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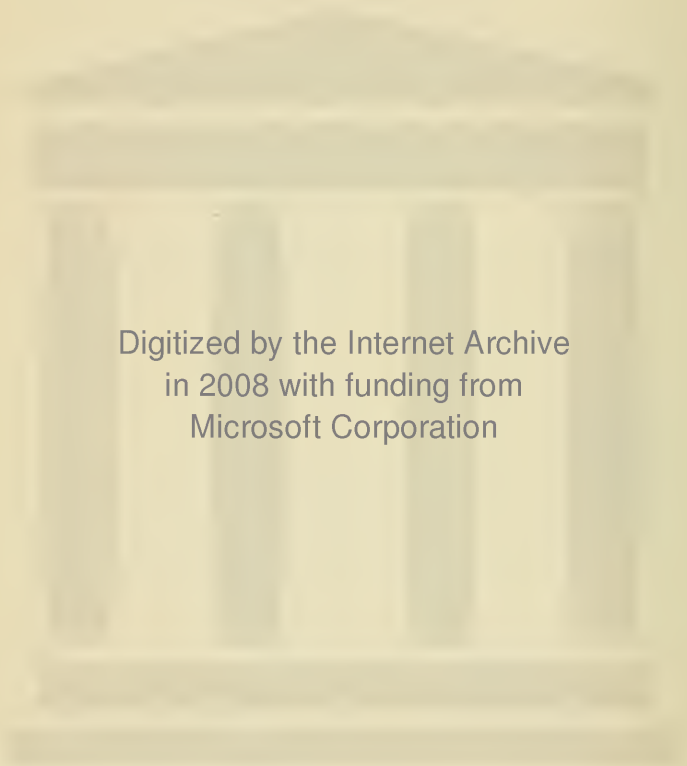

A Digest

OF

THE LAW RELATING TO

THE SALE OF GOODS

WITH

OCCASIONAL REFERENCE TO FOREIGN DECISIONS.

BY

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PREFACE.

The question of the codification of English Law is now-a-days so often discussed that, perhaps, this attempt to construct a Digest of that important branch of it which relates to the Contract of Sale of Goods may require no apology. In the preparation of the following work I have availed myself of the provisions of the Indian Contract Act, 1872, thereby following the high examples of Mr. Justice Stephen and Professor Pollock; but it will be found that a large amount of original matter has been drafted. In carrying out the work I have endeavoured to enunciate only those rules which are more particularly concerned with Sale, to the exclusion of any extraneous matter belonging to the general law of contracts; though I am afraid that I may have occasionally entered into greater detail than was altogether consistent with a due adherence to the above principle.

It is necessary to remind the reader that I have not necessarily quoted statutes verbatim,

but have, when it was possible, condensed them, or given their effect in the light of the decisions thereon. It is obvious that such a course was, in the case of the 17th section of the Statute of Frauds, for instance, inevitable.

Where no special authority for any proposition is quoted, such proposition will have been generally founded on the cases quoted as illustrations.

I need not say that this Digest has involved considerable labour. I can only express a hope that my propositions may be found to be generally correct. I have, at any rate, spared no pains to make them so; but it must be remembered that "omnis definitio est in lege periculosa." . Any corrections or emendations that may be suggested to me will be thankfully acknowledged.

W. C. A. K.

4, Harcourt Buildings, Temple,
March 1st, 1888.

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A Digest

OF

THE LAW OF SALE.

CHAPTER I.

THE FORMATION OF THE CONTRACT.

1. The word "goods" means and includes every kind of corporeal moveable property (*a*).

2. Sale is an exchange of property for a price in money. It involves the transfer of the ownership of the thing sold by the seller to the buyer (*b*).

Of course, when the mutual intention to sell and buy is absent there is no sale. Thus, the sale of an

(*a*) Cf. sect. 6 for the meaning of "goods, wares, and merchandise" under the Statute of Frauds.

(*b*) Benj. (2nd ed.) pp. 1, 2. Another definition is given in the Indian Transfer of Property Act (4 of 1882) as "A transfer of ownership in exchange for a price paid, or promised, or part-paid and part-promised."

For cases of exchange pure and simple, see *Harrison* v. *Luke*, 14 M. & W. 139; and partly of sale and partly of exchange, see *Sheldon* v. *Cox*, 3 B. & C. 420; *Hands* v. *Burton*, 9 East, 349; and *Bull* v. *Barker*, 7 Jur. 282. As to the distinction between sale and bailment, see *South Austr. Ins. Co.* v. *Randell*, 3 P. C. 101; and between sale and agency, *Ex parte Nevill*, 6 Ch. 397; *Ex parte Bright*, 10 Ch. D. 566 (cf., however, with these cases, *Soria* v. *Davidson*, 53 N. Y. Super. Ct. 470); and *Dixon* v. *Lond. Small Arms Co.*, 1 Ap. Ca. 632.

article containing secret treasure is no sale of the treasure (*c*). And so an award that one party shall deliver to the other certain goods, on being paid, does not of *itself*, upon a tender, amount to a sale (*d*). An intention to sell and buy may be presumed from the transaction (though the parties may call it a guaranty or agency), as where one party confers upon the other all that a seller could convey in respect of property or a buyer demand (*e*). And a sale may be inferred (the intention to transfer the ownership being clear) though the governing motive of the parties is that one should have a right to the chattel as security for a loan (*f*). As to mistakes as to the identity of the person contracted with excluding a contract of sale, cf. *Cundy* v. *Lindsay*, 3 Ap. Ca. 459. In *Rodliff* v. *Dallinger* (55 Am. Rep. 439) there was an express refusal to contract with the alleged buyer otherwise than as an agent.

3. A contract whereby one person is employed to do work for another amounts to a contract of sale, or one for the exercise and supply only of labour and materials, according as the subject-matter of the contract is or is not a chattel, the ownership whereof [being unqualified by any independent rights in relation to such subject-matter of the employer] is to be transferred by the workman to his employer (*g*).

(*c*) *Huthermacher* v. *Harris*, 38 Penn. 491; cf. also *Merry* v. *Green*, 7 M. & W. 623.

(*d*) *Hunter* v. *Rice*, 15 East, 100.

(*e*) *Hutton* v. *Lippert*, 8 Ap. Ca. 309.

(*f*) *MacBain* v. *Wallace*, 6 Ap. Ca. 588.

(*g*) *Lee* v. *Griffin*, 1 B. & S. 272; per Littledale, J., in *Smith* v. *Surman*, 9 B. & C. 561; *Isaacs* v. *Hardy*, 1 Cab. & Ell. 287; per Parke, B., in *Pinner* v. *Arnold*, 2 C. M. R. 616. With respect to the clause in brackets, see a note to an article by Mr. Justice Stephen and Prof. Pollock, in No. 1 of Law Q. Rev. pp. 9, 10. The gist of the note is

Explanation.—In the determination of the aforesaid question, the following facts are irrelevant :—

(1) The relative value of the labour and the materials (*h*).

(2) The fact that the workman exercises his labour on his own materials (*i*).

Illustrations.—1. A. contracts to build and fix upon B.'s land a steam engine. This is not a contract of sale, as it is not a contract for the sale and delivery of a chattel, as such, but merely for the affixing of something to the land. *Clark* v. *Bulmer*, 11 M. & W. 243 (*j*).

2. A., a printer, agrees to find the paper for, and to print, 500 copies of a certain treatise for B. This is a contract for the exercise of labour and supply of materials by A., and not a contract of sale, as the books when printed are not the absolute property of A., as B. retains his copyright, and there is no chattel properly to be transferred. *Clay* v. *Yates*, 1 H. & N. 73.

3. A. employs B., an attorney, to prepare a deed. This is a contract of work, labour, and materials [as A. possesses an interest in the deed when drawn]. Per Blackburn, J., in *Lee* v. *Griffin*, *infra*.

4. A., a dentist, makes for B. a set of artificial teeth. Notwithstanding that A.'s labour is skilled labour, this is merely a contract of sale, as a chattel is to be delivered to B. *Lee* v. *Griffin*, 1 B. & S. 272 ; 30 L. J. Q. B. 252.

4. A contract whereby the ownership of the thing which is the subject-matter thereof is immediately, upon the completion of the contract, transferred to the buyer, is called a bargain and sale.

this—that a contract to make a thing which, when made, is not the *absolute* property of the maker, is a contract for work and labour, as the ownership to be transferred to the employer is already affected by rights of his, *e. g.*, a right of copyright.

(*h*) Per Crompton and Blackburn, JJ., in *Lee* v. *Griffin* ; cf. *Gregory* v. *Stryker*, 2 Denio (Am.), 628.

(*i*) *Clark* v. *Mumford*, 3 Camp. 37 ; per Maule, J., in *Grafton* v. *Armitage*, 2 C. B. 336 ; per Hill, J., in *Lee* v. *Griffin*. Of course, when the employer furnishes the materials, or part thereof, the contract is for work and labour, as the labour (in the words of Blackburn, J., in *Lee* v. *Griffin*), "ends in nothing that can become the subject of a sale:" cf. Benj. (2nd ed.) p. 85.

(*j*) Cf. also *Anglo-Egyptian Nav. Co.* v. *Rennie*, 10 C. P. 271.

A contract whereby the transfer of such ownership is postponed till some future time, or the performance of some condition, is called an executory contract of sale (*j*).

Illustration.—A. contracts to sell to B. a quantity of iron on condition that, on delivery, certain bills which were outstanding against A. should be taken out of circulation. This is an executory contract of sale until the bills are withdrawn. *Bishop* v. *Shilleto*, 2 B. & A. 329 a.

5(*k*). No contract for the sale of any goods, wares, or merchandise of the value of 10*l*. or upwards, is enforceable by law, unless

(1) The buyer accept and actually receive part of the goods so sold; or

(2) Give something in earnest to bind the bargain, or in part payment of the price; or unless

(3) The bargain (*l*), or some note or memorandum (*m*) thereof, be in writing, signed by the

(*j*) Benj. (2nd ed.) pp. 3, 4. In some cases the assent of the buyer to a sale may be conditional, as where the goods are sent "on sale or return." Here the *formation* of the contract is suspended till the fulfilment of the condition, and in the meantime the buyer is merely a bailee: Benj. (2nd ed.) p. 49; per Denman, J., in *Elphick* v. *Barnes*, 5 C. P. D. 326. The same principle would apply to a case like *Bianchi* v. *Nash*, 1 M. & W. 545, where the buyer became the bailee of a musical box, with an agreement to pay for it if damaged in his possession. The distinction between such cases and executory contracts of sale is this—that in the latter case it is only the *transfer of the ownership*, and not the *formation of the contract*, that is postponed.

(*k*) 29 Ch. 2, c. 3, s. 17; 9 Geo. 4, c. 14, s. 7, which are to be read together: cf. *Scott* v. *E. C. Ry. Co.*, 12 M. & W. 33; and *Harman* v. *Reeve*, 18 C. B. 587; 25 L. J. C. P. 257.

(*l*) For a possible distinction between s. 4 and s. 17 of Statute of Frauds, founded on this word, as distinguished from "agreement," cf. s. 18, note (*e*), *post*.

(*m*) Observe that the statute makes no mention of an agreement originally in writing, but such cannot be excluded: cf. per Erle and Patteson,

parties to be charged thereby, or their agents thereunto lawfully authorized.

If the above conditions be satisfied, the agreement then(*n*) becomes a contract enforceable by law; but the fulfilment thereof after action has not a retrospective operation(*o*).

6. The words "goods, wares and merchandise" in the preceding section include *fructus naturales* and *fructus industriales*, whether mature at the date of the contract, or immature, the ownership whereof is to pass to the buyer after severance thereof from the soil(*p*), and, in the case of *fructus industriales* [perhaps], also when such ownership is to pass before severance(*q*); but do not include:

(1) *Fructus naturales*, the ownership whereof is to pass before severance(*r*) [and from the further growth whereof the buyer is to derive benefit](*s*);

JJ., in *Sievewright* v. *Archibald*, 17 Q. B. 107, 114; and Cockburn, C.J., in *Williams* v. *Lake*, 29 L. J. Q. B. 1.

(*n*) This, although the statute says the bargain shall *not be good*, *i. e.*, void: cf. per Williams, J., in *Bailey* v. *Sweeting*, 8 C. B., N. S. 843; and per Brett and Thesiger, L.JJ., in *Brittain* v. *Rossiter*, 11 Q. B. D. 123.

(*o*) *Bill* v. *Bament*, 9 M. & W. 36; and per Willes, J., in *Gibson* v. *Holland*, 1 C. P. 1.

(*p*) *Smith* v. *Surman*, 9 B. & C. 561, *fructus naturales*; *Sainsbury* v. *Mathews*, 4 M. & W. 342; per cur. in *Washbourn* v. *Burrows*, 1 Ex. 107.

(*q*) Per Bayley and Littledale, JJ., in *Evans* v. *Roberts*, 5 B. & C. 829; *Jones* v. *Flint*, 10 A. & E. 753. Held in these cases, that *fructus industriales*, even while unsevered, are *chattels*, and, *semble*, *goods*. But cf. Amos and Ferrard on Fixtures, 3rd ed. p. 334.

For a definition of *fructus industriales*, cf. *Graves* v. *Weld*, 5 B. & Ad. 105.

(*r*) *Rodwell* v. *Phillips*, 9 M. & W. 502; *Campbell* v. *Roots*, 2 M. & W. 248; *Scorell* v. *Boxall*, 1 Y. & J. 396.

(*s*) *Marshall* v. *Green*, 1 C. P. D. 35; but *qy.* whether this case was not decided upon a wrong view of the *ratio decidendi* of *Smith* v. *Surman*. In the latter case ownership passed after severance, the timber being sold *at so much per foot*. In *Marshall* v. *Green*, *semble*, the ownership passed

(2) Tenant's fixtures sold while unsevered (*t*);
(3) Scrip (*u*), shares (*v*), and stocks (*w*);
(4) Choses in action (*x*);
(5) Documents of title (*y*).

7. The terms of section 5 include (*z*):
(1) An entire agreement for the sale of goods, and for other objects, where the goods are of the value of 10*l.* (*a*);
(2) An entire agreement for the sale of different goods, the joint value whereof is 10*l.* (*b*);
(3) An agreement for the sale of goods, not then in existence, or otherwise of unascertained

before severance, which makes an intelligible distinction. If *M.* v. *G.* be good law, the words within brackets must stand.

(*t*) *Lee* v. *Risdon*, 7 Taunt. 188; *Lee* v. *Gaskell*, 1 Q. B. D. 700. The last case decided that a bargain and sale by the tenant's buyer to the lessor of unsevered tenant's fixtures was not a sale of *goods*, though there had been an intermediate sale by the tenant. But the dicta of the Court are to the effect that the original sale by the tenant to the plaintiff, who was not the incoming tenant, was only a transfer of a right to sever. The case, of course, does not decide that an *executory* contract for the sale of fixtures, to be severed before the ownership passed, would not be an executory sale of goods within the principle of *Sainsbury* v. *Matthews*, and the remarks of Rolfe, B., in *Washbourn* v. *Burrows*, *suprà*.

Semble, that the principles of *Lee* v. *Gaskell* would apply to the case of tenant's fixtures under sect. 34 of the Agricultural Holdings Act, 1883, though they are there called "the property" of the tenant; cf. Amos & Ferrard (3rd ed.), pp. 92, 334.

(*u*) *Knight* v. *Barber*, 16 M. & W. 70.

(*v*) *Humble* v. *Mitchell*, 11 A. & E. 205; *Duncuft* v. *Albrecht*, 12 Sim. 189.

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

(*x*) Benj. (2nd ed.), p. 89, and per Lindley, L. J., in *Colonial Bank* v. *Whinney*, 30 Ch. D. 283.

(*y*) Benj. *suprà*; cf. also *Freeman* v. *Appleyard*, 32 L. J. Ex. 175, where held that stock certificates not *goods* within Factors Act, 1842.

(*z*) This section is modelled on the Digest by Stephen, J., and Prof. Pollock in Law Q. Rev., No. 1, p. 11.

(*a*) *Astey* v. *Emery*, 4 M. & S. 262; *Cobbold* v. *Caston*, 1 Bing. 399; 8 Moo. 456; *Harman* v. *Reeve*, 18 C. B. 587; 25 L. J. C. P. 257.

(*b*) *Elliott* v. *Thomas*, 3 M. & W. 170; *Scott* v. *E. C. R. Co.*, 12 M. & W. 33; *Bigg* v. *Whisking*, 14 C. B. 195.

value at the date of the contract, the value thereof being afterwards ascertained as 10*l.* (*e*);

But they do not include a contract for the re-sale of goods by the buyer to the seller, forming a term of an entire and valid contract for the sale thereof to the former (*d*).

Illustrations.—1. A. agrees to sell B. a certain mare and foal above the value of 10*l.*, and also to agist them and another mare and foal of B.'s for a certain time, in consideration of an entire sum of 30*l.* This is a contract of sale of goods above the value of 10*l.*, though there be also terms as to agistment. *Harman* v. *Reeve*, 18 C. B. 587.

2. A. buys at B.'s shop a number of articles, each at a separate price less than 10*l.*, the whole amount being 70*l.* This is an entire contract for goods above 10*l.* in value. *Baldey* v. *Parker*, 2 B. & C. 37.

3. A. agrees to sell B. certain seed, and B. agrees to sell A. the crop produced therefrom at so much a bushel. The value of the crop when produced is over 10*l.* B.'s contract is within the terms of the section. *Watts* v. *Friend*, 10 B. & C. 446.

4. A. agrees to sell B. a mare, supposed to be in foal, for 20*l.*, and B. agrees, if the mare should prove to be in foal, to sell her for 12*l.* to A. B. pays the 20*l.* B.'s agreement to re-sell the mare need not be proved by any memorandum, or otherwise, the original entire agreement having become binding by B.'s payment of the 20*l.* *Williams* v. *Burgess*, 10 A. & E. 499.

8. The question whether any act or forbearance amounts in fact to an acceptance or actual receipt, is one for the jury (*e*).

9. A sample of the goods sold constitutes a part of such goods, within the meaning of sub-s. 1 of

(*c*) *Watts* v. *Friend*, 10 B. & C. 446.

(*d*) *Williams* v. *Burgess*, 10 A. & E. 499.

(*e*) Per Denman, C. J., in *Edan* v. *Dudfield*, 1 Q. B. 302; per Coleridge, J., and Williams, J., in *Bushel* v. *Wheeler*, 15 Q. B. 442.

sect. 5, if it be considered by the parties part of the bulk sold (*f*).

10. An acceptance is an assent by the buyer to the receipt of the goods as having been made by the seller in fulfilment of the contract of sale (*g*). It may precede, be contemporaneous with, or subsequent to, an actual receipt (*h*).

Explanation (*i*).—Any act or declaration done or made by the buyer, with the consent (*j*) of the seller, in relation to the goods, which involves an admission of the existence of a contract for the sale thereof, is relevant to prove such an acceptance as aforesaid; but it is not necessary to such an acceptance that any such act or declaration should constitute an absolute and final acceptance of the goods in performance of the contract, or involve an admission of the particular terms (*k*) thereof, or of the due fulfilment (*l*) of such terms by the seller.

11. In particular, an acceptance, within the meaning of the preceding section, takes place—

(1) When the buyer agrees unconditionally to buy specific goods, or selects goods after an opportunity of testing or examining the same (*m*): or

(2) When he retains goods, or the documents of

(*f*) *Talver* v. *West*, Holt, 178; *Hinde* v. *Whitehouse*, 7 East, 558; *Gardner* v. *Grout*, 2 C. B. N. S. 340.

(*g*) Cf. per Brett, M. R., in *Page* v. *Morgan*, 15 Q. B. D. 228.

(*h*) *Cusack* v. *Robinson*, 1 B. & S. 299.

(*i*) *Page* v. *Morgan*, *suprà*.

(*j*) *Taylor* v. *Wakefield*, 6 E. & B. 765; and *Phillips* v. *Bistolli*, 2 B. & C. 511.

(*k*) *Tomkinson* v. *Staight*, 25 L. J. C. P. 85.

(*l*) Per Bramwell, B., in *Castle* v. *Sworder*, 29 L. J. Ex. 235.

(*m*) *Cusack* v. *Robinson*, 1 B. & S. 299; *Kershaw* v. *Ogden*, 3 H. & C. 717; *Simmonds* v. *Humble*, 13 C. B. N. S. 258.

title thereto, after an actual receipt thereof, for such a time as to lead to the presumption that he intends to take thereto as owner (*n*): or

(3) When he uses or deals with the goods, or the documents of title, as an owner thereof (*o*).

12. An actual receipt takes place when there is a delivery of the goods, or of the documents of title thereto, to or into the control of the buyer, and so as to divest the seller's lien in respect thereof (*p*).

13. In particular, an actual receipt takes place, within the meaning of the preceding section:—

(1) When the goods, being in the possession of the seller, the latter constitutes himself a bailee thereof to the buyer (*q*):

(2) When the goods, being in the possession of the seller's agent, the latter, with the consent of the seller, attorns in respect thereof to the buyer (*r*):

(3) When the goods, being in the possession of a

(*n*) *Bushel* v. *Wheeler*, 15 Q. B. 443, n.; per Bramwell, B., in *Bowes* v. *Pontifex*, 3 F. & F. 739; *Coleman* v. *Gibson*, 1 M. & Rob. 168; *Currie* v. *Anderson*, 2 E. & E. 592.

(*o*) *Parker* v. *Wallis*, 5 E. & B. 21; per Erle and Crompton, JJ., in *Meredith* v. *Meigh*, 2 E. & B. 364; *Marshall* v. *Green*, 1 C. P. D. 35.

(*p*) *Phillips* v. *Bistoli*, 2 B. & C. 511; per Parke, B., in *Bill* v. *Bament*, 9 M. & W. 41; *per cur.* in *Cusack* v. *Robinson*, 1 B. & S. 299.

(*q*) *Elmore* v. *Stone*, 1 Taunt. 458; *Castle* v. *Sworder*, 6 H. & N. 828; *Beaumont* v. *Brengeri*, 5 C. B. 301. There must be an agreement between the parties to constitute the seller a bailee; mere continuance of the seller's possession is insufficient: cf. per Kay, J., in *In re Roberts*, 3 Times L. R. 678, quoting *Elmore* v. *Stone*.

(*r*) *Bentall* v. *Burn*, 3 B. & C. 423; *Farina* v. *Home*, 16 M. & W. 119. In *Simmonds* v. *Humble*, 13 C. B. N.S. 258, where the goods were in the possession of the seller's agent, held that the completion of the contract through the medium of the agent, *ipso facto* converted him into a bailee for the buyer. *Sed quære.*

third and neutral person, the seller puts them at the disposal of the buyer, and suffers him to take possession thereof, or to deal with them (*s*).

14. When the goods sold are at the time in the possession of the buyer, an acceptance and actual receipt thereof takes place when the buyer deals therewith in a manner inconsistent with the continuance of his former possession (*t*).

15. A carrier, though selected by the buyer, is not, in the absence of evidence to the contrary, the agent of the latter to accept (*u*), but he is to actually receive (*v*), the goods sold.

Illustrations.—1. A. sells to B. specific firkins of butter, which B. inspects and orders to be sent to C.'s warehouse, which is done. B. has accepted and afterwards actually received the butter. *Cusack* v. *Robinson*, 1 B. & S. 299.

2. A. orders goods of B., to be sent to him by a particular carrier, which is done, and an invoice is sent to A. informing him thereof. A. allows the goods to remain five months in the carrier's warehouse after arrival, without communication to B. A. has actually received the goods, and there is also evidence of his acceptance. *Bushel* v. *Wheeler*, 15 Q. B. 443, n.

(*s*) *Marshall* v. *Green*, 1 C. P. D. 35; *Tansley* v. *Turner*, 2 B. N. C. 151; *Cooper* v. *Bill*, 3 H. & C. 722. Submitted that the fact that the goods sold were in the possession *of a third and neutral party* was the true *ratio decidendi* of *Marshall* v. *Green*, according to the opinion of Grove, J. Coleridge, C. J., and Brett, J., however, treat the case as if the decision would have been the same if the land had been the seller's, which *on the facts* was doubtless the case. But submitted that (as Grove, J., says), the actual receipt is easier to prove when the place of deposit is not the seller's. Grove, J.'s, view of the case is in accordance with *Tansley* v. *Turner*, and *Cooper* v. *Bill*.

(*t*) *Edan* v. *Dudfield*, 1 Q. B. 302; *Lillywhite* v. *Devereux*, 15 M. & W. 285.

(*u*) *Hanson* v. *Armitage*, 5 B. & A. 557; *Norman* v. *Phillips*, 14 M. & W. 277. Per Blackburn, J., in *Smith* v. *Hudson*, 6 B. & S. at p. 448.

(*v*) *Smith* v. *Hudson*, *supra*. Mr. Campbell's view is, that there is no actual receipt until the *transitus* has ended: cf. p. 184 of his book.

3. A. buys goods of B., and orders them to be sent by a particular vessel, the bill of lading to be made out to the order of C., and to include other goods of A.'s. A. receives the bill, which he keeps for a year. The ship never arrives. A. has accepted and actually received the goods. *Currie* v. *Anderson*, 2 E. & E. 592.

4. A. sells to B. some turnip seed, and delivers it. B. spreads it out to dry it. B. has actually received the seed, and has also accepted it, if he acted as owner, and not by the authority of A., or merely to preserve it on A.'s behalf, if he thought it perishable. *Parker* v. *Wallis*, 5 E. & B. 21.

5. A. sells B. a particular horse, and, after the completion of the bargain, asks B. to lend it him, which B. agrees to do. The horse never actually goes out of A.'s possession. There is an acceptance by B., and also (as A. holds the horse as B.'s bailee, and not as unpaid seller) an actual receipt. *Marvin* v. *Wallis*, 6 E. & B. 726 (*w*).

6. A. sells to B. a horse, no time being specified for payment, and it being part of the bargain that the horse shall be kept by A. for twenty days. At the expiration of that time, A. sends the horse by B.'s directions to Kempton Park, but entering it in his own name. There is no actual receipt by B., as he has never had the control of the horse, and A. has never parted with his lien. *Carter* v. *Toussaint*, 5 B. & A. 855 (*x*).

7. A. sells goods to B., and delivers them to A.'s agent, C., who warehouses them with D., who hands C. a delivery warrant. C. indorses the warrant to B., who keeps it ten months, without presenting it to D. There is evidence of acceptance by B. (by reason of the retention of the warrant), but there is no actual receipt, as D. has never attorned to B. *Farina* v. *Horne*, 16 M. & W. 119.

8. A. sells B. timber, then growing on the land of C. B. cuts down some of the trees, and agrees to sell the tops and stumps to D. B. has accepted, and (as A. put the timber at B.'s disposal and allowed him to deal with it) actually received the timber. *Marshall* v. *Green*, 1 C. P. D. 35 (*y*).

9. A. sells goods to B. by sample, and delivers them to B.'s

(*w*) Cf. *Castle* v. *Sworder*, 30 L. J. Ex. 310; *Elmore* v. *Stone*, 1 Taunt. 457.

(*x*) Cf. *Tempest* v. *Fitzgerald*, 3 B. & A. 680.

(*y*) Coleridge, C. J., and Brett, J., in this case seem to refer to and follow *Anderson* v. *Scot*, 1 Camp. 235, and *Hodgson* v. *Le Bret*, *ib.* 233, on the question of actual receipt. But those cases were disapproved of in *Proctor* v. *Jones*, 2 C. & P. 532; and *Saunders* v. *Topp*, 4 Ex. 390; and were, *semble*, overruled in *Baldey* v. *Parker*, 2 B. & C. 37; and *Bill* v. *Bament*, 9 M. & W. 36.

carrier. B. sub-sells to C. B. has actually received and accepted the goods, though he may afterwards contend that the goods were not in accordance with the sample. *Morton* v. *Tibbetts*, 15 Q. B. 428.

10. A. buys of B. a quantity of wheat by sample, and on delivery opens a number of the sacks for the purposes of examination, and then rejects the whole as unequal to sample. There is an actual receipt, and also evidence of an acceptance by A. *Page* v. *Morgan*, 15 Q. B. D. 228.

11. A. sells and delivers to B. a piano at a certain price, which B. retains. B. has actually received and accepted the piano, though he may afterwards insist that he was entitled to credit for payment. *Tomlinson* v. *Staight*, 25 L. J., C. P. 85.

12. A., the tenant under B. of a furnished house, agrees to buy the furniture if C., the superior landlord, would accept A. as his tenant. C. refuses his consent, and A. continues his possession under B. There is no evidence of an acceptance or actual receipt of the furniture, as A.'s possession as B.'s bailee remains unchanged. *Lillywhite* v. *Devereux*, 15 M. & W. 285.

16. Earnest means anything, not forming part of the price, given or received to bind the bargain (*z*).

Illustration.—B., the buyer of goods, takes a shilling from his pocket and draws it across the hand of A., the seller, and then puts it into his pocket. This does not amount to the giving of earnest. *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

17. Part payment must be made at or subsequently to the time of the agreement, either by means of some separate act or by virtue of some collateral agreement not itself forming one of the terms of the original agreement of sale (*a*).

Illustration.—A., being indebted to B. in the sum of 4*l.*, sells to B. goods to the value of 20*l.*, on the terms that B. is to pay only the balance of 16*l.* There is no part payment by B. of 4*l.*, as the set off does not operate as an admission of the agreement, not being collateral thereto. *Walker* v. *Nursey*, 16 M. & W. 302.

(*z*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597; *Evans* v. *Roberts*, 5 B. & C. 829; *Bach* v. *Owen*, 5 T. R. 409.

(*a*) *Walker* v. *Nursey*, 16 M. & W. 302; cf. per Cowen, J., in *Artcher* v. *Zeh*, 5 Hill, 200; Langd. Cas. on C. 332.

18. The note or memorandum of the agreement of sale must in all cases (in addition to any other material terms thereof) include, either in express terms or by implication,

(1) The names or description of the seller and buyer, in their respective characters as such (*b*);

(2) The goods sold (*c*); and

(3) The price, if any were agreed upon (*d*).

But it is [perhaps] not necessary that the memorandum should evidence the consideration for the promise of the party to be charged, or otherwise, than by necessary inference from the terms of such promise (*e*).

Illustrations.—1. A. agrees to buy of B. a quantity of marble, and signs a memorandum as follows:—"A. agrees to buy the marble purchased by B." B. is not shown to be a dealer in marble. This memorandum is insufficient, as B.'s name does not appear *as seller*. *Vanderburgh* v. *Spooner*, L. R. 1 Ex. 316.

2. A. sells to B. twenty puncheons of treacle, and signs a memorandum: "Bought of A. 20 puncheons of treacle, A." This is insufficient, as it does not name the buyer. *Champion* v. *Plummer*, 1 N. R. 252.

3. A. writes to B. offering to buy "that horse" for 50*l*. B. had the day before shown A. a particular horse. The memorandum is sufficient, as the identity of the horse can be proved by parol. Cf. per Lush, L. J., in *Shardlow* v. *Cotterill*, 20 Ch. D. 97 (*f*).

(*b*) *Vandenburgh* v. *Spooner*, L. R. 1 Ex. 316; but cf. per Willes, J., in *Newell* v. *Radford*, 3 C. P. 52. Knowledge by the party sought to be charged of the identity of the other party will not render the contract enforceable: *Jarrett* v. *Hunter*, 34 Ch. D. 182.

(*c*) *Thornton* v. *Kempster*, 5 Taunt. 786.

(*d*) *Elmore* v. *Kingscote*, 5 B. & C. 583; *Hoadley* v. *McLaine*, 10 Bing. 482.

(*e*) *Egerton* v. *Matthews*, 6 East, 307; cf., also, per Willes, J., in *Gibson* v. *Holland*, 1 C. P. 1; per Alderson, B., in *Marshall* v. *Lynn*, 6 M. & W. 109; per cur. in *Sail* v. *Bourdillon*, 1 C. B. N. S. 188; cf., also, some remarks of Stephen, J., in *McCaul* v. *Strauss*, 1 C. & E. 111.

(*f*) Cf. also *MacDonald* v. *Longbottom*, 1 E. & E. 977.

4. A. agrees to buy B.'s horse for 200 guineas, and sends B. a letter, saying, "A. begs to inform B. that if the horse can be proved to be five years old, he will be happy to have him." This is insufficient, as the price is omitted. *Elmore* v. *Kingscote*, 5 B. & C. 583 (*g*).

5. A. writes to B. ordering "a new, fashionable, and handsome landaulet," with specified appointments, but mentioning no price. B., during the making of the carriage, makes various alterations and additions at A.'s request. The memorandum is a sufficient one of a sale of the carriage, as altered, at a reasonable price. *Hoadley* v. *McLaine*, 10 Bing. 482 (*h*).

6. A. agrees to buy wool of B., to be in good dry condition. C., the common broker, makes out a note, "Mr. A., we have this day sold on your account Mr. B." certain specified goods. This memorandum is insufficient, as the condition as to quality does not appear. *Pitts* v. *Beckett*, 13 M. & W. 743.

7. A. buys two candlesticks of B., and, after the sale, says, in answer to B.'s inquiry for a reference, that he intends to pay by means of a cheque of a third person. This mode of payment need not be referred to in the memorandum, not being intended as a term of the contract. *Sail* v. *Bourdillon*, 1 C. B. N. S. 188.

8. A. and B. sign a memorandum of a purchase from C. in these words: "We agree to give C. 19*d.* a lb. for 30 bales of Symrna cotton." This memorandum is [probably] sufficient, though the consideration for A. and B.'s promise does not appear. *Egerton* v. *Matthews*, 6 East, 307.

19. An auctioneer is primarily the seller's agent (*i*); but the buyer at a public auction (*j*) is also deemed, subject to any contrary intention (*k*), by the act of bidding for the goods to authorize him to make and sign a memorandum of the sale on his behalf, after the goods have been knocked down, so as to bind him (*l*).

(*g*) Cf. also *Goodman* v. *Griffiths*, 1 H. & N. 574.

(*h*) *Asheroft* v. *Morvin*, 4 M. & G. 450.

(*i*) Benj. (2nd ed.) p. 202; *White* v. *Proctor*, 4 Taunt. 209; *Kenworthy* v. *Schofield*, 2 B. & C. 945.

(*j*) *Secus*, at a *private* sale, when the auctioneer is only the seller's agent: *Mews* v. *Carr*, 1 H. & C. 484.

(*k*) *Bartlett* v. *Parnell*, 4 A. & E. 792.

(*l*) Benj. *suprà*. Sometimes the auctioneer's clerk may be the buyer's agent: *Bird* v. *Boulter*, 4 B. & A. 443. But ordinarily he has no autho-

20. When the agreement of sale is made through the medium of a broker (*m*), an agreement in writing, or a note or memorandum thereof, will be deemed to exist according to the rules following, that is to say:

(1) (*n*). If the broker make and sign an entry of the agreement in his book, the entry so signed constitutes the original agreement between the parties, and is the primary evidence thereof, to the exclusion of any notes which may afterwards be delivered to the parties (*o*). But if such notes, corresponding with one another, and being otherwise sufficient as a memorandum, differ from the entry, their acceptance by the parties is relevant to prove a mutual assent to a new contract, as evidenced by the notes (*p*).

(2) If there be no entry, or none sufficient as a memorandum, the notes, if they correspond with one another, and are otherwise sufficient, as aforesaid, together constitute a memorandum of the contract (*q*). If in such

rity: *Pierce* v. *Corf*, L. R. 9 Q. B. 210.

(*m*) As to a custom that seller of goods on credit may object to buyer, cf. *Hodgson* v. *Davies*, 2 Camp. 531.

(*n*) Per Lord Campbell, and Patteson and Wightman, JJ., in *Sievewright* v. *Archibald*, 17 Q. B. 115; cf. Smith's M. Law (9th ed.), pp. 505, 506, where cases for and against are collected.

(*o*) And the same rule applies when the agreement was made directly between the parties, and the notes made by the broker vary therefrom: *Heyworth* v. *Knight*, 17 C. B. N. S. 298; 20 L. J. Q. B. 529.

(*p*) Per Patteson, J., in *Sievewright* v. *Archibald*, *supra*, and Parke, B., in *Thornton* v. *Charles*, 9 M. & W. 802, explaining *Hawes* v. *Forster*, 10 W. R. 368.

(*q*) Per Lord Campbell, C. J., and Patteson and Wightman, JJ., in *Sievewright* v. *Archibald*, *supra*.

case the notes do not correspond, or be insufficient, no memorandum at all exists (*r*).

(3) Either note by itself, if there be sufficient authority in the broker to make it, may constitute such a memorandum, in the absence of evidence that the signed entry or the other note differ therefrom (*s*).

(*r*) *Thornton* v. *Kempster*, 5 Taunt. 786; *Grant* v. *Fletcher*, 5 B. & C. 436; *Gregson* v. *Rucks*, 4 Q. B. 747; *Sievewright* v. *Archibald*, *suprà*.

(*s*) *Parton* v. *Crofts*, 16 C. B. N. S. 11; *Hawes* v. *Forster*, 1 M. & R. 368; *Thompson* v. *Gardiner*, 1 C. P. D. 777; cf. *McCaul* v. *Strauss*, 1 Cab. & Ell. 111, where the broker was acting only for seller.

CHAPTER II.

TITLE.

21 (*a*). No seller of goods can pass to the buyer a better title thereto than he himself possesses (*b*), except in the cases mentioned in sects. 22 to 27.

22. When goods have been obtained by a buyer, under a contract voidable by the seller, the buyer may, by a re-sale made to a sub-buyer in good faith before the seller has repudiated the contract, pass a good title to the goods to the sub-buyer (*c*); subject, however, where the goods were obtained by any representation, by words or conduct of the buyer, constituting a false pretence within the meaning of the criminal law, to the re-vesting of the ownership in the original seller, upon the conviction of the buyer, pursuant to the provisions of sect. 32 (*d*).

Illustrations.—1. A. buys iron of B., and pays him by a bill of exchange drawn upon a fictitious person. A., before B. repudiates the contract, re-sells to C. C. has the ownership of the iron. *White* v. *Garden*, 10 C. B. 919.

(*a*) For the law applicable to protected sales under the Bankruptcy Acts, cf. B. A. 1883, s. 49. For the case of the ownership of *coin*, cf. *Miller* v. *Race*, 1 S. L. C. 526.

(*b*) A person can, of course, *agree to sell* a thing which is not at the time his: cf. sect. 34, *infrà*.

(*c*) *White* v. *Garden*, 10 C. B. 919; *Babcock* v. *Lawson*, 4 Q. B. D. 400; 5 Q. B. D. 284; per cur. in *Cundy* v. *Lindsay*, 3 Ap. Ca. 463.

(*d*) *Valmont* v. *Bentley*, 12 Ap. Ca. 471.

2. A. orders goods of B., signing his name so as to resemble the signature of C., a well-known tradesman. B. accordingly sends goods to A.'s premises invoiced to C. A. sells these goods to D. D. is liable to B. for the value of the goods, as B., never having intended to contract with A., there was no contract with him to pass the property in the goods, which, therefore, A. could not transfer to D. *Cundy* v. *Lindsay*, 3 Ap. Ca. 459.

23. A sale may be made by a person, not the owner of goods, in the circumstances mentioned in, and subject to the provisions of, the Factors Acts, 1823 to 1877.

24. A person, not being the owner of goods, may sell them, so as to pass a good title thereto, if he act under any authority or license given by the owner, or otherwise conferred by law, if he duly exercise such authority or power (*e*).

Illustrations.—1. A., who is B.'s landlord, distrains upon B.'s goods for rent due, and sells them to C. The property passes to C. if A. duly executed the distress and sale (*f*).

2. A. pledges goods with B. for an advance, to be repaid on a certain date, in default whereof B. is to be at liberty to sell the goods. A. makes default, and B. sells to C. C. has a good title to the goods.

25. A sale, made by a person not thereto authorized, may be good, as against the owner, by way of estoppel (*g*).

26. A sale of goods, liable to be seized by virtue of a writ of execution or attachment, as against the owner, may be made, before actual seizure or attachment by virtue thereof, to a buyer for value and in

(*e*) Smith's Merc. Law, 9th ed., p. 484.

(*f*) With respect to the case of executions, cf. *Ex parte Hall*, 14 Ch. D. 132, and *Farrant* v. *Thompson*, 5 B. & A. 826.

(*g*) *Gregg* v. *Wells*, 10 A. & E. 90; *Waller* v. *Drakeford*, 22 L. J. Q. B. 274; *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177.

good faith, and not having at that time notice of any writ, whereby the goods might be seized or attached, having been delivered to, and remaining unexecuted in the hands of, the sheriff, under-sheriff, or coroner (*h*).

27. A sale of goods, not belonging to the Crown, may be made, so as to pass a good title thereto to the buyer, if it be made in market overt, as explained in, and subject to the provisions mentioned in, the three next sections, but subject to such rights of the original owner as are explained in sects. 31 and 32 (*i*).

28. Market overt elsewhere than in the City of London is held only on the special days provided for particular localities by charter or prescription, and only in the market-place, or other spot of ground set apart by custom for the sale of particular goods (*j*).

Explanation.—A market newly constituted by Act of Parliament is [perhaps] not a market overt (*k*).

29. In the City of London every week day is a market day, and every shop wherein goods are exposed publicly for sale is a market overt for the sale of such goods as the shopowner professes to trade in (*l*).

(*h*) 19 & 20 Vict. c. 97, s. 1. The words "actual seizure" = seizure; cf. per Bramwell, B., in *Gladstone* v. *Padwick*, L. R. 6 Ex. 203; 46 L. J. Ex. 154.

(*i*) *Cundy* v. *Lindsay*, 3 Ap. Ca. 463. There is no market overt for ships: *Hooper* v. *Gumm*, 2 Ch. 282.

(*j*) *Case of Market Overt*, 5 Co. 83 b. As to a legally constituted market, cf. *Benjamin* v. *Andrews*, 5 C. B. N. S. 299.

(*k*) Per cur. in *Moyce* v. *Newington*, 4 Q. B. D. 34; but cf. *Gandy* v. *Ledwidge*, 10 Ir. R. C. L. 33.

(*l*) *Case of Market Overt*, 5 Co. 83 b; Tudor's L. C. in M. Law, p. 274; *Lee* v. *Bayes*, 18 C. B. 599.

Explanation.—It is doubtful whether such a shop as aforesaid is a market overt for the sale of goods therein to, and not by, the shopowner (*m*).

30. A bargain and sale of goods in market overt must, in order to pass a good title thereto to the buyer, fulfil the following conditions (*n*):—

(1) The sale must be made between sunrise and sunset, and without concealment (*o*), and to a buyer for value, and in good faith, and without notice of the invalidity of the seller's title.

(2) The goods must be present at the market, and every part of the transaction, as well the contract of sale as the delivery, must take place in the market (*p*).

(3) The goods sold must be of the nature and quality the seller proposes to trade in (*q*).

(4) If the thing sold be a horse, the provisions of the 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, must be complied with (*r*).

As to what constitutes a shop, cf. *Lyons* v. *De Pass*, 11 A. & E. 326. The protection does not apply, *e.g.*, to a *wharf*: *Wilkinson* v. *King*, 2 Camp. 335.

(*m*) Per cur. in *Crane* v. *London Docks Co.*, 5 B. & S. 313, quoting *Lyons* v. *De Pass*, *suprà* (where the sale was *to* the shopowner), but not deciding the point. In several cases no distinction appears to have been adverted to between sales to and by the shopowner: cf. *Anon.*, 12 Mod. 521; *Taylor* v. *Chambers*, Cro. Jac. 68; *Hartop* v. *Hoare*, 2 Str. 1187; 3 Atk. 44; and cf. also *White* v. *Spettigue*, 1 C. & K. 673.

(*n*) *Case of Market Overt*, 5 Co. 83 b; Co. 2 Inst. 713; Bac. Ab. tit. Fairs and Markets.

(*o*) *Lyons* v. *De Pass*, 11 A. & E. 326.

(*p*) *Crane* v. *London Docks Co.*, 5 B. & S. at p. 320; *Hill* v. *Smith*, 4 Taunt. 533; *Diston's Case*, 6 East, 438; cf. *Town Commissioners of Newtownards* v. *Woods*, 11 Ir. R. C. L. 516.

(*q*) *Lyons* v. *De Pass*, *suprà*.

(*r*) *Moran* v. *Pitt*, 42 L. J. Q. B. 47; 21 W. R. 525.

Illustrations.—1. Plate which has been stolen from A. is sold to B. at a goldsmith's shop in the city. The bargain takes place behind a screen. No property in the plate passes to B., as the sale was made secretly. 5 Co. 83.

2. A., who carries on at shop 1 the trade of a drug merchant, and at shop 2 that of an oil and colorman, buys from B. at shop 1, by sample, stolen opium. The opium is delivered at shop 2. Assuming that the rule as to market overt protects a *purchase by* a shopkeeper, this sale does not transfer the ownership of the opium to A., as the completion of the contract, *i.e.* the delivery, took place at a shop which was not market overt for opium. *Crane* v. *L. D. Co.*, 5 B. & S. 313.

3. A.'s plate, which has been stolen, is sold in the shop of B., a scrivener in the city of London, to C. No property in the plate is transferred to C., as a scrivener's shop is not a market overt for plate. *Case of Market Overt*, 5 Co. 836.

4. A. sends to B., a wharfinger in the City, a quantity of lead, but gives him no authority to sell it, though B. is accustomed to sell lead. B. sells it to C., who buys in good faith. A. can recover the lead from C., B.'s wharf not being a market overt. *Wilkinson* v. *King*, 2 Camp. 335.

31. If, after a sale in market overt, the goods return into the possession of the seller, the original owner of the goods may recover them from him(*s*).

32. Where any person, who shall have stolen, taken, obtained, extorted, embezzled, converted, or disposed of, or shall knowingly have received any chattel, shall, upon an indictment by or on behalf of the original owner, or his executor or administrator, be convicted thereof, the ownership of such chattel will, upon such conviction, and as from the date thereof, revest in such owner(*t*).

s Co. 2 Inst. 713; Bac. Ab. tit. Fairs and Markets (E).

(*t*) 24 & 25 Vict. c. 96, s. 100; *Walker* v. *Mathews*, 8 Q. B. D. 109; *Wilmont* v. *Bentley*, 12 Ap. Ca. 471: overruling *Moyce* v. *Newington*, 4 Q. B. D. 32; and quoting *Lindsay* v. *Cundy*, 1 Q. B. D. 348, and *Horwood* v. *Smith*, 2 T. R. 750.

The law was thus laid down in *Vilmont* v. *Bentley* in C. A., 18 Q. B. D. 322:—

1. The 24 & 25 Vict. c. 96, s. 100 (which repealed a similar act, the 7 & 8 Geo. 4, c. 29), was intended to apply to cases of false pretences the same law as that applicable to stolen goods sold in market overt, under the 21 Hen. 8 c. 11.
2. Where the ownership does not pass to the party holding the goods, neither statute is required; *e.g.* where stolen goods are sold *out of market overt;* or where there is *no contract of sale at all* between the owner and the original buyer, by means of false pretences, as in *Cundy* v. *Lindsay*, 3 Ap. Ca. 459: *secus*, where stolen goods are sold in market overt; or where goods obtained by false pretences were obtained by a *voidable* contract, and then resold before repudiation by the original seller.

Lopes, L. J., in the case (at p. 331), thus sums up the law: "*Horwood* v. *Smith* and *Lindsay* v. *Cundy* . . . . decide that, on the conviction of a person for felony or misdemeanour in the obtaining of goods, the property in the goods is by force of the statute restored to the original owner, as against both a purchaser in market overt and a *bonâ fide* purchaser for value from a person who has a voidable title." And Lord Blackburn says (12 Ap. Ca. at p. 480): "The law is that, on conviction, the property revests. Until then it is not in the original owner, if it has been sold in market overt, or sold by a fraudulent purchaser to a *bonâ fide* purchaser from him."

Illustrations.—1. A. steals B.'s cow, and sells it to C. in market overt. A. is afterwards convicted of the larceny, and B. afterwards demands the cow from C., who refuses to deliver it. B. may recover in trover for the cow against C. *Scattergood* v. *Silvester*, 15 Q. B. 506.

2. A. steals B.'s sheep, and sells them in market overt to C. A. gives C. notice of the theft, but C. re-sells the sheep before A.'s conviction of felony by B. C. is not liable to B. for the value of the sheep, as he did not have them in his possession at the time of the conviction; at which time only, and not before, B.'s right of ownership was regained. *Horwood* v. *Smith*, 2 T. R. 750(*u*).

33. Non-disclosure by the seller of an absence of title to the goods sold, whereof he is aware, is a fraud on the buyer (*x*).

(*u*) Mr. Campbell (p. 56), lays down the rule, founded on this case, as if it were necessary that the second sale should be in market overt. *Sed quære, vide* case, where this fact is not stated; and cf. *Peer* v. *Humphrey*, 2 A. & E. 495.

(*x*) Per cur. in *Mosley* v. *Attenborough*, 3 Ex. 500, quoting per Littledale, J., in *Early* v. *Garrett*, 9 B. & C. 932; per Brett, L. J., in *Ward* v. *Hobbs*, 3 Q. B. D. at p. 161; *Springwell* v. *Allen*, 2 East, 448, n.

CHAPTER III.

BARGAINS AND SALES AND EXECUTORY CONTRACTS.

34. Anything which, if in existence, might be the subject-matter of a bargain and sale, may be the subject-matter of an executory contract of sale (*a*), whether it is in existence or not, and whether or not it is in the possession of the seller at the date of the contract, and whether or not he had at that time entered into a contract for the purchase thereof, or had any reasonable expectation of acquiring it otherwise than by purchase (*b*).

35. Whether a contract amounts to a bargain and sale of the goods, or to an executory contract of sale, is a question depending upon the mutual intention of the parties to the contract, as expressed therein, or to be inferred from the circumstances of the case (*c*).

(*a*) Of course only if *a sale* is really contemplated; the transaction may sometimes amount to a wager: cf. sect. 129.

(*b*) *Wilks* v. *Atkinson*, 6 Taunt. 11; 1 Marsh. 412; *Hibblewhite* v. *Mcmorine*, 5 M. & W. 462; *Mortimer* v. *Callan*, 6 M. & W. 70: 7, 20. Per Bramwell, L. J., in *Borrowman* v. *Free*, 4 Q. B. D. 502; cf. the analogous case of the sale of prospective dividends, which is not a wager. *Marten* v. *Gibbon*, 33 L. T. 561.

(*c*) And the giving of earnest is only *evidence of the intention of the parties to enter into a bargain and sale*, and the earnest does not *of itself* make the contract such: cf. Benj. (2nd ed.) p. 262.

Subject thereto, the transfer of such ownership shall be regulated according to the rules contained in sects. 36 to 47.

36. A contract for the sale of specific ascertained goods amounts to a bargain and sale thereof immediately the proposal for sale is accepted (*d*).

Illustration.—A. agrees to sell and B. to buy for 145*l.* a specific stack of hay then standing in a certain field, to be paid for in a month, and not to be cut till paid for. Notwithstanding these stipulations, the ownership of the stack is transferred to B. upon the completion of the contract. *Turling* v. *Baxter*, 6 B. & C. 360.

37. Where by the contract the seller is to do anything to the goods for the purpose of putting them into a deliverable state, the bargain and sale thereof is not complete till this has been done (*e*).

Explanation.—An intention that the ownership of a chattel, to be made or finished, shall, before it is in a deliverable state, be transferred to the buyer, will ordinarily be inferred from the existence in the contract of a stipulation for the payment of an instalment of the price at some specified stage of the work, and from the due payment thereof, and

(*d*) Per Bayley, J., and Holroyd, J., in *Simmons* v. *Swift*, 5 B. & C. 862; and per Lord Blackburn in *Seath* v. *Moore*, 11 Ap. Ca. 370.

(*e*) *Rugg* v. *Minett*, 11 East, 210; *Busk* v. *Davis*, 2 M. & S. 397; *Boswell* v. *Kilborn*, 15 Moo. P. C. 309; *Gilmour* v. *Supple*, 11 Moo. P. C. 551. *Qy.* whether *Young* v. *Matthews*, 2 C. P. 127, is good law. The words "do anything" in this section include (in the case of the sale of a full cargo) the completion of the lading. *Anderson* v. *Morice*, 10 C. P. 609; 1 Ap. Ca. 713; *dub.* Lord Selborne, who thought they meant only the doing of an act *directly to the goods*, and not merely the *addition thereto of other goods*. The rule is otherwise where something is to be done *after* delivery. *Greaves* v. *Hepke*, 2 B. & A. 131, where the seller, by custom, had to pay warehouse rent; cf., also, *North B. Ins. Co.* v. *Moffatt*, 7 C. P. 25, where specific chests of tea were sold, but the seller retained the warrants for the purpose only of paying customs dues.

from the work during its progress having been inspected by or on behalf of the buyer (*f*).

It is a question of fact in each case whether or not any particular stage of the work, on the completion whereof the transfer of the ownership is to depend, has been reached (*g*).

> *Acraman* v. *Morrice*, *infrà*, is an instructive case to show that the suspensive condition, that the goods should be put into a deliverable state, must be fulfilled, subject, of course, to any contrary intention, *by the seller*, and cannot be fulfilled *in invitum* by the *buyer*.

Illustrations.—1. A. contracts to sell to B. the trunks of certain oak trees, B. to mark the portions he wanted, and A. having then to cut off the rejected portions before delivery. B. marks the trees and pays for them, but A. does not sever them, but B. does. The ownership remains in A. *Acraman* v. *Morrice*, 8 C. B. 449.

2. A. orders B. to build him a ship, the price to be payable by instalments at specified stages of the work. Three of these instalments are paid. B. signs a certificate for the purpose of A. having his name registered as owner, which is done; and A. also appoints a master, who inspects the building. The ownership of each completed portion of the vessel vests in A. on completion. *Woods* v. *Russell*, 5 B. & A. 942 (*h*).

3. A. agrees to build B. a ship, the price to be payable by instalments at certain stages, which instalments are paid in advance. B.'s superintendent, with A.'s assent, supervises the building and the selection of the materials; and B.'s name is, with A.'s assent, punched on the keel of the ship. A. refuses to assign the vessel to B., but admits it to be B.'s, and A. then becomes bankrupt, the ship being incomplete. The ownership is in B. *Wood* v. *Bell*, 5 E. & B. 772.

(*f*) Per Lord Watson, in *Seath* v. *Moore*, 11 Ap. Ca. 380, 381. But, *semble*, that the stipulation as to payment may be subsequently agreed to; and the fact of non-payment may be supplemented and assisted by other facts showing an intention to pass the ownership of the incomplete chattel. *Ibid.*

(*g*) Per Lord Blackburn, in *Seath* v. *Moore*, *suprà*.

(*h*) Cf. *Anglo-Eg. Nav. Co.* v. *Rennie*, 10 C. P. 271, where instalments not appropriated to any particular stages: cf. also (in Amer.) *Williams* v. *Jackman*, 16 Gray, 514; per Mellish, L. J., in *Ex parte Lambton*, L. R. 10 Ch. 405.

38. In an executory contract for the manufacture and sale of a chattel, the ownership of the materials intended to form part thereof, whether wholly or partially finished, is not transferred unless and until they have been affixed to, or become, in a reasonable way, part of such chattel (*i*).

39. Where anything remains to be done to the goods by the seller, or by the parties jointly, for the purpose of ascertaining the amount of the price, as by weighing, measuring, or testing the goods, where the price is to depend on their quantity or quality, the bargain and sale is not complete until this has been done, although the individual goods may be ascertained, and they are in the state in which they ought to be accepted (*k*).

Explanations.—1. The fact that the parties have agreed upon a provisional estimate of the price of specific goods, is relevant to prove a mutual intention to enter into a bargain and sale thereof, though the actual amount of such price is to be afterwards more exactly calculated (*l*).

(*i*) Per Lord Watson, in *Seath* v. *Moore*, 11 Ap. Ca. at p. 381; cf. also per Lord Bramwell (at p. 385) quoting *Wood* v. *Bell*, 6 E. & B. 355; and *Tripp* v. *Armitage*, 4 M. & W. 687. *Woods* v. *Russell*, *suprà* (on this point) was disapproved of. *Goss* v. *Quinton*, 3 M. & G. 825, would appear to be doubtful law; cf. per Jervis, C. J., in *Wood* v. *Bell*, *suprà*.

(*k*) Cf. Blackburn, p. 152; *Hanson* v. *Meyer*, 6 East, 614; *Withers* v. *Lyss*, 4 Camp. 237; *Zagury* v. *Furnell*, 2 Camp. 240; *Logan* v. *Le Mesurier*, 6 Moore, P. C. 116. Thus, where goods are sold for a lump sum any future weighing is only for the satisfaction of the buyer, and forms no condition precedent: per Lord Ellenborough in *Hanson* v. *Meyer*, *suprà*, quoting *Hammond* v. *Anderson*, 1 N. R. 69.

(*l*) Per Cockburn, C. J., in *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, distinguishing on this ground *Simmons* v. *Swift*, 5 B. & C. 857; cf. also, per cur. in *Logan* v. *Le Mesurier*, *suprà*. And for an express decision in Am. cf. *Sheely* v. *Edwards*, 49 Am. R. 43.

2. The mere arithmetical calculation of the results of an act on which the price of the goods is to depend, such act having been performed, is not deemed a thing remaining to be done within the meaning of this section (*m*).

Strictly speaking, *Turley* v. *Bates*, *infrà*, was decided only on the ground that the parties showed a clear intention that the ownership should pass, and it was not expressly decided whether the rule as to the postponement of the transfer of the ownership applied, where the act was to be done *only by the buyer*. But the court expressed a strong opinion that the rule does not apply to such a case: cf. also *Kershaw* v. *Ogden*, 3 H. & C. 717. Irrespective of the above question, it would seem to follow, from the dicta in *Turley* v. *Bates*, that, where the price of specific goods is to be determined after the consumption or alteration thereof by the buyer, the vesting of the ownership in him will not be postponed till the period of such ascertainment: cf. some remarks in Langdell's Cases on Sale, p. 1026; and cf. *Ward* v. *Shaw*, 7 Wend. 404, which was in its facts similar to the case put, arguendo, by Pigott, Serj., in *Turley* v. *Bates*. But there the court came to the conclusion that the transfer of the ownership was conditional on payment.

Illustrations.—1. A., who owns a specific stack of bark, contracts to sell it to B. at 9*l.* a ton, the bark to be weighed by A. and B., and the price to be paid on a future day. Part is weighed and delivered. The ownership of the rest does not pass to B. until weighing. *Simmons* v. *Swift*, 5 B. & C. 857.

2. A. contracts to sell a specific heap of clay to B. at 2*s.* a ton. B. is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing machine, situate on the road to his place of deposit. Here, nothing remains to be done by the seller after the contract, and the ownership of the clay is transferred at once. *Turley* v. *Bates*, 2 H. & C. 200.

(*m*) *Tansley* v. *Turner*, 2 B. N. C. 151; quoted in *Bradley* v. *Wheeler*, 44 N. Y. 495.

3. A. sells to B. a specified quantity of oats, being all that a certain identified bin contained, and gives B. a delivery order on C., a warehouse-keeper, specifying the bin, and ordering him to weigh and deliver. C. does not weigh. The property in the oats, nevertheless, passes to B. at once, as the identity of the oats is ascertained, as being all that a particular bin contained, and, the quantity being known, weighing is not necessary to ascertain the price. *Swanwick* v. *Sothern*, 9 A. & E. 895.

4. A. agrees to sell to B. certain timber then lying on C.'s land, at the rate of so much per cubic foot. The timber is measured by A. and B., and the cubic contents of each tree put down on paper, but the total is not added up. The ownership of the trees passes to B. *Tansley* v. *Turner*, 2 B. N. C. 151.

40. Where an entire contract is made for the sale of moveable and immoveable property combined, the ownership of the moveable property does not pass before the conveyance of the immoveable property (*n*).

41. Where the goods are, at the time of the contract of sale, unascertained, it is necessary to the completion of the bargain and sale that they should be ascertained, as explained in the three following sections (*o*).

Illustration.—A. contracts to sell B. twenty tons of oil from A.'s cisterns. The cisterns contain more than twenty tons. No portion of the oil has, by the contract itself, become the property of B., and there is consequently no bargain and sale of any twenty tons. *White* v. *Wilks*, 5 Taunt. 176.

42. The ascertainment of unascertained or non-existent goods takes place by means of a subsequent appropriation to the contract of goods by the one

(*n*) *Neal* v. *Viney*, 1 Camp. 471; *Lanyon* v. *Toogood*, 13 M. & W. 29. In *Sleddon* v. *Cruikshank*, 16 M. & W. 71, the buyer has severed the contract by accepting the chattels.

(*o*) *Wilkins* v. *Bromhead*, 6 M. & G. 963; *Busk* v. *Davis*, 2 M. & S. 397; *Wallace* v. *Breeds*, 13 East, 522. *Whitehouse* v. *Frost*, 12 East, 614, though followed in America is, *semble*, not law.

party, and the assent to such appropriation, according to its terms, by the other (*p*).

Illustrations.—1. A., having a quantity of sugar in bulk, more than sufficient to fill twenty hogsheads, contracts to sell to B. twenty hogsheads of it. A. fills up twenty hogsheads with the sugar, and gives B. notice that the hogsheads are ready, and requires him to take them away. B. says he will take them as soon as he can. By this appropriation by A., and assent thereto by B., the sugar becomes the property of B. *Rhode* v. *Thwaites*, 6 B. & C. 388.

2. A. orders B. to make him a greenhouse. When the greenhouse is finished, B. writes to A. stating the fact, and asking for payment. A. sends the money, and asks B. to keep the greenhouse for him till he wants it. The ownership is in A., as the greenhouse has, after completion, been appropriated by B., with A.'s consent, to A. *Wilkins* v. *Bromhead*, 6 M. & G. 963.

3. A. agrees to sell B. five tons of oil out of a lot then lying at C.'s wharf. A. orders C. to transfer five tons into B.'s name, and sends B. C.'s acknowledgment to that effect; but B. is not to retain the acknowledgment unless he at the same time gives a cheque. B. retains the document, but refuses to give the cheque. The goods are not the property of B., as B. has not assented to A.'s appropriation on his terms. *Godts* v. *Rose*, 17 C. B. 229; 25 L. J. C. P. 61.

43. Such assent, as in the preceding section mentioned, may be given by means of a previous authority by the one party to the other to make an appropriation (*q*).

Such an authority is presumed when, by the terms of the contract, the seller is to do some act with reference to the goods which cannot be done until they are appropriated to the buyer (*r*). In such case, the seller's authority is executed, and a final

(*p*) Per Erle, C. J., and Willes, J., in *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412; per Holroyd, J., in *Rhode* v. *Thwaites*, 6 B. & C. 388; *Godts* v. *Rose*, 17 C. B. 229.

(*q*) Per Erle, J., in *Aldridge* v. *Johnson*, 8 E. & B. 885; per Willes, J., in *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412.

(*r*) Blackb. p. 128 *et seq.*, quoting Com. Dig. Election.

appropriation of the goods made, when he does that act with respect to goods answering to the contract (*s*); and the bargain and sale is thereupon, subject to any contrary intention, as aforesaid, complete.

Illustrations.—1. A. contracts to buy of B. 100 quarters of barley out of the bulk in B.'s granary, A. to send sacks therefor, which B. is to fill. A. sends 200 sacks, and B. fills 155 sacks. The barley in the 155 sacks has been appropriated to A., and the ownership thereof passes to him on the filling of the sacks, B. having thus executed his authority to appropriate, but A. has no right to the barley sufficient to fill the forty-five sacks. *Aldridge* v. *Johnson*, 7 E. & B. 885; 26 L. J. Q. B. 296 (*t*).

2. A. agrees to sell and ship to B. a cargo of maize, the bill of lading to be dated within a certain period, and to have the shipping documents attached thereto. A. tenders, by bill of lading, the cargo of the C. without the shipping documents. B. refuses the cargo. A. afterwards, in proper time, tenders the cargo of the D. with the documents. This last appropriation is binding on B., as the first not having been according to the contract may be withdrawn. *Borrowman* v. *Free*, 4 Q. B. D. 500.

3. A. agrees to sell to B. 500 quarters of barley, to be shipped by A. A. ships the barley, and takes the bill of lading to his own order. A dispute having arisen, A. (though B. offers to pay cash) indorses the bill of lading to C. The ownership of the barley does not pass to B. upon the appropriation by shipment, as A. (though he was committing a breach of contract) did not intend it to pass. *Wait* v. *Baker*, 2 Ex. 1 (*u*).

44. Save as aforesaid provided in sections 42

(*s*) *Borrowman* v. *Free*, 4 Q. B. D. 500; per cur. in *Wait* v. *Baker*, 2 Ex. 1. In *Richardson* v. *Dunn*, 2 Q. B. 218, the informality of the appropriation was waived by the buyer.

(*t*) Cf. *Langton* v. *Higgins*, 4 H. & N. 402. The decision would, *semble*, be otherwise, if the seller had to *complete* the filling of the sacks, in other words, if the buyer had agreed to buy an *entire* load of barley; cf. *Anderson* v. *Morice*, 10 C. P. 609; 1 Ap. Ca. 713. In such a case the ownership would not pass till the completion of the filling of all the 200 sacks. *Qy.* whether *Bryans* v. *Nix*, 4 M. & W. 775, is similar to *Anderson* v. *Morice*? It seems, at any rate, contrary to *Aldridge* v. *Johnson*.

(*u*) Cf. *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274.

and 43, no act done by the one party with the intention of, or preparatory to, making an appropriation of the goods, constitutes a final appropriation thereof to the contract (*x*).

It is doubtful how far, where one party has authority from the other to make an appropriation, an appropriation not conforming to the terms of his authority, made by him, may be assented to by the other party, so as thereby to make such appropriation irrevocable by the party who made it (*y*).

Explanation.— The question whether there has been a subsequent assent to any act of appropriation within sect. 42 is one of fact; the question whether any act done by the one party showed merely an intention to appropriate, or amounted to the determination of an election, within the meaning of sect. 43, is one of law (*z*).

It is submitted, that an *actual assent* to an appropriation made under an authority, but not conforming thereto, would have the same effect in transferring the ownership as an appropriation assented to, and not made under any authority. The party making the appropriation cannot complain if his offer is accepted. Moreover, all the rules are only artificial rules, for the purpose of ascertaining the intention of the parties as to the transfer of the ownership: cf. on this point Campb. p. 236.

Illustrations.—1. A. orders two machines to be made by B. according to a certain pattern. B. makes the machines, and packs them in boxes, and writes to A. informing him of the fact.

(*x*) Benj. 2nd ed. p. 264; per Erskine, J., in *Wilkins* v. *Bromhead*, 6 M. & G. 963. Per Lord Penzance in *Dixon* v. *Lond. Small Arms Co.*, 1 Ap. Ca. 653. *Goss* v. *Quinton*, 3 M. & G. 825, is, *semble*, not law.

(*y*) Cf. per Brett, L. J., in *Borrowman* v. *Free*, 4 Q. B. D. 500.

(*z*) Blackb. 2nd ed. p. 129.

This is not a final appropriation, although so intended, by B., unless assented to by A., B. having no authority to bind A. by doing any act to the goods by way of appropriation. *Atkinson* v. *Bell*, 8 B. & C. 277.

2. A. agrees to buy of B. a cargo of maize, the shipping documents to be tendered. B. tenders a cargo without the documents, but A. assents to this tender. B. [perhaps] cannot withdraw the cargo tendered and substitute another, and the cargo becomes the property of A. Cf. per Brett, L. J., in *Borrowman* v. *Free*, *suprà*.

45. A delivery, pursuant to the terms of the contract, of the goods contracted for by the seller to a carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading, as hereinafter explained in the next section) a shipment thereof on board a ship of, or chartered by, the buyer, constitutes a final appropriation by the seller of the goods to the contract, thereby vesting the ownership thereof in the buyer (*a*).

Of course the Statute of Frauds must be satisfied, otherwise the ownership of the goods will not pass on delivery to the carrier or on shipment: *Coombs* v. *B. & E. R. Co.*, 3 H. & N. 510; per Parke, B., in *Wait* v. *Baker*, 2 Ex. 1; and the goods must correspond with the contract: per Bramwell, B., in *Browne* v. *Hare*, 3 H. & N. 484; and (where the particular carrier is selected by the buyer) must be delivered to the right carrier: *Hills* v. *Lynch*, 26 N. Y. Supr. Ct. 42; *Wheelhouse* v. *Parr*, 141 Mass. 593.

The shipment is not complete till the bill of lading is given: per Bramwell, B., in *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274; and, previously thereto, the shipper's intention, as to the transfer of the ownership, may be

(*a*) *Dawes* v. *Peck*, 8 T. R. 330; *Hutton* v. *Solomonson*, 3 B. & P. 582; per Cotton, L. J., in *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. at pp. 172, 173; *Dunlop* v. *Lambert*, 6 C. & F. 600; per Blackburn, J., in *Calcutta, &c. Co.* v. *De Mattos*, 32 L. J. Q. B. 322.

inferred from the terms of the receipt given for the goods. *Craven* v. *Ryder*, 6 Taunt. 433; *Falke* v. *Fletcher*, 18 C. B. N. S. 400.

46. An intention on the part of the seller to reserve the ownership of the goods, notwithstanding appropriation thereof by shipment, will be presumed where he, on his own behalf, and not merely as agent (*b*) for the buyer, takes, on such shipment, the bill of lading to his own order, which he—

(1) Retains in his own possession or control, or deals with on his own account (*c*); or

(2) Forwards to an agent, making it deliverable to the buyer on the performance by the latter of some condition (*d*).

Explanations.—1. It is immaterial, where the intention of the seller to reserve to himself control of the goods is clear, that the invoice of the goods states the goods to be shipped on account and at the risk of the buyer, or (where the goods are shipped on board the buyer's own vessel) that the bill of lading states the goods to be freight free, as the buyer's own property (*e*).

2. Where a bill of exchange for the price of the goods is sent forward with the bill of lading to the seller's agent to be presented to the buyer, for acceptance or payment, an intention on the part of

(*b*) Per Cotton, L. J., in *Mirabita* v. *Imperial Ott. Bank*, 3 Ex. D. 164; *Joyce* v. *Swann*, 17 C. B. N. S. 84; *Van Casteel* v. *Booker*, 2 Ex. 691.

(*c*) *Ellershaw* v. *Magniac*, 6 Ex. 570; *Turner* v. *Trustees of Liverpool Docks*, 6 Ex. 543. Such a retention of the bill of lading involves a right to dispose of the goods elsewhere: cf. *Ogg* v. *Shuter*, 1 C. P. D. 47.

(*d*) *Shepherd* v. *Harrison*, L. R. 5 H. L. 123; *Mirabita* v. *Imperial Ottoman Bank*, *suprà*; *secus*, where sent to buyer direct: *Ex parte Banner*, 2 Ch. D. 278.

(*e*) *Turner* v. *Trustees of Liverpool Docks*, 6 Ex. 543.

the seller is presumed that the transfer of the bill of lading, and the ownership of the goods represented thereby, should be conditional on the acceptance or payment, as the case may be, by the buyer of the bill of exchange (*f*).

Illustrations.—1. A. sells goods to B., and draws bills on him for the price, and takes the bill of lading to his own order, which he transfers to C., the purchaser of the bills. A. sends B. the invoice, stating the goods to be shipped on his account and at his risk. The ownership is not in B. until he pays the bills. *Jenkyns* v. *Brown*, 14 Q. B. 496.

2. A. sells goods to B., and ships them to C., B.'s agent, taking the bill of lading to the order of C., to whom he sends it, with an invoice, stating the goods to have been shipped at the risk of B.; stating at the same time that he had drawn upon him at six months. The bill when presented is dishonoured. The ownership of the goods passed to B. upon the shipment, as A., having taken the bill of lading to C.'s order and sent it direct to him, had not made the appropriation conditional on payment. *Key* v. *Cotesworth*, 7 Ex. 595 (*g*).

3. A. sells a cargo of timber to B., on the terms that the bill of lading should be delivered on payment of a bill of exchange. A. takes the bill of lading to his own order, and indorses to C., to whom he transfers the bill of exchange. B. afterwards tenders the price, but C. then sells the cargo. The ownership of the cargo is in B., as he has fulfilled the condition of appropriation previously to the sale, and C. is liable to him. *Mirabita* v. *Imp. Ott. Bank*, 3 Ex. D. 164.

4. A. sells goods to B., and ships them, taking the bill of lading to his own order, and sends the invoice to B., stating the goods to be on his account and at his risk, and that A. had drawn upon him in favour of C., A.'s agent. The bill of lading and bill of exchange is sent to C., who forwards both to B. B. cannot retain the bill of lading, and has no right to the goods, unless he accepts the bill. *Shepherd* v. *Harrison*, L. R. 5 H. L. 116.

(*f*) *Shepherd* v. *Harrison*, *supra*, explained in *Ex parte Banner*, *supra*; *Rew* v. *Payne*, 53 L. T. 932; per Cotton, L. J., in *Mirabita's case*, 3 Ex. D. 164. And, in the circumstances mentioned, the fact that an *unindorsed* bill of lading is also sent to the buyer, is immaterial: per Cockburn, C. J., in *Shepherd* v. *Harrison*, L. R. 4 Q. B. 196, commenting on *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

(*g*) Cf. *Van Casteel* v. *Booker*, 2 Ex. 691; *Brown* v. *Hare*, 4 H. & N. 822.

47. A contract of sale for ready money is not a bargain and sale, unless the goods are paid for on delivery.

A contract of sale by a tradesman in his shop is ordinarily presumed to be a sale for ready money (*h*).

The transaction referred to in this section amounts, in fact, to a *contemporaneous exchange* of goods and money.

When the payment is to be made, as happens at the Stores, *previously to* delivery, though made at a separate desk or counter, the ownership would probably pass on payment, and would not be postponed till the exhibition, at the selling counter, of the voucher.

48. Subject to any intention (*i*) as to the incidence of the risk of the destruction of, or injury to, the goods sold, as expressed in, or to be inferred from, the terms of the contract itself, such risk attaches to the ownership of the goods (*k*).

(*h*) *Haswell* v. *Hunt*, cited in *Tooke* v. *Hollingworth*, 1 T. R. 231; cf. unreported case, quoted in 1 S. L. C., 7th ed., p. 154; Story on Sales, s. 313; per Bayley, J., in *Bishop* v. *Shillito*, 2 B. & A. 329 a; cf. also *Loeschman* v. *Williams*, 4 Camp. 181, which was argued on the question of stoppage *in transitu*, but which, *semble*, was a case where the *ownership* had not passed. Delivery without demand of payment is relevant to prove a waiver of the condition as to payment. *Haswell* v. *Hunt*, *suprà*; *Upton* v. *Sturbridge Mills*, 111 Mass. 446. Held, in *Heinbockle* v. *Zugbaum*, 51 Am. R. 59, that the mere acceptance of a note is not a waiver. As to *partial* waiver, cf. *Payne* v. *Shadbolt*, 1 Camp. 427. As to the latter clause of this section, cf. *Bussey* v. *Barnett*, 9 M. & W. 312.

(*i*) *Castle* v. *Playford*, L. R. 7 Ex. 98; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436.

(*k*) *Turling* v. *Baxter*, 6 B. & C. 360; *Fragano* v. *Long*, 4 B. & C. 219. *Semble*, per Blackburn, J., in *Martineau* v. *Kitching*, at p. 456, that where the buyer has, by delay or otherwise, *prevented* the transference of the ownership, he is, on the principle of estoppel, bound to bear the risk. In *McConihe* v. *N. Y. & Erie R. Co.*, 20 N. Y. 495 (which at first sight appears inconsistent with the above dictum), the point was not directly raised, that being an action

The terms of this section contemplate only the risk of destruction or injury caused, *e. g.*, by accident, for which neither party is to blame, and does not modify the seller's responsibility, as under s. 77, to deliver goods at a distant place in a merchantable condition; or, as under sect. 54, to take proper care, as a bailee, of the buyer's goods.

In the words of Blackburn, J., in *Sweeting* v. *Turner*, L. R. 7 Q. B. 310: "Where a bargain and sale is completed with respect to goods . . . any accident happening to the things subsequently, unless it is caused by the fault of the vendor—any calamity befalling them after the sale is completed—must be borne by the purchaser."

Illustrations.—1. A. agrees to sell to B. a quantity of butter, and sends B. an invoice specifying the butter, and a bill of lading. The butter is to be paid for by bill of exchange, payable two months after landing. The butter is lost at sea. B. must pay therefor, as the ownership has passed to him, and the terms as to payment was intended to specify the time of payment, and was not a condition precedent. *Alexander* v. *Gardner*, 1 B. N. C. 671.

2. A. sells to B. four fillings of sugar, to be at A.'s risk on A.'s premises for two months. After the expiration of that time, part of the sugar is destroyed by fire. B., whether or not the ownership has passed to him, must bear the loss of, and must pay for, the sugar, as the risk was to be his after two months. *Martineau* v. *Kitching*, L. R. 7 Q. B. 436.

49. Where there is a stipulation, in an executory contract of sale, that the goods shall be shipped free on board by the seller, an intention is presumed that the goods, whether they are on shipment finally appropriated to the buyer or not, should be then at the risk of the buyer (*l*).

of *damages* against the buyer, and not one for *the price* of the perished goods. All that was decided was, that the destruction of the goods was not the necessary result of the buyer's neglect.

(*l*) Per cur. in *Stock* v. *Inglis*, 12 Q. B. D. 564; 10 Ap. Ca. 263.

CHAPTER IV.

THE PERFORMANCE OF THE CONTRACT.

50. The liability of the seller is, subject to the performance of any other condition precedent (*a*) by the buyer, as follows:—

1. To comply with all conditions and warranties; and
2. To deliver goods according to the contract, on the buyer's being ready and willing to receive and accept them, and to pay the price on delivery, unless credit is given (*b*).

51. The liability of the buyer is, subject to the performance by the seller of any condition precedent (*c*), as follows:—

1. To receive and accept the goods, if according to contract, on the seller's being ready and willing to deliver them (*d*); and

(*a*) *E. g.*, notice by the buyer of place of delivery; cf. *Armitage* v. *Insole*, 14 Q. B. 728, followed in *Sutherland* v. *Allhusen*, 14 L. T. 666.

(*b*) Benj. (2nd ed.) pp. 555, 557, 577; *Rawson* v. *Johnson*, 1 East, 203; per Bayley, J., in *Bloxam* v. *Sanders*, 4 B. & C. 941. All expenses naturally incidental to delivery must be borne by the seller: Story on S., ss. 297a, 394, quoting *Coles* v. *Kerr*, 20 Verm. 21; cf. also *Playford* v. *Mercer*, 22 L. T. 41. But expenses may be charged after the buyer's default in taking or accepting delivery: cf. sect. 118, *post*. As to the hour of delivery, cf. *Startup* v. *Macdonald*, 6 M. & G. 593; and *Bordenave* v. *Gregory*, 5 East, 107.

(*c*) *E. g.*, notice of the place of delivery, where none is stipulated for, as in *Davies* v. *McLean*, 28 L. T. N. S. 113.

(*d*) Benj. (2nd ed.) p. 577; *Boyd*

2. To pay therefor on delivery, unless he have credit (*e*), or is bound to pay irrespective of delivery (*f*).

When the goods are to be paid for by a bill or note, which is not given, the buyer is entitled to credit till the time when the bill or note would have matured: *Mussen* v. *Price*, 4 East, 147; *Brooke* v. *White*, 1 N. R. 336; *Helps* v. *Winterbottom*, 2 B. & Ad. 431; *Day* v. *Picton*, 10 B. & C. 120; unless credit was made expressly conditional on such bill being, in fact, given. *Nickson* v. *Jepson*, 2 Stark. 227, explained in *Paul* v. *Dod*, 2 C. B. 800; cf. also *Rugg* v. *Weir*, 16 C. B. N. S. 471. As to the distinction between the terms of payment "cash with option of bill" and "bill with option of cash," cf. per Cockburn, C. J., in *Anderson* v. *Carlisle Horse Clothing Co.*, 21 L. T. 760; cf. also *Schneider* v. *Foster*, 2 H. & N. 4, and *Rugg* v. *Weir*, *suprà*.

When payment is to be made "at the convenience" of the buyer, this stipulation does not mean "at his pleasure," so as to be personal to the buyer and cease at his death, but means "mercantile convenience," and survives for the benefit of a joint buyer, who must pay when he has money free from the ordinary purposes of business. *Crawshaw* v. *Hornstedt*, 3 Times L. R. 426.

v. *Lett*, 1 C. B. 222. The buyer may sometimes be bound to accept goods though not tendered at the place mentioned in the contract, if such place was selected in the interests of *the seller*. *Neil* v. *Whitworth*, 1 C. P. 684. And the buyer cannot demand a delivery elsewhere than at the place mentioned in the contract, if such place were selected in the seller's interest. *Wackerbath* v. *Mason*, 3 Camp. 270.

(*e*) Benj. (2nd ed.) pp. 555, 575.

(*f*) *Dunlop* v. *Grote*, 2 C. & K. 153; *Alexander* v. *Gardner*, 1 B. N. C. 671, in which case the buyer had accepted the risk of delivery. With respect to the *time* of payment for goods which are destroyed, where payment was originally limited *after arrival*, cf. *Alexander* v. *Gardner*, *supra*; and per Bayley and Holroyd, JJ., in *Fragano* v. *Long*, 4 B. & C. 219.

52. In the absence of a contrary stipulation in that behalf, the seller is not bound to send or convey the goods sold to the buyer (*g*).

53. Delivery may be made by means of any act which has the effect of putting the goods in the possession, or at the disposal, of the buyer, or of his agent in that behalf (*h*).

Illustrations.—1. A. sells to B. a rick of hay then standing on C.'s land, and gives him an order on C., who had, previously to the sale, given a licence for its removal, and which licence is referred to in the conditions of sale. This is a sufficient delivery by A., though C. afterwards refuses to allow removal. *Salter* v. *Woollams*, 2 M. & G. 650.

2. A. sells B. cigars for ready money. They are packed in B.'s boxes, and are left with A. till called for. A. has not delivered the cigars, as they are not to be at B.'s disposal till he calls and pays. *Boulter* v. *Arnott*, 1 C. & M. 333.

3. A. sells goods to B., and gives him a delivery order on C., who holds them, and has no lien thereon. A. has delivered. Benj. (2nd ed.) p. 573.

4. A., who has purchased of B. a number of slates, then lying at C.'s wharf, re-sells them to D., and gives him a delivery order, which D. presents within a reasonable time, but B. had stopped the slates *in transitu*. A. has not delivered the slates to D. *Buddle* v. *Green*, 27 L. J. Ex. 33; 3 H. & N. 996.

5. A., the tenant of a farm, who is bound for every load of hay he removes to bring on two loads of manure, sells a rick of hay to B. C., the incoming tenant, consents to the removal of the hay if A. brings the manure, which A. does not do. There is no delivery of the hay to B., A. not having fulfilled the conditions imposed by C. *Smith* v. *Chance*, 2 B. & A. 953.

54. After the completion of the bargain and sale, and until the time for the delivery of the goods has arrived, the seller is subject to the same

(*g*) Benj. (2nd ed.) pp. 558, 575; Campb. p. 277.

(*h*) Benj. (2nd ed.) p. 558; per cur. in *Wilkinson* v. *Lloyd*, 7 Q. B. 27; cf. *Wood* v. *Baxter*, 49 L. T. 47, where *Smith* v. *Chance*, *infrà*, was not cited.

liability in respect of the care and custody thereof, as a bailee for reward.

After default made by the buyer in removing, or in accepting delivery thereof, the seller is subject to the same liability as a gratuitous bailee (*i*).

> The principle is, that part of the consideration for the price is the care of the goods by the seller until a reasonable time for the buyer to take delivery. After that time the seller receives no value for the custody of the goods, as he has performed all that was incumbent on him. Cf. the analogous case of a carrier: *Cairns* v. *Robins*, 8 M. & W. 258.

55. A tender of delivery by the seller must be made under such circumstances that the buyer may have a reasonable opportunity of ascertaining whether the goods tendered are such as the seller is by the contract bound to deliver (*k*).

Illustration.—A. agrees to sell to B. a quantity of hats. A. sends the hats in closed casks to a wharf, and gives notice to B. that the hats are in the casks, but B. is not allowed an opportunity of testing this fact. This is not a good tender by A. *Isherwood* v. *Whitmore*, 11 M. & W. 347.

56. Upon the sale of goods by sample, it is a condition of the contract that the seller should allow the buyer a reasonable opportunity of comparing the bulk with the sample; and, upon an improper refusal in that behalf, the contract is voidable at the option of the buyer (*l*).

(*i*) Benj. (2nd ed.) p. 583; St. on S. ss. 300a, 300b, 393; *Koon* v. *Binkerhoff*, 39 Hun, (N. Y.) 130.

(*k*) *Isherwood* v. *Whitmore*, 11 M. & W. 347; per Parke, B., in *Startup* v. *Macdonald*, 6 M. & G. 593.

(*l*) *Lorymer* v. *Smith*, 1 B. & C. 1. For a case where buyer held not entitled to measure goods, sold by yard, before payment, cf. *Pettitt* v. *Mitchell*, 4 M. & G. 819.

57. An insufficient tender may, unless [perhaps] previously assented to by the buyer (*m*), be withdrawn, and, within the time limited for delivery, or otherwise within a reasonable time, a proper tender substituted therefor (*n*).

58. In the absence of any special promise as to delivery, whether expressed or to be inferred from the nature of the goods, trade usage, previous course of dealing, or otherwise, goods sold are to be delivered at the place where they are at the time of sale; and goods contracted to be sold are to be delivered at the place where they are at the time of the contract of sale; or, if not then in existence, at the place where they are produced (*o*).

59. When, by the terms of the contract, the seller is to dispatch the goods to the buyer, he must duly follow any directions of the latter as to the mode of their transmission (*p*); and must otherwise use ordinary care and diligence in and about the dispatch of the goods to insure their safe receipt by the buyer (*q*). Subject as aforesaid, a delivery of the goods to a carrier is a delivery to the buyer, and the goods thereafter are at the risk of the latter (*r*).

(*m*) Cf. per Brett, L. J., in *Borrowman* v. *Free*, 4 Q. B. D. 500; and s. 44, *supra*.

(*n*) *Tetley* v. *Shand*, 20 W. R. 206; 25 L. T. 658; *Borrowman* v. *Free*, *supra*; *Imperial Ottoman Bank* v. *Cowan*, 29 L. T. 52.

(*o*) Benj. (2nd ed.) p. 561; Story on Contract of Sale, s. 308; cf. also per cur. in *Hatch* v. *Oil Co.*, 10 Otto, 134. Where delivery is to be at an uncertain place, the seller must give notice thereof. This is a condition: *Davies* v. *McLean*, 21 W. R. 264; 28 L. T. 113.

(*p*) *Ullock* v. *Reddelin*, Dans. & Ll. 6; *Vayle* v. *Bayle*, Cowp. 294; *Hills* v. *Lynch*, 26 N. Y. Supr. Ct. 42.

(*q*) *Clarke* v. *Hutchins*, 14 East, 475; *Cothay* v. *Tute*, 3 Camp. 129.

(*r*) *Dutton* v. *Solomonson*, 3 B. & P. 582; *Calcutta Steam Co.* v. *De Mattos*, 32 L. J. Q. B. 328, per Blackburn, J.; *Dunlop* v. *Lambert*, 6 C. & F. 600. The

The delivery to a carrier operates in two ways, viz., as an *appropriation* of the goods, and as a *performance* of the contract. *Dutton* v. *Solomonson*, *suprà*; and cf. sect. 45, and remarks thereunder.

The above rule, as to the delivery of the goods to a carrier being a delivery to the buyer, does not obtain, when the goods are sent "on trial," or "on sale or return," so far as the *computation of the time* is concerned; the object of the conditional contract being that the buyer should *try* the goods, of which he must accordingly have corporal possession: cf. note (*i*) to sect. 124. And *qy.* (per Grove, J., in *Pointin* v. *Porrier*, 49 J. P. 199), whether delivery to a carrier *abroad* is a delivery to a buyer in this country, within the terms of this section?

Illustration.—A. orders a number of chairs of B., to be sent by sea. B. delivers them at a certain wharf to a person there, who is not proved to be the carrier's servant, and B. does not book the chairs, or take a receipt therefor. The chairs are lost. A. is not liable to B. for the price of the chairs, the delivery being bad. *Buckman* v. *Levi*, 3 Camp. 414.

60. When the seller undertakes to make delivery of the goods at their destination, a delivery of the goods to a carrier is not a delivery to the buyer, and the goods during the transit are at the risk of the seller (*s*), save in respect of any deterioration of the goods necessarily consequent upon their transmission to such destination (*t*).

rule applies, though the carrier wrongfully refuse to deliver to the buyer: *Groning* v. *Mendham*, 5 M. & S. 189; or, by reason of an intrinsic change in the goods *in transitu*, they are seized by the excise: *King* v. *Meredith*, 2 Camp. 639. *Qy.*, however, how far this last case would be affected by the rule laid down in sect. 77, *infrà*.

(*s*) Per Blackburn and Mellor, JJ., in *Calcutta St. N. Co.* v. *De Mattos*, *suprà*, quoting *Dunlop* v. *Lambert*, 6 C. & F. 600. Cf. in Scotl. *Walker* v. *Langdale's Chem. Man. Co.*, 11 C. of S. Cas. (3rd Ser.) 906.

(*t*) *Bull* v. *Robison*, 10 Ex. 342; 24 L. J. Ex. 165; 2 C. L. R. 1276, latter best report; for the mutual rights and liabilities of seller and

61. A delivery by the seller of a greater or a less quantity of goods than were contracted for (*u*), or of the goods contracted for mixed with other goods (*x*), is not a good delivery, and the buyer may reject the whole of the goods, [if there be risk or trouble in the selection or separation thereof].

This section does not, of course, modify the buyer's ordinary liability, under a *divisible* contract, to accept any instalment duly tendered. *Graham* v. *Jackson*, 14 East, 498; *Brandt* v. *Lawrence*, 1 Q. B. D. 344, explained in *Reuter* v. *Sala*, 4 C. P. D. 239.

For a case where the quantity was to be taken from the bill of lading, and the parties incurred a mutual risk as to the actual quantity being less or more, cf. *Covas* v. *Bingham*, 2 E. & B. 836, quoted in *Tully* v. *Terry*, 8 C. P. 679; and for a similar case in America, cf. *Heller* v. *Allentown Mfg. Co.*, 39 Hun, 547.

An interesting case on the subject of this section is *Brawley* v. *United States* (6 Otto, 168), where the law was thus laid down per cur.:—

1. Where the contract identifies the goods sold by reference to independent circumstances, *e.g.*, all the goods deposited in a certain warehouse,

buyer in respect of the merchantability on arrival of goods to be dispatched to a distant place, cf. sect. 77, *post*.

(*u*) *Hart* v. *Mills*, 15 M. & W. 87; *Dixon* v. *Fletcher*, 3 M. & W. 146; *Cunliffe* v. *Harrison*, 6 Ex. 903. The rule is, however, less strict where the seller is also a commission agent; per Blackburn, J., in *Ireland* v. *Livingstone*, L. R. 5 H. L. 395.

(*x*) *Levy* v. *Green*, 1 E. & E. 969; *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; *Rylands* v. *Kreitman*, 19 C. B. N. S. 351; *Tarling* v. *O'Riordan*, L. R. Ir. 2 C. L. 82. Cf. *The Imperial Ottoman Bank* v. *Cowan*, 29 L. T. 52, where the bill of lading, including other goods, was specially indorsed, so as to enable buyer to take delivery without trouble, and *held* a good delivery. With respect to the clause between brackets, cf. per Erle, C. J., in *Rylands* v. *Kreitman*, and Byles, J., in *Levy* v. *Green*, and Fitzgerald, B., in *Tarling* v. *O'Riordan*. "Risk" would seem to include the danger of a presumed acceptance of the goods.

or to be shipped in certain vessels, the contract attaches to those specific goods, and the addition of qualifying words, as "about," or "more or less," is only an estimate, subject, however, to good faith on the part of the seller:

2. Where the goods cannot be so identified, the quantity named is material, and the addition of qualifying words provides only for accidental variations, arising from slight or unimportant causes or deficiencies:

3. But the qualifying words may be supplemented by other stipulations or conditions, *e.g.*, so much as the buyer may require, or as the seller may be able to furnish, &c.: cf. *Gwillim* v. *Daniel*, *infrà*.

Illustrations.—1. A. orders of B. specific articles of crockery. B. sends the crockery packed in a crate, with other china of a different pattern, though distinguishable therefrom, and includes all the articles in one invoice, with prices attached. A. may refuse to accept any of the china. *Levy* v. *Green*, 1 E. & E. 969.

2. A. agrees to sell and consign to B. "about 300 quarters (more or less) of foreign rye." A. ships on board a vessel 345 quarters. This is not a good delivery by A. in performance of his contract, as his shipments are excessive, though some latitude was allowed. *Cross* v. *Eglin*, 2 B. & Ad. 106.

3. A. agrees to sell to B. all the naphtha which he may make during two years, "say, from 1,000 to 1,200 gallons a month." During ten months A. delivers 3,000 gallons only, being all that he actually made. This is a good delivery by A., as the terms of the contract show that A. and B. contracted only for the amount of naphtha manufactured by A., and had merely estimated the quantity. *Gwillim* v. *Daniel*, 2 C. M. R. 51 (*y*).

4. A. agrees to sell to B. all the combing skin which he may pull within a certain period, "say, *not less* than 100 packs." A. must deliver to B. not less than 100 packs, as though a certain latitude was allowed, yet a *minimum* quantity was expressly stipulated for. *Leeming* v. *Snaith*, 16 Q. B. 275.

(*y*) Cf. *Macdonnell* v. *Murphy*, 21 W. R. 609; L. R. 5 P. C. 203. *Morris* v. *Levison*, 1 C. P. D. 155, where the words "say about" were construed as words of contract, was the case of a *charter-party*, and not of sale.

5. A. agrees to buy of B. a specific heap of iron then lying in B.'s yard, which both erroneously estimate as containing about 150 tons, but which in fact contains only 44 tons. B. delivers all the iron. B. has performed his contract, having delivered the specific heap contracted for. *McLay* v. *Perry*, 44 L. T. N. S. 152 (*z*).

62. Where delivery of the goods sold is to be made by means of a bill of lading, the seller will make a due delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading, duly indorsed and effectual to pass the ownership of the goods represented thereby (*a*), and purporting on its face to represent goods in accordance with the contract, and which are in fact in accordance therewith (*b*).

Illustrations.—1. A. agrees to sell to B. 2,000 tons of iron rails, to be shipped at St. Petersburgh for Philadelphia, and payment therefor to be made in exchange for the bill of lading. The goods are shipped, and three bills of lading are made out by the master, of which A. tenders two to B., duly indorsed, the third being outstanding in the hands of the original shipper, who, however, does not deal with it in any way. This is a good tender by A., though the third bill was outstanding, as the two were effectual to pass the ownership of the goods to B. *Saunders* v. *MacLean*, 11 Q. B. D. 327.

2. A. agrees to sell to B. a cargo, then at sea, of from 1,800 to 2,200 quarters of wheat, payment to be made by B. on receipt of the usual shipping documents. A. tenders to B. a bill of lading, purporting to represent a cargo of 2,215 quarters, but the invoice represents a cargo within the limits of the contract, and the cargo is in fact between 1,800 and 2,200 quarters, and B. is not required to pay for more than the invoice weight. A. has not made a good tender, and B. may reject the cargo. *Tamvaco* v. *Lucas*, 1 E. & E. 581.

(*z*) Cf. *Levi* v. *Beck & Co.*, 2 Times L. R. p. 898; "a cargo, about 450 tons;" whole cargo of 341 tons delivered, the word "cargo" being the governing word.

(*a*) *Sanders* v. *MacLean*, 11 Q. B. D. 327.

(*b*) *Tamvaco* v. *Lucas*, 1 E. & E. 581, 592; cf. *Imperial Ottoman Bank* v. *Cowan*, 29 L. T. 52, quoted in note (*x*) to preceding section.

3. The facts being otherwise the same as aforesaid, A. tenders to B. a bill of lading, purporting to represent a cargo in quantity within 1,800 and 2,200 quarters, but the cargo is, in fact, less than 1,800 quarters. B. may reject it. *S. C.*, 1 E. & E. 592.

63. Where goods are sold by means of a bill of lading, there is no condition implied in the contract that the seller shall send forward the bill to the buyer in time for him to send it on to meet the arrival of the vessel carrying the goods, or so as to arrive before charges have been incurred in respect thereof (*c*).

64(*d*). If the buyer, in an executory contract of sale, make an unreasonable delay in rejecting the goods after a delivery thereof (*e*), or uses or deals with them more than is necessary for purposes of trial or inspection (*f*), or otherwise as an owner thereof (*g*), he will be deemed to have accepted them; provided always, that where the goods contain a latent defect (*h*), not discoverable by an ordinary inspection at or before delivery, or where the inspection of the goods takes place after, or elsewhere than at the place of delivery (*i*), the buyer,

(*c*) Per Brett, L. J., in *Sanders* v. *MacLean*, 11 Q. B. D. 327.

(*d*) Cf. sect. 11, *supra*, on the question of an acceptance under the Statute of Frauds.

(*e*) *Sanders* v. *Jameson*, 2 C. & K. 557; *Parker* v. *Palmer*, 4 B. & A. 387. The parties may also agree that a certain period of trial should constitute a final acceptance. *Sharp* v. *G. W. R.*, 9 M. & W. 7.

(*f*) *Okell* v. *Smith*, 1 Stark. 107; *Hopkins* v. *Appleby*, 1 St. 477.

(*g*) *Parker* v. *Palmer*, *supra*. Breaking bulk is not necessarily an acceptance: cf. *Wallace & Brown* v. *Robinson, Fleming & Co.*, 22 Sc. L. R. 830.

(*h*) *Mody* v. *Gregson*, L. R. 4 Ex. 49; per Brett, J., in *Heilbutt* v. *Hickson*, 7 C. P. 456; and *Grimoldby* v. *Wells*, 10 C. P. 391.

(*i*) *Grimoldby* v. *Wells*, 10 C. P. 391; cf., also, the Scotch case of *Fleming* v. *Airdrie Iron Co.*, 9 C. of Sess. C. 473. But the buyer cannot recall his acceptance, of course, if he has *dealt with* the goods by re-selling them: cf. Campbell on S., p. 389.

although he may have, on delivery, accepted the goods, may, on discovering the defect, and without unreasonable delay, recall such acceptance and reject the goods.

Explanation.—In determining what is a reasonable time for the rejection by the buyer of the goods sold, regard shall be had to the seller's conduct in inducing the buyer to make a further trial, or otherwise (*k*).

Illustration.—A. agrees to sell B. a hogshead of cider, according to sample. B. taps it, and finding it inferior to sample, informs A. of the fact, saying he would have to return it if it continued unsatisfactory; but A. returns no answer. A month afterwards, B. rejects the cider, having consumed about twenty gallons. B. has not accepted the cider at the end of this time, as A.'s silence implied his consent to a further trial. *Lucy* v. *Moufflet*, 5 H. & N. 229.

65. The buyer may exercise his right of rejection of the goods by giving prompt notice thereof to the seller, or by doing any unequivocal act signifying his rejection, and he is not bound to return them to the seller, or to place them in any neutral custody (*l*). But the buyer, after a rejection of the goods delivered, must act, in relation thereto, in a reasonable manner. Subject thereto, the goods, after a rejection duly made, are at the risk of the seller (*m*).

(*k*) Per Bovill, C. J., in *Heilbutt* v. *Hickson*, L. R. 7 C. P. 452, quoting *Adam* v. *Richard*, 2 H. Bl. 573; cf., also, *Lucy* v. *Moufflet*, 5 H. & N. 229.

(*l*) Per Bayley, J., in *Okell* v. *Smith*, 1 Stark. 107; *Grimoldby* v. *Wells*, 10 C. P. 391, explaining the head-note in *Couston* v. *Chapman*, L. R. 2 Sc. Ap. 250, which is not borne out by the judgment in that case. As the buyer must do some unequivocal act signifying his rejection, he cannot annex conditions thereto. *Jardine* v. *Pendreigh*, 6 Sc. L. R. 272; *Howard* v. *Hayes*, 47 N. Y. (Supr. Ct.) 89.

(*m*) Per Bayley, J., in *Okell* v.

66. When the price of the goods has not been fixed by the terms of the contract of sale, the buyer is liable to pay therefor a reasonable price (*n*); and where such price has been fixed, but the exact amount thereof is to depend upon the weighing, or measuring (*o*), or doing any other act with reference to the goods, which has become impossible by reason of their perishing, the buyer, if otherwise liable, must pay such a price as may reasonably be estimated.

In an executory agreement to sell goods for a price to be determined by a valuation, there is no sale if the valuers refuse or are unable to act: *Thurnell* v. *Balbirnie*, 2 M. & W. 686. And the valuation, being a *personal* act, cannot be delegated to another. *Ess* v. *Truscott*, 2 M. & W. 385.

67. Payment of the price to the owner of the goods sold is a good payment as against a seller thereof without title (*p*).

Smith, 1 Stark. 107. The buyer is, in fact, in the position of an involuntary bailee of the goods: cf. the analogous case of a carrier after the consignee's refusal, *Hough* v. *N. W. R.*, L. R. 5 Ex. 51; Campb. p. 387. In *Dailey* v. *Green*, 15 Penn. 118, the buyer, after rejection, but without notice thereof to the seller, left the goods in an insecure position, whence they were washed by a flood, and was held liable. See (as to the effect of a rejection), Appendix A.

(*n*) *Acebal* v. *Levy*, 10 Bing. 376; *Hoadley* v. *McLaine*, *ib.* 482. And the current price of a cargo at the port of shipment is not necessarily reasonable: per cur. in *Acebal* v. *Levy*. As to an increase of, or deduction from, the contract price of goods sold duty free, when the duties have been increased or lowered after the contract, cf. the 39 & 40 V. c. 36, s. 20.

(*o*) Per Blackburn, J., in *Martineau* v. *Kitching*, L. R. 7 Q. B. at p. 456; cf., also, *Castle* v. *Playford*, L. R. 7 Ex. 98; and *Clarke* v. *Westrope*, 18 C. B. 765, where the buyer had consumed the goods before valuation. The buyer is liable for interest on the price, where the goods are to be paid for by bill, which is not given, from the date when the bill would have matured: *Marshall* v. *Poole*, 13 East, 98; *Farr* v. *Ward*, 3 M. & W. 25; *Davis* v. *Smyth*, 8 M. & W. 399.

(*p*) *Dickenson* v. *Naul*, 4 B. & Ad.

68. The term "warranty" in the following sections means a representation or engagement, express or implied, forming part (*q*) of the contract, as to the quality or fitness of the subject-matter thereof.

Explanation.—Every affirmation made at the time of a contract of sale is a warranty, if the facts of the case show that it was so intended (*r*).

Illustrations.—A., the owner of an unsound horse, says to B., who is inspecting it, that it is sound. The horse is afterwards bought at auction by B. This representation by A. is not a warranty, as it did not form part of the contract of sale which was made at the auction. *Hopkins* v. *Tanqueray*, 15 C. B. 130 (*s*).

2. A. sells to B. a number of barrels of pork, stated to be "of S. & Co.," which, in the trade, means "manufactured by S. & Co." There is a warranty by A. that the pork is so manufactured, and not merely that A. had received it from S. & Co. *Powell* v. *Horton*, 2 B. N. C. 668.

3. A. sells B. a horse, and gives him a receipt for "a grey four-year colt, warranted sound." This receipt is evidence from its terms that the only warranty is that of soundness, and that the description of the age is only an independent representation. *Budd* v. *Fairmanner*, 8 Bing. 43.

4. A. sells to B. four pictures, and gives him the following

638; *Allen* v. *Hopkins*, 13 M. & W. 94. And so, on the ground of estoppel, an agent who sells goods, stating them to be A.'s, is bound by a payment made to A. before he had given the buyer notice of his own claim to commission, though some of the goods sold were not A.'s: *Coppin* v. *Walker*, 7 Taunt. 237. The law in America appears, generally, to be that the buyer cannot *voluntarily* pay the owner, but, to constitute a defence, must do so under pressure: cf. *Vibbard* v. *Johnson*, 19 Johns. 77; *Krumbhaer* v. *Birch*, 83 Penn. 426. *Matheny* v. *Mason*, 39 Am. R. 541, seems to follow *Allen* v. *Hopkins*.

(*q*) Consequently, if made after the sale, it requires a new consideration: cf. *Roscorla* v. *Thomas*, 3 Q. B. 234, and *Summers* v. *Vaughan*, 9 Am. Rep. 741.

(*r*) *Anthony* v. *Halstead*, 37 L. T. 433; cf. also, 1 S. L. C., 7th ed., p. 174; per Bramwell, B., in *Carter* v. *Crick*, 4 H. & N. 412. And the affirmation, if made during the course of the negotiation, so that it enters into the bargain as finally made, and that the bargain is made on the footing of it, will be a warranty: per Huddleston, B., in *Crowdy* v. *Thomas*, 36 L. T. 26.

(*s*) Cf. with this case *Percival* v. *Oldacre*, 18 C. B. N. S. 398, where there was evidence of the warranty being *part* of the contract.

receipt:—"B. bought of A.: Four pictures, views in Venice (Canaletto), 160*l*." It is a question for the jury whether this representation by A. is a warranty that the pictures are by Canaletto, or is merely a description, or an intimation of A.'s opinion. *Power* v. *Barham*, 4 A. & E. 473.

69. In an executory contract for the sale of goods, not then in existence, or unascertained, [or incapable of inspection], a warranty by the seller amounts to a condition of the essence of the contract (*t*); but it does not, in the absence of an express intention in that behalf (*u*), in the case of a bargain and sale of specific goods (*x*).

The term "warranty" is, in the case of a contract of sale, used in various senses, *viz.*:—

1. A representation, or engagement, forming part of the contract, but *collateral* to its main object, that the subject-matter thereof does or will possess certain qualities. That is the proper sense; cf. per Lord Abinger, in *Chanter* v. *Hopkins*, 4 M. & W. 404. As in this case the warranty is collateral, a breach thereof does not constitute a *defence* to the buyer.
2. Such a representation or engagement, *in an executory contract*. This is the wrong use of the term; as the seller who, in an executory contract, fails to deliver goods of the quality,

(*t*) Cf. Benj., 2nd ed., pp. 744, 745, 749, and particularly (with reference to the clause between brackets) his discussion of *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447; cf. also, *Toulmin* v. *Hedley*, 2 C. & K. 157.

(*u*) *Bannerman* v. *White*, 12 C. B. N. S. 560; *Head* v. *Tattersall*, L. R. 7 Ex. 7.

(*x*) *Street* v. *Blay*, 2 B. & Ad. 456; cf. notes to *Cutter* v. *Powell*, 2 S. L. C., 7th ed., p. 30. The dicta of the court in *Heyworth* v. *Hutchinson*, *supra*, are to the effect that, even in the case of an *executory contract*, a warranty is not a condition, if the goods are *specific*; but cf. Benj., *supra*, in note (*t*). Chitty on C., 10th ed., p. 420, takes the same view as the court.

description, or fitness contracted for, simply does not perform his contract. As is neatly put by Story (on Contr., s. 839), a seller only warrants the adjective or epithet, and not the substantive. The warranty is, in such cases, a *condition*, and its breach is a *defence* to the buyer.

3. An implied warranty means the implication of the express engagement aforesaid; and the implication is made, because a sale, upon a demand for goods of a particular quality or fitness, amounts to an engagement that they possess these qualities, or are of that fitness. Cf. per Best, C. J., in *Jones* v. *Bright*, 5 Bing. at pp. 544, 545.

Nevertheless I have used the term warranty, without qualification, in deference to long usage.

Illustrations.—1. A. buys of B. a specific horse, warranted by B. suitable for A.'s carriage. The horse proves unfit. A. cannot return the horse, or refuse to pay the price, or recover the price if paid.

2. A. offers to supply B. with a horse fit to draw his carriage. A. delivers a horse which is unfit. B. may return the horse to A., and recover the price, if paid, or may defend an action for the price. Cf. per Parke, B., in *Chanter* v. *Hopkins*, 4 M. & W. at p. 406.

70. Upon the sale of a specific existing article, accessible to the inspection of the buyer, there is no warranty of quality or fitness implied in the contract, though the article may be subject to latent defects (*y*).

The same rule applies to goods given or taken in exchange. *La Neuville* v. *Nourse*, 3 Camp. 351.

(*y*) *Barr* v. *Gibson*, 3 M. & W. 390; per cur. in *Jones* v. *Just*, L. R. 3 Q. B. 202. *Semble*, that *Parkinson* v. *Lee*, 2 East, 314, was a case in point, as explained by Parke, B., in *Sutton* v. *Temple*, 12 M. & W. 64; and per cur. in *Mody* v. *Gregson*, L. R. 4 Ex. 49.

Illustrations.—1. A. buys of B. a specific bulk of oats, and inspects a sample. The oats are delivered, and are in accordance with the sample, but are new oats. A. really wished to buy old oats. A. must pay the price, though he has not got what he wanted. *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

2. A. buys of B., a meat salesman, after inspection, a quantity of meat. The meat, through a latent defect, is unfit for human food. There is no warranty on the part of B. of the quality or fitness of the meat. *Smith* v. *Baker*, 40 L. T. N. S. 261.

71. Where goods are ordered for a particular purpose known to the seller (*z*), under such circumstances that the buyer relies upon the seller's judgment in that behalf, a warranty by the latter is implied that the goods supplied shall be reasonably fit for such purpose (*a*).

The provisions of this section apply also to the case of the sale of a specific article by the manufacturer thereof, so far as regards any latent defect not discoverable by an ordinary inspection, though the buyer may have, in fact, inspected it (*b*).

Explanation.—The warranty aforesaid is not excluded by the fact that there may be also in the contract an express warranty of quality, unless the

(*z*) And knowledge of the purpose for which the goods are intended may be inferred from the designation of the goods themselves: per Lord Herschell, in *Drummond* v. *Van Ingen*, 12 Ap. Ca. at pp. 293, 294. But knowledge of all the purposes to which a manufactured article may be applied, or of all the trades in which it may be used, will not *necessarily* be imputed to a manufacturer: *Ibid.*; cf. also per Lord Selborne, at p. 288.

(*a*) *Brown* v. *Edgington*, 2 M. & G. 279; *Drummond* v. *Van Ingen*, 12 Ap. Ca. 284. And no exception is implied in favour of the seller with regard to latent defects: *Randall* v. *Newson*, 2 Q. B. D. 102. This warranty is not implied in favour of *third persons*, not parties to the contract of sale: *Longmeid* v. *Holliday*, 6 Ex. 761.

(*b*) Per cur. in *Jones* v. *Just*, L. R. 3 Q. B. 203, quoting *Shepherd* v. *Pybus*, 3 M. & G. 868; per Lord Macnaghten, in *Drummond* v. *Van Ingen*, *supra*, at p. 299, quoting *Jones* v. *Bright*, 5 Bing. 533.

latter is inconsistent with the existence of the implied warranty (*c*).

This warranty of fitness applies, though the seller may have never manufactured similar goods before, and also covers any alterations suggested by the buyer, which the seller may have adopted without objection: *Hall* v. *Burke*, 3 Times L. R. 165. But no such warranty will be implied where the seller has only contracted to manufacture goods according to a specified plan, and does not take upon himself (as in *Hydraulic Eng. Co.* v. *Spencer*, 2 Times L. R. 554) the risk of its adaptability. In such a case he fulfils his contract if he make the goods in a workmanlike manner according to such plan: *S. C.*; cf. note to sect. 72, *infrà*. And *semble*, also, that a *joint* endeavour by seller and buyer to make goods to fulfil a specified purpose, would imply no warranty of fitness on the part of the seller. *S. C.*

In the case above-mentioned, of goods ordered to be made according to a certain plan, there would ordinarily be no warranty by the buyer, the employer of the work, of the sufficiency therefor of the plan, so as to entitle the seller to compensation for extra labour and expense incurred in the adaptation of the goods to the plan. Cf. *Thorn* v. *Mayor, &c. of London*, 1 Ap. Ca. 120. *Qy.*, however, whether the same rule would apply to a case where the adoption of the plan *necessarily* involved the consumption of materials *manufactured* by the buyer and supplied to the seller, and containing a latent defect, which causes the seller, in his adaptation, additional expense and loss of time? *Shepherd* v. *Pybus* would appear to apply to such a case, as the buyer would, *quoad* the materials supplied by him, be a seller; and his exemption from liability

(*c*) *Dickson* v. *Zizania*, 10 C. B. 602. As to the effect of samples in excluding a warranty of fitness, cf. sect. 76, *infrà*.

on a warranty, should, on the principle of *Mody* v. *Gregson*, only extend to matters in respect whereof the seller could judge for himself. Cf. *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108.

Illustrations.—1. A., a retail provision dealer, orders of B., who carries on a wholesale provision trade, a quantity of rabbits. The rabbits prove unwholesome. B. cannot recover the price from A., as the rabbits are unfit for human food. *Beer* v. *Walker*, 48 L. J. C. P. 477; 25 W. R. 880; 37 L. T. N. S. 278.

2. A., a distiller, agrees to sell B., an African merchant, a quantity of whisky, to be coloured like rum, for the use of the natives. A. supplies whisky coloured with logwood, which, though harmless, produces alarming physical effects upon the natives. A. is liable to B. upon a breach of warranty. *Macfarlane* v. *Taylor*, L. R. 1 H. L. Sc. 245.

3. A. agrees to buy of B., a barge builder, a particular barge, which is then nearly complete. A. inspects the barge at the time of the bargain. The barge, when delivered, proves to be leaky, but this fact could not be discovered by the inspection, and would be apparent only after trial. B. is liable to A. in damages, as the barge is not fit for use as a barge, and A., under the circumstances of the case, necessarily bought on B.'s judgment. *Shepherd* v. *Pybus*, 3 M. & G. 868 (*d*).

4. A. agrees to supply B.'s ship with troop stores, and warrants that they shall pass the survey of the East India Co.'s officers. The stores pass the survey, but are, nevertheless, unwholesome. A. is liable to B. upon a warranty that the stores shall be good, although there is also an express warranty that they shall pass the survey. *Bigge* v. *Parkinson*, 7 H. & N. 955.

72. When an article of a defined kind is ordered, though it be stated to be for a particular purpose, there is no warranty of fitness implied in the contract (*e*).

This rule is also in accordance with Scotch law:

(*d*) Followed in America in *Cunningham* v. *Hall*, Sprague, 404; 86 Mass. 275; and approved in *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108.

(*e*) *Chanter* v. *Hopkins*, 4 M. & W. 399; *Olivant* v. *Bayley*, 5 Q. B. 288; *Chalmers* v. *Harding*, 17 L. T. N. S. 571. The court, in *Jones* v. *Just*, L. R. 3 Q. B. 197, mention the rule with reference only to a *manufacturer*; but cf. *Chalmers* v. *Harding*, *supra*, and *Mallan* v. *Radlof*, 17 C. B. N. S. 588. The latest case on the subject is *Ipswich Gas Co.* v. *King*, 3 Times L. R. 100.

cf. *Rowan* v. *Coats, &c. Co.*, 12 C. of S. Cas. 395.

The same principle would seem to apply to the case of a contract for the manufacture and supply of goods according to a specified plan: cf. note to sect. 71, and *Cunningham* v. *Hall*, 86 Mass. 275. The constant principle, of course, is that the buyer should get what he bargained for, and no more.

Illustration.—A. writes to B., the patentee of an invention called "Chanter's smoke-consuming furnace," "Send me your patent apparatus for fitting up my brewing copper with your smoke-consuming furnace." B. sends a furnace and apparatus accordingly, but it is found to be useless for the purpose of a brewery. B., having sent an article according to A.'s description, may recover the price from A., though it is useless for the purpose for which A. wanted it. *Chanter* v. *Hopkins*, 4 M. & W. 399.

73. When goods, inaccessible to the inspection of the buyer, and whether then in existence or not, are ordered of a manufacturer, who is not otherwise a dealer therein, there is, in the absence of an express stipulation, or custom of trade, allowing him to provide goods of other persons, an implied warranty that he should supply goods only of his own manufacture (*f*).

74. When goods are ordered of a manufacturer, there is, in the absence of any express contract in that behalf, no warranty implied in the contract that he should supply goods of the best possible quality (*g*), or equal to his ordinary manufacture, or to that of other manufacturers of similar goods (*h*).

(*f*) *Johnson* v. *Railton*, 7 Q. B. D. 438, diss. Bramwell, L. J.; *Powell* v. *Horton*, 2 B. N. C. 668. As to what amounts to "manufacture" by the seller, cf. per Cotton and Brett, L.JJ., in *Johnson* v. *Railton*, *supra*.

(*g*) *Harris* v. *Waite*, 31 Am. Rep. 694; *Swett* v. *Shumway*, 102 Mass. 365.

(*h*) *Semble*, per Brett, L. J., in *Johnson* v. *Railton*, 7 Q. B. D. at p. 452.

75. In a sale of goods, as being of a particular description, and whether such sale be also by sample, or after an inspection of the goods, it is a condition of the contract that the goods supplied shall be of the specified description (*i*); and also (where there has been no opportunity of inspection by the buyer) that they shall be of saleable or merchantable quality under such description (*j*).

Explanation.—The condition that the goods should conform to their description, is not excluded by reason that there may be also in the contract :—

(1) An express warranty relating to some particular quality of the goods (*k*); or

(2) An express stipulation providing for a certain latitude as regards, or otherwise limiting the seller's liability in respect of, the quality of the goods (*l*).

Illustrations.—1. A., a dealer in acid, sells to B. a quantity of oxalic acid, and B. inspects both samples and the bulk. A. expressly refuses to warrant the quality. The acid, on chemical

(*i*) Per cur. in *Barr* v. *Gibson*, 3 M. & W. 390; *Randall* v. *Newson*, 2 Q. B. D. 101.

(*j*) *Mody* v. *Gregson*, L. R. 4 Ex. 49; *Jones* v. *Just*, L. R. 3 Q. B. 197; per Lord Herschell in *Drummond* v. *Van Ingen*, 12 Ap. Ca. 291. But the goods need not be of any *particular* quality or fitness, in the absence of a warranty in that behalf: *Gardiner* v. *Gray*, 4 Camp. 144. Sometimes the defective condition of the receptacle would render the goods unmerchantable: per Tindal, C. J., in *Gower* v. *Van Dedalzen*, 3 B. N. C. 717. But the rule as to merchantable quality, though stated generally in *Jones* v. *Just*, would seem only to apply to cases *where the subject-matter is a mercantile commodity*: cf. per cur. in *Randall* v. *Newson*, 2 Q. B. D. 101, and *Mody* v. *Gregson*, *suprà*, at pp. 53, 54. *Semble*, that it does not apply to a case like *Turner* v. *Mucklow*, note (*m*), *infrà*.

(*k*) *Nichol* v. *Godts*, 10 Ex. 191; cf. also, per Brett, L. J., in *Johnson* v. *Raillon*, 7 Q. B. D. at p. 451. For a case where the warranty of merchantable quality *in fact*, was held to be excluded by the express contract of the parties to accept another standard of quality, cf. *McLelland* v. *Stewart*, 12 L. R. Ir. 125.

(*l*) *Azemar* v. *Casella*, 2 C. P. 677; *Gorton* v. *Macintosh*, W. N. 1883, p. 103.

analysis, proves to be so impure as not to be what is commercially known as oxalic acid. A. is liable to B. for a breach of warranty. *Josling* v. *Kingsford*, 13 C. B. N. S. 447.

2. A. sells to B. certain cotton, and expressly warrants it equal to a sample, and it is also agreed that if the cotton is inferior in quality to the sample a fair allowance shall be made by A. A. delivers to B. cotton not only inferior to, but also of a different kind from the sample. B. is not bound to accept the cotton with an allowance made by A., as the cotton is of a different kind from that he contracted to buy, and the allowance referred only to the *quality* of the cotton. *Azemar* v. *Casella*, 2 C. P. 677.

3. A. sells B. some foreign refined rape oil, warranted only equal to samples. A. delivers to B. oil which corresponds with the samples, but is not foreign refined rape oil. B. may reject the oil, as the warranty extended only to the quality of the oil. *Nichol* v. *Godts*, 10 Ex. 191 ; 23 L. J. Ex. 314.

4. A. sells to B., with all faults, a ship which is described as copper-fastened, and which B. has an opportunity of inspecting. The ship is, in fact, only partially copper-fastened. A. is liable for breach of warranty, as the limitation as to the faults refers only to such defects as are consistent with the ship answering the description under which it was sold. *Shepherd* v. *Kain*, 5 B. & A. 240.

5. A. agrees to sell to B. a quantity of Manilla hemp expected to arrive by ship, and, upon delivery, the hemp is found to have been wetted by sea water, and afterwards dried, whereby, though answering the description, it becomes unmerchantable under that description. A. is liable for breach of warranty. *Jones* v. *Just*, L. R. 3 Q. B. 197.

6. A., a calico printer, agrees to sell to B., a dye extract manufacturer, a quantity of spent madder, which is merely the refuse of the processes of his manufacture. The madder lies in A.'s yard, open to B.'s inspection, but B. does not inspect it before delivery. It is found useless by B. B. must nevertheless pay for it, as spent madder was delivered. *Turner* v. *Mucklow*, 6 L. T. N. S. 690 (*m*).

(*m*) This case is explained in *Jones* v. *Just*, as decided principally on the ground of the goods sold having been *accessible to inspection :* see s. 70. But this ground was not mentioned by the court—indeed, parts of Pollock, C. B.'s judgment are inconsistent with this view—moreover, it was proved that, by reason of latent defects, inspection would have been futile. Submitted, the court took the view that the article not being a mercantile commodity, merchantability was not part of its description. The case may also be considered an instance of the rule in s. 72 : see the judgments of Martin and Channell, BB. A similar case is *Ipswich Gas Co.* v. *King*, 3 Times L. R. 100. See also Appendix B.

76. In a sale of goods by sample, there is an implied warranty that the bulk of the goods is equal in quality to the sample (*n*); but there is no other warranty implied as to the quality or the fitness thereof (*o*), unless [the sale being by a manufacturer] the sample contains a latent defect, not discoverable by an ordinary inspection; in which case there is also a warranty that the goods (though they may be in fact equal to the sample) are also merchantable, and fit for the purpose for which they were, to the knowledge of the seller, ordered (*p*).

The goods, though according to sample, must of course answer their description. *Nichol* v. *Godts*, 10 Ex. 191; cf. Illustration 3 to sect. 75, *suprà*.

A sale by sample is not *necessarily* to be inferred from the production of a sample of the goods. *Gardiner* v. *Gray*, 4 Camp. 144; *Tye* v. *Fynmore*, 3 Camp. 462; *Meyer* v. *Everth*, *ib.* 22.

The responsibility of the manufacturer to the buyer in respect of latent defects in goods sold by sample, and conforming thereto, may be explained in two ways — viz., (1) as "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," the parties *cannot be presumed to intend* that the sample should be treated as disclosing any other than defects discoverable by due diligence: or (2) the furnishing of a sample by a manufacturer to his customer *amounts to a representation or engagement* on his part

(*n*) *Hibbert* v. *Shee*, 1 Camp. 113.

(*o*) Per cur. in *Mody* v. *Gregson*, L. R. 4 Ex. 49; per Lawrence, J., in *Parkinson* v. *Lee*, 2 East, 322.

(*p*) *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Mody* v. *Gregson*, *suprà*; *Haines* v. *Firminger*, 1 Times L. R. 107, where it did not appear that the defendant was a manufacturer; *Drummond* v. *Van Ingen*, 12 Ap. Ca. 284.

that the goods manufactured, according to that sample, shall not, by reason of any hidden defects of manufacture, be unmerchantable, or unfit for their intended purpose: cf. per Lord Macnaghten, in *Drummond* v. *Van Ingen*, 12 Ap. Ca. at pp. 297, 298.

Illustrations.—1. A. agrees to buy of B., by sample, a quantity of sugar. The sugar delivered is not according to the sample. A. need not accept or pay for it. *Hibbert* v. *Shee*, 1 Camp. 113 (*q*).

2. A. agrees to sell to B., according to sample, a quantity of barley. Both A. and B. are ignorant of the particular description of barley. The bulk delivered is according to sample. A. is not liable to B. on a warranty that the barley is of any particular description or quality, or fit for any particular purpose. *Carter* v. *Crick*, 4 H. & N. 412; 28 L. J. Ex. 238.

3. A., a manufacturer, agrees to sell to B. certain grey shirtings of a certain weight, according to sample. Both the goods and the sample contain 15 per cent. of china clay, introduced by A. to increase the weight, and rendering the goods unmerchantable; and this admixture is not ordinarily discoverable. B. inspects and accepts the goods. A. is liable to B. for a breach of warranty of merchantable quality. *Mody* v. *Gregson*, L. R. 4 Ex. 49.

77. A warranty of merchantability, or fitness for any particular purpose, does not cover any depreciation in the goods necessarily consequent upon their transmission to the buyer; but it extends to loss or depreciation occasioned by any unusual or exceptional cause during the transit, if the seller contracted to deliver the goods at their destination; but not to loss or depreciation, so occasioned as aforesaid, if the seller contracted merely to dispatch the goods (*r*).

(*q*) Cf. *Wells* v. *Hopkins*, 5 M. & W. 7.

(*r*) This seems the result of *Bull* v. *Robison*, 24 L. J. Ex. 165; 10 Ex. 342; and *Beer* v. *Walker*, 37 L. T. N. S. 278, where *Bull* v. *Robison*, was not cited. Cf. also *Ullock* v. *Reddilin*, Dans. & Ll. 6. In *Walker* v. *Langdale's Chemical Manure Co.*, 11 C. of S. Cas. 3rd Ser. 906, the seller had expressly contracted to deliver the goods at their destination (as in *Bull* v. *Robison*); but the deterioration was not inevitable, as it was in the latter case. On these cases, cf. also Appendix C., *infra*.

Illustrations.—1. A., a wholesale provision dealer in London, contracts to send B., a retail provision dealer at Brighton, by railway a quantity of Ostend rabbits. The rabbits when delivered to the railway company are in good condition, but when they are inspected on arrival are found to be unfit for human food, and so unmerchantable. A. cannot recover the price thereof from B. *Beer* v. *Walker*, 25 W. R. 880.

2. A., in Liverpool, orders of B., in Staffordshire, a quantity of iron, to be delivered at Liverpool. B. delivers the iron in merchantable condition to a carrier, but on arrival at Liverpool it is found to be rusted; but this rusting is proved to be necessarily incident to the transit. A. must accept the iron. *Bull* v. *Robison*, 10 Ex. 342.

78. The seller of goods, which are otherwise in accordance with the contract, as explained in the preceding sections, is not liable, in the absence of fraud, or an express warranty of quality, for any latent defect which may exist therein (*s*).

Illustration.—A. buys of B. a quantity of Calcutta linseed, then on board ship. All Calcutta linseed contains an admixture of from 2 to 3 per cent. of other seeds, but the seed bought by A. contains about 15 per cent. B. is liable to A. for delivering a different article if the admixture of 15 per cent. of foreign seeds destroys the distinctive character of Calcutta linseed; otherwise, not. *Wieler* v *Schilizzi*, 17 C. B. 619 (*t*).

79. 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,

(*s*) Per cur. in *Gompertz* v. *Bartlett*, 2 E. & B. 854, 855; per cur. in *Kennedy* v. *Panama, &c. Co.*, L. R. 2 Q. B. 587. Cf. also *Ward* v. *Hobbs*, 3 Q. B. D. 150. As to latent defects rendering goods unfit for their destined purpose, cf. note (*a*) to sect. 71, *suprà*. It has been decided in America that the seller, being a manufacturer, is responsible for any latent defects arising out of the process of manufacture: *Hoe* v. *Sanborn*, 21 N. Y. 442. Cf. also a dictum of Brett, L. J., in *Ward* v. *Hobbs*, at p. 161; and per Lord Macnaghten in *Drummond* v. *Van Ingen*, 12 Ap. Ca. 297.

(*t*) Cf. also *Josling* v. *Kingsford*, 13 C. B. N. S. 447; and in America, *Gossler* v. *Eagle Sugar Refinery*, 103 Mass. 331.

before delivery, tested and stamped, in accordance with the Chain Cables and Anchors Acts, 1864 to 1874; and proof of this warranty having been complied with shall be on the seller (*u*).

80. On the sale, or in the contract for the sale, of any goods to which a trade mark, or mark, or trade description (*x*), has been applied, the seller shall be deemed to warrant that the mark is a genuine trade mark, and not forged (*y*) or falsely applied (*z*), or that the trade description is not a false trade description (*x*) within the meaning of the 50 & 51 Vict. c. 28, unless the contrary be expressed in some writing, signed by or on behalf of the seller, and delivered at the time of the sale or contract to and accepted by the buyer (*a*).

81. Upon a sale made by a sheriff, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property (*b*).

The rule in this section probably applies universally to all cases where the sale is made by a person selling

(*u*) 37 & 38 Vict. c. 51, s. 4. This applies to all contracts, and is not limited to sales for British ships under sect. 3 of this act: *Hall* v. *Billingham*, 54 L. T. 387; 34 W. R. 122.

(*x*) For definition of these terms, cf. sect. 3 (1) of act.

(*y*) Sect. 4.

(*z*) Sect. 5.

(*a*) 50 & 51 Vict. c. 28, s. 17, repealing 25 & 26 Vict. c. 88, ss. 19, 20. The 29 & 30 Vict. c. 37 (Hops, Prevention of Frauds Act), s. 18, would appear not to be repealed. But its provisions are similar.

(*b*) *Peto* v. *Blades*, 5 Taunt. 657. Cf. the remarks of Parke, B., in *Morley* v. *Attenborough*, 18 L. J. Ex. 150. And in America, *Bashore* v. *Whisler*, 3 Watts, 490. This, on the ground that a judicial officer has not necessarily any means of knowing the title to the goods sold, and therefore the *scienter* should be proved: per cur. in *Hoe* v. *Sanborn*, 21 N. Y. 556.

in a special or limited capacity, and not generally as owner. Cf. Add. on C. (8th ed.) pp. 971, 972.

82. One who sends animals to a public market for sale does not thereby impliedly represent them not to be, to his knowledge, affected with disease, though such sending may amount to a criminal offence (*c*).

83. An implied warranty of quality may be established by the custom of any particular trade (*d*).

Illustration.—A. sells to B., by auction, a quantity of sea-damaged pimento, without stating it to be damaged, though it is a trade custom to state the fact if it exists. There is a warranty by A. that the pimento is not damaged. *Jones* v. *Bowden, supra.*

84. A warranty, by the terms of the contract, limited to continue only a certain time, extends so as to cover only such defects in the things sold as are pointed out within such time, though they may have in the meantime existed (*e*).

Of course, the facts of the case may show that the limitation of time refers to the *continuance* during the time of the quality warranted, and not to the responsibility of the seller under the warranty. Per Lush, J.,

(*c*) *Ward* v. *Hobbs*, 3 Q. B. D. 150. The House of Lords decided (4 Ap. Ca. 13) the case on its special facts. *Qy.*, per Lord Cairns (at p. 22), whether, *from the mere fact* of sending the animals to market (there being no qualifying stipulations, as there were in the case, to protect the seller), a warranty of freedom from disease would be implied? cf. *Bodger* v. *Nicholls*, 28 L. T. 441.

(*d*) *Jones* v. *Bowden*, 4 Taunt. 847; Benj. 539; *Syers* v. *Jonas*, 2 Ex. 111.

(*e*) *Chapman* v. *Gwyther*, L. R. 1 Q. B. 463; *Bywater* v. *Richardson*, 1 A. & E. 508; *Smart* v. *Hyde*, 8 M. & W. 723. And held, in such a case, in *Upton Man. Co.* v. *Huiske*, 69 Iowa, 557, that the buyer must return the goods on discovering a breach of the warranty, as the limitation of time "does not operate to extend the time, after the . . . . discovery of the breach, within which the party may rescind the contract." This decision is not inconsistent with *Ellis* v. *Mortimer*, 1 N. R. 257.

in *Chapman* v. *Gwyther*. Thus, in *Snow* v. *Shoemacker Man. Co.*, 44 Am. R. 509, a warranty for five years on the sale of a piano was construed as meaning a warranty *of soundness* for five years.

85. A general warranty does not, in the absence of an intention to the contrary, extend to defects inconsistent therewith, whereof the buyer was then aware, or which were then easily discernable(*f*) by him without the exercise of peculiar skill; but it extends to all other defects(*g*).

Illustrations.—1. A. sells to B. a horse, which is known to B. at the time of sale to be suffering from a cough and a swelled leg, but A. warrants its soundness at the time of delivery at the end of a fortnight. A. is liable to B. for a breach of warranty if the horse is then unsound, as he has expressly warranted its future soundness. *Liddard* v. *Kain*, 2 Bing. 183.

2. A. sells to B. a horse, which, to the knowledge of both, is suffering from a splint, and warrants him then sound. Some splints cause lameness, others do not; and no inspection would reveal the particular character of the splint. The horse becomes lame. A. is liable to B., as B. could not tell that the particular splint would cause lameness. *Margetson* v. *Wright*, 8 Bing. 454.

86. Except where any trade custom, or the general facts of the case, show that only such title as the seller possesses should be transferred to the buyer, a warranty of title to the goods sold is implied:—

(1) In an executory contract of sale of unascertained goods(*h*):

(*f*) In *Kenner* v. *Harding*, 28 Am. R. 615, access to the horse sold was prevented by the seller by a trick, and *held*, a general warranty of soundness extended to a patent defect, whereof the buyer was unaware.

(*g*) *Bailey* v. *Merrell*, 3 Bulstr. 95; *Holliday* v. *Morgan*, 1 E. & E. 1.

(*h*) Per cur. in *Morley* v. *Attenborough*, 3 Ex. 500; *Raphael* v. *Burt*, 1 C. & E. 325, per Stephen, J.

(2) When the seller, expressly or impliedly, affirms the goods to be his own (*i*); and such an affirmation will be implied where a tradesman sells goods in the ordinary course of business in his shop or warehouse (*k*); but such an affirmation is not implied by reason only that the seller is in possession of the goods (*l*);

(3) [Probably] also in any case of a bargain and sale of goods (*m*).

In America, there appears to be a conflict of opinion on the question whether disturbance by the true owner is necessary to the cause of action for breach of warranty of title, the inclination of opinion being that it is. Cf. *Case* v. *Hall*, 24 Wend. 103; *Krumbhaer* v. *Birch*, 83 Penn. 426; *Buss* v. *Putney*, 38 N. H. 44. *Contrà*, *Perkins* v. *Whelan*, 116 Mass. 542. The former decisions adopt the analogy of covenants for quiet possession; the latter, of covenants for right to convey, or against incumbrances.

Illustrations.—1. A., a pawnbroker, puts up for sale by auction a quantity of unredeemed pledges, stating them to be such. There is no warranty of title on the part of A., as all he professed to sell was goods which had been pledged and were unredeemed. *Morley* v. *Attenborough*, 3 Ex. 500.

2. A., a job warehouseman, sells, in his warehouse, to B. a quantity of prints, yarns, &c. The goods had, in fact, been stolen, and B. is compelled to restore them to their owner. A. is liable to B. on a breach of warranty of title, as he has by his conduct affirmed the goods to be his own. *Eicholz* v. *Bannister*, 17 C. B. N. S. 708 (*n*).

(*i*) Per cur. in *Morley* v. *Attenborough*, 3 Ex. 500; per Byles, J., in *Eicholz* v. *Bannister*, 17 C. B. N. S. 708.

(*k*) Cf. cases under note (*i*).

(*l*) Per Buller, J., in *Pasley* v. *Freeman*, 3 T. R. 57, quoted in *Morley* v. *Attenborough*; per cur. in *Eicholz* v. *Bannister*. The rule in Am. is different.

(*m*) *Eicholz* v. *Bannister*, *supra*; per Stephen, J., in *Raphael* v. *Burt*, 1 C. & E. 325.

(*n*) This case was, strictly speak-

3. A. buys goods at an auction, which were sold by the sheriff under a writ of *fi. fa.*, and afterwards resells the bargain to B. for 5*l.* The goods are taken under a superior title. There is no warranty of title by A. to B., as the circumstances of the case show that A. agreed merely to transfer to B. such interest as he had bought under the sheriff's sale. *Chapman* v. *Speller*, 14 Q. B. 621.

4. A. agrees to sell and deliver to B. a quantity of unascertained goods. A. delivers goods which belong to C. B. may reject the goods on delivery, and may recover the price if paid. Cf. per cur. in *Morley* v. *Attenborough*, *suprà*.

87. A failure of title on the part of the seller, who has warranted title, whereby the buyer is dispossessed of the goods sold, or has to account therefor to the owner thereof, amounts to a total failure of the consideration for the contract of sale(*o*); and also, in the absence of a warranty, where the absence of title renders the thing delivered substantially different from that contracted for (*p*).

88. Upon a bargain and sale, with a warranty, of a specific article, the buyer cannot, by reason of a breach of such warranty, return the article and repudiate the contract, in the absence of fraud on the part of the seller (*q*), or unless the warranty was expressly intended as a condition of the sale (*r*); but the buyer may do so in the case of an executory

ing, decided on the common money counts: but cf. Benj. (2nd ed.) p. 523.

(*o*) *Raphael* v. *Burt*, 1 Cab. & Ell. 325; *Eicholz* v. *Bannister*, 17 C. B. N. S. 708.

(*p*) Per cur. in *Chapman* v. *Speller*, 14 Q. B. 621; per Stephen, J., in *Raphael* v. *Burt*, 1 Cab. & Ell. 325; *Robinson* v. *Anderton*, Peake, 94; *Gompertz* v. *Bartlett*, 2 E. & B. 849. For the contrary case, cf. *Lamert* v. *Heath*, 15 M. & W. 487; and *Raphael* v. *Burt*, *suprà*.

(*q*) *Street* v. *Blay*, 2 B. & Ad. 456; *Gompertz* v. *Denton*, 1 C. & M. 207. The same rule applies also to exchanges: cf. *Emmanuel* v. *Dane*, 3 Camp. 299.

(*r*) *Bannerman* v. *White*, 12 C. B. N. S. 560.

contract (*s*), and the buyer (both in the case of a bargain and sale and of an executory contract) is entitled—

(1) To compensation in damages (*t*) in respect of the breach of warranty; and

(2) If sued for the price, to show, as a defence, the inferior quality of the goods (*u*).

89. Special damages, not satisfied by a diminution, in respect of a breach of warranty, of the price of goods sold, within the terms of the preceding section, are recoverable, notwithstanding such diminution (*x*).

Illustration.—A. agrees to build B. a ship according to certain specifications, but builds the ship in an unworkmanlike manner. B., in an action by A. for the agreed price, obtains an abatement, by reason of the defective workmanship. The ship subsequently becomes strained, and has to be repaired. B. may recover the cost thereof from A., such subsequent damage not being covered by the abatement in price. *Mondel* v. *Steel*, 8 M. & W. 858.

(*s*) The court, in *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447, would seem by their dicta to confine this right only to cases of executory contracts for the sale of *unascertained* goods: cf., on this, note (*x*) to sect. 69, *suprà*.

(*t*) Unless he have by the contract accepted another remedy, as in *Hinchliffe* v. *Barwick*, 5 Ex. D. 177; but cf., *contrà*, *McGrane* v. *Loy*, 1 Cr. & Dix (Ir.) 286.

(*u*) Benj. (2nd ed.) p. 748. But the buyer cannot show, in an action *on* a *bill* or *note*, given for the price, and as a *defence*, the inferiority of the article, as the security is entire: *Tye* v. *Gwynne*, 2 Camp. 346. But he may show the *complete* worthlessness of the goods, as a *total* failure of consideration: *Wells* v. *Hopkins*, 5 M. & W. 7.

(*x*) *Rigge* v. *Burbidge*, 15 M. & W. 598; *Davis* v. *Hedges*, L. R. 6 Q. B. 687.

CHAPTER V.

LIEN AND STOPPAGE IN TRANSIT.

90. In the absence of a contrary intention, a seller has a lien on goods sold as long as they remain in his possession, and the price, or any part thereof, remains unpaid (*a*).

The rule must, of course, be read with this limitation —viz., that, in the case of a divisible contract, payment for a portion of the goods divests the seller's lien on such portion: *Merchants, &c. Co.* v. *Phœnix, &c. Co.*, 5 Ch. D. 205; unless the case falls within the terms of sect. 92, *infrà*, when the seller can exercise a *quasi* right of stoppage, the buyer being *insolvent*.

The seller's lien is not affected by a judgment for the price against the buyer, and the payment of an instalment thereunder: *Scrivener* v. *G. N. R. Co.*, 19 W. R. 388; nor is a new lien acquired by a re-delivery to him for a special purpose after the termination of the transit: Cf. note (*t*) to sect. 94, *infrà*.

For the effect on this lien of bills of lading, delivery orders, &c., cf. sect. 109.

Illustrations.—1. A. sells goods to B., and delivers them to a carrier for conveyance to B., the carrier not being A.'s agent. A. has lost his lien. Benj. (2nd ed.) p. 663: cf. *Sweet* v. *Pym*, 1 East, 4.

2. A. agrees to sell goods to B., free on board a ship, and delivers them on board, and takes a receipt therefor in his own

(*a*) *Miles* v. *Gorton*, 2 C. & M. 504; *Spartali* v. *Benecke*, 10 C. B. 212.

name, being thereby entitled to demand the bill of lading. A. has not lost his lien. *Craven* v. *Ryder*, 6 Taunt. 433 (*b*).

3. A sells to B. certain timber then lying on the land of C., who is not A.'s agent, B. to have liberty to enter the land and remove the timber, which B. does in part. A. has lost his lien on all the trees. *Tansley* v. *Turner*, 2 B. N. C. 151 (*c*).

4. A. agrees to sell B. a horse, the bargain being a ready money one, and, before the price is paid, allows B. to take a ride on the animal. A. has not thereby lost his lien, as B. is A.'s bailee. *Tempest* v. *Fitzgerald*, 3 B. & A. 680 (*d*).

5. A. sells to B. some casks of butter, and gives him a delivery order on C., the warehouseman, with whom B. lodges the order, and who assents thereto. A. loses his lien when C. attorns to B. *Harman* v. *Anderson*, 2 Camp. 243.

6. A. sells to B. timber lodged in A.'s name with C., a warehouseman. B. re-sells to D., giving D. a delivery order on C. On presentment by D. of the order, C. refuses to attorn to D., as no delivery order had been given by A. B. has not lost his lien. *Lackrington* v. *Atherton*, 8 Scott, N. R. 38 (*e*).

7. A. buys of B. some wine, then in B.'s possession, and B., at A.'s request, puts A.'s initials on the casks. B. has not lost his lien. Per cur. in *Procter* v. *Jones*, 2 C. & P. 532.

91. Such an intention, as in the preceding section mentioned, will, in the absence of any usage of trade to the contrary (*f*), be presumed in the cases following:—

(1) Where the goods are sold on credit, and no date is fixed for their delivery (*g*);

(2) Where the seller takes a bill or note payable

(*b*) So in *Ruck* v. *Hatfield*, 5 B. & A. 632, where the receipt was demanded but not given.

(*c*) *Cooper* v. *Bill*, 3 H. & C. 722.

(*d*) Cf. also *Reeves* v. *Capper*, 5 B. N. C. 136.

(*e*) Observe that in *Lackrington* v. *Atherton* the delivery order was given by the intermediate buyer to the sub-vendee, and that the latter was not the *transferee* of an order originally given by the first seller. In the latter case attornment of the bailee would not be necessary: Factors Act, 1877, sect. 5, and see s. 109 (2), *post*.

(*f*) *Field* v. *Lelean*, 6 H. & N. 617.

(*g*) *Spartali* v. *Benecke*, 10 C. B. 212; *Miles* v. *Gorton*, 2 C. & M. 504; *Bloxam* v. *Sanders*, 4 B. & C. 941.

at a future day, in conditional payment of the price (*h*); or

(3) Any other security, unless the terms thereof are consistent with the retention by the seller of his lien (*i*).

But if, before actual delivery of the goods, the buyer become insolvent (*k*), or the bill or note be dishonoured (*l*), or the period of credit (*m*) expire, the lien of the seller revives.

Explanation.—A person is said to be insolvent when he has ceased to pay his debts in the ordinary course of business, or who is incapable of paying them (*n*).

Illustration.—A. sells to B. chests of tea, then in A.'s possession, and hands him a delivery order or warrant, stating that the tea remained at rent on B.'s behalf, and making it transferable on B.'s indorsement; and an entry of the transfer to B. is made in A.'s books. B. gives an acceptance for the price. B. becomes insolvent, and the bill is dishonoured. A.'s lien revives, the goods having been all along in his actual possession. *Grice* v. *Richardson*, 3 Ap. Ca. 319.

92. In an executory contract for the sale of goods by instalments, the seller may, in the case of the insolvency of the buyer before the commence-

(*h*) *Hewison* v. *Guthrie*, 2 B. N. C. at p. 759; per cur. in *Miles* v. *Gorton*, *infrà*. In *Cowasjee* v. *Thompson*, 6 Moo. P. C. 165, the security was taken in *absolute* payment.

(*i*) Cf. *Angus* v. *MacLachlan*, 23 Ch. D. 330: case of an *innkeeper's* lien. And an *agreement* to set off against the lien a debt due from the seller would exclude the lien: cf. per cur. in *Pinnock* v. *Harrison*, 3 M. & W. 532. *Semble*, the mere existence of the set-off.

(*k*) *Grice* v. *Richardson*, 3 Ap. Ca. 319.

(*l*) *Miles* v. *Gorton*, 2 C. & M. 504.

(*m*) Per Martin and Channell, BB., in *Castle* v. *Sworder*, 5 H. & N. 281; per Bayley, J., in *New* v. *Swain*, 1 Dans. & L. 193; cf. Benj. (2nd ed.) p. 685.

(*n*) *Biddlecombe* v. *Bond*, 4 A. & E. 332; *Vertue* v. *Jewell*, 4 Camp. 31; and other cases quoted in Blackburn on Sale (2nd ed.) p. 382, n.

ment, or the completion of delivery, although he may have allowed credit for the payment of the price, withhold delivery, or a further delivery, as the case may be, until the price of all the goods unpaid for is tendered to him in cash (*o*).

And after a reasonable time, without tender of cash, the seller may repudiate the contract. Cf. sect. 110.

93. A seller in possession of goods sold has a lien as against also a subsequent buyer (*p*), unless

(1) The seller has, by his words or conduct, estopped himself by recognizing the title of such subsequent buyer (*q*); or

(2) The latter is the *bonâ fide* transferee for value of a bill of lading, or other document of title (*r*) to the goods, within the meaning of sect. 109.

(*o*) Per cur. in *Ex parte Chalmers*, 8 Ch. 289; 42 L. J. Ch. 37; per Coleridge, J., in *Morgan* v. *Bain*, 10 C. P. 15; *Ex parte Stapleton*, 10 Ch. D. 256.

(*p*) *Craven* v. *Ryder*, 7 Taunt. 433; *McEwen* v. *Smith*, 2 H. L. 309; *Dixon* v. *Yates*, 5 B. & Ad. 313. As to what amounts to an estoppel, see *Farmiloe* v. *Bain*, 1 C. P. D. 445.

(*q*) *Pearson* v. *Dawson*, E. B. & E. 448; *Merchants' Banking Co.* v. *Phœnix, &c. Co.*, 5 Ch. D. 205.

(*r*) *Semble*, the "documents of title" are those mentioned in the Factors Acts previously to that of 1877, though the words, "within the meaning of the principal acts," are omitted in sect. 5 of the F. A. 1877. Cf. Pearson and Boyd on F. A. p. 109.

Even on this assumption, however, it appears doubtful whether the wharfinger's certificate issued in *Gunn* v. *Bolckow, Vaughan & Co.* (10 Ch. 49) would, since the F. Act, 1877, be deemed a "document of title" within that act. It does not appear to have been a document "used *in the ordinary course of business* as proof of the possession or control of goods, or . . . . purporting to authorize the possessor . . . . to transfer or receive goods *thereby represented*." No evidence was shown that the wharfinger's certificate in the case was generally treated as equivalent to a warrant, nor was it intended to *represent* the goods. It was merely a certificate that certain goods were ready for shipment. (Cf. per Mellish, L. J., at p. 502.) For

Illustration.—A. sells to B. timber then lying at his wharf, and takes a bill for the price. B. sub-sells to C., who informs A. of the sale, and A. assents thereto, and allows C. to mark the timber. B. becomes insolvent, and the bill is dishonoured. A. has no lien as against C. *Stoveld* v. *Hughes*, 14 East, 308.

94. A seller who has parted with the possession of goods, and is wholly or partially (*s*) unpaid therefor, may, if the buyer become insolvent, stop them while they are in transit to the buyer (*t*).

Explanation.—It is not necessary to the exercise of the seller's right in this behalf that the buyer should have been found, or should be insolvent at the date of the stoppage, if he be in fact so by the time of the termination of the transit (*u*).

95. A seller will be deemed to be unpaid within the meaning of the preceding section, though—

(1) The date fixed for payment of the price may not have arrived at the time of the stoppage (*x*); or

(2) The buyer may have accepted, made, or given a bill, note, or other security in conditional payment of the price, which is outstanding, or not yet come to maturity (*y*); or

the above reasons it was not, *à fortiori*, a document of title, if the term is left undefined in the Act of 1877.

(*s*) *Hodgson* v. *Loy*, 7 T. R. 440.

(*t*) *Lickbarrow* v. *Mason*, 1 S. L. C. 818. But after the termination of the transit, the seller acquires no new rights by a re-delivery to him for a special purpose. *Valpy* v. *Gibson*, 4 C. B. 837.

(*u*) Per Lord Stowell in *The Constantia*, 6 Rob. Adm. at p. 327. Cf. also *The Tigress*, 32 L. J. Adm. at p. 101; Benj. (2nd ed.) p. 696.

(*x*) *Inglis* v. *Usherwood*, 1 East, 515: *Bohtlingk* v. *Inglis*, 3 East, 381: per Bayley, J., in *Bloxam* v. *Sanders*, 4 B. & C. at p. 949.

(*y*) *Feise* v. *Wray*, 3 East, 93; *Patten* v. *Thompson*, 5 M. & S. 350; *Edwards* v. *Brewer*, 2 M. & W. 375. *Sed vide Davis* v. *Reynolds*, 4 Camp. 267; 1 Stark. 115; which, *semble*, is not law. The case would be different if the seller has received the amount of

(3) The seller may have in his hands goods of the buyer, and a mutual account may be unsettled between them, unless [perhaps] the goods stopped were consigned by the seller specifically in discharge of his liability to the buyer (*z*).

96. A person in the position of a seller, with regard to the right of stoppage in transit, may be

(1) A buyer who re-sells his interest under an executory contract of sale, though he may not have the ownership of the goods at the time of stoppage (*a*):

(2) A principal consigning goods to his factor, though the latter may have made advances on the faith of the consignment, or may have a joint interest therein with his principal (*b*):

(3) A factor who has bought goods on his own credit, consigning the goods to his principal (*c*): or

(4) A partnership selling and consigning goods to a member of the firm (*d*).

A surety for the price of the goods is not a person in the position of a seller, so as to be able to stop: *Siffkin* v. *Wray*, 6 East, 371. But, under the M. L.

and is not liable on the bill: *Bunney* v. *Poyntz*, 4 B. & Ad. 568. In that case he would be paid.

(*z*) *Wood* v. *Jones*, 4 D. & R. 126. But cf. *Vertue* v. *Jewell*, 4 Camp. 31, and remarks thereon in Benj. (2nd ed.) p. 694.

(*a*) *Jenkyns* v. *Usborne*, 7 M. & G. 678.

(*b*) *Kinloch* v. *Craig*, 3 T. R. 119; Benj. (2nd ed.) 692; *Newson* v. *Thornton*, 6 East, 17.

(*c*) *Feise* v. *Wray*, 3 East, 93; per Blackburn, J., in *Ireland* v. *Livingstone*, L. R. 5 H. L. 409; per cur. in *Cassaboglou* v. *Gibbs*, 11 Q. B. D. 797; *Phelps* v. *Comber*, 29 Ch. D. 826; cf., also, *Hawkes* v. *Dunn*, 1 Tyrw. 413; 1 C. & J. 519 (former best report), where an ordinary agent, who had bought goods on his own credit, held entitled to intercept the goods before delivery to principal.

(*d*) *Ex parte Cooper*, 11 Ch. D. 68.

Amendment Act, he may, on payment of the price, be a transferee of the seller's right of stoppage. *Imperial Bank* v. *L. & St. K. Dock Co.*, 5 Ch. D. 195.

97. Goods are deemed to be in transit while they are in the possession of the carrier as such (*e*), or lodged in any place in the course of transmission to the buyer (*f*), or to the place of destination contemplated by the seller and the buyer (*g*), and are not yet come into the actual possession of the latter (*g*), or of his agent for custody (*h*), or to such place of destination, otherwise than being in the possession of the carrier, or as being so lodged.

Explanations.—1. When the goods sold are to be sent by the seller to a forwarding agent on behalf of the buyer, the fact that the seller is competent, of his own motion, to instruct such agent as to the transmission of the goods to their ultimate destination; or, on the contrary, that the goods are, in the hands of such agent, to await the orders of the buyer, are relevant facts to prove or disprove respectively that the goods, while in the hands of such agent, are in the course of transmission on their transit, within the meaning of this section (*i*).

(*e*) *Ex parte Cooper*, 11 Ch. D. 68.

(*f*) Per Brett, L. J., in *Kendall* v. *Marshall*, 11 Q. B. D. 365; *Edwards* v. *Brewer*, 2 M. & W. 375; *Ex parte Watson*, 5 Ch. D. 35; *James* v. *Griffin*, 2 M. & W. 623.

(*g*) Per Cotton, L. J., in *Ex parte Golding, Davis & Co.*, 13 Ch. D. 628; per Rolfe, B., in *Gibson* v. *Carruthers*, 8 M. & W. 327; cf. the "place of destination" defined, per Brett, M.R., in *Ex parte Miles*, 15 Q. B. D. 39.

(*h*) And the carrier may constitute himself such an agent, though he retains his lien: *Allen* v. *Gripper*, 2 C. & J. 218; per Lord Blackburn in *Kemp* v. *Falk*, 7 Ap. Ca. at p. 584. *Ex parte Cooper*, *suprà*, is, *semble*, not inconsistent, there being in that case no evidence of attornment, and the fact of the retention by the carrier of his lien being strongly relevant to disprove an attornment: cf. per Lord Blackburn, *suprà*.

(*i*) *Kendall* v. *Marshall*, 11 Q. B. D. 356; *Ex parte Miles*, 15 Q. B. D. 39; *Ex parte Watson*, 5 Ch. D. 35.

2. When the goods are to await the orders of the buyer in the hands of the forwarding agent, it is immaterial that such orders are given before or after the contract of sale, or the order by the buyer to the seller to deliver to the agent (*k*).

Illustrations.—1. A. orders goods of B., who delivers them at the warehouse of C., which A. uses as his own for the receipt of goods. The transit is ended. *Scott* v. *Pettitt*, 3 B. & P. 469 (*l*).

2. A. sells goods to B., and consigns them by C., a carrier, directed to B. On arrival, C. partially unloads the goods on B.'s wharf, but afterwards, hearing that B. was insolvent and had absconded, re-ships them in his barge. The transit is not ended, as C. still held the goods as carrier. *Crawshay* v. *Edes*, 1 B. & C. 181.

3. A. buys goods of B., and directs them to be sent by a carrier to C. Before arrival at C. the carrier, at A.'s request, delivers the goods to him. The transit is determined. Cf. per Parke, B., in *Whitehead* v. *Anderson*, 9 M. & W. 534 (*m*).

4. A. buys goods of B., and orders them to be forwarded to London. B. gives C., A.'s agent, a delivery order for the goods, making them deliverable on board a vessel, which order C. indorses to D., a wharfinger. D. hands the order to E., a keelman, who puts the goods on board. The vessel moors in the port of London, and F., another wharfinger, by A.'s order, receives the goods into his lighter, when they are stopped by B. The transit is not ended, as all these steps form part of the course of transmission of the goods to London. *Jackson* v. *Nicholl*, 5 B. N. C. 508.

5. A. having purchased a cargo of timber of B., to be dispatched by a certain ship, becomes bankrupt. Upon the arrival of the vessel A.'s trustee goes on board, and tells the captain that he is come to take possession, and touches some of the timber. The captain tells him that he will deliver when he is satisfied with regard to freight. B. then stops the goods. The transit is not ended, as the goods had not reached the actual possession of the buyer, and the captain had not contracted to hold the goods as

(*k*) Per Brett and Cotton, L. JJ., in *Kendall* v. *Marshall*, *supra*.

(*l*) Cf., also, *Rowe* v. *Pickford*, 8 Taunt. 83; *Dodson* v. *Wentworth*, 4 M. & G. 1080.

(*m*) Approved of in *N. W. R. Co.* v. *Bartlett*, 7 H. & N. 400; 31 L. J. Ex. 92; cf., also, *Cork Dist. Co.'s case*, L. R. 7 H. L. 269; and per Bowen, L. J., in *Kendall* v. *Marshall*, 11 Q. B. D. at p. 469.

his bailee, so as to give A. constructive possession. *Whitehead* v. *Anderson*, 9 M. & W. 518.

6. A. in Birmingham orders sugar of B. in London. B. sends them by C., a carrier, who notifies A. of the arrival of the sugar. A. takes away part of the sugar, and takes samples of the rest, and requests C. to keep the sugar till he received directions from A. The transit is at an end, as C. has become A.'s bailee to hold the sugar for him. *Foster* v. *Frampton*, 6 B. & C. 107.

7. A. buys of B. a quantity of china clay, to be delivered free on ship-board at a certain port, but does not tell B. the destination of the vessel. A. charters a vessel to convey the clay, and it is put on board. Before the vessel leaves the harbour A. becomes insolvent, and B. stops the goods. The goods are still in transit, as they are in the hands of a carrier as such; the circumstances of the case showing that both A. and B. contemplated a further journey after delivery on board. *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560 (*n*).

8. A. sells goods to B., and ships them to him at C. On arrival, the goods are lodged in the warehouse of D., the agent of the carrier, the course of business being that D. should hold the goods subject to the orders of the consignee and payment of freight. Before the arrival of the goods, B., who was bankrupt, had absconded. A. then stops the goods. This stoppage is good, as B., being absent, could not constitute D. his agent to hold the goods, and the goods accordingly were in D.'s warehouse in the course of their transmission to B. *Ex parte Barrow*, 6 Ch. D. 783 (*o*).

9. A. agrees to supply goods to B. from time to time, B. to consign them to C., at Shanghai, for sale on his account, and A. to have a lien on the bill of lading of such shipment, and on the proceeds of such sale. A. sends goods, marked Shanghai, directed to a ship specified by B., and bound for that place. B. fails. A. may stop the goods at any time before they reach Shanghai: (1) because there was a contract between A. and B. that the transit should continue to Shanghai; (2) because, also, A. had authority, without any fresh order from B., to send direct to Shanghai. *Ex parte Watson*, 5 Ch. D. 35.

10. A. orders a quantity of goods from B., to be marked with the name of "C., Jamaica," and afterwards tells him to forward them, so marked, to D., a shipping agent, for shipment. Instruc-

(*n*) Followed in *Brindley* v. *Chilgwin Slate Co.*, 55 L. J. Q. B. 67; cf. also, *Bethell* v. *Clark*, 19 Q. B. D. 553.

(*o*) Cf. also, *Bolton* v. *L. & Y. R. Co.*, 1 C. P. 431, where the buyer *refused* the goods on arrival, and so prolonged the transit.

tions as to the name of the consignee, and the destination of the goods, are to be sent to D. by A. B. sends the goods to D. to be forwarded as A. should direct. A. instructs D. to ship to C., Jamaica, which is done. A., after the sailing of the vessel, fails. B. cannot stop the goods, as they reached their destination, as between A. and B., when they reached D. *Ex parte Miles*, 15 Q. B. D. 39.

11. A. buys goods of B., saying nothing at the time of their place of delivery, and afterwards arranges with C. for their transmission to a further place, the ultimate destination of the goods being unknown to B. A. tells B. to forward the goods to C., and they are delivered to him. The transit is ended, the destination of the goods being, as against B., in possession of C. *Kendall* v. *Marshall*, 11 Q. B. D. 356.

98. If, when the goods arrive at their destination, the carrier wrongfully refuses to deliver them to the buyer, the transit thereof is thereupon determined (*p*).

99. If, after a stoppage in transit, the buyer prove not to be insolvent, he is entitled to the possession of the goods, and to an indemnity by the seller in respect of any loss caused by the stoppage (*q*).

100. A stoppage, made on behalf of the seller by an unauthorised person, is effectual if ratified at any time before the termination of the transit, but not afterwards (*r*); but the posting of a letter of ratification is sufficient, though it be not received till after the termination of the transit (*s*).

101. A delivery of the goods by the seller on

(*p*) *Bird* v. *Brown*, 4 Ex. 786.

(*q*) Per Lord Stowell, in *The Constantia*, 6 Rob. Ad. at p. 326; *The Tigress*, 32 L. J. Adm. 97.

(*r*) *Bird* v. *Brown*, 4 Ex. 786. This is an instance of the ordinary principle of the law of agency, that a ratification cannot take place to the prejudice of another's vested right. Cf. St. on Ag. s. 246.

(*s*) *Hutchings* v. *Nunes*, 1 Moo. P. C. 243.

board the buyer's own ship (*t*), whether it be a general ship or sent specially for the goods, is not a delivery into the possession of the buyer's agent so as to terminate the transit, if the facts of the case show—as when the seller takes a bill of lading to his own order, or assigns—that the master of the vessel received the goods in the capacity of carrier (*u*).

In some cases the vessel may be the *destination* of the goods, in which case the transit would end on shipment: per cur. in *Berndtson* v. *Strang*, 4 Eq. 481; *Bethell* v. *Clark*, 19 Q. B. D. 553.

Held, per Cave, J., in *In re Bruno, Silva & Co.*, 56 L. T. 577, that when the goods had been delivered on board the buyer's ship, and the mate's receipt, taken by the seller, had been by him given to the buyer's agent, who thereupon received the bill of lading, the transit ended on shipment, though the seller knew the goods were destined for a further journey.

Illustrations.—1. A. sells goods to B., and delivers them on board B.'s ship, employed as a general trader, and takes the bill of lading to the order of B. The transit is ended on shipment, as the goods are delivered to B.'s agent, and A. has not restricted the delivery. *Schotsmans* v. *L. & Y. Ry. Co.*, 2 Ch. 332.

2. A. orders goods of B., to be shipped to London, and sends his chartered vessel for them. B. ships the goods, and takes a bill of lading to his own order, which he indorses to A. The transit does not end till the goods reach A. in London, as B., by taking the bill of lading to his own order (although it is afterwards transferred to A.), made the carrier his agent for carriage. *Berndtson* v. *Strang*, 4 Eq. 481; 3 Ch. 588.

102. The seller's right of stoppage is not defeated by the mere sub-sale of the goods while in

(*t*) Does not include a ship chartered by buyer, unless the charter amount to a *demise* of the ship. *Berndtson* v. *Strang*, 3 Ch. 588; *In re Cock*, 11 Ch. D. 560.

(*u*) *Van Casteel* v. *Booker*, 2 Ex. 691; per Lord Chelmsford, L. C., in *Schotsmans* v. *Lanc. & Y. Ry. Co.*, 2 Ch. 332; per cur. in *Turner* v. *Liverpool Docks Trustees*, 6 Ex. 543.

transit, and the receipt of the price thereof by the buyer(*x*), or by the bill of lading being originally made out in the name of the sub-buyer(*y*); but when the right of stoppage has been defeated by a transfer by the buyer of the bill of lading to the sub-buyer, as hereinafter mentioned in section 109, the seller cannot intercept any part of the sub-buyer's purchase-money (*z*).

There are *dicta* in the case of *Ex parte Golding*, 13 Ch. D. 628, tending to show that the court took the view that the seller's right of stoppage is exerciseable (where there has been a sub-sale), *only if he thereby does not prejudice the rights of the sub-buyer*, though the sub-buyer be not the transferee of a bill of lading. Compare with these *dicta* the remarks of Lords Selborne and Blackburn in *Kemp* v. *Falk*, that the sub-buyer can acquire only such a right as the buyer has, *i.e.*, *a right subject to the seller's right of stoppage;* though the seller's right of stoppage may be well *given effect to* by a payment to him of the sub-buyer's purchase-money, though such right still remains one against the *goods*, and not also (as seems to have been the view in *Ex parte Golding*) against the purchase-money.

It is noticeable that the case of *Hawes* v. *Watson*, 2 B. & C. 540, quoted by James, L. J., in *Ex parte Golding*, as justifying his view, was rather a case where the seller had *estopped* himself from maintaining his *lien* against a sub-buyer, or, at any rate, where the

(*x*) Per Lord Blackburn in *Kemp* v. *Falk*, *infrà*, at p. 584; Benj. (2nd ed.) p. 719; but cf. per Lord Fitzgerald, in *Kemp* v. *Falk*, at p. 590.

(*y*) *Ex parte Golding*, *Davis & Co.*, 13 Ch. D. 628.

(*z*) Per Lord Selborne in *Kemp* v. *Falk*, 7 Ap. Ca. 573; but cf. *contra*, per Cotton, L. J., in *Ex parte Golding*, *Davis & Co.*, *suprà;* and per Bramwell, L. J., in *Ex parte Falk*, 14 Ch. D. 446.

warehouseman had, by an attornment to the sub-buyer, done so.

103. Any act relied upon as a stoppage in transit must be done with that intent, and by virtue of a right in respect of the goods paramount to that of the buyer (*a*), though it may in fact be done with the latter's consent (*b*).

Illustrations.—1. A. orders goods of B., who consigns them by a carrier to A. A., being in insolvent circumstances, writes to B., informing him of his situation, and declining the goods. B. then gives the carrier notice to stop. This stoppage is good. *Mills* v. *Ball*, 2 B. & P. 457.

2. A., the agent of B., the seller of goods, with the consent of C., the buyer, who is bankrupt, takes possession of the goods in order to sell them and apply the proceeds towards bills drawn upon C. for the price. This is not a stoppage, as it was not intended as such, and was not done adversely to C. *Siffkin* v. *Wray*, 6 East, 371.

104. The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier, or other depository who holds possession thereof (*c*).

The right to stop includes a right to demand redelivery: *The Tigress*, 32 L. J. Adm. 97; and a carrier who, after a valid stoppage, delivers to the consignee, is guilty of a conversion: *Pontifex* v. *M. R.*, 3 Q. B. D. 23.

In *Ex parte Watson*, 5 Ch. D. 35, the demand by the seller of the bill of lading was held a good stoppage.

(*a*) Per cur. in *Phelps* v. *Comber*, 29 Ch. D. 822, 824, 826.

(*b*) *Mills* v. *Ball*, 2 B. & P. 457.

(*c*) Per cur. in *Whitehead* v. *Anderson*, 9 M. & W. 518; per Lord Blackburn in *Kemp* v. *Falk*, 7 Ap. Ca. 585. Whether notice sent to consignee sufficient, *quære*. *Phelps* v. *Comber*, 29 Ch. D. 813.

105. Such notice as aforesaid may be given, either to the person who has the immediate possession of the goods, or to the principal, whose servant or agent has such possession. In the latter case, the notice must be given at such a time, and in 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 (*d*).

106. The seller's right of stoppage is subject to the particular lien of the carrier for the carriage of the goods, but is paramount to any general lien which he may have for a balance of account as against the consignee (*e*), and also to the rights of any execution creditor of the latter (*f*).

107. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods has been paid, but does not entitle him to repudiate the contract (*g*).

108. A part delivery of the goods, intended by both parties to operate as a delivery of the whole, (proof of which intention shall lie on the party con-

(*d*) *Whitehead* v. *Anderson*, 9 M. & W. 511; per Lord Blackburn in *Kemp* v. *Falk*, 7 Ap. Ca. 585, dissenting from remarks of James and Bramwell, L.JJ., in court below, 14 Ch. D. 450, 455; cf. also, *Bethell* v. *Clark*, 19 Q. B. D. 553.

(*e*) *Oppenheim* v. *Russell*, 3 B. & P. N. R. 42; particularly per Chambre, J.; cf. analogous case of *Mercantile, &c. Bank* v. *Gladstone*, L. R. 3 Ex. 233, which, however, was not really a case of stoppage in transit.

(*f*) *Smith* v. *Goss*, 1 Camp. 282; cf. *Clark* v. *Lynch*, 4 Daly, (Am.) 83; *semble*, per Chambre, J., in *Oppenheim* v. *Russell*, *supra*.

(*g*) *Wentworth* v. *Outhwaite*, 10 M. & W. 428, *diss.* Abinger, C. B.; per Lord Blackburn in *Kemp* v. *Falk*, 7 Ap. Ca. at p. 581; per Cairns, L. J., in *Schotsman's case*, 2 Ch. 332.

tending for such a complete delivery), has the same effect for the purpose of divesting the seller's lien, or of terminating the transit of the goods, as a delivery of the whole; but a part delivery, intended merely as a separation of such part, does not operate as a complete delivery (*h*).

Explanation.—Where the thing sold is an article, consisting of several parts, an intention to make and receive a complete delivery thereof may [perhaps] be inferred from the delivery of an essential part thereof (*i*).

Illustrations.—1. A. sells and consigns goods to B., and takes a bill of lading making the goods deliverable to B. on his paying freight. C., the master of the vessel, delivers part of the goods to B., who pays part of the freight, but does not tender the rest. This is not a constructive delivery of all the goods, as neither party so intended it, the whole freight not being received. *Ex parte Cooper*, 11 Ch. D. 68.

2. A. sells to B. goods then lying at the wharf of C., and gives B. a delivery order on C. C. afterwards, on B.'s order, delivers a small portion of the goods to D., a sub-buyer from B. This part delivery is not a constructive delivery of the whole of the goods, as B. only intended to take delivery of so much as would satisfy his contract with D. *Tanner* v. *Scovell*, 14 M. & W. 28.

3. A. sells and ships eighty quarters of wheat to B., who accepts a bill for the price. B. being in insolvent circumstances assigns the wheat to C., an assignee for the general benefit of B.'s creditors. C., on the arrival of the wheat, takes samples, and sells seventy quarters, which are delivered to the buyers. The transit of the wheat is determined, as C., being an assignee for B.'s creditors, intended by his acts to take possession of *all* the wheat. *Jones* v. *Jones*, 8 M. & W. 431.

109. The transfer by the seller to the buyer of a bill of lading, or other document of title to the

(*h*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; per Willes, J., in *Bolton* v. *L. & Y. Ry. Co.*, 1 C. P. 431; per Lords Selborne, Blackburn, and Fitzgerald in *Kemp* v. *Falk*, 7 Ap. Ca. at pp. 579, 586, 589; *Ex parte Cooper*, 11 Ch. D. 68.

(*i*) Per Cotton, L. J., in *Ex parte Cooper*, *supra*.

goods, shall have such effect upon the seller's lien and right of stoppage in transit as is mentioned in the next following sub-sections, that is to say—

(1) The transfer of a bill of lading from the seller to the buyer divests the seller's lien, as between him and the buyer (*k*), but does not destroy his right of stoppage as against the latter (*l*); but neither of such rights are affected by the transfer of any other document of title (*m*).

(2) The lawful transfer of any bill of lading, or other document of title (*n*), by the buyer, being a transferee thereof from the seller, to a second transferee in good faith and for value, divests the seller's lien and right of stoppage in transit (*o*).

In the above case an antecedent debt is sufficient value (*p*).

(3) Upon the transfer of a document of title by the buyer, by way of pledge, the seller's right of stoppage is defeated to the extent of the claim of the pledgee (*q*), but the seller may compel the latter to satisfy such claim

(*k*) Benj. (2nd ed.) p. 673.

(*l*) *Ex parte Cooper*, 11 Ch. D. 68; *Brindley* v. *Chilgwin Slate Co.*, 55 L. J. Q. B. 67; Benj. *supra*. But the transfer to the buyer of a bill of lading may sometimes be *evidence* that the ship in which the goods are to be shipped was intended to be the destination of the goods. Cf. per Cave, J., in *Bethell* v. *Clark*, 19 Q. B. D. at p. 562.

(*m*) *Akerman* v. *Humphrey*, 4 Bing. 522; *McEwen* v. *Smith*, 2 H. L. 309; *Pooley* v. *G. E. R.*, 34 L. T. 537; *Farina* v. *Home*, 16 M. & W. 116.

(*n*) Cf. note (*t*) to sect. 93, *supra*.

(*o*) Factors Act, 1877, s. 5; Benj. (2nd ed.) pp. 719, 720. And this though the buyer obtained the bill of lading by fraud, if with seller's assent: *Pease* v. *Gloahec*, 1 P. C. 219.

(*p*) *Leask* v. *Scott*, 2 Q. B. D. 376. On this case, see the remarks after Explanation 2 hereunder.

(*q*) *Kemp* v. *Falk*, 7 Ap. Ca. 573.

against the buyer first out of any other goods or securities in his hands, and available against the latter (*r*).

Explanation.—A transfer of a document of title is said to have been accepted in good faith by the transferee where the latter had no notice of any circumstances which rendered the transfer otherwise than fair and honest. Mere notice that, at the time of the transfer, the goods had not been paid for is insufficient (*s*).

Spalding v. *Ruding*, *infrà*, appears, at first sight, inconsistent with *Leask* v. *Scott*, 2 Q. B. D. 376. In so far as the former case may be taken as deciding that an antecedent debt cannot be a good consideration for the transfer of a bill of lading, so as to divest the seller's right of stoppage as against the transferee, it is inconsistent with *Leask* v. *Scott*, and so far overruled. But *qy.* whether this was the true *ratio decidendi?* It is noticeable that in the former case there was *no evidence* that the existing general balance of account was treated in any way by the parties *as the consideration* for the transfer; indeed, the written memorandum refers only to the *present* advance of 1,000*l.* In *Leask* v. *Scott*, the antecedent debt was the essential consideration. On the above ground, the two cases are, on their respective *facts*, well distinguishable.

Illustrations.—1. A. buys goods of B., and consigns them to C., his agent. A. indorses the bill of lading to D. to secure an advance. During the transit, C. sells the goods to E. Before delivery to E., B. stops the goods. C. then hands to D. the proceeds of the sub-sales. B. is entitled to the balance of the money after D.'s claim is satisfied. *Kemp* v. *Falk*, 7 Ap. Ca. 573.

2. A. sells and consigns goods worth 1,800*l.* to B. B. transfers

(*r*) *In re Westzinthus*, 5 B. & Ad. 817.

(*s*) Per cur. in *Cuming* v. *Brown*, 9 East, at p. 516; cf. also, *Rodger* v. *Comptoir d'Escompte*, L. R. 2 P. C. 393; and per Lord Ellenborough in *Vertue* v. *Jewell*, 4 Camp. 33.

the bill of lading to C. to secure an advance of 1,000*l.* B. becomes insolvent and A. stops the goods. A. is entitled thereto after paying 1,000*l.* to C. *Spalding* v. *Ruding*, 6 Beav. 376; 15 L. J. Ch. 374.

3. A. sells and ships to B. twenty-three casks of oil, and sends him the bill of lading. B. indorses the bill to C., as security for an advance, and also as further security for previous advances made on other goods of B., then in C.'s possession. A. stops the goods in transit. A. is entitled to call upon C. to satisfy his debt out of the proceeds of the goods of B. previously in C.'s possession before he realizes the casks of oil. *In re Westzinthus*, 5 B. & Ad. 817 (*t*).

(*t*) Cf. *Ex parte Alston*, 4 Ch. 168; followed in *Ex parte Salting*, 25 Ch. D. 148.

CHAPTER VI.

THE BREACH OF THE CONTRACT, AND HEREIN OF DAMAGES.

110. The contract of sale is not voidable on the part of the seller by reason only of the buyer's default in payment(*a*), or acceptance(*b*), or by reason only of the buyer's insolvency(*c*).

But a notice by the buyer of his insolvency, and an omission on his part, or on the part of his trustee, within a reasonable time to tender in cash the price of the goods, is relevant to prove an intention to abandon the contract(*d*).

Illustrations.—1. A. sells to B. six stacks of oats, payment to be made on the particular day. B. does not pay on the very day, but afterwards tenders the price. A. then re-sells the oats. A. is liable to B. for conversion of the goods, as the contract still exists, and A.'s lien is gone by tender of the price. *Martindale* v. *Smith*, 1 Q. B. 389.

2. A. sells to B. fifty quarters of oats at 45*s.* a quarter. B. makes default in carrying them away, and A. re-sells at 51*s.* a quarter. A. is liable to B. for non-delivery. *Greaves* v. *Ashlin*, 3 Camp. 426.

3. A. agrees to sell B., by specified instalments during certain months, a quantity of straw, payment to be made on delivery.

(*a*) *Martindale* v. *Smith*, 1 Q. B. 389; *Mersey, &c. Co.* v. *Naylor & Co.*, 9 Q. B. D. 648; 9 Ap. Ca. 434.

(*b*) *Greaves* v. *Ashlin*, 3 Camp. 426.

(*c*) *Boorman* v. *Nash*, 9 B. & C. 145.

(*d*) Per cur. in *Ex parte Chalmers*, 8 Ch. 289; followed in *In re Phœnix, &c. Co.*, 4 Ch. D. 108; *Bloomer* v. *Bernstein*, 9 C. P. 588; per cur. in *Morgan* v. *Bain*, 10 C. P. 15; *Ex parte Stapleton*, 10 Ch. D. 586.

After several instalments had been delivered and paid for, B. expressly refuses to pay for the next instalment, and insists on keeping one instalment in hand. A. may repudiate the contract, as B.'s refusal evinced an intention no longer to be bound by the contract. *Withers* v. *Reynolds*, 2 B. & Ad. 882.

4. A. agrees to sell B. 200 tons of iron, deliverable on the 1st of April. Before that date B. becomes insolvent, and informs A. of this fact. In May, iron having risen, B. demands delivery. A. may repudiate the contract, as the notice of B.'s insolvency, coupled with the fact that B. had not earlier offered to take delivery, and tendered cash, was an offer to rescind which A. might accept. *Morgan* v. *Bain*, 10 C. P. 15.

111. The contract of sale is not voidable by the buyer by reason only—

(1) Of the wrongful retaking of the goods out of his possession by the seller (*e*); or

(2) The wrongful re-sale of the goods by the seller (*f*); or

(3) Of the breach by the seller, where the goods are deliverable by instalments, by non-delivery of any instalment (*g*); unless from such breach, coupled with other facts, may be inferred an intention on the part of the seller to abandon the contract (*h*).

Illustrations.—1. A. sells goods to B., who accepts a bill therefor; and, after delivery, A. forcibly retakes and re-sells them. B. must nevertheless pay the bill, as, the original contract not being discharged by A.'s conduct, the consideration for his acceptance has not failed. *Stephens* v. *Wilkinson*, 2 B. & Ad. 320 (*i*).

2. A. sells B. a quantity of wool, and, on B.'s default in acceptance, re-sells it at a loss. B. is, notwithstanding A.'s re-sale, liable to A. for non-acceptance. *MacLean* v. *Dunn*, 4 Bing. 722.

(*e*) *Gillard* v. *Brittan*, 8 M. & W. 575; per cur. in *Page* v. *Cowasjee*, 1 P. C. 146.

(*f*) *Page* v. *Cowasjee*, *suprà*; per cur. in *Aeebal* v. *Levy*, 10 Bing. 385.

(*g*) *Jonassohn* v. *Young*, 4 B. & S. 296.

(*h*) Cf. the law laid down in *Mersey, &c. Co.* v. *Naylor & Co.*, 9 Ap. Ca. 434.

(*i*) Cf. also, per Lord Ellenborough and Bayley, J., in *Groning* v. *Mendham*, 5 M. & S. 190, 191.

3. A. agrees to sell to B., by instalments, as many coals of a particular description as a steam vessel to be sent by B. could fetch in nine months. On the first voyage A. delivers a cargo of inferior coal, and also detains B.'s ship an unreasonable time; and B. refuses to receive any more. B. is liable for non-acceptance. *Jonassohn* v. *Young*, 4 B. & S. 296.

112. If there be an express provision in the contract that, upon default made by the buyer, the seller may re-sell the goods, a re-sale duly made operates as a discharge of the contract (*j*).

In such case, if the goods on a re-sale produce an amount in excess of the contract price, the seller is entitled thereto; if they produce a deficit, the buyer is liable for the amount thereof, and the expenses of the re-sale (*k*).

Illustration.—A. sells B. goods for 79*l.*, a condition of the sale being that upon B.'s default the goods may be resold. B. makes default, and A. re-sells for 63*l.* A. cannot recover 79*l.*, the original price, as the contract is discharged; but (*l*) [*semble*], he may 16*l.*, and the expenses of the re-sale. *Lamond* v. *Duvall*, 9 Q. B. 1030.

113. A buyer, who becomes insolvent before the ownership of the goods has passed to him, may, with the assent of the seller, reject the goods and rescind the contract (*m*); or, where the ownership has passed, may refuse to accept delivery thereof, so as to prolong the transit; and in each case his conduct will not amount to a fraudulent preference within the meaning of the bankruptcy law (*n*).

(*j*) *Lamond* v. *Duvall*, 9 Q. B. 1030; 16 L. J. Q. B. 136; approving the dictum of the court in *Hagedorn* v. *Laing*, 6 Taunt. 162.

(*k*) Benj. (2nd ed.) pp. 653, 654.

(*l*) Cf. the dicta in the case.

(*m*) *Nicholson* v. *Bower*, E. & E. 172; 28 L. J. Q. B. 97. *Secus*, after the ownership has passed: *Barnes* v. *Freeland*, 6 T. R. 80; Benj. (2nd ed.) pp. 403, 404, 715.

(*n*) *Bartram* v. *Farebrother*, 4 Bing. 579; *Bolton* v. *Lanc. & Y. R. Co.*, 1 C. P. 431; Benj. *supra*.

114. In the case of a breach by the seller by non-delivery, or by the buyer by non-acceptance, of the goods contracted for, the buyer or the seller, as the case may be, may recover, as compensation, the difference between the contract price and the market price, or (in default of a market) other value, of the goods at the date appointed for delivery or acceptance respectively (*o*).

Explanation.—The value of the goods, where there is no market, may be determined by the price at which they were resold, within a reasonable time and under reasonable circumstances, by the seller (*p*) or the buyer (*q*) to a third person; or by the price which the buyer, acting reasonably in that behalf, may have had to pay for the best substitute for the goods procurable (*r*).

The damages may, however, be mitigated, in the case of a breach by a prospective repudiation of the contract, where the party having the cause of action, and who has accepted such repudiation, has had an opportunity of lessening the effect of the breach. Per cur. in *Frost* v. *Knight*, L. R. 7 Ex. 113; and in *Roper* v. *Johnson*, 8 C. P. 167.

In the absence of more relevant evidence of value, the value of the goods at an adjacent place may be taken as the basis. Per cur. in *Durst* v. *Denton*, 47

(*o*) Per cur. in *Barrow* v. *Arnaud*, 8 Q. B. 609, 610; *Boorman* v. *Nash*, 9 B. & C. 145; *Leigh* v. *Paterson*, 8 Taunt. 540; 2 Moo. 588. For the definition of a market, cf. per James, L. J., in *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. 20. And cf. also, per cur. in *Kountz* v. *Kirkpatrick*, 72 Penn. 376; and 3 Pars. on C. (7th ed.) pp. 222, 223.

(*p*) *Dunkirk Colliery Co.* v. *Lever*, 41 L. T. 633; *Greaves* v. *Ashlin*, 3 Camp. 426.

(*q*) *Peterson* v. *Eyre*, 13 C. B. 353, per Maule, J.; *Stroud* v. *Austin*, 1 Cab. & Ell. 119; per Brett, L. J., in *Grebert Borgnis* v. *Nugent*, 15 Q. B. D. 89, 90.

(*r*) *Hinde* v. *Liddell*, L. R. 10 Q. B. 265; *Stroud* v. *Austin*, *supra*.

N. Y. 167, and *Gregory* v. *McDowell*, 8 Wend. 435. In *Stroud* v. *Austin*, *supra*, a re-sale immediately after the contract was held relevant evidence of the value of the goods two months afterwards, the seller not showing any variation in value.

In the case of *Elliott* v. *Hughes*, 3 F. & F. 387, it was held at Nisi Prius, on the analogy of actions for non-replacement of stock, that the buyer, *having prepaid the price*, was entitled to recover the highest value of the goods up to the date of trial. *Sed quære;* see the subject discussed in Mayne on Dam. ch. 5. *Startup* v. *Cortazzi* (the best report of which is 5 Tyrwh. 697; cf. also, 2 C. M. R. 165) seems to throw no light upon the point, and is a confusing case at best.

Illustrations.—1. A. agrees to sell B. a quantity of cotton at $16\frac{3}{4}d.$ a lb., deliverable on August 31st, and fails to deliver. B. re-sells for $19\frac{3}{4}d.$ a lb. The price on the 31st was $18\frac{1}{4}d.$ a lb. B. can recover the difference between $16\frac{3}{4}d.$ and $18\frac{1}{4}d.$ a lb. from A. *Williams* v. *Reynolds*, 6 B. & S. 495.

2. A. agrees to purchase of B. a quantity of corn, the corn to be delivered at a certain place. Before its arrival, A. repudiates the contract, but B. tenders the corn on its arrival. The difference between the contract price and market price of the corn at the date of A.'s repudiation is 93*l.*; at the time of tender it is 218*l.* B. may recover 218*l.* *Philpotts* v. *Evans*, 5 M. & W. 475 (*s*).

3. A. agrees to buy of B. a quantity of iron, deliverable during a particular month. A. makes various requests to B. to allow a postponement of delivery, to which B. assents. B. may recover the difference between the contract price and the market price of the iron, calculated at a reasonable time after A.'s last request for postponement (*t*). *Hickman* v. *Haynes*, 10 C. P. 598.

4. A. agrees to sell B. 2,000 shirtings, deliverable by a certain date, but before that date says he cannot deliver in time, whereby B. is compelled (there being no market for that particular description of shirting) to buy shirtings at an excess in price of 137*l.* 10*s.*, the shirtings being worth 87*l.* 10*s.* more than those contracted for. B. may recover from A. 137*l.* 10*s.*, and not only the difference

(*s*) Cf. for converse case, *Leigh* v. *Paterson*, 8 Taunt. 540.

(*t*) Cf. *Ogle* v. *Vane*, L. R. 3 Q. B. 272.

between that sum and 87*l.* 10*s.* *Hinde* v. *Liddell*, L. R. 10 Q. B. 265.

115. Where goods, under a contract of sale, are deliverable by instalments, the date of delivery of each instalment is, in the case of breach by either party, and for the purpose of estimating the damages, considered a separate date of performance with respect of each instalment (*u*).

Illustrations.—1. A. agrees to sell to B. 500 tons of iron, deliverable by three instalments during three successive months. Before the time of delivery of the first instalment A. renounces the contract, but B. sues him at the end of the three months. The difference between the contract and market price of the iron at the end of the third month is 257*l.* 10*s.*; the sum of the difference of each instalment, calculated at the end of each month, is 109*l.* 4*s.* B. can recover 109*l.* 4*s.* *Brown* v. *Muller*, L. R. 7 Ex. 319.

2. A. agrees to sell to B. 3,000 tons of iron, deliverable by instalments from May to August. In May A. repudiates the contract, which B. in June accepts, and B. sues in August. B. may recover the sum of the difference calculated or estimated at the end of the three months, unless A. can show that B. could have obtained similar goods elsewhere in the meantime. *Roper* v. *Johnson*, L. R. 8 C. P. 167.

116. Upon a non-delivery by the seller of an article which was ordered for a particular purpose known to him, the buyer may, where there is no market for similar articles, recover the value of the profits which he would have gained by the application of the article to such purpose (*x*); or (if the seller were aware of no particular purpose) the

(*u*) *Brown* v. *Muller*, L. R. 7 Ex. 319; *Roper* v. *Johnson*, 8 C. P. 167; *Ex parte Llansamlet Tin Plate Co.*, 16 Eq. 155; *Barningham* v. *Smith*, 31 L. T. 540.

(*x*) Per Grove, J., in *Thol* v. *Henderson*, 8 Q. B. D. 458; *Fletcher* v. *Taylour*, 17 C. B. 21; per Cairns, L. C., in *Ex parte Trent and Humber Co.*, 4 Ch. 117; *Hydraulic Eng. Co.* v. *McHaffie*, 4 Q. B. D. 670.

amount of his loss, not exceeding the value of the profits which he would have gained by the application of the article to any purpose, to which it was, to the knowledge of the seller, capable of being ordinarily applied (*y*).

Illustrations.—1. A. buys of B. a quantity of sheep skins for the purpose of fulfilling a sub-contract of sale, of which he informs B. B. fails to deliver, and there being no market for such goods, A. cannot buy elsewhere, and loses a profit of 34*l.* A. can recover 34*l.* from B. *Grebert Borgnis* v. *Nugent*, 15 Q. B. D. 85.

2. A. agrees to sell to B. the hull of a floating-boom derrick, which he supposes B. wants as a coal store (such being the ordinary use of the article), but which B. intends to put to a new purpose, of transhipping coals. A. delays delivery. B. would have lost 420*l.* profit had he intended the purpose supposed by A., but he, in fact, incurs greater loss. B. can recover 420*l.* from A. *Cory* v. *Thames Ironworks Co.*, L. R. 3 Q. B. 181.

117. Upon a non-delivery of goods bought, to the knowledge of the seller, for the purpose of fulfilling a sub-contract of sale, the damages recoverable by the buyer, if there be no market for similar goods, include, in addition to the buyer's loss of profit, a reasonable indemnity against the buyer's liability to the sub-buyer (*z*). Provided always, that—

(1) The seller is not liable for any particular damages or penalties, which may be provided for in the sub-contract, in the event of a

(*y*) *Cory* v. *Thames Ironworks Co.*, L. R. 3 Q. B. 181; cf. the late case of *De Mattos* v. *G. E. St. S. Co.*, 1 Cab. & Ell. 489.

(*z*) *Grebert Borgnis* v. *Nugent*, 15 Q. B. 85, quoting *Armstrong's case*, L. R. 9 Q. B. 473. And knowledge gained by parol is sufficient, though the sub-contract is not mentioned in a written contract of sale: *Sawdon* v. *Andrews*, 30 L. T. 23.

breach, unless he were aware of such a specific provision (*a*): and

(2) The amount of such damages or penalties is not, as such, recoverable by the buyer, but such amount is relevant to prove what is such a reasonable indemnity as aforesaid (*b*).

Explanation.—Knowledge by the seller of a general intention on the part of the buyer to resell, does not amount, within the meaning of this section, to a knowledge of any specific sub-contract of sale, so as to entitle the buyer to recover the loss of profits (*c*).

Illustration.—A. agrees to sell to B. 243 sheep skins for the purpose of fulfilling a sub-contract, of which A. is aware. A. delivers only forty-two skins, and B., there being no market, is compelled to pay his sub-buyer 28*l.* damages. This sum of 28*l.* may be recovered as damages by B. from A., if the court think the amount reasonable. *Grebert Borgnis* v. *Nugent*, 15 Q. B. D. 85.

118. When it is the duty of the buyer to remove the goods sold, the seller may recover from him the expenses of the keep or preservation of the goods after the expiration of a reasonable time for removal (*d*).

119. In the case of a breach by the seller, by the delivery of goods inferior in quality to those contracted for, the buyer is entitled, as compensation, to the amount of the difference between the value of the goods actually delivered and that of goods of the stipulated quality, at the time and place

(*a*) Per Brett, M. R., in *Grebert Borgnis* v. *Nugent*, *supra*.

(*b*) *S. C.*

(*c*) *Thol* v. *Henderson*, 8 Q. B. D. 457.

(*d*) *Greaves* v. *Ashlin*, 3 Camp. 426; *Dibble* v. *Corbett*, 5 Bosw. 202, Am. And the goods may also be sold by order of court: cf. *Bartholomew* v. *Freeman*, 3 C. P. D. 316, under Ord. L. r. 2.

appointed for delivery (*e*); and when the goods were ordered for a particular purpose, known to the seller, the buyer is entitled to be recouped the amount of any loss incurred by him by reason of the failure of such purpose, necessarily resulting from the inferiority of the goods delivered (*f*); and where such purpose was the fulfilment by the buyer of a sub-contract for the sale of the goods to a sub-buyer, such damages include the damages and costs of an action at the suit of the latter, by the buyer reasonably defended (*g*).

Illustration.—A. agrees to sell B. a quantity of Manilla hemp. On arrival the hemp is found to be unmerchantable, and B. sells it, and realizes seventy-five per cent. of the market price of undamaged hemp. B. may recover from A., in an action for breach of warranty, the twenty-five per cent. *Jones* v. *Just*, L. R. 3 Q. B. 197.

120. Upon a breach of warranty on the sale of a specific article, the buyer, if he have previously tendered it to the seller, may recover the expenses of its keep or preservation until a reasonable opportunity occurs for a re-sale (*h*).

(*e*) *Cassaboglou* v. *Gibbs*, 11 Q. B. D. 797; *Jones* v. *Just*, L. R. 3 Q. B. 197.

(*f*) *Bridge* v. *Wain*, 1 Stark. 504; *Randall* v. *Raper*, E. B. & E. 84. And damages will not necessarily result, where the inferiority of the goods can be detected before their application to the contemplated purpose: *Wagstaff* v. *Shorthorn Dairy Co.*, 1 Cab. & Ell. 324; per cur. in *Hammond* v. *Bussey*, *infrà*. When the contemplated purpose is the production from the goods of a new product, the measure of damages is the difference between the value of the actual and that of the contemplated product: *Randall* v. *Raper*, *suprà*.

(*g*) *Hammond* v. *Bussey*, 20 Q. B. D. 79. And the fact that the inferiority of the goods could only be detected after delivery to the sub-buyer, and that the buyer had only the word of the sub-buyer to rely upon, are relevant facts to prove the reasonableness of a defence: *S. C.* In *Wrightup* v. *Chamberlain*, 7 Scott, 598, the inferiority of the goods could be detected before litigation.

(*h*) *Caswell* v. *Coare*, 1 Taunt. 566;

121. Upon a breach by the seller by non-delivery of specific goods sold, the court or a judge may, at their or his discretion, order the seller to deliver such goods to the buyer, upon payment by the latter of the price, or any part thereof remaining unpaid (*i*).

2 Camp. 82; *Ellis* v. *Chinnock*, 7 C. & P. 169; *Chesterman* v. *Lamb*, 2 A. & E. 129; *McKenzie* v. *Handcock*, R. & M. 436. In *Watson* v. *Denton*, 7 C. & P. 85, where no attempt was made to sell the horse, the buyer recovered his expenses up to tender.

(*i*) 19 & 20 Vict. c. 97, s. 2.

CHAPTER VII.

MISCELLANEOUS.

122. In a sale of goods by auction, there is, in the absence of a contrary intention (*a*), a separate and distinct sale of the goods in each lot, the ownership thereof being transferred by the knocking down of each lot (*b*).

123. Subject to the provisions of the preceding section, a contract for the sale of several things at the same time, or otherwise as one transaction, amounts, in the absence of a contrary intention, to an entire contract for the whole of such goods, though separate prices may be fixed, or though some of the goods contracted for may not be then in existence (*c*); but a contract of sale, originally entire, may become divisible by reason of the buyer's acceptance, with the assent of the seller, of part of the goods (*d*).

Explanation.—The making by the parties of a written contract or memorandum embodying several sales, is a relevant fact to prove an intention that the whole transaction should be deemed one entire

(*a*) Cf. explanation to next section.

(*b*) *Roots* v. *Dormer*, 4 B. & Ad. 77; *Emmerson* v. *Heelis*, 2 Taunt. 38; *Payne* v. *Cave*, 3 T. R. 148; *Cousten* v. *Chapman*, L. R. 2 Sc. Ap. 250.

(*c*) When a lump sum is fixed, the case is stronger for entirety: cf. *Harman* v. *Reeve*, 25 L. J. C. P. 257; *Simmonds* v. *Carr*, 1 Camp. 360.

(*d*) Cf. cases in illustrations.

contract (*e*), within the meaning of this and the preceding section.

Illustrations.—1. A. goes to B.'s shop and buys a lot of goods, a separate price being fixed for each. Some of the goods are measured in his presence, some are marked by him, and some he assists in separating from a larger bulk. One account is made out, and on delivery A. asks for discount on the whole amount. This is an entire contract for the sale of all the goods. *Baldey* v. *Parker*, 2 B. & C. 37 (*f*).

2. A. goes to B.'s manufactory, and orders some ready-made lamps, and one lamp also to be manufactured. This is an entire contract for all the lamps. *Scott* v. *E. C. R. Co.*, 12 M. & W. 33.

3. A.'s traveller, B., calls upon C., and C. orders of him a cask of cream of tartar, and also offers to buy two chests of lacdye at a certain price. B. says he would write to A. as to the acceptance of C.'s offer for the lacdye. The contracts for the sale of the cream of tartar and of the lacdye are separate, as the latter was not complete till A. had made up his mind. *Price* v. *Lea*, 1 B. & C. 156.

4. A. orders of B. a quantity of plums and some raw and lump sugar. B. sends the plums and the raw sugar, and A. consumes the plums, but refuses to accept the raw sugar, as the lump sugar was not sent. As A. did not return both the plums and the raw sugar, he has rendered the contract divisible, and must pay for the raw sugar. *Champion* v. *Short*, 1 Camp. 53 (*g*).

5. A. agrees to sell B. 100 bags of hops, deliverable by a certain date. Before that date A. delivers an instalment of twelve, which B. keeps, and then A. demands the price of the twelve. B. is not bound to pay, as the contract was entire for the 100, and by retaining the twelve before the date appointed for delivery of the whole, B. has not necessarily accepted the twelve, so as to make the contract divisible. *Waddington* v. *Oliver*, 2 B. & P. N. R. 61 (*h*).

6. A. buys timber of B. at a certain place, and then goes with him to other places, at each of which he buys more timber. At

(*e*) *Bigg* v. *Whisking*, *infrà*; *Dykes* v. *Blake*, 4 B. N. C. 463 (sale by auction). And, of course, when the facts show that the object of the contract would be defeated unless it were considered an entire one, it will be so considered: cf. per Lord Ellenborough in *Champion* v. *Short*, *infrà*.

(*f*) Cf. *Elliott* v. *Thomas*, 3 M. & W. 170, overruling *Hodgson* v. *Le Bret*, 1 Camp. 233.

(*g*) Cf. *Tarling* v. *O'Riordan*, L. R. Ir. 2 C. L. 82.

(*h*) The converse case is *Oxendale* v. *Wetherall*, 9 B. & C. 386.

the last place a memorandum of all the sales is drawn up. This is an entire contract for all the timber. *Bigg* v. *Whisking*, 14 C. B. 195.

124. A bargain and sale of goods delivered on sale or return takes place, if and when the bailee—

(a) Retains them beyond the time limited for their return, or otherwise beyond a reasonable time in that behalf (*i*); or

(b) Deals with the goods in an unreasonable manner, or otherwise as an owner thereof (*k*).

The language used by the judges in some of the cases rather suggests the inference that they considered the transaction of "sale or return," and "sale on approval," as, *in its inception*, an absolute sale, subject to a right in the *buyer* to *rescind*. And this may be so, of course, in some cases. It is submitted, however, that, generally, the true view of the transaction is as stated by Mr. Benjamin (2nd ed. p. 49), that, in the first instance, there is a *bailment*, and superadded a *contingent sale*. Cf. note (*j*) to sect. 4, *suprà*. Denman, J., also seems to take this view: cf. *Elphick* v. *Barnes*, 5 C. P. D. 326; and cf. per cur. in *Hunt* v. *Wyman*, 100 Mass. 198.

125. A bargain and sale of goods delivered on trial, or on approval, becomes a bargain and sale thereof, if and when the bailee approve thereof, either expressly, or impliedly by retaining them

(*i*) *Harrison* v. *Allen*, 2 Bing. 4; *Gibson* v. *Bray*, 8 Taunt. 76; *Moss* v. *Sweet*, 16 Q. B. 493; *Ray* v. *Barker*, 4 Ex. D. 279. And as time is given the bailee to enable him *to test* the goods, the time runs from his *receipt* thereof, and not from the time of the delivery to a carrier for transmission to him: *Jacobs* v. *Hornbach*, 1 Times L. R. 419.

(*k*) Cf. per Bramwell, B., in *Head* v. *Tattersall*, L. R. 7 Ex. 7; *Ex parte Nevill*, 6 Ch. 397; per Jessel, M. R., in *Ex parte Wingfield*, 10 Ch. D. 593.

beyond the time limited for trial or approval (*l*), or otherwise beyond a reasonable time (*m*); or by dealing with the goods in an unreasonable manner, or otherwise as an owner thereof (*n*).

Illustration.—A. agrees to sell B. a horse on a month's trial. At the end of a fortnight B. says he does not like the price, whereupon A. asks B. to return the horse, but B. keeps him ten days longer, and then returns him. A. cannot sue B. for the price of the animal, unless A. and B. intended by the conversation to rescind the original bailment, and then to enter into an immediate bargain and sale. *Ellis* v. *Mortimer*, 1 N. R. 257.

126. Such a contract, as in either of the preceding sections mentioned, does not become a bargain and sale of the goods delivered by reason of the destruction (*o*) of, or any damage or injury (*p*) occurring to, the goods while in the custody of the buyer, without his act or default. But the buyer is [probably] liable for the price of the goods, if a return thereof becomes impossible by reason of the wrongful act or default of a third person (*q*).

127. When a person fraudulently procures another to supply goods to an insolvent third person, and afterwards obtains possession thereof, the seller may treat the transaction as a bargain

(*l*) *Blenkinsee* v. *Blaiberg*, 2 Times L. R. 36; *Andrews* v. *Belfield*, 2 C. B. N. S. 779; *Ellis* v. *Mortimer*, 1 N. R. 257; *Humphries* v. *Carvalho*, 16 East, 45; *Elphick* v. *Barnes*, 5 C. P. D. 326.

(*m*) *Swain* v. *Shepherd*, 1 M. & R. 223; *Beverley* v. *Lincoln Gas Co.*, 6 A. & E. 829.

(*n*) *Lucy* v. *Mouflet*, 5 H. & N. 229.

(*o*) *Elphick* v. *Barnes*, 5 C. P. D. 321.

(*p*) *Head* v. *Tattersall*, L. R. 7 Ex. 7. Cf. in America, *Carter* v. *Wallace*, 35 Hun, 189; *Hunt* v. *Wyman*, 100 Mass. 198.

(*q*) *Semble*, per cur. in *Ray* v. *Barker*, 4 Ex. D. 279.

and sale of the goods to such first-named person through the third person as his agent (*r*).

If the fraud consist in a representation concerning the credit, &c. of the third person, such representation must, of course, be in writing, according to 9 Geo. 4, c. 14, s. 6; and if such representation be the foundation of the seller's case, *semble* he could not recover the price of the goods from the person making the representation: cf. *Haslock* v. *Ferguson*, 7 A. & E. 86.

Illustration.—A. assists B., an insolvent person, in fraudulently purchasing goods from C.; B. hands the goods when delivered over to A. as an indemnity for a debt due to him. C. may recover the price of the goods from A. *Hill* v. *Perrott*, 3 Taunt. 274.

128. A judgment, in an action for the conversion or detention of goods, for their full value, followed by a satisfaction of such judgment, transfers the ownership of the goods to the defendant (*s*).

Illustrations.—1. A. recovers judgment against B. for the detention of a mare, and issues execution for its value, but this is stopped before sale by B.'s bankruptcy. The ownership of the mare is in A. *Ex parte Drake*, 5 Ch. D. 866.

2. A. recovers judgment against B. for the conversion of a bedstead, and receives as the damages the value thereof. B. afterwards sells it to C., whom A. sues for the conversion. A. cannot recover against C., as the ownership vested in B., who sold to C. *Cooper* v. *Shepherd*, 3 C. B. 266.

(*r*) *Biddle* v. *Levy*, 1 Stark. 20; *Hill* v. *Perrott*, 3 Taunt. 274; *Abbott* v. *Barry*, 2 B. & B. 369; *Wilson* v. *Hart*, 7 Taunt. 295. Per cur. in *Maspons Hermano y Mildred*, 9 Q. B. D. at p. 544; and Parke, B., in *Selway* v. *Fogg*, 5 M. & W. 84.

(*s*) *Brinsmead* v. *Harrison*, 6 C. P. 584, where cases are reviewed; *Ex parte Drake*, 5 Ch. D. 866; 25 W. R. 641; per Thesiger, L. J., in *Hiort* v. *L. & N. W. R. Co.*, 4 Ex. D. 199; *Marston* v. *Phillips*, 9 L. T. N. S. 289; *In re Scarth*, 10 Ch. 234. *Semble* the ownership is transferred as from the date of the wrongful act. Add. on Torts (5th ed.) p. 442.

129. The following agreements by the seller and the buyer are, or involve, wagering agreements, and are void, that is to say :—

(1) An agreement that the goods shall not be delivered, or the price thereof paid, but that the one party shall pay to the other the difference only between the contract and market price of the goods at the date appointed for delivery (*t*) ; and

(2) An agreement for sale, whereby the amount of the price, or the validity of the agreement, is to depend upon some uncertain event involving a wager (*u*).

Illustration.—A. agrees to sell B. a quantity of rags, and it is agreed that B. shall pay 6*s.* or 3*s.* per cwt., according as the price of former rags sold to B. (about which there is a dispute) was 5*s.* 9*d.* or 6*s.* Six shillings is more than the value of the rags, but 3*s.* is less. This agreement is void, as the transaction amounts to a bet, with the difference of 3*s.* as the stake. *Rourke* v. *Short*, 5 E. & B. 904 ; 25 L. J. Q. B. 196.

130. If the buyer purchase goods with the intention not to pay therefor, he commits a fraud upon the seller (*x*).

The fact that the buyer immediately resold the

(*t*) *Grizewood* v. *Blane*, 11 C. B. 588, explained per cur. in *Thacker* v. *Hardy*, 4 Q. B. D. 685 ; *Irwin* v. *Williar*, 110 U. S. 499 ; cf. also *Heiman* v. *Hardie*, 12 C. of S. Cas. 406, where fictitious sales were set off against fictitious purchases, and differences only paid.

(*u*) *Rourke* v. *Short*, 5 E. & B. 904 ; 25 L. J. Q. B. 196 ; *Brogden* v. *Marriott*, 3 B. N. C. 88 ; *Harper* v. *Crain*, 38 Am. R. 589. Cf. with these, *Crofton* v. *Colgan*, 10 Ir. C. L. R. 133, where the transaction was held *not* to be a wager, but amounted only to an ascertainment of the price.

(*x*) *Ex parte Whittaker*, 10 Ch. 446 ; *Load* v. *Green*, 15 M. & W. 216 ; *Noble* v. *Adams*, 7 Taunt. 59, explained per Park, J., in *Irving* v. *Motley*, 7 Bing. 343 ; and in America, *Belding* v. *Frankland*, 41 Am. R. 430.

goods at a reduced price (*y*); or that he gave in payment securities that he knew to be worthless(*z*): are relevant facts to prove such an intention as aforesaid.

Held, in *Loughnan* v. *Barry*, 5 Ir. R. C. L. 538, that, where payment is made by a cheque, which is dishonoured, the intention depends upon the fact whether the buyer, at the time of giving the cheque, had a reasonable ground of belief that there were funds to meet it; not whether he had grounds of belief, and did believe, that it would be in fact honoured.

Held, also, in America, that a judgment for the price of goods sold under a contract voidable on the ground of fraud, does not prevent the seller afterwards repudiating the sale, the fraud not having been in issue in the action, and there being, therefore, no *res judicata*. *Kraus* v. *Thompson*, 44 Am. R. 182.

131. If the buyer, at a sale by auction, persuade or prevent other intending buyers from bidding against him for the goods, or otherwise collude with them, with the object of stifling a due competition therefor, the sale is fraudulent as against the seller (*a*).

The mere agreement between two persons not to bid against each other does not amount to a fraud; *Heffer* v. *Martyn*, 36 L. J. Ch. 372, and *Chattock* v. *Muller*, 8 Ch. D. 177.

Held, per Gurney, B., in *Levi* v. *Levi*, 6 C. & P. 239, that persons who agree for a "knock out," are indictable for a conspiracy. And, *held*, in America,

(*y*) Cf. *Ferguson* v. *Carrington*, 9 B. & C. 59.

(*z*) *Noble* v. *Adams*, *suprà*; per Bayley, J., in *Camidge* v. *Allenby*, 6 B. & C. 382.

(*a*) *Fuller* v. *Abrahams*, 3 B. & B. 116; 6 Moore, 316, latter best report; and Story on Sales, s. 484.

in *Myers* v. *Dorman*, 34 Hun, 117, that an agreement between buyers *with intent* to stifle competition, is illegal: *secus*, if the agreement is *bonâ fide*, though competition be in fact stifled.

132. The use by the seller, at a sale by auction, without notice to the buyer, of pretended biddings, is fraudulent (*b*), except [perhaps] in the case hereunder stated.

It is doubtful how far, where the sale is not stated to be without reserve (*c*), though it may be a condition thereof that the highest bidder shall be the purchaser (*d*), the seller may employ one person only to bid on his behalf, where the circumstances of the case show that such person was employed solely to prevent a sale at an undervalue (*e*).

In America, in the case of *Peck* v. *List*, 48 Am. R. 498, all the English cases are reviewed, and the conclusion of the court amounted to this: that the secret employment of a person to bid was the gist of the fraud; and the rule was stated thus: that when the seller, or any person interested in the sale, and having a legal or moral authority to give an assurance to the puffer that he will not be held responsible for his bid, employs any person secretly to bid, the sale is fraudulent, though there be only a single bid, and though the puffer was employed to protect the sale, and in-

(*b*) Per Lindley, J., in *Parfitt* v. *Jepson*, 46 L. J. C. P. 529; *Thornett* v. *Haines*, 15 M. & W. 367; *R.* v. *Marsh*, 3 Y. & J. 331. The 30 & 31 Vict. c. 48, applies only to sales of *land*.

(*c*) Otherwise, it is fraudulent both at law and in equity; per Parke, B., in *Thornett* v. *Haines*, *suprà*; per cur. in *Warlow* v. *Harrison*, 1 E. & E. 295; per Lindley, J., in *Parfitt* v. *Jepson*, *suprà*.

(*d*) This at common law is without reserve; *Green* v. *Baverstock*, 14 C. B. N. S. 204; *Thornett* v. *Haines*.

(*e*) *Parfitt* v. *Jepson*; *Thornett* v. *Haines*; *Smith* v. *Clarke*, 12 Ves. 477. In *Woodward* v. *Miller*, 2 Coll. 279, and *Mortimer* v. *Bell*, 1 Ch. 10, the rule was held doubtful.

tended to bid only to a fixed price, and though the goods were in fact sold at a reasonable price.

133. In a sale by auction, which is expressed to be without reserve, the auctioneer is deemed to warrant to the highest *bonâ fide* bidder that the sale shall be without reserve(*f*).

134. A statement or stipulation in a contract of sale as to the time or place of shipment of the goods, is part of the description thereof, and a condition of the contract(*g*). Such condition will be deemed performed, in the absence of any usage or custom of trade in that behalf:—

(1) If the respective dates of the commencement and completion of the shipment fall within the specified period, although a bill of lading may not be given till afterwards(*h*); and

(2) [Perhaps] also, where the shipment of the goods takes place as one entire continuous transaction, which is finally completed within such period (*i*).

Held, per Court of Appeal of N. Y., in *Cunningham* v. *Judson*, 100 N. Y. 179, that, in the absence of an intention that shipment should be by or on behalf

(*f*) *Warlow* v. *Harrison*, 1 E. & E. 295. This, only if the goods are *put up*: they may, of course, be withdrawn; *Harris* v. *Nickerson*, L. R. 8 Q. B. 286.

(*g*) *Bowes* v. *Shand*, 2 App. Ca. 455; cf. in America, *Norrington* v. *Wright*, 115 U. S. 188; *Filley* v. *Pope*, *ib.* 213; and *Cleveland Rolling Mill* v. *Rhodes*, 14 Davis, 255. In *Buck* v. *Spence*, 4 Camp. 329, the goods were to be "dispatched."

(*h*) *Bowes* v. *Shand*, *suprà*. The taking of the bill of lading is relevant to prove the completion of the shipment; Per Lord Blackburn, *ibid.*

(*i*) *S. C.* and *Alexander* v. *Vanderzee*, 7 C. P. 530, which, however, is perhaps of doubtful authority; cf. *Bowes* v. *Shand*, per cur. As to the evidence of the completion of the shipment, cf. last note.

of the seller, the condition is fulfilled, though the goods tendered had been shipped by a third person, and afterwards purchased by the seller; see also per cur. in *Borrowman* v. *Free*, 4 Q. B. D. 500.

In *Gattorno* v. *Adams*, 12 C. B. N. S. 560, a statement in the contract that the goods were "shipped per . . . as per bill of lading, dated September or October," imputed a warranty only of the date *of the bill of lading*.

Illustrations.—1. A. agrees to sell to B. 600 tons of rice, to be shipped at Madras during the months of March or April. The cargo consists of 8,200 bags, which, with the exception of 50 bags only, are put on board in February. The 50 bags are put on board on the 3rd of March. Four bills of lading are signed; three in February, and the last on the 3rd of March. B. is not bound to accept the cargo, as the conditions as to shipment are not fulfilled, as the cargo is substantially shipped in February. *Bowes* v. *Shand*, 2 Ap. Ca. 455.

2. A. agrees to buy of B. a quantity of maize, for shipment in June. B. tenders a cargo, the shipment whereof had commenced on the 12th of May, and went on continuously until the bill of lading for the whole was given on the 4th of June. A. is [perhaps] bound to accept the cargo, as being a June shipment. *Alexander* v. *Vanderzee*, 7 C. P. 530.

135. A contract for the sale of a cargo is, in the absence of any evidence to the contrary, a contract for the sale of the entire load of the ship (*k*).

For the case of a sale of a cargo "as it stands," cf. *Coras* v. *Bingham*, 2 E. & B. 836; and cf. obs. to s. 61.

In *Levi* v. *Berk & Co.*, 2 Times L. R. 898, it was held that the essential term is "*cargo*," though there be also an estimate of capacity.

Morris v. *Levison*, 1 C. P. D. 155 (where the words "say about" added to "cargo" were held words of contract, and not of estimate), was the case of a charter-

(*k*) *Borrowman* v. *Drayton*, 2 Ex. D. 15; *Kreuger* v. *Blanck*, L. R. 5 Ex. 179; but cf. per Blackburn, J., in *Ireland* v. *Livingstone*, L. R. 5 H. L. 395; *Simond* v. *Braddon*, 2 C. B. N. S. 324.

party, and is not analogous: cf. per Archibald, J., *ibid.*

Illustration.—A. contracts to sell to B. a cargo of from 2,500 to 3,000 barrels of petroleum. A. ships 3,000 barrels on board a vessel, and then adds 300 other barrels for other persons to make up an entire cargo. Separate bills of lading are signed for the 3,000 and the 300 barrels. A. tenders to B. 3,000 barrels of this cargo. B. may reject them, as they do not constitute the whole cargo. *Borrowman* v. *Drayton*, 2 Ex. D. 15.

136. A contract for the sale of goods to arrive, or on arrival by a particular vessel by a certain time, or otherwise, does not, in the absence of a contrary intention (*l*), import a warranty on the part of the seller that the goods shall so arrive; but the contract is deemed to be dependent upon the double contingency of the arrival, in the ordinary course of navigation, within the time limited therefor, if any, of the vessel, and of the goods on board (*m*).

Explanation.—The contingency that the goods, the subject-matter of the contract, shall arrive, will [probably] be deemed to have been fulfilled by the arrival of such goods, though they may not have been consigned to the seller, or be under his control (*n*); but such contingency is not fulfilled by the arrival of goods, not the subject-matter of the contract, of similar description consigned to third persons (*o*).

(*l*) Cf. Benj. (2nd ed.) p. 463 *et seq.*; *Hale* v. *Rawson*, 4 C. B. N. S. 85; *Gorissen* v. *Perrin*, 2 C. B. N. S. 681; *Simond* v. *Braddon*, *ib.* p. 324.

(*m*) *Johnson* v. *Macdonald*, 9 M. & W. 600; cf. other cases in illustrations. This, of course, on the ground that the seller should have guarded against such an impossibility in fact, and, not having done so, was liable. Besides, he might make the contract possible by buying the goods from the other person.

(*n*) *Fischel* v. *Scott*, 15 C. B. 69.

(*o*) *Gorissen* v. *Perrin*, *suprà*.

Illustrations.—1. A. agrees to sell B. 50 tons of palm oil, to arrive by the M. The M. is loaded with the oil, but most of her cargo is subsequently transhipped, without the knowledge of A., into the W., which arrives with the oil. The M. also arrives with 7 tons. B. is not entitled to the oil in the W., as it did not arrive by the M.; nor to the 7 tons in the M., as the contract for the 50 tons was entire. *Lovatt* v. *Hamilton*, 5 M. & W. 639 (*p*).

2. A. agrees to sell B. all the oil on board the T. on arrival, delivery not to exceed a certain date. The T. arrives with the oil later. A. is not liable for non-delivery of the oil. *Alewyn* v. *Prior*, R. & M. 406.

3. A. agrees to sell to B. a quantity of tallow, on arrival in London ex the C. by a particular date. The C. is wrecked on the coast of Scotland, but A. could have transhipped the tallow, and brought it to London in time. A. is not liable for non-delivery of the tallow, as he was only bound if the tallow arrived in the ordinary course of navigation. *Idle* v. *Thornton*, 3 Camp. 274.

4. A. agrees to sell to B. the cargo of 400 tons per the M. of Aracan Neerensie rice, provided the same were shipped on his account. The M. arrives with Larong and Latoorie rice. A. is not liable to B. for non-delivery, as the sale was conditional on the arrival in the M. of Aracan rice, that being the description of goods contracted for. *Vernede* v. *Weber*, 1 H. & N. 11 (*q*).

5. A. agrees to sell to B. fifty cases of tallow, to be delivered to B. on the safe arrival of the C. The C. arrives with no tallow on board. A. is liable to B. for non-delivery, as the single contingency contemplated, *i.e.*, the arrival of the ship, is fulfilled. *Hale* v. *Rawson*, 4 C. B. N. S. 85.

6. A. agrees to sell to B. 100 casks of oil, expected to arrive by the R. from W. The R. arrives with 164 casks on board, but only thirty-four are consigned to A., the rest being consigned to others. A. is liable to B. for non-delivery of the 100 casks, as he specifically professed to deal with so much of the R.'s cargo. *Fischel* v. *Scott*, 15 C. B. 69 (*r*).

7. A. agrees to sell to B. 1,170 bales of gambier, stated in the contract to be then on passage from S., and expected to arrive by the C. and D. The C. and D. arrive with a short number of bales consigned to A., but having sufficient gambier consigned to

(*p*) Cf. also, *Boyd* v. *Siffkin*, 2 Camp. 326.

(*q*) Cf. with this case *Simond* v. *Braddon*, 2 C. B. N. S. 324, where a warranty was intended; and, in America, *Dike* v. *Reitlinger*, 23 Hun, 241, where there was in the contract an *express* warranty of quality superadded to the condition of arrival.

(*r*) Cf. *Fraser* v. *Harbeck*, 4 Rob. (Am.) 179.

others to make up the requisite quantity. A. is liable, the ships having arrived, and there being an express warranty that the goods were on board; but otherwise, *semble*, A. would not be liable, as the goods which he contracted to sell did not arrive. *Gorissen* v. *Perrin*, 2 C. B. N. S. 681 (*s*).

137. A stipulation, in a contract for the sale of goods to arrive, that the seller shall declare to the buyer the name of the vessel, is a condition precedent to the liability of the buyer (*t*).

(*s*) *Oppenheim* v. *Fraser*, 34 L. T. 524; and cf. the curious case of *Smith* v. *Myers*, L. R. 7 Q. B. 139, where the specific cargo contracted for was destroyed, and an equal amount of goods came by the ship mentioned in the contract.

(*t*) *Reuter* v. *Sala*, 4 C. P. D. 239; *Buck* v. *Spence*, 4 Camp. 329; *Graves* v. *Legg*, 9 Ex. 709. It is observable, however, that in the latter case there was an express plea that the goods were unsaleable unless the name of the vessel were declared.

APPENDIX A.

THE EFFECT OF A REJECTION OF THE GOODS BY THE BUYER.

I HAVE not been able to discover any English decision expressly defining (though there are various *dicta* on the subject) the principle and effect of the operation of a rejection by the buyer of the goods tendered, after acts done by the seller by way of appropriation.

There are two theories which may be adopted. *First*, that the buyer, in rejecting goods as not conforming to the contract, does so by virtue of an implied condition *subsequent*, enabling him to repudiate the sale and *revest* the ownership of the goods in the seller. *Secondly*, (which, it is submitted, is the correct view,) that the buyer, in so rejecting, is refusing his acceptance of goods *which have never become his property*, as he never assented to the sale of *those* goods.

The former theory appears to be adopted in some of the American States, particularly in Maryland and Massachusetts. (See Story on S., s. 421.) *Qy.*, whether Brett, J., in *Heilbutt* v. *Hickson* (7 C. P. at p. 456), is referring to the same view, when he speaks of "an *implied term* that the goods may, under certain circumstances, be returned." The constant use in the cases of the ambiguous phrase, "return of the goods," and the inaccurate one, "rescind the contract," further complicates the subject.

The question might easily become important in cases where the liability of a third person intervenes after the doing by the seller of acts of appropriation. Suppose, for instance, that, in *Beer* v. *Walker*, the rabbits had been delivered to the

railway company in an *unmerchantable* condition, and had during the transit been *lost*. To whom would the company be liable —to the seller or to the buyer? As the liability of the carrier must be fixed at the time of the loss (see per Pollock, C. B., in *Coombs* v. *B. & E. R. Co.*, 3 H. & N. 510), the question would arise for decision—in whom was the ownership vested *at that time?* and it would be immaterial to consider whether the buyer, by doing acts amounting to a rejection of the goods, might have *re-vested* the ownership in the seller.

It would seem that, on principle, a seller who has, under an authority given him by the buyer (see s. 43), done an act, by way of appropriation, to goods *not* conforming to the terms of the contract, has not duly pursued his authority: cf. Benj. (2nd ed.) p. 284, quoting *Cunliffe* v. *Harrison*, 6 Ex. 903.

Mr. Campbell (on S., at p. 387) takes this view, where he says:—"If the goods tendered are rejected, and properly rejected, by the buyer, I apprehend there can be no doubt that the position remains the same as if the vendor had done nothing under the contract. There is no specific appropriation, and no transfer of property." In other words, I take it that a seller, who has made such a defective appropriation, is in the position of a man who is *offering* goods under a *new* contract, or in the position of the seller on approval in *Swain* v. *Shepherd* (1 M. & Rob. 223), in which case Parke, J., says (the italics are mine):—"Where goods *of a fair merchantable quality* are forwarded in pursuance of a written order, *which binds the person giving the order to accept them*, the property passes to that person by the delivery to the carrier." And, in *Chapman* v. *Morton* (11 M. & W. 534), the same judge says:—"The subsequent circumstances of [the buyer] . . . . selling the cargo in his own name are very strong evidence of *his taking to* the goods . . . . *whereby the property in the goods passed to him.*" The other *dicta*, to the effect that acts of appropriation must be done with respect to goods answering to the contract, are—Per Bramwell, B., in *Browne* v. *Hare*, 3 H. & N. 484; per Martin, B., in *Langton* v. *Higgins*, 4 H. & N. 402; per Parke, B., in *Wait* v. *Baker*, 2 Ex. 1;

per Alderson, B., in *Chapman* v. *Morton*, *supra*, at p. 537; per Watson, B., in *Coombs* v. *B. & E. R. Co.*, *suprà*; per Lord Chelmsford, C., in *Couston* v. *Chapman*, L. R. 2 Sc. Ap. at p. 254; and per cur. in *Borrowman* v. *Free*, 4 Q. B. D. 500.

The point has been expressly decided, in accordance with the above principles, in America, in the case of *Ardsberg* v. *Latta*, 30 Iowa, 442. In that case the seller (the plaintiff) had dispatched the goods, the subject of the action, to the buyer on the latter's order, but the goods were admittedly not in accordance with the order. They were afterwards attached by the sheriff, at the suit of a creditor of the buyer. The seller brought *trover* against the sheriff, who pleaded that the goods were not the plaintiff's; but it was held that, *as the seller had not appropriated the proper goods to the buyer*, the goods *never became the property* of the latter, and the plaintiff could recover. Cf., also, *Mee* v. *McNider*, 39 Hun, 345.

Nevertheless, though the above principle may be the correct one, a case like that of *Beer* v. *Walker* (see sect. 77) presents some difficulty. It is to be observed that no allusion is made in that case by the learned judges to the question whether the ownership of the rabbits was or not vested in the buyer on delivery to the railway company; though the *dicta* of the court, that the buyer would have been bound to take the risk had the rabbits been deteriorated by any *exceptional* cause, would tend to show that they thought the ownership had then vested in him. Moreover, as it was expressly found that the rabbits were *sound* when consigned to the buyer, on the above principle the ownership was then transferred to him. But, nevertheless, he was held entitled to reject the rabbits on arrival. It is, therefore, material to consider on what principle he was so entitled. As the buyer took the risk of extraordinary accidents during the transit, and, subject thereto, the seller the risk of the goods arriving in a merchantable condition in the ordinary course of the transit, it is submitted that the court took a similar view of the case to that hypothetically suggested by Blackburn, J., in *Calcutta Co.* v. *De Mattos* (32 L. J. Q. B.

322); that is to say, the parties must be taken to have bargained that the rabbits should vest in the buyer, as owner, as soon as they were sent off; that then they should be sold and delivered; and yet that acceptance and payment should be incumbent on the buyer only on the contingency of the goods arriving in a merchantable condition.

Another way of explaining *Beer* v. *Walker* is this: that (although the special case expressly found that the goods were sound when they were delivered to the railway company) they were in fact, *quà their capability of being transmitted in a sound condition*, unsound. But this difficulty remains: that the court thought that the buyer should bear *some* risk of their transit; and it is not easy to see why *any* risk should have been cast upon him, as the seller agreed to send the goods to a distant place, except on the theory that the ownership of the rabbits had vested on consignment.

On the whole, it is submitted (assuming the principle, that a buyer, in rejecting goods, rejects what has never become his property, is correct) that *Beer* v. *Walker* must be treated as a case in which the goods were really *unsound* when consigned; or as an exceptional case, to be explained, as I have above suggested, on the authority of Blackburn, J., in *Calcutta Co.* v. *De Mattos*.

APPENDIX B.

WARRANTY.

The law, as stated in sects. 71 to 76, may be thus summarized, the principle in all cases being that the buyer is entitled to have delivered to him what he bargained for :—

1. The goods delivered must in all cases answer the description in the contract, as it is only for such goods that the buyer bargains.
2. When the goods contracted for are a mercantile commodity, the goods delivered must, where the buyer has had no opportunity of inspection, answer to their description in a *commercial sense*, that is, they must be merchantable; as the buyer bargains for such goods as generally understood in commerce, with such essential qualities as render them worth buying. Accordingly, merchantable quality is, in such cases, *part of the description* of the goods; but no other implied warranty of quality is superadded.
3. When the goods contracted for are not a mercantile commodity, there is no warranty of merchantable quality, as the parties are not dealing for goods as commonly known in commerce. See notes (*j*) and (*m*) to sect. 75, *suprà*.
4. When goods are ordered for a specified purpose, under such circumstances that the seller's judgment and skill are relied upon, the adaptability of the goods to such purpose is also part of the description.

5. When the buyer trusts to his own judgment, as, *e. g.*, where he defines the particular article, or kind of goods he requires, or the plan according to which they are to be made or supplied, the statement of the purpose for which they are required is treated only as the expression of the buyer's *motive* in buying, and such adaptability is not part of the description of the goods.
6. The use of a sample ordinarily negatives the implication that the goods (being, however, of the proper *description*) should be of any particular *quality;* but only so far as the buyer can judge of the bulk by the inspection of the sample. Accordingly, the implication of a warranty of merchantability is not rebutted with regard to defects *latent* in the sample.
7. In some cases it is also part of the description of the goods that they should be *home-made*, as where a manufacturer (who is not also a dealer) contracts to supply goods of the class which he manufactures; but no further warranty of superfine, or of average trade quality is ordinarily superadded.

Cf. the law generally laid down, per cur. in *Mody* v. *Gregson*, L. R. 4 Ex. 49; *Randall* v. *Newson*, 2 Q. B. D. 101; *Jones* v. *Just*, L. R. 3 Q. B. 197; and in the latest case of *Ipswich Gasworks Co.* v. *King*, 3 Times L. R. 100.

APPENDIX C.

Bull *v.* Robison and Beer *v.* Walker (ss. 60, 77).

Bull v. *Robison* decided that the buyer was bound to accept the goods, though unmerchantable on arrival at the place of delivery, where the deterioration was the *necessary* result of the transit, although the seller had contracted to deliver the goods at *their destination*. The inference from this decision is that, *à fortiori*, the buyer would be bound to accept, if the seller had contracted merely to *dispatch* the goods. The *dicta* in the case are to the effect that the seller would not have fulfilled his contract, had the deterioration been *unusual* or *unnecessary*.

Beer v. *Walker* decided that the buyer was not bound to accept goods which were unmerchantable on arrival, though the seller had contracted merely to dispatch them.

In this case the deterioration in transit was unexplained, and was assumed by the court to have taken place in the ordinary course of nature—the goods being rabbits.

The inference from this decision is that, *à fortiori*, the buyer would not have been bound to accept, had the seller contracted to make delivery at the destination.

The *dicta* are to the effect that the seller would have performed his contract by delivering the goods to the carrier in a merchantable condition (as it was found he did), had the subsequent deterioration been occasioned by any *exceptional* cause.

The general result appears to be that, when goods are to be sent to a distant place, the seller must deliver them so as to arrive in a merchantable condition at their destination in the ordinary course of transit, though he only contracted to *send them off;* but that this duty of his will be fulfilled if he deliver them to the carrier in a merchantable condition, (even though he agreed to deliver them at their destination,) the after-deterioration being *inevitable;* but that, if such subsequent deterioration is unusual or exceptional, he will or will not have fulfilled his duty (after delivery of the goods in a sound condition to the carrier), according as he contracted only to dispatch the goods, or to deliver them at their destination. See also, (on the question of the transfer of the ownership,) the discussion of *Beer* v. *Walker* in Appendix A.

There are some *dicta* of Lord Tenterden's, in *Ullock* v. *Reddelin*, which at first sight seem to conflict with the rule as laid down in the other two cases. But his lordship was speaking of an *accident* happening to the goods after their shipment; and this is consistent with *Beer* v. *Walker*, being an unusual or exceptional cause of loss. And, in such a case, the maxim *res perit domino* would apply; and the seller, having fulfilled his contract by dispatching the goods, would have no further liability: cf. sect. 48. Besides, the case was decided on another ground, viz., that the seller had *disregarded* the directions of the buyer as to the mode of dispatch.

29 Car. 2, c. 3 (*Statute of Frauds*).

Sect. 17. Be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares, and merchandises, for the price 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 of 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.

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9 Geo. 4, c. 14, s. 7 (*Lord Tenterden's Act*).

Whereas by an Act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for the Prevention of Frauds and Perjuries," it is, among other things, enacted, that [*reciting the statute*]. . . And whereas it has been held that the said recited enactment do[es] not extend to certain executory contracts for the sale of goods, which, nevertheless, are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactment to such executory contracts: Be it enacted, that the said enactment 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.

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