implied warranty of fitness might possibly be established by proof of the previous conduct and dealings of the parties, notwithstanding the written contract of sale was silent on the subject. Gillespie *v.* Cheney (1896), 2 Q. B. 59.

It must be distinctly borne in mind, however, that this *implied* warranty of fitness does not arise (in the absence of fraud) when the buyer selects his own article on his own judgment, although the vendor (not being a manufacturer) knows it is intended for a particular use. If the purchaser gets the exact article he buys, and buys the very thing he gets, he takes the risk of its fitness for the intended use. Deming *v.* Foster, 42 N. H. 165, a yoke of oxen sold for farm work; Hight *v.* Bacon, 126 Mass. 10, leather sold for making boots and shoes, where the doctrine is well stated; County of Simcoe Ag. Soc. *v.* Wade, 12 Up. Can. Q. B. 614, a sale of a bull selected by the buyer for breeding; McQuaid *v.* Ross, 85 Wisc. 492; Briggs *v.* Hunton, 87 Me. 149, and Scott *v.* Renick, 1 B. Monr. 63, much like it. In Perry *v.* Johnston, 59 Ala. 648, the seller of the animal was a dealer, and was held liable upon an implied warranty. Compare In re Ward's Estate, 57 Minn. 377. Walker *v.* Pue, 57 Md. 155, and Mason *v.* Chappell, 15 Gratt. 572; Farrow *v.* Andrews, 69 Ala. 96, may be possibly sustained on this ground. Warren Glass Works *v.* Keystone Coal Co. 65 Md. 547; Kohl *v.* Lindley, 39 Ill. 196, examining many cases; Cogel *v.* Kniseley, 89 Ib. 598, the sale of an engine; Armstrong *v.* Bufford, 51 Ala. 410, a sale of "Soluble Pacific Guano;" Tilton Safe Co. *v.* Tisdale, 48 Vt. 83, a "No. 4 Safe, with construction lock," specially ordered by the buyer by that name; Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149, a sale of "A No. 1 Pig Iron," in which the court say if a *special thing* is ordered, though for a special purpose, yet, if the exact thing ordered be furnished, there is no warranty of fitness for the purpose. Case Plow Works *v.* Niles Co. 90 Wisc. 590. In McCray Refrigerator Co. *v.* Woods, 99 Mich. 269, the contract was for the purchase and erection of a patent apparatus called the M. Patent System of Refrigeration. Held, that no warranty could be implied that the apparatus would preserve meat for any particular length of time. In Nashua Iron Co. *v.* Brush, 91 Fed. R. 213 (C. A.), N. agreed to manufacture and deliver a forged-iron beam-strap, of dimensions particularly described, to be used for a beam-engine. The strap broke. In a suit by the buyer, he recovered in the court below; but the judgment was reversed because the jury were not instructed that, if they found that the beam-strap was constructed of the form and size required by the drawing furnished by the plaintiff, and that the form was unsuitable and the size insufficient, and that the accident was caused thereby, the defendant is not liable. The true question was not whether the strap was reasonably fit for the purposes to which it was applied, but was whether the work done by the defendant manufacturer was fitly done. Shisler *v.* Baxter, 109 Pa. St. 443, is an interesting application of this rule; Jarecki Mfg. Co. *v.* Kerr, 165 Pa. St. 529, a sale of "Pennslyvania tubing;" Seller *v.* Stevenson, 163 Pa. St. 262, a sale of a windmill by a dealer. And see Horner *v.* Parkhurst, 71 Md. 110; Cram *v.* Gas Engine Co. 75 Hun, 316; Goulds *v.* Brophy, 42 Minn. 109; White *v.* Oakes, 88 Me. 367, a folding bedstead. In Carleton *v.* Jenks, 80 Fed. R. 937, there was held to be no implied warranty that the fastenings of a steam-boiler upon a boat were suitable for the purpose. The defects were not inherent, and the fastenings were open to inspection of the buyer. Moore *v.* Barber Paving Co. Ala. (1898), 23 So. R. 798, a sale of macadam; Milwaukee Boiler Co. *v.* Duncan, 87 Wisc. 120; Wisconsin Brick Co. *v.* Hood, 54 Minn. 543, a sale of brick; Byrd *v.* Campbell Co. 90 Geo. 542, 548; McCray Refrigerator Co. *v.* Woods, 99 Mich. 269; Berthold *v.* Seevers Mfg. Co. 89 Iowa, 506; Grand Avenue Hotel Co. *v.* Whar-

ton, 79 Fed. R. 43, and cases cited, a sale of steam-boilers; Healy *v.* Brandon, 66 Hun, 515, a sale of Panama hides which proved to be unfit for conversion into merchantable leather. So where paving stones were ordered of certain dimensions, and the vendor supplied them as ordered, there was no implied warranty of fitness as against a vendor who did not know the purpose for which they were intended. Compare Breen *v.* Moran, 51 Minn. 525, a sale of stones to be used for a particular purpose, as the vendor knew. It was there held that there was an implied warranty that the stones should be fit for the purpose. In Seitz *v.* Brewers' Refrigerating Co. 141 U. S. 510, the plaintiff purchased a certain refrigerating machine specifically designated in the contract. This machine was delivered and put in operation in plaintiff's brewery, where it did the work it was made to do, but nevertheless did not cool the brewery sufficiently to relieve plaintiff of the necessity of buying ice. Held, that there was no implied warranty that it would cool the brewery to a certain temperature. In Morris *v.* Bradley Fertilizer Co. 64 Fed. R. 55, the buyer, relying upon his own judgment, ordered a "Griffin mill." It would not grind wet limestone, although that was the purpose for which he bought it. Held, that there was no implied warranty of fitness. The same rule has been applied where the vendor was a manufacturer. City Railway Co. *v.* Basshor, 82 Md. 397; Seitz *v.* Brewers' Co. *supra;* Rasin *v.* Conley, 58 Md. 60.

But a vendor who gives a warranty of fitness, whether express or implied, is not liable upon breach thereof to a third person not a party to the sale. Lewis *v.* Terry, 111 Cal. 39. In that case a folding-bed, warranted safe for use, was sold to A. There was a latent defect in the article, and a portion of it fell upon and injured B., who had hired the room in which the bed was. Held, that B. could not sue for breach of warranty. (As to the injured person's right of action in tort, see Winterbottom *v.* Wright, and cases cited *ante*, p. 407.)

In the absence of an express warranty, fraud, or deceit, a vendor who is not the manufacturer, as the buyer knows, is not responsible for latent defects. Such a vendor is not liable upon an implied warranty of fitness, although the purpose for which the goods are intended is known to him; American Forcite Co. *v.* Brady, 4 App. Div. (N. Y.) 95 (1896), where powder, still in the original packages received from the manufacturer, was sold by a dealer; Gentilli *v.* Starace, 133 N. Y. 140; Cafre *v.* Lockwood, 22 App. Div. (N. Y.) 11, where twine was sold by a dealer to a paper manufacturer; while he may be liable if a manufacturer; Swain *v.* Schieffelin, 134 N. Y. 471.

17. **From Usage.** In addition to all other implied warranties, it is possible that custom and usage, if sufficiently well established, may modify, enlarge, or restrict warranties usually created by law.

Thus, in Fatman *v.* Thompson, 2 Disney, 482 (1859), it was held that a usage among tobacco dealers, to warrant that the article should remain sound and merchantable for four months after the sale, was valid, and, if sufficiently established, governed a sale so made. So in Schnitzer *v.* Oriental Print Works, 114 Mass. 123, it was held that, in a sale of Persian berries in bags by sample, a custom might be shown that the sample represented only the average quality of the *entire lot*, and not the average quality of the contents of each bag taken separately; and if so, the buyer would have no remedy merely because the average of one bag fell below the sample, if in

fact the average of the entire quantity, taken as a whole, did conform to the standard.

But a usage that in sales by sample there is an implied warranty against *latent defects* is invalid and illegal. Dickinson *v.* Gay, 7 Allen, 29 (1863), a very important case. See, also, Coxe *v.* Heisley, 19 Pa. St. 243, overruling Snowden *v.* Warder, 3 Rawle, 101. So a usage tending to establish an implied warranty of merchantable quality in a sale of goods not sold by description, and which are fully inspected by the buyer (in which cases the common law does not imply a warranty), is inadmissible. Dodd *v.* Farlow, 11 Allen, 426.

So a usage that plain words of representation merely, in their ordinary sense, shall be understood as words of warranty, is invalid. Wetherill *v.* Neilson, 20 Pa. St. 448. Conversely, a usage derogating from the common-law rule of implied warranties is invalid; as a usage that a manufacturer does not impliedly warrant against latent defects in the article he is manufacturing is inoperative against a written contract, from which the law would imply such warranty. Whitmore *v.* South Boston Iron Co. 2 Allen, 52 (1861), also a valuable case.

Sales of Provisions. Some of the earlier American cases, relying upon the words of Blackstone, so often quoted, vol. 3, p. 165, assert that in contracts for provisions it is always implied that the provisions are wholesome; and Van Bracklin *v.* Fonda, 12 Johns. 468 (1815), is one of the cases most relied upon. But that was apparently an action *for deceit* in selling an unsound quarter of beef, and not on a warranty; for the jury found that the vendor knew the animal was diseased, and did not communicate the fact; and the court said that "was equivalent to a suggestion of a falsehood that she was sound." In Divine *v.* McCormick, 50 Barb. 116 (1867), the doctrine of Van Bracklin *v.* Fonda was approved, and the vendor of a heifer sold for beef, which was found to be diseased and unfit for food, was held liable; but there, also, there was satisfactory evidence that the vendor "was aware, or had great reason to suspect, the unsound and unwholesome condition of the heifer when he sold her to the plaintiff." If so, he was bound to disclose it. But see Fairbank Canning Co. *v.* Metzger, 118 N. Y. 267. Again, in Burch *v.* Spencer, 15 Hun, 504 (1878), the same doctrine was applied to a sale of pork for food, which proved to be boar's meat and unfit for food; but the vendor who had slaughtered the animal knew the fact, and not only did not disclose it, but positively denied it to the vendee, and a plain case of fraud existed. Hoover *v.* Peters, 18 Mich. 51 (1869), is also a direct decision in favor of such implied warranty. It was also a sale of pork for food, and although there is no indication in the report of any fraud by the vendor, he was not allowed to recover the price, by reason of his implied warranty of its fitness for food. Again, in Sinclair *v.* Hathaway, 57 Mich. 60 (1885), the same court held that a baker impliedly warrants the wholesomeness of the bread which he sells to a peddler to distribute to customers. See, also, Copas *v.* Anglo-American Provision Co. 73 Mich. 541; Craft *v.* Parker, 96 Mich. 245 (1893), where it was held that the keeper of a retail meat-market was bound to use due care to see that meat sold for food was fit for human consumption.

On the other hand, it is now well settled, notwithstanding some apparently inconsistent expressions, that in sales of animals intended for food, between *dealers*, whether wholesale or retail, or to sell again, and not for

immediate consumption by the buyer, there is no implied warranty of soundness, or fitness for food, merely because the things were finally intended for that use. Howard *v.* Emerson, 110 Mass. 321, a sale of a live cow by a farmer to butchers to retail, is the leading case, where the subject was elaborately considered. Hanson *v.* Hartse, Minn. (1897), 73 N. W. 163, is like it and the conclusions stated above are approved by Mitchell, J. See, also, Giroux *v.* Stedman, 145 Mass. 439, a sale of a hog by a farmer to one known to be buying it for food; an excellent case. Moses *v.* Mead, 1 Denio, 378, a sale of mess beef, is a leading case on this point, affirmed in 5 Denio, 617. And see Humphreys *v.* Comline, 8 Blackf. 516, a sale of two barrels of molasses to a retailer. The same rule was applied in Ryder *v.* Neitge, 21 Minn. 70 (1874), a sale of over 4000 pounds of venison to a dealer in that article. This would seem to be especially true where the sale is expressly made "with all faults," as in Service *v.* Walker, 3 Vict. R. 348 (1877). See, also, Ryan *v.* Ulmer, 108 Pa. St. 332; Leopold *v.* Vankirk, 27 Wisc. 152. But Best *v.* Flint, 58 Vt. 543, seems *contra*. See, however, Warren *v.* Buck, Vt. (1898), 42 Atl. 979, holding that a farmer who sells live hogs to a butcher, knowing that they are to be killed and cut up for sale in the usual course of the butcher's business, is not liable upon an implied warranty for a latent defect, *i. e.* tuberculosis, which renders them unfit for food. Best *v.* Flint is distinguished, upon the ground that there the buyer relied upon the seller's judgment to select and furnish hogs of the quality required.

It is at least doubtful whether there be any such warranty, even though provisions are sold for immediate consumption by the buyer, unless when he trusts to the judgment or selection of the seller. If A. selects of his butcher a *particular piece* of beef, and orders that identical piece to be sent, it is not easy to see, in the absence of any custom or usage to make it good, why there should be any implied warranty as to its quality, any more than in any other sale. The buyer takes his risk, the same as in buying any other thing.

In Goad *v.* Johnson, 6 Tenn. 340, a trader bought beef cattle at the vender's home, inspected them and pronounced them satisfactory. While he was driving them home, some of the cattle became sick and died. The buyer refused payment, on the ground that there was an implied warranty as to quality. But the court held that, although vendor knew that the buyer wanted the cattle for beef, nevertheless, if the sale was made upon the buyer's own inspection and judgment and without fraud, there was no implied warranty. In Hegarty *v.* Snow, 1 Hawaii, 114, a sale of flour, the court applied the rule of *caveat emptor*, and declared that no implied warranty of soundness in provisions arose where they were bought as merchandise, even if there was such a warranty when small quantities were bought for domestic use.

But if the buyer orders his dinner of his marketman for him to select and send up, and the buyer does not see the food until it comes to his table, there is good ground for holding the vendor liable on an implied warranty that the article sent shall be fit for the purpose for which it was ordered; but this is applying to sales of provisions the same rule as is applied to sales of other property, and probably the same rules govern the one case as the other.

It has been recently laid down in Illinois — Wiedlman *v.* Keller, 171 Ill. 93 (1898), reversing 58 Ill. App. 382 — that where a retail dealer sells provisions for immediate domestic consumption, he impliedly warrants their

wholesomeness. It does not appear whether plaintiff selected the meat in question, or whether she gave an order leaving the selection to defendant. This implied warranty is the prevailing rule in the United States, and is contrary to the English law upon the same point, so the opinion declares. Nor is the rule to be extended to transactions between dealers who buy for resale and not for consumption; nor to sales by others than regular dealers, even though for immediate consumption (*sed qu.*).

Compare Sheffer *v.* Willoughby, 163 Ill. 521 (1896), where plaintiff was made sick by an oyster-stew purchased and eaten at the defendant's restaurant. The declaration counted upon defendant's negligence. No evidence tending to prove this was introduced, and the court directed a verdict for defendant.

CHAPTER II.

DELIVERY.

	Sect.
Vendor's first duty is delivery	674
Different meanings of the word	675
Vendor's duty to deliver *prima facie* only	677
May be conditional on payment	677
Effect of sale on credit is to pass property and right of possession	677
Vendor may refuse delivery if buyer becomes insolvent	677
Vendor bound only to put goods at buyer's disposal, not to send them	679
When delivery conditional on notice from purchaser	679
Or on notice from seller	679
Place of delivery	682
Contract for delivery, f. o. b.	682
Vendor's duty when he agrees to send goods	683
Where time is not expressed, reasonable time	683
Where time is expressed	684
"Month," its meaning	684
"Days," how counted	684
Leap Year	684
"Hour"	685
"Directly," "as soon as possible"	687
"Reasonable time," "forthwith"	687
Vendor must deliver bill of lading when rightfully demanded	688
Where payment is to be cash in exchange for bill of lading	688
Where there has been postponement of time of delivery	688
Review of cases	688
General principles deduced from cases	688
Must not deliver more (nor less) than contract requires	689
Delivery of more	689
Delivery of less	690
If buyer keeps what is delivered, he must pay price	690
Rule otherwise in New York	690
Where quantity is stated as being "about" or "more or less"	691
Law in America	692
Where sales are made with reference to bills of lading	692
Delivery to carrier suffices	693
Carrier is vendor's agent in certain cases	693
Vendor not liable for depreciation *necessarily* resulting from transit	693
Vendor bound to take proper precautions to insure delivery by carrier	694
Vendor bound to give an opportunity to inspect the goods	695
May make symbolical delivery	696
Indicia of property	697
Law as to indorsement and delivery of bills of lading	697
Usage of merchants to draw bills of lading in sets considered	697
Right to tender a second delivery	697
Cargo sold "from the deck"	697
Law in America; vendor not entitled to cost of labor in putting goods sold by weight and lying in bulk into packages furnished by buyer	698
Usage may bind vendor to deliver grain in sacks, although not expressed in contract	698

§ 674. After the contract of sale has been completed, the chief and immediate duty of the vendor, in the absence of contrary stipulations, is to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent, if any, incumbent on him.

There is no branch of the law of sale more confusing to the student than that of delivery. This results from the fact that the word is unfortunately used in very different senses; and unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles.

§ 675. *First.* — The word "delivery" is sometimes used with reference to the passing of *the property in* the chattel (*a*), sometimes to the change of *the possession of* the chattel: in a word, it is used in turn to denote transfer of *title*, or transfer of *possession*.

Secondly. — Even where "delivery" is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract; the other, to the *performance* of the contract. When questions arise as to the "actual receipt" which is necessary to give validity to a parol contract for the sale of chattels exceeding 10*l.* in value, the judges contantly use the word "delivery" as the correlative of that "actual receipt." After the sale had 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.

§ 676. Delivery in the sense of a transfer of *title* has been considered *ante*, Book II., Of the Effect of the Contract.

Delivery of *possession*, as required under the Statute of Frauds, as the correlative of the buyer's "actual receipt" in order to prove the *formation* of the contract, has been considered in Book I. Part II. Ch. 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

(*a*) As, for instance, in the opinion of Parke, J., in Dixon *v.* Yates, 5 B. & Ad. 313, 340.

delivering the goods in *performance* of his contract, so as to enable him to defend an action by the buyer for non-delivery.

§ 677. Generally, the purchaser in a bargain and sale of goods, where the property has passed, is entitled to take possession of them, and it is the vendor's duty to deliver this possession. But this right is only *prima facie*, and it may well be bargained that the possession shall remain with the vendor until the fulfilment of certain conditions precedent by the purchaser. 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 (*b*), as is explained in Book IV. Part I., On Conditions. The vendor cannot insist on payment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price. 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" (*c*). But although the buyer has thus acquired the *right of possession* not to be questioned for any legal purpose by any one save his vendor, the latter may refuse to part with the goods, and may exercise his lien as vendor to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession.

§ 678. The law on this whole subject was very perspicuously stated in the case of Bloxam *v.* Sanders (*d*), which may be considered the leading case, always cited when these points are under discussion. The decision turned upon the following facts: One Saxby bought several parcels of hops of the defendants in August, 1823, the bought notes being as follows: "Mr. J. R. Saxby, of Sanders, eight pockets, at 155*s.* 8th August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights; and samples were given to Saxby, and invoices delivered, in which he was made debtor

(*b*) This is, however, only an implication of law, and yields to any proof of what was the intention of the parties, *e. g.* evidence of the course pursued under the contract as to payment, showing that a sale on credit was intended. King *v.* Reedman, 49 L. T. N. S. 473.

(*c*) 2 Wms. Saund. 47, *a*. 1.

(*d*) 4 B. & C. 941. See, further, as to the 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. 1, §§ 758–765.

for six different parcels, amounting to 739*l*. 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 property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price;* but the buyer has no right to have possession of the goods *till he pays the price.* The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a *condition precedent* on the buyer's part; and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the *right of possession* and the *right of property* 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. Tooke *v.* Hollingworth (*e*). 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 (*f*). If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu* (*g*). Why? Because

(*e*) 5 T. R. 215.
(*f*) 6 East, 614.
(*g*) 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.

the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an *indefeasible right to the possession*, and his insolvency without payment of the price defeats that right. And if this be the case after he has dispatched the goods, and whilst they are *in transitu*, *à 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 (*h*). Trover is an action of that description. It requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. . . . Then, as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price" (*i*).

[And, in accordance with this view, it was held in Lord *v.* Price (*k*), 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.]

§ 679. Keeping in view this lucid exposition of the circumstances under which a vendor may decline delivery of possession, we will now inquire what he is bound to do where no legal ground exists for refusing to deliver.

In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. 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.

And if the delivery by the vendor is to take place upon the doing

(*h*) 7 T. R. 9.

(*i*) See, also, *per cur.* in Spartali *v.* Benecke, 10 C. B. 212; 19 L. J. C. P. 293.

(*k*) L. R. 9 Ex. 54.

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 (*l*).

[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 (*m*).]

In Salter *v.* Woollams (*n*), the defendant, an auctioneer, sold a rick of hay, then on the premises of one Jackson, who had given a license to remove it. The license was read at the auction, and the auctioneer delivered to the buyer a note addressed to Jackson, requesting him to permit the buyer to remove the hay. Jackson refused, and the buyer brought action for non-delivery; but the court held that the delivery was complete, the auctioneer having made the only delivery the nature of the case permitted, and Tindal, C. J., said he saw no reason why the buyer could not maintain trover against Jackson.

Wood *v.* Manley (*o*) 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 gates 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 (*p*), and that the delivery to the buyer by the auctioneer's order was a complete delivery in performance of his contract.

§ 680. It might seem at first sight that the decision in Salter *v.* Woollams (*q*) is in conflict with the class of decisions exemplified in Bentall *v.* Burn (*r*), 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

(*l*) 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.

(*m*) Davies *v.* M'Lean, 21 W. R. 264.

(*n*) 2 M. & G. 650; and see Smith *v.* Chance, 2 B. & Ald. 753, for an *incomplete* delivery in a similar sale.

(*o*) 11 A. & E. 34.

(*p*) See Wood *v.* Leadbitter, 13 M. & W. 838; and Taplin *v.* Florence, 10 C. B. 765.

(*q*) 2 M. & G. 650.

(*r*) 3 B. & C. 423.

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.

§ 681. In Wood *v.* Tassell (*s*), 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.

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."

§ 682. As to the *place* where delivery is to be made, when nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal, at the place where they are when sold. No cases have been met with on this point. Lord Coke says (*t*): "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 feoffer is not bound to carry the same about and seek the feoffee, but the obligor or feoffer before the day must go to the feoffee and know where he will appoint to receive it, and there it must be delivered." But this refers to estates held upon condition and to the duty of a *debtor*, and is not applicable to cases where the party bound to deliver, as a vendor, is only held to the obligation of keeping the thing at the disposal of the buyer, and is not bound to more than a *passive* readiness to allow the buyer to take the goods. Kent says (*u*): "If no place be designated by the contract, the gen-

(*s*) 6 Q. B. 234.

(*t*) Co. Lit. 210 b.

(*u*) Vol. 2, p. 505 (12th ed.), and the law was stated to the same effect by the Supreme Court of the United States in Hatch *v.* Oil Co. 100 U. S. at p. 134 (1879).

eral 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." 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.

[In many mercantile contracts it is stipulated that the vendor shall deliver the goods "f. o. b." *i. e.* "free on board." The meaning of these words is, that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are so put on board (*x*).]

§ 683. Where the contract imposes on the vendor the obligation of sending the goods, questions may arise as to the time and manner in which he is to fulfil this duty. 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.

Thus in Ellis *v.* Thompson (*y*), 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.

§ 684. But where the contract expresses the time, the question is one of construction, and therefore one of law for the court, not of fact for the jury. (See Conditions, *ante*, § 562.)

The word "month," although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a *calendar*

(*x*) Per Pollock, C. B., in Brown *v.* Hare, 3 H. & N. 484; 27 L. J. Ex. 372; in Ex. Ch. 4 H. & N. 822; 29 L. J. Ex. 6; Ogg *v.* Shuter, L. R. 10 C. P. 159; 1 C. P. D. 47, C. A.; per Brett, M. R., in Stock *v.* Inglis, 12 Q. B. D. at p. 573. In the last case the Master of the Rolls expresses his opinion that the same meaning will be attributed to the words, whether the contract is or is not one for the sale of specific goods. See, also, Craven *v.* Ryder, 6 Taunt. 433; Ruck *v.* Hatfield, 5 B. & Ald. 632; Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

(*y*) 3 M. & W. 445; and see Jones *v.* Gibbons, 8 Ex. 920; Sansom *v.* Rhodes, 8 Scott, 544.

month (*z*). And the court will look at the context in all cases, to see whether a calendar month was not intended, and if so, will adopt that construction (*a*).

And now by statute 13 & 14 Vict. c. 21, s. 4, it is enacted, "that in all acts the word 'month' shall be taken to mean calendar months, unless words be added showing lunar months to be intended."

Where a certain number of "days" is to be allowed for the delivery, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed (*b*), or an usage to that effect be shown (*c*). 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 & 43 Vict. c. 59, and the effect is that the extra day counts by itself].

And the rule, though long in doubt, seems now to be settled by the decision in Webb *v.* Fairmaner (*d*), 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.

In Coddington *v.* Paleologo (*e*) 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.

§ 685. In relation to the *hour* up to which a vendor can make a valid delivery on the last day fixed by the contract, the whole subject is fully discussed in the carefully considered case of Startup *v.* M'Donald (*f*), 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, etc., etc. The jury found, as a special

(*z*) Reg. *v.* Chawton, 1 Q. B. 247; Hart *v.* Middleton, 2 C. & K. 9; Webb *v.* Fairmaner, 3 M. & W. 473.

(*a*) Simpson *v.* Margitson, 11 Q. B. 23; Webb *v.* Fairmaner, 3 M. & W. 473.

(*b*) Brown *v.* Johnson, 10 M. & W. 331.

(*c*) Cochran *v.* Retberg, 3 Esp. 121.

(*d*) 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 A. & E. 577; Isaacs *v.* Royal Insurance Company, L. R. 5 Ex. 296.

(*e*) L. R. 2 Ex. 193. In Bergheim *v.* Blaenavon Iron Company, 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.

(*f*) 6 M. & G. 593.

verdict, that the plaintiff made the tender at half past eight o'clock at night on the 31st of March, that day being *Saturday; that there was full time before twelve o'clock at night for the defendant to examine, and weigh, and receive the oil*, but that he objected on the ground that the tender was at an *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 (*g*), 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 (*h*), and within the time limited, if the other be within the four seas (*i*), 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 varying

(*g*) 2 M. & G. 395.
(*h*) Kidwelly *v.* Brand, Plowden, 71.
(*i*) Shepp. 136, ed. 1651.

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.

§ 686. "But where the thing is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party, *at that place;* and as the attendance of the other party is necessary at that place to complete the act, there the law, though it requires 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 that 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 as far as he could his part of the contract, and was entitled to recover for the breach of it by the defendant."

§ 687. In Duncan *v.* Topham (*k*), the declaration alleged an order

(*k*) 8 C. B. 225.

for goods to be delivered to the defendant within a *reasonable time*, but the proof showed a written order for "five tons, etc.; but it must be put on board *directly*," to which the plaintiff replied, "I shall ship you five tons, etc., *to-morrow*." Held, that the proof did not support the declaration; and that a *reasonable time* was a more protracted delay than *directly*.

In Attwood *v.* Emery (*l*), the agreement of the vendor, who was a *manufacturer*, to deliver goods "as soon as possible," was construed to mean "as soon as the *vendors* could," with reference to *their* ability to furnish the article ordered, consistently with the execution of prior orders in hand. A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th of November, was held to be reasonably complied with by tender in the February following.

[But in the later case of the Hydraulic Engineering Company *v.* McHaffie (*m*) 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.]

For the meaning of the words *reasonable time*, see Brighty *v.* Norton (*n*), and Toms *v.* Wilson (*o*), *post*, § 709.

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 (*p*).

§ 688. Where by the terms of a contract of sale the vendor was to deliver to the purchaser a bill of lading for the cargo which had been bought on the purchaser's orders, it was held that the delivery of the *bill of lading* within a reasonable time after its receipt, and without reference to the unloading of the *cargo*, was incumbent on the vendor, and that the buyer was justified in rejecting the purchase on the refusal to deliver the bill of lading (*q*).

(*l*) 1 C. B. N. S. 110; 26 L. J. C. P. 73.
(*m*) 4 Q. B. D. 670, C. A.
(*n*) 3 B. & S. 305; 32 L. J. Q. B. 38.
(*o*) 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.
(*p*) Staunton *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."
(*q*) Barber *v.* Taylor, 5 M. & W. 527.

[Where payment is to be made in cash in exchange for bill of lading, it would seem that it is the duty of the seller to forward the bill of lading to the buyer within a *reasonable time* after shipment of the cargo; but it is not an implied condition of such a contract, entitling the buyer to reject the goods, that the bill of lading shall be in the hands of the buyer, or of his agent, before the arrival of the ship (*r*).

Sometimes the time of delivery stipulated for by the contract has been postponed at the request either of the seller or the buyer. Such postponement, unless amounting to a contract, in which case it must have been reduced to writing in order to satisfy the requirements of the Statute of Frauds, is, as we have already seen (*s*), a mere forbearance by the one party at the request of the other, and either is at liberty at any time to insist upon his rights under the original contract.

In Ogle *v.* Earl Vane (*t*), the defendant contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July, 1865. Owing to an accident to the defendant's furnaces, he had delivered none of the iron *by that date.* Afterwards negotiations passed between the parties, but eventually, in February, 1866, the plaintiff went into the market. The price of iron had risen since July, and the plaintiff sought to recover from the defendant the difference between the contract and the market price in February. The defendant paid into court the difference between the contract and the market price in July. The judge at the trial left it to the jury to say whether on the evidence they thought that the defendant had held out that he should be able to deliver the iron, and that the plaintiff had waited accordingly, in which case they might return a verdict for damages beyond the amount paid into court. The jury returned a verdict for the full amount claimed. Upon the argument of a rule to enter the verdict for the defendant, on the ground that there was no evidence to go to the jury of the plaintiff being entitled to more damages than were represented by the sum paid into court, it was objected, on behalf of the defendant, that any agreement for postponement ought to have been in writing to satisfy the Statute of Frauds; but it was held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, first, that there was evidence from which the jury might infer that the plaintiff's delay in going into the market was at the defendant's request; and, secondly, that as the evidence went to show, not a new contract, *but simply a forbearance by the*

(*r*) Per Brett, M. R., in Sanders *v.* Maclean, 11 Q. B. D., at p. 337. The point was not necessary to the decision in the case, and Cotton and Bowen, L. JJ., refrained from expressing an opinion upon it, but they offered no dissent to the opinion expressed by the Master of the Rolls.

(*s*) *Ante*, Part II. Ch. 1.

(*t*) L. R. 3 Q. B. 272, in Ex. Ch.; affirming same case L. R. 2 Q. B. 275.

plaintiff at the request of the defendant, the Statute of Frauds did not apply.

The cases bearing upon this point are considered in the judgment of the Court of Common Pleas in Hickman *v.* Haynes (*u*). The contract was for the sale by the plaintiff to the defendants of 100 tons of pig iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873. Seventy-five tons of iron were delivered during the months of March, April, and May respectively, in accordance with the contract, but early in June the defendants verbally requested the plaintiff, and the plaintiff consented, to postpone delivery of the remaining twenty-five tons. Upon the expiration of the contract time the plaintiff tendered the residue of the iron, but the defendants then refused to accept it. In an action for damages for breach of contract the plaintiff was held entitled to succeed. It was contended, on behalf of the defendants, that a new agreement for the delivery and acceptance of the remaining twenty-five tons of iron had been substituted for the original written contract, and that this new agreement being verbal could not be enforced; but the court held that the original contract still subsisted, and that the plaintiff could maintain an action upon it; that the assent to the defendant's request to give time was not a valid agreement binding the plaintiff, but a *voluntary forbearance* on his part; and the same distinction was drawn between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another, which had already been recognized in Ogle *v.* Earl Vane.

On the other hand, in Plevins *v.* Downing (*x*), the plaintiffs contracted to deliver 100 tons of pig iron, "25 tons at once, and 75 tons in July next." By the end of July the plaintiffs had delivered, and the defendants had accepted, 75 tons in all. There was no evidence that the defendant had requested the plaintiffs, *before the end of July*, to withhold delivery of the remaining 25 tons, but there was evidence that in *October* the defendant *verbally* requested the plaintiffs to forward 25 tons, which, when forwarded, he declined to accept. Held, that the plaintiffs could not sue on the original contract, inasmuch as they were unable to prove that they were ready and willing to deliver the 25 tons at the end of July, and had only withheld delivery at the defendant's request; neither could they rely upon the request to deliver made to them by the defendant in October, as that would have been to substitute a parol for a written agreement.

"It is true," said Brett, J. (*y*), in delivering the judgment of the court, "that a distinction has been pointed out and recognized between

(*u*) L. R. 10 C. P. 598.
(*x*) 1 C. P. D. 220.
(*y*) At p. 225.

an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect in favor of either to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test, in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so, made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages; . . . but if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, *he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract.* The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be the result of the cases which are summed up in Hickman *v.* Haynes."

In Tyers *v.* The Rosedale Iron Co. (*z*), the defendants were the sellers and the plaintiffs the purchasers of iron, deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly qualities at the plaintiffs' request. Afterwards, in December, 1871, *the last month* fixed in the contract for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery, it was held by the Exchequer Chamber, reversing the decision of the majority of the Court of Exchequer, that the defendants were not entitled to refuse to deliver more than the monthly quantity. It became unnecessary, in the Exchequer Chamber, to decide whether the defendants were bound to deliver in December all that remained to be delivered under the contract, or whether they had a reasonable time within which to deliver, because the plaintiffs agreed to have the damages assessed at the market price of iron in December, and this arrangement, in a rising market, was more favor-

(*z*) L. R. 10 Ex. 195, Ex. Ch., reversing S. C. L. R. 8 Ex. 305.

able to the defendants. The opinion of the Exchequer Chamber was evidently in favor of their having a reasonable time within which to deliver, but Martin, B., in delivering a dissentient judgment in the Court of Exchequer, which on the main point was upheld by the Exchequer Chamber, took the opposite view.

The following propositions with reference to the seller's duty to deliver (*a*) may fairly be deduced from the foregoing authorities, where, in contracts for the delivery of goods by instalments, there have been applications for postponement and a subsequent request for delivery by the buyer : —

(A.) Where the request is *within the contract time.*

(1) The seller is bound to deliver, although there has been postponement at the buyer's request (*b*).

(2) It has not yet been decided whether the seller is bound to deliver all the quantities within the contract time, or only within some reasonable time afterwards, though the latter appears to be the better opinion (*b*).

(B.) Where the request is *after the contract time.*

(1) If the postponement has taken place at the buyer's request, he is estopped from denying that the seller was ready and willing to deliver within the contract time (*c*).

(2) If the postponement has taken place at the seller's request, he cannot maintain his action *on the original contract*, because he cannot prove he was ready and willing to deliver pursuant to the contract (*d*).]

§ 689. The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for (*e*), or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered (*f*).

(*a*) It is obvious that these propositions apply equally, *mutatis mutandis*, to the correlative duty of the buyer to accept; *post*, Chapter on Acceptance, §§ 699–705.

(*b*) Tyers *v.* Rosedale Iron Company, L. R. 10 Ex. 195, in Ex. Ch., reversing S. C. L. R. 8 Ex. 305.

(*c*) Ogle *v.* Earl Vane, L. R. 3 Q. B. 272, in Ex. Ch., affirming S. C. L. R. 2 Q. B. 275; Hickman *v.* Haynes, L. R. 10 C. P. 598; [Duryea *v.* Bonnell, 18 App. Div. (N. Y.), 151, 154. — B.]

(*d*) Plevins *v.* Downing, 1 C. P. D. 220.

(*e*) The rule is less rigid where goods are ordered from a correspondent who is an *agent* for buying them. See Ireland *v.* Livingston, L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; L. R. 5 Q. B. 516; 5 H. L. 395, *ante*, § 590; Johnston *v.* Kershaw, L. R. 2 Ex. 82; 36 L. J. Ex. 44; Jefferson *v.* Querner, 30 L. T. N. S. 867. [And see Fairbanks *v.* Low, 12 New Zealand, 302 (1894). — B.]

(*f*) Renter *v.* Sala, 4 C. P. D. 239, C. A.

In Dixon *v.* Fletcher (*g*), the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton, and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton, or "any part thereof." The court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of an averment that the plaintiffs were ready and willing to deliver the 200 bales only.

So in Hart *v.* Mills (*h*), where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned.

In Cunliffe *v.* Harrison (*i*), 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" (*k*).

In Nicholson *v.* Bradfield Union (*l*), 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*.

In Levy *v.* Green (*m*), 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.

§ 690. If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold (*n*). But the buyer is

(*g*) 3 M. & W. 146.
(*h*) 15 M. & W. 85.
(*i*) 6 Ex. 903.
(*k*) Per Parke, B.
(*l*) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.
(*m*) 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 L. R. Ir. 82, C. A.
(*n*) Per Parke, J., in Oxendale *v.* Wetherell, 9 B. & C. 386, approved by the Privy Council in Colonial Insurance Company of New Zealand *v.* Adelaide Marine Insurance

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.

Thus, in Waddington *v.* Oliver (*o*), 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.

But in Oxendale *v.* Wetherell (*p*), 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 delivery of the remainder.

In Hoare *v.* Rennie (*q*), 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*, § 593. [Chapter on Conditions, where the question of delivery by instalments is fully considered.]

In Morgan *v.* Gath (*r*), 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.

[In the State of New York the qualification, that the vendor may recover the price of the portion of the goods delivered, if retained by the vendee until after the time for the full performance of the contract, has been expressly repudiated (*s*).]

§ 691. The quantity to be delivered is, however, sometimes stated in the contract with the addition of words, such as "about," or "more or less," which show that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance.

Company, 12 App. C. 128. 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*.

(*o*) 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.

(*p*) 9 B. & C. 386. See, also, Mavor *v.* Pyne, 3 Bing. 285.

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

(*r*) 3 H. & C. 748; 34 L. J. Ex. 165.

(*s*) Per Spencer, J., in M'Millan *v.* Vanderlip, 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; but see Avery *v.* Willson, 81 N. Y. 341, 345 (1880).

In Cross *v.* Eglin (*t*), the purchase was of "about 300 quarters (more or less) of foreign rye, . . . shipped on board the Queen Elizabeth, etc., also about 50 quarters of foreign red wheat," etc., etc. 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 burden of proof lay on the vendors, who were seeking to enforce the contract, and that they had failed to show clearly what was the meaning of the parties.

In Cockerell *v.* Aucompte (*u*), the court refused to give consideration to an objection against paying for 127 tons of coal, on a contract to deliver 100 tons "more or less;" but the coals had been supplied, and there was no offer to return them.

Bourne *v.* Seymour (*x*) 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" (*y*).

In Moore *v.* Campbell (*z*), 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

(*t*) 2 B. & Ad. 106.
(*u*) 2 C. B. N. S. 440; 26 L. J. C. P. 194.
(*x*) 16 C. B. 337; 24 L. J. C. P. 202.
(*y*) 24 L. J. C. P. 207.
(*z*) 10 Ex. 323; 23 L. J. Ex. 310.

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.

§ 692. In McConnell *v.* Murphy (*a*), 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 (*b*) 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 (*c*).

[In America, this question has been recently discussed in a case before the Supreme Court of the United States (*e*), and three rules were laid down for the guidance of the courts in the construction of similar contracts: —

1. Where the goods are identified by reference to independent circumstances, *e. g.* all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped 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 goods, 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.

2. 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

(*a*) L. R. 5 P. C. 203. See, also, McLay *v.* Perry, 44 L. T. N. S. 152, and *cf.* Morris *v.* Levison, 1 C. P. D. 155, where the words "say about" were held to be words of contract, and not of estimate. This was, however, a case arising out of a charter party, and not out of a contract of sale.

(*b*) 2 C. M. & R. 61; 5 Tyr. 644.

(*c*) See, further, Leeming *v.* Smith, 16 Q. B. 275; Barker *v.* Windle, 6 E. & B. 675; Hayward *v.* Scougall, 2 Camp. 56.

(*e*) Brawley *v.* The United States, 96 U. S. 168.

qualifying words in such cases only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight (*ee*).

3. But the qualifying words may be supplemented by other stipulations or conditions, — *e. g.* "as much as the seller shall manufacture or the buyer shall require," — and they will then govern the contract. In Taucred *v.* Steel Co. 15 App. Cas. 125, A. agreed with B. to supply "the whole of the steel required by you" for certain work; and in another part of the contract the quantity was estimated at "30,000 tons more or less." Held, that A. had a right to supply all that B. required for the work, although largely in excess of 30,000 tons; and also that evidence of a custom putting a different interpretation on the contract was inadmissible.]

Where delivery is to be made according to bills of lading, the authorities have already been reviewed, *ante*, § 591.

§ 693. Where the vendor is bound to send the goods to the purchaser, the rule is well established, as shown *ante*, § 181, that delivery to a common carrier, *à fortiori*, to one specially designated by the purchaser, is a delivery to the purchaser himself; the carrier being, in contemplation of law in such cases, the bailee of the person *to* whom, not *by* whom, the goods are sent; the latter when employing the carrier being regarded as the agent of the former for that purpose (*f*).

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 (*g*). When goods are ordered from a distant place, the vendor's duty to deliver them in merchantable condition is complied with if the goods are in proper condition when delivered *to the carrier*, provided the injury received during the transit does not exceed that which must *necessarily* result from the transit.

Where hoop-iron was sold in Staffordshire, deliverable in Liverpool in the winter, the vendor was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, on proof that this deterioration was the *necessary* result of the transit, and that the iron was bright and in good order when it left Staffordshire (*h*).

[The case was decided upon the ground that it would be unreason-

[(*ee*) United States *v.* Pine River Logging Co. 89 Fed. R. 907. — B.]

(*f*) Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Ex. 1; Fraganov. Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364, and 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E. B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 34 L. J. Q. B. 145.

(*g*) Dunlop *v.* Lambert, 6 Cl. & F. 600.

(*h*) Bull *v.* Robison, 10 Ex. 342; 24 L. J. Ex. 165.

able to imply a warranty which it is physically impossible to comply with. It is submitted that when goods are ordered from a distant place, of a manufacturer or dealer, it is the vendor's duty to deliver them in a merchantable condition at that place, and he must bear the risk of any deterioration which is not necessarily consequent upon the transit. The point is considered *ante*.]

§ 694. But the vendor is bound, when delivering to a carrier, to take the usual precautions for insuring the safe delivery to the buyer. In Clarke *v.* Hutchins (*i*), the vendor, in delivering goods to a trading vessel, neglected to apprise the carriers that the value of the goods exceeded 5*l*., although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and, on the vendor's action for goods sold and delivered, it was held by the King's Bench, Lord Ellenborough giving the decision, that the vendor had not made a delivery of the goods; not having "put them in such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers."

§ 695. In offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. Thus in Isherwood *v.* Whitmore (*k*) the defendants, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but, on application to inspect the goods, were shown two closed casks said to contain them. The persons in charge refused to allow the casks to be opened. Held, that the plaintiff had not made a valid offer of delivery.

§ 696. There may be a symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in Chaplin *v.* Rogers (*l*), 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 (*m*). 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 (*n*).

§ 697. So the indorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instru-

(*i*) 14 East, 475. See, also, Buckman *v.* Levi, 3 Camp. 414; Cothay *v.* Tute, 3 Camp. 129.

(*k*) 11 M. & W. 347; and per Parke, B., in Startup *v.* MacDonald, 6 M. & G. 593.

(*l*) 1 East, 192.

(*m*) 3 T. R. 464.

(*n*) Atkinson *v.* Maling, 2 T. R. 462.

ments, 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 (*o*), and Wood *v.* Manley (*p*); but the effect of transferring such documents of title upon the rights 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.

[But *semble*, if the vendor has used reasonable diligence in forwarding the bill of lading, the buyer is bound to accept it, although the bill of lading may not have reached his hands before the arrival of the ship, so that the goods may be subject to charges for warehousing or to demurrage (*q*).

The law as to the indorsement and delivery of bills of lading is stated by Lord Justice Bowen in a recent case in the following terms: "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During the period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be" (*r*).

It will be convenient to refer here to the long-established custom of merchants, both in this country and abroad, to draw bills of lading in sets of three or more, "one of such bills being accomplished, the others to stand void." Sometimes one of the set is retained by the captain, the others being transferred by him to the shipper; sometimes the whole of the set are handed, upon shipment, to the merchant, the cap-

(*o*) 2 M. & G. 650.
(*p*) 11 A. & E. 34.
(*q*) Sanders *v.* Maclean, 11 Q. B. D. 327, C. A., per Brett, M. R.
(*r*) Sanders *v.* Maclean, 11 Q. B. D. at p. 341.

tain retaining only a copy. The practice was originally intended for the protection of the shipper or consignee, but is now of small practical benefit, owing to the altered conditions of modern commercial life, with the rapid means of communication by steam or telegraph, while in some cases it undoubtedly affords opportunities for fraud. The inconveniences resulting from its continuance have been recently pointed out by very eminent judges (*s*), and it is for merchants to consider whether some alteration of the practice may not with advantage be adopted. In Barber *v.* Meyerstein (*t*), the House of Lords decided that the indorsement and transfer, with intent to pass the property, of *one* bill of lading out of the set of three, passes the property in the goods which the bill of lading represents, and that any subsequent indorsement of any other bill of the set is ineffective for that purpose. This was confirmed in Glyn, Mills & Co. *v.* East and West India Dock Co. (*u*), where the right of the holder of the first bill of lading to sue the captain or shipowner who has innocently delivered the goods to the holder of a subsequently indorsed bill was considered. And in Sanders *v.* Maclean (*v*) it was decided that, where by the terms of the contract payment is to be made against bills of lading, the buyer is bound, when it is tendered to him by the seller, to accept a duly indorsed bill of lading effective to pass the property in the goods, although the other bills of the set have not been tendered or accounted for. If the seller has fraudulently dealt with the other bills, the buyer's rejection will be justified because the tender is a bad one, the bill of lading tendered being ineffectual to pass the property; but in refusing to accept the bill of lading and pay for the goods, the buyer does so at his own risk.

In Borrowman *v.* Free (*x*), it was 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.

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.]

§ 698. 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

(*s*) Among others, by Lords Cairns and Blackburn, in Glyn, Mills & Co. *v.* East and West India Dock Company, 7 App. Cas. 591.

(*t*) L. R. 4 H. L. 317, *post*, Book V. Part I. Chap. 4, on Lien.

(*u*) 7 App. Cas. 591. Book V. Part I. Chap. 5, on Stoppage *in Transitu;* and see the remarks of Brett, M. R., in Sanders *v.* Maclean, 11 Q. B. D., at p. 335.

(*v*) 11 Q. B. D. 327, C. A.

(*x*) 4 Q. B. D. 500, C. A.

(*y*) 22 L. T. N. S. 41.

(*z*) Cole *v.* Kerr, 20 Vt. 21.

recover the cost of labor, etc., in putting the wool into sacks furnished by the purchaser, the wool not having been weighed till after being put into the sacks.

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*.

AMERICAN NOTE.

DELIVERY.

§§ 674–698.

The word "delivery" is unfortunately used in various senses, and to express various shades of meaning: —

(1.) Delivery sufficient to pass the property and the risk from the seller to the buyer.

(2.) Delivery sufficient to enable the vendor to sue for goods "sold and delivered," instead of for "goods bargained and sold."

(3.) Delivery sufficient to destroy the vendor's lien for the price, whether the buyer be solvent or insolvent.

(4.) Delivery sufficient to terminate the right of stoppage *in transitu* when the buyer is insolvent.

(5.) Delivery sufficient to comply with the Statute of Frauds, for which "acceptance and receipt" is of course the more appropriate term.

(6.) Delivery sufficient to pass the title as against creditors or subsequent purchasers of the vendor.

Unless the sense in which the words are used in each particular case be steadily borne in mind, confusion will be sure to follow in reading the many decisions on this subject. For although a delivery which is sufficient as against creditors may also suffice, and more than suffice, to pass the property, and even the possession, as between the parties, the reverse is not equally true.

1. **To merely pass the Property between the Parties.** This is undoubtedly the lowest form of delivery known to the law, if delivery it can be called, when the only duty of the vendor (in the absence of any contrary agreement or usage) is to deposit or leave the article in some convenient and suitable place for the buyer to take away whenever he may choose. (See Frazier *v.* Simmons, 139 Mass. 531, 535.) When the merchant has rolled the barrel of flour to the store door, or put the tied-up bundle on the counter before the customer, his task is done. The property and risk then become the buyer's. If the article is destroyed or stolen while in that situation, and before the buyer has done anything to remove it, undoubtedly the loss is his; for the delivery, so called, is complete. See Leonard *v.* Davis, 1 Black, 476. Of course a buyer must have a reasonable time,

(*a*) 13 Wallace, 363.

after the bargain is closed, in which to remove or take possession of the goods, before the risk or loss will fall on him. Therefore, where in a sale of a large lot of potatoes which were to be delivered "in good condition," but no time was stated in which the buyer was to take them, it was held he had a reasonable time to do so, and was not liable for such portion thereof as were lost by frost and rot after the sale, and before such reasonable time had elapsed. Danforth *v.* Walker, 40 Vt. 257. Doubtless custom and usage as well as special agreement may extend this duty of the vendor, and require him to carry the goods to the house or place of business of the buyer, in which case apparently the property and risk are still in the vendor until delivered at the place designated. But this is only applying the same principle to the other end of the transit; and when the goods are left in some suitable place on the buyer's premises they become his, even though he has not seen or removed them to a more safe or secure position.

The general principle as to delivery between the parties is too well settled to need the citation of authorities, but some illustrations of the rule are here given. They show that when the contract of sale is fully completed, and the property is separated or identified, "readiness to deliver," and full opportunity in the buyer to take away, is amply sufficient to pass the title and the risk as between the parties. This is more obvious, perhaps, when the buyer has taken a bill of sale, or has paid for the property. See Dugan *v.* Nichols, 125 Mass. 43; Philbrook *v.* Eaton, 134 Ib. 400; Bradley *v.* Wheeler, 4 Robertson, 19; McNamara *v.* Edmister, 11 Hun, 597, a valuable case.

In Merrill *v.* Parker, 24 Me. 89, the defendant bought a bureau of the plaintiff, at an agreed price, and said, "she would come in a short time and take it and pay for it." It was marked, in her presence and at her wish, with her name and the price; but it was not moved from its place in the shop. She never came for it. Held, that the title had so far passed that the price could be recovered. And see Brewer *v.* Salisbury, 9 Barb. 511; Dows *v.* Morewood, 10 Barb. 183. If a dress is tried on by a lady, and she expresses herself satisfied, and says she will take it, there is a sufficient delivery to pass the title, although she leaves the dress with the maker for some slight alteration involving a matter of mere personal taste. Galvin *v.* MacKenzie, 21 Oreg. 184 (1891). In Middlesex Co. *v.* Osgood, 4 Gray, 447, the plaintiffs contracted to sell the defendant all the "manure waste" which might be made at their mill for a year, for $325. The waste was placed in a certain barn ready for delivery to the defendant, but he had never demanded it, nor had the plaintiffs ever offered to deliver it. This was held a sufficient delivery to enable the plaintiffs to recover the price, the court saying: "All the plaintiffs were bound to do was to be in readiness to deliver the waste when called for by the defendant." And see Chamberlain *v.* Farr, 23 Vt. 265; Clark *v.* Greeley, 62 N. H. 394.

In Lincoln *v.* Gallagher, 79 Me. 189, the vendor of a vessel was held not bound to put her into a dry dock at the port of delivery, so that the buyer could examine her; but that it was sufficient to tender a delivery at a safe and usual anchorage in the port designated. In Goddard *v.* Binney, 115 Mass. 450, the plaintiff built a buggy for the defendant upon a special order, put the defendant's name upon it, and set it apart for him in the shop, and at his request was keeping it for him, when it was destroyed by fire: it was held that, at common law, there was such a delivery as to

enable the vendor to recover the price. And see Muckey *v.* Howenstine, 3 Thomp. & Cook, 28.

In Pratt *v.* Maynard, 116 Mass. 388, the plaintiff bought a locomotive boiler of one Snow, paid for it, and at the plaintiff's request Snow placed the boiler on a lot of land in the rear of his shop; and the title to the boiler was held thus to pass to the plaintiff as between him and Snow. In Means *v.* Williamson, 37 Me. 556, the chaise sold was in the vendor's stable, where the vendee wisbed it to remain until he could build a shed for it. It was to be paid for in wood the following winter. The buyer never removed it, nor delivered any wood; but it was held a sufficient delivery to enable the vendor to recover the price. See, also, Chapman *v.* Searle, 3 Pick. 38; Olyphant *v.* Baker, 5 Denio, 379; Bemis *v.* Morrill, 38 Vt. 153; Griswold *v.* Scott, 66 Ib. 555; Weld *v.* Came, 98 Mass. 152; Beecher *v.* Mayall, 16 Gray, 376; Folsom *v.* Cornell, 150 Mass. 119.

In Barrett *v.* Goddard, 3 Mason, 107, 41 bales of cotton in the vendor's warehouse were sold on six months' credit, for which the buyer's note was given. They were sold by marks and numbers and thus fully identified, and part of the bargain was that they might remain in the warehouse "rent free," at the option of the vendee, and for his sole benefit, "until the vendor should want the room." Before the note fell due the buyer failed and the vendor refused to deliver. Held, there was such a delivery as to complete the sale, and that the vendor was liable to the assignee of the buyer for selling again. This case may go too far in saying that the vendor's lien for the price was gone (see White *v.* Welsh, 38 Pa. St. 421), but the general principle involved, *that the title* passed, is well sustained by many cases. See Hotchkiss *v.* Hunt, 49 Me. 222; Partridge *v.* Wooding, 44 Conn. 277; Ballantyne *v.* Appleton, 82 Me. 570; and Pinkham *v.* Appleton, 82 Me. 574. On a sale of a wagon at public auction, the delivery is sufficient if the wagon be pointed out and the purchaser informed that he can take it away. Beller *v.* Block, 19 Ark. 567. In Rattary *v.* Cook, 50 Ala. 352, the vendor of lumber, which was paid for, deposited it on the river bank, at a selected place, and the buyer was notified that it was at his risk, and it was decided that the title passed and the buyer was entitled to possession. And see Nichols *v.* Morse, 100 Mass. 523; Barton *v.* McKelway, 22 N. J. L. 165.

And apparently the title passes upon deposit at the designated place. Washburn Iron Co. *v.* Russell, 130 Mass. 543; Hunt *v.* Thurman, 15 Vt. 336; Phelps *v.* Hubbard, 51 Vt. 489; Bement *v.* Smith, 15 Wend. 493; Sanborn *v.* Benedict, 78 Ill. 309; Bloyd *v.* Pollocks, 27 West Va. 75; White *v.* Harvey, 85 Me. 214; Hening *v.* Powell, 33 Mo. 468.

In Sedgwick *v.* Cottingham, 54 Iowa, 512, the plaintiff sold the defendant a carload of wheat, to be shipped to a place named, and there delivered " on the track," when it was to be taken from the car by the defendant, weighed by him, and paid for according to the weight. The wheat arrived at the station, was placed upon a side track, and there destroyed by a flood before the weighing. Held, the delivery was complete, and the buyer liable for the price. And see Pacific Iron Works *v.* Long Island R. R. Co. 62 N. Y. 272; Denman *v.* The Cherokee Iron Co. 56 Geo. 319.

Some courts hold that, in contracts to deliver at a future day, at a specified price and place, *property not in existence* at the time (hops), but to be produced, and of a specified character and description, the property does not pass by its mere delivery at the appointed time and place, and

tender to the vendee, if *he then refuses to accept it*, and that the agreed price cannot be recovered, but only the difference between the price and its market value at the time of delivery. Rider *v.* Kelley, 32 Vt. 268; Hodges *v.* Fox, 36 Ib. 74, overruling Mattison *v.* Westcott, 13 Ib. 258.

In Rice *v.* Codman, 1 Allen, 377, the plaintiff bought a lot of gunny-cloth of the defendant, then in a warehouse of the defendant, which was designated and set apart by the vendor and paid for, and part actually removed on the buyer's order to third persons, although he never saw the goods, and this was held a sufficient delivery to enable the buyer to maintain an action on a warranty of the goods. If a bill of sale be made and delivered of goods in the possession of the vendor's bailee, this is a sufficient delivery, especially if the bailee has no lien or claim on them. Wooley *v.* Edson, 35 Vt. 214; Heine *v.* Anderson, 2 Duer, 318. In Claflin *v.* Boston & Lowell R. R. 7 Allen, 341, the plaintiff bought a lot of oil of R., "from eight to ten thousand gallons, more or less." Although originally executory and uncertain in amount, the vendors sent a part of it by railroad to Boston (the plaintiff's place of business), gave the plaintiff an order for it, and received payment. The carrier refused to deliver it to the plaintiff, but the court held there was a sufficient delivery to pass the property and maintain the action. And see People *v.* Haynes, 14 Wend. 546; McCormick *v.* Hadden, 37 Ill. 370. So, in Odell *v.* Boston & Maine R. R. 109 Mass. 50, it was held that a delivery to a common carrier designated by the buyer, with direction to carry and deliver to him, vests the property in the buyer, so that if the carrier delivers it to other parties on a second direction from the vendor, he is liable to the first vendee therefor.

In Bogy *v.* Rhodes, 4 Greene (Iowa), 133, the plaintiff delivered an unmeasured quantity of wood on board a flatboat, to be paid for when measured at a certain rate per cord. The defendant took the boat in tow, but during the voyage it was sunk and all the wood lost. Held that, notwithstanding the wood was not measured, the title passed, and the defendant was held liable for the price. And Richmond Iron Works *v.* Woodruff, 8 Gray, 447, is like it. So is Hunt *v.* Thurman, 15 Vt. 336. And see many cases collected *ante*, note to Conditional Sales, §§ 318–351 a.

But it must be steadily borne in mind that, if for any reason the article sold is not quite ready for delivery, not quite identified, or something more remains to be done by the seller for the purpose of completing, separating, identifying, etc., then the sale is not quite complete and the title does not pass. Rochester, etc. Oil Co. *v.* Hughey, 56 Pa. St. 322, is an interesting case on this point. The defendant bought of the plaintiff "four barge loads" of oil at a certain rate per barrel. The defendant furnished the barges, and when partially filled the barges and the oil on board were destroyed by fire. Held, no such delivery as to enable the vendor to sue for the price of that which had been put on board, since the sale was of "barge loads," and no barge was fully loaded when it was burned. In Woodbury *v.* Long, 8 Pick. 543, the plaintiff contracted to make some pew-panels for J., who was building a meeting-house, to be paid for *in cash* on delivery. The plaintiff left the pew-panels at the meeting-house when J. was absent, out of town, although his workmen were there. No one paid or offered to pay for the panels, and they were attached there as the property of J. But the court held that there was no delivery, as payment had not been made or waived.

In like manner in Houdlette *v.* Tallman, 14 Me. 400, a lot of hay in the vendor's barn was sold at $50 per ton, but not to be taken away until June 5th, and *to be paid for before taken away*. The hay was all screwed, weighed, and labelled, and the weight marked on each bundle; but the whole quantity had not been ascertained by adding up the marks of the weight or other means. No money was paid, or writing made, and before June 5th the vendor sold the hay for a higher price to other parties. In trover by the first vendee against the vendor, the jury found that the bargain was not closed until the bundles were counted and the weight added up, and a verdict for the defendant was sustained. Where P. agreed to furnish B. with a paper-machine and put it up in B.'s mill, and if it worked satisfactorily B. was to pay for it, otherwise P. was to take it away; and it was set up in B.'s mill and tried and did not work satisfactorily, some important parts being wanting; and before the defect was remedied it was attached as B.'s, — it was held that the title had not passed to B., and that P. could maintain trespass against the attaching officer. Phelps *v.* Willard, 16 Pick. 29, explained in 103 Mass. 64.

In Sibley *v.* Tie, 88 Ill. 287, the vendor of a lot of corn put part of it in the vendee's cribs, under an agreement with the latter that he should have no claim on the corn until it was paid for; but the vendee, without paying for it, sold the part put into the cribs to another party. Held, no delivery to the first purchaser, but only a getting ready to deliver, and so no title passed to the sub-vendee. See, also, Toledo Railway Co. *v.* Gilvin, 81 Ill. 511; Barker *v.* Freeland, 91 Tenn. 112.

In England *v.* Mortland, 3 Mo. App. 490, the plaintiff sold the defendant part of a larger pile of wood, not measured, set apart, or in any way identified; but he notified the defendant that the wood was ready for him, and the defendant in fact took away part of the wood, but refused to take any more. Held, there was not such a delivery of that remaining in the pile as to enable the plaintiff to recover the price.

Ordinarily, in sales, the buyer must come for the goods before the seller is bound to deliver; and if this is postponed beyond a reasonable time, the seller may be released altogether from delivery, especially if the goods are not paid for. So, where the buyer of hay agreed to come and press it before the seller was to weigh and deliver it, but did not do so for an unreasonable time, the seller was held no longer bound. Coon *v.* Spaulding, 47 Mich. 162. Although ordinarily the delivery is to be made at the place where the goods are at the time of sale, of which principle Gray *v.* Walton, 107 N. Y. 254, is a recent application, yet a special contract, custom, or usage may require a vendor to *carry and deliver* to the vendee.

If the seller is bound by agreement or custom and usage to carry and deliver the article *at a fixed place*, he must do so, before he can recover the price, and within a reasonable time. Council Bluffs Iron Co. *v.* Cuppey, 41 Iowa, 104; Steel Works *v.* Dewey, 37 Ohio St. 242; Cocker *v.* Franklin Hemp Co. 3 Sumn. 530; Smith *v.* Wheeler, 7 Oreg. 49; Corwith *v.* Colter, 82 Ill. 585; Van Valkenburgh *v.* Gregg, 45 Neb. 654. If the delivery be delayed unreasonably, the buyer is not bound to take the goods. Rhoades *v.* Cotton, 90 Me. 453. Perhaps if the buyer had made it useless to carry and deliver at that place, it might be an excuse, as if he did not provide the cars or vessels on which the vendor was to deliver the goods. See Bolton *v.* Riddle, 35 Mich. 13; Kunkle *v.* Mitchell, 56 Pa. St. 100. So, if by the agreement the buyer is to designate a place for

delivery, but neglects to do so for an unreasonable time after notice from the seller, the seller may recover the price without any more attempt to deliver. Hunter *v.* Wetsell, 84 N. Y. 549. See, also, Weld *v.* Came, 98 Mass. 152; Higgins *v.* Murray, 73 N. Y. 252. *A fortiori*, the vendor may recover the price if the vendee has positively notified him not to deliver. Windmuller *v.* Pope, 107 N. Y. 674. Where a buyer has expressly repudiated the contract, the seller need not tender the goods. His right of action is immediate. Stokes *v.* Mackay, 147 N. Y. 223, 235.

In Terry *v.* Wheeler, 25 N. Y. 520, an important case, it was held that in a sale of lumber in the vendor's yard, the whole of which is selected, designated, and piled so that it would certainly be known, and the price was paid, the title and the risk passed immediately, although the seller said he would deliver "to the cars free of charge," before which time it was destroyed by fire. It was here hardly a part of the *sale* that the vendor should deliver. Somewhat like it is Commonwealth *v.* Hess, 148 Pa. St. 98. See, also, Rail *v.* Little Falls Lumber Co. 47 Minn. 422 (1891).

If the vendor, being a manufacturer, agrees to deliver the article at the place of business of the vendee, he is liable for any injury to it on the way arising from his carelessness. Taylor *v.* Cole, 111 Mass. 363. If the seller has the option to deliver at either one of two places, he should give the buyer seasonable notice at which place he will deliver; and if he delivers at one place without such notice, and the goods perish, the loss is on him. Rogers *v.* Van Hoesen, 12 Johns. 221.

2. **To sustain an Action for Goods sold and delivered.** If there be any difference between this and the last species of delivery, this is of a slightly higher grade, and requires more distinctive acts on the part of the vendor. At least the lines have been more sharply drawn than in the former case; for since more is required to sustain an action for goods sold and *delivered* than merely for goods bargained and sold, and since the latter action even cannot be sustained unless sufficient has been done by the vendor to fully pass the property and the risk to the buyer, it seems to follow that rather more is requisite to enable the vendor to declare for goods sold and delivered than for goods bargained and sold.

In Hart *v.* Tyler, 15 Pick. 171, the defendant bargained for a lot of sides of leather of the plaintiff, weighing 2132¼ pounds, at 23 cents a pound. The whole was sent by the plaintiff to a third person, with directions to deliver them to the defendant when called for. The defendant called for, took away, and paid for 114 sides, but never called for the remainder. Held, that the plaintiff could not recover the price of the other sides, as for goods sold and delivered, because they were never delivered. Bement *v.* Smith, 15 Wend. 493, upon a similar state of facts, is more favorable for the plaintiff.

In Messer *v.* Woodman, 22 N. H. 173, it was held that an action "for goods sold and delivered" will not lie unless there has been either an actual delivery of goods, or what in law amounts to a delivery; and that a mere offer by the seller to deliver, upon payment or security for the price, with a refusal by the buyer to accept the goods, will not amount in law to a delivery. See, also, Atwood *v.* Lucas, 53 Me. 508; Spicers *v.* Harvey, 9 R. I. 582.

In Stearns *v.* Washburn, 7 Gray, 187, an action to recover the price of standing grass which the defendant had not cut or had any benefit of,

"although he could have cut it if he had wished," the court held that the action could not be maintained, the court saying: "But if the grass could be regarded as goods, yet there was no such delivery of it to the defendant as is necessary to entitle the plaintiff to maintain a count for goods sold and delivered. To maintain that count, it is essential that the goods should have been delivered to the defendant or his agent, etc., or that something equivalent to a delivery should have occurred; and if not delivered, but still on the premises of the vendor, though packed in boxes furnished by the purchaser, the plaintiff will be nonsuited if he has declared only for goods sold and delivered, for he should have declared for goods bargained or sold, or in a special count." But a count for goods "bargained and sold" could be maintained although the vendor has the article still on hand ready for delivery, in a place known to the buyer and convenient for delivering to him, whenever he complies with the terms of the sale, without any other delivery. Turner *v.* Langdon, 112 Mass. 265, differing somewhat from Atwood *v.* Lucas, 53 Me. 508, before cited; Warden *v.* Marshall, 99 Mass. 306.

The distinction between suing for goods bargained and sold, and for goods sold and delivered, was more strictly maintained under the common-law rules of pleading, and it may be that in modern times actions have been sometimes sustained without distinctly regarding the difference between the two classes of actions. See, for instance, Ross *v.* Welch, 11 Gray, 235; Stern *v.* Filene, 14 Allen, 9; Hart *v.* Summers, 38 Mich. 399.

3. **As to Vendor's Lien.** The subject of the vendor's lien, and how it is affected by a delivery of the goods, is discussed in the subsequent chapter on Lien, §§ 796–827.

4. **As to Stoppage in Transitu.** The whole subject of Stoppage *in Transitu*, of which delivery is so inseparable a part, is examined in the subsequent chapter on that subject, §§ 828–868 a, to which the reader is referred.

5. **Delivery under the Statute of Frauds.** This is fully considered under the head of Acceptance and Receipt, *ante*, Ch. 4, §§ 138–188, where it properly belongs.

6. **As against Creditors of the Vendor.** It has already been shown that non-delivery is in some States a conclusive, and in others a presumptive, badge of fraud, enabling creditors of the vendor to disregard the sale and seize the property as if a sale never was made. *Ante*, Book III. Ch. II. p. 489. It remains now to consider what does or does not constitute a delivery sufficient to validate such a sale when no charge of fraud is made; for even a *bona fide* sale of a chattel without sufficient delivery, though it may pass the property as between the parties, does not prevent creditors of the vendor from attaching it as still his. Shumway *v.* Rutter, 7 Pick. 56; Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Morgan *v.* Taylor, 32 Tex. 363.

Of course delivery to a common carrier according to the order of the purchaser is good against creditors of the vendor, in the absence of fraud, of which Lumber Co. *v.* Hardware Co. 53 Ark. 196, is a recent illustration.

Some maintain that delivery is not essential, even as against creditors and subsequent purchasers, except as non-delivery may be a badge of fraud; and if no fraud be alleged, or non-delivery be satisfactorily explained, that a sale without delivery is as valid against third persons as against the vendor himself. The elaborate opinion of Judge Storrs, in Meade *v.* Smith, 16 Conn. 346, is worthy of careful perusal.

On the other hand, the ground upon which non-delivery is often held available to a creditor is, that he has a right to presume from the possession of the vendor that the property is still his; and therefore, *if he knows of the sale*, though the property be not delivered, the sale, in the absence of fraud, is good against a creditor as well as against the vendor. Haskell *v.* Greeley, 3 Greenl. 425; Ludwig *v.* Fuller, 17 Me. 162. But notice to an officer when making the attachment, uncommunicated to the creditor himself, is not sufficient. McKee *v.* Garcelon, 60 Me. 165. Or, as has been elsewhere said, the doctrine of delivery rests upon the ground that the vendee should have the entire control of the property, and that there should be some notoriety attending the act of sale; and therefore proof of delivery will not be dispensed with on account of the peculiar situation or relation of the parties with respect to the property at the time of sale. Wolf *v.* Kahn, 62 Miss. 814. The necessity for a visible change of possession is, if possible, more obvious when the vendor and vendee are near relatives, and occupy the same house, or the same premises in which the property sold is kept. See Steelwagon *v.* Jeffries, 44 Pa. St. 407; Waller *v.* Cralle, 8 B. Monr. 11; Hoffner *v.* Clark, 5 Whart. 545.

In McKee *v.* Garcelon, 60 Me. 165, a husband, for a valuable consideration, gave his wife a bill of sale of the cattle on his farm, which she kept in her own possession, but the husband continued to use the cattle on the farm as before, and one of his creditors attached them. Held no delivery as against the creditor. The subject of sale and delivery between relatives inhabiting the same house was much discussed in McClure *v.* Forney, 107 Pa. St. 415, where the sale was, however, sustained.

Lanfear *v.* Sumner, 17 Mass. 110 (1821), is a leading case in favor of the necessity of a delivery as against creditors, even where there is no charge of fraud. There L. in Philadelphia bought a lot of teas which were then in Boston. He took an informal written transfer of them, but no delivery was made. On the same day they were attached in Boston by a creditor there, ignorant of the sale, and possession was first taken by him. Held, that the sale was invalid for the want of a delivery. This case has been sometimes doubted in its application of the rule, since the goods sold were at such a distance from the place of sale (and were *supposed* to be at sea) that the vendee could not have taken possession before the attachment was made, which was only a few hours after the sale; but the general principle involved is well supported. See Ricker *v.* Cross, 5 N. H. 572; Meade *v.* Smith, 16 Conn. 346. Subsequently the same court held that the delivery of a bill of sale, for a valuable consideration, with no actual or symbolical delivery of the chattel other than is to be inferred from the bill of sale, is not sufficient against a creditor of the vendor. Dempsey *v.* Gardner, 127 Mass. 381, examining the cases. And see Hoofsmith *v.* Cope, 6 Wharton, 53.

So in Cobb *v.* Haskell, 14 Me. 303, a bill of sale was made of a quantity of lumber to pay a just debt, and the vendor, pointing to the boards then in several piles in the lumber yard, at some distance but within sight,

said, "There are your boards; take care of them and make the most of them," and thereupon the vendee went away, and allowed the boards to remain there two months, still bearing the initial letter of the vendor's name, and without any act of ownership. This was held not a sufficient delivery as against a creditor of the vendor.

In Packard *v.* Wood, 4 Gray, 307, D. for a good consideration gave P. a deed of a bakehouse, and the implements therein, including a bread-cart standing under an open shed on the premises, which were several miles away from the place of sale. P. then gave back to D. a lease of the entire property for a year, but took no other possession thereof, and D. returned and continued in possession as before the sale, and the cart was soon after attached by his creditors. Held there was no sufficient delivery as against creditors. And Harlow *v.* Hall, 132 Mass. 232, is much like it.

But although some delivery may be necessary, it need not necessarily be at the very moment of the sale: it is sufficient if made within a reasonable time after, or before creditors have attached the property as the vendor's. Kleinschmidt *v.* McAndrews, 117 U. S. 282; State *v.* Hellman, 20 Mo. App. 304; Gilbert *v.* Decker, 53 Conn. 401; Kendall *v.* Samson, 12 Vt. 515; Bartlett *v.* Williams, 1 Pick. 288.

But whenever a *bona fide* sale of personal property has been made, and the price paid, slight acts are sufficient to show a delivery, good against even the claims of third persons. Perhaps rather more proof is required in those States which hold non-delivery to be a conclusive badge of fraud, than in such as hold it only presumptive evidence of fraud; but as to the general rule, see Shumway *v.* Rutter, 8 Pick. 447; Stinson *v.* Clark, 6 Allen, 340; Goodwin *v.* Goodwin, 90 Me. 23; Bates *v.* Conkling, 10 Wend. 390; Mount Hope Iron Co. *v.* Buffinton, 103 Mass. 62. Therefore in Phelps *v.* Cutler, 4 Gray, 137, — a sale of a horse and sleigh, — it was held that evidence that the vendor in presence of a witness declared that he delivered them to the vendee, and thereupon the vendee got into the sleigh with the vendor and they drove away together, was sufficient to warrant a jury in finding a delivery if the parties so intended it.

In Calkins *v.* Lockwood, 17 Conn. 154, the parties to a sale of iron met at the place where the iron was, and agreed upon the price and mode of payment, and thereupon the seller said to the buyer, "I deliver you this iron at that price." Before the iron was removed by the buyer, it was claimed and taken away by a third person: held a sufficient delivery, and that the sale was valid. And see Patrick *v.* Meserve, 18 N. H. 300. In Post *v.* Coal Mining Co. 176 Pa. St. 297, the buyer took possession of the dredges and scows which he had bought. There was a sufficient delivery although there was no change of location.

In a sale of goods stored in a building, especially if they are duly paid for, a delivery of the key by the vendor to the vendee, with intent to surrender possession of the property, may be a sufficient delivery as against creditors of the vendor. Packard *v.* Dunsmore, 11 Cush. 282; Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158; Morrison *v.* Oium, 3 No. Dak. 76. And see 12 Cush. 29; Vining *v.* Gilbreth, 39 Me. 496; Chappel *v.* Marvin, 2 Aik. 79; Wilkes *v.* Ferris, 5 Johns. 335; Barr *v.* Reitz, 53 Pa. St. 256; Benford *v.* Schell, 55 Ib. 393, the sale of a safe; Van Wert *v.* Olney Grocer Co. 100 Mich. 328; Goddard *v.* Weil, 165 Pa. St. 419; Howe *v.* Johnson, 117 Cal. 37.

In a sale of property then in the possession of a bailee of the vendor, if

notice be given to the bailee, who is ready and willing to deliver to the purchaser, the sale and delivery are sufficient even against creditors of the vendor, although the bailee never formally assented to the sale, or expressly agreed to hold the property for the purchaser. Tuxworth *v.* Moore, 9 Pick. 347; Carter *v.* Willard, 19 Pick. 1; Campbell *v.* Hamilton, 63 Iowa, 293; Stowe *v.* Taft, 58 N. H. 445, and cases cited; Baker *v.* Guinn, 4 Texas Civ. App. 539. Notice to him and silence on his part might be considered an assent to keep it for the vendee instead of for the vendor. Such notice of the sale to the bailee is generally held necessary in order to perfect the buyer's title against creditors of the vendor, even though a bill of sale be given. Carter *v.* Willard, 19 Pick. 1; Burge *v.* Cone, 6 Allen, 412; Whitney *v.* Lynde, 16 Vt. 579; Freiberg *v.* Steenbock, 54 Minn. 509. See Russell *v.* O'Brien, 127 Mass. 349; Pierce *v.* Chipman, 8 Vt. 334; Judd *v.* Langdon, 5 Vt. 231. This subject was very much considered in the late important case of Hallgarten *v.* Oldham, 135 Mass. 1, in which the vendor of 497 slabs of tin, which were then in the hands of his bailee, indorsed over to the buyer the bailee's receipt for the goods, in which he had agreed to deliver the goods to the bailor (not saying to his order or assigns) upon payment of all his charges. Before any notice to such bailee of the sale, the goods were attached in his hands by a creditor of the vendor, who apparently had no knowledge of the sale. It was held, in an elaborate opinion by Mr. Justice Holmes, that there was no sufficient delivery as against creditors of the vendor; and Lanfear *v.* Sumner, 17 Mass. 110, was fully sustained, and Nat. Bank of Green Bay *v.* Dearborn, 115 Mass. 219, not approved.

In Hildreth *v.* Fitts, 53 Vt. 684, the reasons why notice to the bailee at least is necessary are forcibly stated by Mr. Justice Ross. Some courts seem to hold that notice to the bailee must be given *by the vendee*, or some other person than the vendor, but it is conceived that this is immaterial, as the fact of knowledge of a sale, and an implied tacit consent to hold the goods as agent of the new owner, is all that seems to be material. See Hunter *v.* Wright, 12 Allen, 548.

Whether it is also necessary that the bailee or lessee should expressly consent to keep the articles for the buyer, is not universally agreed. That it is not necessary, see Carter *v.* Willard, 19 Pick. 1; Bailey *v.* Quint, 22 Vt. 474; Pettingill *v.* Elkins, 50 Ib. 431. But if he does so agree, no doubt the sale and delivery are complete. Potter *v.* Washburn, 13 Vt. 558; Montgomery *v.* Hunt, 5 Cal. 366. And see the important cases of Hatch *v.* Bayley, 12 Cush. 27; and Hatch *v.* Lincoln, Ib. 31.

On the other hand, many courts seem to hold that a mere written order by the vendor on the bailee, delivered by the vendor to the vendee, or the assignment, and delivery to the vendee, of the bailee's receipt for the goods (especially if he therein agrees to deliver the goods *to the holder*, or to the order of the bailor), is quite sufficient in a *bona fide* sale, even as to creditors, although no notice of the sale be given to the bailee at all. This has been more strongly applied in case of a sale of bulky or ponderous articles, but it does not appear to have been confined to them. See Puckett *v.* Reed, 31 Ark. 131, a lot of seed cotton; Glasgow *v.* Nicholson, 25 Mo. 29, five hogsheads of sugar; Zellner *v.* Mobley, 84 Geo. 746; Newcomb *v.* Cabell, 10 Bush, 460, and cases cited: it being understood in such cases that the bailee on whom the order is given has the goods in his possession, capable

of delivery. Cofield *v.* Clark, 2 Colo. 101, a well-considered case; citing Stevens *v.* Stewart, 3 Cal. 140.

If at the time of sale the property is already in the possession of the vendee, no formal delivery is necesssry; it would be an idle ceremony. Shurtleff *v.* Willard, 19 Pick. 210; Lake *v.* Morris, 30 Conn. 201; Macomber *v.* Parker, 13 Pick. 175; Nichols *v.* Patten, 18 Me. 231. And this rule applies to a sale by one tenant in common to his co-tenant, already in possession. Beaumont *v.* Crane, 14 Mass. 400; Cushing *v.* Breed, 14 Allen, 376; Kittredge *v.* Sumner, 11 Pick. 50; Macomber *v.* Parker, 13 Pick. 175.

But even as to creditors a *bona fide* sale may be valid, although the article be not *manually* delivered to the vendee, but remains by agreement in the custody or keeping of the vendor as agent, bailee, or keeper for the vendee. See Ropes *v.* Lane, 11 Allen, 591; Hobbs *v.* Carr, 127 Mass. 532, and cases cited; Shaul *v.* Harrington, 54 Ark. 305; White *v.* McCraken, 60 Ib. 613; Cartwright *v.* Phœnix, 7 Cal. 281. This was pushed so far in Thorndike *v.* Bath, 114 Mass. 116, that evidence of a sale of an unfinished piano in the vendor's shop, if he would finish it at a stated price, which offer was accepted, and a bill of sale made and delivered, accompanied by a subsequent payment of the price, would *authorize* a jury to find a delivery sufficient to pass the title, even against a subsequent purchaser of the piano while still in the hands of the vendor. Ingalls *v.* Herrick, 108 Mass. 351.

This principle may perhaps have been overlooked in Rourke *v.* Bullens, 8 Gray, 549. There S. sold a hog to the defendant, but agreed to keep it for him until he should call for it, when he was to pay the market price for it at its then weight, and on a subsequent day they went to the pen and the defendant asked S. to keep it for him, and S. agreed to do so, but subsequently sold and delivered the hog to the plaintiff, and it was held that the plaintiff had the better title. The opinion in this case is very short, and the point was not discussed. Mr. Benjamin cites this as being merely executory as to the first purchaser, but it was no more so than in the piano case just referred to.

In Hardy *v.* Potter, 10 Gray, 89, evidence that the plaintiff in Maine bought of one Adams a lot of lumber then in Massachusetts, in the custody of an agent of A. to whom A. promised to write, and took the plaintiff's note for the price, and that nothing more was to be done in relation to the sale, accompanied with proof that the plaintiff afterwards came into Massachusetts and saw the lumber, is sufficient to warrant a jury in finding a delivery as against attaching creditors of A., while the lumber was still in the agent's custody. An additional fact existed in this case, stated in 127 Mass. 383, viz., that the vendor informed his agent of the sale soon after it was made; which additional fact brings the case in line with other decisions.

Constructive or Symbolical Delivery. In a sale of ponderous or bulky articles, not capable of ordinary manual delivery from hand to hand, as a large quantity of logs, or a raft, then in the water, it is sufficient, at least where a bill of sale is made, if the vendor actually show the property to the vendee as the property conveyed by the bill of sale. Jewett *v.* Warren, 12 Mass. 300, where the vendee did not exercise any act of ownership over the property until after the administrator of the vendor

(who died the next day after the sale) had taken possession, and inventoried the goods as the vendor's. But this case was practically between the parties to the sale. This same principle has, however, been applied as against creditors. See Leonard *v.* Davis, 1 Black, 476; Thompson *v.* Baltimore & Ohio R. R. 28 Md. 396; Van Brunt *v.* Pike, 4 Gill, 270; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9; Hayden *v.* Demets, 53 N. Y. 426; Dubois *v.* Spinks, 114 Cal. 289, a good case; Hart *v.* Wing, 44 Ill. 141.

In Ayers *v.* McCandless, 147 Pa. St. 49, lumber separately piled in the vendor's yard was sold, and the piles marked with the buyer's name. Held, a sufficient change of possession, even against attaching creditors of the vendor.

In Lathrop *v.* Clayton, 45 Minn. 124, a contractor assigned to another person a certain contract to build a bridge, and sold to him at the same time a quantity of lumber, then on the river bank, and brought there to be used in building the bridge. Held, a sufficient delivery.

A sale in July of saw-logs piled on land so low that they could not be removed except on frozen ground, unless with an expense exceeding the value of the logs, is good against a creditor attaching them in the next August, and before they could have been removed, although no possession was taken by the vendee. Kingsley *v.* White, 57 Vt. 565.

Impracticable Delivery. When chattels are so situated that there *can be* no immediate delivery, the law requires none; and it is sufficient if the vendee without laches takes possession in a reasonable time after he has an opportunity to do so. If he does so his title is good, even against a creditor who has in the mean time attached them as the vendor's. This is the familiar case of the sale of property then at sea, whether vessel or *cargo*. If taken possession of as soon as they arrive in port, or within a reasonable time afterwards, and the sale is *bona fide*, the title is good. Badlam *v.* Tucker, 1 Pick. 389; Joy *v.* Sears, 9 Ib. 4; Wheeler *v.* Sumner, 4 Mason, 185; Brinley *v.* Spring, 7 Greenl. 241; Conrad *v.* Atlantic Ins. Co. 1 Peters, 386; Turner *v.* Coolidge, 2 Met. 350; Dawes *v.* Cope, 4 Binn. 258. But a reasonable taking possession is important; Meeker *v.* Wilson, 1 Gall. 419; which is a question for the jury; Joy *v.* Sears, 9 Pick. 4. The rule has been applied to the sale of a vessel by a bill of sale in another port from the place of sale, but in the same country. Putnam *v.* Dutch, 8 Mass. 287, where the sale was in Salem and the vessel was at Manchester, only a few miles distant. A creditor of the vendor attached the vessel in an hour after the sale; but the vessel did not come into the port of Salem for several days, when the vendee took possession, or attempted to do so, and his title was held superior to the creditor's. Possibly the fact that the vendee already owned part of the vessel, and bought the remaining part, might have had some influence in the decision. So in Portland Bank *v.* Stacey, 4 Mass. 661, the vessel and cargo, sold by a regular bill of sale, was in Charleston, S. C., when the sale was made in Massachusetts, and did not arrive at the place of sale for more than a week, when she was attached by creditors of the vendor several days before being taken possession of by the vendee; but his title was held good. The doctrine does not apply to a yacht moored on the water near by, and which might have been actually taken into the possession of the vendee. Veazie *v.* Somerby, 5 Allen, 281.

Such a transfer of property at sea is more obviously valid, perhaps, when a bill of sale is made and delivered, or an assignment of the bill of lading of the goods, or of the invoice of them, to the vendee, as in Gardner *v.* Howland, 2 Pick. 599; Pratt *v.* Parkman, 24 Ib. 42; Buffington *v.* Curtis, 15 Mass. 528. But it is believed that a formal bill of sale, transfer of a bill of lading, or even of the invoice, is not absolutely essential, provided a real sale be made, in good faith, and possession be reasonably taken by the vendee.

This principle of sales of goods "at sea" was applied in Ricker *v.* Cross, 5 N. H. 570, to the sale of a chaise and harness, which were in the hands of a hirer some distance from the place of sale, and which were attached in his hands by the vendor's creditor, before the vendee had taken possession or even notified the bailee of the sale. But it should not be overlooked that the sale there included other articles beside the chaise, "which were delivered to the vendee in the name of the whole;" for generally an actual delivery of part for the whole may suffice, although the goods are in different places. Shurtleff *v.* Willard, 19 Pick. 210; and see May *v.* Tallman, 20 Ill. 443; Boynton *v.* Veazie, 24 Me. 286; Leisherness *v.* Berry, 38 Ib. 84.

Growing Crops. As to delivery of growing crops. Obviously an actual delivery of a growing crop cannot be made, except by putting the vendee in possession of the land itself. See Noble *v.* Smith, 2 Johns. 56; Brantom *v.* Griffits, 2 C. P. Div. 212; Smith *v.* Champney, 50 Iowa, 174.

For this reason (viz., the impossibility of delivery at the time), it has been frequently held in California that the non-delivery of growing crops was no badge of fraud, as it might be in case of the sale of other property. Davis *v.* McFarlane, 37 Cal. 638, and cases cited; and Robbins *v.* Oldham, 1 Duvall (Ky.), 28, is like it. See, also, Cummins *v.* Griggs, 2 Duvall, 87; 5 Bush, 335. And consequently the same court has held that a growing crop may be levied upon by a creditor of the vendor notwithstanding such sale, because the thing sold was not capable of manual delivery. Raventas *v.* Green, 57 Cal. 254.

But apparently a more lenient rule prevails in some States. Thus in Graff *v.* Fitch, 58 Ill. 373, a party sold a part of a field of growing corn which was distinguished from the remainder by cutting off the top of the row separating them. Subsequently a creditor of the vendor levied upon it, but it was held a sufficient delivery. In Thompson *v.* Wilhite, 81 Ill. 357, a sale of growing wheat and corn in June, which were levied upon by a creditor of the vendor a day or two after it was cut, and before the buyer could remove it, it was held that if the purchaser "took all the possession of it it was possible to do" (though it does not appear what that was), his title was good as against the creditor. And see Ticknor *v.* McClelland, 84 Ill. 471; Bellows *v.* Wells, 36 Vt. 600.

Perhaps a stricter rule as to delivery obtains in a sale of annual crops (*fructus naturales*) — such as standing grass, for instance — than in cultivated crops (*fructus industriales*); since in Lamson *v.* Patch, 5 Allen, 586, it was held that a sale of standing grass half grown, made in June, was not valid against creditors, although the parties went on to the land, and the vendor plucked a handful of the grass and delivered it to the buyer in the name of the whole; and in Stone *v.* Peacock, 35 Me. 386, it was held that a purchase of standing grass, though paid for, passes no title against the

vendor's creditors until possession or delivery be had. In a sale of standing trees to be cut by the purchaser, the title passes as soon as the trees are cut, although not yet removed from the soil. Yale *v.* Seely, 15 Vt. 221.

Rescission of Sale. If the parties to a sale, once completed by delivery and without fraud, agree to rescind the sale, the same formalities of delivery are necessary as against creditors of *the vendee* as was necessary to pass the property in the first instance to him. Quincy *v.* Tilton, 5 Me. 277; Miller *v.* Smith, 1 Mason, 437; State of Maine *v.* Intoxicating Liquors, 61 Me. 520. And see Gleason *v.* Drew, 9 Me. 81; Folsom *v.* Cornell, 150 Mass. 118; Colcord *v.* Dryfus, 1 Oklahoma, 228. A mere offer to rescind unaccepted and unacted upon is not sufficient. Robinson *v.* Pogue, 86 Ala. 257. But if the buyer continue to keep the goods after a mutual rescission, but solely to repair them for the vendor, the buyer's possession becomes that of the vendor, and the resale is complete, so that the buyer cannot sell them again to others. Beecher *v.* Mayall, 16 Gray, 376. See, also, Parks *v.* Hall, 2 Pick. 206.

Delivery as against Second Purchasers. It is equally clear, from the foregoing cases, that there must be a delivery to the first purchaser in order to perfect his title as against a second *bona fide* purchaser who relies on, and has a right to rely upon, the continued possession of the vendor as proof of his continued title. Cole *v.* Bryant, 73 Miss. 297; North Pacific Co. *v.* Kerron, 5 Wash. 214. If there be any difference, it would seem that the second *bona fide* purchaser, upon a new consideration paid, should be more protected than attaching creditors, but it is clear that they have *at least equal rights*.

In Winslow *v.* Leonard, 24 Pa. St. 14, D. sold a lot of pig-iron to the plaintiff, in these words: "We have this day sold to W. 400 tons of pig-metal now at our landing, or that will soon be delivered there;" but it did not appear that there was any iron at the landing, nor where it was to come from. Subsequently D. sold the iron to the defendant without any notice of the prior sale to the plaintiff. Held, that the plaintiff had no title as against the defendant. An assignee in bankruptcy of a vendor does not stand in the position of a second purchaser, nor even of a single attaching creditor; and on this point of sufficient delivery, in a *bona fide* sale, the assignee of the vendor has the same rights as the vendor, and no more. If the sale was fraudulently made, it might be different. Dugan *v.* Nichols, 125 Mass. 43.

PART III.

BUYER'S DUTIES.

CHAPTER I.

ACCEPTANCE.

	Sect.		Sect.
Buyer must fetch goods bought	699	Mere receipt is not acceptance	703
Liable to damages for unreasonable delay	700	But may become so by delay in rejecting	703
Where the contract was, to deliver the goods "as required"	700	Or by exercising acts of ownership	703
Buyer has right to inspect goods before acceptance	701	Where goods do not agree with sample	705
But not to measure, when bound by terms to pay before delivery	702	Acceptance, when based on deceptive sample, may be retracted	705
		Duty to accept, where time of delivery has been postponed	705

§ 699. THE vendor having done or tendered all that his contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he ACCEPTS, and PAYS the price.

As to ACCEPTANCE, little need be said. When the vendor has tendered delivery, if there be no stipulated place, and no special agreement that the vendor is to send the goods, the buyer must fetch them; for it is settled law that the vendor need not aver nor prove in an action against the buyer anything more than his readiness and willingness to deliver on payment of the price (*a*).

§ 700. 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*).

The question of what is a reasonable time is one of fact for a jury under all the circumstances of the case (*c*).

(*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.

(*b*) Per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426; also, per Bailey, J., in Bloxam *v.* Sanders, *ante*, § 678; and see Bartholomew *v.* Freeman, 3 C. P. D. 316.

(*c*) Buddle *v.* Green, 3 H. & N. 906; 27 L. J. Ex. 33.

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.

§ 701. It has already been seen, in the chapter on Delivery, that the buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. He is not bound to accept goods in a closed cask which the vendor refuses to open (*e*); nor to comply with the contract at all, but may rescind it, if the seller refuse to let him compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time (*f*); nor to remain at his place of business after sunset on the fixed day 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 lot that the vendor has sent him (*h*). In a word, as delivery and acceptance are concurrent conditions, it is enough to say that the vendee's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor.

Thus in a sale of rice in "double bags," the purchaser was held not bound to accept the goods in single bags, in Makin *v.* The London Rice Mills Company (*i*). In this case there was proof that this mode of packing rice made a difference in the sale.

§ 702. 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

(*d*) 8 Ex. 920.

(*e*) Isherwood *v.* Whitmore, 10 M. & W. 757; 11 M. & W. 347.

(*f*) Lorymer *v.* Smith, 1 B. & C. 1; Toulmin *v.* Hedley, 2 C. & K. 157.

(*g*) Startup *v.* McDonald, 6 M. & G. 593.

(*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'Riordan, 2 L. R. Ir. 82.

(*i*) 20 L. T. N. S. 705.

(*j*) 4 M. & G. 819.

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*," etc., etc.; and, in another plea, breach of a condition, that the purchaser "should be entitled to *measure* the lot."

Held, that the law did not imply the conditions stated in the pleas; and that, under the contract as made, the buyer was bound to pay before delivery, but that he had the right *after delivery*, and *before taking away the goods*, to measure them and claim an allowance for deficient measure, if any.

§ 703. When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely *receiving* them; for receipt is one thing and acceptance another. 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*, § 138 *et seq.*

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 was not sold. He then rejected it as inferior to sample; but held that, by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

In Sanders *v.* Jameson (*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.

§ 704. In Chapman *v.* Morton (*n*), a cargo of oil-cake was shipped

(*k*) Bianchi *v.* Nash, 1 M. & W. 545; Beverley *v.* Lincoln Gas Light Company, 6 A. & E. 829; Couston *v.* Chapman, L. R. 2 Sc. App. 250; *ante*, § 652.

(*l*) 4 B. & Ald. 387. [And see Brown *v.* Nelson, 66 Vt. 663; Burke *v.* Roberts, 27 Nova Scotia, 445. —B.]

(*m*) 2 C. & K. 557.

(*n*) 11 M. & W. 534.

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 plaintiff distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called on the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs." Parke, B., thought that there was no acceptance by the defendant down to the month of May, "but the subsequent circumstances of his offering to sell, and selling the cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him, which may be considered as having been again offered to him by the plaintiffs' letter in the month of May." Alderson and Rolfe, BB., concurred.

§ 705. The question whether on the sale of specific goods the purchaser may refuse acceptance, because they do not correspond with sample, is discussed, *post* Book V. Part II. Ch. 1.

The cases of Heilbutt *v.* Hickson, *ante*, § 651, Mody *v.* Gregson, *ante*, § 667 [and Drummond *v.* Van Ingen, *ante*, § 667], are authorities to show under what circumstances an acceptance may be retracted if the sample itself is deceptive.

[The buyer's duty to accept, where the time of delivery stipulated by the contract has been postponed at the request of either party, has been already considered in relation to the correlative duty of the seller to deliver (*o*).]

AMERICAN NOTE.

ACCEPTANCE.

§§ 699–705.

Of acceptance, as our author justly remarks, but "little need be said." So far as acceptance is important under the Statute of Frauds, it has already been considered, *ante*, Book I. Ch. 4, §§ 138–188; but, at common law, acceptance is not necessary in order to complete the sale, pass the title, transfer the risk, and perfect the vendor's remedies, provided he has in fact already fulfilled his own obligations. He can, therefore, recover for "goods sold and delivered," as well as for goods bargained and sold, without proving any actual acceptance. Nichols *v.* Morse, 100 Mass. 523; Barton *v.* McKelway, 22 N. J. L. 165; Schneider *v.* O. P. Railroad Co. 20 Oreg. 172; Fox *v.* Utter, 6 Wash. 299. Acceptance not being absolutely necessary, its chief importance is as evidence that the goods complied with the contract, and so that the buyer is bound to pay for them.

As to what circumstances do or do not show an acceptance, see Pease *v.* Copp, 67 Barb. 132; Treadwell *v.* Reynolds, 39 Conn. 31; Wilds *v.* Smith, 2 Ont. App. 8 (1877); Gordon *v.* Waterous, 36 Up. Can. Q. B. 321; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Pennell *v.* McAfferty, 84 Ill. 364; Delamater *v.* Chappell, 48 Md. 244; Shipman *v.* Graves, 41 Mich. 675; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Hayner *v.* Sherrer, 2 Bradw. 536; Gowing *v.* Knowles, 118 Mass. 232; Belt *v.* Stetson, 26 Minn. 411; Hamilton *v.* Myles, 24 Up. Can. C. P. 309; Cox *v.* Jones, 24 Ib. Q. B. 81; McCormick Co. *v.* Martin, 32 Neb. 723 (1891); Indiana Mfg. Co. *v.* Hayes, 155 Pa. St. 160. An acceptance may be inferred from the fact that the buyer examined the goods, as they were delivered from time to time, and made no objection to them. Small *v.* Stevens, 65 N. H. 209. In Hercules Iron Works *v.* Dodsworth, 57 Fed. R. 556, a machine was sold with a guaranty. After refusal by the seller to take it back, the buyer continued to use it. Held, an acceptance.

In Thomson *v.* Dyment, 13 Duv. (Canada), 303, T. bought 200,000 feet of lumber of D., to be of a stated quality, which was sent to T. He accepted and used some carloads, but rejected the rest, as not entirely answering to the contract, which was proved to be only a very small part thereof; and it was held he had no right of rescission, but that his only remedy was either to obtain some reduction when sued for the price, or a suit for damages for not delivering according to the contract. 12 Ont. App. 659.

Goods are usually to be inspected and accepted or rejected at the place of delivery, but the rule can be waived, as in Cefalu *v.* Fitzsimmons Co. 65 Minn. 480.

(*o*) *Ante*, Chapter on Delivery, §§ 674–698.

The buyer, of course, has a reasonable time after a receipt to inspect and reject the goods if they do not answer the description. Shields *v.* Reibe, 9 Bradw. 598; Erwin *v.* Harris, 87 Geo. 333; Dowdle *v.* Bayer, 9 App. Div. (N. Y.) 308; Sun Publishing Co. *v.* Minn. Type Foundry Co. 22 Oreg. 49. And if not allowed to inspect within a reasonable time, he is not bound to accept. Charles *v.* Carter, 96 Tenn. 607. When the facts are clear, the question of what is a reasonable time is exclusively for the court. Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. R. 83; Wiggins *v.* Burkham, 10 Wall. 129.

This subject was very fully examined in the late case of Pierson *v.* Crooks, 115 N. Y. 539, to which the learned reader is referred. Hudson *v.* Germain Fruit Co. 95 Ala. 621. In Studer *v.* Bleistein, 115 N. Y. 317, Ruger, C. J., in a learned opinion declared that an acceptance by a vendee of goods manufactured for him, after a full and fair opportunity of inspection, does, in the absence of fraud, estop the vendee from afterwards raising any objection as to visible defects and imperfections, whether discovered by him or not, unless such delivery and acceptance is accompanied with some warranty of quality manifestly intended to survive such an acceptance. For if the goods received are not according to the contract, it is the buyer's duty, within a reasonable time, to notify the vendor of that fact, or he may be considered as accepting. Doane *v.* Dunham, 79 Ill. 131; Hirshhorn *v.* Stewart, 49 Iowa, 418; Berthold *v.* Seevers Mfg. Co. 89 Iowa, 506; Sorg Co. *v.* Crouse, 88 Hun, 246 (holding that question of what is a reasonable time is for the jury); Boughton *v.* Standish, 48 Vt. 594; Greenthal *v.* Schneider, 52 How. Pr. R. 133; Henkel *v.* Welsh, 41 Mich. 665; Neaffie *v.* Hart, 4 Lans. 4; Pease *v.* Copp, 67 Barb. 132; Watkins *v.* Paine, 57 Geo. 50; Reed *v.* Randall, 29 N. Y. 358; Gentilli *v.* Starace, 133 N. Y. 140; Carr *v.* Sullivan, 68 Hun, 246; Sprague *v.* Blake, 20 Wend. 61; Stafford *v.* Pooler, 67 Barb. 143; Coply Iron Co. *v.* Pope, 108 N. Y. 232; Pierson *v.* Crooks, 115 Ib. 539; Brown *v.* Foster, 108 Ib. 387; Norton *v.* Dreyfuss, 106 Ib. 90; Cleveland Stove Co. *v.* Hovey, 26 Neb. 628; Snow *v.* Swan, 1 Hawaii, 152; Potter *v.* Lee, 94 Mich. 140; Talbot Paving Co. *v.* Gorman, 103 Mich. 403; Williams *v.* Robb, 104 Ib. 242; Palmer *v.* Banfield, 86 Wisc. 441; Starr *v.* Torrey, 22 N. J. L. 190; Woodward *v.* Emmons, 61 Ib. 281 (1898); Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. R. 83; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281; Richardson *v.* Levi, 69 Hun, 432; McClure *v.* Jefferson, 85 Wisc. 208; Fewell *v.* Deane, 43 S. C. 257. Whether acceptance is a waiver is for the jury. English *v.* Spokane Commission Co. 48 Fed. R. 196. In Kentucky it is held that where the vendee inspects the goods, or has an opportunity to do so, and then accepts them, no warranty of quality survives, and he cannot thereafter maintain an action for damages. Jones Bros. *v.* McEwan, 91 Ky. 373. There the contract called for wheat "to grade No. 2." The buyer, who inspected it at the railroad station where it was delivered, thought it was of that grade. He forwarded it to a port for shipment by vessel, and found that it did not there grade No. 2. He was not allowed to maintain his action. The court adheres to its earlier decisions, and cites Dana *v.* Boyd, 2 J. J. Marshall, 594; O'Bannon *v.* Relf, 7 Dana, 320; Kerr *v.* Smith, 5 B. Monr. 553; followed in Bannon *v.* St. Bernard Coal Co. Ky. (1897), 39 S. W. 252. If the buyer inspects and gives notice of his refusal to accept, he cannot afterwards test the goods. Such an act is inconsistent with the right of rejection. Cream City Glass Co. *v.* Friedlander, 84 Wisc. 53.

The notice to the vendor need not necessarily point out the alleged defects in the goods, especially when they may be already known to the vendor. Am. White Bronze Co. *v.* Gillette, 88 Mich. 231 (1891). Such notice may be waived by the vendor, however. See Wartman *v.* Breed, 117 Mass. 18; Suit *v.* Bonnell, 33 Wisc. 180. When the contract provides that notice of defects shall be given in writing, the requirement that the notice shall be in that form may be waived, and, if so, an oral notice is sufficient. This rule has been applied frequently in the sale of farming machinery. Manufacturing Co. *v.* Feary, 40 Neb. 226; Davis *v.* Buttrick, 68 Iowa, 94; Davis *v.* Robinson, 67 Ib. 355; Trust Co. *v.* Welch, 47 Minn. 183; Manufacturing Co. *v.* Hanson, 3 No. Dak. 81; Aultman-Taylor Co. *v.* Frazier, 5 Kan. App. 202; 47 Pac. 156; Kingman *v.* Watson, 97 Wisc. 596 (1897); and many other cases. The buyer has a reasonable time for examination, but, if he intends to reject the article, he cannot put the article after examination to any use inconsistent with the vendor's ownership. He may put the purchased machinery in motion, and see it operate, but he cannot thereafter, having learned of its defects, use it in the prosecution of his business. Brown *v.* Foster, 108 N. Y. 387; Chambers *v.* Lancaster, etc. Co. 3 App. Div. (N. Y.) 215; Wiles *v.* Provost, 6 App. Div. (N. Y.) 1; Kingman *v.* Watson, 97 Wisc. 596 (1897).

Some cases seem to hold that he must *return* the goods (Tryon *v.* Plumb, 20 App. Div. (N. Y.) 530, a sale by sample, citing Mason *v.* Smith, 28 N. Y. State R. 519; 8 N. Y. Supp. 301, and cases, 55 Hun, 607 (mem. decision); Coply Iron Co. *v.* Pope, *supra*). But that is not so clear; a real acceptance, after a sufficient time to examine, being deemed conclusive proof, in the absence of fraud or mistake, that the goods conform to the contract, and so to finally fix the buyer's liability. And the buyer cannot afterwards change his mind and reject. Carondelet Iron Works *v.* Moore, 78 Ill. 69; Theilen *v.* Rath, 80 Wisc. 263 (1891).

An objection to the goods for only one reason *may* be a waiver of any other objection; and if the first be untenable, the buyer might be bound to take them. Johnson *v.* Oppenheim, 55 N. Y. 291; Smith *v.* Pettee, 70 N. Y. 17 ; Knox *v.* Schoenthal, 13 N. Y. Supp. 7.

If less than the quantity ordered be delivered, or if they be delivered before the time stipulated, the vendee is not bound to accept them, or pay the price if he does not. Corrigan *v.* Sheffield, 10 Hun, 227; Reynolds *v.* Spencer, 92 Hun, 275; Bryant *v.* Thering, 46 Neb. 244. And see Soloman *v.* Neidig, 1 Daly, 200; Bruce *v.* Pearson, 3 Johns. 534; Kein *v.* Tupper, 52 N. Y. 553.

Of course a vendee is bound by his acceptance of part of the goods ordered by one entire order, after a reasonable opportunity to examine them. Gaylord Man. Co. *v.* Allen, 53 N. Y. 515; Eaton *v.* Waldron, 67 Hun, 551; Reed *v.* Randall, 29 N. Y. 358; McCormick *v.* Sarson, 45 Ib. 265; Guernsey *v.* West Coach Lumber Co. 87 Cal. 249. Yet the fact of such acceptance does not excuse the vendor from delivering the balance. Kipp *v.* Meyer, 5 Hun, 111.

An acceptance of one class of goods ordered will not necessarily operate as an acceptance of another class at different prices, sent later, although both lots were included in one and the same order. Pierson *v.* Crooks, 115 N. Y. 539; Tarling *v.* O'Riordan, 2 L. R. Ir. 82 (1875). In Holmes *v.* Gregg, 66 N. H. 621 (1890), defendant ordered five lots of lumber of different dimensions and prices, amounting in all to about $1000. The lumber was

delivered in box cars, in which it could not be examined. Defendant unloaded and examined it, and accepted and used three of the five lots, and rejected the others as not conforming to the order. He piled the rejected lots in his yard, informed plaintiff that they remained subject to his order, and tendered the price of the three lots accepted. It was held that defendant rightfully inspected and measured the lumber, and also that the parties might have understood that under the contract defendant could accept those lots that conformed to the order and reject the others. A judgment for defendant was sustained.

In a sale of goods to be of a certain specified quality and grade, a tender of a larger quantity of goods of different grades, but from which the vendee might with great labor select enought to fulfil the contract, is not sufficient. The vendor should select and tender the proper goods; and a tender of bulky articles, such as fleece wool, which by the contract must be of a specified grade, must be made at a reasonable time; and if daylight be necessary for the examination, the tender must be so long before dark that the vendee may reasonably inspect and examine the goods. Croninger *v.* Crocker, 62 N. Y. 151, an interesting case. And see Corrigan *v.* Sheffield, 10 Hun, 227.

Ordinarily a buyer is not bound to accept a tender of much more than the amount ordered, and to separate the correct quantity from a larger mass. Perry *v.* Mt. Hope Iron Co. 16 R. I. 318, where a tender of fifty-three tons of iron was made on a sale of "thirty or forty tons." And see Stevenson *v.* Burgin, 49 Pa. St. 44. But the contract, or custom and usage, may sometimes modify this, especially whenever the goods sent are of uniform quality, and the labor of separation is not onerous to the buyer. Brownfield *v.* Johnson, 128 Pa. St. 268, where this subject is carefully examined. And see Lockhart *v.* Bonsall, 77 Pa. St. 53. In Shrimpton *v.* Warmack, 72 Miss. 208, a certain number of papers of needles, each paper containing two needles, were ordered. The vendor delivered the specified quantity of papers, some of which contained three needles. No charge was made for the excess in quantity. The buyer refused to accept. It was held that the evidence did not show a non-performance of the contract.

Mere acceptance of goods after time specified for delivery does not constitute a waiver of any claim for damages due to the delay. Belcher *v.* Sellards, Ky. (1897), 43 S. W. 676; Lumber Co. *v.* Sutton, 46 Kans. 192.

CHAPTER II.

PAYMENT AND TENDER.

	Sect.
Payment absolute or conditional	706
"Cash, with option of bill"	706
"Bill, with option of cash"	706
Cash against bill of lading	706
Buyer not entitled to wait for demand	707
Buyer must pay even if goods are destroyed before he gets delivery, where property has passed to him	708
And even where property has not passed, if he has assumed risk of delivery	708
Tender valid before writ issued	708
Where price payable only after demand, reasonable time allowed to fetch money	709
Mode of payment,—good when in accordance with vendor's request	710
Money sent by post	710
Set-off in account stated same as payment	711
Not so in ordinary accounts current	711
Tender is equivalent to payment	712
Requisites of valid tender	713
Production of the money may be waived	713
Cases cited	713
Examples of sufficient waiver	714
Opportunity must be given to examine and count the money	715
In what coin to be made	715
Coinage Act, 1870	715
Bank of England notes	715
Waiver of objection to *quality* of money	716
Tender of more than is due	717
Demand for change	718
Tender of part of entire debt not valid	719
Tender of balance due after set-off not allowable	720
Tender must be unconditional	721
Buyer cannot demand admission that no more is due	722
But may exclude any presumption against himself	722
Tender, with protest	725
Whether at common law debtor could demand receipt?	726
Statute 16 & 17 Vict. c. 59	727
Stamp Act, 1870	727
Receipt by a third party	727
Tender bars action, and not merely damages	728
Payment by bill or note	729
Presumed conditional until contrary shown	729
Payment not always "satisfaction and discharge"	729
Is absolute when made, but defeasible	730
Payment absolute where vendor elects to take bill instead of cash	731
Taking check is not such election	731
But may operate as absolute payment, if drawer prejudiced by undue delay in presentment	731
Bills of Exchange Act, 1882	731
Presentment of foreign check	731
Where bill taken in absolute payment, buyer no longer owes *price*	732
Vendor must account for bill received in conditional payment before he can sue for price	733
Rules of pleading in such case	733
Reason why vendor must account for bill	734
Conditional payment becomes absolute if vendor passes away bill without indorsement	734
Bill or note given by buyer, not his own, nor indorsed by him	735
Vendor must show due diligence in preserving buyer's rights against all parties to the bill	735
Or buyer will be discharged from payment of price	735
Buyer entitled to same notice of dishonor as if he had put his name on the bill	735
Country bank notes	736
Vendor cannot recover price after loss of bill given in payment	736
Or after alteration of it so as to prejudice buyer's rights	736
Vendor may bring action on lost bill	736
Where bill is given as collateral security, —vendor's duty	737
Where buyer for cash, paid in vendor's own dishonored note	738
Where bills are given for which buyer is not to be responsible	739
Where forged securities are given	739
Securities known by the buyer to be worthless	739

	Sect.
Sale for "approved bills"	740
Payment to agent	741
Who are agents to receive payment, factors, brokers, shopmen, etc.	741
Purchaser from an agent cannot pay principal so as to defeat agent's lien	742
Payment to agent must be in money, in usual course of business	742
And not by a set-off	742
Del credere commission makes no difference on this point	743
Auctioneer has no authority to take accepted bill as cash	744
But *semble*, may take check	744
Payment by set-off, where agent in possession represents himself as owner	745
Appropriation of payments, — debtor has the right to elect	746
Creditor cannot, till debtor has had an opportunity	746
Appropriation by debtor may be implied	747
Where an account current is kept	748
Creditor may apply payment, when debtor does not appropriate	748
Even to debt which he could not recover by action	748
But it must be to a really existent debt	749
Creditor's election not determined till communicated to debtor	749
Pro rata appropriation of payment	750
American rules where bills or notes given in payment	751
French law on that point	753
Appropriation of payments by French Code	753
Tender under French law	754
Roman law on the subject of this chapter	755
In Rome, payment by whomsoever made discharged debtor	756
At common law *quære*	756
Acceptilatio, or fictitious payment and release	757

§ 706. THE chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on. The terms of the sale may require, 1st, an *absolute* payment in cash, and this is always implied when nothing is said; or, 2dly, a *conditional* payment in promissory notes or acceptances; or, 3dly, it may be agreed that credit is given for a stipulated time, without payment, either absolute or conditional. In the first two cases the buyer is bound to pay, if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last case he has a right to demand possession of the goods without payment.

[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 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*).

Again, by the terms of the contract for the sale of goods to be shipped, payment has often to be made in exchange for bills of lading of each shipment. In such cases the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading has been drawn

(*a*) This was, in effect, the ruling of Cockburn, C. J., at Nisi Prius, in Anderson *v.* The Carlisle Horse Clothing Company, 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.

in triplicate, and all three bills of the set are not then tendered or accounted for (*b*).]

§ 707. The rule of the common law is, that a man bound to pay has no right to delay till demand made, but must pay as soon as the money is due, under peril of being sued; and it has already been stated (*c*) 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 (*d*).

§ 708. In cases where the property has passed, the buyer must pay the price according to the terms agreed on, even if the goods are destroyed in the vendor's possession, as has already been pointed out, *ante*, § 313 *et seq.* The goods are at the buyer's risk; they are *his* goods from the moment the property passes, and the price is due to the vendor, who simply holds the goods as bailee for the buyer in such a case (*e*). 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 (*f*) (*ante*, § 328).

In Briggs *v.* Calverley (*g*), the vendor attempted to go one step 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."

§ 709. But the contract sometimes provides that the payment is only to be made after demand or notice, and, when this is the case, a reasonable time must be allowed for the buyer to fetch the money. In Brighty *v.* Norton (*h*), 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

(*b*) Sanders *v.* Maclean, 11 Q. B. D. 327.

(*c*) *Ante*, § 679.

(*d*) 1 Wms. Saund. 33 b, n. 2.

(*e*) Rugg *v.* Minett, 11 East, 210; *ante*, § 322.

(*f*) Castle *v.* Playford, L. R. 5 Ex. 165; 7 Ex. 98; Martineau *v.* Kitching, L. R. 7 Q. B. 436; Stock *v.* Inglis, 9 Q. B. D. 708; 12 Q. B. D. 564, C. A.; 10 App. Cas. 263. [See White *v.* Solomon, 164 Mass. 516.—B.]

(*g*) 8 T. R. 629.

(*h*) 32 L. J. Q. B. 38; 3 B. & S. 305.

hour was not a reasonable notice, the judges concurring in this, though agreeing that it was difficult to say in general what would be a reasonable time.

In Toms *v.* Wilson (*i*), 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" (*j*)

And in Massey *v.* Sladen (*k*), where the promise was to pay "instantly on demand, and without delay on any pretence whatever," and demand might be made *by giving or leaving verbal or written notice for him at his place of business*, held that, in the party's absence, reasonable time must be given for the notice left at his place of business to reach him.

§ 710. As to the mode of payment, the buyer will be discharged if he make payment in accordance with the vendor's request, even if the money never reach the vendor's hands; as if it be transmitted by post in compliance with the vendor's directions and be lost or stolen (*l*). But Lord Kenyon held that a direction to send by post was not complied with by the delivery of a letter, with the remittances inclosed, to the bellman or postman in the street, but should have been put into the general post-office, or a receiving office authorized to receive letters with money (*m*).

In Caine *v.* Coulton (*n*), the plaintiff's attorney wrote to the defendant to *remit* the balance of the account due to the plaintiff, with 13*s.* 4*d.* costs. The defendant remitted by post a banker's bill payable at sight for the amount of the account without the costs. The next day the attorney wrote refusing to accept the bill unless the 13*s.* 4*d.* were also remitted. The defendant refused, and action was brought; but the attorney kept the banker's bill, although he did not cash it. The jury found that the attorney had waived any objection to the remittance not having been made in cash, and only objected because the costs were not paid. Held, that the payment was good, on the ground that it was the attorney's duty to return the banker's bill if he did not choose to receive it in payment. Martin, B., said of the attorney's conduct: "He says one thing, but he does another; he kept the banker's draft. It seems to me to be common sense to look at what is

(*i*) 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.

(*j*) Com. Dig. tit. Conditions, G. 5.

(*k*) L. R. 4 Ex. 13.

(*l*) Warwick *v.* Noakes, Peake, 68, 98.

(*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.

done, and not to what is said." This case was distinguished by Pollock, C. B., in giving his decision, from Gordon *v.* Strange (*o*), and Hough *v.* May (*p*), which will presently be noticed, on the ground that in this case the creditor ordered the money *remitted*, which the learned Chief Baron said was of the very essence of the question.

In Eyles *v.* Ellis (*q*), both parties kept an account at the same 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.

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."

§ 711. If the buyer has stated an account with the vendor, in which the vendor has, by mutual agreement, received credit for the amount of the goods sold, as a set-off against items admitted to be due by the vendor to the buyer, this is equivalent to an actual cash payment by the buyer of the price of the goods. The principle was thus explained by Lord Campbell, in a case which involved the necessity of a stamp to a written agreement, offered in proof of a plea of payment (*s*): "The way in which an agreement, to set one debt against another of equal amount and discharge both, proves a plea of payment is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the cross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect,

(*o*) 1 Ex. 477.
(*p*) 4 A. & E. 954.
(*q*) 4 Bing. 112.
(*r*) 1 Ex. 477.
(*s*) Livingstone *v.* Whiting, 15 Q. B. 722; 19 L. J. Q. B. 528.

because, in contemplation of law, a pecuniary transaction is supposed to have taken place by which each debt was then paid." A written memorandum of such a transaction was therefore held to be a receipt requiring a stamp. The cases establishing the above 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*).

§ 712. In the absence of any of these special modes of payment, it is the buyer's duty, under the contract, to make actual payment in cash, or a tender of payment, which is as much a performance and discharge of his duty as an actual payment.

§ 713. A tender is only validly made when the buyer produces and offers to the vendor an amount of *money equal* to the price of the goods. 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.

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*l.* 5*s.*, and the attorney said he could not take that sum, the claim being above 8*l.* Held, not a good tender, because the money was not produced, and the defendant had not dispensed with the production; "if he saw it produced, he might be induced to accept of it."

In Leatherdale *v.* Sweepstone (*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.

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*l.* for him, which had been left by the attorney to be paid to him. The plaintiff, who wrongly supposed that a larger sum had been collected for him, said he would not receive the 10*l.* The clerk did not produce the money. Held, no tender.

In Finch *v.* Brook (*a*), in the Common Pleas, in 1834, the defendant's attorney called on the plaintiff and said: "I have come to pay you 1*l.* 12*s.* 5*d.*, which the defendant owes you," and put his hand in his pocket, whereupon the plaintiff said: "I can't take it; the matter

(*t*) Owens *v.* Denton, 1 Cr. M. & R. 711 Callandar *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*) Cottam *v.* Partridge, 4 M. & G. 271; and see *ante*, § 193.

(*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.

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."

§ 714. The following are cases in which the courts have held the acts or sayings of the creditor sufficient to dispense with the production of the money: Douglas *v.* Patrick (*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*l.* 10*s.*, and the creditor said "he would not take it;" Alexander *v.* Brown (*e*), where the person who made a tender of 29*l.* 19*s.* 8*d.* had in his hand two bank notes twisted up and inclosing four sovereigns and 19*s.* 8*d.* in change, making the precise sum, and told the plaintiff what it was, but did not open it before him, and it was objected that he ought to have *shown* him the money; Best, C. J., saying in this last case that, if the debtor had not mentioned the amount to the creditor, the tender would not have been sufficient.

In Harding *v.* Davies (*f*), the proof was that the defendant, at her own house, offered to pay the plaintiff 10*l.*, 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, 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.'"

§ 715. The tender must of course be made in such a manner as will enable the creditor to examine and count the money, but it may be produced in a purse or bag ready to be counted by the creditor if he choose, provided the sum to be the correct amount (*g*).

(*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.
(*g*) Isherwood *v.* Whitmore, 11 M. & W. 347.

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*).

And by "The Coinage Act, 1870,' s. 4, a tender of payment in coin is declared to be legal, —

In the case of gold coins, for a payment of any amount.

In the case of silver coins, for a payment not exceeding forty shillings.

In the case of bronze coins, for a payment not exceeding one shilling.

By the 7th sect. of the same act, all contracts, sales, payments, etc., "shall be made, executed, entered into, done, and had according to the coins which are current and legal tender pursuant to this act, and not otherwise, unless the same be made, executed, entered into, done, or had according to the currency of some British possession, or some foreign state."

By the 3 & 4 Will. IV. c. 98, s. 6, tenders are valid for all sums in excess of five pounds, if made in notes of the Bank of England, payable to bearer on demand, so long as the bank continues to pay on demand its notes in legal coin.

§ 716. When the tender is made in a currency different from that required by the law, the courts are much less rigorous in inferring a dispensation than in cases were no money is produced. If the buyer should offer his vendor a country bank note, or a check, or silver coin for a debt exceeding 40*s*., and the vendor 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.

In Polglass *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."

§ 717. A tender of more than is due is a good tender, for *omne majus continet in seminus*, and the creditor ought to take out of the

(*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 (Ir. R.) 48.

(*k*) 2 Cr. & J. 15. See, also, Jones *v.* Arthur, 8 Dowl. P. C. 442; Caine *v.* Coulton, 1 H. & C. 764; 32 L. J. Ex. 97, *ante*, § 710.

sum tendered him as much as is due to him (*l*). A tender, therefore, of 20*l.* 9*s.* 6*d.* in bank notes and silver, proves a plea of tender of 20*l.* (*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*l.* (*n*).

§ 718. But a tender of a larger sum than is due, with a demand for change, is not a good tender, if the creditor objects to giving change.

In Watkins *v.* Robb (*o*), the proof in support of a plea of tender of 4*l.* 19*s.* 6*d.* was that the debtor tendered a five-pound note, and demanded sixpence change; but Buller, J., was of opinion that the creditor was not bound to give change, and held the tender bad.

So, a tender of a five-pound note in payment of 3*l.* 10*s.*, with a demand for the change, was held no tender by Le Blanc, J., in Betterbee *v.* Davis (*p*), the learned judge saying that, if that was good, a tender of a 50,000*l.* note, with demand for change, would be equally good.

But in Tadman *v.* Lubbock, decided in M. Term, 1824 (and reported in the note to Blow *v.* Russell) (*q*), where a tender of 1*l.* 13*s.* was pleaded, the proof was that the party offered two sovereigns and asked for change, and that the other refused the tender *on the ground* that more than 1*l.* 13*s.* was due. The Court of King's Bench held this a good tender.

§ 719. It is now settled that there can be no valid tender of part of an *entire* debt, though a debtor may make a valid tender of one of several distinct debts if he specify the debt on account of which he makes the tender; and if he makes a tender without specifying which of several debts is the subject of the tender, and the amount tendered be insufficient to cover all, it will not be good for *any*.

In Dixon *v.* Clark (*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: —

"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 tender-

(*l*) Wade's case, 3d resolution, 5 Rep. 115 a.

(*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, 121.

(*o*) 2 Esp. 711.

(*p*) 3 Camp. 70. See Robinson *v.* Cook, 6 Taunt. 336.

(*q*) 1 C. & P. 366.

(*r*) 5 C. B. 365.

ing the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain his plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action in the sense that he will recover judgment for his cost of defence against the plaintiff, in which respect the plea of tender is essentially different from that of payment of money into court. And as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

"With respect to the 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.* 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*.

"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

(*s*) 7 M. & W. 147.
(*t*) 3 Q. B. 915.
(*u*) 11 M. & W. 356.
(*x*) 9 M. & W. 338.

v. Peploe (*y*) and Poole *v.* Tumbridge (*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*, 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."

§ 720. 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*l.* 7*s.* for several matters, including 10*s.* for a particular contract, a tender of 19*s.* 6*d.*, without specifying the appropriation to be made of it, did not sustain a plea of tender of 10*s.* on the particular contract.

In Searles *v.* Sadgrave (*b*), the defendant pleaded as to 55*l.* 6*s.* parcel, etc., tender. Plaintiff replied that a larger sum was due at the time of the tender than the amount tendered, as *one entire sum* and on *one entire contract*, which larger sum the plaintiff demanded at the time of the tender, and the defendant refused. Rejoinder, that, though a larger sum was due at the time of making the tender, yet before making the tender the plaintiff was indebted to the defendant in an amount equal to the whole of the larger sum, except the said sum of 55*l.* 6*s.* parcel, etc., for money payable, etc., which amount, etc., the defendant was and still is *ready to set off*, etc. 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.

§ 721. 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 conditional or not, but if there be ambiguity the question is properly left to the jury; as where

(*y*) 8 East, 168.
(*z*) 2 M. & W. 223.
(*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. 135.

a debtor said he had called to tender 8*l.* in *settlement* of an account, and Lord Denman, C. J., left it to the jury whether that meant simply in *payment*, or involved a condition, and this was held right by the King's Bench (*c*).

§ 722. The condition which the debtor is the most apt to impose is one to which the law does not permit him to subject the creditor. The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due (*d*).

In Sutton *v.* Hawkins (*e*), the money was tendered as "all that was due," and this was held bad.

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 due. The rent claimed by the plaintiff was 23*l.*, and the tender was of 21*l.*

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.

In Hough *v.* May (*h*), the tender was in a check, in these words: "Pay Messrs. Hough & Co. balance account railing, or bearer, 8*l.* 11*s.*" This was held no tender, because, as Coleridge, J., put it, "Suppose this check had been presented, and it had been afterwards a question for a jury whether the plaintiff had been paid in full, they would see that, before the action was brought, the plaintiff had accepted and made use of a check professedly given for the then balance," and this condition vitiated the tender.

§ 723. But in Henwood *v.* Oliver (*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

(*c*) Eckstein *v.* Reynolds, 7 A. & E. 80; Marsden *v.* Goode, 2 C. & K. 133.

(*d*) Bowen *v.* Owen, 11 Q. B. 130.

(*e*) 8 C. & P. 259.

(*f*) Ibid. 573; but see Jones *v.* Bridgman, 39 L. T. N. S. 500.

(*g*) 6 C. & P. 237.

(*h*) 4 A. & E. 954.

(*i*) 1 Q. B. 409. See, also, Evans *v.* Judkins, 4 Camp. 156; Strong *v.* Harvey, 3 Bing. 304; Foord *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.

of part, accompanied by expressions that are *implied* in every tender? *Expressio eorum quæ tacite insunt nihil operatur.* If the defendant when he paid the money had called it *part* of the amount of the plaintiff's bill, he would thereby have admitted that more was due, and the effect of the tender would have been defeated."

Henwood *v.* Oliver was followed by Wightman, J., in Bull *v.* Parker (*k*), in a case where the witness who proved the tender said: "I offered him 4*l.*, and I said I went by the direction of Mr. C. Parker to pay him 4*l.* in full discharge of his account. I did not say, 'I will pay the money if you will accept it in full discharge.'" The learned judge held, that there was no such condition annexed to the offer as amounted to saying, "Unless you accept this money in full discharge, I will not pay it at all."

§ 724. 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*l.* 5*s.* 7½*d.*, to settle one year's rent of *Nant-y-pair.*" The messenger told the landlord that he had the money with him to pay, but the latter refused, saying more was due. The messenger went away and returned, saying he had a few pounds more in his pocket to pay, in addition to the 26*l.* 5*s.* 7½*d.*, certain arrears of duties, but the landlord again refused, saying there was more due. It was objected that these offers, coupled with the plaintiff's letter, were no more than a conditional tender, and Rolfe, B., so ruled, but the King's Bench held that the letter did not contain a condition, Erle, J., stating the general rule, as follows: "The person making a tender has a right to exclude presumptions against himself by saying, 'I pay this as the whole that is due you;' but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender."

[The last 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*, § 722, was stated to be inconsistent with Bowen *v.* Owen, which was followed.]

§ 725. A tender accompanied by a protest that the amount is not due is a good tender. Lord Ellenborough was of a contrary opinion in Simmons *v.* Wilmot (*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*).

(*k*) 12 L. J. Q. B. 93.
(*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.

Nor is a tender vitiated because the debtor says he considers it all that is due (*r*).

A payment or tender by one of several joint debtors, or to one of several joint creditors, is valid (*s*).

§ 726. Whether or not the debtor was entitled at common law to demand a receipt for money tendered seems to be considered an open question.

In Cole *v.* Blake (*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.* Meader (*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."

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."

§ 727. But now, by statute (*y*), a stamp of one penny is required on all receipts upon payment of money amounting to 2*l*., and the debtor is empowered to tender a blank receipt, with the proper stamp, at the time of payment, which the creditor is bound to fill up, and to pay the amount of the stamp, under the penalty of 10*l*. (*z*).

[The statutes 16 & 17 Vict. c. 59, ss. 3 and 4, and 43 Geo. III. c. 126, are repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 29), and receipt stamps are now regulated by the Stamp Act,

(*r*) Robinson *v.* Ferreday, 8 C. & P. 752.

(*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*) 1 Peake, 238.

(*u*) Bunbury, 348.

(*v*) 1 C. & P. 257.

(*x*) 8 M. & W. 298.

(*y*) 16 & 17 Vict. c. 59, ss. 3, 4.

(*z*) 43 Geo. III. c. 126, ss. 5 and 6. By the Revenue Act, 1882, 45 & 46 Vict. c. 72, s. 13, stamp duties not exceeding two shillings and sixpence may be denoted by postage stamps.

1870 (33 & 34 Vict. c. 97), ss. 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 subject to a penalty. This, in practice, throws the obligation upon the creditor.

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*).]

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.

§ 728. 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.* Walker (*e*), that a tender is a *bar to the action* quoad its amount, and not merely a bar to damages.

§ 729. The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the vendor's right to the price 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*). The intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods (*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, drawn on a person who has no effects of the drawer in his hands, and who therefore refuses to accept it, in such

(*a*) L. R. 8 C. P. 685.

(*b*) 8 Dowl. 442.

(*c*) 2 E. & E. 883; 29 L. J. Q. B. 169. Where the defence is a tender before action, the sum of money alleged to have been tendered must be brought into court: R. S. C., Order XXII. r. 3. This rule only confirms what was the practice of the common-law courts before the Judicature Acts. Bullen & Leake, Prec. of Pleading, 694, 3d edition; Dixon *v.* Clark, 5 C. B. 365, *ante*, § 719. Without such payment into court, the plaintiff may sign judgment for the amount to which the tender is pleaded. Chapman *v.* Hicks, 2 Cr. & Mee. 633.

(*d*) 23 L. J. Q. B. 305.

(*e*) 7 M. & W. 214.

(*f*) Goldshede *v.* Cottrell, 2 M. & W. 20.

(*g*) Stedman *v.* Gooch, 1 Esp. 3; Maillard *v.* Duke of Argyle, 6 M. & G. 40.

(*h*) Kemp *v.* Watt, 15 M. & W. 672.

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.

§ 730. The authorities in support of the rule that in the absence of stipulation to the contrary the negotiable security is only considered to be a conditional payment, defeasible on the dishonor of the security, need not be reviewed, as there is no conflict on the point (*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.* non-payment at maturity (*k*).

§ 731. But if the buyer offer to pay in cash, and the vendor takes a negotiable security in preference, the security is deemed to be taken as an absolute, not a conditional payment (*l*). And in Cowasjee *v.* Thompson (*m*), where the vendor elected to take a bill at six months in preference to cash, less discount, it was held in the Privy Council that this was a "payment in substance," making it the vendor's duty to give up the ship's receipt for the goods, and thus depriving him of the right of stoppage *in transitu*.

But a man who prefers a check on a banker to payment in money is not considered as electing to take a security instead of cash, for a check is accepted as a particular form of *cash payment*, and, if dishonored, the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken (*n*).

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*).

(*i*) 6 M. & G. 40.

(*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.* Oakeley, 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 *v.* 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.

(*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 A. & E. 954; Caine *v.* Coulton, 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. 21, ed. 1885.

[The presentment of checks is dealt with by s. 74 of the new statute 45 & 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*).]

§ 732. Whenever it can be shown to be the intention of the parties that a bill or note should operate as immediate payment, then the buyer will no longer be indebted for the *price of the goods*, although he may be responsible 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 indorsed his name (*r*).

§ 733. 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. 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, etc., and that the defendant had not paid. Special demurrer, assigning for causes, that the replication did not show that the plaintiff held the note, and that it was consistent with the replication that the note might have been indorsed away, and payable to some other person. Joinder in demurrer. Held, after consideration, Parke, B., giving the judgment of the court, that it lay on the defendant to make the first averment that the note had been indorsed away, it being *his own note*, which he was bound to pay, and not on the plaintiff to aver the negative in his replication, overruling Mercer *v.* Cheese (*t*); but *secus*, if it had been the note of a third person.

§ 734. It will be perceived that it was taken for granted in the above case that the vendor could not recover the price if he had parted with the negotiable security, and the reason is obvious, for the buyer would thus be compelled to pay twice, once to the vendor, and again to the holder of the bill; and the vendor would thus receive payment twice, once when he passed away the bill, and again when he obtained the price. And on this principle it was held, in Bunney *v.* Poyntz (*u*),

(*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 Kewley, 2 B. & P. 518; Camidge *v.* Allenby, 6 B. & C. 381; Lewis *v.* Lyster, 2 C. M. & R. 704.

(*s*) 16 M. & W. 232.

(*t*) 4 M. & G. 804.

(*u*) 4 B. & Ad. 568.

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 indorsement. The vendor had not indorsed them. Held, that the vendor had received payment, and could not recover from the buyer, though the notes were not paid and the agent had become bankrupt. Plainly, if the vendor had been allowed to recover, the buyer would still have remained liable to pay a second time to the banker who held his notes.

But where the vendor had indorsed the note received on paying it away, it was held, in Miles *v.* Gorton (*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 indorsed and passed away, yet till he had actually paid it he ought not to have been allowed to sue for the price of the goods sold, on the general principle that it is a good defence to an action for any debt that a negotiable bill given for it is outstanding in other hands (*z*).

§ 735. If the bill or note given in payment by the buyer be not his own, but that of some third person, on which he has not put his name, and is therefore only secondarily liable, then it lies upon the vendor to allege and prove the dishonor of it in an action against the buyer for the price (*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.

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

(*x*) 2 Cr. & Mee. 504.
(*y*) Page 541, ed. 1877.
(*z*) Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24.
(*a*) Price *v.* Price, 16 M. & W. 232.
(*b*) 6 B. & C. 373.

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*).

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 the buyer could not be in a worse position than if he had indorsed the bill, and was therefore entitled to notice as an indorser, in default whereof he was discharged.

§ 736. 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*).

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*).

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.

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

(*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.

(*f*) Robson *v.* Oliver, 10 Q. B. 704; 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.* Hawdon, 2 A. & E. 628.

(*m*) 4 Bing. 273.

the vendor's order had been lost without indorsement 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 a bill of exchange given him for the price, he may bring an action upon the lost bill and recover from the drawer the amount for which it was drawn, on providing an indemnity against any claims that may be made in respect to 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*).]

§ 737. If a bill or note be indorsed, and given by the buyer to the vendor, merely as a collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment; and if he neglect to present, or to give notice of dishonor to the buyer, the buyer will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount (*q*).

§ 738. In one case where goods were sold for cash, the buyer refused to pay cash, and gave the vendor his own dishonored acceptance, past due, and the payment was held good, in the absence of fraud. But the decision 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*).

§ 739. When the agreement is that the price of the goods sold shall be paid in a negotiable security held by the buyer, to which he is no party, and for the payment of which he is not to be answerable, this may be considered as a species of barter, as was said by Lord Ellenborough in Read *v.* Hutchinson (*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 Lichfield *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,

(*n*) 1 Ex. 167; and see Hansard *v.* Robinson, 7 B. & C. 90.

(*o*) Wain *v.* Bailey, 10 A. & 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.

(*p*) 45 & 46 Vict. c. 61, ss. 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.

(*s*) 3 Camp. 352.

(*t*) 6 B. & C. 373.

(*u*) 1 H. & N. 884; 39 L. J. Ex. 140. And see Fydell *v.* Clark, 1 Esp. 447.

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 (*x*). And if the securities, though genuine, were known to the buyer to be worthless when he passed them, his conduct would be deemed fraudulent (*y*), and the seller would be entitled to rescind the sale, and bring trover for the goods, as shown in the chapter on Fraudulent Sales (*z*).

§ 740. In Hodgson *v.* Davies (*a*), 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.

2d. That a sale for bills does not mean *approved bills*, and parol evidence to that effect is not admissible when the written contract mentions "bills" only.

3d. That an *approved bill* means a bill to which no reasonable objection could be made, and which ought to be approved.

§ 741. Payment properly made to a duly authorized agent of the vendor is, of course, the same as if made to the vendor himself. Without entering into the general doctrines of the law of agency, it may be convenient to point out that in contracts of sale certain agents have been held entitled to receive payment from their known general authority. Thus, a factor is an agent of a general character, entitled to receive payment and give discharge of the price (*b*); but a broker is not, for he is not intrusted with the possession of the goods (*c*). In Kaye *v.* Brett (*d*), Parke, B., delivering the judgment of the court, said: "If a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, the payment is not good." In Barrett *v.* Deere (*e*), Lord Tenterden held that payment to a person sitting in a counting-room, and appearing to be intrusted with the conduct of the business, is a good payment; and

(*x*) *Ante*, Book III. Ch. 1.

(*y*) 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.

(*z*) *Ante*, § 433 *et seq.*

(*a*) 2 Camp. 530.

(*b*) Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

(*c*) Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassel, 1 Stark. 233. Stock-brokers, however, appear to be excepted from this rule, and duly authorized to receive payment. Ex parte Cook, 4 Ch. D. 123. Their practice of dealing as principals is probably the reason for this. There is a distinct rule of the stock exchange that brokers are to be treated as principals, and that no member can be obliged to take a reference for payment to a non-member, or to pay a non-member for securities bought in the stock exchange. Melsheimer and Lawrence's Law of the Stock Exchange, 69. It is submitted that this rule would be binding on principals dealing under the Rules of the London Stock Exchange.

(*d*) 5 Ex. 269; Jackson *v.* Jacob, 5 Scott, 79.

(*e*) Moo. & Malk. 200.

the same learned judge held a tender under similar circumstances to be valid (*f*).

[The authority of an agent is, as a rule, determined by the bankruptcy of the principal; hence, after the bankruptcy of his principal, an agent has no authority to receive money due to the principal, or to pay away his money (*g*).

In Finch *v.* Boning (*h*), 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.]

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 (*i*); and it is plain that if the auctioneer acts as a mere crier or broker, for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price.

A wife has no general authority to receive payment for a husband, and a payment to her of money even earned by herself will not bind the husband, without proof of authority express or implied (*k*). [But the plea of payment to the wife of money earned by herself, 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 (*l*).]

§ 742. The general rule of law is, that an agent who makes a sale may maintain an action against the buyer in respect of his privity, and the principal may also maintain an action in respect of his interest (*m*); but where the agent has himself an interest in the sale, as for example a factor or auctioneer, for his lien, a plea of payment to the principal is no defence to an action for the price by the agent, unless it show that the lien of the agent has been satisfied (*n*).

(*f*) Wilmott *v.* Smith, M. & M. 238.

(*g*) Minett *v.* Forrester, 4 Taunt. 541; Drinkwater *v.* Goodwin, Cowp. 251; and Evans on Principal and Agent, p. 102, as to commencement and duration of agent's authority.

(*h*) 4 C. P. D. 143; and see Bingham *v.* Allport, 1 Nev. & M. 398.

(*i*) 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.

(*k*) Offley *v.* Clay, 2 M. & G. 172.

(*l*) 33 & 34 Vict. c. 93, s. 1 (Married Women's Property Act, 1870), and 45 & 46 Vict. c. 75, s. 2 (Married Women's Property Act, 1882).

(*m*) Per Lord Abinger, in Sykes *v.* Giles, 3 M. & W. 645.

(*n*) Williams *v.* Millington, 1 H. Bl. 81; Drinkwater *v.* Goodwin, Cowp. 251; Robin-

In Catterall *v.* Hindle (*o*), 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 somewhat complicated facts 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 (*p*); 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 (*q*), who is no party to the agreement, though it may have been agreed to by the agent: see the judgments of Abbott, C. J., in Russell *v.* Bangley (*r*), and in Todd *v.* Reid (*s*), the authority of which, upon this point, is not affected by the correction as to a fact by Parke, B., in Stewart *v.* Aberdein (*t*). It has also been held by this court, in the case of Underwood *v.* Nicholls (*u*), 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. . . .

§ 743. "It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent selling upon a *del credere* commission (*x*) receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obliga-

son *v.* Rutter, 4 E. & B. 954; 24 L. J. Q. B. 250, in which Coppin *v.* Walker, 7 Taunt. 237, and Coppin *v.* Craig, Ib. 243, are reviewed. See, also, Grice *v.* Kenrick, L. R. 5 Q. B. 340.

(*o*) 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.

(*p*) Sweeting *v.* Pearce, 7 C. B. N. S. 449; affirmed, 9 C. B. N. S. 534; Scott *v.* Irving, 1 B. & Ad. 605, 614. If, however, payment is made by check, and the check is duly honored, that is payment in cash. Bridges *v.* Garrett, L. R. 5 C. P. 451; Pearson *v.* Scott, 9 Ch. D. 198.

(*q*) See Evans on Principal and Agent, p. 135.

(*r*) 4 B. & A. 398.

(*s*) 4 B. & A. 210.

(*t*) 4 M. & W. 224.

(*u*) 17 C. B. 239; 25 L. J. C. P. 79.

(*x*) A *del credere* commission was defined by Lord Ellenborough in Morris *v.* Cleasby, 4 M. & S. 566, as "the premium or price given by the principal to the factor for a guaranty." Disapproval was expressed by his Lordship of the *dicta* in Grove *v.* Dubois, 1 T. R. 112, and in Houghton *v.* Matthews, 3 Bos. & P. 489. See, also, Story on Agency, § 33, p. 36, ed. 1882; Hornby *v.* Lacy, 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.

tions of an ordinary agent as to receiving payments on account of his principal" (*y*).

§ 744. In Williams *v.* Evans (*z*), the terms of an auction were that the 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 were to be taken away by the evening of the 3d. A purchaser of some of the goods at the 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*l.* 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*l.* 7*s.*, the auctioneer having no authority to accept the bill as cash, but *semble*, it might have been a good payment if made by check (*a*), if the jury had found it to be so; in accordance with the *dictum* of Holt, C. J., in Thorold *v.* Smith (*b*).

§ 745. In Ramazotti *v.* Bowring (*c*), 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.

(*y*) 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.

(*z*) L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

(*a*) See Bridges *v.* Garrett, L. R. 5 C. P. 451, and note (*p*), p. 762, *supra*.

(*b*) 11 Mod. 87. And see, on this point, Bridges *v.* Garrett, L. R. 4 C. P. 580; reversed in Ex. Ch. L. R. 5 C. P. 451.

(*c*) 7 C. B. N. S. 851; 29 L. J. C. P. 30.

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 Nixon was the owner, the verdict should be for the defendants, but that if the plaintiff was the owner he was entitled to recover. The court held this a misdirection, Erle, C. J., saying: "The proper question to have asked the jury would have been, whether they were of opinion that the plaintiff had enabled Nixon to hold himself out as being the owner of these goods, and whether Nixon did in fact so hold himself out to the defendants as such owner. Then, if the jury should find that such was the case, I am of opinion that an undisclosed principal, adopting the contract which the agent has so made, must adopt it *in omnibus*, and take it, therefore, subject to any right of set-off which may exist." The learned judges all intimated, however, that there had been no contract of sale at all, that the goods had been misappropriated by the agent, and that the plaintiff might have recovered in trover for the tort, but that in an action on the contract he was bound to adopt the whole contract (*d*).

§ 745 a. In Pratt *v.* Willey (*e*), 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, etc." The coals really belonged to the plaintiff, who had employed Surtees as his agent to sell them; and when the coals were sent, *the name of the plaintiff was on the tickets as the seller.* On these facts, Best, C. J., told the jury that the defendant ought to have made inquiries into the nature of the situation of Surtees, and should not have dealt with him as principal. The question was left to the jury, who found for the plaintiff.

§ 746. Where the purchaser owes more than one debt to the vendor, and makes a payment, it is his right to apply, or in technical language appropriate, the payment to whichever debt he pleases. 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 actually receive it, for the law regards what he *does*, not what he *says* (*f*). And if money

(*d*) 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.

(*e*) 2 C. & P. 350.

(*f*) Peters *v.* Anderson, 5 Taunt. 596; Simson *v.* Ingham, 2 B. & C. 65; Mills *v.* Fowkes, 5 Bing. N. C. 455; Croft *v.* Lum-

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 (*g*).

§ 747. The debtor's election of the debt to which he applies a payment may be shown otherwise than by express words. A payment of the exact amount of one of several debts was said by Lord Ellenborough (*h*) 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.

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 (*i*).

§ 748. Where an account current is kept between parties, as a banking account, the leading case is Clayton's case (*k*), in which Sir William Grant, the Master of the Rolls, said: "There is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out: it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." This case was followed and approved in Bodenham *v.* Purchas (*l*); but although the rule was recognized as sound in Simson *v.* Ingham (*m*), and Henniker *v.* Wigg (*n*), 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

ley, 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.

(*g*) Waller *v.* Lacy, 1 M. & G. 54.

(*h*) Marryatts *v.* White, 2 Stark. 101. See, also, Shaw *v.* Picton, 4 B. & C. 715; Newmarch *v.* Clay, 14 East, 239; Plomer *v.* Long, 1 Stark. 153; Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71.

(*i*) Goddard *v.* Cox, 2 Str. 1194.

(*k*) 1 Merivale, 572, 608. See, also, Brown *v.* Adams, 4 Ch. 764; Thompson *v.* Hudson, 6 Ch. 320.

(*l*) 2 B. & A. 39. See, also, Hooper *v.* Keay, 1 Q. B. D. 178.

(*m*) 2 B. & C. 65.

(*n*) 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.

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 against his own fund, and not against the trust fund, and this inference is sufficient to exclude the application of the rule (*o*).]

In Field *v.* Carr (*p*), the court said that the rule in Clayton's case had been adopted in all the courts of Westminster Hall.

The cases already cited on this point also established 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. 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 (*q*), and even a debt of which the consideration was illegal (*q*), as a debt contracted in violation of the Tippling Acts (*r*). 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 an usurious contract, the law will apply the payment to the legal contract (*s*).

§ 749. It has been held, however, that this doctrine will not apply in cases where there never was but *one* debt between the parties, as in the case of a building contract with a corporation not competent to contract save under seal, where it was held that the builder, who had supplied extra work on verbal orders, could not apply any of the general payments to the discharge of his claim for the extra work, that not being a debt at all against the corporation, either equitable or legal (*t*).

It was held by the King's Bench, in Simson *v.* Ingham (*u*), 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 communciated to the debtor.

[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 (*x*).]

§ 750. In a case where the buyer had bought from a broker two parcels of goods belonging to different principals, and had made a

(*o*) In re Hallett's Estate, 13 Ch. D. 696, C. A.

(*p*) 5 Bing. 13.

(*q*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Ashby *v.* James, 11 M. & W. 542.

(*r*) Dawson *v.* Remnant, 6 Esp. 24, approved in Laycock *v.* Pickles, 4 B. & S. 507; 33 L. J. Q. B. 43; Philpott *v.* Jones, 2 A. & E. 41; Crookshank *v.* Rose, 5 C. & P. 19; S. C. 1 Mood. & R. 100.

(*s*) Wright *v.* Laing, 3 B. & C. 165.

(*t*) Lamprell *v.* Billericay Union, 3 Ex. 283.

(*u*) 2 B. & C. 65.

(*x*) Hooper *v.* Keay, 1 Q. B. D. 178.

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 (*y*).

§ 751. [In the Supreme Court of the United States and in the State of New York the rule is the same as in England, and the taking of the debtor's promissory note or bill of exchange, in the absence of a special agreement to the contrary, 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 (*z*). In California, Pennsylvania, West Virginia, Illinois, Wisconsin, and Arkansas, a promissory note or bill of exchange will not be regarded as absolute payment unless it be so expressly agreed (*a*). 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 (*b*).]

On the other hand, the common-law rule is reversed in some of the States, and in Massachusetts, Vermont, Maine [Louisiana, Indiana, and Oregon (*c*)], it is held that, where a promissory note or bill of exchange is given for the price of goods, it is *prima facie* an absolute payment, though the presumption may be rebutted.

§ 753. By the French Civil Code, Art. 1271, it is declared that "novation" takes place "when a debtor contracts towards his creditor a new debt which is substituted for the old one that is extinguished." Novation is included in Ch. 5 as being one of the modes by which debts

(*y*) Favenc *v.* Bennett, 11 East, 36.

(*z*) Story on Sales, § 219, ed. 1871, where the cases are cited. The cases in the Supreme Court of the United States are Sheehy *v.* Mandeville, 6 Cranch, 253 (1810), per Marshall, C. J., at p. 264; Peter *v.* Beverley, 10 Peters, 532 (1836), per Thompson, J., at p. 568; The Kimball, 3 Wallace, 37 (1865), per Field, J., at p. 45. The cases in New York are very numerous, and not all reconcilable. The latest are Parrott *v.* Colby, 6 Hun, 55, 58; aff. 71 N. Y. 597 (1875); Jagger Iron Co. *v.* Walker, 76 N. Y. 521 (1879), 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; National Bank of Newburgh *v.* Bigler, 83 N. Y. 51, 59 (1880).

(*a*) Brown *v.* Olmsted, 50 Cal. 162; Hays *v.* M'Clurg, 4 Watts (Pennsylvania), 452; Poole *v.* Rice, 9 West Virginia, 73; Walsh *v.* Lennon, 98 Ill. 27, 31; Matteson *v.* Ellsworth, 33 Wis. 488; Brugman *v.* McGuire, 32 Ark. 733, 740, overruling Camp *v.* Gullett, 2 Eng. 524.

(*b*) Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Hays *v.* M'Clurg, 4 Watts, 452. See judgment of Huston, J.

(*c*) Re Clap, 2 Lowell, at p. 230; Hutchins *v.* Olcutt, 4 Vt. 549; Ward *v.* Bourne, 56 Maine, 161; Hunt *v.* Boyd, 2 Miller (La.) 109; Smith *v.* Bettger, 68 Ind. 254; Matasce *v.* Hughes, 7 Oreg. 39.

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 (*d*).

The French Code gives the debtor the right to "impute" a payment to the debt that he chooses, Art. 1253; but he cannot apply money towards payment of the capital of a debt while arrearages of interest are due, and if a general payment is made on a debt bearing interest, the excess only, after satisfying interest already due, will be appropriated to payment of the capital. Art. 1254. And where no appropriation is made at the time of payment, the law applies the money to that debt, amongst such as are past due, which the debtor is most interested in discharging; but to a debt past due in preference to one not yet due, even if the debtor has a greater interest in discharging the latter than the former: if the debts are of the same nature, the appropriation is made to the oldest; if all are of the same nature and the same date, the appropriation is made proportionably. The creditor is never allowed to elect without the debtor's assent. Art. 1255.

§ 754. 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 deposit, 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."

§ 755. The ancient civil law rules bore a strong resemblance to those of the common law in regard to payment and tender. Whenever the sum due was fixed, and the date of the payment specified

(*d*) See the cases and authors cited and compared in Sirey, Code Civ. Annoté, Art. 1271.

either by the law or by force of the contract, it was the debtor's duty to pay without demand (*e*), according to the maxim that in such cases *dies interpellat pro homine;* and the default of payment was said to arise *ex re* (*f*). 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 to decide in case of dispute, and the default in payment on such demand was said to arise *ex persona* (*g*).

On the refusal of the creditor to receive (*creditoris mora*), when the debtor made a tender (*oblatio*), the discharge of the debtor took place by his payment of the debt (*obsignatio*) into certain public offices, or to certain ministers of public worship: "Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est," the *obsignatio* being made in *sacratissimas ædes*, or, if the debtor preferred, he might apply to the prætor to name the place of deposit (*h*).

§ 756. And payment by *whomsoever made* liberated the debtor. "Nec tamen interest quis solvat utrum ipse qui debet, an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorante debitore vel invito solutio fiat" (*i*). On this point the law of England is not yet settled, as stated by Willes, J., in Cook *v.* Lister (*k*), 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 (*l*).

In Walter *v.* James (*m*), 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.

§ 757. Mr. Smith, in his book on Mercantile Law (*n*), also calls attention to the very singular sham or imaginary payment used in Rome — as a substitute for a common-law release — known as *acceptilatio*. "Est acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debeter, si id velit Titius remittere, poterit sic

(*e*) 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.

(*f*) Dig. 40. 5. de Fidei-com. libert. 26, § 1. Ulp.: 22. 32. Marcian.

(*g*) Dig. 40. 5. de Fidei-com. libert. 26, § 1, Ulp.: 22. 32. Marcian.

(*h*) Cod. 4. 32. de Usuris, 19, Const. Philipp: 8. 43. de Solution. 9, Const. Diocl. et Max.

(*i*) Inst. lib. 3, tit. 29, 1.

(*k*) 13 C. B. N. S. 543; 32 L. J. C. P. 121.

(*l*) 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.

(*m*) L. R. 6 Ex. 124, at p. 128.

(*n*) Page 535, note (*e*), ed. 1877.

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" (*o*). 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 got rid of them by the *acceptilatio*, a device termed, in honor of its inventors, the Aquiliana stipulatio. This statement is quite accurate, the Aquilian stipulation being recognized in the Institutes of Justinian (*p*). This "acute person" was a very eminent lawyer, the colleague in the prætorship, and friend of Cicero (collega et familiaris meus) (*q*), and of great authority among the jurisconsults of his day, "Ex quibus, Gallum maxime auctoritatis apud populum fuisse" (*r*); 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 (*s*).

AMERICAN NOTE.

PAYMENT.

§§ 706–757.

The first duty of a buyer is to make payment; and unless time is expressly or impliedly given, he is not entitled to possession without payment. Behrends *v.* Beyschlag, 50 Neb. 304. But if by contract, usage, or former dealing between the particular parties, he is allowed credit, he has the right of immediate possession, unless the same be expressly reserved by the seller, which indeed *may* be, although credit be given. If credit was allowed, it is the debtor's duty, at the expiration thereof, and without waiting for a demand, to search out his creditor and positively offer payment. Payment involves the act of both parties. It is no payment for a debtor to voluntarily deposit the amount of the debt in a bank, in the creditor's name, without his authority. The latter is not bound to send for it, or draw it out; and unless he assents to it, or ratifies the transaction, the money is at the risk of the debtor. Freeholders *v.* Thomas, 20 N. J. Eq. 39; St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95. A creditor is not bound to accept money even if it be sent him by the debtor. The debtor could not plead such an act as "payment" unless it be accepted, though he

(*o*) Inst. 3, 30, 1.
(*p*) Lib. 3. 29. 2.
(*q*) De Officiis, lib. 3, § 14.
(*r*) Dig. 1, 2. de Orig. Jur. 2, § 42, Pomp.
(*s*) See, for another example, Dig. 28. 2. 29, pr. f. Scævola. Book V. Ch. 1.

might rely on it as a tender. Sweet *v.* Titus, 67 Barb. 327; Kingston Bank *v.* Gay, 19 Barb. 459; Edgerton *v.* Hodge, 41 Vt. 676.

1. **Payment in Cash.** At the present time the only legalized means of payment are United States gold coins and silver dollars for any amount; smaller silver coins up to ten dollars; minor coins up to twenty-five cents; United States treasury notes for any amount; but not foreign coin, nor "trade dollars," nor "silver certificates," except for customs, taxes, and all public dues; nor national bank notes, save for particular purposes. But according to the doctrine advanced in the late case of Juilliard *v.* Greenman, 110 U. S. 421, it is in the power of Congress at any time, in peace or in war, to make any substance, even leather or rags, a legal payment, even for debts contracted when gold was the only circulating medium in the known world. Whereas, had the parties taken the precaution to insert in their contract the words "payable in gold," nothing but gold could be made by law a valid payment of the debt. If no payment is made in such cases, a special judgment is rendered in a suit on such contract "to be paid in gold coin." Bronson *v.* Rodes, 7 Wall. 229; Ib. 258; Trebilcock *v.* Wilson, 12 Wall. 687; Independent Ins. Co. *v.* Thomas, 104 Mass. 192; Warren *v.* Franklin Ins. Co. Ib. 518; Stark *v.* Coffin, 105 Mass. 334; Currier *v.* Davis, 111 Mass. 480. But whatever be the legal tender of the country at the time, whether gold and silver only, as formerly, or paper also as now, a creditor will always be sustained in his strict right to demand payment in the legal currency, notwithstanding it be an unexpected exercise of his right, and not in conformity with the custom between parties in such relations. The law recognizes no usage binding upon any person contrary thereto. See Lord *v.* Burbank, 18 Me. 178, where an attorney who had collected a claim in current bank-bills was obliged to pay the creditor in specie. A genuine coin, though worn smooth by use, is legal tender. Railroad Co. *v.* Morgan, 52 N. J. L. 60; U. S. *v.* Lissner, 12 Fed. R. 840; but a bank-bill from which a piece more than an inch square has been torn is not. North Hudson Ry. Co. *v.* Anderson, 61 N. J. L. (1898).

2. **Payment in Counterfeit or Worthless Bills.** A payment and receipt of counterfeit or forged bank-bills, or personal notes, is no valid payment. There is a mistake of fact as to the species or kind of the thing given in payment. It is not money at all; and there being an implied warranty by the payer that such bills are genuine, he is liable to have them returned, and is bound to pay again, even though the payment was honestly made in the first instance. Markle *v.* Hatfield, 2 Johns. 455 (1807), the leading case in America; Young *v.* Adams, 6 Mass. 182; Eagle Bank *v.* Smith, 5 Conn. 71; Hargrave *v.* Dusenberry, 2 Hawks, 326; Goodrich *v.* Tracy, 43 Vt. 314; Semmes *v.* Wilson, 5 Cranch C. C. 285; Emerine *v.* O'Brien, 36 Ohio St. 496; Baker *v.* Bonesteel, 2 Hilt. 397; Ritter *v.* Singmaster, 73 Pa. St. 400; Ramsdale *v.* Horton, 3 Ib. 330. An agent, therefore, who innocently takes counterfeit money in payment, must pay his principal in legal money. United States *v.* Morgan, 11 How. 154. And counterfeit or forged bills, being entirely worthless, if taken in payment, need not, it seems, be returned previous to commencing an action for the price of the goods. It would be in some tribunals quite sufficient to tender them back at the trial, even if that were necessary. Brewster *v.* Burnett, 125 Mass. 68; Kent *v.* Bornstein, 12 Allen, 342. Though some decisions

hold that the receiver of counterfeit bills must use due diligence to ascertain the character of the paper, and either return it or notify the other party; otherwise it is a valid payment. Atwood *v.* Cornwall, 28 Mich. 342; Wingate *v.* Neidlinger, 50 Ind. 526; Samuels *v.* King, Ib. 527; Pindall *v.* Northwestern Bank, 7 Leigh, 617, well considered; Bank *v.* Stevenson, 51 Ind. 594; Thomas *v.* Todd, 6 Hill, 340; Simms *v.* Clarke, 11 Ill. 137: Kenny *v.* First Nat. Bank, 50 Barb. 114; Crucier *v.* Pennock, 14 S. & R. 51, a case of spurious coin. The question of reasonable time being for the jury. Burrill *v.* Watertown Bank, 51 Barb. 105. But payment in *genuine* bank-bills, which, because of the failure of the bank, are comparatively worthless, or are circulating at a great discount, should upon principle be considered a valid payment at their received value. If honestly made, the receiver should be held to take his risk. There is no warranty of value in such cases. The mistake is one as to *quality* and *value* of the article given and received, and not as to the kind or species; and such mistakes do not generally avoid an otherwise legal transaction. This view is supported by Young *v.* Adams, 6 Mass. 185, Sewall, J.; Bayard *v.* Shunk, 1 Watts & Serg. 92 (1841), a valuable case; Lowrey *v.* Murrell, 2 Porter, 280; Scruggs *v.* Gass, 8 Yerg. 175; Ware *v.* Street, 2 Head, 609; Edmunds *v.* Digges, 1 Gratt. 359; Corbit *v.* Band of Smyrna, 2 Harr. (Del.) 235. But this is not uniformly assented to. Indeed, the numerical preponderance is the other way. Lightbody *v.* Ontario Bank, 11 Wend. 9; 13 Ib. 101; Wainright *v.* Webster, 11 Vt. 576; Benedict *v.* Field, 4 Duer, 162; Townsends *v.* Bank of Racine, 7 Wisc. 185; Fogg *v.* Sawyer, 9 N. H. 365; Frontier Bank *v.* Morse, 22 Me. 88; Harley *v.* Thornton, 2 Hill (S. C.), 509; Roberts *v.* Fisher, 43 N. Y. 159; Westfall *v.* Braley, 10 Ohio St. 188; Harris *v.* Hanover Nat. Bank, 15 Fed. Rep. 786; Magee *v.* Carmack, 13 Ill. 289; Honore *v.* Colmesnil, 1 J. J. Marsh. 523; Aldrich *v.* Jackson, 5 R. I. 218. And see 99 Mass. 308, Chapman, C. J.; 100 Ib. 424, Foster, J. Whether payment in "Confederate" money is valid or not, the authorities are not agreed. It was held good in Piegzar *v.* Twohig, 37 Tex. 225; Douglas *v.* Neil, 7 Heisk. 437. But this last was payment of a judgment to a clerk of the court for the party in interest. The same court held that a mere agent has not authority to receive payment in Confederate money, unless specially authorized. King *v.* Fleece, 7 Heisk. 273. In Turner *v.* Collier, 4 Heisk. 89; Atkin *v.* Mooney, 1 Phillips Law (N. C.), 32; Emerson *v.* Mallett, 1 Phillips Eq. 236; Boyd *v.* Sales, 39 Geo. 72, it was also held that payment to a sheriff, on execution, of Confederate money, when it was commonly current in the community, was so far valid as to exonerate him from liability to the party in interest.

3. **Payment by Check or Draft.** Some States hold the buyer's *negotiable* check to be *prima facie* payment, though conditionally so; and if the debtor has no funds in the drawee's hands to meet the check, or draws them out before a reasonable time elapses in which to present the check, the same fails to be a payment, and the creditor may resort to his original cause of action. Broughton *v.* Silloway, 114 Mass. 71. But if sufficient funds are on hand at the time, and the payee of the check neglect for an unreasonable time to present the check, and the drawee fails, the loss is on the creditor, and, the check having operated as payment, he cannot recover on his original claim. Taylor *v.* Wilson, 11 Met. 44; Barnard *v.* Graves, 16 Pick. 41; Hodgson *v.* Barrett, 33 Ohio St. 63; Cushman *v.* Libbey, 15

Gray, 358; Syracuse, etc. R. R. *v.* Collins, 3 Lans. 33, and cases cited; Getchell *v.* Chase, 124 Mass. 366; Warriner *v.* The People, 74 Ill. 346; Thayer *v.* Peck, 93 Ib. 357; McIntyre *v.* Kennedy, 29 Pa. St. 448; Weddigen *v.* Boston Elastic, etc. Co. 100 Mass. 422. Some courts apparently do not give a check quite the effect of even a *prima facie* payment, and they allow the creditor to recover on the original cause of action, unless *the debtor can show* that the check has been paid, or that a loss has been sustained by the debtor by a failure of the creditor to present the check in a reasonable time for payment: the duty of proving payment being on a debtor, they say he must clearly make it out. Bradford *v.* Fox, 38 N. Y. 289; Sweet *v.* Titus, 67 Barb. 327; Kermeyer *v.* Newby, 14 Kans. 164; Phillips *v.* Bullard, 58 Geo. 256. See Smith *v.* Miller, 43 N. Y. 171; De Yampert *v.* Brown, 28 Ark. 166; Thompson *v.* Bank, 82 N. Y. 1; Mordis *v.* Kennedy, 23 Kans. 408; Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. 39; Bank of Commerce *v.* Chicago, etc. R. R. 44 Minn. 224, 229. Of course the parties may agree that a check shall be an absolute payment, which is always a question for the jury. Blair *v.* Wilson, 28 Gratt. 165. Unreasonable delay in returning a check may make it equal to payment. Redpath *v.* Kolfage, 16 Up. Can. Q. B. 433; Smith *v.* Miller, 43 N. Y. 171; Mehlberg *v.* Tisher, 24 Wisc. 607.

4. **Payment by the Debtor's Note or Bill.** In some States a *negotiable* bill or note given by a debtor to his creditor for the amount of a preëxisting simple contract debt is *prima facie* deemed a payment or satisfaction of the debt. This presumption is founded upon the consideration that, when a negotiable note has been given, it is equally convenient for the creditor to sue upon the note as upon the original claim (and generally more so), and so there is no reason for considering the original simple contract as still subsisting and in force. But this is a presumption of fact merely, and not of law, and may easily be rebutted and controlled by evidence that such was not the intention of the parties. If, therefore, it appears that it would be more advantageous for the creditor to retain his original claim, as when that was secured by collateral or by the name of some third party, which security would not in terms apply to the subsequent note, this is sufficient to warrant the inference that the creditor did not intend to take an unsecured note in place of a prior secured claim. And it is always a question for the jury whether the circumstances rebut the *prima facie* presumption of payment. This is believed to be the law of Massachusetts, Maine, Vermont, Indiana, and Louisiana.

Massachusetts. Butts *v.* Dean, 2 Met. 76; House *v.* Alexander, 2 Ib. 157; Curtis *v.* Hubbard, 9 Ib. 328; Melledge *v.* Boston Iron Co. 5 Cush. 170; Connecticut Trust Co. *v.* Melendy, 119 Mass. 449; Dodge *v.* Emerson, 131 Ib. 467.

Maine. Descadillas *v.* Harris, 8 Greenl. 298; Fowler *v.* Ludwig, 34 Me. 455; Kidder *v.* Knox, 48 Ib. 551; Paine *v.* Dwinel, 53 Ib. 52; Ward *v.* Bourne, 56 Ib. 161; Mehan *v.* Thompson, 71 Ib. 492; Bunker *v.* Barron, 79 Ib. 62.

Vermont. Hutchins *v.* Olcutt, 4 Vt. 549; Wait *v.* Brewster, 31 Ib. 516; Arnold *v.* Sprague, 34 Ib. 402; Wemet *v.* Missisquoi Lime Co. 46 Ib. 458.

Indiana. Gaskin *v.* Wells, 15 Ind. 253; Jewett *v.* Pleak, 43 Ib. 368; Maxwell *v.* Day, 45 Ib. 509; Hill *v.* Sloan, 59 Ib. 181; Schneider *v.*

Kolthoff, Ib. 568; Smith *v.* Bettger, 68 Ib. 254; Teal *v.* Spangler, 72 Ib. 380; Krutsinger *v.* Brown, Ib. 466.

Louisiana. Hunt *v.* Boyd, 2 La. 109.

On the other hand, the law of most of the States is slightly different, inasmuch as it is generally held that no presumption of payment exists, even of fact, and that the note will not be deemed payment unless it be affirmatively proved by the evidence that such was the understanding of the parties; and without any such evidence the creditor could recover upon the original cause of action by simply returning the note at the trial, or before judgment on the account. In the following States the taking of a bill or note for a preëxisting debt is not payment, unless it be positively so agreed; and the original cause of action could still be the foundation of a suit, subject to a return of the note unpaid: —

Alabama. Myatts *v.* Bell, 41 Ala. 222; Marshall *v.* Marshall, 42 Ib. 149; Day *v.* Thompson, 65 Ib. 269.

Arkansas. Coster *v.* Davies, 8 Ark. 213; Brugman *v.* McGuire, 32 Ib. 733.

California. Brewster *v.* Bours, 8 Cal. 506; Griffith *v.* Grogan, 12 Ib. 321; Smith *v.* Owens, 21 Ib. 11; Welch *v.* Allington, 23 Ib. 322; Brown *v.* Olmsted, 50 Ib. 162.

Connecticut. Dougal *v.* Cowles, 5 Day, 511; Bill *v.* Porter, 9 Conn. 23; Clark *v.* Savage, 20 Ib. 258.

Florida. May *v.* Gamble, 14 Fla. 467.

Illinois. Archibald *v.* Argall, 53 Ill. 307; Morrison *v.* Smith, 81 Ib. 221; Wilhelm *v.* Schmidt, 84 Ib. 183; Walsh *v.* Lennon, 98 Ib. 27; Kappes *v.* White Hard Wood Lumber Co. 1 Bradw. 280.

Iowa. Logan *v.* Attix, 7 Iowa, 77; McLaren *v.* Hall, 26 Ib. 297; Edwards *v.* Trulock, 37 Ib. 244; Farwell *v.* Grier, 38 Ib. 83.

Maryland. Glenn *v.* Smith, 2 Gill & J. 493; Berry *v.* Griffin, 10 Md. 27; Morrison *v.* Welty, 18 Ib. 169; Haines *v.* Pearce, 41 Ib. 221.

Michigan. Breitung *v.* Lindauer, 37 Mich. 217; Case *v.* Seass, 44 Ib. 195; Brown *v.* Dunckel, 46 Ib. 29.

Mississippi. Guion *v.* Doherty, 43 Miss. 538; Lear *v.* Friedlander, 45 Ib. 559; Partee *v.* Bedford, 51 Ib. 84; Wadlington *v.* Covert, 51 Ib. 631.

Missouri. Appleton *v.* Kennon, 19 Mo. 637; McMurray *v.* Taylor, 30 Ib. 263; Howard *v.* Jones, 33 Ib. 583; Leabo *v.* Goode, 67 Ib. 126; Hughes *v.* Israel, 73 Ib. 538.

Nebraska. Young *v.* Hibbs, 5 Neb. 433.

New Hampshire. Jaffrey *v.* Cornish, 10 N. H. 505; Johnson *v.* Cleaves, 15 Ib. 332; Foster *v.* Hill, 36 Ib. 526.

New Jersey. Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. 39; Ayers *v.* Van Lieu, 5 N. J. L. 765.

New York. Hughes *v.* Wheeler, 8 Cow. 77; Tobey *v.* Barber, 5 Johns. 68; Schermerhorn *v.* Loines, 7 Ib. 313; Gregory *v.* Thomas, 20 Wend. 17; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 Ib. 448; Vail *v.* Foster, 4 N. Y. 312; Geller *v.* Seixas, 4 Abb. Pr. 103; Smith *v.* Ryan, 7 Jones & Sp. 489; Parrott *v.* Colby, 6 Hun, 55, 71 N. Y. 597; Thomson *v.* British No. Am. Bank, 82 Ib. 1; National Bank of Newburgh *v.* Bigler, 83 Ib. 51; Feldman *v.* Beier, 78 Ib. 293; Jagger Iron Co. *v.* Walker, 76 Ib. 521.

North Carolina. Spear *v.* Atkinson, 1 Ired. L. 262; Gordon *v.* Price, 10 Ib. 385.

Ohio. Merrick *v.* Boury, 4 Ohio St. 60; Sutliff *v.* Atwood, 15 Ib. 186; Emerine *v.* O'Brien, 36 Ib. 491.

Oregon. Matasce *v.* Hughes, 7 Oreg. 39.

Pennsylvania. McGinn *v.* Holmes, 2 Watts, 121; Weakly *v.* Bells, 9 Ib. 273; Leas *v.* James, 10 S. & R. 307; McIntyre *v.* Kennedy, 29 Pa. St. 448; Brown *v.* Scott, 51 Ib. 357; League *v.* Waring, 85 Ib. 245; Hunter *v.* Moul, 98 Ib. 13.

Rhode Island. Sweet *v.* James, 2 R. I. 270; Wheeler *v.* Schroeder, 4 Ib. 383; Wilbur *v.* Jernegan, 11 Ib. 113; Nightingale *v.* Chafee, 11 Ib. 609.

South Carolina. Watson *v.* Owens, 1 Rich. L. 111; Kelsey *v.* Rosborough, 2 Ib. 241; Bank *v.* Bobo, 9 Ib. 31; Mars *v.* Conner, 9 S. C. 70.

Texas. McNeil *v.* McCamley, 6 Tex. 163.

Virginia. M'Cluny *v.* Jackson, 6 Gratt. 96; Lewis *v.* Davisson, 29 Ib. 216.

West Virginia. Poole *v.* Rice, 9 W. Va. 73; Dunlap *v.* Shanklin, 10 Ib. 662; Feamster *v.* Withrow, 12 Ib. 644.

Wisconsin. Eastman *v.* Porter, 14 Wisc. 39; Ford *v.* Mitchell, 15 Ib. 308; Lindsey *v.* McClelland, 18 Ib. 481; Mehlberg *v.* Tisher, 24 Ib. 607; Paine *v.* Voorhees, 26 Ib. 526; Matteson *v.* Ellsworth, 33 Ib. 488.

5. **Payment by Third Person's Note.** In some States a third person's negotiable note for a preëxisting debt is also *prima facie* evidence of payment, sufficient where there is nothing to defeat the inference, or show that such was not the intention of the parties. Ely *v.* James, 123 Mass. 37. But here again the law of most States requires positive proof that the third person's note was agreed to be received in final payment, before it can have that effect, or prevent the creditor from resorting to his original cause of action. The note is considered merely conditional security, and if not paid has no effect to discharge the claim, even though a receipt in full was given upon delivery of the note. Johnson *v.* Weed, 9 Johns. 310; Vail *v.* Foster, 4 Comst. (N. Y.) 312; Holmes *v.* Briggs, 131 Pa. St. 233; Shepherd *v.* Busch, 154 Ib. 149 (1893); League *v.* Waring, 85 Ib. 244; Patterson *v.* McDougall Distilling Co. 26 Nova Scotia, 209. But, if so agreed, such note is a final payment, whether itself be paid at maturity or not. Conkling *v.* King, 10 N. Y. 440; N. Y. State Bank *v.* Fletcher, 5 Wend. 85; Noel *v.* Murray, 13 N. Y. 167; Wise *v.* Chase, 44 Ib. 337; Roberts *v.* Fisher, 43 Ib. 159; Torry *v.* Hadley, 27 Barb. 192.

The burden of proving that such note was taken in satisfaction is upon the vendee who asserts it. Susquehanna Fertilizer Co. *v.* White, 66 Md. 457; Sebastian May Co. *v.* Codd, 77 Ib. 293. There are authorities *contra*.

Of course the note of a third person which is absolutely void, as for incompetency of maker, Little *v.* American Co. 67 Ind. 67; or for usury, Cook *v.* Barnes, 36 N. Y. 520; Gerwig *v.* Sitterly, 56 Ib. 214, is not a valid payment so as to prevent a recovery on the original claim. Hartshorn *v.* Hartshorn, 67 N. H. 163 (1892), and cases cited.

Upon a somewhat similar view, it was held in Benedict *v.* Field, 16 N. Y. 595, that if a vendor agrees to take in payment at a future day the notes of a third person who is at the time solvent, but who becomes insolvent before the time of payment arrives, the vendor is not bound to take such notes, or deliver the goods without other payment. See, also, Roget

v. Merritt, 2 Caines, 117; Roberts *v.* Fisher, 43 N. Y. 159. But Bicknall *v.* Waterman, 5 R. I. 43, is directly opposite, and is better supported by the analogies of the law.

6. **Payment in Specific Articles.** If, by agreement, payment is to be made in specific articles, they must be actually tendered within or at the specified time, or within a reasonable time if none be specified; otherwise the debt becomes payable in cash. The creditor is not compelled to sue on the special contract to deliver the stipulated articles, but may sue for "goods sold and delivered," and recover the amount as if the sale was originally for cash. The contract is popularly said to have "run into money." Perry *v.* Smith, 22 Vt. 301; Roberts *v.* Beatty, 2 Pen. & Watts, 63; Church *v.* Feterow, Ib. 301; Stone *v.* Nichols, 43 Mich. 16; Smith *v.* Coolidge, 68 Vt. 516.

If A. agrees to pay B. a stated sum (as $40), the same to be paid in certain specified articles, and neglects to deliver the articles at the time stated, it is an interesting question whether B. can recover as damages the market value of the specified articles at the time and place where they were to be delivered, or only the $40 and interest thereon. The latter was held in the case of Heywood *v.* Heywood, 42 Me. 229. And see Brooks *v.* Hubbard, 3 Conn. 58; Smith *v.* Smith, 2 Johns. 235; Trowbridge *v.* Holcomb, 4 Ohio St. 38; Cleveland R. R. Co. *v.* Kelly, 5 Ib. 180; Pinney *v.* Gleason, 5 Wend. 393.

Other courts have taken a different view. Meason *v.* Philips, Add. 346; Edgar *v.* Boies, 11 Serg. & Rawle, 445; Clark *v.* Pinney, 7 Cow. 681; and the dissenting opinion of Rice, J., in 42 Me. 235.

There can be no payment unless the thing tendered is accepted. Tender alone is not payment. Jenkins *v.* Mapes, 53 Ohio St. 110, 115; Vancleave *v.* Beach, 110 Ind. 269; Thompson *v.* Kellogg, 23 Mo. 281.

7. **Payment by Set-off.** A "sale" ordinarily implies that payment is to be in money, and the buyer has not a right to keep the goods and apply the price thereof on a counter-claim he has against the seller. If he attempt to do so without the consent of the seller, it has been *held* that the latter may retake the goods, either on the ground of fraud in the buyer, or because he never agreed to sell the goods in payment of his own debt, and so the minds of the parties never met. Wabash Elevator Co. *v.* First National Bank, 23 Ohio St. 311. And see Allen *v.* Hartfield, 76 Ill. 358. But this can hardly yet be considered as settled law. And it has recently been held no fraud in a buyer not to inform the seller that he was intending to pay by the set-off of a counter-claim which he had acquired against him. Baker *v.* Fisher, 19 Ont. Rep. 650.

8. **Payment by Mail.** If payment be expressly or impliedly authorized by a creditor to be sent him by mail, or in any other specific mode, and the money be duly so sent, it is a valid payment and discharges the debt, although it never reaches the creditor. Gurney *v.* Howe, 9 Gray, 404; Morgan *v.* Richardson, 13 Allen, 410; Palmer *v.* Phœnix Mut. Ins. Co. 84 N. Y. 63; Wakefield *v.* Lithgow, 3 Mass. 249. And in Townsend *v.* Henry, 9 Rich. L. 318, it was held that a request by mail to a debtor "to remit to us as soon as received" authorized its remittance by mail, there being no other prompt mode of remittance practicable. But money sent by mail

without any authority from the creditor, or any general custom or usage sanctioning it, is at the risk of the debtor, and, if not received, must be paid again. Crane *v.* Pratt, 12 Gray, 348; First Nat. Bank *v.* McManigle, 69 Pa. St. 156; Buell *v.* Chapin, 99 Mass. 596; Williams *v.* Carpenter, 36 Ala. 9; Holland *v.* Tyus, 56 Geo. 56. Depositing the money in the post-office, in a letter addressed to the creditor at his place of business, is *prima facie* evidence, however, that he duly received it. Huntley *v.* Whittier, 105 Mass. 391; Waydell *v.* Velie, 1 Bradf. 277.

9. **Payment to Agents.** Several rules are here well established: (1.) An agent in possession of goods which he is authorized to sell and deliver is ordinarily also authorized, in the absence of any understanding to the contrary, to receive payment for the same. Whiton *v.* Spring, 74 N. Y. 173; Rice *v.* Groffmann, 56 Mo. 434; Bailey *v.* Pardridge, 134 Ill. 188, affirming 35 Ill. App. 121. (2.) Agents intrusted with the possession of bills to collect are thereby *prima facie* authorized to receive payment and give a valid discharge, even though they did not make the sale. Adams *v.* Humphreys, 54 Geo. 496. And see Kinsman *v.* Kershaw, 119 Mass. 140. Payment to an attorney at law having a claim to collect is for this reason sufficient. Gray *v.* Wass, 1 Greenl. 257; Branch *v.* Burnley, 1 Call, 147; Brackett *v.* Norton, 4 Conn. 517; Ducett *v.* Cunningham, 39 Me. 386. But payment to an officer serving a writ is not, *per se*, a valid payment, and, if the money is retained by him, the debtor must pay again. Waite *v.* Delesdernier, 15 Me. 144.

(3.) Of course, also, payments to an agent are good where sanctioned by the usages of the business, or the previous dealings between the parties, or where the principal in any way holds out the agent as authorized to receive payment. Howe Mach. Co. *v.* Ballweg, 89 Ill. 318; Noble *v.* Nugent, Ib. 522. Payment to the creditor's wife may come under this head. Stanton *v.* French, 83 Cal. 194. (4.) But brokers, travelling agents, salesmen, commercial travellers, etc., who have merely authority to take orders, or to sell by sample, but without possession of the goods, or of any bill of them coming from the principal, are not, in the absence of any usage or custom to that effect, authorized to collect and receipt for a bill of goods sold by them; and payment to such persons which never comes to the hands of the principal would not discharge the debt. A mere power "to sell" does not *per se* imply a power "to collect." Clark *v.* Murphy, 164 Mass. 490; Higgins *v.* Moore, 34 N. Y. 417; McKindly *v.* Dunham, 55 Wisc. 515; Kornemann *v.* Monaghan, 24 Mich. 36; Butler *v.* Dorman, 68 Mo. 298; Clark *v.* Smith, 88 Ill. 298; Seiple *v.* Irwin, 30 Pa. St. 513; Greenhood *v.* Keator, 9 Bradw. 183; Chambers *v.* Short, 79 Mo. 204; Law *v.* Stokes, 32 N. J. L. 250; Harrison *v.* Ross, 12 Jones & Sp. 230. And see Hirshfield *v.* Waldron, 54 Mich. 649; Dunn *v.* Wright, 51 Barb. 244. Though some cases seem to adopt a different rule. Possibly usage may have influenced these decisions. Hoskins *v.* Johnson, 5 Sneed, 469; Putnam *v.* French, 53 Vt. 402; Collins *v.* Newton, 7 Baxt. 269; Trainer *v.* Morison, 78 Me. 160. The subject is very ably considered in the late case of Meyer *v.* Stone, 46 Ark. 210, in which it is said the authority to collect payment in such cases is limited to the cases of known usage, or where the circumstances give color to the belief in the purchaser's mind that such authority exists. An agent has not *prima facie* authority to receive anything but money in payment. This is elementary law. Aultman

v. Lee, 43 Iowa, 404; Bevis *v.* Heflin, 63 Ind. 129; Sangston *v.* Maitland, 11 Gill & J. 286; Deatherage *v.* Henderson, 43 Kans. 684. But the custom of auctioneers to accept checks, instead of cash, in payment of deposits on sales, is a reasonable custom. Farrer *v.* Lacy, 31 Ch. Div. 42; 53 L. T. N. S. 515.

An agent's authority to collect a bill, it seems, is terminated by the death of his principal, *eo instanti*, and therefore a payment subsequently made to him, even without notice of the death, is not valid; and, unless the money comes to the hands of the creditor or his estate, the debtor must pay again. Clayton *v.* Merrett, 52 Miss. 353, a valuable case on this point; Gale *v.* Tappan, 12 N. H. 145. But see Cassiday *v.* M'Kenzie, 4 Watts & Serg. 282. In Dick *v.* Page, 17 Mo. 234, sometimes cited on the same side, the estate of the deceased creditor really received the benefit of the money paid. All agree that, as a general rule, the death of the principal terminates an agent's authority. If there is no principal, there can be no agent. Payment to an agent, after an actual revocation of his authority by the principal, may depend on other conditions; such as whether it were known or not to the debtor, or whether the latter had still good reason to believe, from the circumstances, that the authority still continued. See Packer *v.* Hinckley Locomotive Works, 122 Mass. 484.

Payment to one who is supposed to be the principal, but who in fact is only agent, is valid, if the buyer had no reasonable cause to believe the seller acted as agent. Eclipse Windmill Co. *v.* Thorson, 46 Iowa, 181; Pratt *v.* Collins, 20 Hun, 126; Peel *v.* Shepherd, 58 Geo. 365. But he must have made such payment without reasonable grounds to believe the payee was an agent. See Wright *v.* Cabot, 89 N. Y. 570.

10. Payments by Strangers. Of course no payment, properly speaking, can be made by one having no authority from the debtor, express or implied, and such payment, if made, would not discharge the debt (unless assented to), so as to prevent a suit by the original creditor, and *à fortiori* not to give a right of action by the party paying against the original debtor. This is familiar law. See the interesting case of Neely *v.* Jones, 16 West Va. 625; Sinclair *v.* Learned, 51 Mich. 335. If accepted by the creditor, of course it bars a suit for the original debt. Gray *v.* Herman, 75 Wisc. 453.

11. Appropriation of Payments. (1.) By the debtor. (2.) By the creditor. (3.) By the law. The familiar rule is well stated by Story, J., in Cremer *v.* Higginson, 1 Mason, 338. And see Stone *v.* Seymour, 15 Wend. 19; Franklin Bank *v.* Cooper, 36 Me. 222; Smuller *v.* Union Canal Co. 37 Pa. St. 68.

(1.) The debtor, at the time of payment, has the first right to designate the claim on which he makes the payment; and if he once does so, and the creditor so applies it, the debtor cannot afterwards change the application to another claim, although the latter be legal and the former an illegal one. Richardson *v.* Woodbury, 12 Cush. 279; Hubbell *v.* Flint, 15 Gray, 550; Caldwell *v.* Wentworth, 14 N. H. 431; Plummer *v.* Erskine, 58 Me. 59; Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 269; Phillips *v.* Moses, 65 Me. 70; Brown *v.* Burns, 67 Me. 535. Nor would the law change the appropriation for him. Treadwell *v.* Moore, 34 Me. 112; Feldman *v.* Gamble, 26 N. J. Eq. 494. This debtor's right of making the applica-

tion must be exercised at the very time of making the payment, or at least before the creditor has applied it. Nat. Bank *v.* Bigler, 83 N. Y. 51. And the debtor's election may be gathered from facts and circumstances as well as express declarations. 32 Ark. 346; 103 Ill. 633; 3 Ont. App. 30; 4 Ib. 213; 5 Grant (Ont.), 322; 85 N. Y. 226.

(2.) As to the creditor's right to apply a payment entirely unappropriated by the debtor, the creditor has a right to apply it to any one of several legal claims, even to one barred by the Statute of Limitations; or to a claim against the payer individually; or to a claim against him and others; or to a debt not otherwise secured, in preference to one secured. Ayer *v.* Hawkins, 19 Vt. 26; Upham *v.* Lefavour, 11 Met. 174; Van Rensselaer *v.* Roberts, 5 Denio, 470. To a disputed debt, if it be valid. Lee *v.* Early, 44 Md. 80. To one not enforcible by reason of the Statute of Frauds. Haynes *v.* Nice, 100 Mass. 327; McLendon *v.* Frost, 57 Geo. 458; Murphy *v.* Webber, 61 Me. 478. But not to a claim originally *illegal*, and never by law recoverable, as for sales contrary to law. Caldwell *v.* Wentworth, 14 N. H. 431; Kidder *v.* Norris, 18 N. H. 532; Bancroft *v.* Dumas, 21 Vt. 456. Nor to a debt absolutely void for usury. Rohan *v.* Hanson, 11 Cush. 44; Adams *v.* Mahnken, 41 N. J. Eq. 332; Brown *v.* Lacy, 83 Ind. 436; Pickett *v.* Merchants' Bank, 32 Ark. 346; Greene *v.* Tyler, 39 Pa. St. 361. Nor to a debt not yet due, when there is one due enough to absorb the payment. Bobe *v.* Stickney, 36 Ala. 482. And an application *by the creditor* to a debt already barred by the Statute of Limitations (though it may be properly retained for that debt), yet it will not *revive* the balance of the debt, since it was not a conscious intended payment by the debtor on that particular debt. Pond *v.* Williams, 1 Gray, 630. And see Armistead *v.* Brooke, 18 Ark. 521; Ramsay *v.* Warner, 97 Mass. 13. If all the claims of the creditor are barred by the statute, a creditor may apply to the payment any *one*, but cannot distribute the amount received towards all the claims, so as to revive the whole. Ayer *v.* Hawkins, 19 Vt. 26. This right of the creditor to appropriate a payment is based upon the debtor's neglect to do so when he makes the payment; and if under the circumstances the debtor never had an opportunity to elect, the creditor's right may be quite different, as where the payments are involuntary. Blackstone Bank *v.* Hill, 10 Pick. 129; Cowperthwaite *v.* Sheffield, 3 N. Y. 243; Bridenbecker *v.* Lowell, 32 Barb. 9; Jones *v.* Williams, 39 Wisc. 300; Jones *v.* Benedict, 83 N. Y. 86. And it seems the creditor has a right to make his election any time before suit is commenced by him, and some hold even down to the time of trial. Moss *v.* Adams, 4 Ired. Eq. 42; Brice *v.* Hamilton, 12 S. C. 37; Gaston *v.* Birney, 11 Ohio St. 506; Plummer *v.* Erskine, 58 Me. 61. But having once made such election and notified the debtor, who acquiesces in it, he cannot afterwards change it. Seymour *v.* Marvin, 11 Barb. 80; McMaster *v.* Merrick, 41 Mich. 505.

(3.) If neither party make any appropriation, the law applies it as justice and equity may require, as to an unsecured debt in preference to a secured one; to a debt already due in preference to one not yet due; and, if all the claims are equally just, legal, and due, to the older items rather than the later. This subject is elaborately discussed in 1 Am. Lead. Cas. p. 268, to which the learned reader is referred.

12. **Payment on Sunday.** Although a payment made and received on Sunday may, if retained by the creditor, so far discharge the debt that

he cannot collect the same again, as was held in Johnson *v.* Willis, 7 Gray, 164, yet it does not necessarily follow that such a payment has *for all purposes* the same effect as if on a week day. For instance, what is the effect upon the Statute of Limitations of a partial payment made on Sunday? As a partial payment does not *per se* revive or continue a debt, but only because ordinarily it implies a promise to pay the balance, — Wainman *v.* Kynman, 1 Exch. 118, — it would seem to follow that, if an express promise made on Sunday would not avoid the statute, an implied one arising from partial payment would not. Accordingly it was held in Clapp *v.* Hale, 112 Mass. 368 (1873), that a payment on Sunday would not take a debt out of the operation of the statute; the reason given being that the payment was an important "link in the chain of evidence necessary to sustain the plaintiff's action." See, also, Bumgardner *v.* Taylor, 28 Ala. 687; Dennis *v.* Sharman, 31 Geo. 607, in which the reasons are well stated. Thomas *v.* Hunter, 29 Md. 412, and Ayres *v.* Bane, 39 Iowa, 518, take a different view as to admissions of the debt made on Sunday.

13. **Presumption and Proof of Payment.** Payment of a debt may be presumed after the lapse of twenty years from the time it became due and payable. Bass *v.* Bass, 8 Pick. 187; Andrews *v.* Sparhawk, 13 Pick. 393; Bentley's Appeal, 99 Pa. St. 500; Kingman *v.* Kingman, 121 Mass. 249. But this presumption is not, at common law, absolute and conclusive, but only *prima facie*, and may be explained and controlled by the particular facts in the case; such as the debtor's poverty and inability to pay, his absence from the State, his insanity for the whole period of time, his admission of the debt, etc., or other circumstances. Mansfield *v.* Cheever, 3 Dane Ab. 506; Searle's case, 5 Ib. 401–405; Daggett *v.* Tallman, 8 Conn. 168; Reed *v.* Reed, 46 Pa. St. 239; Bissell *v.* Jaudon, 16 Ohio St. 499; Stout *v.* Levan, 3 Pa. St. 235; Brobst *v.* Brock, 10 Wall. 519; Delany *v.* Robinson, 2 Whart. 503; Bailey *v.* Jackson, 16 Johns. 210. See Rogers *v.* Judd, 5 Vt. 236. And in Bean *v.* Tonnele, 94 N. Y. 381, it was held that evidence of the creditor's poverty and need of money was *admissible* to the jury in support of the presumption of payment. See, also, Strong *v.* Slicer, 35 Vt. 40. Evidence of a debtor's wealth and ability to pay is not competent in his favor in support of his defence of payment. Hilton *v.* Scarborough, 5 Gray, 422; Veazie *v.* Hosmer, 11 Gray, 396; Atwood *v.* Scott, 99 Mass. 177. Nor is evidence admissible that it was his habit to pay his debts promptly. Abercrombie *v.* Sheldon, 8 Allen, 532; Strong *v.* Slicer, 35 Vt. 40. Nor that he had paid all the other persons employed on the same work at the same time with the plaintiff. Filer *v.* Peebles, 8 N. H. 226. And, conversely, evidence of his poverty and inability to pay is not competent for the creditor to disprove an alleged payment. Waugh *v.* Riley, 8 Met. 290. Evidence of the *creditor's* habit to promptly collect his claims has been held competent, as tending to show a payment, especially after a long lapse of time. Leiper *v.* Erwin, 5 Yerg. 97. *Sed quære.*

So twenty years' quiet possession by the mortgagor of mortgaged premises, after the debt is payable, without any entry or claim by the mortgagee, raises a *prima facie* presumption that the mortgage debt has been paid. Howland *v.* Shurtleff, 2 Met. 26. But such presumption is not conclusive. Cheever *v.* Perley, 11 Allen, 584. Possession of a promissory note or bill, by a party liable thereon, after it has been in circulation, is *prima facie*

evidence that it has been paid, and paid by *him*. Baring *v.* Clark, 19 Pick. 220; M'Gee *v.* Prouty, 9 Met. 547. A receipt of rent for a stated period, as for a quarter, a month, etc., is *prima facie* evidence that all *previous* rents had been duly paid. Brewer *v.* Knapp, 1 Pick. 337. So payment of one year's tax may be *prima facie* presumed, if it is not included in the tax-bill of the succeeding year. Attleborough *v.* Middleborough, 10 Pick. 378. It is familiar law that a "receipt" is not conclusive evidence of payment, but may be rebutted. But the further examination of this subject more properly belongs to a treatise on Evidence.

Tender.

Payment implies the assent of both parties; tender, that of only one. Ordinarily, a tender of part of an entire debt, unaccepted by the creditor, has no effect whatever. Wright *v.* Behrens, 39 N. J. L. 413. Though where the debtor did not know the exact amount of the creditor's claim, and the latter would not inform him, as where he had a claim for freight of an unknown amount as well as for the price of the goods, and the buyer did not tender quite enough, and there was some evidence that the production of more was waived, this was held nevertheless a good tender. Nelson *v.* Robson, 17 Minn. 284. For if no objection to the tender be made because of the amount, the insufficiency might properly be considered as waived. Oakland Bank *v.* Applegarth, 67 Cal. 86. Obviously a perfect tender can be made only in the legalized currency of the country, made such by positive law. Bank-bills of state banks are not, even for a debt due the bank. Moody *v.* Mahurin, 4 N. H. 296; Donaldson *v.* Benton, 4 Dev. Batt. 435; Coxe *v.* State Bank, 8 N. J. L. 172. It is not therefore a legal "tender" to present a counter-claim or note due from the creditor to the debtor. Cary *v.* Bancroft, 14 Pick. 315; Barker *v.* Walbridge, 14 Minn. 469; Wilmarth *v.* Mountford, 4 Wash. C. C. 79; Bellows *v.* Smith, 9 N. H. 285. But a tender in other money than that legally authorized, if commonly current in the community, may be good, unless objected to; or, in other words, the legal objection to the kind of money may be waived. Objecting to a tender on other grounds would be an implied waiver. Ward *v.* Smith, 7 Wall. 447; Warren *v.* Mains, 7 Johns. 476; Williams *v.* Rorer, 7 Mo. 556; Harding *v.* Commercial Line Co. 84 Ill. 251; Towson *v.* The Havre-de-Grace Bank, 6 Har. & J. 53; Wheeler *v.* Knaggs, 8 Ohio, 169; Snow *v.* Perry, 9 Pick. 542; Brown *v.* Dysinger, 1 Rawle, 408; Ball *v.* Stanley, 5 Yerg. 199; Noe *v.* Hodges, 3 Humph. 163; Fosdick *v.* Van Husan, 21 Mich. 567; Seawell *v.* Henry, 6 Ala. 226; Hoyt *v.* Byrnes, 11 Me. 475; McGrath *v.* Gegner, 77 Md. 331; Koehler *v.* Buhl, 94 Mich. 496.

The Money must be produced, unless its production be waived. A mere "offer to pay," without producing the money, is not *per se* sufficient. Breed *v.* Hurd, 6 Pick. 356; Sargent *v.* Graham, 5 N. H. 440; Sheredine *v.* Gaul, 2 Dall. 190; Fuller *v.* Little, 7 N. H. 535; Potts *v.* Plaisted, 30 Mich. 149; Harmon *v.* Magee, 57 Miss. 410. Much less is an offer to give a check for the amount a good tender. Collier *v.* White, 67 Miss. 133. Therefore the debtor must have the money at hand, ready to be produced. It would not be sufficient to have the money in one's pocket, there being no waiver of its production by the creditor. Bakeman *v.* Pooler, 15 Wend.

637; Strong *v.* Blake, 46 Barb. 227. Nor that a friend of the debtor then present would have loaned him enough to pay the debt with, had he been asked. Sargent *v.* Graham, 5 N. H. 440. Nor to leave the money with a third person for the creditor, although the latter be informed of it. Town *v.* Trow, 24 Pick. 168; Breed *v.* Hurd, 6 Ib. 356.

In Knight *v.* Abbott, 30 Vt. 577, the debtor, having the amount in his hand, said to the creditor, passing by in a wagon, "I want to tender you this money for labor you have done for me," holding out the money, but naming no sum. The creditor did not stop, but drove on, saying nothing. This was held no tender; but it is pretty close. In Matheson *v.* Kelly, 24 Up. Can. C. P. 598, the debtor, having the money in his sight in the desk, where the creditor could not see it, said: "Here is the rent." The landlord said nothing, but walked away. Held, no tender. Producing the right amount "in bags" is sufficient without counting it out. Behaley *v.* Hatch, Walker (Miss.), 369. But the production or even presence of the money may be waived by the creditor, as where he declares he will not receive it if it be produced, or uses other equivalent language. Hazard *v.* Loring, 10 Cush. 267; Sands *v.* Lyon, 18 Conn. 18; Berry *v.* Nall, 54 Ala. 451; Wheeler *v.* Knaggs, 8 Ohio, 172; Berthold *v.* Reyburn, 37 Mo. 586; Ashburn *v.* Poulter, 35 Conn. 553; Guthman *v.* Kearn, 8 Neb. 507. In order to waive a tender, the party bound to make it must at the time have been *able* to make it. Eddy *v.* Davis, 116 N. Y. 247. Though the creditor *might* waive even the possession of the money at the time by the debtor. Hall *v.* Norwalk F. Ins. Co. 57 Conn. 105.

A Tender must be unconditional. Richardson *v.* Boston Chemical Laboratory, 9 Met. 52; Strong *v.* Blake, 46 Barb. 227; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; Roosevelt *v.* Bull's Head Bank, 45 Barb. 579; Cashman *v.* Martin, 50 How. Pr. R. 338; Rose *v.* Duncan, 49 Ind. 269; Cass *v.* Higenbotam, 27 Hun, 406; Flake *v.* Nuse, 51 Tex. 98; Tompkins *v.* Batie, 11 Neb. 147. Therefore a tender on condition that the creditor give a receipt or release "in full" is not good; or on condition that a mortgage shall be cancelled, or a discharge given. Wood *v.* Hitchcock, 20 Wend. 47; Jewett *v.* Earle, 21 Jones & Sp. 349, and cases cited on p. 350; Hepburn *v.* Auld, 1 Cranch, 321; Forest Oil Co.'s Appeal, 118 Pa. St. 138; Thayer *v.* Brackett, 12 Mass. 450; Loring *v.* Cooke, 3 Pick. 48; Richardson *v.* Boston Chemical Laboratory, 9 Met. 43; Storey *v.* Krewson, 55 Ind. 397; Hardy *v.* Angel, 1 Hawaii, 149. In Tompkins *v.* Batie, 11 Neb. 147, this was held not a good tender: "I showed him $500, and told him he could have it *for his claim.*" Though it is not yet settled that the party may not demand a simple receipt for the amount itself. Clearly a *note* may be demanded as the condition of a tender to pay it. Strafford *v.* Welch, 59 N. H. 46; Buffum *v.* Buffum, 11 Ib. 451; Storey *v.* Krewson, 55 Ind. 397; Wilder *v.* Seelye, 8 Barb. 408. So, where a statute makes it the duty of a creditor to give a release, the same may be demanded when the tender is made. Saunders *v.* Frost, 5 Pick. 270; Balme *v.* Wambaugh, 16 Minn. 116; Salinas *v.* Ellis, 26 So. Car. 337. Although a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount claimed, may be good if it imposes no conditions on the creditor. Greenwood *v.* Sutcliffe [1892], 1 Ch. Div. 1.

Tender must be kept good. Not that the debtor must be continually

renewing his tender; nor that the same identical money must be always kept on hand, McCalley *v.* Otey, 90 Ala. 302; but if the creditor afterwards demands the money, it must be ready for him, or the former tender will be of no avail. Dodge *v.* Fearey, 19 Hun, 277; Town *v.* Trow, 24 Pick. 168; Parks *v.* Allen, 42 Mich. 482; Crain *v.* McGoon, 86 Ill. 431; Thayer *v.* Meeker, Ib. 470; Carr *v.* Miner, 92 Ib. 604; Gray *v.* Angier, 62 Geo. 596; McCalley *v.* Otey, 90 Ala. 302. And if suit be brought, the amount must be paid into court for the plaintiff. Becker *v.* Boon, 61 N. Y. 317; Hamlett *v.* Tallman, 30 Ark. 505; Gilkeson *v.* Smith, 15 West Va. 44; Allen *v.* Cheever, 61 N. H. 32; Gilpatrick *v.* Ricker, 82 Me. 185.

Effect of Tender. A valid tender stops the running of interest, and bars any liability for subsequent costs. Cornell *v.* Green, 10 S. & R. 14; Gracy *v.* Potts, 4 Baxt. 395; Suffolk Bank *v.* Worcester Bank, 5 Pick. 105; Goff *v.* Rehoboth, 2 Cush. 475. It should, of course, include all former interest and costs, even though the debtor was unaware of any costs having been made. Wright *v.* Behrens, 39 N. J. L. 413; Eaton *v.* Wells, 22 Hun, 123; Francis *v.* Deming, 59 Conn. 108; Bank of Benson *v.* Hove, 45 Minn. 40; People's Sav. Bank *v.* Norwalk, 56 Conn. 547; Emerson *v.* White, 10 Gray, 351. Haskell *v.* Brewer, 11 Me. 258, can hardly be correct. See Holdridge *v.* Wells, 4 Conn. 151; Ashburn *v.* Poulter, 35 Conn. 557. But inasmuch as a tender must be kept good on demand, and as the suit is a demand, it seems that the money should be paid into court for the creditor, in order to make the first tender fully available; in which case he ought to recover no costs, at least after such payment into court, for he can take out the money at any time without any prejudice to his right to recover more. Pennypacker *v.* Umberger, 22 Pa. St. 492; Wheeler *v.* Woodward, 66 Ib. 158. And the money paid in thereby becomes the plaintiff's, whether he does or does not prevail in the suit. Taylor *v.* Brooklyn Elevated R. R. 119 N. Y. 561.

In a sale where the title is to remain in the vendor until payment, a tender of the price is sufficient to divest the vendor of the title. Ingersoll-Sergeant Drill Co. *v.* Worthington, 110 Ala. 322.

BOOK V.

BREACH OF THE CONTRACT.

PART I.

RIGHTS AND REMEDIES OF THE VENDOR.

CHAPTER I.

PERSONAL ACTIONS AGAINST THE BUYER.

SECTION I. — WHERE THE PROPERTY HAS NOT PASSED.

Sect.

Sole remedy is action for non-acceptance 758
Date of the breach 759
Where buyer becomes bankrupt before delivery 759
Seller's right to treat notice of the buyer's insolvency as a repudiation of the contract 759
Bankruptcy court may rescind contract and award damages 759
Disclaimer of contract by trustee after part performance 759
Purchaser's bankruptcy after partial delivery 759
Where buyer gives notice that he will not accept 760
Where buyer interrupts performance partially executed 760
Measure of damages in such case . . 761
In certain cases seller may recover the whole price of goods though the ownership remains vested in himself . 762
In some cases seller may consider contract rescinded when partially executed, and recover value of goods delivered 763

SECTION II. — WHERE PROPERTY HAS PASSED.

None but personal action where goods are in actual possession of buyer . 764
Nature of this action 764
Vendor cannot rescind contract for default of payment 764
Nor because of buyer's bankruptcy . 764
Different forms of claim in personal action 765

SECTION I. — WHERE THE PROPERTY HAS NOT PASSED.

§ 758. When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as has been explained in Book II., — as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, — the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not, at his pleasure. But his only action against the buyer

is for damages for non-acceptance: he can in general only recover the damage that he has sustained (*a*), not the full price of the goods. The law, with the reason for it, was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in Barrow *v.* Arnaud (*b*): "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy (*c*). So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

§ 759. 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*).

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.

[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

(*a*) Laird *v.* Pim, 7 M. & W. 478.

(*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.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 381; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Lamond *v.* Davall, 9 Q. B. 1030; Boswell *v.* Kilhorn, 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. 1.

(*d*) Phillpotts *v.* Evans, 5 M. & W. 475; Leigh *v.* Patterson, 8 Taunt. 540; Ripley *v.* M'Clure, 4 Ex. 345; Boswell *v.* Kilhorn, *ubi supra*.

(*e*) 9 B. & C. 145.

(*f*) There must he notice of "an inability to pay avowed either in act or word:" see In re Phœnix Bessemer Steel Company, 4 Ch. D. 108, C. A.

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*).

It would seem that a sub-purchaser from the insolvent buyer would also be entitled to complete the contract by paying the price in cash within a reasonable time (*h*).

A new provision on this subject has been introduced by the Bankruptcy Act, 1883, which declares that "the court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the court may seem equitable, and any damages payable under the order to any such person may be proved by him, as a debt under the bankruptcy (*i*)."

A provision was introduced into the Bankruptcy Act, 1869, giving power to the trustee to disclaim (*inter alia*) unprofitable contracts (*j*), and a further clause was inserted whereby the trustee was not to be entitled to disclaim in cases where an application in writing had been made to him by any one interested, requiring him to decide whether he would disclaim or not, and the trustee had, for a period of not less than twenty-eight days after the receipt of the application, or such further time as might be allowed by the court, declined or neglected to give notice whether he disclaimed or not (*k*). No clause, however, in the Act of 1869, declared what was to be the effect of a non-disclaimer after such application.

In Ex parte Davis (*l*), the trustees had omitted to disclaim a continuing contract of the debtor under the 23d section of the act, after an application in writing had been made to them under the provisions of the 24th section. They carried on the contract for some time for the benefit of the estate, and then, finding it unprofitable, gave notice of abandonment, and ceased from performance. It was argued before the Chief Judge that the trustees were personally liable under the contract. In the Court of Appeal this contention was abandoned, but it was very strenuously contended by the author of this treatise that they were liable as representing the estate. Mr. Benjamin was

(*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, 10 Ch. D. 586.

(*i*) Sect. 55, sub-sect. 5.

(*j*) Sect. 22. Upon the history of the law generally with reference to the disclaimer of onerous property, the reader is referred to Robson on Bankruptcy, p. 443 *et seq.* (6th ed. 1887).

(*k*) Sect. 24.

(*l*) 3 Ch. D. 463, C. A.; 45 L. J. Bank. 137.

obliged, however, to admit that, in order to give effect to his argument, the section must be read as if it contained by implication words to the effect that if the contract was not disclaimed after notice from the other party, then it was to be deemed to have been adopted by the trustee upon the responsibility and at the expense of the estate. The court, while admitting the force of Mr. Benjamin's argument, and that the law might well be altered in accordance therewith, declined so to construe the section, and held that the only remedy of the other contracting party was to prove for damages against the estate under the 31st section of the act.

Accordingly, the law has now been altered by the Bankruptcy Act, 1883, and it is provided (*m*), that in the case of a contract, if the trustee, after application in writing, does not, within the specified period, disclaim the contract, *he shall be deemed to have adopted it.*

It is submitted that the effect of the clause italicized is, that the trustee upon non-disclaimer after notice will be deemed to have adopted the contract, not personally, so as render himself personally liable upon it, but as representing the body of creditors; that the contract thereupon becomes by novation a contract between the whole body of creditors and the other contracting party; and that, in the event of non-fulfilment of the contract, the estate will be liable to pay damages to the full amount (*n*).

If goods are deliverable by successive instalments, 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 (*o*).

§ 759 a. In Morgan *v.* Bain (*p*), the plaintiffs sought to recover damages for the defendants' 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 instalments of 25 tons at a time. It was admitted that by the usage of the iron trade the first instalment 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

(*m*) Sect. 55, sub-s. 4.

(*n*) This was the position contended for by Mr. Benjamin in Ex parte Davis, 3 Ch. D. 463, and approved as a matter of abstract right by James, L. J., at pp. 471, 472. Mr. Williams is of this opinion. Williams on Bankruptcy, 226 (4th ed.). Mr. Robson, however, appears to be of a contrary opinion. Robson on Bankruptcy, 456 (6th ed.).

(*o*) Ex parte Chalmers, 8 Ch. 289.

(*p*) L. R. 10 C. P. 15; see, also, Bloomer *v.* Bernstein, L. R. 9 C. P. 588.

present, but it was not included in the plaintiffs' 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 plaintiffs' 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.

In the State of New York it has been held that the mere insolvency of one of the parties is not equivalent either to a rescission or a breach. It simply relieves the vendor from his agreement to give credit, and entitles him to demand payment on or before delivery of the goods (*q*).]

§ 760. The rules of law [applicable where the purchaser gives notice that he will not receive goods ordered] were fully discussed in Cort *v.* Ambergate Railway Company (*r*), in which the cases were reviewed, and the judgment of the Queen's Bench delivered by Lord Campbell, C. J. The case was an action for damages by a manufacturer against a railway company for breach of a contract to accept and pay for certain railway chairs, part of which had been delivered, when the plaintiff received orders from the defendant to make and send no more. The plaintiff thereupon discontinued making them, although he was in a position to continue the supply according to the contract. The manufacturer had made a sub-contract for a part of the goods which he had promised to supply to the defendants, and was compelled to pay 500*l.* to be released from this sub-contract; and had made contracts for supplies of the necessary iron, and had built a large foundry for the manufacture of the chairs. Two questions were presented: *first*, whether the plaintiffs could recover without actually making and tendering the remainder of the goods, the declaration alleging that they were ready and willing to perform their contract until a refusal and wrongful discharge by the defendants, and that the defendants had wholly and wrongfully prevented and discharged the plaintiffs from

(*q*) Pardee *v.* Kanady, 100 N. Y. 121, 126 (1885); cf., also, The New England Iron Company *v.* The Gilbert Elevated Railroad Company, 91 N. Y. 153, 168 (1883).

(*r*) 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, § 569 *et seq.*; Frost *v.* Knight, L. R. 5 Ex. 322; 7 Ex. 111.

supplying the said residue; *secondly*, what was the proper measure of damages. Lord Campbell said, in relation to Phillpotts *v.* Evans (*s*), that it had been properly decided, but that the Exchequer of Pleas had not determined in that case that the vendor would not have the right of treating the bargain as broken, *if he chose to do so*, as soon as the buyer gave him notice that he would not accept the goods, without being compelled afterwards to make a tender of them; and that the true point, decided in Ripley *v.* M'Clure (*t*), 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 (*u*): —

"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 desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods (*x*), 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."

§ 761. On the question of damages, Coleridge, J., had told the jury at Nisi Prius that the plaintiff ought to be put in the same position as if he had been permitted to complete the contract. This direction was approved, the learned Chief Justice saying that "the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept."

§ 762. Although in general the vendor's recovery in damages is limited to the difference between the price fixed in the contract and the market value on the day appointed for the delivery, — according to the rule as stated by Parke, B., in Laird *v.* Pim (*y*), that "a party

(*s*) 5 M. & W. 475.

(*t*) 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 Ib. 3, 5.

(*u*) At p. 148.

(*x*) See, also, on this point, Silkstone Coal Company *v.* Joint Stock Coal Company, 35 L. T. N. S. 668; Tredegar Coal and Iron Company *v.* Gielgud, 1 Cababé & Ellis, 27.

(*y*) 7 M. & W. 478.

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 to his cross action if the vendor, after receiving the price, should refuse delivery of the goods (*z*).

§ 763. 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 (*a*), the plaintiffs had contracted to supply the defendant with such furniture as he should require to the amount of 600*l.* or 700*l.*, payable half in cash, and half by bill at six months. After some of the goods had been delivered, the defendant became displeased, and wrote to the plaintiffs: "I now close all further orders, and desire what I have not purchased be taken off my premises, — I will not be responsible for them," etc., etc. The defendant kept goods of the value of 88*l.* 17*s.* 6*d.*, and, on action brought for goods sold and delivered, insisted that the plaintiffs ought to have declared specially, and could not recover on the common counts before the expiration of 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 (*b*), and cases of a like character, referred to *ante*, in the chapter on Conditions.

[In Wayne's Merthyr Steam Company *v.* Morewood & Company (*c*), 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 bars up into plates that they discovered their inferior quality, and they then refused to accept the residue. Before

(*z*) Dunlop *v.* Grote, 2 Car. & K. 153.

(*a*) 15 C. B. N. S. 711; 33 L. J. C. P. 145.

(*b*) 2 E. & B. 678; 22 L. J. Q. B. 455; and see Inchbald *v.* The Western Neilgherry Coffee Company, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(*c*) 46 L. J. Q. B. 746.

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.

§ 764. When by the contract of sale the property in the goods has passed to the buyer, the vendor may, under certain circumstances hereafter to be considered, exercise rights on the goods themselves, if the buyer make default in payment; but whenever the goods have reached the actual possession of the buyer, the vendor's *sole* remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favor *quà* vendor are gone.

By the law of England, differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved.

The principle at common law is, that the goods have become the property of the buyer, and that the vendor has agreed to take for them the buyer's *promise* to pay the price. If, then, the buyer fail to pay, the vendor's remedy is limited to an action for the breach of *that* promise, the damages for the breach being the amount of the price promised, to which may be added interest.

The leading case on the subject is Martindale *v.* Smith (*d*), in which Lord Denman, C. J., delivered the opinion of the Queen's Bench after advisement. His Lordship said: "Having taken time to consider of our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end, and reinvest the property in himself, by reason of the vendee's failure to pay the price at the appointed time, *we are clearly of opinion that he had no such right*, and that the action (trover) is well brought against him. For the sale of a specified chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the creditor a right of

(*d*) 1 Q. B. 395. See, also, Tarling *v.* Baxter, 6 B. & C. 360; Dixon *v.* Yates, 5 B. & Ad. 313.

action for the price, and a lien upon the goods if they remain in his possession till that price be paid. But that *default of payment does not rescind the contract.*"

It has already been shown (*ante*, § 579) 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 (*e*).

§ 765. It is not proposed in this treatise to enter into any discussion of questions of procedure, but it may be stated generally that the vendor may recover the price of goods sold, either where the goods have been *sold and delivered* to the buyer, or where they have been only *bargained and sold* to him; but that, where the property has not passed, the vendor's claim must be special for damages for non-acceptance (*f*).

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 (*g*).

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 resulting from the buyer's conduct, and recover the value of the goods delivered (*h*).

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 (*i*).

AMERICAN NOTE.

REMEDIES AGAINST BUYER.

§§ 758–765.

1. For Non-acceptance before Completion. This special action for non-acceptance, or for refusal to accept, is most usually resorted to in cases of executory contracts for the future sale or manufacture of some article, where the buyer countermands his order before the time of delivery or completion has arrived; in which case the seller may desist from further efforts to complete his contract, and sue at once for damages caused by the refusal. Todd

(*e*) Bankruptcy Act, 1883, sect. 55.
(*f*) Chitty on Contracts, p. 408, ed. 1881.
(*g*) Ibid. p. 409.
(*h*) Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 33 L. J. C. P. 145; but see Wayne's Merthyr Steam Company *v.* Morewood & Co. 46 L. J. Q. B. 746.
(*i*) *Ante*, § 730.

v. Gamble, 67 Hun, 38, affirmed in 74 Ib. 569; Dingley *v.* Oler, 11 Fed. R. 373. This special action is the *only* appropriate remedy upon such a state of facts, for, unless the contract is completed by the vendor, he cannot recover on the common counts for work and labor, or materials furnished, or goods sold. The article, or the materials and labor expended upon it, are still his. Hosmer *v.* Wilson, 7 Mich. 294, an important case; Allen *v.* Jarvis, 20 Conn. 38; McConihe *v.* New York & N. E. R. R. 20 N. Y. 495; Butler *v.* Butler, 77 Ib. 472; Atwood *v.* Lucas, 53 Me. 508; Pittsburg, etc. Railway Co. *v.* Heck, 50 Ind. 303, and cases cited. This special action for damages for refusal to accept, therefore, may be commenced immediately upon such refusal or countermand of the order. No previous tender or even completion of the article is necessary, and it is immaterial that the stipulated time of credit had not expired. The action is not based upon the completion of the contract, but upon prevention of its performance. See Hosmer *v.* Wilson, 7 Mich. 294; McCormick *v.* Basal, 46 Iowa, 235; James *v.* Adams, 16 W. Va. 267.

The measure of damages in this special action for refusal to accept, brought before the article is completed, is of course not the full price of the article, nor necessarily the difference between the contract price and the market value, but simply such damages as will fully compensate the plaintiff for being deprived of the benefits of the contract: Collins *v.* Delaporte, 115 Mass. 162; Rand *v.* White Mt. Railroad, 40 N. H. 79; Hosmer *v.* Wilson, 7 Mich. 294; McNaught *v.* Dodson, 49 Ill. 446; Ganson *v.* Madigan, 13 Wisc. 67; Danforth *v.* Walker, 37 Vt. 239: the difference between the cost of making and delivering and the contract price. Hinckley *v.* Steel Co. 121 U. S. 264. And see Roehm *v.* Horst, 91 Fed. R. 345. In Newark City Ice Co. *v.* Fisher, 76 Fed. R. 427, the vendee refused to take certain ice which he had ordered. The vendor was allowed to recover the difference between the contract price and the market value at the time of delivery, less the expense saved by the buyer's refusal, to wit, the expense of loading. In Todd *v.* Gamble, 67 Hun, 38, 74 Ib. 569, 148 N. Y. 382, it was held that the measure of damages, where there is no market value, is the difference between the contract price and the cost of production. The burden is on the vendor to show that there is no market value, and the question whether there is or not is for the jury. New York, etc. Co. *v.* Howell, 7 N. Y. St. R. 494. In Baltimore, etc. R. R. *v.* Brydon, 65 Md. 198, the buyer agreed to receive a quantity of coal at a fixed price per ton. The vendor recovered the difference between the contract price and the cost of mining and delivering. And see Walsh *v.* Myers, 92 Wisc. 397, where there was a breach of an agreement to receive a large number of cans. Kelso *v.* Marshall, 24 App. Div. (N. Y.) 128.

2. **Non-acceptance after Completion.** This special action for refusal to accept may also be maintained *after* the article is fully completed and ready for delivery. See Central Lithographic Co. *v.* Moore, 75 Wisc. 170: Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640, and note thereto.

If the buyer has refused to accept, no special tender or offer to deliver is necessary before bringing the suit. Where plaintiff's failure to deliver is caused by defendant's refusal to receive, plaintiff is excused by law from any actual tender, even though there be no express waiver of the right to require performance. Plaintiff need show only his ability to make a valid tender according to the terms of the contract. Duryea *v.* Bonnell, 18 App. Div.

(N. Y.) 151; Nelson *v.* Plimpton Co. 55 N. Y. 480; Ogden *v.* Marshall, 8 Ib. 340; Eddy *v.* Davis, 116 Ib. 247, and many other cases; and in this state of facts, the measure of damages in *this form of action* is not *usually* the full price of the goods, but simply the difference between the agreed price and the market value of the article at the time and place of delivery; and therefore, if the market value was fully equal to the contract price, the damage would be only nominal. But special circumstance may allow a recovery for the whole contract price, as where the article has no ascertainable market value. Phelps *v.* McGee, 18 Ill. 158; Sanborn *v.* Benedict, 78 Ib. 309; Bagley *v.* Findlay, 82 Ill. 524; Foos *v.* Sabin, 84 Ib. 565; Thurman *v.* Wilson, 7 Bradw. 312; Gordon *v.* Norris, 49 N. H. 376, carefully examining the rule of damages; Haines *v.* Tucker, 50 Ib. 307; Camp *v.* Hamlin, 55 Geo. 259; McNaughter *v.* Cassally, 4 McLean, 530; Williams *v.* Jones, 1 Bush, 621; Haskell *v.* McHenry, 4 Cal. 411; James *v.* Adams, 16 W. Va. 245; Sanborn *v.* Benedict, 78 Ill. 309; Brownlee *v.* Bolton, 44 Mich. 218; Harris Man. Co. *v.* Marsh, 49 Iowa, 11; Pittsburgh, etc. Railway Co. *v.* Heck, 50 Ind. 303; Wood *v.* Michaud, 63 Minn. 478; Morris *v.* Cohn, 55 Ark. 401.

The vendor can recover the difference between the contract price and the market price, although, by keeping the article after the refusal, he has sold it for more than the original price. Being his after a refusal to accept, he has a right to make the most of it. Bridgford *v.* Crocker, 60 N. Y. 627. If there be no fixed market price for the article at the time and place of delivery, the seller may prove his damage or loss in any other way. Chicago *v.* Greer, 9 Wall. 726; McCormick *v.* Hamilton, 23 Gratt. 561, where evidence of the market value near the time of delivery was admitted. See Kountz *v.* Kirkpatrick, 72 Pa. St. 376, containing a valuable discussion on this subject; the limit of time and place being somewhat in the discretion of the court. Durst *v.* Burton, 47 N. Y. 175. See Thurman *v.* Wilson, 7 Bradw. 312; Paxton *v.* Meyer, 58 Miss. 445.

But under some circumstances the full contract price may be recovered, even in this form of action, as where the goods are made to a special order, or the vendor has wholly divested himself of the title to the goods, so that he might have brought an action for goods sold instead of the special action for refusal to accept. See instances in Thompson *v.* Alger, 12 Met. 428; Thorndike *v.* Locke, 98 Mass. 340; Pearson *v.* Mason, 120 Mass. 53; Shawhan *v.* Van Nest, 25 Ohio St. 490, reviewing the cases; Ballentine *v.* Robinson, 46 Pa. St. 177. See Gordon *v.* Norris, 49 N. H. 383, a valuable case; White *v.* Solomon, 164 Mass. 516.

3. Action for the Price. In America the prevailing rule is (notwithstanding a few decisions to the contrary, as in Moody *v.* Brown, 34 Me. 107) that an action for the full price may be maintained upon the completion or tender of the article, even though the other refuses to accept, and there has been, therefore, no actual delivery, especially if there has been a constructive delivery. Bement *v.* Smith, 15 Wend. 493; Pollen *v.* Le Roy, 30 N. Y. 549; Nicholson *v.* Paston, 11 N. Y. Supp. 567; Dustan *v.* McAndrew, 44 N. Y. 72; Hayden *v.* Demets, 53 Ib. 426; Bridgford *v.* Crocker, 60 Ib. 627; Mason *v.* Decker, 72 Ib. 595; Higgins *v.* Murray, 73 Ib. 252; Quick *v.* Wheeler, 78 Ib. 300; Hunter *v.* Wetsell, 84 Ib. 549; Donnell *v.* Hearn, 12 Daly, 230; Wade *v.* Moffett, 21 Ill. 110; Bagley *v.*

Findlay, 82 Ib. 524; Bell *v.* Offutt, 10 Bush, 639; Ballentine *v.* Robinson, 46 Pa. St. 177.

But sufficient must be done to pass the title to the property before an action for the price will lie. See Ganson *v.* Madigan, 13 Wisc. 67, 15 Ib. 144; Perdicaris *v.* Trenton City Bridge, 29 N. J. L. 368; Bailey *v.* Smith, 43 N. H. 141; Armstrong *v.* Turner, 49 Md. 589; Indianapolis, etc. R. Co. *v.* Maguire, 62 Ind. 140; Tufts *v.* Grewer, 83 Me. 414; Fell *v.* Muller, 78 Ind. 507.

This action for the full price, if the goods have not been accepted or delivered, must be for goods bargained and sold, and not goods sold and delivered. New Market Iron Foundry *v.* Harvey, 23 N. H. 395; *ante*, p. 723. No delivery (and, if the goods fulfil the contract, no acceptance) is necessary in such action. Doremus *v.* Howard, 23 N. J. L. 390; Nichols *v.* Morse, 100 Mass. 523; Brigham *v.* Hibbard, 28 Oreg. 386; Rodman *v.* Guilford, 112 Mass. 405; Frazier *v.* Simmons, 139 Ib. 531. But the seller can prove either that the goods were of the quality agreed, or else that they have been in fact accepted as such. Brewer *v.* Housatonic Railway Co. 104 Mass. 593; 107 Ib. 277.

If credit was unconditionally given by the contract, an action *for the full price* cannot be maintained under any circumstances before the time of credit has expired. Such action affirms and counts upon the very contract of sale, time of credit included; the fraud or insolvency of the buyer, or abandonment of the contract, does not alter the term of credit. Dellone *v.* Hull, 47 Md. 112; Silliman *v.* McLean, 13 Up. Can. Q. B. 544; Sheriff *v.* McCoy, 27 Ib. 597; Auger *v.* Thompson, 3 Ont. App. 19; Keller *v.* Strasburger, 23 Hun, 625; on appeal, 90 N. Y. 379; Thomas *v.* Dickinson, 65 Hun, 5. See, also, Iselin *v.* Henlein, 23 N. Y. Week. Dig. 422 (1886). If the credit was conditional, as upon giving a note with security for the price, and condition is not complied with, an action for the full price lies at once. Jaquith *v.* Adams, 60 Vt. 392. And see Hale *v.* Jones, 48 Ib. 227.

But the special action for damages for non-acceptance, or not giving security according to the contract, may be brought even before the time of credit has expired, and the damages would be *prima facie* the same, less perhaps interest for the unexpired time of credit. Hanna *v.* Mills, 21 Wend. 90; Girard *v.* Taggart, 5 S. & R. 19; Rinehart *v.* Olwine, 5 W. & S. 157; Barron *v.* Mullin, 21 Minn. 374; Manton *v.* Gammon, 7 Bradw. 201.

CHAPTER II.

UNPAID VENDOR'S REMEDIES AGAINST THE GOODS — GENERAL PRINCIPLES.

	Sect.
Goods may be in possession of the buyer, and then vendor's right in them is gone	766
Or in possession of vendor or his agents	766
Or in transit for delivery to buyer	766
Unpaid vendor has at least a lien on goods still in his possession unless waived	767
Where vendor sells on credit he waives lien	767
What are the unpaid vendor's rights if goods remain in his possession till credit has expired	767
Or if buyer becomes insolvent before credit has expired	767
Meaning of the word "delivery" in this connection	768
Division of the subject	769
Exposition of the law as to unpaid vendors in Bloxam *v.* Sanders	769
Bankrupt's trustee cannot maintain trover against unpaid vendor in possession	769
Unpaid vendor does not lose his rights by agreeing to hold the goods in the changed character of bailee for the buyer	769
The unpaid vendor's right may exist by special contract after *actual possession* has been taken by buyer	771
When bills given to vendor have been dishonored he may retain possession of goods not yet delivered	772
And will be responsible only for actual damages, that is, the difference between contract price and market price	772
Where no difference is proven between contract price and market price, nominal damages to be given	773
And it makes no difference whether sale is of specific chattels or of goods to be supplied	773
Vendor's lien exists although he is warehouseman for the buyer	773
Unpaid vendor may estop himself from asserting his rights on the goods as against sub-vendee	744
This estoppel takes place where vendor assents to a sale by his purchaser to a sub-vendee	774
Effect of delivery order	776
Vendor may also estop himself from denying as against sub-vendee that the property has passed to the first buyer	778
Wharfinger's certificate that goods are ready for delivery not equivalent to warrant and not negotiable	778 a
Nor "undertakings" of a form not known to merchants	778 a
Vendor estopped from setting up lien when he has issued documents which are, by the custom of the trade and according to the intention of the parties, negotiable	778 a
Effect of Factors' Act, 1877, s. 5	778 a
Definition of "document of title" considered	778 a
Propositions deduced from the review of the authorities	779
Warehousemen and other bailees may make themselves liable to both parties	780
May estop themselves from setting up the claims of unpaid vendor against purchasers or sub-vendees	781

§ 766. WHERE the property in goods has passed by a sale, the *right of possession* also passes, but is, as we have seen, defeasible on the insolvency of the buyer, or the non-performance of conditions precedent or concurrent imposed on him by the contract.

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; 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*.

§ 767. 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 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.

§ 768. Before reviewing the authorities, attention must be recalled to the different meanings of the word "delivery," as pointed out in Book IV. Part II. Ch. 2.[1] 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

(*a*) This is termed the right of *retention* in the Scotch law; see *ante*, § 413.

[1] [See § 675.]

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*).

§ 769. It will be convenient to review, in the first place, the cases which establish the existence of this peculiar right in the unpaid vendor who has waived his lien, and then to treat separately his remedies, 1st, of resale; 2dly, of lien; and 3dly, of stoppage *in transitu*.

The leading cases of Bloxam *v.* Sanders (*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 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 (*f*). If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right, in virtue of the original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the *possession*, and his insolvency, without payment of the price, defeats that right. The buyer, or *those who stand in his place*, may still obtain the right of possession if they will pay or tender the price, or they may still act on their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite unless they have both those rights." The assignees of the insolvent buyer were therefore held not entitled to maintain trover against the unpaid vendor, who had sold the goods on credit, but who still held them in his own warehouse.

(*b*) Townley *v.* Crump, 4 A. & E. 58, and other cases examined, *post*, § 770.

(*c*) 4 B. & C. 941, *ante*, § 678.

(*d*) 4 B. & C. 951.

(*e*) In Donald *v.* Suckling, 35 L. J. Q. B. at p. 237.

(*f*) Tooke *v.* Hollingworth, 5 T. R. 215.

In 1833, Miles *v.* Gorton (*g*) 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 sub-vendee 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.

§ 770. In Townley *v.* Crump (*h*), 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 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. 115 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 divest the right in such a case, *upon the insolvency of the vendee*. Cases have been cited, but none where the question

(*g*) 2 C. & M. 504. See, also, Grice *v.* Richardson, 3 App. Cas. 319 (Privy Council), *post*, § 773.

(*h*) 4 A. & E. 58.

arose between the *original vendor* and *vendee*." It is impossible to imagine a clearer case than this of the vendor's agreement to change the character of his possession into that of 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 bankrupty. 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.

§ 771. Next came, in 1840, the case of Dodsley *v.* Varley (*i*), 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."

§ 722. In 1851, Valpy *v.* Oakeley (*j*) 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 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 dif-

(*i*) 12 A. & E. 632. (*j*) 16 Q. B. 941; 20 L. J. Q. B. 380.

ference between the contract price and the market price, and only nominal damages where no such difference is proven. The *ratio decidendi* in this case was distinctly that, on the dishonor of the bills given for the price, the parties were placed *in the same condition as if the bills had never been given, and the contract had been to pay in ready money.* All the judges treated the case as one of lien, reviving on the non-payment of the bills. Wightman, J., said: "I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running, they may be taken to have been *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.

§ 773. This point came again before the same court in Griffiths *v.* Berry (*k*), in 1859, the judges being Crompton and Hill, neither of whom was on the bench when Valpy *v.* Oakeley was decided. The circumstances were precisely the same as in the last-named case. Crompton, J., said: "I apprehend that where there is a sale of specific chattels, to begin with, and a bill is given, there is no lien in the strict sense of the word; but if afterwards an insolvency happens, and the bill is dishonored, then the party has in my opinion a right *analogous to that which a vendor who exercises the right of stoppage in transitu has.* . . . When goods are left in the hands of a vendor, it cannot properly be said to be a stoppage *in transitu*, for it is one of those cases in which the *transitus* has not commenced. . . . It has always seemed to me, and I think it has been established in a great many cases, that there is a similar right where the *transitus* has not commenced; and although no right to a strict lien has ever existed, yet where goods remain in the party's hands and insolvency occurs, and the bill is dishonored, there a right analogous to that of stoppage *in transitu* arises, and there is a right to withhold delivery of the goods." It was accordingly held, 1st. That the plaintiff was only entitled to nominal damages, in accordance with the decision in Valpy *v.* Oakeley; 2dly. That it makes no difference in such cases whether the sale is of specific chattels, or an executory contract to supply goods (*l*).

[The point was again considered in Ex parte Chalmers (*m*) in 1873

(*k*) 1 E. & E. 680; 28 L. J. Q. B. 204.

(*l*) It was also held that the indorsement 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 (1849), *post*, § 776, which was not cited in the case. See now, however, Factors' Act, 1877, s. 5, *post*, § 778 a.

(*m*) 8 Ch. 289.

before the Court of Appeal in Chancery. Hall & Co. had contracted to sell goods to Edwards by monthly instalments, 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 instalment of goods already delivered which was unpaid for, and a final instalment remaining to be delivered. Hall & Co., upon notice of the insolvency, refused to deliver the remaining instalment, 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 instalments 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 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 instalments as on a sale of specific goods.

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*, § 769. 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 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.]

§ 774. The rights of the unpaid vendor, under the circumstances which we are now considering, were not [previous to the Factors' Act, 1877 (*o*)] affected by a resale to a third person, unless the vendor

(*n*) 3 App. Cas. 319. (*o*) 40 & 41 Vict. c. 39, s. 5, *post*, § 778 a.

had by his conduct *estopped* himself from asserting his own rights, and we must now turn to the class of cases where the conflict of pretensions on the goods not paid for arose between the original vendor and the sub-vendee [considering first the decisions prior to Factors' Act, and then the effect of that act].

Without referring specially to the early cases (*p*), we may pass to the decision of the King's Bench in Stoveld *v.* Hughes (*q*), 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 vendors' 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 to the marking of the timber by the plaintiff's agent, which took place at the same time. If that be not an executed delivery, I know not what is so." The other judges, Grose, Le Blanc, and Bayley, concurred.

In Craven *v.* Ryder (*r*), 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 sub-vendee 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.

§ 775. The next in date, and the leading case, is Dixon *v.* Yates (*s*), 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

(*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.

(*q*) 14 East, 308.

(*r*) 6 Taunt. 433.

(*s*) 5 B. & Ad. 313.

owner. He afterwards sold forty-six puncheons, parcel of his purchase, to one Collard, a clerk in Yates's service, and gave him an invoice specifying the number and marks of each puncheon, and took Collard's acceptances for the amount of the invoice. By invariable usage in Liverpool, the mode of delivering goods sold while in warehouse is that the vendor hands to the buyer a delivery order for the goods. On a former occasion, Collard had made in the same manner a similar purchase of another parcel of the rums, and Dixon gave him delivery orders for them; but when Collard applied for delivery orders for this second purchase, Dixon refused, but said, if he wanted one or two puncheons, he, Dixon, would let him have them. Collard then drew two orders on Dixon for one puncheon each, and the latter gave corresponding orders on Yates, and these two puncheons were delivered to a purchaser from Collard. One of Collard's bills became due on the 16th 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's warehouse, and marked with the letter C. On the 28th of October, before Collard's bill was due, he sold twenty-six puncheons of the rum bought from Dixon to one Kaye, receiving in payment Kaye's acceptances, which were duly honored. On the 31st of October, Kaye's cooper went to Yates's premises, and got Yates's warehouseman to go with him to the warehouse, and there marked the casks (which were described in Collard's invoice to Kaye by marks and numbers) with the letters J. A. K., and got the casks ready for Kaye's gauger, who gauged them, and the casks were then coopered by Kaye's cooper. When the gauger first came to Yates's office, a clerk of Yates repeatedly refused permission that he should gauge the casks for Kaye, but Collard came afterwards, and had it done. Collard had taken samples of the rum when first landed on the quay, but not after it was in the warehouse.

It was held by all the judges that the possession of the vendor Dixon had never been divested: *not* by Collard's *taking the samples*, for they were not taken as part of the bulk; *not* by his *taking possession of the two puncheons* which were actually delivered to him, because it is only when delivery of part is intended to operate as delivery of the whole that it can have that effect; *not* by the *marking*, for that is an equivocal act, and may be merely for the purpose of identifying the goods, besides which, usage required delivery orders, which had been expressly refused; *not* by the *coopering and gauging*, because that had been objected to by Yates's clerk, and was only accomplished

through the unauthorized interference of Collard, availing himself of his position as clerk. Parke, J., in delivering his opinion, said: "There was no delivery to the sub-vendees, and the rule is clear *that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title defeasible on the non-payment of the price by the first vendee*" (*t*).

§ 776. M'Ewan *v.* Smith (*u*) 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. & 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 undernoted 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 mean time, however, the appellants M'Ewan 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 indorsed to them by Bowie & Co. Alexander's clerk thereupon gave them this note: "Delivered to the order of Messrs. M'Ewan & 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. M'Ewan 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. M'Ewan per order of 25th of Sept., 1843,' and at their request he gave them a slip of paper to this effect." On these facts Messrs. M'Ewan claimed that the goods had been delivered to them, and brought their action in Scotland for the goods.

It seems manifest, on the face of the transaction, that Messrs.

(*t*) Craven *v.* Ryder, 6 Taunton, 433. See Griffiths *v.* Perry, *ante*, § 773.

(*u*) 2 H. L. C. 309.

M'Ewan 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 sub-vendees, in constituting delivery of possession, and in vesting title in a sub-vendee as against the unpaid original vendor.

The Lord Chancellor (Lord Cottenham) first said of the note given by Alexander's clerk, that it was "nonsense to say that by that memorandum the goods were delivered." His Lordship then said (*v*): "First, it is said that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that . . . merely puts the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the 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

(*v*) The force of these observations of the learned Lords has been destroyed since the passing of the Factors' Act, 1877, *post*, § 778 a.

this note *as a dealing between the vendors and the second vendee*, when in fact there was no communication whatever between them."

Lord Campbell said: "The single point in this case is, whether Smith & Co., the respondents, the original vendors of the goods, retained their lien upon them. . . . If a bill of lading is given, and that is indorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. . . . It is said that the delivery order and the subsequent payment of the price by the second vendee take away the lien of the vendors. These acts do not seem to me to do so; for, first, this price was not paid to the original owners; and then to treat what passed between *other people as an estoppel to the original owners* is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to the point for which no authority in the usage of trade or in the law can be shown" (*w*).

As to the true nature of the unpaid vendor's right on the goods in such circumstances, his Lordship was very emphatic in repudiating any supposed analogy with stoppage *in transitu*. He said: "Several of the judges in the court below discuss at great length the question of stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case *than the doctrine of contingent remainders*." It was in his Lordship's opinion clearly the revival of the lien, which entitles the vendor to exercise his right on goods sold originally with a waiver of lien, if the buyer becomes insolvent before the credit expires.

The law on this point has been altered since the decision in M'Ewan *v.* Smith in 1849. By the 5th section of the Factors' Act, 1877, *post*, § 778 a, the lawful transfer of a delivery order by the buyer to a *bona fide* transferee for value divests the original vendor's lien.]

§ 777. 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, etc.]. 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,

(*w*) 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. Ib. 205; Farmeloe *v.* Bain, 1 C. P. D. 445.

(*x*) E. B. & E. 448; 27 L. J. Q. B. 248.

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 Earle, 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 sub-vendee.

§ 778. In Woodley *v.* Coventry (*z*), 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 plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse, and lodged it there, the granary clerk saying, "It is all right," and showing the plaintiff samples of the flour sold to Clarke. The plaintiff sold the flour to different persons, and the defendants delivered part of it, but, Clarke having in the mean time absconded and become bankrupt, the defendants refused, as unpaid vendors, to part with any more of the flour. The plaintiff brought *trover*, and it was contended for the defendants that the estoppel set up against them by the plaintiff could not prevail against the rule that trover will not lie where the property is not vested; and that by the contract between the defendants and Clarke no property had passed, because the sale was not of any specific flour, but of flour to be supplied generally in accordance with the samples. But the court held that the defendants were estopped also from denying that the property had passed, and refused to set aside the verdict given in plaintiff's favor.

Under very similar circumstances, the Queen's Bench held in Knights *v.* Wiffen (*a*) that the estoppel took place, even where the

(*z*) 2 H. & C. 164; 32 L. J. Ex. 185.

(*a*) L. R. 5 Q. B. 660. [On the other hand, in a recent case, F., a broker, purported to sell to unnamed principals, for the defendants, 1000 bags of rice, which on a subsequent day he purported to buy for the plaintiffs at a different price. Neither the plaintiffs nor the defendants had instructed F. to act as their agent, and neither knew of his dealings with the other. F. then obtained from the defendants, who were both merchants and wharfingers, a delivery order, addressed to the superintendent of the defendants' wharf, for the delivery of the rice to the plaintiffs; and the latter, on receipt of the order, paid part of the price to F., who absconded with the money. In the action by the plaintiffs to recover of the defendants the 1000 bags of rice, it was held that the defendants were not estopped from denying the plaintiff's title, and that the latter had no cause of action for the non-delivery of the

buyer had paid the price before presenting the delivery order, the court holding that the buyer's position was nevertheless altered through the defendants' 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.

§ 778 a. [In Gunn *v.* Bolckow, Vaughan & Company (*y*), 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, wharfinger's certificates in the following form: —

I hereby certify that there are lying at the works of Messrs. Bolckow, Vaughan & Co., Limited, of Middleborough, . . . 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 treated as 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. (*z*), "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 (*a*): "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.

In Farmeloe *v.* Bain (*b*), the defendants, under a contract for the

rice; and Knights *v.* Wiffen was held not to apply. Gillman *v.* Carbutt, 61 L. T. 281; 37 W. R. 437 (1889). — E. H. B.]

(*y*) 10 Ch. 491.

(*z*) At p. 499.

(*a*) At p. 502.

(*b*) 1 C. P. D. 445.

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 at the time. The plaintiffs bought from Burrs & Co. on the faith of these documents, which it was admitted were not documents known 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.

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*: —

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 indorsement hereon.*

Smith & Co. indorsed the warrants to the plaintiffs for value, who, on the failure of Smith & Co. and the defendants, 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 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*). Jessel, M. R., drew the inference that the sellers must have intended the warrants to be

(*c*) 5 Ch. D. 205.

(*d*) The form of the warrants had been settled by eminent counsel in 1866. 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.

used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued them 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 marks the distinction between a delivery warrant, which is a document of title transferable by indorsement, and which represents, and is intended to represent, the goods, and a wharfinger's certificate that the goods are "ready for delivery," the form of document considered in Gunn *v.* Bolckow, Vaughan & Co., which is not intended to represent the goods, and is not, therefore, equivalent to a document of title.

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 Factors' Act, 1877 (*e*). The 5th section provides that, "where any document of title to goods has been lawfully indorsed, or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (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.*"

The expression "document of title" must, it is submitted, be interpreted by reference to the definition given in the 4th section of the Factors' Act, 1842 (*g*), which is fully set out *post*, although the words "within the meaning of the principal acts" are omitted in the section of the later act. That definition is wider than the one contained in the 2d section of the Factors' Act, 1825 (*h*), but omits wharfingers' certificates, which are expressly included in the earlier act. It is submitted that the question whether a wharfinger's certificate is or is not equivalent to a document of title depends upon its form. If it purports to be a delivery warrant, making the goods deliverable to "A. B. or his assigns by indorsement or otherwise," the warrant or certificate then represents the goods, and is used as proof of the possession or control of them. This was the form of certificate in Farina *v.* Home (*i*). A document in this form, although not expressly mentioned in the 4th section of the Factors' Act, 1842, would clearly be included in the general words of the section, "any other document used in the ordinary course of business as proof of the possession or

(*e*) 40 & 41 Vict. c. 39.
(*g*) 5 & 6 Vict. c. 39.
(*h*) 6 Geo. IV. c. 94.
(*i*) 16 M. & W. 119, *post*, § 811.

control of the goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." If, on the other hand, the document is in form only a certificate that the goods are *ready for delivery*, it does not and is not intended to represent the goods, nor to entitle the holder to possession of them; it is, therefore, not a document of title, and no alleged custom of trade can make it one. This was the form of certificate in Gunn *v.* Bolckow, Vaughan & Co. (*j*).]

§ 779. 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: —

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 (*k*). (And see *ante*, § 759 a, as to antecedent partial deliveries not paid for.)

Secondly. — The vendor's remedy will not be impaired by his giving a delivery order for the goods if countermanded before his bailee attorns to the buyer (*l*).

[*Thirdly.* — If the controversy be between the unpaid vendor and a sub-vendee or pledgee, the vendor may retain possession of the goods, unless he has transferred to the buyer a bill of lading or other document of title to the goods which the buyer has lawfully transferred for value to the sub-vendee or pledgee, in which case 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, the unpaid vendor has the same right against a sub-vendee or pledgee as against the original buyer (*m*), unless he be precluded by the estoppel resulting from his assent, express or implied, to the sub-sale or pledge when informed of it (*n*).

Fourthly. — The vendor may by language or conduct assent to the sub-sale or pledge before it has taken place (*o*); but his assent will

(*j*) *Ante*, § 778 a.

(*k*) 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 A. & E. 58; Craven *v.* Ryder, 6 Taunt. 433; Dodsley *v.* Varley, 12 A. & 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.

(*l*) M'Ewan *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.

(*m*) Craven *v.* Ryder, 6 Taunt. 433, per Parke, B., in Dixon *v.* Yates, 5 B. & Ad. 313; M'Ewan *v.* Smith, and Griffiths *v.* Perry, *ubi supra.*

(*n*) Stoveld *v.* Hughes, 14 East, 308; Pearson *v.* Dawson, E. B. & E. 448; 27 L. J. Q. B. 248; Merchant Banking Co. *v.* Phœnix Bessemer Steel Co. 5 Ch. D. 205.

(*o*) Merchant Banking Co. *v.* Phœnix Bessemer Steel Co. *ubi supra.*

not be implied from the fact alone that he has issued to the buyer a document which is not a document of title, but which the buyer has dealt with by way of sale or pledge, unless such document contain some representation of fact creating an estoppel (*p*).

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.

§ 780. It will be again necessary to refer more particularly (*post*, Ch. 4, On Lien) to the effect of delivery orders; but before leaving the subject of estoppel, attention may properly be directed to the cases in which it has been applied to warehousemen and bailees who may by their conduct make themselves responsible to sub-vendees without relieving themselves of liability towards the unpaid vendor. For the doctrine of estoppel in general, the reader is referred to the notes appended to the case of Doe *v.* Oliver (*q*), in Mr. Smith's very valuable book. The principle was thus stated by Lord Denman in Pickard *v.* Sears (*r*): "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But in Freeman *v.* Cooke (*s*), Parke, B., said — and this dictum was approved by Chelmsford, L. C., in Clarke *v.* Hart (*t*) — 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.

§ 781. In Stonard *v.* Dunkin (*u*), the defendant, a warehouseman, gave a written acknowledgment that he held a parcel of malt for the plaintiff, who had advanced money on a pledge of it to one Knight. Knight became bankrupt, and the defendant attempted to show that the malt had not been measured, and that the property in it therefore passed to Knight's assignees; but Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff, 'The malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned

(*p*) Gunn *v.* Bolckow, Vaughan & Co. 10 Ch. 491; Farmeloe *v.* Bain, 1 C. P. D. 445.

(*q*) 2 Sm. L. C. pp. 829 *et seq.* ed. 1887.

(*r*) 6 A. & E. 474. See the remarks of Lord Blackburn on the doctrine of estoppel *in pais* in Burkinshaw *v.* Nicolls, 3 App. Cas. at p. 1026, and the definition of estoppel offered by Bramwell, L. J., in Simm *v.* Anglo-American Telegraph Company, 5 Q. B. D. 188, C. A., at p. 202, and the observations of Brett, L. J., at p. 206.

(*s*) 2 Ex. 654.

(*t*) 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.

(*u*) 2 Camp. 344.

to him, and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title."

This case was followed by Hawes *v.* Watson (*x*), in the King's Bench in 1824, and by Gosling *v.* Birnie (*y*), 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."

The rule has since been applied in very many cases, among which may be cited Gillett *v.* Hill (*z*), Holl *v.* Griffin (*a*), Lucas *v.* Dorrien (*b*), and Woodley *v.* Coventry (*c*); and it was recognized in Swanwick *v.* Sothern (*d*), in the elaborate judgment delivered by Blackburn, J., in the Queen's Bench, in Biddle *v.* Bond (*e*), and in Knights *v.* Wiffen (*f*).

[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 (*g*).]

(*x*) 2 B. & C. 540.

(*y*) 7 Bing. 339.

(*z*) 2 C. & M. 536.

(*a*) 10 Bing. 246.

(*b*) 7 Taunt. 278.

(*c*) 2 H. & C. 164; 32 L. J. Ex. 185.

(*d*) 9 A. & E. 895.

(*e*) 6 B. & S. 225; 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 Company, L. R. 3 Q. B. 584; Hart *v.* Frontino Gold Mining Company, 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 Company, 5 Q. B. D. 188, where some criticisms are passed upon Hart *v.* Frontino Gold Mining Company, 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 Company, 41 L. T. N. S. 553.

(*f*) L. R. 5 Q. B. 660, *ante*, § 778. See, also, Farmeloe *v.* Bain, 1 C. P. D. 445, *ante*, § 778 a.

(*g*) L. R. 10 C. P. 307, at pp. 316-318. See, also, Coventry *v.* Great Eastern Railway Company, 11 Q. B. D. 776, C. A.; Seton *v.* Lafone, 19 Q. B. D. 68, C. A.

CHAPTER III.

REMEDIES AGAINST THE GOODS — RESALE.

	Sect.
May vendor resell if buyer continues in default?	782
Law as stated in Blackburn on Sale	782
Review of authorities	783
Right cannot exist after tender of price by buyer	783
Nor before buyer's default	783
Purchaser in default cannot maintain trover	785
A resale in pursuance of right reserved by the terms of original sale is a rescission of the sale	786
A buyer's rights different when resale is made under express reservation of that power, and when there has been no such reservation	787
Modern cases decide that vendor has no right of resale on buyer's default, and is always liable for at least nominal damages	787
Law in America is different on this point	788
Where unpaid vendor tortiously retakes goods *after* delivery	789
Where vendor tortiously resells *before* delivery	792
Damages in trover not always the full value of the goods converted	793
Lien to be distinguished from pledge	793
Full value of goods recoverable against stranger	793
Measure of damages where the goods are returned	793
Effect of Judicature Acts	793
Summary of the rules of law on resale by vendor	794
Title of second purchaser on resale	795

§ 782. We have seen that the vendor has no right to rescind the sale when the buyer is in default for the payment of the price (*a*), and this suggests at once other important questions. What is a vendor to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods are perishable (*b*), 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 Sale was published, in 1845. The following is the statement of the learned author: —

"Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed to the assent of the purchaser, under the contract of sale, the question arises, How much greater than a lien are they? and this is a question that, in the present state of the law, no one will venture to answer positively, but, as has already been said, the better opinion

(*a*) *Ante*, § 766.

(*b*) As to the sale of perishable goods, or goods which for any other reason it may be desirable to have sold at once by order of the court, see R. C. S. Ord. L. r. 2. Bartholomew *v.* Freeman, 3 C. P. D. 316; Coddington *v.* Jacksonville, etc. Railway Company, 39 L. T. 12; The Hercules, 11 P. D. 10.

seems to be, that *in no case do they amount to a complete resumption of the right of property*, or, in other words, *to a right to rescind the contract of sale*, but perhaps come nearer to the rights of a *pawnee with a power of sale* than to any other common-law rights. At all events, it seems that a resale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover" (*b*).

§ 783. There has been a great deal of authority on the point since the publication of Blackburn on Sale, 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.

In Langfort *v.* Tiler (*e*), Holt, C. J., ruled, in 1705, that "after earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." We have already seen that, by the law as now settled, the agreement is not dissolved, according to the *dictum* in this old case.

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 bargain and sale, and could only recover on a count for damages, as on an executory agreement.

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 not been overruled. See Lamond *v.* Davall, § 786, *infra*.

(*b*) Blackburn on Sale, p. 325.
(*c*) 1 Q. B. 395.
(*d*) 5 H. & N. 288; 29 L. J. Ex. 180.
(*e*) 1 Salk. 113, cited by Lord Ellenborough in Hinde *v.* Whitehouse, 7 East, 571; and by Littledale, J., in Bloxam *v.* Sanders, 4 B. & C. 945.
(*f*) 1 Peake, 42 n. (58 n. in ed. 1820).
(*g*) 4 Esp. 251.

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.

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.

§ 784. 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 worse the longer they are kept, and at all events there is the risk of the price becoming lower" (*k*).

In Blackburn on Sale, 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*).

§ 785. 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*

(*h*) 6 Taunt. 162.
(*i*) 3 Camp. 426.
(*k*) 4 Bing. 722.
(*l*) Blackburn, p. 337.
(*m*) 10 Bing. 376.

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."

In Milgate *v.* Kebble (*n*), decided in the Common Pleas in 1841, the plaintiff brought *trover* upon the following facts. The defendant sold the plaintiff his crop of apples, for 38*l.*, to be paid by instalments *before* the buyer took them away. The buyer paid 33*l.* on account, and gathered the apples on the 1st 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*l.* on the 22d of January. The jury found that a reasonable time had *not* elapsed before the resale, and gave a verdict for 5*l.* damages to the plaintiff. On leave reserved, a motion for nonsuit was successful, on the ground that the vendor's right of *possession* was not lost, so as to enable the 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.

In Fitt *v.* Cassanet (*o*), the subject again came before the same court in 1842, but the facts did not require a direct decision on it, though the judges all assumed it to be settled law that a resale would be legal, after a refusal to accept on the part of the purchaser.

Thus stood the authorities in 1845, and one of the points in dispute was settled very speedily afterwards.

§ 786. In Lamond *v.* Davall (*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*l.*, of certain shares, one of the conditions of the sale being that the goods might be resold unless the purchase-money was paid on the following day, the bidder so making default being answerable for the loss on the resale. The vendor resold for 63*l.* Erle, J., nonsuited the plaintiff, on the ground that this reservation of the power of resale was in effect a condition for making void the sale on default of the buyer, and that the actual resale had rescinded the original contract, so that *assumpsit* could not be maintained on it. The 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

(*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*, § 40; Lord *v.* Price, L. R. 9 Ex. 54.

(*o*) 4 M. & G. 898.

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

(*q*) 4 Esp. 251.

(*r*) 6 Taunt. 162.

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 default, 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 a special action for damages for the difference in price and the expenses, whether there has or has not been an express reservation of the right of resale.

§ 787. When the sale is thus conditional, the vendee's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is *in duriori casu.* He runs all the risk of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale (*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, *quà* 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*).

The cases of Valpy *v.* Oakeley (*x*), and Griffiths *v.* Perry (*y*), cited in the preceding chapter, §§ 772, 773, decide that in an action by the buyer, *on the contract*, against the unpaid vendor for non-delivery, whether the sale was of specific goods or of goods to be supplied, the buyer can only recover the actual damages, that is, the difference between the contract price and the market value ; and to this extent the buyer's right is plain, because the effect of his default was not to rescind the contract, and he is entitled to any profit on the resale. But the cases go 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.

§ 788. In the United States the law is somewhat different, and in

(*s*) 4 Bing. 722.

(*t*) Sugd. on Vendors, p. 39, ed. 1862.

(*u*) Ashlin *v.* Greaves, 3 Camp. 426 ; Valpy *v.* Oakeley, and Griffiths *v.* Perry, *ante*, § 772.

(*x*) 16 Q. B. 941 ; 20 L. J. Q. B. 380.

(*y*) 1 E. & E. 680 ; 28 L. J. Q. B. 204.

Dustan *v.* McAndrew (*z*) was thus stated: "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of one of three remedies: 1st, He may store or retain the property for the vendee and sue him for the entire price; 2d, He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or, 3d, He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

§ 789. Where an unpaid vendor, *after delivery* of the goods to the buyer, tortiously retakes and resells them, the law is equally well settled that the contract is not rescinded, and the vendor may still recover the price, while the buyer may maintain an action in trover for the conversion. In these cases neither party [could, previous to the Judicature Acts], set up his own right as a defence in an action by the other, but must [have brought] 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: —

§ 790. 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 purchase-money, and gave this bill for the residue; had possession of the goods delivered to him; kept them for two months, and was then dispossessed by the vendor; and it is said that entitles the defendant to refuse to pay the bill. I am, however, inclined to think that in point of law that is not so, but that the vendee's remedy is by an action of

(*z*) 44 N. Y. 72, per Earl, commissioner, at p. 78. The law here laid down has been since frequently affirmed and restated. Hayden *v.* Demets, 53 N. Y. 426 (1873), per Church, C. J., at p. 431; Smith *v.* Pettee, 70 N. Y. 13 (1877), per Rapallo, J., at p. 18; Mason *v.* Decker, 72 N. Y. 595 (1878), per Earl, J., at p. 599; 2 Kent, 504, ed. 1873.

(*b*) 2 B. & Ad. 320.

trespass. In that action he will be entitled to recover a full compensation for the injury which he sustained by the wrongful seizure of the goods, and their value will be the measure of damages." Park, J., also held, that there was not a total failure of consideration, so that of course the defence was unavailing against a bill of exchange (because no partial failure of consideration, except for an ascertained liquidated sum, is a good defence in an action on a negotiable instrument (*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.*"

§ 791. 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 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

(*c*) Byles on Bills, 151, 152, ed. 1885; but now unliquidated damages may be set up in a counter-claim. Ord. XIX. r. 3; Ord. XXI. r. 17.

(*d*) 8 M. & W. 575.

lead to the consequence that a party may set off a debt due in one case against damages in another. *The verdict in this case does not at all affect the right of the defendant to recover the whole* 67*l. due to him from the plaintiff.* The learned judge was therefore clearly in error." Alderson, B., said that the debt due by the plaintiff "ought to have been excluded altogether, otherwise it is equivalent to allowing a set-off in trespass."

§ 792. 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*l.*, being the excess in the market value of the sheep over the price at which they had been bought. On the second count there was a formal verdict for 118*l.* 19*s.*, the whole value of the sheep, without deducting the unpaid price, with leave reserved to the defendant to move for a verdict in his favor on that count, or to reduce the damages. The court held the count in trover maintainable, in which opinion it was stated by Bramwell, B., when delivering the judgment, that Blackurn, J., concurred: and on the question of damages it was held that the plaintiff could only recover the actual loss sustained, not the whole value of the sheep for which he had not paid; and the damages were reduced to 5*l.*

In this case, Gillard *v.* Brittan (*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 has passed into his ownership and actual possession. But in Chinery *v.* Viall the *ratio decidendi* was that the vendor could not, by reason of his conversion *before* delivery, maintain a cross-action for the price, and therefore *ex necessitate* it must be allowed for in calculating the buyer's damages in his action, for otherwise the buyer would get the goods for nothing (*g*).

§ 793. On the point decided in Chinery *v.* Viall, namely, that in an action of trover the measure of damages is not always the full value of the goods, and that a party cannot recover more by suing on the tort than on the contract, but that the actual damage only ought to be given in either action, the case has met with full approval in subsequent decisions. It was followed by the Common Pleas (*dissentiente* Williams, J.) in Johnson *v.* Stear (*h*), which was an action in trover

(*e*) 5 H. & N. 288; 29 L. J. Ex. 180.
(*f*) 8 M. & W. 575.
(*g*) See per Denman, J., in Johnson *v.* Lancashire and Yorkshire Railway Company, 3 C. P. D. at p. 507.
(*h*) 15 C. B. N. S. 330; 33 L. J. C. P. 130.

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.

[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 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*).

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*).

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*).]

In Page *v.* Cowasjee (*o*), the cases were all reviewed, and the court,

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.

(*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 Company, 3 C. P. D. 499, where the cases are reviewed by Denman, J.

(*m*) Hiort *v.* London and North Western Railway Company, 4 Ex. D. 188, C. A.

(*n*) See Appendix A. to the Act of 1875, pt. ii. s. 4, and per Bramwell, L. J., in Hiort *v.* London and North Western Railway Company, *supra*, at p. 194.

(*o*) L. R. 1 P. C. 127; 3 Moo. P. C. C. N. S. 499.

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.

[The above-cited decisions are of little importance since the Judicature Acts. The forms of action are no longer material, and it is provided (*p*), 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 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*, § 790, Gillard *v.* Brittan, *ante*, § 791, and Page *v.* Cowasjee, *ante*, § 793, the defendant may now obtain relief by way of counter-claim.]

§ 794. The following summary of the law is submitted as fairly resulting from the foregoing authorities [having regard to the effect of the Judicature Acts]: —

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 (*q*); but not in the absence of such express reservation (*r*).

Secondly. The vendor's remedy, after a resale under *an express reservation of that right*, against a purchaser in default, is a special action for damages for the loss of price and expenses of the resale (*s*). 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 (*t*).

Thirdly. The vendor's remedy, after a resale made in the absence of an express reservation of that right, is *assumpsit* on the original contract, which was not rescinded by the resale. And in this action he may either recover as damages the actual loss on the resale com-

(*p*) By Ord. XIX. r. 3, of the Rules of the Supreme Court, made under section 17 of the Supreme Court of Judicature Act, 1875. Upon the question of counter-claims generally, see Bullen and Leake, Prec. of Pl. Part II. Ch. 3, p. 51 (4th ed. 1888).

(*q*) Lamond *v.* Davall, 9 Q. B. 1030.

(*r*) 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.

(*s*) Lamond *v.* Davall, *ubi supra.*

(*t*) Sugd. on Vendors, p. 39.

posed of the difference in price and expenses (*u*), or he may refuse to give credit for the proceeds of the resale, and claim the whole price (*v*), leaving the buyer to a [counter-claim] for damages of 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 (*v*).

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*).

Fifthly. A buyer, even if *not in default*, has no right to treat the sale as rescinded by reason of the vendor's tortious resale; and cannot get back any part of the price paid, nor refuse to pay the remainder when due. His only remedy [was] a cross-action in damages (*y*) [but he may now raise a counter-claim in the vendor's action for the price].

Sixthly. A buyer *not in default* may maintain trover against a vendor who has tortiously resold, and [prior to the Judicature Acts] the vendor [could] not have the unpaid price deducted from the damages, but must [have brought] his cross-action (*z*) [but he may now set up a counter-claim for the amount of the unpaid price]; and if the vendor is unable to maintain a cross-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 (*a*).

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 (*b*).

§ 795. Where there has been a resale, the title of the second purchaser depends on the fact whether the first buyer was in default, for, if not, we have seen that he may maintain trover. The subject was touched on in Gosling *v.* Birnie (*c*), which went off on the point of estoppel, so that nothing was decided on it.

(*u*) Maclean *v.* Dunn, *ubi supra.*

(*v*) Stephens *v.* Wilkinson, and Page *v.* Cowasjee, *ubi supra.*

(*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*) Gillard *v.* Brittan, 8 M. & W. 575.

(*a*) Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

(*b*) 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.

(*c*) 7 Bing. 339.

AMERICAN NOTE.

RESALE.

§§ 782–795.

The right of resale on the default of the buyer to make payment, and to recover the difference between the proceeds and the original contract price, is universally established in this country. Sands *v.* Taylor, 5 Johns. 395 (1810), the leading case in America; Mann *v.* National Oil Co. 87 Hun, 558; Gray *v.* Central R. R. Co. 82 Ib. 523; Petrie *v.* Stark, 79 Ib. 550; Hayes *v.* Nashville, 80 Fed. R. 641; Girard *v.* Taggart, 5 S. & R. 19; Haines *v.* Tucker, 50 N. H. 313; Dustan *v.* McAndrew, 44 N. Y. 72; Hayden *v.* Demets, 53 Ib. 431; Mason *v.* Decker, 72 Ib. 599; Holland *v.* Rea, 48 Mich. 218; Shawhan *v.* Van Nest, 25 Ohio St. 490; Cook *v.* Brandeis, 3 Metc. (Ky.) 557; Young *v.* Mertens, 27 Md. 114; Bell *v.* Offutt, 10 Bush, 632; Bagley *v.* Findlay, 82 Ill. 524; Grist *v.* Williams, 111 N. C. 53. In such sales the vendor acts as agent for the vendee (Lewis *v.* Greider, 51 N. Y. 231, criticised in Moore *v.* Potter, 155 N. Y. 481, reversing 87 Hun, 334; the vendor's right of resale is recognized and New York decisions cited; compare Penn *v.* Smith, 98 Ala. 560, supporting the text), as the title is not ordinarily retransferred to him by the mere default of the vendee in making the stipulated payment. It seems the sale should be made of the goods separately, and not as part of a larger quantity. The latter course might affect the market value of the identical articles themselves. See Cousinery *v.* Pearsall, 8 Jones & Sp. 114. The vendor should dispose of the goods to the best advantage. Riendeau *v.* Bullock, 147 N. Y. 269, 275; Gray *v.* R. R. 82 Hun, 523. Such resale must be within a reasonable time and be fairly made, or the amount recovered would not furnish a conclusive test of the damages to the vendor, though the sale might itself be valid. It is not necessary that the sale should have been made at the earliest possible moment after the default is known, even though the article be falling in market. Smith *v.* Pettee, 70 N. Y. 13; Pickering *v.* Bardwell, 21 Wisc. 562; George *v.* Glass, 14 Up. Can. Q. B. 514; Brownlee *v.* Bolton, 44 Mich. 218; Camp *v.* Hamlin, 55 Geo. 259. Two months' delay was held not unreasonable in Tilt *v.* La Salle Silk Man. Co. 5 Daly, 20, a sale of "organzine;" and also in Rosenbaums *v.* Weeden, 18 Gratt. 785, a sale of dry goods; and five months was held reasonable in Saladin *v.* Mitchell, 45 Ill. 79, a sale of grain.

Notice to the buyer of the time and place of resale is usual, and is important as tending to prove the sale a fair one; but it is not absolutely necessary in all cases that such notice should have been given. The same may be said of selling at auction. Crooks *v.* Moore, 1 Sandf. 297; Pollen *v.* LeRoy, 30 N. Y. 549; Van Brocklen *v.* Smeallie, 140 Ib. 70, 75; Mann *v.* National Oil Co. 87 Hun, 558; Lewis *v.* Greider, 51 Ib. 231; Lindon *v.* Eldred, 49 Wisc. 305; McGibbon *v.* Schlessinger, 18 Hun, 225; Ullmann *v.* Kent, 60 Ib. 271; Maulding *v.* Steele, 105 Ill. 644, reviewing the cases; Plumb *v.* Campbell, 129 Ill. 101, 111; Morris *v.* Wibaux, 159 Ib. 627, 646; Wrigley *v.* Cornelius, 162 Ib. 92. But although a notice of *the time and place* of resale may not be absolutely necessary, it is now generally thought that the vendor should inform the buyer that he intends

to exercise his right of resale, and hold him responsible for the difference in price; though some doubt whether even this is absolutely essential, and it cannot be safely asserted that it always is so. See Gaskell *v.* Morris, 7 W. & S. 32; Saladin *v.* Mitchell, 45 Ill. 79; Bagley *v.* Findlay, 82 Ib. 524; Holland *v.* Rea, 48 Mich. 218; Rosenbaums *v.* Weeden, 18 Gratt. 785; Redmond *v.* Smock, 28 Ind. 365; Atwood *v.* Lucas, 53 Me. 508; West *v.* Cunningham, 9 Port. 104; McClure *v.* Williams, 5 Sneed, 718; Clore *v.* Robinson, Ky. App. (1897), 38 S. W. 687.

If the resale be fairly made, especially if at public auction, the amount thus obtained is considered as a fair test of the market value, and the difference between the amount thus received and the original contract price is, therefore, the true standard of the vendor's damages. Sands *v.* Taylor, 5 Johns. 395; Lewis *v.* Greider, 51 N. Y. 231; Schultz *v.* Bradley, 4 Daly, 29; McGibbon *v.* Schlessinger, 18 Hun, 225; Hunter *v.* Wetsell, 84 N. Y. 549; Jones *v.* Marsh, 22 Vt. 144; Phelps *v.* Hubbard, 51 Ib. 489; Whitney *v.* Boardman, 118 Mass. 242; McLean *v.* Richardson, 127 Ib. 339; Rosenbaums *v.* Weeden, 18 Gratt. 785; Lamkin *v.* Crawford, 8 Ala. 153; Van Horn *v.* Rucker, 33 Mo. 391; Young *v.* Mertens, 27 Md. 126; Williams *v.* Godwin, 4 Sneed, 557; Bartley *v.* New Orleans, 30 La. An. 264; Bell *v.* Offutt, 10 Bush, 632, an important case.

Of course, also, the necessary expenses of the sale may be deducted, but not the expense of keeping the property an unreasonable time after a sale could have been properly made. Thurman *v.* Wilson, 7 Bradw. 312. And see Chalmers *v.* McAuley, 68 Vt. 44. The sale need not necessarily take place in the place of delivery, but a sale in some distant market, far from the place of original delivery, *may be* some evidence that the resale was unfair; and, if so, it might not furnish a conclusive test of the real value of the goods, or authorize the vendor to charge the vendee with the expense of transportation to such distant market. Chapman *v.* Ingram, 30 Wisc. 290; Rickey *v.* Tenbroeck, 63 Mo. 563. Perhaps the amount obtained on the resale is not conclusive evidence of the value as against the original buyer, when sued for the difference, but he may be allowed to show, especially if not notified of the sale, that the goods were resold for less than their value. The jury may adopt some other rule of ascertaining the value besides the sale. See Girard *v.* Taggart, 5 S. & R. 32; M'Combs *v.* M'Kennan, 2 W. & S. 219; Coffman *v.* Hampton, Ib. 390; Chapman *v.* Ingram, 30 Wisc. 290; Haskell *v.* McHenry, 4 Cal. 411; Rickey *v.* Tenbroeck, 63 Mo. 567.

CHAPTER IV.

REMEDIES AGAINST THE GOODS — LIEN.

	Sect.
Lien defined	796
Extends only to price, not charges, etc.	796
Law in America the same	796
May be waived when contract formed	797
Or abandoned afterwards	797
Waived by sale on credit, unless special agreement to contrary	797
Or proof of usage in the particular trade	797
And parol evidence of this usage admissible even when the contract is in writing	798
Waived by taking bill of exchange or other security	798
Abandoned by delivery of the goods to buyer	799
Delivery to divest lien, not same as to satisfy 17th sect. of Stat. of Frauds	801
Where goods are already in possession of the buyer	802
Where goods are in possession of bailee of vendor	803
Where goods are in possession of vendor at time of sale	803
Delivery to common carrier divests lien when carrier is buyer's agent	804
Delivery of part, when delivery of whole	804
Always question of fact as to intention	805
In absence of evidence, delivery of part operates only as a delivery of that part	805
No case where delivery of what remains in vendor's own custody has been held to be effected by previous delivery of part	806
Effect of marking goods, putting them in packages, etc.	807
Buyer may be let into possession as bailee of vendor	807
Conditional delivery	808
Transfer of documents of title	809
Factors' Acts	809
Legal Quays in London Act	811
Sufferance Wharves Act	811
Bills of Lading Act	812
Bills of lading, their nature and effect	813
Delivery orders, their effect	814
Dock warrants, warehouse warrants, and certificates	815
Law as stated in Blackburn on Sale	815
His views confirmed by subsequent cases	816
Remarks on the opposite constructions of courts and lawgivers	816
Factor's transfer of documents of title binds true owner, even when obtained through fraud	819
Effect of secret revocation of authority previous to Factors' Act, 1877	820
Warehouseman may demand surrender of his warrant, promising to deliver goods "on presentation," before delivering the goods	821
Bill of lading represents goods even after landing, till replaced by wharfinger's warrant	822
Effect of transferring parts of one set of bill of lading to different persons	822
Indorsement and delivery of dock warrants and other like documents of title	823
Vendor's lien not lost by delivery on a vessel f. o. b. if he take receipt in his own name	824
Unless the vessel belong to the purchaser of the goods	824
Lien revives in case of goods sold on credit, if possession remains in vendor at expiration of credit	825
Tender of price by purchaser divests lien	826
Loss of lien where vendor permits buyer to exercise acts of ownership on goods lying on the premises of a third person not bailee of vendor	827

§ 796. A LIEN in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied (*a*); and as the rule of law is, that in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right

(*a*) Hammonds *v.* Barclay, 2 East, 235.

to retain the goods until payment of the price (*b*), he has in all cases *at least* a lien, unless he has waived it.

But this lien extends only to the price. If by reason of the vendee's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, *if any*, is personal against the buyer. In Somes *v.* The British Empire Shipping Company (*c*), it was held by the unanimous judgment of the Queen's Bench, the Exchequer Chamber, and the House of Lords, that a shipwright who kept a ship in his dock after repairing her, in order to preserve his lien, had *no claim at all* for dock charges against the owner of the ship for the time that elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default in payment. Cockburn, C. J., in 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 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

(*b*) Miles *v.* Gorton, 2 C. & M. 504.

(*c*) 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. 229.

(*d*) 28 L. J. Q. B. 221.

(*e*) See per Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426.

during that time to our lien for the repairs.' The two courts held, and I think correctly held, that they had no such right."

In the case of Crommelin *v.* The New York 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.

§ 797. The vendor's lien may of course be waived expressly. It may also be waived by implication at the time of the *formation* of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the *performance* of the contract, by the vendor's actually parting with the goods before payment.

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.

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.

(*f*) 4 Keyes, 90.

(*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*, § 783.

(*h*) Chase *v.* Westmore, 5 M. & S. 180; Crawshay *v.* Homfray, 4 B. & Ald. 50; Cowell *v.* Simpson, 16 Ves. Jr. 275.

§ 798. 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, etc., at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment, half in two, half in four months." It was held by the court, unanimously, that parol evidence was admissible of a usage among dealers in such shares, that the delivery was to take place concurrently with, and at the time agreed on for payment. Williams, J., made some remarks with the view of suggesting a distinction between this case and Spartali *v.* Benecke, but added: "If Spartali *v.* Benecke cannot be distinguished in this way, I agree it ought to be overruled." Wightman, J., however, delivered the judgment of the whole court, declining to make any distinction, so that upon *this point* Spartali *v.* Benecke must be treated as an overruled case. But its authority is unshaken in support of the principle that a sale on credit, in the absence of a contrary stipulation express or implied from usage, is a waiver of the vendor's lien, and entitles the purchaser to delivery before payment.

A vendor also waives his lien by taking from the buyer a bill of exchange or other security payable at a distant day (*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.*"

§ 799. The vendor's lien is abandoned when he makes delivery of the goods to the buyer. 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

(*i*) 6 H. & N. 617; 30 L. J. Ex. 168. See, also, cases cited in notes to Wigglesworth *v.* Dallison, 1 Sm. L. C. 577, ed. 1887.

(*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.

right as proprietor of the thing would make a complete delivery for all purposes.

§ 800. The "actual receipt" required by the Statute of Frauds, being possible only when the vendor has made delivery, our present inquiry has been anticipated to some extent in Book I. Part II. Ch. 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.

§ 801. As there must always be a delivery of possession of *part* of the goods at least to satisfy the clause of the Statute of Frauds which relates to "actual receipt," it would seem to be a natural inference that the same acts which have been held sufficient under that statute to constitute an actual receipt by the purchaser would, if done in respect of the *whole* of the goods sold, have the like effect in determining the vendor's lien, and justifying an action for goods sold and delivered.

This was the impression of the learned author of the Treatise on Mercantile Law, as shown in an elaborate note, in which the authorities are reviewed (*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.

§ 802. Where the goods are at the time of the contract already in possession of the buyer, as agent of the vendor, the mere completion of the contract operates as a delivery of possession. There is nothing further that can be done to transfer the actual possession. 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,

(*m*) Sm. Mer. Law, note (*s*), p. 497, ed. 1877.

(*n*) *Ante*, § 771.

(*o*) Edan *v.* Dudfield, 1 Q. B. 306; Lillywhite *v.* Devereux, 15 M. & W. 285; Taylor *v.* Wakefield, 6 E. & B. 765.

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.

§ 803. When the goods are at the time of sale in possession of a third person, an actual delivery of possession takes place, and the vendor's lien is lost as soon as the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor, and shall become the agent of the buyer in retaining custody of them (*p*). The cases have been reviewed, *ante*, § 173 *et seq.*; § 776 *et seq.*

The goods are generally in the vendor's possession at the time of sale, and the modes by which delivery can be effected are so various as fully to justify Chancellor Kent's remark (*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.

§ 804. A delivery of the goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien (*r*).

[In ordinary cases, when the vendor fulfils his duty by dispatching the goods to the buyer, the carrier is the buyer's agent; but the vendor may undertake to deliver the goods to the buyer, and the carrier is then the vendor's agent: see *ante*, § 693.]

§ 805. Generally a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien. He may, if he choose, give up part, and retain the rest, and then his lien will remain on the part retained in his possession for the price of *the whole;* but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole, and puts an end to the vendor's possession, and consequently to his lien. The rule was stated conversely by Parke, J., in Dixon *v.* Yates (*s*), where he

(*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.

(*q*) 2 Kent, 510, ed. 1873.

(*r*) Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & 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.

(*s*) 5 B. & Ad. 313-341.

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 circumstancess 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.

In Slubey *v.* Heyward (*x*), the defendants, being in possession of bills of lading which had been indorsed to them as sub-vendees of a cargo of wheat, had ordered the vessel to Falmouth, with the consent of the vendor, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original vendor attempted to stop the further delivery because his buyer had become insolvent. Held, that "the transitus was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of, delivery, to separate part of the cargo from the rest."

Hammond *v.* Anderson (*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.

It seems very plain that in these two cases there was a delivery of the whole, not because a part was carried away, but because the vendor's agent and bailee in each case had attorned to the buyer, and become the buyer's bailee. There was, in the case of the bill of lading and of the delivery order, an agreement between the vendor, the buyer, and the bailee that the last-named should thenceforth hold for account of the buyer (*z*).

[Slubey *v.* Heyward and Hammond *v.* Anderson were thus explained by Brett, L. J., in Ex parte Cooper (*a*), and do not, therefore, form exceptions to the general rule that, *in the absence of evidence to*

(*t*) 2 A. & 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.

(*z*) See per Bramwell, L. J., in Ex parte Falk, 14 Ch. D. at p. 455, who says he does not understand Slubey *v.* Heyward, and also treats Hammond *v.* Anderson as a case of attornment by the wharfinger to the buyer.

(*a*) 11 Ch. D. 68, C. A. at p. 74. Ex parte Cooper and Ex parte Falk are noticed *post*, chapter on Stoppage *in Transitu*.

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.]

§ 806. In Bunney *v.* Poyntz (*b*), the vendee of a parcel of hay asked the vendor's permission to take a part, and this was granted, and it was held not to be a delivery of the whole.

So in Dixon *v.* Yates (*c*), the delivery by the vendor of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the vendor having refused a delivery order for the whole.

In Simmons *v.* Swift (*d*), 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* (*e*).

In Miles *v.* Gorton (*f*), 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 sub-vendee. 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 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 Hammond *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."

In Tanner *v.* Scovell (*g*), the facts were that one McLaughlin

(*b*) 4 B. & Ad. 568.
(*c*) 5 B. & Ad. 313.
(*d*) 5 B. & C. 857.
(*e*) See Hanson *v.* Meyer, 6 East, 614.
(*f*) 2 Cr. & M. 504; and see Grice *v.* Richardson, 3 App. Cas. 319.
(*g*) 14 M. & W. 28. See, also, Jones *v.* Jones, 8 M. & W. 431; Whitehead *v.* Anderson, 9 M. & W. 518; Wentworth *v.* Outhwaite, 10 M. & W. 436; Crawshay *v.* Eades, 1 B. & C. 181; Bolton *v.* Lancashire & Yorkshire Railway Co. L. R. 1 C. P. 431; 35 L. J. C. P. 137.

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, and addressed to the defendants, in the following terms: "Please weigh and deliver to Mr. McLaughlin 48 bales glue pieces." The defendants, on receipt of the order, weighed and sent a return of the weight to Boutcher & Co., who thereupon made an invoice, which they sent to McLaughlin, showing the price to amount to 168*l.* 1*s.* 6*d.* About a month later, the defendants delivered five of these bales to a sub-vendee of McLaughlin on the latter's order. Other vessels arrived with further goods, which were treated in the same way, by handing delivery orders to the buyer, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendant's books to McLaughlin, nor any rent charged to him. Another partial delivery was made to a sub-vendee of McLaughlin, and the vendors then notified the defendants to make no further deliveries, McLaughlin having failed to make them a payment according to promise, and being then in debt to them about 700*l.* McLaughlin afterwards became bankrupt, and his assignees brought this action in trover against the defendants. There was evidence at the trial in relation to some objection made by McLaughlin to the weights. Held, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and, secondly, that the delivery of the part removed from the wharf was not intended to be, and did not operate as, a delivery of the whole, but was a separation for the purpose of that part only, leaving all the rest *in statu quo*.

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* (*h*).

§ 807. A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name, or setting them aside (*i*), or boxing them up by the purchaser's orders, and putting his name on them (*j*), so long as the vendor holds the goods, and has not agreed to give credit on them.

On the same principle which permits the vendor to remain in custody of the goods in the changed character of bailee for the purchaser, it would seem that the buyer may be let into possession of the goods for a special purpose, or in a different character from that of

(*h*) 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.

(*i*) 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 A. & E. 58; Proctor *v.* Jones, 2 C. & P. 532.

(*j*) Boulter *v.* Arnott, 1 C. & M. 333.

buyer. Thus, A. might refuse to deliver a horse sold to B., *quà* 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*).

§ 808. If the vendor consent to give delivery to the buyer, only on a condition, it is of course incumbent on the buyer to perform the condition before he can claim the possession; as where a vendor gave the buyer an order for goods lying in a bonded warehouse, with the understanding that the buyer was to pay the duties, it was held that on the buyer's insolvency his assignees could not take possession of the goods without refunding the duties which the vendor had advanced on default of the buyer (*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.

§ 809. It is now necessary to examine the question as to the effect, on the vendor's lien, of the transfer and indorsement to the buyer of the instruments known in commerce as documents of title. The statutory law will first be referred to, and it consists of the enactments known as the Factors' Acts, the Bills of Lading Act, the Legal Quays Act for the port of London, and the Sufferance Wharves Act, also for the port of London.

The Factors' Acts [1823 to 1877], namely, the 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, 5 & 6 Vict. c. 39 [and 40 & 41 Vict. c. 39], are intended to afford security to persons dealing with factors. The Act 5 & 6 Vict. c. 39 provides substantially as follows: —

By the 1st section, that any agent intrusted with the possession of goods, *or of the documents of title to goods*, shall be *deemed and taken* to be *the owner of such goods and documents* so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and that such contract or

(*k*) Tempest *v.* Fitzgerald, 3 B. & C. 680; Marvin *v.* Wallis, 6 E. & B. 726; 25 L. J. Q. B. 369.

(*l*) Reeves *v.* Capper, 5 Bing. N. C. 136.

(*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. 397; Shepley *v.* Davis, 5 Taunt. 617; and see Swanwick *v.* Sothern, 9 A. & E. 895.

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 (*p*).

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 negotiable security, upon which the person so delivering up the same had at the time a valid and available lien, and security for, or in respect of, a previous advance, by virtue of some contract or agreement made with such agent, such contract or agreement, if *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 (*q*).

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 (*r*) owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner, but 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" (*s*).

By the 4th section, a "document of title" is stated to mean "*any*

(*p*) This section is fully considered in a work by the present editors on the Factors' Acts, pp. 67–86.

(*q*) Factors' Acts, pp. 87–91.

(*r*) This must be taken subject to 6 Geo. IV. c. 94, s. 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; Macnee *v.* Gorst, 4 Eq. 315; Kaltenbach *v.* Lewis, 24 Ch. D. 54, 76, C. A.

(*s*) Factors' Acts, pp. 87–91.

bill of lading, *India warrant*, *dock warrant*, *warehouse-keeper's certificate*, *warrant*, or *order for the delivery of goods*, or any other document used in the ordinary course of business as *proof of the possession* or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods *thereby represented*" (*t*).

The same section defines an "agent" as "intrusted," whether he has the goods or documents in his actual custody, or they are held by any other person subject to his control, or for him or on his behalf; and provides that, where any loan or advance shall be *bona fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver them, and they shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, though not actually received by the person making such loan or advance till the period subsequent thereto (*u*).

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 intrusted with them by the owner, *unless the contrary can be shown in evidence* (*v*).

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

(*t*) The Stamp Act, 1870, 33 & 34 Vict. c. 97 (ss. 87–92), requires delivery orders and warrants for goods to be stamped, and contains a definition of those instruments. Factors' Acts, pp. 91–93.

(*u*) 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 and 487. The editors submit 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, s. 2, because the factor was not *intrusted with and in possession of the warrants* at the time of the advance, and leave was given to amend the pleadings. Factors' Acts, pp. 93–98.

(*v*) Baines *v.* Swainson, 4 B. & S. 270, *post*, § 820; Factors' Acts, pp. 98–100.

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 (*x*), cases supposed to be within the former statutes had been excluded. These purposes are stated in the preamble.

§ 809 a. [It was found that the Act of 1842 was still not sufficient to protect merchants in the transaction of their ordinary business, and several decisions given under that act occasioned much dismay in the city. Accordingly recourse was again had to legislation, and by the Factors' Act, 1877 (*y*), it is provided substantially as follows: —

By the 2d section, that where any agent has been intrusted 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 intrustment 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.

This alters the law as laid down in Fuentes *v.* Montis (*z*), *post*, § 820 (*a*).

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 intrusted by the vendor with the goods or documents, shall be as effectual as if such vendor or person were *an agent intrusted 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 (*b*).

This alters the law as laid down in the cases of Johnson *v.* The Credit Lyonnais Company and Johnson *v.* Blumenthal (*c*), which came before the courts immediately before the passing of the act.

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

(*x*) The most important of these decisions were Evans *v.* Trueman, 1 Moo. & R. 10; Taylor *v.* Kymer, 3 B. & Ad. 320; Fletcher *v.* Heath, 7 B. & C. 517; Phillips *v.* Huth, 6 M. & W. 572; 9 M. & W. 647; Bonzi *v.* Stewart, 4 M. & G. 295.

(*y*) 40 & 41 Vict. c. 39.

(*z*) L. R. 3 C. P. 268; aff. in Ex. Ch. 4 C. P. 93.

(*a*) Factors' Acts, p. 107.

(*b*) Factors' Acts, p. 108.

(*c*) 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 (s. 6).

so in possession, or by any other person or agent intrusted 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 intrusted 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.

This alters the law as laid down in the cases of Jenkyns *v.* Usborne (*d*), and Van Casteel *v.* Booker (*e*).

By the 5th section, that where any document of title to goods has been *lawfully* indorsed or otherwise transferred to any person *as a vendee or owner of the goods*, and such person transfers such document by indorsement (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.*

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 (*f*), 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 (*g*).]

§ 810. Under the [earlier] Factors' Acts [was] decided, —

1st, That a factor might lawfully consign the goods consigned to him to another factor and obtain an advance on them (*h*), and,

2dly, That the factor's authority was not exhausted by the first pledge made of the goods, but that he might lawfully obtain a second advance from a different person by a pledge of the surplus remaining after satisfying the holder of the first pledge (*i*).

§ 811. By the 9 & 10 Vict. c. 309, entitled "An Act for the Regulation of the Legal Quays within the Port of London," and the 11 & 12 Vict. c. 18, entitled "An Act for the Regulation of Certain

(*d*) 7 M. & G. 678, 699; S. C. 8 Scott N. R. 505.

(*e*) 2 Ex. 691; S. C. 18 L. J. Ex. 9.

(*f*) 5 & 6 Vict. c. 39, s. 4; Factors' Acts, 109–114, *ante*, § 809.

(*g*) See *post*, § 813.

(*h*) 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 wording and effect of the earlier statutes will be found.

(*i*) Portalis *v.* Tetley, 5 Eq. 140.

Sufferance Wharves in the Port of London" (*j*), 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 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.

§ 812. The next statute to be referred to in this connection is the Bills of Lading Act, 18 & 19 Vict. c. 111, which, after reciting in the preamble that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (*k*), proceeds to enact by the 1st section that

(*j*) 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.

(*k*) Referring to Thompson *v.* Dominy, 14 M. & W. 403.

"every consignee (*l*) of goods named in a bill of lading, and every *indorsee of a bill of lading* to whom *the* property (*m*) in goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself" (*n*).

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.

§ 813. Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods (*o*); *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, intercept the goods, in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu*. These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of Lickbarrow *v.* Mason (*p*), on the authority of which very numerous decisions have since been made, and will be found collected in Smith's Leading Cases. On this mode of delivery the law is free from doubt.

The law in relation to bills of lading is more fully discussed *post*, in the Chapter on Stoppage *in Transitu* [§§ 828–868 a].

§ 814. In regard to delivery orders, there is also little room for con-

(*l*) 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.

(*m*) *I. e.* the general property. The section does not apply to a pledgee of the bill of lading who has only a special property in the goods. Sewell *v.* Burdick, 10 App. C. 74, reversing the judgment of the Court of Appeal, 13 Q. B. D. 159, and restoring that of Field, J., 10 Q. B. D. 363.

(*n*) 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), but this case is criticised in Sewell *v.* Burdick, *supra*, by Lord Selborne, at p. 88, and by Lord Blackburn, at p. 93.

(*o*) "It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." Per Bowen, L. J., in Sanders *v.* Maclean, 11 Q. B. D. at p. 341.

(*p*) 2 T. R. 63; 1 H. Bl. 357; 6 East, 20; 1 Sm. L. C. 737, ed. 1887.

troversy, 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 (*q*). It was also decided in M'Ewan *v.* Smith (*r*), and Griffiths *v.* Perry (*s*), that such a delivery order differed in effect from a bill of lading; that the indorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor; and that his lien remained unaffected when neither the first buyer nor the sub-vendee 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].

§ 815. In treating of the effect of indorsing and delivering dock warrants, and warehouse warrants or certificates, Blackburn, J., remarks (*t*), that "these documents are generally written contracts by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that, when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his 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 should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.

"Besides this substantial difference between them, there is the more technical one that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established." After reviewing the authorities then extant, the learned author concluded by saying: "It is therefore submitted that the indorsement of a delivery order or dock warrant *has not* (independently of the Factors' Acts) *any effect beyond that of a token of an authority to receive possession.*"

§ 816. This view of the law was confirmed, immediately after the

(*q*) Book I. Part II. Ch. 4, *ante*, On Actual Receipt.

(*r*) 2 H. L. C. 309.

(*s*) 1 E. & E. 680; 28 L. J. Q. B. 204.

(*t*) Blackburn on Sale (1845), p. 297.

publication of the Treatise on Sale, by the Exchequer of Pleas, in Farina *v.* Home (*u*). There the defendant had retained in his possession for many months a delivery warrant, signed by a wharfinger, whereby the goods were made deliverable to the plaintiff, *or his assignee by indorsement*, on payment of rent and charges from the 25th of July; the document was dated on the 21st of July, and forthwith indorsed to the defendant as vendee; but the latter refused to take the goods or return the warrant, saying that he had sent it to his solicitor, and meant to defend the action, for he had never ordered the goods. Held, that there had been an acceptance, but no actual receipt of the goods; no delivery to the defendants. Parke, B., in giving the judgment of the court, said: "This warrant is no more than an *engagement by the wharfinger* to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (*sic*, consignee?), who is the vendor's agent, and his possession is that of the consignee until an assignment has taken place, and the wharfinger *has attorned*, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and *then only is there a constructive delivery to him.* In the mean time the warrant, and the indorsement of the warrant, is nothing more than *an offer* to hold the goods as the warehouseman of the assignee. The case is the same in principle as that of Bentall *v.* Burn, and others which are stated and well discussed 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.*"

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 lawgivers. In the decided cases between vendor and vendee, the judges construe these documents as mere "tokens of authority to receive possession;" as mere "offers" by the warehouseman to hold the goods for an indorsee of the warrant, inchoate and incomplete till the vendee has obtained the warehouseman's assent to attorn to him.

§ 817. The legislature, on the other hand, bases its enactments on the assumption that "dock warrants, warehouse-keepers' 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);

(*u*) 16 M. & W. 119.

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 lawgiver attached to them; a meaning which might have been given without doing violence to their language.

No doubt a warehouseman or wharfinger in possession of goods is the bailee of the owner alone from whom he received them, and cannot be forced to become the bailee of any one else without his own consent. But what is there in the law to prevent this assent from being given in *advance?* (*x*) 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 indorsement on this paper shall be accepted by me as full proof that you have given this assent for me, and shall be taken as my assent," it is submitted that there is no principle of law which would prevent this paper from taking effect according, to its import. But, in truth, special juries of London merchants have repeatedly volunteered statements that this is what they understand the paper to mean: that it is not a mere *offer* or *token of authority to receive possession*, but is meant by the parties to be an actual transfer of the possession. In Lucas *v.* Dorrien (*y*), Dallas, C. J., said, in relation to a West India dock warrant: "I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by the indorsement of these instruments. All special juries cry out with one voice that the practice is, that the produce lodged in the docks is transferred by indorsing over the certificates and dock warrants." And at Nisi Prius, it was directly decided by Parke, J., in one case (*z*), and by Dallas, C. J., in another (*a*),

(*x*) See the cases of Salter *v.* Woollams and Wood *v.* Manley, cited *ante*, § 679, in the former of which cases Tindal, C. J., said that Jackson had, in advance, "attorned to the sale."

(*y*) 7 Taunt. 278.

(*z*) Zwinger *v.* Samuda, 7 Taunt. 265.

(*a*) Keyser *v.* Suse, Gow, 58.

that such was the true construction of these mercantile "documents of title."

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 Sale, 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 for which the judges in Fuentes *v.* Montis (*b*) declared there was then no remedy save further legislation.

[And now by the Factors' Act, 1877, 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.]

§ 818. By the decisions under the earlier Factors' Acts already referred to (*c*), it was settled that the words "an agent intrusted with goods or documents of title" did not include a vendee, because he held in *his own right*, and not as agent (*d*). 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 conflicting 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*, § 809, this anomaly is now removed by the 4th section of the Factors' Act, 1877.]

§ 819. The safety of the man who buys goods from a *factor* is not affected by the fact that the document of title only came into the factor's hands in consequence of his false and fraudulent representations to the owner, if it appear that the owner really *intrusted* the factor or his agent with the document (*e*); but if a person gets possession of a document of title by fraud, without having been *intrusted* with it *as agent of the owner*, or as vendee, he has no title at all, either as prin-

(*b*) L. R. 3 C. P. 268; 37 L. J. C. P. 137.

(*c*) *Ante*, § 19.

(*d*) Jenkyns *v.* Usborne, 7 M. & G. 678; Van Casteel *v.* Booker, 2 Ex. 691; Fuentes *v.* Montis, *supra.*

(*e*) 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.

cipal or agent, and can convey none to anybody else (*f*). This was really the point decided by the Exchequer Chamber in Kingsford *v.* Merry (*f*), a case which created some excitement among the city merchants, who did not at first understand its true import.

§ 820. In Baines *v.* Swainson (*g*), 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 intrusting.

This view was deliberately adopted by Willes, J., in delivering the opinion in Fuentes *v.* Montis (*h*), 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 (*i*) : —

"In the case of an agent for sale, whose general business it is to sell, intrusted for a purpose other than sale, as, for instance, if he were intrusted upon an advance against the goods, but with directions not to sell, being a mere lender, and upon his pledge of them, or if he happen to have a warehouse, though his general business was that of a factor and not that of a warehouseman, and on the particular occasion the goods were put in his warehouse at a rent, in both cases he would be a person who, *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 (*j*) 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 & 6 Vict. c. 39 : 'An agent in possession as aforesaid of such goods or

(*f*) 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.

(*g*) 4 B. & S. 270; 32 L. J. Q. B. 281.

(*h*) L. R. 3 C. P. 268; 37 L. J. C. P. 137; and in error, L. R. 4 C. P. 93.

(*i*) L. R. 3 C. P. at p. 280. The judgment as given in the Law Journal differs in some respects, and is more full, 37 L. J. C. P. at p. 142.

(*j*) 4 B. & S. 270; 32 L. J. Q. B. 281.

documents shall be taken for the purposes of this act to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' I believe that that provision in the 4th section has been applied to that extent in the judgment of my brother Blackburn in the case of Baines *v.* Swainson (*j*), where he expressed an opinion that it was sufficient for the person making the advance upon the goods to show that the agent who was in apparent possession of them was an agent whose general business was one that would bring him within the operation of the Factors' Act, and thereby to *throw upon the principal the burden of proving that in the particular transaction, with respect to the goods in question, the agent was not such agent.* I should, therefore, but for that statement, have been rather disposed to read that last clause (the 4th section) as applicable to the cases expressly provided for in the previous act, and say that by this act a factor or agent is held to become intrusted with the possession of documents which he has been enabled to obtain by reason of having been intrusted with the possession of other documents which led to the former being obtained, entirely, as it were, as a key to them. But I will not criticise the judgment of my brother Blackburn, and the other judges in that case, but adopt it for the purpose of the present. Here is a case in which an agent, whose general business has been within the act, being in possession of goods, is supposed to have pledged them. What is the result? Is it that the person who dealt with such agent is by reason of his general employment, and by reason of his having been a *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 intrusting within the meaning of the act? Let the act speak for itself: 'An agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' The inevitable conclusion is, that if the contrary be shown in evidence, 'an agent in possession as aforesaid of such goods or documents' is not to be taken to have been 'intrusted therewith by the owner thereof.' I drew my conclusions from the 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 Black-

(*j*) 4 B. & S. 270; 32 L. J. Q. B. 281.

burn, J., in the case of Baines *v.* Swainson (*k*), 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 'intrusted and in possession.*' Much argument was bestowed, and properly, upon the words 'intrusted and in possession;' but it appears to me that before you can deal with either the state of being 'intrusted,' or the state of being 'in possession,' you must first get hold of your substantive, namely, 'agent:' the person who is to give the title as against the principal must be an agent, and if he is not an agent he is not a person to whom the provisions of the act apply."

But this decision seems not to have met the approval of Lord Westbury, whose remarks on it in Vickers *v.* Hertz (*l*) have been referred to *ante*, § 20 [and the law, so far as relates to the particular case of the agent's authority, is now expressly altered by the 2d section of the Factors' Act, 1877, *ante*, § 809 a].

§ 821. The recent cases in which this question has been referred to, independently of the Factors' Acts, will now be presented.

It was held, in Bartlett *v.* Holmes (*m*), that a delivery order by which a warehouseman acknowledged to hold goods deliverable to A., "on the *presentation* of this document duly indorsed by you," did not authorize the indorsee to claim the goods by merely *showing* the order, but that he must deliver it up to the warehouseman *before* the latter could be required to part with the goods. The reasoning of the court in this case would seem to cover all "documents of title." The grounds given by Jervis, C. J., and concurred in by Williams and Cresswell, JJ., were two. 1st. That confidence must be placed by one of the parties in the other, where the article is bulky, and the exchange of the goods for the document cannot possibly be simultaneous. 2dly. That if the party having the goods were to make the delivery before receiving the document, he would *expose himself to the risk of the document's being transferred to third persons by a second sale.*

In Johnson *v.* Stear (*mm*), the action was trover by the assignee of

(*k*) 4 B. & S. 270; 32 L. J. Q. B. 281.
(*l*) L. R. 2 Sc. App. 113.
(*m*) 13 C. B. 630; 22 L. J. C. P. 182.
(*mm*) 15 C. B. N. S. 330; 33 L. J. C. P. 130.

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 the loan, for which purpose the dock warrant would have been an important instrument." Williams, J., said: "The handing over of the dock warrant to the vendee, before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was *tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol*, but because, according to the doctrine applied in donations *mortis causa*, it is the *means* of coming into possession of a thing which will not admit of corporal delivery."

§ 822. In 1870 the case of Meyerstein *v.* Barber (*n*) 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 (*o*); 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 has performed his contract; that the bill of lading ceases to be negotiable after this is done: and upon this contention the case turned. The judges in the lower courts had, however, held unanimously that the *bills of lading continued to represent the goods at the sufferance wharf until replaced by the wharfinger's warrant*, and that the plaintiff was therefore entitled to retain his verdict. Martin, B., in delivering the judgment of the Exchequer Chamber,

(*n*) L. R. 4 H. L. 317; 2 C. P. 38 and 661. (*o*) *Ante*, § 811.

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 goods." These *dicta*, however, which would seem, at least so far as the London quays and sufferance wharves are concerned, to be in opposition to the ruling in Farina *v.* Home in relation to the effect of the 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 Sale (*p*), above quoted (§ 815), was cited in argument: "That was published twenty-two years ago, and I have not changed my opinion."

In the House of Lords the judgment was also unanimous in affirmance of that given in the Exchequer Chamber, and it was pointed out that,

1st. The person who first gets *one* bill of lading out of the set of *three* (the usual number) gets the property which it represents, and needs do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate; and,

2d. That though the shipowner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivering 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 latter 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 (*q*), which is noticed *post*, in the chapter on Stoppage *in Transitu*.

And upon the buyer's duty to accept one of the set of three bills of lading, although the rest of the set are not tendered or accounted for, see Sanders *v.* Maclean (*r*), *ante*, chapter on Delivery.]

§ 823. It is to be inferred from the foregoing authorities that, by the law as now settled, the indorsement and transfer of a dock warrant, warehouse certificate, or other like document of title, by a vendor to a vendee, *is not such a delivery of possession as divests the vendor's lien;* [nor prior to the Factors' Act, 1877, did the transfer of such documents by the vendee to a *bona fide* holder for value enlarge their

(*p*) Blackburn on Sale, pp. 297, 298.
(*q*) 7 App. Cas. 591; S. C. 6 Q. B. D. 475, C. A.; 5 Q. B. D. 129.
(*r*) 11 Q. B. D. 327, C. A.

effect, except by way of estoppel 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 (*s*); but by the 5th section of that statute, the lawful transfer by indorsement or delivery of such documents by a vendee to a *bona fide* holder for value divests the vendor's lien.]

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.

§ 824. The vendor's lien is not lost by sending goods on board of a vessel in accordance with the buyer's instructions, even though by the contract the goods are to be delivered free on board to the buyer, if the vendor on delivering the goods takes (*t*) or demands (*u*) 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 (*x*).

§ 825. When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. The point was directly decided at Nisi Prius by Bayley, J., in New *v.* Swain (*y*), and by Littledale, J., in Bunny *v.* Poyntz (*z*), and has ever since been treated as settled law, though there has been no case decided in Banc. Among the numerous *dicta*, where the law is assumed to be undoubted on this point, are those of Lord Campbell, *ante*, § 776; of Parke, B., in Dixon *v.* Yates (*a*); of the court in Martindale *v.* Smith (*b*); of the Barons of the Exchequer in Castle *v.* Sworder (*c*), and in Miles *v.* Gorton (*d*); and of the judges of the Queen's Bench in Valpy *v.* Oakeley (*e*).

(*s*) 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.

(*t*) Craven *v.* Rider, 6 Taunt. 433.

(*u*) Ruck *v.* Hatfield, 5 B. & Ald. 632.

(*x*) Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

(*y*) 1 Dans. & L. 193.

(*z*) 4 B. & Ad. 568.

(*a*) 5 B. & Ad. at p. 341.

(*b*) 1 Q. B. at p. 395.

(*c*) 5 H. & N. 281; 29 L. J. Ex. 235.

(*d*) 2 C. & M. at p. 510.

(*e*) 16 Q. B. 941; 20 L. J. Q. B. 380.

§ 826. As the vendor's lien is a right granted to him by law solely for the purpose of enabling him to obtain payment of the price, it follows that a tender of the price puts an end to the lien, even if the vendor decline to receive the money; and this was the decision in Martindale *v.* Smith (*f*).

§ 827. Where the vendor allows the purchaser to mark, or spend money upon, the goods sold, which are lying at a public wharf, or on the premises of a third person *not the bailee of the vendor*, and to take away part of the 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 (*g*).

AMERICAN NOTE.

§§ 796–827.

LIEN.

1. **Nature and Extent of.** The term "lien" imports that by the sale the *title* to the property sold has actually vested in the vendee, since no man can have a lien on his own goods. If the holder of goods is the owner, the right to retain possession is a right incident to the right of property; but it is not, strictly speaking, a lien. See a very instructive discussion of the law of lien in Conrad *v.* Fisher, 37 Mo. App. 352, by Mr. Justice Thompson. And see Sullivan *v.* Clifton, 55 N. J. L. 324 (1893), for the distinction between common law and statutory liens.

A lien for the price is incident to every contract of sale, where there is no stipulation to the contrary, because a man is not required to part with his goods until he is paid for them. This is elementary law. See Arnold *v.* Delano, 4 Cush. 33, Shaw, C. J., for a valuable statement of the law of lien; Nevius *v.* Schofield, 2 Pugs. & Bur. (N. B.) 435; Carlisle *v.* Kinney, 66 Barb. 363; Bowen *v.* Burk, 13 Pa. St. 146; Cornwall *v.* Haight, 8 Barb. 328; Safford *v.* McDonough, 120 Mass. 291; Bradley *v.* Michael, 1 Ind. 551; Ware River Railroad Co. *v.* Vibbard, 114 Mass. 447; Curtin *v.* Isaacsen, 36 W. Va. 391; Perrine *v.* Barnard, 142 Ind. 448; Holderman *v.* Manier, 104 Ib. 118; Burke *v.* Dunn, Mich. (1898), 75 N. W. 931; Bohn Mfg. Co. *v.* Hynes, 83 Wisc. 388.

This lien exists so long as the goods remain in the possession of the vendor, although he has taken the note of the vendee on time, if he has the note ready to surrender on payment of the price, especially if the buyer has become insolvent. Arnold *v.* Delano, 4 Cush. 33; Milliken *v.* Warren, 57 Me. 46; Clark *v.* Draper, 19 N. H. 419. For the right of an unpaid vendor to *retain* possession, if the buyer has become insolvent, is much like the right to *retake* possession, or stoppage *in transitu*. See White *v.* Welsh, 38 Pa. St. 396; Wanamaker *v.* Yerkes, 70 Ib. 443; Parker *v.* Byrnes, 1 Low.

(*f*) 1 Q. B. 389.

(*g*) Tansley *v.* Turner, 2 Bing. N. C. 151; Cooper *v.* Bill, 3 H. & C. 722; 34 L. J. Ex. 161.

539. And see S. W. Freight Co. *v.* Stanard, 44 Mo. 71; Same *v.* Plant, 45 Ib. 517; Haskell *v.* Rice, 11 Gray, 240.

The lien sometimes given by statute to the vendor of seed grain, who takes the buyer's note, is only a lien. The title to the seed and to the new crop is in the buyer. The transaction is not a conditional sale. See Scofield *v.* National Elevator Co. 64 Minn. 527.

2. **Waiver of Lien.** Selling on credit is *prima facie* a waiver of the lien for the price, and the vendee on credit has ordinarily a right to the actual possession and custody of the goods on his mere promise to pay at a future time. Leonard *v.* Davis, 1 Black, 476; McNail *v.* Ziegler, 68 Ill. 224; Thompson *v.* Wedge, 50 Wisc. 642. Although such purchaser be insolvent to his own knowledge. Johnson *v.* Farnum, 56 Geo. 144. Compare Crummey *v.* Raudenbush, 55 Minn. 426, holding that such waiver is upon the implied condition that the vendee shall keep his credit good, and that his insolvency justifies the vendor in refusing to deliver. In this case the vendor at the time of the contract did not know of the buyer's insolvency. If the vendee allows the goods to remain in the vendor's possession until after the time of credit expires, the lien remains or revives, whether the buyer has or has not become insolvent. Re Batchelder, 2 Low. 245; Owens *v.* Weedman, 82 Ill. 409; Milliken *v.* Warren, 57 Me. 46; McElwee *v.* Lumber Co. 69 Fed. R. 302, a valuable case. Any agreement inconsistent with the right of lien would be a waiver of it. Pickett *v.* Bullock, 52 N. H. 354. In Green *v.* Janion, 2 Hawaii, 428, A. hired of B. a certain space in the latter's store for the storage of goods. A. then bought the goods in question from B., and inspected them, and they were moved to that part of the store leased by A. He afterwards assigned, and his assignee claimed the goods. B. asserted a right of lien. Held, that he had none. In the case of Re Batchelder, 2 Low. 245, a vendor of goods in the possession of a bailee was held to have lost his lien by giving the purchaser a receipted bill and taking his note for the price.

3. **Delivery terminating Lien.** Ordinarily a voluntary and unconditional delivery of the goods is a waiver of a lien. Haskins *v.* Warren, 115 Mass. 515; Blackshear *v.* Burke, 74 Ala. 239; Obermier *v.* Core, 25 Ark. 562; Thompson *v.* Wedge, 50 Wisc. 642; Gay *v.* Hardeman, 31 Tex. 245; Freeman *v.* Nichols, 116 Mass. 309; McNail *v.* Ziegler, 68 Ill. 224; Johnson *v.* Farnum, 56 Geo. 144. But the parties may contract as between themselves that the lien may exist notwithstanding a delivery. Gregory *v.* Morris, 96 U. S. 619; Sawyer *v.* Fisher, 32 Me. 28; Horr *v.* Powe, 18 Wash. 536. And by delivery is meant something more than a mere "handing over" the goods to the purchaser, or his agent. Leven *v.* Smith, 1 Denio, 573.

So in a sale of standing wood, which by the contract the buyer is to cut and prepare for market within a certain time: if he has done so, and sold and taken away a portion thereof, the vendor must be deemed to have so far parted with his possession and control of the property as to have lost his lien for the purchase-money. Douglas *v.* Shumway, 13 Gray, 498. Had the buyer become actually insolvent before the time of credit had expired, perhaps the vendor's lien might reattach to such of the wood as was still on his own land. See Arnold *v.* Delano, 4 Cush. 33; Haskell *v.* Rice, 11 Gray, 240.

4. **Delivery of Part.** It seems that if part of the goods sold by one and the same sale be delivered, the seller's lien for *the whole* price attaches to the part undelivered, and not merely for that portion so undelivered. Buckley *v.* Furniss, 17 Wend. 504. At least this is so as to a carrier's lien, in the absence of any other understanding, and apparently the same rule should attach to a vendor's lien. See Lane *v.* Old Colony, etc. R. R. Co. 14 Gray, 143; New Haven, etc. Co. *v.* Campbell, 128 Mass. 104; Potts *v.* N. York & New E. R. R. Co. 131 Ib. 455. So if, during the delivery, the vendee sells or pledges the part so delivered, without the knowledge or consent of the vendor, his lien on the goods so sold is not lost, and he may retake them from the subsequent purchaser. Palmer *v.* Hand, 13 Johns. 434.

5. **Transfer of Documents of Title.** That an assignment and delivery of a bill of lading transfers the *title* from the vendor to the vendee, is too elementary law to need the citation of authorities. How far it affects the lien of the vendor, especially when the vendee becomes insolvent, is more fully discussed in the note to the next chapter, on Stoppage *in Transitu*. In Louisiana, by code, an unpaid vendor has a priority over one holding under a transfer of the bill of lading. Allen *v.* Jones, 24 Fed. Rep. 11.

6. **Warehouse Receipts.** In some States the transfer of a warehouse receipt operates, either by common law or by force of statute, as a transfer of the title, the same as a transfer of a bill of lading. See Davis *v.* Russell, 52 Cal. 611; Horr *v.* Barker, 8 Ib. 613; Merchants' Bank *v.* Hibbard, 48 Mich. 118; Mass. Pub. Sts. c. 72, § 6; Burton *v.* Curyea, 40 Ill. 320; Allen *v.* Maury, 66 Ala. 10; Cochran *v.* Ripy, 13 Bush, 495; Second Nat. Bank *v.* Walbridge, 19 Ohio St. 424; Whitlock *v.* Hay, 58 N. Y. 484; Shepard *v.* King, 96 Geo. 81; Farmers' Packing Co. *v.* Brown, 87 Md. 1 (1898); Tiedman *v.* Knox, 53 Md. 618; Ruhl *v.* Corner, 63 Ib. 182; Seal *v.* Zell, Ib. 356; Hill *v.* Colorado Bank, 2 Colo. App. 324; Bank of Newport *v.* Hirsch, 59 Ark. 225; Garoutte *v.* Williamson, 108 Cal. 135; Cavallaro *v.* Texas, etc. R. R. 110 Cal. 348. Especially where the vendor has estopped himself from contesting the assignee's title. See Voorhis *v.* Olmstead, 66 N. Y. 113; Hazard *v.* Fiske, 83 Ib. 287. But the transfer of a mere storage receipt issued by one not technically a warehouseman does not operate to transfer title. Geilfuss *v.* Corrigan, 95 Wisc. 651; Sinsheimer *v.* Whitely, 111 Cal. 378; Steaubli *v.* Blaine Bank, 11 Wash. 426.

7. **Delivery Orders.** If, after the sale and giving of a delivery order by the vendor on a warehouseman, the buyer fails, the vendor may, before actual delivery of the goods, rescind the order, and revoke the authority of the bailee to deliver on the order. See Anderson *v.* Reed, 106 N. Y. 333. In Keeler *v.* Goodwin, 111 Mass. 490, this right of countermand was allowed even as against a *bona fide* sub-purchaser, the delivery order not having been even presented to the bailee before the countermand. And see Re Batchelder, 2 Low. 245. But if the vendee has sold the goods to a *bona fide* purchaser, upon the strength of the delivery order and a bill of the goods, and such purchaser presents the order to the bailee, and has the goods marked with his name, the lien of the original vendor is lost. Hollingsworth *v.* Napier, 3 Caines, 182.

CHAPTER V.

REMEDIES AGAINST THE GOODS — STOPPAGE IN TRANSITU.

Sect.

A right which arises on the insolvency of buyer 828
History is given by Lord Abinger . . 829

SECTION I. — WHO MAY EXERCISE THE RIGHT?

Persons in position of vendors . . 830
Consignor who has bought with his own money or credit 830
Agent of vendor to whom bill of lading is transferred 830
Vendor of an interest in an executory contract 831
May surety exercise the right by virtue of the 5th section of Merchant Law Amendment Act? 831
Persons possessing liens other than that of vendor not entitled to this remedy 832
Principal consigning goods may exercise right, even though factor has made advances on the goods, or has a joint interest in them 833
When agents without authority stop goods, subsequent ratification too late after transitus has ended . . . 833
But not when letter of ratification was written before transit ended, although not reaching agent till after the transit had ended 834
Vendor's right not impaired by partial receipt of price 835
But only exercisable over goods unpaid for when contract apportionable . 835
Not by conditional payment 835
But the right is gone if he has received securities in absolute payment . . 835
Consignor may stop goods although an account current is running with consignee and the balance is uncertain . 835
Consignor who ships goods in payment of unmatured acceptances cannot stop *in transitu* on the insolvency of consignee. *Quære* 835
Vertue *v.* Jewell questioned . . . 835
Vendor's right of stoppage is paramount to the carrier's lien for *general balance* 836

Sect.

And to the claim of an attaching creditor 836
And in certain cases to demand for freight 836

SECTION II. — AGAINST WHOM MAY IT BE EXERCISED?

Only against an insolvent buyer . . 837
Meaning of "insolvency" 837
Vendor stops at his peril in advance of buyer's insolvency 838

SECTION III. — WHEN DOES THE TRANSITUS BEGIN; AND END?

Duration of the transitus 839
The right comes into existence after vendor has parted with title and right of possession and actual possession 840
Double meaning of term "constructive possession" 840
General principles as stated by Parke, B., in James *v.* Griffin 840
Goods may be stopped as long as they remain in possession of carrier — *quà* carrier 841
Whether delivery of goods to buyer's servant on his own cart or vessel puts an end to transit 841
Vendor may restrain the effect of delivering goods on the buyer's own vessel by the terms of the bill of lading . 842
And it makes no difference whether the vessel was sent by the buyer expressly for the goods or not 842
When a vessel chartered by the buyer is to be considered his own vessel . . 843
Right does not extend to insurance money due to purchaser 844
Before bill of lading taken, vendor reserves his lien by taking ship's receipts for the goods in his own name, so as to entitle himself to the bill of lading 845
But not if the vessel were the purchaser's own vessel, and nothing were contained in the receipts to show that vendor reserved his rights . . . 845

Sect.
Goods are still in transit while lying in a warehouse if at an intermediate point in the transit 846
Test question for determining whether transit is ended 846
Cases selected as examples of transit ended 847
Meaning of "destination" in a business sense 847
Cases selected as illustrations of transit not ended 848
Transit contemplated by the terms of an agreement . . . . . 848 a
Delivery to shipowner as carrier . . 848 a
Immaterial that destination was undisclosed to vendor at time of contract . 848 a
Cases in which goods are at destination, but still in hands of carrier or carrier's agent 849
Both buyer and carrier must agree before carrier ceases to possess *quà* carrier, and becomes bailee to keep the goods for the buyer 849
Carrier may be converted into bailee to keep goods for buyer while retaining his own lien 853
But retention of lien strong evidence that carrier has not changed his character 853
Buyer may anticipate end of transitus, and thus put an end to right of stoppage 854
Buyer's right of possession not affected by the carrier's tortious refusal to deliver goods, and the right of stoppage is ended though goods remain in carrier's custody 855
Vendor's right of stoppage not ended by arrival of the goods at ultimate destination till buyer takes possession . 856
What is such possession? 856
Whether delivery of part amounts to delivery of the whole 857
Rule stated 857
Delivery of goods in buyer's warehouse after his bankruptcy or delivery to his trustee defeats the right 858
Buyer on becoming insolvent may agree to rescind the sale while the goods are still liable to stoppage 858
Or may refuse to take possession in order to leave them liable to stoppage 858

SECTION IV. — HOW IS THE RIGHT EXERCISED?

No particular mode of stoppage required 859
Usually effected by simple notice to carrier forbidding delivery to vendee . 859
The notice must be given to the person in possession 860
Sect.
Or to the employer in time to enable him to send notice to his servant not to deliver . . 860
Whether shipowner under any obligation to communicate notice . . . 860 a
Opinions of Lords Bramwell and Blackburn . . . . . 860 a
Quære: effect of notice given to the consignee of the goods . . . . 860 a
Notice may be given to shipowner when he has retained bill of lading for unpaid freight . . . . . 860 a
Vendor need not inform master of vessel that the bill of lading is still in possession of the buyer . . . 861
Master's duty is to deliver goods to vendor, not simply to retain them till conflicting claims have been settled . 861
Master's duty as between conflicting bills of lading 861
Master, as bailee, delivers at his peril, and, if indemnity is refused, may bring an action of interpleader . . 861
But where he has no notice or knowledge of prior indorsement may deliver to the holder of the first bill of lading presented 861
Stoppage must be made in behalf of vendor in assertion of his paramount right to the goods 861

SECTION V. — HOW MAY IT BE DEFEATED?

Vendor's right defeasible only by transfer of bill of lading or other document of title to *bona fide* indorsee for value 862
By common law, consignee could only defeat vendor's rights by resale of the goods 863
But now, by Factors' Acts, by pledge also 863
The transfer of the bill of lading is now an assignment of contract . . . 863
Bill of lading not negotiable like a bill of exchange 864
Transferee has no better title than the indorser 864
But a *bona fide* indorsee will hold goods against a vendor who has been defrauded into a transfer of the bill of lading 864
Where holder of bill of lading proves that the transfer to him was for value, this is *prima facie* proof of ownership of goods without showing that prior indorsements were meant to transfer ownership 864
Where consignor gets back bill of lading pledged for advances, his original rights revive 865
Vendor's right of stoppage exists where vendee has pledged bill of lading, for surplus after pledgee is satisfied . 865

Sect.
And he may force pledgee to marshal the assets 865
Effect on the vendor's right of a sub-sale of the goods during the transit . . 865 a
Right of stoppage defeated only when the sub-sale is accompanied by a transfer of a bill of lading . . . 865 a
Transfer of bill of lading defeats vendor's rights even where indorsee knows goods are not paid for, if transaction is honest 866
Effect of transfer for an antecedent debt 866

SECTION VI. — WHAT IS THE EFFECT OF A STOPPAGE IN TRANSITU?

Effect is to restore the goods to vendor's possession, not to rescind the sale . 867
This is settled by the decisions in equity 868
Law in America 868
Civil Law . . . . . 868 a
Law in France . . . . . 868 a
Law in Scotland . . . . . 868 a

§ 828. THE last remedy which an unpaid vendor has against the goods is stoppage *in transitu*. This is a right which arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts (*a*). If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (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.

§ 829. 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: —

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 (*c*)]?
6. What is the legal effect of the exercise of the right?

SECTION I. — WHO MAY EXERCISE THE RIGHT?

§ 830. Stoppage *in transitu* is so highly favored, on account of its

(*a*) Per Lord Northington (then Lord Henley), L. C., in D'Aquila *v.* Lambert, 2 Eden, at p. 77; S. C. Amb. 399.

(*b*) 8 M. & W. 337. 'The right of stoppage *in transitu* was originally part of the custom of merchants. The earliest reported case in which the right is recognized is Wiseman *v.* Vandeputt, 2 Vern. 203, 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 in 1757. Burghall *v.* Howard, 1 H. Bl. 366, n. (*a*).

(*c*) Factors' Act, 1877, s. 5.

intrinsic justice, that it has been extended by the courts to *quasi* vendors; to persons in a position similar to that of vendors.

In Feise *v.* Wray (*d*), Lord Ellenborough and the other judges of the King's Bench held the right to exist in favor of a consignor who had bought goods, on account and by order of his principal, on the factor's own credit, in a foreign port, and had shipped the goods to London, drawing bills on the merchant here, who had ordered the goods and become bankrupt during the transit. The bankrupt's assignee contended that the factor was but an *agent* with a lien, but the court held that he might be considered as a vendor who had first bought the goods, and then sold them to his correspondent at cost, plus his commission. The principle of this case has been recognized in numerous subsequent decisions (*dd*).

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 (*e*).

§ 831. The vendor of an interest in an executory agreement may also stop the goods, as if he were owner of them. In Jenkyns *v.* Usborne (*f*), the plaintiff was agent of a foreign house, which had shipped a cargo of beans to London; a portion of the cargo had been ordered by Hunter & Co., of London, but only one bill of lading had been taken for the whole cargo, and this was given to Hunter & Co., they giving to the plaintiff a letter, acknowledging that 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

(*d*) 3 East, 93.

(*dd*) The Tigress, 32 L. J. Adm. 97; Patten *v.* Thompson, 5 M. & S. 350; Ogle *v.* Atkinson, 5 Taunt. 759; Oakford *v.* Drake, 2 F. & F. 493; Tucker *v.* Humphrey, 4 Bing. 516; Turner *v.* Trustees 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.; Cassaboglou *v.* Gibb, 11 Q. B. D. 797, C. A.; Ex parte Miles, 15 Q. B. D. 39, C. A.; Phelps *v.* Comber, 29 Ch. D. 826, C. A.; Ex parte Francis, 56 L. T. N. S. 577.

(*e*) Morison *v.* Gray, 2 Bing. 260.

(*f*) 7 M. & G. 678; 8 Scott N. R. 505.

Hunter & Co., yet the interest of the plaintiff in the goods was sufficient to entitle him to exercise the vendor's rights of stoppage.

It was said by Lord Ellenborough, in Siffkin *v.* Wray (*g*), 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 (*h*), which provides that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and *such person shall be 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," etc. (*hh*).

[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 (*i*). Goods had been purchased by a broker without disclosing the name of his principals. By the custom of the market, the broker on the buyers' 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 vendors' name.]

(*g*) 6 East, 371.

(*h*) 19 & 20 Vict. c. 97.

(*hh*) 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. 697; Batchellor *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.

(*i*) 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

§ 832. The right of stoppage *in transitu* does not depend on the fact that the vendor, having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods *quà* vendor, which is greater than a lien. Other persons, therefore, entitled to liens, as factors (*k*), fullers (*l*) who have fulled cloths, have no right to stop *in transitu* before obtaining or after having lost possession.

§ 833. A principal consigning goods to a factor has the right of stoppage *in transitu*, on the latter becoming insolvent, even if the factor have made advances on the faith of the consignment (*m*), or have a joint interest with the consignor (*n*).

An agent of the vendor may make a stoppage in behalf of his principal (*o*), but attempts have been made occasionally by persons who had no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions.

§ 834. Where the stoppage *in transitu* is effected in behalf of the vendor, by one who has at no time had any authority to act for him, a subsequent ratification of the vendor will be too late if made after the transit is ended. In Bird *v.* Brown (*p*), the holder of some bills of exchange, drawn by the vendor on the purchaser, for the price of the goods, assumed to act in behalf of the vendor in stopping the goods *in transitu*, and the assignees of the 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.

But in Hutchings *v.* Nunes (*q*) the stoppage was made by the defendant, who had previously done business for the vendor as his agent. The defendant had written to the vendor, informing him of the insolvency of the buyer, on the 26th of March, and the vendor on the 16th of April inclosed 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 dispatched on the 16th of April was a

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.

(*k*) Kinloch *v.* Craig, 3 T. R. 119; and in the House of Lords, Ib. 786, and 4 Bro. P. C. 47.

(*l*) Sweet *v.* Pym, 1 East, 4.

(*m*) Kinloch *v.* Craig, 3 T. R. 119.

(*n*) Newsom *v.* Thornton, 6 East, 17.

(*o*) Whitehead *v.* Anderson, 9 M. & W. 518.

(*p*) 4 Ex. 786. [See Dibbins *v.* Dibbins [1896], 2 Ch. D. 348. — B.]

(*q*) 1 Moo. P. C. N. S. 243.

sufficient ratification of the agent's act done on the 21st, although the agent was not then aware of the existence of the authority.

§ 835. The vendor's right exists notwithstanding partial payment of the price (*r*); [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 (*s*);] neither is the vendor's right lost by his having received conditional payment by bills of exchange or other securities (*t*), even though he may have negotiated the bills so that they are outstanding in third hands, unmatured (*u*).

It has already been shown, however (*x*), that a vendor is not unpaid if he have taken bills or securities in *absolute* payment. He must in such cases seek his remedy on the securities, having no further right on the goods.

In Wood *v.* Jones (*y*), it was held that the consignor, whose bill drawn against a cargo had been dishonored by an insolvent consignee, was not deprived of the right of stoppage because he had in his own hands goods belonging to his consignee unaccounted for, and the account current between them had not been adjusted, and the balance was uncertain.

But in Vertue *v.* Jewell (*z*) it was held by Lord Ellenborough, and confirmed by the court in Banc, that a consignor who was indebted to the consignee on a balance of accounts, in which were included acceptances of the consignee outstanding and unmatured, and who, under these circumstances, shipped a parcel of barley on account of that balance, had no right of stoppage on the insolvency of the consignee, although the acceptances were afterwards dishonored. Lord Ellenborough said that "the circumstance of Bloom (the consignor) being indebted to them on the balance of accounts, divested him of all control over the barley from the moment of the shipment. The non-payment of the bills of exchange cannot be taken into consideration." The court held, in Banc, that under these circumstances the consignees were to be considered as purchasers for a valuable consideration.

This case has never been overruled, but, if correctly reported, is very questionable law. Lord Blackburn, in the Treatise on Sale (*a*), suggests as an explanation that the position of the consignor was not

(*r*) 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.

(*s*) Merchant Banking Co. *v.* Phœnix Bessemer Steel Co. 5 Ch. D. 205.

(*t*) Dixon *v.* Yates, 5 B. & Ad. 345; Feise *v.* Wray, *ubi supra*; Edwards *v.* Brewer, *ubi supra*.

(*u*) Feise *v.* Wray, *ubi supra*; Patten *v.* Thompson, 5 M. & S. 350; Edwards *v.* Brewer, *ubi supra*; Miles *v.* Gorton, 2 Cr. & M. 504. [Ainis *v.* Ayres, 62 Hun, N. Y. 376. — B.]

(*x*) *Ante*, § 732.

(*y*) 7 D. & R. 126.

(*z*) 4 Camp. 31.

(*a*) P. 220.

such as to allow him to be considered as a vendor, and that the case would therefore be an authority for the proposition that the right of stoppage is peculiar to a vendor. But it happens, unfortunately for this explanation, that the report states in express terms that the ground of the decision in Banc was, that the consignees "were to be considered the purchasers of the goods for a valuable consideration," a ground which would prove the right of stoppage to *exist;* for it had already been held by the same court, in Feise *v.* Wray (*b*), that a vendor's right of stoppage was not taken away by the fact that he had received acceptances for the price of the goods, which were outstanding and unmatured at the time of the stoppage.

When this case was pressed on the court by the counsel in Patten *v.* Thompson (*c*), Lord Ellenborough did not suggest that it was good law *as reported*, but said: "*I have looked also into that case of* Vertue *v.* Jewell, and *find* that there the bill of lading was indorsed and sent by the consignor on account of a balance due from him, including several acceptances then running; *so that it was the case of a pledge to cover these acceptances.*" There was an interval of only two years between the cases, and this explanation scarcely renders Vertue *v.* Jewell more intelligible; for it was recognized as settled law in Patten *v.* Thompson that a consignor may stop the *specific* goods on which his consignee has made advances, on learning the consignee's insolvency (*cc*); 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.

§ 836. The unpaid vendor's right of stoppage is higher in its nature than a carrier's lien for a *general balance* (*d*), though not for the special charges on the goods sold; and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods whilst in transit, by process out of the Mayor's Court of the city of London (*e*).

In the case of The Mercantile and Exchange Bank *v.* Gladstone (*f*), 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

(*b*) 3 East, 93.
(*c*) 5 M. & S. 350.
(*cc*) This had been settled in Kinloch *v.* Craig, in the House of Lords, 3 T. R. 786.
(*d*) Oppenheim *v.* Russell, 3 B. & P. 42.
(*e*) Smith *v.* Goss, 1 Camp. 282.
(*f*) L. R. 3 Ex. 233.

owner's account." The bill of lading was such as the master had authority from the owners to sign, but *before* it was signed in Calcutta, the owners in Liverpool had transferred the vessel with "all the profits and all the losses, as the case might be," though this transfer was unknown to the consignors or to the captain when the bills of lading were signed. It was held, under these circumstances, that the consignor's right of stopping the goods "free of freight" could not be affected by the sale in England, which was unknown to him. Kelly, C. B., expressed the opinion also, that the master of a vessel in distant seas retains all the authority given to him by the owner who appointed him, notwithstanding an intervening transfer, until such transfer is made known to him; and on that ground also held that the transferee of the ship was bound by the terms of the bill of lading.

SECTION II. — AGAINST WHOM MAY IT BE EXERCISED?

§ 837. The vendor can only exercise the right against an *insolvent* or *bankrupt* buyer. By the word "insolvency" is meant a general inability to pay one's debts (*g*); and of this inability, the failure to pay one just and admitted debt would probably be sufficient evidence (*h*). 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* (*i*).

§ 838. If the vendor stop *in transitu* where the vendee has not yet become insolvent, he does so at his peril. If, on the arrival of the goods at destination, the vendee is then insolvent, the premature stoppage will avail for the protection of the vendor; but if the vendee remain solvent, the vendor would be bound to deliver the goods, with an indemnification for expenses incurred (*k*).

In The Tigress (*l*), 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?

§ 839. The transit is held to continue from the time the vendor parts

(*g*) Parker *v.* Gossage, 2 C. M. & R. 617; Biddlecombe *v.* Bond, 4 A. & E. 332, 696; and see Billson *v.* Crofts, 15 Eq. 314.

(*h*) Sm. Merc. Law, note, p. 550, ed. 1877.

(*i*) Vertue *v.* Jewell, 4 Camp. 31; Newsom *v.* Thornton, 6 East, 17; Dixon *v.* Yates, 5 B. & Ad. 313; Bird *v.* Brown, 4 Ex. 786. And see a discussion by Willes, J., as to the meaning of "insolvency" in The Queen *v.* The Saddlers' Co. 10 H. L. C. 404, 425.

(*k*) Per Lord Stowell, in The Constantia, 6 Rob. Adm. R. 321.

(*l*) 32 L. J. Adm. 97.

with the possession until the purchaser acquires it; that is to say, from the time when the vendor has so far made delivery that his right of retaining the goods, and his right of lien, as described in the antecedent chapters, are gone, to the time when the goods have reached the *actual* possession of the buyer.

[The definition of the transit is well given by Lord Tenterden (*m*): —

"Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee (*n*)."]

§ 840. 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*.

[It is, however, necessary to point out that the expression "constructive possession" is used in two senses in this connection. Where the goods have been delivered to a carrier named by the vendee, they are in the constructive possession of the vendee, yet the right to stop *in transitu* remains.

On the other hand, where the goods have been delivered by the carrier, and have reached the hands of an agent to the vendee (although the agent holds them only for the purpose of forwarding them to another destination, to be appointed by the vendee), that is another kind of constructive possession by the vendee which defeats the right of stoppage *in transitu* (*nn*).]

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

(*m*) Abbott on Shipping, Part III. Ch. 9, p. 374 (5th ed.), and Part IV. Ch. 10, p. 409 (12th ed.).

(*n*) Cited with approval by Brett, L. J., in Kendall *v.* Marshall, 11 Q. B. D. at p. 364.

(*nn*) See per Brett, L. J., in Kendall *v.* Marshall, 11 Q. B. D. at p. 364, C. A.

(*o*) 1 M. & W. 20; 2 M. & W. 633.

is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods, — before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, — and thereby to *replace the vendor* in the same situation as if he had not parted with the actual possession. . . . The actual delivery to the vendee or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; Scott *v.* Pettit (*p*), Rowe *v.* Pickford (*q*); or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; Dixon *v.* Baldwen (*r*); 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.

§ 841. Goods are liable to stoppage as long as they remain in possession of the carrier, *quà carrier* (*s*) (a qualification to be kept in view, for, as we shall presently see, he may become bailee for the buyer, as warehouseman or wharfinger, after his duties as carrier have been discharged), and it makes no difference that the carrier has been named or appointed by the vendee (*t*).

But when the owner sends his own servant for the goods, the delivery to the servant is a delivery into the actual possession of the master. If, therefore, the buyer send his own cart or his own vessel for the goods, they have reached the buyer's *actual possession* as soon as the vendor has delivered them into the cart or vessel (*u*).

(*p*) 3 B. & P. 469.

(*q*) 8 Taunt. 83.

(*r*) 5 East, 175.

(*s*) Mills *v.* Ball, 2 B. & P. 457; James *v.* Griffin, 2 M. & W. 633; Lickbarrow *v.* Mason, 1 Sm. L. C. 737, ed. 1887, and notes, and the cases on Stoppage *passim*.

(*t*) Holst *v.* Pownall, 1 Esp. 240; Northey *v.* Field, 2 Esp. 613; Hodgson *v.* Loy, 7 T. R. 440; Jackson *v.* Nichol, 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.; Bethell *v.* Clark, 19 Q. B. D. 553; 20 Q. B. D. 615, C. A.

(*u*) Blackburn on Sale, 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. In the Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co. 5 Ch. D. 205, where the goods were loaded in trucks sent by the agents of the purchaser, it was held that, *under the circumstances*, the

§ 842. But if the vendor desire to restrain the effect of a delivery of goods on board the vendee's own vessel, he may do so by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not *an agent to receive possession for the purchaser.* This point was decided in Turner *v.* Trustees of the Liverpool Docks (*x*), the facts of which are fully reported *ante*, § 392, and that case was recognized as settled law in Schotsmans *v.* Lancashire and Yorkshire Railway Company (*y*), 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 indorsement, as was established in Turner *v.* Trustees of Liverpool Docks.

In the foregoing case it was further held by both the learned lords, reversing Lord Romilly's judgment at the Rolls (*z*), that there was no difference in the effect of the delivery, whether the buyer's ship was expressly sent for the goods, or whether it was a general ship belonging to the buyer, and the goods were put on board without any previous special arrangement.

§ 843. Whether a vessel chartered by the buyer is to be considered

transit ceased upon the loading. But Jessel, M. R., expresses 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.

(*x*) 6 Ex. 543; 20 L. J. Ex. 394.

(*y*) 2 Ch. 332; 36 L. J. Ch. 361.

(*z*) 1 Eq. 349.

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 (*a*).

§ 844. In Berndtson *v.* Strang (*b*), 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 indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held that the effect of taking a bill of lading in that form, from the master of the chartered ship, was to interpose him, as a carrier, between the vendor and the vendee, and to preserve the right of stoppage to the former. The following instructive passages are extracted from the opinion of the learned lord: "Now there are two criteria, as it appears to me, with respect to the stoppage *in transitu*, viz.: whether there is a transitus at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board of his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery, and the transitus is at an end just as much — as was said in Van Casteel *v.* Booker (*c*) — as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further transitus after the goods are in the purchaser's own cart (*d*). 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*

(*a*) Blackburn on Sale, 242; Fowler *v.* McTaggert, cited 7 T. R. 442, and 1 East, 522; Inglis *v.* Usherwood, 1 East, 515; Bohtlingk *v.* Inglis, 3 East, 381; see the cases collected in Maude and Pollock on Shipping (ed. 1881 by Pollock and 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, L. R. 2 C. P. D. 464. As to what amounts to a demise of a ship, see Meiklereid *v.* West, 1 Q. B. D. 428.

(*b*) 4 Eq. 481; 3 Ch. 588; and see Ex parte Rosevear China Clay Co. 11 Ch. D. 560, C. A., *post*, § 848 a.

(*c*) 2 Ex. 691.

(*d*) But see per Jessel, M. R., in Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co. 5 Ch. D. at p. 219, note (*u*), *ante*, § 842.

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 *quà carrier* to deliver the goods, so that according to the ordinary rule as laid down in Bohtlingk *v.* Inglis (*e*), and continually referred to as settled law upon the subject, the transitus is only at an end when the carrier has arrived at the place of destination and has delivered the goods."

On the appeal in this case (*f*), 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 (*ff*).

§ 845. Before a bill of lading is taken, the vendor preserves his lien, and is not driven to the exercise of his right of stoppage, if he has taken or demanded the receipts for the goods in his own name;

(*e*) 3 East, 381.

(*f*) 3 Ch. 588. See, also, Fraser *v.* Witt, 7 Eq. 64.

(*ff*) 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 of their sale or sub-sale, see Phelps *v.* Comber, 29 Ch. D. 814, C. A., and Kemp *v.* Falk, 7 App. Cas. 573, *post*, § 865 a.

though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage (*g*). 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 Schotsmans *v.* Lancashire and Yorkshire Railway Company (*h*) would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage (*i*).

§ 846. Goods may be still in transit though lying in a warehouse to which they have been sent by the vendor on the purchaser's orders. Goods sold in Manchester to a merchant in New York may be still in transit while lying in a warehouse in Liverpool. The question, and the sole question, for determining whether the transitus is ended is, In what capacity are the goods 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 Sale (*k*), 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?" (*l*).

§ 847. A few of the cases offering the most striking illustrations of the distinction will now be presented.

(*g*) Craven *v.* Ryder, 6 Taunt. 433; Ruck *v.* Hotfield, 5 B. & Ald. 632.

(*h*) 2 Ch. 332; 36 L. J. Ch. 361.

(*i*) Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

(*k*) Blackburn on Sale, 224.

(*l*) Blackburn on Sale, 244.

In Leeds *v.* Wright (*m*), the London agent of a Paris firm had in the packer's hands in London goods sent there by the vendor from Manchester, under the agent's orders; but it appeared that the goods were, at the agent's discretion, to be sent where he pleased, and not for forwarding to Paris; and it was held that the transitus was ended.

In Scott *v.* Pettit (*n*), the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own; and there was no *ulterior* destination. Held, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders.

In Dixon *v.* Baldwin (*o*), 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 giving an indemnity to Metcalfe. The latter, as witness, said "that at the time of the stoppage he held the goods for the Battiers, *and at their disposal;* that he accounted with the Battiers for the charges. The witness described his business to be merely an *expeditor* agreeable to the directions of the Battiers,—a *stage* and *mere instrument* between buyer and seller; 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* (*p*). Lawrence and Le Blanc, JJ., concurred, but Grose, J., dissented on this point.

In Valpy *v.* Gibson (*q*), which was a case very similar to the foregoing, the goods were ordered of the Manchester vendor, and sent to a

(*m*) 3 B. & P. 320.
(*n*) 3 B. & P. 469.
(*o*) 5 East, 175.
(*p*) Approved by Brett, L. J., in Ex parte Miles, 15 Q. B. D. at p. 44.
(*q*) 4 C. B. 837.

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 re-delivery to the vendor for a new purpose could give him no lien.

[In Ex parte Gibbes (*r*), 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 acceptance, and, upon their returning them accepted, sent them the shipping documents. The purchasers indorsed 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 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.

In Kendall *v.* Marshall (*s*) the vendors, Ward & Co., of Bolton,

(*r*) 1 Ch. D. 101.

(*s*) 11 Q. B. D. 356, C. A., overruling Mathew, J., S. C. 52 L. J. Q. B. 313, where a fuller report of the judgments will be found. See discussion of this case by Mathew, J., in the subsequent case of Bethell *v.* Clark, 19 Q. B. D. at p. 559, where he points out that the facts as presented to the Court of Appeal seem to have been different from those dealt with in the court below.

sold certain bales of cotton-waste by verbal contract to Leoffler. At the time of the sale, nothing was said as to the place of delivery. After the purchase, Leoffler arranged with Marshall, Stevens & Co., who were carriers and forwarding agents at Liverpool and Garston, that the goods should be sent to them from Bolton to be shipped as soon as possible to Rouen at a through rate from Bolton to Rouen. Afterwards, Ward & Co. inquired of Leoffler where the goods were to be sent, and Leoffler ordered them to be sent to Marshall, Stevens & Co., at Garston. Ward & Co. thereupon delivered the goods at the railway station at Bolton, to be forwarded to Marshall, Stevens & Co., Garston. Leoffler the same day advised Marshall, Stevens & Co. that the goods had been sent to them, and directed that they should be forwarded to Rouen. Upon the arrival of the goods at Garston, the railway company gave to Marshall, Stevens & Co. the usual notice that the goods had arrived, and that, if delivery was not taken in due course, they would hold the goods as warehousemen and charge rent. Leoffler stopped payment while the goods were lying in the railway company's goods shed at Garston, and Ward & Co., having ascertained that the goods had not been shipped by Marshall, Stevens & Co., gave them notice to stop delivery.

On these facts, it was held by the Court of Appeal, overruling the decision of Mathew, J., that the transitus from the vendor to the purchaser was from Bolton to Garston, and not from Bolton to Rouen; that that transit was at an end from the moment when the goods were under the control of Marshall, Stevens & Co., they being agents of and receiving their orders solely from the purchasers, and not from the sellers; and that, for the purpose of deciding whether the seller could exercise his right of stoppage, it was immaterial that the buyer, when the transit from the seller to him was at an end, was about to start the goods on to a fresh destination.

Ex parte Rosevear China Clay Co. (*t*), which was relied upon by the defendants, was carefully distinguished by Cotton, L. J. (*u*), who pointed out that there the goods were shipped by the vendors themselves, the master of the vessel receiving them only as carrier to a further point, and that the shipping was an indication that they were to go on a voyage which was not only unfinished, but not even begun; and further, that Brett, L. J., and himself had expressly guarded themselves against extending the principle which they had then acted upon to a case like the present.

In Ex parte Miles (*x*), the bankrupt, a commission agent in Lon-

See, also, a note upon this case, and Ex parte Miles, *infra*, by Mr. Cohen, Q. C.; Law Quarterly Review, vol. 1, p. 397.

(*t*) 11 Ch. D. 560, C. A., *post*, § 848.
(*u*) 11 Q. B. D. at p. 367.
(*x*) 15 Q. B. D. 39; 54 L. J. Q. B. 567;

don, was employed by Morrice & Co. of Kingston, Jamaica, to buy boots and shoes for them from Turner & Co., Northampton. In July, 1883, the bankrupt gave two orders to Turner & Co. for boots for the mark "E. M., Kingston, Jamaica." Upon the 11th of September, the bankrupt instructed Turner & Co. by letter to forward the boots in numbered packages bearing this mark to Dunlop & Co., Southampton, for shipment per Moselle, and to advise Dunlop & Co., with particulars for clearance. Turner & Co. accordingly forwarded the goods, instructing Dunlop & Co. "to forward them as directed," and gave them particulars, with destination and consignee in blank, and paid the carriage to Southampton. They also sent the invoices to the bankrupt, who instructed Dunlop & Co. that the consignees were Morrice & Co., and the destination Jamaica. The bankrupt was described in the bill of lading as consignor, and Morrice & Co. consignees. Turner & Co. heard that the bankrupt had suspended payment while the goods were at sea, and, knowing from previous dealings that goods so marked would go to Morrice & Co. in Jamaica, had the goods stopped at Kingston.

It was held by the Court of Appeal (reversing the decision of Mr. Registrar Brougham) that Turner & Co. and the bankrupt stood in the relation of vendor and purchaser; that it was not the business interpretation of the mark which, according to the order, was to be placed on the goods, that Turner & Co. were to forward them to Jamaica; that the order given by the bankrupt in September was an order to forward the goods, not to Jamaica, but to Dunlop & Co., Southampton; and that Turner & Co. had taken this view of the transaction, because they had left blank the columns for destination and consignee in the particulars which they had forwarded, and had instructed Dunlop & Co. to forward them as directed; that the only transitus as between Turner & Co. and the bankrupt was that from Northampton to Dunlop & Co. at Southampton, and that consequently the right to stop *in transitu* had gone.

In the course of his judgment, Brett, M. R. (*y*), pointed out that the case mainly depended upon the true interpretation to be placed upon the letter of the 11th of September, and that, although it was clear from that letter that the goods were ultimately to go to Jamaica, that was not their "destination," because, in order to constitute a "destination" in the business sense of that term, it is insufficient for the seller to know the particular place to which, he must also know the name of the particular person to whom, they are to be sent.]

see Bethell *v.* Clark, 19 Q. B. D. at p. 562, per Cave, J., who says that he is unable to reconcile Ex parte Rosevear China Clay Co. with some of the *dicta* in Ex parte Miles.

(*y*) 15 Q. B. D. at p. 43.

See, also, Wentworth *v.* Outhwaite (*z*), Dodson *v.* Wentworth (*a*), Cooper *v.* Bill (*b*), Smith *v.* Hudson (*c*), Rowe *v.* Pickford (*d*) [and Ex parte Francis (*e*).]

§ 848. Reference will now be made to some of the cases in which the transitus was considered *not* at an end, where the goods had reached the custody of the buyer's agent, the agent's duty being merely to forward them.

In Smith *v.* Goss (*f*), 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.

In Coates *v.* Railton (*g*), 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.

So in Jackson *v.* Nichol (*h*), 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 await-

(*z*) 10 M. & W. 436.
(*a*) 4 M. & G. 1080.
(*b*) 3 H. & C. 722; 31 L. J. Ex. 151.
(*c*) 6 B. & S. 431; 34 L. J. Q. B. 145.
(*d*) 8 Taunt. 83.
(*e*) 56 L. T. N. S. 577.
(*f*) 1 Camp. 282.
(*g*) 6 B. & C. 422; commented upon by Brett, L. J., in Kendall *v.* Marshall, 11 Q. B. D. at p. 366.
(*h*) 5 Bing. N. C. 508.

ing their orders, but in this particular instance had received instructions to forward the goods to the buyers in London *before the goods left the vendor's possession;* and on receiving the delivery order, he at once indorsed it to a wharfinger, "to go on board the Esk," and the wharfinger gave the order to a keelman, who went for the goods and put them on board the Esk. The Esk arrived in the port of London with the goods, and, while moored in the Thames, the goods were put on board a lighter sent for them by the defendants, who were the wharfingers of the Esk, and the stoppage was made while the goods were on the lighter. The court held that "the lead never came into the actual possession of Crawhall, the agent;" that the series of acts done at Newcastle were but "links in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyers in London." Tindal, C. J., said also: "If the goods had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, *such possession would have been the constructive possession* of the buyers themselves, and the right to stop *in transitu* at an end."

[§ 848 a. There may be an actual bargain between the buyer and the seller as to the destination of the goods, and the transit will then continue until the goods have reached that destination. Thus, in Ex parte Watson (*i*), 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 car-

(*i*) 5 Ch. D. 35, C. A., following Rodger *v.* The Comptoir d'Escompte de Paris, L. R. 2 P. C. 393. Ex parte Watson is explained in Ex parte Miles, 15 Q. B. D., by Brett, M. R., at p. 46; by Lindley, L. J., at p. 47.

riage 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 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.

In Ex parte Rosevear China Clay Company (*k*), 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, following Berndtson *v.* Strang (*l*), that the transitus was not at an end. The court adopted the rule, as stated by Lord Cairns in Berndtson *v.* Strang. "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. This 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

(*k*) 11 Ch. D. 560, C. A.; explained by Cotton, L. J., in Kendall *v.* Marshall, 11 Q. B. D. at p. 367; and see Brindley *v.* The Cilgwyn Slate Company, 55 L. J. Q. B. 67.

(*l*) 4 Eq. 481; 3 Ch. 588; *ante*, § 844.

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 time when the contract was made did not affect the vendor's right to stop the goods.

§ 848 b. In Bethell *v.* Clark (*m*), the bankrupts, Tickle & Co., of London, ordered goods from Clark & Co. of Wolverhampton. In the order nothing was stated as to the destination of the goods, but Tickle & Co. afterwards sent to Clark & Co. a consignment note in the following terms: "Please consign the 10 hogsheads hollow ware to the Darling Downs, to Melbourne, loading in the East India Docks here." Clark & Co. delivered the goods to the railway company at Wolverhampton to be put on board the Darling Downs. The railway company notified to Tickle & Co. that the goods had been forwarded to Poplar Station for shipment per Darling Downs, and the goods were afterwards shipped by a lighter company employed by the railway company and put on board. The mate's receipt was sent to Tickle & Co. while the goods were in course of transit to the Darling Downs. Clark & Co. were informed that Tickle & Co. had stopped payment, and they at once gave notice to the railway company to stop the delivery of the goods on board the ship. The railway company gave a similar notice to the lighter company, but too late to prevent the delivery of the goods on board. No bills of lading, however, were applied for in exchange for the mate's receipt, and it was arranged that the goods should remain in possession of the owners of the ship pending the settlement of the question whether or not the right to stop *in transitu* was gone.

On these facts it was held by the Court of Appeal, affirming the decision of the Divisional Court, that the true construction of the consignment note sent by the purchasers was, that the goods were to be delivered on board the Darling Downs to be carried to Melbourne; that the original transitus prescribed by the purchasers was from Wolverhampton to Melbourne; and that the railway company, the lightermen, and the shipowners were all agents to receive the goods, not for the purpose of holding them for the purchaser or awaiting further orders, but for the purpose of carrying them to Melbourne; and that, therefore, the right to stop *in transitu* still existed and was rightly exercised by the vendors.

The question whether or not the transit, upon which the goods are going when the notice to stop is given, is the original or a fresh transit, or whether the goods have reached a place from which fresh orders

(*m*) 19 Q. B. D. 553; 20 Q. B. D. 615, C. A.

from the purchaser are required to give them a new destination, has been so frequently presented for decision in recent years that the editors venture to transcribe the following passage from the judgment of Lord Esher, M. R., upon this point. He says (*n*) : —

"There has been a difficulty in some cases where the question was whether the original transit was at end, and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone.

"So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit."]

§ 849. Next come the cases where the goods have reached their ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *quà 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 Sale has this passage (*o*) : "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 order 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

(*n*) 20 Q. B. D. at p. 617. [In Lyons *v.* Hoffnung, 15 App. Cas. 391, the purchaser directed the seller to deliver the goods at a certain wharf, to be forwarded by a certain ship to a certain port, consigned to the purchaser, who was a passenger on board the same ship. The seller did so, took receipts from the shipowners, and delivered the same to the purchaser, who exchanged them for bills of lading. While on the way to the destined port, the vendors stopped the goods, and it was held they could do so, since they were still in the hands of the carrier as carrier, and not in the possession of the purchaser, although he was a passenger on the same ship, and Bethell *v.* Clark, 20 Q. B. D. 615, was approved. — E. H. B.]

(*o*) Page 248.

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) (*p*); 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)" (*q*).

§ 850. This view of the law has received full confirmation in subsequent cases.

In James *v.* Griffin, above quoted, and decided in 1837, the buyer, knowing himself to be insolvent, determined that he would not receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead; and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, Bolland, and Alderson, BB., held the transitus not ended, and that, the buyer's intention not to receive being proven, the wharfingers could not receive as his agents without his assent. Abinger, C. B., dissented, on the ground that, the intention of the buyer not having been communicated to the wharfingers, the agency of the latter could not be affected by it, and that the transitus was therefore ended. But all agreed that the sole question was, whether the wharfingers were in possession *quâ agents of the buyer*. And in Jackson *v.* Nichol (*r*), repeated demands were made by the buyers for the goods after the arrival of the Esk in the Thames (*s*) 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 (*t*), and the principle seems to be exactly that of Bentall *v.* Burn, and the class of cases like it, reviewed *ante*, § 175 *et seq.*

§ 851. The question was considered by the Common Pleas in the singular case of Bolton *v.* The Lancashire and Yorkshire Railway Company (*u*). The facts stated in the special case were, that Wol-

(*p*) 2 M. & W. 623.
(*q*) 5 Bing. N. C. 508.
(*r*) 5 Bing. N. C. 508.
(*s*) *Ante*, § 848.
(*t*) See Foster *v.* Frampton, 6 B. & C. 107, where the assent of both parties was given.
(*u*) L. R. 1 C. P. 431; 35 L. J. C. P. 137.

stencroft, of Manchester, sold to Parsons, of Brierfield, certain goods lying at the defendants' 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 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 of 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 (*x*), that the intention of the vendee to take possession is a material fact." So in Whitehead *v.* Anderson (*y*), 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

(*x*) 2 M. & W. 623. (*y*) 9 M. & W. at p. 529.

at their destination the character of carrier shall cease, and that of warehouseman supervene." Willes, J., laid stress on the circumstance that the goods were, at the time of the sale, in possession of the railway company as warehousemen and bailees of the vendor, and thought that this agency had never ended, because the order for delivery to the buyer must be considered as subject to the condition "if he will receive them," but not to an absolute abandonment, or authority to throw them away, if the buyer would not have them. And on the main question the learned judge said: "Mr. Holker is undoubtedly right when he says that the property in these goods passed to the vendee. Unless the property passed, there would be no need of the right of stoppage *in transitu*. The only effect of the property passing is that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession unless he is prepared to pay for the goods. . . . The right to stop *in transitu* upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new 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.*"

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 (*z*). 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 consignee 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

(*z*) 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.

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.]

The case of Whitehead *v.* Anderson (*a*), 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 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 afterward 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.

§ 852. In Coventry *v.* Gladstone (*b*), 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*.

[The same principle was 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" (*c*).]

(*a*) 9 M. & W. 518; Tud. L. C. on Mer. Law, 411, ed. 1884.

(*b*) 6 Eq. 44.

(*c*) 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,

§ 853. The carrier's change of character into that of agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied (*d*). 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 (*e*) the captain was held not to have intended such an agreement by telling the assignee that he *would* deliver him the cargo when he was satisfied about the freight; Parke, B., saying: "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise without a new consideration to *fulfil the original contract*, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. *After* the agreement he *remained* a mere agent for expediting the cargo to its original destination."

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 (*f*).]

§ 854. The question whether the vendee may anticipate the end of the transitus, and thus put an end to the vendor's right of stoppage *in transitu*, was treated by most of the books (*g*) as settled in the affirmative on the authority of the cases in the note (*h*), and in opposition to the ruling of Lord Kenyon, and the King's Bench in Holst *v.* Pownall (*i*). And in Whitehead *v.* Anderson (*k*), in which the judgment was prepared after advisement, Parke, B., expressed no doubt upon the subject. He said: "The law is clearly settled that the unpaid vendor has a right to retake the goods *before* they have arrived at the destination originally contemplated by the purchaser, *unless in the mean time* they came to the actual or constructive posses-

they signed for the goods, and afterwards paid the carrier's charges.

(*d*) Allan *v.* Gripper, 2 Cr. & J. 218; but see Crawshay *v.* Eades, 1 B. & C. 181, *post*, § 856.

(*e*) 9 M. & W. 518.

(*f*) 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.

(*g*) 1 Sm. L. C. p. 806, ed. 1887; Tudor's L. C. Mer. Law, 455, ed. 1884; Houston on Stoppage in Transitu, 130 *et seq.*; 1 Griffith & Holmes on Bankruptcy, 352.

(*h*) 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. 623.

(*i*) 1 Esp. 240.

(*k*) 9 M. & W. 518.

sion of the vendee. If the vendee take them out of the possession of the carrier, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action." 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 (*l*), 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" (*m*).

§ 855. In Blackburn on Sale (*n*), 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 (*o*). The doubt thus suggested seems to be justified by the decision in Bird *v.* Brown (*p*), which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case, the carrier tortiously refused possession to the purchaser when the goods had arrived at destination, and the Exchequer Court held, after advisement and in very decided language, that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver; that the transitus was at an end, and the right of stoppage gone.

§ 856. Of course the mere arrival of the goods at destination will not suffice to defeat the vendor's rights. The vendee must take actual, if he has not obtained constructive, possession. 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 (*q*), and delivery sufficient to divest lien (*r*), will be found applicable.

In Whitehead *v.* Anderson (*s*) 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

(*l*) 7 H. & N. 400; 31 L. J. Ex. 92.

(*m*) See per Bowen, L. J., in Kendall *v.* Marshall, 11 Q. B. D. at p. 369.

(*n*) Page 259.

(*o*) See the Civil law texts; Dig. Ulpian, l. 134, § 1, Æ. Edict. Lib. xxi.; Broom's Legal Maxims, 279; Phillimore on Jurisprudence, 224.

(*p*) 4 Ex. 786.

(*q*) *Ante*, § 172 *et seq.*

(*r*) *Ante*, § 799 *et seq.*

(*s*) 9 M. & W. 518.

from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession, unless accompanied by such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the nature of an agent for custody."

In Crawshay *v.* Eades (*t*), 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.

§ 857. Whether delivery of part, when not retracted under the peculiar circumstances shown in Crawshay *v.* Eades, amounts to delivery of the whole, is always a question of intention, as shown *ante*, § 805 *et seq.*, where the cases mentioned in the note (*u*) have been reviewed; and the general rule was there deduced, that a delivery of part is not a delivery of the whole, unless the circumstances show that it was intended so to operate.

[The rule to be gathered from recent decisions which will be found in the note *infra* 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) perhaps, 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 (*x*).

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

(*t*) 1 B. & C. 181.

(*u*) Dixon *v.* Yates, 5 B. & Ad. 313, per Parke, J., at p. 341; Betts *v.* Gibbins, 2 A. & 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. 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.

(*x*) Ex parte Cooper, 11 Ch. D. 68, C. A.

carrier assented to the buyer's taking possession of the goods without payment of freight or charges.]

§ 858. The bankruptcy of the buyer not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the buyer's warehouse after his bankruptcy, or an actual possession of them taken by his trustee, will suffice to put an end to the transitus, and to determine the right of stoppage (*y*).

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*, § 499, where the cases are referred to.

§ 858 a. [In Howell *v.* Alport (*a*), Alport bought goods, consisting of teas and tobacco, of Howell & Company, of New York. The goods were shipped to Belleville, and landed on the 21st of November at a wharf, where one Martin, acting as wharfinger, had charge of them; he paid the freight, which Alport repaid him. The goods being subject to duties were carried by defendant's team to the bonded warehouse, and were bonded by the defendant. The warehouse was a part of the defendant's premises. It was a room the entrance to which was by a door opening from a room in which the defendant carried on his own business. On this door there were two locks, the key to one being kept by the defendant, the key to the other by the customs officer. Both keys were necessary to open the door. While the goods were in this warehouse, the defendant sold part of them, and by permission of the messenger of customs, who unlocked the customs lock, he marked the goods thus sold. But the duty was not paid on any of the goods. On the 22d day of December the defendant became insolvent, and on the following day the plaintiffs notified the customs officer that they claimed the goods. On an interpleader, it was held that the plaintiffs had not lost the right to stop the goods. In Wiley *v.* Smith (*b*), the facts were as follows: The defendant was the assignee of the estate of E. Bendelari & Co. The plaintiff, of New York, sold to Bendelari & Co. 250 barrels of currants on time. The currants were sent from New York by rail on the 7th of January,

(*y*) 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.

(*a*) 12 U. C. C. P. 375.

(*b*) 1 Ont. App. 179.

1876, at the risk of Bendelari & Co. A bill of lading was duly received by Bendelari & Co.; the goods arrived on the 12th of January, and the freight was paid by Bendelari & Co., who also gave acceptances to the plaintiff for the price, which were payable thirty days from the date thereof. When the goods arrived at Toronto, the place of business of Bendelari & Co., they bonded the same. Subsequently Bendelari & Co. sold a portion of the currants, and the remainder, consisting of one hundred barrels, was bonded in a portion of the warehouse of Bendelari & Co., partitioned off and used by the customs authorities as a bonded warehouse, and for which they paid rent. On the 7th of February the defendant was chosen and appointed the assignee of Bendelari & Co. On the 8th of March the plaintiff demanded the goods from the collector, and on the 9th of March the defendant demanded them. The court held that the plaintiff's right of stoppage was lost. Burton, J. A., said: "It appears to me that the question, in determining whether the transitus is ended, is to ascertain in what capacity the goods are held by the person who has the custody. Is he the vendee's agent to keep the goods, or does he hold them as the agent of the carrier, or as a mere bailee or middleman not exclusively the agent of the vendor or vendee? The delivery into a warehouse, though belonging to the insolvent but used also as a bonded warehouse, would not in itself be a delivery to him; but whenever the collector of customs recognized his title, and took from him a bond for the payment of the duties at a future day, it appears to me out of the question to contend that the customs officer was a middleman, and that notice to him would operate as a stoppage *in transitu*. There was nothing remaining to be done on the part of the vendee as between him and the vendor. All that remained to be done was between the vendee and the crown; and if the officer representing the crown in the exercise of his lawful authority chooses to accept the bond of the vendee in place of the duties, it scarcely lies in the mouth of the vendors to say that the delivery is not complete. From the moment the collector of customs received the bond of the vendee, there was as complete a delivery as if the goods had been delivered into his own hands." Howell *v.* Alport, *supra*, was said not to be good law. The case was affirmed in Wiley *v.* Smith, 2 Duval (Supr. Ct. of Can.), 1. Mr. Justice Strong said: "The possession by the custom house authorities in this case was that of the vendee. The system of bonding is merely to facilitate trade, and numerous cases show that goods in bond may be dealt with by a mere transfer of delivery orders. The custom house officer undertook to hold, not for the vendor, but for the purchaser. The case is, therefore, precisely the same as if the goods had come into the actual possession of the vendee, and had then been deposited by

him with a bailee" (*c*). In Haig *v.* Wallace (*d*), the vendor and plaintiff, a distiller, had, under 4 Geo. IV. c. 94, deposited spirits in the king's warehouse subject to the king's duty. A sale was made of these goods subject to the duty, and a delivery order given to the customs warehouseman to deliver the puncheons sold to the vendee, "he paying duty and storage." The vendee gave in payment a three months' bill. The vendee lodged the delivery order with the warehouseman, who indorsed thereon "transfer received," and the transfer was entered in the keeper's books. While the puncheons were still in the warehouse, the vendee became insolvent, but it was held that the vendor's right of stoppage was gone. And in Orr *v.* Murdock, 2 Ir. C. L. R. 9, Haig *v.* Wallace was affirmed, and it was held that the transfer of the order on the warehouseman's books was not essential (*e*).]

SECTION IV. — HOW IS THE RIGHT EXERCISED?

§ 859. No particular form or mode of stoppage has been held necessary in any case; and Lord Hardwicke once said that the vendor was so much favored in exercising it as to be justifiable in getting his goods back by any means not criminal, before they reached the possession of an insolvent vendee (*f*). 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.

In Litt *v.* Cowley (*a*), where notice had been given to the carrier not to deliver the goods to the vendee, the carrier's clerk made a mistake, and delivered the package to the buyer, who opened it and sold part of the contents, and then became bankrupt. The assignees claimed to hold the goods, but were unsuccessful. Gibbs, C. J., in delivering judgment, said: "It was formerly held that, unless the vendor recovered back actual possession of the goods by a corporeal seizure of them, he could not exercise his right of stoppage *in transitu*. Latterly it has been held that notice to the carrier is sufficient; and that, if he delivers 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

(*c*) Graham *v.* Smith, 27 U. C. C. P. 1; Burr *v.* Wilson, 13 U. C. Q. B. 478. See Lewis *v.* Mason, 36 U. C. Q. B. 590; Wilds *v.* Smith, 2 Ont. App. 8, modifying and reversing the same case in 41 U. C. Q. B. 136.

(*d*) 2 Huds. & Br. 671.

(*e*) Croker *v.* Lawder, 9 Ir. L. R. 21. Such seems to be the rule in Scotland also. Strachan *v.* Knox (decided in 1817), 1 Bell's Com. (7th ed.) p. 185. See § 868 a, *post*, as to the general history of the right of stoppage *in transitu* in Scotland.

(*f*) 1 Atk. 250.

(*a*) 7 Taunt. 169; 2 Marsh. 457.

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 (*b*); but that it revests the *possession*, so as to restore to the vendor his lien, is undoubted.

In Bohtlingk *v.* Inglis (*c*), a demand for the goods, made by the vendor's agents on the master of the ship, was held a sufficient stoppage; and in Ex parte Walker and Woodbridge (*d*), it was decided that an entry of the goods at the custom house by the vendor, on the arrival of the vessel, in order to pay the duties, was a valid stoppage, as against the assignees of the bankrupt purchaser, who afterwards got forcible possession of the goods when landed.

In Northey *v.* Field (*e*), wine bought by the bankrupt was landed from the vessel and put in the king's cellars, according to the excise law, where it was to remain until the owner paid duty and charges; but if not paid within three months, then to be sold, and the excess of the proceeds, after payment of duty and charges, to be paid to the owner. The assignees petitioned to have the wine, and it was also claimed by the vendor's agent while in the king's cellar, but it was sold at the end of the three months under the law. Lord Kenyon held that the claim made by the vendor was a good stoppage *in transitu*, the wine being *quasi in custodiâ legis* (*f*).

[In Phelps *v.* Comber (*g*), it was held that a direction by the seller to hold the proceeds of the goods subject to his order did not express an intention to retake possession of the goods, and was not an effectual stoppage.]

§ 860. The notice of the stoppage must be given to the person in possession of the goods, or, if to his employer, then under such circumstances and at such time as to give the employer opportunity by using reasonable diligence to send the necessary orders to his servant. In Whitehead *v.* Anderson (*h*), 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

(*b*) *Post*, Sect. VI.; *post*, § 867.
(*c*) 3 East, 381.
(*d*) Cited in Cooke's Bankrupt Law, 402.
(*e*) 2 Esp. 613.
(*f*) See Nix *v.* Olive, Abbott on Ship. (12th ed.) 424.
(*g*) 29 Ch. D. 813, C. A.
(*h*) 9 M. & W. 518; Bethell *v.* Clark, 19 Q. B. D. at p. 560, per Mathew, J.

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."

§ 860 a. [In his judgment in Ex parte Falk (*i*), Bramwell, L. J., expressed doubt as to whether it is the shipowner's duty to 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 (*k*): "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."

Lord Blackburn, however, in his opinion in the same case in the House of Lords (*l*), 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 reasonable diligence, he will be excused in the event of the master having delivered the goods before the arrival of the notice.

The question whether a notice to stop the goods can be effectual if sent to the *consignee*, and not to the master or owner of the ship, was left undecided in Phelps *v.* Comber (*m*).

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*).]

§ 861. The mode of exercising the right of stoppage underwent

(*i*) 14 Ch. D. at p. 455.
(*k*) 14 Ch. D. at p. 450.
(*l*) 7 App. Cas. at p. 585. Reported *sub nom.* Kemp *v.* Falk. Cf., also, Bethell *v.* Clark, 19 Q. B. D. 553.
(*m*) 29 Ch. D. 813, C. A.
(*n*) Ex parte Watson, 5 Ch. D. 35, C. A.

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 indorsed, and was sufficient without any representation that the bill of lading had not been transferred by the vendee.

Secondly. That the master's refusal to acquiesce in the vendor's claim of stoppage was a *breach of duty*, giving jurisdiction to the Admiralty Court.

Thirdly. That the vendor's right included the right of demanding *delivery to himself*, and that the carrier has no right to say that he will retain the goods for delivery to the true owner after the conflicting claims have been settled.

Fourthly. That the stoppage is at the vendor's peril, and it is incumbent on the master to give effect to a claim as soon as he is satisfied that it is made by the vendor, unless *he is aware of a legal defeasance* of the vendor's claim; but it is not a matter ordinarily within his cognizance whether or not the buyer has indorsed over a bill of lading to a third person.

Fifthly. That if bills of lading are presented to the master by 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."

This last proposition was said by the learned judge to be unnecessary to the decision. It was stated on the authority of Fearon *v.* Bowers, reported in the notes to Lickbarrow *v.* Mason (*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 Sale 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

(*o*) 32 L. J. Adm. 97.

(*p*) 1 H. Bl. 364; 1 Sm. L. C. at p. 737, ed. 1887.

(*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 (ed. 1887), Ord. I. r. 2, notes, p. 129, and Ord. LVII. p. 429.

(*r*) P. 266. See, also, Abbott on Shipping, Part 3, Chap. 9, sect. 25, ed. 1827.

opinion delivered in The Tigress, this suggestion is rejected, the judge saying distinctly that the proof of the conditions on which the vendor's rights depend would always be difficult, often impossible, at the time of their exercise; "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange given for the goods becomes due: for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent." And see the decision of the House of Lords in Meyerstein *v.* Barber, as stated *ante*, § 822.

[The foregoing 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 "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. indorsed 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," unindorsed, 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

(*s*) 7 App. Cas. 591, affirming S. C. 6 Q. B. D. 475, C. A., reversing S. C. 5 Q. B. D. 129.

whom they received them, and could not, therefore, be held guilty of a conversion.

Bramwell's, L. J.'s, view (*s*) 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.

Baggallay, L. J. (*t*), 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 (*u*), that the shipowner, *who is in ignorance of any previous dealing with the bill of lading*, may be justified in delivering the goods to the party presenting one part of the set.

Brett, L. J., in a dissentient opinion (*v*), 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.

The case was taken on appeal to the House of Lords, who affirmed the decision of the Court of Appeal (*w*). 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 opinion, takes occasion to say: "Where the master has notice, or probably even knowledge, of the other indorsement, I think he must deliver at his peril to the righful 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 to that extent only.

The effect of this decision is not to alter the established usage of merchants with relation to the passing of property by bills of lading, but to point out the risk which attends it in the case of fraud (*x*).]

(*s*) 6 Q. B. D. at p. 492.
(*t*) 6 Q. B. D. at p. 504.
(*u*) L. R. 4 H. L. at p. 336, *ante*, § 822.
(*v*) 6 Q. B. D. at p. 487.
(*w*) 7 App. Cas. 591.
(*x*) Per Brett, M. R., and Bowen, L. J., in Sanders *v.* Maclean, 11 Q. B. D. at pp. 335, 344.

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 (*y*).

SECTION V. — HOW MAY IT BE DEFEATED?

§ 862. 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 (*z*)], and 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 (*a*).

§ 863. The Bills of Lading Act, 18 & 19 Vict. c. 111 (referred to *ante*, § 812), and the Factors' Acts (*ante*, § 809 *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 (*b*), 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* indorsee; but if the indorsement was by a factor or consignee, it was only valid in case of sale, not of pledge; and, even when by the vendor himself, the transfer operated as a conveyance of the property in the goods, but not as an *assignment of the contract*, so that the indorsee was not empowered to bring suit on the bill of lading (*c*). But now, by the effect of the Factors' Acts, the indorsement of a bill of lading by factors or consignees, intrusted with it as agents of the owners, is as effective as that of the vendor would be in giving validity to "any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents [including bills of lading], as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and *good against the owner of such goods*, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." So that, as regards the effect of the transfer of the bill of lading, it now makes no difference whether the consignor was vendor, or merely consigning goods for sale, his 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.

(*y*) Siffkin *v.* Wray, 6 East, 371; Mills *v.* Ball, 2 B. & P. 457.

(*z*) See the 5th section of the Factors' Act, 1877, *ante*, § 809 a.

(*a*) It would seem that the mere indorsement, 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*, § 865 a.

(*b*) 1 Sm. L. C. 737, ed. 1887.

(*c*) Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 297.

And by the Bills of Lading Act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or *indorsee, to whom the property in the goods shall pass.*

For decisions upon the legal effect of the words just quoted in italics, reference may be made to the cases quoted in the note (*d*).

[And by the act to amend the Factors' Act (*e*), the doctrine has been extended so as to include not only bills of lading, but any document of title, as defined by the previous Factors' Act (*f*), and the lawful transfer of any document of title by the vendee to a transferee (whether a sub-vendee or a pledgee), who takes the same *bona fide* and for valuable consideration, has the same effect as the transfer of a bill of lading in defeating the vendor's right of stoppage *in transitu* (*g*).]

§ 864. It is not within the province of this treatise to examine the general law in relation to bills of lading, for which the authorities are collected in the notes to Lickbarrow *v.* Mason (*h*), but only the effect of transferring these documents in defeating the right of stoppage.

The first point to be noticed is, that a bill of lading is not negotiable in the same sense as a bill of exchange, and that therefore the mere honest *possession* of a bill of lading indorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. *The indorsement of a bill of lading gives no better right to the goods than the indorser himself had* (except in cases where an agent *intrusted with it* may transfer it to a *bona fide* holder under the Factors' Acts), so that, if the owner should lose or have stolen from him a bill of lading indorsed in blank, the finder or the thief could confer no title upon an innocent third person (*i*).

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 (*k*),

(*d*) Fox *v.* Nott, 6 H. & N. 630; The Figlia Maggiore, L. R. 2 A. & E. 106; The Nepoter, L. R. 2 A. & E. 375; The Freedom, L. R. 3 P. C. 594; Dracachi *v.* The Anglo-Egyptian Navigation Company, L. R. 3 C. P. 190; Short *v.* Simpson, L. R. 1 C. P. 248, 252; Burdick *v.* Sewell, 10 App. C. 74; 13 Q. B. D. 159, C. A.; 10 Q. B. D. 363.

(*e*) 40 & 41 Vict. c. 39, s. 5, *ante*, § 809 a.

(*f*) 5 & 6 Vict. c. 39, s. 4.

(*g*) In Kemp *v.* Falk, 7 App. Cas. 573, *post*, § 865 a, it was argued that cash receipts given by vendees to their sub-purchasers, 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.

(*h*) 1 Sm. L. C. 737, ed. 1887.

(*i*) 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.

(*k*) Pease *v.* Gloahec, L. R. 1 P. C. 219.

because, as we have seen (*l*), a transfer obtained by fraud is only voidable, not void.

In Dracachi *v.* The Anglo-Egyptian Navigation Company (*m*), the plaintiff proved that the consignor had indorsed the bill of lading to A., and that A. had indorsed it to the plaintiff for value, so as to pass the property; and it was objected by defendant that there was no proof that the first indorsement was for value *so as to pass the property* under the 1st section of the Bills of Lading Act; but the court held that the transfer by the consignor was strong *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.

§ 865. If the consignor or vendor transfers the bill of lading as security for advances, and the bill of lading is then transferred back on the repayment of the advances, the rights of the original consignor or vendor return to him, and he is remitted to all his remedies under the original contract (*n*).

But the vendor's rights of stoppage *in transitu* may be defeated in part only, for the bill of lading [or other document of title] 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 (*o*). On these grounds, therefore, the vendor's right of stoppage will remain so far as to entitle him to any surplus proceeds after satisfying the creditor to whom the bill of lading was transferred as security; and the vendor will have the further equitable right of insisting on *marshalling the assets;* that is to say, of forcing the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding on the goods of the unpaid vendor (*p*).

§ 865 a. [In Ex parte Golding Davis & Company (*q*), 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 sub-sale of the goods by the original purchasers during the continuance of the transit. The

(*l*) *Ante*, § 433 *et seq.*

(*m*) L. R. 3 C. P. 190; 37 L. J. C. P. 71.

(*n*) Short *v.* Simpson, L. R. 1 C. P. 248; 35 L. J. C. P. 147.

(*o*) See on this point Burdick *v.* Sewell, 10 App. C. 74; 13 Q. B. D. 159, C. A.; 10 Q. B. D. 363.

(*p*) In re Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; S. C. on App. 15 L. J. Ch. 374, and in the note to Berndtson *v.* Strang, 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 marshalling assets in equity, Aldrich *v.* Cooper, and notes, 2 Tud. L. C. in Eq. 82, 95, ed. 1886.

(*q*) 13 Ch. D. 628, C. A.

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 sub-purchasers. 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 sub-purchasers 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 (*r*): "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 in any way the interest of the sub-purchaser? In my opinion he can."

In Ex parte Falk (*s*), 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 indorsed 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 sub-purchasers who paid their purchase-money, but only took, as it afterwards appeared (*s*), *cash receipts* in exchange. The buyer became bankrupt, and the unpaid seller thereupon gave the ship's master notice to stop the goods *in transitu*. The notice was effected after the date of the sub-sales, but before the goods had been delivered to the sub-purchasers.

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 sub-purchasers 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 sub-purchasers' 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 &

(*r*) At p. 638.

(*s*) 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 sub-purchasers.

Company, but Bramwell, L. J., says (*t*): "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*l*., and their being resold for 600*l*., and the case of the purchaser pledging the goods for 600*l*. 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 & Company and to the present case."

Leave was given to appeal to the House of Lords (*u*), 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 sub-sales 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 sub-sales 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.

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 & Company. Lords Blackburn and Watson (*v*) distinctly refrain from offering any opinion upon it, whilst Lord Selborne (*w*), without expressly mentioning the case, states his opinion to be, that there can be no right of stoppage *in transitu* as against the purchase-money payable by sub-purchasers to their vendor. He says: "I assent entirely to the proposition that, where the sub-purchasers 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 sub-purchasers were paid

(*t*) At page 457.
(*u*) Kemp *v.* Falk, 7 App. Cas. 573.
(*v*) At pp. 581 and 588.
(*w*) At p. 577.

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 sub-sale, Lord Blackburn (*x*) 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 indorsement of the bill of lading* (*y*). 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."

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 & Company, *ante*, § 865 a. 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 sub-purchaser 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 only exercise his rights subject to the rights of the sub-purchaser, and that, it would seem, whether the sub-sale 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 & Company may be supported upon the ground that, upon the sub-sale, there was an *indorsement* 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 sub-sale 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 (*ante*, § 865); but it is submitted that the true principle of those decisions is, that, when 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 sub-purchaser, *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.]

(*x*) At p. 582.

(*y*) Lord Fitzgerald (at p. 590) reserves his opinion on this point. In point of fact, it appears that the sub-sales were for cash, although the purchase-money had not reached the vendee's hands when the notice to stop was given.

§ 866. The transfer of the bill of lading, in order to affect the vendor's right of stoppage *in transitu*, must be, both by the statute and the common law, to a *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 (*z*), but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable* (*a*). Thus in Vertue *v.* Jewell (*b*), where Lord Ellenborough held that the vendor had no right of stoppage, he said expressly that, if such a right had existed against the consignee, he would have enforced it against Ayres, the indorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee.

On this principle it was decided by the Judicial Committee of the Privy Council, in Rodger *v.* The Comptoir d'Escompte (*c*), 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*.

[But in Leask *v.* Scott (*d*), 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 fulfilment 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

(*z*) Cuming *v.* Brown, 9 East, 506.

(*a*) Ib.; Salomons *v.* Nissen, 2 T. R. 681. Cf. the 5th section of the Factors' Act, 1877, which provides that the indorsement of the document of title shall be a *lawful* one.

(*b*) 4 Camp. 31. See, also, Wright *v.* Campbell, 4 Burr. 2046.

(*c*) L. R. 2 P. C. 393; and see The Chartered Bank of India *v.* Henderson, L. R. 5 P. C. 501.

(*d*) 2 Q. B. D. 376, C. A. The decisions of the Judicial Committee, although entitled to great weight, are not binding on the English courts.

that there was "not a trace of such distinction between cases of past 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.]

SECTION VI. — WHAT IS THE EFFECT OF A STOPPAGE IN TRANSITU?

§ 867. There can no longer be a reasonable doubt that the true nature and effect of this remedy of the vendor is simply to restore the goods to his *possession*, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale (*d*).

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, 795, 797 (*e*); and in Wentworth *v.* Outhwaite (*f*), where the point was raised and elaborately argued, Parke, B., gave the judgment, in 1842, in which he declared that in his own opinion and that of his brethren, with the exception of Lord Abinger, who dissented, the effect of the stoppage was "to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods till the price is paid down."

In Martindale *v.* Smith (*g*), 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."

In Valpy *v.* Oakeley (*h*), where the assignees of bankrupts sued the defendant in assumpsit for non-delivery of goods bought by the

(*d*) The most recent statement of the law on this point is by Cotton, L. J., in Phelps *v.* Comber (1885), 29 Ch. D. 821.

(*e*) Ed. 1887.

(*f*) 10 M. & W. 436.

(*g*) 1 Q. B. 389.

(*h*) 16 Q. B. 941; 20 L. J. Q. B. 380.

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 (*i*), 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.

§ 868. But the strongest ground for holding the question to be now at rest is, that courts of equity have assumed regular jurisdiction of bills filed by vendors to assert their rights of stoppage *in transitu*, a jurisdiction totally incompatible with the theory of a rescission of the contract; for if the contract was rescinded, there would be no privity in a court of equity between the parties. This was pointed out by Lord Cairns, in Schotsmans *v.* The Lancashire and Yorkshire Railway Company (*k*); 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.

[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 (*l*), "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 (*m*).

(*i*) 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."

(*k*) 2 Ch. 332.

(*l*) 2 Kent, 543, ed. 1873.

(*m*) Ludlow *v.* Bowne, 1 Johnson, 15 (1805), judgment of Kent, C. J.; Stubbs *v.* Lund, 7 Mass. 453 (1811); The St. José Indiano, 1 Wheaton, 208, 210 (1816), judgment of Story, J.; Rowley *v.* Bigelow, 12 Pick. (29 Mass.), 306 (1832); Stanton *v.* Eager, 16 Pick. (33 Mass.), 467 (1835);

The prevailing current of authority in America is in favor of the doctrine that the exercise of the right of stoppage *in transitu* does not rescind the sale, but simply replaces the vendor in possession of the goods, enabling him to assert a lien upon them (*n*).

In Cross *v.* O'Donnell (*o*), Mr. Commissioner Earl said: "When the seller retakes the property in the exercise of the right of stoppage, he is not reinvested with the title, but simply placed in the actual possession of the goods, holding them as security for the purchase-money."

And in Babcock *v.* Bonnell (*p*), Church, C. J., in the course of an elaborate judgment, while expressing his own preference for the doctrine of rescission as being more simple, and in most cases more just to both parties, and stating that, so far as he was aware, the question had never been definitely decided in the State of New York, conceded that the prevailing current of authority in America was in favor of the view that the act of stoppage was the assertion of a right of lien.

§ 868 a. 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 had given security for the price (*q*). 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 mean time, *bona fide* given value for them.

Newhall *v.* Vargas, 13 Me. 93; S. C. 15 Me. 314 (1836); Bell *v.* Moss, 5 Wharton (Pa.), 189 (1839); Rogers *v.* Thomas, 20 Conn. 53 (1849); Grout *v.* Hill, 4 Gray (70 Mass.), 361 (1855); Harris *v.* Pratt, 17 N. Y. 250 (1858); Reynolds *v.* Boston & Maine Railway, 43 N. H. 580 (1862); Patten's Appeal, 45 Pa. St. 157 (1863); Seymour *v.* Newton, 105 Mass. 272 (1870); Mohr *v.* Boston & Albany Railroad Company, 106 Mass. 67 (1870); Babcock *v.* Bonnell, 80 N. Y. 244 (1880), per Church, C. J., at p. 250.

(*n*) Newhall *v.* Vargas, 15 Me. 314; Rowley *v.* Bigelow, 12 Pick. (29 Mass.), 306, 312; Stanton *v.* Eager, 16 Pick. (33 Mass.), 467, 475; Rogers *v.* Thomas, 20 Conn. 53, 58; Patten's Appeal, 45 Pa. St. 151, 158.

(*o*) 44 N. Y. 661, 665.

(*p*) 80 N. Y. 244, 251.

(*q*) 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.

These rules became established in France, Spain, Italy, Germany, Holland, and in fact nearly all the states of the Continent. With the growth of commerce and credit, however, 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.

In France, for example, the Code de Commerce (*r*) 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 principles of the law of stoppage *in transitu*. The right may be exercised: —

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 (*s*). The committee of the bankrupt's creditors (*les syndics*) have the right to demand delivery of the goods on payment of the price.

2dly. 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 con-

(*r*) 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 Bohtlingk *v.* Inglis, 3 East, 381. See, also, the Code Civil D'Italie (traduit par Gandolfi), tit. 6, cap. 5, art. 1513.

(*s*) This seems to assume that the effect of the exercise of the right is to rescind the sale.

signor may intercept so much of the price due from the purchaser to the bankrupt as remains unpaid or unaccounted for.

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 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 (*t*), 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 (*u*).]

AMERICAN NOTE.

STOPPAGE IN TRANSITU.

§§ 828–868 a.

Stoppage *in transitu* has been well defined as being an extension of the right of lien which a vendor has by the common law upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law.

By a bargain and sale, the property vests in the vendee without delivery; but where, by the terms of sale, the price is to be paid on delivery, the vendor has a right to retain the goods till payment is made, and this right is strictly *a lien*, a right to detain and hold the goods of another as security for the payment of some debt, or performance of some duty. But when the vendor and vendee are at some distance from each other, and the goods

(*t*) 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.

(*u*) See Bell's Comm. vol. i. p. 226, ed. 1870, and Brown on the Law of Sale in Scotland, p. 434. Mr. Bell favors the doctrine that the effect of a notice to stop *in transitu* is to rescind the sale. He says, vol. i. p. 251: "Although there are many difficulties either way, it appears on the whole most consistent with the great lines of this doctrine of stoppage *in transitu*, that the seller's security over the goods sold, though perhaps in a large sense of the nature of a lien, is given by equity originally on the condition that the seller shall take back the goods, as if the contract were, *ab initio*, recalled."

are on their way from the vendor to the vendee, or to the place by him appointed for their delivery, if the vendee become insolvent, and the vendor can repossess himself of the goods before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This, however, does not rescind the contract, but only restores the vendor's lien; and it can only take place where the property has vested in the vendee. Rowley *v.* Bigelow, 12 Pick. 312.

A factor, carrier, or agent, therefore, having possession of the goods, who delivers them to the vendee after notice from the vendor not to do so because of the vendee's insolvency, is liable to the vendor therefor. Howatt *v.* Davis, 5 Munf. 34; Bloomingdale *v.* Memphis, etc. R. R. Co. 6 Lea, 616; Ascher *v.* The Grand Trunk Railway Co. 36 Up. Can. Q. B. 609. Trover was thought not to be the proper form of action by the vendor in Childs *v.* Northern Railway Co. 25 Up. Can. Q. B. 165, since the title of the goods is in the vendee. *Sed quære.*

If the goods are taken out of the possession of the carrier by an attaching creditor of the vendee, after which the vendor notifies the carrier to stop the goods, it does not thereby become the carrier's duty to notify the officer, and request him not to deliver to the vendee. And the carrier is not, therefore, liable to the vendor for neglect to give such notice. French *v.* Star Union Transportation Co. 134 Mass. 288.

This right is so much favored in law that it exists in full force although credit has been given for the goods and the time has not expired, and so the bill be not yet due. The insolvency of the buyer supersedes the fact of credit. Stubbs *v.* Lund, 7 Mass. 453; Bell *v.* Moss, 5 Whart. 189; Newhall *v.* Vargas, 13 Me. 93; Atkins *v.* Colby, 20 N. H. 154; Clapp *v.* Sohmer, 55 Iowa, 273. Nor would taking a time note for the price make any difference. But taking the note of a *third person* actually in final payment, without any guaranty or indorsement of the buyer, would prevent the right, since the goods are thus fully paid for. Eaton *v.* Cook, 32 Vt. 58.

Partial payment of the price does not impair the right to stop the whole for the balance due. Newhall *v.* Vargas, 13 Me. 93. Nor does partial delivery affect the right to retain the balance for the whole bill. Buckley *v.* Furniss, 17 Wend. 504; Ex parte Cooper, 11 Ch. Div. 68.

The term *stoppage in transitu* is sometimes used, perhaps incorrectly, in a very different sense from the above. Thus, where a debtor ships goods to his creditor in payment of a debt, and changes his mind before the goods reach the creditor, it is sometimes said that, if he has not notified the creditor of the shipment, he may countermand his order, and recall the goods, or send them elsewhere, though he could not exercise it if he had duly notified the creditor of the shipment; since that would be a final appropriation of the goods to such creditor. Clark *v.* Mauran, 3 Paige, 373; Berly *v.* Taylor, 5 Hill, 581; Wood *v.* Roach, 1 Yeates, 177. This act has been sometimes called a *stoppage in transitu.* Walter *v.* Ross, 2 Wash. C. C. 283. But as this right could be exercised, if at all, as well when the creditor or consignee is solvent as when insolvent, it is obvious that it differs essentially from the right discussed in this chapter.

Another sense in which the phrase is sometimes used is where the vendee and vendor mutually agree to *rescind* the purchase before the goods arrive, or afterwards, but before the rights of creditors or third persons have intervened, and the vendor, in the exercise of that right, retakes the goods, after which creditors of the vendee seek to attach them. This act of the

vendor is also sometimes termed a *stoppage in transitu*. But here again the difference is plain, since this may be done, like the last, whether the buyer be solvent or insolvent, and in both cases the act is done to revest the entire *title* and ownership in the vendor, and not merely the possession or lien for the price, as in the proper case of a *stoppage in transitu*. See Scholfield *v.* Bell, 14 Mass. 40; Ash *v.* Putnam, 1 Hill, 302; Kahnweiler *v.* Buck, 2 Pearson, 69; Grout *v.* Hill, 4 Gray, 361; Cox *v.* Burns, 1 Iowa, 64; Kloes *v.* Wurmser, 34 Mo. App. 456; Flynn *v.* Ledger, 48 Hun, 465; Sturtevant *v.* Orser, 24 N. Y. 538, in which the subject of rescission, and what amounts to one, is carefully considered; Mason *v.* Wilson, 43 Ark. 172. But to consider the subject in its strict sense : —

1. **Who may exercise the Right.** Not only may vendors, strictly speaking, exercise the right, but oftentimes those who stand in the relation of vendors or consignors may do so. A factor or agent who buys goods in his own name or on his own credit, and ships them to his principal, may exercise the right of stoppage as a vendor, although he charges a commission for doing the business, or has taken bills of exchange in his favor drawn by the master of the vessel on the consignee. Newhall *v.* Vargas, 13 Me. 93; Seymour *v.* Newton, 105 Mass. 275; and see Ex parte Miles, 15 Q. B. Div. 39 (1885). Any person, therefore, who has paid the price of the goods for the vendee, and taken from him an assignment of the bill of lading as security for his advances, is a *quasi* vendor, and may exercise the right. Gossler *v.* Schepeler, 5 Daly, 476; citing Muller *v.* Pondir, 55 N. Y. 325. In Memphis, etc. Railroad Company *v.* Freed, 38 Ark. 614, it was held that if A. orders goods of B., and B. sends the order to C. with directions to send the goods to A., but to charge them to him (B.) and send the bill to him, and C. does so, he cannot stop the goods on the way to A. because of the insolvency of B., since there is no privity between C. and A., and he is not vendor to A. But this seems inconsisent with Ex parte Golding, 13 Ch. Div. 628. See Gwyn *v.* Richmond & Danville R. R. Co. 85 N. C. 429.

2. **Against whom it may be exercised.** All agree that it can be exercised only against *insolvent* buyers, wherein it differs from the lien existing before the transit commences. And by an "insolvent buyer" is meant one who is unable to meet his liabilities as they mature in the ordinary course of business. A person may be insolvent, in the legal acceptation of the term, although his assets may, at a fair valuation, far exceed his liabilities, as it finally turns out. It is not necessary that the buyer should have applied for the benefit of any insolvent law, or been proceeded against by a creditor under such law. Any overt act of insolvency, such as failure to pay a debt due, is sufficient, even if any such act be necessary. Indeed, it would seem that no prior overt act of insolvency is necessary, but that the insolvency might be established by a comparison of the liabilities and assets of the buyer at the time the right is exercised. See Hays *v.* Mouille, 14 Pa. St. 48; Naylor *v.* Dennie, 8 Pick. 205; Reynolds *v.* Boston, etc. R. R. Co. 43 N. H. 580; Secomb *v.* Nutt, 14 B. Monr. 324. It is the *fact* of insolvency, and not the *act*, which governs.

The mere fact that a creditor of the vendee has attached the goods in transit would not alone be sufficient evidence of insolvency to warrant the vendor in stopping them. Gustine *v.* Phillips, 38 Mich. 674. But judg-

ments confessed by the vendee, and executions levied on his property before the transit is ended, *tend* to prove his insolvency, and are competent for that purpose. Loeb *v.* Peters, 63 Ala. 243. Of course evidence of the actual insolvency of the vendee is always competent, even though the price of the goods stopped is not yet due. Clapp *v.* Sohmer, 55 Iowa, 273. For definitions of legal insolvency, see Thompson *v.* Thompson, 4 Cush. 127; Lee *v.* Kilburn, 3 Gray, 594; Benedict *v.* Schaettle, 12 Ohio St. 515; Rogers *v.* Thomas, 20 Conn. 54; Herrick *v.* Borst, 4 Hill, 650; Chandler *v.* Fulton, 10 Tex. 2; Blum *v.* Marks, 21 La. An. 268; Durgy Cement Co. *v.* O'Brien, 123 Mass. 13. If insolvency exist at the *time* the alleged *right* of stoppage *is exercised*, it is sufficient.

Neither is it necessary (notwithstanding Rogers *v.* Thomas, 20 Conn. 54) that the insolvency should have first occurred after the sale, and before the right is set up. If the insolvency in fact existed at the time of the purchase, unknown to the vendor, and he afterwards discovers it before the transit is ended, he may lawfully stop the goods. Benedict *v.* Schaettle, 12 Ohio St. 515, a valuable case; Loeb *v.* Peters, 63 Ala. 243; Reynolds *v.* Boston & Maine R. R. 43 N. H. 589; Gustine *v.* Phillips, 38 Mich. 675; Blum *v.* Marks, 21 La. An. 268; O'Brien *v.* Norris, 16 Md. 122; White *v.* Mitchell, 38 Mich. 390; Schwabacher *v.* Kane, 13 Mo. Ap. 126; Bender *v.* Bowman, 2 Pearson (Penn.), 517; Kingman *v.* Denison, 84 Mich. 612; More *v.* Lott, 13 Nev. 380; Couture *v.* McKay, 6 Manitoba Rep. 273, following Benedict *v.* Schaettle, *supra*. Some say a knowledge of a buyer's insolvency at the time of sale (if such a sale ever would be made) would prevent any right of stoppage which might otherwise have existed. Buckley *v.* Furniss, 15 Wend. 137; O'Brien *v.* Norris, 16 Md. 122.

3. **When does the Transit begin?** The transit begins, of course, when the goods have so far left the possession of the vendor that he can no longer exercise his common-law right of "lien," existing against every buyer, whether solvent or insolvent. If the right of detention is exercised before that moment, it is not a right of stoppage *in transitu*, strictly speaking, even though the buyer be insolvent, but rather the right of lien, which may be more perfect perhaps in case the buyer has become insolvent than it otherwise would be; and it is possible there may be such a delivery as would destroy a vendor's lien against a solvent buyer, and still allow the vendor to retain or retake possession if the buyer become insolvent before the transit commences. See Thompson *v.* Baltimore, etc. R. R. Co. 28 Md. 396.

4. **What does or does not defeat the Right intermediately.** (1.) Attachment or resale. (2.) Transfer of bill of lading. (3.) Intermediate delivery, or possession by vendee or his agents.

(1.) The right is not lost by an attachment or levy of execution by a creditor of the vendee upon the goods while in transit, although the officer take possession of the goods. That is the very occasion when the vendor needs his right the most, and it is between vendors and attaching creditors of vendees that the question most frequently arises. Naylor *v.* Dennie, 8 Pick. 198; Seymour *v.* Newton, 105 Mass. 275; Cox *v.* Burns, 1 Iowa, 64; Sherman *v.* Rugee, 55 Wisc. 346; Durgy Cement and Umber Co. *v.* O'Brien, 123 Mass. 14; Buckley *v.* Furniss, 15 Wend. 137; 17 Ib. 504; Clark *v.* Lynch, 4 Daly, 83; Covell *v.* Hitchcock, 23 Wend. 611; Black-

man *v.* Pierce, 23 Cal. 508; Wood *v.* Yeatman, 15 B. Monr. 270; Rucker *v.* Donovan, 13 Kans. 251; Mississippi Mills *v.* Bank, 9 Lea, 314; Dreyfuss *v.* Mayer, 69 Miss. 282; McLean *v.* Breithaupt, 12 Ont. App. 383. In Couture *v.* McKay, 6 Manitoba R. 273, it is held that, while an attachment before judgment does not put an end to the vendor's right, a seizure upon execution does have that effect. In that case, goods directed to Beren's River were seized at a railway warehouse in Winnipeg, the sheriff who made the seizure acting under an execution which he held against the vendee.

An attachment of the goods in transit by the *vendor himself* in a suit against the vendee is sometimes considered as an abandonment of his right of stoppage, since that assumes that the goods are the property of the vendee. But if that ever be so, it seems it ought not to be so held where it appears that the attachment was made under an erroneous belief that the right of stoppage was gone, especially if the attachment is withdrawn as soon as the error is discovered, and the right of stoppage is exercised before the goods arrive at their destination. Fox *v.* Willis, 60 Tex. 373.

The right is not lost by a mere sale of the goods by the vendee to another without the vendor's consent, and unaccompanied by any actual or constructive possession by either. Holbrook *v.* Vose, 6 Bosw. 77, where the whole subject is elaborately examined. If delivered to such sub-vendee, of course the right is gone. U. S. Wind Engine Co. *v.* Oliver, 16 Neb. 612. But where the buyer, at the time of sale, directed the seller to ship the goods to A. in his (the buyer's) name, as consignee, and the seller did so, it was held he could not stop the goods on the way to A. upon hearing of the buyer's failure; for he had consented to a clear and unmistakable act of ownership by the buyer. Treadwell *v.* Aydlett, 9 Heisk. 388. And see Eaton *v.* Cook, 32 Vt. 58; Wait *v.* Scott, 6 Grant (Ont.), 154. On a similar principle it was held, in Rowley *v.* Bigelow, 12 Pick. 307, that if goods be put on board a vessel designated by the vendee, not for transportation to him nor to a place designated by him, but to be shipped by said vessel from the buyer's place of business and residence, and in his name, to some third person, the right of stoppage is gone when the goods are put on board the vessel; citing Noble *v.* Adams, 7 Taunt. 59.

In the recent case of Brindley *v.* The Cilwyn Slate Co. 55 Law J. Q. B. 67 (1886), it was held that, although the goods be shipped on board a vessel chartered by the vendee, to be sent to him, and the bill of lading makes them deliverable to him or his assignees, and not to the vendor or his assigns, the vendor has still a right to stop them before reaching the port of original destination, viz., the buyer's place of business. See, also, Ex parte the Rosevear China Clay Co. 11 Ch. Div. 560. But the same precise point had been decided in exactly the same way seventy-five years earlier in Massachusetts. Stubbs *v.* Lund, 7 Mass. 453 (1811). And see Ilsley *v.* Stubbs, 9 Mass. 65. Bolin *v.* Huffnagle, 1 Rawle, 9 (1828), to the contrary, can hardly now be considered as law, though a *dictum* to the same effect may be found in Pegueno *v.* Taylor, 38 Barb. 375.

(2.) But a *bona fide* sale for a valuable consideration, *accompanied with an assignment and delivery of the bill of lading*, does defeat the right. The American law entirely accepts the doctrine of Lickbarrow *v.* Mason, and the cases need not be cited. And in Newhall *v.* Central Pacific R. R. 51 Cal. 345, this was *held* to be so, although the vendee was insolvent, and

the vendor had notified the carrier to stop the goods *before* the sale and transfer of the bill of lading, neither of which facts being known to the assignee. The subject is elaborately considered in this case, but it is open to question whether the effect of a bill of lading was not carried too far. Had the vendor actually retaken possession of the goods while still in transit, and before the buyer had assigned the bill of lading, it seems he would have held them as against the assignee; but if he had actually demanded the goods of the carrier before such assignment, and was prevented by the carrier from taking possession, he does all he can to secure his rights, and apparently ought not to suffer. It is true that some cases hold that, although the seller has never parted with the possession of the goods, as where they are in the possession of his agent, a *bona fide* assignee of the bill of lading may claim the goods as against the lien of the original vendor. Dows *v.* Greene, 32 Barb. 490; 24 N. Y. 638; Dows *v.* Rush, 28 Barb. 157. But it is not easy to see how this can be so.

The carrier's bills for freight and wharfage, although receipted, are not substituted for the bill of lading. A transfer of such receipts by the consignee to his vendee, without any transfer of the bill of lading, does not deprive the vendor of his right of stoppage as to such of the goods as still remain in the carrier's possession, although the sub-vendee has paid for all of the goods and taken away part of them. Ocean Steamship Co. *v.* Ehrlich, 88 Geo. 502.

The *bona fide* sale of the goods, accompanied by an assignment of the bill of lading, terminates the right, though the goods be sold in payment of an antecedent debt. Lee *v.* Kimball, 45 Me. 172; Leask *v.* Scott, 2 Q. B. Div. 376; Clementson *v.* Grand Trunk Railway Co. 42 Up. Can. Q. B. 273 (1877). But not, it is said, where the assignment is merely *collateral security* for a preëxisting debt, and in which nothing is advanced or surrendered by the assignee. Loeb *v.* Peters, 63 Ala. 243; Lessassier *v.* The Southwestern, 2 Woods, 35. Of course the transfer must be *bona fide*, and not merely for the purpose of terminating the vendor's right. Rosenthal *v.* Dessau, 11 Hun, 49.

If the vendee has been guilty of such fraud that the vendor could retake the goods from him had they been actually delivered, it is generally held that the vendee cannot, by a sale and transfer of the bill of lading of the goods while in transit, give a good title to *his vendee* as against the right of stoppage of the original vendor: in other words, that a fraudulent buyer has not the same power to give a perfect title to his *bona fide* vendee, if the goods have not yet reached him, as he could if he had absolute and complete possession of them by consent of the vendor; a bill of lading not being exactly negotiable, and not itself constituting title. Dows *v.* Perrin, 16 N. Y. 325; Evansville, etc. R. R. Co. *v.* Erwin, 85 Ind. 457; Decan *v.* Shipper, 35 Pa. St. 239; Brower *v.* Peabody, 13 N. Y. 122. And see Barnard *v.* Campbell, 55 N. Y. 456; Pollard *v.* Vinton, 105 U. S. 7; Pollard *v.* Reardon, 65 Fed. R. 848. But see Dows *v.* Greene, 32 Barb. 490, and 24 N. Y. 638; Dows *v.* Rush, 28 Barb. 157; Blossom *v.* Champion, Ib. 217.

Assignees of the vendee for the benefit of creditors, whether voluntary or involuntary, do not take as *bona fide* purchasers, but acquire only the rights of the assignor, and are subject to the right of the vendors to stop in transit, unless they have obtained possession. Stanton *v.* Eager, 16 Pick.

467; Buckley *v.* Furniss, 17 Wend. 504; Bell *v.* Moss, 5 Wharton, 205; Arnold *v.* Delano, 4 Cush. 33; Ainis *v.* Ayres, 62 Hun, 376.

(3.) When the goods have come into the actual possession of the vendee or his assignee, even though they have not yet reached their original destination, the right is lost. The vendee may intercept them on the way and take possession, and thus defeat the right. Secomb *v.* Nutt, 14 B. Monr. 324; Wood *v.* Yeatman, 15 Ib. 270; Mohr *v.* Boston & Albany Railroad, 106 Mass. 72, Morton, J.; Stevens *v.* Wheeler, 27 Barb. 658. Good faith in taking intermediate possession may be essential to its validity. Poole *v.* The Houston & Texas C. R. Co. 58 Tex. 134. If taken possession of by an agent of the vendee before reaching their original destination, the right is or is not lost, according to the authority and purpose of such agent in taking possession. If the purpose and authority is merely to *transmit or forward* to the vendee at the original place of destination, the transit is not ended by such interception or act of the agent. This is so although such agent be especially appointed by the vendee for that particular purpose. The right continues as much as if the goods were still in the hands of the original carrier on their way. Harris *v.* Pratt, 17 N. Y. 249, a valuable case, but somewhat limited in 86 N. Y. 167; Cabeen *v.* Campbell, 30 Pa. St. 254; In re Foot, 11 Blatchf. 530; Holbrook *v.* Vose, 6 Bosw. 76; Aguirre *v.* Parmelee, 22 Conn. 473; Hays *v.* Mouille, 14 Pa. St. 48; Pottinger *v.* Hecksher, 2 Grant, 309; Markwald *v.* Creditors, 7 Cal. 213; Blackman *v.* Pierce, 23 Ib. 508; McDonald *v.* McPherson, 12 Duval (Can.), 416 (1886). In a recent case in Massachusetts, A. sold to B. in Boston a quantity of whiskey then in a government bonded warehouse in Indiana, and B. gave his acceptance for the price. The government storekeeper gave his certificate for the whiskey as the property of B., and this certificate was sent by A. to B. It was part of the terms of sale that A. should from time to time, as B. should request, ship the whiskey to Boston, and pay the storehouse charges, taxes, and insurance, drawing on B. for the amounts. A. having shipped most of the whiskey to B. in this manner, and having received an order to ship the remaining barrels, the warehouseman, by A.'s direction, as had been the practice with the previous shipments, caused the whiskey to be regauged, in order to ascertain the taxes due, paid the taxes, and drew on A. for the amount so paid and the warehouse charges. The whiskey could not be taken out of the warehouse until it was regauged and the taxes paid. A. sent the bill of the warehouseman, together with the bill of lading, to B., drawing on him for the amount thereof. The barrels were delivered to a railroad company for transportation to B. at Boston. While they were in the hands of the company, B. became insolvent; and it was held that A.'s right of stoppage was not lost. Mohr *v.* Boston & Albany Railroad Co. 106 Mass. 67.

If, on the other hand, the purpose and authority of the agent in taking possession is to change the destination of the goods, as originally arranged by vendor and vendee, and he does so, this is tantamount to a reception by the vendee himself, and the right of stoppage is gone, even before the goods actually reach their secondary or substituted destination. Becker *v.* Hallgarten, 86 N. Y. 167, and cases last cited. And see Kendal *v.* Marshall, 11 Q. B. Div. 356; Ex parte Miles, 15 Q. B. Div. 39 (1885), distinguishing Ex parte Watson, 5 Ch. Div. 35.

5. **When does the Right naturally terminate?** The right naturally terminates when the goods have completely reached the destination originally intended by the parties, although not yet in the actual possession of the vendee. And "original destination" has been held to be any place where they will remain until some fresh impulse is communicated to them by the vendee. If they have reached such a place, the transit is over. Biggs *v.* Barry, 2 Curtis, 259. For if the transit is once at an end, it does not commence again merely because the goods are sent to a new destination. Pottinger *v.* Hecksher, 2 Grant, 309; Brooke Iron Co. *v.* O'Brien, 135 Mass. 442. In Mollison *v.* Lockhart, 30 New Brunswick R. 398, the vendor shipped goods to the vendee at S., where they were put in the freight house by the carrier. The vendee then directed the carrier to ship the goods to C. at St. John, which the carrier did, marking the goods and making out a way-bill in C.'s name. Upon the arrival of the goods in St. John the vendor attempted to exercise the right of stoppage in *transitu.* It was held that a new transit commenced at S.

While all agree in the simple abstract rule that the right continues until the goods reach their ultimate destination as originally understood between vendor and vendee at the time of sale, the application of it to a given state of facts is not so simple. Thus where the goods were sold in New York city to a vendee living in W., where they were to be sent, and on the way were stored a while at H., an intermediate place, until the vendee should come from W. for them (there being no public carrier between the two places), it was held that the vendor might stop them at H., and that an attachment by the vendee's creditors would not hold. Covell *v.* Hitchcock, 23 Wend. 611, a very important case. On the other hand, in a somewhat similar case, a different result was reached. Sawyer *v.* Joslin, 20 Vt. 172. There the goods were directed to the vendee "at Vergennes." They were landed on the wharf at Vergennes, about a half mile from the vendee's place of business, where it was customary for the vendee and others in Vergennes to come and get their goods and transport them to their places of business. On the wharf the goods were in the charge of no one, and there were no charges or lien for freight or storage, and after their deposit on the wharf, and before the vendee had taken them away, but after an attachment, the vendor sought to stop them; but it was held he was too late, and Covell *v.* Hitchcock was distinguished. This subject was elaborately examined by Bennett, J., in Guilford *v.* Smith, 30 Vt. 49. There P., at Burlington, Vt., bought flour of G. at Toronto, and ordered it to be shipped to an agent, F., at Ogdensburgh, between the other two points. The bill of lading described F. as consignee, but stated that the flour was to be "forwarded to P. at Burlington." The flour arrived by steamer at Ogdensburgh, whence there was a railroad to Burlington. The freight and government duties not being paid, the flour was placed by F., the agent at Ogdensburgh, subject to the rules of the United States warehouse system, in a warehouse of the railroad company, but which was in charge of the owners of the steamboat line, and from which it could not be removed until the freight and duties were paid or secured, nor would it have been forwarded to P., the vendee, until so ordered by F., their agent. P. failed, and his assignees notified F. to hold the flour for them, and P. directed the warehouseman to retain the flour for further orders. While in this condition the vendor sought to stop the goods, but it was held he was too late; and Buckley *v.* Furniss, 15 Wend. 137, was distinguished.

While, therefore, each case is decided upon its own particular facts, some aid can be derived from a few well-settled propositions: —

(1.) The mere arrival of the goods at the *town* or *city* of the buyer, if they still remain in the hands of the carrier, *as carrier*, does not terminate the right. Parker *v.* McIver, 1 Des. Eq. 281 (1792); Seymour *v.* Newton, 105 Mass. 275; Inslee *v.* Lane, 57 N. H. 454, a very interesting case on this point; Greve *v.* Dunham, 60 Iowa, 108, approving McFetridge *v.* Piper, 40 Ib. 627; Jenks *v.* Fulmer, 160 Pa. St. 527. So if still in the hands of a local carrier at the place of the vendee's residence. White *v.* Mitchell, 38 Mich. 390. In Allen *v.* Mercier, 1 Ashm. 103, the goods were demanded of the carrier by the vendee on their arrival, but the carrier refused to deliver them unless he was paid for former bills against the vendee; which not being paid, the carrier transported them back to Philadelphia, and then attached them as the property of the vendee. The vendor then tendered the amount of freight due on these particular goods, and demanded them, but the carrier declined to surrender them. It was held the vendor had a right to stop them, notwithstanding they had been carried to the place of destination, and had been demanded by the vendee. And see Anderson *v.* Fish, 16 Ont. Rep. 476. In Kitchen *v.* Spear, 30 Vt. 545, A., residing at West Randolph, Vt., bought goods of K. in New York, to be forwarded by railroad to A. at West Randolph. Immediately on their arrival by rail at West Randolph, and before they were taken from the cars, a creditor of A., the vendee, attached and removed them from the railroad. The officer paid the freight, and retained possession under his attachment, when K., the vendor, demanded them under his right of stoppage *in transitu*, A. having become insolvent. Held, that the transit was not at an end at the time of the attachment nor at the time of the demand, and that the vendor was entitled to the goods; explaining Sawyer *v.* Joslin, 20 Vt. 172. And see Tufts *v.* Sylvester, 79 Me. 213. In Lewis *v.* Sharvey, 58 Minn. 464, wool was consigned to the buyer at D. Upon its arrival the buyer was notified. A few days later he directed the carrier to deliver the wool to another party in D. Later, on the same day, the wool, which was still in the freight-yard, was attached as the buyer's property. In a suit by the vendor it was held that the transit had not terminated, and that the direction to deliver to another party in D. did not mark the beginning of a new transit.

So if goods are carried by sea, the right is not lost by the mere arrival of the ship containing the goods at the home port of the consignee, if the claim of the right to stop be made before any possession is taken by the vendee or the goods are taken out of the vessel. See Naylor *v.* Dennie, 8 Pick. 198; Mottram *v.* Heyer, 5 Denio, 629.

(2.) The right still continues, although the carrier, at the end of his route, has put the goods into his own warehouse, or into a public warehouse, preparatory to delivery to the consignee upon payment of freight and charges. So long as the carrier, or warehouseman for him, has possession of the goods, and the freight is unpaid, he has a lien on them for his freight, etc. That implies he is still in possession; and if so, the vendee is not in possession or entitled to possession until all liens are discharged. So long, therefore, the right of stoppage continues. Calahan *v.* Babcock, 21 Ohio St. 281; McLean *v.* Breithaupt, 12 Ont. App. 383 (1884), an excellent illustration of the rule; Symns *v.* Schotten, 35 Kans. 310; Bender *v.* Bowman, 2 Pearson, 517; O'Neil *v.* Garrett, 6 Iowa, 480; Halff *v.*

Allyn, 60 Tex. 278, approving Chandler *v.* Fulton, 10 Tex. 2; More *v.* Lott, 13 Nev. 384; Morris *v.* Shryock, 50 Miss. 591; Clapp *v.* Peck, 55 Iowa, 270; Hoover *v.* Tibbetts, 13 Wisc. 79. Even a demand on the carrier by the assignee of the insolvent buyer, accompanied with a tender of the freight, if unacceded to by the carrier, has been thought not to terminate the right of stoppage, so long as the goods are still in the carrier's hands. Anderson *v.* Fish, 16 Ont. Rep. 476; affirmed on appeal, 17 Ont. App. 28.

(3.) If, however, the goods, at the end of the route, have been put into the hands of the *vendee's* agent, whether warehouseman or other agent, although not yet quite delivered at such vendee's store or place of business, the transit is at an end and the right gone. The conflict in the case, if any, is whether the warehouseman where the goods are stored is the agent of the carrier, a mere middleman, or, on the other hand, is agent for the vendee, and so the transit ended. In Jeffris *v.* Fitchburg Railroad Co. 93 Wisc. 250, the carrier had stored the goods, and was holding them subject to the payment of freight charges by the consignee. It was held that the carrier was not the latter's agent, the question being one of intention. Many cases are cited. In ordinary cases, if the goods are still in the carrier's or warehouseman's possession at the end of the route, and *all charges for freight, storage, etc., have been paid by the vendee*, and so all liens on them discharged, the "possession" of the bailee, *as such*, is at an end; he is now holding or keeping them solely for the vendee, or as his agent. The legal possession, therefore, is in the vendee, and so the right of stoppage is gone. McFetridge *v.* Piper, 40 Iowa, 627; Lane *v.* Robinson, 18 B. Monr. 623; Williams *v.* Hodges, 113 N. C. 36; Farrell *v.* Railroad, 102 N. C. 390. Hall *v.* Dimond, 63 N. H. 565, goes even farther. In Tufts *v.* Sylvester, 79 Me. 213, the vendee, having gone into insolvency, refused to receive the goods from the carrier, but the "messenger" in insolvency subsequently took possession of them to hold until an assignee was appointed. While in the messenger's hands, the vendor asserted his right of stoppage, and it was held he had a right so to do. And see Sutro *v.* Hoile, 2 Neb. 186. In Kingman *v.* Denison, 84 Mich. 608, the goods had come into the possession of a mortgagee of the vendee, who had possession of his store under a mortgage made prior to the purchase, but this was held not to defeat the right of the vendor to retake them.

In Brooke Iron Co. *v.* O'Brien, 135 Mass. 442, by the terms of a bought-and-sold note, A. sold a quantity of iron to C., of B., "deliverable at E." The iron was forwarded to E., where it was loaded by C.'s agent upon a vessel chartered by him to carry the iron to B. An invoice of the iron was sent to C., and the iron was deliverable to him by the terms of the bill of lading. While the iron was at E., a bank lent C. a sum of money upon the security of a warehouse receipt issued by a warehouseman in B. to C. On receipt of the bill of lading, C. indorsed it in blank to the warehouseman, who thereupon issued a new warehouse receipt to the bank. On the subsequent arrival of the vessel, the warehouseman, acting as agent for the bank, took possession of the iron. On the day of the arrival of the vessel C. became insolvent. It was held that A. could not subsequently stop the goods. Macon Railroad *v.* Meador, 65 Ga. 705, apparently contrary, was decided upon the Code of Georgia requiring "actual possession" by the vendee in order to terminate the right.

Deposit in the Custom House. The mere deposit of the goods in the custom house for entry, before actual entry and payment of the customs dues, or bond given, does not constitute such a delivery as to destroy the right. Burnham *v.* Winsor, 5 Law Rep. 507 (1843), before Sprague, J.; Mottram *v.* Heyer, 5 Denio, 629; Holbrook *v.* Vose, 6 Bosw. 78; In re Bearns, 18 Bank. Reg. 500; Lewis *v.* Mason, 36 Up. Can. Q. B. 590 (1875), a valuable case. Otherwise if such entry has been duly perfected by the consignee, and he has done everything required of him by law to entitle him to remove the goods. Cartwright *v.* Wilmerding, 24 N. Y. 521; Fraschieris *v.* Henriques, 6 Abb. Pr. R. (N. S.) 251; Parker *v.* Byrnes, 1 Low. 539; Wiley *v.* Smith, 1 Ont. App. 179 (1877), containing an exhaustive examination of the question; affirmed in 2 Duval, 1. See, also, Wilds *v.* Smith, 2 Ont. App. 8 (1877).

In Donath *v.* Broomhead, 7 Pa. St. 301, the goods arrived from England at Philadelphia, the port of destination. The buyer paid the freight, and gave his note for the price; but the goods, on account of the loss of the invoice, were not duly entered at the custom house, but were simply transported there from the vessel by the officers. They remained there in that condition until the note matured; it was dishonored, and it was held the vendor might stop the goods.

6. **How is the Right exercised?** A "claim" made by the vendor or his agents upon any one having the goods in his possession, before the transit is legally ended, is sufficient. The vendor is not obliged to retake the goods into his actual custody, or use any force or physical effort to obtain possession; due notice to the carrier not to deliver the goods is enough. Newhall *v.* Vargas, 13 Me. 93; Reynolds *v.* Boston & Maine R. R. Co. 43 N. H. 580; Rucker *v.* Donovan, 13 Kans. 251.

But the notice or claim of the vendor to stop the goods should properly be made upon some party having the possession, custody, or charge of the goods. A notice to the vendee himself, while the goods are in transit in other persons' hands, has been held not sufficient; and if the vendee obtain actual possession afterwards, he can hold against the vendor. Mottram *v.* Heyer, 5 Denio, 629, affirming 1 Denio, 483. But see Bell *v.* Moss, 5 Wharton, 206, somewhat contrary. The question cannot be considered fully settled.

Any agent authorized to act for the vendor, either generally or in relation to the particular goods, may exercise the right, although not specially directed to adopt that particular measure. Reynolds *v.* Boston & Maine R. R. Co. 43 N. H. 580; Bell *v.* Moss, 5 Wharton, 206. Stoppage by an unauthorized agent of the vendor, if ratified by him before the buyer or his assignee has obtained possession or made any demand for the goods, is sufficient. Durgy Cement and Umber Co. *v.* O'Brien, 123 Mass. 14, distinguishing Bird *v.* Brown, 4 Exch. 786, in which it was held that if an unauthorized agent stop the goods, and his act be not ratified until after the goods have come into the possession of the vendee or those claiming under him, the stoppage is ineffectual. And the same was held in Davis *v.* McWhirter, 40 Up. Can. Q. B. 598 (1877). And see Dibbins *v.* Dibbins [1896], 2 Ch. D. 348. Bird *v.* Brown was also distinguished in a late English case, in which A. made a proposition to B. supposed by him to be agent for C. B. accepted without authority, and, before C. had ratified, A.

withdrew his proposition by a second communication to B., but it was held that the ratification of C. related back to the acceptance by B., and that the withdrawal was of no effect. Bolton *v.* Lambert, 37 W. R. 434; 41 Ch. D. 295. *Sed quære.* As to what does or does not amount to an exercise of the right, see Phelps *v.* Comber, 26 Ch. Div. 755, and 29 Ib. 814 (1885).

7. **The Effect of exercising the Right.** The American rule entirely agrees with the English in this respect, viz., that the right of stoppage *in transitu* is only an *extension of the right of lien* which, by the common law, every vendor has for the price before the goods leave his possession; that the exercise of it, therefore, can no more rescind the sale and revest the *title* in the vendor than would the vendor's detention of the goods under his right of lien for non-payment of the price. Both rights relate only to the *possession* of the goods, and not to the ownership. The vendor has the same remedies to recover the price by resale or suit at law as before the stoppage. If the price be subsequently duly tendered by the buyer, the vendor must give up the goods, if not resold, even though they have risen much in value. See Rowley *v.* Bigelow, 12 Pick. 313; Newhall *v.* Vargas, 13 Me. 93, and 15 Ib. 315; Grout *v.* Hill, 4 Gray, 361; Rucker *v.* Donovan. 13 Kans. 251; Chandler *v.* Fulton, 10 Tex. 2; Shaw *v.* Lady Ensley Coal Co. 147 Ill. 526; Rogers *v.* Thomas, 20 Conn. 53; Babcock *v.* Bonnell, 80 N. Y. 244; Stanton *v.* Eagar, 16 Pick. 475; Wait *v.* Scott, 6 Grant (Ont.), 154; Patten's Appeal, 45 Pa. St. 151; Penn. R. R. Co. *v.* Am. Oil Works, 126 Ib. 485.

But the vendor, after duly stopping the goods in transit for insolvency of the buyer, may sell the goods and give a good title to the buyer, so far at least that he can maintain replevin against an officer attaching them as goods of the vendee. Tuthill *v.* Skidmore, 124 N. Y. 148, citing Dustan *v.* McAndrew, 44 Ib. 72; Hamburger *v.* Rodman, 9 Daly, 93.

PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

BEFORE OBTAINING POSSESSION OF THE GOODS.

SECTION I. — WHERE THE CONTRACT IS EXECUTORY.

Sect.

Buyer's only remedy is action for the breach 870
What damages he may recover . . 870
General and special damages . . . 870
Special damages must be alleged in statement of claim 870
Rule in Hadley *v.* Baxendale . . 871
Where vendor by his own conduct enhances the damage 872
Or buyer is delayed in replacing the goods at vendor's request and for his benefit 872
Postponement may have taken place at the plaintiff's request 872
Measure of damagee in cases where there has been postponement of delivery 872
Probable profits of a voyage as damages for failure to deliver ship . . . 872
Vendor is always bound for such damages as result from buyer's being deprived of the ordinary use of the chattel 873
Parol evidence not allowed, where contract is written, to show special motive for the contract in order to enhance damages 874
Damage to crops by failure to deliver threshing engine 874
Loss of profits on sub-sale . . . 875
Review of the cases 875
General rule of damages not applicable where there is no market in which buyer can repurchase 875
And in such case he may recover profits lost in a sub-sale . . 875
But cannot recover profits lost by reselling in a high market before the time fixed for delivery to himself 875

Sect.

Where there is no market for the goods, buyer may procure substitute . . 877
Rules where goods are bought for resale, and there is no market for their repurchase 877
Where goods are deliverable to buyer on request, he must make demand before action for breach 878
Where no damagee are proven, nominal damages are recoverable . . . 879
Measure of damagee in contracts for future delivery by instalments . . 880
Where amount of instalments not mentioned in contract 882
Law in America . . . . . 882 a
Special damages . . . . . 882 a
Second branch of rule in Hadley *v.* Baxendale adopted . . . . . 882 a
Enlargement of liability by communication of special consequences to result from breach . . . . . 882 a

SECTION II. — WHERE THE PROPERTY HAS PASSED.

Buyer had formerly no remedy at law but action for damages . . . 883
But equity would sometimes enforce specific performance . . . 884
Rule in equity 884
Specific performance now allowed at law by Mercantile Law Amendment Act 885
Buyer may also maintain trover . . 886
But cannot recover greater damages than by suing on the contract 886
Where vendor has converted before delivery, and can maintain no action for price, the price must be deducted in trover 886
But after delivery by vendor, the buyer must bring his cross-action

	Sect
for trespass if vendor tortiously retake the goods	886
Buyer's right to reject the goods after property has passed to him	887
This right exists where the goods are not of the same kind or description as called for by the sale	888
But not for breach of warranty of quality	888
Heyworth *v.* Hutchinson reviewed, where buyer was held bound to accept goods not corresponding with quality warranted, even where property had not passed	889
Remarks on the *dicta* in the case	890

§ 869. THE breach of contract of which the buyer complains may arise from the vendor's default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of the collateral contract of warranty either of quality or title.

The buyer's right to *avoid* the contract for mistake, failure of consideration, fraud, or illegality has been discussed in 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. 2dly. The remedies of the buyer after having taken actual possession of the goods.

SECTION I. — WHERE THE CONTRACT IS EXECUTORY.

§ 870. Where by the terms of the contract the property has not passed to the buyer in the thing which the vendor has agreed to sell, it is obvious that the buyer's remedy for the breach of the vendor's promise is the same as that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relations of vendor and vendee.

The damages which the buyer may recover in such an action are in general the difference between the contract price and the market value of the goods at the time when the contract is broken, as explained by Tindal, C. J., in the opinion delivered in Barrow *v.* Arnaud, cited § 758; and numerous instances of the application of this rule are to be found in the reported cases (*a*).

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

(*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.* Ayre, 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 Company, 9 C. B. N. S. 632; 30 L. J. C. P. 232; per Blackburn, J., in Elbinger Company *v.* Armstrong, L. R. 9 Q. B. at p. 476; Silkstone Company *v.* Joint Stock Coal Company, 35 L. T. N. S. 668.

(*b*) Boorman *v.* Nash, 9 B. & C. 145.

of the breach, 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*).

§ 871. 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.

§ 872. Although this rule has generally been accepted as sound, it is not universally true that the *mere* communication of the special circumstances of the case made by one party to the other would impose on the latter an obligation to indemnify the former for all the damages that would ordinarily follow from the breach; and to produce such a result, it would require proof of an assent by the latter to assume such a responsibility, in many cases which might be suggested, in which the application of the rule now criticised would otherwise be productive of startling injustice (*f*). The courts have accordingly

(*c*) Crouch *v.* Great Northern Railway Company, 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.

(*e*) 9 Ex. 341-354; 23 L. J. Ex. 179.

(*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*, § 874, and the cases collected in Mayne on Damages, ed. 1884, pp. 9-40. See, also, Vicars *v.* Wilcocks, and the notes to that case in 2 Sm. L. C. 577 (ed. 1887); the important case of Horne *v.* Midland Railway Co. in Ex. Ch. L. R. 8 C. P. 131, *post*, § 874;

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 illustration 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 fourth edition of Mayne on Damages (by the author and Mr. Lumley Smith) 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 (*g*); and to Mr. H. D. Sedgwick's Leading Cases on the Measure of Damages (*h*)].

In Loder *v.* Kekulé (*i*), the buyer paid in advance for the goods to be supplied, and they were found on delivery to be of inferior quality, and were rejected, so that the amount of the damages ought to have been fixed with reference to the market price on that day; and the buyer did not resell the goods till some time afterwards, when the market price had fallen; but the court being of opinion that it was the vendor who by his conduct had delayed the sale, and the jury having found that the resale was within a reasonable time, the buyer recovered as damages the full difference between the market value at the date of the breach and the price subsequently obtained on the resale.

So in Ogle *v.* Earl Vane (*k*), decided in Hilary Term, 1868, where the defendant failed to make 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 (*l*).

[The two cases of Tyers *v.* The Rosedale Iron Company (*m*), and

in the remarks of Blackburn, J., in Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. at p. 478; and Simpson *v.* London & North Western Railway Co. 1 Q. B. D. 274.

(*g*) Vol. 1, p. 218, ed. 1880.

(*h*) New York, 1878.

(*i*) 3 C. B. N. S. 128; 27 L. J. C. P. 27.

(*k*) L. R. 3 Q. B. 272; 37 L. J. Q. B. 77, in Ex. Ch.; S. C. L. R. 2 Q. B. 275, *ante*, § 217 a.

(*l*) On this latter point, eee *ante*, § 217 a *et seq.*

(*m*) L. R. 8 Ex. 305; S. C. in Ex. Ch. L. R. 10 Ex. 195.

Hickman *v.* Haynes (*n*), already considered *ante*, § 872, 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*, § 881), the sum of the differences between the contract price and the market price on the last day of each month during 1871.

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, 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 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.

A consideration of this case shows how advisable it is that an agreement for the postponement of deliveries should specify the date to which postponement is made, and whether the instalments 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.

In Hickman *v.* Haynes (*n*), where the plaintiff, under contract to deliver 100 tons of iron by monthly deliveries of twenty-five 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

(*n*) L. R. 10 C. P. 598.

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.

These 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.

2. Where the postponement is *indefinite*, the damages must be assessed: —

(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 Company (*o*), 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*, § 881 *et seq.*]

In Fletcher *v.* Tayleur (*p*), 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*l.* on the voyage, but that, in consequence of the fall in freight, they made only 4280*l.* on the voyage when the vessel was delivered. The jury gave the plaintiff 2750*l.* damages. Crowder, J., read to the jury as the rule the passage above quoted (*q*) from the opinion in Hadley *v.* Baxendale (*r*). 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

(*o*) 16 Eq. 155.
(*p*) 17 C. B. 21; 25 L. J. C. P. 65.
(*q*) P. 921.
(*r*) 9 Ex. 341; 23 L. J. Ex. 179.

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 with the concurrence of Willes, J., but no further notice was taken of it, on the ground that the question had not been raised at the trial.

§ 873. In the case of The Columbus (*s*) will be found a discussion by Dr. Lushington of the Admiralty Rules which govern the allowance of freight as damages in cases of collision.

Cory *v.* Thames Iron Works Company (*t*), 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 (*tt*); that the true rule is that the vendor is always bound for such damages as result from the buyer's being deprived of the ordinary use of the chattel, but is not bound for the further special damage that the buyer may suffer by being debarred from using it for some special and unusual purpose, not made known to the vendor when he contracted for the delivery.

In the case of In re The Trent and Humber Company (*u*), 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.

§ 874. In Brady *v.* Oastler (*x*), 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 in consideration of the vendor's being allowed an unusually short time for the manufacture and delivery of the articles.

(*s*) 3 Wm. Robinson, 158.
(*t*) L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.
(*tt*) 9 Ex. 341; 23 L. J. Ex. 179.
(*u*) 6 Eq. 396; 4 Ch. 112.
(*x*) 3 H. & C. 112; 33 L. J. Ex. 300.

In Smeed *v.* Foord (*y*), 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.

In the case of the British Columbia Saw Mill Company *v.* Nettleship (*z*), 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 the cases actually delivered would be useless unless the missing parts 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.

In the case of Horne *v.* Midland Railway Company (*a*), 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

(*y*) 1 E. & E. 602; 28 L. J. Q. B. 178. See, also, The Hydraulic Engineering Company *v.* McHaffie, 4 Q. B. D. 670, C. A., *post*, § 877; and Wilson *v.* The General Screw Colliery Company, 47 L. J. Q. B. 239.

(*z*) L. R. 3 C. P. 499; 37 L. J. C. P. 235.

(*a*) 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 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, 123; approved and followed in The Notting Hill, 9 P. D. 105, C. A.

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, 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" (*b*).

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.

§ 875. France *v.* Gaudet (*c*) 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

(*b*) L. R. 7 C. P. at p. 591. (*c*) L. R. 6 Q. B. 199.

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."

[We shall now review the cases in which the buyer has contracted for the purpose of fulfilling a sub-contract of sale, and claims to recover from the seller damages in respect of a breach of such sub-contract, caused by the seller's breach of the original contract. They involve the application to the particular contract and special circumstances in each case of the second branch of the rule laid down in Hadley *v.* Baxendale, viz., whether the damages are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.]

In Borries *v.* Hutchinson (*d*), 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 sub-sale, 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 resale. The plaintiff had paid 159*l.* to his vendee in St. Petersburg as damages for non-delivery to him, and for his loss of profit on his sub-sale. Held, that the buyer was entitled to recover as damages his lost profits on the resale, and all his additional expenses for freight and insurance, but not the damages paid to his vendee for the latter's loss on the sub-sale, those being too remote.

(*d*) 18 C. B. N. S. 445; 34 L. J. C. P. 169. See, also, Wilson *v.* Lancashire and Yorkshire Railway Company, 9 C. B. N. S. 632; 30 L. J. C. P. 232; Elbinger Company *v.* Armstrong, L. R. 9 Q. B. 473, at p. 476; and Schulze *v.* Great Eastern Railway Company, 19 Q. B. D. 30, C. A. Borries *v.* Hutchinson was considered in Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, C. A. Lord Esher, M. R., at p. 90, thinks that the case is reconcilable with Elbinger Co. *v.* Armstrong, *post;* Bowen, L. J., at page 94, is doubtful, but considers that the principle of Elbinger Co. *v.* Armstrong is sound, and must prevail.

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 (*e*).

§ 876. In Williams *v.* Reynolds (*f*), 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 to have considered the sub-contract as contemporaneous, and known to the defendant at the time of his making his contract.

[It was, however, admitted that it was the universal custom, in contracts like the one under consideration in this case "for forward delivery," for the purchaser to resell; and the opinion of Crompton, J., that "loss of profits by a resale can never be contemplated unless the resale has taken place and is communicated to the other party," is controverted by the decision of the Court of Appeal in Hammond *v.* Bussey (*g*), *post*, § 877.

In Randall *v.* Raper (*h*), 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.

[In The Elbinger Company *v.* Armstrong (*i*), 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 sub-contract, but not of the date of delivery, nor of the amount of

(*e*) See, on this point, O'Hanlan *v.* Great Western Railway Company, 6 B. & S. 484; 38 L. J. Q. B. 154; Rice *v.* Baxendale, 7 H. & N. 96; 30 L. J. Ex. 371.

(*f*) 6 B. & S. 495; 34 L. J. Q. B. 221; and see Gee *v.* Lancashire and Yorkshire Railway Company, 6 H. & N. 211; 30 L. J. Ex. 11; Great Western Railway Company *v.* Redmayne, L. R. 1 C. P. 329; Portman *v.* Middleton, 4 C. B. N. S. 322; 27 L. J. C. P. 231; Mayne on Damages, pp. 45 *et seq.* ed. 1884.

(*g*) 20 Q. B. D. 79; 57 L. J. Q. B. 58.

(*h*) E. B. & E. 84; 27 L. J. Q. B. 266.

(*i*) L. R. 9 Q. B. 473; see remarks of Cotton, L. J., on this case in Hydraulic Engineering Company *v.* McHaffie, 4 Q. B. D. at p. 677.

the penalties. By reason of the defendant's delay in delivery of the goods, which, being made according to tracings, were not obtainable in the market, the plaintiffs had to pay 100*l.* to the Russian company by way of penalties under their sub-contract. Held, that the plaintiffs were not entitled, as a matter of law, to damages to the amount of the penalties, 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 damages 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" (*k*).

§ 877. In Hinde *v.* Liddell (*l*), the defendants had contracted to supply the plaintiff with gray shirting, by the 20th of October. They were informed generally that the shirtings were intended for shipment, but had no notice of the particular sub-contract which the plaintiff had made. Shortly before the time 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 shirtings contracted for, the plaintiff procured shirtings of a better quality at a higher price, in order to fulfil his sub-contract, but he received no advance in price from his sub-vendee. 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?"

In the Dunkirk Colliery Company *v.* Lever (*m*), which was the

(*k*) This ruling of Blackburn, J., was approved by the Court of Appeal in Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85.

(*l*) L. R. 10 Q. B. 265. See, also, an earlier case at Nisi Prius (Bridge *v.* Wain, 1 Stark. 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.

(*m*) 9 Ch. D. 20, C. A.; see per James,

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.*

In the Hydraulic Engineering Company *v.* McHaffie (*n*), 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; (2) expenditure uselessly incurred in making other parts of the machine; and (3) cost of preserving and warehousing it.

In Thol *v.* Henderson (*o*), 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 sub-contract 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 sub-sale.

But this decision is not in accord with that of the Court of Appeal in Hammond *v.* Bussey (*p*), where Lord Esher, M. R. (*q*), states that it is sufficient for the seller to know that sub-contracts, in the ordinary course of business, or in ordinary probability, will be made.

In Grébert-Borgnis *v.* Nugent (*r*), the defendants contracted to deliver to the plaintiff skins of a particular quality, shape, and description, at certain prices, and by instalments at different times. At the time of making the contract, the defendants knew that the plaintiff had entered into a sub-contract with a French customer on substantially similar terms, but of course at an advanced price. The defendants failed to deliver, and, there being no market for goods of a similar description, the sub-purchaser recovered damages against the plaintiff for breach of his contract. Held by the Court of Appeal that the plaintiff was entitled to recover damages not only in respect of his loss of profit, but also in respect of the damages which he was

L. J., at p. 25; 41 L. T. N. S. 633, C. A.; 43 L. T. N. S. 706, in the House of Lords.

(*n*) 4 Q. B. D. 670, C. A. See, also, Wilson *v.* The General Screw Colliery Company, 47 L. J. Q. B. 239.

(*o*) 8 Q. B. D. 457. And see Hamilton *v.* Magill, 12 L. R. Ir. 186.

(*p*) 20 Q. B. D. 79; 57 L. J. Q. B. 58.

(*q*) 20 Q. B. D. at p. 86.

(*r*) 15 Q. B. D. 85, C. A.

compelled to pay to his sub-purchaser. In estimating these damages, the rule laid down in The Elbinger Co. *v.* Armstrong (*ante*, § 876) was cited with approval, and the amount of damages awarded to the sub-purchaser by the French court was treated as a reasonable one at which to assess the damages to be awarded to the plaintiff. Lord Esher, M. R. (*s*), states the result of the cases which have carried out the principle of Hadley *v.* Baxendale as follows: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value. But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable, and the proper inference, and one which the jury might infer, would be that he had contracted upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract. Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him."

In Hammond *v.* Bussey (*t*), the last reported case on this subject, the defendant undertook to deliver to the plaintiff coals warranted to be steam-coals. The defendant knew from the course of business between himself and the plaintiff, and from his knowledge of the plaintiff's business, that the plaintiff intended to resell the goods as coal of the same description, but did not know of any particular sub-contract: no sub-contract had in fact been entered into at the time of making the principal contract. The defendant delivered coals which were not equal to warranty. The sub-purchaser sued the plaintiff for damages for breach of his warranty. The plaintiff defended the action, was defeated, and compelled to pay damages and costs. Held by the Court of Appeal that he was entitled to recover these costs (as well

(*s*) 15 Q. B. D. at p. 89.

(*t*) 20 Q. B. D. 79; 57 L. J. Q. B. 58. It will be observed that this was an action for damages for breach of warranty, but the measure of damages being substantially the same as in an action for breach of contract to deliver (see *post*, § 903), the decision is included in this review of the cases.

as the damages) from the defendant. The plaintiff had acted reasonably in defending the action, and, applying the *second* branch of the rule laid down in Hadley *v.* Baxendale to the special circumstances of the case, the action of the sub-purchaser, and the consequences flowing from it, might reasonably be supposed to be in the contemplation of the parties at the time of making the contract, as a probable consequence of the breach of it. The application of the rule is for the court, and not for the jury. It is to be observed that this case goes beyond Williams *v.* Reynolds and Thol *v.* Henderson, *ante*, in respect of the seller having no knowledge of any particular sub-contract existing or contemplated, but only of the plaintiff's general intention to resell.

It is submitted that the following propositions may fairly be deduced from the foregoing 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 making the contract the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them (*s*), although he may or may not know of any particular sub-contract existing or contemplated (*t*), the inference is that the seller contracts to be liable for the increased damages which will flow from a breach of the contract under the special circumstances, and, applying the second part of the rule laid down in Hadley *v.* Baxendale, those damages may reasonably be supposed to be within the contemplation of the parties. On the seller's breach of contract to deliver, the buyer may adopt one of two courses: —

(i.) He may elect to fulfil his sub-contract, 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 (*u*).

(ii.) He may elect to abandon his sub-contract, and is entitled to recover as damages from the seller his loss of profit on the sale, and further to be indemnified by him in respect of any damages (including costs reasonably incurred) or penalties which he has been compelled to pay for breach of his sub-contract (*v*); but unless the *amount* of the particular damages or penalties has been made known to the seller, the buyer is not entitled to recover their amount as a matter of

(*s*) Hammond *v.* Bussey, 20 Q. B. D. 79. And knowledge gained by parol is sufficient, where the written contract of sale is silent as to the sub-contract. Sawdon *v.* Andrews, 30 L. T. N. S. 23.

(*t*) Hamilton *v.* Magill, 12 L. R. Ir. 186.

(*u*) Hinde *v.* Liddell, L. R. 10 Q. B. 265.

(*v*) Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, C. A.; Borries *v.* Hutchinson, 18 C. B. N. S. 445; Elbinger Company *v.* Armstrong, L. R. 9 Q. B. 473; Hydraulic Engineering Company *v.* McHaffie, 4 Q. B. D. 670, C. A.

right, though, if reasonable, the jury may assess the indemnity at that amount (*w*).

It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a sub-sale, 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 that he accepted the contract with the special condition attached to it (*x*).

II. If at the time of the sale neither the sub-contract nor the intention to resell is made known to the seller, notice of the sub-contract given to him subsequently will not render him liable for the buyer's loss of profits on such sub-contract; the buyer may either procure the best substitute for the goods as before, and fulfil his sub-contract, charging the seller with the difference in price, or abandon the sub-contract and bring his action for damages, when the ordinary rule 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 (*a*). But the sub-contract, although not brought to the knowledge of the seller, may be put in evidence to show the real value of the goods (*b*).

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 (*c*).]

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 (*d*), 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 (*e*).

(*w*) Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. 473; Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, C. A.

(*x*) See *ante*, § 874, opinion of Willes, J., in British Columbia Saw Mills Company *v.* Nettleship, and in Horne *v.* Midland Railway Company; and see, also, Sedgwick on Damages, vol. 1, p. 223, ed. 1880, and the case of Booth *v.* Spuyten Duyvil Rolling Mill Company, 60 N. Y. 487, in the Court of Appeals of the State of New York, noticed *post*, § 882 a.

(*a*) Williams *v.* Reynolds, 6 B. & S. 495; Thol *v.* Henderson, 8 Q. B. D. 457. See, however, the remarks upon these two cases *ante*, §§ 876, 877.

(*b*) Per Brett, M. R. in Gréhert-Borgnis *v.* Nugent, 15 Q. B. D. at p. 89; Stroud *v.* Austin, Cahahé & Ellis, 119.

(*c*) Dunkirk Colliery Company *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; Warren *v.* Stoddart, 105 U. S. 224, a case in the Supreme Court of the United States.

(*d*) 1 H. L. C. 381.

(*e*) See the remarks on this case in Mayne on Damages, p. 53, ed. 1884, quoted and ap-

§ 878. If the contract which has been broken provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should make this request either personally or by letter, unless there has been a waiver of compliance with this condition, resulting from the vendor's having incapacitated himself from complying with the request by consuming, or reselling, or otherwise so disposing of the goods as to render a request idle and useless (*f*), as heretofore explained in the chapter on Conditions (*g*).

§ 879. If the buyer is unable to prove the existence of any actual damage resulting from the non-delivery, he will, nevertheless, be entitled to recover nominal damages (*h*), on the general principle that every breach of contract imports some damage in law.

It must not be forgotten that even after the goods have been sent to the buyer, in the performance of an executory contract, his right of rejecting them is unaffected by the actual delivery to him, until he has had a reasonable opportunity of inspection and examination, as shown in the chapter on Acceptance.

§ 880. 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 instalments. It has already been shown 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 (*i*), 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*, § 882.

§ 881. The measure of damages to which the buyer is entitled on the breach of such a contract has been determined in two cases, — one in which the action was brought after the time fixed for the final delivery, and the other where the action was brought after partial breach, but *before* the time fixed for the last delivery.

In Brown *v.* Muller (*k*), the contract was for the delivery of 500 tons of iron, in about equal proportions, in September, October, and

proved by the judges in Williams *v.* Reynolds, 6 B. & S. 495, per Crompton, J., at p. 501, and per Blackburn, J., at p. 506.

(*f*) 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.

(*g*) *Ante*, § 567.

(*h*) 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.

(*i*) L. R. 8 Q. B. 14; and see the cases reviewed *ante*, § 593 *et seq.* The Mersey Steel and Iron Company *v.* Naylor, 9 App. Cas. 434, is the last and most authoritative decision upon this subject.

(*k*) L. R. 7 Ex. 319. See, also, Ex parte Llansamlet Company, 16 Eq. 155; and Barningham *v.* Smith, 31 L. T. N. S. 540, where the damages were assessed upon the same principle.

November, 1871, and action was brought in December by the buyer. The defendant had given notice soon after the contract that he "considered the matter off," and that he regarded the contract as cancelled, and had expunged the order from his books. It was held that the proper measure of damages was the sum of the difference between the contract and 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 (*l*) and Frost *v.* Knight (*m*), but had insisted on the execution of the contract after that repudiation.

§ 882. In Roper *v.* Johnson (*n*), the defendants had contracted to sell to the plaintiffs 300 tons of coal, "to be taken during the months of May, June, July, and August;" and the plaintiffs having taken no coals in May, the defendants, on the 31st of that month, wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendant positively refused delivery, and the action was commenced on the 3d of July.

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 plaintiff's default in not sending to take the May delivery; and, secondly, 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, thirdly, 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.

[It may be observed that where, as in Roper *v.* Johnson, the amount of the instalments 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

(*l*) 2 E. & B. 678; 22 L. J. Q. B. 455.
(*m*) L. R. 7 Ex. 111.
(*n*) L. R. 8 C. P. 167.

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 (*o*).

Bergheim *v.* The Blaenavon Iron Company (*p*) 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 defendant 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*, § 684), where the language of the contract was somewhat similar; but, upon the construction of the penalty clause, they were all unanimous in deciding that the parties intended the 15th of May to be the date from which the penalty for non-delivery was to be assessed.

§ 882 a. 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 (*q*).

With regard to special damages, it has been laid down in the leading case of Griffin *v.* Colver (*r*), 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*

(*o*) See Calaminus *v.* Dowlais Iron Company, 47 L. J. Q. B. 575.

(*p*) L. R. 10 Q. B. 319.

(*q*) Shepherd *v.* Hampton, 3 Wheaton, 209 (1818); Dana *v.* Fiedler, 12 N. Y. 40 (1854); Grand Tower Company *v.* Phillips, 23 Wallace, 471 (1874), per Bradley, J., at pp. 479, 480. As to proof of market price, see Harrison *v.* Glover, 72 N. Y. 451, 454 (1878).

(*r*) 16 N. Y. 489, per Selden, J., at p. 494.

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 reaffirmed by the same court (*s*).

In America, therefore, the *second* branch of the rule laid 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 (*t*).

Upon the question referred to *ante*, § 875 *et seq.*, it was held in Messmore *v.* The New York Shot and Lead Company (*u*) that, if the vendor know that the purchase is made in order to enable the buyer to fulfil an existing contract for resale at a profit, the latter may claim as damages this profit if lost by the vendor's default.

And in Booth *v.* Spuyten Duyvil Mill Company (*x*), 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.*

(*s*) Messmore *v.* The New York Shot and Lead Company, 40 N. Y. 422, 427; Cassidy *v.* Le Fevre, 45 N. Y. 562, 567; Booth *v.* The Spuyten Duyvil Mill Company, 60 N. Y. 487, at p. 492; Devlin *v.* The Mayor and Aldermen of New York, 63 N. Y. 8, at p. 25 (1875); cf., also, United States *v.* Behan, 110 U. S. 338, 344 (1883).

(*t*) Per Selden, J., in Griffin *v.* Colver, 16 N. Y. 489, at p. 494. Mr. Sedgwick (Sedgwick on Damages, vol. 1, 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.

(*u*) 40 N. Y. 422.

(*x*) 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 sub-contract, 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; see p. 493.

Church, C. J., in delivering the opinion of the court (*x*), 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 basis of the agreement*, 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."

The Supreme Court of Pennsylvania has gone somewhat further than any reported case in the State of New York, and in McHose *v.* Fulmer (*y*) 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.]

SECTION II. — WHERE THE PROPERTY HAS PASSED.

§ 883. Where the contract which has been broken by the vendor is one in which the property has passed to the buyer, there arise in favor of the latter the rights of an owner; of one who has not only the property in the goods, but the *right of possession*, defeasible only on his own default in complying with his duty of accepting and paying for them. A buyer in this condition has of course the right of action for damages for breach of the contract, discussed in the preceding section; for that is a right common to all parties to contracts of every kind, and was formerly the *only* remedy at common law for such breach.

§ 884. In equity, however, the courts would in certain cases compel the vendor to deliver the specific chattel sold, and the cases on the subject are collected in White and Tudor's Leading Cases in Equity (*z*), 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

(*x*) At p. 494.

(*y*) 73 Penn. St. 365. See, also, Bank of Montgomery *v.* Reese, 26 Penn. St. 143.

(*z*) Vol. 1, p. 912, ed. 1886, notes to Cuddee *v.* Rutter.

remedy at law is complete: if they will not, specific performance of the agreement will be enforced" (*a*).

§ 885. But now, by the Mercantile Law Amendment Act, 1856 (*b*), 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" (*c*).

§ 886. The buyer to whom the property has passed may, if not in default, maintain an action in trover for damages for the conversion, on the vendor's refusal to deliver, as well as an action on the contract; but he cannot recover greater damages by thus suing in tort than by suing on the contract. If, therefore, the vendor's conversion was before delivery, so that he cannot maintain an action for the price, as if he has resold the goods to a third person, the damages recoverable would be only the difference between the contract price and the market value (*d*). 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 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 (*d*) [but he may

(*a*) 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; and Donnell *v.* Bennett, 22 Ch. D. 835, where, in a contract for the sale of chattels, a court of equity granted an injunction to restrain the breach of a negative stipulation in the contract, although it would not have granted specific performance of the contract itself.

(*b*) 19 & 20 Vict. c. 97, s. 2.

(*c*) And by the R. S. C. Ord. XLVIII. r. 1, where it is sought to enforce judgment or order for the recovery of any property other than land or money by writ of delivery, the court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed. See Forms of Writs of Delivery, Appendix H, Nos. 10 and 11.

(*d*) Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

(*d*) Gillard *v.* Brittan, 8 M. & W. 575.

now set up a counter-claim for the price]. The subject has already been discussed, in the examination of the Vendor's Right of Resale, in Part I., Chap. 3, Book V. [§§ 782–795].

§ 887. After the property in the specific chattel has passed to the buyer, it may happen that he discovers the goods bought to be different in kind or quality from that which he had a right to expect according to the agreement. In such case it is necessary to distinguish whether the defect be one in the performance of a condition or of a warranty. In the former case he may refuse to accept the goods and reject the contract, but not in the latter.

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.

§ 888. If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as explained *ante*, § 600 *et seq.*, in the chapter on Conditions, where the cases are cited and reviewed.

[And it is necessary again to point out that the term "warranty" in English law is frequently misleading, and that when used in relation to *executory contracts* it imports a condition precedent, a non-compliance with which entitles the buyer to reject the goods (*e*).]

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 (*f*). His proper remedy, therefore, is to receive the goods, and to exercise the rights explained in the next chapter.

§ 889. In Heyworth *v.* Hutchinson (*g*), 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

(*e*) See Mr. Benjamin's remarks on the *dicta* of the judges in Heyworth *v.* Hutchinson, *post*, § 892. And see note to chapter on Warranty, *ante*.

(*f*) Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 C. & M. 207; 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. 1887. Lord Eldon's decision to the contrary in Curtis *v.* Hannay, 3 Esp. 83, is overruled by the later cases.

(*g*) L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

specific goods. The defendant bought a quantity of wool, "413 bales greasy Entre Rios, at $10\frac{1}{4}d.$ per pound, to arrive *ex* Stige, or any vessel they may be transshipped in, and subject to the wool not being sold in New York, before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkins' and Robinson's possession, *and if any dispute arises it shall be decided by the selling* brokers, whose decision shall be final," etc.

On arrival it was found by the brokers that 180 bales were not as good as the original samples by $2d.$ a pound; 201 bales not as good by $1\frac{1}{4}d.$ a pound; and 32 bales not as good by $\frac{1}{2}d.$ per pound. The buyer on inspecting the wool refused to take it, and after due notice to, and under protest from him, the brokers awarded that he should take it at the above allowances. The second count of the declaration alleged this decision of the brokers as an *award after due arbitration.* One of the brokers deposed at the trial that the wool was not "about similar to samples," and that was the reason for making the allowances. The defendant was held bound to accept under the award. Among the *dicta*, however, were the following, some of which, if taken literally, go farther, it is submitted, than has yet been determined by any direct authority.

Cockburn, C. J., said: "This contract is for the sale of specific wools to arrive by a particular ship; they are ear-marked, so as to prevent the contract applying to any other wools; and they are 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 (*g*),

(*g*) L. R. 2 C. P. 677, in Ex. Ch.; 36 L. J. C. P. 263.

Blackburn, J., said that the decision was quite consistent with the judgment in the latter case, because "the wool which arrived was of the same kind or character as that contracted for, but inferior only in quality."

§ 890. It is very difficult to understand the reason for the 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 reduction of the price, are all cases of the *bargain and sale* of a special chattel *unconditionally*, where, consequently, the property had become vested in the buyer: but no similar case of an *executory contract* has been found; no case in which the buyer has been held bound to accept goods which required to be weighed before delivery, and in which, therefore, the property remained in the vendor if they were not equal in quality to the sample by which they were bought.

In justice and principle there seems to be no difference between a vendor's saying, "I will sell you 100 bales of wool at 10*d.* a pound, warranted equal to this sample," and his saying, "I will sell you 100 bales of wool marked with my name, which I have on board the ship 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 (*h*), 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*

(*h*) 2 B. & Ad. 456. See, also, Heilbutt *v.* Hickson, L. R. 7 C. P. 438, *ante*, § 651.

does not apply to the case of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. . . . *Nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk which may not agree with it.*"

§ 891. In every one of the cases cited in the books as authority for the proposition that the buyer cannot refuse acceptance of a specific chattel sold, on the ground of breach of warranty of quality, the contract was a *bargain and sale*, and the property in the specific chattel had passed (*i*).

In Toulmin *v.* Hedley (*k*), 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 (*l*), the well-considered opinion of the court, as delivered by Parke, B. (*post*, § 898), gives as the reason why a purchaser is driven to a cross-action on a warranty, "that the property has vested in him indefeasibly."

§ 892. It is submitted, therefore, that the *dicta* of the learned judges, in Heyworth *v.* Hutchinson, must be taken as referring to cases of *bargain and sale*, not to *executory contracts* (*m*), 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.

(*i*) 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. 1, ed. 1887.

(*k*) 2 C. & K. 157.

(*l*) 8 M. & W. 858.

(*m*) And see note, *ante*, chapter on Warranty. 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.

Sect.

If the breach be of warranty of title, buyer may sue for return of price, or for damages for breach of contract . 893
If breach of warranty of quality, the buyer has four remedies . . . 894
First, the right to reject the goods if the property has not passed to him . 895
Second, an action for damages for the breach 897
Third, buyer's right to plead breach of warranty in diminution of price . 898
Fourth, by counter-claim in the vendor's action for the price . . . 898
Before Judicature Acts, might plead breach in defence to an action by vendor, so as to diminish the price . . 898
But was obliged to bring cross-action for special or consequential damages . 898
Effect of Judicature Acts . . . 898
Case where buyer was relieved from paying any part of the price, the goods being entirely worthless . . 899
Buyer's remedies are not dependent upon his return of the goods . . 899
Nor is he bound to give notice to vendor 899
But his failure to return the goods, or complain of the quality, will raise presumption against him . . . 900
Where vendor has agreed to take back the chattel if faulty, buyer must offer to return it as soon as faults are discovered 900
Sale does not become absolute by accident to, or death of, thing sold during time limited for return . . . 900
Buyer loses his right of returning goods if by his acts or conduct he has accepted them 901
But retains his other remedies . . 901
Buyer could not (prior to Judicature Acts) plead breach of warranty in reduction of a bill or note given for the price 902
General rule as to measure of damages on breach of warranty . . . 903
Buyer may in certain cases recover costs of defence against his vendee, as damages for breach of his vendor's warranty 903
And damages may be recovered by the buyer, for which he is liable to his sub-vendees before actual payment to them 903
Damages recoverable by buyer under Sale of Foods and Drugs Act . . 903
Damages aggravated by fraudulent misrepresentation 904
Damages for personal injury by deleterious quality of article sold . . . 904

§ 893. After the goods have been delivered into the actual possession of the buyer, the performance of the vendor's duties may still be incomplete, by reason of the breach of some of the warranties, express or implied, whether of title or quality, to which he has bound himself by the contract.

If the breach be of 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*, § 635, or he may sue in damages for breach of the vendor's promise, as in all other cases of breach of contract.

§ 894. Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer has the choice of four remedies: —

First. He may refuse to accept the goods, and return them, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter [but it is sufficient for the buyer, 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 a cross-action for the breach of the warranty.

Thirdly. If he has not paid the price, he may plead the breach of warranty in reduction of the damages in the action brought by the vendor for the price (*b*).

[*Fourthly.* Since the Judicature Acts, he may set up by way of counter-claim a claim for damages in the vendor's action (*b*) for the price.]

§ 895. That the buyer, *where the property has not passed to him*, may reject the goods if they do not correspond in quality with the warranty, seems to be the necessary result of the principles established heretofore in the chapters on Delivery and Acceptance. The buyer's obligation to accept depends on the compliance by the vendor with his obligation to deliver. In an executory agreement for sale with a warranty of quality, as, for example, in a sale by sample, it is part of the vendor's promise to furnish a bulk equal in quality to the sample ; and in general this must operate as 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*, § 561 *et seq.* But where the buyer has agreed to buy goods that he has never seen, nor had an opportunity of inspecting, on the vendor's warranting that they are of a specified quality, nothing seems clearer than that this warranty is not an independent contract, but is a part of the original contract, operating as a condition, and that what the buyer intends when accepting the offer is, "I agree to buy IF the goods are equal to the quality you warrant." 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 ven-

(*a*) Grimoldby *v.* Wells, L. R. 10 C. P. 391.

(*b*) By the Rules of the Supreme Court, Ords. XIX. r. 3, and XXI. r. 17, 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.

(*c*) Vol. 2, p. 31, ed. 1887.

dee to rescind the contract and revest the property in the vendor without his consent. . . . But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted." The same reasoning which applies to a thing not yet existing, or not yet ascertained, would seem equally applicable to goods in a distant country or on the high seas, beyond the possible reach of the buyer's inspection.

§ 896. In the absence of some such express stipulation as was contained in Heyworth *v.* Hutchinson, *ante*, § 889, it is therefore a complete defence for the buyer to show that in such a sale the delivery offered was not in accordance with the promise (*d*). And the buyer may even reject the goods if the vendor refuses him an opportunity for inspection when demanded at a reasonable time, although the vendor, a few days afterwards, offers them for inspection, as was decided in Lorymer *v.* Smith.

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*).

§ 897. The *second* proposition, that the buyer may, after receiving and accepting the goods, bring his action for damages, in case the quality is inferior to that warranted by the vendor, needs no authority. It is taken for granted in all the cases, there being nothing to create an exception from the general rule, that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration (*f*).

§ 898. The *third* remedy of the buyer, with an exposition of the

(*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*, § 594.

(*f*) 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.

whole law on the subject, cannot be better presented than by extracts from the lucid decision given, in behalf of the Exchequer of Pleas, by Parke, B., in Mondel *v.* Steel (*g*). In that case the action was by the buyer for damages for breach of an express warranty in the quality of a ship built under written contract. The defendant pleaded in effect that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. The damages claimed in the declaration were special, and were alleged to result from defects in the fastenings, whereby the vessel was so much strained as to require 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 as 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 (*h*), a different practice began to prevail, and, being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the 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*

(*g*) 8 M. & W. 858; but the decision is now of little practical importance. 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, Rigge *v.* Burbidge, 15 M. & W. 598.

(*h*) 7 East, 479.

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.*"

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 (*i*).

[But this restriction has been removed by the provisions of the new procedure, and a *fourth* remedy provided. 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 XXI. r. 17 the defendant is enabled to recover consequential damages which may far exceed the amount of the price sued for by the plaintiff (*j*).]

§ 899. In Davis *v.* Hedges (*k*), the Queen's Bench followed Mondel *v.* Steele, and further held that the buyer had the *option* of setting up the defective quality as a defence, or of maintaining a separate action.

In Poulton *v.* Lattimore (*l*), 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.

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

(*i*) See, also, Rigge *v.* Burbidge, 15 M. & W. 598; Cutter *v.* Powell, 2 Sm. L. C. ed. 1887, notes, pp. 29, 30.

(*j*) It appears that it is usually the best course now to plead the diminution in value by way of defence *pro tanto*, and to make a counter-claim for the special damage. See Bullen & Leake, Precedents of Pleading, part 2, p. 304 (ed. 1888).

(*k*) L. R. 6 Q. B. 687.

(*l*) 9 B. & C. 259.

by the buyer may be maintained for damages for the breach, without notice to the vendor (*m*).

§ 900. It has been said, however, by eminent judges, and the jury at the trial would no doubt be told, that the failure either to return the goods, or to notify the vendor of the defect in quality, raises a strong presumption that the complaint of defective quality is not well founded (*n*).

In Adams *v.* Richards (*o*), 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.

[In Hinchcliffe *v.* Barwick (*p*), 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.]

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 (*q*) ; [and, on the same principle, it was held that when a horse 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 (*r*).]

§ 901. The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them; all of which acts show an agreement to accept the goods (*s*), but do not constitute an abandonment of his remedy

(*m*) Fielder *v.* Starkin, 1 H. Bl. 17; Pateshall *v.* Tranter, 3 A. & E. 103; Buchanan *v.* Parnshaw, 2 T. R. 745.

(*n*) 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.

(*o*) 2 H. Bl. 573.

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

(*q*) Head *v.* Tattersall, L. R. 7 Ex. 7.

(*r*) Elphick *v.* Barnes, 5 C. P. D. 321; Chapman *v.* Withers, 20 Q. B. D. 824. [In Chapman *v.* Withers, the buyer of a horse agreed that a failure to return him within two days should bar any action for an alleged breach of warranty. On the first day after the sale the horse ran away and broke his shoulder bone, and it was unsafe to return him, but the buyer gave the seller notice on the second day that the horse was not according to warranty, and was unfit to travel. Held, that the failure to return was no bar to a suit on the warranty.— E. H. B.]

(*s*) *Ante*, § 702 *et seq.*

by cross-action, or his right to insist in defence upon a reduction in price (*t*), [or now to raise a counter-claim in the vendor's action for the price.]

§ 902. 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 (*u*), [but now the buyer may set up unliquidated damages by counter-claim (*x*).]

§ 903. In relation to the measure of damages which the buyer is entitled to recover for breach of warranty, the rules are substantially the same as those which govern in the case of the vendor's breach of his obligation to deliver.

In Dingle *v.* Hare (*y*), cited in § 624, it was held that the jury had properly allowed the purchaser the difference of value between the article delivered and the article as warranted. And in Jones *v.* Just (*z*), cited *ante*, § 657, the same rule was applied, and the plaintiff recovered as damages 756*l.*, although by reason of a rise in the market the inferior article sold for nearly as much as the price given in the original sale.

In Lewis *v.* Peake (*a*), 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.

In Randall *v.* Raper (*b*), the plaintiffs had bought barley from the defendant as Chevalier seed barley, and in their trade as corn-factors resold it with a warranty that it was such seed barley. The sub-vendees sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy, but no par-

(*t*) Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Allen *v.* Cameron, 1 C. & M. 832. [McGregor *v.* Harris, 30 New Brunswick, 456. — B.]

(*u*) See the exposition of the law, and citation of authorities, in Byles on Bills, p. 151, ed. 1885; Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56; 36 L. J. Ex. 33.

(*x*) Ords. XIX. r. 3; XXI. r. 17.

(*y*) 7 C. B. N. S. 145; 29 L. J. C. P. 143.

(*z*) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

(*a*) 7 Tanut. 153. This case was decided prior to Hadley *v.* Baxendale, 9 Ex. 341 (1853), and is, therefore, of little weight as an authority. See per Lord Esher, in Hammond *v.* Bussey, 20 Q. B. D. at p. 91; set out *ante*, § 877.

(*b*) E. B. & E. 84; 27 L. J. Q. B. 266.

ticular sum was fixed, and nothing had yet been paid by the plaintiffs. The difference in the value of the barley sold by the defendant, and the barley as described, was 15*l.*, but the plaintiffs recovered 261*l.* 7*s.* 6*d.*, the excess being for such damages as the plaintiffs were deemed by the jury liable to pay to their sub-vendees. All the judges of the Queen's Bench held the damages to the sub-vendees to be the necessary and immediate consequence of the defendant's breach of contract, and properly recoverable. Wightman, J., however, expressed a doubt whether these damages were recoverable before the plaintiffs had actually paid the claims of their sub-vendees, but declined to dissent from his brethren on the point.

[In Hammond *v.* Bussey (*c*), the buyer was held entitled to recover from the seller, in addition to damages for breach of warranty, the costs incurred by him in an action brought against him by his sub-vendee and reasonably defended by the buyer.

The Sale of Food and Drugs Act, 1875 (*d*), 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 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.

In Wilson *v.* Dunville (*dd*), 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 "distiller's 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.]

(*c*) 20 Q. B. D. 79, C. A.
(*d*) 38 & 39 Vict. c. 63, s. 28.
(*dd*) 6 L. R. Ir. 210; S. C. 4 L. R. Ir. 249.

§ 904. The damages recoverable by a buyer for the breach of warranty may be greatly augmented when they are the consequence of a fraudulent misrepresentation by the vendor. Thus, in Mullett *v.* Mason (*e*), 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 (*f*), 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.

[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 course of his business, place the infected animal with others (*g*). 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 (*h*).]

In George *v.* Skivington (*i*), 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.

AMERICAN NOTE.

§§ 869–904.

Action for Non-Delivery.

It is equally elementary law in America as in England that, if the seller neglect or refuse to deliver whenever the buyer, by the contract, is entitled to a delivery, the latter may sustain an action therefor. If no credit was given, the price must be tendered before bringing the action. Mere readiness to pay is not sufficient. Lawrence *v.* Everett, 11 N. Y. Supp. 881, citing Speyer *v.* Colgate, 67 Barb. 192; Nelson *v.* Plimpton, etc. Co. 55 N. Y. 480. The insolvency of the buyer and his inability to pay for the goods is a good defence to the action. Diem *v.* Koblitz, 49 Ohio St. 41.

It is equally elementary that the usual measure of damages, if the goods are not paid for, is the difference between the agreed price and the fair

(*e*) L. R. 1 C. P. 559.
(*f*) 2 H. & N. 299; 27 L. J. Ex. 45.
(*g*) Smith *v.* Green, 1 C. P. D. 92.
(*h*) Smith *v.* Green, *supra*; Randall *v.* Newson, 2 Q. B. D. 102, C. A.
(*i*) L. R. 5 Ex. 1; 39 L. J. Ex. 8; but see the criticism on this case in Heaven *v.* Pender, 9 Q. B. D. 302, and, on appeal, 11 Q. B. D. 503, per Cotton, L. J., at p. 517.

market value, as advanced, at the time and place of delivery, with interest; Brown *v.* Sharkey, 93 Iowa, 157; being the converse of the rule in actions by vendors against vendees for not accepting the goods, the leading authorities on which are collected *ante*, pages 792, 793, which see. As to the evidence competent to prove market value, see Lush *v.* Druse, 4 Wend. 313; Cliquot's Champagne, 3 Wall. 143; Harrison *v.* Glover, 72 N. Y. 451.

And if no special time or place be fixed for the delivery, the time and place of sale is the standard, or at least within a reasonable time afterward; Thompson *v.* Woodruff, 7 Coldw. 401; Kipp *v.* Wiles, 3 Sandf. 585; or upon a demand of delivery and failure to comply; Williams *v.* Wood, 16 Md. 220.

And no more than the difference between the agreed price and such market value can be recovered unless the use to which the goods were to be applied was known to the vendor. Bartlett *v.* Blanchard, 13 Gray, 429; Buffalo Barb Wire Co. *v.* Phillips, 64 Wisc. 338; Fessler *v.* Love, 48 Pa. St. 407, approving Adams Express Co. *v.* Egbert, 36 Ib. 360.

If there be no market price or market value at the place of delivery, the value at the nearest available market where the articles could be procured, with the expense of transporting them to the stipulated place of delivery, is the rule; some latitude being allowed in determining the point of time and space within which the evidence must be confined. Grand Tower Co. *v.* Phillips, 23 Wall. 471, an important case; Durst *v.* Burton, 47 N. Y. 167; Douglass *v.* Merceles, 25 N. J. Eq. 144; Cahen *v.* Platt, 69 N. Y. 352; Furlong *v.* Polleys, 30 Me. 491; Berry *v.* Dwinel, 44 Me. 255; McCormick *v.* Hamilton, 23 Gratt. 561; Wemple *v.* Stewart, 22 Barb. 154; Rice *v.* Manley, 66 N. Y. 82; Young *v.* Lloyd, 65 Pa. St. 199; Hazelton Coal Co. *v.* Buck Mt. Coal Co. 57 Ib. 301; Coxe *v.* England, 65 Ib. 212; Sellar *v.* Clelland, 2 Colo. 532. In Campbellsville Lumber Co. *v.* Bradlee, 96 Ky. 494, there was no market value for the commodity, lumber, at the place of delivery, the vendor being the only manufacturer and dealer in the place. The lumber was intended for immediate reshipment to B., as the vendor knew. It was held that the difference between the contract price and the market value at B. was the measure of damages.

It is the duty of the buyer to use all reasonable efforts to supply himself elsewhere. Penn. R. R. Co. *v.* Titusville Plank Road Co. 71 Pa. St. 350; Hopkins *v.* Sandford, 41 Mich. 243; Hamilton *v.* McPherson, 28 N. Y. 76; Beymer *v.* McBride, 37 Iowa, 114; Humphreysville Copper Co. *v.* Vermont Copper Mining Co. 33 Vt. 92; Laporte Improvement Co. *v.* Brock, 99 Iowa, 485; Saxe *v.* Penokee Lumber Co. 11 App. Div. (N. Y.) 291; Baker Transfer Co. *v.* Merchants' Mfg. Co. 12 App. Div. 260.

If the article cannot be purchased in any market at any price, the vendee may prove his actual loss in some other way. Bank of Montgomery *v.* Reese, 26 Pa. St. 143; McHose *v.* Fulmer, 73 Ib. 367; Carroll-Porter Co. *v.* Columbus Machine Co. 55 Fed. R. 451; Culin *v.* Woodbury Glass Works, 108 Pa. St. 220; Cockburn *v.* The Ashland Lumber Co. 54 Wisc. 619; Ramsey *v.* Tully, 12 Bradw. 463. There are many cases where the general rule is not applicable. See Merrimack Man. Co. *v.* Quintard, 107 Mass. 127; Camden Oil Co. *v.* Schlens, 59 Md. 31; Schouse *v.* Neiswaanger, 18 Mo. App. 236; Bell *v.* Reynolds, 78 Ala. 511. In Todd *v.* Gamble, 148 N. Y. 382, there was no general market for the commodity — silicate of soda — which was the subject-matter of sale. Plaintiffs were held entitled to damages equalling the difference between the contract price and the cost

of manufacture. Silkstone, etc. Iron Co. *v.* Joint Stock Coal Co. 35 L. T. N. S. 668, cited by the author, is relied upon.

If there has been no advance in value since the time of the purchase, and *à fortiori* if the market price has declined, evidently the damages cannot be material; but whenever there has been a breach of the contract, a party can in any event recover nominal damages. Bush *v.* Canfield, 2 Conn. 485; Maher *v.* Riley, 17 Cal. 415; Rose *v.* Boseman, 41 Ala. 678; Billings *v.* Vanderbeck, 23 Barb. 546; Wilson *v.* Whitaker, 49 Pa. St. 114; Moses *v.* Rasin, 14 Fed. Rep. 772; School Furniture Co. *v.* Somerville Board, 58 N. J. L. 646. The general rules thus stated will be found supported in the following among other cases: —

Arkansas. Hanna *v.* Harter, 2 Ark. 397.

California. Crosby *v.* Watkins, 12 Cal. 85.

Connecticut. Bush *v.* Canfield, 2 Conn. 487; Wells *v.* Abernethy, 5 Ib. 227; West *v.* Pritchard, 19 Ib. 215; Jordan *v.* Patterson, 67 Ib. 473.

Illinois. Smith *v.* Dunlap, 12 Ill. 184; Phelps *v.* McGee, 18 Ib. 155; Deere *v.* Lewis, 51 Ib. 254; Capen *v.* De Steiger Glass Co. 105 Ib. 185.

Indiana. Kent *v.* Ginter, 23 Ind. 1; Zehner *v.* Dale, 25 Ib. 433; McCollum *v.* Huntington, 51 Ib. 229.

Iowa. Cannon *v.* Folsom, 2 Iowa, 101; Jemmison *v.* Gray, 29 Ib. 537.

Kansas. Stewart *v.* Power, 12 Kans. 596; Gray *v.* Hall, 29 Ib. 704.

Kentucky. Miles *v.* Miller, 12 Bush, 134.

Louisiana. Arrowsmith *v.* Gordon, 3 La. An. 106; Porter *v.* Barrow, Ib. 140; Marchesseau *v.* Chaffee, 4 Ib. 24.

Maine. Smith *v.* Berry, 18 Me. 122; Bush *v.* Holmes, 53 Ib. 417.

Maryland. Kribs *v.* Jones, 44 Md. 396; Camden Consolidated Oil Co. *v.* Schlens, 59 Ib. 31; McGrath *v.* Gegner, 77 Ib. 331.

Massachusetts. Shaw *v.* Nudd, 8 Pick. 9; Bartlett *v.* Blanchard, 13 Gray, 429; Essex Co. *v.* Pacific Mills, 14 Allen, 389.

Michigan. McKercher *v.* Curtis, 35 Mich. 478; and see Lawrence *v.* Porter, 63 Fed. R. 62.

Missouri. White *v.* Salisbury, 33 Mo. 150.

New Hampshire. Stevens *v.* Lyford, 7 N. H. 360; Rand *v.* The White Mt. R. R. Co. 40 Ib. 79.

New York. Gregory *v.* McDowell, 8 Wend. 435; Dey *v.* Dox, 9 Wend. 129; Davis *v.* Shields, 24 Ib. 326; Beals *v.* Terry, 2 Sandf. 127; McKnight *v.* Dunlop, 1 Selden, 537; Dana *v.* Fielder, 12 N. Y. 40, a valuable case; Clark *v.* Dales, 20 Barb. 42; Fishell *v.* Winans, 38 Ib. 228; Van Allen *v.* Illinois Central R. R. 7 Bosw. 515. This is so although the failure to deliver was not by design, but innocently, as when the vendor did not own the property sold. Lister *v.* Windmuller, 20 Jones & Sp. 408.

Pennsylvania. White *v.* Tompkins, 52 Pa. St. 363.

Tennessee. Doak *v.* Snapp, 1 Coldw. 180.

Vermont. Worthen *v.* Wilmot, 30 Vt. 555.

Wisconsin. Hill *v.* Chipman, 59 Wisc. 211.

If the price has been paid in advance, two different views exist as to the rule of damages. In many tribunals the rule is that the buyer can

recover only the full value of the property at the very time and place of the stipulated delivery, and interest added; or, as sometimes stated, the difference between the contract price and the market value, with the amount paid for the goods and interest thereon. Shepherd *v.* Hampton, 3 Wheat. 200, a leading case; Douglass *v.* McAllister, 3 Cranch, 298; Cofield *v.* Clark, 2 Colo. 102; Humphreysville Copper Co. *v.* Vermont Copper Co. 33 Vt. 92; Bear *v.* Harnish, 3 Brewster, 113; Smethhurst *v.* Woolston, 5 W. & S. 106; Hill *v.* Smith, 32 Vt. 433; Rose *v.* Boseman, 41 Ala. (N. S.) 678; McKenney *v.* Haines, 63 Me. 74. Such is Mr. Sedgwick's view. 1 Sedgw. on Dam. page [274]. While some courts allow the vendee to recover the *highest market value* which the article ever reaches between the time of the breach and the commencement of the suit, or, as some hold, even down to the time of the actual trial. The States in which this rule is most positively adopted are: —

California. Dahovich *v.* Emeric, 12 Cal. 171; Maher *v.* Riley, 17 Ib. 415.

Connecticut. West *v.* Pritchard, 19 Conn. 212.

Iowa. Davenport *v.* Wells, 1 Iowa, 598; Cannon *v.* Folsom, 2 Ib. 101; Stapleton *v.* King, 40 Ib. 278; Myer *v.* Wheeler, 65 Ib. 390; Gilman *v.* Andrews, 66 Ib. 116.

Indiana. Kent *v.* Ginter, 23 Ind. 1, as to stocks.

New York, which may be considered as the leading State on this point. West *v.* Wentworth, 3 Cow. 82 (1824), a purchase of salt; reaffirmed upon careful consideration in Clark *v.* Pinney, 7 Cow. 687 (1827), also a purchase of salt, elaborately examining the authorities; Van Allen *v.* Illinois Cent. R. R. 7 Bosw. 515, a sale of stocks; Arnold *v.* Suffolk Bank, 27 Barb. 424, also a sale of stocks. See Suydam *v.* Jenkins, 3 Sandf. 614, for an interesting examination of the subject.

Pennsylvania. This rule is applied to *stocks*, though, as we have before seen, not generally. Bank of Montgomery *v.* Reese, 26 Pa. St. 143.

South Carolina. In Davis *v.* Richardson, 1 Bay, 105 (1790), it was held, in a contract to deliver South Carolina stocks, that if no time of delivery is agreed upon, and no demand proved, the value *at the commencement of the suit*, being the first demand, is the standard.

Texas. Randon *v.* Barton, 4 Tex. 289; Calvit *v.* McFadden, 13 Ib. 324; Brasher *v.* Davidson, 31 Ib. 190; Cartwright *v.* McCook, 33 Ib. 612; Gregg *v.* Fitzhugh, 36 Ib. 127; Ranger *v.* Hearne, 37 Ib. 30.

As to special or consequential damages the rule is not quite so clear, nor the adjudications quite so harmonious. It is obvious enough, however, that to recover any special or consequential damages, *i. e.* damages not naturally or ordinarily the result of non-delivery, — or, to state it in other language, to recover any other damages than the difference between the contract price and the market value, — the declaration must distinctly allege such damages. Stevens *v.* Lyford, 7 N. H. 360; Furlong *v.* Polleys, 30 Me. 491; Cofield *v.* Clark, 2 Colo. 102; Miles *v.* Miller, 12 Bush, 138; Parsons *v.* Sutton, 66 N. Y. 92; Lawrence *v.* Porter, 63 Fed. R. 62. See Peters *v.* Cooper, 95 Mich. 191, as to expense of keeping. And as to what special damages may be recovered, under a sufficient allegation thereof, may be best understood by a review of the American cases, where the subject has been most carefully considered. See Lattin *v.*

Davis, Hill & Denio, 12, for an examination of several English cases; also Wakeman *v.* Wheeler & Wilson Mfg. Co. 101 N. Y. 205. And without discussing the rule of special damages in other cases than for non-delivery, such as in suits against carriers or tort-feasors, it is proposed to examine here only cases of sales, since this is not a general work on Damages. Neither does this seem the appropriate place to present the cases involving the rule of damages in cases of fraud, or a breach of warranty; for, though the analogy is perhaps perfect, yet, those cases being fully collected elsewhere, it is unnecessary to repeat them here. See *post*, pp. 962–964. In Shepard *v.* Milwaukee Gas Light Co. 15 Wisc. 318, a storekeeper was allowed to recover the damages sustained in his business by the wrongful refusal of a gas company to furnish him gas therefor, as they were bound to do. See, also, Richardson *v.* Chynoweth, 26 Ib. 656. In Hammer *v.* Schoenfelder, 47 Wisc. 455, the defendant agreed to supply the plaintiff, a butcher, with ice for his ice-box, in which to keep his fresh meat, for the season of 1878. He was held liable for loss of meat sustained for want of the ice, it being considered fairly within the contemplation of the parties as the natural and probable result of a breach of the contract.

In some cases the vendee has been allowed to recover the amount of profits he would have made upon a sub-sale which had already been entered into before the vendor's failure to deliver, especially if the vendor knew of such sub-sale, and some do not seem to make that fact necessary. See Booth *v.* Spuyten Duyvil Rolling Mill, 60 N. Y. 487; Messmore *v.* New York Shot Co. 40 Ib. 422; Griffin *v.* Colver, 16 Ib. 489; White *v.* Miller, 71 Ib. 118; Laird *v.* Townsend, 5 Hun, 107; McKay *v.* Riley, 65 Cal. 623; Stewart *v.* Power, 12 Kans. 596; Benton *v.* Fay, 64 Ill. 417.

Specific Performance.

The general rule is, that the purchaser of personal property cannot maintain a bill in equity for specific performance, for the reason that the remedy at law for damages is ordinarily full and adequate. The authorities for this rule need hardly be collated, as the exceptions stated below fully sustain it. See, however, Jones *v.* Newhall, 115 Mass. 244; Noyes *v.* Marsh, 123 Ib. 286; Barton *v.* De Wolf, 108 Ill. 195; Stayton *v.* Riddle, 114 Pa. St. 464; Avery *v.* Ryan, 74 Wisc. 591; and the cases cited in 3 Pom. Eq. Jur. § 1402, note. But wherever it *is clear* that the purchaser of personal property has not a plain, adequate, and complete remedy at law, it seems there is no reason why a bill for specific performance will not lie in cases of personal property as well as real. See Clark *v.* Flint, 22 Pick. 231; Appeal of Goodwin Gas Stove Co. 117 Pa. St. 514. On this ground it was frequently held, in the days of slavery, that a bill in equity would lie for the specific performance of a purchase of slaves for the family use of the plaintiff, or to compel their delivery when wrongfully withheld by the defendant for any cause. See Sarter *v.* Gordon, 2 Hill, 121 (1835); Young *v.* Burton, 1 McMullan Eq. 255 (1841). In McGowin *v.* Remington, 12 Pa. St. 56, a bill was maintained for the return of a surveyor's maps, plans, and papers of like character. Sales of patent rights have been frequently enforced in equity, and the vendor ordered to make an assignment. Binney *v.* Annan, 107 Mass. 95; Somerby *v.* Buntin, 118 Ib. 287; Corbin *v.* Tracy, 34 Conn. 325; Satterthwait *v.* Marshall, 4 Del. Ch. 337. So of heirlooms. Williams *v.* Howard, 3 Murphey,

74. So of a sale of specific articles which the vendor alone can supply. Hapgood *v.* Rosenstock, 23 Fed. Rep. 86. And see Adams *v.* Messinger, 147 Mass. 185. So where the buyer was not to pay in cash, but in certain specified securities, the vendor may be ordered to convey. Rothholtz *v.* Schwartz, 46 N. J. Eq. 477. While the general rule is that a sale *of stocks* will not be specifically enforced any more than that of other property, Cuddee *v.* Rutter, 5 Viner's Ab. 588, pl. 21; 1 P. Wms. 570 (1719), yet it has been sometimes done. In Leach *v.* Fobes, 11 Gray, 506, a contract for the sale of land *and* corporation shares was specifically enforced as to the whole. And see Todd *v.* Taft, 7 Allen, 371, of stock alone; Johnson *v.* Brooks, 93 N. Y. 337; Frue *v.* Houghton, 6 Colo. 318; Treasurer *v.* Commercial Coal Co. 23 Cal. 390; Ashe *v.* Johnson, 2 Jones Eq. 149. So in Bumgardner *v.* Leavitt, 35 W. Va. 194, as to a sale of stock, which had for the buyer "a unique and special value," citing Doloret *v.* Rothschild, 1 Sim. & S. 590 (1824). In Foll's Appeal, 91 Pa. St. 434, such remedy was refused when it appeared that the object of the buyer was to obtain control of the corporation; but that was because public policy was declared to be against it. In Equitable Gas Light Co. *v.* Baltimore Coal Tar Co. 63 Md. 285, a sale of coal tar was specifically enforced, it appearing that the article was indispensable in the plaintiff's business, and could not be obtained elsewhere in the city of Baltimore.

Right to Return.

The buyer has in America a right of return in several cases besides where there is an express agreement for it, as was the case in Giles *v.* Bradley, 2 Johns. Cas. 253: —

(1.) Where the goods sent are not of the same description, as to kind or species, as those bought. This, in England, is called a "condition" of the sale, the breach of which gives a right of return. But whether it be a condition or an implied warranty, as the American view seems to be, the right of return is well established, if exercised in a reasonable time, and the other party can be placed in *statu quo*. Hoadley *v.* House, 32 Vt. 179. The learned reader will remember the difference, as to a right to return for defective *quality*, between sales of some existing, known, and identified chattel, and sales of some non-existing or not ascertained goods, which by the contract the vendor is to furnish of a certain specified quality, since it is only in the latter case that the buyer has the right of return for defects in quality. See Pope *v.* Allis, 115 U. S. 363, and cases cited. And in this case, if the vendor will not receive the goods back, the buyer may resell them at auction on the vendor's account, and is responsible only for the proceeds of such sale. Rubin *v.* Sturtevant, 80 Fed. R. 930, citing Story on Sales, §§ 408, 409. And see 42 Mo. App. 313.

(2.) In sales by sample where the goods do not correspond with the sample. Butler *v.* Northumberland, 50 N. H. 33; Magee *v.* Billingsley, 3 Ala. 679; Kauffman *v.* Stuckey, 37 So. Car. 7, reaffirmed in 40 So. Car. 110. And as to what constitutes a sale by sample, see note on warranty, *ante*, p. 683.

(3.) For breach of an express warranty. As to what constitutes a warranty, see *ante*, note to §§ 610–673, pp. 662–693. The prevailing rule in America is that, if there be no fraud or knowledge of the defect, and no agreement for a return, the mere breach of warranty does not give that

right. Thornton *v.* Wynn, 12 Wheat. 189 (1827), is certainly the leading case in support of that view, though the real point there *decided* was, that a breach of warranty, without an offer to rescind the contract and return the goods, was not a defence to a note for the price; but the views there expressed have been adopted and followed in many cases. See Voorhees *v.* Earl, 2 Hill, 288; Lightburn *v.* Cooper, 1 Dana, 273; Lattin *v.* Davis, Hill & Denio, 16; Cary *v.* Gruman, 4 Hill, 625; Muller *v.* Eno, 14 N. Y. 597; Kase *v.* John, 10 Watts, 107; Freyman *v.* Knecht, 78 Pa. St. 141; Allen *v.* Henderson, 3 Humph. 581; West *v.* Cutting, 19 Vt. 536; Mayer *v.* Dwinell, 29 Vt. 299; Matteson *v.* Holt, 45 Vt. 341; Walls *v.* Gates, 6 Mo. App. 242; Marsh *v.* Low, 55 Ind. 271; Wright *v.* Davenport, 44 Tex. 164; Woodruff *v.* Graddy, 91 Geo. 333; Lynch *v.* Curfman, 65 Minn. 170. The New Jersey courts have not yet passed upon the question, although apparently in sympathy with this view. Woodward *v.* Emmons, 61 N. J. L. 281 (1898), citing New Jersey cases. This rule is established by statute in some jurisdictions, and the right of rescission for breach of warranty restricted to executory sales. Hull *v.* Caldwell, 3 So. Dak. 451.

Some States, for the sake of convenience, adopt the opposite rule, and allow a return for breach of warranty. Rutter *v.* Blake, 2 Harr. & J. 353; Hyatt *v.* Boyle, 5 Gill & Johns. 121; Franklin *v.* Long, 7 Ib. 407; Bryant *v.* Isburgh, 13 Gray, 607; Dorr *v.* Fisher, 1 Cush. 274; Alden *v.* Hart, 161 Mass. 580 and cases, as to what is necessary to reject; Marston *v.* Knight, 29 Me. 341; Marshall *v.* Perry, 67 Me. 78; Milliken *v.* Skillings, 89 Me. 180; Tyler *v.* Augusta, 88 Me. 504; Woodruff *v.* Graddy, 91 Geo. 333; Smith *v.* York Mfg. Co. 58 N. J. L. 242; Davis *v.* Hartlerode, 37 Neb. 864; Aultman *v.* Theirer, 34 Iowa, 272; Rogers *v.* Hanson, 35 Iowa, 287; Jack *v.* Des Moines, etc. R. R. Co. 53 Iowa, 399; Boothby *v.* Scales, 27 Wisc. 636, and cases cited; Sparling *v.* Marks, 86 Ill. 125. And see Dushane *v.* Benedict, 120 U. S. 639. A buyer is not allowed to return the goods for breach of a warranty of quality when the contract is executed. His only remedy is by suit on the warranty. Woodruff *v.* Graddy, 91 Geo. 333; Clark *v.* Neufville, 46 Ib. 261.

But it seems that a breach of warranty, technical only, and resulting in no appreciable damage to the vendee, does not authorize him to rescind. Chase *v.* Willard, 67 N. H. 369, citing Stoddart *v.* Smith, 5 Binn. 355, 363; Case *v.* Hall, 24 Wend. 102; Flight *v.* Booth, 1 Bing. N. C. 377. And where the contract provides that buyer may either rescind or recover damages for breach of warranty, he must make an election of remedies. He cannot recover the purchase-price and also damages for the breach of warranty. Park *v.* Richardson, 81 Wisc. 399. As in rescission for mistake or for fraud, the party rescinding must tender back whatever of value he has received. Milliken *v.* Skillings, 89 Me. 180, and cases cited; Snow *v.* Alley, 144 Mass. 546, 551, and cases cited.

(4) In cases of fraudulent representations. Here the rule is quite uniform allowing a return. Voorhees *v.* Earl, 2 Hill, 288; Gates *v.* Bliss, 43 Vt. 299; Freyman *v.* Knecht, 78 Pa. St. 141; Matteson *v.* Holt, 45 Vt. 336.

In all cases of return, however, for whatever cause, the right must be exercised within a reasonable time after the arrival of the goods, or at least after the defect has been discovered. A delay of seven months was thought to be too long in Eagle Iron Works *v.* Des Moines Railway Co. 101 Iowa, 289; it being sometimes held a question for the jury, and in some circumstances a question of law, what is a reasonable time. Matteson *v.* Holt,

45 Vt. 336; Cutler *v.* Gilbreth, 53 Me. 176; Libby *v.* Haley, 91 Me. 33 (1898); Boothby *v.* Scales, 27 Wisc. 626; Barnett *v.* Stanton, 2 Ala. 181, 195; Boughton *v.* Standish, 48 Vt. 594; Douglass Axe Man. Co. *v.* Gardner, 10 Cush. 88; Cookingham *v.* Dusa, 41 Kans. 229; Jones *v.* Wessel, 40 Neb. 116; Brown *v.* Waters, 7 Neb. 424, and cases cited. Using part after knowledge of the fraud might be a waiver of a right to return. Lyon *v.* Bertram, 20 How. 149. And see Weybrick *v.* Harris, 31 Kans. 92. Because a contract must be wholly rescinded, or not at all. Voorhees *v.* Earl, 2 Hill, 288; Barrie *v.* Earle, 143 Mass. 1; Bryant *v.* Thesing, 46 Neb. 244. Of course an offer to return, duly made, is equivalent to an actual return. Thornton *v.* Wynn, 12 Wheat. 183; Williams *v.* Hurt, 2 Humph. 68; Fuentes *v.* Caballero, 1 La. An. 27; Matthews *v.* Fuller, 8 Bradw. 529; Myers *v.* Townsend, 103 Iowa, 569; Milliken *v.* Skillings, 89 Me. 182, and cases cited. But a mere "proposal" to return, if there be a continued use of the property by the vendee, might not be a sufficient rescission. Horn *v.* Buck, 48 Md. 358. If the goods have been duly returned, the buyer may, of course, recover back all he has paid for them, and interest from the time of the return. Kuntzman *v.* Weaver, 20 Pa. St. 422; Giles *v.* Bradley, 2 Johns. Cas. 253; Haggert Man. Co. *v.* Pugsley, 26 New Brunswick, 223, a bill in equity; Pope *v.* Allis, 115 U. S. 363. And the whole transaction is thereby rescinded. See Lord *v.* Kenny, 13 Johns. 219; Healy *v.* Utley, 1 Cow. 345.

Action upon the Warranty.

A right of action for breach of a warranty exists in America (contrary to Adam *v.* Richards, 2 H. Bl. 573), although the vendor had expressly agreed to take back the property in case it did not correspond with the warranty. The right to return is merely a cumulative remedy. Douglass Axe Co. *v.* Gardner, 10 Cush. 88; Perrine *v.* Serrell, 30 N. J. L. 454; Mandel *v.* Buttles, 21 Minn. 391; Osborne *v.* Flood, 11 Bradw. 408; McCormick *v.* Dunville, 36 Iowa, 645; Eyers *v.* Haddem, 70 Fed. R. 648; Love *v.* Ross, 89 Iowa, 400; Fitzpatrick *v.* Osborne, 50 Minn. 261; Shupe *v.* Collender, 56 Conn. 489. If the buyer expressly agrees that the thing "shall be" returned if defective, he may not have a right to keep it and sue on the warranty. See Bomberger *v.* Griener, 18 Iowa, 477; Love *v.* Ross, *supra*. And although the buyer has exercised his right of return, an action for breach of warranty will lie for any actual damage thereby sustained before such return. Northwood *v.* Rennie, 3 Ont. Ap. 37 (1878), an important case; Clark *v.* McGetchie, 49 Iowa, 437; Kimball *v.* Vorman, 35 Mich. 310. The mere fact of acceptance and use of the goods, even after knowledge of the defect, does not, in America, prevent a resort to an action upon a warranty, or for fraud. The warranty "survives the acceptance," it is said.

The buyer need not return the goods, nor offer to do so, nor give any notice in order to sue upon his warranty.

Alabama. Cozzins *v.* Whittaker, 3 S. & P. 322; Milton *v.* Rowland, 11 Ala. 732.

California. Polhemus *v.* Heiman, 45 Cal. 573; Hughes *v.* Gray, 60 Ib. 284.

Connecticut. Kellogg *v.* Denslow, 14 Conn. 411.

ILLINOIS. Shields *v.* Reibe, 9 Bradw. 598; Doane *v.* Dunham, 65 Ill. 512; Underwood *v.* Wolfe, 131 Ib. 425.

INDIANA. Ferguson *v.* Hosier, 58 Ind. 438; Hillenbrand *v.* Stockman, 123 Ib. 598.

IOWA. Short *v.* Matteson, 81 Iowa, 638; Love *v.* Ross, 89 Ib. 400; Hefner *v.* Haynes, 89 Ib. 616; Latham *v.* Shipley, 86 Ib. 543.

MARYLAND. McCeney *v.* Duvall, 21 Md. 166; Lane *v.* Lantz, 27 Ib. 211; 38 Ib. 351; Central Trust Co. *v.* Arctic Ice Co. 77 Ib. 202, 237.

MASSACHUSETTS. Douglass Axe Co. *v.* Gardner, 10 Cush. 88; Vincent *v.* Leland, 100 Mass. 432.

MINNESOTA. Frohreich *v.* Gammon, 28 Minn. 476; Felsenthal *v.* Hawks, 50 Ib. 178.

MISSOURI. Martin *v.* Maxwell, 18 Mo. App. 176.

NEW JERSEY. Woodward *v.* Emmons, 61 N. J. L. 281.

NORTH CAROLINA. Cox *v.* Long, 69 N. C. 7; Lewis *v.* Rountree, 78 Ib. 323; Kester *v.* Miller, 119 Ib. 475.

NEW YORK. Walling *v.* Schwartzkopf, 12 J. & S. 576; Waring *v.* Mason, 18 Wend. 426; Zuller *v.* Rogers, 7 Hun, 540; Meagley *v.* Hoyt, 88 Hun, 332; Smith *v.* Foote, 81 Hun, 128; Ames *v.* Norwich Light Co. 22 App. Div. 249; Schroeder *v.* Coatsville Mill Co. 31 App. Div. 295; Muller *v.* Eno, 14 N. Y. 597; Fairbank Canning Co. *v.* Metzger, 118 Ib. 260; Rust *v.* Eckler, 41 Ib. 491; Day *v.* Pool, 52 Ib. 416; Dounce *v.* Dow, 57 Ib. 16; Kent *v.* Friedman, 101 Ib. 616; Hooper *v.* Story, 155 Ib. 171; 81 Hun, 128.

PENNSYLVANIA. Borrekins *v.* Bevan, 3 Rawle, 23; Daily *v.* Green, 15 Pa. St. 118; Youghiogheny Iron Co. *v.* Smith, 66 Ib. 340; Freyman *v.* Knecht, 78 Ib. 141; Holloway *v.* Jacoby, 120 Ib. 583.

VERMONT. Gilson *v.* Bingham, 43 Vt. 410.

WISCONSIN. Fisk *v.* Tank, 12 Wisc. 277; Bonnell *v.* Jacobs, 36 Ib. 63; Larson *v.* Aultman Co. 86 Ib. 281.

NOVA SCOTIA. Wurzburg *v.* Andrews, 28 Nova Scotia, 387.

UNITED STATES. English *v.* Spokane Co. 57 Fed. Rep. 451.

No doubt a failure to return the goods, or notify the vendor of the defect, after sufficient opportunity to examine them, may be some evidence that no defect existed, but it is not a condition precedent to the action, nor *in law* a waiver of the warranty, though some States seem to hold it so, especially in executory contracts, and when the defects are apparent. But in Marshall *v.* Perry, 67 Me. 78, it was held that even a local usage to return the goods, or notify the seller, would not compel the buyer to do so, or preclude him from resorting to his express warranty. The contract of sale may, of course, expressly make it the duty of the buyer to notify the seller of the defect, or that, failing to do so, the continued use of the property should be considered as a final acceptance. Russell *v.* Murdock, 79 Iowa, 101. Where the seller is present at the trial of the machine purchased, it is unnecessary to give formal notice of defects then discovered. Peterson *v.* Walter A. Wood Co. 97 Iowa, 148. No doubt, also, the vendee *may* so use the goods, after knowledge of the defect, as to be abundant and satisfactory proof of his acceptance of them, especially in cases of obvious defects. See Dounce *v.* Dow, 64 N. Y. 411; Wilds *v.* Smith, 2 Ont. App. 8; Draper *v.* Sweet, 66 Barb. 145; Defenbaugh *v.* Weaver, 87 Ill. 132; Dodsworth *v.* Hercules Iron Works, 66 Fed. R. 483. (See note, *ante*, §§ 699–705, Acceptance.)

But this seems to be a question of fact for the jury in each case, under proper instructions from the court.

An action for a breach of warranty may be maintained although the goods are not paid for, or though notes for the price are still outstanding; Aultman *v.* Wheeler, 49 Iowa, 647; Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341; Frohreich *v.* Gammon, 28 Minn. 476; Fitzpatrick *v.* Osborne, 50 Minn. 261; Creighton *v.* Comstock, 27 Ohio St. 548; or although the buyer has sold the goods, and no claim has been made on him for the alleged defect; Muller *v.* Eno, 14 N. Y. 598; or although the buyer gave his notes for the price after knowing of the breach of warranty; Wheelock *v.* Berkley, 38 Ill. App. 518; or although the buyer allowed the seller to recover judgment for the full price because he did not set up the defence. The failure to rely upon the defect is only a matter of evidence as to the non-existence of such a defence. Bodurtha *v.* Phelon, 13 Gray, 413; Smith *v.* Foote, 81 Hun, 128. And *vice versa*. Barker *v.* Cleveland, 19 Mich. 230. See, also, Britton *v.* Turner, 6 N. H. 482; Bascom *v.* Manning, 52 N. H. 132. But see Gilson *v.* Bingham, 43 Vt. 410. Of course, if he had obtained a deduction from the price on account of the breach of warranty, he could not afterwards sue upon the warranty, although the first allowance was not adequate. Burnett *v.* Smith, 4 Gray, 50; Batterman *v.* Pierce, 3 Hill, 171; Beall *v.* Brown, 12 Md. 550. And see Starr Glass Co. *v.* Morey, 108 Mass. 573; Fabbricotti *v.* Launitz, 3 Sandf. 743; O'Connor *v.* Varney, 10 Gray, 231; Huff *v.* Broyles, 26 Gratt. 283. In Church *v.* Abell, 1 Can. Sup. Ct. 442, a middle ground was adopted.

No action will lie on a warranty unless the title has fully passed to the buyer. Therefore, where the sale was conditional on payment of the full price which was due in instalments, and the last instalment had not been paid, it was held in Frye *v.* Milligan, 10 Ont. R. 509 (1885), that no remedy yet existed on the warranty. And see Tomlinson *v.* Morris, 12 Ont. R. 311; English *v.* Hanford, 75 Hun, 428. Copeland *v.* Hamilton, 9 Manitoba R. 143, seems *contra*. There the suit was upon a note given for the price of a horse. The agreement was that title was not to pass until payment. The horse died before maturity of the note. There was a warranty of soundness, and a breach thereof. The court held that the transaction was a bailment; that there was not a total failure of consideration, that defendant was bound upon the note, and might counter-claim for damages due to the breach of warranty. *A fortiori*, if the buyer has entirely rejected the goods because they do not correspond with the warranty, he has no remedy for the breach. Taylor *v.* Saxe, 57 Hun, 411.

The **general rule of damages**, in actions upon a warranty, is too well settled to require citations, viz., the value of an article corresponding to the warranty, minus the value of the article actually received and kept. And this seems to be so both in express and implied warranties. This is not *necessarily* the same as the difference between the value of the article received and *the price actually paid for it*, for the buyer might have purchased it below its real value; and if so, he is entitled to the benefit of his bargain. Cothers *v.* Keever, 4 Pa. St. 168; Reggio *v.* Braggiotti, 7 Cush. 166; Comstock *v.* Hutchinson, 10 Barb. 211; Tuttle *v.* Brown, 4 Gray, 457; Goodwin *v.* Morse, 9 Met. 278; Cary *v.* Gruman, 4 Hill, 625; Rutan *v.* Ludlam, 29 N. J. L. 398; Whitmore *v.* South Boston Iron Co. 2 Allen, 52. And it is immaterial that the purchaser subsequently sold

the article for a higher price than he paid. Brown *v.* Bigelow, 10 Allen, 242. If he has resold with warranty similar to that given to him, and damages for breach have been recovered of him by his vendee, the amount thereof is *prima facie* the amount he is entitled to recover. Reese *v.* Miles, 99 Tenn. 378.

As to special or consequential damages, not quite so much unanimity exists, as a review of the American cases will best illustrate. The subject is very well examined in Thoms *v.* Dingley, 70 Me. 100, in which a maker of carriage springs, which had been sold to a carriage-maker, was held liable for the expense of taking out the defective springs and inserting others in their place. In Love *v.* Ross, 89 Iowa, 400, there was breach of warranty in the sale of a horse, and the buyer was allowed to recover as special damages the expenses of keeping and caring for the horse. See Cassidy *v.* La Fevre, 45 N. Y. 563; Parks *v.* Morris Axe Co. 54 Ib. 586. In Sinker *v.* Kidder, 123 Ind. 530, the buyer of a warranted steam-boiler, bought for a mill, was allowed to recover as special damages the rental value of the mill while it was necessarily idle on account of an explosion of the boiler from a defect warranted against. In Merguire *v.* O'Donnell, 103 Cal. 50, the buyer was induced by fraud to purchase horses afflicted with glanders. The buyer was obliged to kill the horses, and also to destroy the stable in which they had been kept. He was allowed to recover the price paid, the value of the stable, and the amount expended for surgical treatment of the horses. In Beeman *v.* Banta, 118 N. Y. 538 (1890), it was held that, upon breach of warranty of quality of an article sold to be used for a particular purpose, the measure of damages is the profit that might have been made by using the article for such purpose if it had conformed to the warranty. See a valuable note to the case in 30 Am. Law Reg. N. S. 107 (Feb. 1891), by Louis Boisot, Jr. See Swain *v.* Schieffelin, 134 N. Y. 471, a valuable case. In a sale of seeds to a market gardener, known to be for his own use, that being considered an implied warranty of fitness for that special use, the buyer may recover as damages the difference between the value of the crop raised from the seed and the value of what a crop would have been raised from such seed as they were warranted to be. Wolcott *v.* Mount, 36 N. J. L. 262 (1873); 38 Ib. 496; Passinger *v.* Thorburn, 34 N. Y. 634, approved in Milburn *v.* Belloni, 39 N. Y. 53; White *v.* Miller, 71 N. Y. 118; Flick *v.* Wetherbee, 20 Wisc. 392; Van Wyck *v.* Allen, 69 N. Y. 61; Schutt *v.* Baker, 9 Hun, 556; Shearer *v.* Park Nursery Co. 103 Cal. 415. See Frohreich *v.* Gammon, 28 Minn. 476, a discriminating case. But not interest on the amount so found. White *v.* Miller, 78 N. Y. 393. In Ferris *v.* Comstock, 33 Conn. 513, the buyer was allowed to recover the value of his labor in preparing the ground for the seed, and in planting it, and the sum paid for the seed, with interest, deducting any benefit to the land by the labor. In Jones *v.* George, 61 Tex. 345, the purchaser of an article *as* Paris green, for the known purpose of killing cotton-worms, but which proved not to be Paris green, and ineffectual for the purpose, was allowed to recover the value of the crop, as it was just before its destruction by the worms, with the cost of the article bought and of its application to the crop, with interest on the money thus expended; it being proved that Paris green would have destroyed the worms. This case contains a very exhaustive examination by Stayton, J., of the cases upon the subject of special damages, and to it the learned reader is specially referred. So it has been held that a vendee, who

takes a warranty with notice that he buys to sell again in another market, may include in his damages both the losses actually sustained by the breach, and also the profits he would have made upon the resale had the article been what it was warranted to be. Lewis *v.* Rountree, 78 N. C. 323; Oldham *v.* Kerchner, 81 Ib. 430, and cases cited; Thorne *v.* McVeagh, 75 Ill. 81. Gains prevented as well as losses sustained may be sometimes recovered, if they can be clearly established by the evidence as natural results of the breach of warranty. See Griffin *v.* Colver, 16 N. Y. 489; Messmore *v.* New York Shot & Lead Co. 40 N. Y. 422. While mere contingent or speculative gains or losses cannot be recovered, it cannot be ascertained whether they would or would not have resulted. Goodell *v.* Bluff City Lumber Co. 57 Ark. 203, and cases cited. Therefore, for breach of warranty that a safe was "burglar-proof," the value of articles stolen from the safe cannot be recovered. Herring *v.* Skaggs, 62 Ala. 180. A buyer of a threshing machine cannot recover as damages loss of time of his teams and men while waiting to have it repaired. It is too remote. McCormick *v.* Vanatta, 43 Iowa, 389. But a buyer, who retained a defective engine at the seller's request, was allowed to recover as damages the loss due to idle hands, and to the increased amount of fuel used on account of the defects, such losses being sustained while the sellers were trying to remedy the defects. Kester *v.* Miller, 119 N. C. 475. The buyer of a warranted wagon, which proved to be defective, cannot recover for the loss of a horse caused by the defective wagon. Schurmeier *v.* English, 46 Minn. 306. As to recoveries for amount paid a servant injured by using the article bought from some imperfection therein, see Roughan *v.* Boston, etc. Block Co. 161 Mass. 24.

Action for Fraud.

The buyer is not obliged to treat the sale as *void* for the fraud and return the property, but may, at his option, keep the goods and maintain an action of deceit, or a special assumpsit, and recover damages for the fraud. Kimball *v.* Cunningham, 4 Mass, 502. It has been held that rescission is the only remedy if a party's assent has been procured by undue influence as distinguished from fraud, and that failure to disaffirm within a reasonable time amounts to affirmance. See Bancroft *v.* Bancroft, 110 Cal. 374. In that case the plaintiff had been induced by undue influence to sell certain stock for $5000. Nineteen months afterwards, never having offered to rescind, he brought suit to recover $45,000 damages, the stock having risen in value. Held that he could not maintain the action. Two judges dissented. As to what constitutes a fraud on a buyer, see *ante*, p. 479, and *post*. The general rule of damages is the same as in actions on warranties, viz., the difference between the actual value of the thing received and the value of such an article if it were as represented to be. Stiles *v.* White, 11 Met. 356; Cothers *v.* Keever, 4 Pa. St. 168; Morse *v.* Hutchins, 102 Mass. 439; Murray *v.* Jennings, 42 Conn. 9; Gustafson *v.* Rustemeyer, 70 Conn. 125; Krumm *v.* Beach, 25 Hun, 293; Vail *v.* Reynolds, 118 N. Y. 297; Drew *v.* Beall, 62 Ill. 164; Nysewander *v.* Lowman, 124 Ind. 584; Page *v.* Parker, 43 N. H. 363; Shanks *v.* Whitney, 66 Vt. 405; Williams *v.* McFadden, 23 Fla. 143; Brook *v.* Clark, 60 Vt. 551. As to evidence of damages in purchase of bonds, see Currier *v.* Poor, 151 N. Y. 344. But some courts hold that the true measure of damages is what the

plaintiff has lost by being deceived into the purchase, such as money paid out and interest. Expected profits are not to be included. Smith *v.* Bolles, 132 U. S. 125.

But special or consequential damages may also sometimes be recovered, as in actions on warranties. Thus the vendor of a flock of sheep, known to have a contagious disease, may be liable not only for the reduced value of the sheep sold, but also for the disease to the buyer's other sheep communicated from those so bought, without the buyer's fault. Jeffrey *v.* Bigelow, 13 Wend. 518 (1835); Sherrod *v.* Langdon, 21 Iowa, 518 (1866); Wintz *v.* Morrison, 17 Tex. 373 (1856). And Bradley *v.* Rea, 14 Allen, 20; Marsh *v.* Webber, 16 Minn. 418, tend strongly in the same direction. Compare Joy *v.* Bitzer, 77 Iowa, 73, where there was a breach of warranty that the animals sold were sound, and the buyer recovered the damages resulting from the communication of the disease to other animals, together with the expenses of curing them. See, also, Barnum *v.* Vandusen, 16 Conn. 200; Dushane *v.* Benedict, 120 U. S. 639; Rose *v.* Wallace, 11 Ind. 112. Still more clearly, where an animal is sold for a specific purpose, the expenses of keeping it a reasonable time to test its capacity for that purpose may be recovered. Peak *v.* Frost, 162 Mass. 299, and cases cited.

Defence to a Suit for the Price.

This may in one sense be called a buyer's "remedy," though negative in its character.

(1.) For breach of warranty. The prevailing rule in America is that, in order to prevent circuity of action, a buyer, when sued for the price, may rely upon a breach of warranty as a defence *pro tanto*, and so reduce the amount of the plaintiff's recovery, or, if the articles were entirely worthless, defeat the whole claim. McAllister *v.* Reab, 4 Wend. 485; 8 Ib. 109; Cook *v.* Castner, 9 Cush. 266; Hitchcock *v.* Hunt, 28 Conn. 343; Bouker *v.* Randles, 31 N. J. L. 335; Merrill *v.* Nightingale, 39 Wisc. 247; Stevens *v.* Johnson, 28 Minn. 172; Marsh *v.* McPherson, 105 U. S. 709; Parker *v.* Pringle, 2 Strobh. 242; Trimmier *v.* Thomson, 10 S. C. 164–187; Seigworth *v.* Leffel, 76 Pa. St. 476; Bradley *v.* Rhea, 14 Allen, 20; Morse *v.* Brackett, 98 Mass. 205; Howie *v.* Rea, 70 N. C. 559; Kester *v.* Miller Bros. 119 N. C. 475; Smith *v.* Mayer, 3 Colo. 207; Dushane *v.* Benedict, 120 U. S. 639; Manufacturing Co. *v.* Wood, 84 Mich. 452; Birdsall Co. *v.* Palmer, 74 Md. 201; Jeffers *v.* Easton, 113 Cal. 345; Hazelhurst Co. *v.* Boomer, etc. Co. 48 Fed. R. 803.

Acceptance and use of the goods is not, as a matter of law, a conclusive bar to setting up a breach of warranty as a partial defence to a suit for the full price. Morse *v.* Moore, 83 Me. 473, a valuable case; English *v.* Spokane Commission Co. 48 Fed. R. 196. And a failure to notify the vendor of the defect would not be. Weed *v.* Dyer, 53 Ark. 155.

The same rules apply to *implied warranties*, or a breach of some other contract by the vendor as to the goods, and forming a part of the sale thereof. Batterman *v.* Pierce, 3 Hill, 171; Gurney *v.* Atlantic, etc. Railway Co. 58 N. Y. 358, an elaborately considered case; Gautier *v.* Douglass Man. Co. 13 Hun, 514; Marsheutz *v.* McGreevy, 23 Hun, 408; Kenworthy *v.* Stevens, 132 Mass. 123; Howe Mach. Co. *v.* Reber, 66 Ind. 498.

Some extend this rule, allowing the defence of a breach of warranty,

even to suits on a note given for the article, as well as to the action of general assumpsit for the price, and there seems no sound objection to such a practice. Harrington *v.* Stratton, 22 Pick. 510; Judd *v.* Dennison, 10 Wend. 513; Perley *v.* Balch, 23 Pick. 283; Shepherd *v.* Temple, 3 N. H. 455; Goodwin *v.* Morse, 9 Met. 278; Merrill *v.* Nightingale, 39 Wisc. 247; Aultman *v.* Theirer, 34 Iowa, 272; Ferguson *v.* Oliver, 8 Sm. & Mar. 332; Stevens *v.* Johnson, 28 Minn. 172; Wright *v.* Davenport, 44 Tex. 164; Ruff *v.* Jarrett, 94 Ill. 475, and cases cited. The preponderance of authority in America being that a subsequent partial failure of consideration may be set up as a partial defence to a promissory note, sued upon by the payee, as much as to any other promise. Spalding *v.* Vandercook, 2 Wend. 431; Burton *v.* Stewart, 3 Ib. 236; Stacy *v.* Kemp, 97 Mass. 166; Hill *v.* Southwick, 9 R. I. 299; Albertson *v.* Halloway, 16 Geo. 377; Fisher *v.* Sharpe, 5 Daly, 214; Andrews *v.* Wheaton, 23 Conn. 112; Sawyer *v.* Chambers, 44 Barb. 42; Bonker *v.* Randles, 31 N. J. L. 335, carefully considering the question; affirmed in Wyckoff *v.* Runyon, 33 N. J. L. 107; Woodward *v.* Emmons, 61 N. J. L. 281 (1898), citing many New Jersey cases; Peden *v.* Moore, 1 Stew. & Port. 71; Rasberry *v.* Moye, 23 Miss. 320; Wilson *v.* King, 83 Ill. 232.

Though some hold differently. Drew *v.* Towle, 27 N. H. 412; Riddle *v.* Gage, 37 Ib. 519; Burton *v.* Schermerhorn, 21 Vt. 289; Stone *v.* Peake, 16 Vt. 213; Pulsifer *v.* Hotchkiss, 12 Conn. 234; Kellogg *v.* Hyatt, 1 Up. Can. Q. B 445; Georgian Lumber Co. *v.* Thompson, 35 Ib. 64; McGregor *v.* Harris, 30 New Brunswick, 456.

(2.) So most courts allow fraud to be set up as a defence to an action for the price, or on a note for the price, as well as to be a cause of action itself. Harrington *v.* Stratton, 22 Pick. 510; Withers *v.* Greene, 9 How. 213; Cook *v.* Castner, 9 Cush. 277; Coburn *v.* Ware, 30 Me. 202; Dushane *v.* Benedict, 120 U. S. 639; Joplin Water Co. *v.* Bathe, 41 Mo. App. 285. This doctrine of recoupment by reason of fraud was pushed so far in Carey *v.* Guillow, 105 Mass. 18, as to allow a defendant, who was sued for fraudulent representations as to a horse given by him in exchange for the plaintiff's horse, to show, in reduction of damages, that the plaintiff himself had also been guilty of fraudulent representations as to the *horse he let the defendant have.* This certainly has the merit of convenience in its favor.

APPENDIX.

56 AND 57 VICT. CHAPTER 71.

Sale of Goods Act, 1893. An Act for Codifying the Law relating to the Sale of Goods.

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1. Sale and agreement to sell.
2. Capacities to buy and sell.

Formalities of the Contract.

3. Contract of sale, how made.
4. Contract of sale for ten pounds and upwards.

Subject-matter of Contract.

5. Existing or future goods.
6. Goods which have perished.
7. Goods perishing before sale, but after agreement to sell.

The Price.

8. Ascertainment of price.
9. Agreement to sell at valuation.

Conditions and Warranties.

10. Stipulations as to time.
11. When condition to be treated as warranty.
12. Implied undertaking as to title, etc.
13. Sale by description.
14. Implied conditions as to quality or fitness.

Sale by Sample.

15. Sale by sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Goods must be ascertained.
17. Property passes when intended to pass.
18. Rules for ascertaining intention.
19. Reservation of right of disposal.
20. Risk *prima facie* passes with property.

Transfer of Title.

21. Sale by person not the owner.
22. Market overt.
23. Sale under voidable title.
24. Revesting of property in stolen goods on conviction of offender.
25. Seller or buyer in possession after sale.
26. Effect of writs of execution.

PART III.

PERFORMANCE OF THE CONTRACT.

27. Duties of seller and buyer.
28. Payment and delivery are concurrent conditions.
29. Rules as to delivery.
30. Delivery of wrong quantity.
31. Instalment deliveries.
32. Delivery to carrier.
33. Risk where goods are delivered at distant place.
34. Buyer's right of examining the goods.
35. Acceptance.
36. Buyer not bound to return rejected goods.
37. Liability of buyer for neglecting or refusing delivery of goods.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38. Unpaid seller defined.
39. Unpaid seller's rights.
40. Attachment by seller in Scotland.

Unpaid Seller's Lien.

41. Seller's lien.
42. Part delivery.
43. Termination of lien.

Stoppage in Transitu.

44. Rights of stoppage *in transitu*.
45. Duration of transit.
46. How stoppage *in transitu* is affected.

Resale by Buyer or Seller.

47. Effect of sub-sale or pledge by buyer.
48. Sale not generally rescinded by lien or stoppage *in transitu*.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49. Action for price.
50. Damages for non-acceptance.

Remedies of the Buyer.

51. Damages for non-delivery.
52. Specific performance.
53. Remedy for breach of warranty.
54. Interest and special damages.

PART VI.

SUPPLEMENTARY.

55. Exclusion of implied terms and conditions.
56. Reasonable time a question of fact.
57. Rights, etc., enforceable by action.
58. Auction sales.
59. Payment into court in Scotland when breach of warranty alleged.
60. Repeal.
61. Savings.
62. Interpretation of terms.
63. Commencement.

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

Sale and agreement to sell.

1. (1.) A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to buy and sell.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"Necessaries" in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

Contract of sale; how made.

3. Subject to the provisions of this Act, and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale for ten pounds and upwards.

4. (1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept (*a*) part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, (*b*) or unless

(*a*) Hay was sent to defendant's wharf, together with a note, from which defendant knew that the hay was tendered under an existing contract, and not offered for sale under a contract to be made. The defendant took a sample, and inspected it to see whether it was equal to sample previously delivered, and explained what he was doing. Held, that there was an acceptance within the meaning of the statute. Abbott *v.* Wolsey [1895], 2 Q. B. 97.

(*b*) In Norton *v.* Davison [1899], 1 Q. B. 401, there was an oral contract for goods to be supplied. The contract provided that money which had been overpaid the vendor upon a

some note or memorandum in writing (*c*) of the contract be made and signed by the party to be charged, or his agent in that behalf.

(2.) The provisions of this section apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof for rendering the same fit for delivery.

(3.) There is an acceptance of goods, within the meaning of this section, when the buyer does any act in relation to the goods which recognizes a preëxisting contract of sale, whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

Subject-matter of Contract.

5. (1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller, after the making of the contract of sale, in this Act called "future goods." Existing or future goods.

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where, by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. Goods which have perished.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. Goods perishing before sale, but after agreement to sell.

The Price.

8. (1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Ascertainment of price.

(2.) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. (1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided: provided that, if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Agreement to sell at valuation.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10. (1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract, or not, depends on the terms of the contract. Stipulations as to time.

(2.) In a contract of sale, "month" means *prima facie* calendar month.

prior sale should be held by him, and applied on account to the price of goods supplied under the present contract. Held, not a part payment which would satisfy the statute.

(*c*) In Pearce *v.* Gardner [1897], 1 Q. B. 188, an envelope and letter, shown to have been used together, were allowed to be used as evidence of a sufficient memorandum.

11. (1.) In England or Ireland —

When condition to be treated as warranty.

(*a.*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(*b.*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(*c.*) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either, within a reasonable time after delivery, to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is executed by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

Implied undertaking as to title, etc.

(1.) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(3.) An implied warranty that the goods shall be free from any charge or incumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description: and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description.

14. Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:—

Implied conditions as to quality or fitness.

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose. (*d*)

(*d*) Gillespie *v.* Cheney [1896], 2 Q. B. 59.

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith.

Sale by Sample.

15. (1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. Sale by sample.

(2.) In the case of a contract for sale by sample,—

(*a.*) There is an implied condition that the bulk shall correspond with the sample in quality;

(*b.*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(*c.*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Goods must be ascertained.

17. (1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Property passes when intended to pass.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the contract of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:— Rules for ascertaining intention.

RULE 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

RULE 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

RULE 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

RULE 4. When goods are delivered to the buyer on approval, or "on sale or return," or other similar terms, the property therein passes to the buyer:—

(*a.*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (*e*)

(*b.*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

RULE 5. (1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier, or other bailee or custodier (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Reservation of right of disposal.

19. (1.) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier, for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange; and if he wrongfully retains the bill of lading, the property in the goods does not pass to him. (*f*)

Risk *prima facie* passes with property.

20. Unless otherwise agreed, the goods remain in the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not.

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided, also, that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title.

Sale by person not the owner.

21. (1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(*e*) In Kirkham *v.* Attenborough [1897], 1 Q. B. 201, K. had delivered to one W. certain goods "on sale or return." W. pawned them to A. Held, that the act of W. in pawning the goods showed an intention to complete the sale, and that K. could not recover them of A.

(*f*) In Calm *v.* Pockett's Bristol, etc. Co. [1898], 2 Q. B. 61, the buyer did not accept the bill of exchange, which was sent with the bill of lading, and it was held that title did not pass to him so that he could sell the goods. (And see the case reversed on appeal [1899], 1 Q. B. 643, *infra*, § 25.) See, also, Shepherd *v.* Harrison, L. R. 5 H. L. 116.

(2.) Provided, also, that nothing in this Act shall affect, —

(*a.*) The provisions of the Factors' Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b.*) The validity of any contract of sale under any special common-law or statutory power of sale, or under the order of a court of competent jurisdiction.

22. (1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of any defect or want of title on the part of the seller. Market overt.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of the seller's defect of title. Sale under voidable title.

24. (1.) Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise. Revesting of property in stolen goods on conviction of offender.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud, or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

25. (1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. (*g*) Seller or buyer in possession after sale.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (*h*)

(*g*) § 25, sub-sec. 2. See Lee *v.* Butler [1893], 2 Q. B. 318; Payne *v.* Wilson [1895], 1 Q. B. 653, 660; S. C. [1895], 2 Q. B. 537; Helby *v.* Matthews [1894], 2 Q. B. 262; S. C. [1895], App. Cas. 471.

(*h*) In Nicholson *v.* Harper [1895], 2 Ch. 415, one G. owned wine then stored in the cellars of warehousemen. G. sold the wine to plaintiff, and afterwards pledged the same wine to the warehousemen for loans, the warehousemen having no notice of the purchase. Afterwards the warehousemen advertised the wine for sale by auction. Plaintiff asked for an injunction against the auctioneer, Harper, and against them. It was held that the pledge conferred no title to the wine, which should be delivered up to plaintiffs upon payment of the warehouse charges. In Calm *v.* Pockett's Bristol, etc. Co. [1899], 1 Q. B. 643, C. A., it was held that, the buyer having obtained possession of the bill of lading with the seller's consent, the transfer of the bill by the buyer to the plaintiffs gave them a good title to the goods, and held also, that the vendor had no right to stop the goods *in transitu*. (Sec. 47.)

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors' Acts.

Effects of writs of execution.

26. (1.) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ, to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

Duties of seller and buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Payment and delivery are concurrent conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Rules as to delivery.

29. (1.) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence. Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity.

30. (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. Instalment deliveries.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question, in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

32. (1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer. Delivery to carrier.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit. Risk where goods are delivered at distant place

34. (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Buyer's right of examining the goods.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and when he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. Buyer not bound to return rejected goods.

37. When the seller is ready and willing to deliver the goods, and

requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Liability of buyer for neglecting or refusing delivery of goods.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38. (1.) The seller of goods is deemed to be an "unpaid seller," within the meaning of this Act, —

Unpaid seller defined.

(*a.*) When the whole of the price has not been paid or tendered;

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. (1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has, by implication of law, —

Unpaid seller's rights.

(*a.*) A lien on the goods, or right to retain them for the price while he is in possession of them;

(*b.*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(*c.*) A right of resale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect, in a competition or otherwise, as an arrestment or poinding by a third party.

Attachment by seller in Scotland.

Unpaid Seller's Lien.

41. (1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: —

Seller's lien.

(*a.*) Where the goods have been sold without any stipulation as to credit;

(*b.*) Where the goods have been sold on credit, but the term of credit has expired;

(*c.*) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Part delivery.

43. (1.) The unpaid seller of goods loses his lien or right of retention thereon — (*a.*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods; Termination of lien.

(*b.*) When the buyer or his agent lawfully obtains possession of the goods;

(*c.*) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. Right of stoppage *in transitu*.

45. (1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier. Duration of transit.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer, it is a question, depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in his behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. (1.) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer. How stoppage *in transitu* is affected.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Resale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Effect of sub-sale or pledge by buyer.

Provided, that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention or stoppage *in transitu*, is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee. (*i*)

48. (1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention, or stoppage *in transitu*.

Sale not generally rescinded by lien or stoppage *in transitu*.

(2.) Where an unpaid seller, who has exercised his right of lien or retention or stoppage *in transitu*, resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of resale, in case the buyer should make default, and, on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49. (1.) Where, under contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

Action for price.

(2.) Where, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of

(*i*) See Calm *v.* Pockett's Bristol, etc. Co. *supra*, § 25.

damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51. (1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree. Specific performance.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. (1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may, — Remedy for breach of warranty.

(*a.*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b.*) maintain an action against the seller for damages for breach of the warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty, in diminution or extinction of the price, does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

(54.) Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. Interest and special damages.

PART VI.

SUPPLEMENTARY.

Exclusion of implied terms and conditions.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Reasonable time a question of fact.

56. Where, by this Act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Rights, etc., enforceable by action.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

Auction sales.

58. In the case of sale by auction, —

(1.) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid.

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.

(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

Payment into court in Scotland, when breach of warranty alleged

59. In Scotland, where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

Repeal.

60. The enactments mentioned in the schedule to this Act are hereby repealed, as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued, before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

61. (1.) The rule in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act, or in any repeal effected thereby, shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. (1.) In this Act, unless the context or subject-matter otherwise requires, —

Interpretation of terms.

"Action" includes counter-claim and set-off, and in Scotland condescendence and claim and compensation;

"Bailee" in Scotland includes custodier;

"Buyer" means a person who buys or agrees to buy goods;

"Contract of sale" includes an agreement to sell as well as a sale;

"Defendant" includes in Scotland defender, respondent, and claimant in a multiple-poinding;

"Delivery" means voluntary transfer of possession from one person to another;

"Document of title to goods" has the same meaning as it has in the Factors' Acts;

"Factors' Acts" means the Factors' Act, 1889, the Factors' (Scotland) Act, 1890 (52 & 53 Vict. c. 45, 53 & 54 Vict. c. 40), and any enactment amending or substituted for the same;

"Fault" means wrongful act or default;

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale;

"Goods" include all chattels personal, other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

"Lien" in Scotland includes right of retention;

"Plaintiff" includes pursuer, complainer, claimant in a multiple-poinding and defendant or defender counter-claiming;

"Property" means the general property in goods, and not merely a special property;

"Quality of goods" includes their state or condition;

"Sale" includes a bargain and sale as well as a sale and delivery;

"Seller" means a person who sells or agrees to sell goods;

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made;

"Warranty," as regards England and Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated;

As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done "in good faith," within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent, within the meaning of this Act, who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a "deliverable state," within the meaning of this Act, when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-four.

Commencement.

64. (Short title.) This Act may be cited as the Sale of Goods Act, 1893.

SCHEDULE.

(Section 60.)

This schedule is to be read as referring to the revised edition of the statutes, prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

SESSION AND CHAPTER.	TITLE OF ACT AND EXTENT OF REPEAL.
1 Jac. 1, c. 21	An Act against brokers. The whole Act.
29 Cha. 2, c. 3	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.*
9 Geo. 4, c. 14	An Act rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

TABLE OF CASES.

Figures refer to Pages.

A.

A. B. *v.* Fogarty 42
Abat *v.* Atkinson 294
Abberger *v.* Marrin 543
Abbott *v.* Barry 59
v. Creal 45
v. Gilchrist 112
v. Shepard 79
v. Wolsey 140, 171
Abbotts *v.* Barry 448
Abercrombie *v.* Sheldon 780
Abilene Nat. B'k *v.* Nodine 668
Aborn *v.* Merchants' Transportation Co. 82, 469, 476
Acatos *v.* Burns 19
Acebal *v.* Levy 93, 155, 186, 217, 236, 817
Acker *v.* Campbell 308
Ackert *v.* Barker 536
Acraman *v.* Morrice 273, 293, 317
Adam *v.* Richards 950, 960
Adams *v.* Broughton 60
v. Conilliard 539
v. Gay 534, 542, 543
v. Hall 208
v. Hamell 542
v. Humphreys 777
v. Lindsell 54, 56, 57, 70, 71, 72
v. Mahnken 779
v. McMillan 225
v. Messinger 958
v. Nichols 599
v. Roscoe Lumber Co. 299
v. Royal Mail Co. 556
v. Weaver 490
Adams Ex. Co. *v.* Egbert 954
Adams Mining Co. *v.* Senter 296
Addinel's case 48
Addlestone Linoleum Co. in re 443
Aderbolt *v.* Embry 321
Adler *v.* Fenton 473
Agnew *v.* Dumas 169
Agra, &c. Bank *v.* Leighton 951
Aguirre *v.* Allen 262
v. Parmelee 913
Ahern *v.* Goodspeed 671
Aiken *v.* Blaisdell 539
v. Hyde 606
Ainis *v.* Ayres 863, 913
Aken *v.* Meeker 677
Albany Hardware Co. *v.* Day 473
Albertson *v.* Halloway 966
Albright *v.* Brown 307
Alden *v.* Hart 686, 959
Alderson, in re 8
Alderson *v.* Langdale 758
v. Temple 465
Aldrich *v.* Cooper 898
v. Grimes 44
v. Jackson 397, 679, 772
v. Pyatt 137
Aldridge *v.* Johnson 331, 334, 336, 337, 339
Alewyn *v.* Pryor 560
Alexander *v.* Brown 746
v. Dennis 480
v. Dutton 670
v. Gardner 274, 332
v. Gibson 619, 620
v. Haskins 45
v. Heriot 44
v. Lewis 538
v. Swackhamer 469
v. Vanderzee 189, 566, 567, 568
v. Worman 62, 390
Alger *v.* Thacher 536
Allan *v.* Gripper 885
v. Lake 590, 612
Allard *v.* Greasert 137, 164, 169
Allatt *v.* Carr 86
Allen *v.* Aguirre 116
v. Bennet 195, 201, 218, 227
v. Berryhill 45
v. Cameron 951
v. Carr 468
v. Chapman 293
v. Cheever 783
v. Delano 305
v. Deming 533, 534
v. Ford 473
v. Goodnow 90
v. Grove Springs Co. 171
v. Hammond 81
v. Hartfield 776
v. Henderson 959
v. Hopkins 631
v. Jarvis 112, 793
v. Jones 856
v. Lake 612
v. Maury 297, 856
v. Mercier 915
v. Pink 618
v. Schuchardt 116
Allis *v.* Read 181
Allman *v.* Davis 294
v. Wheatcroft 478, 483
Allsopp *v.* Wheatcroft 511, 515
Alna *v.* Plummer 261
Amelie, The 40
Amer. Electric Co. *v.* Consumers' Gas Co. 677

Figures refer to Pages.

Amer. Forcite Co. *v.* Brady 690
Amer. Sugar Ref. Co. *v.* Fancher 475, 478
Amer. White Bronze Co. *v.* Gillette 738
Ames *v.* Jones 685
v. Norwich Co. 961
v. Quimby 95
Ames Iron Works *v.* Kalamazoo Pulley Co. 478
v. Richardson 299
Amory *v.* Brodrick 551, 935
Amson *v.* Dreher 173
Anderson *v.* Carlisle, &c. Co. 741
v. Clark 333
v. Crisp 320
v. Fish 915, 916
v. Harold 224
v. Hillies 755
v. Levyson 321
v. May 598
v. Morice 274, 275, 276, 574
v. Radcliffe 517
v. Read 5
v. Reed 856
v. Roberts 494, 495
v. Scott 158, 163
v. Soward 44
v. Warner 488
Andres *v.* Lee 674
Andrew *v.* Dieterich 298
Andrews *v.* Cheney 351
v. Durant 291
v. Garrett 48
v. Jackson 469
v. Kneeland 671, 684
v. Mockford 404
v. Richmond 321
v. Sparhawk 780
v. Wheaton 966
Angier *v.* Taunton Paper Co. 301
Anglo-Egyptian Navigation Co. *v.* Rennie 109, 283, 285, 286, 553
Anglo-Italian Bank, in re 94
Angur *v.* Couture 235
Angus *v.* Clifford 436
Anheuser *v.* Mason 538
Anon 19
Anthony *v.* Halstead 613
v. Wheaton 493
Apperson *v.* Moore 91
Appleby *v.* Franklin 16
v. Johnson 48, 50
v. Meyers 553
Appleman *v.* Fisher 92
Appleton *v.* Bancroft 41
v. Binks 208
v. Campbell 499
v. Kennon 774
v. Norwalk Library 303
Arbuckle *v.* Kirkpatrick 8
Archer *v.* Baynes 197, 218
v. Marsh 514
Archibald *v.* Argall 774
Arendale *v.* Morgan 39, 477
Argus Co. *v.* Mayor of Albany 222, 226
Arkwright *v.* Newbold 403, 434, 435
Armentrout *v.* St. Louis R. R. Co. 349
Armington *v.* Houston 310
Armistead *v.* Brooke 779
Armitage *v.* Insole 550, 559, 699
Armour *v.* Pecker 300
Armsby Co. *v.* Eckerly 225
Armstrong *v.* Bufford 689
v. Johnson Tobacco Co. 688
v. Lawson 134
v. Stokes 203
v. Toler 533
v. Tuffts 475
v. Turner 795
Arnett *v.* Cloudas 477
Arnison *v.* Smith 435
Arnold *v.* Delano 854, 855, 913
v. Prout 350
v. Sprague 773
v. Suffolk Bank 956
Arnot *v.* Pittston Coal Co. 539
Arques *v.* Wasson 92
Arrowsmith *v.* Gordon 955
Artcher *v.* Zeh 132, 180
Arthur *v.* Chicago, &c. R. R. Co. 6
v. Wynne 554
Ascher *v.* Grand Trunk R'y Co. 908
Ash *v.* Abdy 97
v. Aldrich 111, 543
v. Putnam 471, 909
Ashburn *v.* Poulter 782, 783
Ashby *v.* James 745, 766
v. West 5
Ashcroft *v.* Butterworth 217, 225
v. Morrin 217
Ashe *v.* Johnson 958
Asher *v.* Deyoe 478
Ashforth *v.* Redford 189
Ashlin *v.* Greaves 819
Ashworth *v.* Outram 38
Aspell *v.* Hosbein 542
Astey *v.* Emery 136
Aston *v.* Gwinnell 529
Atchison *v.* Bruff 43
Atherton *v.* Newhall 169, 173
Atkin *v.* Barwick 465, 467
Atkins *v.* Barnstable 608
v. Colby 908
v. Mooney 772
Atkinson *v.* Bell 101, 102, 103, 106, 107, 279, 280, 348, 349
v. Hawdon 758
v. Horridge 617
v. Maling 715
v. Ritchie 556
v. Smith 576
Atkyns *v.* Kinnier 510
Atlanta *v.* Tappan 81
Atlantic Ins. Co. *v.* Huth 19
Atlee *v.* Bartholomew 80
Attenborough *v.* London & St. Katherine's Dock Co. 410
Attleborough *v.* Middleborough 781
Attorneys and Solicitors' Act, in re 517
Attwood *v.* Emery 705
v. Small 402
Atwater *v.* Clancy 666, 685
v. Hough 111, 112
Atwood *v.* Cornwall 772
v. Dearborn 477
v. Fisk 545
v. Lucas 723, 724, 793, 826
v. Scott 780
Aubert *v.* Maze 499

Figures refer to Pages.

Audenried *v.* Betteley 7
Auger *v.* Thompson 795
Augur *v.* Couture 235
Aukeney *v.* Hannon 35
Aultman *v.* Falkum 666
v. Fletcher 301
v. Kennedy 666
v. Lee 777
v. Mallory 307
v. Olson 301
v. Theirer 606, 959, 966
v. Wheeler 962
v. Wykle 608
Aultman-Taylor Co. *v.* Frazier 738
Austen *v.* Craven 272, 313, 315, 323
Austin *v.* Boyd 171
v. Dawson 323
v. Dye 308
v. Sawyer 133
v. Seligman 6
Australian Steam Navigation Co. *v.* Morse 19
Averill *v.* Hedge 78
Avery *v.* Bowden 551, 789
v. Langford 510
v. Mansur 478
v. Ryan 957
v. Wilson 80, 711
Ayer *v.* Bartlett 299
v. Hawkins 779
Ayers *v.* Hewett 477
v. McCandless 729
v. Moore 489
v. Van Lien 774
Ayerst *v.* Jenkins 497
Ayres *v.* Bane 780
v. Moore 489
v. Parks 664
v. Sleeper 7
Azemar *v.* Casella 591, 635, 942

B.

Baals *v.* Stewart 304
Babcock *v.* Bonnell 905, 918
v. Case 397
v. Eckler 489
v. Lawson 410, 418
Bach *v.* Clark 476
v. Levy 679
v. Owen 175, 316, 935
v. Tuch 473
Bache *v.* Proctor 62
Backenstoss *v.* Stahler 486
Backentoss *v.* Speicher 471
Backhouse *v.* Harrison 18
Bacmeister *v.* Fenton 205
Bacon *v.* Brown 474
v. Cobb 599
v. Eccles 170, 262
v. The Poconoket 298
Baddeley *v.* Baddeley 3
Badger *v.* Phinney 469
Badlam *v.* Tucker 729
Baehr *v.* Clark 476
Bagby *v.* Walker 114
Baglehole *v.* Walters 454, 455
Bagley *v.* Cleveland Rolling Mill 679
Bagley *v.* Findlay 794, 826, 827
Bagot *v.* Arnott 501
Bagshaw *v.* Seymour 408
Bagueley *v.* Hawley 629
Baham *v.* Bach 485
Bahia & San Francisco R'y Co., in re 390, 814
Bailey *v.* Bensley 6
v. Forrest 617
v. Foster 397
v. Goldsmith 586
v. Harris 304
v. Hervey 303, 305
v. Hudson River R. R. Co. 349, 374
v. Jackson 780
v. Long 326
v. Ogden 170, 224
v. Pardridge 777
v. Quint 727
v. Smith 324, 795
v. Sweeting 185, 197, 219
v. Walford 431
Bailiffs, &c. of Tewkesbury *v.* Diston 14
Baily *v.* De Crespigny 554
Bain *v.* Withey 483
Bainbrigge *v.* Moss 517
v. Pickering 28
Baines *v.* Ewing 242
v. Geary 516
v. Jevons 143
v. Swainson 21, 23, 839, 847, 848, 849, 850
Bakeman *v.* Pooler 781
Baker *v.* Arnot 677
v. Bonesteel 771
v. Bourcicault 374
v. Dening 228
v. Firminger 732
v. Fisher 472, 776
v. Gray 285
v. Guinn 727
v. Hall 304
v. Holt 79
v. Kennett 45
v. Lyman 678
v. Robbins 474
v. Seahorn 482
v. Stone 44
v. Woodruff 6
Baker Transfer Co. *v.* Mfg. Co. 954
Baldey *v.* Parker 135, 158, 163, 167
Baldry *v.* Bates 621, 671
Baldwin *v.* Doubleday 297
v. Hill 312
v. McKay 325
v. Van Densen 672
v. Williams 131
v. Zadig 540
Balfe *v.* West 96
Ball, ex parte 16
v. Stanley 781
v. Warwick 517
Ballantine *v.* Harold 223
Ballantyne *v.* Appleton 293, 720
Ballard *v.* Burgett 308
v. McKenna 45
Ballentine *v.* Robinson 317, 351, 794, 795
Balme *v.* Wambaugh 782
Baltimore & Ohio R. R. Co. *v.* Brydon 793

Figures refer to Pages.

Baltimore & Ohio R. R. Co. *v.* Glenn 468
Bamber *v.* Savage 261
Banchor *v.* Mansel 539, 545
v. Warren 318
Bancroft *v.* Bancroft 964
v. Dumas 539, 779
Bank *v.* Bank 673
v. Beegle 134
v. Bobo 775
v. Hibbard 321
v. Raymond 540
v. Stevenson 772
Bank of Bengal *v.* M'Leod 18
Bank of Benson *v.* Hove 783
Bank of Commerce *v.* Chicago R. R. 773
Bank of Huntington *v.* Napier 296
Bank of Montgomery *v.* Reese 939, 954, 956
Bank of Newport *v.* Hirsh 856
Bank of Northampton *v.* Mass. Loan Co. 674
Bank of Rochester *v.* Jones 374
Bank of Up. Can. *v.* Killaly 296, 298
Bank of United States *v.* Bank of Washington 39
Bankart & Bowers 576
Banks *v.* McCosker 539
v. Robinson 91
Banner, ex parte 860
Bannerman *v.* White 591
Bannon *v.* St. Bernard Coal Co. 737
Banta *v.* Chicago 131
Banton *v.* Shorey 133
Barbe *v.* Parker 2
Barber *v.* Meyerstein 717
v. Morris 448
v. Taylor 705
Barclay *v.* Tracy 137
Barden *v.* Montana Club 10
Bardon *v.* Keverberg 33, 34
Baring *v.* Clark 788
v. Corrie 760
Barker *v.* Bushnell 6
v. Cleveland 960
v. Dinsmore 41, 81, 82, 469, 476
v. Freeland 722
v. Hibbard 43
v. Hodgson 554
v. Roberts 5
v. Walbridge 781
v. Windle 747, 714
Barkley *v.* Rensselaer R. R. Co. 169
Barley *v.* Walford 431
Barningham *v.* Smith 935
Barnard *v.* Bachaus 537
v. Campbell 478, 912
v. Eaton 90
v. Graves 772
v. Kellogg 642, 684, 685
v. Norwich, &c. R. R. Co. 91
v. Yates 683
Barnes *v.* Barnes 43
v. Burns 665
v. Chipp 660
v. Freeland 466
v. Hathaway 45
v. Smith 537
v. Tove 28, 43
Barnes Safe Co. *v.* Bloch Tobacco Co. 7
Barnett, ex parte 417
v. Brandao 60
Barnett *v.* Stanton 960
Barney *v.* Brown 172
Barney & Smith Manuf. Co. *v.* Hart 305
Barnum *v.* Vandusen 965
Barr *v.* Borthwick 297
v. Gibson 84, 633, 646
v. Hatch 492
v. Meyers 595
v. Reitz 726
Barrett *v.* Buxton 46
v. Deere 760
v. Goddard 172, 720
v. Hall 681
v. Kelley 312
v. Pritchard 299
Barrick *v.* Buba 551
Barrie *v.* Earle 960
Barringer *v.* Spangler 490
Barrington *v.* Skinner 9
Barron *v.* Alexander 482
v. Mullin 677, 795
Barrow, ex parte 883, 885
v. Arnaud 785, 920
v. Coles 288
v. Dyster 206
Barrows *v.* Barrows 487
Barrowman *v.* Drayton 600
Barry *v.* Croskey 403, 404, 408, 434
Barstow & Gray 234
Bartholomew *v.* Freeman 19, 732, 815
v. Markwick 551, 790, 791, 792
Bartles *v.* Gibson 488
Bartlett *v.* Bailey 44
v. Blanchard 954, 955
v. Holmes 850
v. Pentland 763
v. Purnell 241
v. Wells 24
v. Williams 726
Bartley *v.* New Orleans 827
Barton *v.* De Wolfe 957
v. Kane 351
v. McKelway 720, 736
v. Piggott 519
v. Port Jackson, &c. Ice Co. 539
Bartram *v.* Farebrother 467
Barwick *v.* English Joint Stock Bank 400, 437, 439, 442, 443, 444, 445
v. Reade 507
Bascom *v.* Manning 962
Bass *v.* Bass 780
Bassett *v.* Brown 397
v. Camp 173
v. Collis 617
Bassinger *v.* Spangler 490
Basten *v.* Butter 948
Bastress *v.* Chickering 5
Batchelder, in re 855, 856
v. Libbey 261
Batchelor *v.* Lawrence 861
Bateman *v.* Kingston 44
v. Phillips 187
v. Pinder 29
Bates *v.* Clifford 536
v. Conklin 726
v. Coster 114
v. Smith 4
Batsford *v.* Every 540

Figures refer to Pages.

Batterbury *v.* Vyse 558
Batterman *v.* Morford 72
v. Pierce 962, 965
Batut *v.* Hartley 893
Banendahl *v.* Horr 299
Baum *v.* Stevens 664
Baumann *v.* James 187, 193
Baumbach *v.* Gessler 688
Baur *v.* Beall 490
Baxter *v.* Duren 680
v. Earl of Portsmouth 32
Bayard *v.* Shunk 772
Bayless *v.* Bayless 494
Bayliffe *v.* Butterworth 619
Bayliss *v.* Davis 7
Bayne *v.* Wiggins 223
Baynton *v.* Collins 37
Beach's Appeal 300, 303
Beadles *v.* McElrath 537
Beak'e Estate, in re 3
Beal *v.* Warren 489
Beall *v.* Brown 962
Beals *v.* Olmstead 666, 688
v. See 45
v. Terry 955
Bean *v.* Smith 477, 488
v. Tonnele 780
Bear *v.* Harnish 956
Beard *v.* Webb 35
Bearns, in re 917
Beattie *v.* Lord Ebury 394
Beaumont *v.* Brengeri 143, 164
v. Crane 728
Beaupre *v.* Pacific, &c. Telegraph Co. 77
Beavan *v.* McDonnell 32, 45
Beck Lithographing Co. *v.* Colorado Milling Co. 112
Beck's case 48
Becker *v.* Boon 783
v. Hallgarten 913
v. Smith 309
v. Trickel 487
Beckwith *v.* Cheever 68, 77
v. Farnum 680
v. Talbot 223
Bedford *v.* Bagshaw 408
Beebe *v.* Johnson 556
v. Knapp 480
v. Robert 684
v. Saulter 487
Beecher *v.* Mayall 720, 731
Beekman *v.* Bond 468
Beeler *v.* Young 42
Beeman *v.* Banta 963
v. Buck 665
Beer *v.* London, &c. Hotel Co. 240
v. Walker 647, 648, 651
Beers *v.* Crowell 132
Begbie *v.* Phosphate Sewage Co. 395
Begole *v.* McKenzie 296
Behaley *v.* Hatch 782
Behn *v.* Burness 549, 550
Behrends *v.* Beyschlag 770
Beirne *v.* Dord 682, 684, 685
Belcher *v.* Costello 470, 480
v. Sellards 739
Belding *v.* Frankland 478
v. Read 86, 87
Bell *v.* Balls 241, 261
Bell *v.* Cafferty 477
v. Dagg 680
v. Ellis 471
v. Farrar 297
v. Howard 191
v. Moss 905, 908, 913, 917
v. Offut 795, 826, 827
v. Reynolds 954
v. Smith 517
Bellefontaine *v.* Vassaux 373
Beller *v.* Block 325, 720
Bellows *v.* Smith 781
v. Wells 730
Belshaw *v.* Bush 755, 757, 769
Belt *v.* Marriott 170
v. Stetson 736
Belton *v.* Hodges 28
Bement *v.* Smith 351, 720, 723, 794
Bemis *v.* Morrill 720
Bench *v.* Sheldon 472
Bender *v.* Bowman 910, 915
Benedict *v.* Field 600, 772, 775
v. Kerr 6
v. Schættle 910
v. Williams 476
Benford *v.* Schell 726
Beninger *v.* Corwin 482
Benjamin *v.* Andrews 12, 17
v. Elmira R. R. Co. 91
Benner *v.* Puffer 300
Bennett *v.* Bartlett 631, 673
v. Brumfitt 229
v. Buchan 668
v. Hull 111
v. Judson 480, 484
v. Nye 113
v. Sims 309
Bensley *v.* Bignold 517
Bent *v.* Cobb 260
v. Hoxie 134, 311
v. Manning 42
Bentall *v.* Burn 161, 699, 833, 881
Bentinck *v.* Franklin 536
v. O'Brien 536
Bentley *v.* Vilmont 15, 410
Bentley's Appeal 780
Benton *v.* Fay 957
v. Pratt 409
Bergeman *v.* Indianapolis, &c. R.R. 373, 484
Bergen *v.* Producers' Marble Yard 495
Berger *v.* State 373
Bergheim *v.* Blaenavon Iron Co. 702, 937
Berley *v.* Taylor 908
Berndtson *v.* Strang 867, 869, 878, 898
Berolles *v.* Ramsay 26
Berry *v.* Dwinel 954
v. Griffin 774
v. Nall 782
Berthold *v.* Reyburn 782
v. Seevers Mfg. Co. 637, 689
Bessey *v.* Windham 464
Best *v.* Bauder 540
v. Flint 688, 692
v. Osborne 617
Bestor *v.* Hickey 45
Bethel *v.* Clark 867, 873, 875, 879, 880, 891, 892
Bethel Steam Mill Co. *v.* Brown 266, 729
Betterbee *v.* Davis 748

Figures refer to Pages.

Bettini *v.* Gye 548
Betts *v.* Armstead 660
v. Gibbons 834, 887
Bevans *v.* Rees 748
Beverly *v.* Lincoln Gaslight Co. 586, 734
Bevis *v.* Heflin 778
Bexwell *v.* Christie 448
Beymer *v.* McBride 954
Bianchi *v.* Nash 586, 734
Bibb *v.* Allen 225, 537
Bickely *v.* Sheets 538
Bickley *v.* Keenan 235
Bicknall *v.* Waterman 776
Bidault *v.* Wales 472
Biddle *v.* Bond 814
v. Levy 420
Biddlecombe *v.* Bond 865
Bidwell *v.* Overton 600
Bierman *v.* City Mills Co. 671, 687
Bigelow *v.* Baxall 688
v. Benedict 537
v. Huntley 310
Bigg *v.* Whiskin 159
Bigge *v.* Parkinson 618, 645, 647, 651
Biggs *v.* Barry 472, 914
v. Evans 20
v. Lawrence 501
Bigler *v.* Flickinger 483
Bigley *v.* Risher 96, 296
Bilbie *v.* Lumley 390
Bill *v.* Bament 155, 158, 161, 163, 167, 192, 833
v. Porter 774
Billings *v.* Russell 489
v. Vanderbeck 954
Billingslea *v.* Smith 537
Billson *v.* Crofts 865
Bindley *v.* Martin 493
Binford, in re 285
Bingham *v.* Allport 761
v. Maxcy 677
Binnard *v.* Spring 482
Binney *v.* Annan 957
Binney's Appeal 479
Birch *v.* Birch 507
Bird *v.* Boulter 241
v. Brown 862, 865, 886, 917
v. Muhlinbrink 113
v. Munroe 222
Bird's Trusts 62
Birdsall Co. *v.* Palmer 965
Birdseye *v.* Frost 669
Birkmyr *v.* Darnell 199
Bishop *v.* Crawshay 279, 347
v. Honey 538
v. Rowe 758
v. Shillito 287
v. Small 481
v. Stewart 397
v. Weber 408
Bissell *v.* Balcom 180
v. Beard 189
v. Hopkins 468
v. Jaudon 780
Bjork *v.* Bean 306
Blachford *v.* Preston 505, 506
Black *v.* Bakers of Glasgow 384
v. Jones 39
v. Smith 748
Black *v.* Webb 318
Blackburn *v.* Reilly 602, 603
v. Smith 387
v. Vigors 442
Blackman *v.* Pierce 910, 913
v. Wheaton 491
Blackmore *v.* Shelby 88, 90
Blackshear *v.* Burke 855
Blackstone Bank *v.* Hill 779
Blackwell *v.* Walker 302
Blackwood *v.* Cutting, &c. Co. 92, 294
Blair *v.* Ormond 177
v. Wilson 773
Blaisdell *v.* Holmes 45
Blake *v.* Blackley 472
v. Sawin 488
Blakeley *v.* Patrick 323
Blakeney *v.* Goode 132
Blanchard *v.* Child 300
v. Cooke 91
Blandord *v.* Morrison 521
Blasdell *v.* Souther 4
Blass *v.* Anderson 541
Blaut *v.* Gabler 468
Blen *v.* Bear River Co. 486
Blenkinsop *v.* Clayton 143, 165, 176
Bligh *v.* James 539, 544
Bliss *v.* Sickles 469
Block *v.* Maas 326
v. McMurry 541
Blood *v.* French 670
v. Palmer 7
Bloom *v.* Richards 540
Bloomer *v.* Bernstein 577, 696, 787
Bloomingdale *v.* Memphis, &c. R. R. 908
Bloss *v.* Kittridge 663
Blossom *v.* Champion 912
Blow *v.* Russell 748
Bloxam *v.* Morley 798
v. Sanders 696, 798, 811, 816, 818
Bloxsome *v.* Williams 530, 531, 535
Bloyd *v.* Pollocks 720
Bluett *v.* Osborne 649
Blum *v.* Marks 910
v. The Caddo 349
Blunt *v.* Heslop 702
Boardman *v.* Cutter 131
v. Spooner 173, 226, 234, 666
Boast *v.* Firth 553
Bode *v.* Stickney 779
Bodenham *v.* Purchas 765
Bodurtha *v.* Phelon 762
Bogert *v.* Chrystie 674
Boggett *v.* Frier 33
Boggs *v.* Wann 475
Bogy *v.* Rhodes 298, 721
Bohn Mfg. Co. *v.* Hynes 854
v. Sawyer 76
Bohtlingk *v.* Inglis 697, 867, 869, 870, 891, 906
Bold *v.* Rayner 188, 259
Bolden *v.* Brogden 616
Bolin *v.* Huffnagle 911
Bollman *v.* Burt 601
v. Loomis 536
Bolton *v.* Lambert 917
v. Lancashire, &c. R'y Co. 467, 835, 881
v. Riddle 596, 722

Figures refer to Pages.

Bomberger *v.* Griener 960
Bonaparte *v.* Clagett 474
Bond *v.* Coke 133
v. Greenwald 293
Bonito *v.* Mosquera 40
Bonnell *v.* Jacobs 961
Bonner *v.* Marsh 351
Bonnewell *v.* Jenkins 51
Bonzi *v.* Stewart 839, 840
Boody *v.* McKenney 44
Boon *v.* Moss 308
Boone *v.* Hardie 468
Booraem *v.* Crane 299
Boorman *v.* Jenkins 667, 684
v. Nash 785, 920
Booth *v.* Hodgson 499
v. Spuyten Duyvil Rolling Mills Co. 557, 598, 934, 938, 957
v. Tyson 80
Boothby *v.* Plaisted 543, 684
v. Scales 671, 688, 957, 960
Borgfeldt *v.* Wood 417
Borland *v.* Guffey 77
Borrekins *v.* Bevan 678, 961
Borries *v.* Hutchinson 928, 929, 930, 931, 933
Borrowman *v.* Drayton 574
v. Free 346, 717
Borthwick *v.* Young 685
Bos *v.* Helsham 94
Boston & Maine Railroad *v.* Bartlett 69, 77
v. Warrior Mower Co. 7
Boston Ice Co. *v.* Potter 65, 82, 387
v. Royal Insurance Co. 300
Bostwick *v.* Leach 132
v. Lewis 662
v. Winton 677
Boswell *v.* Kilborn 272, 785, 920
Botcher *v.* Berry 492
Bott *v.* McCoy 40
Boughton *v.* Standish 737, 960
Bouker *v.* Randles 965, 966
Boulter *v.* Arnott 158, 836
Boulton *v.* Jones 64, 65, 386, 387, 388
Bourne & Seymour 61, 712
Boutelle *v.* Melendy 534
Bowdell *v.* Parsons 69, 551, 935
Bowen *v.* Buck
v. Burk 299, 854
v. Owen 751, 752
v. Sullivan 82
Bower *v.* Fenn 480
Bowers *v.* Anderson 170
v. Bowers 535
Bowery Bank *v.* Wilson 132
Bowes *v.* Shand 180, 566, 567, 568, 584, 678, 711
Bowker *v.* Hoyt 80
Bowlby *v.* Bell 116
Bowling *v.* Bell 117
Bowman *v.* Clemmer 670, 682
v. Conn 138
v. Herring 490
v. McClenahan 485
Bowry *v.* Bennett 499
Box *v.* The Provincial Ins. Co. 324
Boyce *v.* McDonald 311
v. Washburn 133
Boyd *v.* Eaton 545
Boyd *v.* Green 116
v. Hanson 538
v. Lett 576, 732
v. Sales 772
v. Siffkin 559
v. Whitfield 672
v. Wilson 684
Boydell *v.* Drummond 186, 198
Boyden *v.* Boyden 44
Boyntou *v.* Hubbard 91
v. Libby 305
v. Veazie 296, 730
Boyson *v.* Coles 21
Brabin *v.* Hyde 180
Brackett *v.* Hoyt 539
v. Norton 777
Brackliu *v.* Fonda 662
Bradbury *v.* Dwight 96
Braddock Glass Co. *v.* Irwin 296
Bradford *v.* Bush 671
v. Fox 773
v. Manly 683, 684
v. Williams 550, 578
Bradlaugh *v.* Newdegate 517
Bradley *v.* Arnold 310
v. Holdsworth 117
v. King 605
v. Luce 483
v. Michael 854
v. Obear 477
v. Pratt 42
v. Rea 543, 965
v. Wheeler 290, 297, 719
Bradshaw *v.* Thomas 310
Brady *v.* Cassidy 81
v. Harrahy 180
v. Oastler 190, 925
v. Todd 619, 621, 671
v. Whitney 81
Bragg *v.* Morrill 687
Braley *v.* Powers 480
Bramley *v.* Alt 451, 453
Bramwell *v.* Spiller 207
Branch *v.* Burnley 777
v. Palmer 606
Brand *v.* Brand 180
v. Focht 171
Brandao *v.* Barnett 258
Brandon *v.* Brandon 861
v. Nesbitt 501
v. Newington 749
v. Scott 753
Brant *v.* Bowlby 288, 355, 356, 372
v. Lawrence 580, 584, 711
Brantley *v.* Thomas 684, 686
Brantom *v.* Griffits 730
Brasher *v.* Davidson 956
Brauer *v.* Shaw 76, 78, 80
Brawley *v.* The United States 713
Braxton *v.* Bell 91
Brayley *v.* Kelly 234
Brayshaw *v.* Eaton 28
Breed *v.* Hurd 781, 782
Breen *v.* Moran 688, 690
Breitung *v.* Lindauer 774
Breton *v.* Davis 688
Breton's Estate, in re 3
Brett *v.* Carter 91
Bretz *v.* Diehl 5, 6

Figures refer to Pages.

Brewer *v.* Ford 301
v. Housatonic Ry. Co. 96, 795
v. Knapp 781
v. Mich. Salt Assoc. 298
v. Salisbury 319, 719
v. Smith 321
Brewery Co. *v.* Merritt 306
Brewster *v.* Bours 774
v. Burnett 397, 771
v. Kitchell 554
v. Taylor 170
Brias's Appeal 537
Brice *v.* Hamilton 779
Bricker *v.* Hughes 134
Bridenbecker *v.* Lowell 779
Bridge *v.* Eggleston 488
v. Wain 634, 930
Bridger *v.* Savage 524
Bridges *v.* Berry 758
v. Garrett 762, 763
Bridgford *v.* Crocker 794
Briggs *v.* A Light Boat 291
v. Barry 443
v. Calverley 742
v. Ewart 476
v. Hunton 689
v. Rumely Co. 664
v. United States 92
v. Weston 490
Brigham *v.* Hibbard 795
v. Potter 544
Bright, ex parte 3
Brighty *v.* Norton 705, 742
Brindley *v.* Cilgwyn Slate Co. 878, 911
Brinley *v.* Spring 729
Brinsmead *v.* Harrison 60, 81
Brisban *v.* Boyd 79
British & Am. Tel. Co. *v.* Colson 55
British Columbia Saw Mill Co. *v.* Nettleship 921, 926, 927, 934
British Mutual Banking Co. *v.* Charnwood Ry. Co. 442, 443, 445, 446
Britain *v.* Rossiter 124, 234
Brittain *v.* McKay 134
Britten *v.* Hughes 465
Britton *v.* Turner 962
Broadwell *v.* Howard 6
Brohst *v.* Brock 780
Brock *v.* O'Donnell 4
Broennenburgh *v.* Haycock 617
Brogden *v.* Marriot 557
v. Metropolitan R. R. Co. 47, 48, 51, 58
Bromley *v.* Brunton 3
Bronson *v.* Rodes 771
v. Wiman 113
Brook *v.* Clark 964
Brooke Iron Co. *v.* O'Brien 914, 916
Brooker, ex parte 289
v. Scott 25
v. Wood 521
Brooklyn Bank *v.* De Grauw 782
Brooks *v.* Hassall 619, 621
v. Hubbard 776
v. Paper Co. 350
v. Powers 491
Broughton *v.* Bronghton 487
v. Silloway 772
Brower *v.* Goodyer 470
Brower *v.* Lewis 684
v. Peabody 912
Brown *v.* Adams 765
v. Allen 113
v. Bateman 86, 285
v. Bellows 96
v. Bigelow 670, 963
v. Billington 309
v. Burns 778
v. Butchers' Bank 235
v. Childs 296
v. Cline 490
v. Cockburn 673, 674
v. Doyle 662
v. Duncan 518, 519
v. Dunckel 774
v. Dysinger 781
v. Edgington 645, 646, 649
v. Elkington 617
v. Ellis 607
v. Fitch 303
v. Foster 607, 737, 738
v. Guarantee Trust Co. 602
v. Hall 137
v. Harmon 492
v. Haynes 301, 305
v. Hitchcock 5
v. Holbrook 7
v. Johnson 702
v. Kewley 756
v. Lacy 779
v. Mayor of London 554
v. McCune 43
v. Montgomery 482
v. Muller 923, 924, 935, 937
v. Nelson 734
v. Olmstead 767, 774
v. Pierce 41, 474, 673
v. Sanborn 113, 115, 138
v. Sayles 686
v. Scott 774
v. Sharkey 954
v. Stanclift 133
v. Thurber 308
v. Waters 960
v. Whipple 223
v. Wunder 113
Browne *v.* Hare 339, 364, 372
Brownfield *v.* Johnson 739
Browning *v.* Halford 529
v. Hamilton 325
v. Magill 38
Brownlee *v.* Bolton 794, 826
Brownlie *v.* Campbell 437
Bruce *v.* Pearson 78, 351, 738
v. Smith 491
Brugman *v.* McGuire 767, 774
Brundage *v.* Camp 303
Brunswick, &c. Co. *v.* Hoover 309
v. Vallean 538
Brush *v.* Scribner 39
Brusie *v.* Peck 602
Bryan *v.* Block 473
v. Lewis 88
Bryans *v.* Nix 333, 336, 352
Bryant *v.* Booze 79
v. Crosby 663
v. Isburgh 959
v. Kelton 493

Figures refer to Pages.

Bryant *v.* Mansfield 487
v. Pember 397, 683
v. Richardson 26
v. Thesing 398, 738, 960
v. Whitcher 18, 39
Bryson *v.* Whitehead 510
Buchanan *v.* Parnshaw 614, 950
Buchenan *v.* Horney 486
Buck *v.* Grimshaw 308
v. Pickwell 134, 221
v. Spence 530, 531
Buckingham *v.* Osborne 173
Buckley *v.* Artcher 471
v. Duff 493
v. Furniss 856, 908, 910, 913, 914
v. Morgan 473
Buckman *v.* Levi 715
Buckmaster *v.* Consumers' Ice Co. 83
v. Smith 310
Bucknam *v.* Goddard 673
Budd *v.* Fairmaner 613
v. Power 675
Buddle *v.* Green 732
Budlong *v.* Cottrell 304
Buell *v.* Chapin 777
Buffalo Barb Wire Co. *v.* Phillips 954
Buffington *v.* Curtis 730
v. Gerrish 477
Buffum *v.* Buffum 782
v. Deane 39
v. Merry 6
Bugg *v.* Wertheimer Shoe Co. 470
Bughman *v.* Central Bank 471, 478
Building Ass'n *v.* Cameron 474
Bulkley *v.* Andrews 5
Bull *v.* Griswold 134
v. Harragan 540
v. Parker 752
v. Robinson 647, 648, 714
Bullard *v.* Wait 172
Bullis *v.* Borden 493
Bulter, ex parte 580
Bulwinkle *v.* Cramer 683
Bumgardner *v.* Leavitt 958
v. Taylor 780
Bunge *v.* Koop 597
Bunker *v.* Barron 773
v. McKenney 305
Bunn *v.* Ahl 471
v. Guy 509
v. Markham 3
Bunnell *v.* Whitlaw 682
Bunney *v.* Poyntz 756, 835, 853, 887
Burbank *v.* Crooker 300
Burch *v.* Spencer 691
Burchell *v.* Clark 62
Burchfield *v.* Moore 394
Burdick *v.* Sewell 897, 898
Burfield *v.* De Pienne 33
Burge *v.* Cone 173, 727
Burges *v.* Wickham 183
Burgess *v.* Chapin 680
Burgess's case 447
Burgett *v.* Burgett 487
Burghall's Assignees *v.* Howard 859
Burghart *v.* Hall 24
Burke *v.* Dunn 854
v. Roberts 734
Burke *v.* Shannon 297
Burkinshaw *v.* Nicholls 813
Burley *v.* Russell 43
Burnby *v.* Bollett 650, 658
Burnell *v.* Marvin 300, 311
Burnett *v.* Beahnear 478
v. McBean 296
v. Smith 487, 962
Burnley *v.* Tufts 301
Burnham *v.* Winsor 917
Burns *v.* Mahannah 472
Burnyeat *v.* Hutchinson 525
Burr *v.* Wilson 890
Burrell *v.* Highleyman 111, 115
v. Jones 208
Burrill *v.* Stevens 470
v. Watertown Bank 772
Burrowes *v.* Lock 432
Burrows *v.* Whitaker 296, 298
Bursill *v.* Tanner 37, 38
Burt *v.* Dewey 631, 673, 677
v. Myer 537
Burtis *v.* Thompson 551, 596
Burton *v.* Curyea 856
v. Great Northern Railway Co. 53, 54
v. Schermerhorn 966
v. Stewart 397, 486, 966
Bush *v.* Canfield 955
v. Fry 66, 417
v. Holmes 173, 955
Bushel *v.* Wheeler 143, 156, 157, 170
Busk *v.* Davis 272, 313, 315, 785, 837
v. Spence 565
Buson *v.* Dougherty 310
Bussing *v.* Rice 478
Buswell *v.* Bicknell 7, 305, 606
Butler *v.* Butler 793
v. Dorman 777
v. Gannon 305
v. Hildreth 473
v. Lee 533, 534
v. Moore 487
v. Northumberland 958
v. Rahm 91
v. School District 606
v. Thomson 225, 261
v. Tufts 672
v. Van Wyck 468
Butler's Appeal 472
Butt *v.* Ellett 91
Butterfield *v.* Burroughs 615
v. Lathrop 6
Butters *v.* Glass 262
v. Haughwout 478
Butts *v.* Dean 773
Buxton *v.* Hamblen 539
v. Rust 198, 219
Byassee *v.* Reese 133
Byers *v.* Chapin 81, 688
Byrd *v.* Campbell Co. 689
v. Hall 471
v. Rautman 421
Byrne *v.* Jansen 682
v. Stewart 481
v. Van Tienhoven 51, 52, 54, 57, 72, 74, 78
Byrnside *v.* Burdett 673, 676
Bywater *v.* Richardson 455, 614, 617, 618

Figures refer to Pages.

C.

Caheen *v.* Campbell 913
Cabot *v.* Christie 480
Cabot Bank *v.* Morton 679
Caden *v.* Farwell 598
Cadogan *v.* Kennett 459
Cafre *v.* Lockwood 671, 690
Cahen *v.* Platt 954
Cain *v.* Moon 8
Caine *v.* Coulson 743, 747, 755
v. McGuire 133
Caines *v.* Smith 551
Cairns *v.* Page 40
Calahan *v.* Babcock 915
Calaminus *v.* Dowlais Iron Co. 937
Calcutta Co. *v.* De Mattos 268, 269, 277, 341
Calder *v.* Dobell 191, 204
Caldwell *v.* Walters 39
v. Wentworth 778, 779
California Co. *v.* Scatena 235
Calkins *v.* Falk 224, 262
v. Griswold 81
v. Lockwood 726
Call *v.* Seymour 308
Callaghan *v.* Myers 265
Callaway *v.* Jones 669
Callen *v.* Thompson 493
Callendar *v.* Howard 745
Calvit *v.* McFadden 956
Camac *v.* Warriner 610, 612, 645, 650
Camden Oil Co. *v.* Schlens 954, 955
Camidge *v.* Allenby 756, 757, 758, 759, 760
Cammell *v.* Sewell 19
Camp *v.* Gullett 767
v. Hamlin 794, 826
v. Wood 39
Campbell *v.* Fleming 425
v. Gittings 595
v. Hamilton 727
v. Hassell 760
v. Hill 45
v. Mersey Docks Co. 314, 315, 337
v. Sewell 8
v. Young 542
Campbell Mfg. Co. *v.* Rockaway Puhl. Co. 307
Campbell Press Co. *v.* Thorp 608
v. Walker 303
Campbellsville Co. *v.* Bradlee 954
Canada Bank *v.* Toronto Railway Co. 115
Canda *v.* Wick 597
Cannan *v.* Bryce 500, 501
v. Meaburn 19
v. Wood 177
Cannon *v.* Folsom 955, 956
Canterbury *v.* Miller 262
Cantine *v.* Phillips 43
Cantor *v.* Claffin 469
Capel *v.* Thornton 761
Capen *v.* De Steiger Glass Co. 955
Card *v.* Hope 506
Cardinal *v.* Edwards 307
Cardinell *v.* Bennett 4, 303
Cardoze *v.* Swift 543
Cardwell *v.* McClellan 482
Carey *v.* Guillow 966
Cargill *v.* Bower 445
Carlisle *v.* Kinney 854
v. United States 536
v. Wallace 6
Carleton *v.* Jenks 689
v. Lombard 687
v. Sumner 299
v. Woods 137, 545
Carmack *v.* Masterson 261
Carman *v.* Smick 111
Carmarthen, &c. R'y Co. *v.* Manchester, &c. R'y Co. 754
Carnahan *v.* Bailey 472
Carondelet Iron Works *v.* Moore 681, 738
Carpenter *v.* Clark 492
v. Galloway 138
v. Graham 321
v. McClure 487
v. Phillips 482
v. Roe 489
v. Rogers 46
v. Scott 9, 300
v. Stevens 89
Carr *v.* Clough 45
v. Duval 78
v. London, &c. R'y Co. 62, 390, 814
v. Miner 783
v. Passaic Land Co. 225
v. Sullivan 737
Carrington *v.* Roots 124, 125
Carrol *v.* Blencow 33
v. Hayward 488
v. Wiggins 302
Carroll-Porter Co. *v.* Colnmbus Co. 954
Carson *v.* Baillie 681
Carter *v.* Bingham 79
v. Castleberry 494
v. Crick 612, 636
v. Graves 491
v. Grimshaw 494
v. Kingman 302
v. Scargill 550
v. Toussaint 165, 167
v. Wallace 66, 588
v. Willard 726, 727
Cartland *v.* Morrison 41
Cartmel *v.* Newton 79
Cartwright *v.* McCook 956
v. Phœnix 728
v. Wilmerding 40, 917
Caruthers *v.* McGarvey 325
Carver *v.* Lane 173
Cary *v.* Bancroft 781
v. Gruman 959, 962
v. Hotailing 469
Case *v.* Fish 91
v. Hall 480, 631, 673, 677, 659
v. Seass 774
Case Man. Co. *v.* Garven 308
Case Plow Works *v.* Niles Co. 672, 689
Cashman *v.* Holyoke 297
v. Martin 782
v. Root 538
Cason *v.* Cheely 113
Cass *v.* Higenbotam 782
Cassaboglou *v.* Gibb 203, 573, 860
Cassard *v.* Hinman 62, 537
Cassidy *v.* Begoden 667
v. La Fevre 938, 963
v. M'Kenzie 778

Figures refer to Pages.

Castle *v.* Playford 273, 274, 742
v. Sworder 146, 147, 153, 166, 168, 853
Caswell *v.* Hunton 480
Catchings *v.* Hacke 679
Cathcart *v.* Keirnaghan 261
Catlett *v.* Trustees 542
Catlin, ex parte 884
v. Haddox 44
v. Tobias 601
Catling *v.* King 202
Caton *v.* Caton 229, 232
Catt *v.* Tourle 512
Catteral *v.* Hindle 762
Caulfield *v.* Van Brunt 172
Caulkins *v.* Hellman 141, 164, 169
Cavallaro *v.* Texas 856
Cave *v.* Hastings 187, 193
Caylus *v.* N. Y., &c. R. R. Co. 473
Cefalu *v.* Fitzsimmons Co. 736
Central Engraving Co. *v.* Moore 112
Central Lithographic Co. *v.* Moore 793
Central R. R. Co. *v.* Burr 326
v. Fritz 132
Central Trust Co. *v.* Arctic Ice Co. 305, 961
Chadsey *v.* Greene 669
Chadwick, in re 884
Chaffee *v.* Sherman 310
Chalmers, ex parte 785, 787, 801, 811
v. Harding 612
v. McAuley 827
Chamber of Commerce *v.* Sollitt 596
Chamberlain *v.* Farr 719
v. Fisher 538
v. Smith 7, 309
v. Stern 492
Chamberlyn *v.* Delarive 177
Chambers *v.* Davidson 831
v. Kelly 187
v. Lancaster 738
v. Manchester, &c. R'y Co. 517
v. Miller 268
v. Short 777
Chamblee *v.* McKenzie 297
Champion *v.* Plummer 201
v. Short 48
Champlin *v.* Rowley 80, 711
Champney *v.* Blanchard 8
v. Smith 39
Chancellor *v.* Wiggins 672, 677
Chandelor *v.* Lopus 394
Chandler *v.* Fulton 910, 916, 918
v. Thompson 672
Chanter *v.* Hopkins 63, 568, 589, 610, 633, 646, 649, 678
v. Leese 396
Chapin *v.* Cram 90
v. Pease 487
v. Shafer 45
Chaplin *v.* Clarke 48
v. Rogers 143, 164, 165, 715
Chapman *v.* Cole 82
v. Gwyther 614
v. Hicks 754
v. Ingram 827
v. Lathrop 308
v. Morton 734
v. Searle 720
v. Shepard 266, 320
Chapman *v.* Speller 394, 626, 628, 630
v. Weimer 90
v. Withers 588, 950
Chappel *v.* Brockway 536
v. Marvin 726
Chapple *v.* Cooper 25
Charles *v.* Carter 373, 737
Chartered Bank of India *v.* Henderson 902
Chase *v.* Chase 494
v. Denny 90
v. Ingalls 300
v. Pike 300
v. Washburn 6
v. Westmore 830
v. Willard 172, 540, 959
Chatham Furnace Co. *v.* Moffatt 480
Cheshman *v.* Nainby 509
Cheever *v.* Perley 780
Cheminant *v.* Thornton 751
Cheney *v.* Duke 538
Cheongwo *v.* Jones 486
Chesapeake Club *v.* State 10
Cheshire *v.* Barrett 44
Chesley *v.* Josselyn 90
Chester *v.* Dickerson 484
Chestnut *v.* Harbaugh 541
Chicago & Great Eastern R'y Co. *v.* Dane 53, 71, 78
Chicago, &c. Railroad Co. *v.* Dane 78
v. Greer 794
v. Hoyt 599
Chichester *v.* Cobb 229
Chidell *v.* Galsworthy 86
Child *v.* Allen 310
v. Morley 67
Childers *v.* Wooler 432
Childs *v.* Northern R'y Co. 908
v. O'Donnell 607
Chiles *v.* Nelson 79
Chinery *v.* Viall 60, 269, 816, 825, 920, 940
Chisholm *v.* Proudfoot 682
Chism *v.* Woods 672
Chissom *v.* Hawkins 304
Chrysler *v.* Canaday 483
Church *v.* Abell 962
v. Feterow 776
v. McLeod 310
v. Muir 487
Churchill *v.* Holton 81
v. Palmer 671
Chynoweth *v.* Tenney 90
Cincinnati Cooperage Co. *v.* Gaul 471
City Discount Co. *v.* McLean 765
City Nat. Bank *v.* Tufts 310
City Railway Co. *v.* Basshor 690
Claflin *v.* Boston & Lowell R. R. Co. 349, 721
v. Carpenter 133
v. Flack 469
v. Rosenberg 492
Clapham *v.* Langton 183
Clapp, re 767
v. Hale 780
v. Peck 916
v. Sohmer 908, 910
v. Tirrell 487
Clark *v.* Alexander 745
v. Baker 397
v. Bank of Montreal 374

Figures refer to Pages.

Clark *v.* Bulmer 109
v. Dales 955
v. Draper 854
v. Edgar 481
v. Fairchild 8
v. Flint 957
v. Frye 600
v. Greeley 719
v. Griffith 321
v. Guest 133
v. Hayward 310
v. Hill 9
v. Jack 309
v. Labreche 116
v. Lynch 910
v. Marriott 170
v. Mauran 908
v. McGetchie 960
v. Morrell 489
v. Murphy 777
v. Neufville 959
v. Nichols 112
v. Pinney 776, 956
v. Rice 608
v. Savage 774
v. Smith 777
v. Stevens 298
v. Tucker 173, 174
v. Wells 310
v. Wheeling Steel Works 603
Clarke, in re 87
v. Dickson 387, 424
v. Foss 92
v. Gardiner 221
v. Hart 813
v. Hutchins 715, 833
v. Shee 59
v. Spence 270, 280, 281, 282, 283, 284, 286, 291
v. Watson 558
v. Westrope 94, 96, 558
Clarkson *v.* Noble 170
v. Stevens 298
Clason *v.* Bailey 234
Clay *v.* Yates 102, 103, 105, 106, 108, 109
Clayton *v.* Andrews 99, 100
v. Hester 308
v. Merrett 778
Clayton's case 765, 766
Clements *v.* Matthews 87
v. Yturria 536
Clementson *v.* Grand Trunk R'y Co. 912
Cleu *v.* McPherson 686
Cleveland Rolling Mill *v.* Rhodes 583, 602
Cleveland R. R. Co. *v.* Kelley 776
v. Williams 326
Cleveland Store Co. *v.* Hovey 737
Clever *v.* Kirkman 186
Clifford, in re 173
v. Watts 553
Clipsham *v.* Vertue 548
Cliquot's Champagne 954
Cloke *v.* Shafroth 321
Clore *v.* Robinson 827
Close *v.* Crossland 677
Clough *v.* Davis 533
v. Hoffman 600
v. London & Northwestern R'y Co. 412, 409, 415, 425
Clow *v.* Woods 468, 492
Clugas *v.* Penaluna 501
Coate *v.* Terry 224, 681
Coates *v.* Buck 390
v. Railton 876
v. Stevens 616
v. Wilson 26
Cobb *v.* Buswell 312
v. Haskell 725
v. Prell 537
Cobbold *v.* Caston 136
Coburn *v.* Odell 137, 544, 545
v. Pickering 468, 492
v. Ware 966
Cochran *v.* Retberg 702
v. Ripy 856
v. Roundtree 309
v. Stewart 477
Cochrane *v.* Moore 3
v. Rymill 211
v. Willis 61, 84, 387
Cockburn *v.* Lumber Co. 954
Cocker *v.* Franklin Hemp Co. 722
Cockerell *v.* Ancompte 712
Cockrell *v.* Thompson 537
Cocks *v.* Izard 473
Coddington *v.* Goddard 224, 261
v. Paleologo 584, 702, 939
v. Jacksonville & R'y Co. 815
v. T. P. & M. R'y Co. 19
Codman *v.* Freeman 90
Coe *v.* Tough 222
Coffey *v.* The Quebec Bank 320
Coffin *v.* Reynolds 596
Coffman *v.* Hampton 138, 827
Cofield *v.* Clark 728, 956
Cogel *v.* Kniseley 689
Coggill *v.* Hartford, &c. R. R. Co. 300
Cohen *v.* Ammidon 673
v. Armstrong 30
v. Hale 755
Cohn *v.* Broadhead 470
v. Heimbauch 541
Colbert *v.* Baetjer 478
Colburn *v.* Mathews 683
Colcock *v.* Goode 673
Colcord *v.* Dryfus 731
v. McDonald 301
Cole *v.* Berry 307
v. Blake 753
v. Bryant 731
v. Davis 462
v. Kerr 717
v. Mann 308
v. The North Western Bank 20, 21, 23, 24, 839
v. Sackett 774
Coleman *v.* Waller 465
Coles *v.* Hulme 61
v. Trecothick 242
Collard *v.* South Eastern R'y 926
Collen *v.* Wright 214
Collender Co. *v.* Marshall 9, 310, 544
Collette *v.* Weed 663
Collier *v.* Faulk 92
v. White 781
Collins *v.* Blantern 497
v. Collins 94
v. Delaporte 793

Figures refer to Pages.

Collins *v.* Evans 432
v. Gibbs 69
v. Locke 516
v. Louisiana Lottery Co. 351
v. Newton 777
Collyer *v.* Isaacs 87
Colonial Bank *v.* Whinney 117
Colonial Ins. Co. *v.* Adelaide Ins. Co. 59, 275, 574, 710
Colson's case 56
Colton *v.* Wise 7
Columbia Rolling *v.* Beckett Foundry Co. 606
Columbian Iron Works *v.* Douglas 678
Columbus Buggy Co. *v.* Turley 300
Columbus, The 925
Colvin *v.* Williams 131
Colwell *v.* Keystone Iron Co. 298
Combs *v.* Bateman 180
v. Scott 671
Comer *v.* Cuningham 308
Comey *v.* Pickering 477, 495
Comfort *v.* Kiersted 294
Commercial Bank *v.* Gillette 295
Commins *v.* Scott 202
Commonwealth *v.* Abrams 8
v. Baker 10
v. Clark 8
v. Davis 8
v. Ewig 10
v. Fleming 374, 544
v. Harrington 535
v. Hess 350, 544, 723
v. Jackson 483
v. Jacobs 10
v. Packard 8
v. Pomphret 10
v. Ryan 10
v. Smith 10
v. Tierney 10
Comstock *v.* Hutchinson 962
Comstocks *v.* Scales 92
Conable *v.* Lynch 7
Conaway *v.* Sweeney 260
Concord Bank *v.* Gregg 484
Conderman *v.* Smith 92
Congar *v.* Chamberlain 664
v. Galene 296
Congreve *v.* Evetts 86
Conkling *v.* King 775
Conlan *v.* Roemer 481, 483
Conn *v.* Coburn 43
Connecticut Granite Co. *v.* N. Y. etc. Bridge 599
Connecticut Trust Co. *v.* Melendy 724, 773
Conner *v.* Coffin 133
v. Henderson 397
v. Robertson 537
Connolly *v.* Hull 43
Conolly *v.* Parsons 451, 453
Conover *v.* Walling 484
Conrad *v.* Atlantic Ins. Co. 729
v. Fisher 854
v. Lane 44
v. Smith 492
Constantia, The 865
Consumers' Ice Co. *v.* Webster 81
Converse *v.* Harzfeldt 683
v. Sickles 474
Converseville Co. *v.* Chambersburg Co. 7
Conyers *v.* Ennis 472
Cooch *v.* Maltby 754
Cook, ex parte 760
v. Barnes 775
v. Brandeis 826
v. Castner 965, 966
v. Corthell 90
v. Field 517
v. Gilman 397, 486
v. Lister 769
v. Logan 323
v. Lum 8
v. Moseley 664
v. Wilson 208
Cooke *v.* Clayworth 32
v. Millard 110, 114
v. Oxley 51, 52, 53, 55, 68, 69, 70, 71
v. Riddelien 947
Cookingham *v.* Dusa 960
Cookson *v.* Swire 463
Cool *v.* Peters Box Co. 134
Cooley *v.* Gillan 303
v. Perrine 671
Coolidge *v.* Brigham 397, 474, 673
v. Goddard 482
v. Melvin 492
Coombe *v.* Carter 87
Coombs *v.* Bristol & Exeter R'y Co. 138, 146, 148
v. Gorden 39
Coon *v.* Atwell 480
v. Spaulding 722
Cooper, ex parte 834, 884, 885, 887, 908
v. Bill 162, 273, 854, 876
v. Elston 99, 142
v. Lansing Wheel Co. 77
v. Law 753
v. Lovering 481
v. Neil 524
v. Phibbs 391
v. Shepherd 60
v. Shuttleworth 94
v. Smith 195, 201, 218
v. Willomat 21
Cooper Mfg. Co. *v.* De Forest 479
Copas *v.* Anglo-American Prov. Co. 691
Cope *v.* Rowlands 517, 519, 520
Copeland *v.* Bosquet 302
v. Hamilton 662, 962
Coplay Iron Co. *v.* Pope 737
Coppin *v.* Craig 761
v. Walker 761
Corbett *v.* Brown 448
v. Wolford 171
Corbin *v.* Tracy 957
Corbit *v.* Bank of Smyrna 772
Corcoran *v.* Prosser 577
Cork & Youghal R'y Co., in re 517
Cork Distilleries Co. *v.* Great Southern R'y Co. 331, 371
Corking *v.* Jarrard 59
Cornelius *v.* Molloy 482
Cornell *v.* Green 783
Cornfoot *v.* Fowke 400, 427, 429, 437, 438, 446, 483, 484
Corning *v.* Abbott 539, 540, 543
v. Colt 78, 351

Figures refer to Pages.

Cornish *v.* Abington 62, 390
Cornwall *v.* Haight 595, 854
Corporation of Liverpool *v.* Wright 506
Corrigan *v.* Sheffield 738, 739
Cort *v.* Ambergate R'y Co. 550, 551, 732, 787
Cortelyou *v.* Lansing 10
Corwin *v.* Benham 677
Corwith *v.* Colter 722
Cory *v.* Thames, &c. Co. 925
Cosgrove *v.* Bennett 686
Coster *v.* Davies 774
Costigan *v.* Hawkins 398, 673
Cote, ex parte 56
Cothay *v.* Tute 715
Cothers *v.* Keever 962, 964
Cottam *v.* Partridge 745
Cotten *v.* Willoughby 92
Cotterell *v.* Apsey 109
Cotterill *v.* Stevens 180
Cotton *v.* Godwin 749
Coulson, ex parte 37
Council Bluffs Iron Co. *v.* Cuppey 722
Counts *v.* Bates 42
County of Simcoe Ag. Soc. *v.* Wade 689
Coursin's Appeal 298
Court *v.* Snyder 670
Courtright *v.* Leonard 324
v. Stewart 113
Couse *v.* Tregent 305
Cousinery *v.* Pearsall 685, 826
Couston *v.* Chapman 136, 385, 639, 640, 642, 734
Couture *v.* McKay 910, 911
Couturier *v.* Hastie 761
Covas *v.* Bingham 563
Covell *v.* Hitchcock 910, 914
Coventry *v.* Gladstone 884, 897
v. Great Eastern R'y Co. 814
Cowan *v.* Dodd 397
v. Melbourne 535
v. Singer Mfg. Co. 9
Cowasjee *v.* Thompson 701, 755, 853, 871
Cowdy *v.* Thomas 612
Cowell *v.* Simpson 830
Cowie *v.* Remfry 255
Cowley *v.* Smyth 479
Cowperthwaite *v.* Sheffield 779
Cox *v.* Bailey 138
v. Burns 909, 910
v. Jones 736
v. Long 961
v. Prentice 387
Coxe *v.* England 954
v. Harden 353, 354
v. Heisley 691
v. State Bank 781
Coxhead *v.* Mullis 31
Cozzins *v.* Whitaker 672, 682, 960
Crabtree *v.* Messersmith 596
Craft *v.* Isham 78
v. Parker 691
Cragin *v.* Coe 303
Craig *v.* Godfry 261
v. Harper 76
v. Marsh 476
v. Miller 663
v. Ward 484
Crain *v.* McGoon 783
Cram *v.* Gas Engine Co. 689
Crane *v.* Powell 198
v. Pratt 777
v. The London Dock Co. 12, 13, 14
Cranson *v.* Goss 533, 534
Crapo *v.* Seybold 321, 326
Craven *v.* Ryder 355, 356, 701, 803, 805, 811, 853, 871
Craver *v.* Hornburg 688
Crawcour, ex parte 289
v. Salter 289
Crawford *v.* Beard 494
v. Wilson 683
Crawshay *v.* Eades 835, 885, 887
v. Homfray 830
Cream City Glass Co. *v.* Friedlander 737
Creekmore *v.* Chitwood 540
Creighton *v.* Comstock 962
Cremer *v.* Higginson 778
Cresswell *v.* Martindale 602, 604, 606
Cressy *v.* Sabre 90
Crisp *v.* Churchill 499
Crist *v.* Armour 551, 596, 597
v. Kleber 9
Crocker *v.* Crocker 41
v. Gullifer 7, 305, 606
v. Hopps 90
Crockett *v.* Scribner 112
Crofoot *v.* Bennett 289, 290, 291, 297, 318
Croft *v.* Lumley 764
Croker *v.* Lawder 890
Crommelin *v.* N. Y. &c. R. R. Co. 830
Crompton *v.* Beach 303
v. Pratt 300
Cronan *v.* Fox 312
Croninger *v.* Crocker 738
v. Paige 673
Crook *v.* Jadiz 18
Crookewit *v.* Fletcher 548
Crooks *v.* Davis 261
v. Moore 826
Crookshank *v.* Burrell 113
v. Rose 498, 526, 766
Cropper *v.* Cook 191, 255
Crosby *v.* Del. & Hudson Canal Co. 6
v. Wadsworth 120, 122, 124, 125
v. Watkins 954
Crosby Co. *v.* Trester 311
Crosland *v.* Hall 480
Cross *v.* Eglin 712
v. Gardner 611
v. O'Donnell 164, 171, 905
v. Peters 471
Crossley *v.* Maycock 48, 51
Crossman *v.* Johnson 663
Crouch *v.* Culbreath 670
v. Great Northern R'y Co. 921
Crowder *v.* Austin 448, 453
Crowe *v.* Clay 755, 758
Crowley's case 97
Croyle *v.* Moses 482
Crucier *v.* Pennock 772
Cruess *v.* Fessler 481
Crummey *v.* Raudenbush 855
Cudee *v.* Rutter 839, 958
Cuff *v.* Penn 189
Culin *v.* Glass Works 954
Cullen *n.* Bimm 686

Figures refer to Pages.

Culliford *v.* De Cardenell 529
Cumberland Banking Co. *v.* Maryport Iron Co. 91
Cumberland Bone Co. *v.* Andes Ins. Co. 325
Cuming *v.* Brown 902
Cummer *v.* Butts 83
Cumming *v.* Roebuck 246, 256, 258
Cummings *v.* Cass 479
v. Gilman 41, 494
Cummins *v.* Griggs 730
Cundell *v.* Dawson 520
Cundy *v.* Lindsay 66, 417
Cunliffe *v.* Harrison 157, 346, 710
Cunningham *v.* Ashbrook 298
v. Brown 95
v. Cunningham 535
v. Dunn 554
v. Hall 661, 687, 688
v. Hedge 301
v. Williams 234
Cunningham Iron Co. *v.* Warren Mfg. Co. 265
Curran *v.* Downs 538, 540
Currie *v.* Anderson 144, 146
v. Misa 755
v. White 5
Currier *v.* Davis 771
v. Knapp 300
v. Poor 964
Curtin *v.* Isaacsen 493, 854
Curtis *v.* Aspinwall 454, 485
v. Blair 78
v. Gibbey 601, 605
v. Hannay 941
v. Hubbard 773
v. Pugh 139, 155
v. Saltau 667
Curtis Man. Co. *v.* Williams 688
Cusack *v.* Robinson 155, 166, 168, 714, 833
Cushing *v.* Breed 6, 172, 328, 728
Cushman *v.* Holyoke 290
v. Jewell 301, 311
v. Libbey 772
v. Marshall 474
Cutler *v.* Gilbreth 954
v. Pope 133
Cutter *v.* Powell 547, 549, 551, 595, 732, 941, 944, 949
C. & C. Electric Co. *v.* D. Frisbie Co. 608

D.

Dabovich *v.* Emeric 956
Dacosta *v.* Davis 116
Daggett *v.* Johnson 608
v. Tallman 780
Dailey *v.* Green 961
Dalby *v.* India Life Assurance Co. 523
Daley *v.* Marks 169
Dalglish *v.* McCarthy 488
Dalrymple *v.* Scott 596
Dalton *v.* Hamilton 473
v. Thurston 472
Dame *v.* Baldwin 18, 38
v. Dame 132
v. Flint 543
Damm *v.* Mason 9
Damon *v.* Bryant 494
Damon *v.* Osborn 173, 318
Dana *v.* Angel 680
v. Boyd 737
v. Fielder 937, 955
v. King 595
Danby *v.* Tucker 3
Dando *v.* Foulds 7, 309
Dane *v.* Kirkwall 32
Danforth *v.* Evans 536
v. Walker 719, 793
Daniell *v.* Sinclair 392
Daniells *v.* Aldrich 666
Daniels *v.* Bailey 134
v. Newton 597
Danks, ex parte 746
Dannefelser *v.* Weigel 306
Danube R'y Co. *v.* Xenos 551
D'Aquila *v.* Lambert 859
Darrell *v.* Evans 237
Darst *v.* Brockway 673
Darvill *v.* Terry 463
Dater *v.* Earle 543
Dauglish *v.* Tennent 458, 465
Davenport *v.* Wells 956
Davies *v.* Davies 508, 509, 511, 513, 514
v. M'Lean 699
Davis, ex parte 785, 787
v. Bradley 310, 351
v. Bronson 539
v. Buttrick 738
v. Caldwell 42
v. Cary 554
v. Eastman 170
v. Emery 307, 602
v. Goodman 464
v. Hartlerode 959
v. Hedges 949
v. Hill 294
v. Jones 188
v. Mason 509
v. McFarlane 133, 730
v. McWhirter 917
v. Meeker 483
v. Moore 173, 180
v. Murray 683
v. Nye 673
v. Richardson 956
v. Robertson 116
v. Robinson 638
v. Rowell 116
v. Russell 856
v. Shields 221, 235, 955
v. Smith 673
v. Turner 493
Davison *v.* Davis 299
v. Seymour 535
Davy *v.* Kelley 487
Dawe *v.* Morris 470
Dawes *v.* Cope 729
v. Peck 163, 371, 714, 833
v. Peebles 688
Dawley *v.* Potter 78
Dawson *v.* Collis 941, 944
v. Remnant 526, 266
v. Susong 39
Day *v.* Bassett 300
v. Cooley 494
v. Kinney 680
v. McAllister 534, 542

Figures refer to Pages.

Day *v.* Pool 682, 947, 961
v. Ragnet 684, 685
v. Thompson 774
Dayton *v.* Hooglund 684
v. Monroe 474
Deal *v.* Maxwell 114
v. Palmer 308
Dean *v.* James 748
v. Mason 666, 682
v. Morey 670, 682
v. Tallman 171
v. Yates 477
Dearborn *v.* Raysor 309
v. Turner 7, 305, 606
Dearman *v.* Radcliffe 487
Dearmer, in re 38
Deason *v.* Boyd 44
Deatherage *v.* Henderson 778
De Baun *v.* Brand 473
De Bussche *v.* Alt 194
Decan *v.* Shipper 81, 912
Decell *v.* Lewenthal 42, 545
Decker *v.* Fredericks 484
v. Furness 5
v. Gwinn 78
DeCordova *v.* Smith 234
Dederick *v.* Wolfe 306
Dedrich *v.* Leonard 114
Deere *v.* Lewis 955
Deering *v.* Chapman 544
v. Cobb 90
Defenbaugh *v.* Weaver 351, 961
De Gaillon *v.* L'Aigle 33
Delamater *v.* Chappell 736
Delaney *v.* Wallis 13, 39
Delany *v.* Robinson 780
Dellone *v.* Hall 795
v. Hull 473
De Medina *v.* Norman 732
Deming *v.* Chase 671
v. Darling 481
v. Foster 672, 689
Dempsey *v.* Gardner 468, 725
Den *v.* Moore 545
v. Zellers 485
Denman *v.* Cherokee Iron Co. 720
Denmead *v.* Glass 169
Dennis *v.* Alexander 296
v. Sharman 780
Denny *v.* Williams 170
Dent *v.* Dent 507
v. Dunn 758
Denton *v.* The Great Northern Railway Co. 450
Dermott *v.* Jones 557, 599
Derry *v.* Peek 435, 479
De Saint Germain *v.* Wind 311
Descadillas *v.* Harris 773
De Sewhanberg *v.* Buchanan 613
Des Farges *v.* Pugh 471
Deshon *v.* Bigelow 300
Deslandes *v.* Gregory 208
Devane *v.* Fennell 294
Devaux *v.* Connolly 396
v. Steinkeller 420
Dever *v.* Corcoran 545
Devine *v.* Edwards 296
Devlin *v.* New York 938
v. O'Neill 304
Devoe *v.* Brandt 476
De Wahl *v.* Braune 34
Dewey *v.* Erie 606
De Witt *v.* Berry 666, 672, 684, 686
De Wolf *v.* Gardner 352, 374
v. Lindsell 861
Dexter *v.* Curtis 90
v. Norton 89, 553, 557, 558
Dey *v.* Dox 955
De Yampert *v.* Brown 773
Deyoe *v.* Jamison 306
Diamond Match Co. *v.* Roeber 536
Dias *v.* Chickering 41
Dibbins *v.* Dibbins 862, 917
Dibblee *v.* Sheldon 473
Dick *v.* Page 778
Dickenson *v.* Gupp 613
v. Naul 631
Dickey *v.* Linscott 598
Dickinson *v.* Calahan 598
v. Dodds 52, 58
v. Follett 617
v. Gay 683, 684, 691
v. Hall 397
v. Lilwall 242
v. Shee 745
Dickson *v.* Reuter's Telegram Co. 432
v. Ziziania 618, 653
Diem *v.* Koblitz 953
Diggs *v.* Denny 471
Dike *v.* Reitlinger 600, 684
Dilk *v.* Keighley 28
Dill *v.* O'Ferrell 397
Dillard *v.* Moore 668
Dillaway *v.* Alden 537
Dillman *v.* Nadlehoffer 483, 662
Dimech *v.* Corlett 548, 550
Dimmock *v.* Hallett 452
Dingle *v.* Hare 619, 951
Dingley *v.* Oler 597, 793
Dinkler *v.* Potts 478
Ditcham *v.* Worrall 31
Ditman *v.* Cottrell 309
Ditmar *v.* Norman 4
Ditson *v.* Randall 477
Divine *v.* McCormick 662, 691
Dixon, ex parte 764
v. Baldwen 467, 867, 872
v. Blondin 311, 312
v. Bovill 807
v. Clark 748, 754
v. Fletcher 346, 710, 733
v. M'Clutchey 482
v. Walker 754
v. Yates 268, 695, 791, 803, 811, 833, 835, 836, 853, 863, 865, 887
Doak *v.* Snapp 955
Doane *v.* Dunham 737, 961
Dobell *v.* Hutchinson 198
v. Stevens 454
Dodd *v.* Adams 494
v. Farlow 670, 691
Dodds *v.* Durand 7
Dodge *v.* Emerson 773
v. Fearly 783
Dodsley *v.* Varley 168, 800, 811
Dodson *v.* Harris 543
v. Wentworth 876
Dodsworth *v.* Hercules 961

Figures refer to Pages.

Doe v. Murless 19
v. Oliver 62, 390, 813
v. Rugely 554
Doe d. Emmett v. Thorn 19
Doe d. Roberts v. Roberts 464
Doggett v. Emerson 486
Dole v. Olmstead 6, 328
v. Stimpson 172
Doll v. Noble 608
Dollard v. Potts 171, 680
Dolliver v. Ela 133
Doloret v. Rothschild 958
Domestic Sewing Machine Co. v. Anderson 9
Domestic Sew. Mach. Co. v. Arthurhultz 304
Donahue v. Parkman 175
Donald v. Suckling 798, 823
Donaldson v. Benton 781
v. Farwell 424, 471, 478
v. McRoy 485
v. Newman 673
Donath v. Broomhead 917
Donnell v. Bennett 940
v. Hearn 111, 794
Donovan v. Willson 113
Doolin v. Ward 473
Doolittle v. Lyman 543
Doremus v. Howard 795
Dorr v. Fisher 631, 663, 673, 959
Doty v. Smith 132
v. Willson 3
Dougal v. Cowles 774
Douglas v. Douglas 3
v. Dunlap 487
v. Moses 663
v. Neil 772
v. Patrick 746, 748, 753
v. Shumway 133, 855
Douglass v. McAllister 956
v. Merceles 954
Douglass Axe Man. Co. v. Gardner 960, 961
Dounce v. Dow 679, 688, 961
Dow v. Sanborn 471
v. Worthen 180
Dowdle v. Bayer 737
Dowing v. Dearborn 688
Dowling v. McKenney 8, 111
Downer v. Thompson 351
Downing, in re 171
v. Dearborn 482
Downs v. Marsh 351
v. Ross 114
Dows v. Dennistown 308
v. Greene 912
v. Kidder 308, 477
v. Montgomery 171
v. Morewood 719
v. National Exchange Bank 40, 373
v. Perrin 912
v. Rush 912
Dracachi v. The Anglo-Egyptian Nav. Co. 897, 898
Drake, ex parte 66
v. Seaman 223, 224
v. Wells 134
Drakeford v. Piercy 764
Draper v. Pattina 234
v. Sweet 961
Draycott v. Harrison 37
Dresser v. Ainsworth 631, 674, 675
Drew v. Beal 964
v. Ellison 666, 669
v. Nunn 32
v. Roe 682
v. Towle 966
Dreyfuss v. Mayer 911
Driggs v. Norwood 489
Drinkwater v. Drinkwater 487
v. Goodwin 760, 761
Dr. Tudor's case 529
Drummond v. Van Ingen 639, 642, 646, 654, 657, 661, 684, 735
Drury v. Defontaine 530, 531
v. Young 222, 235
Dryden v. Kellogg 673, 677
Dubois v. Spinks 729
Dubose v. Wheddon 42
Ducett v. Cunningham 777
Dudley v. Abner 302
v. Danforth 488
Duff v. Budd 399, 410
Dugan v. Anderson 596
v. Nichols 719, 731
Duke v. Andrews 48
v. Asbee 540
v. Harper 536
v. Shackleford 301
Duke of Norfolk v. Worthy 448
Dumont v. Williamson 397
Dunbar v. Locke 539
v. Rawles 304
Duncan v. Bell 683
v. Topham 54, 55, 704
Duncans v. Stone 311
Duncruft v. Albrecht 117
Dunham v. Pettee 173
Dunkart v. Rhineheart 323
Dunkirk Colliery Co. v. Lever 930, 934
Dunlap v. Gleason 305
v. Shanklin 775
Dunlop v. Berry 322
v. Gregory 536
v. Grote 790
v. Higgins 54, 55, 56, 934
v. Lambert 163, 332, 343, 371, 714, 833
Dunmore v. Alexander 54, 58, 75
Dunu v. Bell 537
v. The State 544
v. Wright 777
Dunne v. Ferguson 134
Dunning v. Gordon 294
Duplex Safety Co. v. Garden 608
Duppa v. Mayo 126
Dupree v. Harrington 309
Durant v. Rogers 484
Durell v. Haby 443
Durfee v. Jones 82
Durgin v. Dyer 540
Durgy Cement Co. v. O'Brien 910, 917
Durkee v. Moses 538
Durnford v. Messiter 67
Durell v. Haley 471
Durrell v. Evans 229, 231, 237, 239, 240
Durst v. Burton 484, 794, 954
Duryea v. Bonnell 709, 793
Dushane v. Benedict 686, 959, 965, 966

Figures refer to Pages.

Dustan *v.* McAndrew 794, 820, 826, 918
Dutton *v.* Solomonson 331, 371
Duval *v.* Mowry 474
Duvall *v.* Medtart 482
Dwinel *v.* Howard 606
Dwyer *v.* Denny 306
Dye *v.* Wall 662
Dyer *v.* Great Northern R'y Co. 350
v. Homer 397, 487, 488
v. Libby 265, 296
v. Pearson 21
v. Taylor 488
Dygert *v.* Remerschnider 489
Dykers *v.* Townsend 225
Dyster, ex parte 244

E.

Eadie *v.* Ashbaugh 671
Eagan *v.* Call 683
Eagle Bank *v.* Smith 771
Eagle Iron Works *v.* Des Moines R'y Co. 682, 959
Earl Beauchamp *v.* Winn 391
Earl of Bristol *v.* Wilsmore 410
Earl of Falmouth *v.* Thomas 120, 131
Earle *v.* Hopwood 517
v. Reed 42
Earley *v.* Garrett 4, 611, 624
v. Owens 489
East India Co. *v.* Tritton 390
Easter *v.* Allen 476, 477
Eastman *v.* Porter 775
Easton *v.* Worthington 18, 39
Eaton *v.* Avery 469
v. Cook 908, 911
v. Davidson 479
v. Kegan 540
v. Waldron 738
v. Wells 783
Eberle *v.* Mehrbach 539, 540
Eckstein *v.* Reynolds 751
Eclipse Windmill Co. *v.* Thorson 778
Edan *v.* Dudfield 143, 160, 161, 832
Eddy *v.* Capron 535
v. Clement 598
v. Davis 782, 794
Eden *v.* Parkinson 619
Edgar *v.* Boies 776
v. Canadian Oil Co. 678
Edgerton *v.* Hodge 180, 771
v. Michels 673
Edgington *v.* Fitzmaurice 434, 435
Edick *v.* Crim 631, 675
Edmund *v.* Digges 772
Edmunds *v.* Downes 188
v. Merchants' Transportation Co. 82, 476
Edwards *v.* Brewer 863
v. Cottrell 8
v. Dickson 493
v. Dillon 671
v. Glancy 293
v. Grand Trunk R'y Co. 111, 112, 172
v. Harben 461, 467, 468
v. Stevens 46
v. Trulock 774
Egerton *v.* Mathews 215, 216
Eggleston *v.* Wagner 78, 225
Eichelberger *v.* M'Cauley 114
Eichholz *v.* Bannister 394, 623, 627, 630 631, 945
Eighmie *v.* Taylor 666
Elbinger Co. *v.* Armstrong 920, 922, 928, 929, 232, 933, 934
v. Claye 203
Elder *v.* Rourke 492
Eldridge *v.* Benson 5
v. Wadleigh 672
Elerick *v.* Reid 470
Eley *v.* The Positive Assurance Co. 233
Elfe *v.* Gadsden 221, 233
Elgee Cotton Cases 294, 325
Eliason *v.* Henshaw 79
Elkins *v.* McKean 408
Ellen *v.* Topp 549, 550
Ellershaw *v.* Magniac 360, 362, 367, 371, 372, 860
Elliott *v.* Bradley 351, 352
v. Dean 220
v. Edwards 298
v. Pyhus 349, 351
v. Richardson 465, 516
v. Stoddard 4, 489
v. Thomas 158, 585
v. Von Glehn 547
Ellis *v.* Andrews 470, 483
v. Hammond 541
v. Hunt 697, 715, 867, 888
v. Mortimer 585
v. Thompson 701
Ellison *v.* Brigham 112
v. Jones 308
Ellsworth *v.* Campbell 304
Elmore *v.* Fitzpatrick 305
v. Kingscote 186, 216
v. Stone 164, 165
Elphick *v.* Barnes 7, 436, 585, 588, 950
Elsass *v.* Harrington 471
Elston *v.* Fieldman 678
Elting Woollen Co. *v.* Martin 601
Elton *v.* Brogden 616
v. Jordan 616
Elves *v.* Crofts 516
Elwell *v.* Chamberlain 484
Ely *v.* James 775
v. Ormshy 180
v. Webster 539
Embree Carriage Co. *v.* Lusk 349
Embrey *v.* Jennison 537
Emerine *v.* O'Brien 771, 775
Emerson *v.* Brigham 673
v. European, &c. R. Co. 90
v. Graff 77
v. Mallett 772
v. White 783
Emery *v.* Irving National Bank 373
Emma Min. Co. *v.* Emma Co. 473, 474
Emmerson *v.* Heelis 136, 124, 240
Emmerton *v.* Matthews 646, 651, 658, 659
Emmet *v.* Dewhirst 189
v. Thorn 19
Emmett *v.* Penoyer 667
Empire State Type Co. *v.* Grant 299
Empress Engineering Co., in re 214
Ender *v.* Scott 665
Enger *v.* Dawley 666

Figures refer to Pages.

England *v.* Cowley 211
v. Forbes 478
v. Marden 67
v. Mortland 326, 722
English *v.* Hanford 962
v. Spokane Com. Co. 670, 688, 737, 961, 965
Enlow *v.* Klein 9, 309
Entz *v.* Mills 261
Epperson *v.* Nugent 43
Equitable Foundry Co. *v.* Hersee 473
Equitable Gas Light Co. *v.* Baltimore Coal Tar Co. 958
Erb *v.* Cole 489
Erickson *v.* Paterson 134
Erskine *v.* Plummer 133
Erwin *v.* Harris 374, 605, 736
v. Maxwell 664
Eskridge *v.* Glover 68, 77
Esposito *v.* Bowden 556
Essex Co. *v.* Pacific Mills 955
Estabrook *v.* Swett 474
Esterly *v.* Campbell 585
Eubanks *v.* Peak 44
Evans *v.* Bicknell 432
v. Collins 400, 426, 430, 431
v. Edmonds 433
v. Gale 474
v. Judkins 751
v. Lewis 494
v. Montgomery 486
v. Roberts 121, 122, 124, 125, 126, 128
v. Trueman 840
Evansville, &c. R. R. C. *v.* Erwin 912
Everett *v.* Collins 755
v. Hall 300, 305
v. Taylor 493
Everingham *v.* Meighan 537
Everman *v.* Robb 92
Ewing *v.* Composite Brake Shoe Co. 486
v. French 5
Exhaust Ventilator Co. *v.* Chicago R. R. Co. 607
Eyers *v.* Haddem 960
Eyles *v.* Ellis 744

F.

Fabricotti *v.* Launitz 962
Fahey *v.* Esterley Machine Co. 607
Faikney *v.* Reynous 498, 500
Fairbank Canning Co. *v.* Metzger 691, 961
Fairbank *v.* Phelps 301
Fairbanks *v.* Eureka Co. 302
v. Low 709
v. Richardson Drug Co. 115
Fairfield Bridge Co. *v.* Nye 724
v. Madison Man. Co. 606
Fairlie *v.* Fenton 206, 207
Falcke *v.* Gray 940
Fales *v.* Roberts 311
Falk, ex parte 834, 885, 887, 892, 899, 901
Falke *v.* Fletcher 365, 367, 372
Falls *v.* Gaither 76
Falvey *v.* Richmond 350
Farebrother *v.* Simmons 240, 260
Fareira *v.* Gabell 537
Farina *v.* Home 162, 811, 833, 845, 847, 852, 853
Farlow *v.* Ellis 299
Farmeloe *v.* Bain 807, 809, 813, 814
Farmer *v.* Gray 173
v. Robinson 259
Farmers' & Mechanics' Bank *v.* Logan 373
Farmers' Packing Co. *v.* Brown 856
Farmers' Phosphate Co. *v.* Gill 297
Farquhar *v.* McAlevy 309
Farrant *v.* Thompson 19
Farrell *v.* Railroad 916
Farrer *v.* Countess of Grannard 33
v. Lacy 778
v. Nightingale 85
Farrow *v.* Andrews 687, 689
Farwell *v.* Grier 774
v. Hanchett 470, 474
v. Myers 474
Farwell Co. *v.* Hilton 475
Fatman *v.* Thompson 670, 690
Faulkner *v.* Hebard 68, 77
v. Lowe 552
Favence *v.* Bennett 763, 767
Fawcett *v.* Osborne 39
Fawkes *v.* Lamb 183, 191, 207
Fay *v.* Burditt 45
v. Oliver 397
v. Wheeler 116, 174
Feamster *v.* Withrow 775
Fearon *v.* Bowers 893, 894
Featherston *v.* Hutchinson 498
Fechheimer *v.* Baum 471
Ferger *v.* Kroh 39
Feise *v.* Wray 860, 863, 864
Feldman *v.* Beier 774
v. Gamble 778
Fell *v.* Muller 795
Felsenthal *v.* Hawks 961
Felt *v.* Cleghorn 490
Felthouse *v.* Bindley 50, 818
Fenn *v.* Harrison 620
Fennell *v.* Ridler 531
Fenno *v.* Weston 76
Fenton *v.* Braden 96
v. Clark 598
v. Holloway 32
Feret *v.* Hill 400, 446
Ferguson *v.* Carrington 399, 413
v. Hosier 961
v. Norman 519
v. Northern Bank 326, 328
v. Oliver 966
Ferrier *v.* Storer 79
Ferris *v.* Adams 535
v. Comstock 963
Fessenden *v.* Mussey 235
Fessler *v.* Love 954
Fettyplace *v.* Dutch 41
Fewell *v.* Deane 737
Fidelity Ins. Co. *v.* Shenandoah R. R. 311
Field *v.* Carr 766
v. Lelean 189, 831
v. Moore 322
v. Simco 490
Fielder *v.* Starkin 950
Fifield *v.* Elmer 305
Figlia Maggiore, The 897
Filer *v.* Peebles 780
Filkins *v.* Whyland 666, 667
Filley *v.* Pope 602

Figures refer to Pages.

Filson *v.* Himes 535
Finch *v.* Boning 761
v. Brook 745
v. Mansfield 543
Finding *v.* Hartman 490
Findley *v.* Cooley 487
Findon *v.* Parker 516
Fine *v.* Hornsby 131
Finley *v.* Quick 543
Finn *v.* Clark 350
v. Donahue 542
Finney *v.* Apgar 111, 112
First Bank of Toledo *v.* Shaw 40
First National Bank *v.* Bayley 374
v. Crocker 374
v. Crowley 296, 317
v. Dearborn 352, 374
v. Grindstaff 668
v. Lindenstruth 90
v. McManigle 777
v. Petit 374
v. Robinson 671
v. Yocum 486
First Ward National Bank *v.* Thomas 41
Fischel *v.* Scott 561
Fish *v.* Gates 597
v. Kempton 760
v. Payne 472
Fishback *v.* Van Dusen 6, 299
Fishell *v.* Winans 955
Fisher *v.* Hersey 485
v. Kuhn 223, 225
v. Lord 539
v. Marsh 207
v. Marvin 767
v. Pollard 669
v. Rieman 680
v. Samuda 950
v. Seltzer 76
v. Sharpe 966
Fisk *v.* Tank 688
Fiske *v.* Tanke 961
Fitch *v.* Archibald 686
v. Fitch 91
v. Jones 525
Fitt *v.* Cassanet 818
Fitzgerald *v.* Evans 668, 669, 670
v. Fuller 304, 308
v. Meyer 492
v. Vestal 91
Fitzmaurice *v.* Bayley 186, 198, 200, 236
Fitzpatrick *v.* Fain 326
v. Osborne Co. 607, 668, 960, 962
Fitzsimmons *v.* Joslin 477, 484
v. Woodruff 114
Flagg *v.* Mann 65
Flake *v.* Nuse 782
Flanagan *v.* Demarest 600
Flanders *v.* Maynard 303
v. Putney 80
Flandrow *v.* Hammond 673
Flannery *v.* Jones 485
Flarty *v.* Odlum 507
Flatt *v.* Osborne 671
Fleck *v.* Warner 301, 304
Fleeman *v.* McKean 308
Fleet *v.* Murton 192, 205, 206, 208
Fleming *v.* Gilbert 596
Fletcher *v.* Cole 606
Fletcher *v.* Heath 840
v. Ingram 265
v. Livingston 134
v. Tayleur 924, 925
v. Willard 667
v. Young 668
Flick *v.* Wetherhee 963
Flight *v.* Booth 959
v. Leman 517
Flint *v.* Corbitt 114
v. Gibson 599
v. Lyon 679
Flintoft *v.* Elmore 261
Flood *v.* Patterson 12
Florence Mining Co. *v.* Brown 606
Floyd *v.* Browne 81
Flynn *v.* Allen 673
v. Ledger 909
Foard *v.* McComb 480
Fogel *v.* Brubaker 678, 686
Fogg *v.* Sawyer 772
Foggart *v.* Blackweller 664
Foley *v.* Felrath 606
Follansbee *v.* Adams 596
Foll's Appeal 958
Folsom *v.* Cornell 720, 731
Fonda *v.* Lape 481
Fondren *v.* Durfee 670
Fontaine *v.* Bush 171
Fonville *v.* Casey 92
Foord *v.* Noll 751
Foos *v.* Sabin 794
Foot, in re 913
v. Webb 224
Foote *v.* Marsh 290, 318, 321, 325
Forbes *v.* Marsh 303
Forcheimer *v.* Stewart 681
Ford *v.* Beech 755
v. Cotesworth 554
v. Johnston 494
v. Mitchell 776
v. Phillips 44
v. Yates 184, 185, 830
Fordice *v.* Gibson 317
Foreman *v.* Ahl 542, 543, 545
Fores *v.* Johnes 497
Forest Oil Co.'s Appeal 782
Forman *v.* Wright 393
Forrest *v.* Nelson 309
Forsaith Machine Co. *v.* Mengel 607
Forster *v.* Rowland 48
v. Taylor 517, 522
Forsyth *v.* Jervis 2, 8
v. Mann 112
Forsythe *v.* Ellis 577
Fort Worth Co. *v.* Consumers' Co. 171
Fosdick *v.* Car Co. 306
v. Schall 304, 306
v. Van Husan 781
Foss Brewing Co. *v.* Bullock 737
Foster *v.* Caldwell 665
v. Charles 426
v. Frampton 142, 881, 885
v. Hall 488
v. Hill 774
v. Mabe 132
v. Mackinnon 476
v. Pettibone 5
v. Redgrave 28

Figures refer to Pages.

Foster *v.* Ropes 293
v. Rowley 486
v. Smith 63, 293, 610
v. Thurston 539
v. Wooten 541
Foulk *v.* Eckert 487
Foundry *v.* Harvey 589
Foundry Co. *v.* Pascagoula Ice Co. 301
Fowler *v.* Hollins 208
v. Knoop 843
v. Ludwig 773
v. McTaggart 869
Fowler Elevator Co. *v.* Cottrell 223
Fox *v.* Harvester Works 688
v. Hills 494
v. Kitton 596
v. Mackreth 421
v. Nott 897
v. Prickett 81
v. Turner 79
v. Utter 351, 736
v. Webster 471
v. Willis 911
Fragano *v.* Long 163, 274, 331, 332, 348, 349, 714, 833
Franley *v.* Bisphan 681
France *v.* Gaudet 927
Francis, ex parte 860, 876
v. Cockrell 650
v. Deming 783
v. Maas 660
Francis, The 351
Frank *v.* Hoey 350, 543
v. Miller 223
Franklin *v.* Long 959
v. Miller 551
Franklin, &c. Co. *v.* Collier 471
Franklin Bank *v.* Cooper 778
Franklyn *v.* Lamond 207
Franks, ex parte 33
v. De Pieune 33
Fraschieris *v.* Henriques 917
Fraser *v.* Witt 870
Frazer *v.* Hilliard 297
Frazier *v.* Harvey 682
v. Simmons 718, 795
v. Thompson 545
Frechette *v.* Corbet 374
Freedom, The 841, 897
Freeholders *v.* Thomas 770, 773, 774
Freeman *v.* Baker 455, 611
v. Bridger 42
v. Cooke 62, 390, 813
v. East India Co. 14, 19
v. Kraemer 306
v. Nichols 299, 855
Freeport *v.* Bartol 223
Freer *v.* Denton 552, 596
Freeth *v.* Burr 579, 582, 604
Freiburg *v.* Steenbock 727
French *v.* French 46
v. Row 301
v. Transportation Co. 908
v. Vining 687
Freyman *v.* Knecht 959, 961
Frick *v.* Hilliard 308
Fricker *v.* Tomlinson 154
Frisbee *v.* Chickering 471
Frohlich *v.* Alexander 538
Frohreich *v.* Gammon 961, 962, 963
Frontier Bank *v.* Morse 772
Frost *v.* Blanchard 666
v. Hill 260
v. Knight 551, 597, 787, 936
v. Lowry 474
v. Woodruff 294
Frostburg Mining Co. *v.* N. E. Glass Co. 169
Frue *v.* Houghton 958
Fry *v.* Mobile Savings Bank 326
Frye *v.* Milligan 662, 962
Fuentes *v.* Caballero 960
v. Montis 20, 22, 23, 840, 847, 849
Fuller *v.* Abrahams 419
v. Bean 96, 266, 293, 324
v. Brown 598
v. Bryne 306
v. Buswell 7
v. Durn 8
v. Little 781
v. Wilson 427, 429, 430, 454
Fulton Brothers *v.* Furniture Co. 79
Furley *v.* Bates 278
Furlong *v.* Polleys 954, 956
Furman *v.* Miller 683
Furness *v.* Meek 188
Furniss *v.* Sawers 180
Furniture Co. *v.* Hill 299
Fydell *v.* Clark 759

G.

Gabarron *v.* Kreeft 314, 366, 371, 372
Gachet *v.* Warren 679
Gadd *v.* Houghton 208
Gadsden *v.* Lance 113, 132
Gage *v.* Epperson 477
v. Whittier 540
Gaines *v.* McKinley 671
Gainesville Bank *v.* Bamberger 469
Gainsford *v.* Carroll 785
Gaitskill *v.* Greathead 523
Gale *v.* Burnell 86
v. Reed 509
v. Tappan 778
Gale Harrow Mfg. Co. *v.* Moore 607
Gallagher *v.* Waring 684, 686
Galligan *v.* Fannan 538
Galloway *v.* Week 295, 321
Galpin *v.* Atwater 666
Galvin *v.* Bacon 41
v. MacKenzie 170, 719
Gambling *v.* Read 310
Gambs *v.* Sutherland's Est. 538
Gammell *v.* Gunby 686, 687
Ganly *v.* Ledwidge 13, 18
Ganson *v.* Madigan 793, 795
Gant *v.* Shelton 669
Garbracht *v.* The Commonwealth 4
Garbutt *v.* Bank 472
v. Watson 99, 100, 107, 109, 110, 111, 112
Gardiner *v.* Gray 636, 644, 649
v. Suydam 323
v. Morse 473
Gardner *v.* Dutch 323
v. Grout 142
v. Howland 730
v. Joy 111, 112, 113

Figures refer to Pages.

Gardner *v.* Lane 81, 351, 678
v. McEwen 90
Garfield *v.* Paris 170
Garford *v.* Fearon 505, 559
Garland *v.* Lane 350, 543
Garman *v.* Cooper 492
Garment *v.* Barrs 617
Garner *v.* Graves 487
Garretson *v.* Hackenberg 493
v. Selby 350
Garrote *v.* Williamson 856
Gartner *v.* Corwine 662
Gartrell *v.* Stafford 234
Gary *v.* Jacobson 487
Gaskell *v.* Morris 827
Gaskin *v.* Wells 773
Gaston *v.* Birney 779
v. Drake 535
Gates *v.* Bliss 486, 959
v. Tompson 40
Gath *v.* Lees 346, 347
Gault *v.* Brown 137, 138, 173, 180, 398
Gautier *v.* Douglass Man. Co. 965
Gay *v.* Dare 606
v. Hardeman 855
v. Smith 39
Gayden *v.* Tufts 300
Gayler *v.* Wilder 397
Gaylor *v.* Dyer 302
Gaylord *v.* Soragen 539
Gaylord Man. Co. *v.* Allen 686, 738
Gazley *v.* Price 595
Geary *v.* Physic 199, 229
Gee *v.* Lancashire, &c. R'y Co. 929
Geilfuss *v.* Corrigan 856
Geller *v.* Seixas 774
Genesee River Bank *v.* Mead 489
Gentilli *v.* Starace 667, 690, 737
George *v.* Glass 826
v. Skivington 403, 405, 406, 408, 953
v. Tufts 303
Georgian Lumber Co. *v.* Thompson 966
Gerhard *v.* Bates 408
Gerli *v.* Poidebard Silk Mfg. Co. 603
German Nat. Bank *v.* Meadowcroft 6
Gerow *v.* Castello 9, 303
Gerst *v.* Jones 688
Gerwig *v.* Sitterly 775
Getchell *v.* Chase 773
Getty *v.* Rountree 684, 688
Gibbes, ex parte 873, 887
Gibbons *v.* Luke 9
Gibbs *v.* Benjamin 170, 293
v. Estey 132
v. Linabury 476
v. Merrell 24
v. Neely 39
Gibbs & Sterrett Man. Co. *v.* Brucker 533, 534
Gibson *v.* Carruthers 859
v. Cranage 607
v. Holland 118, 192, 199, 222
v. Love 490
v. McKean 296
v. Pelkie 81
v. Stevens 172, 352
v. Vail 606
Giffen *v.* Baird 673
Giffert *v.* West 680
Gilbert *v.* Decker 726
v. Hudson 477
v. Lichtenberg 173
v. N. Y. Cent. R. R. Co. 293
Gilchrist *v.* Hilliard 673, 680
Giles *v.* Bradley 958, 960
v. Edwards 394, 395
v. Simonds 134
Gilkes *v.* Leonino 566
Gilkeson *v.* Smith 783
Gill *v.* Benjamin 605
v. Bicknell 261
v. Cubitt 18
v. Hewett 261
v. Kaufman 683
v. Weller 595
Gillard *v.* Brittan 821, 822, 824, 825, 940
Gillespie *v.* Cheney 688
Gillett *v.* Hill 313, 813
Gilliatt *v.* Gilliatt 452
v. Roberts 142
Gillman *v.* Carbutt 808
Gilman *v.* Andrews 956
v. Hill 112, 137, 294
Gilmore *v.* Newton 302
Gilmour *v.* Supple 268, 269, 272
Gilpatrick *v.* Ricker 783
Gilpins *v.* Consequa 599
Gilson *v.* Bingham 961, 962
Gimson *v.* Woodfull 16
Gipps Brewing Co. *v.* De France 79, 350, 544
Girard *v.* Taggart 795, 826, 827
Girardy *v.* Richardson 499
Giroux *v.* Stedman 692
Gittings *v.* Nelson 90, 92
Gladstone *v.* Hadwen 410
Glaholm *v.* Hays 548
Glasgow *v.* Nicholson 727
Glass *v.* Goldsmith 350
Glazebrook *v.* Woodrow 548
Gleason *v.* Drew 731
Glenn *v.* Smith 774
Glover *v.* Coles 126
v. Ott 42
Glyn Mills & Co. *v.* The East & West India Dock Co. 717, 852, 894
Goad *v.* Johnson 692
Goard *v.* Gunn 490
Godbold's case 530
Goddard *v.* Binney 110, 111, 114, 318, 351, 719
v. Cox 765
v. Weil 726
Godolphin *v.* Tudor 528
Godts *v.* Rose 162, 336, 339, 833
Godwin *v.* Francis 241
Goff *v.* Rehoboth 783
Gogier *v.* Mieville 18
Golden Gate Co. *v.* Caplice 606
Golder *v.* Ogden 322
Golding Davis & Co., ex parte 896, 898, 899, 900, 901, 909
Goldsborough *v.* Orr 595
Goldshede *v.* Cottrell 754
Gompertz *v.* Bartlett 395, 593

Figures refer to Pages.

Gompertz *v.* Denton 941, 944
Gooch *v.* Holmes 131
Good *v.* Winslow 6
Goodall *v.* Skelton 175, 176, 836
Goodell *v.* Bluff City Co. 964
v. Fairbrother 9, 309
Goodenow *v.* Tyler 41
Gooderham *v.* Marlatt 7
v. Griffiths 186, 218
v. Harvey 18
v. Simonds 39
Goodrich *v.* Nortwick 607
v. Tracy 771
Goodwin *v.* Boston & Lowell R. R. 299
v. Clark 137, 545
v. Goodwin 726
v. Holbrook 595
v. Mass. Loan Co. 478, 499
v. May 303
v. Merrill 80
v. Morse 962, 966
Goodwin Stove Co.'s Appeal 957
Goodyear *v.* Mayor of Weymouth 558
Gookin *v.* Graham 673
Goom *v.* Aflalo 247, 248, 256, 257
Gordon *v.* Butler 483
v. Ellis 753
v. Harper 698
v. Norris 351, 794
v. Parmelee 483
v. Price 774
v. Ritenour 495
v. Strange 744
v. Waterous 667, 736
Gore *v.* Gibson 32
Gorham *v.* Fisher 170
Gorrissen *v.* Perrin 560
Gorton *v.* Macintosh & Co. 645
Gosbell *v.* Archer 236, 241
Gosling *v.* Birnie 814, 825
Goss *v.* Lord Nugent 189, 191
v. Quinton 284, 285
v. Whitney 533
Goss Printing Press Co. *v.* Jordan 309
Gossler *v.* Eagle Sugar Refinery 680
v. Schepeler 909
Gouda, re Millo, ex parte 884
Gough *v.* Dennis 482
Gould *v.* Bourgeois 674
v. Murch 598
v. Stein 684
Goulding *v.* Davidson 46
Goulds *v.* Brophy 689
Governor, &c. of the Poor *v.* Petch 49
Gowans *v.* Consolidated Bank of Canada 351
Gowen *v.* Klous 225
Gower *v.* Von Dedalzen 648
Gowing *v.* Knowles 736
Grace *v.* Hale 42
Gracy *v.* Potts 783
Graeme *v.* Wroughton 530
Graff *v.* Evans 10
v. Fitch 730
v. Foster 684
Graffenstein *v.* Epstein 470, 480
Grafton *v.* Armitage 102, 103, 106, 107
v. Cummings 224
Graham *v.* Fretwell 237
Graham *v.* Furber 459
v. Musson 237, 238, 239
v. Smith 890
Grand Avenue Hotel *v.* Wharton 690
Grand Tower Co. *v.* Phillips 937, 954
Grant *v.* Cadwell 663
v. Fletcher 246, 248, 258
v. King 310
v. McGrath 543
v. Vaughan 18
Grantham *v.* Hawley 85
Gratitudine, The 19
Grau *v.* McVicker 596
Gravely *v.* Barnard 513, 514
Graves *v.* Johnson 538
v. Legg 548, 550, 565, 619
v. Spier 484
v. Weld 128
Gray *v.* Agnew 40
v. Angier 783
v. Central R. R. Co. 607, 826
v. Cox 649
v. Davis 170
v. Green 597
v. Hall 955
v. Herman 778
v. Hook 534, 535
v. Veirs 485
v. Walton 722
v. Wass 777
Great Northern R'y Co. *v.* Witham 53, 71
Great Western R'y Co. *v.* Redmayne 929
Greaves *v.* Ashlin 732, 817, 829, 830
v. Hepke 277
Grébert-Borguis *v.* Nugent 928, 930, 931, 933, 934
Greely *v.* Bartlett 41
Greeley & Co. *v.* Capen 222
Green, in re 537
v. Armstrong 134
v. Baverstock 448
v. Brookins 132
v. Collins 538
v. Hall 298
v. Haythorne 803
v. Humphry 469
v. Janion 855
v. Kennedy 478
v. Lewis 116
v. Merriam 172
v. North Carolina R. R. Co. 133
v. Price 438, 515
v. Stuart 397
v. Tanner 488, 495
Greene *v.* Bateman 81
v. Godfrey 541
v. Lewis 96
v. Tyler 779
Greenhood *v.* Keator 777
Greenthal *v.* Schneider 737
Greenwood *v.* Law 132
v. Sutcliffe 782
Greer *v.* Church 9, 305
Gregg *v.* Fitzhugh 956
Gregory *v.* Lee 42
v. McDowell 955
v. Morris 855
v. Schoenell 469
v. Thomas 774

Figures refer to Pages.

Gregory *v.* Wendell 537
Gregson *v.* Ruck 258
Gresham *v.* Bryan 325
Greve *v.* Dunham 915
Greville *v.* Attkins 529
Grey *v.* Cary 171
Grice *v.* Kendrick 762
v. Richardson 787, 802, 811, 835
Grier *v.* Stout 6
Griffin *v.* Colver 937, 938, 957, 964
v. Pugh 306
Griffith, ex parte 465
v. Fowler 35
v. Grogan 774
v. Hodges 751
v. Ingledew 349
v. Strand 683
v. Wells 539
Griffiths *v.* Owen 177, 755
v. Perry 755, 785, 801, 802, 805, 811, 812, 819, 825, 844, 904, 920, 935
Grigsby *v.* Stapleton 482
Grimes *v.* Van Vechten 169
Grimoldby *v.* Wells 149, 640, 642, 946
Grist *v.* Williams 826
Griswold *v.* Haven 484
v. Scott 720
Griezewood *v.* Blane 524, 537
Groat *v.* Gile 290, 297
Groetzinger *v.* Kann 679
Groff *v.* Belche 293
Grose *v.* Hennessey 677
Gross *v.* Jordan 9
v. Kierski 672, 677
Grosvenor *v.* Phillips 374
Grotenkemper *v.* Achtermeyer 76
Grout *v.* Hill 905, 909, 918
Grove *v.* Brien 349, 352
v. Donaldson 597
v. Dubois 761
Groves *v.* Buck 99, 100, 107, 110
Grymes *v.* Sanders 486
Guardians of Litchfield *v.* Green 755, 756, 758, 759
Guernsey *v.* West Coach Lumber Co. 738
Guerreiro *v.* Peile 2
Guilford *v.* Smith 914
Guion *v.* Doherty 774
Gulick *v.* Ward 473
Gumm *v.* Tyrie 372
Gunderson *v.* Richardson 543
Gunn *v.* Bolckow 755, 809, 811, 813, 814, 853
Gunter *v.* Leckey 8
Gunther *v.* Atwell 683
Gurley *v.* Dickason 674
Gurney *v.* Atlantic, &c. R'y Co. 965
v. Behrend 897
v. Howe 776
v. Womersley 394, 593
Gustafson *v.* Rustemeyer 483, 487, 964
Gustine *v.* Phillips 909, 910
Guthing *v.* Lynn 61
Guthman *v.* Kearn 782
Guthrie *v.* Morris 42
v. Murphy 43
Gutwillig *v.* Zuberbier 349
Gwillim *v.* Daniell 713
Gwinn *v.* Simes 542
Gwyn *v.* Richmond, &c. R. R. Co. 909

H.

Haak *v.* Linderman 309
Haas *v.* Myers 79, 80
Haase *v.* Mitchell 397
Hadcock *v.* Osmer 480
Hadley *v.* Baxendale 919, 921, 922, 924, 925, 927, 928, 932, 933, 938, 939, 951
v. Clinton, &c. Co. 482, 682
Hagar *v.* King 116, 174
Hagedorn *v.* Laing 817, 818
Hager *v.* Catlin 535
Hagg *v.* Darley 516
Haggert Man. Co. *v.* Pugsley 960
Hagins *v.* Combs 296
Hague *v.* Porter 351
Hahn *v.* Doolittle 668
v. Fredericks 296, 325
Haig *v.* Wallace 890
Haight *v.* Hayt 480
Haille *v.* Smith 333
Haine *v.* Tarrant 42
Haines *v.* Pearce 774
v. Tucker 583, 603, 606, 794, 826
Haldeman *v.* Duncan 324
Hale *v.* Huntley 293
v. Jones 795
v. Metropolitan Omnibus Co. 462, 463
v. Rawson 562
v. Smith 672
Halff *v.* Allyn 916
Hall *v.* Aitkin 673
v. Billinham 661
v. Butterfield 44
v. Condor 611, 625, 628
v. Dimond 916
v. Draper 304
v. Hinks 305
v. Naylor 472
v. Norfolk F. Ins. Co. 782
v. Pillsbury 6
v. Plassan 683
v. Robinson 41
v. Wright 552
Hall Machine Co. *v.* Brown 606
Hallahan *v.* Webber 486
Hallen *v.* Runder 126, 127, 128
Hallett *v.* Oakes 45
Hallett's Estate, in re 766
Hallgarten *v.* Oldham 727
Halliday *v.* Briggs 668
v. Holgate 2, 19, 823
Hallidie *v.* Sutter St. R. R. Co. 607
Hallock *v.* Commercial Ins. Co. 69, 76, 79
Hallowell *v.* Milne 304
Halterline *v.* Rice 293
Ham *v.* Cerniglia 9
v. Smith 535
v. Van Orden 170
Hamburger *v.* Rodman 918
Hamet *v.* Letcher 82
Hamilton *v.* Ganyard 686
v. Gordon 295
v. Gray 536

Figures refer to Pages.

Hamilton *v.* Lycoming Ins. Co. 79
v. McPherson 954
v. Magill 931, 933
v. Myles 736
v. Rogers 90
v. Russell 467
Hamlett *v.* Tallman 783
Hammer *v.* Schoenfelder 957
Hammett *v.* Linneman 299
Hammond *v.* Anderson 277, 803, 834, 835, 887
v. Buckmaster 397
v. Bussey 929, 931, 932, 933, 951, 952
v. Pennock 486
Hammonds *v.* Barclay 828
Hanauer *v.* Bartels 351
v. Doane 501, 536
v. Woodruff 501
Hands *v.* Burton 2
v. Slaney 26
Handy *v.* St. Paul Globe Pub. Co. 545
v. Waldron 483
Hanford *v.* Artcher 492
Hanington *v.* Cormier 296
v. Du Chatel 505, 506
Hanks *v.* Palling 89
Hanna *v.* Harter 955
v. Mills 795
Hannum *v.* Richardson 680
Hansard *v.* Robinson 759
Hansen *v.* Dennison 92
Hanson *v.* Armitage 155
v. Busse 683
v. Edgerly 482
v. Gaar 668
v. Hartse 692
v. Marsh 225
v. Meyer 271, 338, 697, 803, 835, 837
v. Slaven 595
Hanway *v.* Wallace 304
Hapgood *v.* Rosenstock 958
v. Shaw 596
Hardell *v.* McClure 113, 115
Harding *v.* Commercial Line Co. 781
v. Davies 746
v. Metz 310
Hardingham *v.* Allen 750
Hardman *v.* Bellhouse 743
v. Booth 66, 211, 417, 469
Hardy *v.* Angel 782
v. Fairbanks 678
v. Metzgar 38
v. Porter 728
Hargous *v.* Stone 682, 684, 685
Hargrave *v.* Dusenberry 771
Harkness *v.* Russell 291, 302, 311
Harley *v.* Thornton 772
Harlow *v.* Hall 726
v. Putnam 397
Harman *v.* Anderson 161, 833
v. Fishar 465
v. Reeve 99, 136
Harmer *v.* Killing 45
Harmon *v.* Magee 781
Harmony *v.* Bingham 556, 599
Harms *v.* Parsons 509
Harner *v.* Fisher 469, 471
Harnor *v.* Groves 186, 395
Harper *v.* Crain 536
v. Dotson 674
v. Goodsell 2
v. People 303, 312
Harralson *v.* Stein 80
Harrell *v.* Godwin 308
v. Miller 134
Harrington *v.* Cormier 280
v. Du Chastel 505
v. King 300
v. Kloprogge 529
v. Stratton 487, 966
v. The Victoria Graving Dock Co. 498
Harris's case 54
Harris *v.* Brisco 517
v. Burns 489
v. Fowle 2, 8
v. Hanover Nat'l Bank 82, 680, 772
v. May 660
v. Nicholas 89
v. Pence 491
v. Pepperell 389
v. Pratt 905, 913
v. Rounsevel 171
v. Runnels 540
v. Tumbridge 537
v. Tyson 472
v. Waite 688
v. Wall 30
Harris Manuf. Co. *v.* Marsh 794
Harrison *v.* Colton 542
v. Conlan 598
v. Elvin 228
v. Fortlage 600
v. Glover 937, 954
v. Luke 2
v. McCormick 685
v. Ross 777
v. Shanks 677
Hart *v.* Anderson 172
v. Bush 155, 164, 714, 833
v. Carpenter 303
v. Frontino, &c. Co. 814
v. Middleton 702
v. Mills 58, 346, 710, 733
v. Nash 177
v. Prater 26
v. Sattley 155
v. Summers 724
v. Swaine 434, 436
v. Tyler 723
v. Wing 729
Hartford Ins. Co. *v.* Matthews 479
Hartford Man. Co. *v.* Brush 608
Hartford, &c. Railroad *v.* Jackson 81
Harth *v.* Gibbes 683
Hartley *v.* Wharton 30, 188
Hartlove *v.* Durham 596
v. Fox 407
Hartley *v.* Cummings 514
Hartman *v.* Blackburn 607
Hartop *v.* Hoare 13
Hartshorn *v.* Hartshorn 775
Hartwell *v.* Gurney 485
Harvey *v.* Facey 77
v. Grabham 189, 191
v. Harris 81

Figures refer to Pages.

Harvey *v.* Merrill 538
v. Stevens 261
v. Varney 487
Hasberg *v.* McCarty 603
Hasbrouck *v.* Lounsbury 308
Haselinton *v.* Gill 462
Haskell *v.* Brewer 783
v. Greeley 725
v. McHenry 794, 827
v. Rice 855
Haskins *v.* Warren 299, 855
Haslock *v.* Furgusen 420
Hassell *v.* Borden 41
Hastie *v.* Couturier 84
Hasting *v.* Lovering 681, 683
Hastings *v.* Pearson 40
Hatch *v.* Bayley 172, 727
v. Lincoln 352, 727
v. Oil Co. 265
Hathaway *v.* Moran 545
Hathesing *v.* Laing 356, 861
Hatstat *v.* Blakeslee 468
Haubner *v.* Martin 220
Haughton *v.* Morton 196, 218
Hauk *v.* Brownell 481
Haule *v.* Hemyng 558
Hausman *v.* Nye 169
Haviland *v.* Johnson 301
Hawes *v.* Foster 248, 249, 253, 257
v. Humble 559
v. Watson 168, 814
Hawkins *v.* Chase 226, 235
v. Davies 476
v. Graham 608
v. Hersey 300
v. Pemberton 665, 678, 682
v. Rutt 743
Hawley *v.* Keeler 597
Hawse *v.* Crowe 760
Haxall *v.* Willis 298
Haycraft *v.* Creasy 426, 826
Hayden *v.* Demets 729, 794, 819
Hayes *v.* Nashville 826
Haynes *v.* Nice 779
Hayner *v.* Sherrer 736
Hays *v.* Jordan 9, 301
v. M'Clurg 767
v. Midass 473
v. Mouille 909, 913
v. Pittsburgh Co. 295, 296
Hayward *v.* Barker 46
v. Scougall 561, 713
Hazard *v.* Day 225, 541
v. Fiske 40, 856
v. Irwin 480
v. Loring 667, 782
Hazelhurst *v.* Boomer 965
Hazelton Boiler Co. *v.* Fargo Gas Co. 664
Hazelton Coal Co. *v.* Coal Co. 954
Hazul *v.* Dunham 453
Heacock *v.* Walker 39
Head *v.* Diggon 53, 71
v. Goodwin 90
v. Tattersall 436, 587, 950
Headrick *v.* Brattain 92
Heald *v.* Builders' Ins. Co. 92
Healy *v.* Brandon 690
v. Utley 960
Heartley *v.* Nicholson 3
Heath *v.* Mahoney 44
v. Randall 302
Heaven *v.* Pender 403, 404, 405, 407, 408, 953
Hecht *v.* Batcheller 82, 680
Hedge *v.* Lowe 536
Hedges *v.* Wallace 538
Hedstrom *v.* Toronto Car Wheel Co. 608
Heermance *v.* Vernoy 673
Hefflin *v.* Bell 311
Hefner *v.* Haynes 961
Hegarty *v.* Snow 692
Heilbutt *v.* Hickson 265, 550, 637, 639, 642, 654, 735, 943, 947
Heinbockle *v.* Zugbaum 307
Heine *v.* Anderson 721
Heinekey *v.* Earle 466, 467
Helby *v.* Matthews 9, 300
Helger *v.* Eddy 303
Hellings *v.* Russell 21, 24
Helps *v.* Glenister 522
v. Winterbottom 755
Helsbaw *v.* Langley 228
Helyear *v.* Hawke 619, 620
Hemmer *v.* Cooper 481
Hemphill *v.* McClimans 46
Henderson *v.* Barnewall 260
v. Gibbs 477
v. Hart 490
v. Lacon 408
v. Lauck 309, 328
v. Wheaton 607
Hening *v.* Powell 720
Henkel *v.* Pape 61
v. Welsh 737
Hennequin *v.* Naylor 471
Henniker *v.* Wigg 765
Henning's case 524
Henry *v.* Allen 469
v. Patterson 309
v. Salisbury 663
Henshaw *v.* Robbins 678, 683
Hensley *v.* Baker 677
Henwood *v.* Oliver 751, 752
Hepburn *v.* Auld 782
v. Sewell 81
Hercules, The 815
Hercules Iron Works *v.* Dodsworth 736
Hereford, &c. Wagon Co., in re 214
Herman *v.* Haffenegger 397
Hern *v.* Nichols 439
Herrick *v.* Borst 910
v. Carter 8
v. Whitney 679
Herrin *v.* Libbey 486
Herring *v.* Cannon 309
v. Hoppock 308
v. Skaggs 671, 694
Herron *v.* Dibbrell 664
v. The State 544
Hersey *v.* Benedict 474
Hersom *v.* Henderson 667
Hervey *v.* Dimond 9, 300
v. R. I. Locomotive Works 9, 304
Heryford *v.* Davis 306
Herzog *v.* Purdy 398
Heseltine *v.* Siggers 117
Hesketh *v.* Fawcett 749
Hess Co. *v.* Dawson 606

Figures refer to Pages.

Hessel *v.* Fritz 489
Hesser *v.* Wilson 491
Hessing *v.* McCloskey 488
Heugh *v.* The London and North Western R'y Co. 412
Hewes *v.* Jordan 170, 171
Hewison *v.* Guthrie 831
Heyman *v.* Flewker 20, 21
v. Neale 243, 245, 246, 256
Heyward's case 330
Heywood *v.* Heywood 776
v. Pickering 756
Heyworth *v.* Hutchinson 920, 941, 942, 944, 947
v. Knight 255, 258
Hibblewhite *v.* M'Morine 4, 88, 92
Hickey *v.* Morrell 483
Hickman *v.* Haynes 189, 190, 707, 708, 709, 923
Hickox *v.* Adams 571
Hicks *v.* Cleveland 180
v. Skinner 677
v. Whitmore 261
Hienty *v.* Burkhard 115
Higgins *v.* Burton 415
v. Chessman 294
v. Delaware R'y Co. 318, 578, 583, 603
v. Kusteren 133
v. McCrea 537
v. Moore 777
v. Murray 111, 318, 351, 374, 544, 723, 794
v. Pitt 465
v. Senior 191, 204
Higginson *v.* Simpson 524
Higgons *v.* Burton 21, 66, 417
Hight *v.* Bacon 689
v. Harris 490
v. Ripley 111, 112
Hildreth *v.* Fitts 727
v. O'Brien 667
Hill, ex parte 465
v. Balls 953
v. Blake 600, 602
v. Bowman 494
v. Chipman 955
v. Colorado Bank 856
v. Dunham 533
v. Freeman 302
v. Gray 448, 455
v. McDonald 170
v. North 667
v. Perrott 59, 420, 448
v. Pine River Bank 487
v. Sloan 773
v. Smith 956
v. Southwick 966
v. Spear 538
v. Willis 261
Hillenbrand *v.* Stockman 961
Hills *v.* Snell 81
Hilman *v.* Wilcox 662
Hilton *v.* Eckersley 502, 503
v. Houghton 533
v. Scarborough 780
Hime *v.* Klasey 604
Hincheliffe *v.* Barwick 588, 950
Hinchman *v.* Lincoln 170, 172
Hinckley *v.* Merchants' National Bank 38
v. Steel Co. 793
Hinde *v.* Gray 510, 511
v. Liddell 930, 933, 934
v. Longworth 489
v. Whitehouse 110, 141, 145, 187, 194, 198, 216, 240, 243, 245, 268, 316, 816
Hinds *v.* Kellogg 112
Hine *v.* Campion 433
v. Roberts 9, 301, 433
Hineman *v.* Matthews 309
Hines Lumber Co. *v.* Alley 597
Hintermister *v.* Lane 308
Hiort *v.* London, &c. R'y Co. 823
Hirsch *v.* Richardson 488
v. Steele 310
Hirschorn *v.* Canney 300
Hirshfield *v.* Waldron 777
Hirshhorn *v.* Stewart 737
Hirth *v.* Graham 133
Hitchcock *v.* Coker 510, 512, 513
v. Giddings 89
v. Humfrey 758
v. Hunt 965
Hoadley *v.* House 958
Hoadly *v.* M'Laine 47, 93, 190, 217
Hoare *v.* Rennie 550, 578, 579, 580, 581, 583, 584, 711
Hobart *v.* Littlefield 113, 350, 373
v. Young 663, 667
Hobbs *v.* Bibb 490
v. Carr 728
v. Massasoit Whip Co. 157
Hochster *v.* De la Tour 551, 552, 597, 787, 790, 936
Hodgesen *v.* Hubbard 423, 474
Hodges *v.* Fox 721
v. Kimball 351
v. Richmond Manuf. Co. 138
v. Wilkinson 674
Hodgson *v.* Barrett 772
v. Davies 246, 258, 760
v. Le Bret 158, 163
v. Loy 697, 863, 867
v. Temple 499, 500
Hodson *v.* Warner 299, 304
Hoe *v.* Sanborn 661, 673, 687
Hoey *v.* Felton 921
Hoffman *v.* Burr 685
v. Carow 18, 39
v. Culver 298
v. Gallaher 607
v. King 321
v. Noble 477, 495
v. Strohecker 39
Hoffner *v.* Clark 725
Hogarth *v.* Wherley 763
Hogins *v.* Plympton 663, 681
Hogue *v.* Mackey 82
Holbird *v.* Anderson 463
Holbrook *v.* Armstrong 7, 305
v. Connor 481, 483
v. Vose 911, 913, 917
Holcomb *v.* Noble 479
v. Weaver 536
Holden *v.* Dakin 682
Holder *v.* Jackson 485
Holderman *v.* Monier 854

Figures refer to Pages.

Holderman *v.* Smith 294
Holdever *v.* Jackson 454
Holdridge *v.* Wells 783
Holland, ex parte 37
v. Rea 826, 827
v. Tyus 777
Hollender *v.* Koetter 684
Holliday *v.* McKinne 490
v. Morgan 616, 617
Hollingsworth *v.* Napier 856
Hollins *v.* Fowler 211, 212, 417, 848
Hollman *v.* Pullin 214
Holloway *v.* Griffith 596
v. Jacoby 679, 960
v. York 387
Holman *v.* Bailey 9
v. Dord 668
v. Johnson 502, 534
v. Lock 302
Holme *v.* Guppy 550
Holmes *v.* Bailey 374
v. Evans 225
v. Briggs 775
v. German Security Bank 374
v. Gregg 398, 738
v. Hoskins 166, 168
v. Mitchell 186
v Shands 597
v. Tyson 665
v. Wilson 60
Holroyd *v.* Marshall 86, 87, 91
Holst *v.* Pownall 867, 885
Holt *v.* Clarencieux 24
v. Griffin 813
v. Holt 307
v. O'Brien 544
v. Pie 679
v. Ward 24
Holt Man. Co. *v.* Ewing 302
Holton *v.* Goodrich 602
v. Noble 483
Homan *v.* Headley 46
Homans *v.* Newton 302
Home Ins. Co. *v.* Heck 295
Home Lightning-rod Co. *v.* Neff 683
Homer *v.* Ashford 509
v. Perkins 470
Honck *v.* Müller 581, 582
Honegger *v.* Wettstein 539
Honeyman *v.* Marryat 48
Honore *v.* Colmesnil 772
Hood *v.* Bloch 686
Hoofsmith *v.* Cope 725
Hook *v.* Mowre 494
v. Stovall 670
Hooper *v.* Keay 765, 766
v. Stephens 177
v. Story 961
Hooser *v.* Hunt 479
Hooven *v.* Burdette 304
Hoover *v.* Maher 265
v. Peters 691
v. Tibbetts 916
Hope *v.* Hayley 86
Hopkins *v.* Grinnell 676
v. Hitchcock 596, 612
v. Prescott 498, 529
v. Sanford 954
v. Stefan 542
Hopkins *v.* Tanqueray 610, 611
v. Ware 755
Hopper, in re 94
Hopton *v.* M'Carthy 155
Horacek *v.* Keehler 540
Horder *v.* Scott 660
Hore *v.* Milner 816
Horn *v.* Buck 960
Hornby *v.* Lacy 760, 961
Horncastle *v.* Farran 831
Horne *v.* Midland R'y Co. 921, 926, 934
v. Niver 79
Horner *v.* Graves 515
v. Parkhurst 689
Horr *v.* Baker 319, 856
v. Powe 855
Horsfall *v.* Thomas 455, 457
Horton *v.* Buffinton 533, 541
v. Green 664
v. McCarty 261
Horwood *v.* Smith 15
Hosack *v.* Weaver 38
Hosegood *v.* Bull 404
Hoskins *v.* Johnson 777
Hosmer *v.* Wilson 298, 793
Hotchkin *v.* Third National Bank 472
Hotchkiss *v.* Finan 539
v. Higgins 7, 8
v. Hunt 395, 720
v. Oliver 88
Hotham *v.* East India Company 550
Houck *v.* Linn 7
Houdlette *v.* Tallman 172, 722
Hough *v.* Evans 482
v. Manzanos 208
v. May 744, 751, 755
Houghtaling *v.* Ball 116
Houghton *v.* Matthews 761
Houldsworth *v.* The City of Glasgow Bank 443, 445, 446, 447
House *v.* Alexander 773
v. Beak 607
v. Fort 662, 665
Household Fire Ins. Co. *v.* Grant 54, 56, 58
Houston *v.* Dyche 310
v. Gilbert 683
Howard *v.* Borden 170
v. Castle 448
v. Daily 79, 552, 596
v. Emerson 662, 692
v. Fessenden 132
v. Harris 8, 543
v. Hoey 661, 684, 686, 688
v. Jones 774
v. Shepherd 408, 896
v. Sheward 621
v. Smedley 608
Howatt *v.* Davis 908
Howden *v.* Haigh 465
Howe *v.* Batchelder 134
v. Hayward 180
v. Huntington 595
v. Johnson 726
v. Palmer 167
v. Rea 908
v. Smith 175, 178
v. Ward 489, 494
Howe Machine Co. *v.* Ballweg 777
v. Reher 965

Figures refer to Pages.

Howe Machine Co. *v.* Willie 397
Howell *v.* Alport 888, 889
v. Coupland 553, 598
v. Pugh 321, 326
Howes *v.* Ball 168
Howie *v.* Rea 965
Howland *v.* India Ins. Co. 40
v. Shurtleff 780
v. Woodruff 40
Hoxie *v.* Small 482
Hoyle *v.* Hitchman 660
Hoyt *v.* Byrnes 781
v. Casey 43
v. Hartford Ins. Co. 319
Hubbard *v.* Bliss 41, 300
v. Bugbee 46
v. George 683
v. Moore 538
Hubbell *v.* Flint 539, 778
v. Meigs 487
Hubert *v.* Moreau 228
v. Treherne 231
Hudgins *v.* Perry 668
Hudnall *v.* Paine 303
Hudson *v.* Germania Fruit Co. 737
v. McKale 306
v. Weir 131
Hudson Furniture Co. *v.* Freed Furniture Co. 169
Huff *v.* Broyles 962
v. McCauley 134
Huggins *v.* Bambridge 528, 529
Hughes *v.* Bray 683, 961
v. Done 525, 526
v. Gallans 42
v. Humphreys 522
v. Israel 774
v. Kelley 301, 303
v. Wheeler 774
Hugill *v.* Masker 20
Hulet *v.* Stratton 573
Huling *v.* Craig 599
Hull *v.* Caldwell 677, 959
v. Hull 91
v. Ruggles 539
Humaston *v.* Tel. Co. 96
Humble *v.* Mitchell 117
Hume *v.* Peploe 749, 750
Humfrey *v.* Dale 192, 205, 206, 208
Humphrey *v.* Haskell 470
v. Merriam 666
v. Smith 469
Humphreys *v.* Comline 682, 692
Humphreysville Copper Co. *v.* Vermont, &c. Co. 954, 956
Humphries *v.* Carvalho 53, 69, 70, 585
Humphrys *v.* Pratt 430, 431
Hundley *v.* Webb 491
Hunt *v.* Boyd 767, 774
v. Hecht 146, 147, 148, 149, 155
v. Higman 79
v. Massey 24, 30
v. Sackett 673
v. Silk 387
v. Thurman 720, 721
v. Wyman 7, 66, 588, 606
Hunter *v.* Bosworth 90, 91
u. Giddings 225
v. Hudson River Iron Co. 469, 484
Hunter *v.* McLaughlin 397
v. Moul 775
v. Nolf 535
v. Wetsel 180, 181, 723, 794, 827
v. Wright 349, 727
Huntingdon *v.* Hall 631, 672, 675
Huntington *v.* Chisholm 326
Huntley *v.* Whittier 777
Hurd *v.* Bickford 478
v. Cook 265
v. Fleming 301
v. West 6
Hurff *v.* Hires 320
Hurst *v.* Bell 92
Hussey *v.* Horne-Payne 186
v. Sibley 680
Hutcheson *v.* Blakeman 78, 79
v. Eaton 208
Hutchings *v.* Munger 301
Hutchins *v.* Nunes 862
v. Olcutt 767, 778
v. Sprague 488
Hutchinson *v.* Bowker 48
v. Commonwealth 322
v. Ford 92
v. Hunter 322, 324
v. Tatham 205, 206
Huthmacher *v.* Harris 82
Hutley *v.* Hutley 517
Hutton *v.* Bullock 203
v. Moore 96
Huxham *v.* Smith 751
Hyatt *v.* Boyle 681, 682, 959
Hyde *v.* Cookson 5
v. Ellery 478
v. Lathrop 294, 297
v. Wrench 49, 79
Hydraulic Engineering Co. *v.* McHafflie 705, 926, 929, 931, 933
Hyman *v.* Cain 42
Hynds *v.* Hays 545

I.

Ide *v.* Leiser 234
v. Stanton 111, 225
Idle *v.* Thornton 559
Ijams *v.* Hoffman 261
Iley *v.* Frankenstein 586
Illinois Leather Co. *v.* Flynn 472
Ilsley *v.* Stubbs 911
Imperial Bank *v.* London, &c. Dock Co. 205, 807, 861
Imperial Land Co. of Marseilles, in re 55
Inchbald *v.* The Western Neilgherry Coffee Co. 551, 790
Independent Ins. Co. *v.* Thomas 771
Indiana Mfg. *v.* Hayes 736
Indianapolis, &c. R. Co. *v.* Maguire 795
Indianapolis, &c. R. R. Co. *v.* Tyng 480, 484
Ingalls *v.* Herrick 728
Inge *v.* Bond 673
Ingersoll-Sargent Drill Co. *v.* Worthington 783
Ingham *v.* White 46
Inglebright *v.* Hammond 6, 328
Inglis *v.* Stock 276
v. Usherwood 697, 869, 888, 906
Ingraham *v.* Union Railroad Co. 665
Inman *v.* Western Ins. Co. 599

Figures refer to Pages.

Ins. Co. *v.* Kiger 40
v. Lasher Stocking Co. 78
Inslee *v.* Lane 915
International Pavement Co. *v.* Smith 672, 686
Ipswich Tailors' Case, The 508
Ireland *v.* Livingston 203, 569, 574, 709, 860
Iron Co. *v.* Best 608
Iron Cliffs Co. *v.* Buhl 319
Irons *v.* Kentner 5
v. Smallpiece 2, 3
Irvine *v.* Stone 138
Irving *v.* Motly 412
Irwin *v.* Williar 533, 538
Isaac *v.* Andrews 5
Isaacs *v.* Hardy 105
v. N. Y. Plaster Works 595
v. Royal Ins. Co. 702
Iselin *v.* Henlien 795
Isherwood *v.* Whitmore 715, 733, 746
Ives *v.* Hartley 6
Iveson *v.* Conington 208
Ivory *v.* Murphy 234

J.

Jack *v.* Des Moines, &c. R. R. Co. 959
Jackson *v.* Allaway 576, 732
v. Anderson 318
v. Attrell 525
v. Cadwell 39
v. Covert 111
v. Duchaire 458, 465
v. Garnsey 487
v. Henry 495
v. Jacob 746, 760
v. Langston 672
v. Lowe 196, 218
v. Mather 489
v. Morter 473
v. Myers 494
v. Nichol 867, 876, 881, 885
v. Seward 494
v. Tupper 181
v. Turquand 48
v. Union, &c. Ins. Co. 548
v. Walsh 495
v. Watts 172
v. Wetherill 682
v. Wooley 12
Jacksonville, &c. Railway *v.* Hooper 599
Jacob *v.* Kirk 201, 229
Jaffrey *v.* Allan 907
v. Brown 471
v. Cornish 774
Jaggar Iron Co. *v.* Walker 767, 774
James, ex parte 392
v. Adams 596, 793, 794
v. Bocage 663
v. Griffin 465, 467, 857, 866, 867, 881, 882, 885
v. Morgan 556
v. Muir 96, 225
v. Patten 235
v. Plank 6
v. Vane 754
v. Williams 755
Jameson *v.* Gregory 7, 538
Jamison *v.* King 489
Janvrin *v.* Maxwell 172
Jaquith *v.* Adams 795
Jarecki Mfg. Co. *v.* Kerr 689
Jarrett *v.* Goodnow 673
v. Hunter 202
Jaulerry *v.* Britten 21
Jeffcott *v.* North British Oil Co. 217
Jefferson *v.* Querner 709
Jeffers *v.* Easton 672, 965
Jeffrey *v.* Bigelow 484, 965
Jeffris *v.* Fitchburg R. R. 916
Jelks *v.* Barrett 223
Jemison *v.* Woodruff 486
Jemmison *v.* Gray 955
Jendwine *v.* Slade 612
Jenkins *v.* Betham 94
v. Brown 2
v. Eichelberger 309
v. Hogg 485
v. Mapes 776
v. Reynolds 200
v. Stetson 91
Jenks *v.* Colwell 302
v. Fulmer 915
Jenkyns *v.* Brown 360, 372
v. Usborne 841, 847, 860
Jenner *v.* Smith 344
Jenness *v.* Mt. Hope Iron Co. 77, 223
v. Wendell 137, 398
Jennings *v.* Flanagan 294
v. Gage 303
v. Gratz 681
v. Throgmorton 499
v. West 293
Jeraulds *v.* Brown 325
Jervis *v.* Berridge 186
v. Tomkinson 556
Jessopp *v.* Lutwyche 524
Jewan *v.* Whitworth 838
Jewett *v.* Carter 484
v. Cook 489
v. Earle 782
v. Pleak 773
v. Warren 728
Jezeph *v.* Ingram 462
John K. Shaw, The 373
Johnson *v.* Blumenthal 840
v. Brooks 958
v. Brown 540
v. Buck 116, 223, 260
v. Cleaves 774
v. Cope 682
v. Credit Lyonnais Co. 20, 21, 24, 840
v. Cuttle 169
v. Dodgson 155, 163, 230, 231, 238, 714, 833
v. Farnum 855
v. Filkington 76
v. Gallagher 35
v. Harder 96
v. Hibbard 551
v. Hudson 518
v. Kirkaldy 586
v. Kolb 540
v. Lancashire, &c. R'y Co. 331, 822, 823
v. Latimer 686
v. Lansley 523

Figures refer to Pages.

Johnson *v.* Laybourn 677
v. Lines 43
v. Macdonald 560, 564
v. McLane 7
v. Nicoll 649
v. Oehning 677
v. Oppenheim 738
v. Peck 423
v. Phœnix Ins. Co. 599
v. Powers 682
v. Pye 24
v. Raylton 189, 646, 649
v. Royal Mail Steam Packet Co. 67
v. Stear 19, 822, 823, 850
v. Stevenson 79
v. Stoddard 349
v. Trinity Church 222
v. Truesdale 666
v. Weed 775
v. Willis 541, 780
v. Whittemore 301
Johnson Co. *v.* Central Bank 299, 300
Johnston *v.* Barker 677
v. Bent 477
v. Browne 6
v. Dick 489
v. Fessler 76
v. Kershaw 709
v. Standard Oil Co. 5
v. Trask 116
v. Whittemore 306
Johnstone *v.* Marks 28, 43
v. Milling 551, 597
Joliff *v.* Bendell 617
Joliffe *v.* Baker 432, 479
Jonassohn *v.* Young 549, 578
Jones, ex parte 37
v. Alley 666
v. Arthur 747, 754
v. Barkley 548
v. Benedict 779
v. Berry 539
v. Bowden 448, 456, 644
v. Bridgman 751, 752
v. Bright 645, 646, 649, 657
v. Caswell 473
v. Clark 303
v. Cliff 746
v. Clifford 391
v. Daniel 48, 78
v. Flint 124
v. Franklin 399, 423
v. George 679, 963
v. Gibbons 701, 733
v. Giles 522
v. Gretton 765
v. Hoar 81
v. Hodgkins 41
v. Huggeford 674
v. Jones 835, 887
v. Just 645, 688, 951
v. Kemp 5, 6
v. King 494
v. Lees 512, 516
v. Littledale 207
v. Lock 3
v. Marsh 595, 827
v. Mechanics' Bank 169, 170
v. Mellis 39
Jones *v.* Newhall 957
v. Padgett 657
v. Pearce 295
v. Richardson 90
v. Ryde 394, 592, 593
v. Shale 537
v. St. John's College 556
v. Surprise 538
v. United States 557, 598, 602
v. Victoria Graving Dock Co. 233
v. Waite 498
v. Wasson 685
v. Wessel 960
v. Williams 779
v. Wright 607
v. Yates 753
Jones Bros. *v.* M'Ewan 737
Joplin Water Co. *v.* Bathe 966
Jordan *v.* Coffield 43
v. Foster 668
v. Norton 48, 49
v. Parker 477
v. Patterson 955
v. Warren Ins. Co. 40
Jorden *v.* Money 813
Joseph *v.* Adkins 17
v. Cannon 310
v. Lyons 87
Joslin *v.* Cowee 474
Josling *v.* Kingeford 591, 633, 636
Josliny *v.* Irvine 920
Jowers *v.* Blandy 303
Joy *v.* Bitzer 965
v. Schlose 115
v. Sears 729
Joyce *v.* Adams 295
v. Murphy 4
v. Swann 268, 353, 362, 364, 372
Jude *v.* Dennison 966
v. Langdon 727
v. Webber 472
Juillard *v.* Greenman 771
Julia, The 351
Junkins *v.* Simpson 482
Justice *v.* Lang 221, 234
Juxton *v.* Morris 529

K.

Kadish *v.* Young 598
Kahn *v.* Klabunde 7, 606
Kalmweiler *v.* Buck 909
Kain *v.* Old 590, 618
Kaltenbach *v.* Lewis 838
Kane *v.* Hood 595
Kappes *v.* White Hardwood Lumber Co. 774
Kase *v.* John 959
Kauffman *v.* Stuckey 958
Kaufmann *v.* Hamm 540
v. Schilling 321
v. Stone 297
Kay *v.* Duchess de Pienne 33, 34
Kaye *v.* Brett 760
Kealey *v.* Tenant 170
Kearney *v.* Taylor 473
Kearon *v.* Pearson 554
Kearslake *v.* Morgan 177, 755

Figures refer to Pages.

Keates *v.* Earl Cadogan 455, 456
Keele *v.* Wheeler 60
Keeler *v.* Goodwin 325, 856
v. Jacobs 606
v. Vandervere 294
Kein *v.* Tupper 80, 290, 294, 298, 711, 738
Keller *v.* Strasburger 795
Kelley *v.* Cosgrove 541, 542
v. Upton 4
Kellogg *v.* Denslow 960
v. Hyatt 966
v. Turpie 473
v. Witherhead 114
Kellogg Bridge Co. *v.* Hamilton 661, 688
Kellogg Newspaper Co. *v.* Peterson 726
Kelly *v.* Gould 469
Kelner *v.* Baxter 182, 213, 214, 215
Kelsea *v.* Haines 266
v. Ramsey *v.* Mfg. Co. 349
Kelsey *v.* Harrison 471
v. Kendall 310
v. Rosborough 775
Kelso *v.* Marshall 793
Kemble *v.* Atkins 242
Kemp *v.* Falk 870, 885, 887, 892, 897, 898, 900, 904
v. Watt 754
Kempner *v.* Cohn 79
Kempson *v.* Boyle 259
v. Saunders 394
Kendal *v.* Marshall 866, 873, 876, 913
Kendall *v.* May 45
v. Samson 726
v. Wilson 487
Kendrick *v.* Lomax 755
Kennedy *v.* Dunclee 39
v. McKay 484
v. Panama Mail Co. 392, 393, 593
Kenner *v.* Harding 665, 669, 670
Kennerly *v.* Martin 46
Kenny *v.* First Nat. Bank 772
Kent *v.* Bornstein 397, 771
v. Buck 310
v. Friedman 961
v. Ginter 955, 956
v. Huskinson 144
Kent Iron Co. *v.* Norbeck 266
Kentucky Club *v.* Louisville 10
Kentucky Mut. Ins. Co. *v.* Jenks 79
Kenworthy *v.* Schofield 110, 187, 195, 240
v. Stevens 995
Kern *v.* Thurber 477
Kermyer *v.* Newbt 773
Kerr *v.* Connell 134
v. Shrader 138
v. Smith 737
Kershaw *v.* Ogden 278
Kerwin *v.* Doran 538
Kester *v.* Miller 961, 964, 965
Ketchum *v.* Brennan 101, 306
v. Catlin 81
v. Zeilsdorff 596
Ketletas *v.* Fleet 480
Keys *v.* Harwood 2
Keyser *v.* Suse 846
Kibble, ex parte 31
v. Gough 149, 151, 152, 153
Kidd *v.* Rawlinson 462
Kiddell *v.* Burnard 616, 617
Kidder *v.* Knox 773
v. Norris 779
Kiddill *v.* Farnell 75
Kidwelly *v.* Brand 703
Kilgore *v.* Rich 43
Killmore *v.* Howlett 133
Kimball, The 767
v. Cunningham 397, 474, 964
v. Hutchins 494
v. Jackman 307
v. Thompson 488
v. Vorman 960
Kimberly *v.* Patchin 290, 291, 319, 320, 325, 326
King *v.* Bates 307
v. Eagle Mills 479
v. Fleece 772
v. Green 541
v. Jarman 172
v. Parker 548
v. Phillips 471
v. Reedman 576, 696
v. Rochester 589
King Philip Mills *v.* Slater 583, 601
King, The, *v.* Arnold 522
v. Inhabitants of Chillesford 24
v. Major 522
v. Waddington 503
Kingman *v.* Denison 910, 916
v. Kingman 780
v. Watson 191, 738
Kingsbury *v.* Kirwan 537
v. Smith 477
v. Taylor 679, 682
Kingsford *v.* Merry 409, 415, 418, 469, 848
Kingsley *v.* Holbrook 134
v. Johnson 667
v. Siebrecht 223, 260
v. White 729
Kingston Bank *v.* Gay 771
Kinloch *v.* Craig 862, 864
v. Savage 225
Kinney *v.* Kiernan 474
v. McDermot 541
v. Showdy 485
Kinsey *v.* Leggett 40
Kinsman *v.* Kershaw 777
Kintzling *v.* McElrath 472
Kiplin *v.* Ratley 3
Kipp *v.* Meyer 738
v. Wiles 954
Kirby *v.* Duke of Marlborough 765
v. Johnson 172
Kircher *v.* Conrad 665, 671
Kirk *v.* Gibbs 555
Kirkham *v.* Allenborough 607
Kirkpatrick *v.* Adams 537
v. Gowan 590
Kirtland *v.* Moore 599
Kirven *v.* Pinckney 4
Kitchen *v.* Spear 915
Kittredge *v.* Sumner 727
Kleeman *v.* Collins 222
Kleinschmidt *v.* McAndrews 726
Klinck *v.* Kelly 41
Kline *v.* Baker 471, 543
v. L'Amoureux 43
Kling *v.* Fries 543
Klinitz *v.* Surry 141, 142, 163

Figures refer to Pages.

Kloes *v.* Wurmser 909
Knight *v.* Abbott 782
v. Barber 117
v. Bean 598
v. Bowers 660
v. Bowyer 517
v. Burnham 540
v. Cambers 524
v. Cockford 229
v. Fitch 524
v. Mann 172
Knights *v.* Wiffen 808, 814
Knittel *v.* Cushing 9
Knoblauch *v.* Kronschnahel 736
Knowles Loom Works *v.* Vacher 307, 312
Knowlton *v.* Doherty 538
v. Redenbaugh 304
Knox *v.* Schoenthal 738
Koehln *v.* Bull 781
Koenig *v.* State 10
Kohl *v.* Lindley 689
Kohler *v.* Hayes 9, 303
Kohn *v.* Melcher 539
Kokomo Strawboard Co. *v.* Inman 606
Koop *v.* Handy 667
Kornegay *v.* Kornegay 308
v. White 669
Korneman *v.* Monaghan 777
Kost *v.* Reilly 5
Kottwitz *v.* Alexander 539
Kountz *v.* Kennedy 479
v. Kirkpatrick 96, 794
v. Price 542, 543
Kraus *v.* Thompson 473
Krause *v.* The Commonwealth 309
Kreiss *v.* Seligman 538
Kreuger *v.* Blanck 569, 574
Kribs *v.* Jones 955
Kriess *v.* Seligman 538
Kriete *v.* Myer 226
Krohn *v.* Bantz 180
Krulder *v.* Ellison 331
Krumbhaar *v.* Birch 673, 674, 677
Krumm *v.* Beach 487, 964
Krutsinger *v.* Brown 774
Kuhns *v.* Gates 111, 542
Kullman *v.* Simmens 540
Kunkle *v.* Mitchell 722
Kuntzman *v.* Weaver 960
Kuppenheimer *v.* Wertheimer 350
Kyle *v.* Kavanaugh 81
v. Ward 488

L.

Labaree *v.* Klosterman 8
Lackington *v.* Atherton 161, 833
Ladd *v.* Rogers 542
Lady Arundell *v.* Phipps 462
Laidlaw *v.* Organ 402, 457, 472
v. Wilson 660
Laidler *v.* Burlinson 281
Laing *v.* Fidgeon 645, 646, 649
v. Meader 753
Laird *v.* Pim 550, 785
v. Townsend 957
Lake *v.* Morris 728
Lamb *v.* Attenborough 21
v. Crafts 109, 110, 111, 666, 680
Lambert *v.* McCloud 301
Lambton, ex parte 266
Lamert *v.* Heath 395, 594
Lamkin *v.* Crawford 827
Lamm *v.* Port Deposit Ass'n 484
Lamond *v.* Davall 594, 785, 816, 818, 824
Lamprell *v.* Billericay Union 766
Lamprey *v.* Sargent 321
Lamson *v.* Patch 730
Lancaster Co. Bank *v.* Moore 45
Landeche *v.* Sarpy 606
Landon *v.* Platt 132
Lane *v.* Bremer 132
v. Chadwick 374
v. Lantz 961
v. Old Colony, &c. R. R. Co. 856
v. Robinson 916
v. Romer 673
Lanfear *v.* Sumner 41, 468, 725, 727
Lang's Appeal 298
Lang *v.* Smyth 18
v. Stockwell 468
Langdon *v.* Goole 62
Lange *v.* Werk 536
Langfoot *v.* Tyler 266, 766
Langfort *v.* Administratrix of Tiler 316
v. Tiler 282
Langridge *v.* Levy 403, 404, 405, 406, 408, 658
Langton *v.* Higgins 277, 337
v. Hughes 499, 500
v. Waring 19
Lansing Iron Works *v.* Wilbur 306
Laporte Co. *v.* Brock 954
L'Apostre *v.* L'Plaistrier 625, 629
Larey *v.* Taliaferro 662
Larkin *v.* Mitchell Lumber Co. 351
Larmon *v.* Jordan 77
Larned *v.* Andrews 540
Larson *v.* Anltman 671, 961
La Rue *v.* Gilkyson 45
Lassiter *v.* Ward 662
Lassing *v.* James 297
Latham *v.* Atwood 130
v. Chartered Bank of India 870
v. Davis 301
v. Morrow 485
v. Shipley 961
v. Sumner 301
Lathrop *v.* Amherst Bank 536
v. Clayton 729
Latimer *v.* Batson 461, 462
Lattin *v.* Davis 956, 959
Laughter's case 552
Laussatt *v.* Lippincott 40
Laval *v.* Rowley 39
Lavery *v.* Pursell 125, 132
Law *v.* Borthwick 297
v. Grant 484
v. Hodson 522
v. Law 505, 529
v. Stokes 777
Lawes *v.* Purser 395, 396
Lawrence *v.* Everett 953
v. Knowles 732
v. Minturn 349
v. Porter 955, 956
Lawry *v.* Ellis 325
Lawson *v.* Lovejoy 44

Figures refer to Pages.

Lawton *v.* Blitch 537
Laycock *v.* Pickles 766
Laying *v.* Paine 529
Laythoarp *v.* Bryant 199, 215, 216, 227
Lazarus *v.* Andrade 87, 91
Leabo *v.* Goode 774
Leach *v.* Fobes 958
Leadbetter *v.* Ætna Ins. Co. 599
Leadlay *v.* M'Roberts 220, 222
League *v.* Waring 775
Leak *v.* Driffield 38
Leaming *v.* Wise 486
Lear *v.* Friedlander 774
Learoyd *v.* Bracken 540
Leas *v.* James 775
Leask *v.* Scott 902, 912
Leatham *v.* Amor 87, 91
Leather *v.* Simpson 436
Leatherdale *v.* Sweepstone 745
Leather-Cloth Co. *v.* Hieronimus 190, 220
v. Lorsont 510, 511, 516
Leavitt *v.* Fletcher 668
Leddell *v.* McDougal 427, 434
Ledwich *v.* McKim 679
Ledyard *v.* Hibbard 6
Lee *v.* Bayes 12, 16, 17
v. Butler 300
v. Cherrey 224
v. Early 779
v. Gaskell 1, 117, 127, 128
v. Griffin 102, 105, 106, 107, 108, 109, 110, 115
v. Jones 403
v. Kilburn 910
v. Kimbal 911
v. Mahony 223
v. Pennington 596
v. Portwood 477
Leeds *v.* Wright 872
Leeming *v.* Smith 713
Leeson *v.* The North British Oil Co. 551
Leggat *v.* Sands' Ale Co. 670
Leggatt *v.* Clary 265
Leggett *v.* Young 654
Leggett Tobacco Co. *v.* Collier 171, 350
LeGrand *v.* Nat. Bank 477
Lehigh Co. *v.* Field 309
Lehigh Zinc Co. *v.* Bamford 480
v. Trotter 602
Lehman *v.* Kelly 495
Leicester *v.* Rose 465
Leigh *v.* Hind 510
v. Mobile, &c. R. R. Co. 302, 304
v. Patterson 785
Leighton *v.* Stevens 305
v. Wales 509
Leiper *v.* Erwin 780
Leisherness *v.* Berry 730
Lennard *v.* Robinson 208
Leonard *v.* Baker 462
v. Davis 298, 718, 729, 855
v. Fowler 644, 684
v. Medford 133, 171
v. Winslow 322
Leopold *v.* Vankirk 692
Lerned *v.* Johns 225
v. Wannemacher 222
Leroux *v.* Brown 118, 140
Lerow *v.* Wilmarth 487, 489
Leslie *v.* Casey 595
Lessassier *v.* South Western 912
Lester *v.* Buel 538
v. East 4
v. Garland 702
v. Graham 683
v. Palmer 397
Leven *v.* Smith 308, 855
L'Evesque de Worcester's case 12
Levy *v.* Cohen 79
v. Cooke 476
v. Green 346, 710, 733
v. Scott 490
Lewenberg *v.* Hayes 305
Lewis *v.* Brass 48, 51
v. Browning 79
v. Davisson 775
v. Doyle 662
v. Greider 826, 827
v. Jewell 481
v. Latham 538
v. Lofley 318
v. Lyster 856
v. Mason 890, 917
v. McCabe 303, 309
v. Nicholson 208
v. Peake 951
v. Rountree 679, 961, 964
v. Sharvey 915
v. Terry 407, 690
v Wood 224
Lexow *v.* Julian 487
Libby *v.* Downey 540
v. Haley 960
Lickbarrow *v.* Mason 843, 893, 895, 896, 897, 911
Lidderd *v.* Kane 614
Lidderdale *v.* Montrose 507
Lightbody *v.* Ontario Bank 772
Lightburn *v.* Cooper 959
Lightfoot *v.* Tenant 500, 522
Lilienthal *v.* Suffolk Brewing Co. 481
Lillie *v.* Dunbar 134
Lillywhite *v.* Devereux 143, 160, 832
Lima Machine Works *v.* Parsons 310
Lincoln *v.* Buckmaster 45
v. Erie Preserving Co. 224
v. Gallagher 719
v. Quynn 305
Lindon *v.* Sharp 462
v. Eldred 826
Lindsay *v.* Cundy 14, 15, 16, 66, 417
v. Lamb 672
Lindsey *v.* McClelland 775
v. Rutherford 540
v. Stone 539
Lines *v.* Smith 672
Linforth, in re 7
Lingham *v.* Eggleston 265, 295
Linn *v.* McLean 79
Linton *v.* Butz 172
v. Porter 677
Lister *v.* Windmuller 955
Litchfield *v.* Hutchinson 480
Litt *v.* Cowley 890, 892
Littauer *v.* Goldman 680
Little *v.* American Co. 775
v. Paige 306
v. Poole 520

Figures refer to Pages.

Little *v.* Van Syckle 686
v. Woodworth 668
Littler *v.* Holland 189
Livermore *v.* Boutelle 494
v. White 82
Liverpool Borough Bank *v.* Eccles 221
Livingston *v.* Peru Iron Co. 472
Livingstone *v.* Whiting 744
Llansamlet Tin Plate Co., ex parte 924, 935
Lloyd *v.* Brewster 473
v. Johnson 499
v. Lord Say 62
Load *v.* Green 413, 414
Lobb *v.* Stanley 30, 188, 229
Lobdell *v.* Baker 397, 680
v. Hopkins 595
v. Horton 266
v. Stowell 320
Lock *v.* Sellwood 19
Lockart *v.* Bonsall 739
Locke *v.* Stearns 484
Lockett *v.* Nicklin 184, 185, 830
Lockhart *v.* Reilly 861
Lockwood *v.* Ewer 18
Lockyer *v.* Jones 746
Loder *v.* Kekulé 922
Loeb *v.* Flash 470
v. Peters 910, 912
Loeschman *v.* Machin 21
Logan *v.* Attix 774
v. Le Mesurier 272, 317
Lomi *v.* Tucker 613
London *v.* Youmans 477
London Chartered Bank *v.* Lemprière 35
London, &c. R'y *v.* Bartlett 371, 886
v. Fairclough 3
Lonergran *v.* Stewart 6
Long *v.* Anderson 674
v. Hickingbottom 631, 673, 676
v. Hicks 668
v. Millar 187, 193
v. White 132
v. Woodman 483
Longdale Iron Co. *v.* Swift's Iron Works 478
Longley *v.* Daly 493
Longmeid *v.* Holliday 407, 408, 657
Longworth *v.* Mitchell 78
Loome *v.* Bailey 522
Loomis *v.* Bragg 9, 301
Lord *v.* Burbank 771
v. Edwards 667
v. Goddard 479
v. Grow 679, 683
v. Kenny 960
v. Parker 46
v. Price 698, 818, 825
Lord Gallway *v.* Mathew 67
Lorillard *v.* Clyde 598
Loring *v.* Boston 78
v. Cooke 782
Lorymer *v.* Smith 584, 635, 733, 947
Lothrop *v.* Cais 683
Loughnan *v.* Barry 410
Louisville Co. *v.* Lorick 222, 223
Lovatt *v.* Hamilton 560
Love *v.* Ross 960, 961, 963
Lovejoy *v.* Michels 96
v. Murray 91
v. Whipple 533
Lovell *v.* Newton 38
v. St. Louis Mut. Life Ins. Co. 597
Low *v.* Andrews 116
v. Bouverie 479
v. Pew 88
Lowber *v.* Connit 234
Lowe *v.* Harwood 597
Lowell *v.* Henry 781
Lowrey *v.* Murrell 772
Lowry *v.* Dillman 537
v. Mehaffy 234
Loyd *v.* Wight 169, 351
Lucas *v.* Campbell 9, 304
v. Dixon 155, 221
v. Dorrien 161, 814, 833, 846
v. Harper 536
v. Harris 507
v. Wilkinson 769
Lucesco Oil Co. *v.* Brewer 602
Lucy *v.* Monflet 642
v. Mouflet 585
Ludden *v.* Dusenbury 9
v. Hazen 304, 308
v. Hornsby 9
Ludgater *v.* Love 428, 437, 438
Ludlow *v.* Browne 904
v. Hardy 545
Ludwig *v.* Fuller 725
Luey *v.* Bundy 307
Lukens *v.* Aiken 487
Lumber Co. *v.* Bradlee 597
v. Hardware Co. 724
v. Sutton 739
Lumsden *v.* Davies 174
Lungstrass *v.* German Ins. Co. 79
Lunn *v.* Thornton 3, 85, 90
Lupin *v.* Marie 308
Lush *v.* Druse 954
Lyde *v.* Barnard 420
Lynch, ex parte 29
v. Beecher 474, 477
v. Curfman 959
v. Murphy 470
v. O'Donnell 296
Lynde *v.* McGregor 488
Lyon *v.* Bertram 960
v. Culbertson 537
v. Lamb 200
v. Lennon 6
v. Strong 543
Lyons *v.* Barnes 586
v. De Pass 12, 14
v. Hamilton 488
v. Hoffnung 880
v. Stills 606
Lyons Bank *v.* Oskaloosa Packing Co. 537
Lysney *v.* Selby 454
Lytle *v.* The State 536

M.

Maber *v.* Maber 177, 745
Maberley *v.* Sheppard 143, 168
Macbeath *v.* Haldimand 208
Macdona *v.* Swiney 461, 462
Macdonald *v.* Longbottom 187
Macdonell *v.* McKay 134
Macfarlane *v.* Taylor 652

Figures refer to Pages.

McAdams *v.* Cates 482
McAllister *v.* Reab 965
M'Andrew *v.* Chapple 548
M'Bain *v.* Wallace 385
McBean *v.* Fox 474
McBlair *v.* Gibbes 533
McBrayer *v.* Cohen 261
McBride *v.* Silverthorn 95
McCaa *v.* Elam Drug Co. 686
McCabe *v.* McKinstry 6
v. Morehead 673
McCaffrey *v.* Woodin 91
McCalley *v.* Otey 783
McCall *v.* Powell 302
McCandlish *v.* Newman 318
McCarren *v.* McNulty 607
McCarthy *v.* Henderson 42
v. Nash 173
M'Carty *v.* Blevins 91
v. Gordon 543
McCaul *v.* Strauss 198, 259
McCeney *v.* Duvall 961
McCliffen *v.* Baird 677
McClay *v.* Perry 713
McClellan *v.* Scott 470
McClelland *v.* Nichols 302, 306
v. Stewart 651
McClintock *v.* Emick 664, 666
McClintock's Appeal 133
McClung *v.* Kelley 294, 686
M'Cluny *v.* Jackson 775
McClure *v.* Briggs 608
v. Forney 725
v. Jefferson 737
v. Williams 827
McCollum *v.* Huntington 955
McComb *v.* Donald 311
McCombs *v.* Guild 310
M'Comb *v.* Wright 261
M'Combs *v.* M'Kennan 827
M'Conihe *v.* McMann 538
v. New York & N. E. R. R. 793
v. Sawyer 494
McConnell *v.* Hughes 95
v. Murphy 713
M'Cormick *v.* Basal 596, 793
v. Dunville 960
v. Hadden 303, 721
v. Hamilton 794, 954
v. Kelly 668
v. Littler 45
v. Nichols 538
v. Sauson 738
v. Stevenson 307
v. Vanatta 964
McCormick Co. *v.* Martin 607, 736
McCormick Machine Co. *v.* Brower 607
v. Callen 307
v. Chesrown 607
v. Thompson 666
McCormick Harv. M. Co. *v.* Richardson 78
McCotter *v.* Mayor 79
McCown *v.* Mayer 92
McCoy *v.* Artcher 631, 673, 675
McCrae *v.* Young 5
McCraw *v.* Welch 490
McCray Refrigerator Co. *v.* Wood 666, 689
McCreary *v.* Gaines 40
McCrillis *v.* Allen 82, 469, 476
M'Culloch *v.* Eagle Ins. Co. 69, 76, 80
McCulloch *v.* Scott 486
McCully *v.* Swackhamer 492
McDonald *v.* Bewick 76
v. McDonald 91
v. McPherson 913
M'Donald *v.* Hewett 296
McDonough *v.* Sutton 294
McDougall *v.* Elliott 323
McDowell *v.* Simms 486
McElroy *v.* Buck 225
v. Seery 224
McElwee *v.* Metropolitan Lumber Co. 296, 855
M'Ewan *v.* Smith 801, 805, 807, 812, 844
McEwen *v.* Morey 86
McFarland *v.* Farmer 307
v. Newman 665, 683
McFatridge *v.* Robb 673
McFetridge *v.* Piper 915, 916
McGaughey *v.* Richardson 663
McGavock *v.* Puryear 538
McGee *v.* Prouty 781
McGibbon *v.* Schlessinger 826, 827
McGiffin *v.* Baird 673, 677
McGinn *v.* Holmes 775
McGinnis *v.* Savage 311
McGirr *v.* Sell 304
McGoren *v.* Avery 81
McGowin *v.* Remington 957
McGrath *v.* Cannon 398
v. Gegner 605, 781, 955
McGraw *v.* Fletcher 672, 686
v. Solomon 478
McGregor *v.* Harris 549, 951, 966
McGuire *v.* James 493
McHose *v.* Fulmer 939, 954
McIntosh *v.* Brill 79
v. Hill 302
M'Intyre *v.* Kennedy 773, 775
v. Kline 351
v. Parks 538, 543
McKanna *v.* Merry 42, 43
McKay *v.* Riley 957
M'Kean *v.* M'Ivor 412
McKee *v.* Garcelon 468, 725
v. Judd 41
McKellar *v.* Wallace 745
McKenney *v.* Haines 956
McKenzie *v.* British 62
v. Weinnann 469
McKearcher *v.* Curtis 955
McKibbin *v.* Martin 468, 492
McKindly *v.* Dunham 777
McKinnell *v.* Robinson 500
McKinney *v.* Andrews 538
v. Bradlee 7, 606
McKinnon Mfg. Co. *v.* Alpena Fish Co. 687
McKnight *v.* Devlin 673
v. Dunlop 173, 955
McKown *v.* Furgason 480
McLane *v.* Johnson 494
McLaren *v.* Hall 774
McLaughlin *v.* Horton 683
v. Piatti 324
McLay *v.* Perry 713
McLean *v.* Breithaupt 711, 915
v. Brown 567

Figures refer to Pages.

McLean *v.* Richardson 827
McLellan *v.* North British Ins. Co. 296
McLendon *v.* Frost 779
McMahon *v.* Sloan 41
McMaster *v.* Merrick 779
McMillan *v.* Fox 598
v. Larned 300
v. Vanderlip 711
M'Mullen *v.* Helberg 186, 196, 226, 241, 635
v. Riley 138
v. Williams 667
McMurray *v.* Taylor 774
McMurtry *v.* Ramsey 538
McNail *v.* Ziegler 855
McNamara *v.* Edmister 719
McNaughter *v.* Cassaly 794
McNaught *v.* Dodson 793
McNeil *v.* McCamley 775
McPherson *v.* Gale 328
v. Walker 596
McQuaid *v.* Ross 666, 689
McRea *v.* Merrifield 303
Mack *v.* Drummond Tobacco Co. 8
v. Lee 543
v. Story 300, 303
Mackay *v.* Commercial Bank 442, 443, 444, 445, 446
Mackellar *v.* Pillsbury 320, 491
Mackey *v.* Dick 550
Mackinley *v.* M'Gregory 473
Maclay *v.* Harvey 78
Maclean *v.* Dunn 236, 259, 785, 817, 819, 824, 825
Macnee *v.* Gorst 838
Macomber *v.* Parker 297, 728
Macon Railroad *v.* Meador 916
Macdona *v.* Swiney 461, 462
Mactier *v.* Frith 72, 79
Macullar *v.* McKinley 469
Maddison *v.* Alderson 110, 124, 139, 234
Mader *v.* Jones 678, 682
Madison *v.* Zabriskie 235
Magee *v.* Billingsley 297, 958
v. Carmack 772
v. Scott 542
Magruder *v.* Gage 349
Mahaffey *v.* Ferguson 681
Mahalen *v.* The Dublin, &c. Distillery Co. 187, 219
Maher *v.* Riley 955, 956
v. Swift 487
Mahler *v.* Schloss 8
Mahan *v.* United States 3
Mahone *v.* Reeves 397
Mahood *v.* Tealza 538
Maillard *v.* Duke of Argyle 755
Maize *v.* Bowman 92
Makin *v.* London Rice Mills Co. 733
v. Watkinson 559
Malcolm *v.* Loveridge 477
Mallalieu *v.* Hodgson 465
Mallan *v.* May 498, 514
Mallory *v.* Willis 5
Manby *v.* Scott 32
Mandel *v.* Buttles 960
Mandlebaum *v.* Gregovich 540
Manhattan Trust Co. *v.* Sioux City R'y Co. 304
Manier *v.* Appling 76
Mann *v.* Glauber 350
v. National Oil Co. 826
v. Stowell 473
Manning's case 19
Manning *v.* Albee 480
v. Lunn 752
Manny *v.* Glendinning 608
Mansfield *v.* Cheever 780
v. Converse 5
v. Triggs 398
Manton *v.* Gammon 795
Manufacturing Co. *v.* Feary 738
v. Hanson 738
v. Wood 965
Marble *v.* Moore 290
v. Standard Oil Co. 83
Marchesseau *v.* Chaffee 955
Margetson *v.* Wright 614
Marina, The 302
Marine Bank *v.* Wright 374
Markle *v.* Hatfield 771
Marks *v.* Van Eeghen 597
Markwald *v.* Creditors 913
Marmont *v.* State 10
Marner *v.* Banks 13
Marquette Man. Co. *v.* Jeffery 306
Marquis of Hastings *v.* Thorley 751, 752
Marryatts *v.* White 765
Mars *v.* Conner 775
Marsden *v.* Cornell 81
v. Goode 751
Marsh, in re 36
v. Hutchinson 33
v. Hyde 170, 173
v. Keating 12, 16
v. Low 959
v. McPherson 965
v. Pedder 755
v. Pier 81, 473
v. Rouse 163, 172
v. Titus 6
v. Webber 965
v. Wickham 7
Marshall *v.* Bacheldor 300
v. Drawhorn 668
v. Duke 672
v. Ferguson 133, 134, 170
v. Green 120, 121, 125, 126, 133, 162, 164
v. Jamieson 80
v. Lynn 189
v. Marshall 774
v. Morgan 680
v. Perry 959, 961
v. Rutton 33
Marsheutz *v.* McGreevy 965
Marston *v.* Baldwin 301
v. Knight 959
v. Simpson 603
Marten *v.* Gibbon 524
Martin *v.* Adams 4, 606
v. Black 78
v. Clarke 536
v. Hurlburt 298
v. Jordan 480
v. Mathiot 309
v. Maxwell 961
v. Pewtress 410

Figures refer to Pages.

Martin *v.* Podger 461
v. Reid 18, 19
v. State 10
v. Wade 535
v. Wallis 165
Martin Barris Co. *v.* Jackson 486
Martin Safe Co. *v.* Norton 307
Martindale *v.* Booth 462
v. Smith 268, 269, 578, 791, 816, 825, 853, 854, 903
Martineau *v.* Kitching 274, 742
Martz *v.* Putnam 297
Marvin *v.* Wallace 153, 164, 837
Marvin Safe Co. *v.* Norton 312
Mary and Susan, The 349
Maryland Fertilizing Co. *v.* Lorentz 601
Mason *v.* Bickle 311
v. Chappell 689
v. Crosby 423
v. Decker 221, 234, 794, 820, 826
v. Great Western R. R. 374
v. Johnson 311
v. Lickbarrow 697
v. Lothrop 8
v. Philips 776
v. Smith 738
v. Thompson 296
v. Wilson 909
v. Wright 42, 43
Massey *v.* Sladen 743
v. State 8
Masson *v.* Bovet 480
Master of Gunmakers *v.* Fell 509
Masters, in re 516
Mastin *v.* Marlow 91
Matasce *v.* Hughes 767, 775
Materne *v.* Horwitz 539
Matheny *v.* Mason 673, 677
Matheson *v.* Kelly 782
Mathews *v.* Smith 303
Mathewson *v.* Fitch 536
Mathias *v.* Yetts 434
Matteson *v.* Ellsworth 767, 775
v. Holt 959
Matthewman's case 35
Matthews *v.* Baxter 32
v. Bliss 472
v. Fuller 960
v. Lucia 299, 310
v. McElroy 306
v. Parker 617
Matthiessen *v.* McMahon 45
Mattingly *v.* Wulke 494
Mattison *v.* Westcott 721
Maulding *v.* Steele 826
Maurin *v.* Lyon 224
Maxted *v.* Fowler 48
Maxwell *v.* Brown 169
v. Brown Shoe Co. 470
v. Day 773
v. Tufts 307
May *v.* Gamble 774
v. Hoaglan 318
v. Tallman 730
v. Walter 468
May *v.* Ward 112, 225
Mayer *v.* Dean 666, 671
v. Dwinell 959
v. Nyas 759
Mayer *v.* Wilkins 490
Mayfield *v.* Wadsley 126, 131
Mayhew *v.* Mather 83
Maynard *v.* Maynard 482
v. Tabor 78
Mayor *v.* Pyne 711
Mayor of Berwick *v.* Oswald 556
Mayor of Dublin *v.* Hayes 506
Meacham *v.* Collignon 477
Mead *v.* Case 113
v. Dogolyer 80, 711
v. Gardiner 493
Meade *v.* Smith 725
Meader *v.* White 542
Meadows *v.* Meadows 261
Meagley *v.* Hoyt 961
Means *v.* Randall 374
Means *v.* Williamson 172, 720
Mears *v.* Waples 303, 477
Mechanics', &c. Bank *v.* Farmers', &c. Bank 40
Medbury *v.* Watson 480
Medicke *v.* Sauer 306
Medina *v.* Stoughton 611, 624
Mee *v.* McNider 331
Meehan *v.* Sharp 132, 171
Meeker *v.* Johnson 299
v. Wilson 729
Megaw *v.* Molloy 63
Mehan *v.* Thompson 773
Mehlberg *v.* Tisher 773, 775
Meickley *v.* Parsons 669
Meiklereid *v.* West 869
Meincke *v.* Falk 113
Melby *v.* Oshorne 671
Melchert *v.* Am. Un. Tel. Co. 537
Melchoir *v.* McCarty 542
Meldrum *v.* Snow 7
Melledge *v.* Boston Iron Co. 773
Mellish *v.* Motteux 454
Memphis, &c. R. R. Co. *v.* Freed 909
Mentz *v.* Newitter 224
Mercantile and Exchange Bank *v.* Gladstone 864
Mercer *v.* Cheese 756
Merchant *v.* Chapman 543
Merchant Banking Co. *v.* Phœnix Bessemer Steel Co. 807, 810, 812, 853, 863, 867, 869
Merchants' National Bank *v.* Hibbard 321, 856
v. Spicer 235
v. Bangs 266, 350, 373
Meredith *v.* Ladd 535
v. Meigh 144, 155, 164, 714, 833
Merguire *v.* O'Donnell 963
Meriden Nat. Bank *v.* Gallaudet 679
Merriam *v.* Cunningham 43
v. Field 666, 672, 684, 686
v. Lapsley 79
v. Wolcott 397, 679, 680
Merrick *v.* Boury 775
v. Bradley 670
Merrifield *v.* Baker 9
Merrill *v.* Chase 9
v. Hunnewell 322
v. Meachum 488
v. Nightingale 688, 965, 966

Figures refer to Pages.

Merrill *v.* Parker 719
Merrimack Man. Co. *v.* Quintard 954
Merriman *v.* Chapman 683
Merritt *v.* Clason 234
v. Earle 540
v. Robinson 482
Mersey Steel Co. *v.* Naylor 576, 580, 582, 583, 584, 602, 604, 935
Mertens *v.* Adoock 816, 818
Mesnard *v.* Aldridge 614
Messer *v.* Woodman 172, 293, 324, 723
Messmore *v.* The N. Y. Shot, &c. Co. 938, 957, 964
Methwold *v.* Walhank 505
Metropolitan Bank *v.* Hooley 517
Mews *v.* Carr 240
Meyer *v.* Everth 636
v. Richards 81, 397
v. Stone 777
Meyerstein *v.* Barber 851, 852, 894, 895
Michael *v.* Bacon 538
v. Curtis 171
Mich. Cent. R. R. Co. *v.* Phillips 304, 374
Michigan State Bank *v.* Gardner 40
Middlebury College *v.* Chandler 42
Middlesex Co. *v.* Osgood 719
Middleton *v.* Brown 514
Midland Ins. Co. *v.* Smith 16
Midland R'y Co. *v.* Ontario, &c. Mills 604
Mighell *v.* Dougherty 113
Milburn *v.* Belloni 963
Miles, ex parte 860, 872, 874, 875, 877, 909, 913
v. Edsall 9
v. Gorton 757, 799, 802, 812, 829, 835, 853, 863, 887
v. Miller 955, 956
Milgate *v.* Kebble 818, 825
Millar *v.* Fitzgibbons 115
Miller *v.* Ammon 540
v. Barber 480, 487
v. Hyde 60, 81
v. McDonald 670
v. Moore 603, 684
v. Pancoast 468, 492
v. Post 539, 540
v. Race 18
v. Smith 731
Milliken *v.* Chapman 482
v. Skillings 959, 960
v. Warren 854, 855
Milliman *v.* Neher 90, 92
Mills *v.* Auriol 556
v. Ball 867, 885, 896
v. Bayley 557
v. Dunham 511, 515
v. Fowkes 764, 766
v. Hunt 137
Milner *v.* Patton 538
v. Post 507
Milnes *v.* Duncan 390
v. Gery 94
Milton *v.* Rowland 960
Milwaukee Boiler Co. *v.* Duncan 666, 689
Miner *v.* Bradley 397
Minett *v.* Forrester 761
Ming *v.* Corbin 398
Minneapolis Harvester Works *v.* Hally 397, 301
Minneapolis, &c. Railway *v.* Columbus, &c. Mills 79
Minnesota Oil Co. *v.* Collier Lead Co. 78, 80
Minnesota Thresher Mfg. Co. *v.* Lincoln 607
Minock *v.* Shortridge 44
Mirabita *v.* Imperial Ottoman Bank 370, 372, 373
Mires *v.* Solebay 288
Misner *v.* Granger 686
Mississippi Mills *v.* Bank 911
Mitchell *v.* City of Glasgow 532
v. Cockburne 499
v. Duhose 683
v. Gile 8
v. King 751
v. Lapage 64, 388
v. Le Clair 332
v. Newhall 594
v. Reynolds 508, 513
v. Scott 535
v. Smith 539
v. West 468
v. Winslow 91
v. Worden 572
Mixed Moneys, case of 747
Mixer *v.* Coburn 682
v. Cook 299
v. Howarth 111, 113
M'Minn *v.* Richmonds 42
Moakes *v.* Nicolson 86, 355, 364, 367, 372
Moale *v.* Buchanan 223
Mobile Savings Bank *v.* Fry 325
Mockbee *v.* Gardner 672, 676
Mody *v.* Gregson 636, 639, 642, 653, 656, 735
Moeller *v.* Young 836
Moens *v.* Heyworth 429
Mohoney *v.* Evans 42
Mohr *v.* Boston & Albany R. R. 905, 913
v. Miesen 537
Moline Plow Co. *v.* Rodgers 607
Moline Scale Co. *v.* Beed 317
Molitor *v.* Robinson 491
Moller *v.* Tuska 474
Mollett *v.* Robinson 207, 244
v. Wackerbath 260
Mollison *v.* Lockhart 914
Molton *v.* Camroux 32
Moncrief *v.* Wilkinson 482
Moncrieff *v.* Goldsborough 485
Mondel *v.* Steel 63, 610, 944, 948, 849, 951
Monjo *v.* French 309
Monk *v.* Whittenbury 21
Monte Allegre, The 670
Montefiori *v.* Montefiori 497
Montgomery *v.* Hunt 727
v. Middleton 559
Montgomery Iron Works *v.* Smith 299
Moody *v.* Brown 351, 793, 794
v. Mahurin 781
v. Wright 91
Mooers *v.* Gooderham 686
Moon *v.* Northern Pacific R'y Co. 408
Mooney *v.* Davis 469
v. Miller 483
Moore *v.* Barber Paving Co. 689
v. Byrum 92
v. Campbell 189, 191, 258, 712

Figures refer to Pages.

Moore *v.* King 663
v. Loll 857
v. McKinley 682, 683
v. Moore 3
v. Mountcastle 222
v. Murdock 540, 541
v. Perrott 318
v. Piercy 7
v. Pierson 79
v. Potter 826
v. Sibbald 8
Moran *v.* Pitt 17
Mordis *v.* Kennedy 773
More *v.* Lott 910, 916
Morehead *v.* Hunt 453, 485
Morehouse *v.* Comstock 663
Moreland *v.* Myall 134
Mosewood *v.* South Yorkshire R'y Co. 464
Morford *v.* Peck 474
Morgan *v.* Bain 466, 696, 786, 787
v. Birnie 558
v. Bogue 492
v. Gath 59, 711
Morgan *v.* Malleson 3
v. McKee 398, 603
v. Olvey 489
v. Perkins 298
v. Richardson 776
v. Taylor 724
Morley *v.* Attenborough 611, 622, 623, 626, 627, 628, 631, 674
v. Boothby 200
Morrill *v.* Blackman 471
v. Noyes 91
v. Wallace 684
Morris *v.* Bradley Fertilizer Co. 690
v. Cleasby 762
v. Cohn 794
v. French 132
v. Levison 713
v. Lynde 9
v. Rexford 474
v. Shryock 916
v. Talcott 472
v. Thompson 672, 682
v. Wibaux 826
Morrison *v.* Adams 478
v. Dingley 325
v. Gray 860
v. Oium 726
v. Shuster 471
v. Smith 774
v. Universal Marine Ins. Co. 416
v. Welty 774
v. Woodby 322, 328
Morrow *v.* Reed 298
Morse *v.* Brackett 398, 965
v. Hutchins 964
v. Moore 679, 965
v. Shaw 470
v. Union Stock Yards 686
v. Wheeler 44
Morse Twist Co. *v.* Morse 536
Morss *v.* Stone 7
Mortimer *v.* Bell 451
v. M'Callan 88
Morton *v.* Dean 116, 221, 223, 225
v. Lamb 576
v. Steward 42
Morton *v.* Tibbett 139, 143, 144, 146, 147, 148, 149, 150, 151, 157, 159, 168
Moseley *v.* Shattuck 304
Moses *v.* Lawrence County Bank 224
v. Mead 662, 682, 684, 692
v. Rasin 955
Mosher *v.* Post 481
Moss *v.* Adams 779
v. Meshew 318
v. Sweet 7, 66, 585, 586
Mostyn *v.* West Mostyn Coal Co. 387
Mottram *v.* Heyer 915, 917
Mouflet *v.* Cole 510
Moulton *v.* Kershaw 77
Mount *v.* Harris 306
Mount Hope Iron Co. *v.* Buffington 296, 351, 726
Mowbray *v.* Cady 606
Mowrey *v.* Walsh 39, 476
Moyce *v.* Newington 15, 18, 414, 419, 424
Moyer *v.* Shoemaker 397
Muckey *v.* Howenstine 720
Mucklow *v.* Mangles 279, 347
Mudge *v.* Oliver 81
Mullain *v.* Thomas 666, 672
Muller *v.* Eno 959, 961, 962
v. Ponder 903
Mullett *v.* Mason 953
Mulliken *v.* Millar 471
Mulliner *v.* Florence 823
Mumford *v.* Gething 187, 509, 512
v. McPherson 666
Mumper *v.* Rushmore 41
Munson *v.* Washband 43
Murch *v.* Wright 9, 303
Murchie *v.* Cornell 686
Murphy *v.* Boese 239
v. Hubert 487
v. Simpson 543
v. Webber 779
Murray *v.* Brooks 671
v. Gilbert 134
v. Goodridge 293
v. Jennings 964
v. Mann 424, 944
Murry *v.* Ocheltree 537
Musick *v.* Dodson 46
Muskegon Booming Co. *v.* Underhill 296
Mussen *v.* Price 741
Mutual Life Ins. Co. *v.* Hunt 45
Myatts *v.* Bell 774
Myer *v.* Car Co. 304
v. Wheeler 602, 683, 956
Myers *v.* Baymore 40
v. Harvey 309
v. Meinrath 541
v. Sanders 45
v. Smith 78
v. Townsend 960
v. Trestcott 78

N.

Nash *v.* Brewster 320
v. Jewett 44
v. Lull 397
Nashua Iron Co. *v.* Brush 689
Nat. Bank *v.* Railroad Co. 299

Figures refer to Pages.

Nat. Bank *v.* Sprague 485
Nat. Bank of Greenbay *v.* Dearborn 727
Nat. Bank of Newburgh *v.* Bigler 767, 774, 779
Nat. Benefit Co. *v.* Union Hospital Co. 536
Nat. Car Builder *v.* Cyclone Plow Co. 9
Nat. Cash Register Co. *v.* Coleman 299
National Exchange Co. of Glasgow *v.* Drew 437, 438, 444
National Savings Bank Assoc. *v.* Tranah 759
Nattin *v.* Riley 303
Naugatuck Cutlery Co. *v.* Babcock 469
Navulshaw *v.* Brownrigg 841
Naylor *v.* Dennie 909, 910, 915
N. B. and N. S. Land Co. *v.* Kirk 134
Neaffie *v.* Hart 737
Neal *v.* Gillaspy 676
v. Gregory 495
v. Williams 477, 495
Neate *v.* Ball 466
Needles *v.* Needles 91
Nellis *v.* Clark 487
Neely *v.* Jones 778
v. Wood 487
Neff *v.* Clute 480
v. Landis 476
Neill *v.* Whitworth 565
Neilson *v.* James 532
Neldon *v.* Smith 600
Nelson *v.* Brown 6
v. Chicago, &c. R. R. Co. 374
v. Cowing 671
v. Duncombe 32
v. Nelson 133
v. Plimpton Co. 794, 953
v. Robson 781
v. Stocker 24
Nelson Mitchell *v.* City of Glasgow Bank 532
Nepoter, The 897
Nesbit *v.* Burry 294, 319
Nettleton *v.* Sikes 133
Nevius *v.* Schofield 854
New *v.* Swain 853
Newark City Ice Co. *v.* Fisher 793
Newbery *v.* Wall 225, 261, 686
Newbigging *v.* Adam 437
Newby *v.* Sharpe 554
New Brunswick R'y Co. *v.* Conybeare 408, 444
Newcomb *v.* Cabell 727
Newcombe *v.* De Roos 58
Newell *v.* Radford 202
New England, &c. Co. *v.* Standard Worsted Co. 225, 235, 323, 327
New Eng. Iron Co. *v.* Gilbert Elev. R. R. Co. 788
Newhall *v.* Central Pacific R. R. 911
v. Kingsbury 301
v. Langdon 322
v. Vargas 905, 908, 909, 917, 918
New Haven Wire Co. Cases 293
New Haven, &c. Co. *v.* Campbell 856
Newington Local Board *v.* Cottingham Local Board 554
Newman *v.* Morris 110
Newmarch *v.* Clay 765
New Market Iron Foundry *v.* Harvey 795
Newsom *v.* Thornton 862, 865
Newton *v.* Winchester 605
Newtownards Commissioners *v.* Woods 14
N. H. Mutual Fire Ins. Co. *v.* Noyes 42, 44
N. Y., &c. Co. *v.* Howell 793
N. Y. State Bank *v.* Fletcher 775
Nibert *v.* Baghurst 542
Nichol *v.* Godts 589
Nicholle *v.* Plume 157
Nichols *v.* Ashton 9
v. Crandall 666
v. Johnson 224
v. Marsland 554
v. Michael 471, 475
v. Morse 720, 736, 797
v. Mudgett 535
v. Patten 728
v. Pinner 472
v. Scranton Steel Co. 596
Nicholson *v.* Bower 154, 466
v. Bradfield Union 710, 733
v. Hood 530
v. Paston 794
v. Taylor 294
v. Wilborn 44
Nicholls *v.* Nordheimer 662, 670
v. Stretton 513, 515, 516
Nickerson *v.* Darrow 40
Nickly *v.* Thomas 482
Niell *v.* Morley 32
Nightingale *v.* Chafee 775
Niver *v.* Best 487
Nix *v.* Olive 891
Nixon *v.* Brown 41
Noakes *v.* Morey 180
Noble *v.* Adams 410, 413, 760, 911
v. Bosworth 133
v. Fagnant 663
v. Nugent 777
v. Smith 730
v. Ward 189, 191
Nobles *v.* Bates 536
Noe *v.* Hodges 781
Noel *v.* Murray 775
Nogales Club *v.* State 10
Non-Magnetic Watch Co. 374
Noonan *v.* Hartford Ins. Co. 599
Norfolk R. R. Co. *v.* Barnes 374
Nofsinger *v.* Ring 599
Norman *v.* Phillips 155, 157, 164, 714, 833
Norrington *v.* Wright 578, 583, 601, 602, 603
Norris *v.* Blair 226
v. Harris 398
v. Parker 668
v. Spofford 96
North *v.* Forest 131
v. Williams 309
Northcoate *v.* Doughty 31
Northey *v.* Field 867, 891
Northington, ex parte 45
Northup *v.* Foote 543
North Hudson R'y Co. *v.* Anderson 771
North Pacific Co. *v.* Kerron 731
North-Western Cordage Co. *v.* Rice 679
North-Western Iron Co. *v.* Meade 78
Northwood *v.* Rennie 662, 960
Norton *v.* Dreyfuss 737
v. Gale 96, 226
v. Herron 208
v. Pilger 307

Figures refer to Pages.

Norton *v.* Sewall 408
v. Woodruff 6
v. Young 474
Notting Hill, The 926
Noyes *v.* Marsh 957
Nugent *v.* Jacobs 489
v. Smith 552
Nunes *v.* Carter 465
Nutter *v.* Wheeler 7
N. Y. Bank *v.* Fletcher 775
Nysewander *v.* Lowman 964

O.

Oakes *v.* Turquand 409, 417, 418, 447
Oakford *v.* Drake 860
Oakland Bank *v.* Applegarth 781
Oakley *v.* Morton 598
Oakman *v.* Rogers 226
O'Bannon *v.* Relf 737
Ober *v.* Blalock 672, 679, 687
v. Carson 297, 326
v. Smith 349
Oberdorfer *v.* Meyer 479
Obermier *v.* Core 855
O'Brien *v.* Ballou 490
v. Norris 910
Ocean Steamship Co. *v.* Ehrlich 912
Ockington *v.* Richey 324
O'Connor *v.* Varney 962
Odell *v.* Boston & Maine R. R. 297, 349, 721
Odessa Tramways Co. *v.* Mendel 498
O'Donald *v.* Constant 470
O'Donnell *v.* Clinton 479
v. Leeman 226
v. Sweeney 542
Oeltrichs *v.* Trent Valley Co. 584
Oester *v.* Sitlington 299
Official Receiver *v.* Tailby 87
Offley *v.* Clay 761
Ogden *v.* Hall 208
v. Marshall 794
Ogg *v.* Shuter 340, 368, 371, 372, 373, 701
Ogilvie *v.* Foljambe 232
Ogle *v.* Atkinson 860, 867
v. Earl Vane 189, 190, 706, 707, 709, 922, 923, 924
Oglesby *v.* Yglesias 208
O'Hanlan *v.* Great Western R'y Co. 929
Ohio, &c. R. R. Co. *v.* Kerr 477
Okell *v.* Smith 585, 649
Old Colony R. R. Co, *v.* Evans 234
Old Dominion Steamship Co. *v.* Burckhardt 311
Oldham *v.* Kerchner 964
Oliver *v.* Fielden 548
v. Hunting 187, 223
v. Moore 351
v. Sale 480
Ollivant *v.* Bayley 63, 646, 649
Olmsted *v.* Hotailing 469
v. Niles 134
Olney *v.* Howe 4
Olyphant *v.* Baker 290, 720
Omaha Coal Co. *v.* Fay 686
Omoa Coal and Iron Co. *v.* Huntley 869
Oneida Mfg. Co. *v.* Lawrence 684
O'Neil *v.* Crain 225
v. Garrett 915
v. McIlmoyle 294
v. N. Y. Co. 113
v. Vermont 374
Onslow *v.* Eames 617
Oppenheim *v.* Fraser 549
v. Russell 864, 885
Orcutt *v.* Nelson 350, 543
Oregon Steam Nav. Co. *v.* Winsor 536
Oriental Bank *v.* Haskins 488
Orman *v.* Hager 112
Ormrod *v.* Huth 400, 426, 431, 611, 624
Ormsby *v.* Budd 666
v. Dearborn 474
v. Machir 318
O'Rourke *v.* Hadcock 301
v. O'Rourke 540, 543
Orr *v.* Murdock 890
Osborn *v.* Nicholson 670
v. South Shore Lumber Co. 301
Osborne *v.* Flood 960
v. Francis 607
v. Gantz 684
v. Moss 487
v. Rogers 67
v. Tuller 490
Osborne Co. *v.* Plano Mfg. Co. 8, 307
Osgood *v.* Bander 602
v. Lewis 677, 681
Osterhout *v.* Roberts 81
O'Sullivan *v.* Overton 224
Oswego Starch Factory *v.* Lendrum 470, 477
Otis *v.* Adams 603
v. Payne 79
v. Sill 90
Ott *v.* Sweatman 309
Ottawa Bottle Co. *v.* Gunther 688
Otto *v.* Alderson 682
Outon *v.* Rodes 535
Outwater *v.* Dodge 169, 296
Overton *v.* Phelan 688
Owen *v.* Legh 126
Owens *v.* Denton 522, 745
v. Dunbar 686
v. Lewis 134
v. Porter 526
v. Weedman 855
Owenson *v.* Morse 755
Oxendale *v.* Wetherell 59, 80, 710, 711

P.

Pacific Coast Elevator Co. *v.* Bravinder 4, 294
Pacific Guano Co. *v.* Mullen 397, 688
Pacific Iron Works *v.* Long Island R. R. Co. 331, 720
v. Newhall 688
Packard *v.* Dunsmore 726
v. Getman 350
v. Wood 726
Packer *v.* Gillies 13
v. Hinckley Locomotive Works 778
Paddock *v.* Strobridge 459, 482
Page *v.* Carpenter 321
v. Cowasjee Eduljee 629, 823, 824, 825

Figures refer to Pages.

Page *v.* Morgan 151, 153
v. Parker 481, 964
Paget *v.* Perchard 461
Paice *v.* Walker 207, 208
Paige *v.* O'Neal 477
v. Ott 80
Paine *v.* Dwinel 773
v. Fulton 180
v. Voorhees 775
Palliser *v.* Gurney 37
Palmer's Appeal 390
Palmer *v.* Banfield 607, 737
v. Bate 507, 529
v. Breen 605
v. Hand 856
v. Hatch 671
v. Phœnix Mut. Ins. Co. 776
v. Stephens 235
Palo Alto, The 78
Pam *v.* Vilmar 7
Pangborn *v.* Ruemenapp 474, 475
Paradine *v.* Jane 556
Parana, The 926
Pardee *v.* Kanady 788
Parfitt *v.* Jepson 448, 452
Paris Skating Rink Co., in re 517
Park *v.* Darling 39
v. Richardson 959
Parke Co. *v.* White River Co. 9, 301, 303
Parker *v.* Baxter 308
v. Brynes 917
v. Coburn 96
v. Gossage 865
v. Jacobs 92
v. McIver 915
v. Moulton 483
v. Palmer 635, 734
v. Patrick 14, 399, 414
v. Pettit 597
v. Pitts 542
v. Pringle 965
v. Schenck 113
v. Staniland 120, 121, 127
v. Wallis 143, 144, 156, 157
v. Winslow 208
Parkinson *v.* Lee 457, 611, 633, 635, 645, 652, 653
Parkman *v.* Welch 494
Parks *v.* Allen 783
v. Hall 731
v. Lancaster 474
v. Morris Axe Co. 963
Parmlee *v.* Adolph 308, 486
v. Catherwood 306
Parris *v.* Roberts 308
Parrott *v.* Colby 767, 774
Parsons *v.* Loucks 110, 113
v. McKinley 486
v. Sexton 941, 944
v. Sutton 956
v. Thompson 505
Partee *v.* Bedford 774
Parton *v.* Crofts 255, 257
Partridge *v.* Rubin 479
v. Wilsey 113
v. Woodin 720
Paschal *v.* State 8
Pash *v.* Weston 304
Pasley *v.* Freeman 402, 405, 421, 426, 611, 612, 624, 631, 658
Passaic Man. Co. *v.* Hoffman 115
Passinger *v.* Thorburn 963
Patee *v.* Pelton 673
Pateshall *v.* Tranter 950
Paton *v.* Duncan 592
Patrick *v.* Bowman 78
v. Meserve 540, 726
Patten's Appeal 905, 918
v. Smith 490
v. Thompson 860, 863, 864
Patterson *v.* Delorme 78
v. McDougall Distilling Co. 775
Pattison's Appeal 126
Patton *v.* McCane 305
Paul *v.* Hadley 482
Paulsen *v.* Hall 672
Pawelski *v.* Hargreaves 113
Pawson *v.* Watson 434
Paxton *v.* Meyer 794
Payne *v.* Batterson 308
v. Cave 53, 55
v. Rodden 672, 677
v. Shadbolt 836
v. Whale 944
v. Wilson 300
Pea *v.* Pea 133
Peabody *v.* Fenton 479
v. Maguire 299
v. Speyers 132, 222
Peacock *v.* Pursell 759
Peak *v.* Frost 965
Pearce *v.* Blackwell 483
v. Brooks 501
v. Davis 755
v. Gardner 223
v. Watts 61
Pearl *v.* M'Dowell 45
Pearse *v.* Pettis 475
Pearson, ex parte 345
v. Dawson 807, 812
v. Howe 480
v. Mason 794
v. Scott 762
Pease *v.* Copp 736, 737
v. Gloahec 399, 409, 415, 418, 897
v. Sabin 688
Pechell *v.* Watson 517
Peck *v.* Armstrong 686
v. Jenison 481
v. Land 489, 490
v. List 454, 485
v. Heurich 536
v. Vandemark 222
Peckham *v.* Davis 677
Peden *v.* Moore 966
Pedrick *v.* Porter 483
Peek *v.* Derry 432, 433, 434, 435
v. Gurney 403, 404, 408, 427, 432, 456
v. Heim 309
v. North Staffordshire R'y Co. 195
Peel *v.* Shepherd 778
Peer *v.* Humphrey 11, 14, 16
Pegram *v.* Carson 40
Pegueno *v.* Taylor 911
Peirce *v.* Corf 187, 194, 198, 216, 241
Pellam *v.* Aldrich 489
Pellecat *v.* Angell 502

Figures refer to Pages.

Pellew *v.* Wonford 702
Peltier *v.* Collins 226, 262
Pemherton *v.* Vaughan 512
Pembroke Iron Co. *v.* Parsons 600
Pence *v.* Langdon 474, 486
Penchen *v.* Imperial Bank 674
Pender *v.* Fobes 666
Peninsular Stove Co. *v.* Ellis 470, 478
Penn *v.* Smith 826
Penn. Ins. Co. *v.* Crane 480
Penn. R. R. Co. *v.* Am. Oil Works 918
v. Titusville, &c. Road Co. 954
Pennell *v.* Dawson 462
v. McAfferty 736
Penniman *v.* Hartshorn 225, 234, 235
Pennington *v.* Jones 91
Pennock's Appeal 454
Penuock *v.* Coe 91
Pennybacker *v.* Laidley 472
Pennypacker *v.* Umherger 783
People *v.* Adelphi Club 10
v. Andrews 10
v. Beebe 132
v. Haynes 721
v. Shriver 374
v. Soule 10
People's Bank *v.* Kurtz 680
People's Sav. Bank *v.* Norwalk 783
Peoria Mfg. Co. *v.* Lyons 304
Peoria Co. *v.* Turner 680
Perdicaris *v.* Trenton City Bridge 795
Perkins *v.* Bank 9, 90
v. Clay 536
v. Cunningham 544
v. Douglas 7, 305, 606
v. Lougee 470
v. Whelan 677
Perks *v.* Mylrea 37
Perley *v.* Balch 397, 486, 487, 966
Perlman *v.* Satorius 471, 543
Perrin *v.* Wilson 43
Perrine *v.* Barnard 854
v. Cooley 667
v. Serrell 960
Perry *v.* Barnett 532
v. Foster 490
v. Johnston 689
v. Mt. Hope Iron Co. 80, 739
v. Smith 776
v. Young 308
Perrymau *v.* Wolffe 537
Peru *v.* Turner 78
Peter *v.* Beverley 767
Peters *v.* Anderson 764
v. Cooper 956
v. Fleming 25
v. Gooch 397
v. Opie 547
Peters Box Co. *v.* Lesh 469, 476
Peterson *v.* Ayre 920
v. Steiner 477
v. Tufts 307
v. Walter A. Wood Co. 961
Petrie *v.* Hannay 499, 500
v. Stark 826
Pettingill *v.* Elkins 727
Pettitt *v.* Mitchell 733
Petty *v.* Roberts 45
Pettyplace *v.* Groton Bridge Co. 306
Pew *v.* Lawrence 318
Pfistner *v.* Bird 298
Phelps *v.* Comber 860, 870, 891, 892, 903, 918
v. Cutler 726
v. Hubbard 595, 790, 827
v. McGee 794, 955
v. Murray 91
v. Stillings 225
v. Whitaker 667
v. Willard 722
v. Worcester 42
Phifer *v.* Erwin 95
Philadelphia Coal Co. *v.* Hoffman 679
Philadelphia, &c. R. R. Co. *v.* Wireman 349
Philadelphia, &c. Co. *v.* Woelpper 91
Philbrook *v.* Eaton 719
Phillimore *v.* Barry 229
Phillips *v.* Bistolli 61, 141, 168
v. Bullard 773
v. Dickson 861
v. Foxall 403
v. Huth 840
v. Lloyd 42
v. Moses 778
v. Ocmulgee Mills 92, 170, 320
v. Reitz 491
v. Winslow 91
Phillipps *v.* Bateman 200
Philpot *v.* Sandwich Man. Co. 44
Philpott *v.* Jones 526
Phillpotts *v.* Clifton 750
v. Evans 551, 785
v. Phillpotts 464, 789
Phippen *v.* Hyland 262
v. Stickney 473
Phipps *v.* McFarlane 113
Phœnix Bessemer Co., in re 785
Phœnix Iron Co. *v.* Hopatcong 472
v. McEvony 475, 478
Piazzek *v.* White 321
Picard *v.* Hine 35
v. McCormick 8
Pickard *v.* Sears 813
Pickering *v.* Bardwell 826
v. Busk 21, 619, 620
v. Cease 537
v. Dowson 454, 618
Pickett *v.* Bullock 855
v. Merchants' Bank 779
Pickslay *v.* Starr 8
Piegzar *v.* Twohig 772
Pierce *v.* Chipman 727
Pierce *v.* Cooley 608
v. Milwaukee R. R. Co. 91
v. Schenck 5
Pierrepont *v.* Barnard 134
Pierson *v.* Crooks 171, 737, 738
v. Scott 763
v. Spaulding 326
Pigot *v.* Cubley 19
Pike *v.* Balch 116
v. Fay 685
v. Fitzgibbon 35, 37
v. King 542
v. Ongley 192, 205
v. Vaughn 294, 296
Pilgreen *v.* The State 374, 544

Figures refer to Pages.

Pilkington *v.* Scott 573
Pince *v.* Beattie 517
Pinckney *v.* Darling 472
Pindall *v.* Northwestern Bank 772
Pinkham *v.* Appleton 299, 720
v. Crocker 41
v. Mattox 170
Pinney *v.* Andrus 668
v. Gleason 776
Pitcher *v.* Lowe 223
Pitkin *v.* Noyes 112
Pitt *v.* Smith 32
Pitts *v.* Beckett 186, 250
Pitt's Sons Man. Co. *v.* Poor 606
Pittsburgh, &c. Railway Co. *v.* Heck 793, 794
Plaisted *v.* Palmer 543
Planché *v.* Colburn 551
Plant Seed Co. *v.* Hall 78
Plating Co. *v.* Farquharson 517
Platt *v.* Broderick 607
v. Bromage 390
Playford *v.* Mercer 717
v. United Kingdom Tel. Co. 408
Pleasants *v.* Pendleton 318, 320, 322, 326
Plevins *v.* Downing 191, 707, 709
Plimley *v.* Westley 755
Plomer *v.* Long 765
v. Lord 46
Pluckford *v.* Maxwell 755
Plumb *v.* Campbell 826
Plummer *v.* Erskine 778, 779
v. Shirley 304
Poland *v.* Brownell 481, 483
v. Miller 688
Pole *v.* Cetcovitch 556
Polglass *v.* Oliver 747
Polhemus *v.* Heiman 960
Polhill *v.* Walter 427
Poling *v.* Flanagan 493
Pollard *v.* Vinton 912
v. Reardon 912
Pollen *v.* Le Roy 794, 826
Polley *v.* Johnson 134
Pollok *v.* Fisher 322
Polson *v.* De Geer 301
Pond *v.* Williams 779
Pontifex *v.* Wilkinson 550
Poole *v.* Houston & Texas R. R. Co. 913
v. Rice 767, 775
v. Tumbridge 750
Pooley *v.* Brown 593
v. Great Eastern R'y 812, 831
Poor *v.* Woodburn 478
Poorman *v.* Witman 304
Pope *v.* Allis 958, 960
v. Linn 534, 542
v. Nickerson 40
v. Pope 478
v. Porter 583, 602
Poplett *v.* Stockdale 497
Pordage *v.* Cole 547, 550, 579, 582
Porritt *v.* Baker 522
Portalis *v.* Tetley 839, 841
Port Carbon Iron Co. *v.* Groves 688, 689
Porter *v.* Barrow 955
v. Bright 674
v. Pettengill 301, 307
v. Pool 664
Porter *v.* Talcott 8
Porterfield *v.* Butler 46
Portland Bank *v.* Stacey 729
Portman *v.* Middleton 929
Portsmouth Brewing Co. *v.* Smith 543
Post *v.* Coal Mining Co. 726
v. Jones 40
Postel *v.* Oard 676
Pothonier *v.* Dawson 18
Potsdamer *v.* Kruse 398
Potter *v.* Duffield 202
v. Lee 737
v. Sanders 54, 55
v. Titcomb 397
v. Washburn 727
Pottinger *v.* Hecksher 913, 914
Potts *v.* N. York & New E. R. R. 856
v. Plaisted 781
v. Whitehead 77, 78
Poulton *v.* Latitmore 941, 944, 949, 950
Poussard *v.* Spiers 548, 553
Powder Co. *v.* Burkhardt 4
Powell, ex parte 289
v. Bradlee 471, 477
v. Chittick 666
v. Divett 260
v. Ecker 9
v. Horton 612, 613, 636
v. Hoyland 414
v. Jessopp 117
v. McAshen 132
v. Preston 308
v. Yeazel 492
Power's Appeal 91
v. Barham 611, 612
v. Cook 2
Powers *v.* Benedict 474
Prairie Farm Co. *v.* Taylor 606
Pratt *v.* Chase 173
v. Collins 778
v. Maynard 720
v. Miller 115
v. Parkman 730
v. Paules 679
v. Rush 226
v. Willey 764
Pray *v.* Burbank 540
v. Mitchell 131
Pregnall *v.* Miller 493
Prentiss *v.* Russ 482
Presby *v.* Parker 484
Prescott *v.* Locke 110, 112, 170, 293
Preston *v.* Crofut 488
v. Whitney 301, 305
Price *v.* Durin 261
v. Dyer 191
v. Hewett 24
v. Jones 310
v. Lea 135
v. Price 756, 757, 759
v. Sanders 42, 43
Prichett *v.* Cook 309
Prideaux *v.* Bunnett 63
Prince *v.* Boston & Lowell R. Co. 350, 352
Pringle *v.* Corporation of Napanee 535
v. Phillips 476
Printing, &c. Co. *v.* Sampson 503
Pritchett *v.* Jones 294
Proctor *v.* Jones 158, 836

Figures refer to Pages.

Proctor *v.* Nicholson 525, 526
v. Sargent 509
v. Sears 44
v. Spratley 685
Proprietors of English, etc. *v.* Arduin 48, 51
Prosser *v.* Edmonds 517
v. Hooper 950
Protection Ins. Co. *v.* Pherson 599
Providence Coal Co. *v.* Coxe Bros. 603
Provonchee *v.* Piper 543
Puckett *v.* Reed 727
Puckford *v.* Maxwell 755
Puffer *v.* Reeve 308
Puffer Mfg. Co. *v.* Lucas 9
Puget Sound Machinery Depot *v.* Rigby 112
Pugh *v.* Heath 191
Pulse *v.* Miller 225
Pulsifer *v.* Hotchkiss 966
Purney *v.* Piercy 133
Pusey's Trustees *v.* Wathen 677
Pust *v.* Dowie 550
Putnam *v.* Dutch 729
v. French 777
v. Lamphier 303
v. Tillotson 349
Putney *v.* Day 134
Pym *v.* Campbell 186, 188

Q.

Queen, The, *v.* Kenrich 454
v. The Saddlers' Co. 865
Quenerduaine *v.* Cole 48
Quick *v.* Wheeler 794
Quincy *v.* Tilton 731
Quinn *v.* Davis 41
v. Parke Machinery Co. 311
v. Stout 7
Quintard *v.* Bacon 170

R.

Raabe *v.* Squier 605
Raby *v.* Frank 474
v. Sweetzer 475
Radford *v.* Smith 935
Raeside *v.* Hamm 482
Raffles *v.* Wichelhaus 60, 188, 389
Rahilly *v.* Wilson 6
Rahter *v.* First Nat. Bank 540
Rail *v.* Little Falls Lumber Co. 265, 296, 723
Railey *v.* Gay 538
Railroad Co. *v.* Morgan 771
Raineys, in re 29
Rainsford *v.* Fenwick 28
Rainwater *v.* Durham 42
Ramazotti *v.* Bowring 763
Ram Coomar Coondoo *v.* Chunder Canto Mookerjee 517
Ramsdale *v.* Horton 771
Ramsden *v.* Brearley 35
Ramsey *v.* Tully 954
v. Warner 779
Ramsbire *v.* Bolton 432
Ramuz *v.* Crowe 759
Rand *v.* White Mt. R. R. Co. 793, 953
Randall *v.* Cook 468
v. Hazelton 409
v. Kehlor 671
v. Lautenberger 261
v. Newson 646, 649, 653, 953
v. Raper 929, 951
v. Rhodes 666
v. Sweet 43
Randolph Iron Co. *v.* Elliott 82, 318
Randon *v.* Barton 956
v. Toby 677
Ranger *v.* Great Western R'y Co. 441
v. Hearne 956
Rankin *v.* Potter 548
Rankins *v.* Grupe 116, 174
Ranney *v.* Higby 349
Rannie *v.* Irvine 509
Rapelye *v.* Mackie 296
Raphael *v.* Bank of England 18
v. Burt 622, 623, 630
v. Reinstein 398, 474
Rapleye *v.* Adee 172
Rasberry *v.* Moye 966
Rasin *v.* Conley 690
Ratcliffe *v.* Sangston 478
Rateau *v.* Bernard 477
Rathbun *v.* Waters 308
Rattary *v.* Cook 720
Raventas *v.* Green 730
Rawls *v.* Deshler 41, 308
Rawley *v.* Rawley 31
Rawlings *v.* Hunt 92
Rawlins *v.* Wickham 434, 436
Rawson *v.* Johnson 576
Ray *v.* Barker 586
v. Light 82
v. Thompson 7, 607
Raymond *v.* Saunders 170
Rea *v.* Alexander 492
Read *v.* Anderson 524
v. Goldring 751
v. Hutchinson 2, 410, 759, 760
v. Rann 59
v. Taft 543
Reade *v.* Livingston 489
Readhead *v.* Midland R'y Co. 649, 650
Reager *v.* Kendall 470
Redd *v.* Burrus 92, 374
Redewill *v.* Gillen 9, 307
Redfield *v.* Tegg 8
Redgrave *v.* Hurd 402, 434, 435, 436, 437
Redmond *v.* Smock 827
Redpath *v.* Kolfage 773
Reed *v.* Blades 85
v. Brown 478
v. Hastings 665, 668
v. Jewett 491
v. Peterson 484
v. Randall 686, 737, 738
v. Reed 780
v. Upton 299
v. Wood 666
Reeder *v.* Machen 326
Reeder Shoe Co. *v.* Prylinski 471
Reese *v.* Miles 963
Reese River Mining Co., in re 409
v. Smith 417, 434, 547
Reeves *v.* Barlow 87

Figures refer to Pages.

Reeves *v.* Butcher 542
v. Capper 19, 837
v. Corning 483, 662
v. Harris 309
v. Whitmore 86
Reg. *v.* Chawton 702
v. Justices of the Cent. Crim. Crt. 15
v. Wilson 29
Reggio *v.* Braggiotti 962
Regina *v.* Charretied 530
Reichart *v.* Castator 487
Reid *v.* Cowduroy 469
v. Dreaper 207
v. Fairbanks 280
v. Hoskins 551, 556, 789
v. Reid 37
Reimers *v.* Ridner 600
Reinhart *v.* Gregg 170
Remick *v.* Sandford 170, 226, 262
Rennell *v.* Kimball 96
Rentch *v.* Long 114
Restad *v.* Engemoen 266, 295
Reusens *v.* Mexican, &c. 597
Reuss *v.* Picksly 221, 227
Reuter *v.* Sala 578, 580, 584, 709, 711
Rew *v.* Barber 673
v. Payne 373
Rex *v.* Jackson 410, 419
v. Marsh 448
Reybold *v.* Voorhees 606
Reynolds *v.* Boston & Maine R. R. 905, 909, 910, 917
v. Dechaums 485
v. Palmer 684
v. Spencer 738
v. Witte 484
Rhoades *v.* Castner 222
v. Cotton 722
Rhodes, in re 45
Rice *v.* Baxendale 929
v. Codman 681, 721
v. Forsyth 672, 688
v. Groffmann 777
v. Manley 409, 954
v. Nixon 6
v. Stone 99
Richards *v.* Delbridge 3
v. Porter 196, 197, 218, 220
v. Shaw 80
Richardson *v.* Boston, &c. Laboratory 782
v. Bouck 682
v. Brown 613
v. Chynoweth 957
v. Dunn 59
v. Goss 466
v. Jackson 753
v. Levi 737
v. Mahon 558
v. Mason 670
v. Mellish 502
v. Noble 481
v. Olmstead 6
v. Squires 173
v. Strong 45
v. Tipton 672
v. Woodbury 778
Richardson Drug Co. *v.* Teasdall 299
Riches *v.* Evans 463
Richey *v.* Daemicke 665
Richmond Iron Works *v.* Woodruff 721
Richmond Trading Co. *v.* Farquar 682
Rickard *v.* Moore 150, 151
Rickart *v.* People 10
Ricker *v.* Cross 725, 730
Rickey *v.* Tenbroeck 173, 827
Ricks *v.* Dillahunty 672, 677
Riddle *v.* Gage 966
v. Varnum 266, 297
v. Webb 664
Rider *v.* Kelley 351, 721
Ridgeway *v.* Kennedy 306
Ridgway, ex parte 3
v. Ingram 225
v. Wharton 185, 187, 193, 194
Riendeau *v.* Bullock 826
Rigby *v.* Norwood 224
Rigdon *v.* Walcott 486
Rigge *v.* Burbridge 948, 949
v. Magruder 131
Riley *v.* Bancroft 173
v. Farnsworth 226
Rindskopf *v.* De Ruyter 169
Rinehart *v.* Olwine 795
Ring *v.* Jamison 44
Ripley *v.* M'Clure 551, 785, 789
Rishton *v.* Whatmore 187, 198, 216
Ritchie *v.* Smith 521
Ritter *v.* Singmaster 771
River Wear Comiss. *v.* Adamson 554, 556
Rivers *v.* Gregg 43
Roan *v.* Winn 474
Robbins *v.* Chipman 326
v. Clark 599
v. Oldham 730
v. Phillips 306
Roberts *v.* Anderson 488
v. Applegate 470
v. Beatty 595, 776
v. Brett 549, 705
v. Crawford 540
v. Fisher 772, 776
v. French 481
v. Hughes 682
v. Jenkins 669
v. Morgan 665
v. Roberts 464, 497
v. Watkins 558
Robertson *v.* Clarkson 669
v. Strickland 294
v. Vaughn 113
Robeson *v.* French 543
Robinson *v.* Chapline 304
v. Cook 748
v. Cooper 683
v. Davison 553
v. Ferreday 753
v. Gordon 170
v. Green 137
v. Hoskins 44
v. Macdonnel 85
v. Mollett 192, 206, 207
v. Pogue 731
v. Rutter 762
v. Read 755
v. State 8
v. Uhl 492
v. United States 718
v. Ward 750

Figures refer to Pages.

Robinson *v.* Weller 78
Robinson Machine Works *v.* Chandler 688
Robison *v.* Tyson 595
Robotham *v.* Trevor 529
Robson *v.* Bohn 606
v. Drummond 551
v. Miller 687
v. Oliver 758
Roby *v.* West 539, 545
Rochester Distilling Co. *v.* Rasey 90
v. Devendorf 473
Rochester Oil Co. *v.* Hughey 351, 721
Rodee *v.* Wade 324
Rodger *v.* Comptoir d'Escompte 877, 902
Rodgers *v.* Bachman 303
v. Jones 172
v. Niles 689
v. Phillips 169
Rodliff *v.* Dallinger 82, 469, 475
Rodman *v.* Guilford 795
v. Thalheimer 471
Rodwell *v.* Phillips 119, 124, 125, 131
Roeber *v.* Bowe 489
Roebling *v.* Lockstitch Fence Co. 598
Roehm *v.* Horst 596, 793
Rogers *v.* Cox 132
v. Hadley 188, 259
v. Hanson 959
v. Ingham 392
v. Judd 780
v. Langford 758
v. Thomas 905, 910, 918
v. Van Hoesen 723
v. Whitehouse 300, 305
v. Woodruff 600
Rogers Locomotive Works *v.* Lewis 306
Roget *v.* Merritt 767
Rohan *v.* Hanson 779
Rohde *v.* Thwaites 329, 332, 338, 348
Roland *v.* Gundy 39
Rolls *v.* Pearce 3
Rolt *v.* Watson 758
Rommel *v.* Wingate 78, 350
Romp, The 467
Rondeau *v.* Wyatt 99, 100, 107
Roof *v.* Morrison 82
Rook *v.* Hopley 660
Roope *v.* D'Avigdor 16
Roosevelt *v.* Bull's Head Bank 782
Root *v.* French 419, 424, 478
v. Lord 310
Roots *v.* Lord Dormer 136
Roper *v.* Johnson 924, 935, 936, 937
Ropes *v.* Lane 323, 728
Roquemore *v.* Alloway 538
Roscorla *v.* Thomas 611
Rose *v.* Beatie 683, 684
v. Boseman 956
v. Colter 491
v. Duncan 782
v. Story 309
v. Wallace 963
Rosenbaums *v.* Weeden 826, 827
Rosendorf *v.* Hirschberg 308
Rosenfield *v.* Swenson 170
Rosenthal *v.* Dessau 912
v. Kahn 294
v. Risley 324
Rosevear China Clay Co., ex parte 867, 869, 874, 875, 878, 911
Ross's Appeal 132
Ross *v.* McDuffie 9
v. Miner 471
v. Terry 680
v. Welch 172, 724
Rossiter *v.* Miller 51, 202, 203, 240
Roth *v.* Buffalo, &c. Co. 486
v. Palmer 473
Rothholz *v.* Schwartz 958
Rothmiller *v.* Stein 482
Rothchild *v.* Rowe 493
Rothwell *v.* Milner 683
Rough *v.* Hall 660
Roughan *v.* Boston, &c. Block Co. 964
Roumage *v.* Mechanics' Ins. Co. 599
Rourke *v.* Bullens 290, 728
v. Short 525
Rouse *v.* Lewis 602
Rousillon *v.* Rousillon 503, 511, 512, 515
Routledge *v.* Grant 48, 53, 70
v. Ramsay 30
v. Worthington Co. 667
Rovegno *v.* Defferari 81
Rowan *v.* Sharps' Rifle Co. 90
v. Union Arms Co. 310
Rowe *v.* Faren 686
v. Hopwood 30
v. Osborne 258
v. Pickford 867, 876
v. Sharp 309
Rowley *v.* Bigelow 477, 904, 905, 908, 911, 918
v. Rice 90
Roys *v.* Johnson 535
Rubin *v.* Sturtevant 398, 958
Ruck *v.* Hatfield 356, 701, 853, 871
Rucker *v.* Donovan 911, 917, 918
Ruckman *v.* Bryan 538
Ruff *v.* Jarrett 966
Rugg *v.* Minett 136, 271, 293, 338, 381, 533, 742
v. Moore 605
v. Weir 741
Ruhl *v.* Corner 856
Ruiz *v.* Norton 80
Rumpf *v.* Bates 5
Rupley *v.* Daggett 82
Rushdall *v.* Ford 393
Russell *v.* Abbott 265
v. Bandira 550
v. Bangley 762
v. Carrington 290, 291, 320
v. Hamilton 493
v. Minor 308
v. Murdock 542, 961
v. Nicoll 600
v. Nicolopulo 636
v. O'Brien 727
Rust *v.* Eckler 961
Rutan *v.* Ludlam 962
v. Hinchman 111
Rutter *v.* Blake 959
Ryall *v.* Rolle 625
v. Rowles 625
Ryan *v.* Conroy 294
v. Ulmer 681, 683, 692
v. United States 223

Figures refer to Pages.

Ryder *v.* Neitge 692
v. Wombwell 25, 26, 28
Ryno *v.* Darby 542

S.

Sabra *v.* Smith 234
Sacra *v.* Sample 310
Safford *v.* McDonough 172, 854
Sage *v.* Sleutz 301, 308
Sahlman *v.* Mills 297
Sainsbury *v.* Matthews 121
Sainter *v.* Ferguson 514
Saladin *v.* Mitchell 826, 827
Sale *v.* Darragh 173
v. Lambert 202
Salinas *v.* Ellis 782
Salisbury *v.* Howe 480
v. Stainer 685
Salmon Falls Co. *v.* Goddard 221, 224, 225, 235
Salomon *v.* Hathaway 302
v. Webster 79
Salomons *v.* Nissen 902
Salte *v.* Field 75, 466, 467
Salter *v.* Woollams 699, 716, 846
Saltmarsh *v.* Tuthill 533
Samuel *v.* Cheney 82
Samuels *v.* King 772
Sample *v.* Bridgforth 82
Sams *v.* Stockton 43
Sanborn *v.* Benedict 92, 720, 794
v. Chittenden 311
v. Flagler 221, 224, 234
Sandeman *v.* Scurr 869
Sander *v.* Hoffman 536
Sanderlin *v.* Trustees 116
Sanders *v.* Jameson 734, 947
v. Keber 301, 308
v. Maclean 706, 716, 717, 742, 843, 852, 895
v. Pottlitzer 77
Sanderson *v.* Graves 190
Sandford *v.* Handy 481
v. The Wiggins Ferry Co. 298
Sands *v.* Lyon 782
v. Taylor 684, 827
Sandwich Mfg. Co. *v.* Fearsy 607
Sandys *v.* Small 532, 660
Sanford *v.* Dodd 397
Sanger *v.* Waterbury 297, 321
v. Wood 474
Sangston *v.* Maitland 778
Sansom *v.* Rhodes 701
Sarah Ann, The 40
Sarbecker *v.* State 350
Sard *v.* Rhodes 756
Sargeant *v.* Butts 534
v. Currier 673, 674
v. Gile 9, 307
v. Graham 781, 782
v. Metcalf 300
v. Sturm 477, 478
Sarl *v.* Bourdillon 187, 201, 216
Sarle *v.* Arnold 468
Sarter *v.* Gordon 957
Satterthwait *v.* Marshall 957
Saunders *v.* Bartlett 351
v. Clark 96
Saunders *v.* Frost 782
v. Short 80
v. Topp 154, 158, 167
v. Wakefield 200
Saunderson *v.* Jackson 195, 229, 231
Savage *v.* Canning 387
v. Stevens 480
Sawdon *v.* Andrews 933
Sawyer *v.* Almand 476
v. Chambers 966
v. Fisher 305, 855
v. Gerrish 92
v. Joslin 914, 915
v. Long 90, 91
v. Lufkin 45
v. Pringle 301
v. Shaw 305
v. Taggart 537
Saxe *v.* Penokee Lumber Co. 954
Sayers *v.* London, &c. Co. 685
Sayles *v.* Wellman 542
Scales *v.* Wiley 132
Scanton *v.* Clark 676
Scarborough *v.* Reynolds 669
Scarfe *v.* Morgan 532
Scattergood *v.* Sylvester 14, 15
Schaeffer *v.* Bond 82
Schaferman *v.* O'Brien 536
Schell *v.* Stephens 670
Schenck *v.* Saunders 5, 667
Schermerhorn *v.* Loines 774
Scheuer *v.* Goetter 477
Schindler *v.* Westover 6
Schlessinger *v.* Stratton 7, 544
Schloss *v.* Feltus 466, 478
Schmertz *v.* Dwyer 349, 350
Schmidt *v.* Thomas 169, 173
Schneider *v.* Heath 454
v. Kolthoff 774
v. Norris 230
v. O. P. R. R. Co. 736
Schnitzer *v.* Oriental Print Works 644, 683, 690
Scholefield *v.* Robb 617
Scholfield *v.* Bell 909
Scholey *v.* Walton 745
Schomp *v.* Schenck 536
School Directors *v.* Trefethren 77
School District *v.* Dauchy 599
School Furniture Co. *v.* Somerville Board 955
v. Warsaw 608
School Trustees *v.* Bennett 599
Schotsmans *v.* Lancashire, &c. R'y Co. 361, 372, 868, 871, 904
Schouse *v.* Neiswanger 954
Schroder *v.* Palmer Hardware Co. 169
Schroeder *v.* Coatsville Mill Co. 961
v. Mendl 433, 436
Schuchardt *v.* Allens 671, 684
Schneider *v.* Norris 230, 231
Schnitzer *v.* Oriental Print Works 644
Schubert *v.* Clark Co. 407
Schulein *v.* Hainer 478
Schultz *v.* Bradley 827
Schulze *v.* Grt. East. R'y Co. 928
Schumacher *v.* Eby 374
Schurmeier *v.* English 964
Schutt *v.* Baker 963
Schutz *v.* Jordan 81

Figures refer to Pages.

Schuyler *v.* Russ 668
Schwabacher *v.* Kane 910
Schwartz *v.* Church of the Holy Cross 170
Scofield *v.* National Elevator Co. 855
Scoggin *v.* Slater 132
Scott *v.* Dixon 408
v. Eastern Counties R'y Co. 99, 158
v. Gilmore 498, 526
v. Hix 675
v. Irving 762
v. Kittaning Coal Co. 583, 603
v. Littledale 63
v. Lord Ebury 213
v. McGraw 477
v. Morley 37
v. Pettit 867, 872
v. Phœnix Ins. Co. 599
v. Renwick 682
v. Scott 672, 677
v. Uxbridge R'y Co. 752
v. Wells 296
Scott Lumber Co. *v.* Hafnerlothanan Co. 683
Scovell *v.* Boxall 125
Screws *v.* Roach 294
Scroggin *v.* Wood 479, 606
Scruggs *v.* Gass 772
Scudder *v.* Bradbury 299
v. The Calais Steamboat Co. 298
v. Worster 319, 320, 323, 325, 326, 338
Scull *v.* Shakespear 298
Seal *v.* Dent 18
v. Zell 856
Searle's case 731
Searles *v.* Sadgrove 750
Seath *v.* Moore 269, 281, 283, 287, 292, 385
Seaver *v.* Dingley 474
Seavey *v.* Potter 474
v. Walker 491
Seawell *v.* Henry 781
Sebastian May Co. *v.* Codd 469, 482, 775
Seckel *v.* Scott 297
Secomb *v.* Nutt 909, 913
Second Nat. Bank *v.* Walbridge 856
Sedgwick *v.* Cottingham 298, 720
v. Stanton 536
Seear *v.* Lawson 517
Seeger *v.* Duthie 548
Seeley *v.* Welles 607
Seeligson *v.* Philbrick 373
Seigworth *v.* Leffel 965
Seim *v.* State 10
Seiple *v.* Irwin 777
Seitz *v.* Brewers' Refrigerating Co. 690
Seixas *v.* Woods 678, 679, 682
Selby *v.* Selby 228
Selden *v.* Beale 7
Sellar *v.* Clelland 954
Seller *v.* Stevenson 689
Selser *v.* Roberts 678, 685
Semenza *v.* Brinsley 764
Semmes *v.* Wilson 771
Sentell *v.* Mitchell 80
Seré *v.* McGovern 303
Service *v.* Walker 685, 692
Seton *v.* Lafone 62, 814
Sewall *v.* Fitch 113, 261
Sewell *v.* Burdick 843
v. Eaton 265, 298
Sexton *v.* Anderson 488, 489
v. Graham 6
v. Wheaton 489
Seybel *v.* National Currency Bank 39
Seymour *v.* Bagshaw 408
v. Bridge 532
v. Brown 5
v. Davis 114
v. Marvin 779
v. Newton 905, 909, 910, 915
Shackell *v.* Rosier 498, 517
Shade *v.* Creviston 483
Shakespear, in re 37
Shand *v.* Bowes 566, 567, 589
Shanks *v.* Whitney 964
Shardlow *v.* Cotterell 187, 193
Sharman *v.* Brandt 207, 237, 244, 260
Sharp *v.* Mayor of New York 480, 484
v. Ponce 483
Sharpless Bros. *v.* Gummey 469
Shattock *v.* Shattock 35
Shattuck *v.* Green 632, 673, 674
Shaul *v.* Harrington 728
Shaver *v.* Ehle 679
Shaw *v.* Badger 80
v. Barnhart 486
v. Carbery 132
v. Carpenter 544
v. Finney 261
v. Gilmore 90, 92
v. Lady Ensley Coal Co. 918
v. Nudd 955
v. Picton 765
v. Port Philip Gold Mining Co. 446
v. Republic Life Ins. Co. 552, 596
Shawhan *v.* Van Nest 351, 794, 826
Shealy *v.* Edwards 93
Shearer *v.* Park Nursery Co. 963
Shearick *v.* Huber 39
Sheehy *v.* Mandeville 767
v. Shinn 540
Sheffer *v.* Willoughby 693
Sheldon *v.* Capron 82
v. Cox 2
Sheldon Co. *v.* Mayers 311
Shelton *v.* Franklin 297
Shenstone *v.* Hilton 9
Shepard *v.* King 856
Shephard *v.* Milwaukee Gas Light Co. 957
Shepherd *v.* Busch 775
v. Gilroy 666, 686
v. Hampton 937, 956
v. Harrison 288, 365, 368, 369, 371, 372, 373
v. Jenkins 397
v. Kaine 570, 611, 634
v. Pressey 170
v. Pybus 645, 646, 650, 652
v. Temple 966
Shepley *v.* Davis 272, 313, 837
Sheppard *v.* Earles 676
v. Newhall 374
v. Union Bank of London 22, 847
Sherbon *v.* Colebach 523
Sherburne *v.* Shaw 224
Sheredine *v.* Gaul 781
Sheriff *v.* McCoy 795
Sherk *v.* Endress 487

Figures refer to Pages.

Sherman *v.* Rugee 910
Sherrod *v.* Langdon 965
Sherwin *v.* Mudge 4, 294
Shewalter *v.* Ford 669
Shields *v.* Kopf 541
v. Pettie 600
v. Reibe 737, 961
Shindler *v.* Houston 171
Shingleur *v.* Telegraph Co. 82
Shinn *v.* Bodine 605
Shipman *v.* Graves 736
v. Horton 45
v. Seymour 471
Ship Packet, The 40
Shippen *v.* Bowen 662, 664
Shippey *v.* Eastwood 542
Shireman *v.* Jackson 304
Shirley *v.* Shirley 234
Shisler *v.* Baxter 679, 681, 689
Short *v.* Matteson 961
v. Simpson 897, 898
v. Spackeman 207
v. Stone 551
v. Woodward 667
Shortrede *v.* Cheek 187
Shoshonetz *v.* Campbell 310
Shower *v.* Pilck 3
Shrimpton *v.* Warmack 78, 739
Shufeldt *v.* Pease 478
Shuman *v.* Shuman 541
Shumate *v.* The Commonwealth 536
Shumway *v.* Rutter 724, 726
Shupe *v.* Collender 960
Shurtleff *v.* Willard 728, 730
Sibley *v.* Hulbert 480
v. Tie 722
Sibree *v.* Tripp 756
Sievewright *v.* Archibald 185, 188, 250, 256, 257, 258, 259
Siffkin *v.* Wray 467, 896
Silberman *v.* Fretz 80
Silkstone Coal Co. *v.* Joint, &c. Coal Co. 785, 789, 920, 955
Sillers *v.* Lester 91
Silliman *v.* M'Lean 795
Silver Bow Mining Co. *v.* Lowry 307
Silverman *v.* Greaser 494
Simar *v.* Canaday 470
Simeon *v.* Watson 553
Simm *v.* Telegraph Co. 813, 814
Simmons *v.* Green 595
v. Swift 268, 272, 278, 835, 836, 887
v. Wilmot 752
Simms *v.* Clarke 772
Simon *v.* Braddon 612
v. Lloyd 755
v. Motivos 110
Simond *v.* Braddon 561, 562
Simonds *v.* Fisher 142
Simpson *v.* Crippin 578, 579, 580, 581, 583, 584, 935, 936
v. Eggington 769
v. Krumdick 173
v. Lamb 517
v. London & North Western R'y Co. 922
v. Margitson 702
v. Nicholls 531
Simpson *v.* Potts 617
v. Shackelford 303
Sims *v.* Everhardt 43
v. James 303
v. Marryat 626, 628
Simson *v.* Ingham 764, 765, 766
Sinclair *v.* Hathaway 691
v. Healy 477
v. Learned 778
Singer *v.* Jacobs 489
v. Schilling 478
v. Smith 9
Singer Machine Co. *v.* Treadway 301
Singer Manuf. Co. *v.* Cole 9
v. Converse 303
v. Graham 9, 308
v. Gray 9
v. Sammons 477
Singer Sewing Mach. Co. *v.* Holcomb 9, 304
Singerly *v.* Thayer 608
Sinker *v.* Comparet 310
v. Kidder 963
Sinsheimer *v.* Whitely 856
Sir Arthur Ingram's case 528
Skidmore *v.* Romaine 45
Skiff *v.* Johnson 539
Skinner *v.* Gunn 671
Slade *v.* Lee 298
Slagle *v.* Goodnow 472, 474, 478
Slater *v.* Emerson 602
Slaughter *v.* Green 5
Slaymaker *v.* Irwin 77
Slayton *v.* McDonald 8
Sledge *v.* Scott 483
Sleeper *v.* Chapman 495
v. Davis 472, 477
Slim *v.* Croucher 432
Slingluff *v.* Eckel 473
Sloan *v.* Hayden 608
Slocum *v.* Seymour 134
Slubey *v.* Heyward 803, 834, 887
Slutz *v.* Desenburg 8
Small *v.* Glasel 472
v. Stevens 736
Smalley *v.* Hendrickson 606
Smart *v.* Batchelder 295
v. Sandars 75
Smeed *v.* Foord 926
Smethhurst *v.* Woolston 956
Smidt *v.* Tiden 61
Smilie *v.* Hobbs 671
Smith *v.* Acker 468
v. Allen 46
v. Andrews 483
v. Arnold 225, 260, 261
v. Atkins 92
v. Baker 651, 654, 659
v. Bean 533, 543
v. Beatty 472
v. Berry 955
v. Bettger 767, 774
v. Bolles 965
v. Brady 602
v. Briggs 599
v. Bryan 133
v. Case 542
v. Chadwick 403, 427, 434, 435, 547
v. Champney 730
v. Chance 699

Figures refer to Pages.

Smith *v.* Clark 5
v. Clarke 451, 453
v. Clews 38
v. Conkwright 495
v. Coolidge 776
v. Countryman 470
v. Craft 493
v. Dennie 299
v. Dunlap 955
v. Evans 294
v. Ferrand 755
v. Field 467
v. Foote 961, 962
v. Foster 310
v. Friend 320
v. Godfrey 538
v. Goss 864, 876
v. Gowdy 77
v. Green 953
v. Greenlee 473
v. Henry 468
v. Hudson 54, 148, 152, 153, 155, 157, 164, 714, 833, 876
v. Hughes 402, 455, 457
v. Jones 223, 224, 261
v. Kay 402
v. Kelley 44
v. Lewis 398, 595
v. Loze 306
v. Lynes 308
v. Mawhood 519, 520, 540
v. Mayer 965
v. Mercer 758
v. Miller 773
v. Myers 84, 562
v. Neale 221, 626
v. Newland 311
v. Newton 480
v. Niles 8
v. N. Y. Cent. R. R. 109, 114
v. Odom 133
v. Owens 774
v. Page 745
v. Pettee 600, 738, 820, 826
v. Ryan 774
v. Shell 226
v. Smith 234, 350, 397, 470, 471, 477, 776
v. Sparkman 294
v. Sparrow 531
v. Surman 101, 107, 112, 120, 121, 125, 167, 198, 218
v. Thomas 921
v. Tracy 671
v. Ware 82
v. Wheeler 722
v. White 499
v. York Mfg. Co. 959
v. Young 42
Smithpeters *v.* Griffin 42
Smithurst *v.* Edmunds 91
Smoot's case 596, 597, 598
Smoot *v.* United States 551
Smuller *v.* Union Canal Co. 778
Smyth *v.* Craig 96
Sneathen *v.* Grubbs 296
Snee *v.* Prescott 859
Snelgrove *v.* Bruce 681
Snow *v.* Alley 474, 959
Snow *v.* Miles 78
v. Perry 78
v. Schomacker Man. Co. 667, 687
v. Swan 737
v. Warner 169
Snowden *v.* Warder 691
Soloman *v.* Neidig 738
Soles *v.* Hickman 221, 225
Soltau *v.* Gerdau 40
Soltykoff, in re 30
Somerby *v.* Buntin 132, 957
Somers *v.* Richards 480
Somes *v.* Brewer 476
v. British, &c. Shipping Co. 829
Sondheim *v.* Gilbert 537
Sorg Co. *v.* Crouse 686, 737
Sortwell *v.* Hughes 350, 538
South Australian Ins. Co. *v.* Randell 3, 6
South Western Freight Co. *v.* Standard 297
Southall *v.* Rigg 393
Southbridge Savings Bank *v.* Exeter Machine Works 133
Southern *v.* Howe 615
Southern Development Co. *v.* Silva 483
Southern Life Ins. Co. *v.* Cole 131
Southwell *v.* Bowditch 192, 206, 208
Southwestern Freight Co. *v.* Standard 297
Southwick *v.* Harndell 38
v. Smith 305, 606
Soward *v.* Palmer 758
Spalding *v.* Ruding 898, 900, 901
v. Vandercook 966
Sparkes *v.* Marshall 332
Sparling *v.* Marks 959
Sparrow *v.* Carruthers 33
Spartali *v.* Benecke 268, 698, 830, 831
Spear *v.* Atkinson 774
v. Bach 172
Spencer *v.* Cone 111
v. Hale 169
v. Jones 535
v. Smith 525
v. St. Clair 474
Speyer *v.* Baker 301
v. Colgate 953
Spicer *v.* Cooper 188
Spicers *v.* Harvey 351, 723
Spickler *v.* Marsh 606
Spira *v.* Hornthall 479
Spivey *v.* Wilson 491
Spooner *v.* Holmes 39
v. Payne 507
Spott *v.* United States 536
Spotswood *v.* Barrow 732
Sprague *v.* Blake 173, 737
v. King 296
Spring Co. *v.* Knowlton 497
Spring Lake Iron Co. *v.* Waters 488
Springer *v.* Drosch 487
Springstead *v.* Lawson 670
Springwell *v.* Allen 611, 624
Sprott *v.* United States 501
Sprye *v.* Porter 516
Spurr *v.* Albert Mining Co. 688
St. Paul Tr. Co. *v.* Howell 171
Stackpole *v.* Symonds 533, 534
Stacy *v.* Kemp 667, 966
Stadtfeld *v.* Huntsman 309
Stafford *v.* Pooler 737

Figures refer to Pages.

Stafford *v.* Roof 45
v. Walter 349
Staines *v.* Shore 454, 485
Stamm *v.* Kuhlmann 670
Stancliffe *v.* Clarke 645
Standard Co. *v.* Parlin Co. 304
Standard Sugar Refinery *v.* Castano 600
Standeford's Adm'r *v.* Schultz 882
Stanford *v.* McGill 597
Stanley *v.* Dowdeswell 48
v. Jones 516
Stanton *v.* Austin 559, 699
v. Eagar 349, 904, 905, 912, 918
v. French 777
v. Richardson 550
v. Small 92
v. Willson 42
Stapleton, ex parte 786
v. King 956
Stark *v.* Coffin 771
Starnes *v.* Erwin 665
Starr *v.* Anderson 672
v. Stevenson 471, 476, 478
v. Torrey 737
Starr Glass Co. *v.* Morey 962
Startup *v.* M'Donald 702, 715, 733
State *v.* Austin Club 10
v. Bacon Club 10
v. Blakeman 538
v. Boston Club 10
v. Carl 374, 544
v. Easton Club 10
v. Essex Club 10
v. Fredricks 671
v. Hefner 483
v. Hellman 726
v. Horace 10
v. Intoxicating Liquors 374, 544
v. Lockyear 10
v. McMaster 10
v. Mercer 10
v. Merritt 488
v. Neis 10
v. O'Neil 374, 544
v. Paul 481
v. Peters 77, 374
v. St. Louis Club 10
v. Salyers 39
v. Tomlin 483
State Capital Bank *v.* Thompson 533
State of Maine *v.* Intoxicating Liquors 731
Staunton *v.* Wood 705
Stayton *v.* Riddle 957
Stead *v.* Dawber 189
Stearns *v.* Felker 536
v. Marsh 40
v. Washburn 723
Steaubli *v.* Blaine Bank 326, 856
Stebbins *v.* Leowolf 540
Stedman *v.* Gooch 754, 760
Steel *v.* Brown 461
v. Curle 538
Steele *v.* Ellmaker 453, 454, 485
v. Frierson 91
v. Haddock 188
Steel Works *v.* Dewey 722
Steelwagon *v.* Jeffries 725
Stees *v.* Leonard 599
Stephens *v.* Chappell 670
Stephens *v.* Elwall 291
v. Gifford 493
v. Harrow 487
v. Santee 5, 266
v. Tucker 92
v. Wilkinson 820, 824, 825
Stephenson *v.* Cady 605
v. Hart 399, 411, 412
v. Ranney 5
v. Weathersby 469
Sterling *v.* Baldwin 133
Stern *v.* Filene 724
Stevens *v.* Bradley 664
v. Brennan 478
v. Cunningham 606
v. Eno 322
v. Fuller 482
v. Hyde 474
v. Johnson 965, 966
v. Lyford 955, 956
v. Lynch 390, 393, 394
v. Smith 683
v. Stewart 728
v. Wheeler 913
Stevenson *v.* Burgin 739
v. Marble 482
v. McLean 49, 51, 52, 54, 57, 72
v. Newnham 409, 414
v. Rice 311
v. State 8
Stewart *v.* Aberdein 762
v. Eddowes 188
v. Emerson 424, 471
v. Many 606
v. Power 955, 957
v. Schall 537
v. Stearns 479
v. Stewart 390
v. Thayer 542
v. Wyoming Ranche Co. 472, 482
Stiles *v.* White 964
Stinson *v.* Clark 726
v. Ross 39
St. Joze Indiano, The 351, 373
Stock *v.* Inglis 340, 345, 351, 701, 742
Stockham *v.* Stockham 79
Stockwith *v.* North 529
Stoddard *v.* Ham 82
Stoddart *v.* Smith 137, 959
Stokes *v.* Baars 606
v. La Riviere 867
v. Lewis 67
v. Mackay 723
v. Moore 232
Stollenwerck *v.* Thacher 40
Stonard *v.* Dunkin 813
Stone *v.* Browning 170, 224
v. City and County Bank 447
v. Denny 479
v. Ebberly 39
v. Godfrey 391
v. Marsh 12, 16
v. Nichols 776
v. Peacock 265, 324, 730
v. Peake 966
v. Perry 302, 305
v. Robie 480
v. Seymour 778
v. Waite 300

Figures refer to Pages.

Stone Co. *v.* Carey's Adm'r 300
Storey *v.* Agnew 41
v. Krewson 782
v. Waddle 387
Storm *v.* Smith 673, 676
Storrs *v* Emerson 668
Story *v.* Salomon 537
Stout *v.* Levan 780
Stoutenburgh *v.* Konkle 473
Stoveld *v.* Eade 765
v. Hughes 803, 812
Stover *v.* Eycleshimer 91
Stowe *v.* Taft 727
Stowell *v.* Robinson 189
St. Jose Indiano 351
St. Paul Co. *v.* Great West Co. 374
St. Paul Nat. Bank *v.* Cannon 770
Strachan *v.* Knox 890
Strafford *v.* Welch 782
Straus *v.* Minzesheimer 297
v. Ross 295
v. Wessel 350, 374
Strauss Saddlery Co. *v.* Kingman 7
Street *v.* Blay 392, 424, 585, 610, 941, 943, 947, 951
Strickland *v.* Turner 84, 387
Strong *v.* Blake 782
v. Dodds 169
v. Doyle 132, 133
v. Foote 43
v. Hart 755
v. Harvey 751
v. Slicer 780
v. Strong 486
v. Taylor 308
Stroud *v.* Austin 934
v. Pieree 666
Stuart *v.* Nicholson 509
v. Pennis 134
Stubbs *v.* Johnson 470
v. Lund 904, 908, 911
Stucky *v.* Clyburn 669
Stucley *v.* Bailey 610, 612
Studds *v.* Watson 187, 193
Studdy *v.* Sanders 586
Studer *v.* Bleistein 668, 737
Studwell *v.* Shapter 44
Stulz *v.* Loyalhanna Co. 607
Sturdy *v.* Arnaud 745
Sturtevant *v.* Ballard 468
v. Orser 909
Suffolk Bank *v.* Worcester Bank 783
Suit *v.* Bonnell 738
v. Woodhall 296, 350, 544
Sullings *v.* Goodyear Dental Co. 596
Sullivan *v.* Clifton 854
v. Sullivan 543
Sully *v.* Fean 387
Sulsbury Manuf. Co. *v.* Chico 607
Summeril *v.* Elder 349
Summers *v.* Cook 134
v. Hibbard 598
v. Sleeth 595
v. Vaughn 663
Summerson *v.* Hicks 9
Sumner *v.* Cottey 306
v. Jones 533, 534
v. McFarlan 304
v. Woods 302
Sun Publishing Co. *v.* Minnesota Type Foundry Co. 578, 737
Susman *v.* Whyard 9
Sutherland *v.* Allhusen 559, 699
v. Mannix 311
Sutliff *v.* Atwood 775
Sutton *v.* Crosby 667
v. Hawkins 751
v. Page 745
Suydam *v.* Clark 262
v. Jenkins 956
Swain *v.* Schieffelin 690, 963
v. Shepherd 288, 585
Swallow *v.* Emery 300
Swan *v.* Drury 595
v. Phillips 421
Swanke *v.* McCarty 349
Swann *v.* Swann 543
Swanwick *v.* Sothern 272, 814, 837
Swanzey *v.* Parker 673, 680
Swart's Appeal 537
Swarthout *v.* Merchant 472
Swayze *v.* Hull 535
Sweeney *v.* Coe 490
Sweet *v.* James 775
v. Lee 187, 229
v. Pym 862
v. Titus 771, 773
Sweeting *v.* Pearce 762
v. Turner 269
Sweetmae *v.* Prince 677
Swett *v.* Colgate 673, 678, 679, 682
Swift *v.* Bennett 43
v. Jewsbury 443
v. Pannell 464
v. Rounds 471
v. Thompson 468
v. Tyson 39
v. Winterbotham 443
Swinerton *v.* Swinerton 488
Swinyard *v.* Bowes 758
Swire *v.* Francis 442
S. W. Freight Co. *v.* Plant 855
v. Stanard 855
Swords *v.* Owen 540
Sykes *v.* Giles 761
Symes *v.* Hughes 497
Symns *v.* Benner 475
v. Schotten 915
Symonds *v.* Hall 39
Syracuse, &c. R. R. *v.* Collins 773

T.

Tadman *v.* Lubbock 748
Taft *v.* Sergeant 44
v. Travis 96
Tagg *v.* Tennessee Nat. Bank 484
Tagiasco *v.* Molinari 235
Tahoe Ice Co. *v.* Union Ice Co. 686
Talbot Paving Co. *v.* Gorman 737
Talcott *v.* Henderson 471, 472
Tallis *v.* Tallis 515
Tallman *v.* Franklin 223
Talmadge *v.* Oliver 309
Talmage *v.* Bierhause 671
Talver *v.* West 142
Tamvaco *v.* Lucas 574, 575

Figures refer to Pages.

Tancred *v.* Steel Co. 714
Tanner *v.* Christian 208
v. Scovell 834, 835, 887
v. Smart 30
Tansley *v.* Turner 273, 834, 854
Taplin *v.* Florence 699
Tapp *v.* Lee 448
Tarkinton *v.* Purvis 486
Tarling *v.* Baxter 268, 791
v. O'Riordan 346, 710, 733, 738
Tarrabochia *v.* Hickie 548
Tasker *v.* Bartlett 600
v. Shepherd 552
Tatum *v.* Kelly 539
Tayloe *v.* Merchants' Fire Ins. Co. 72, 76, 78, 79
Taylor *v.* Ashton 430
v. Blanchard 536
v. Bowers 497
v. Brooklyn Elev. R. R. 783
v. Bullen 612
v. Caldwell 552, 553, 554
v. Chambers 13
v. Chester 501
v. Cole 723
v. Fleet 82
v. Gardiner 621, 671
v. Hare 396
v. Harnet 485
v. Jones 56
v. Kymer 840
v. Mississippi Mills 470
v. Saxe 962
v. Smith 153, 220
v. Victoria Stove Co. 349
v. Wakefield 54, 159, 832
v. Wilson 772
Taymon *v.* Mitchell 682
Teachout *v.* Van Hoesen 481
Teal *v.* Auty 125
v. Spangler 774
Tedder *v.* Odom 538
Teed *v.* Johnson 390
v. Teed 180
Teesdale *v.* Anderson 592
Telford *v.* Adams 487
Tempest *v.* Fitzgerald 165, 167, 837
v. Kilner 117
Tenbrook *v.* Brown 8
Tennent *v.* The City of Glasgow Bank 447
Tennessee Club *v.* Dwyer 10
Tennessee River Co. *v.* Leeds 687
Terrell *v.* Stevenson 677
Territt *v.* Bartlett 538
Terry *v.* Belcher 493
v. Bissell 397, 679
v. Munger 8
v. Wheeler 265, 296
Tetley *v.* Shand 205, 260
Tewkesbury *v.* Diston 14
Texter *v.* Hutchings 596
Thacher *v.* Moors 40
v. Phinney 489
Thacker *v.* Hardy 524
Thaxter *v.* Foster 477
Thayer *v.* Brackett 782
v. Luce 223
v. Manley 81
v. Meeker 783
Thayer *v.* Peck 773
v. Sheriff 683
v. Turner 397
Theilen *v.* Rath 738
Thing *v.* Libbey 44
Third Nat. Bank *v.* Armstrong 301
Thol *v.* Henderson 931, 933, 934
Thomas *v.* Brown 62, 203
v. Dickinson 475, 795
v. Evans 745
v. Goodwin 488
v. Hunter 780
v. Kerr 484
v. Knowles 397, 598
v. Simpson 688
v. The State 325
v. Todd 772
v. Winchester 407, 408
v. Winters 304
Thompson *v.* Alger 180, 794
v. Balt. &c. R. R. Co. 729, 910
v. Bank 773
v. Bertrand 670
v. Botts 669
v. Cincinnati, &c. R. R. 296
v. Conover 294
v. Davenport 204, 205, 208, 420
v. Davies 473
v. Dominy 842, 896
v. Gardiner 244, 256, 257
v. Gould 598
v. Harvey 669
v. Hudson 765
v. Kellogg 776
v. Lay 44
v. Libby 666
v. Maceroni 159
v. Peck 471
v. Rose 477
v. Thompson 910
v. Wedge 855
v. Wilhite 730
v. Williams 542
v. Woodruff 954
v. Yeck 468
Thompson Electric Company *v.* Brush Swan Co. 606
Thompson Mfg. Co. *v.* Perkins 77
Thoms *v.* Dingley 963
Thomson *v.* Bank 774
v. Dyment 736
Thoreson *v.* Harvester Works 962
Thornborow *v.* Whitacre 555
Thorndike *v.* Bath 728
v. Locke 794
Thorne *v.* Barwick 80
v. McVeigh 964
Thornett *v.* Haines 448, 450
Thornton *v.* Charles 249, 253, 256, 257
v. Davenport 490
v. Illingworth 28, 29
v. Kempster 60, 218, 227, 246, 258
v. Meux 247, 248, 252, 256, 258
v. Wynn 959, 960
Thorold *v.* Smith 763
Thorpe *v.* Fowler 304
Thrall *v.* Newell 397, 673, 679
v. Wright 43, 44
Thresh *v.* Rake 189

Figures refer to Pages.

Thurman *v.* Wilson 794, 827
Thurnell *v.* Balbirnie 94, 557
Thurston *v.* Blanchard 474
v. Percival 536
v. Spratt 672
Tibbetts *v.* Towle 305
Ticknor *v.* McClelland 730
Tiedman *v.* Knox 856
Tigress, The 860, 865
Tillock *v.* Webb 534
Tilt *v.* La Salle Silk Man. Co. 826
v. Silverthorne 6
Tilton Safe Co. *v.* Tisdale 689
Timrod *v.* Shoolbred 683
Tipton *v.* Feitner 80, 595
v. Triplett 677
Tisdale *v.* Buckmore 397
v. Harris 131
Tilson *v.* Terwilliger 468
Titcomb *v.* Wood 469, 478
Titus *v.* Cairo 484
v. Poole 470, 664
Tobey *v.* Barber 774
Todd *v.* Gamble 793, 954
v. Reid 762
v. Taft 958
Toledo R'y Co. *v.* Gilvin 722
Tolman *v.* Johnson 944
Tomblin *v.* Callen 537
Tome *v.* Dubois 41
Tomkinson *v.* Balkis Consol. Co. 479
v. Staight 159
Tomlinson *v.* Morris 662, 962
v. Savage 485
Tomlinson Carriage Co. *v.* Kinsella 778
Tompkins *v.* Batie 782
v. Dudley 599
v. Haas 138
v. Nichols 489
v. Tibbetts 296
Toms *v.* Wilson 705, 743
Tone *v.* Doelger 596
Tooke *v.* Hollingworth 697, 798, 812
Toomer *v.* Dawson 222
Torkelson *v.* Gorgenson 668
Torrance *v.* Bolton 393
Torry *v.* Hadley 775
Torrey *v.* Corliss 349, 543
Toulmin *v.* Hedley 733, 944
Tourret *v.* Cripps 231
Towell *v.* Gatewood 663, 681
Tower *v.* Tudhope 171
Towers *v.* Osborne 99, 100, 107
Towerson *v.* Aspatria Society 637, 948
Towle *v.* Blake 545
v. Dresser 45
v. Leavitt 485
v. White 586
Town *v.* Trow 782, 783
Townend *v.* Drakeford 256
Towne *v.* Collins 38
Towner *v.* Bliss 311
Townley *v.* Crump 798, 799, 812, 836
Townsend *v.* Hargraves 173
v. Henry 776
Townsends *v.* Bank of Racine 772
Towson *v.* Bank 781
Tracy *v.* Talmage 505
Traders' Bank *v.* Day 493
Trainer *v.* Morrison 777
v. Trumbull 43
Trask *v.* Bowers 492
Treadwell *v.* Aydlett 911
v. Moore 778
v. Reynolds 736
Treasurer *v.* Commercial Coal Co. 958
Trebilcock *v.* Wilson 771
Tredegar Coal Co. *v.* Gielgud 789
Tregelles *v.* Sewell 340
Trent, &c. Co., in re 925
Trenton Potteries Co. *v.* Oliphant 536
Trevor *v.* Wood 80
Trice *v.* Cockran 662
Trigg *v.* Faris 673
Trimmier *v.* Thomson 672, 965
Tripp *v.* Armitage 109, 284, 287
Troewert *v.* Decker 542
Tronson *v.* Dent 19
Trotter *v.* Hecksher 603
Trowbridge *v.* Holcomb 776
Truax *v.* Slater 132
Trueman *v.* Loder 191, 203, 249, 257
Trull *v.* Eastman 91
Truman *v.* Hardin 302
Trust *v.* De La Plaine 485
Trust Co. *v.* Welch 738
Truxton *v.* Fait 471, 478
Tryon *v.* Plumb 738
v. Whitmarsh 479
Tuberville *v.* Whitehouse 28
Tucker *v.* Humphrey 860
v. Mowrey 542
v. West 542
v. White 480
v. Wilson 18
v. Woods 76
Tuckerman *v.* Hinkley 534
Tufts *v.* Cleveland 310
v. D'Arcambal 301, 306
v. Grewer 795
v. Griffin 301
v. Mottashed 311
v. Plymouth Gold Mining Co. 222
v. Stone 306
v. Sylvester 915, 916
v. Weinfeld 482
Tull *v.* David 260
Tunno *v.* Fludd 683
Tupper *v.* Cadwell 42
Turley *v.* Bates 268, 278
Turnbull *v.* Forman 37
Turner *v.* Collier 772
v. Coolidge 729
v. Felgate 19
v. Goldsmith 553
v. Goulden 94
v. Harvey 421, 423
v. Hockey 211
v. Huggins 682
v. Langdon 724
v. Machine Co. 606
v. Mason 112
v. Mucklow 646
v. Trisby 28
v. Trustees of Liverpool Docks 361, 364, 367, 368, 371, 372, 860, 867
Turney *v.* Dodwell 755
Turnley *v.* McGregor 421

Figures refer to Pages.

Tuteur *v.* Chase 488
Tuthill *v.* Skidmore 918
Tuttle *v.* Brown 664, 962
v. Holland 538, 543
Tuxworth *v.* Moore 172, 727
Twyne's case 460
Tye *v.* Fynmore 615, 635
Tyers *v.* Rosedale Iron Co. 191, 708, 709, 922, 923
Tyler *v.* Augusta 959
v. Barrows 92
v. Bland 749
v. Strang 297
Tyson *v.* Thomas 522

U.

Udell *v.* Atherton 438, 439, 440, 442
Uhlman *v.* Day 78, 295
Ullmann *v.* Kent 826
Ullock *v.* Reddelein 648
Underhill *v.* Boom Co. 296
Underwood *v.* Nicholls 762, 763
v. Robertson 19
v. Wolfe 961
Union Bank *v.* Miller 80
Union Nat. Bank *v.* Carr 537
Union Pacific R. R. Co. *v.* Johnson 374
Union Stock Yards *v.* Western Land Co. 5
United States *v.* Bank of Washington 39
v. Behan 597, 938
v. Lissner 771
v. Morgan 771
v. Peck 596
v. Pine River Logging Co. 714
v. Robeson 599
v. Wittig 10
U. S. Reflector Co. *v.* Rushton 171
U. S. Wind Engine Co. *v.* Oliver 911
Unity Joint Stock Banking Association, ex parte 24
Unland *v.* Garton 665
Updike *v.* Campbell 535
Upham *v.* Dodd 325
v. Lefavour 779
Upper Canal Co. *v.* Roach 486
Upson *v.* Holmes 297
Upton *v.* Sturbridge Cotton Mills 299
v. Suffolk County Mills 671
Uther *v.* Rich 18
Utley *v.* Donaldson 81

V.

Vail *v.* Foster 774, 775
v. Reynolds 964
v. Strong 8, 662
Valentini *v.* Canali 31
Vallens *v.* Tillman 603
Valpy *v.* Gibson 93, 219, 872
v. Oakeley 755, 785, 800, 801, 819, 812, 825, 853, 903, 920, 935
Van Allen *v.* Illinois R. R. 955, 956
Van Bracklin *v.* Fonda 691
Van Brocklen *v.* Smeallie 826
Van Brunt *v.* Pike 729
Van Buren *v.* Digges 475
Van Casteel *v.* Booker 360, 362, 364, 372, 467, 441, 847, 863, 867, 869
Vancleave *v.* Beach 776
Van Duzor *v.* Allen 304
Van Eps *v.* Schenectady 137
Van Epps *v.* Harrison 470, 481
Van Hassell *v.* Borden 41
Van Hoozer *v.* Cory 92
Van Horn *v.* Hann 45
v. Rucker 827
Van Neste *v.* Conover 308, 469
Van Ostrand *v.* Reed 666
Van Rensselaer *v.* Roberts 779
Van Toll *v.* South Eastern R'y Co. 62, 390
Van Valkenburgh *v.* Gregg 722
Van Wart *v.* Woolley 758
Van Wert *v.* Olney Grocer Co. 726
Van Wren *v.* Flynn 302
Van Wyck *v.* Allen 679, 963
Vance *v.* Shroyer 397
v. Wells 46
Vandenbergh *v.* Spooner 201, 202
Vandewalker *v.* Osmer 668
Vassar *v.* Camp 79
Vasser *v.* Buxton 308
Vates *v.* Cornelius 669
Vaughn *v.* Campbell 683
v. Hopson 304
Vawter *v.* Griffin 132
Veasey *v.* Doton 483
v. Hosmer 780
v. Somerby 729
v. Williams 453, 484, 485
Ventress *v.* Smith 18, 39
Venus, The 296
Vermilye *v.* Adams Express Co. 39
Vermont Marble Co. *v.* Brow 303
Vernede *v.* Weber 561
Vernon *v.* Hallam 516
v. Keyes 399, 421, 423, 470
Vertue *v.* Jewell 857, 863, 864, 865, 902
Vibbard *v.* Johnson 631, 673, 677
Vicars *v.* Wilcocks 921
Vickers *v.* Hertz 23, 850
v. Vickers 94
Vielie *v.* Osgood 235
Vierling *v.* Iroquois Furnace Co. 666
Vietor *v.* Stroock 170
Vilmont *v.* Bentley 14, 15, 16, 419
Vincent *v.* Cornell 301
v. Leland 663, 961
Vining *v.* Bricker 540
v. Gilbreth 726
Vinton *v.* King 545
Vinz *v.* Beatty 542
Vlierboom *v.* Chapman 19
Vogel *v.* Osborne 671
Volking *v.* Huckabay 306
Voorhees *v.* Earl 959, 960
Voorhis *v.* Olmstead 856
Vorebeck *v.* Roe 134
Vorse *v.* Loomis 304
Voss *v.* McGuire 684
Vulicevich *v.* Skinner 133
Vyse *v.* Wakefield 558, 559

Figures refer to Pages.

W.

Wabash Elevator Co. *v.* First National Bank 776
Wabash R. R. *v.* Shryock 470
Waddell *v.* Blockey 207
Waddington *v.* Bristow 120, 131
v. Oliver 711
Wade's case 747
Wade *v.* Moffett 794
v. Tatton 421
Wadhams *v.* Balfour 297, 684
Wadleigh *v.* Buckingham 311
Wadlington *v.* Covert 744
Wadsworth *v.* Havens 489, 494
v. Williams 489
Wailing *v.* Toll 43
Wain *v.* Bailey 759
v. Warlters 98, 199, 200, 215, 216, 223
Wainman *v.* Kynman 780
Wainright *v.* Webster 772
Wait *v.* Baker 358, 360, 371, 372, 714, 833
v. Borne 671
v. Brewster 773
v. Green 308
v. Scott 911, 918
Waite *v.* Delesdernier 777
v. Hudson 491
v. McKelvy 171
Wake *v.* Harrop 186, 192, 390
Wakefield *v.* Lithgow 776
Wakeman *v.* Wheeler & Wilson Manuf. Co. 957
Waldo *v.* Belcher 323
v. Martin 505
Waldron *v.* Chase 319
v. Romanei 349
Walford *v.* Duchesse de la Pienne 33
Walker, ex parte 891
v. Blake 7, 606
v. Boulton 170
v. Butterick 7
v. Constable 240
v. Ebert 476
v. Gooch 678
v. Hoisington 670
v. Hyman 311
v. Langdale's, &c. Co. 648
v. Lovell 137, 545
v. Matthews 16
v. Nussey 177
v. Orange 608
v. Pue 689
v. Supple 131
v. Vaughn 90
v. Woodbridge, ex parte 90
Walkins *v.* Paine 737
Wall's case 56
Wall *v.* Schneider 537
Wallace *v.* Breeds 272, 313, 315, 837
v. Cohen 471
v. Frazier 669
v. Kelsall 753
v. Lark 538
v. Rogers 667
Waller *v.* Cralle 725
v. Lacy 765
Walley *v.* Montgomery 354
Walling *v.* Schwartzkopf 961
Wallis *v.* Bardwell 42
v. Day 513
Walls *v.* Gates 959
Walradt *v.* Brown 494
Walrath *v.* Ingles 180
v. Richie 180
Walsh *v.* Barton 485
v. Everard 42
v. Lennon 767, 774
v. Myers 793
v. Powers 44
v. Taylor 302, 305
Walter *v.* James 769
v. Ross 908
v. Walter 529
Walton *v.* Bonham 487
Wanamaker *v.* Yerkes 854
Wangler *v.* Franklin 306
Wanser *v.* Messler 673, 677
Ward *v.* Audland 3
v. Bourne 767, 773
v. Byrne 510, 511, 512
v. Haggard 680
v. Hobbs 455, 652
v. Shaw 298
v. Smith 781
v. Van Duser 540
v. Wiman 480
Wardell *v.* Fosdick 480, 662
Warden *v.* Marshall 724
Warder *v.* Whitish 607
Ware *v.* Street 772
Ware River R. R. Co. *v.* Vibbard 854
Waring *v.* Mason 684, 685, 961
Warlow *v.* Harrison 116, 241, 448, 485
Warner *v.* Martin 41
v. Norton 467, 493
v. Willington 221
Warnock *v.* Campbell 46
Warren *v.* Buck 692
v. Buckminster 295, 324
v. Chapman 544
v. Franklin Ins. Co. 771
v. Leland 134
v. Mains 781
v. Milliken 172, 328
v. Philadelphia Coal Co. 683
v. Stagg 189
v. Stoddart 934
v. Williams 494
Warren Glass Works *v.* Keystone Coal Co. 689
Warriner *v.* Rogers 3
v. The People 773
Warten *v.* Strane 325
Wartman *v.* Breed 7, 738
Warwick *v.* Bruce 24, 29, 31, 121
v. Noakes 743
v. Slade 259
Washbourn *v.* Burrows 121
Washburn *v.* Cuddihy 670
v. Fletcher 79
v. Pond 40
Washburn Iron Co. *v.* Russell 720
Washington *v.* Johnson 7
Washington Ice Co. *v.* Webster 174
Wason *v.* Rowe 667
Wassonboehr *v.* Boulier 544
Waterhouse *v.* London, &c. R'y Co. 814

Figures refer to Pages.

Waterhouse *v.* Skinner 576
Waterman *v.* Buckland 537
v. Meigs 111, 225
Waters *v.* Bean 46
v. Cox 304, 312
Waters Heater Co. *v.* Mansfield 606, 736
Watertown *v.* Davis 303
Watkins *v.* Birch 462
v. Halstead 46
v. Paine 737
v. Robb 748
v. Rymill 619
v. Wyatt 92
Watson, ex parte 877, 892, 913
v. Denton 617
v. Owens 775
v. Rodgers 490
v. Roode 668
v. Silshy 471
v. Spratley 117
v. Walker 600
Watts *v.* Ainsworth 51
v. Cummins 470, 483
v. Friend 130, 136, 138, 522
v. Hendry 320
Waugh *v.* Riley 780
Way *v.* Marten 663
v. Ryther 481
v. Wakefield 8
Waydell *v.* Luer 774
v. Velie 777
Waymell *v.* Reed 502
Wayne's Merthyr Steam Co. *v.* Morewood & Co. 790, 792
Weakly *v.* Bells 775
Weall *v.* King 644
Weaver *v.* Barden 478
v. Shriver 487
Webb *v.* Brooke 499
v. Darvey 489
v. Fairmaner 702
v. Herne Bay Commissioners 814
v. Knight 660
v. Odell 81, 679
Webber *v.* Davis 41
v. Donnelly 538
v. Tivill 93
Weber *v.* Diebold Safe Co. 303
Webster *v.* Granger 683
v. Munger 538
v. Zielly 181
Webster Marble Co. *v.* Dryden 679
Weddigen *v.* Boston Electric, &c. Co. 773
Weed *v.* Boston Ice Co. 265
v. Dyer 688, 695
v. Page 474
Weeks *v.* Pike 307
v. Prescott 468
v. Wead 493
Weiden *v.* Woodruff 667
Weidner *v.* Hoggett 208
v. Phillips 481
Weiland *v.* Krejnick 6
v. Sunwall 6
Weimer *v.* Clement 683
Weinstein *v.* Freyer 312
Weir *v.* Bell 432, 434, 443, 479, 547
Welch *v.* Allington 774
v. Spies
Weld *v.* Came 172, 296, 720
v. Cutler 298, 319
Welde *v.* Scotten 494
Wellauer *v.* Fellows 81
Wellington *v.* Oil Co. 408
Wellock *v.* Constantine 16
Wells *v.* Abernethy 955
v. Abrahams 16
v. Calnan 598
v. Day 137
v. Foster 507
v. Girling 465
v. Porter 88
v. Spears 672
Welsh *v.* Carter 682
v. Gossler 602
Welter *v.* Hill 92, 293
Wemet *v.* Missisquoi Lime Co. 773
Wemple *v.* Stewart 954
Wentworth *v.* Outhwaite 835, 876, 887, 903
v. Tubb 32
v. Woods Machine Co. 300
Wessels *v.* Weiss 471
West *v.* Bolton 310
v. Cunningham 682, 827
v. Cutting 959
v. Gregg 42
v. Pritchard 955, 956
v. Suda 608
v. Wentworth 956
Westbrook *v.* Eager 134
Westcott *v.* Nims 487
v. Thompson 5
Western Bank of Scotland *v.* Addie 400, 408, 424, 433, 434, 439, 440, 442, 443, 444, 455, 446
Western Union R. R. *v.* Wagner 41
Westfall *v.* Braley 772
West Jersey R. R. *v.* Trenton Car Works 293
Westlake *v.* Bostwick 596
Westmoreland *v.* Powell 494
Weston *v.* Downes 944
Weston Land and Cattle Co. *v.* Plumb 306
West Republic Mining Co. *v.* Jones 605, 685
Westropp *v.* Solomon 394, 593
West Stockton Iron Co. *v.* Nielson 649
Westurn *v.* Page 671
Westzinthus, in re 898, 900, 901
Wetherill *v.* Jones 518
v. Neilson 681, 691
Weybrick *v.* Harris 900
Wharton *v.* McKenzie 25
Wheadon *v.* Olds 82
Wheat *v.* Cross 78, 82
Wheaton *v.* Baker 474
Wheelan *v.* Couch 301
Wheeler *v.* Collier 448
v. Guild 39
v. Knaggs 781, 782
v. Newbould 40
v. Russell 540
v. Schroeder 775
v. Sumner 729
v. Wheeler 91
v. Woodward 783
Wheeler & Wilson Mfg. Co. *v.* Heil 309
v. Keeler 472

Figures refer to Pages.

Wheeler & Wilson M. Co. *v.* Teetzlaff 311
Wheelock *v.* Berkley 962
Wheelton *v.* Hardisty 437, 547
Wheelwright *v.* Depeyster 18, 39
Whelan *v.* Sullivan 83, 225
Whincup *v.* Hughes 395, 553
Whippey *v.* Hillary 30
Whipple *v.* Gilpatrick 305
Whistler *v.* Forster 11, 18
Whitaker, in re 38
v. Eastwick 673, 683
v. Hueske 684
v. Sumner 10
Whitaker Iron Co. *v.* Preston Bank 476
Whitcomb *v.* Joslyn 44
v. Whitney 298
v. Woodworth 9, 310
White, ex parte 3, 7
v. Barber 537
v. Beeton 550
v. Buss 538
v. Corlies 77
v. Drew 180
v. Foster 134
v. Garden 414
v. Harvey 143, 720
v. McCraken 728
v. Miller 679, 687, 957, 963
v. Mitchell 910, 815
v. Oakes 407, 689
v. Philbrick 81
v. Proctor 240
v. Salisbury 955
v. Sawyer 484
v. Solomon 742, 794
v. Spettigue 12, 16
v. Tompkins 955
v. Welsh 720, 854
v. Wilks 313, 315, 323
White Bronze Co. *v.* Gillette 738
Whitehead *v.* Anderson 467, 835, 862, 882, 884, 885, 886, 891, 892
Whitehouse *v.* Frost 290, 314, 315, 320, 322
Whitesides *v.* Hunt 537
Whitfield *v.* United States 536
Whiting *v.* Farrand 349
v. Price 481
Whiting Mfg. Co. *v.* Gephart 493
Whitlock *v.* Hay 856
Whitman *v.* Freese 680
Whitman Agricultural Co. *v.* Strand 78, 349
Whitmarsh *v.* Walker 133
Whitmore *v.* South Boston Iron Co. 666, 683, 688, 691, 962
Whitney *v.* Boardman 483, 827
v. Heywood 631, 673, 674
v. Lynde 727
v. McConnell 302, 306
v. Slayton 536
v. Snyder 476
v. Taylor 670
Whiton *v.* Spring 777
Whittaker, ex parte 414
v. Howe 509, 513
v. McCormick 679
Whittemore *v.* Gibbs 132
Whitwell *v.* Vincent 299
Whitworth *v.* Thomas 483
Whywall *v.* Champion 28
Wickham *v.* Martin 478
Widoe *v.* Webb 544
Wiedman *v.* Keller 692
Wieland *v.* Kobick 44
Wieler *v.* Schilizzi 590
Wiener *v.* Whipple 225, 685
Wier *v.* Bissett 678
Wigand *v.* Sichel 473
Wiggin *v.* Butcher 681
v. Day 477
Wiggins *v.* Burkham 737
v. Snow 299
Wigglesworth *v.* Dallison 189, 258, 831
Wigton *v.* Bowley 266, 350
Wilbur *v.* How 473
v. Jernegan 775
Wilcox *v.* Ellis 481
v. Fitch 494
v. Hall 686, 687
v. Howard 683
v. Owens 686, 687
v. Roath 44
v. San Jose Co. 474
v. Wilcox Co. 303
Wilcox, &c. Co. *v.* Green 164
Wilde *v.* Gibson 432
Wilder *v.* Cowles 679
v. Seelye 782
v. Weakely 45
Wilds *v.* Smith 736, 890, 917, 961
Wildy *v.* Stephenson 206
Wiles *v.* Provost 738
Wiley *v.* Smith 888, 889
Wilhelm *v.* Schmidt 774
Wilkes *v.* Ferris 726
Wilkins *v.* Bromhead 332
v. Casey 177
Wilkinson *v.* Evans 197, 219, 220
v. Heavenrich 234
v. Holiday 266, 295
v. Ketler 92
v. King 13
Wilks *v.* Davis 94
Willard *v.* Sumner 306
Willock *v.* Terrell 507
Williams *v.* Bacon 222, 225, 260
v. Briggs 90
v. Burgess 159
v. Byrnes 201
v. Carpenter 777
v. Connoway 303
v. Davis 7
v. Evans 761, 763
v. Feiniman 326
v. Given 469, 477
v. Goodwin 827
v. Griffith 766
v. Hathaway 82
v. Healey 595
v. Hide 552
v. Hodges 916
v. Howard 957
v. Hurt 960
v. Ingram 668
v. Jackman 291
v. Jones 794
v. Lake 201
v. Lowe 487
v. McFadden 964

Figures refer to Pages.

Williams *v.* Miller 39
v. Millington 761
v. Moor 30
v. Paul 531, 534
v. Protheroe 517
v. Rawlinson 765
v. Reynolds 929, 933, 934, 935
v. Robb 737
v. Robinson 226, 234
v. Rorer 781
v. Smith 12
v. Spafford 683
v. Tappan 539
v. Tiedemann 537
v. Wheeler 117
v. Winsor 91
v. Wood 261, 954
Williamson *v.* Allison 611, 642, 662
v. Barnsley 530
v. Berry 8
v. Dawes 33
v. Henley 517
v. Sammons 672
Willoughby, ex parte 755
Willson *v.* Binford 680
Wilmarth *v.* Mountford 781
Wilmot *v.* Hurd 663
v. Lyon 471
Wilmott *v.* Smith 761
Wilmouth *v.* Patton 595
Wilmshurst *v.* Bowker 357, 372
Wilson *v.* Anderton 893
v. Cooper 6
v. Dunville 688, 952
v. Fuller 133, 429, 662
v. Furguson 669
v. King 966
v. Lancashire, &c. R'y Co. 920, 928
v. Lewiston Mill Co. 223, 260
v. Melvin 543
v. Ray 465
v. Stratton 7, 544
v. The General Screw Collier Co. 926, 931
v. Whitaker 955
v. White 471
v. Wilson 62
Winchell *v.* Carey 542
Winchester *v.* Charter 489
v. Howard 81
v. Newton 583, 604
Winchester Co. *v.* Carman 304
Windmiller *v.* Chapman 488
v. Pope 723
Wineland *v.* Coonce 477
Winfield *v.* Dodge 542
Wing *v.* Clark 349
v. Merchant 8
Wingate *v.* Neidlinger 772
Wingfield, ex parte 585
Wingo *v.* Brown 683
Winks *v.* Hassall 837
Winslow *v.* Leonard 318, 731
Winsor *v.* Lombard 662, 680, 682
Winter *v.* Winter 3
Winterbottom *v.* Wright 407, 408, 690
Winterport, &c. Co. *v.* Schooner Jasper 79
Wintz *v.* Morrison 965
Wirth *v.* Roche 544
Wisconsin Brick Co. *v.* Hood 689
Wise *v.* Chase 775
v. M'Mahon 350
v. Moore 488, 494
Wizecarver *v.* Adamson 596
Wiseman *v.* Vandeputt 859
Witherow *v.* Witherow 80
Withers *v.* Greene 475, 966
v. Lyss 272
v. Reynold 576, 578, 583, 601, 605
Wittkowsky *v.* Wasson 96
Wolcott *v.* Mount 679, 963
Wolf *v.* Gardner 40
v. Kahn 725
v. Marsh 596
Wolfe *v.* Horne 242, 578
v. Luyster 453, 485
v. Pugh 484
Wolfenden *v.* Wilson 115
Wolfley *v.* Rising 491
Wontner *v.* Sharp 48
Wood *v.* Ashe 666, 672, 683
v. Bell 268, 282, 283, 285, 286, 287, 291
v. Benson 136
v. Colvin 39
v. Dixie 463
v. Garland 474
v. Hitchcock 782
v. Jones 863
v. Leadbitter 699
v. Losey 44
v. Manley 699, 716, 846
v. Michaud 685, 794
v. Roach 908
v. Rowcliffe 21, 22
v. Sheldon 397, 673, 680
v. Smith 613
v. Tassell 700
v. Yeatman 911, 913
Wood & Foster's case 85
Wood Machine Co. *v.* Gaertner 667
Wood Mower Co. *v.* Thayer 688
Wood Reaping Machine Co. *v.* Smith 607
Woodbridge, ex parte 891
Woodbury *v.* Long 721
v. Robbins 670
Woodcock *v.* Bennet 39
Woodland *v.* Fear 394, 593
v. Fuller 12
Woodley *v.* Coventry 161, 808, 814, 833
Woodruff *v.* Clark 46
v. Graddy 959
v. Hinman 544
v. Noyes 350
Woods *v.* Armstrong 539, 540, 545
v. Hall 453, 485
v. M'Gee 322, 324
v. Russell 279, 280, 281, 282, 283, 285, 286, 287, 291
Woodsworth *v.* Bennett 534
Woodward *v.* Boone 6
v. Burton 602
v. Emmons 737, 959, 961, 966
v. Foxe 529
v. Semans 5
Wooley *v.* Edson 721
Woolfe *v.* Horne 207

Figures refer to Pages.

Woolley *v.* Geneva Wagon Co. 307
Woolner *v.* Hill 597
Woolridge *v.* Thiele 479
Woolsey *v.* Bailey 350
Woonsocket Rubber Co. *v.* Loewenberg 478
Wooster *v.* Sherwood 321
Word *v.* Cavin 673, 677
Wordall *v.* Smith 462
Work *v.* Jacobs 469
Worlsey *v.* Wood 558
Worthen *v.* Wilmot 955
Worthington *v.* Cowles 679
v. Grimsditch 745
Wortes *v.* Clifton 2
Wright *v.* Barnard 304
v. Behrens 781, 783
v. Bircher 90
v. Cabot 778
v. Campbell 902
v. Crookes 618
v. Dannah 260
v. Davenport 959, 966
v. Hart 682
v. Laing 766
v. Lawes 885
v. Solomon 40
v. Tetlow 298
v. Weeks 226
Wrigley *v.* Cornelius 826
Wulschner *v.* Ward 174
Wurzburg *v.* Andrews 961
Wyburd *v.* Stanton 536
Wyckoff *v.* Runyon 966
v. Vicary 476
Wyndham *v.* Chetwynd 98
Wynn *v.* Shropshire Union R'y Co. 554
Wynne's case 48
Wyper *v.* Harveys 385

Y.

Yale *v.* Seely 731
Yates *v.* Bond 683
v. Pym 614
Ybarra *v.* Lorenzana 487
Yerby *v.* Grigsby 260
Yerkes *v.* Salmon 537
v. Wilson 454, 485
Yockey *v.* Norn 293
Youghiogheny Iron Co. *v.* Smith 961
Young, ex parte 537
v. Adams 771, 772
v. Austin 321
v. Blaisdell 170
v. Bruces 89
v. Burton 957
v. Cole 592, 593
v. Covell 479
v. Heermans 488
v. Hibbs 774
v. Higgin 702
v. Lloyd 954
v. Matthews 278
v. Mertens 826, 827
v. Miles 6, 320, 321
v. Poole 490
v. Stevens 45
v. Timmins 509, 513
v. Young 3
Young, &c. Man. Co. *v.* Wakefield 398
Yundt *v.* Roberts 545

Z.

Zaguary *v.* Furnell 271
Zaleski *v.* Clark 607
Zehner *v.* Dale 955
Zellner *v.* Mobley 727
Zimmerman *v.* Holliday 605
v. Morrow 663, 668
Zimmerman Mfg. Co. *v.* Dolph 666, 737
Zoeller *v.* Riley 495
Zouch *v.* Parsons 24, 33
Zuchtmann *v.* Roberts 300
Zuck *v.* McClure 596, 597
Zucker *v.* Karpeles 471
Zuller *v.* Rogers 961
Zwinger *v.* Samuda 846

INDEX.

"ABOUT." (See DELIVERY, p. 1054.)

ACCEPTANCE,

of offer. (See ASSENT, OFFER, pp. 1047, 1066.)

must be unconditional, 48, 78.

must be communicated, 48, 77.

by letter,

takes effect when posted, 48, 54, 58, 79.

neither can then retract, 54, 78.

though never received, 54.

in Scotland, 58.

by telegraph, 80.

after agent's authority to make offer is revoked, 74.

insufficient, examples of, 76.

before period allowed for, 77.

by performance of contract, 732, 736, 741.

when and where, 732.

receipt not, 734.

right to inspect before, 733, 736.

and to reject, 734, 736.

right to reject after, 737.

not necessary to complete sale, 736.

what circumstances show, 736.

of part effect, 737.

tender, 737.

of more than ordered, 738.

of less than ordered, 738.

under Statute of Frauds. (See STATUTE OF FRAUDS, p. 1075.)

evidence of receipt, 140.

may be constructive, 142, 155.

for jury, 142.

dealing with goods as owner, 143, 170.

or bill of lading, 144.

resale, 170.

lease, 171.

stock, 171.

does not conclude buyer from rejecting goods, 146, 149.

cases reviewed, 146 *et seq.*

may be prior to receipt, 154.

whether after action brought, 155.

mere silence and delay, effect, 156.

goods marked with buyer's consent, 158.

of part enough, 158, 173.

how effecting agreement for verbal resale to vendor, 159, 173.

ACCEPTANCE, *continued.*
must be before disaffirmance, 159.
if terms disputed, 159.
by agent, 169.
as carrier, 169.
whether seller one, 169.
by mere selection, 170.
mental satisfaction necessary, 169.
burden of proof, 170.
fact for jury, 170.
manual receipt insufficient, 170.
right to keep a reasonable time, 170.
whether order properly filled, immaterial, 170.
ACTIONS,
by vendor if property has not passed, 784, 792.
for non-acceptance, 784.
before completion, 792.
measure of damages (see DAMAGES, p. 1053), 785, 789, 792, 793.
date of breach, as effecting, 552, 596, 785, 788.
insolvency of buyer, effect, 785.
bankruptcy act, 786.
in instalment deliveries, 787.
not necessarily rescission, 788, 790.
by vendor if part has passed, 789.
quantum valebant, 789.
necessity of tender, 792, 793.
and credit given, 795.
by vendor if property has passed, 791.
for price, 791, 794.
title must pass before, 795.
if credit given, 795.
cannot rescind, 791.
if bill given, 793.
for goods sold and delivered, when, 793, 795.
by the vendee. (See REMEDIES OF THE BUYER, p. 1071.)
ADVERSE POSSESSION,
does not affect sale, 41.
AFTER-ACQUIRED PROPERTY (see THING SOLD, p. 1081), 86, 90.
AGENT. (See CARRIER; PRINCIPAL AND AGENT, pp. 1050, 1070.)
AGREEMENT,
"bargain" under Statute of Frauds distinguished, 215.
must be intelligible, 61, 83.
ALIEN ENEMY,
sale, to illegal, 501, 535.
ALTERATION OF CONTRACT, 177.
APPROPRIATION. (See JUS DISPONENDI, p. 1063.)
generally, 329, 349.
election determined, when, 330.
English cases reviewed, 331.
American cases reviewed, 349.
by delivery to carrier, 331, 343, 349.
intention, for jury, when, 350.
freight paid by seller, effect, 332, 350.
of larger amount, 346, 350.

APPROPRIATION, *continued.*
of smaller amount, 351.
without direction, 351.
conditional, 336.
assent by vendee necessary, 339, 351.
"free on board," 340.
sale by sample, 345, 351.
not in accordance with contract, 345, 351.
goods to be manufactured, 347, 351.
consignment to factor, 351.
consignment to creditor, 351.
"AS SOON AS POSSIBLE" (see DELIVERY, p. 1054), 705.
ASSENT. (See ACCEPTANCE; OFFER, pp. 1045, 1066.)
may be implied, 47, 76.
if part only of order sent, 59, 80.
if goods not ordered consumed, 81.
mutual and coexistent, 48, 77.
for court, 49.
must be communicated, 48, 77.
must be unconditional, 48, 78.
cases reviewed, 48 *et seq.*
by letter, 54, 79.
mistake, free from, 60, 81.
intelligible, 61, 83.
under Civil Law, 66.
"AS SOON AS POSSIBLE." (See TIME, p. 1081.)
ATTACHMENT,
sale of goods under, 12.
AUCTION,
every bid an offer, 53, 76.
sales at, Statute of Frauds applies, 110, 116.
separate articles, each under 10£, 136.
fraud at,
if vendor bids, 448.
reserving right to do so, 452, 485.
or agent of, 448.
puffers, or by-bidders, 448, 484, 485.
equity rule, 451.
principles laid down, 452.
American law, 453, 484.
sale "without reserve," 448, 450, 452, 485.
false bids, 484.
secret signals used, 484.
false advertisement, 484.
whether vendor allowed one bid, 485.
minimum price may be set, 485.
may repudiate, when, 486.
if buyer prevents bidding, 419, 472.
or combines with others to, 473.
warranties at, 623–624.
sale at, fair test of market value, 776.
AUCTIONEER,
agent to "sign" for both parties, 240, 261.
liability upon signature, 207.

AUCTIONEER, *continued.*
owner undisclosed, effect, 240.
no, at private sale, 240.
rebuttable inference, 240.
during what time, 241, 261.
whether clerk is, 241, 261.
witness is not, 241.
no, if both auctioneer and vendor, 260.
clerk of, might, 260.
authority to receive payment, 712.
power to warrant, 629.
personal liability for delivery, 227.
AVOIDANCE OF THE CONTRACT. (See FAILURE OF CONSIDERATION; FRAUD; ILLEGALITY; MISTAKE, pp. 1057, 1061, 1065.)

BAILMENT,
sale distinguished, 3, 5.
identical thing returned, 5.
if risk in owner, 6.
for jury, 6.
deposits of grain, 5, 6, 308.
consignment is, 7.
if option given, 7.
sale when, 8.
BANKRUPTCY. (See INSOLVENCY, p. 1063.)
BARGAIN AND SALE,
definition of (see SALE, p. 1072), 1, 4, 92.
BARTER,
sale distinguished, 2, 8.
exchange of liquors, 8.
effect upon pleading, 8.
BID, BIDDER. (See AUCTION, p. 1047.)
BILLS AND NOTES. (See NEGOTIABLE PAPER, p. 1066.)
BILL OF LADING,
Factors' Act, effect of, 21.
constructive "acceptance" by dealing with, 144.
reservation of *jus disponendi* by taking, 353, 373.
English cases reviewed, 354.
conclusions reached, 371.
American cases reviewed, 373.
in seller's name, effect, 373.
symbol of property, 373.
not negotiable, 897.
delivery of,
transfers title, 715, 844, 856.
divests lien, 843.
divests right of action, 843.
by statute, 842.
right to stop in transit notwithstanding, 843, 893.
but if indorsed, 896, 911.
by fraudulent vendee, 898.
re-transfer, 898.
in pledge, 898.
agent with, has, 860.

BILL OF LADING, *continued.*
Bills of Lading Act, 896.
within reasonable time, 705.
other documents distinguished, 844.
in sets of three, 852.
carrier's liability if delivery under one, 894.
"BILL OF PARCELS" (see WARRANTY, p. 1082), 666.
BILLS OF SALE,
different English acts, 463.
BONA FIDE PURCHASERS,
who are,
as to attaching creditors, 477.
as to pledgee, 418, 478.
as to assignee, 478.
of vendor, necessity of delivery, 731.
if sale upon credit, 479.
unexecuted writ, effect of on title of, 12.
in market overt (see MARKET OVERT, p. 1065), 13, 38.
from thief, 16, 18.
of negotiable paper, 18, 39.
from pledgee, 18, 40.
from sheriff (see SHERIFF, p. 1012), 19.
under Factors' Act, 20, 40.
necessity of delivery, as to, 731.
from fraudulent seller, 409, 475, 485.
BOUGHT AND SOLD NOTES. (See BROKERS; PRINCIPAL AND AGENT pp. 1049, 1070.)
parol evidence to show mistake in, 188.
generally, 244, 262.
four forms,
(1) both principals disclosed, 244.
(2) one principal disclosed, 244.
(3) broker appears as principal, 244.
(4) broker appears as agent, but is really principal, 244.
authorities reviewed and conclusions reached, 244, 256.
contract is signed entry, 256.
and not the notes, 256.
but notes are evidence of, 257.
or either one is, 257.
other note evidence to show variance, 257.
as to variance
between bought and sold notes, 257, 262.
if no signed entry, 258.
between notes and entry, 258.
between note and bargain by correspondence, 258.
in language but not meaning, 259.
credit sale, purchaser undisclosed, 258.
when is vendor bound, 258.
revocation of broker's authority, 259.
alteration, effect of, 259.
authority of clerk, 260.
BREACH OF CONTRACT. (See ACTIONS; REMEDIES, p. 1046, 1071.)
BROKERS. (See PRINCIPAL AND AGENT, p. 1070.)
under Statute of Frauds,
liability upon signature, 206, 207.

BROKERS, *continued.*
effect of usage, 192, 205.
presumption that he is not personally bound, 208.
agents to sign for both parties, 242, 261.
no, if parties only brought together, 262.
whether clerks of, are, 260, 261.
bought and sold notes (see BOUGHT AND SOLD NOTES, p. 1049), 244.
statutes regulating London brokers, 242.
bound by custom, 244.
revocation of authority, 259.
warranty by, 629.
payment to, 711, 728.
BURDEN OF PROOF,
to show "acceptance," 170.
to show illegality, 543.
as to payment if check taken, 774.
BUILDINGS, 132.
BY-BIDDER. (See AUCTION, p. 1047.)

"CARGO,"
meaning of, 569, 600.
CARRIER. (See PRINCIPAL AND AGENT, p. 1070.)
whether agent to "accept," 141, 155, 164, 169.
whether agent to "receive," 161, 163.
delivery to,
passes title, 331, 342, 348, 714, 720.
even as to creditor of vendor, 724.
intention for jury sometimes, 350.
effect if seller pays freight, 350.
no, if not in season, 350.
no, if part only, 351.
no, if no direction given, 330, 351.
divests vendor's lien, 833.
liability of,
for delivery to fraudulent purchaser, 411.
for delivery upon bill of lading in set, 916.
for delay in delivery, 926.
lien of,
as against vendor, 864.
for freight, 915.
CAVEAT EMPTOR. (See FRAUD; WARRANTY, pp. 1057, 1082.)
CHAMPERTY, 503, 516.
CHATTEL, INCOMPLETE,
contract executory, 313, 317.
instalments as work progresses, 279, 291, 298.
CHATTEL NOT SPECIFIC,
contract is executory, 313, 317.
goods to be manufactured, 298, 313, 317.
goods on hand, 298, 313, 317.
appropriation (see APPROPRIATION, p. 1046), 313, 329, 349.
separation from mass, 313, 318.
cases reviewed, 313, 318.
conclusions reached, 327.
grain elevator rule, 327.

CHECK,
whether taking of, passes title to goods, 246.
whether payment, 756, 774.
yes, if delayed in presenting, 756, 772, 773.
yes, *prima facie*, 773.
CHOSES IN ACTION, SALE OF,
whether "goods, wares, and merchandise,"
in England, 117.
in America, 131.
implied warranty of title, 672.
CIVIL LAW,
as to assent, 66.
permits *quasi* contracts, 66.
by letter, 73.
revocation of agents' authority, 74.
must be a thing sold, 85.
expectation dependent on chance, 88.
must be a price certain, 94, 378.
as to earnest, 178.
nature of contract of sale,
discovery of Institute of Gaius, effect, 375.
sale, offspring of exchange, 376.
civil, prætorian, and natural obligations, 376.
four stages of formation :
nexum, 378.
stipulation, 378.
expensilatio, 378.
mutual assent, 378.
differs from common law,
as to price, 378.
as to transfer of property, 378.
as to eviction, 380.
as to risk of loss, 381.
French law, 382.
Scotch law, 384.
innocent misrepresentation, 392.
fraud defined, 401.
fraud in bidding, 448.
warranty in (see WARRANTY, p. 1082), 622, 632.
tender and payment under, 768.
no stoppage *in transitu*, 54.
COMMISSION MERCHANTS. (See FACTORS, p. 1057.)
CONDITIONS. (See PREPAYMENT; SPECIFIC CHATTELS, pp. 1069, 1074.)
what are, 546, 594.
precedent, 547.
independent agreements distinguished, 547.
question of intention, 548, 595.
rules for determining, 548.
circumstances looked at, 549.
may become warranties, 549.
may be waived, 550.
by fault of defendant, 550, 596.
action may be brought, when, 551, 596.
mutual, 595.

CONDITIONS, *continued.*
dependent upon,
act of third person, 557, 598.
party claiming must show performance, 558.
impossible to perform by fault of defendant, 558.
some event, 559, 599.
necessity of notice, 559, 599.
construction of words,
sale "to arrive," 560, etc.
cases classified, 564, 600.
notice, necessity of, 565.
"shipment" within certain time, 566, 600.
"cargo," 569, 574, 600.
"to cover cost, freight, and insurance," etc., 571.
impossible to perform,
if in nature possible, 552, 553, etc.
disability not impossibility, 597.
but unconscionable, 555.
American law same, 556.
if physically impossible, 552, 597.
if legally impossible, 554.
because of defendant's act, 557.
sale by description,
of identity of kind, 571.
condition and not warranty, 568, 633.
mercantile paper, 574, 592.
sale by sample,
entitled to inspection, 584.
sale on trial, 585, 606.
failure to return, effect, 586, 600.
consumption, effect, 586.
as to notice, 607.
risk, in whom, 606.
"sale or return," 585, 606.
sale to be satisfactory, 607.
sale by instalments,
as to time of delivery, 578, 602.
as to payment, 604.
CONDITIONAL SALE. (See CONDITIONS; PREPAYMENT; SPECIFIC CHATTELS, pp. 1051, 1069, 1074.)
CONFLICT OF LAWS,
lex loci contractus governs in conditional sale, 311.
CONSIDERATION. (See FAILURE OF CONSIDERATION; ILLEGALITY; MISTAKE; WARRANTY, pp. 1057, 1061, 1065, 1082.)
offer is without, 68, 71.
warranty must have, 611, 662.
CONSIGNEES. (See FACTORS, p. 1057.)
CONSIGNMENT,
sale distinguished, 7.
is a bailment, 7.
CONTINUED POSSESSION, 489.
CONVERSION. (See TROVER, p. 1082.)
CORRESPONDENCE,
contract by. (See ACCEPTANCE; ASSENT; OFFER, pp. 1045, 1047, 1066.)

COUNTER-CLAIM,
in suit for note, 951.
if damages unliquidated, 951.
C. O. D.
shipment, effect of, on title, 374.
reserves possession only, 374.
buyer may replevy, when, 374.
CREDIT,
sale upon, passes title and right of possession, 696.
must expire before action for price brought, 795.
waives lien, 797, 831, 853, 855.
which revives, when, 797, 853, 855.
does not affect right to stop in transit, 908.
CROPS,
whether "goods, wares, and merchandise," 118.
yes, if sale executory until severance, 119.
if sale executed before severance, 119.
fructus industriales and *naturales* distinguished, 122.
fructus industriales,
not directly decided as to, 126.
chattels, even when growing, 124.
though immature, 125, 134.
fructus naturales,
no, before severance, 125.
standing timber, 125, 133.
license to cut, whether revocable, 133.
test whether land a "warehouse" only, 126, 133.
who must sever, 133.
emblements, 128.
if not yet sown, 130.
between lessor and lessee, 131.

DAMAGES. (See REMEDIES, p. 1071.)
by seller,
for non-acceptance, 784.
if no price fixed, 93.
before completion, 792.
after completion, 793.
as to market value, 794.
date when contract broken, 785.
if buyer insolvent, 785.
Bankruptcy Act, 786.
if title has passed, 791.
action for price, 794.
by buyer,
for non-delivery if contract executory, 920, 953.
measure of, 920, 954.
general, 920, 954.
market value,
evidence of, 954.
where and when, 954.
if no, 954.
if goods not on market, 954.
special, 921, 956.

DAMAGES, *continued.*
nominal, 935, 954.
States reviewed, 955.
date when determined, 922.
delivery in instalments, 922, 935.
if postponed, 923.
cases reviewed, 922, 935.
if carrier fails to deliver in time, 926.
if there be a sub-contract, 927.
cases reviewed, 928.
rules laid down, 933.
must mitigate loss, 934.
rule in America contrasted, 937.
upon breach of warranty, 940, 951.
general, 963.
special, 964.
profits when, 964.
speculative, 965.
defence upon suit for price, 949, 964.
recovery of costs, 951.
in case of fraud, 952.
for fraud,
need not rescind, 964.
general, 964.
special, 965.
defence in suit for price, 966.
when property has passed, 940.
"DAYS," construction of (see DELIVERY, p. 1054), 702.
DEATH,
as affecting offer, 58.
of principal terminates agent's authority to receive payment, 778.
DEL CREDERE,
agency distinguished, 3.
del credere agent's authority to receive payments, 762.
DELIVERY,
different kinds, 695, 718.
where,
generally, 698, 700, 718, 722.
reasonable time to remove, 701, 722.
effect of usage, 722.
goods in hands of third person, 699.
"F. O. B.," meaning, 701.
when,
in case of precedent act by buyer, 699, 722.
if time expressed, 701.
construction for court, 702.
if time implied, 702.
within reasonable time, 702.
construction of the following:
"month," 702.
"days," 702.
"hour," 702.
"reasonable time," 705.
"as soon as possible," 705.
"forthwith," 705.

DELIVERY, *continued.*
of bill of lading, 705, 714.
postponement of, effect, 706.
rules laid down, 709.
of more or less than exact amount, 709, 738.
recovery of price for, 711.
"about" or "more or less," 713.
in America, 713.
to common carrier, effect, 714, 721.
precautions necessary, 715.
as to merchantableness upon, 715.
as to right to examine goods upon, 715.
symbolical, 715, 728.
of key, 715.
of bill of lading, 716.
second, tender of, 717.
in case of sale "from the deck," 717.
as affecting lien (see LIEN, p. 1064), 833, 855.
if partial, 835, 856.
implies receipt under Statute of Frauds (see STATUTE OF FRAUDS, p. 1075), 167.
what necessary in action for goods sold and delivered, 723.
as against creditors, 724.
to common carrier, 724.
change of possession, 725.
as to relatives, 725.
within reasonable time, 726.
slight acts sufficient, 726.
if goods in hands of bailee, 726, 727.
if goods already in hands of vendee, 728.
co-tenants, 728.
manual not necessary, 728.
constructive, 728.
if impracticable, 729.
goods at sea, 730.
of growing crops, 730.
formality upon rescission, 731.
as against second purchasers, 731.
tender of, unnecessary before suit for non-acceptance, 793.
"DESCRIPTON," sale by (see MERCHANTABILITY, p. 1065), 685.
DISSEISIN,
no application to personal property, 41.
DOCUMENTS OF TITLE. (See BILL OF LADING, p. 1048.)
defined, 20, 787.
DRUNKARDS,
capacity to purchase, 32, 46.

EARNEST,
under Statute of Frauds,
not same as part payment, 175.
must be actually given, 176.
whether property passes, 175, 315.
in America, 180.
taken from civil law, 178.
deposit as forfeiture not, 180.

ELECTION. (See FRAUD, p. 1057.)
EMBLEMENTS. (See CROPS, p. 1053.)
ENTIRE CONTRACT,
effect of failure of consideration upon, 393, 397.
part within Statute of Frauds, effect, 136, 138.
ERROR. (See MISTAKE, p. 1065.)
ESTOPPEL,
in favor of sub-vendee against unpaid vendor, 802, 812.
against bailee, 813.
EVIDENCE,
parol under Statute of Frauds, 183.
to show writing not a record of contract, 186, 215.
not to enlarge memorandum, 186.
not to connect papers, 186, 193, 215.
to apply ambiguous reference, 187.
to indentify subject-matter, 187.
to show situation of parties, 187.
to show circumstances, 187.
to explain language, 187.
to show assent to alteration, 188.
to show usage, 188, 685, 718.
to show mistake in drawing instrument, 188.
to show conditions, 188.
to show latent ambiguity, 188.
not to show subsequent agreement, 189.
to show substituted mode of performing, 190.
not to show forbearance, 190.
whether to show abandonment, 191.
to show oral rescission in equity, 191.
to show agency, 191.
usage, 192.
mistake, 192.
to show "lease" a sale, 9.
to show warranty, 617, 666.
to show sale by sample, 685.
to determine reasonable time, 701.
to overturn presumption of payment, 775, 780.
to show enhanced contract price, 925.
EXECUTION,
sale on, effect,
if execution set aside, 19.
if warrant illegal, 19.
by United States government, 39.
if debtor not owner, 39.
if execution voidable, 39.
if execution void, 39.
if execution satisfied, 39.
EXECUTORY AND EXECUTED CONTRACTS.
distinguished, 4, 98, 264.
how determined, 264.
by actual intention, 264, 265.
if intention not manifested, 264, 266.
EXPRESS WARRANTIES. (See WARRANTIES, p. 1082.)

FACT,
mistake as to. (See MISTAKE, p. 1065.)
FACTORS,
English Factors' Acts, 20 *et seq.*
"documents of title," what are, 20.
persons included in Act, 20.
limited to mercantile transactions, 21, 23.
revocation of factor's authority, effect, 22.
American Factors' Acts, 40.
persons included, 40.
necessity of possession, 40.
cannot pledge, 40.
nor satisfy factor's own preëxisting debt, 41.
may sell on credit, 41.
if goods already sold by principal, 41.
analogous common-law principles, 41.
factor, agent to receive payment, 760, 777.
FAILURE OF CONSIDERATION. (See MISTAKE, p. 1065.)
if thing sold ceases to exist, 89, 397.
because of misrepresentation, 392.
if entire contract not complied with, 394.
for want of title, 394.
if buyer gets what he intended to buy, 395, 397
if partial, contract entire, 395, 397.
if partial, contract divisible, 396, 397.
in sale of patent, 397.
if article taken by vendor's creditors, 397.
or vendor himself, 397.
FIXTURES,
whether "goods, wares, and merchandise,"
if sale to landlord, 127.
if sale to stranger, 127.
if to be severed, 132.
buildings, 132.
absolute deed of land conveys, 133.
F. O. B. (FREE ON BOARD),
risk in whom, 276.
meaning, 340.
as affecting *jus disponendi*, 368.
as affecting lien, 853.
FOOD. (See PROVISIONS, p. 1070.)
"FORTHWITH,"
meaning of (see DELIVERY, p. 1054), 705.
FRAUD. (See STATUTE OF FRAUDS, p. 1075.)
generally, 400, 469.
contract voidable, 400.
definition, 401.
Civil Law, 401.
French law, 401.
elements necesary,
means used to be successful, 401.
dishonest intention, 401.
damages, 402.
who may sue for,

FRAUD, *continued.*
third persons, when, 403.
in America, 407.
parties or proxies only, 408.
on vendor,
contract voidable, 409, 415, 418, 469.
unless possession only transferred, 410, 475.
English cases reviewed, 410 *et seq.*
trespass not maintainable by vendor, 414.
to prevent bidding at auction sales, 419, 472. (See AUCTION, p. 1047.)
by secret agents, 420.
if third person assures vendee's solvency, 420.
false statements, 421, 469.
cases of, 469.
ability to pay, 469.
to commercial agency, 469.
must be relied on, 469.
within reasonable time, 469.
of identity, 417, 469.
of age, 469.
as to notes, 470.
as to futures, 470.
of opinion, 470.
of value, 470.
jury determine, sense of, 470.
concealment, 402, 421, 470.
in equity, 421.
of intent not to pay, 470.
artifice necessary, 471.
of insolvency, 413, 424, 471.
of intent to pay by set-off, 472.
of facts enhancing price, 472.
ratification by vendor, 473.
by suit for assumpsit, 413.
by suit for price, 473.
when, if credit given, 474.
taking security for price, 474.
rescission, 417, 474.
within reasonable time, 474.
as to demand, 474.
may retake goods, 474.
partial, effect of, 474.
must return anything of value, 474, 475.
"purchaser" from vendee,
gets perfect title, 402, 475.
unless fraud goes to existence, 475.
commercial paper, 476.
or possession obtained wrongfully, 477.
burden of proof, where, 477.
who are, 477, 478, 479.
creditors, 477.
by attachment, 477.
by voluntary delivery, 478.
pledgee or mortgagee, 478.
assignee, 478.

FRAUD, *continued.*
on buger,
generally, 424, 479.
contract voidable, 424, 447.
false statement,
English cases reviewed, 426 *et seq.*
knowingly made, 426, 432, 479.
recklessly made, 426, 432, 479.
believed to be untrue, 430, 480.
innocently made, 426, 437.
may rescind, 436.
no damages recoverable, 437.
by party deriving no benefit, 426.
essentials of deceit, 434.
of material facts necessary, 434.
and not opinion, 480, 483.
for court, 480.
American examples of, 480.
"dealer's" talk, 481.
promises as to future, 482, 483.
by vendor's agent, 427, 437, 483.
cases reviewed, 427, 437, 483.
action for tort and contract contrasted, 439, 440.
agent's liability in tort, 441.
vendor's liability in tort, 441, 445.
to shareholder, 446.
American law, 483.
concealment, 455, 482.
of hidden defects, 455.
in animals, 459, 482.
usage may control, 456.
motive material, 482.
with artifice, 482.
sale "with all faults," 482.
at auction sales (see AUCTION, p. 1047), 448, 484.
remedies,
may refuse to accept goods, 424.
may return goods, 424.
within reasonable time, 486.
may recover price, 424, 486.
bill in equity, 486.
may keep goods,
and sue for fraud, 487.
or defend in suit for price, 487.
ratification,
by treating property as own, 424.
by delay in rejecting, 425.
final though new incidents of fraud arise, 425.
on creditors of vendee,
by vendee attempting rescission, 465.
refusal of possession, 466.
refusal to "accept" under Statute of Frauds, 466.
on creditors of vendor,
English statutes, 459.
how affected by bills of sales acts, 463, 464.

FRAUD, *continued.*
intent necessary, 461, 488.
of both parties, 488.
unless conveyance voluntary, 488.
for jury, 461, 489.
fraud may be purged, 488.
change of possession, 460, 462.
American rules and cases, 467, 489.
notoriety of sale material, 462.
by disturbing bankruptcy law, 465.
parties to sale bound, 464, 487.
voidable as to creditors, 464, 487.
unless vendee sells to third person, 464, 495.
who are "creditors," 494.
FRENCH LAW. (See CIVIL LAW, p. 1051.)
thing sold must exist, 85.
price under, 95.
sale in, 382.
as to fraud, 401.
warranty of title in, 632.
as to payment, 767.
FRUCTUS INDUSTRIALES. (See CROPS, p. 1053.)
FRUCTUS NATURALES. (See CROPS, p. 1053.)
FURNITURE,
upon instalments, 288, 298.
FUTURE CONDITION. (See WARRANTY, p. 1082.)
FUTURE DELIVERY, 537.

GIFT,
sale distinguished, 2, 8.
delivery, necessity of, 2, 8.
check or bond, 3.
if donee in possession, 8.
whether fraudulent as to creditors, 488.
in market overt, effect of, 13.
GOODS, WARES, AND MERCHANDISE (see STATUTE OF FRAUDS, p. 1075.)
what is included, 117.
in America, 131.
Stamp Act, how affecting, 118.
fourth and seventeenth sections compared, 118.
property attached to soil,
title to pass after severance, 119.
title to pass before severance,
fructus industriales and *naturales* distinguished, 122.
fructus industriales,
not directly decided whether, 126.
chattels even when growing, 124.
though immature, 125, 134.
fructus naturales, 125.
standing timber, 125, 133.
license to cut, whether revocable, 133.
test, whether soil a "warehouse" only, 126, 133.
who must sever, 133.
fixtures, 127, 132.

GOODS, WARES, AND MERCHANDISE, *continued.*
emblements, 128.
not yet sown, 130.
between lessor and lessee, 131.
GRAIN ELEVATOR CASES, 5, 6, 327.

HORSES,
sale, of in market overt (see MARKET OVERT, p. 1064), 16.
court may order sale pending suit, 19.
warranty,
as to soundness, 615, 669.
by agent, when, 619, 620, 670.
misrepresentation as to soundness, 392.
fraud,
conceal latent defect, 149.
"HOUR,"
construction of (see DELIVERY, p. 1054), 702.
HUSBAND AND WIFE. (See MARRIED WOMEN, p. 1065.)

IDIOTS. (See LUNATICS, p. 1064.)
ILLEGALITY,
at common law,
generally, 496, 535.
executory and executed agreements, 497.
consideration partly illegal, 498.
goods supplied for illegal purpose, 498.
English cases reviewed, 498 *et seq.*
effect of knowledge, 498 *et seq.*, 535, 537.
sale of liquors, 538.
malum in se and *malum prohibitum*, 499, 500.
sale to alien enemy, 501, 536.
smuggling contracts, 501.
money advanced by agent for illegal purpose, 537.
by partner, 537.
public policy, because of, 502.
meaning of, 502.
forestalling, 503.
regrating, 503.
engrossing, 503.
sale of offices, 504 *et seq.*, 535.
restraint of trade, 507, 536.
general and particular, 507 *et seq.*, 536.
as to place, 509.
as to time, 512.
unreasonableness of, the test, 510.
time when determined, 516.
as to consideration, 513.
contract may be divisible, 515.
sale of trade secret, 516.
sale of trade name, 516.
champerty and maintenance, 516, 536.
wagers, 536.
speculating in futures, 537.
elements necessary, 537.
Sunday contracts, 530, 540.

ILLEGALITY, *continued.*
by statute,
" prohibited " contracts, what are, 517.
express or implied, 517.
rules of construction,
if statute for revenue purposes, 517, 521, 539.
if statute to protect public, 517, 521, 539.
three forms of statutes,
sale " null and void," 539.
prohibition with penalty, 539.
penalty only, 539.
Weight and Measure Act, 522.
Game Act, 522.
wagers, 523.
in America, 536.
Tippling Act, 526.
cattle salesmen in London, 526.
sale of offices, 527 *et seq.*
Sunday contracts, 530, 540.
if sale executory on both sides, 541.
if sale executed on both sides, 541.
if sale executed on one side, 541.
replevin, 541.
ratification, 534, 542.
of contract incomplete, but completed later, 534, 543.
negotiated only, 542.
what prohibited in America, 540.
burden of proof, 543.
consideration partly illegal, 545.
effect on mortgages, 545.
effect on notes, 545.
if statute repealed, effect, 545.
"IMMEDIATELY" (see PAYMENT, p. 1067), 743.
IMPLIED CONTRACT. (See WARRANTY, p. 1082.)
if part only of order filled, 59, 80.
IMPOSSIBILITY OF PERFORMANCE. (See CONDITIONS, p. 1051.)
if in nature possible, 552 *et seq.*
disability not impossibility, 597.
but unconscionable, 555.
American law, 556.
if physically impossible, 552, 598.
if legally impossible, 554.
because of act of defendant, 558.
INFANTS,
purchases voidable, 24.
also sales, 45.
binding on vendor, 24.
may ratify purchases, 24.
acknowledgment insufficient, 30, 44.
English statutes, effect of, 29.
effect of keeping and using, 44.
effect of selling, 44.
effect of silence, 44.
whether entering necessary, 44.
though ignorant of liability, 44.

INFANTS, *continued.*
effect of falsely stating age, 24, 43.
in tort, 44.
necessaries,
"*necessaries*" *bind them,* 25, 42.
may be sued on note, 42.
whether price agreed recoverable, 42.
if contract executory, 42.
what are, 25, 42.
whether for jury, 26, 42.
burden of proof, 44.
must be actually necessary, 28, 42, 43.
effect of marriage 28.
trading contracts, 28, 42, 44.
if there be a parent or guardian, 43.
emancipation, effect of, 43.
INSOLVENCY,
concealment of, whether fraud, 423, 472.
whether vendee may rescind sale upon his, 465.
whether vendee may refuse possession upon his, 466.
gives right to refuse delivery, 696.
does not *per se* end contract, 785, 792.
right to stoppage *in transitu* upon (see STOPPAGE IN TRANSITU, p. 1078) 798, 856.
"insolvency," meaning of, 865, 909.
stoppage before, effect, 865.
INSPECTION,
after receipt of goods, right of, 715, 736.
INSTALMENT. (See SALE BY INSTALMENT, p. 1073.)
"INSTANTLY" (see PAYMENT, p. 1067), 743.
INTENTION,
determines whether sale is executed or executory, 265.
immaterial in warranty, 612, 664, 666.

JUDGMENT,
in tort, whether title passes to goods upon, 60, 81.
JUS DISPONENDI,
generally, 353, 373.
English cases reviewed, 354.
principles deduced, 371.
American cases considered, 373.
bill of lading in seller's name, effect 373.
symbol of property, 373.
shipment C. O. D., 374.
reserves possession only, 374.
replevin by buyer, when, 374.

LADING. (See BILL OF LADING, p. 1048.)
LEASE,
sale distinguished, 8.
oral evidence to show sale intended, 9.
when in reality a mortgage, 9.
LETTER. See ACCEPTANCE; ASSENT; OFFER, pp. 1045, 1047, 1066.)
LICENSE,
when irrevocable, 133, 699.

LIEN,
defined, 828, 854.
goes to price only, 829.
may be waived, 830, 855.
by giving credit, 797, 830, 855.
evidence of usage to show delivery not intended, 830.
how revived, 853, 855.
by taking security, 831.
no, if note ready to surrender, 854.
by inconsistent agreement, 855.
abandoned by delivery ordinarily, 831, 855.
what is sufficient delivery, 832, 856.
goods in hands of buyer as bailee, 832, 837.
goods in hands of third person, 833, 834, 854.
and not a bailee, 854.
goods delivered to carrier, 833.
marking or boxing, effect, 836.
partial delivery, effect, 833, 856.
delivery upon condition, 837.
how affected by tender of price, 854.
on documents of title, 837, 856.
as to surrender of, 850.
factors' acts, affecting, 837.
Legal Quays in London Act, 841.
Sufferance Wharves Act, 841, 851.
bills of lading, 842.
statutes concerning, 837 *et seq.*
delivery of, divests lien, 843, 856.
delivery orders, effect of, 843, 856.
dock warrants, 844.
warehouse warrants, 844, 851, 856.
bills of lading distinguished, 844.
interpretation of, 844, 845.
by legislature, 845.
by court, 846.
by Factors' Act, 847.
LIQUOR,
exchange of, is a "sale," 8.
delivery of, by club, whether sale, 10.
LORD TENTERDEN'S ACT,
puts executory contracts within Statute of Frauds, 99.
LUNATICS,
capacity to purchase, 32, 45.

MAINTENANCE, 503, 516.
MANUFACTURE. (See GOODS, WARES, and MERCHANDISE, p. 1060.)
contract of, executory, 313, 317.
MANUFACTURER,
implied warranty of,
that goods are his own, 648.
of fitness for purpose, 649, 686.
of merchantability, 686.
MARKET OVERT,
what is, 12.

MARKET OVERT, *continued.*
conditions necessary, 13.
sheriffs' sale not like, 39.
effect of sale in,
as to seller, 13, 39.
if sovereign, 13.
as to buyer, 13.
if not innocent, 13.
if seller indicted, 14.
as to houses, 16.
modern markets, whether like, 17.
not recognized in America, 18, 38.
nor in Scotland, 18.
MARRIED WOMEN,
contracts at common law, 32, 46.
absolutely void, 33, 46.
ratification not binding, 46.
if husband dead in law, 33.
if husband an alien, 33.
by custom of London, 34.
contracts in equity, 35, 36.
contracts under statutes, 35.
20 & 21 Vict., 35.
33 & 34 Vict., 35.
45 & 46 Vict., 36 *et seq.*
in America, 35.
MASTER OF VESSEL,
may sell cargo, when, 19, 40.
MEASURING. (See WEIGHING AND MEASURING, p. 1085.)
"MEMORANDUM." (See STATUTE OF FRAUDS, p. 1075.)
MERCHANTABILITY. (See SALE BY SAMPLE, p. 1073.)
in sale "by description," 685.
effect of express warranty, 686.
MISREPRESENTATION. (See FRAUD; MISTAKE, pp. 1057, 1065.)
fraudulent and innocent distinguished, 392, 401.
Civil Law, 392.
innocent, of law, 393.
innocent, as to agency, 394.
MISTAKE. (See FAILURE OF CONSIDERATION, p. 1057.)
of fact, as affecting assent,
as to subject-matter, 60, 81.
as to quantity, 61, 82.
making agreement unintelligible, 61.
agreement corrected, when, 61.
as to person, 63, 82.
due to fraud, 66, 82.
as to existence of subject-matter, 84, 89.
of one party, 62.
as to motive, 62, 82.
manifested intention governs, 62.
as to fitness for purpose, 62, 82.
as to solvency of maker, 82.
after contract carried into effect, 386, 396.
suit in equity for, when, 386.

MISTAKE, *continued.*
voidable, 387.
if partly performed, 387.
mutual mistake of fact,
of existence, 387.
of quantity, 387.
of person, 388.
of one party as to fact, 389.
manifested intention governs, 390.
known by other party, effect, 390.
of law, insufficient, 390.
private law, contrasted, 391.
in equity, 391.
innocent misrepresentation, 392.
Civil Law, 392.
of law, 393.
as to agency, 394.
may recover money paid, 396.
if article restored, 397.
unless of no value, 397.
or impracticable, 397.
MONEY,
legal tender, what is, 746, 771, 781.
"MONTH," meaning of (see DELIVERY, p. 1054), 702.
"MORE OR LESS" (see DELIVERY, p. 1054), 713.
MORTGAGE,
sale distinguished, 9.
"lease" is, when, 9.
of after-acquired property. (See THING SOLD, 1081), 86, 90.
MUTUAL ASSENT. (See ASSENT, p. 1047.)

NECESSARIES,
what are, 25, 42, 43.
who decides, 26, 42.
burden of proof, 44.
NEGOTIABLE PAPER,
title of *bona fide* purchaser, 18, 39.
of United States bonds, 39.
payment by (see PAYMENT, p. 1067), 755, 772.
as to genuineness, 591, 679.
partial failure of consideration, 820, 966.
"NULL AND VOID," meaning of (see ILLEGALITY, p. 1061), 539.

OBVIOUS DEFECTS. (See WARRANTY, p. 1082.)
general warranty does not apply, 668.
what are, 668, 669.
OFFER. (See ACCEPTANCE; ASSENT, pp. 1045, 1047.)
must be accepted, 48–76.
revoked, how,
by conditional acceptance, 48, 78.
not by inquiry, 49.
by withdrawal before acceptance, 51, 53.
though time allowed, 51, 77.
must be communicated, 51, 52, 78.

OFFER, *continued.*
view in United States, 57, 68.
Civil Law, 73.
when letter of, takes effect, 54, 78.
Civil Law, 66.
by death, 58.
effect if agent's authority revoked, 74.
OPINION, MATTERS OF (see WARRANTY, p. 1082), 612, 664.
OPTION TO DELIVER, 537.

PARTIAL PAYMENTS. (See PAYMENT, p. 1067.)
when forfeited, 301.
PARTIES. (See BONA FIDE PURCHASERS, p. 1049.)
who may sell generally, 11, 38.
owner, 11, 38, 41.
if competent to contract, 12.
though disseised, 41.
though property attached, 41.
thief, when, 16, 18.
in market overt (see MARKET OVERT, p. 1064), 12, 38.
sheriff (see SHERIFF, p. 1074), 19.
pledgee, 18, 40.
master of vessel, 19, 40.
by order of judge, when, 19.
factors (see FACTORS, p. 1057), 20, 40.
who may buy generally, 24.
infants (see INFANTS, p. 1062), 24, 42.
drunkards, 32, 46.
lunatics (see LUNATICS, p. 1064), 32, 45.
married women (see MARRIED WOMEN, p. 1065), 32, 46.
PATENT,
failure of consideration, when, 397.
implied warranty of title, whether, 626.
fraud, 483.
PAYMENT. (See PREPAYMENT; TENDER, pp. 1069, 1081.)
generally, 741, 770.
kinds, 741.
when and where made, 741.
if upon demand, 742.
reasonable time allowed, 742.
"immediately," 743.
"instantly," 743.
by mail, 743, 776.
by set-off, 744, 776.
by negotiable paper, 754.
absolute or conditional, 754.
for jury, 754.
if transferred, 755.
if lost, 758.
if altered, 758.
if given collaterally, 759.
duty of holder, 758.
by check, 299, 755, 772.
by debtor's note, 767, 773.

PAYMENT, *continued.*
States reviewed, 774.
by note of third person, 756, 759, 775.
if absolutely void, 775.
barter, 759.
laches by vendor, 756.
to agent, 760, 777.
if principal bankrupt, 761.
as factor, 760.
as broker, 760.
as auctioneer, 761.
by setting off agent's debt, 762.
in possession of goods, 777.
in possession of bills, 777.
as attorney, 777.
officer serving writ, 777.
usage, 777.
money only, 777.
authority of, revoked, 778.
by death of principal, 778.
in specific articles, 776.
in worthless bills, 771.
counterfeit, 771.
return of, when, 772.
though genuine, 773.
Confederate money, 773.
to sheriff, 773.
to agent, 772.
by stranger, 778.
applied to what debt, 766, 778.
by debtor, 778.
by creditor, 779.
by law, 779.
on Sunday, 779.
French Code, 767.
Civil Law, 768.
PAYMENT BY INSTALMENTS. (See PREPAYMENT, p. 1069.)
title to goods passes, when, 288, 298.
PERFORMANCE,
of condition,
when waived (see WAIVER, p. 1082), 550, 596.
if impossible (see IMPOSSIBILITY OF PERFORMANCE, p. 1062), 552, 598.
in instalment sales,
as to delivery, 578, 600.
as to payment, 604.
PERISHABLE GOODS,
court may order sale of, 19.
PLEADING.
if transaction be a barter, 8.
in warranty,
allegation of fraud unnecessary, 662.
PLEDGE — PLEDGEE,
sale distinguished, 2, 9.
general property in pledgee, 9.

PLEDGE — PLEDGEE, *continued.*
delivery necessary, 10.
sale of, in market overt, 13.
right to sell upon default, 18, 40.
as to warranty of title, 623.
PORTION OF A MASS,
sale of, as to separation, 313, 318.
cases reviewed, 318.
conclusions reached, 327.
grain elevator rule, 327.
POTENTIAL EXISTENCE. (See THING SOLD, p. 1081.)
meaning of, 85, 91.
PREPAYMENT. (See PAYMENT; PRICE, pp. 1067, 1069.)
condition precedent to passing of title, 299, 312.
may be waived, 299, 301.
check, effect of taking, 299.
buyer's note, effect of taking, 299.
interest of seller in goods before default,
if condition express, 299.
if condition implied, 299.
attachable, 300.
may be sold, 300.
risk, in whom, 300.
cannot recover goods, 301.
interest of seller in goods after default,
may waive forfeiture, 301.
is entitled to goods, 301.
or balance due, 302.
as to return of partial payments, 301.
in equity, 301.
suppose note taken, 301.
liability for trespass, 302.
if affixed to freehold, 302.
necessity of demand before replevin, 302.
as to third person, 302.
interest of buyer in goods before default,
may sell, 300.
attachable, 300.
if goods wrongfully taken, 300.
interest of third person from vendee,
if condition express, 300.
if condition implied, 299.
if vendee authorized to resell, 300.
may attach, 300.
American statutes reviewed, 302.
conflict of laws, 311.
PRICE. (See PAYMENT; PREPAYMENT; STATUTE OF FRAUDS, pp. 1067, 1069, 1075.)
must be money, 2, 93.
must be fixed, 95.
law implies, when, 93, 96.
how much, 93, 96.
how determined, 93, 96.
valuers and valuation, 94, 96.

PRICE, *continued.*
valuation not arbitration, 94.
valuer's liability for neglect, 94, 96.
Customs Act, effect of, 94.
Civil Law, 94.
Code Napoléon, 95.
mistake as to, 61, 81.
when payable, 268, 269.
suit for, when, if credit given, 474, 794.
title must be in buyer, 795.
failure to pay does not rescind contract, 792.
if goods bargained and sold, 792, 794.
lien for, 831.
tender of, effect upon lien, 854.
tender of, before suit for non-delivery, 953.
defence to suit for, 965.
PRINCIPAL AND AGENT. (See BROKERS, p. 1049.)
as to revocation of authority, 74, 75.
liability upon signing "memorandum" under Statute of Frauds,
agency disclosed, principal undisclosed,
usage to charge agent, 192, 205.
must be consistent, 206, 207.
agent cannot sue personally, 207.
Agency undisclosed, principal undisclosed,
principal may be charged, 191, 203.
if foreign, 203.
agent bound, 191, 203.
agent may sue or be sued, 207.
agent for non-existent principal, 213.
personally bound, 213, 244.
contract not binding on other party, 207, 244.
mistake, agent described as principal, 191.
agents duly authorized to "sign," 236, 260.
must be a third person, 237, 260.
parol evidence to show, 236.
cases reviewed, 237.
subsequent ratification, 236.
auctioneer agent for both (see AUCTION, p. 1047), 240, 261.
broker agent to sign (see BROKER, p. 1049), 240, 261.
signature as witness insufficient, 242.
principal's name need not appear, 260.
power of agent to warrant, 619, 670.
payment to agent, 760, 777.
right of stoppage *in transitu*, 917.
PROMISSORY NOTES. (See NEGOTIABLE PAPER, p. 1066.)
PROPERTY IN GOODS,
general distinguished from special, 2.
draws possession, 696.
PROVISIONS, SALES OF,
whether an implied warranty, 661, 691.
PUBLIC POLICY, 502.
PUFFER. (See AUCTION, p. 1047.)

RATIFICATION,
meaning of, 29.
by married women, 32, 46.
by minor, 44.
of fraudulent sale, 473.
"REASONABLE TIME,"
construction of (see DELIVERY, p. 1054), 705.
RECEIPT. (See STATUTE OF FRAUDS, p. 1075.)
not conclusive, 781.
right to demand, 753, 754, 782.
of third person, admissibility, 754.
REMEDIES,
of unpaid vendor, 796.
in actual possession, 797.
liens, 798, 799.
credit given, 798, 801.
"delivery" defined, 797.
review of cases, 798.
estoppel as to sub-vendees, 803.
Factors' Act, effect of, 807.
rules deduced from cases, 801.
of buyer,
when property has passed, 939.
action for damages, 939.
in equity, 939.
Mercantile Amendment Act, effect of, 940.
trover, action for, 940.
warranty and condition distinguished, 941.
rescission, right of, 941.
for non-delivery, 920.
tender of price, necessity of, 953.
measure of damages (see DAMAGES, p. 1053), 920, 954.
specific performance (see SPECIFIC PERFORMANCE, p. 1075), 957.
right of return,
goods not of description, 920, 958.
sales by sample, 958.
breach of warranty, 958.
fraudulent representation, 959, 964.
within reasonable time, 958.
effect of using part, 958.
offer to return enough, 958.
recovery of price, 958.
cumulative, 960.
upon breach of warranty, 961.
may reject goods, 946, 947.
if goods accepted, 948, 959.
return of goods, necessity of, 950, 960.
notice, necessity of, 950, 962, 965.
if goods not paid for, 962.
if notes given, 962.
if goods resold, 962.
title must pass, 962.
damages (see DAMAGES, p. 1053), 951, 962.
if sued for price, 948, 965.

REMEDIES, *continued.*
Judicature Act, effect, 949.
if sued on note, 966.
counterclaim, 949.
RESALE,
right of vendor to, upon default in payment, 815, 825.
whether a rescission, 815, 824.
before default, 816.
express reservation of, 816, 818, 824.
damages upon, 817, 824, 825.
rules in the United States, 819.
trover by buyer, when, 818, 824.
tortious, 820.
not a rescisssion, 821, 823.
damages upon, 821, 824.
Judicature Act, effect of, 823, 824.
rules deduced from authorities, 824.
vendor an agent in, 826.
time of, 826.
notice of, 826.
place of, 826.
expenses connected with, 827.
price at, evidence of value, 827.
evidence of "acceptance," 171.
oral agreement for, to vendor, whether affected by Statute of Frauds, 158, 173.
RESCISSION. (See DELIVERY, p. 1054.)
formalities necessary, 731.
for fraud, 474.
under Statute of Frauds, 116.
if price unpaid, 791, 815, 824.
effect if buyer insolvent, 785, 787, 792.
upon stoppage *in transitu*, 785.
stoppage *in transitu* not, 801, 806.
goods worthless, necessity of return, 397.
RESTRAINT OF TRADE (see ILLEGALITY, p. 1061), 503, 507.
RETURN. (See REMEDIES OF THE BUYER, p. 1071.)
of goods, to effect rescisssion,
if goods valueless, 397.
if impracticable, 397.
RISK,
in whom, 263, 274, 742.
in conditional sales, 299.
Civil Law, 380, 381.

SALE,
definition, 1, 98.
validity, requisites for, 3.
barter or exchange distinguished from, 2, 8.
gift distinguished, 2, 8.
contract to sell *in futuro*, 4.
what language imports, 4.
bailment distinguished, 3, 5,
consignment distinguished, 7.

SALE, *continued.*
lease distinguished, 8.
mortgage distinguished, 9.
pledge distinguished, 9.
in market overt (see MARKET OVERT, p. 1064), 12.
SALE BY DESCRIPTION,
condition and not warranty, 568, 589.
of books and maps, 592.
of mercantile paper, 592.
SALE BY INSTALMENTS,
successive deliveries,
whether time the essence, 578 *et seq.*, 601.
cases reviewed, 578.
American law distinguished, 583, 601.
successive payments. (See PREPAYMENT, p. 1069.)
title passes, when, 288, 298.
chattel incomplete, 279, 291, 298.
failure to pay one instalment, effect, 603.
with intent to repudiate entire contract, 604.
SALE BY SAMPLE. (See WARRANTY, p. 1082.)
in market overt, effect, 14.
appropriation, when, 351.
not enough that sample shown, 635, 685.
for jury, 685.
as to bulk, 584, 640, 683.
American States reviewed, 683.
as to inspection, 636, 640, 642.
Scotch law, 641.
as to rejection, 641.
hidden defects, 640, 684.
usage, 688.
average sample, 644, 687.
as to merchantableness, 653.
may be an express warranty in, 684.
by agent, when, 671.
as to implied warranty, 672.
custom and usage in, 685, 690.
SALE ON TRIAL. (See CONDITIONS, p. 1051.)
generally, 584, 606.
failure to return, effect, 585, 606.
entitled to full time, 585.
if no time stated, 606.
risk, in whom, 606.
duty to give notice of result, 607.
"SALE OR RETURN,"
distinguished from *del credere* agency, 3.
vendor having no title at time of sale, 88.
explained, 587, 606.
accident in mean time, effect, 588.
American law, 588, 606.
risk, in whom, 606.
"SALE TO ARRIVE" (see CONDITIONS, p. 1051), 559.
cases classified, 564, 600.
notice, necessity of, 565.

SALE TO BE SATISFACTORY. (See CONDITIONS, p. 1051.)
construed strictly, 607.
except as to realty, 608.
provision to notify if dissatisfied, effect, 608.
SALE "WITH ALL FAULTS," 482.
SAMPLE. (See SALE BY SAMPLE; WARRANTY, pp. 1073, 1082.)
SCOTCH LAW,
contract by letter, 58, 75.
title passes, when, 384.
sale by sample, 384, 641.
stoppage *in transitu*, 384, 907.
SEPARATION,
necessity of, to pass title, 313, 318.
cases reviewed, 318.
conclusions reached, 327.
grain elevator rule, 327.
SET-OFF. (See PAYMENT, p. 1067.)
SHARES,
whether, goods, wares, and merchandise,
in England, 117.
in America, 131.
SHERIFF,
effect of unexecuted writ on goods, 12.
sale on execution, effect, 19, 39.
if debtor not owner, 39.
if execution void, 39.
if execution satisfied, 39.
SIGNATURE IN "MEMORANDUM." (See STATUTE OF FRAUDS, p. 1075.)
4th and 17th sections distinguished, 227.
of party to be charged, enough, 227, 234.
acceptance may be oral, 227, 234.
by mark, 228, 235.
by initials, 228, 234.
by writing or print, 229.
by pencil or stamp, 229, 234.
place of, 229, 235.
intention for jury, 229.
in separate papers, 233.
"subscribed" distinguished, 235.
SPECIFIC CHATTELS,
unconditional sale of, 267.
ancient authorities, 267.
title passes without delivery, 268, 269, 282, 296.
conditional sale of, 270. (See CONDITIONS; PREPAYMENT, pp. 1051, 1069.)
when something remains to be done,
authorities reviewed, 271.
generally, 271, 293.
as to weighing, 271, 274, 278, 294.
as to counting, 271, 297.
as to measuring, 271, 272, 294.
as to loading, 275.
as to delivery, 277.
as to payment, 287, 292, 298. (See PREPAYMENT, p. 1069.)
after delivery, 277.
by buyer, 278, 289, 296, 297.

SPECIFIC CHATTELS, *continued.*
American law distinguished, 289.
intention changes rule, 279, 292, 296, 298.
chattel incomplete,
contract is executory, 313, 317.
instalments paid as work progresses, 279, 291, 298.
materials unincorporated, 283.
SPECIFIC PERFORMANCE,
when maintained, 940, 957.
for maps, 957.
for patent rights, 957.
for heirlooms, 957.
for securities, 958.
for stock, 958.
SPECIFIC PURPOSE, goods for, 646, 649, 661, 686.
STATUTE OF FRAUDS,
history of, 97.
17th section, what is, 98.
"*contract,*" *meaning,*
includes executory, 99, 110.
Lord Tenterden's Act, 99.
"for the sale," what are contracts, 98.
contracts for work and labor distinguished, 99.
English cases reviewed, 99 *et seq.*
principles deduced:
1. Whether goods in existence, 106.
2. Whether labor bestowed on own materials, 107.
3. Essence test, 105.
present English test, 105, 109.
sustained by statute, 115.
American cases reviewed, 111.
Massachusetts rule, 109, 111.
New York rule, 110, 113.
other States, 111 *et seq.*
agreement to affix goods to freehold, whether, 109.
improvement to chattel in use, whether, 109.
auction sales, whether, 116.
oral promise by vendor to retake goods sold, whether within, 116.
"*goods, wares, and merchandise,*"
what is included, 117.
in America, 131.
Stamp Act, how affecting, 118.
4th and 17th sections compared, 118.
property attached to soil,
title to pass after severance, 119.
title to pass before severance, 119.
fructus industriales and *naturales* distinguished, 122.
fructus industriales,
not directly decided whether, 126.
chattels even when growing, 124.
though immature, 125, 134.
fructus naturales, 125.
standing timber, 125, 133.
license to cut, whether revocable, 133.

STATUTE OF FRAUDS, *continued.*
test, whether land a "warehouse" only, 126, 133.
who must sever, 133.
fixtures, 127, 132.
emblements, 128.
if not yet sown, 130.
between lessor and lessee, 131.
"*for the price of* 10£," 135, 137.
"value" synonymous, 137.
"price" not same everywhere, 137.
several articles at separate prices, 135, 137.
of lots at auction sale, 136, 137.
price uncertain, 136, 138.
contract entire and part within statute, 136, 138.
"*accept*" *and* "*receive*,"
both necessary, 140.
"delivery" distinguished, 169.
need not be simultaneous, 154, 171.
may be after sale, 173.
implies mutual assent, 174.
acceptance,
"receipt" is not, 140, 155.
but is evidence of, 140.
effect of taking sample, 141, 142, 173.
may be constructive, 142, 155.
for jury, 142.
dealing with goods as owner, 143, 170.
or bill of lading, 144.
resale, 170.
lease, 171.
stock, 171.
does not prevent rejecting goods as,
not up to contract, 146, 149.
cases reviewed, 146 *et seq.*
may be prior to actual receipt, 154.
whether after action brought, 155.
mere silence and delay, effect, 156.
goods marked with buyer's consent, 158.
of part, enough, 158, 173.
how affecting agreement for verbal resale to vendor, 159, 173.
must be before disaffirmance, 159.
if terms disputed, 159.
by agent, 169.
by carrier, 169.
whether seller could be agent, 169.
implies mental satisfaction, 169.
by mere selection, 170.
mere words insufficient, 169.
burden of proof, 170.
fact for jury, 170.
manual receipt insufficient, 170.
right to keep a reasonable time before, 170.
whether order properly filled immaterial, 170.

STATUTE OF FRAUDS, *continued.*
receipt,
1. If goods in buyer's hands, 160.
any act of ownership, 160.
fact for jury, 160.
2. If in hands of third person, 161, 172.
must agree to hold for buyer, 161, 173.
suppose he holds not as bailee, 162.
3. Goods in hands of vendor, 163, 171.
delivery to carrier, 163, 171.
in changed character, 164, 171.
cases reviewed, 165.
test is whether lien lost, 167, 172.
preparation for, insufficient, 171.
"*part of the goods,*"
sample may be, 141, 142, 173.
must represent whole, 173.
for jury, 173.
if balance to be delivered long after, 173.
or unmanufactured, 158, 173.
binds both parties to whole bargain, 173.
"*earnest,*"
not same as part payment, 175.
what may it be, 175.
whether property passes, 175, 315.
must be actually given, 176.
Roman Law, 178.
French Code, 179.
in America, 180.
deposit as "forfeiture," 180.
part payment,
debt deducted, 176, 180.
of vendor's creditor, 180.
need not be money, 177, 180.
gift of interest, 177.
something of value, 180.
tender insufficient, 180.
time of, immaterial, 180.
note or memorandum,
generally, 182, 221.
legal effect same as at common law, 183.
presupposes antecedent oral contract, 185, 222.
parol evidence admitted, when (see EVIDENCE, p. 1056), 186 *et seq.*, 222.
what is,
made before suit, 192, 222.
whether terms must be written at one time, 193.
separate papers may be connected, 193, 223.
physically, 193, 222.
by reference in each, 193.
parol evidence to connect, when, 193.
must be consistent, 194, 218.
cases reviewed, 194.
signed paper draws unsigned, 223.
may be addressed to third person, 199, 222.
may be in pencil, 199.

STATUTE OF FRAUDS, *continued.*
sufficiency of,
"agreement" distinguished from "bargain," 199, 215.
name of buyer and seller, 200 *et seq.*
description of plaintiff sufficient, 200, 202.
abbreviations, 224.
fictitious name, 225.
signature of agent, principal undisclosed, 203, 225.
usage to charge brokers, 205.
of broker's signature, 207.
statement of,
all terms, 215, 218, 244.
consideration, 200, 215, 223.
price, 217, 518, 225.
mode of payment, 219.
subject-matter, 225.
time of payment, 226.
place of delivery, 226.
conditions, 226.
proposal accepted by parol, sufficiency, 222.
letter repudiating contract, 219, 222.
"*signed by the parties.*"
fourth and seventeenth sections distinguished, 227.
of party to be charged, enough, 227, 234.
acceptance may be oral, 227, 234.
by mark, 228, 235.
by initials, 228, 234.
by writing or print, 229.
by pencil or stamp, 229, 234.
place of, 229, 235.
intention for jury, 229.
as to separate papers, 233.
"subscribed" distinguished, 235.
"*agents lawfully authorized,*"
generally, 236, 260.
proved by parol, 236.
as to ratification, 236.
some third person, 237, 260.
whether plaintiff's agent may be, 237.
auctioneer is (see AUCTION, p. 1047), 240, 261.
broker is (see BROKER, p. 1049), 242, 261.
must sign as agent, not as witness, 241.
prrincipal need not be disclosed, 260.
STATUTE OF LIMITATION,
effect of partial payment on Sunday, 779.
STOCKS,
speculating in, 636.
STOPPAGE IN TRANSITU,
generally, 859, 907.
arises upon insolvency, 859, 908.
history of, 859.
does not rescind, 908.
delivery after notice of, effect, 908.
if credit given, 908.

STOPPAGE IN TRANSITU, *continued.*
used in several senses, 908.
who may exercise right,
quasi vendors, 860, 909.
consignor, 860.
agent, 862.
with bill of lading, 861.
selling to principal, 909.
ratification, 862.
vendor of interest in executory agreement, 860.
surety, 860, 909.
broker, 861.
not all having liens may, 861.
principal consigning to factor, 862.
partial payment, effect of, 863, 908.
partial delivery, effect of, 908.
if security taken, 863, 908.
in absolute payment, 863.
in case of account current, 864.
paramount to,
carrier's lien for general balance, 864.
attachment, 865, 910.
demand for freight, 865.
against whom exercised,
insolvent buyer, 865, 909.
defined, 865, 909.
overt act unnecessary, 909.
stoppage before insolvency, effect, 865.
if price not due, 910.
at time of sale, 910.
transit begins and ends when,
generally, 866, 910, 913.
transit defined, 866.
at time lien lost, 910.
constructive possession, 866.
reservation of *jus disponendi*, effect, 867.
delivery to carrier, effect, 868.
delivery to vendee's agent, 868.
bill of lading taken, 868.
ship chartered by buyer, 868.
receipt given to seller, 870.
"to forward" and "not to keep," 871, 913.
cases reviewed, 876.
destination not named, 878.
new transit, effect, 880.
goods in intermediate warehouse, 871, 913.
cases reviewed, 871.
how ended, 865.
at ultimate destination, 880, 913.
carrier, agent of whom, 881, 883, 884.
if lien unsatisfied, 885, 915.
mere arrival, effect of, 886.
if in hands of carrier, 915.
goods on ship, 915.

STOPPAGE IN TRANSITU, *continued.*
demand by assignee, 916.
delivery to vendee's agent, 916.
deposit in custom house, 916.
delivery of part, effect, 887.
delivery after bankruptcy, 887.
right of buyer to anticipate end, 885, 912.
how right exercised,
revests possession, 890, 917.
notice,
form of, 890, 917.
to carrier, 890.
to person in possession, 891, 917.
to master of ship, 891.
obligation to communicate, 891.
to consignee, effect, 892.
duty upon receiving, 892.
to vendee, effect, 917.
by whom,
vendor's agent, 911, 917.
as to ratification, 917.
by demanding bill of lading, 892.
defeated intermediately, how, 896.
by vendee's transferring bill of lading, 912.
Bills of Lading Act, 896.
Factors' Act, 897.
bill of exchange compared, 898.
to *bona fide* third person, 897.
if by fraud, 897, 912.
proof of value, 897.
re-transfer, effect of, 898.
in pledge, 898.
transfer necessary, 899, 901.
not by attachment, 911.
if goods intercepted, 886, 913.
by agent, 913.
to transmit, 913.
to change destination, 913.
effect of stoppage,
revests possession, 903, 907.
right of resale, 917, 918.
United States law compared, 904.
Civil Law, 906.
France, 906.
Scotland, 907.
STORAGE,
whether lien covers, 829.
SUCCESSIVE DELIVERIES. (See CONDITIONS, p. 1051.)
generally, 577, 600.
"STRADDLE,"
meaning of, 637.
SUNDAY.
illegality of sales upon, 530, 540.
whether at common law, 540.

SUNDAY, *continued.*
effect of statutes, 530, 540.
wholly executory, 541.
wholly executed, 541.
partly executed, 541.
as to ratification, 542.
merely negotiated on, 542.
payment on, effect, 779.
as to statute of limitation, 780.

TENANT IN COMMON,
depositors of grain are, 5, 6, 308.
TENDER (OF PRICE). (See DELIVERY, p. 1054), 745, 781.
before writ issues, effect, 742.
of exact amount, 745.
money must be produced, 745, 781.
waived, how, 746, 782.
in what kind of money, 747, 771, 781.
right to examine, 746.
waived, how, 747.
of more than due, 748.
of part, 748, 781.
unconditional, 750, 782.
accompanied by protest, 752.
by one of several creditors, 753.
by one of several debtors, 753.
with demand for receipt, 753, 782.
must be kept good, 783.
effect of, 784.
of price before suit of non-delivery, 953.
THING SOLD,
must exist, 84, 89.
in executory agreement *contra,* 85.
not a wager, 88.
Civil Law, 85.
French law, 85.
potential existence sufficient, 85, 91.
after-acquired property,
at law, 85, 90.
as to third person, 90.
as to grantor, 90.
mortgagee of, 90.
in equity, 91.
assignment of, 86.
expectation dependent on chance, 88.
sale by heir of expected interest, 91.
TIMBER. (See CROPS, p. 1053.)
TIME. (See DELIVERY, p. 1054.)
in instalment sales,
as to delivery, 577, 600.
as to payment, 603.
construction of the following words,
"month," 701.
"days," 702.

TIME, *continued.*
"hour," 703.
"reasonable time," 705.
" as soon as possible," 705.
" forthwith," 705.
TORT,
judgment in, whether title to goods passes, 60, 81.
may waive and sue for contract, when, 81.
fictitious agent liable in, 215.
TRESPASS,
whether maintainable for fraud, 414.
TROVER,
against innocent buyer from one not owner, 12.
against buyer in market overt, 13, 39.
title to goods passes if judgment is satisfied, 60, 81.
broker, liability in, 211.
before power of selection exercised, 295.
against unpaid vendor, 798.
or vendor's wrongdoer, 698.
if buyer in default, 819, 825.
and resale made, 825.
damages in, 823, 940.
lien and pledge contrasted, 823.

VALUATION,
fixing of price by, 94.
not arbitration, 94.
liability of valuers, 94, 96.
VESSEL,
incomplete, title passes when, 279, 298.
as to material unincorporated, 283.

WAGERS,
are illegal, 523, 536.
" differences " to be paid, 523.
WAREHOUSE RECEIPTS,
transfer title, 856.
WAIVER,
if part of entire order accepted, 59, 80.
of prepayment, 299.
in "cash sale," 299.
of condition precedent, 550, 596.
by fault of defendant, 550, 596.
must be absolute, 551, 576, 596, 604.
suit, when brought, 551.
if impossible to perform, 552, 598.
if partly performed, effect, 549.
of defects by acceptance, 736.
WARRANTY, EXPRESS,
collateral contract, 610, 662.
when made, 610, 664.
what is, 611, 662.
no particular form, 664.
affirmation of fact, 612, 664.

WARRANTY, EXPRESS, *continued.*
intention immaterial, 666.
opinions, 612, 664.
as to intention, 612, 664.
for jury, 612, 664.
for court, when, 667.
general warranty, 614, 667.
obvious defects, 614, 667.
defined, 668.
"soundness" in horses, meaning, 615, 668.
parol evidence,
to show usage, 612.
to create or enlarge, 617.
"bill of parcels," 666.
memorandum, 667.
receipt, 618, 667.
of future events, 619, 670.
by agent, 619, 670.
general, 670.
special, 670.
broker, 670.
auctioneer, 670.
as to ratification, 670.
in sales by sample, 671.
of one not a horse-dealer, 620.
of a horse-dealer, 621.
fraud immaterial, 662.
how affected by Statute of Frauds, 662, 671.
what title necessary to action, 662.
as to consideration, 611, 663.
WARRANTY, IMPLIED,
of title, 622, 672.
express warranty excludes implied, 672.
in executory agreement for no specified thing, 622.
if ownership affirmed, 622, 625.
by word or conduct, 628.
sale by shop-keeper, 626, 628.
if owership not affirmed, 622.
caveat emptor, 622, 623.
Civil Law, 623, 632.
modern doctrine, 629, 630.
if want of title concealed, 622, 624.
as to sale by pledgee, 623.
as to sale of patent, 626.
as to sale of ship by master, 629.
goods in possession, 631, 672.
review of cases, 672.
goods not in possession, 631, 674.
"possession" defined, 674.
what defects covered, 674.
official sales, 676.
when broken, 677.
French law, 632.
Civil Law, 622, 632.

WARRANTY, IMPLIED, *continued.*
of existence of subject-matter, 85, 658.
of identity of kind, 633, 677.
commercial paper, 592, 679.
as to signature, 592, 679.
as to capacity, 680.
as to solvency, 680.
of quality, 633, 680.
express warranty excludes implied, 672, 684.
usage and custom, 643, 690.
sale by inspection,
caveat emptor the rule, 633, 645, 682.
as to latent effects, 645.
American cases reviewed, 682.
sale by description,
condition precedent, 633.
must be merchantable, 645, 685.
time, when determined, 647.
extends to packages in which goods are, 648.
express warranty excludes implied, 686.
adjectives importing particular quality, 681.
sale by manufacturer, 649.
that goods are his make, 649.
Merchandise Marks Act, 660.
Chain Act, 660.
sale by sample,
not enough that sample shown, 635, 685.
for jury, 685.
as to bulk, 636, 684.
American cases, 682.
as to inspection, 635, 639, 641.
Scotch law, 641.
hidden defects, 639, 684.
usage, 690.
as to rejection, 641.
average sample, 644, 689.
as to merchantableness, 653.
may be an express warranty in, 684.
custom and usage in, 685, 690.
fitness for particular purpose,
goods bought for particular purpose, 646, 649, 686.
specific goods bought, 646, 650, 689.
as to latent defects, 650, 688.
if manufacturer, vendor, 650, 686.
liability to third person, 657.
sale of provisions,
by inspection, 645, 692.
by description, 692.
by farmer, 651, 692.
by wholesaler to retailer, 651.
freedom from disease, 652.
as to wholesomeness, 657, 691.
English statutes, 659, 660.
for immediate consumption, 661.
American and English law compared, 661.

WEIGHING AND MEASURING,
presumptively prevents passing of title, 271, 294.
if it be done by buyer, 278, 289, 296.
language may rebut, 296, 298.
WHARFINGER,
how affected by Factors' Acts, 20.
power to "accept" under Statute of Frauds, 155.
power to "receive" under Statute of Frauds, 162.
how affected by Legal Quays Act, 841, 845.
may defeat right to stop *in transitu*, when, 880, 881.
WORK AND LABOR. (See STATUTE OF FRAUDS, p. 1075.)

ELECTROTYPED AND PRINTED
BY H. O. HOUGHTON AND CO.

The Riverside Press

CAMBRIDGE, MASS., U. S. A.