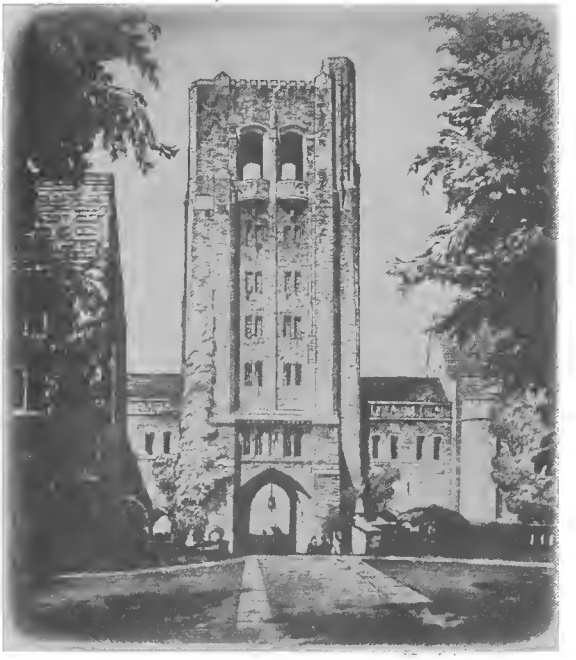
TOMPKINS & LEARY,
Attorneys and Counselors at Law,
SAVINGS BANK BUILDING,
ITHACA, N. Y.

Frank M. Leary.



BENJAMIN'S

Treatise on the Law

OF

SALE OF PERSONAL PROPERTY:

WITH REFERENCES TO THE

AMERICAN DECISIONS, AND TO THE FRENCH CODE AND CIVIL LAW.

Third Edition.

BROUGHT DOWN TO THE END OF THE YEAR 1883 (WITH THE AUTHOR'S SANCTION AND REVISION)

BY

ARTHUR BEILBY PEARSON, B.A.,
(*Of Trinity Hall, Cambridge*)

AND

HUGH FENWICK, BOYD,
(*Of Brasenose College, Oxford*)

OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

WITH AMERICAN NOTES BY JAMES M. KERR,

EDITOR OF "AMERICAN AND ENGLISH RAILROAD CASES," AND THE "AMERICAN AND ENGLISH CORPORATION CASES."

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*CHAPTER III. [*496]

ILLEGALITY.

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Section I. — AT COMMON LAW.

§ 654. The contract of sale, like all other contracts, is void when entered into for an illegal consideration or for purposes violative of good morals or prohibited by the lawgiver. The thing sold may be such as in its nature cannot form the subject of a valid contract of sale, as an obscene book or an indecent picture, which are deemed by the common law to be evil and noxious things. The article [*497] sold * may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly sold for the purpose, prohibited by law, of adulterating food or drink. Or the sale may be prohibited by statute for revenue purposes, or other motive of public policy. In all these cases the law permits neither party to maintain an action on such a sale.

§ 655. [It is important, however, to observe that although the Courts will not entertain an action either to enforce an unlawful agreement or to have an unlawful agreement set aside after it has been *executed*, yet if money has been paid, or goods have been delivered under an unlawful agreement, which remains in other respects *executory*, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods. The action is then founded, not upon the unlawful agreement, but upon its disaffirmance. Thus, in Taylor *v.* Bowers,[1] the plaintiff had assigned and delivered goods to one Alcock for the purpose of defrauding his (the plaintiff's) creditors. Alcock, without the plaintiff's assent, executed a bill of sale of the goods to the defendant, who was aware of the illegal transaction. It was held that the plaintiff was entitled to repudiate the transaction, and recover his goods from the defendant. Mellish L. J. said, "If money is paid, or goods delivered, for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal

[1] 1 Q. B. D. 291, C. A.; and see Symons *v.* Hughes, 2 Eq. 475, 479.

purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."

The law has very recently been laid down to the same effect by the Supreme Court of the United States.[2]]

§ 656. The subject will be considered in two parts: 1st, with reference to the common law; 2d, the Acts of Parliament.

At common law the rule is invariable: *Ex turpi causâ non * oritur actio.* And this rule is as applicable [*498] to a statement of defence as to a statement of claim; for, as it was said by Lord Mansfield in Montefiori *v.* Montefiori,[1] "no man shall set up his own iniquity as a defence any more than as a cause of action."[2] Sales are therefore void, and neither party can maintain an action on them, if the thing sold be contrary to good morals or public decency.[3]

[2] Spring Co. *v.* Knowlton, 103 U. S. (13 Otto) 49; bk. 26, L. ed. 347. See, also, Lowell *v.* Boston & L. R. R. Co., 40 Mass. (23 Pick.) 24; s. c. 34 Am. Dec. 33; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181; Stanley *v.* Chamberlin, 39 N. J. L. (10 Vr.) 565; Knowlton *v.* Congress & Empire Spring Co., 57 N. Y. 518; Merritt *v.* Millard, 4 Keyes (N. Y.) 208; Burkholder *v.* Beetem, 65 Pa. St. 96.

Where a contract is illegal the law will not assist either party to enforce it. — See Milton *v.* Haden, 32 Ala. 30; s. c. 70 Am. Dec. 523: Banking Co. *v.* Rantenberg, 103 Ill. 460; Penn *v.* Bornman, 102 Ill. 523; Gunderson *v.* Richardson, 56 Iowa, 56; Kinney *v.* McDermont, 55 Iowa, 674; s. c. 39 Am. Rep. 191; Pike *v.* King, 16 Iowa, 49; Ratcliffe *v.* Smith, 13 Bush (Ky.) 172; Durgin *v.* Dyer, 68 Me. 143; Horton *v.* Buffinton, 105 Mass. 399; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Way *v.* Foster, 83 Mass. (1 Allen) 408; Gregg *v.* Wyman, 58 Mass. (4 Cush.) 322; Robeson *v.* French, 53 Mass. (12 Metc.) 24; s. c. 45 Am. Dec. 236; Worcester *v.* Eaton, 11 Mass. 378; McWilliams *v.* Phillips, 51 Miss. 196; Coburn *v.* Odell, 30 N. H. (10 Fost.) 540; Smith *v.* Bean, 15 N. H. 577; Hooker *v.* De Palos, 28 Ohio St. 251; Kottwitz *v.* Alexander, 34 Tex. 689; Bank of United States *v.* Owens, 27 U. S. (2 Pet.) 539; bk. 7, L. ed. 508; Clark *v.* Protection Ins. Co., 1 Story C. C. 109.

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

[2] See the authorities collected in the notes to the leading case of Collins *v.* Blantern, in 1 Sm. L. C. (8th ed.) 387. See, also, Phalen *v.* Clark, 19 Conn. 421; s. c. 50 Am. Dec. 253; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Sampson *v.* Shaw, 101 Mass. 145; s. c. 3 Am. Rep. 327; Welch *v.* Wesson, 72 Mass. (6 Gray) 505; Gilliam *v.* Brown, 43 Miss. 645, 660; Roby *v.* West, 4 N. H. 290; s. c. 17 Am. Dec. 423; Fowler *v.* Scully, 72 Pa. St. 454; s. c. 13 Am. Rep. 699; Hipple *v.* Rice, 28 Pa. St. 406; Swan *v.* Scott, 11 Serg. & R. (Pa.) 155; Laing *v.* McCall, 50 Vt. 657; Hanauer *v.* Woodruff, 82 U. S. (15 Wall.) 439; bk. 21, L. ed. 224.

[3] Horton *v.* Buffinton, 105 Mass.

Sales of an obscene book,[4] and of indecent prints or pictures,[5] have been held illegal and void at common law.[6]

§ 657. Even where part only of the consideration of a contract is illegal, the whole contract is void and cannot be enforced. This was treated as established law by Tindal C. J. in Waite *v.* Jones,[1] on the authority of Featherston *v.* Hutchinson,[2] and was affirmed by all the judges who delivered opinions in the Exchequer Chamber in Jones *v.* Waite.[3]

400; Myers *v.* Meinrath, 101 Mass. 367; Sampson *v.* Shaw, 101 Mass. 145; s. c. 3 Am. Rep. 327; Lowell *v.* Boston & L. R. R. Co., 40 Mass. (23 Pick.) 24; s. c. 34 Am. Dec. 33; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181; Peterson *v.* Christensen, 26 Minn. 377; Adams *v.* Rowan, 16 Miss. (8 Smed. & M.) 624; Stanley *v.* Chamberlin, 39 N. J. L. (10 Vr.) 365; Knowlton *v.* Congress & Empire Spring Co., 57 N. H. 518; Merritt *v.* Millard, 4 Keyes (N. Y.) 208; Moore *v.* Adams, 8 Ohio, 372; s. c. 32 Am. Dec. 723; Roll *v.* Raguet, 4 Ohio, 400; s. c. 22 Am. Dec. 759; 7 Ohio, 76; Burkholder *v.* Beetem, 65 Pa. St. 496; Buck *v.* Albee, 26 Vt. 184; Foote *v.* Emerson, 10 Vt. 338; Dixon *v.* Olmstead, 9 Vt. 310; s. c. 31 Am. Dec. 629; Oscanyan *v.* Armes Co., 103 U. S. (13 Otto) 261; bk. 26, L. ed. 539; Western Union Tel. Co. *v.* Union Pac. R. R. Co., 1 McC. C. C. 418.

A vendee cannot recover for goods sold and delivered on a contract invalid because contrary to law. — Cameron *v.* Peck, 37 Conn. 555; Watrous *v.* Blair, 32 Iowa, 58; Concord *v.* Delaney, 58 Me. 309; Horton *v.* Buffinton, 105 Mass. 400; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Sampson *v.* Shaw, 101 Mass. 150; Walan *v.* Kerby, 99 Mass. 1; King *v.* Green, 88 Mass. (6 Allen) 139; Johnson *v.* Willis, 73 Mass. (7 Gray) 164; Forster *v.* Thurston, 65 Mass. (11 Cush.) 323; Lowell *v.* Boston & L. R. R. Co., 40 Mass. (23 Pick.) 24; s. c. 34 Am. Dec. 33; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181; Worcester *v.* Eaton, 11 Mass. 368; Greenwood *v.* Curtis, 6 Mass. 380; s. c. 4 Am. Dec. 145; Hoover *v.* Pierce, 26 Miss. 627; Butler *v.* Northumberland, 50 N. H. 33, 39; Prescott *v.* Norris, 32 N. H. 101; Boyce *v.* People, 55 N. Y. 644; Curtis *v.* Leavitt, 15 N. Y. 9; Tracy *v.* Talmage, 14 N. Y. 162; Schermerhorn *v.* Talman, 14 N. Y. 93; Steinfild *v.* Levy, 16 Abb. (N. Y.) Pr. N. S. 26; Kreiss *v.* Seligman, 8 Barb. (N. Y.) 439; s. c. 67 Am. Dec. 132; Trovigner *v.* McBurney, 5 Cow. (N. Y.) 253; Holman *v.* Johnson, Cowp. 341, 343; Ochse *v.* Wood (Eng.), 5 Cent. L. J. 217, 218.

[4] Poplett *v.* Stockdale, Ry. & Moo. 337.

[5] Fores *v.* Johns, 4 Esp. 97.

[6] As to immoral considerations, see *per* Lord Selborne in Ayerst *v.* Jenkins, 16 Eq. App. 282.

[1] 1 Bing. N. C. 656.

[2] Cro. Eliz. 199.

[3] 5 Bing. N. C. 341. See, also, Shackell *v.* Rozier, 2 Bing. N. C. 634; Hopkins *v.* Prescott, 4 C. B. 578; and Harrington *v.* The Victoria Graving Dock Co., 3 Q. B. Div. 549; Chandler *v.* Johnson, 39 Ga. 85; Tobey *v.* Robinson, 99 Ill. 222; Tenney *v.* Foote, 95 Ill. 99; Donallen *v.* Lenox, 6 Dana (Ky.) 89; Ladd *v.* Dillingham, 34 Me. 316; Deering *v.* Chapman, 22 Me. 488; s. c. 39 Am. Dec. 592; Dixie *v.* Abbott, 61 Mass. (7 Cush.)

§ 658. [But it is necessary to distinguish the case where part of the consideration for a contract is illegal, and the contract is rendered void in its entirety, from one where the contract is in its naturc separable into distinct parts, and the consideration for one part is illegal. In the latter case, if it is clear on the face of the agreement that the parties intended it to be carried into effect piecemeal, the illegality of the consideration for one part will not prevent the other legal part of the contract from being enforced.[1]]

610; Prescott *v.* Norris, 32 N. H. 101, 104; Coburn *v.* Odell, 30 N. H. (10 Fost.) 540; Carleton *v.* Woods, 28 N. H. 290; Clark *v.* Ricker, 14 N. H. 44; Hinds *v.* Chamberlin, 6 N. H. 225; Carleton *v.* Witcher, 5 N. H. 196; Roby *v.* West, 4 N. H. 285; s. c. 17 Am. Dec. 423; Rose *v.* Truax, 21 Barb. (N. Y.) 361; Jarvis *v.* Peck, 1 Hoff. Ch. (N. Y.) 479; Thayer *v.* Rock, 13 Wend. (N. Y.) 53; Ragnet *v.* Roll, 7 Ohio, 77; Filson *v.* Himes, 5 Pa. St. 452; s. c. 47 Am. Dec. 422; Kottwitz *v.* Alexander, 31 Tex. 689; Woodruff *v.* Hinman, 11 Vt. 592; s. c. 34 Am. Dec. 712; Hinesburgh *v.* Sumner, 9 Vt. 23; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 468; s. c. 4 Wash. C. C. 297.

Where an entire contract based upon one consideration is in part illegal the whole contract will be void. Hynds *v.* Hays, 25 Ind. 31; Kimbrough *v.* Lane, 11 Bush (Ky.) 556; Deering *v.* Chapman, 22 Me. 488; s. c. 39 Am. Dec. 592; Warren *v.* Chapman, 105 Mass. 87; Snyder *v.* Willey, 33 Mich. 483, 495; Carleton *v.* Witcher, 5 N. H. 196; Saratoga Bank *v.* King, 44 N. Y. 87, 91; Lindsay *v.* Smith, 78 N. C. 328; Widoe *v.* Webb, 20 Ohio St. 431; Appeal of Bredin, 92 Pa. St. 241, 247; s. c. 37 Am. Rep. 677; Filson *v.* Himes, 5 Pa. St. 452, 456; s. c. 47 Am. Dec. 422; Laing *v.* McCall, 50 Vt. 657; Woodruff *v.* Hinman, 11 Vt. 592; s. c. 34 Am. Dec. 712; Meguire *v.* Corwin, 101 U. S. (11 Otto) 108; bk. 25, L. ed. 899; Trist *v.* Child, 88 U. S. (21 Wall.) 441; bk. 22, L. ed. 623.

[1] Odessa Tramways Co. *v.* Merdel, 8 Ch. Div. 235, C. A. See, also, Boyd *v.* Eaton, 44 Me. 51; Towle *v.* Blake, 38 Me. 528; Deering *v.* Chapman, 22 Me. 488; Perkins *v.* Cummings, 68 Mass. (2 Gray) 258; Loomis *v.* Newhall, 32 Mass. (15 Pick.) 159; Adams *v.* Rowan, 16 Miss. (8 Smed. & M.) 624; Carlton *v.* Woods, 28 N. H. 291; Walker *v.* Lovell, 28 N. H. 138, 146; s. c. 61 Am. Dec. 605; Hinds *v.* Chamberlain, 6 N. H. 225; Erie R. R. Co. *v.* Union Locomotive & Ex. Co., 35 N. J. L. (6 Vr.) 240; Crawford *v.* Morrell, 8 Johns. (N. Y.) 195; Ohio *ex rel.* Laskey *v.* Board of Education, 35 Ohio St. 519, 527; Widoe *v.* Webb, 20 Ohio St. 431, 435; s. c. 5 Am. Rep. 664; Yundt *v.* Roberts, 5 Serg. & R. (Pa.) 139; Duchman *v.* Hagerty, 6 Watts. (Pa.) 65; Frazier *v.* Thompson, 2 Watts. & S. (Pa.) 235; Bates *v.* Watson, 1 Sneed (Tenn.) 376; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 468.

Unlawful sale. — A contract which the law makes illegal is utterly void. Tolman *v.* Johnson, 43 Iowa, 127; Bowen *v.* Weber (Iowa), 28 N. W. Rep. 600; Wilson *v.* Stratton, 47 Me. 120; Riley *v.* Jordan, 122 Mass. 231; Suit *v.* Woodhall, 113 Mass. 391; Hooker *v.* De Palos, 28 Ohio St. 251; Hanauer *v.* Doane, 79 U. S. (12 Wall.) 342; bk. 21, L. ed. 224; 2 Schouler on Pers. Prop. sec. 617. See Cameron *v.* Peck, 37 Conn. 555;

Watrous *v.* Blair, 32 Iowa, 58; Concord *v.* Delaney, 56 Me. 201; Horton *v.* Buffinton, 105 Mass. 400; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Sampson *v.* Shaw, 101 Mass. 145; s. c. 3 Am. Rep. 327; Peterson *v.* Christensen, 26 Minn. 377; Brackett *v.* Edgerton, 14 Minn. 174; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. (13 Otto) 261; bk. 26, L. ed. 536.

Mala in se and mala prohibita. — All invalid contracts are either *mala in se* or *mala prohibita*. White *v.* Buss, 57 Mass. (3 Cush.) 448, 450; Hill *v.* Spear, 50 N. H. 253; s. c. 9 Am. Rep. 205; Evans *v.* City of Trenton, 24 N. J. L. (4 Zab.) 764, 771; 2 Bouv. L. Dict. tit. Mala Prohibita (14th ed.) 91; 2 Schouler on Pers. Prop. sec. 617; Story on Sales, sec. 486; Greenhood on Pub. Pol. 1. Sales *mala in se* are such sales as are illegal at common law, and those *mala prohibita* are such as are prohibited by statute. In re Mapleback, Ex parte Caldecott, L. R. 4 Ch. Div. 150; Campbell on Sales, 145; Greenhood on Pub. Pol. 1; 2 Schouler on Pers. Prop. sec. 617. Any sale or contract which will tend to promote, advance, or carry into effect an object or purpose which is unlawful will be void. Hanauer *v.* Gray, 25 Ark. 350; More *v.* Bonnet, 40 Cal. 251; s. c. 6 Am. Rep. 621; Chandler *v.* Johnson, 39 Ga. 85; Tolman *v.* Johnson, 43 Iowa, 127; Wilson *v.* Stratton, 47 Me. 120, 126; Boyd *v.* Eaton, 44 Me. 51; s. c. 69 Am. Dec. 83; Ladd *v.* Dilingham, 34 Me. 316; Riley *v.* Jordan, 122 Mass. 231; Suit *v.* Woodhall, 113 Mass. 391; White *v.* Buss, 57 Mass. (3 Cush.) 448; Skinner *v.* Henderson, 10 Mo. 206; Pecker *v.* Kennison, 46 N. H. 488; Carlton *v.* Woods, 28 N. H. 290; Erie R. R. Co. *v.* Union Express Co., 35 N. J. L. (6 Vr.) 240; McKnight *v.* Devlin, 52 N. Y. 399; Nellis *v.* Clark, 20 Wend. (N. Y.) 24; Perkins *v.* Savage, 15 Wend. (N. Y.) 412; Hooker *v.* De Palos, 28 Ohio St. 251; Lange *v.* Werk, 2 Ohio St. 519; Goudy *v.* Gebhart, 1 Ohio St. 266; Filson *v.* Himes, 5 Pa. St. 452; s. c. 47 Am. Dec. 422; Kottwitz *v.* Alexander, 34 Tex. 689; Miller *v.* Larson, 19 Wis. 466; Hanauer *v.* Doane, 79 U. S. (12 Wall.) 342; bk. 20, L. ed. 439; Waite *v.* Jones, 1 Bing. N. C. 656; Crookshank *v.* Rose, 5 C. & P. 19; Hinde *v.* Gray, 1 Man. & Gr. 195; Campbell on Sales, 145, 146; 2 Schouler on Pers. Prop. sec. 618; Story on Sales, sec. 504.

Knowledge and participation. — Mere knowledge by the vendor of the intended unlawful use of the property by the vendee will not avoid the contract. Brickel *v.* Sheets, 24 Ind. 1, 6; Hedges *v.* Wallace, 2 Bush (Ky.) 442; Steele *v.* Curle, 4 Dana (Ky.) 381; Cheney *v.* Duke, 10 Gill & J. (Md.) 11; Webber *v.* Donnelly, 33 Mich. 469, 472; Michael *v.* Bacon, 49 Mo. 474; s. c. 8 Am. Rep. 138; Hill *v.* Spear, 50 N. H. 253; s. c. 9 Am. Rep. 205; Curtis *v.* Leavitt, 15 N. Y. 9; Tracy *v.* Talmage, 14 N. Y. 162; s. c. 67 Am. Dec. 132; Armfield *v.* Tate, 7 Ired. (N. C.) L. 258; Wallace *v.* Lark, 12 S. C. 576; s. c. 32 Am. Rep. 516; McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34; McKinney *v.* Andrews, 41 Tex. 363; Bishop *v.* Honey, 34 Tex. 245; Tuttle *v.* Holland, 43 Vt. 542; Gaylord *v.* Soragen, 32 Vt. 110; Hanauer *v.* Doane, 79 U. S. (12 Wall.) 342; bk. 20, L. ed. 439; Harris *v.* Runnels, 53 U. S. (12 How.) 79; bk. 13, L. ed. 901; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 468; Hodgson *v.* Temple, 5 Taunt. 181. Story on Sales, sec. 506; 2 Schouler on Pers. Prop. sec. 217. It must be shown that the vendor sold the goods for the purpose that the law should be violated or that he had some interest in its violation, or that he participated in some manner in the unlawful purpose. Distilling Co. *v.* Nutt, 34 Kans. 724, 730, 731; s. c. 10 Pac. Rep. 163.

Sale of goods to a public enemy with knowledge that they are to be used for war purposes is invalid. Milner

In Scott *v.* Gillmore,[2] a bill of exchange was held void where part of the consideration was for spirits sold in violation of the Tippling Acts. But in Crookshank *v.* Rose,[3]

v. Patton, 49 Ala. 423; Tatum *v.* Kelly, 25 Ark. 209; Railey *v.* Gay, 20 La. An. 158; Bank of New Orleans *v.* Matthews, 49 N. Y. 12; Clements *v.* Yturria, 14 Hun (N. Y.) 151; Lewis *v.* Latham, 74 N. C. 283; Roquemore *v.* Alloway, 33 Tex. 461; Dewing *v.* Perdicaries, 96 U. S. (6 Otto) 193, 195; bk. 24, L. ed. 654; Whitfield *v.* United States, 92 U. S. (2 Otto) 165; bk. 23, L. ed. 705; Sprott *v.* United States, 87 U. S. (20 Wall.) 459, 463; bk. 22, L. ed. 371; Cornett *v.* Williams, 87 U. S. (20 Wall.) 226; bk. 22, L. ed. 254; United States *v.* Lapene, 84 U. S. (17 Wall.) 601; bk. 21, L. ed. 693; Carlisle *v.* United States, 83 U. S. (16 Wall.) 147; bk. 21, L. ed. 426; Hanauer *v.* Woodruff, 82 U. S. (15 Wall.) 439; bk. 21, L. ed. 224; Knox *v.* Lee, 79 U. S. (12 Wall.) 457; bk. 20, L. ed. 287; Thomas *v.* City of Richmond, 79 U. S. (12 Wall.) 349; bk. 20, L. ed. 453; Hanauer *v.* Doane, 79 U. S. (12 Wall.) 342; bk. 20, L. ed. 439; Hickman *v.* Jones, 76 U. S. (9 Wall.) 197; bk. 19, L. ed. 551; Texas *v.* White, 74 U. S. (7 Wall.) 700; bk. 19, L. ed. 227. See Martin *v.* McMillan, 65 N. C. 199; McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34.

Sale for unlawful use in another state. — Mere knowledge by the vendor that the vendee intends to use the goods sold in another state will not defeat an action in such other state, particularly by the vendor, to recover the purchase price of the goods. Tegler *v.* Shipman, 33 Iowa, 195; s. c. 11 Am. Rep. 118; Distilling Co. *v.* Nutt, 34 Kans. 724; s. c. 10 Pac. Rep. 163; Feineman *v.* Sachs, 33 Kans. 621, 625, 626; s. c. 52 Am. Rep. 547; 7 Pac. Rep. 222; Jameson *v.* Gregory, 4 Met. (Ky.) 363; Lindsey *v.* Stone, 123 Mass. 332; Dater *v.* Earl, 69 Mass. (3 Gray) 482; Orcutt *v.* Nelson, 67 Mass. (1 Gray) 536; McIntyre *v.* Parks, 44 Mass. (3 Metc.) 207; Webber *v.* Donnelly, 33 Mich. 469; Hill *v.* Spear, 50 N. H. 253; s. c. 9 Am. Rep. 205; Smith *v.* Godfrey, 28 N. H. 379; s. c. 61 Am. Dec. 617; Watson *v.* Murray, 23 N. J. Eq. (8 C. E. Gr.) 257; Tracy *v.* Talmage, 14 N. Y. 162; s. c. 67 Am. Dec. 132; President, &c. *v.* Spalding, 12 Barb. (N. Y.) 302; McKenney *v.* Andrews, 41 Tex. 363; Gaylord *v.* Soragen, 32 Vt. 110; s. c. 76 Am. Dec. 154; Green *v.* Collins, 3 Cliff. C. C. 494, 500; Sortwell *v.* Hughes, 1 Curt. C. C. 244; Holman *v.* Johnson, 1 Cowp. 341; Pellecat *v.* Angell, 2 Cromp. M. & R. 311. In Maine, however, by special statute no recovery can be had for liquors sold in any state though the sale was valid where made and the vendor had knowledge that they were to be used in Maine. Merservey *v.* Gray, 55 Me. 540; Wilson *v.* Stratton, 47 Me. 120, 126.

Sales for immoral purposes are illegal. Adams *v.* Coulliard, 102 Mass. 167; Commonwealth *v.* Harrington, 20 Mass. (3 Pick.) 26; Updike *v.* Campbell, 4 E. D. Smith (N. Y.) 570; Sprott *v.* United States, 87 U. S. (20 Wall.) 459; bk. 22, L. ed. 371; Pringle *v.* Napanee, 43 Up. Can. Q. B. 285; Cowan *v.* Melbourn, L. R. 2 Ex. 230; Pearce *v.* Brooks, L. R. 1 Ex. 212; MacFarlane *v.* Taylor, L. R. 1 H. L. Sc. App. 245; Langton *v.* Hughes, 1 Maule & S. 593; 2 Schouler on Pers. Prop. sec. 619; Story on Sales, sec. 506n. And a sale against good morals or public policy will not be enforced although valid in the place where made. Frazier *v.* Fredericks, 24 N. J. L. (4 Zab.) 162; Watson *v.* Murray, 23 N. J. Eq. (8 C. E. Gr.) 257.

[2] 3 Taunt. 226.

[3] 5 C. & P. 19.

[*499] *where the action was brought on a promissory note and a bill of exchange given at the same time in payment of a sailor's bill to his landlord, in which were items for spirits sold illegally, it appeared that the whole amount of the charge for spirits was *less than either of the two securities;* and Lord Tenterden held that one security might be recovered because the plaintiff had the right to appropriate the other to all the illegal charges, which it was more than sufficient to cover.[4]

And the principle does not apply to cases in which the Court determines covenants in restraint of trade to be illegal because unreasonable; for in such cases the Courts will enforce the covenants so far as reasonable, and reject only the excess.[5]

§ 659. The sale of a thing in itself an innocent and proper article of commerce is void when the vendor sells it, knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose, or profit by the immoral act. The later decisions overrule this doctrine, as will appear by the authorities now to be reviewed.

In Faikney *v.* Reynous,[1] which came before the King's Bench in 1767, a party had paid, at the request of another, money on a contract, which was illegal, and sued for its recovery. Judgment was given for the plaintiff, Lord Mansfield saying: "One of these two persons has paid money for the

[4] *Where there are different promises based upon one consideration*, some of which promises are illegal and the others valid, the latter may be enforced. See Ware *v.* Curry, 67 Ala. 274; Hanauer *v.* Gray, 25 Ark. 350; Fackler *v.* Ford, McCahon (Kans.) 21; Goodwin *v.* Clark, 65 Me. 280; Ladd *v.* Dallingham, 34 Me. 316; Robinson *v.* Green, 44 Mass. (3 Metc.) 159; Carlton *v.* Woods, 28 N. H. 290; s. c. 61 Am. Dec. 605; Walker *v.* Lovell, 28 N. H. 138; Curtis *v.* Leavitt, 15 N. Y. 9; Tracy *v.* Talmage, 14 N. Y. 162; s. c. 67 Am. Dec. 132; Leavitt *v.* Palmer, 3 N. Y. 19; s. c. 51 Am. Dec. 333; Hook *v.* Gray, 6 Barb. (N. Y) 398; Leavitt *v.* Blachford, 5 Barb. (N. Y.) 9; Shaw *v.* Carpenter, 54 Vt. 155; Northern Pac. R. R. *v.* United States, 15 Ct. of Cl. 428.

[5] See the cases of Mallan *v.* May, Green *v.* Price, and others cited *post*, "Restraint of Trade," p. 517.

[1] 4 Burr. 2070.

other, and on his account, and he gives him his bond to secure the *repayment* of it. *This* is not prohibited. *He is not concerned in the use which the other makes of the money.*" [2]

This case was followed, in 1789, by the judges in Petrie *v.* Hannay,[3] but with evident reluctance, and many * expressions of hesitation, especially by Lord Kenyon. Much stress was laid in both decisions upon a supposed distinction between the law applicable to the case of a contract which was *malum in se*, and one which was *malum prohibitum.* [*500]

[2] Lestapies *v.* Ingraham, 5 Pa. St. 71; Planters' Bank *v.* Union Bank, 83 U. S. (16 Wall.) 483, 500; bk. 21, L. ed. 473; Brooks *v.* Martin, 69 U. S. (2 Wall.) 70; bk. 17, L. ed. 732; McBlair *v.* Gibbs, 58 U. S. (17 How.) 232, 236; bk. 15, L. ed. 132; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 832.

What contracts are illegal. — Any contract which violates the revenue laws of the country in which it is made is void. Patton *v.* Nicholson, 16 U. S. (3 Wheat.) 204; bk. 4, L. ed. 371; Hannay *v.* Eve, 7 U. S. (3 Cr.) 242; bk. 2, L. ed. 427; Cambioso *v.* Maffett, 2 Wash. C. C. 98; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Catlin *v.* Bell, 4 Campb. 183; Meux *v.* Humphries, 3 Car. & P. 79; Ritchie *v.* Smith, 6 C. B. 462; Holman *v.* Johnson, Cowp. 341; Johnson *v.* Hudson, 11 East, 180; Langton *v.* Hughes, 1 M. & S. 593; Smith *v.* Mawhood, 14 Mees. & W. 459; Cope *v.* Rowlands, 2 Mees. & W. 149. Hodgson *v.* Temple, 5 Taunt. 181; s. c. 1 Marsh. 5; 2 Pars. on Contr. 259. Where any part of an entire consideration or promise, or any part of an entire promise, is illegal, either by statute or at common law, the whole contract will be void. Donallen *v.* Lenox, 6 Dana (Ky.) 91; Brown *v.* Langford, 3 Bibb (Ky.) 500; Deering *v.* Chapman, 22 Me. 488; s. c. 39 Am. Dec. 592; Filson *v.* Himes, 5 Pa. St. 452; s. c. 47 Am. Dec. 422; Craig *v.* Missouri, 29 U. S. (4 Pet.) 410; bk. 7, L. ed. 903; Bartle *v.* Coleman, 29 U. S. (4 Pet.) 184; bk. 7, L. ed. 825; The Pioneer, Deady (U. S. D. C.) 72; Woodruff *v.* Hinman, 11 Vt. 592; Hinesburgh *v.* Sumner, 9 Vt. 23; 1 Pars. on Contr. 38. But where a contract is severable, part of it being legal and part illegal, that which is illegal will not affect the enforcement. Leavitt v. Palmer, 3 N. Y. 37; s. c. 51 Am. Dec. 333; Kerrison *v.* Cole, 8 East, 236; Norton *v.* Simmes, Hob. 14; Bank of Australasia *v.* Bank of Australia, 12 Jur. 189; Bishop of Chester *v.* Freeland, Ley. 79.

Contracts against public policy are void because illegal; thus contracts for procuring legislation are void (Weed *v.* Black, 2 McAr. U. S. D. C. 268); as, also, are contracts for services — such services known as lobbying (Trist *v.* Child, 88 U. S. (21 Wall.) 441; bk. 22, L. ed. 623); contracts providing a compensation for obtaining legislation or preventing legislative investigation (Usher *v.* McBratney, 3 Dill. C. C. 385); a promise to pay an officer a compensation because of forbearance to prosecute (Keir *v.* Leeman, 9 Ad. & El. (N. S.) 371); and an agreement to use one's influence with a body of public officers to accomplish a private purpose. Wall *v.* Charlick, 8 N. Y. Leg. Obs. (July, 1850) 230.

[3] 3 T. R. 418.

These two cases were repeatedly questioned and disapproved, as will be seen by reference to Booth *v.* Hodgson,[4] Aubert *v.* Maze,[5] Mitchell *v.* Cockburn,[6] Webb *v.* Brooke,[7] and Langton *v.* Hughes;[8] and in these, as well as in many subsequent cases, the distinction drawn between a thing *malum in se* and *malum prohibitum* was overruled.

§ 660. In 1803, the case of Bowry *v.* Bennet[1] was tried before Lord Ellenborough. A prostitute was sued for the value of clothes furnished, and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. His Lordship said: "It must not only be shown that he had notice of this, *but that he expected to be paid from the profits of the defendant's prostitution*, and that he sold the clothes to enable her to carry it on, *so that he might appear to have done something in furtherance of it.*"[2]

In 1813, Hodgson *v.* Temple[3] was decided. There the action was for the price of spirits, sold with the knowledge that defendant intended to use them illegally. There was a verdict for plaintiff, and a motion for new trial was refused by the Court, Sir James Mansfield saying: "This would be carrying the law much further than it has ever yet been carried. The *merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment*, but to effect that, it is *necessary that the vendor should be a sharer in the illegal transaction.*"

[*501] § 661. * This decision was given in November, 1813, and is the more remarkable because the case of Langton *v.* Hughes[1] had been decided exactly to the contrary

[4] 6 T. R. 405.
[5] 2 Bos. & P. 371.
[6] 2 H. Bl. 379.
[7] 3 Taunt. 6.
[8] 1 M. & S. 594.
[1] 1 Camp. 348. See, also, Lloyd *v.* Johnson, 1 B. & P. 340; and Crisp *v.* Churchill, there cited in argument; Girardey *v.* Richardson, 1 Esp. 13; Jennings *v.* Throgmorton, Ry. & Moo. 251; Appleton *v.* Campbell, 2 C. & P. 347; and Smith *v.* White, 1 Eq. 626; 35 L. J. Ch. 454.
[2] Hill *v.* Spear, 50 N. H. 253, 273; s. c. 9 Am. Dec. 205, citing Pearce *v.* Brooks, L. R. 1 Ex. 212; Bowry *v.* Bennet, 1 Campb. 348; Appleton *v.* Campbell, 2 Car. & P. 347.
[3] 5 Taunt. 181.
[1] 1 M. & S. 593.

in the King's Bench, in the month of June, in the same year, and was not noticed by the counsel or the Court in Hodgson *v.* Temple. Langton *v.* Hughes was first tried before Lord Ellenborough at Nisi Prius. It was an action for the price of drugs sold to the defendants, who were brewers, the plaintiffs knowing that defendants intended to use the drugs for mixing with beer, a use prohibited by statute. His Lordship charged the jury that the plaintiffs in *selling drugs to the defendants, knowing that they were to be used contrary to the statute, were aiding them in the breach of that act*, and therefore not entitled to recover. He, however, reserved the point. The ruling was maintained by all the judges, and it was distinctly asserted as the true principle, that "parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which *were sold with a knowledge that they were to be used for a purpose which is prohibited by law*, are not entitled to recover."[2]

§ 662. The leading case of Cannan *v.* Bryce[1] was decided in the King's Bench in 1819. The question was whether money lent for the purpose of enabling a party to pay for losses and compounding differences on illegal stock transactions could be recovered. All the previous cases were reviewed, and the Court took time to consider. The opinion was delivered by Abbott C. J. and the principle was stated as follows: — "The statute in question has absolutely prohibited the payment of money for compounding differences (*i.e.* in stock-bargains); it is impossible to say that making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were fur-

[2] *Per* Le Blanc J. and see the strong observations of Eyre C. J. in Lightfoot *v.* Tenant, 1 B. & P. 551. See, also, Milner *v.* Patton, 49 Ala. 423; Shepherd *v.* Reese, 42 Ala. 329; Arnot *v.* Pittston & E. Coal Co., 68 N. Y. 558; s. c. 23 Am. Rep. 190; People *v.* Fisher, 14 Wend. (N. Y.) 9; s. c. 28 Am. Dec. 501; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; s. c. 8 Am. Rep. 159; Laing *v.* McCall, 50 Vt. 657; Hanauer *v.* Doane, 79 U. S. (12 Wall.) 342; bk. 20, L. ed. 439; Kelly *v.* Earl, 29 Up. Can. C. P. 477.

[1] 3 B. & Ald. 179.

[*502] nished *with a *full knowledge of the object to which they were to be applied*, and *for the express purpose of accomplishing that object.*" The money lent was, therefore, held not recoverable. The case of Langton *v.* Hughes was approved and followed, while Faikney *v.* Reynous and Petrie *v.* Hannay were practically overruled, and the distinction between *malum prohibitum* and *malum in se* pointedly repudiated.[2]

In McKinnell *v.* Robinson,[3] in the Exchequer, in 1838, it was held, that money knowingly lent for gambling at a game prohibited by law, could not be recovered, the case of Cannan *v.* Bryce being referred to by the Court as the decisive authority on this subject.

§ 663. The latest case, that of Pearce *v.* Brooks,[1] was decided in the same Court in 1866. The plaintiff had supplied a brougham to a prostitute. The evidence showed that the plaintiff knew the defendant to be a prostitute, but there was no *direct* evidence that plaintiff knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was *no* evidence that plaintiff expected to be paid out of the wages of prostitution. The jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff *knew it was supplied for that purpose.* It was *held*, First, not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; Secondly, that the *knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorized in inferring that the plaintiff also knew the purpose for which she wanted an ornamental brougham;* and thirdly, that *this knowledge was sufficient to render the contract void*, on the authority of Cannan

[2] See Greenough *v.* Balch, 7 Me. (7 Greenl.) 462; White *v.* Buss, 57 Mass. (3 Cush.) 448, 450; Hill *v.* Spear, 50 N. H. 253; s. c. 9 Am. Rep. 205; Lewis *v.* Welch, 14 N. H. 294; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Collins *v.* Nevin, (Pa. St.) 27 Alb. L. J. 354; Bank of the United States *v.* Owens, 27 U. S. (2 Pet.) 527, 539; bk. 7, L. ed. 508; Clark *v.* Protection Ins. Co., 1 Story C. C. 109.

[3] 3 M. & W. 435.

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

v. Bryce, which was recognized as the leading case on the subject.

§ 664. [In a recent case the Supreme Court of the United States held, that a purchaser of cotton from the Government of the Confederate States, who knew that the purchase-money went * to sustain the rebellion, was not [*503] entitled to the proceeds of the cotton which had been captured and sold by the Government of the United States under the Captured and Abandoned Property Act, 1863. The question involved, however, seems rather to be one of ownership than of contract. See the dissenting judgment of Field J.[1]]

§ 665. By the common law, a sale to an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the sovereign.[1]

§ 666. Smuggling contracts are also illegal, and where a party in England sent an order to Guernsey for goods, which were to be smuggled into this country, the Court held that the plaintiffs, who were Englishmen, residing here, and partners of the vendor in Guernsey, were not entitled to recover.[1] This case was followed in Clugas *v.* Penaluna.[2] But where the plaintiff, a foreigner, sold goods abroad to the defendant, knowing his intention to smuggle them, but having no concern in the smuggling scheme itself, the Court of King's Bench held, that the sale was complete abroad; was governed by foreign law; was not immoral nor illegal *there*, because no country takes notice of the revenue laws of another; that the goods were not sold to be delivered in England, but were actually delivered in the foreign country, and that the plaintiff was therefore entitled to recover.[3]

[1] Sprott *v.* United States, 20 Wall. 459. See, also, Hanauer *v.* Doane, 12 Wall. 342; Hanauer *v.* Woodruff, 15 Wall. 439.

[1] Brandon *v.* Nesbitt, 6 T. R. 23. See, also, § 659, note 1, "Sale of Goods to a Public Enemy."

[1] Biggs *v.* Lawrence, 3 T. R. 454.

[2] 4 T. R. 466.

[3] Holman *v.* Johnson, 1 Cowp. 341, 345. See, also, Condon *v.* Walker, 1 Yeates (Pa.) 483; Biggs *v.* Lawrence, 3 T. R. 456.

§ 667. In Waymell *v.* Reed,[1] the goods were sold abroad, and plaintiff invoked the decision in Holman *v.* Johnson, but was not permitted to recover, because he had aided the purchaser in his smuggling purposes, by packing the goods in a particular manner, so as to evade the revenue.

In Pellecat *v.* Angell,[2] the subject again came before the Exchequer Court, and the previous decisions were followed, the Court pointing out that the true distinction was [*504] this: * Where the foreigner takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into this country, is not illegal, and may be enforced.[3]

§ 668. At common law, also, certain contracts are prohibited as being against public policy. Most of these are not properly within the scope of this treatise, such as contracts in restraint of marriage; marriage brokage contracts; contracts compounding felonies, &c. Confining our attention to sales illegal at common law, because contravening or supposed to contravene considerations of public policy, it is impossible not to be impressed with the force of the observations made by the judges in Richardson *v.* Mellish,[1] and by Lord Campbell in Hilton *v.* Eckersley,[2] as well as the striking illustrations presented in the reports, of the justice of their strictures. Best C. J. said: "I am not much disposed to yield to arguments of public policy: I think the Courts of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak, of the judgments of those who have gone be-

[1] T. R. 599.

[2] 2 C. M. & R. 311.

[3] See Westlake Priv. Int. L. (1880), § 203.

Sale by an alien in violation of the revenue laws is invalid. Patton *v.* Gilmer, 42 Ala. 548; Hill *v.* Spear, 50 N. H. 253, 273, 274; s. c. 9 Am. Rep. 205; Cambioso *v.* Maffett, 2 Wash. C. C. 98; New Brunswick Oil Co. *v.* Parsons, 20 Up. Can. Q. B. 531, 535; Walbridge *v.* Follett, 2 Up. Can. Q. B. 280; Sewell *v.* Richmond, 2 Up. Can. Q. B. 423; Sawyer *v.* Manahan, (Taylor, U. C.) 315; see, also, Ritchie *v.* Smith, 6 C. B. 462; Cundell *v.* Dawson, 4 C. B. 376.

[1] 2 Bing. 242.

[2] 24 L. J. Q. B. 353; 6 E. & B. 47.

fore me) have gone much further than they were warranted in going, on questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of policy. . . . I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed: but it must be unquestionable: there must be no doubt." Burroughs J. joined in the protest of the Chief Justice "against arguing too strongly * upon public [*505] policy: it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

§ 669. In Hilton *v.* Eckersley,[1] the judges differed in opinion as to what public policy really was in the case before them; and Lord Campbell said: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases; and I cannot help thinking that where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them, unless where they are avoided by Act of Parliament."

§ 670. [There is now a strong tendency towards controlling the exercise of judicial discretion in laying down fresh principles of public policy, and towards limiting the application of the doctrine to certain well-known classes of contracts, and to such contracts as may from time to time be held by analogy to fall within those classes. In a recent case Jessel M. R. said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one

[1] 24 L. J. Q. B. 353; 6 E. & B. 47.

thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." [1]]

§ 671. An illustration of the justice of these remarks is to be found in the radical change of public opinion, and of the law, upon the subjects of forestalling, regrating, [*506] and *engrossing, which were reprobated by the common law as against public policy, and punished as crimes. *Forestalling* was the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price there. *Regrating* was the buying of corn or any other dead victual in any market and selling it again in the same market, or within four miles of the place. *Engrossing* was the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again.[1] In The King *v.* Waddington,[2] the defendant was sentenced to a fine of 500*l.* and four months' imprisonment (*i.e.* a further term of one month in addition to his previous confinement of three months), for the offence of trying to raise the price of hops in the market by telling sellers that hops were too cheap, and planters that they had not a fair price for their hops; and contracting for one-fifth of the produce of two counties when he had a stock in hand and did not want to buy, but merely to speculate how he could enhance the price. Lord Kenyon made many observations on the subject of public policy, discussed the doctrine of free trade, referred to his study of Smith's Wealth of Nations and other writings on political economy, and declared that the defendant's was "an offence of the greatest magnitude"; that "no defence could

[1] The Printing and Numerical Co. *v.* Sampson, 19 Eq. at p. 465, adopted by Fry J. in Rousillon *v.* Rousillon, 14 Ch. D. at p. 365.

[1] 4 Black. Com. 158; and Mr. Chitty's note, ed. 1844.

[2] 1 East, 143.

be made for such conduct"; that the policy of the common law, which he declared to be still in force on this subject, was "to provide for the wants of the poor laboring classes of the country: and if humanity alone cannot operate to this end, interest and policy must compel our attention to it." The passing of sentence was postponed to the next term, and Grose J. in delivering the opinion of the Court, said: "It would be a *precedent of most awful moment* for this Court to declare that hops which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an * article, the price of which it is a crime, by [*507] undue means, to enhance."

§ 672. The common-law rules on the subject of these offences were abolished by the statute 7 & 8 Vict. c. 24, and although no legislation on the subject has taken place in America, Mr. Story says:[1] "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

Notwithstanding these observations, it is quite beyond doubt that there are various well-defined cases where contracts of sale are still held illegal at common law as being violative of public policy and the interests of the state. These are chiefly — 1st. Contracts for the sale of offices or the fees or emoluments of office; 2d. Contracts of sale in restraint of trade; and 3d. Contracts for the sale of lawsuits, or interests in litigation.

§ 673. Contracts for the sale or transfer of public offices or appointments, or the salary, fees, or emoluments of office, have in many cases been prohibited by statute, as will presently be shown; but by common law antecedent to these enactments such sales were held to be subversive of public policy, as opposed to the interests of the people and to the

[1] Story on Sales, § 490.

proper administration of government.[1] *Nullâ aliâ re magis Romana respublica interiit, quam quod magistratûs officia venalia erant.* Co. Litt. 234 a. The Courts have reprobated every species of traffic in public office, and of bargains in relation to the profits derived from them. Thus, in Garforth *v.* Fearon,[2] the Common Pleas held, in 1787, that an agreement, whereby the defendant promised to hold a public office in the Customs in trust for the plaintiff, and to permit the plaintiff to appoint the deputies and receive all the emoluments of the place, was illegal and void, Lord Loughborough observing that the effect was to make the plaintiff "the real officer, but not accountable for the due execution of [*508] it; he *may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, may exercise inconsistent trades, may act as a magistrate in

[1] *Contracts for the sale of a public office or official influence* are against public policy and void. Forbes *v.* McDonald, 54 Cal. 98; Martin *v.* Wade, 37 Cal. 168; Bollman *v.* Loomis, 41 Conn. 581; Grant *v.* McLester, 8 Ga. 553; Lewis *v.* Knox, 2 Bibb (Ky.) 453; Wood *v.* McCann, 6 Dana (Ky.) 366; Outon *v.* Rodes, 3 A. K. Marsh. (Ky.) 432; Cunningham *v.* Cunningham, 18 B. Mon. (Ky.) 24; s. c. 68 Am. Dec. 718; Holcomb *v.* Weaver, 136 Mass. 265; Guernsey *v.* Cook, 120 Mass. 501; Spencer *v.* Jones, 72 Mass. (6 Gray) 502; Tucker *v.* Aiken, 17 N. H. 140; Cardigan *v.* Page, 6 N. H. 183; Carlton *v.* Whitcher, 5 N. H. 196; Meredith *v.* Ladd, 2 N. H. 517; Swayze *v.* Hull, 8 N. J. L. (3 Halst.) 54; Watson *v.* Murray, 23 N. J. Eq. (8 C. E. Gr.) 257; Gaston *v.* Drake, 14 Nev. 175; s. c. 33 Am. Rep. 548; Mills *v.* Mills, 40 N. Y. 543; Gray *v.* Hook, 4 N. Y. 449; Davison *v.* Seymour, 1 Bosw. (N. Y.) 88; Hager *v.* Catlin, 18 Hun (N. Y.) 448; Duke *v.* Asbee, 11 Ired. (N. C.) L. 112; Ham *v.* Smith, 87 Pa. St. 63; Ashburner *v.* Parrish, 81 Pa. St. 52; Hunter *v.* Nolf, 71 Pa. St. 282; Bowers *v.* Bowers, 26 Pa. St. 74; s. c. 67 Am. Dec. 398; Filson *v.* Hines, 5 Pa. St. 452; s. c. 47 Am. Dec. 422; Hatzfield *v.* Gulden, 7 Watts. (Pa.) 152; s. c. 31 Am. Dec. 750; Eddy *v.* Capron, 4 R. I. 394; s. c. 67 Am. Dec. 541; Ferris *v.* Adams, 23 Vt. 136; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. (13 Otto) 261, 273; bk. 26, L. ed. 539; Meguire *v.* Corwine, 101 U. S. (11 Otto) 108, 111; bk. 25, L. ed. 900; Trist *v.* Child, 88 U. S. (21 Wall.) 441; bk. 22, L. ed. 623; Coppell *v.* Hall, 74 U. S. (7 Wall.) 542; bk. 19, L. ed. 244; Tool Co. *v.* Norris, 69 U. S. (2 Wall.) 45; bk. 17, L. ed. 868; Marshall *v.* Baltimore & O. R. R. Co., 57 U. S. (16 How.) 314; bk. 14, L. ed. 95.

Combinations to stifle competitions are illegal. — Craft *v.* McConoughy, 79 Ill. 346; Arnot *v.* Pittston, &c. Coal Co., 68 N. Y. 558; 23 Am. Rep. 190; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666; Morris Run Coal Co. *v.* Barclay Coal Co., 88 Pa. St. 173; s. c. 8 Am. Rep. 159.

[2] 1 H. Bl. 237.

affairs concerning the revenue, may sit in Parliament, and he will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the acting officer, he does not appear upon the records of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a trust can be created in such an office is for the consideration of the Court in which the suit was originally brought. The only question in this Court is, whether the agreement springing out of such a transaction can support an action?"

§ 674. In Parsons *v.* Thompson,[1] in 1790, the same Court held illegal a bargain by which the plaintiff, a master joiner in his majesty's dockyard at Chatham, agreed to apply for superannuation on condition that the defendant, if successful in obtaining his place, would share the profits with the plaintiff. In this case stress was laid on the fact that the bargain was unknown to the person having the power to appoint.

§ 675. In equity, a perpetual injunction was granted against enforcing a bond for the purchase of an office, as opposed to public policy, although the sale was not within the prohibitions of the statutes.[1] And in Law *v.* Law,[2] a bond was held illegal by which a party covenanted to pay 10*l.* per annum, as long as he enjoyed an office in the excise, to a person who by his interest with the commissioners had obtained the office for him.

§ 676. In Blachford *v.* Preston,[1] the sale by the owner of a ship in the East India Company's service, of the place of master * of the vessel, was held illegal, as [*509] being in violation of the laws and regulations of the

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

[1] Harrington *v.* Du Chastel, 1 Bro. C. C. 124; Methwold *v.* Walbank, 2 Ves. Sen. 238.

[2] 3 P. Wms. 391.

[1] 8 T. R. 89.

company, and of public policy, and Lord Kenyon said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori;* on principles of public policy, no money consideration ought to influence the appointment to such offices."

In Card *v.* Hope,[2] the Court went further, and not only affirmed the doctrine of Blachford *v.* Preston, but expressed a strong opinion that the majority of the owners of any ship, whether in public or private service, who had the right to appoint the officers, could not make sale of an appointment, because public policy gives every encouragement to shipping in this country, and the power of appointing the officer without the consent of minority, carries with it the duty of exercising impartial judgment in regard to the office *ut detur digniori.*

In Harrington *v.* Du Chastel,[3] Lord Thurlow held illegal a bargain by which an officer in the King's household recommended a person to another office in the household in consideration of an annuity to be paid to a third person.

§ 677. In The Corporation of Liverpool *v.* Wright,[1] the defendant was appointed clerk of the peace by the plaintiffs, under the Municipal Corporations Act, which made the tenure of the office dependent only on good behavior, and fixed the fees attached to the office. The Municipal Council agreed to appoint, and the defendant to accept, under an arrangement which, in substance, bound the defendant to pay over to the borough fund all his fees in excess of a certain annual amount. On demurrer to a bill, filed to enforce this agreement, Vice-Chancellor Wood held it void, as against public policy, on two grounds: First, because a person accepting an office of trust can make no bargain in respect of such office. Secondly, because where the law assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office; and the [*510] policy of the law will not * permit the officer to bar-

[2] 2 B. & C. 661.
[3] 1 Bro. C. C. 124.
[1] 28 L. J. Ch. 868; S. C. Johnson, 359.

gain away a portion of those fees to the appointor or to anybody else.

[In The Mayor of Dublin *v.* Hayes,[2] the Court of Common Pleas in Ireland, following the decision in The Corporation of Liverpool *v.* Wright, has lately held an agreement to be illegal where the defendant, upon his appointment to an office in the gift of the Corporation, agreed to accept a fixed salary, the amount of which was very much below the value of the fees attached to the office, and to account for and pay over all the fees to the City Treasurer.]

In Palmer *v.* Bate,[3] the Court of Common Pleas certified to the Vice-Chancellor that an assignment of the income, emolument, produce, and profits of the office of the Clerk of the Peace for Westminster (after deducting the salary of the deputy for the time being), is not a good or effectual assignment, nor valid in the law.

§ 678. The pay or half-pay of a military officer is not a legal subject of sale.[1] Nor a pension or annuity to a civil officer, unless exclusively for past services, as was held in Wells *v.* Foster,[2] where Parke B. explained the principle of the cases as follows: "The correct distinction made in the cases is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the assignee acquires a title to it, both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

§ 679. A contract of sale, by the terms of which the vendor is restrained *generally* in the carrying on of his

[2] 10 Ir. R. C. L. 226.
[3] 2 Br. & B. 670.
[1] Flarty *v.* Odlum, 3 T. R. 681; Lidderdale *v.* Montrose, 4 T. R. 248; Barwick *v.* Reade, 1 Hy. Bl. 627.
[2] 8 M. & W. 149.

[*511] trade, is against *public policy, and is void.[1] These cases arise usually where tradesmen or mechanics

[1] *Contracts in restraint of trade.*— The common law in this country is similar to that of England so far as relates to unlawful sales. Thus a sale which amounts to a general or unlimited restraint of trade is an invalid contract. See Callahan *v.* Donnolly, 45 Cal. 152; s. c. 13 Am. Rep. 172; More *v.* Bonnet, 40 Cal. 251; s. c. 6 Am. Rep. 621; Jenkins *v.* Temples, 39 Ga. 655; Craft *v.* McConoughy, 79 Ill. 346; Whitney *v.* Slayton, 40 Me. 224; Davis *v.* Barney, 2 Gill & J. (Md.) 382; Taylor *v.* Blanchard, 95 Mass. (13 Allen) 370; Alger *v.* Thacher, 36 Mass. (19 Pick.) 51; Pierce *v.* Fuller, 8 Mass. 222; s. c. 5 Am. Dec. 102; Gale *v.* Kalamazoo, 23 Mich. 344; s. c. 9 Am. Rep. 80; Long *v.* Towl, 42 Mo. 545, 549; Perkins *v.* Clay, 54 N. H. 518, 519; Saratoga Co. Bank *v.* King, 44 N. Y. 87; Dunlop *v.* Gregory, 10 N. Y. 241; s. c. 61 Am. Dec. 746; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166; Chappel *v.* Brockway, 21 Wend. (N. Y.) 157; Dakin *v.* Williams, 11 Wend. (N. Y.) 67; Lange *v.* Werk, 2 Ohio St. 519; Keeler *v.* Taylor, 53 Pa. St. 467; Gillis *v.* Hall, 7 Phila. (Pa.) 422, 424; Barber *v.* Connecticut Mut. Ins. Co., 15 Fed. Rep. 312; s. c. 15 Rep. 581; 16 Cent. L. J. 396; Collins *v.* Locke, 28 W. R. 189. But a contract is valid which imposes upon consideration a partial restraint upon trade if the restraint be kept within reasonable bounds. See More *v.* Bonnett, 40 Cal. 251; s. c. 6 Am. Rep. 621; Wright *v.* Ryder, 36 Cal. 342, 354; Hedge *v.* Lowe, 47 Iowa, 137; Whitney *v.* Slayton, 40 Me. 224; Taylor *v.* Blanchard, 95 Mass. (13 Allen) 370; Gilman *v.* Dwight, 79 Mass. (13 Gray) 356; s. c. 74 Am. Dec. 634; Pierce *v.* Woodward, 23 Mass. (6 Pick.) 206; Palmer *v.* Stebbins, 20 Mass. (3 Pick.) 188; s. c. 15 Am. Dec. 204; Pierce *v.* Fuller, 8 Mass. 225; s. c. 5 Am. Dec. 102; Perkins *v.* Clay, 54 N. H. 518; Sander *v.* Hoffman, 64 N. Y. 248; Nobles *v.* Bates, 7 Cow. (N. Y.) 307; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Taylor *v.* Saurman, (Pa.) 1 Atl. Rep. 40; Harkinson's Appeal, 78 Pa. St. 196; s. c. 21 Am. Rep. 9; Keeler *v.* Taylor, 53 Pa. St. 467; Gompers *v.* Rochester, 56 Pa. St. 194; Oregon Steam. Nav. Co. *v.* Winsor, 87 U. S. (20 Wall.) 64; bk. 22, L. ed. 315. But a contract in restraint of trade made on good consideration not extending beyond the territory of the obligee's actual business is valid. Palmer *v.* Stebbins, 20 Mass. (3 Pick.) 188; s. c. 15 Am. Dec. 204. The same is true of a contract applying to a particular place or section of the country, and leaving the major part of the country open to business. Pike *v.* Thomas, 4 Bibb (Ky.) 486; s. c. 7 Am. Dec. 741. Whether or not the contract is valid depends upon three considerations, to wit: (1) the restraint must be partial; (2) the contract must be founded on a good consideration; and (3) it must be reasonable and not oppressive. Wright *v.* Ryder, 36 Cal. 342; Holmes *v.* Martin, 10 Ga. 503; Brewer *v.* Marshall, 19 N. J. Eq. (4 C. E. Gr.) 537; Dunlop *v.* Gregory, 10 N. Y. 241; s. c. 61 Am. Dec. 746; Holbrook *v.* Waters, 9 How. (N. Y.) Pr. 335; Chappel *v.* Brockway, 21 Wend. (N. Y.) 157; Thomas *v.* Miles, 3 Ohio St. 275; Parsons on Contracts, 753; Smith's Lead. Cas. 724.

Where the restraint is restricted as to territory, the duration in point of time may be indefinite where it is based on a reasonable consideration. See Cook *v.* Johnson, 47 Conn. 178; s. c. 36 Am. Dec. 64; Bowser *v.* Bliss, 7 Blackf. (Ind.) 344; s. c. 43 Am. Dec. 93; Pierce *v.* Woodward, 23 Mass. (6 Pick.) 206; Bunn *v.* Grey,

sell out their business, including the goodwill, and where the buyer desires to guard himself against the competition in trade of the person whose business he is purchasing.

The leading case on this subject is Mitchel *v.* Reynolds,[2] in the Queen's Bench, 1711, and republished in Smith's Leading Cases.[3] The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messuage and bakehouse in Liquorpond Street, parish of St. Andrew's for five years, and the defendant covenanted that he would not exercise the trade of a baker within that parish during the said term under penalty of 50*l.* The defendant pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus*, the said bond was in law, *per quod* he did trade, *prout ei bene licuit.* Demurrer in law. Held, a valid bond. In a very elaborate judgment, Parker C. J. laid down, as settled rules, that voluntary restraints of trade by agreement of parties were either — First, general, and, in such cases, void, whether by bond, covenant, or promise; whether with or without consideration, and whether of the party's own trade or not; or, second, particular, and these latter were either without consideration, in which case they are void, by what sort soever

4 East, 190; Hastings *v.* Whitley, 2 Ex. 611; Chesman *v.* Nainby, 2 Str. 739; s. c. 2 Raym. 1456; Wickens *v.* Evans, 3 Y. & J. 318. A partial restraint of trade may be either as to time or as to space; but restraint in space will be upheld, (Taylor *v.* Saurman, (Pa.) 1 Atl. Rep. 40 though unlimited as to time. Guerand *v.* Dandelet, 32 Md. 561; s. c. 3 Am. Rep. 164. No general rule can be laid down by which it can be determined whether a partial restraint on trade is valid or invalid; the sole test in each case is the reasonableness or the unreasonableness of the restraint in question. More *v.* Bonnet, 40 Cal. 251; s. c. 6 Am. Rep. 621; Guerand *v.* Dandelet, 32 Md. 561; s. c. 3 Am. Rep. 164; Dean *v.* Emerson, 102 Mass. 480; Crawford *v.* Wick, 18 Ohio St. 190; Lange *v.* Werk, 2 Ohio St. 519; Erie R. R. Co. *v.* Union Locomotive & Ex. Co., 35 N. J. L. (6 Vr.) 240; Mumford *v.* Gething, 7 C. B. N. S. 305; s. c. 97 Eng. C. L. 303; Hinde *v.* Gray, 1 M. & G. 195; s. c. 39 Eng. C. L. 413; Story Sales, §§ 492, 493. See, also, Jenkins *v.* Temples, 39 Ga. 655; Johnson *v.* Gwinn, 100 Ind. 466; Wiley *v.* Baumgardner, 97 Ind. 66; s. c. 49 Am. Rep. 27; Warren *v.* Jones, 51 Me. 146; Whitney *v.* Slayton, 40 Me. 224; Timmerman *v.* Dever, 52 Mich. 34; s. c. 50 Am. Rep. 240; Bowers *v.* Whittle, 63 N. H. 147; s. c. 56 Am. Rep. 499; Diamond Match Co. *v.* Roeber, 35 Hun (N. Y.) 421; Paxson's Appeal, 106 Pa. St. 429.

[2] 1 P. Wms. 181.

[3] Vol. I. 8th ed. p. 417.

of contract created; or with consideration. In this latter class they are valid, when made upon a good and adequate[4] consideration, so as to make them proper and useful contracts. This doctrine, with some modification, has been maintained in many subsequent cases as the settled rule of law.[5]

§ 680. In Homer *v.* Ashford,[1] Best C. J. said: "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed therefore by which a person [*512] binds himself * not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade or to act in a profession, *in a particular place*, proper."[2]

[4] Overruled as to adequacy of consideration, *post*, p. 515.

[5] Master of Gunmakers *v.* Fell, Willes, 388; Cheesman *v.* Nainby, 2 Str. 739, and 1 Bro. P. C. 234; Gale *v.* Reed, 8 East, 83; Stuart *v.* Nicholson, 3 Bing. N. C. 113; Young *v.* Timmins, 1 C. & J. 331.

[1] 3 Bing. 328.

[2] California Nav. Co. *v.* Wright, 6 Cal. 258; s. c. 65 Am. Dec. 511; 8 Cal. 585; Cook *v.* Johnson, 47 Conn. 175; s. c. 36 Am. Dec. 64; Hoyt *v.* Holly, 39 Conn. 326; s. c. 12 Am. Rep. 390; Treat *v.* Shoninger Melodeon Co., 35 Conn. 543; Ellis *v.* Jones, 56 Ga. 504; Jenkins *v.* Temples, 39 Ga. 655; Linn *v.* Sigsbee, 67 Ill. 75, 80; Bowser *v.* Bliss, 7 Blackf. (Ind.) 344; Haldeman *v.* Simonton, 55 Iowa, 144; Smalley *v.* Greene, 52 Iowa, 241; s. c. 35 Am. Rep. 267; Hedge *v.* Lowe, 47 Iowa, 137, 140; Heichew *v.* Hamilton, 3 G. Greene (Iowa) 596; Warren *v.* Jones, 51 Me. 146; Whitney *v.* Slayton, 40 Me. 224; Warfield *v.* Booth, 33 Md. 63, 70; Guerand *v.* Dandelet, 32 Md. 561, 569; s. c. 3 Am. Rep. 164; Ropes *v.* Upton, 125 Mass. 258; Boutelle *v.* Smith, 116 Mass. 111; Dwight *v.* Hamilton, 113 Mass. 175; Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass. 73, 75; s. c. 4 Am. Rep. 513; Peabody *v.* Norfolk, 98 Mass. 452; Taylor *v.* Blanchard, 95 Mass. (13 Allen) 370, 372; Gilman *v.* Dwight, 79 Mass. (13 Gray) 35; s. c. 74 Am. Dec. 634; Vickery *v.* Welch, 36 Mass. (19 Pick.) 523; Pierce *v.* Woodward, 23 Mass. (6 Pick.) 206; Palmer *v.* Stebbins, 20 Mass. (3 Pick.) 188; s. c. 15 Am. Dec. 204; Stearns *v.* Barrett, 18 Mass. (1 Pick.) 443; s. c. 11 Am. Dec. 223; Perkins *v.* Lyman, 9 Mass. 522; Pierce *v.* Fuller, 8 Mass. 223; s. c. 5 Am. Dec. 102; Hubbard *v.* Miller, 27 Mich. 21; s. c. 16 Am. Rep. 153; Thompson *v.* Means, 19 Miss. (11 Smed. & M.) 604; Self *v.* Cordell, 45 Mo. 345; Skrainka *v.* Scharringhausen, 8 Mo. App. 522; Perkins *v.* Clay, 54 N. H. 518; Hoagland *v.* Segur, 38 N. J. L. (9 Vr.) 230; Richardson *v.* Peacock, 33 N. J. Eq. (7 Stew.) 597; Curtis *v.* Gokey, 68 N. Y. 300; Sander *v.* Hoffman, 64 N. Y. 248; Dunlop *v.* Gregory, 10 N. Y. 241; s. c. 61 Am. Dec. 746; Van Marter *v.* Babcock, 23 Barb.

In accordance with these principles, covenants have been held legal not to carry on business as a surgeon for fourteen years within ten miles of a particular place;[3] not to practise as attorney within London and 150 miles from thence;[4] not to practise as attorneys or solicitors *in Great Britain* for twenty years, without the consent of the vendee to whom the business was sold;[5] not to carry on trade as a horsehair manufacturer within 200 miles of Birmingham;[6] not to carry on trade as a milk-man for twenty-four months within five miles from Northampton Square;[7] not to supply bread to the custo-

(N. Y.) 633; Mott *v.* Mott, 11 Barb. (N. Y.) 127; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Morgan *v.* Perhamus, 36 Ohio St. 517; s. c. 38 Am. Rep. 607; Grasselli *v.* Lowden, 11 Ohio St. 349; Lange *v.* Werk, 2 Ohio St. 520; Harkinson's Appeal, 78 Pa. St. 196; s. c. 21 Am. Rep. 9; McClurg's Appeal, 58 Pa. St. 51; Gompers *v.* Rochester, 56 Pa. St. 194; Gillis *v.* Hall, 2 Brewst. (Pa.) 342; Palmer *v.* Graham, 1 Pars. Cas. (Pa.) 476; Oregon Steam. Nav. Co. *v.* Winsor, 87 U. S. (20 Wall.) 64; bk. 22, L. ed. 315; Williamson *v.* Ewing, 27 Grant (Ont.) 596; Toronto Dairy Co. *v.* Gowans, 26 Grant (Ont.) 290; Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant (Ont.) 540; Mossop *v.* Mason, 17 Grant (Ont.) 360; s. c. 16 Grant (Ont.) 302; Jones *v.* Wooley, 16 Grant (Ont.) 106; Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Earl of Zetland *v.* Hislop, L. R. 7 App. Cas. 427.

Sale of good will. — The good will of a business is to regard it as property and may be sold. Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 354; Morgan *v.* Perhamus, 36 Ohio St. 517; s. c. 38 Am. Rep. 607; Smith *v.* Everett, 27 Beav. 446; Wedderburn *v.* Wedderburn, 22 Beav. 84. A sale of a business does not carry with it an implied covenant that the seller will not engage in the same business. Porter *v.* Gorman, 65 Ga. 11; Grimm *v.* Warner, 45 Iowa, 106; Bassett *v.* Percival, 87 Mass. (5 Allen) 345; White *v.* Jones, 1 Abb. (N. Y.) Pr. N. S. 328; Hall's Appeal, 60 Pa. St. 458; Rupp *v.* Over, 3 Brewst. (Pa.) 133. There can be no sale of good will in those cases where the good will of the business depends upon the skill of the vendor. Warren *v.* Jones, 51 Me. 146; Dwight *v.* Hamilton, 113 Mass. 175; Angier *v.* Wakefield, 96 Mass. (14 Allen) 211; Hall's Appeal, 60 Pa. St. 458. In those cases where there is an implied or express agreement not to trade within a certain territory on breach of such covenant, the plaintiff may have an action at law, or a more complete remedy in equity by an injunction. Dwight *v.* Hamilton, 113 Mass. 175, 178; Ensign *v.* Kellogg, 21 Mass. (4 Pick.) 1; Partridge *v.* Menck, 2 Barb. Ch. (N. Y.) 101; s. c. 47 Am. Dec. 281; Morgan *v.* Perhamus, 36 Ohio St. 517, 523; s. c. 38 Am. Rep. 607; Catt *v.* Tourle, L. R. 4 Ch. App. Cas. 654; Fox *v.* Scard, 33 Beav. 327; Whittaker *v.* Howe, 3 Beav. 383; Howard *v.* Woodward, 10 Jur. N. S. 1123; Hall *v.* Barrows, 33 L. J. Ch. 204; Harrison *v.* Gardner, 2 Madd. 444; Millington *v.* Foy, 3 Myl. & C. 338.

[3] Davis *v.* Mason, 5 T. R. 118.

[4] Bunn *v.* Guy, 4 East, 190.

[5] Whittaker *v.* Howe, 3 Beav. 383; this was on the ground of limitation of time (*sed quære?*) *post*, p. 515.

[6] Harms *v.* Parsons, 32 L. J. Ch. 247.

[7] Proctor *v.* Sargent, 2 M. & G. 20.

mers of a baker's shop, of which the lease and goodwill were sold;[8] not to travel for any other commercial firm than that of the employers, within the district for which the traveller was employed;[9] not to run a coach within specified hours upon a particular road.[10]

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

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

§ 681. Where there is a partial restraint as to *space*, the distance is to be measured from the place designated in a straight line on the map,[1] in the absence of any ex-
[*513] pressions * indicating the intention of the parties to adopt a different mode of measurement.[2]

§ 682. On the other hand, where the restraint was general, as to *place*, the agreements have been held void; as in a covenant not to be employed in the business of a coal merchant for nine months.[1] In this case, Parke B. said that he could not express the rule more clearly than was done by Tindal C. J. in Hitchcock *v.* Coker,[2] when he said: "We agree in the general principle adopted by the Court of King's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void."[3]

[8] Rannie *v.* Irvine, 7 M. & G. 969.

[9] Mumford *v.* Gething, 7 C. B. N. S. 305, and 29 L. J. C. P. 105.

[10] Leighton *v.* Wales, 3 M. & W. 545.

[1] Monflet *v.* Cole, L. R. 7 Ex. 70; 8 Ex. 32, in Ex. Ch.

[2] Atkyns *v.* Kinnier, 4 Ex. 776; Leigh *v.* Hind, 9 B. & C. 774.

[1] Ward *v.* Byrne, 5 M. & W. 548.

[2] 6 A. & E. 456.

[3] Hubbard *v.* Miller, 27 Mich. 15; s. c. 16 Am. Rep. 153; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Chappel *v.* Brockway, 21 Wend. (N. Y.) 158; 2 Kent Com. 466e; Pars. on Contr. 747–752. Where the contract is susceptible of two constructions the court will, according to the well settled rules of law, adopt the construction which will make it conform to the law. Hubbard *v.* Miller, 27 Mich. 15; s. c. 16 Am. Rep. 153; Riley *v.* Van Houten, 5 Miss. (4 How.) 428; Archi-

In Hinde *v.* Gray,[4] a covenant, in a demise by a brewer of his premises and business in Sheffield for ten years, that he would not during the continuance of the demise carry on the business of a brewer, or merchant, or agent, for the sale of ale, beer, or porter, in Sheffield, *or elsewhere*, was held void. But in the later cases, as will presently appear, such stipulations have been held *divisible;* and valid, so far as the particular place was concerned, although illegal as to the general restraint.

§ 683. [In The Leather Cloth Company *v.* Lorsont,[1] decided in 1869, James L. J. (then V-C.) came to the conclusion that there was no rule laid down by the authorities as to the invalidity of a restraint which is unlimited in point of space, and expressed the opinion that the sole test in all cases was the reasonableness of the restraint, having regard to the subject-matter of the contract; the criterion of reasonableness being that amount of restraint which is necessary for the due protection of the covenantee. The case, it is to be observed, related to the disclosure or non-disclosure of a trade secret, as to which it is well settled that a restraint, though general as * to space, may be enforced.[2] Accordingly, in Allsopp *v.* Wheatcroft,[3] decided in 1872, Wickens V.-C. held that The Leather Cloth Company *v.* Lorsont was no authority for departing "from the recognized rules as to the limitations of space." But in the last case on this subject Rousillon *v.* Rousillon,[4] decided in 1880, Fry J. upon a review of the authorities, adopted the opinion of James L. J. in preference to the decision of Wickens V.-C. and held that the alleged rule had no existence. The learned judge explained the decisions in Ward *v.* Byrne and Hinde *v.* Gray, referred to in the text, where a general restraint had been spoken of as void, as relating only [*514]

bald *v.* Thomas, 3 Cow. (N. Y.) 284; Many *v.* Beekman Iron Co., 9 Paige Ch. (N. Y.) 188; Church Wardens of St. Saviour, 10 Cooke's Rep. 67; Shore *v.* Wilson, 9 Cl. & F. 354; Attorney *v.* Chapman, 3 Beav. 255; s. c. 31 Eng. L. & Eq. 147

[4] 1 M. & G. 195.

[1] 9 Eq. 345.

[2] Bryson *v.* Whitehead, 1 Sim. & St. 74.

[3] 15 Eq. 59.

[4] 14 Ch. D. 351

to cases where, from the circumstances and subject-matter of the contract, the restraint was in fact unreasonable. In this state of the authorities, and pending a decision of an Appellate Court, it would, perhaps, be as yet premature to affirm that the rule, assuming it to have once existed, is now abrogated.]

§ 684. The restraint may be general or limited as to *time*, as well as *space*. In Ward *v.* Byrne,[1] the covenant was that "the said Thomas Byrne shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he shall have left the employment of the said W. Ward." There was a verdict for plaintiff, and motion in arrest of judgment, on the ground that the agreement was void in law as against public policy. Parke B. commenting on the limitation of time, said: "When a *general* restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a *total* restriction in trade, limited only as to *time*." All the judges concurred in this view of the subject.

In Hitchcock *v.* Coker,[2] the Exchequer Chamber [*515] held, * that the restraint might be indefinite as to time, might extend to the whole lifetime of the party, when the restriction was otherwise reasonable — and the judges considered this point as settled law, in Mumford *v.* Gething,[3] Erle C. J. saying: "I argued most strenuously in Hitchcock *v.* Coker, that a restriction, indefinite in point of time, avoided the contract, but the court of error decided against me."

§ 685. It would appear from these cases that the question of time is unimportant in determining whether a contract is

[1] 5 M. & W. 548.

[2] 6 A. & E. 438. See, also, Pemberton *v.* Vaughan, 10 Q. B. 87.

[3] 29 L. J. C. P. 104, and 7 C. B. N. S. 305. See Jones *v.* Lees, 26 L. J. Ex. 9; Catt *v.* Tourle, 4 Ch. 654, *per* Selwyn L. J. at p. 659.

void as being in restraint of trade. The decision of Lord Langdale M. R. therefore, in Whittaker *v.* Howe [1] (*ante*, p. 512), has been practically overruled in the later cases.[2]

§ 686. It has already been seen that in the leading case of Mitchel *v.* Reynolds,[1] Parker C. J. laid down the proposition that to render a particular or partial restraint legal, it was necessary that the contract should be made "upon a good and adequate consideration, so as to make it a proper and useful contract."

The earlier cases went upon this doctrine, and the Courts took into contemplation the *adequacy* of the consideration for the restraint. In Young *v.* Timmins,[2] Lord Lyndhurst C. B. and Bayley and Vaughan BB. held the contract void, on the express ground that the consideration was inadequate, though no doubt the contract was also entirely unreasonable for want of mutuality, as pointed out by Bolland B., inasmuch as the agreement bound the workman to work for no one but his employers, and left them at liberty to employ him or not at their discretion.

In Wallis *v.* Day,[3] a contract was held valid as being for sufficient consideration, and not in general restraint of trade, where a carrier sold his business under an agreement, by * which he entered into the vendee's service for [*516] life, at a stipulated weekly payment. Here, there was mutuality, and adequacy of consideration.

§ 687. But in Pilkington *v.* Scott,[1] in 1846, on a contract of the same nature, Alderson B. said: "The question in this case simply is whether the rule ought to be made absolute, on the ground that this is a contract in restraint of trade, and has no adequate consideration to support it. If it be an unreasonable restraint of trade, it is void altogether; but if not it is lawful, the only question being whether there is a

[1] 3 Beav. 383.

[2] See remark of Patteson J. in Nicholls *v.* Shelton, 10 Q. B. at p. 353.

[1] 1 P. Wms. 181.

[2] 1 Cr. & J. 331. "If Young *v.* Timmins turned on the question of consideration, it must be treated as overruled by Hitchcock *v.* Coker," *per* Jessel M. R. in Gravely *v.* Barnard, 18 Eq. at p. 521.

[3] 2 M. & W. 273.

[1] 15 M. & W. 667.

consideration to support it,[2] *and the adequacy of the consideration the Court will not inquire into*, but will leave the parties to make the bargain for themselves. Before the case of Hitchcock *v.* Coker,[3] a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."

§ 688. The learned Baron had himself been a member of the Court in Exchequer Chamber, in 1837, which reversed the judgment of the King's Bench, in Hitchcock *v.* Coker, and in that case, Tindal C. J. delivered the unanimous opinion of the Court of Error. Upon the point now under consideration, the language of the opinion is as follows: "Undoubtedly in most, if not all the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, *such consideration as is essential to support any contract not under seal*, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in re-
[*517] straint * of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, *we feel ourselves bound to differ from that doctrine.* A duty would thereby be imposed on the Court in every

[2] Weller *v.* Hersee, 10 Hun (N. Y.) 431; Ross *v.* Sagabeer, 21 Wend. (N. Y.) 166; Chappell *v.* Brockway, 21 Wend. (N. Y.) 157; Mitchel *v.* Reynolds, 1 P. Wms. 181.

[3] 6 A. & E. 438.

particular case, which it has no means whatever to execute."

This decision was held in Archer *v.* Marsh,[1] to have settled the law on the principle that the parties must act on their own views as to the adequacy of the compensation.[2]

[It is therefore sufficient for the plaintiff to show that he gave any consideration, however small, and in the case of a bond, the consideration, if not actually expressed, may be inferred from the terms of the instrument.[3]]

§ 689. But even though the restraint be partial, and founded upon good consideration, the Courts will refuse to enforce the contract if unreasonable,—and this is a question of law for the Court, not of fact for the jury.[1]

The whole doctrine on the subject, and the authorities, were reviewed in Mallan *v.* May,[2] where the promise was

[1] 6 A. & E. 966. See, also, Sainter *v.* Ferguson, 7 C. B. 716, and Hartly *v.* Cummings, 5 C. B. 247.

[2] *Measure of damages* for the breach of a contract in partial restraint of trade is the actual loss suffered because of such breach regardless of the consideration paid. Treat *v.* Schoninger Melodeon Co., 35 Conn. 543; Jenkins *v.* Temples, 39 Ga. 655; Stewart *v.* Challacombe, 11 Ill. App. 379; Baker *v.* Pottmeyer, 75 Ind. 451; Hall *v.* Stewart, 58 Iowa, 681; Peltz *v.* Eichele, 62 Mo. 171; Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

Where the contract is divisible and a portion of it only is invalid, because in general restraint of trade, that portion which is valid will be enforced. Dean *v.* Emerson, 102 Mass. 480; Peltz *v.* Eichele, 62 Mo. 171, 178; Presbury *v.* Fisher, 18 Mo. 50; Thomas *v.* Adm'r of Miles, 3 Ohio St. 274. Contracts not to engage in business are in general within the Statute of Frauds and must be in writing. Guerand *v.* Dandelet, 32 Md. 561; s. c. 3 Am. Rep. 164; Somerby *v.* Buntin, 118 Mass. 279, 286; 19 Am. Rep. 459; Doyle *v.* Dixon, 97 Mass. 211; Worthy *v* Jones, 77 Mass. (11 Gray) 168; s. c. 71 Am. Dec. 996; Lyon *v.* King, 52 Mass. (11 Metc.) 411; s. c. 45 Am. Dec. 219; Blake *v.* Cole, 39 Mass. (22 Pick.) 97; Perkins *v.* Clay, 54 N. H. 518; Blanding *v.* Sargent, 33 N. H. 239; s. c. 66 Am. Dec. 720; Packet Co. *v.* Sickles, 72 U. S. (5 Wall.) 580; bk. 18, L. ed. 550; 1 Chit. Contr. (11th Am. ed.) 101, n (*y*) 102.

[3] Gravely *v.* Barnard, 18 Eq. 518; Middleton *v.* Brown, 47 L. J. Ch. 411, C. A.; 38 L. T. N. S. 334. See, also, Linn *v.* Sigsbee, 67 Ill. 75, 80; Duffy *v.* Shockey, 11 Ind. 70; McClurg's Appeal, 58 Pa. St. 51.

[1] Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 157; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133; s. c. 56 Am. Dec. 164; Oregon Steam Nav. Co. *v.* Winsor, 87 U. S. (20 Wall.) 64; bk. 22, L. ed. 315; Horner *v.* Graves, 7 Bing. 735; Mallan *v.* May, 11 Mees. & W. 653. The reasonableness of the restriction is always a question for the court. Linn *v.* Sigsbee, 67 Ill. 81.

[2] 13 M. & W. 511, and 11 M. & W. 653

not to carry on, as principal, assistant, or agent, the profession of surgeon-dentist, or any branch thereof, in London, *or in any of the towns or places in England or Scotland*, where the other parties may have been practising, &c., &c.

The principles of law were declared by Parke B. who gave the opinion of the Court, after time for consideration, to be as follows: —

"If there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, [*518] and * without any averment showing *circumstances which rendered such a contract reasonable*, the instrument is void.

"But if there are circumstances recited in the instrument (or probably if they appear by averment), *it is for the Court to determine whether the contract be a fair and reasonable one or not.* And the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry."

§ 690. The learned Baron discussed the question whether the limits assigned by the covenant before the Court were reasonable, and adopted as safe law the proposition of Tindal C. J. in Horner *v.* Graves,[1] that "*whatever restraint is larger than the necessary protection of the party with*

[1] 7 Bing. 743.

whom the contract is made is unreasonable and void." [2] Applying this rule, the Court then held that for such a profession as that of a dentist, the limit of London was not too large: that the further restraint was unreasonable, and that the *contract was not illegal as a whole, because illegal in part;* that the stipulation as to not practising in London [3] was *valid, and was not affected by the illegality of the other part.*[3]

This decision was followed in Green *v.* Price,[4] where an agreement not to carry on business as perfumers within the * cities of London and Westminster, or [*519] the distance of 600 miles from the same respectively, was held valid as to London and Westminster, but void as to the 600 miles; and this was affirmed in the Exchequer Chamber.[5]

It has also been held that where the contract is reasonable at the time when it is made, subsequent change of circumstances will not affect its validity.[6]

[Where the subject-matter of the contract is a *trade secret*, a restraint unlimited in regard to space is not unreasonable.[7]]

[2] See, also, Beard *v.* Dennis, 6 Ind. 200; s. c. 63 Am. Dec. 380; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166; Chappel *v.* Brockway, 21 Wend. (N. Y.) 158; Lange *v.* Werk, 2 Ohio St. 519; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133; s. c. 63 Am. Dec. 380; Western Union Tel. Co. *v.* Burlington & S. R. Co., 3 McCr. C. C. 130; Rousillon *v.* Rousillon, L. R. 14 Ch. Div. 351; s. c. 28 Week. Rep. 623; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Tallis *v.* Tallis, 1 E. & B. 404, 405.

[3] The court held that "London" means the city of London, and did not include Great Russell Street, Middlesex; 13 M. & W. 517.

[4] 13 M. & W. 699.

[5] 16 M. & W. 346. See, also, Nicholls *v.* Stretton, 10 Q. B. 346, and Tallis *v.* Tallis, 1 E. & B. 391; 22 L. J. Q. B. 185. But see Allsopp *v.* Wheatcroft, 15 Eq. 59, disapproved by Fry J. in Rousillon *v.* Rousillon, 14 Ch. D. 351. The two cases appear to be in direct conflict; see, also, Collins *v.* Locke, 4 App. Cas. 674, 686.

[6] Elves *v.* Crofts, 10 C. B. 241; Jones *v.* Lees, 1 H. & N. 189.

[7] Leather Cloth Co. *v.* Lorsont, 9 Eq. 345; Hagg *v.* Darley, 47 L. J. Ch. 567. See, also, Peabody *v.* Norfolk, 98 Mass. 452; Taylor *v.* Blanchard, 95 Mass. (13 Allen) 370; Vickery *v.* Welch, 36 Mass. (19 Pick.) 523; Jarvis *v.* Peck, 10 Paige Ch. (N. Y.) 118; Yovatt *v.* Winyard, 1 Jac. & W. 394; Newbery *v.* James, 2 Meriv. 446; Williams *v.* Williams, 3 Meriv. 157; Green *v.* Folgham, 1 Sim. & S. 398; Bryson *v.* Whitehead, 1 Sim. & S. 74.

§ 691. Contracts for the sale of lawsuits or interests in litigation are, in certain cases, also void at common law, as being against public policy.[1]

Champerty (*campi partitio*) is a contract for the purchase of another's suit or right of action: or a bargain by which a person agrees to carry on a suit at his own expense for the recovery of another's property on condition of dividing the proceeds. This, as well as *maintenance*, are offences at common law, and cannot, therefore, form the subject of a valid contract. Maintenance, according to Lord Coke,[2] "is derived of the verb *manutenere*, and signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right."[3]

§ 692. In Stanley *v.* Jones,[1] an agreement by a man who had evidence in his possession respecting a matter in dispute between third persons, and who professed to be able to procure more, to purchase from one of the contending parties, at the price of this evidence, a share of the money to [*520] be *recovered by it, was held to be champertous; and champerty was defined to be the unlawful *maintenance* of a suit, in consideration of some bargain to have part of the thing in dispute or some profit out of it. "The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of

[1] Lytle *v.* State, 17 Ark. 608, 620; Mathewson *v.* Fitch, 22 Cal. 86; Richardson *v.* Rowland, 40 Conn. 565; Thompson *v.* Reynolds, 73 Ill. 11; Greenman *v.* Cohee, 61 Ind. 201; Scobey *v.* Ross, 13 Ind. 117; Davis *v.* Sharron, 15 B. Mon. (Ky.) 64; Shaferman *v.* O'Brien, 28 Md. 565; Ackert *v.* Barker, 131 Mass. 436; Duke *v.* Harper, 66 Mo. 51; Schomp *v.* Schenck, 40 N. J. L. (11 Vr.) 195, 202; Coughlin *v.* New York C. & H. R. R. R. Co., 71 N. Y. 443; s. c. 27 Am. Rep. 75; Sedgwick *v.* Stanton, 14 N. Y. 289, 295; Peck *v.* Briggs, 3 Den. (N. Y.) 107; Key *v.* Vattier, 1 Ohio, 132; Martin *v.* Clarke, 8 R. I. 402.

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

[3] Vaughan *v.* Marable, 64 Ala. 60; Broughton *v.* Mitchell, 64 Ala. 10; Thompson *v.* Marshall, 36 Ala. 512; s. c. 76 Am. Dec. 328; McCall *v.* Caphart, 20 Ala. 536; Gilbert *v.* Holmes, 64 Ill. 548; Chicago & N. W. R. Co. *v.* Boller, 7 Ill. App. 625; Wigle *v.* Setterington, 19 Grant (Ont.) 512; Little *v.* Hawkins, 19 Grant (Ont.) 267.

[1] 7 Bing. 369; and see Sprye *v.* Porter, 7 E. & B. 58; 26 L. J. Q. B. 64.

maintaining the action." And the Court held that, in this restricted sense, the offence of champerty remains the same as formerly.[2]

In Hutley *v.* Hutley,[3] it was held that mere relationship between the parties, or even some collateral interest, could not render valid an agreement otherwise champertous, for dividing the proceeds of an action.

§ 693. Taking a transfer of an interest in litigation as a security is not champertous, and is a valid contract;[1] [and a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, will not be regarded as being, *per se*, opposed to public policy. "Indeed, cases may be easily supposed in which it would be "in furtherance of right and justice, and necessary to resist "oppression, that a suitor who had a just title to property "and no means except the property itself, should be assisted "in this manner."[2]]

[2] See further as to maintenance and champerty, Re Masters, 4 Dow, 18; Findon *v.* Parker, 11 M & W. 675; Simpson *v.* Lamb, 7 E. & B. 84, and 26 L. J. Q. B. 121; Flight *v.* Leman, 4 Q. B. 883; Cook *v.* Field, 15 Q. B. 460; Bell *v.* Smith, 5 B. & C. 188; Williamson *v.* Henley, 6 Bing. 299; Pechell *v.* Watson, 8 M. & W. 691; Shackell *v.* Rosier, 2 Bing. N. C. 634; Williams *v.* Protheroe, 3 Y. & J. 129, in Ex. Ch.; s. c. 5 Bing. 309; Earle *v.* Hopwood, 9 C. B. N. S. 566; 30 L. J. C. P. 217; Pince *v.* Beattie, 32 L. J. Ch. 734; Prosser *v.* Edmonds, 1 Y. & C. 481; Knight *v.* Bowyer, 27 L. J. Ch. 521; Bainbridge *v.* Moss, 3 Jur. N. S. 58; In re Attorneys and Solicitors Act, 1 Ch. D. 573; In re The Paris Skating Rink Co., 5 Ch. D. 959, C. A.; Seear *v.* Lawson, 15 Ch. D. 426, C. A. Where a sale by a trustee in bankruptcy of the debtor's right of action was upheld; Ball *v.* Warwick, 50 L. J. Q. B. 382; 29 W. R. 468; Plating Co. *v.* Farquharson, 17 Ch. D. 49, C. A.

American authorities. — Redman *v.* Sanders, 2 Dana (Ky.) 70; Smith *v.* Thompson, 7 B. Mon. (Ky.) 305; Lathrop *v.* Amherst Bank, 50 Mass. (9 Metc.) 489; Allen *v.* Hawks, 30 Mass. (13 Pick.) 79; Thurston *v.* Percival, 18 Mass. (1 Pick.) 415; Swett *v.* Poor, 11 Mass. 549; Caldwell *v.* Shepherd, 6 Mon. 392; Taylor *v.* Gilman, 58 N. H. 417; Sedgwick *v.* Stanton, 14 N. Y. 301; Belding *v.* Pitkin, 2 Cai. (N. Y.) 147; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 643; Peck *v.* Briggs, 3 Den. (N. Y.) 107; Whitaker *v.* Cone, 2 Johns. Cas. (N. Y.) 58; Key *v.* Vattier, 1 Ohio, 132.

[3] L. R. 8 Q. B. 112.

[1] Anderson *v.* Radcliffe, E. B. & E. 806–819; 28 L. J. Q. B. 32; in error, 29 L. J. Q. B. 128.

[2] *Per* Committee of Privy Council in Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, 2 App. Cas. 186, 210. See, also, Richardson *v.* Rowland, 40 Conn. 565; Bayard *v.* McLane, 3 Harr. (Del.) 212; Lathrop *v.* Amherst Bank, 50 Mass. (9 Metc.)

[*521] * *Section II.* — CONTRACTS ILLEGAL BY STATUTE.

§ 694. When contracts are prohibited by statute, the prohibition is sometimes express, and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced. Of this there is no doubt.[1]

490; Duke *v.* Harper, 66 Mo. 57; s. c. 27 Am. Rep. 314; Benedict *v.* Stuart, 23 Barb. (N. Y.) 421; Ogden *v.* Des Arts, 4 Duer (N. Y.) 283; Martin *v.* Clarke, 8 R. I. 397, 402; Danforth *v.* Streeter, 28 Vt. 490; Allard *v.* Lamirande, 29 Wis. 502; McPherson *v.* Cox, 96 U. S. (6 Otto) 404; bk. 24, L. ed. 746.

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

See, also, Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Woods *v.* Armstrong, 54 Ala. 150; Johnston *v.* McConnell, 65 Ga. 129; Kleckley *v.* Leyden, 63 Ga. 215; Wadleigh *v.* Develling, 1 Ill. App. 596; Caldwell *v.* Bridal, 48 Iowa, 15; Durgin *v.* Dyer, 68 Me. 143; James *v.* Josselyn, 65 Me. 138; Coombs *v.* Emery, 14 Me. 404; Prescott *v.* Battersby, 119 Mass. 285; Sawyer *v.* Smith, 109 Mass. 220; Smith *v.* Arnold, 106 Mass. 269; Libby *v.* Downey, 87 Mass. (5 Allen) 299; Miller *v.* Post, 83 Mass. (1 Allen) 434; White *v.* Buss, 57 Mass. (3 Cush.) 449, 450; Atlas Bank *v.* Nahant Bank, 44 Mass. (3 Metc.) 581; Pattee *v.* Greely, 55 Mass. (13 Metc.) 284; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181; Allen *v.* Hawks, 30 Mass. (13 Pick.) 82; Wheeler *v.* Russell, 17 Mass. 258; Russell *v.* De Grand, 15 Mass. 35; Springfield Bank *v.* Merrick, 14 Mass. 322; Pray *v.* Burbank, 10 N. H. 377; Sharp *v.* Teese, 9 N. J. L. (4 Halst.) 352; s. c. 17 Am. Dec. 479; Seidenbender *v.* Charles, 4 Serg. & R. (Pa.) 159; s. c. 8 Am. Dec. 682; Mitchell *v.* Smith, 1 Binn. (Pa.) 118; s. c. 2 Am. Dec. 417; 4 U. S. (4 Dall.) 269; bk. 1, L. ed. 828; Bancroft *v.* Dumas, 21 Vt. 456; Bank of Rutland *v.* Parsons, 21 Vt. 199; Territt *v.* Bartlett, 21 Vt. 184; Harris *v.* Runnels, 53 U. S. (12 How.) 80; bk. 13, L. ed. 901.

Validity of contract determined by lex loci contractus. — The validity of a contract is usually to be determined by the law of the place where it is made. Finch *v.* Mansfield, 97 Mass. 89; Corning *v.* Abbott, 54 N. H. 469, 470; Boothby *v.* Plaisted, 51 N. H. 436; s. c. 12 Am. Rep. 140; Hill *v.* Spear, 50 N. H. 253; s. c. 9 Am. Rep. 205; Bliss *v.* Brainard, 41 N. H. 256, 261; Whitney *v.* Whiting, 35 N. H. 457; Backman *v.* Jenks, 55 Barb. (N. Y.) 468; s. c. 1 Alb. L. J. 123; Wilcox *v.* Hunt, 38 U. S. (13 Pet.) 379; bk. 10, L. ed. 209; Andrews *v.* Pond, 38 U. S. (13 Pet.) 65; bk. 10, L. ed. 61; United States Bank *v.* Donnally, 33 U. S. (8 Pet.) 372; bk. 8, L. ed. 974; Fergusson *v.* Fyffe, 8 Cl. & F. 121; Don *v.* Lippmann, 5 Cl. & F. 13. The imposition of a penalty is usually equivalent to prohibition. Woods *v.* Armstrong, 54 Ala. 150; Caldwell *v.* Bridal, 48 Iowa, 15; Dillon *v.* Allen, 46 Iowa, 299; s. c. 26 Am. Rep. 145; Durgin *v.* Dyer, 68

§ 695. But the question frequently arises whether, on the true construction of a statute, the contract under consideration has really been prohibited, and in determining this point much weight has been attributed to a distinction held to exist between two classes of the statutes, those passed merely for revenue purposes, and those which have in contemplation, wholly or in part, the protection of the public, or the promotion of some object of public policy. It is necessary to review the cases, as the principles established by them seem to be imperfectly stated in some of the text-books.

§ 696. The leading case on this point is Johnson *v.* Hudson,[1] decided by the King's Bench in 1809. Different statutes had provided, 1st, that all persons dealing in tobacco should, before dealing therein, take out a license under penalty of 50*l.*: and 2dly, that no tobacco should be imported, either wholly or in part manufactured, under penalty of forfeiture of the tobacco, the package, and the ship. In this state of the law, the plaintiffs, who had never before dealt in that article, received a consignment of tobacco manufactured into segars, *which they duly entered at the Custom House*, and then sold to defendant without taking out a license. The Court *held* that the action was maintainable, observing "that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; *nor any clause making the contract of sale illegal*, but, at most, it was ** the breach of a mere revenue regulation* which was [*522]

Me. 143; Prescott *v.* Battersby, 119 Mass. 285; Sawyer *v.* Smith, 109 Mass. 220; Smith *v.* Arnold, 106 Mass. 269; Libby *v.* Downey, 87 Mass. (5 Allen) 299; Miller *v.* Post, 83 Mass. (1 Allen) 434; Gregory *v.* Wilson, 36 N. J. L. (8 Vr.) 315, 316; s. c. 13 Am. Rep. 448; Holt *v.* Green, 73 Pa. St. 198; s. c. 13 Am. Rep. 737; Burkholder *v.* Bertem, 65 Pa. St. 496, 507; Mitchell *v.* Smith, 1 Binn. (Pa.) 110; s. c. 2 Am. Dec. 417; Seidenbender *v.* Charles, 4 Serg. & R. (Pa.) 159; s. c. 8 Am. Dec. 682; Columbia Bank, &c. Co. *v.* Halderman, 7 Watts & S. (Pa.) 233; s. c. 43 Am. Dec. 229; Bank of the United States *v.* Owens, 27 U. S. (2 Pet.) 538; bk. 7, L. ed. 508; and where a contract is forbidden the law will not enforce the contract but will leave the parties where it finds them. James *v.* Josselyn, 65 Me. 138; Cotten *v.* McKenzie, 57 Miss. 418; Decell *v.* Lewenthal, 57 Miss. 331; Anding *v.* Levy, 57 Miss. 51; s. c. 34 Am. Rep. 449; Block *v.* McMurry, 56 Miss. 217; s. c. 31 Am. Rep. 357; Coppell *v.* Hall, 74 U. S. (7 Wall.) 542, 559; bk. 19, L. ed. 244.

[1] 11 East, 180.

protected by a specific penalty; and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the Act."

§ 697. Next, in 1829, Brown *v.* Duncan[1] came before the same Court. The statutes provided, 1st, that no distiller should, under penalty, deal in the retail sale of spirits within two miles of the distillery; and 2d, that in taking out a license for distilling, the names of the persons taking out the license should be inserted. One of five partners in a distillery was engaged in the retail trade within two miles of the distillery, and his name was, it seems, intentionally omitted in taking out the distillers' license. The partners then appointed an agent to sell their whiskey in London, and the defendant guaranteed the fidelity of the agent. In the action by the partners to enforce this contract, its illegality was pleaded. The Court held that the plaintiffs could recover on the authority of Johnson *v.* Hudson, saying "there has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt in order to secure, as far as may be, the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. . . . These cases are very different from those where the provisions of Acts of Parliament have had for their *object the protection of the public*, such as the Acts against stock-jobbing and the Acts against usury. It is different, also, from the case where a sale of bricks required by Act of Parliament to be of a certain size was held to be void because they were under that size. There the Act of Parliament operated as a *protection to the public as well as to the revenue*, securing to them bricks of the particular dimensions. Here the clauses of the Act of Parliament had *not for their object to protect the public, but the revenue only*."[2]

[1] 10 B. & C. 93. See, also, Wetherell *v.* Jones, 3 B. & Ad. 221.

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

§ 698. * In 1836, Cope *v.* Rowlands[1] was decided [*523] in the Exchequer, and it was held that a City of London broker could not maintain an action for his commissions in buying and selling stock, unless duly licensed according to the 6 Anne, c. 16, s. 4, which provides that if any person should act as a broker in making sales, &c., without such license, he shall forfeit 25*l.* "for every such offence." In the course of the argument, Parke B. said: "Very considerable doubt was thrown on the distinction which has been taken between breaches of laws passed for revenue purposes, and others, in the case of Brown *v.* Duncan, and when it comes to be considered, I think that distinction will be overruled." The Court took the case into consideration, and the decision was delivered by the same learned Baron, who again said: "It may be safely laid down, notwithstanding some dicta apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract.*" Notwithstanding this statement, the learned baron went on to say that the question before the Court was whether the statute under discussion "is meant *merely* to secure a revenue to the city, . . . or whether *one* of the *objects be the protection of the public. . . . On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; in the latter it is.*" The Court then decided that the benefit and security of the public formed *one* object of the statute, and that the plaintiff was not entitled to recover.

§ 699. Again, in 1845, the same point was discussed in the same Court, in Smith *v.* Mawhood,[1] where the defence in an action for goods sold and delivered was based on the allegation that the goods were tobacco, and that the plaintiff had not complied with the law requiring him to have his name

[1] 2 M. & W. 149; and see Fergusson *v.* Norman, 5 Bing. N. C. 76, approving Cope *v.* Rowlands and Barton *v.* Piggott, L. R. 10 Q. B. 86.

[1] 14 M. & W. 463.

painted on the house in which he carried on his bus-
[*524] iness, in *the manner specified in the law, under penalty that the person so offending should forfeit 200*l.* Held, that plaintiff could maintain his action. Parke B. said: "I think the object of the legislature was not to *prohibit a contract* of sale by dealers who have not taken out a license pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition were *merely* for the purpose of revenue. But, looking to the Act of Parliament, I think its object was not to vitiate the contract itself, but only to *impose a penalty on the party offending, for the purpose of the revenue.*" The other judges concurred, and Alderson B. pointed out, as a controlling circumstance in construing the statute, that the penalty was "for carrying on the trade in a house in which the requisites were not complied with; and that there is no addition to his criminality if he makes fifty sales of tobacco in such a house."[2]

This distinction seems to be as sound as it is acute. In Cope *v.* Rowlands, the broker was not allowed to recover, because, by the law, *each sale was an offence, punished by a separate penalty;* but in Smith *v.* Mawhood there was but one offence, punished by but one penalty, viz., the *offence of failing to paint a proper sign on the house in which the business was done.* Making a sale in such a house was not declared by the law to be an offence.

§ 700. In the Court of Common Pleas, in 1847, all the foregoing cases were cited and considered in Cundell *v.*

[2] See Pope *v.* Beals, 108 Mass. 561; Larned *v.* Andrews, 106 Mass. 435; s. c. 8 Am. Rep. 346; Aikin *v.* Blaisdell, 41 Vt. 655, 666; Johnson *v.* Hudson, 11 East, 180. A distinction is to be drawn between a law that forbids an act and imposes a penalty for its commission, and a law that imposes a penalty without forbidding the act. Lowell *v.* Boston & Lowell R. R. Corp., 40 Mass. (23 Pick.) 32; s. c. 34 Am. Dec. 33; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 184; Lewis *v.* Welch, 14 N. H. 294; Favor *v.* Philbrick, 7 N. H. 340; Schermerhorn *v.* Talman, 14 N. Y. 93, 124, 125. But there is said to be no distinction in legal effect between these laws. See Aiken *v.* Blaisdell, 41 Vt. 655. In Larned *v.* Andrews, 106 Mass. 436; s. c. 8 Am. Rep. 346; it was held that the neglect or refusal of a wholesale dealer to pay the internal revenue tax imposed on him does not invalidate sales made by him during the period of his default, or prevent his recovery of the price of the goods sold.

Dawson.[1] At the close of the argument, Wilde C. J. said, that considering the diversity of *dicta* and decisions on the subject, the Court would not pronounce any judgment without looking into the cases more carefully, and the matter was therefore held under advisement from the 23d of April to the 8th of May, when the Chief Justice delivered the opinion of the Court. The action was for the price of coals, and the defence was that the plaintiff had violated the statute 1 & 2 Vict. c. 101, by failing to deliver to the defendant a ticket as required by that statute, stating the quantity and description of the coals delivered. The statute directed such delivery, * under penalty, in case of de- [*525] fault, of 20*l.* "for every such offence." The Chief Justice said: "The statutes which have given rise to the question of the right to recover the price of the goods by sellers who have not complied with the terms of such statutes, are of two classes — the one class of statutes having for their *object the raising and protection of the revenue:* the other class of statutes being directed either to the *protection of buyers* and consumers, or to some *object of public policy.* The present case arises upon a statute included in the latter class. . . . The class of statutes enacted simply for the security of the revenue, do not apply to the present case: and various determinations which are contained in the books, upon the construction of those statutes, and the effect of a non-compliance with their enactments by the seller of goods, rest upon principles not applicable to the present case." The Court then held, on the authority of Little *v.* Pool,[2] that the Coal Acts[3] were intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

§ 701. In 1848, the same Court adverted to the same distinction in Ritchie *v.* Smith.[1] The case was a very clear one. It was a bargain between parties, by which the buyer

[1] 1 Com. Bl. 376.

[2] 9 B. & C. 192.

[3] The Coal Act, 1 & 2 Vict. c. 101, does not apply where coals are unloaded directly from the vessel in which they were shipped on to the wharf of the purchaser. Blandford *v.* Morrison, 15 Q. B. 724, and 19 L. J. Q. B. 533.

[1] 6 C. B. 462.

was to be enabled to carry on a retail trade in spirits on part of the vendor's premises, under the vendor's license, so as to make one license cover both trades. The statute, 9 Geo. IV. c. 61,[2] inflicted a penalty, when liquor was sold to be drunk on the premises, without such license, of not more than 20*l.* nor less than 5*l.*, "for every such offence." Wilde C. J. said that "it is impossible to look at this agreement without seeing that the parties contemplated doing an illegal thing, in the infraction of a law enacted *not simply for revenue purposes*, but for the safety and protection of the public morals." * All the judges, Coltman, Maule, and Williams, put the judgment on the same ground, that the law was made *not merely for revenue purposes*, but for the protection of the public morals.[3]

[*526]

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

First. — That where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that parliament has prohibited it, and it is therefore void.

Secondly. — That when the question is *whether* a contract has been prohibited by statute, it *is* material, in *construing the statute*, to ascertain whether the legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is, that the statute was not intended to prohibit contracts; in the latter, that it was.

Thirdly. — That in seeking for the meaning of the lawgiver, it is material also to inquire whether the penalty is imposed once for all, on the offence of failing to comply with the requirements of the statute, or whether it is a recurring

[2] The penalties now in force for the sale of intoxicating liquors without license are those imposed by 35 & 36 Vict. c. 94, s. 3 (Licensing Act, 1872). See also sects. 4–8 of the same Act and sect. 9 of 37 & 38 Vict. c. 49 (Licensing Act, 1874).

[3] It is not a fraud on the revenue, nor illegal, to sell to an unlicensed person beer which is to be retailed by a licensed person at a public-house. Brooker *v.* Wood, 5 B. & Ad. 1052.

penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to *prevent the dealing*, to *prohibit the contract*, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced.[1]

§ 703. It is quite in accordance with these principles that in Bensley *v.* Bignold,[1] it was held by the Common Pleas that a printer who had omitted to affix his name to a book, in violation of 39 Geo. III. c. 79, s. 27,[2] which punishes such omission by a penalty of 20*l.* *for every copy published*, could not recover for work and labor done, and materials furnished. The statute was declared to have been enacted for public purposes.

*So, also, in Foster *v.* Taylor,[3] a farmer was held [*527] not entitled to recover the price of butter sold, because he had packed it in firkins, not marked, in violation of the prohibition of the statute, 36 Geo. III. c. 88; and in Law *v.* Hodson,[4] a vendor failed in his action because his bricks had been sold of smaller dimensions than permitted by the statute 17 Geo. III. c. 42. In both these statutes a penalty was imposed *for every offence.*

In Lightfoot *v.* Tenant,[5] the sale was of lawful goods, but they were sold knowingly for the purpose of being shipped on board of foreign ships to trade to the East Indies, and by the 7 Geo. I. c. 21, s. 2, all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

§ 704. There have been numerous decisions, also, under the various statutes which have been passed, modified, and repealed from time to time, for ascertaining and establishing

[1] See Lindsey *v.* Rutherford, etc., 17 B. Mon. (Ky.) 245; Larned *v.* Andrews, 106 Mass. 435; s. c. 8 Am. Rep. 346; Corning *v.* Abbott, 54 N. H. 469, 471; Ruckman *v.* Bergholz, 37 N. J. L. (8 Vr.) 437, 440; Vining *v.* Bricker, 14 Ohio St. 331; Rossman *v.* McFarland, 9 Ohio St. 369; Holt *v.* Green, 73 Pa. St. 198; s. c. 13 Am. Rep. 737; Aiken *v.* Blaisdell, 41 Vt. 655, 666; Harris *v.* Runnels, 53 U. S. (12 How.) 84; bk. 13, L. ed. 901.

[1] 5 B. & Ald. 335.

[2] This section is now repealed by the 32 & 33 Vict. c. 24.

[3] 5 B. & Ad. 887.

[4] 11 East, 300; and see a case on the game laws, Helps *v.* Glenister, 8 B. & C. 553.

[5] 1 B. & P. 551.

uniformity of weights and measures, all of which are quite in accordance with those above reviewed.[1]

[The law on this subject is now consolidated by the 41 & 42 Vict. c. 49, The Weights and Measures Act, 1878.]

§ 705. The statute 1 & 2 Will. IV. c. 32, prohibits the sale of birds of game after the expiration of ten days from the respective days in each year on which it becomes unlawful under the Act to kill or take such birds. This Act includes live game.[1] The 17th section authorizes every person who shall have obtained a game certificate, to sell game to a licensed dealer, with a proviso that no gamekeeper shall sell any game, except for account and on the written authority of his master, whenever his game cetificate has cost less than 3*l.* 13*s.* 6*d.*

The 25th section prohibits, under penalty of not more than 2*l.* for each head of game, the offence of selling game [*528] by an *unlicensed person, who has not obtained a game certificate, or of selling, even when possessed of a game certificate, to any other person than a licensed dealer; but by the 26th section, the prohibition does not extend to an innkeeper or tavern keeper who sells to his guests, for consumption in his house, game bought from a licensed dealer. The 27th section imposes penalties on the buyer of game who

[1] See Rex *v.* Major, 4 T. R. 750; Rex *v.* Arnold, 5 T. R. 353; Tyson *v.* Thomas, 1 M'Cl. & Y. 119; Owens *v.* Denton, 1 C. M. & R. 711; Hughes *v.* Humphreys, 23 L. J. Q. B. 356, and 3 E. & B. 954; Jones *v.* Giles, 23 L. J. Ex. 292, and 10 Ex. 119; and in Ex. Ch. 24 L. J. Ex. 259, and 11 Ex. 303; Watts *v.* Friend, 10 B. & C. 446.

A recovery can be had for the price of articles sold by weight or measure not sealed as required by statute if the sealer of weights and measures has not been given permission to test them and if they have not been by him condemned. Eaton *v.* Kegan, 114 Mass. 433; Ritchie *v.* Boynton, 114 Mass. 431. See, also, Woods *v.* Armstrong, 54 Ala. 150; s. c. 25 Am. Rep. 671; Durgin *v.* Dyer, 68 Me. 143. But the rule is well established that contracts for the sale of chattels entered into in contravention of the terms and policy of the statute cannot be enforced, and it is immaterial whether the sale is expressly prohibited or a penalty is imposed, therefore, because the imposition of a penalty in such case implies a prohibition. Durgin *v.* Dyer, 68 Me. 143; Foye *v.* Southard, 54 Me. 147; s. c. 64 Me. 389; Buxton *v.* Hamblen, 32 Me. 448; Libby *v.* Downey, 87 Mass. (5 Allen) 299; Miller *v.* Post, 83 Mass. (1 Allen) 434; Cundell *v.* Dawson, 4 C. B. 376; s. c. 56 Eng. C. L. 375.

[1] Loome *v.* Bayly, 30 L. J. M. C. 31. But see, also, Porritt *v.* Baker, 10 Ex. 759.

buys from one not a licensed dealer, unless the purchase be made *bonâ fide* at a shop or house where a board is affixed to the front, purporting to be the board of a licensed dealer in game.

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

§ 706. The statute 8 & 9 Vict. c. 109, s. 18, provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for covering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

§ 707. At common law, the wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited.[1] Since the

[1] Sherbon *v.* Colebach, 2 Vent. 175; Johnson *v.* Lausley, 12 C. B. 468; Dalby *v.* India Life Assurance Co., 15 C. B. 365; 24 L. J. C. P. 2, 6.

Wagering contracts are void on the ground of public policy. Gilmore *v.* Woodcock, 69 Me. 118; s. c. 31 Am. Rep. 255; McDonough *v.* Webster, 68 Me. 530; Lewis *v.* Littlefield, 15 Me. 233; Sampson *v.* Shaw, 101 Mass. 150; s. c. 3 Am. Rep. 327; Ball *v.* Gilbert, 53 Mass. (12 Metc.) 397, 399; Babcock *v.* Thompson, 20 Mass. (3 Pick.) 446; s. c. 15 Am. Rep. 235; Amory *v.* Gilman, 2 Mass. 1; Winchester *v.* Nutter, 52 N. H. 507; s. c. 13 Am. Rep. 93; Clark *v.* Gibson, 13 N. H. 386; Hoit *v.* Hodge, 6 N. H. 104; s. c. 25 Am. Dec. 451; Perkins *v.* Eaton, 3 N. H. 152; Edgell *v.* McLaughlin, 6 Whart. (Pa.) 175; s. c. 36 Am. Dec. 214; Rice *v.* Gist, 1 Strobh. (S. C.) L. 82; Collamer *v.* Day, 2 Vt. 144.

Recovery of money from stakeholder. — The depositor of a wager with a stakeholder may recover it from him before paid to the winner or from the latter after it is paid over. See Carrier *v.* Brannan, 3 Cal. 328; Petillon *v.* Hipple, 90 Ill. 420; s. c. 32 Am. Rep. 31; Richardson *v.* Kelly, 85 Ill. 491; Doxey *v.* Miller, 2 Ill. App. 30; Alvord *v.* Smith, 63 Ind. 58; Brown *v.* Thompson, 14 Bush (Ky.) 538; s. c. 29 Am. Rep. 416; Patterson *v.* Clark, 126 Mass. 531; Morgan *v.* Beaumont, 121 Mass. 7; McKee *v.* Manice, 65 Mass. (11 Cush.) 357; Whitwell *v.* Carter, 4 Mich. 329; Wilkinson *v.* Tousley, 16 Minn. 299; s. c. 10 Am. Rep. 139; Martin *v.* Terrell, 20 Miss. (12 Sm. & M.) 571; Bunn *v.* Riker, 4 Johns. (N. Y.) 426; s. c. 4 Am. Dec. 292; Phillips *v.* Ives, 1 Rawle (Pa.) 37; Hasket *v.* Wootan, 1 Nott & McC. (S. C.) 180; Tarleton *v.* Baker, 18 Vt. 9; s. c. 44 Am. Dec. 358; Collamer *v.* Day, 2 Vt. 144; Diggle *v.* Higgs, 2 Ex. D. 422; M'Elwaine *v.* Mercer, 9 Ir. C. L. 13; Graham *v.* Thompson, 2 Ir. C. L. 64; Bailey *v.* McDuffee, 2 Pugs. & B. (N. B.) 26; Ryerson *v.* Derby, 1

passing of the above statute, cases have arisen, which present the question whether an executory contract for the sale of goods is not a device for indulging in the spirit of gaming which the statute was intended to repress. It has already been shown (*ante*, pp. 80, 81) that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them. But such a contract is only valid where the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer. If under guise of such a contract, the real intent be merely to speculate in
[*529] the rise * or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the

Russ. & Chess. (N. S.) 13; 1 Chitty Contr. (11th Am. ed.) 735, 738.

A gambling contract is invalid. — Bates *v.* Clifford, 22 Minn. 52; Cooper *v.* Brewster, 1 Minn. 94; Denniston *v.* Cook, 12 Johns. (N. Y.) 376; Lansing *v.* Lansing, 8 Johns. (N. Y.) 454; Brush *v.* Keeler, 5 Wend. (N. Y.) 256; Harper *v.* Crain, 36 Ohio St. 338; Lucas *v.* Harper, 24 Ohio St. 328; Thomas *v.* Cronise, 16 Ohio St. 54; Shumat *v.* Commonwealth, 15 Gratt. (Va.) 653; Danforth *v.* Evans, 16 Vt. 538. Respecting gambling contracts and option sales, see Hatch *v.* Douglas, 48 Conn. 116, 127; s. c. 40 Am. Rep. 154; Cole *v.* Milmine, 88 Ill. 349; Lyon *v.* Culbertson, 83 Ill. 33; s. c. 35 Am. Rep. 349; Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Cease, 79 Ill. 328; Beveridge *v.* Hewitt, 8 Ill. App. 467; Sawyer *v.* Taggart, 14 Bush (Ky.) 727; Sampson *v.* Shaw, 101 Mass. 150; s. c. 3 Am. Rep. 327; Gregory *v.* Wendell, 39 Mich. 337, 344; s. c. 33 Am. Rep. 390; Rudoff *v.* Winters, 7 Neb. 125; Gheen *v.* Johnson, 90 Pa. St. 38, 44; Fareira *v.* Gabell, 89 Pa. St. 89; Maxton *v.* Gheen, 75 Pa. St. 166; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155, 158; Smith *v.* Bouvier, 70 Pa. St. 325, 332; Brua's Appeal, 55 Pa. St. 294, 298; Swart's Appeal, 3 Brewst. (Pa.) 131; Brown *v.* Speyers, 20 Gratt. (Va.) 296; Everingham *v.* Meigham, 55 Wis. 354; Barnard *v.* Backhaus, 52 Wis. 593, 597; Melchert *v.* American Union Tel. Co., 3 McCr. C. C. 521; s. c. 11 Fed. Rep. 193. See, sec. 708, note 2.

The burden is on the plaintiff to show that the transaction was a gambling one, because it will be presumed to be legitimate until the contrary is shown. Harris *v.* Tumbridge, 83 N. Y. 92; s. c. 38 Am. Rep. 398; Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Salomon, 71 N. Y. 420; Bigelow *v.* Benedict, 70 N. Y. 202; s. c. 26 Am. Rep. 573. A contrary doctrine, however, prevails in Michigan. Everingham *v.* Meighan, 55 Wis. 354; Barnard *v.* Backhaus, 52 Wis. 593, 599. Some of the cases hold that to constitute a gambling transaction the intent must be common between the buyer and seller. Murry *v.* Ocheltree, 59 Iowa, 435; Rumsey *v.* Berry, 65 Me. 570; Gregory *v.* Wendell, 39 Mich. 337, 344; s. c. 33 Am. Rep. 390; Williams *v.* Carr, 80 N. C. 294, 298; Clarke *v.* Foss, 7 Biss C. C. 540; Grizewood *v.* Blane, 11 C. B. 526; s. c. 73 Eng. C. L. 525; Rourke *v.* Short, 5 El. & Bl. 904; s. c. 34 Eng. L. & Eq. 219.

difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute.[2] In Grizewood *v.* Blane,[3] where the contract was for the future delivery of railway shares, Jervis C. J. left it to the jury to say "what was the plaintiff's intention, and what was the defendant's intention, at the time of making the contract, whether either party really meant to purchase or to sell the shares in question, telling them, that if they did not, the contract was, in

[2] See Branch *v.* Palmer, 65 Ga. 210; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Warren *v.* Hewitt, 45 Ga. 501; Swift *v.* Powell, 44 Ga. 124; Corbett *v.* Underwood, 83 Ill. 324; s. c. 25 Am. Rep. 392; Lyon *v.* Culbertson, 83 Ill. 33; s. c. 25 Am. Rep. 349; Logan *v.* Music, 81 Ill. 415; Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Cease, 79 Ill. 328; s. c. 8 Chic. Leg. News. 340; Colderwood *v.* McCrea, 11 Ill. App. 543; Beveridge *v.* Hewitt, 8 Ill. App. 467; Webster *v.* Sturges, 7 Ill. App. 560; Gregory *v.* Wattowa, 58 Iowa, 711; Sawyer *v.* Taggart, 14 Bush (Ky.) 727; Rumsey *v.* Berry, 65 Me. 574; Brown *v.* Phelps, 103 Mass. 313; Barrett *v.* Mead, 92 Mass. (10 Allen) 337; Brigham *v.* Mead, 92 Mass. (10 Allen) 246; Wyman *v.* Fiske, 85 Mass. (3 Allen) 238; s. c. 80 Am. Dec. 66; Barrett *v.* Hyde, 73 Mass. (7 Gray) 160; Shaw *v.* Clark, 49 Mich. 384; s. c. 43 Am. Rep. 474; Gregory *v.* Wendell, 39 Mich. 337; s. c. 40 Mich. 432; Kent *v.* Miltenberger, 13 Mo. App. 317; s. c. 16 Cent. L. J. 433; Williams *v.* Tiedemann, 6 Mo. App. 269; Waterman *v.* Buckland, 1 Mo. App. 45; Harris *v.* Tumbridge, 83 N. Y. 92; s. c. 38 Am. Rep. 398; Story *v.* Salomon, 71 N. Y. 420; Bigelow *v.* Benedict, 70 N. Y. 202; s. c. 26 Am. Rep. 573; Kingsbury *v.* Kirwan, 77 N. Y. 612; s. c. 20 Alb. L. J. 14; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207; Ruckman *v.* Bryan, 3 Den. (N. Y.) 340; Parsons *v.* Taylor, 12 Hun (N. Y.) 252; Yerkes *v.* Salomon, 11 Hun (N. Y.) 473; Williams *v.* Carr, 80 N. C. 294; Kingsbury *v.* Suit, 66 N. C. 601; Dickson *v.* Thomas, 97 Pa. St. 278; Rnchizky *v.* De Haven, 97 Pa. St. 202; Patterson's Appeal, 96 Pa. St. 93; s. c. 16 Cent. L. J. 461; North *v.* Phillips, 89 Pa. St. 250; Fareira *v.* Gabell, 89 Pa. St. 89; Maxton *v.* Gheen, 75 Pa. St. 168; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Smith *v.* Bonvier, 70 Pa. St. 325; Brua's Appeal, 55 Pa. St. 294; Marshall *v.* Thruston, 3 Lea (Tenn.) 740; Everingham *v.* Mieghan, 55 Wis. 354; Barnard *v.* Backhaus, 52 Wis. 593; Hooker *v.* Knab, 26 Wis. 511; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 468; Justh *v.* Halliday, 2 Mackey (D. C.) 346; s. c. 11 Wash. Rep. 418; Gilbert *v.* Gangar, 8 Biss. C. C. 214; Clarke *v.* Foss, 7 Biss. C. C. 540; In re Green, 7 Biss. C. C. 33; Melchert *v.* American Union Tel. Co., 3 McCr. C. C. 521; Cobb *v.* Prell, 15 Fed. Rep. 774; s. c. 16 Cent. L. J. 453; Byers *v.* Beattie, 2 Ir. C. L. 220.

[3] 11 C. B. 526. The decision was (apparently) disapproved by Bramwell B. in Marten *v.* Gibbon, 33 L. T. N. S. at p. 563. See the same case as to the pleadings in 21 L. J. C. P. 46; see, also, Knight *v.* Combers, and Knight *v.* Fitch, 15 C. B. 562 and 566; Jessop *v.* Lutwyche, 11 Ex. 614.

his opinion, a gambling transaction, and void." The ruling was held to be correct.[4]

§ 708. [But the statute affects only the contract which actually makes the bet or wager. It does not apply to a contract which is a gambling transaction in the sense only that its object is to enable one of the contracting parties to gamble. Thus, in Thacker *v.* Harding,[1] the defendant had employed the plaintiff, a broker, to speculate for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts into which the plaintiff entered on his behalf, but the plaintiff was to arrange matters so that nothing but "differences" should be actually payable to or by the defendant. The plaintiff knew that unless such an arrangement was effected, the defendant would not be in a position to take up the contracts. The plaintiff accordingly entered into contracts on the defendant's behalf in respect of which he became by the rules of the Stock Exchange personally liable, and he then sued the defendant for commission and for indemnity against the liability he had incurred. Held, by Lindley J. and afterwards [*530] by the Court of Appeal, * distinguishing Grizewood *v.* Blane, that the agreement between the plaintiff and defendant was not a contract by way of gaming or wagering within the meaning of 8 & 9 Vict. c. 109, s. 18, and that the plaintiff was entitled to recover. In the judgment of Lindley J. the nature of the transactions on the Stock Exchange, and in particular that of the so-called "time-bargains," is fully considered.[2]

[4] And see Higginson *v.* Simpson, 2 C. P. D. 76, and cases there cited.

[1] 4 Q. B. D. 685, C. A.; where the findings of the jury in Grizewood *v.* Blane are criticized by Brett L. J. at p. 695, and by Cotton L. J. at p. 696; see, also, Cooper *v.* Neill, 27 W. R. 159; W. N. 1878, p. 128.

[2] *Dealing in futures.* — An executory contract for a sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase the goods to fulfil his contract, and no skill or labor or expense enters into the consideration, but it is a pure speculation upon chance the contract will be contrary to the policy of the law, and cannot be enforced by either party. It would seem to be valid, however, where the contract is executed. Warren *v.* Hewitt, 45 Ga. 507; Ingram *v.* Mitchell, 30 Ga. 547; Andrews *v.* Marshall, 48 Me. 26; White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181, 184; Doolittle *v.* Lyman, 44 N. H. 608, 613; State *v.*

It may be remarked that there are transactions, in which the parties may gain or lose, according to the happening of some future event, which are not within the provisions of 8 & 9 Vict. c. 109; for instance, the sale of the next year's crop of a specified orchard.[3]]

§ 709. In the case of Rourke *v.* Short,[1] the plaintiff and defendant, while discussing the terms of a bargain for the sale of a parcel of rags, differed as to their recollection of the price at which a parcel had been previously invoiced by the plaintiff to the defendant, and then agreed to a sale on these terms, viz., that the rags should be paid for at six shillings a cwt. if the plaintiff's, but only three shillings a cwt. if the defendant's, statement as to the former sale should turn out to be correct, six shillings being more and three shillings being less than the value of the goods per cwt. It was held, that although the goods were really to be delivered and the price to be paid, yet the terms of the bargain included a wager that rendered it illegal.[2]

§ 710. By the statute 24 Geo. II. c. 40, s. 12 (usually termed the Tippling Act), as amended by the 25 & 26 Vict. c. 38, no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bonâ fide*, to the amount of 20*s.* or upwards, except in cases when sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser, in quantities not less at one time than a reputed quart.

And now by 30 & 31 Vict. c. 142, s. 4, "No action shall henceforth be brought or be maintainable in any court to

Plaisted, 43 N. H. 413; Williams *v.* Carr, 80 N. C. 294; Fareira *v.* Gabell, 89 Pa. St. 89; Smith *v.* Bouvier, 70 Pa. St. 325; Bruas' Appeal, 55 Pa. St. 294; Brooks *v.* Martin, 69 U. S. (2 Wall.) 79; bk. 17, L. ed. 732; McMicken *v.* Perin, 59 U. S. (18 How.) 510; bk. 15, L. ed. 504; McBlair *v.* Gibbs, 53 U. S. (17 How.) 232; bk. 15, L. ed. 132; Armstrong *v.* Toler, 24 U. S. (11 Wheat.) 272; bk. 6, L. ed. 468. To render a contract invalid, however, both parties must be privy to and participate in the illegal intent. See sec. 707, note 1.

[3] See *per* Bramwell L. J., 4 Q. B. D. at p. 692, and *per* Cotton L. J. at p. 696.

[1] 5 E. & B. 904; 25 L. J. Q. B. 196.

[2] Quære—unenforceable. The statute makes gaming contracts null and void, but not illegal. See Fitch *v.* Jones, 5 E. & B. 238.

[*531] *recover any debt or sum of money, alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given" for obtaining said articles.

§ 711. In construing the Tippling Acts it has been held, that the prohibition extends to sales made to a retail dealer who bought for the purpose of selling again to his customers;[1] but in Spencer *v.* Smith,[2] Lord Ellenborough would not allow this defence to prevail, where a bill of exchange for 6*l.* had been given by a lieutenant in the recruiting service for spirits supplied to him at different times, not for consumption at the house of vendor, but for use by recruits and others under the officers' command. In Burnyeat *v.* Hutchinson,[3] the Queen's Bench, in 1821, refused to except from the operation of the statute a sale made to one who was not himself the consumer, and where the spirits formed part of an entertainment given at the buyer's expense to third persons, the Court holding that the "prohibition was general and absolute." This decision was not brought to the notice of Lord Abinger, in 1835, when he held, in Proctor *v.* Nicholson,[4] that the enactment did not apply to the case of spirits supplied to a guest lodging in the house, and Proctor *v.* Nicholson can hardly be considered an authority after the observations of the Court in Hughes *v.* Dove.[5]

If quantities of spirits of different kinds be sold, the quantity of each being less than 20*s.* in value, but the whole amounting to more than that sum, the sale is legal.[6]

Some cases[7] in which the price of spirits sold in contravention of the Tippling Acts formed only part of the consideration of the contract sued on, are cited in the note. See, also, *ante*, p. 498, as to consideration partly illegal.[8]

[1] Hughes *v.* Dove, 1 Q. B. 294, overruling Jackson *v.* Attrill, Peake, 181.

[2] 3 Camp. 9.

[3] 5 B. & Ald. 241.

[4] 7 Car. & P. 67.

[5] 1 Q. B. 294.

[6] Owens *v.* Porter, 4 C. & P. 367.

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

[8] See State *v.* Delano, 54 Me. 501; Webster *v.* Sanborn, 47 Me. 471; Wilson *v.* Stratton, 47 Me. 120; Ban-

§ 712. *By the 31 Geo. II. c. 40, s. 11, cattle sales- [*532] men in London, and others who sell cattle there on commission, are forbidden to buy live cattle, sheep, or swine, either in London or while on the road to London (except for actual use by themselves and family), or to sell in London or within the weekly bills of mortality, any live cattle, sheep, or swine. This statute is said in the preamble to be intended to prevent abuses by cattle salesmen to the prejudice of their employers.

§ 713. The statutes passed in relation to the sale of offices are the 5 & 6 Edw. VI. c. 16, and the 49 Geo. III. c. 126, amending and enlarging the provisions of the first Act. These statutes are declared to extend to Scotland and Ireland by the first section of the latter Act.

The principal provisions of these statutes prohibit the sale of any office, or deputation, or part of an office which "shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's highness' treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the king's Majesty's honors, castles, manors, lands, tenements, woods, or hereditaments; *or any of the king's Majesty's customs, or any other administration or necessary attendance to be had, done, or executed in any of the king's Majesty's custom-house or houses*,[1] or the keeping of any of the king's Majesty's towns, castles, or fortresses being used, occupied, or appointed for a place of strength and defence: or which shall touch or concern any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered" (5 & 6 Edw. VI. c. 16, s. 2); and "all offices in the gift of the crown or of any office appointed by the crown, and all commissions civil, naval, or military, and all places and em-

chor *v.* Monsel, 47 Me. 58; State *v.* Greenleaf, 31 Me. 517; Commonwealth *v.* Holbrook, 92 Mass. (10 Allen) 200; Holt *v.* O'Brien, 81 Mass. (15 Gray) 311; Doolittle *v.* Lyman, 44 N. H. 608; Bliss *v.* Brainard, 41 N. H. 256; Ferguson *v.* Clifford, 37 N. H. 19; Aiken *v.* Blaisdell, 41 Vt. 655.

[1] The clause in italics seems to be repealed by the 6 Geo. IV. c. 104. See "The Statutes Revised," vol. i. p. 559.

ployments, and all deputations to any such offices, commissions, places or employments in the respective departments or offices, or under the appointment or superintendence and control of the Lord High Treasurer, or Commissioners of the Treasury, the Secretary of State, the Lords Commis-
[*533] sioners for executing the office of Lord High * Admiral, the Master-General, and principal officers of his Majesty's Ordnance, the Commander-in-Chief, the Secretary at War, the Paymaster-General of his Majesty's Forces, the Commissioners for the affairs of India, the Commissioners of Excise, the Treasurer of the Navy, the Commissioners of the Navy, the Commissioners for Victualling, the Commissioners of Transports, the Commissary-General, the Storekeeper-General, and also the principal officers of any other public department or office of his Majesty's Government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations which now belong, or may hereafter belong to his Majesty, and also all offices, commissioners, places, and employments belonging to or under the appointment or control of the United Company of Merchants of England trading to the East Indies." (49 Geo. III. c. 126, s. 1.)

§ 714. The exceptions to these prohibitions provide that they shall not be applicable "to any office or offices whereof any person or persons is or shall be seized of any estate of inheritance: nor to any office of parkership or the keeping of any park, house, manor, garden, chase, or forest, or to any of them."[1] And it is provided that the Act "shall not in any wise extend or be prejudicial or hurtful to any of the chief justices of the king's courts, commonly called the King's Bench or Common Pleas, or to any of the justices of assize that now be or hereafter shall be, but that they and every of them may do in every behalf touching or concerning any office or offices to be given or granted by them or any of them, as they or any of them might have done before the making of this Act."[2]

[1] Stat. 5 & 6 Edw. VI. c. 16, s. 4.
[2] *Ibid.*, s. 7, repealed by the Statute Law Revision Act, 1863; and see 6 Geo. 4, cc. 83 and 84.

It was also provided that "nothing in this Act contained shall extend or be construed to extend to any purchases, sales, or exchanges of any commissions or appointments in the honorable band of gentlemen pensioners, or in his Majesty's yeoman guard, or in the Marshalsea, and the court of the king of the palace of the King at Westminster, or to extend to any purchases, sales, or exchanges of any * commission in his Majesty's forces, for such prices [*534] as shall be regulated and fixed by any regulation made or to be made by his Majesty in that behalf," [3] but this section is repealed by the Statute Law Revision Act, 1872 (No. 2).

Another section [4] excludes from the operation of the Act of 49 Geo. III. "any office which was legally salable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed, under any patent or appointment for his life."

§ 715. The Act, also, shall not "extend or be construed to extend to prevent or make void any deputation to any office in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance, lawfully made in respect of any allowance, salary, or payment made or agreed to be made by or to such principal or deputy respectively, out of the fees or profits of such office"; (49 Geo. III. c. 126, s. 10;) nor "to any annual reservation, charge or payment made or required to be made out of the fees, perquisites, or profits of any office to any person who shall have held such office in any commission or appointment of any person succeeding to such office, or to any agreement, contract, bond, or other assurance made for securing such reservation, charge, or payment; provided always, that the amount of such reservation, charge, or payment, and the circumstances and reasons under which the same shall have been permitted, shall be stated in the commission, patent, warrant, or instrument of appointment of the person so succeeding to and holding such office and paying or securing such money as aforesaid." (*Ib.*, s. 11.)

[3] 49 Geo. III. c. 126, s. 7. [4] *Ibid.*, s. 9.

§ 716. On these statutes, it has been held that a contract by A. to resign an office, with the intent of B.'s obtaining the appointment, was void.

In Sir Arthur Ingram's case,[1] the report in Coke is as follows: — "Sir Robert Vernon, Knight, being coferer[2] of the king's house of the king's gift, and having the receit of a great summe of money yearely of the king's reve-
[*535] nue, did * for a certaine summe of money bargain and sell the same to sir A. I., and agreed to surrender the said office to the king, *to the entent a grant might be made to sir A.*, who surrendered it accordingly: and thereupon sir A. was, by the king's appointment, admitted and sworne coferer. And it was resolved by sir Thomas Egerton, lord chancellour, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute (5 & 6 Edw. VI. c. 16), and that sir A. was disabled to have or to take the said office."

§ 717. It was, also, held, in the case of Godolphin *v.* Tudor,[1] in the Queen's Bench and affirmed in the House of Lords,[2] that where the salary of an office within the statute 5 & 6 Edw. VI. was certain, a deputation by the principal, reserving to himself a certain lesser sum out of the salary, is good. And even where the profits arising from fees are uncertain, a deputation by the principal, with a reservation of a certain sum, *out of the profits*, is good, for the deputy will not be obliged to pay anything beyond the amount of the profits received. But if the reservation is to pay absolutely a certain sum, without reference to the profits, the agreement is void.[3] And the case was not affected by the fact that it appeared on the record that the payment was to be 200*l.* a-year, and that the profits of the office had amounted to 329*l.* 10*s.* a-year. See the comments of Lord Loughborough in Garforth *v.* Fearon in 1 H. Bl. 327. See, also, the cases

[1] Co. Lit. 234 a. See, also, Huggins *v.* Bainbridge, Willes, 241.

[2] Coferer, or treasurer, from "coffer."

[1] 2 Salk. 467, and 6 Mod. 234; also, Willes, p. 575, n.

[2] 1 Bro. P. C. 135.

[3] See, also, Culliford *v.* De Cardenell, 2 Salk. 466.

of Juxton *v.* Morris, and Law *v.* Law, as reported in the same opinion of Lord Loughborough.

§ 718. The principles established in these decisions under the 5 & 6 Edw. VI. were held by the Queen's Bench, in Greville *v.* Atkins,[1] to be applicable also to the enactments in 49 Geo. III. c. 126.

§ 719. In the case of Aston *v.* Gwinnell,[1] in the Exchequer Chamber in Equity, the statute was held not to apply to a * covenant in a deed by which the [*536] grantor, a clerk to the Deputy Registrar in the Prerogative Court of Canterbury, authorized and permitted his deputy to pay a yearly sum to trustees of an annuity constituted by the deed. The Court, also, held that the agreement was not void as against public policy, because the situation held by the grantor was not an office, Sir William Alexander, Lord Chief Baron, saying that "he was a mere clerk, assisting the Deputy Registrars, receiving emoluments for business done at the pleasure of his superiors."[2]

In Hopkins *v.* Prescott,[3] an agreement for the sale of a law-stationer's business, he being also *sub-distributor of stamps*, and *collector of assessed taxes*, coupled with a stipulation that the vendor should not do business as a law-stationer within ten miles, *nor collect any of the assessed taxes*, but would do his best to introduce the purchaser of the said business *and offices*, was held void under these statutes.

§ 720. In Harrison *v.* Kloprogge,[1] it was held, that the office of private secretary was not within the statutes. The following officers have been held to come within their provisions: officers of Spiritual Courts, as chancellor, registrar, and commissary,[2] clerk of the fines to a justice in Wales,[3] surrogate,[4] gaolers,[5] undersheriffs,[6] stewards of court-

[1] 9 B. & C. 462.
[1] 3 Y. & J. 136.
[2] But see Palmer *v.* Bate, 2 Br. & B. 673, *ante*, p. 510.
[3] 4 C. B. 578.
[1] 2 Bro. & B. 678.
[2] Dr. Tudor's case, Cro. Jac. 269; Robotham *v.* Tudor, 2 Brownl. 11.
[3] Walter *v.* Walter, Golds. 180.
[4] Juxton *v.* Morris, 2 Ch. Ca. 42, corrected rep. in 1 H. Bl. 332; Woodward *v.* Foxe, 3 Lev. 289; Layng *v.* Paine, Willes, 571.
[5] Stockwith *v.* North, Moore, 781; Huggins *v.* Bainbridge, Willes, 241.
[6] Browning *v.* Halford, Free. 19; and see stat. 3 Geo. I. c. 15.

leets,[7] but not the bailiff of a hundred,[8] or the under-marshal of the City of London.[9]

In a case under the 49 Geo. III., it was held that a cadetship in the East India service was embraced within the law, and that receiving money for procuring the appointment was an indictable offence.[10]

[*537] § 721. *In Graeme *v.* Wroughton,[1] a bargain, by which the officers of a regiment subscribed a sum to induce the major to retire, and thus create a step for promotion in the regiment, was held to be a sale of his office by the major, and void under the statute.

§ 722. By the 2 Will. IV. c. 16, s. 7, the buyer may resist payment of the price of goods (spirits), for the removal of which a permit is required by that statute, by pleading and proving that the goods were delivered without a permit.[1]

§ 723. At common law, a sale made on Sunday was not void.[1] In Drury *v.* Defontaine,[2] Sir James Mansfield delivered the judgment of the Common Pleas, that such a sale was not illegal, until made so by statute.[3]

[7] Williamson *v.* Barnsley, 1 Brownl. 70.

[8] Godbold's case, 4 Leon. 33.

[9] Ex parte Bulter, 1 Atk. 210.

[10] Rex *v.* Charretier, 13 Q. B. 447, and 18 L. J. M. C. 100.

[1] 11 Ex. 146, and 24 L. J. Ex. 265.

[1] See a decision on the construction of this statute, Nicholson *v.* Hood, 9 M. & W. 365.

[1] Tucker *v.* West, 29 Ark. 386; Moore *v.* Murdock, 26 Cal. 514, 526; Davis *v.* Barger, 57 Ind. 54; Johnson *v.* Brown, 13 Kans. 529; Johnson *v.* Dray, 34 Mass. (17 Pick.) 106; Geer *v.* Putnam, 10 Mass. 312; O'Rourke *v.* O'Rourke, 43 Mich. 58; Kaufman *v.* Hamm, 30 Mo. 387; Horacek *v.* Keebler, 5 Neb. 355, 358; Eberle *v.* Mehrbach, 55 N. Y. 682; Merritt *v.* Earle, 29 N. Y. 120; Story *v.* Elliot, 8 Cow. (N. Y.) 27; Batsford *v.* Every, 44 Barb. (N. Y.) 618; Bloom *v.* Richards, 2 Ohio St. 387; Kepner *v.* Keefer, 6 Watts (Pa.) 231; s. c. 31 Am. Dec. 460; Fox *v.* Mensch, 3 Watts & S. (Pa.) 444; Adams *v.* Gay, 19 Vt. 359; Richardson *v.* Goddard, 64 U. S. (23 How.) 28, 42; bk. 16, L. ed. 412.

[2] 1 Taunt. 131.

[3] *Where a statute prohibits work or contracts on Sunday* all contracts made on that day will be invalid. See Merritt *v.* Robinson, 35 Ark. 483, 491; Tucker *v.* West, 29 Ark. 386; Finn *v.* Donahue, 35 Conn. 216; Ball *v.* Powers, 62 Ga. 757; Parker *v.* Pitts, 73 Ind. 597; Gilbert *v.* Vachon, 69 Ind. 372; Mace *v.* Putnam, 71 Me. 238; Davidson *v.* Portland, 69 Me. 116; Meader *v.* White, 66 Me. 90; s. c. 22 Am. Rep. 551; White *v.* Lang, 128 Mass. 598; s. c. 35 Am. Rep. 402; Davis *v.* Somerville, 128 Mass. 594; s. c. 35 Am. Rep. 399; Cranson *v.* Goss, 107 Mass. 442; s. c. 9 Am. Rep. 45; Myers *v.* Meinrath, 101 Mass. 366, 368; s. c. 3 Am. Rep. 368; Dickinson *v.* Richmond, 97 Mass. 45;

By the 29 Charles II. c. 7, it is enacted that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of five shillings; that no person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale."[4]

Bradley *v.* Rea, 96 Mass. (14 Allen) 20; s. c. 103 Mass. 188; s. c. 4 Am. Rep. 524; Ladd *v.* Rodgers, 93 Mass. (11 Allen) 209; Tuckerman *v.* Hinkley, 91 Mass. (9 Allen) 452; Bustin *v.* Rogers, 65 Mass. (11 Cush.) 346; Carroll *v.* Staten Island R. R., 58 N. Y. 126; Platz *v.* Cohoes, 24 Hun (N. Y.) 101; Holcomb *v.* Danby, 51 Vt. 428; Troewert *v.* Decker, 57 Wis. 46; s. c. 37 Am. Rep. 808; Powhatan Steamboat Co. *v.* Appomattox R. R., 65 U. S. (24 How.) 247; bk. 16, L. ed. 682.

Executed contracts made on Sunday. — A contract made and executed on Sunday, in violation of the statute forbidding all business or labor on that day will be void. See Hussey *v.* Roquemore, 27 Ala. 281; Saltmarsh *v.* Tuthill, 13 Ala. 390; Dodson *v.* Harris, 10 Ala. 366; O'Donnell *v.* Sweeney, 5 Ala. 467; s. c. 39 Am. Dec. 336; Tucker *v.* West, 29 Ark. 386; Cameron *v.* Peck, 37 Conn. 555, 557; Ellis *v.* Hammond, 57 Ga. 179; Shaw *v.* Williams, 87 Ind. 158; s. c. 44 Am. Rep. 756; Mueller *v.* State, 76 Ind. 310; Parker *v.* Pitts, 73 Ind. 598; s. c. 38 Am. Rep. 155; Carver *v.* State, 69 Ind. 61; s. c. 35 Am. Rep. 205; Peake *v.* Conlan, 43 Iowa, 297; Sayre *v.* Wheeler, 32 Iowa, 559; s. c. 31 Iowa, 112; Murphy *v.* Simpson, 14 B. Mon. (Ky.) 419; Meader *v.* White, 66 Me. 90; Towle *v.* Larrabee, 26 Me. 464; Day *v.* McAllister, 81 Mass. (15 Gray) 433; Robeson *v.* French, 53 Mass. (12 Metc.) 24; s. c. 44 Am. Dec. 236; Block *v.* McMurry, 56 Miss. 217; s. c. 31 Am. Rep. 357; Adams *v.* Hamell, 2 Doug. (Mich.) 73; s. c. 43 Am. Dec. 455; George *v.* George, 47 N. H. 27; Merrill *v.* Downs, 41 N. H. 72; Varney *v.* French, 19 N. H. 233; Smith *v.* Bean, 15 N. H. 577; Allen *v.* Deming, 14 N. H. 133; Sellers *v.* Dugan, 18 Ohio, 489; Allen *v.* Gardiner, 7 R. I. 24, 25; Lyon *v.* Strong, 6 Vt. 219; Link *v.* Clemmens, 7 Blackf. (Ind.) 479. In Pennsylvania and elsewhere the law seems to be otherwise. See, also, Moore *v.* Murdock, 26 Cal. 514; Ellis *v.* Hammond, 57 Ga. 179; Kinney *v.* McDermot, 55 Iowa, 674; s. c. 39 Am. Rep. 191; Greene *v.* Godfrey, 44 Me. 25; Horton *v.* Buffington, 105 Mass. 399; Meyers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 168; Chestnut *v.* Harbaugh, 78 Pa. St. 473; Foreman *v.* Ahl, 55 Pa. St. 325; Baker *v.* Lukens, 35 Pa. St. 146; Shuman *v.* Shuman, 27 Pa. St. 90; Moore *v.* Kendall, 1 Chand. (Wis.) 33; s. c. 52 Am. Dec. 145.

[4] As to the mode of instituting proceedings under this Act, see 34 &

§ 724. The first reported case under this statute seems to have been Drury *v.* Defontaine,[1] in 1808, more than 130 years after its passage. There the private sale of a horse on a Sunday, made by a horse-auctioneer, was held valid, [*538] as not * within the ordinary calling of the vendor, his business being to sell at public, not private sale.

Next, in 1824, in Bloxsome *v.* Williams,[2] Bayley J. expressed his entire concurrence in the above decision of the Common Pleas, but decided the case on two grounds: 1st, that in the case before him the sale was not complete on the Sunday and 2dly, that it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own ordinary calling of a horse dealer on Sunday, to set up his own contravention of the law against the plaintiff, an innocent person, *who was ignorant of the fact that the defendant was a horse dealer.* Holroyd and Littledale JJ. concurred.

§ 725. In 1826, Fennell *v.* Ridler[1] was decided by the same judges. Plaintiffs were horse dealers, who bought a horse, with warranty, on Sunday; and the action was for breach of warranty. The plaintiffs were non-suited, Bayley J. again delivering the opinion, and saying, that he had given too narrow a construction to the Act in the previous case, and that it was intended to regulate private conduct as well as to promote public decency.[2]

35 Vict. c. 87. This last Act is continued by the Expiring Laws Continuance Act, 1881.

[1] Taunt. 131.

[2] 3 B. & Cr. 232.

[1] 5 B. & Cr. 406.

[2] *Action on contracts made on Sunday* will not lie for deceit, fraud, or a breach of warranty in a sale. Kinney *v.* McDermot, 55 Iowa, 674; s. c. 39 Am. Rep. 191; Gunderson *v.* Richardson, 56 Iowa, 56; Pike *v.* King, 16 Iowa, 49; Murphy *v.* Simpson, 14 B. Mon. (Ky.) 419; Ray *v.* Catlett, 12 B. Mon. (Ky.) 533; Plaisted *v.* Palmer, 63 Me. 576; Towle *v.* Larrabee, 26 Me. 468; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Howard *v.* Harris, 90 Mass. (8 Allen) 297; Robeson *v.* French, 53 Mass. (12 Metc.) 24; s. c. 45 Am. Dec. 236; Smith *v.* Bean, 15 N. H. 577; Lewis *v.* Welch, 14 N. H. 294, 298; Allen *v.* Deming, 14 N. H. 133; Carroll *v.* Staten Island R. R. Co., 58 N. Y. 126; s. c. 17 Am. Rep. 221; Smith *v.* Wilcox, 14 N. Y. 353; Watts *v.* Van Ness, 1 Hill (N. Y.) 76; Northrup *v.* Foot, 14 Wend. (N. Y.) 248. *Contra* Adams *v.* Gay, 19 Vt. 358. The Supreme Judicial Court of Massachusetts in Winchell *v.* Carey, 115 Mass. 560, say that where goods are

Next, in 1827, came Smith *v.* Sparrow,[3] in the Common Pleas. The plaintiff's broker made an agreement on Sunday for a sale to defendant, and at first refused to deliver a written note of the sale (without which it would not have been complete under the Statute of Frauds) until the next day, but finally yielded to defendant's importunity, and gave him a bought note, in which the vendor's name was not mentioned. The broker also entered the sale on his book on Sunday, with a blank for the vendor's name. On Monday the blank was filled up with the vendor's name, before the broker had seen the vendor, or informed him of the sale. The plaintiff's action was for damages, for breach of this contract, and he was held not entitled to recover. Best C. J. expressed a doubt about the decision in Bloxsome *v.* Williams, and * warmly eulogized Fennell *v.* Ridler. [*539] Park J. joined in the commendation of the last-mentioned case, and said he did "not think this Court was right in the decision of Drury *v.* Defontaine."

§ 726. In Williams *v.* Paul,[1] decided in 1830, it was held that where a sale was made on Sunday, and the buyer retained the thing bought, and afterwards made a new promise to pay, he was liable, not for the price agreed on in the void bargain, but for a *quantum meruit* on the new promise.

But in Simpson *v.* Nicholls,[2] Parke B. expressed the opinion that the decision in Williams *v.* Paul could not be supported in law.[3] In Simpson *v.* Nicholls, the defendant pleaded the nullity of the sale made on Sunday, and plaintiff replied "*precludi non*, because although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defend-

sold and delivered to A. & B. on the Lord's day, the sale being induced by the false representations of A. on the previous day, and subsequently, not on the Lord's day, the seller demands the price of A. and he promises to pay it, this amounts to a sale to him, and he will be liable for the price, citing Cranson *v.* Goss, 107 Mass. 439; s. c. 9 Am. Rep. 45; Hall *v.* Corcoran, 107 Mass. 251; s. c. 9 Am. Rep. 30; Stebbins *v.* Peck, 74 Mass. (8 Gray) 553.

[3] 4 Bing. 84.

[1] 6 Bing. 653.

[2] 3 M. & W. 244, and S. C. corrected report in 5 M. & W. 702.

[3] See the American cases referred to, *post*, pp. 541, 542.

ant *after the sale and delivery of the said goods kept and retained the same*, and hath ever since kept and retained the same *without in any manner returning or offering to return the same to the plaintiff*, and thereby hath become liable," &c. Replication held bad on demurrer, because even on the authority of Williams *v.* Paul, which was doubted, a fresh promise was necessary, and this was not alleged in the replication.

In Scarfe *v.* Morgan,[4] the defendant pleaded illegality under the statute against a claim by a farmer for the services of his stallion in covering the defendant's mare on Sunday, but the defence was overruled.

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

§ 728. The statute 30 & 31 Vict. c. 29, s. 1, renders void any contract for the sale of shares in a joint stock [*540] banking *company unless the contract sets forth in writing the numbers of the shares on the register of the company, or where the shares are not distinguished by numbers, the names of the registered proprietors of the shares in the books of the company.[5]

§ 729. The statute 37 & 38 Vict. c. 51, s. 3, enacts, that no maker of or dealer in anchors and chain cables shall sell, or contract to sell, and no person shall purchase, or contract to purchase, for the use of any British ship, any chain cable or any anchor exceeding in weight 168 lbs. which has not been previously tested and stamped in accordance with "The Chain Cables and Anchors' Acts, 1864 to 1874."[1]

§ 730. The statute 38 & 39 Vict. c. 63, s. 6,[1] enacts that "no person shall sell to the prejudice of the purchaser any

[4] 4 M. & W. 270.

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

[1] 27 & 28 Vict. c. 27, s. 11; 34 & 35 Vict. c. 101, ss. 7, 9; 35 & 36 Vict. c. 30.

[1] Sale of Food and Drugs Act, 1875, amended by the 42 & 43 Vict. c. 30. The decisions under the act are given *post*, Chapter on Warranty.

article of food, or any drug which is not of the nature, substance and quality of the article demanded by such purchaser" under the penalty therein mentioned; a proviso follows having reference to certain cases in which an offence is not to be deemed to be committed under the section. By the 8th section the seller may protect himself by giving notice to the purchaser.[2]

Several important statutes have recently been passed regulating the sales of intoxicating liquors,[3] of spirits,[4] of explosives,[5] and of poisons.[6]]

§ 731. In America, the law in general upon the subjects embraced in this chapter is in accordance with the English law.

*The cases in our courts upon contracts of sale [*541] where the thing sold was intended by both parties for illegal purposes, or was transferred with a knowledge on the part of the vendor that the buyer intended to use it for illegal purposes, were elaborately reviewed and discussed in the Supreme Court of the United States in two cases, Armstrong *v.* Toler, reported in 11 Wheaton, 258, and McBlair *v.* Gibbes, 17 Howard, 232. The principles established by these two cases may be summed up as follows: —

First. — No action lies on any contract, the consideration of which is either wicked in itself, or prohibited by law.

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

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

§ 732. In relation to sales made on Sunday, nearly, if not all the States have passed laws substantially in accordance with the 29 Charles II. c. 7, and there is very great diversity

[2] See Sandys *v.* Small, 3 Q. B. D. 449.

[3] The Licensing Acts, 1872, 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49).

[4] The Spirits Act, 1880 (43 & 44 Vict. c. 24).

[5] The Explosives Act, 1875 (38 Vict. c. 17).

[6] The Pharmacy Act, 1868 (31 & 32 Vict. c. 121, s. 17, amended by 32 & 33 Vict. c. 117, s. 3).

of opinion on the questions which have arisen under these statutes. In many of the States the law makes no distinction between sales made by a party in his ordinary calling and any other sale, but forbids all secular business on Sunday. A note given for property sold on Sunday is held of course to be invalid in the hands of the payee; but it is not settled whether such a note is void in the hands of an innocent indorsee.[1]

A sale is there held not to be invalid although commenced on Sunday, if not completed till another day, nor if it merely grow out of a transaction which took place on Sunday.[2]

[*542] And a note, though signed on Sunday, may be enforced, if *delivered on some other day;[3] and when the vendee has obtained possession of the property sold to him on Sunday, with the assent of the vendor, it is held that the title has passed, and that he may maintain his possession under the void contract as against both the vendor and his creditors.[4]

§ 733. There is great conflict of decisions on the question whether the vendee becomes liable (either under a new contract, or by reason of a ratification of the old one) when he takes possession of the thing sold on some other day, after making a purchase of it on Sunday. The case of Williams

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

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

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

[4] Smith *v.* Bean, 15 N. H. 577; Allen *v.* Deming, 14 N. H. 133; Horton *v.* Buffinton, 105 Mass. 399.

See, also, Kinney *v.* McDermot, 55 Iowa, 674; s. c. 39 Am. Rep. 191; Levet *v.* His Creditors, 22 La. An. 105; Greene *v.* Godfrey, 44 Me. 25, 27; Hall *v.* Corcoran, 107 Mass. 259; s. c. 9 Am. Rep. 30; Cranson *v.* Goss, 107 Mass. 441; s. c. 9 Am. Rep. 30; Horton *v.* Buffinton, 105 Mass. 399; Myers *v.* Meinrath, 101 Mass. 366; s. c. 3 Am. Rep. 368; Ladd *v.* Rogers, 93 Mass. (11 Allen) 209; King *v.* Green, 88 Mass. (6 Allen) 139; Frazer *v.* Robinson, 42 Miss. 121; Beauchamp *v.* Comfort, 42 Miss. 94; Thompson *v.* Williams, 58 N. H. 248; Hall *v.* Costello, 48 N. H. 176; s. c. 2 Am. Rep. 207.

v. Paul,[1] and the observations of Parke B. seriously questioning its authority,[2] have been much discussed in the American courts. In the case of Adams *v.* Gay,[3] the purchaser refused, at the request of the vendor, to rescind the contract and return the thing sold, and this was held to be an affirmation of the Sunday bargain, and to render the purchaser liable; and in Sargent *v.* Butts[4] the same Court held that a subsequent promise ratified an award made on Sunday, so that an action would lie on the award. So in Sumner *v.* Jones,[5] where a note was given on Sunday for the price of a horse sold that day, and the buyer afterwards made payments on account of the note, it was held that these payments, coupled with his retaining the horse in his possession, were a ratification of the contract, entitling the vendor to recover the sum remaining due on the note. In Alabama,[6] however, New Hampshire,[7] [and Massachusetts,[8]] the courts have rather been inclined to follow the opinion of Parke B. than the decision in Williams *v.* Paul. In the case of Boutelle *v.* Melendy,[7] the New Hampshire Court expressly held that an illegal contract is *incapable [*543] of ratification or of forming a good consideration for a subsequent promise.[9]

[1] 6 Bing. 653.

[2] *Ante*, p. 539.

[3] 19 Vt. 358.

[4] 21 Vt. 99.

[5] 24 Vt. 317.

[6] Butler *v.* Lee, 11 Ala. 885.

[7] Allen *v.* Deming, 14 N. H. 133, and Boutelle *v.* Melendy, 19 N. H. 196.

[8] Day *v.* McAllister, 81 Mass. 433; Tuckerman *v.* Hinkley, 91 Mass. 452, at p. 454.

[9] *Contracts made on Sunday* in violation of statute are void and cannot be ratified. Finn *v.* Donahue, 35 Conn. 216; Pate *v.* Wright, 30 Ind. 476; Cranson *v.* Goss, 107 Mass. 440, 441; s. c. 9 Am. Rep. 30; Myers *v.* Meinrath, 101 Mass. 368; s. c. 3 Am. Rep. 368; Hazard *v.* Day, 96 Mass. (14 Allen) 487; Bradley *v.* Rea, 96 Mass. (14 Allen) 22; Ladd *v.* Rogers, 93 Mass. (11 Allen) 209; Tuckerman *v.* Hinkley, 89 Mass. (9 Allen) 454, 455; Day *v.* McAllister, 81 Mass. (15 Gray) 133; Reeves *v.* Butcher, 31 N. J. L. (2 Vr.) 224; Ryno *v.* Darby, 20 N. J. Eq. (5 C. E. Gr.) 231. But see Morgan *v.* Bailey, 59 Ga. 683; Plasted *v.* Palmer, 63 Me. 576; Tillock *v.* Webb, 56 Me. 100; Pope *v.* Linn, 50 Me. 83; Day *v.* McAllister, 81 Mass. (15 Gray) 433; Smith *v.* Foster, 41 N. H. 215; Sayles *v.* Wellman, 10 R. I. 467, 468; Van Hoven *v.* Irish, 3 McC. C. C. 443. It is held in some states however, that the illegality which attaches to contracts executed on Sunday is not an illegality which enters into the subject matter or essence of the contract, and that they are capable of ratification by any act which fairly recognizes them as existing contracts

§ 734. The French Civil Code, Art. 1133, provides that "the consideration (*la cause*) of a contract is unlawful, when prohibited by law, or contrary to good morals or public order." Under this article the decisions are very much the same as those in our own reports, and they are collected by Sirey in his Code Civil Annotè,[1] under Arts. 902 and 1133. One of the cases establishes the illegality of a bargain not likely to occur in England: that by which an organizer of dramatic successes (*un entrepreneur de succès dramatiques*) engages to ensure, by means of hired applauders (*claqueurs*), the success of actors, or of pieces performed by them.[2]

made on a subsequent week day. Flinn *v.* St. John, 51 Vt. 334. See, also, Catlett *v.* Trustees, 62 Ind. 365; s. c. 30 Am. Rep. 197; Heller *v.* Crawford, 37 Ind. 279; Banks *v.* Werts, 13 Ind. 203; Perkins *v.* Jones, 26 Ind. 499; Harrison *v.* Colton, 31 Iowa, 16; Campbell *v.* Young, 9 Bush (Ky.) 240; Gwinn *v.* Simes, 61 Mo. 335, 338; Gray *v.* Hook, 4 N. Y. 449; Smith *v.* Case, 2 Oreg. 190; Sayles *v.* Wellman, 10 R. I. 465; Sumner *v.* Jones, 24 Vt. 317; Sargeant *v.* Butts, 21 Vt. 99; Adams *v.* Gay, 19 Vt. 360; Lovejoy *v.* Whipple, 18 Vt. 379; Troewert *v.* Decker, 51 Wis. 46; Melchoir *v.* McCarty, 31 Wis. 252, 256; s. c. 11 Am. Rep. 605. But it is held by other courts that nothing short of a new contract will give it validity. Tucker *v.* West, 29 Ark. 386, 406; Reeves *v.* Butcher, 31 N. J. L. (2 Vr.) 224; Ryno *v.* Darby, 20 N. J. Eq. (5 C. E. Gr.) 231.

[1] pp. 280–282, ed. 1859.

[2] Sirey, V. 41, 1, 623; D. P. 41, 1, 228.

*BOOK IV. [*544]

PERFORMANCE OF THE CONTRACT.

PART I.

CONDITIONS.

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§ 735. The rules of law on the subject of conditions in contracts are very subtle and perplexing. Whether a promise made or an obligation assumed by one party to a contract is dependent on, or independent of, the promise [*545] made * by the other; whether it be a condition to be performed before or concurrently with any demand on the other party for a compliance with his promise; or whether it may be neglected, at the peril indeed of a cross action [or counter-claim], but without affecting the right to sue the other party, are questions on which the decisions have been so numerous (and in many instances so contradictory), and the distinction so refined, that no attempt can here be made to do more than enunciate a few general principles. An examination of the cases will be restricted to such as have special reference to sales of goods.[1]

§ 736. The subjects of representation, warranty, conditions, and fraud, run so closely together, and are so frequently intertwined,[1] that it is very difficult to treat each separately; and it will be convenient here, although these different topics need independent consideration, to give an outline of

[1] For the general subject, see the notes to Pordage *v.* Cole, 1 Wms. Saund. 320, and to Peeters *v.* Opie, 2 Wms. Saund. 352; Cutter *v.* Powell, 2 Sm. L. C. 1, and the numerous authorities in the notes; Leake Dig. of the Law of Contract, p. 649.

[1] *What is a representation.* — The fact that the declaration amounts to a warranty will not strip it of its character as a representation. Larey *v.* Taliaferro, 57 Ga. 443, 446.

the general principles applicable to the whole subject, as recognized in the most recent decisions. A *representation* is a statement or assertion made by one party to the other, before or at the time of the contract of same matter or circumstance relating to it. A representation, even though contained in a written instrument, is *not an integral part of the contract.* Hence it follows, that even it be untrue, the contract in general is not broken, nor is the untruth any cause of action, unless made fraudulently. To this general rule there is a special exception, in the case of marine policies of insurance, founded on reasons which need not be here discussed.[2] The false *representation* becomes a *fraud*, as has been already explained (Book III. Ch. 2.), when the untrue statement was made with a knowledge of its untruth, or dishonestly, or with reckless ignorance whether it was true or false;[3] or when it differs from the truth so grossly and * unreasonably as to evince a dishonest purpose.[4] [*546] When the representation is made in writing, instead of words, it is plain that its *nature* is not thereby altered, and in either case a question may arise whether the statement be not something more than a mere representation, whether it be not *part of the contract.* On a written instrument this is a question of construction, one of law for the Court, not one of fact for the jury.

§ 737. Whenever it is determined, that a statement is really a substantial part of the contract, then comes the nice and difficult question, Is it a *condition precedent?* or is it an *independent agreement?* a breach of which will not justify a repudiation of the contract, but only a counter-claim for

[2] Hammatt *v.* Emerson, 27 Me. 308; s. c. 46 Am. Dec. 598; Stone *v.* Denny, 45 Mass. (4 Metc.) 151; Hazard *v.* Irwin, 35 Mass. (18 Pick.) 95; Lewis *v.* McLemore, 10 Yerg. (Tenn.) 206; Mitchell *v.* Zimmerman, 4 Tex. 75; s. c. 51 Am. Dec. 717; Doggett *v.* Emerson, 3 Story C. C. 700; Hough *v.* Richardson, 3 Story C. C. 691; Daniel *v.* Mitchell, 1 Story C. C. 172; Tuthill *v.* Babcock, 2 Woodb. & M. 298; Smith *v.* Babcock, 2 Woodb. & M. 246; Mason *v.* Crosby, 1 Woodb. & M. 342; Warner *v.* Daniels, 1 Woodb. & M. 101, 108; Moens *v.* Heyworth, 10 Mees. & W. 147, 157.

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

[4] Barker *v.* Windle, 6 E. & B. 675; s. c. 25 L. J. Q. B. 349.

damages. The cases show distinctions of extreme nicety on this point, of which a striking example is afforded in charter parties, where a statement that a vessel is to sail or to be ready to receive cargo on a given day, has been decided to be a condition,[1] but a stipulation that she shall sail with all convenient speed, or within a reasonable time, is held to be an independent agreement.[2] In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield, in Jones *v.* Barkley,[3] remains unchanged, "that the dependence, or independence of covenants, is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."[4]

[1] Glaholm *v.* Hays, 2 M. & G. 257; Oliver *v.* Fielden, 4 Ex. 135; Croockewit *v.* Fletcher, 1 H. & N. 893; 26 L. J. Ex. 153; Seeger *v* Duthie, 8 C. B. N. S. 45; 29 L. J. C. P. 253.

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

[3] 2 Doug. 684–691; and see *per* Blackburn J. in Bettini *v.* Gye, 1 Q. B. D. at p. 187.

[4] Blackman *v.* Dowling, 63 Ala. 304; Leonard *v.* Dyer, 26 Conn. 176, 177; s. c. 68 Am. Dec. 382; Bean *v.* Atwater, 4 Conn. 3; s. c. 10 Am. Dec. 91; Waldron *v.* Brazil & C. Coal Co., 7 Ill. App. 542; Stewart *v.* Many, 7 Ill. App. 508; Cadwell *v.* Blake, 72 Mass. (6 Gray) 407, 409; Knight *v.* New England Worsted Co., 56 Mass. (2 Cush.) 287; Mill Dam Foundery *v.* Hovey, 38 Mass. (21 Pick.) 439; Kane *v.* Hood, 30 Mass. (13 Pick.) 281, 282; Howland *v.* Leach, 28 Mass. (11 Pick.) 151; Gardiner *v.* Corson, 15 Mass. 500; Johnson *v.* Reed, 9 Mass. 78; s. c. 4 Am. Dec. 36; Moore *v.* Waldo, 69 Mo. 277; James *v.* Burchell, 7 Daly (N. Y.) 531; Phillips *v.* Alleghany Car Co., 82 Pa. St. 368; King Philip Mills *v.* Slater, 12 R. I. 82; Adrian *v.* Lane, 13 S. C. 183; Phelps *v.* Hubbard, 51 Vt. 489; Brokenbrough *v.* Ward, 4 Rand. (Va.) 352; Malcomson *v.* Morton, 11 Ir. L. R. 230; Elliott *v.* Hewitt, 11 Up. Can. Q. B. 292. The Massachusetts Court say in Knight *v.* New England Worsted Co., 56 Mass. (2 Cush.) 271, 287, that "some of the stipulations of an entire contract may be dependent and others independent, according to their nature and the order of performance." See, also, Savage Manufacturing Co. *v.* Armstrong, 19 Me. 147; Mill Dam Foundery *v.* Hovey, 38 Mass. (21 Pick.) 439; Kane *v.* Hood, 30 Mass. (13 Pick.) 281; Couch *v.* Ingersoll, 19 Mass. (2 Pick.) 292; Clement *v.*

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

*1. Where a day is appointed for doing any act, [*547] and the day *is* to happen or *may* happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent: *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.[1]

2. When a covenant or promise goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is an independent covenant, not a condition.[2]

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

4. Where each party is to do an act at the same time as the other, as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer;

Clement, 8 N. H. 210; Hill *v.* Hovey, 26 Vt. 109; Thomas *v.* Cadwallader, Willes, 496. Where mutual covenants go to the whole consideration on both sides, they are dependent covenants, one precedent to the other, but where they go only to a part and a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall plead it as condition precedent. Makepeace *v.* Harvard College, 27 Mass. (10 Pick.) 298; Sibley *v.* Holden, 27 Mass. (10 Pick.) 249; s. c. 20 Am. Dec. 521; Tileston *v.* Newell, 13 Mass. 406; Hopkins *v.* Young, 11 Mass. 302; Duke of St. Albans *v.* Shore, 1 H. Bl. 270; Havelock *v.* Geddes, 10 East, 555, 564; Storer *v.* Gordon, 3 Man. & S. 308; Glazebrook *v.* Woodrow, 8 T. R. 366; Campbell *v.* Jones, 6 T. R. 570.

[1] Sheeren *v.* Moses, 84 Ill. 448; Allard *v.* Belfast, 40 Me. 369, 377; Lord *v.* Belknap, 55 Mass. (1 Cush.) 279; Sumner *v.* Parker, 36 N. H. 449, 454; Putnam *v.* Mellen, 34 N. H. 71; Pordage *v.* Cole, 1 Sund. 320, n. Murphy *v.* Scarth, 16 Up. Can. Q. B. 48; Elliott *v.* Hewitt, 11 Up. Can. Q. B. 292; Driscole *v.* Barker, 2 Pugs. & B. (N. B.) 407.

[2] *Per* Parke B. in Graves *v.* Legg, 9 Ex. 709, 716; Bettini *v.* Gye, 1 Q. B. D. 183. See, also, Knight *v.* New England Worsted Co., 56 Mass. (2 Cush.) 271, 286; Auchterlonie *v.* Arms, 25 Up. Can. C. P. 403; Tate *v.* Port Hope, L. & B. R. R. Co., 17 Up. Can. Q. B. 354.

[3] See Glazebrook *v.* Woodrow, 8 T. R. 366; Jackson *v.* Union Insurance Co., L. R. 10 C. P. at p. 141; Poussard *v.* Spiers, 1 Q. B. D. 410. See, also, Knight *v.* New England Worsted Co., 56 Mass. (2 Cush.) 285, 287; Mill Dam Foundery Co. *v.* Hovey, 38 Mass. (21 Pick.) 439; Willington *v.* West Boylston, 21 Mass. (4 Pick.) 101, 103; Tileston *v.* Newell, 13 Mass. 406; Hopkins *v.* Young, 11 Mass. 302; Dox *v.* Dey, 3 Wend. (N. Y.) 356; Cole *v.* Hester, 9 Ired. (N. C.) L. 23.

these are concurrent conditions, and neither party can maintain an action for breach of contract, without averring that he performed or offered to perform what he himself was bound to do.[4]

5. Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.[5]

§ 739. In applying these rules of construction, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration.

[*548] The same statement may, under certain circumstances, be merely * a description or representation, and under others, the most substantial stipulation in the contract; as for instance, if a vessel were described in a charter-party as a "French vessel," these words would be merely a description in time of peace, but if England were at war, and France at peace, with America, they would form a condition precedent of the most vital importance.[1]

[4] These rules are (in substance) given in 1 Wms. Saund. 320 b; and adopted in the notes to Cutter *v.* Powell, 2 Sm. L. C. 1. The general statement of the law applicable to conditions in the preliminary remarks in this chapter, is mainly based on the judgment of the Ex. Ch. in Behn *v.* Burness, 3 B. & S. 751; 32 L. J. Q. B. 204. See, also, Smith *v.* Lewis, 26 Conn. 110; Clark *v.* Weis, 87 Ill. 438; s. c. 29 Am. Rep. 60; Metz *v.* Albrecht, 52 Ill. 491; Smith *v.* Lamb, 26 Ill. 396; s. c. 79 Am. Dec. 381; Hough *v.* Rawson, 17 Ill. 588; Summers *v.* Sleeth, 45 Ind. 598; Hapgood *v.* Shaw, 105 Mass. 276; Smith *v.* Boston & M. R. R., 88 Mass. (6 Allen) 262; Kane *v.* Hood, 30 Mass. (13 Pick.) 281; Hunt *v.* Livermore, 22 Mass. (5 Pick.) 395; Dana *v.* King, 19 Mass. (2 Pick.) 155; Gardiner *v.* Corson, 15 Mass. 500; Parker *v.* Parmele, 20 Johns. (N. Y.) 130; s. c. 11 Am. Dec. 253; Simmons *v.* Green, 35 Ohio St. 104; Walsh *v.* Brown, 13 Up. Can. C. P. 60; Koster *v.* Holden, 16 U. Can. C. P. 331; Baker *v.* Booth, Draper (Up. Can.) 65; Sweeny *v.* Godard, 4 Allen (N. B.) 400. In Tinney *v.* Ashley, 32 Mass. (15 Pick.) 546; s. c. 26 Am. Dec. 620, the Massachusetts Court hold that the party suing for damages is required only to aver that he was ready and willing (without alleging an offer) to perform the agreement on his part. See, also, Cobb *v.* Hall, 33 Vt. 233.

[5] *Per* Jervis C. J. in Roberts *v.* Brett, 18 C. B. 561; 25 L. J. C. P. 280; and see the opinions of the Lords in this case in 11 H. L. C. 337.

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

§ 740. Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part of that which was to be performed in his favor, the *condition precedent changes its character*, and *becomes a warranty, or independent agreement*, affording no defence to an action, but giving right to a counter-claim for damages.[1] The reason is, that it would be unjust under such circumstances, that a party who has received a part of the consideration for which he bargained, should keep it and pay nothing, because he did not receive the *whole*. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action of or counter-claim for damages against the other side, for the imperfect performance of the condition. It is in the application of this rule that the cases have not been harmonious, and the practitioner is often embarrassed in advising; for the Courts draw a distinction between what is and what is not a substantial part of the contract, in determining whether the original condition precedent has become converted *ex post facto* into an independent agreement. Some cases are referred to in the note.[2]

§ 741. *Apart from this modification of the prin- [*549]
ciple, in cases where one of the parties has accepted a portion of the benefit of the condition, which was stipulated in his favor, and has thus *ex post facto* changed its nature, the rule is very general and uniform that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise.

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

[2] Jonassohn *v.* Young, 4 B. & S. 296; 32 L. J. Q. B. 385; Graves *v.* Legg, 9 Ex. 709; 23 L. J. Ex. 228; White *v.* Beaton, 7 H. & N. 42; 30 L. J. Ex. 373; Hoare *v.* Rennie, 5 H. & N. 19; 29 L. J. Ex. 73; Pust *v.* Dowie, 5 B. & S. 20; 32 L. J. Q. B. 179; Ellen *v.* Topp, 6 Ex. 424; Behn *v.* Burness, 3 B. & S. 751; 32 L. J. Q. B. 204; Dimech *v.* Corlett, 12 Moo. P. C. 199, Bradford *v.* Williams, L. R. 7 Ex. 260; Stanton *v.* Richardson, L. R. 7 C. P. 421–436, *per* Brett J.; Heilbutt *v.* Hickson, L. R. 7 C. P. 450–1, *per* Bovill C. J.; Carter *v.* Scargill, L. R. 10 Q. B. 564; 1 Wms. Saund. ed. 1871, p. 554, notes to Pordage *v.* Cole. See,

§ 742. But the necessity for performing the condition precedent may be *waived* by the party in whose favor it is stipulated, either expressly, or by the implication resulting from his acts or conduct.[1] This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the *other party* in fulfilling the condition,[2] or incapacitates *himself* from performing his own promise,[3] or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition.

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

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

§ 743. If a man offer to perform a condition precedent in favor of another, and the latter refuse to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashhurst J. in delivering the opinion of the King's Bench, in Hotham *v.* East India Company,[1] said that it was evident from common sense, and therefore needed no authority to prove it, that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, "it is equal to performance."[2] On the same principle a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a com-
[*550] plete *breach of contract on his part, and dispenses the other party from the useless formality of tendering

also, Maryland F. & M. Co. *v.* Lorentz, 44 Md. 218; Warfield *v.* Booth, 33 Md. 63.

[1] Hayden *v.* Reynolds, 54 Iowa 157; Sullins *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313; Bolton *v.* Riddle, 35 Mich. 13.

[2] Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 527; Ketchum *v.* Zeilsdorff, 26 Wis. 514; United States *v.* Peck, 102 U. S. (12 Otto) 64; bk. 26, L. ed. 46.

[3] Wolf *v.* Marsh, 54 Cal. 228; Heard *v.* Bowers, 40 Mass. (23 Pick.) 455; Newcomb *v.* Brackett, 16 Mass. 161; Hopkins *v.* Young, 11 Mass. 302; Goodhand *v.* Griffith, T. Jones 191.

[1] 1 T. R. 645.

[2] See, also, Pontifex *v.* Wilkinson, 1 C. B. 75; Holme *v.* Guppy, 3 M. &

performance of the condition precedent: as if A. engage B. to write articles for a specified term in a periodical publication belonging to A., and before the end of the term A. should discontinue the publication; or if he agree to sell to B. a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should send them abroad on a different vessel, it is plain that it would be futile for B., in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit.*[3]

§ 744. But a mere assertion that the party will be unable or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the

W. 387; Armitage *v.* Insole, 14 Q. B. 728; Ellen *v.* Topp, 6 Ex. 424; Laird *v.* Pim, 7 M. & W. 474; Cort *v.* Ambergate Railway Co., 17 Q. B. 127; 20 L. J. Q. B. 460; Russell *v.* Bandeira, 13 C. B. N. S. 149; 32 L. J. C. P. 68; Mackay *v.* Dick, 6 App. Cas. 251.

[3] Cort *v.* The Ambergate Railway Co., 17 Q. B. 127; 20 L. J. Q. B. 460; Bowdell *v.* Parsons, 10 East, 59; Amory *v.* Brodrick, 5 B. & Ald. 712. Short *v.* Stone, 8 Q. B. 358; Caines *v.* Smith, 15 M. & W. 189; Reid *v.* Hoskins, 4 E. & B. 979; 5 E. & B. 729; 25 L. J. Q. B. 55, and 26 L. J. Q. B. 5; Avery *v.* Bowden, 5 E. & B. 714; 6 E. & B. 953; 25 L. J. Q. B. 49, and 26 L. J. Q. B. 3; Bartholomew *v.* Markwick, 15 C. B. N. S. 710; 33 L. J. C. P. 145; Franklin *v.* Miller, 4 A. & E. 599; Planché *v.* Colburn, 8 Bing. 14; Robson *v.* Drummond, 2 B. & Ad. 303; Inchbald *v.* The Western Neilgherry Coffee Co., 17 C. B. N. S. 733; 34 L. J. C. P. 15.

American authorities. — Smith *v.* Lewis, 26 Conn. 110; Follensbee *v.* Adams, 86 Ill. 13; Chamber of Commerce *v.* Sollitt, 43 Ill. 519; McPherson *v.* Walker, 40 Ill. 372; Fox *v.* Kitton, 19 Ill. 519; Lee *v.* Pennington, 7 Ill. App. 248; Law *v.* Henry, 39 Ind. 414; McCormick *v.* Basal, 46 Iowa, 235; Holloway *v.* Griffith, 32 Iowa, 409; Crabtree *v.* Messersmith, 19 Iowa, 179; Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271; Textor *v.* Hutchings, 62 Md. 150; Dugan *v.* Anderson, 36 Md. 582; s. c. 11 Am. Rep. 509; Buttrick *v.* Holden, 62 Mass. (8 Cush.) 233; Heard *v.* Lodge, 37 Mass. (20 Pick.) 53; s. c. 22 Am. Dec. 197; Newcomb *v.* Brackett, 16 Mass. 161; Coffin *v.* Reynolds, 21 Minn. 456; Haines *v.* Tucker, 50 N. H. 307; Shaw *v.* Republic Life Ins. Co., 69 N. Y. 293; Freer *v.* Denton, 61 N. Y. 496; Howard *v.* Daly, 61 N. Y. 374; s. c. 19 Am. Rep. 285; Bruce *v.* Tilson, 25 N. Y. 194; Westlake *v.* Bostwick, 35 N. Y. Super. Ct. (3 J. & S.) 256; Christ *v.* Armour, 34 Barb. (N. Y.) 378; Clark *v.* Crandall, 3 Barb. (N. Y.) 612; Harriss *v.* Williams, 3 Jones (N. C.) L. 483; James *v.* Adams, 16 W. Va. 245; Hinckley *v.* Pittsburgh Steel Co., 121 U. S. 264; bk. 30, L. ed. 967; Smoot's Case, 82 U. S. (15 Wall.) 36; bk. 21, L. ed. 107.

promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end.[1] The authorities will be found collected and considered in the notes to Cutter *v.* Powell, 2 Smith's Leading Cases, 1.

The Supreme Court of the United States has cited the foregoing passage with approval as a correct statement of the law.[2]

[*551] § 745. * The whole law on this subject has been re-examined and conclusively settled in the Exchequer Chamber, in Frost *v.* Knight (L. R. 5 Ex. 322; 7 Ex. 111), in which the doubts intimated by the lower Court as to the principle of Hochster *v.* De la Tour, were held to be ill-founded, and the decision of that Court reversed by an unanimous judgment.

In New York, also, the Court of Appeals, in the case of Burtis *v.* Thompson (42 N. Y. 246), which, like Frost *v.* Knight, was an action based on a positive refusal to fulfil a promise of marriage, the action being brought in advance of the time fixed for the marriage, decided in favor of the plaintiff; and the case of Hochster *v.* De la Tour was cited in the judgment.[1]

[1] Barrick *v.* Buba, 2 C. B. N. S. 563; 26 L. J. C. P. 280; Ripley *v.* McClure, 4 Ex. 345; Hochster *v.* De la Tour, 2 E. & B. 678; 22 L. J. Q. B. 455; Avery *v.* Bowden, 5 E. & B. 714; 6 E. & B. 953; 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; The Danube Railway Co. *v.* Xenos, 11 C. B. N. S. 152; 13 C. B. N. S. 825; 31 L. J. C. P. 84, 284; Philpots *v.* Evans, 5 M. & W. 475; Leeson *v.* The North Bristol Oil Co., 8 Ir. R. C. L. 309. See, also, Smith *v.* Lewis, 24 Conn. 624; s. c. 26 Conn. 110; Mill Dam Foundery *v.* Hovey, 38 Mass. (21 Pick.) 417; Haines *v.* Tucker, 50 N. H. 307.

[2] Smoot *v.* The United States, 15 Wall. 36, at p. 48.

[1] *Repudiation by one party to contract; suit by other.* — It has been held that where one of the parties to a contract has repudiated his intention before the time specified for the performance, the other party has immediate cause of action. Follansbee *v.* Adams, 86 Ill. 13; Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Fox *v.* Kitton, 19 Ill. 519; Lee *v.* Pennington, 7 Ill. App. 248; McCormick *v.* Basal, 46 Iowa, 235; Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa, 538; Holloway *v.* Griffith, 32 Iowa, 209; s. c. 57 Am. Rep. 208; Crabtree *v.* Messersmith, 49 Iowa, 179; Stage Co. *v.* Peck, 17 Kans. 271; Daniels *v.* Newton, 114 Mass. 530; Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286, 292, 293; Freer *v.* Denton, 61 N. Y. 492; Howard *v.* Daly, 61 N. Y. 374; s. c. 19 N. Y. 285; Burtis *v.* Thompson,

§ 746. It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfil it, if the performance be in its nature possible. But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God,[1] as if A. agree to sell and deliver his horse, Eclipse, to B. on a fixed future day, and the horse die in the interval, the obligation is at an end.[2]

In Taylor *v.* Caldwell,[3] the whole law on this subject was reviewed by Blackburn J., who gave the unanimous decision of the Court after advisement. It was an action for breach of a promise to give to the plaintiff the use of a certain music-hall for four specified days, and the defence was that the hall had been burnt down before the appointed days, so that it was impossible to fulfil the condition. This excuse was held valid. The learned judge there stated as an example, that "where a contract of sale is made, amounting to a

42 N. Y. 246; s. c. 1 Am. Rep. 516; Gray *v.* Green, 9 Hun (N. Y.) 334; James *v.* Adams, 16 W. Va. 245; Dingley *v.* Oler, 117 U. S. 490; bk. 29, L. ed. 984.

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

[2] Shep. Touch. 173, 382; Co. Lit. 206 a; Faulkner *v.* Lowe, 2 Ex. 595; Williams *v.* Hill, Palm. 548; Laughter's case, 5 Rep. 21 b; Hall *v.* Wright, 1 E. B. & E. 746; 27 L. J. Q. B. 145; 2 Wms. Saund. 420; Tasker *v.* Shepherd, 6 H. & N. 575; 30 L. J. Ex. 207.

General rule as to "act of God." — But the rule, that, if a thing become physically impossible to be done by the act of God, performance is excused, does not prevail, as the essential purpose of the contract may be accomplished, if the intention of the parties could be substantially, though not literally executed, performance is not excused; thus where the mortgagee of a vessel had contracted to convey the fourth part of such vessel, it was held that on the loss of the ship, the purchaser was entitled to redeem and to have the amount received of the insurer, for the loss accounted for to him. Walker *v.* Tucker, 70 Ill. 527; White *v.* Mann, 26 Me. 361; Wells *v.* Calnan, 107 Mass. 514; s. c. 9 Am. Rep. 65; Thompson *v.* Gould, 37 Mass. (20 Pick.) 134. But where a person contracted to build a house on the land of another, and the house was destroyed by fire before completion, such destruction does not discharge the contractor from his obligation. Adams *v.* Nichols, 36 Mass. (19 Pick.) 275; s. c. 3 Am. Dec. 137. But where the contract to build is not absolute and divisible, but only a contract to do a part of the work and furnish part of the materials, the contractor may recover for the work and materials actually done and furnished by him. Cook *v.* McCabe, 53 Wis. 250; s. c. 40 Am. Rep. 765. Where one agrees to repair a house already built, the destruction of the house puts an end to the contract. Lord *v.* Wheeler, 67 Mass. (1 Gray) 282.

[3] 3 B. & S. 826; 32 L. J. Q. B. 164.

bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the [*552] vendor at * a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of English law, is established by the case of Rugg *v.* Minet."[4] After some further illustrations, the rule was laid down as follows: "The principle seems to us to be that in contracts in which the *performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility arising from the perishing of the person or thing shall excuse the performance.*" This case was followed in Appleby *v.* Meyers, in the Exchequer Chamber.[5] And in Robinson *v.* Davison,[5] the same principle was applied to excuse the defendant, a lady, for breach of a promise to play upon the piano at a concert, when she was too ill to perform; the Court holding that the promise was upon the implied condition that she would be well enough to play.

In Dexter *v.* Norton,[6] it was held upon the authority of Taylor *v.* Caldwell, as well as upon the American cases, that in an executory agreement for the sale and delivery of specified goods, the vendor is excused from performance, if the goods perish without his fault, so as to render delivery impossible.[7]

[4] 11 East, 210.

[5] Appleby *v.* Meyers, L. R. 1 C. P. 615; 35 L. J. C. P. 295, reversed in Ex. Ch., L. R. 2 C. P. 651; 36 L. J. C. P. 331. See, also, Boast *v.* Firth, L. R. 4 C. P. 1; Clifford *v.* Watts, L. R. 5 C. P. 577; Whincup *v.* Hughes, L. R. 6 C. P. 78; Robinson *v.* Davison, L. R. 6 Ex. 269; Anglo-Egyptian Navigation Co. *v.* Rennie, L. R. 10 C. P. 271; Howell *v.* Coupland, L. R. 9 Q. B. 462, on app. 1 Q. B. D. 258; Poussard *v.* Spiers, 1 Q. B. D. 410, 414; Simeon *v.* Watson, 46 L. J. C. P. 679.

[6] 47 N. Y. 62. See Ryan *v.* Dayton, 25 Conn. 188, 194; s. c. 65 Am. Dec. 560; Dickey *v.* Linscott, 20 Me. 453; s. c. 37 Am. Dec. 66.

[7] *Contract to manufacture goods. — Burning of mill.* — But it was held that where a manufacturer had contracted to manufacture and deliver goods within a specified time, but failed to do so, and pleaded the burning of his mill, such defence could not be sustained, where he had ample time prior to the burning to fulfil his contract. Booth *v.* Spuyten Duyvil R. M. Co., 60 N. Y. 487. See, also, Jones *v.* United States, 96 U. S. (6 Otto) 24; bk. 24, L. ed. 644.

§ 747. [The principle of Taylor *v.* Caldwell was applied to a case where the contract was to sell "200 tons of potatoes grown *on land belonging to the defendant in Whaplode.*" The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only able to deliver 80 tons. In an action for *non-delivery of the residue, the de- [*553] fendant was held to be excused from further performance, on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused, if, before breach, performance became impossible from the perishing, without default on his part, of the subject-matter of the contract.[1]]

§ 748. And a party is equally excused from the performance of his promise when a *legal impossibility* supervenes. If, after promise made, an Act of Parliament is passed rendering the performance illegal, the promise is at an end, and the obligor no longer bound.[1]

§ 749. But if the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfil a promise, when he might have guarded himself by the terms of his contract.[1]

[1] Howell *v.* Coupland, L. R. 9 Q. B. 462; s. c. affirmed, 1 Q. B. D. 258, C. A.

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

[1] See *per* Mellish L. J. in River Wear Commissioners *v.* Adamson, 1 Q. B. D. at p. 548, and *per eundem* in Nichols *v.* Marshland, 2 Ex. D. at p. 4. See, also, Arthur *v.* Wynne, 14 Ch. D. 603. See *ante*, § 747, note 1.

Contract to perform absolutely. — *Act of God.* — So a carrier, who has agreed to deliver goods at a certain place within a stated time, is not excused by reason of freshet obstructing navigation. Harmony *v.* Bingham, 12 N. Y.

Thus in Kearon *v.* Pearson,[2] the defendant undertook to deliver a cargo of coals on board of a vessel with the usual despatch. The defendant commenced the delivery, but a sudden frost occurred, so that no more coal could be brought from the colliery by the "flats" navigating the canal. The delivery was thus delayed about thirty days, and the Court was unanimous in holding that the defendant was not excused from performing his promise.

So in Barker *v.* Hodgson,[3] the defendant attempted to excuse himself for not furnishing a cargo in a for-
[*554] eign port, * on the ground that a pestilence broke out in the port, and all communication between the vessel and the shore was interdicted by the authorities, so that it was unlawful and impracticable to send the cargo on board, and Lord Ellenborough said: "Perhaps it is too much to say that the freighter was compellable to load his cargo: but if he was unable to do the thing, is he not answerable upon his covenant? . . . If, indeed, the performance of this contract had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

99; s. c. 62 Am. Dec. 142; and where a merchant contracted to sell goods, with prompt shipment from a European port, and the delivery thereof was delayed through port of shipment being blocked by ice, when other ports were well opened, the fact that such port was so blocked was held to be no excuse for non-performance. Tobias *v.* Lissberger, 105 N. Y. 404. See, also, Hodgdon *v.* New York, N. H. & H. R. R., 46 Conn. 277; s. c. 33 Am. Rep. 21; Kitzinger *v.* Sanborn, 70 Ill. 146; Bacon *v.* Cobb, 45 Ill. 47; Kribs *v.* Jones, 44 Md. 396; Wareham Bank *v.* Burt, 87 Mass. (5 Allen) 113; Dewy *v.* Alpena School District, 43 Mich. 480; s. c. 48 Am. Rep. 803; Hand *v.* Baynes, 4 Whart. (Pa.) 204; s. c. 33 Am. Dec. 54; Eddy *v.* Clement, 38 Vt. 486.

[2] 7 H. & N. 386; 31 L. J. Ex. 1.

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

§ 750. So in Kirk *v.* Gibbs,[1] the charterers of a vessel agreed to furnish to the captain, at Pisco, in Peru, the pass necessary to enable him to load a cargo of guano "free of expense, within twenty-four hours of his application." The charterers having loaded an insufficient cargo, pleaded in an action against them for this breach of the charter-party, that by the laws of the republic of Peru no guano could be loaded without a pass from the government, and that on inspection of the vessel the government refused a pass, and that on the plaintiff's repairing the vessel, a pass was granted for only a limited quantity, which was loaded, and that no more could be loaded without exposing both vessel and cargo to seizure. On demurrer, this plea was held bad. But the insufficiency of the plea consisted in this, that it did not allege that the owners of the vessel were in default, or that the vessel was not really fit to carry a full cargo, but only that the government officers refused the permit; and the charterer had made an absolute promise to furnish one, from which nothing could excuse him unless hindered by some act or default of the other party.

§ 751. *There are two old cases in which the ven- [*555] dors took advantage of the buyers' ignorance of arithmetic to impose on them conditions practically impossible.

In Thornborow *v.* Whitacre,[1] the declaration was in case, and alleged that the defendant, in consideration of 2*s.* 6*d.* paid, and of 4*l.* 17*s.* 6*d.* promised to be paid on the defendant's performance, agreed to deliver to the plaintiff two grains of rye-corn on the following Monday, four grains on the Monday after, eight grains on the Monday after, "*et progressu sic deliberaret quolibet alio die Lunæ sucessive infrà unum annum ab eodem* 29 *Martii bis tot grana Secalis quot die Lunæ proximo præcedente respective deliberanda forent.*" The defendant demurred, on the ground that the performance was impossible, *Salkeld* saying that all the rye in the world would not make so much, and arguing that there were three impossibilities that would excuse an obligor, — *impossibilitas legis*, as a promise to murder a man; *impossi-*

[1] 1 H. & N. 810; 26 L. J. Ex. 209. [1] 2 Lord Raym. 1164.

bilitas rei, as a promise to do a thing in its own nature impossible; and *impossibilitas facti*, where though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day. But Holt C. J. said that *impossibilitas rei et facti* were all one: that the defendant's promise was only impossible with respect to his inability to perform it, and that the words *quolibet alio die Lunæ* must be construed as if written in English, every other Monday, *i.e.*, every next Monday but one, which would bring the obligation much nearer the defendant's ability to perform it. After some further argument, Salkeld, perceiving the opinion of the Court to be adverse to the defendant, offered the plaintiff to return the half-crown and give him his costs, which was accepted, and no judgment was delivered.

The reporter says that in arguing this case, the old case of James *v.* Morgan[2] was remembered. The report is so concise, that it is given entire. "K. B. Mich. 15 Car. 2. Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail: and avers that there were thirty-two nails in the shoes of the horse, which, being doubled every [*556] nail, came to * 500 quarters of barley: and on non-assumpsit pleaded, the cause being tried before Hyde, at Hereford, he directed the jury to give the value of the horse in damages, being £8; and so they did, and it was afterwards moved in arrest of judgment,[3] for a small fault in the declaration, which was overruled, and judgment given for the plaintiff." The Hyde here mentioned was not the well-known Sir Nicholas Hyde, *temp.* Charles I., but Sir Robert Hyde, the Chief Justice, who had just been placed on the bench, and only remained in office two years (Foss' Tab. Cur. 66). The ground of his decision nowhere appears. For further authorities upon this subject of impossible conditions, the reader is referred to the cases in the note.[4]

[2] 1 Levinz, 111.

[3] 1 Keble, 569.

[4] Reid *v.* Hoskins, 6 E. & B. 953; 26 L. J. Q. B. 5; Esposito *v.* Bowden, 4 E. & B. 963; 7 E. & B. 763; 27 L. J. Q. B. 17; Pole *v.* Cetcovitch, 9 C. B. N. S. 430; 30 L. J. C. P. 102; Mayor of Berwick *v.* Oswald, 3 E. & B. 665, and 5 H. L. C. 856; Atkinson *v.* Ritchie, 10 East, 530; Adams *v.* Royal Mail Co., 5 C. B. N. S. 492; Mills *v.* Auriol, 1 H. Bl. 433, and 4 T. R. 94, in error; Jervis *v.* Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41;

§ 752. A strong illustration of the rigor of the rule by which parties are bound to the performance of a promise deliberately made is furnished by the case of Jones *v.* St. John's College [1] where a builder had contracted to do certain works by a specified time, as well as any alterations ordered by named persons within the same time, and the plaintiff attempted to excuse himself for delay by averring that the alterations ordered were such, and the orders given for them were received at so late a time, that it was impossible for him to complete them within the period specified in the contract, *as the defendant well knew when he gave the order:* but the Court held that if he chose to bind himself by his promise to do, unconditionally, a thing which he could not possibly perform, under a penalty for not doing it, he was bound by the bargain and liable to the penalties stipulated for the breach of it.

* [The rule is well illustrated by a decision in the [*557] State of Connecticut, School District *v.* Dauchy.[2]
The defendant had agreed to complete the building of a school house by a certain time, and before its expiration the building, when nearly completed, was destroyed by lightning whereby alone the defendant was prevented from performing his contract, which was absolute in its terms. It was held that the destruction of the building was no excuse for the non-performance of the contract. The judgment of Ellsworth J. who delivered the opinion of the Court, is well worth consideration.]

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

It is not uncommon to make the performance of a sale dependent on an act to be done by a third person. Such

Paradine *v.* Jane, Aleyn, 27 (see remarks of Lord Blackburn on this case in River Wear Commissioners *v.* Adamson, 2 App. Cas. at p. 770); Chitty on Cont. (ed. 1881) p. 667; Leake, Dig. of the Law of Contract, p. 681 *et seq:* Broom's Leg. Max. 245.

[1] L. R. 6 Q. B. 115.

[2] 25 Conn. 530. See, also, Harmony *v.* Bingham, 12 N. Y. 106, and Booth *v.* Spuyten Duyvil Mills Co., 60 N. Y. 487, at pp. 490, 491, where Dexter *v.* Norton (*ante*, p. 552) was distinguished, and the limits of the rule are laid down by Church C. J. in delivering the opinion of the Court.

conditions must be complied with before rights dependent on them can be enforced, and if the third party refuse, even unreasonably, to perform the act, this will not dispense with such compliance. Thus in Brogden *v.* Marriott,[1] the vendor sold a horse for one shilling cash, and a further payment of 200*l.* provided the horse should trot eighteen miles within one hour, the task to be performed within one month, and "J. N., to be the judge of the performance." It was held, to be no defence to the buyer's action for the delivery of the horse, that J. N. refused to be present at the trial, and Tindal C. J. said it was a "condition which the defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party."

So in Thurnell *v.* Balbirnie,[2] the declaration averred an agreement that defendant should purchase the plaintiff's goods "at a valuation to be made by certain persons, viz., Mr. Newton and Mr. Matthews, or their umpire," the former in behalf of the plaintiff, and the latter in behalf of [*558] the * defendant: that Newton was ready and willing to value the goods, and that the defendant and Matthews, though notified and requested to proceed with the valuation, and to meet Newton for that purpose, continually neglected and refused to do so; and that the defendant was notified that Newton would meet Matthews or *any other person whom the defendant might nominate for the purpose of making the valuation*, but the defendant wholly neglected, &c. To this declaration there was a special demurrer for want of an allegation that the defendant *hindered or prevented* Matthews from making the valuation, and the demurrer was sustained.[3]

[1] 2 Bing. N. C. 473.

[2] 2 M. & W. 786.

[3] For cases falling under this class of contracts, see Bayliss *v.* Henessey, 54 Iowa, 11; Drake *v.* Hill, 53 Iowa, 37; Leadbetter *v.* Ætna Ins. Co., 13 Me. 265; s. c. 29 Am. Dec. 505; Baltimore & Ohio R. R. Co. *v.* Brydon, 65 Md. 198; s. c. 57 Am. Rep. 318; Gill *v.* Vogler, 52 Md. 663; Robbins *v.* Clark, 129 Mass. 145; Johnson *v.* Phœnix Ins. Co., 112 Mass. 49; Flint *v.* Gibson, 106 Mass. 391; Nofsinger *v.* Ring, 71 Mo. 149; s. c. 36 Am. Rep. 456; Kirtland *v.* Moore, 40 N. J. Eq. (13 Stew.) 106; Boyd *v.* Meighan, 48 N. J. L. (19 Vr.) 404; Roumage *v.* Mechanics' Fire Ins. Co., 13 N. J. L. (1 J. S. Gr.) 110; Read *v.* Decker, 67 N. Y. 182; Mark *v.* Insurance Co., 24 Hun (N. Y) 565; Gibbs *v.* Insurance Co., 13 Hun (N.

§ 754. On the same principle it has been held, in other contracts on conditions of this kind, that the party who claims must show the performance of the condition on which his claim depends, or that the opposite party prevented or waived the performance. On an agreement to do work which is to be settled for according to the measurement of a named person, the measurement by that person is a condition precedent to the claim for payment;[1] on an insurance where the claim for payment was made to depend on a certificate from the minister of the parish, that the insured was of good character, and his claim for loss *bonâ fide*, it was held, that the insured could not recover without the certificate, even though the minister unreasonably refused to give it;[2] and where building work was to be paid for on a certificate in writing, by an architect, that he approved the work, no recovery could be had until the certificate was given.[3]

§ 755. If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in Clarke *v.* Westrope,[1] where the outgoing tenant sold the straw on a farm to the incomer at a valuation to be made by two indifferent persons, but pending the valuation * the buyer consumed the straw. In like [*559] manner, where an employer colluded with an architect, upon whose certificate the builder's claim for payment depended, so that the builder was prevented from getting the certificate, a declaration setting forth that fact in terms

Y.) 611; Whelan *v.* Boyd, 114 Pa. St. 228; Gray *v.* Wilson, 4 Watts (Pa.) 39; Sullivan *v.* Byrne, 10 S. C. 122; Herrick *v.* Estate of Belknap, 27 Vt. 673; Vulcanite Paving Co. *v.* Philadelphia Traction Co., 115 Pa. St. 286; United States *v.* Robeson, 34 U. S. (9 Pet.) 319; bk. 9, L. ed. 142; Aitcheson *v.* Cook, 37 Up. Can. Q. B. 490; Elliott *v.* Hewitt, 11 Up. Can. Q. B. 292.

[1] Mills *v.* Bayley, 2 H. & C. 36; 32 L. J. Ex. 179.

[2] Worsley *v.* Wood, 6 T. R. 720. See Whelen *v.* Boyd, 114 Pa. St. 228; Humaston *v.* American Telegraph Co., 87 U. S. (20 Wall.) 20; bk. 22, L. ed. 279.

[3] Morgan *v.* Birnie, 9 Bing. 672; Clarke *v.* Watson, 18 C. B. N. S. 278; 34 L. J. C. P. 148; Roberts *v.* Watkins, 14 C. B. N. S. 592; 32 L. J. C. P. 291; Goodyear *v.* Mayor of Weymouth, 35 L. J. C. P. 12; Richardson *v.* Mahon, 4 L. R. Ir. 486.

[1] 18 C. B. 765; 25 L. J. C. P. 287.

sufficient to aver fraud, was held maintainable by all the Barons of the Exchequer.[2]

§ 756. The condition on which a sale depends may be the happening of some event, and then the question arises as to the duty of the obligee to give notice that the event has happened. As a general rule, a man who binds himself to do anything on the happening of a particular event, is bound to take notice, at his own peril, and to comply with his promise when the event happens.[1] But there are cases in which from the very nature of the transaction, the party bound on a condition of this sort is entitled to notice from the other of the happening of the event on which the liability depends. Thus, in Haule *v.* Hemyng,[2] it was held, that the vendor who had sold certain weys of barley, to be paid for at as much as he should sell for to any other man, could not maintain an action against the purchaser before giving him notice of the price at which he had sold to others, the reason being that the persons to whom the plaintiff might sell were perfectly indefinite, and at his own option. But no notice is necessary where the particular person whose action is made a condition of the bargain is named, as if in Haule *v.* Hemyng the bargain had been that the purchaser would pay as much as the vendor should get for the barley from J. S.[3] for the party bound in this event is sufficiently notified by the terms of his contract, that a sale is or will be made to J. S. and agrees to take notice of it; there is a particular individual specified, and no option to be exercised by the vendor. And it seems that this is the true test, viz., that if the obligee has reserved any option to himself, by which he can control the event on which the duty of the obligor depends, then he must [*560] give * notice of his own act before he can call upon the obligor to comply with his engagement. Therefore, in Vyse *v.* Wakefield,[4] where the defendant had cove-

[2] Batterbury *v.* Vyse, 2 H. & C. 42; 32 L. J. Ex. 177.

[1] 2 Wms. Saund. 62 a, n. 4.

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

[3] Viner's Ab. Condition (A. d.), pl. 15.

[4] 6 M. & W. 442; see Makin *v.* Watkinson, L. R. 6 Ex. 25; Stanton

nanted to appear at any time or times thereafter, at an office or offices, for the insurance of lives within London or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and *would not afterwards do any act to prejudice the insurance*, the declaration alleged that the defendant did, in part performance of his covenant, appear at a certain insurance office, and that plaintiff insured the defendant's life, and that the policy contained a proviso, by which it was to become void, if the defendant went beyond the limits of Europe. Breach, — that the defendant went beyond the limits of Europe, to wit, to Canada. Special demurrer, for want of averment, that the plaintiff had given notice to the defendant, that he had effected an insurance on the life of the defendant, and that the policy contained the proviso alleged in the declaration. Held, that the declaration was bad.[5]

§ 757. A very frequent contract among merchants is a sale of goods "to arrive."[1] It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at Nisi Prius, but in recent times these contracts have been multiplied to a great extent.

In Boyd *v.* Siffkin,[2] the sale was of "32 tons, more or less, of Riga Rhine hemp *on arrival per Fanny and Almira, &c.*," and the vessel arrived, but without the hemp. Held, that

v. Austin, L. R. 7 C. P. 651; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Armitage *v.* Insole, 14 Q. B. 728; 19 L. J. Q. B. 202.

[5] *Notice on happening of a contingency.* — On the subject of a notice required of the happening of a contingeney," see Hammond *v.* Gilmore, 14 Conn. 486; Sanborn *v.* Benediet, 78 Ill. 309; Home Life Ins. Co. *v.* Pierce, 75 Ill. 426; Posey *v.* Scales, 55 Ind. 282; Kirkpatrick *v.* Alexander, 44 Ind. 595; s. c. 60 Ind. 95; Quarles *v.* George, 40 Mass. (23 Pick.) 400; Lent *v.* Padelford, 10 Mass. 230; s. c. 6 Am. Dec. 119; Nichols *v.* Hail, 4 Neb. 194; Watson *v.* Walker, 23 N. H. 471; Topping *v.* Root, 5 Cow. (N. Y.) 404; Clough *v.* Hoffman, 5 Wend. (N. Y.) 500; James *v.* Adams, 16 W. Va. 245; Williams *v.* United States, 15 Ct. of Cl. 461; Robertson *v.* Hayes, 15 Up. Can. Q. B. 293; Stinson *v.* Branigan, 10 Up. Can. Q. B. 210; Russell *v.* Rowe, 7 Up. Can. Q. B. 484; Watson *v.* Gorren, 6 Up. Can. Q. B. 542.

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

[2] 2 Camp. 326.

the sale was conditional on the arrival, not of the vessel, but of the hemp. And the same conclusion was adopted by the Court in Hawes *v.* Humble,[3] where the sale was thus expressed : "I have this day sold for and by your order *on arrival* 100 tons, &c."

In Idle *v.* Thornton,[4] the contract was for "200 [*561] casks * first sort yellow candle tallow, at 68*s.* per cwt. *on arrival:* if it should not arrive on or before the 31st of December next, the bargain to be void: to be taken from the king's landing scale, &c., ex Catherina, Evers." The vessel with the tallow on board was wrecked off Montrose, but the greater part of the tallow was saved, and might have been forwarded to London by the 31st of December, but was not so forwarded, and was sold at Leith. Lord Ellenborough held that the contract was conditional on the arrival of the tallow in London *in the ordinary course of navigation*, and that the vendor was not bound, after the shipwreck, to forward it to London: at all events, not without a request and offer of indemnity by the purchaser.

§ 758. In Lovatt *v.* Hamilton,[1] the contract was, "We have sold you 50 tons of palm oil *to arrive* per Mansfield, &c. In case of non-arrival, or the vessel's not having so much in, after delivery of former contracts, this contract to be void." During the voyage a part of the cargo of the Mansfield was transshipped by an agent of the vendors into another vessel belonging to the vendors, but without their knowledge, and the oil arrived safely on *that* vessel. The Mansfield also arrived safely. The question was whether the arrival of the oil *in the Mansfield* was a condition precedent to the buyer's right to claim the delivery, and the Court, without hearing the vendor's counsel, held the affirmative to be quite clear.

§ 759. In Alewyn *v.* Pryor,[1] the sale was of "all the oil on board the Thomas . . . *on arrival* in Great Britain: to be delivered by sellers on a wharf in Great Britain to be appointed by the buyers with all convenient speed, *but not to*

[3] 2 Camp. 327, n.
[4] 3 Camp. 274.
[1] 5 M. & W. 639.
[1] Ry. & M. 406.

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

In Johnson *v.* Macdonald,[2] the sale was of 100 tons of nitrate of soda "to arrive ex Daniel Grant," and there was a memorandum at foot, "should the *vessel* be lost, this *contract to be void." The vessel arrived without [*562] any nitrate of soda, and it was strenuously contended that the expression "to arrive," when coupled with the stipulation in the memorandum, showed the meaning to be an undertaking by the vendor that the soda should arrive, and that he would deliver it if the *vessel* arrived safely. But all the judges were of opinion that there was a *double condition precedent*, and that the contract was to take effect only if the vessel arrived, *and* if on arrival the soda was on board.

§ 760. In Gorrissen *v.* Perrin,[1] the sale was of "1170 bales of gambier, *now on passage from Singapore*, and *expected to arrive* in London, viz., per Ravenscraig 805 bales, per Lady Agnes Duff 365 bales." Both vessels arrived with the specified number of *packages*, but it was proven that the contents were far short of the agreed number of *bales*, the latter word meaning in the trade a compressed package of two hundred weight. There was also on board the vessels a quantity of gambier consigned to other parties, sufficient to make up the whole quantity sold. The plaintiff, who had bought the goods, claimed in two counts: the first, on the theory that the words of the contract imported a *warranty* that there were 1170 *bales* actually on the passage: the second count, on the theory that even if it was a double condition precedent that the vessels should arrive with that quantity on board, the condition had been fulfilled, although part of the goods belonged to third persons and not to the vendor. The Court held, on the first count, that the language of the contract was plainly an absolute assurance, a warranty that the goods were on the passage. On the second point, which was not necessary to the decision, the

[2] 9 M. & W. 600.

[1] 27 L. J. C. P. 29; 2 C. B. N. S. 681.

Court, reviewing Fischel *v.* Scott,[2] distinguished it from the case before them. In that case a party sold oil expected to arrive, and which did arrive but he had supposed it would come consigned to him, whereas it turned out that it had been consigned to some one else, — and inasmuch as he had intended and contracted to sell the very oil which [*563] arrived, he must bear the consequences, * and the Court could not add to the contract a further condition, viz., that the goods on arrival should prove to be his: a very different thing from saying that when a man sells his own specific goods contingent on their arrival, and they do not arrive, the arrival of other similar goods, with which he never affected to deal, shall operate to fix him with the same consequences as if his own goods had arrived.[3]

§ 761. In Vernede *v.* Weber,[1] the contract was for the sale of "the cargo of 400 tons, provided the same be shipped for seller's account, more or less, *Aracan Necrensie rice*, . . . per British vessel Minna, . . . at 11*s.* 6*d.* per cwt. for Necrensie, or at 11*s.* for *Larong*, the latter quality not to exceed 50 tons, or else at the option of buyers to reject any excess, &c." By the pleadings it appeared that the vessel arrived without any Aracan Necrensie rice at all, but with 285 tons of Larong rice, and 159 tons of *Latoorie* rice. The buyer sued for delivery of this cargo. It was held by the Court, first, that the contract did not contain a warranty that any particular rice should be put on board, but that the sale was conditional on such a cargo as was described being shipped; secondly, that the purchaser was not entitled to the entire cargo that arrived, because no *Latoorie* rice had been sold, no price was fixed for that quality, and the parties plainly intended to fix their own price for what was sold, and not to leave it for a jury to determine; and *thirdly*, though with some hesitation,[2] that the buyer had no right to the *Larong* rice, because the contract was entire; it contemplated

[2] 15 C. B. 69.

[3] See, on this point, Lord Ellenborough's remarks in Hayward *v.* Scougall, 2 Camp. 56.

[1] 1 H. & N. 311; 25 L. J. Ex. 326. See Simond *v.* Braddon, 2 C. B. N. S. 324; 26 L. J. C. P. 198.

[2] This third point, notwithstanding the expression of hesitation by the learned judge who delivered the

the sale of a whole cargo of *Necrensie* rice; the *Larong* rice was to be a mere subsidiary portion of the cargo which was described as one of *Necrensie* rice; that the vendor could not have compelled the buyer to take a cargo of which no part corresponded with the description in the contract, in which there was no *Necrensie* rice at all, and that * he could not be bound to deliver what he could not [*564] have compelled the buyer to take, for the contract must bind both or neither.

§ 762. In Simond *v.* Braddon,[1] the sale was "of the following cargo of Aracan rice, per Severn, Captain Bryan, now on her way to Akyab (where the cargo was to be taken on board), *via* Australia. The cargo to consist of fair average Necrensie rice, the price of which is to be 11*s.* 6*d.* per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account, and in conformity with his invoice, &c." The word "only" was improperly inserted before the word "engages," after the sold note was signed, and was not in the bought note. This was held to be a *warranty* by the defendant to ship a cargo of fair average Necrensie rice, and he was held liable for a breach of it, the cargo proving to be Necrensie rice of inferior quality.

§ 763. In Hale *v.* Rawson,[1] the declaration alleged an agreement by the defendant to sell to the plaintiff 50 cases of East India tallow, "to be paid for *in fourteen days after the landing thereof*, to be delivered by the defendant to the plaintiff, *on safe arrival of a certain ship* or vessel called the *Countess of Elgin*, then alleged to be on her passage from Calcutta to London;" that the sale was by sample, that the vessel had arrived, &c., &c., and that the defendant refused to deliver. Plea, that neither the tallow nor any part thereof arrived by the Countess of Elgin, whereby, &c. Demurrer and joinder. Held, that the contract for the sale was conditional on the arrival of the *vessel* only, notwithstanding the

opinion, seems to rest on grounds quite as solid and indisputable as the two preceding.

[1] 2 C. B. N. S. 324; 26 L. J. C. P. 198.

[1] 4 C. B. N. S. 85; 27 L. J. C. P. 189.

stipulation for payment after the landing of the tallow. In this case the language of the contract plainly imported an assurance or warranty that the tallow was not board the ship.

§ 764. In Smith *v.* Myers,[1] the contract was for the sale of "about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per [*565] *Precursor*, * at 12*s.* 9*d.* per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." The vendors (the defendants) when this contract was made on the 8th of September, had been informed by their Valparaiso correspondents of the purchase of 600 tons nitrate, and of the charter of the Precursor on account of the vendors. Before the date of the contract, to wit, on the 13th of August, an earthquake had destroyed the greater part of the nitrate while lying at the port of lading, and on the 2d of September, after it had been decided in Valparaiso that the firm there was not bound to ship another cargo on the Precursor, the charter of that vessel had been cancelled by the Valparaiso house; the vendors in England being ignorant of these facts when they made the contract with the plaintiff on the 8th of September. Afterwards the Valparaiso correspondents, hearing of the contract made by the defendants, and not knowing what its precise terms were, determined as a measure of precaution to buy for them another cargo of 600 tons, and obtained an assignment of the charter of the same Precursor, from another house which had taken up the vessel, and on the 23d of December this second cargo was shipped to the defendants, who in January sold it "to arrive" to other parties. On the arrival of the cargo in May the plaintiffs claimed it, and on refusal of delivery by the defendants brought their action.

It was held that the contract referred to a specific cargo "*expected* to arrive per Precursor," under the information the vendors had received when they made the bargain, and that the destruction of *that* expected cargo, under the terms

[1] L. R. 5 Q. B. 429; 7 Q. B. 139, in Ex. Ch.

of the contract was provided for, in the stipulation that the contract in such event should "be void." It was a mere accident, a mere coincidence, that the second cargo bought had come on the Precursor, and there would have been no pretext for the plaintiffs' demand, if it had come on a vessel of a different name.

§ 765. In Covas *v.* Bingham,[1] a sale was made of a cargo not yet arrived "as it stands," and it was said by counsel, in *argument, that such contracts are not [*566] now uncommon, instead of, as formerly, "to arrive." The sale was made in Liverpool of "the cargo per Prima Donna now at Queenstown *as it stands*, consisting of 1300 quarters Ibraila Indian corn, at the price of 30*s.* per imperial quarter, *the quantity to be taken from the bill of lading*, and measure calculated 220 quarters equal to 100 kilos., — payment cash *on handing shipping documents and policy of insurance.*" The contract was made on the 16th of November, the ship being then at Queenstown awaiting orders. The bill of lading and policy of insurance were not then in Liverpool, but were received on the 19th of November, and the bill of lading then appeared to be for 758 kilos., with a memorandum at foot signed by the master, "quantity and quality unknown to me." The defendants sent plaintiff an invoice for 1667$\frac{2}{3}$ quarters, being the proper number, calculated according to the terms of the contract as applied to the bill of lading, and plaintiff paid the price thus calculated. The ship was ordered by the plaintiff to Drogheda, and the cargo on delivery there was found to measure only 1614$\frac{1}{2}$ quarters, leaving a deficiency of 53$\frac{1}{10}$ quarters, and the action was brought to recover back the excess of price paid for this deficiency in quantity. It does not appear in the report how the deficiency arose, *nor whether there were really* 758 *kilos. on board, in which case there would have been no deficiency* according to the basis of calculation agreed on by the parties, but this point does not seem to have been suggested in argument, nor adverted to in the decision. It was held that there was no condition nor warranty as to quantity, and that

[1] 2 E. & B. 836; 23 L. J. Q. B. 26.

the true effect of the contract was to put the purchaser in place of the vendor as owner of the cargo according to the face of the bill of lading, with all the chances of excess or deficiency in the quantity that might be on board.

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

First. — Where the language is that goods are sold "*on arrival* per ship A. or ex ship A.," or "*to arrive* per ship A. or ex ship A." (for these two expressions mean pre-
[*567] cisely the * same thing,[1] it imports a *double condition precedent*, viz., that the ship named shall arrive, *and* that the goods sold shall be on board on her arrival.

Secondly. — Where the language asserts the goods to be on board of the vessel named, as "1170 bales *now on passage*, and expected to arrive per ship A.," or other terms of like import, there is a *warranty* that the goods are on board, and a *single condition precedent*, to wit, the arrival of the *vessel*.

Thirdly. — The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him.

Fourthly. — Where the sale describes the expected cargo to be of a particular description, as "400 tons *Aracan Necrensie* rice," and the cargo turns out on arrival to be rice of a different description,[2] the condition precedent is not fulfilled, and neither party is bound by the bargain.

§ 767. In Neill *v.* Whitworth,[1] an attempt was made to convert a stipulation introduced in the vendor's favor into a condition precedent which he was bound to fulfil. A sale was made of cotton, "to arrive in Liverpool," and a clause

[1] *Per* Parke B. in Johnson *v.* M'Donald, 9 M. & W. 600-604.

[2] See *post*, Part 2, Ch. 1, Warranty, for the effect of a *description* of the thing sold.

[1] 18 C. B. N. S. 435; 34 L. J. C. P. 155.

was inserted: "*The cotton to be taken from the quay:* customary allowance of tare and draft, and the invoice to be dated from date of delivery of last bale." This was construed to be a stipulation *against* the buyer, not a condition in his *favor;* the purpose being probably to save warehouse charges, as it was shown that by the dock regulations in Liverpool, goods must be removed from the quay within twenty-four hours, in default whereof they are removed and warehoused by the dock authorities.[2]

§ 768. * In sales of goods "to arrive," it is quite a [*568] usual condition that the vendor shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract.

In Buck *v.* Spence,[1] decided in 1815, the seller agreed to sell certain flax, to be shipped from St. Petersburg, "and as soon as he knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer." The vendor received the advice on the 12th of September, in London, and did not communicate it to the defendant, who resided at Hull, till the 20th. The vessel arrived in October, and the defendant refused to accept the flax. Held, by Gibbs C. J. that this was a condition precedent, that it had not been complied with, and that the question whether or not the communication made eight days after receiving the information was a compliance with the condition was one of law, not of fact. The plaintiff was therefore non-suited.

§ 769. This point seems not to have occurred again until 1854, when it was carefully considered as a new question,

[2] *For American cases* on the subject of sales "to arrive," see Salmon *v.* Boyken, 66 Md. 541; s. c. 6 Cent. Rep. 485; Neldon *v.* Smith, 36 N. J. L. (7 Vr.) 148; Pope *v.* Porter, 102 N. Y. 366; Hill *v.* Blake, 97 N. Y. 216; Smith *v.* Pettee, 70 N. Y. 13; Benedict *v.* Field, 16 N. Y. 595; Shields *v.* Pettie, 4 N. Y. 122; Seixas *v.* Ockershausen, 43 Hun (N. Y.) 559; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Reimers *v.* Ridner, 2 Robt. (N. Y.) 22; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112; s. c. 20 Am. Dec. 670; Rogers *v.* Woodruff, 23 Ohio St. 632; s. c. 13 Am. Rep. 276; Filley *v.* Pope, 115 U. S. 213; bk. 29, L. ed. 372; Norrington *v.* Wright, 115 U. S. 188; bk. 29, L. ed. 366.

[1] 4 Camp. 329.

and determined in the same way, in the Exchequer, in Graves *v.* Legg,[1] the decision of Gibbs C. J. in Buck *v.* Spence, having escaped the notice of the counsel and the Court, as no reference is made to it in the report. In this case, after the decision on the demurrer to the above effect, there was a trial on the merits, in which it was proven that the vessel was named to the buyer's broker, who had made the contract, in Liverpool; and that by the usage of that market, such notice to the broker was equivalent to notice to his principal, and the Court of Exchequer, as well as the Exchequer Chamber, held that this was a compliance with the condition.[2]

§ 770. [Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract. It is then a condition [*569] precedent * that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expressions "to be shipped" or "shipment" within a certain time. They may be construed to mean either that the goods shall be placed on board ship during the time specified, or that the shipment shall be completed before that time expires. The former has now been decided by the highest authority to be the natural meaning of the words, and one which the Courts for the future will place upon them, in the absence of any trade usage to alter that meaning. The point in question was fully considered in the two cases of Alexander *v.* Vanderzee [1] and Shand *v.* Bowes.[2]

§ 771. In Alexander *v.* Vanderzee,[1] the defendant had contracted for the purchase of 10,000 quarters of Danubian maize, *for shipment in June and* [*or*] *July*, 1869 (old style), seller's option. In fulfilment of the seller's contract two cargoes of maize were tendered to the defendant, the bills of

[1] 9 Ex. 709; 23 L. J. Ex. 228.

[2] 11 Ex. 642; 26 L. J. Ex. 316. See, also, Gilkes *v.* Leonino, 4 C. B. N. S. 485.

[1] L. R. 7 C. P. 530.

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

[1] See § 770, note 1.

lading for which were dated respectively the 4th and the 6th of June, 1869. The loading of the two cargoes was commenced on the 12th and 16th of May, and completed on the 4th and 6th of June, rather more than half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June, but it does not appear that any evidence of usage to affect the ordinary meaning of the words was tendered.[2] At the trial it was left to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term, and they found that they were, and the majority of the Court of Exchequer Chamber held, affirming the decision of the Court of Common Pleas, that the question was rightly left to the jury, and that their verdict, therefore, disposed of the case. In the Exchequer *Chamber, Martin B., Blackburn, [*570] Mellor, and Lush, JJ. were of the opinion that the words "June and [or] July shipment" were ambiguous, and might mean either that the shipment was to be completed in one of those months, or that the whole quantity of grain was to be put on board within those months, and that it was properly left to the jury to decide. Kelly C. B., on the other hand, was of opinion that, in the absence of any suggestion that the words bore a technical meaning, the construction of them was for the judge, and that their natural meaning was that the cargoes should be put on board in June or July, not partly in May, particularly upon the evidence that a May shipment was more likely to heat than a June shipment, but he declined to differ from the rest of the Court.

§ 772. But the authority of this case is shaken by the later decision of the House of Lords in Shand *v.* Bowes.[1] The contract was for the sale of 600 tons of "Madras rice *to be shipped* at Madras or coast *during the months of March and* [*or*] *April*, 1874, per Rajah of Cochin."

The Rajah of Cochin arrived at Madras in February, and

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

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

by far the larger portion of the rice was put on board in that month, and bills of lading for various portions were given upon the 23d, 24th, and 28th of February. The last bill of lading was given upon the 4th of March, but all except a very small portion of the parcel shipped under this bill of lading also had been put on board in February. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March and [or] April. There was no evidence tendered on behalf of the plaintiffs to show that the words "to be shipped during the months of March and [or] April" had in the trade any other than their natural and ordinary meaning. On the other hand, the defendants called evidence to prove affirmatively that the words were understood in the trade in their ordinary meaning, and they obtained an admission to the same effect [*571] *from one of the plaintiffs in cross-examination. It was held that the natural meaning of the stipulation as to shipment contained in the contract was that the whole of the rice should be put on board during the months mentioned: and that, in the absence of any trade usage to affect the meaning of the words, it was for the Court to construe the contract.

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

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

In treating of the fulfilment of the description given by the contract as a condition precedent, Lord Blackburn makes some valuable observations. He says, at p. 480, "It was argued, or tried to be argued, on one point that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, * its being shipped at another and a dif- [*572] ferent time being, (it was said,) only a breach of a stipulation, which could be compensated for in damages. But I think that that is quite untenable. I think — to adopt an illustration which was used a long time ago by Lord Abinger,[1] and which always struck me as being a right one — that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige the party to take beans; if the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras — I do not quite know what the boundary is, — and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped April, and I daresay equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin.*

[1] In Chanter *v.* Hopkins, 4 M. & W. 399, *post.*

But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."]

§ 774. There is not an entire concordance in the authorities as to the true construction of a contract for the sale of "a cargo." In Kreuger *v.* Blanck,[1] the defendant in Liverpool sent an order to the plaintiffs, at Mauritius, on the 25th of July, for "a small cargo (of lathwood) of about the following lengths, &c., &c., in all about 60 cubic [*573] fathoms, which you *will please to effect on opportunity for my account, at 6*l.* 15*s.* c. f. and i.[2] per cubic fathom, discharged to the Bristol Channel." The plaintiffs being unable to get a vessel of the exact size for such a cargo, chartered a ship and loaded her with 83 fathoms, and on the arrival of the vessel the plaintiffs' agent unloaded the cargo and measured and set apart the amount of the defendant's order and tendered him a bill of lading for that quantity, but the defendant declined to accept on the ground that "the cargo" was in excess of the order. Held, by Kelly C. B. and Cleasby B. (Martin B., diss.), that "cargo" meant a whole cargo, and that plaintiffs had not complied with the order and could not maintain the action.

§ 775. But this case was referred to with marked doubt, by Blackburn J. in the opinion given by him in Ireland *v.* Livingstone,[1] in the House of Lords. The contract in that case was in a letter in the following words: "My opinion is that should the beet crop prove less than usual there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a

[1] L. R. 5 Ex. 179.

[2] The initials mean "cost, freight, and insurance."

[1] L. R. 2 Q. B. 99; 5 Q. B. 516; L. R. 5 H. L. 395–410.

maximum, say 26*s.* 9*d.* for Nos. 10 and 12, and you may ship me 500 tons to cover cost, freight, and insurance, — 50 tons more or less of no moment if it enables you to get a *suitable vessel.* You will please to provide insurance and draw on me for the cost thereof, as customary, attaching documents, and I engage to give the same due protection on presentation. I should prefer the *option of sending vessel* to London, Liverpool, or the Clyde, but if that is not compassable you may ship to either Liverpool or London." And a telegram was sent the next day to say that "the insurance is to be done with average, and if possible, *the ship* to call for orders for a good port in the United Kingdom."

The plaintiffs answered on the 6th of September: "We are in receipt of your esteemed favor of the 25th of July, and take due note that you authorize us to purchase and ship on *your account *a cargo of about* 500 *tons*, pro- [*574] vided we can obtain Nos. 10 to 12 D S, at a cost not exceeding 26*s.* 9*d.* per cwt. free on board, including cost, freight, and insurance; and your remarks regarding the *destination of the vessel* have also our attention. . . . If prices come within your limits, and we can lay in a *good cargo*, we shall not fail to operate for you." At the date of this letter, the market at the Mauritius was too high to enable the plaintiffs to make the purchase at the defendants' limit, freight ranging from 2*l.* 15*s.* to 3*l.* per ton.

In the course of September the plaintiffs received an offer from a partly loaded vessel, to take 7000 or 8000 bags of sugar at a freight of 2*l.* 10*s.* per ton for a voyage direct to London, and ascertained that at this rate of freight the sugar could be purchased so as to bring the cost, freight, and insurance within the limit. It was impossible to purchase the sugar in one lot from the same person, and the plaintiffs purchased from several brokers fourteen distinct parcels of the specified quality.

The plaintiffs used due diligence, but could not obtain more than 5778 bags, weighing about 392 tons, within the limits, and reduced their own commissions by a sum of 163*l.* 19*s.* 4½*d.*, in order not to exceed the limit.

They shipped this quantity to the defendants, and being

unable to fill up the vessel with any further quantity on the defendants' account, they shipped on their own account about 150 tons of inferior quality, and the ship sailed on the 29th of September with the cargo above described.

The plaintiffs continued to watch the market for the purpose of completing the defendant's order for "about 500 tons," without success, till the 26th of October, when they received from the defendants a countermand of the order. The defendants refused to accept the 392 tons shipped to them as aforesaid, and the plaintiffs brought their action.

§ 776. In the Queen's Bench, it was held (by Cockburn C. J., Mellor and Shee JJ.) that the true construction of the order was to buy sugar for the defendants, according to the * usage of the market at the Mauritius, where the sugar could only be bought in several parcels from different persons, and that as fast as the plaintiffs bought each lot, in pursuance of the order, the lot so bought was appropriated to the order, and that the defendants were bound to accept what was so bought, and had, themselves, by countermanding the order, prevented its execution for the entire quantity ordered. The question as to the shipment being *part of a cargo* and not *a cargo* was not mooted.

[*575]

In the Exchequer Chamber, the judgment of the Queen's Bench was reversed, by Kelly C. B., Martin and Channell BB. and Keating J. (Montague Smith J. and Cleasby B., diss.), on the ground that the order was for a single shipment of one cargo by a single vessel. The dissenting judges did not consider that the fulfilment of the order was made conditional upon its being so executed as to send the whole order as one cargo.

In the House of Lords, Martin and Cleasby BB. adhered to their opinions expressed in the Exchequer Chamber, and Blackburn, Hannen, and Byles, JJ. were all of opinion that the case was one of principal and agent, not of vendor and vendee (as held by Martin B.), and that the true construction of the order did not impose the condition of shipment as one cargo in one vessel. Although the case, as decided by the

Lords, did not involve all the considerations upon which the judgment of Blackburn J. (in behalf of himself and Hannen J.) were based, the exposition by that eminent judge of the principles which distinguish different contracts with commission merchants or agents, and of their rights and duties, is so instructive as to justify a very full extract from his opinion.

§ 777. "The terms, at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premium of insurance and the freight, as the case * may be), and giving him credit for the amount [*576] of the freight which he will have to pay the ship-owner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept, if the shipment be in conformity with his contract, on having handed to him the charter-party, bill of lading, and policy of insurance.[1] Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered, in consequence of the perils of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners not covered by the policy, he will recover it from the ship-owner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way.

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

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

obvious, that if freight is high, the consignor gets the less for the goods he supplies: if low, he gets the more. But inasmuch as he has contracted to supply the goods at this price, he is bound to do so, though, owing to the rise in prices at the port of shipment, making him pay more for the goods, or of freight, causing him to receive less himself, because the ship-owner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices at the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party *binds himself absolutely* to supply the goods in a vessel such as is stipulated for *at a fixed price*, to [*577] be paid *in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party *binds himself to pay that fixed price.* Each party there takes upon himself the risk of the rise or fall in price, and there is no *contract of agency or trust* between them, and therefore no commission is charged.

§ 778. "But it is also very common for a consignor to be an agent who does not bind himself absolutely to supply the goods, but merely accepts an order, by which he *binds himself to use due diligence to fulfil the order.* In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the *actual cost* and charges at which the goods are procured by the consignor, with the addition of a commission: and the naming of a maximum limit shows that the order is of that nature. It would be *a positive fraud*, if having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit.

"The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering, the freight being in no way an element in the limit. But when, as in the

present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. If, by due exertions, he can execute the order within those limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission, because *there is a contract of agency*. . . . It is quite true that the agent who in thus executing an order ships goods to his
* principal *is a vendor to him*. The persons who sup- [*578]
ply goods to a commission agent sell them to *him*
and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. . . . The property in the goods passes from the country producer to the commission merchant; and then when the goods are shipped from the commission merchant to his consignee, and the *legal effect* of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from one to the other; and, consequently, *the commission merchant is a vendor*, and has the right of one as to stoppage *in transitu*.

"I therefore perfectly agree with the opinion expressed by Baron Martin in the Court below, that the present is a *contract between vendor and vendee;* but I think he *falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent.*

"My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs, there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered, at or below the limit given, to be followed up by the transfer of the property at the actual cost, with the addition of the commission, but that this super-added sale is not in any way inconsistent with the contract of agency existing between the

parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered, as much below the limit as they could."[1]

The learned judge then went on to show that the question of usage of the market did not really arise; that the commission merchant as an agent must use reasonable exertions to buy *as cheaply as he can*, and to buy them either [*579] in small *parcels or one large lot, according to the advantage which would be gained in price by the one or the other mode of purchase.

It is very remarkable that after the thorough discussion of this case the only point upon which the judges had given opinions that was decided in the Lords,[2] was that the contract was one of agency, as explained by Blackburn J.

§ 779. The case was decided upon a totally new point, not taken in the argument nor suggested by the judges. It was determined in favor of the plaintiffs, on the ground that the divergence of opinion among the judges as to the construction of the order was conclusive proof that the language was ambiguous and admitted of either construction, and the very important rule was laid down "*that when a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent* bonâ fide *adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in the other sense, of which it is equally capable.*"

[In Borrowman *v.* Drayton,[1] the Court of Appeal defined "cargo" to be the entire quantity of goods loaded on board a vessel on freight for a particular voyage, and held, therefore, that a purchaser of a cargo was not bound to accept a part only of the entire load of the ship, thus practically affirming Kreuger *v.* Blanck. The opinion of Blackburn J.

[1] See *ante*, p. 198, and Cassaboglou *v.* Gibbs, 9 Q. B. D. 220, where it was held, that, upon breach of a contract by a commission merchant to supply his correspondent with goods of a specific description, the damages are to be assessed on the footing of principal and agent, and not of vendor and vendee.

[2] The Lords present were Chelmsford, Westbury, and Colonsay

[1] 2 Ex. D. 15, C. A.

in Ireland *v.* Livingston, was referred to in argument, but not noticed in the judgment, which was delivered by Mellish L. J. who suggested reasons why a purchaser might prefer to have the entire quantity of goods loaded on the vessel.[2]]

§ 780. Sometimes the sale of a cargo is made by bill of lading, and the condition imposed by the contract on the vendor must be strictly complied with, in order to enable him to enforce the bargain.

In 1859 the two cases of Tamvaco *v.* Lucas were decided, * both in favor of the purchaser, on the [*580] ground that the vendors' proffer of delivery was not in accordance with the conditions of the contract. In the first case,[1] the sale was of a cargo of wheat "of about 2,000 quarters, say from 1,800 to 2,200 quarters, . . . to be shipped between the 1st of September and the 12th of October: . . . sellers guarantee delivery of invoice weights, sea accidents excepted. *Buyers to pay for any excess of weight*, unless it be the result of sea damage or heating. The measure for the sake of invoice to be calculated at the rate of 100 chetwerts, equal to 72 quarters. . . . Payment cash in London *in exchange for usual shipping documents, &c.*" In an action for non-acceptance, the declaration alleged that the plaintiffs offered to deliver "the usual shipping documents according to the contract, . . . in exchange for the invoice price, according to the contract." The defendants pleaded in substance that the shipping documents offered to them were for a cargo of wheat, amounting to 2,215 quarters, and that the plaintiffs had wrongly stated in the invoice that the cargo was only 2,200 quarters: that when the bill of lading was tendered and the invoice made out, the vessel was at sea, and neither party knew what quantity was on board, except from the shipping documents, and that the defendants were therefore entitled to reject the offer, as they had done, as not being in conformity with the contract. The plaintiff replied that the cargo offered was really a cargo

[2] See, also, Anderson *v.* Morice, L. R. 10 C. P. 58, at p. 71, considered *ante*, p. 274.

[1] 1 E. & E. 581; 28 L. J. Q. B. 150.

of more than 1,800 and less than 2,000 quarters, as shown by the number of quarters *delivered* from the ship when actually discharged. On demurrer to this replication, the Court held, after advisement, that the purchaser was not bound to accept the offer made on the tender of the usual shipping documents; that he had no power to accept the part he agreed to purchase and reject the rest; that if he had accepted he would have been *bound to pay for the surplus*, if any, and that the vendor had no right to make out an invoice otherwise than in accordance with the bill of lading, that is, counting 100 chetwerts, equal to seventy-two quarters, according to the terms [*581] of the contract. The plaintiffs * had failed to show that they were ready and willing to perform their part of the contract, and could not force the purchaser to accept.

§ 781. The second case,[1] on a contract similar to the first, presented the converse of the facts. The bill of lading represented a cargo which was in conformity with the contract, but the defendants' plea alleged that the quantity of wheat actually on board was less than 1,800 quarters, and this plea was held good on demurrer. The contracts in the two cases were held to mean substantially that the vendor was to supply in each case a cargo of "about 2,000 quarters," that an excess or deficiency of 200 quarters should form no objection; that the purchaser's promise to pay for any excess of weight applied to such excess as might occur within the stipulated limits; and that the vendor was in default if he either tendered shipping documents for a cargo not in accordance with the contract, or shipping documents erroneously describing a cargo as being within the contract, when in fact and truth it was not.[2]

§ 782. The general rule in executory agreements for the sale of goods is that the obligation of the vendor to deliver,

[1] Tamvaco *v.* Lucas, 1 E. & E. 592; 28 L. J. Q. B. 301.

[2] In Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173, it was held that a cargo of 5070 bushels of barley could not be offered in fulfilment of a contract to furnish a cargo "of about 9,000 bushels." In Pembroke Iron Co. *v.* Parsons, 71 Mass. (5 Gray) 589, a contract for the sale of a cargo "to be shipped per barque C. W. about 300 or 350 tons, was held to be complied with by the delivery of a full cargo from the vessel, although such cargo only amounted to 227 tons."

and that of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance,[1] or offer to perform, or averring readiness and willingness to perform his own promise.[2]

In Atkinson *v.* Smith,[3] there was a *mutual* agreement for cross sale, as follows: "Bought of A. & Co., about thirty packs of Cheviot fleeces, and agreed to take the under-mentioned noils (coarse woollen cloths, so called); also agreed to draw for 250*l.*, on account, at three months. Sixteen packs No. 5 noils, at 10¾*d.*; eight packs No. 4 noils, at 12*d.*" The defendant had bargained with the plaintiff for the purchase * of the fleeces, and had agreed to sell him [*582] the noils. The noils rose in price, and the defendant refused to deliver them. Plaintiff brought action, averring *independent agreements*, but he was nonsuited, all the judges holding that he should have alleged his offer to deliver the fleeces, which was a condition precedent to his right to claim the noils.

§ 783. In Withers *v.* Reynolds,[1] the defendant agreed to furnish plaintiff with wheat straw, sufficient for his use as stable-keeper, from the 20th of October, 1829, till the 24th of June, at the rate of three loads in a fortnight, at 33*s.* per load, and the plaintiff agreed "to pay to the said J. R., 33*s.* per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830." The plaintiff insisted that these were two independent agreements, that no

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

[2] Rawson *v.* Johnson, *supra*; Jackson *v.* Allaway, *supra*; Boyd *v.* Lett, 1 C. B. 222.

American authorities. — Smith *v.* Lewis, 26 Con. 110; Warren *v.* Wheeler, 21 Me. 484; Howland *v.* Leach, 28 Mass. (11 Pick.) 151; Johnson *v.* Reed, 9 Mass. 78; s. c. 4 Am. Dec. 36; Pope *v.* Terre Haute Car & Manuf. Co., 107 N. Y. 61; Gazley *v.* Price, 16 Johns. (N. Y.) 267; Dermott *v.* Jones, 64 U. S. (23 How.) 220; bk. 16, L. ed. 442; Boone *v.* Missouri Iron Co., 58 U. S. (17 How.) 340; bk. 15, L. ed. 171; Hyde *v.* Booraem, 41 U. S. (16 Pet.) 169; bk. 10, L. ed. 925; Colson *v.* Thompson, 15 U. S. (2 Wheat.) 336; bk. 4, L. ed. 584.

[3] 14 M. & W. 395.

[1] 2 & Ad. 882. See the interlocutory observations of Jessel M. R. and Bowen L. J. on this case in The Mersey Steel Co. *v.* Naylor, 51 L. J. Q. B. at p. 581.

time was fixed for payment, and that he could maintain his action against the defendant for not delivering, leaving the latter to his cross action for payment; but all the judges held, that the plaintiff's right was dependent on his readiness to pay for each load on delivery, and it being proven that he had expressly refused to execute the contract according to this interpretation of it, he was nonsuited.

In Bankart *v.* Bowers,[2] there was a written agreement, containing eight covenants, by which the plaintiff agreed to purchase certain land and coal mines from the defendant; and the latter, by the seventh of these covenants, agreed to purchase from the plaintiff all coal that he might require from time to time, at a fair market rate, and the action was for damages against the defendant for refusing to buy the coal, to which it was pleaded that the plaintiff had refused to buy the land; and on *demurrer* by plaintiff to this plea, held, that these were not independent agreements, but concurrent stipulations, and there was judgment for the defendant on the demurrer.

§ 784. [But it is to be borne in mind that, to entitle the seller to rescind the contract, the acts and conduct of [*583] the buyer must either * amount to an *express refusal* or manifest a complete inability to perform his part of the contract. Thus in Corcoran *v.* Prosser,[1] the contract was for the sale of 2,000 quarters of barley at the price of 17*s.*, c. f. and i., "to be paid for in net cash in exchange for bills of lading, as soon as the vessel or vessels which had the barley on board arrived in Dublin." Four deliveries were made and paid for by the plaintiff, some of them being short in weight. On discovering the deficiency, the plaintiff wrote claiming an allowance for short weight and for cost of reweighing, and upon the next delivery *refused to accept the defendant's cash order without the deduction.* The defendant thereupon treated the contract as rescinded. In an action by the plaintiff for the non-delivery of the residue of the barley according to the contract, it was held by the majority of the Court of Exchequer Chamber in Ireland that the conduct of

[2] L. R. 1 C. P. 484.

[1] 22 W. R. 222 (Ir. Ex. Ch.).

the plaintiff did not amount to a positive refusal to pay, but was only a collateral claim to a deduction off the price, which did not justify the defendant in rescinding the contract.

§ 785. In Bloomer *v.* Bernstein,[1] the defendants, who were merchants at Antwerp, contracted to sell to the plaintiff "from 3,650 to 5,110 tons of old iron rails, delivery to take place during 1872, and to be completed in December of that year, payment net cash, in London, against bill of lading and sworn weigher's certificate." It was proved that under such a contract the practice was to deliver monthly. The plaintiff duly paid for the first parcel on presentment of the bill of lading on the 27th of January, 1872, but did not take up the bill of lading for the second parcel, presented on the 31st, and after further negotiation, during which the second parcel was sold, the defendants' agent wrote on the 14th of February that he considered the contract cancelled. Upon the 22d of February the plaintiff went into liquidation. After agreeing to pay a composition of 2*s.* 6*d.* in the £, his estate was reassigned to him, and he then brought this action for non-delivery of the iron. At the trial, Brett J. ruled that, if before the alleged breach the buyer was insolvent and neglected to pay the amount due on presentment of the bill of lading, he
*could not afterwards insist upon any delivery, at [*584]
all events without tendering the price or giving the sellers reasonable evidence that he would be able and willing to pay the price; and he then asked the jury, among other questions, to say whether the defendants, by reason of the plaintiff's conduct, had reasonable ground for believing, and did they believe, that plaintiff would be unable to pay for the future bills of lading to be presented under the contract. The jury answered in the affirmative, and upon motion in the Court of Common Pleas, the Court held that the findings of the jury concluded the matter in favor of the defendants, and brought the case directly within the authority of Withers *v.* Reynolds.[2]

The effect of the purchaser's bankruptcy as an act entitling the seller to treat the contract as abandoned is considered *post*, Book V. Part I. Ch. 1, s. 1.]

[1] L. R. 9 C. P. 588.

[2] 2 B. & Ad. 882, *ante*, p. 582.

§ 786. In determining whether stipulations as to the *time* of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.[1]

In Hoare *v.* Rennie,[2] the defendant agreed to buy from the plaintiff, 667 tons of iron, to be shipped from Sweden, *in about equal portions*, in each of the months of June, July, August, and September. The plaintiff shipped only twenty-one tons in June, which the defendant refused to [*585] accept as * part compliance with the contract, and it was held, that the delivery at the time specified was a condition precedent, and that plaintiff could not on these facts maintain an action against the defendant for not accepting. But this case has been much questioned, particularly in Simpson *v.* Crippin, *infra.*

§ 787. In Jonassohn *v.* Young,[1] the agreement was for a supply of coal by the plaintiff to the defendant, as much as one steam vessel could convey in nine months, plying between Sutherland and London, the coals to be equal to a previous cargo supplied on trial, and the defendant to send the steamer for them. In an action for breach of this agreement, the defendant, among other defences, pleaded that the

[1] This statement of the law was cited with approval by Folger J. in delivering the opinion of the Court of Appeals of New York in Higgins *v.* The Delaware Railroad Co., 60 N. Y. at p. 557.

The Judicature Acts provide that stipulations in contracts as to time or otherwise, which would not before the commencement of the Act of 1873 have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they formerly would have received in equity, Jud. Act, 1873, s. 25, sub-s. 7; Jud. Act, 1875, s. 10. At common law, even before the Acts, on a sale of chattels time was not of the essence of the contract, in the absence of express agreement to that effect, see *per* Lord Denman in Martindale *v.* Smith, 1 Q. B. at p. 395. See, also, Wolfe *v.* Horne, 2 Q. B. D. 355.

[2] 5 H. & N. 19; 29 L. J. Ex. 73.

[1] 4 B. & S. 296; 32 L. J. Q. B. 385. See, also, Bradford *v.* Williams, L. R. 7 Ex. 259, a case intermediate to Jonassohn *v.* Young, and Simpson *v.* Crippin, and referred to by Baggallay L. J. in Honck *v.* Müller, 7 Q. B. D. at p. 102 as one in which the principle of Hoare *v.* Rennie was adopted.

plaintiff had first broken the contract by detaining the vessel on divers occasions an unreasonable time, *far beyond that permitted by the contract*, before loading her, wherefore the defendant immediately, on notice of the plaintiff's default, refused to go on with the execution of the contract. A demurrer to this plea was held good.

§ 788. In Simpson *v.* Crippin,[1] the defendants had agreed to supply the plaintiff with 6,000 to 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendants' colliery, "in equal monthly quantities during the period of twelve months from the first of July next." During the first month, July, the plaintiff sent wagons for 158 tons only, and on the 1st of August, the defendants wrote that the contract was cancelled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be cancelled, and the action was brought on the defendants' refusal to go on with it. Held, that although the plaintiff had committed a breach of the contract by failing to send wagons in sufficient number the first month, the breach was a good *ground for compensation, but did not justify the [*586] defendants in rescinding the contract, under the rule established by Pordage *v.* Cole.[2] Two of the judges (Blackburn and Lush JJ.) declared that they could not understand Hoare *v.* Rennie, and declined to follow it.

§ 789. [In French *v.* Burr,[1] the defendant contracted to sell to the plaintiffs 250 tons of pig iron, half to be delivered in two, remainder in four weeks, payment net cash fourteen days after delivery of each parcel. The delivery of the first parcel of 125 tons was not completed for nearly six months, in spite of repeated demands by plaintiffs. The plaintiffs thereupon refused to pay for the parcel, claiming an allowance, but they still urged delivery of the second parcel. The defendant treated the refusal to pay as an abandonment of the contract and declined to deliver any more. The price of

[1] L. R. 8 Q. B. 14.
[2] Wms. Saund. 319 l.
[1] L. R. 9 C. P. 208.

the first parcel was ultimately paid, and it was not suggested that plaintiffs were unable to pay. On these facts the Court of Common Pleas held that the refusal to pay was not, under the circumstances, sufficient to warrant the defendant in treating the contract as abandoned by the plaintiffs. Coleridge C. J. in delivering judgment, says (at p. 213): "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is, *whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract.* I say this in order to explain the ground on which I think the decisions in those cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., *that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.* Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be *evidence for a jury* of an intention wholly to abandon the contract and set the other party free. This is the true principle on which Hoare *v.* Rennie was [*587] decided, * whether rightly or not upon the facts, I will not presume to say."[2]

§ 790. In Brandt *v.* Lawrence[1] there were two contracts, each for the sale by plaintiff to defendant of 4,500 quarters of Russian oats, more or less, *shipment by steamer or steamers* during February. The plaintiff shipped on board one steamer, 4,511 quarters to answer the first contract, and

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

[1] 1 Q. B. D. 344, C. A.

1,139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time, that on the second too late. Held, that the defendant was bound to accept the 1,139 quarters in part fulfilment of the second contract, notwithstanding that the remaining shipment in respect of that was made too late; the Court holding that the words "by steamer or steamers" showed an intention that the shipment should be made in different parcels and not in two specific lots, so that the case was brought within the principle of Simpson *v.* Crippin.

§ 791. In Reuter *v.* Sala,[1] the contract was for the sale, by plaintiffs to defendants, of twenty-five tons Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, *name of vessel or vessels to be declared.* The plaintiffs declared twenty-five tons by particular vessel, only twenty tons of which complied with the terms of the contract as to shipment, and it was held by the majority of the Court of Appeal, Cotton and Thesiger L. JJ. (Brett L. J. dissenting), that the defendants were not bound to accept less than twenty-five tons. Brandt *v.* Lawrence * was distinguished, on [*588] the ground that in the case under consideration the plaintiffs had only named one ship, and made one indivisible shipment. Lord Justice Brett, however, delivered a dissentient judgment, laying down that "the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to ac-

[1] 4 C. P. D. 239, C. A.

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

§ 792. In Honck *v.* Müller,[1] the plaintiff had bought from the defendant 2,000 tons of iron to be delivered "in November or equally over November, December and January" at an increased price. The plaintiff failed to take delivery of any of the iron in November, and the defendant thereupon cancelled the contract. In an action by the plaintiff for damages on account of the defendant's refusal to deliver in December and January, it was held by the majority of the Court, that the plaintiff's refusal to accept in [*589] November *justified the defendant in refusing to continue to carry out the contract. On the one hand, Bramwell and Baggallay L. JJ. distinctly approved and followed Hoare *v.* Rennie; the former learned judge distinguishing Simpson *v.* Crippin upon the ground of part performance, the latter finding it impossible to reconcile Simpson *v.* Crippin with Hoare *v.* Rennie, and preferring to adopt the principles enunciated in the latter case; Brett L. J. on the other hand dissented, and preferred to adopt the doctrine laid down in Simpson *v.* Crippin, and contained in the notes to Pordage *v.* Cole,[2] resting his judgment mainly upon the view taken by merchants of the class of contracts in question.[3]

[1] 7 Q. B. D. 92, C. A.
[2] 1 Wm. Saund. 319 l.
[3] In this case an appeal to the House of Lords was lodged, but afterwards abandoned.

§ 793. In a still more recent decision, The Mersey Steel and Iron Company *v.* Naylor,[1] the Court of Appeal, *differently constituted*, and consisting of Jessel M. R. and Lindley and Bowen L. JJ. has affirmed that there is no absolute rule in these cases, and unanimously stated the true test to be that suggested by Lord Coleridge in Freeth *v.* Burr, viz., *whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract, and that this is a question of evidence.* The Court indirectly affirms the authority of Simpson *v.* Crippin, by laying down that non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not *per se* necessarily evidence of any such intention.

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

§ 794. In America the law appears to be fairly settled in accordance with the decision in Simpson *v.* Crippin, viz., that in * the absence of any expressed intention [*590] of the parties,[1] a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one instalment does not entitle the other party to refuse delivery or acceptance of the instalments that remain.[2]

Only one case, King Philip Mills *v.* Slater,[3] a decision of the State of Rhode Island, has been found, in which the rule laid down in Simpson *v.* Crippin is directly attacked.[4]]

[1] 51 L. J. Q. B. 576, only reported while the sheets of this edition were passing through the press.

[1] Higgins *v.* Delaware Railroad Co., 60 N. Y. 553.

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

[3] 34 Am. Rep. 603; s. c. 12 Rhode Island, 82.

[4] *American rule.* — In Blackburn *v.* Reilley, 47 N. J. L. (11 Vr.) 290, 308, the court stated the rule in America to be that "default by one party in

§ 795. In a sale of goods by sample, it is a condition implied by law that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this, is a breach which justifies the purchaser in rejecting the contract. In Lorymer *v.* Smith,[1] the purchaser asked to look at the bulk of 1,400 bushels of wheat, which he had bought by sample, and on a refusal by the vendor to show it, said he would not take it. A few days afterwards the vendor communicated to the buyer his readiness then to show the bulk, and to make delivery on payment of the price. Held, by the King's Bench, that the buyer's request having been made at a proper and convenient time, and refused, he had the right to reject the sale. In this case a usage was shown, that the buyer had the right of inspection when demanded, but Abbott C. J. said, that even without the usage, the law would give him that right.

The mutual rights and obligations of the parties in a sale by sample are discussed, *post*, Book IV. Part II. Ch. 1, sect. 3, Implied Warranty of Quality.

§ 796. Other instances of sales, dependent on conditions precedent, are afforded by "sales on trial," or "approval," and by the bargain known as "sale or return." In the former class of cases there is no sale till the approval is given, either expressly or by implication resulting from [*591] keeping the goods beyond *the time allowed for trial.[1] In the latter case the sale becomes absolute,

making particular payments or deliveries will not release the other party from his duty to make the other deliveries for payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms." See, also, Trotter *v.* Heckscher, 40 N. J. Eq. (13 Stew.) 612; Cahen *v.* Platt, 69 N. Y. 348; s. c. 25 Am. Rep. 203. But the Supreme Court of the United States in the recent case of Norrington *v.* Wright, 115 U. S. 188; bk. 29, L. ed. 366, held that where the plaintiff, instead of shipping 1000 tons of iron per month, as stipulated in the contract, had shipped only 400 tons during the first month, and 885 tons the second month, his failure to fulfil the contract in respect to these two instalments justified the defendants in rescinding the whole contract provided they distinctly and seasonably asserted the right of rescission. A full discussion of this subject with the authorities upon it, will be found in the briefs of council and the opinion of the judge in this case.

[1] 1 B. & C. 1.

[1] Cited, with approval, as a correct

and the property passes only after a reasonable time has elapsed, without the return of the goods.

In sales "on trial," the mere failure to return the goods within the time specified for trial, makes the sale absolute,[2] but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term, and this right is not affected by his telling the vendor in the interval that the price does not suit him, if he still retains possession of the thing.[3]

§ 797. Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, for if so, the sale will have become absolute by the approval implied from thus accepting a part of the goods. This was ruled by Parke B. in Elliott *v.* Thomas,[1] and approved by the Court in Banc, in that case, as well as by Martin and Bramwell BB. in Lucy *v.* Mouflet.[2]

In Okell *v.* Smith,[3] Bayley J. also held, that where certain copper pans had been used five or six times by the defendant in trials, which showed them not to answer the purpose intended, it was a question for the jury whether the defendant had used them more than was necessary for a fair trial.

§ 798. The bargain called "sale or return" was explained by the Queen's Bench, in Moss *v.* Sweet,[1] to mean a sale with

statement of the law by Denman J. in Elphick *v.* Barnes, 5 C. P. D. at p. 326.

[2] Humphries *v.* Carvalho, 16 East, 45.

[3] Ellis *v.* Mortimer, 1 B. & P. N. R. 257. See, also, Elphick *v.* Barnes, *ut supra.*

[1] 3 M. & W. 170.

[2] 5 H. & N. 229; 29 L. J. Ex. 110.

[3] 1 Starkie, 107; and see Street *v.* Blay, 2 B. & Ad. 456.

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

American Authorities. — Zaleski *v.* Clark, 44 Conn. 218; s. c. 26 Am. Rep. 446; Prairie Farmer Co. *v.* Taylor, 69 Ill. 440; s. c. 18 Am. Rep. 621; Fitz's Sons Manuf. Co. *v.* Poror, 7 Ill. App. 24; Bayliss *v.* Hennessey, 54 Iowa, 11; Mowbray *v.* Cady, 40 Iowa, 604; Aultman *v.* Thierer, 34 Iowa, 212; Delamater *v.* Chappell, 48 Md. 253; Spickler *v.* Marsh, 36 Md. 222; Waters P. H. Co. *v.* Smith, 120 Mass. 444; Brown *v.* Foster, 113 Mass. 136; s. c. 18 Am. Rep. 463; Hunt *v.* Wyman, 100 Mass. 198; Aiken *v.* Hyde, 99

a right on the part of the buyer to return the goods at his option, within a reasonable time, and it was held in [*592] that * case that the property passes, and an action for goods sold and delivered will lie, if the goods are not returned to the seller within a reasonable time.[2] In this case, Iley *v.* Frankenstein[3] was overruled, and Lyons *v.* Barnes,[4] was said by Patteson J. not to be "very good law," as had been previously intimated by Lord Abinger C. B. in Bianchi *v.* Nash.[5]

§ 799. In a case before the Lords Justices, Ex parte White,[1] the facts were that Alfred Nevill was a partner in a firm of Nevill & Co. He also did business *on his individual account* with Towle & Co. cotton manufacturers. His dealings with Towle & Co. were conducted as follows: they consigned goods to him accompanied by a price list, and he sent to them monthly an account of the goods which he had sold, debiting himself *with the price given in the price list*, giving no particulars whatever as to his sales; and in the next month he paid according to his accounts thus rendered. He frequently had the goods received from Towle & Co. dyed or bleached before selling them, but he gave no account of this to Towle & Co. and did not charge them with the expense. By an arrangement between Nevill and his partners

Mass. 183; McCarren *v.* McNulty, 73 Mass. (7 Gray) 139; Clark *v.* Rice, 46 Mich. 308; Smalley *v.* Hendrickson, 29 N. J. L. (5 Dutch.) 371; Dewey *v.* Erie Borough, 14 Pa. St. 211; s. c. 53 Am. Dec. 533; Hall *v.* Meriwether, 19 Tex. 224; Gibson *v.* Vail, 53 Vt. 476; Daggett *v.* Johnson, 49 Vt. 345; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Hartford Sorghum Co. *v.* Brush, 43 Vt. 528; Kahn *v.* Klabunde, 50 Wis. 235; Fairfield *v.* Madison Manuf. Co., 38 Wis. 346.

[2] Thompson *v.* Russey, 50 Ala. 329; Jones *v.* Wright, 71 Ill. 61; Crocker *v.* Gullifer, 44 Me. 491; s. c. 69 Am. Dec. 118; Southwick *v.* Smith, 29 Me. 228; Perkins *v.* Douglass, 20 Me. 317; Buswell *v.* Bicknell, 17 Me. 344; s. c. 35 Am. Dec. 262; Dearborn *v.* Turner, 16 Me. 17; s. c. 33 Am. Dec. 630; McKinney *v.* Bradley, 117 Mass. 321; Mafflyn *v.* Hathaway, 106 Mass. 414; Martin *v.* Adams, 104 Mass. 262; Stevens *v.* Cunningham, 85 Mass. (3 Allen) 491; Bolles *v.* Stearns, 65 Mass. (11 Cush.) 320; Sehlesinger *v.* Stratton, 9 R. I. 578; Washington *v.* Johnson, 7 Humph. (Tenn.) 468; In re Linforth, 4 Sawy. C. C. 370.

[3] 8 Scott, N. R. 839.

[4] 2 Stark. 39.

[5] 1 M. & W. 546; and see Bailey *v.* Goldsmith, Peake, 56, 78; Beverley *v.* Lincoln Gaslight Co., 6 A. & E. 829.

[1] 6 Ch. 397, affirmed by House of Lords, *sub nom.* Towle *v.* White, 21 W. R. 465.

he paid to the credit of the firm's general account the money received by him from the sale of Towle & Co.'s goods, and when he made payments to Towle & Co. he sent them either bills received from the purchasers of the goods, subject to a discount which Towle & Co. charged against them in their books, or cheques, or both; and when cheques were sent they were always drawn by the firm of Nevill & Co. Nevill dealt with his own firm as *his* bankers; he had a private account with them of all monies paid in and drawn out in matters not relating to the partnership, and this account included many entries not at all connected with the goods of Towle & Co. Nevill & Co. became bankrupt, and there was a balance in favor of Alfred Nevill on their books in the above-mentioned private * account, [*593] and Towle & Co. claimed that this was trust money improperly paid by Nevill to his firm, with knowledge by the latter of the trust; and it was not disputed that the balance in Nevill's favor on the private account arose chiefly from the proceeds of the goods received from Towle & Co.

§ 800. On these facts both the Lords Justices (James and Mellish) decided that the true contract between Nevill and Towle & Co. was not an agency, by which the former on a *del credere* commission sold goods on behalf of the latter, but that it was one of "sale or return," that the money received by Nevill for the goods was his own money arising out of the sale of his own goods, the property in the goods passing to himself as soon as by his sale he put it out of his power to return them.

James L. J. said that Nevill's unquestioned authority to deal with the goods as above described, was "quite inconsistent with the notion that he was acting in a fiduciary character in respect of those goods. If he was entitled to alter them, to manipulate them, to sell them at any price he thought fit after such manipulation, and was still only liable to pay for them *at a price fixed beforehand without any reference to the price at which he had sold them*, or to anything else than the fact that he had sold them in a particular month, it seems to me impossible to say that the produce of the

goods so sold was the money of the consignors, or that the relation of vendor and purchaser existed between Towle & Co. and the different persons to whom Nevill sold the goods. . . . It appears to me, therefore, to be the necessary conclusion, that as regards these transactions Mr. Nevill was in the position of a person having goods 'on sale or return.'"

Mellish L. J. was of the same opinion, and after stating the fact that Nevill's purchase was at a fixed price and a fixed time for payment, said, "Now if it had been his duty to sell to his customers at that price, payable at that time, then the course of dealing would have been consistent with his being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; [*594] * and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore if he sells at the price and upon the credit authorized by his principal, and the customer pays him according to his contract, then no doubt he is bound, like any other agent, as soon as he receives the money, to hand it over to his principal. But if the consignee is at liberty to sell at any price he likes, and receive payment at at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent, . . . and in point of law, the alleged agent in such a case *is making on his own account a purchase from his alleged principal and is again reselling.*"

§ 801. In Head *v.* Tatersall,[1] the plaintiff on Monday the 13th of March bought at the defendant's auction a horse described in the catalogue as "having hunted with the Bicester and Duke of Grafton's hounds," and learned after the sale that this was not true. A condition of the sale was "horses not answering the description must be returned

[1] L. R. 7 Ex. 7.

before 5 o'clock on Wednesday evening next, otherwise the purchaser shall be obliged to keep the lot with all faults." Although the plaintiff had heard of the above-stated misdescription, he took away the horse on trial, as he did not buy it for hunting, and the horse while on its way to the plaintiff's premises, in charge of the plaintiff's servant, took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before 5 o'clock on Wednesday evening, and the action was brought to recover back the price paid to the auctioneer. The jury found that the injury to the horse *was not caused by any default of plaintiff*. Held, that the injury to the horse did not deprive the plaintiff of the right of return, and that the special contract in the case made it an exception to the general rule, that a contract of sale cannot be rescinded if the party claiming the rescission has altered the condition of the thing sold.

§ 802. [And applying the same principle, that the sale is only *complete when the time limited for the [*595] return has expired, it was held in Elphick *v.* Barnes,[1] where the buyer had eight days to return a horse, and the horse died in his possession before the end of that time, but without any fault of his, that the seller could not recover the price in an action for goods sold and delivered.

In Hinchcliffe *v.* Barwick,[2] the plaintiff bought a horse which was warranted a good worker. The form of condition was, that " horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty, must be returned before 5 o'clock of the day after the sale; shall be then tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The purchaser did not return the horse within the time specified, but brought an action on the breach of warranty. Held, on demurrer, that the purchaser's only remedy was to return the horse within the time limited by the condition. The Court laid stress upon the fact, that the object of the condition was to provide an immediate and

[1] 5 C. P. D. 321. [2] 5 Ex. D. 177, C. A.

final settlement of all disputes that might arise upon the warranty.]

§ 803. When the vendor sells an article by a particular description, it is a condition precedent to his right of action, that the thing which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, *collateral to the express object of it.* But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party [*596] has *engaged to fulfil: as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas, the *contract* is to sell peas, and if he sell anything else in their stead, it is a non-performance of it."[1] There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use; whereas, in case of warranty, the rules are very different, as will appear *post* (Book V. Part II. Ch. 2). There is no controversy as to this principle, and a few only of the more modern cases need be referred to, as affording illustrations of its application.

[1] In Chanter *v.* Hopkins, 4 M. & W. 399; see, also, *per* Lord Blackburn, in Shand *v.* Bowes, 2 App. Cas. at p. 480, *ante*, p. 571.

§ 804. In Nichol *v.* Godts,[1] the sale was of "foreign refined rape oil, warranted only equal to samples." *The oil tendered corresponded with sample*, but the jury found that it was not "foreign refined rape oil." Held, that a sale by sample has reference only to *quality;* that the purchaser was not bound to receive what was not the article described, Pollock C. B. saying, in answer to the argument that there was no warranty the oil should be refined rape oil: "It is not exactly a warranty, but if a man contracts to buy a thing, he ought not to have something else delivered to him."

In Shepherd *v.* Kaine,[2] a vessel was advertised for sale as a "copper-fastened vessel," on the terms that she was to be "taken with all faults, without allowance for any defects whatsoever." She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. Held, that the vendor was liable for the misdescription, the Court saying that the words "with all faults," meant all faults which the vessel might have "consistently with its being the thing described," *i.e.*, a copper-fastened vessel. But in the * very similar case of Taylor *v.* [*597] Bullen,[3] where the vessel was described as "teak-built," and the terms were "with all faults, . . . and without any allowance for any defect or *error* whatever," it was held that the addition of the word "error" distinguished the case from Shepherd *v.* Kaine, and covered an unintentional misdescription, so as to shield the vendor, in the absence of fraud, from any responsibility for error in describing the vessel as teak-built.

§ 805. In Allan *v.* Lake,[1] it was held that a sale of turnip-seed as "Skirving's Swedes," was not a sale with warranty of quality, but with a description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's Swedes."

In Wieler *v.* Schilizzi,[2] the sale was of "Calcutta linseed, *tale quale*," and the article delivered contained an admixture

[1] 10 Ex. 191; 23 L. J. Ex. 314.
[2] 5 B. & Ald. 240; and see Kain *v.* Old, 2 B. & C. 627.
[3] 5 Ex. 779.

[1] 18 Q. B. 560.
[2] 17 C. B. 619; 25 L. J. C. P. 89; and see Kirkpatrick *v.* Gowan, 9 Ir. R. C. L. 521.

of 15 per cent. of mustard, but it came from Calcutta, and there was a conflict of testimony. It was left to the jury to say whether the article had lost "its distinctive character," so as not to be salable as Calcutta linseed. The jury so found, and the purchaser succeeded in his action. This was an action for breach of warranty, but although maintained as such, it is plain that, on principle, the purchaser might have rejected the contract *in toto*.

In Hopkins *v.* Hitchcock,[3] the plaintiffs, Hopkins & Co. had succeeded to the firm of Snowden & Hopkins, iron manufacturers, who were in the habit of stamping their iron "S. & H." with a crown. The defendants applied to purchase "S. & H." iron through a broker, and were informed that all iron made by the firm was now marked "H. & Co." The defendants then ordered 67 tons of the iron, and the broker made the bought note for "67 tons S. & H. Crown common bars." The iron on delivery was marked "H. & Co." and rejected by the defendants. The jury found the variation in the brand to be of no consequence, [*598] and gave a verdict for the *plaintiffs. On motion for new trial the Court refused to set aside the verdict, holding that under the special facts and circumstances of the case, and the jury having negatived that the mark was of any consequence, the plaintiffs had delivered the goods in conformity with the description in the contract.

§ 806. In Bannerman *v.* White,[1] the sale was of hops, and there was a known objectionable practice of using sulphur in their growth, and both parties knew that the merchants had notified the growers of their objection to buy such hops. At the time of the sale the buyers inquired, before asking the price, if sulphur had been used, and the seller answered, No. The sale was then made by sample, and the delivery corresponded, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. It was uncontroverted that the defendant would not have bought if the fact had been known to him, and that he

[3] 14 C. B. N. S. 65; 32 L. J. C. P. 154.

[1] 10 C. B. N. S. 844; 31 L. J. C. P. 28.

could not sell the hops as they were, in his usual dealings with his customers. The jury found that the misrepresentation as to the use of sulphur was not wilful, thus repelling fraud, but that "the affirmation that no sulphur had been used was intended between the parties as a part of the contract of sale, and a warranty by the plaintiff." Erle C. J. in delivering the decision of the Court, said that in deciding the effect of this finding, "We avoid the term 'warranty,' because it is used in two senses, and the term 'condition,' because the question is, whether the term is applicable. Then the effect is that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation, and if it had not been given, the defendant would not have gone on with the treaty, which resulted in the sale. In this sense, it was the condition upon which the defendant contracted." Held, that plaintiff had not fulfilled the condition, and could not enforce the sale.

§ 807. In Josling *v.* Kingsford,[1] the sale was of oxalic acid, * and it had been examined and approved [*599] and a great part of it used by the purchaser, and the vendor did not warrant quality. On analysis, it was afterwards found to be chemically impure, from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid," the other for breach of warranty that the goods delivered were "oxalic acid." Erle C. J. told the jury that there was no evidence of a warranty, and that the question was whether the article delivered came under the denomination of oxalic acid in commercial language. The jury found for the plaintiff. Held, in Banc, that the direction was right.

§ 808. In Azémar *v.* Casella,[1] the plaintiff sold cotton to the defendants through a broker, by what was known as a

[1] 13 C. B. N. S. 447; 32 L. J. C. P. 94.

[1] L. R. 2 C. P. 431–677 in error; 36 L. J. C. P. 124.

certified London contract, in the following words: — "Sold by order and for account of Messrs. J. C. Azémar and Co., to Messrs. A. Casella and Co. the following cotton, viz., $\frac{DC}{C}$ 128 bales at 25*d.* per pound, expected to arrive in London per Cheviot, from Madras. The cotton *guaranteed equal to sealed sample in our possession*, &c." The sealed sample was a sample of "Long-staple Salem cotton"; the cotton turned out, when landed, to be not in accordance with the sample, being "Western Madras." The contract contained a clause: "Should the quality prove inferior to the guarantee, a fair allowance to be made." It was admitted that Western Madras cotton is inferior to Long-staple Salem, *and requires machinery for its manufacture different from that used for the latter*. Held, that this was not a case of inferiority of *quality*, but difference of *kind;* that there was a condition precedent, and not simply a warranty, and that the defendants were not bound to accept.

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

[*600] § 809. * Lord Tenterden held, in two cases [1] at *Nisi Prius*, that a vendor could not recover for books or maps sold by a description or prospectus, if there were any material difference between the book or map furnished and that described in the prospectus.[2]

[1] Paton *v.* Duncan, 3 C. & P. 336, and Teesdale *v.* Anderson, 4 C. & P. 198.

[2] *Sale of goods by description.* — In America the courts hold that where goods are sold by description, the seller warrants that they shall answer the description. The following are a few of the leading cases upon this point: Hyatt *v.* Boyle, 5 Gill & J. (Md.) 110; s. c. 25 Am. Dec. 276; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495; s. c. 18 Am. Dec. 317; Swett *v.* Shumway, 102 Mass. 365; Henshaw *v.* Robins, 50 Mass. (9 Metc.) 83; s. c. 43 Am. Dec. 367; Hastings *v.* Lovering, 19 Mass. (2 Pick.) 214; s. c. 13 Am. Dec. 420; Bradford *v.* Manly, 13 Mass. 139; s. c. 17 Am. Dec. 122; Wolcott *v.* Mount, 38 N. J. L. (9 Vr.) 496; s. c. 20 Am. Rep. 425; Van Wyck *v.* Allen, 69 N. Y. 61; s. c. 25 Am. Rep. 136; Hawkins *v.* Pemberton, 51 N. Y. 198; s. c. 10 Am. Rep. 595; Messmore *v.* New York S. & L. Co., 40 N. Y. 422; Milburn *v.* Belloni, 39 N. Y. 53; Passinger *v.* Thorburn, 34 N. Y. 634; White *v.* Miller, 71 N. Y. 118; s. c. 27 Am. Rep. 13; 78 N. Y. 393; 34 Am. Rep. 544; Swett *v.* Colgate, 20 Johns. (N. Y.) 196; s. c. 11 Am. Dec. 266; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; s. c. 10 Am. Dec. 227; Borrekins *v.* Bevan, 3 Rawle

§ 810. Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates, and other securities is bound not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.[1]

(Pa.) 23; s. c. 23 Am. Dec. 85; Flick *v.* Wetherbee, 20 Wis. 392. In Lord *v.* Grow, 39 Pa. St. 88; s. c. 80 Am. Dec. 504, it was held that even though goods were sold by description, there was no warranty, if the purchaser had at the same time inspected them. But see *contra*, Henshaw *v.* Robins, 50 Mass. (9 Metc.) 83; s. c. 43 Am. Dec. 367.

In Canada, however, the English rule obtains. See Hedstrom *v.* Toronto Car & Wheel Co., 31 Up. Can. C. P. 475; s. c. affd. 8 App. Rep. 627.

[1] *The American authorities* hold that there is an implied warranty of the validity of bonds, negotiable instruments, and securities sold. Bankhead *v.* Owen, 60 Ala. 457; Ellis *v.* Grooms, 1 Stew. (Ala.) 47; Terry *v.* Bissell, 26 Conn. 23; Persons *v.* Jones, 12 Ga. 371; s. c. 58 Am. Dec. 476; Wilson *v.* Binford, 81 Ind. 588; Ward *v.* Haggard, 75 Ind. 381; Bell *v.* Cafferty, 21 Ind. 411; Snyder *v.* Reno, 38 Iowa, 329; Challiss *v.* McCrum, 22 Kans. 157; s. c. 31 Am. Rep. 181; Smith *v.* McNair, 19 Kans. 330; s. c. 27 Am. Rep. 117; Watson *v.* Cresap, 1 B. Mon. (Ky.) 195; s. c. 32 Am. Dec. 572; Parlange *v.* Faures, 14 La. An. 448; McCall *v.* Corning, 3 La. An. 409; s. c. 48 Am. Dec. 454; Buck *v.* Doyle, 4 Gill (Md.) 478; s. c. 45 Am. Dec. 176; Worthington *v.* Cowles, 112 Mass. 30; Wilder *v.* Cowles, 100 Mass. 487; Merriam *v.* Wolcott, 85 Mass. (3 Allen) 258; s. c. 80 Am. Dec. 69; Cabot Bank *v.* Morton, 70 Mass. (4 Gray) 156; Melledge *v.* Boston Iron Co., 59 Mass. (5 Cush.) 171; s. c. 51 Am. Dec. 59; Coolidge *v.* Brigham, 42 Mass. (1 Metc.) 547; Lobdell *v.* Baker, 42 Mass. (1 Metc.) 193; s. c. 35 Am. Dec. 358; s. c. 44 Mass. (3 Metc.) 469; Young *v.* Adams, 6 Mass. 182; Thompson *v.* McCullough, 31 Mo. 224; s. c. 77 Am. Dec. 644; Wood *v.* Sheldon, 42 N. J. L. (13 Vr.) 421; Ross *v.* Terry, 63 N. Y. 613; Ledwich *v.* McKim, 53 N. Y. 307; Webb *v.* Odell, 49 N. Y. 583; Bell *v.* Dagg, 60 N. Y. 528; Whitney *v.* National Bank of Potsdam, 45 N. Y. 303; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.) 287; Shaver *v.* Ehle, 16 Johns. (N. Y.) 201; Herrick *v.* Whitney, 15 Johns. (N. Y.) 240; Markle *v.* Hatfield, 2 Johns. (N. Y.) 455; s. c. 3 Am. Dec. 446; Ontario Bank *v.* Lightbody, 13 Wend. (N. Y.) 101; s. c. 27 Am. Dec. 179; Dumont *v.* Williamson, 18 Ohio St. 515; Peoples Bank *v.* Kurtz, 99 Pa. St. 344; s. c. 44 Am. Dec. 112; Swanzey *v.* Parker, 50 Pa. St. 441; Aldrich *v.* Jackson, 5 R. I. 218; Barton *v.* Trent, 3 Head (Tenn.) 167; Allen *v.* Clark, 49 Vt. 390; Gilman *v.* Peck, 11 Vt. 516; s. c. 34 Am. Dec. 702; Bank of St. Albans *v.* Farmers' & Mechanics' Bank, 10 Vt. 145; s. c. 33 Am. Dec. 188; Thrall *v.* Newell, 19 Vt. 202; s. c. 47 Am. Dec. 682; Lyons *v.* Miller, 6 Gratt. (Va.) 427; s. c. 52 Am. Dec. 129; Edmunds *v.* Digges, 1 Gratt. (Va.) 359; s. c. 42 Am. Dec. 561; Utley *v.* Donaldson, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; Bank of United States *v.* Bank of Georgia, 23 U. S. (10 Wheat.)

Thus, in Jones *v.* Ryde,[2] it was held that the vendor of a forged navy-bill was bound to return the money received for it.

In Young *v.* Cole,[3] the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds, in April, 1836, and it was shown that in 1829, unstamped Guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the Stock Exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. Held, that the defendant was bound to restore the price received. Tindal C. J. saying that the contract was for real Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters instead. "It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

In Westropp *v.* Solomon,[4] the same rule was recognized, and it was also held that in such cases, nothing further was recoverable from the vendor than the purchase-
[*601] money he had * received, and that he was not responsible for the value of genuine shares.

§ 811. In Gompertz *v.* Bartlett,[1] the sale was of a foreign bill of exchange: it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described in the sale. But in Pooley *v.* Brown,[2] where the plaintiff bought foreign bills

333; bk. 6, L. ed. 334. But see to the contrary, Baxter *v.* Duren, 29 Me. 434; s. c. 50 Am. Dec. 606; Fisher *v.* Rieman, 12 Md. 497.

[2] 5 Taunt. 488.

[3] 3 Bing. N. C. 724.

[4] 8 C. B. 345.

[1] 2 E. & B. 849; 23 L. J. Q. B. 65. The 33 & 34 Vict. c. 97, s. 52 (The Stamp Act, 1870) provides that every bill of exchange, *purporting* to be drawn or made at any place out of the United Kingdon, shall for the purposes of the Act be deemed a foreign bill.

[2] 11 C. B. N. S. 566; 31 L. J. C. P. 134.

from the defendant, and by the Stamp Act, 1854,[3] it was the duty of the seller to cancel the stamp before he delivers, and of the buyer to see that this is done before he receives, and both parties neglected this duty, so that the buyer was unable to recover on the bills, Erle C. J. and Keating J. were of opinion that the buyer, who was equally in fault with the vendor under the law, could not avail himself of the principle laid down in Gompertz *v.* Bartlett; but Williams J. dissented on that point, though the Court was unanimous in holding that the purchaser had by his own laches and delay lost all right to complain, under the special circumstances.

In Gurney *v.* Womersley,[4] a bill of exchange was sold to the plaintiffs, on which all the signatures were forged except that of the last indorser, who had forged all the preceding names, and Bramwell, for defendant, made a strenuous effort to distinguish the case, on the ground that in Jones *v.* Ryde, and Young *v.* Cole, *supra*, the thing sold was *entirely* false and valueless; whereas in this case the last indorser's signature was genuine, and the bill therefore of *some* value. But it was held that a party offering a bill for sale, offers in effect an instrument drawn, accepted, and indorsed according to its purport.

§ 812. But it is a question for the jury, whether the thing * delivered be what was really intended [*602] by both parties as the subject-matter of the sale, although not very accurately described.

Thus, in Mitchell *v.* Newhall,[1] the sale was of "fifty shares," in a foreign railway company. The buyer refused to receive from the plaintiff, his stock-broker, delivery of a *letter of allotment*, for fifty shares. Held, that he was bound by his bargain, proof having been made to the satisfaction of the jury, that no shares in the railway had yet been issued, and that letters of allotment were commonly bought and sold as shares in this company on the Stock Exchange. And

[3] 17 & 18 Vict. c. 83, s. 5. See, now, 33 & 34 Vict. c. 97, s. 24.

[4] 4 E. & B. 133; 24 L. J. Q. B. 46; and see, also, Woodland *v.* Fear, 7 E. & B. 519; 26 L. J. Q. B. 202; and the remarks of Blackburn J. on the principle of the decisions in these cases, in Kennedy *v.* Panama Mail Co., L. R. 2 Q. B. at p. 587.

[1] 15 M. & W. 308.

in Lamert *v.* Heath,[2] it appeared that the defendant, a stock-broker, had bought for the plaintiff scrip certificates of shares in the Kentish Coast Railway Company. These scrip certificates were signed by the secretary, and issued from the offices of the company, and were the subject of sale and purchase in the market for several months, when the scheme was abandoned, and the company repudiated the scrip as not genuine, on the allegation that it was issued without authority. The plaintiff then sought to recover back the price from the stock-broker, on the ground that the latter had not delivered genuine scrip. But the Court, without hearing argument on the other side, held the buyer bound by his bargain, the Court saying: "If this was the only Kentish Coast Railway scrip in the market, . . . and one person chooses to sell, and the other to buy that, then the latter has got all that he contracted to buy."

In Lamond *v.* Duvall,[3] it was held that a sale was conditional, where the vendor had reserved power to resell on the buyer's default; that a resale on such default was a rescission of the original sale; and that the vendor could not, therefore, maintain *assumpsit* on it, his proper remedy being an action for damages for the loss and expenses of the resale.

§ 813. [A reference should be made here to the important decision in Johnson *v.* Raylton,[1] where the majority [*603] of the Court * of Appeal held, in opposition to two decisions of the Court of Session in Scotland,[2] that on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is (in the absence of any usage in the particular trade, or as regards the particular goods, to supply goods of other makers), an implied condition that the goods shall be those of the manufacturer's own make, and the purchaser is entitled to reject others, although they are of the quality contracted for.[3]]

[2] 15 M. & W. 487.

[3] 9 Q. B. 1030.

[1] 7 Q. B. D. 438, C. A.

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

[3] In this case an appeal to the House of Lords was lodged but afterwards abandoned.

*PART II. [*604]

VENDOR'S DUTIES.

CHAPTER I.

WARRANTY.

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Section I. — EXPRESS WARRANTY.

§ 814. A WARRANTY in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, *forming part of the contract* by the agreement of the parties express or implied.[1] It follows,

[1] Foster *v.* Smith, 18 C. B. 156; Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Chanter *v.* Hopkins, 1 M. & W. 399.

Distinction between warranty and guaranty. — In Sturges *v.* Bank of Circleville, 11 Ohio St. 153; s. c. 78 Am. Dec. 296, 299, the court discuss-

therefore, that antecedent representations made by the vendor as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties. It is not, indeed, necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing, which leads to the bargain, and should then enter into the bargain as part of it. Of the general principle, a good illustration is given in Hopkins *v.* Tanqueray,[2] where the plaintiff bought a horse, sold at auction, without warranty. On the day before the sale, while the plaintiff was examining the horse at Tattersall's stables, the defendant entered, and they being acquainted with each other, he said to the plaintiff: "You have nothing to look for: I assure you he is perfectly sound in every * respect;" to which the plaintiff replied: "If [*606] you say so, I am satisfied," and desisted from the examination. The horse turned out to be unsound, but the vendor did not know it when he made the representation, so that there was no pretence for a charge of fraud; which was indeed disclaimed by the buyer, who stood simply on the point that the conversation was a private warranty to *him*, although the auctioneer put up the horse without warranty. But all the judges held, that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse; that it was a representation of the seller's opinion and judgment about the horse, for which he could not be made responsible, if he was honest when expressing it. See further as to innocent misrepresentation, *ante*, pp. 376–378.

ing the distinction between warranty and guaranty say: "Each is alike an undertaking by one party to another to indemnify or make good the party insured against some possible default or defect in the contemplation of the parties. The guaranty is, perhaps, always understood in strict, legal, and commercial sense, as a collateral warranty, and often as a conditional one against some default or event in future. The term warranty on the other hand is generally understood as an absolute undertaking *in præsenti*, as well as *in futuro* against the defect or for the quantity or quality contemplated between the parties in the subject-matter of the contract."

[2] 15 C. B. 130; 23 L. J. C. P. 162; and see *per* Martin B. in Stucley *v.* Bailey, 1 H. & C. 405;

§ 815. It also follows from what precedes, that a warranty given after a sale has been made, is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given.[1]

It further follows, and such is the general rule of law, that no warranty of the *quality* of a chattel is implied from the mere fact of sale. The rule in such cases is *caveat emptor*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself,[2] and has no

31 L. J. Ex. 483; and Camac *v.* Warriner, 1 C. B. 356.

[1] Roscorla *v.* Thomas, 3 Q. B. 234. See, also, Towell *v.* Gatewood, 3 Ill. (2 Scam.) 22; s. c. 33 Am. Dec. 437; Summers *v.* Vaughan, 35 Ind. 323; Hogins *v.* Plympton, 28 Mass. (11 Pick.) 99; Burton *v.* Young, 5 Harr. (Del.) 233; Reed *v.* Wood, 9 Vt. 285, 287; Bloss *v.* Kittridge, 5 Vt. 28; Grant *v.* Cadwell, 8 Up. Can. Q. B. 161. Where the goods have been delivered, but the price has not been fixed, a warranty given at the time of adjusting the price forms part of the contract. Vincent *v.* Leland, 100 Mass. 432. So, too where the buyer refuses to receive the goods on account of the seller's failure to fulfil some of the obligations incumbent upon him, a warranty given to induce the buyer to accept the goods is valid. Congar *v.* Chamberlain, 14 Wis. 258. And where third parties, before purchasing the goods from the original buyer, called upon the seller and asked him if the warranty would follow the goods, when they come into their possession, the court held that the renewal was supported by sufficient consideration. Porter *v.* Pool, 62 Ga. 238. Where the sale has been completed, a written warranty given some time after it is supported by a sufficient consideration, if given in terms of the negotiations between the parties. Collette *v.* Weed, 68 Wis. 428.

[2] Springwell *v.* Allen, Aleyn, 91, and 2 East, 448, n; Parkinson *v.* Lee, 2 East, 314; Williamson *v.* Allison, 2 East, 446; Earley *v.* Garrett, 9 B. & C. 902; Morley *v.* Attenborough, 3 Ex. 500; Ormrod *v.* Huth, 14 M. & W. 664; Hall *v.* Conder, 2 C. B. N. S. 22; 26 L. J. C. P. 138 and 288; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J. C. P. 162. See West *v.* Cunningham, 9 Port. (Ala.) 104; s. c. 33 Am. Dec. 300; Cozzins *v.* Whitaker, 3 Stew. & P. (Ala.) 322; Harley *v.* Golden State & M. Iron Works, 66 Cal. 238; Frazier *v.* Harvey, 34 Conn. 469; Dean *v.* Mason, 4 Conn. 428; s. c. 10 Am. Rep. 162; Roberts *v.* Hughes, 81 Ill. 130; s. c. 25 Am. Rep. 270; Hadley *v.* Prather, 64 Ind. 137; Brewer *v.* Christian, 9 Ill. App. 57; Scott *v.* Renick, 1 B. Mon. (Ky.) 63; s. c. 35 Am. Dec. 177; Hughes *v.* Robertson, 1 T. B. Mon. (Ky.) 215; s. c. 15 Am. Dec. 104; Kingsbury *v.* Taylor, 29 Me. 508; s. c. 50 Am. Dec. 607; Taymon *v.* Mitchell, 1 Md. Ch. 496; Hyatt *v.* Boyle, 5 Gill & J. (Md.) 110; s. c. 25 Am. Dec. 276; Johnson *v.* Cope, 3 Har. & J. (Md.) 90; s. c. 5 Am. Dec. 423; Howard *v.* Emerson, 110 Mass. 320; s. c. 14 Am. Rep. 608; French *v.* Vining, 102 Mass. 132; s. c. 3 Am. Rep. 440; Mixer *v.*

remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent. To this rule there are many exceptions.[3]

§ 816. In regard to warranty of *title*, inasmuch as it is an essential element of the contract of sale that there should *be a transfer of the absolute or general [*607] property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the chattel, the vendor undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell, and it is believed that such is the true rule of law, but the question is still open to doubt, as will presently be shown.

§ 817. No special form of words is necessary to create a warranty. It is nearly two hundred years since Lord Holt first settled the rule, in Cross *v.* Gardner,[1] and Medina *v.*

Coburn, 52 Mass. (11 Metc.) 559; s. c. 45 Am. Dec. 230; Winsor *v.* Lombard, 35 Mass. (18 Pick.) 57; Emerson *v.* Brigham, 10 Mass. 197; s. c. 6 Am. Dec. 113; Otts *v.* Alderson, 18 Miss. (10 Smed. & M.) 476; Bartlett *v.* Hoppock, 34 N. Y. 120; Beirne *v.* Dord, 5 N. Y. 95; s. c. 55 Am. Dec. 321; 2 Sandf. (N. Y.) 89; McCoy *v.* Artcher, 3 Barb. (N. Y.) 331; Seixas *v.* Woods, 2 Cai. (N. Y.) 48; s. c. 2 Am. Dec. 215; Oneida M. Soc. *v.* Lawrence, 4 Cow. (N. Y.) 440; Moses *v.* Mead, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; Burch *v.* Spencer, 15 Hun (N. Y.) 508; Swett *v.* Colgate, 20 Johns. (N. Y.) 196; s. c. 11 Am. Dec. 266; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; s. c. 10 Am. Dec. 227; Fleming *v.* Slocum, 18 Johns. (N. Y.) 403; s. c. 9 Am. Dec. 224; Holden *v.* Dakin, 4 Johns. (N. Y.) 421; Hawkins *v.* Pemberton, 6 Robt. (N. Y.) 42; s. c. 51 N. Y. 198; Wright *v.* Hart, 18 Wend. (N. Y.) 449; Hart *v.* Wright, 17 Wend. (N. Y.) 267; Walsh *v.* Carter, 1 Wend. (N. Y.) 185; s. c. 19 Am. Dec. 473; Smith *v.* Love, 64 N. C. 441; Dickson *v.* Jordan, 11 Ired. (N. C.) L. 166; s. c. 53 Am. Dec. 403; Erwin *v.* Maxwell, 3 Murph. (N. C.) 241; s. c. 9 Am. Dec. 602; Hadley *v.* Clinton County Importing Co., 13 Ohio St. 502; Rodgers *v.* Niles, 11 Ohio St. 48; s. c. 78 Am. Dec. 290; Whitaker *v.* Eastwick, 75 Pa. St. 229; Heilbruner *v.* Wayte, 51 Pa. St. 261; Lord *v.* Grow, 39 Pa. St. 88; s. c. 80 Am. Dec. 504; Weimer *v.* Clement, 37 Pa. St. 147; s. c. 78 Am. Dec. 417; Eagan *v.* Call, 34 Pa. St. 236; s. c. 75 Am. Dec. 653; Wetherell *v.* Neilson, 20 Pa. St. 448; s. c. 59 Am. Dec. 741; Carnochan *v.* Gould, 1 Bail. (S. C.) L. 179; s. c. 19 Am. Dec. 668; Westmoreland *v.* Dixon, 4 Hayw. (Tenn.) 223; s. c. 9 Am. Dec. 763; Getty *v.* Rountree, 2 Pinn. (Wis.) 379; s. c. 54 Am. Dec. 138; Williams *v.* Slaughter, 3 Wis. 360. *Contra*, Bailey *v.* Nickols, 2 Root (Conn.) 407; s. c. 1 Am. Dec. 83; Whitefield *v.* McLeod, 2 Bay (S. C.) 380; s. c. 1 Am. Dec. 650; Timrod *v.* Shoolbred, 1 Bay (S. C.) 324; s. c. 1 Am. Dec. 630; Smith *v.* McColl, 1 McC. (S. C.) 220; s. c. 10 Am. Dec. 666.

[3] *Post*, Warranty of Quality.

[1] Carthew, 90; 3 Mod. 261; 1 Show. 68.

Stoughton,[2] which Buller J., in 1789, laid down in the opinion given by him in the famous leading case of Pasley *v.* Freeman,[3] as follows: "It was rightly held by Holt C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended."[4]

[2] 1 Lord Raym. 593; Salk. 220.

[3] 3 T. R. at p. 57; 2 Sm. L. C. p. 66 (ed. 1879).

[4] See, also, Power *v.* Barham, 4 A. & E. 743; Shepherd *v.* Kain, 5 B. & Ald. 240; Freeman *v.* Baker, 5 B. & Ad. 797; Hopkins *v.* Tanqueray, 15 C. B. 130; 23 L. J. C. P. 162; Taylor *v.* Bullen, 6 Ex. 779; Powell *v.* Horton, 2 Bing. N. C. 668; Allen *v.* Lake, 18 Q. B. 560; Simond *v.* Braddon, 2 C. B. N. S. 324; 26 L. J. C. P. 198; Hopkins *v.* Hitchcock, 14 C. B. N. S. 65; 32 L. J. C. P. 154; Cowdy *v.* Thomas, 36 L. T. N. S. 22.

American authorities. — Ricks *v.* Dillahunty, 8 Port. (Ala.) 133; Byrne *v.* Jansen, 50 Cal. 624; Polhemus *v.* Heiman, 45 Cal. 573; Gilchrist *v.* Marrow, 2 Car. L. Repos. (N. C.) 607; O'Neal *v.* Bacon, 1 Houst. (Del.) 215; Sparling *v.* Marks, 86 Ill. 127; Kenner *v.* Harding, 85 Ill. 264; s. c. 28 Am. Rep. 615; Carondelet Iron Works *v.* Moore, 78 Ill. 71; Ender *v.* Scott, 11 Ill. 35; Towell *v.* Gatewood, 3 Ill. (2 Scam.) 24; s. c. 33 Am. Dec. 437; Humphreys *v.* Comline, 8 Blackf. (Ind.) 516; Clark *v.* Ralls, 50 Iowa, 275; Randall *v.* Thornton, 43 Me. 226; s. c. 69 Am. Dec. 56; Bryant *v.* Crosby, 40 Me. 18; Hillman *v.* Wilcox, 30 Me. 170; Horn *v.* Buck, 48 Md. 358; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495; s. c. 18 Am. Dec. 317; Tuttle *v.* Brown, 70 Mass. (4 Gray) 457; s. c. 64 Am. Dec. 80; Henshaw *v.* Robins, 50 Mass. (9 Metc.) 83, 87, 88; s. c. 43 Am. Dec. 367; Stone *v.* Denny, 45 Mass. (4 Metc.) 151, 155; Anderson *v.* Burnett, 6 Miss. (5 How.) 165; s. c. 35 Am. Dec. 425; Kinley *v.* Fitzpatrick, 5 Miss. (4 How.) 59; s. c. 34 Am. Dec. 108; Otts *v.* Alderson, 18 Miss. (10 Smed. & M.) 476; Carter *v.* Black, 46 Mo. 384; Murphy *v.* Gay, 37 Mo. 535; Aubuchon *v.* Pohlmanies, 1 Mo. App. 298; Patrick *v.* Leach, 8 Neb. 530; Little *v.* Woodworth, 8 Neb. 281; Wolcott *v.* Mount, 36 N. J. L. (7 Vr.) 262; s. c. 13 Am. Rep. 438; 38 N. J. L. (9 Vr.) 496; 20 Am. Rep. 425; Hawkins *v.* Pemberton, 51 N. Y. 198; s. c. 10 Am. Rep. 595; Brown *v.* Tuttle, 66 Barb. (N. Y.) 169; Morgan *v.* Powers, 66 Barb. (N. Y.) 35; Lawton *v.* Keil, 61 Barb. (N. Y.) 558; Wilbur *v.* Cartwright, 44 Barb. (N. Y.) 536; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Roberts *v.* Morgan, 2 Cow. (N. Y.) 438; Murray *v.* Smith, 4 Daly (N. Y.) 277; Greenthal *v.* Schneider, 52 How. (N. Y.) Pr. 133; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; s. c. 10 Am. Dec. 227; Cramer *v.* Bradshaw, 10 Johns. (N. Y.) 484; Cook *v.* Moseley, 13 Wend. (N. Y.) 277; Whitney *v.* Sutton, 10 Wend. (N. Y.) 412; Henson *v.* King, 3 Jones (N. C.) L. 419; Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Weimer *v.* Clement, 37 Pa. St. 147; s. c. 78 Am. Dec. 411; McFarland *v.* Newman, 9 Watts (Pa.) 56; s. c. 34 Am. Dec. 497; Crary *v.* Hoffman, 2 W. N. C. (Pa.) 16; Bryce *v.* Parker, 11 S. C. 337; McGregor *v.* Penn, 9 Yerg. (Tenn.) 74; Blythe *v.* Speake, 23 Tex. 430; Bond *v.* Clark, 35 Vt. 577; Beals *v.* Olmstead, 24 Vt. 114; s. c. 58 Am. Dec. 150; Beeman *v.* Buck, 3 Vt. 53; s. c. 21 Am. Dec. 571; Hahn *v.* Doolittle, 18 Wis. 197; Chisholm *v.* Proudfoot, 15 Up. Can. Q. B. 203, 607, sec. 817.

And in determining whether it was so intended, a decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter, not.[5]

But in Chalmers *v.* Harding,[6] the Exchequer of Pleas held, that a statement to a farmer by the vendor, who was the patentee's agent for sale of an agricultural machine, that it would "cut wheat, barley, oats, &c., efficiently," was not a warranty, but a mere representation of Wood's Patent Reapers generally.

* This intention is a question of fact for the jury, [*608] to be inferred from the nature of the sale and the

[5] *Per* Buller J. in Pasley *v.* Freeman, 3 T. R. 51; Powell *v.* Barham, 4 A. & E. 473; Jendwine *v.* Slade, 2 Esp. 572; and see *per* Bramwell B. in Stucley *v.* Bailey, 1 H. & C. 405; 31 L. J. Ex. 483; Carter *v.* Crick, 4 H. & N. 412; 28 L. J. Ex. 238; Camac *v.* Warriner, 1 C. B. 356. See Byrne *v.* Jansen, 50 Cal. 624; Polhemus *v.* Heiman, 45 Cal. 573, 578; Robinson *v.* Harvey, 82 Ill. 58; Reed *v.* Hastings, 61 Ill. 266; Towell *v.* Gatewood 3 Ill. (2 Scam.) 22; s. c. 33 Am. Dec. 437; Hunter *v.* McLaughlin, 43 Ind. 38, 48; Matlock *v.* Todd, 19 Ind. 135; Jack *v.* Des Moines & Ft. D. R. Co., 53 Iowa, 399; Tewkesbury *v.* Bennett, 31 Iowa, 83; Bacon *v.* Brown, 3 Bibb (Ky.) 35; Smith *v.* Miller, 2 Bibb (Ky.) 617; Lamme *v.* Gregg, 1 Met. (Ky.) 444; s. c. 71 Am. Dec. 489; Bishop *v.* Small, 63 Me. 12; Randall *v.* Thornton, 43 Me. 226; s. c. 69 Am. Dec. 56; Crenshaw *v.* Slye, 52 Md. 143, 146; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495; s. c. 18 Am. Dec. 317; Stroud *v.* Pierce, 83 Mass. (6 Allen) 413, 416; Henshaw *v.* Robins, 50 Mass. (9 Metc.) 83; s. c. 43 Am. Dec. 367; Osborn *v.* Rawson, 47 Mich. 206; Worth *v.* McConnell, 42 Mich. 473; Torkelson *v.* Jorgenson, 28 Minn. 383; Kinley *v.* Fitzpatrick, 5 Miss. (4 How.) 59; s. c. 34 Am. Dec. 108; Wolcott *v.* Mount, 36 N. J. L. (7 Vr.) 262; s. c. 13 Am. Rep. 438; Murray *v.* Smith, 4 Daly (N. Y.) 277; Swett *v.* Colgate, 20 Johns. (N. Y.) 196; s. c. 11 Am. Dec. 266; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; s. c. 10 Am. Dec. 227; Erwin *v.* Maxwell, 3 Murph. (N. C.) 241; s. c. 9 Am. Dec. 602; Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Weimer *v.* Clement, 37 Pa. St. 147; s. c. 78 Am. Dec. 411; Robson *v.* Miller, 12 S. C. 586; Waterbury *v.* Russell, 8 Baxt. (Tenn.) 159; Richardson *v.* Grandy, 49 Vt. 22; Beals *v.* Olmstead, 24 Vt. 114; s. c. 58 Am. Dec. 150; Mason *v.* Chappell, 15 Gratt. (Va.) 572, 583; Roe *v.* Bacheldor, 41 Wis. 360; Elkins *v.* Kenyon, 34 Wis. 93; Austin *v.* Nickerson, 21 Wis. 542; Hahn *v.* Doolittle, 18 Wis. 196; Smith *v.* Justice, 13 Wis. 600; McFerran *v.* Taylor, 7 U. S. (3 Cr.) 281; bk. 2, L. ed. 436; Northwood *v.* Rennie, 3 Ont. App. 37.

[6] 17 L. T. N. S. 571.

circumstances of the particular case, as will appear *passim* in the authorities to be reviewed.[7]

§ 818. In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect, and in some cases even where the alleged warranty was expressed in writing, it has been left to the jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty or not, for *simplex commendatio non obligat.*

In Jendwine *v.* Slade,[1] two pictures were sold at auction by a catalogue in which one was said to be a sea piece by Claude Lorraine, and the other a fair by Teniers. Lord Kenyon held this no warranty that the pictures were genuine works of these masters, but merely an expression of opinion by the vendor. But in Power *v.* Barham,[2] where the vendor sold by a bill of parcels, "four pictures, views in Venice, Canaletti," it was held proper that the jury should decide whether the defendant meant to warrant that the pictures were the genuine works of Canaletti. Lord Denman C. J. distinguished the case from Jendwine *v.* Slade, by the sugges-

[7] See, especially, Stucley *v.* Bailey, 1 H. & C. 405; 31 L. J. Ex. 483.

American cases. — Claghorn *v.* Lingo, 63 Ala. 230; Bradford *v.* Bush, 10 Ala. 386; Matlock *v.* Todd, 19 Ind. 130; Humphreys *v.* Comline, 8 Blackf. (Ind.) 516; McDonald Manuf. Co. *v.* Thomas, 53 Iowa, 558; Lemme *v.* Gregg, 1 Met. (Ky.) 444; s. c. 71 Am. Dec. 489; Horn *v.* Buck, 48 Md. 358; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495; s. c. 18 Am. Dec. 317; Stroud *v.* Pierce, 88 Mass. (6 Allen) 413; Edwards *v.* Marcy, 84 Mass. (2 Allen) 486; Tuttle *v.* Brown, 70 Mass. (4 Gray) 457; s. c. 64 Am. Dec. 80; Kinley *v.* Fitzpatrick, 5 Miss. (4 How.) 59; s. c. 34 Am. Dec. 108; Morrill *v.* Wallace, 9 N. H. 111; Wolcott *v.* Mount, 36 N. J. L (7 Vr.) 262; s. c. 13 Am. Rep. 438; Duffee *v.* Mason, 8 Cow. (N. Y.) 25; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; s. c. 10 Am. Dec. 227; Whitney *v.* Sutton, 10 Wend. (N. Y.) 411; Starnes *v.* Erwin, 10 Ired. (N. C.) L. 226; McFarland *v.* Newman, 9 Watts (Pa.) 56; s. c. 34 Am. Dec. 497; Beals *v.* Olmstead, 24 Vt. 114; s. c. 58 Am. Dec. 150; Foster *v.* Caldwell, 18 Vt. 176; Tisdale *v.* Connell, 1 Kerr (N. B.) 407; Baker *v.* Fawkes, 35 Up. Can. Q. B. 302. Where the agreement is in writing the court must determine whether it contains an express warranty or not. Horn *v.* Buck, 48 Md. 358; Osgood *v.* Lewis, 2 Har. & J. (Md.) 495; s. c. 18 Am. Dec. 317; Whitney *v.* Thacher, 117 Mass. 523; Brown *v.* Bigelow, 89 Mass. (10 Allen) 242; Edwards *v.* Marcy, 84 Mass. (2 Allen) 486.

[1] 2 Esp. 572.

[2] 4 A. & E. 473.

tion that Canaletti[3] was a comparatively modern painter, of whose works it would be possible to make proof as a matter of *fact*, but that in the case of very old painters the assertion was necessarily a matter of opinion.

§ 819. In a sale of "a horse, five years old; has been constantly driven in the plough, warranted;" the warranty was held to refer to soundness only,[1] and where the sale was in these words: "Received £10 for a grey four-year-old colt, warranted sound in every respect," the warranty was also confined to soundness.[2] And where the sale was thus worded, "Received £100 for a bay gelding got by Cheshire Cheese, * warranted sound," it was held that there was [*609] no warranty that the horse was of the breed named.[3] [And again, in another case where the warranty was contained in the following receipt, "Received from C. Anthony, Esq., £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," it was held that there was no warranty that the horse was quiet to ride and drive.[4]]

§ 820. In Lomi *v.* Tucker,[1] the sale was of two pictures, said by the plaintiff to be "a couple of Poussins;" and it was left by Lord Tenterden to the jury, to say whether the defendant bought the pictures, believing them, from the plaintiff's representation, to be genuine; for if so, he was not bound to take them unless genuine.

In Wood *v.* Smith,[2] the action was *assumpsit*, and the proof was that the defendant, in reply to the plaintiff's question, had said that a mare sold was "sound to the best of his knowledge," and on further question, had refused to warrant, saying, "I never warrant; I would not even warrant myself."

[3] Canaletti died in 1768; Claude Lorraine in 1682; Teniers the younger in 1694.

[1] Richardson *v.* Brown, 1 Bing. 344.

[2] Budd *v.* Fairmaner, 8 Bing. 48.

[3] Dickenson *v.* Gupp, quoted at p. 50 in Budd *v.* Fairmaner, 8 Bing. 48.

[4] Anthony *v.* Halstead, 37 L. T. N. S. 433.

[1] 4 Car. & P. 15. See, also, De Sewhanberg *v.* Buchanan, 5 Car. & P. 343.

[2] 5 M. & R. 124.

The mare was unsound, and the defendant knew it. Gurney, for defendant, insisted that the action should have been *tort*, for there was an express refusal to warrant. But Lord Tenterden, at the trial, and the Court in Banco, afterwards held, that on these facts there was a *qualified warranty* that the mare was sound to the best of the defendant's knowledge, and that the action was therefore well brought in *assumpsit*.

In Powell *v.* Horton,[3] the sale was "of mess pork, of Scott and Co.," and the defendant attempted to evade his responsibility by showing that the pork delivered by him was really mess pork, *consigned* to him by Scott and Co.; but proof was received to show that those words meant in the trade, [*610] mess pork *manufactured* by Scott and Co., which * was worth more in the market than the article delivered by the defendant, and the Court held the defendant bound by a warranty that the pork was of that manufacture.

And in Yates *v.* Pym,[4] the Court refused to admit parol evidence of the usage of trade to qualify an express warranty. The sale was of "prime singed bacon;" and evidence was offered, that as bacon is an article necessarily deteriorating from its first manufacture, a usage of the trade was established, that a certain degree of deterioration, called average taint, was allowed, before the article ceases to become "prime bacon," but the evidence was held rightly rejected.

In Bywater *v.* Richardson,[5] a notice that a warranty was to remain in force only till twelve o'clock next day was construed to mean that the vendor was responsible only for such defects as might be pointed out before that hour; and in Chapman *v.* Gwyther,[6] a sale of a horse, "warranted sound for one month," was also construed as a limitation of the vendor's responsibility to such faults as were pointed out within the month, so that he was held not liable for a defect which existed at the time of the sale, but was not discovered till more than a month had elapsed.[7]

[3] 2 Bing. N. C. 668.

[4] 6 Taunt. 446.

[5] 1 A. & E. 508.

[6] L. R. 1 Q. B. 464; 35 L. J. Q. B. 142. See Mesnard *v.* Aldridge, 3 Esp. 271; Buchanan *v.* Parnshaw, 2 T. R. 745.

[7] *What constitutes a breach of warranty.* — A warranty that a horse is "all right except that he would

§ 821. A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor defects known to the buyer.[1] But the

sometimes shy" is broken by partial blindness, even though the shying arises therefrom. Kingsley *v.* Johnson, 49 Conn. 462. See, also, Little *v.* Woodworth, 8 Neb. 281. Where a horse is represented to be fourteen years of age, there is a warranty that he is no older. Burge *v.* Stroberg, 42 Ga. 89. Where a horse requires to be constantly shod in a peculiar manner to prevent stumbling, he is not sure footed within the meaning of a warranty in which the only excepted causes are of a temporary character. Morse *v.* Pitman (N. H.), 2 New Eng. Rep. 545. A warranty that a negro is "sound in body and mind and a slave for life" is not a warranty of title. Patrick *v.* Swinney, 5 Bush (Ky.) 421. Where the seller warrants a slave to be a slave for life and warrants title clear and perfect, the warranty is not broken by the subsequent emancipation of the slave by the government. Haskill *v.* Sevier, 25 Ark. 153; Osborn *v.* Nicholson, 80 U. S. (13 Wall.) 654; bk. 20, L. ed. 689. Where the vendor knows the use to which goods are to be put, and warrants them "perfect" this means perfect for the use intended. Roe *v.* Bacheldor, 41 Wis. 360. A warranty in the sale of young fruit trees, that they were really harvest apples, is a present warranty, when the trees are what they were represented to be, and no future warranty to become effected after the lapse of years. Gregory *v.* Underhill, 6 Lea (Tenn.) 207. A warranty that cattle work evenly on the yoke is broken if they will not so work when driven by a person of ordinary skill in the management of oxen. Woodruff *v.* Weeks, 28 Conn. 328. A warranty that a soda fountain was in good condition is broken if from inherent defects in construction existing at the time of the sale it was liable to get out of order from time to time. Pritchard *v.* Fox, 4 Jones (N. C.) L. 140. For other instances of the construction of warranty, see Whitney *v.* Thacher, 117 Mass. 523; Cunningham *v.* Hall, 86 Mass. (4 Allen) 268; Stedman *v.* Lane, 36 Mass. (19 Pick.) 547; Croninger *v.* Paige, 48 Wis. 229.

[1] 2 Bing. 183.

American authorities.— Tabor *v.* Peters, 74 Ala. 90; s. c. 49 Am. Rep. 804; Livingston *v.* Arrington, 28 Ala. 424; Jordan *v.* Foster, 11 Ark. (6 Eng.) 141; Dillard *v.* Moore, 7 Ark. (2 Eng.) 166; Chadsey *v.* Green, 24 Conn. 562; Huston *v.* Plato, 3 Colo. 402; Marshall *v.* Drawhorn, 27 Ga. 275; Kenner *v.* Harding, 85 Ill. 264; s. c. 28 Am. Rep. 615; President of Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102; s. c. 41 Am. Dec. 214; Meickley *v.* Parsons, 66 Iowa, 63; s. c. 55 Am. Rep. 261; Dean *v.* Morey, 33 Iowa, 120; Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587; Robertson *v.* Clarkson, 9 B. Mon. (Ky.) 507; Gant *v.* Shelton, 3 B. Mon. (Ky.) 423; Richardson *v.* Johnson, 1 La. An. 389; Brown *v.* Bigelow, 92 Mass. (10 Allen) 242; Winsor *v.* Lombard, 35 Mass. (18 Pick.) 57; McCormick *v.* Kelly, 28 Minn. 135; Leavitt *v.* Fletcher, 60 N. H. 182; Bennett *v.* Buchan, 76 N. Y. 386; Van Schoick *v.* Niagara Fire Ins. Co., 68 N. Y. 434; Vandewalker *v.* Osmer, 65 Barb. (N. Y.) 556; Birdseye *v.* Frost, 34 Barb. (N. Y.) 367; Schuyler *v.* Russ, 3 Cai. (N. Y.) 202; Hudgins *v.* Perry, 7 Ired. (N. C.) L. 102; Mulvany *v.* Rosenberger, 18 Pa. St. 203; Fisher *v.* Pollard, 2 Head (Tenn.) 314; s. c. 75 Am. Dec. 740; Long *v.* Hicks, 2 Humph. (Tenn.) 305; Keely *v.* Turbeville, 11 Lea (Tenn.) 339; Williams *v.* Ingram, 21 Tex.

warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect.[2]

In Liddard *v.* Kain,[3] the sale was of horses, known to the buyer to be affected, one with a cough, and the other with a swelled leg; but the vendor agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and this warranty was held to include the defects above mentioned, although known to the purchaser.

§ 822. Margetson *v.* Wright,[1] which was twice tried, is instructive on this point. The sale was of a race-
[*611] horse, which * had broken down in training, was a crib-biter, and had a splint on the off fore-leg. The horse, sound in other respects, would have been worth 500*l.* if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for 90*l.* The defendant refused to give a warranty that the horse would stand training, and refused to sign a warranty that the horse was "sound, wind and limb," without adding the words, "at this time." Six months afterwards the horse broke down in training, and Parke J. told the jury that the express warranty rendered the defendant responsible for the consequences of the splint, though it was known to the purchaser: but that the addition of the words, "at this time," was intended to exclude a warranty that the horse would stand training. On motion for new trial, the first branch of this ruling was held erroneous, Tindal C. J. saying: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a warranty was by an

300; Pinney *v.* Andrus, 41 Vt. 631; Hill *v.* North, 34 Vt. 604; Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129; Vates *v.* Cornelius, 59 Wis. 615. *Contra*, Stucky *v.* Clyburn, Cheves (S. C.) L. 186; s. c. 34 Am. Dec. 590

[2] Thompson *v.* Bertrand, 23 Ark. 730; Fletcher *v.* Young, 69 Ga. 591; Hambright *v.* Stover, 31 Ga. 300; Callaway *v.* Jones, 19 Ga. 277; House *v.* Fort, 4 Blackf. (Ind.) 293; Shewalter *v.* Ford, 34 Miss. 417; Thompson *v.* Botts, 8 Mo. 710; Fox *v.* Everson, 27 Hun (N. Y.) 355; Wilson *v.* Ferguson, Cheves (S. C.) L. 190; Scarborough *v.* Reynolds, 13 Rich (S. C.) L. 98; Fisher *v.* Pollard, 2 Head (Tenn.) 314; s. c. 75 Am. Dec. 640; Pinney *v.* Andrus, 41 Vt. 631.

[3] 2 Bing. 183.

[1] 7 Bing. 603; 8 Bing. 454.

action of deceit grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time; a party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not sue on a general warranty of soundness. In the present case, the splint was known to both parties, and the learned judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by the parties.*"

On the new trial then ordered, the plaintiff proved to the satisfaction of the jury, that there were two kinds of splints, some of which cause lameness, and others do not, and that the splint in question did cause a subsequent lameness, and they found that the horse, at the time of the sale, "had upon him the seeds of unsoundness arising from the splint." Held, that this result not being apparent at the time, and the buyer * not being able to tell whether the splint [*612] was one that would cause lameness, was protected by the warranty that the horse was then sound.[2]

§ 823. But in Tye *v.* Fynmore,[1] where the sale was of "fair merchantable sassafras wood," the purchaser refused to take the article, alleging that these words meant in the trade, the roots of the sassafras tree, but that the wood tendered by plaintiff was part of the timber of the tree, not worth more than one-sixth as much as the roots. In answer to this it was shown that a specimen of the wood sold was exhibited to the buyer before the sale, and that the buyer was a druggist, well skilled in the article. Lord Ellenborough said: "It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity."

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

[1] 3 Camp. 462.

§ 824. The meaning of the word "sound," when used in the sale of horses, has been the subject of several decisions, and it is settled that the interpretation of a warranty to that effect depends much on custom and usage, as well as upon the circumstances of the particular case. The rule was fully considered in Kiddell *v.* Burnard.[1] A verdict was given at Nisi Prius in favor of the plaintiff, who had purchased, with a warranty of soundness, some bullocks at a fair. The learned judge (Erskine J.) told the jury that the plaintiff was bound to show that at the time of the sale the beasts had some disease, or the seeds of some disease in them which would render them unfit, or in some degree less fit, for the ordinary use to which they would be applied. On the motion for new trial, Parke B. said: "The rule I laid down in Coates *v.* Stevens[2] is correctly reported, and I am there stated to have said: 'I have always considered that a man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to [*613] *expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has either from disease or accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. If the cough actually existed at the time of the sale as a disease, so as actually to diminish the natural usefulness of the horse at that time and to make him less capable of immediate work, he was then unsound; or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed at the

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

[2] 2 Moo. & Rob. 157.

moment on a new subject: it is the result of a full previous consideration.' That is the rule I have always adopted and acted on in cases of unsoundness, although in so doing I differ from the contrary doctrine laid down by my brother Coleridge in Bolden *v.* Brogden."[3] All the judges, Alderson, Gurney, and Rolfe, BB., concurred in this exposition, the first-named saying: "The doctrine laid down by my brother Parke to-day, and in the case of Coates *v.* Stevens, is not new law: it is to be found recognized by Lord Ellenborough[4] and other judges in a series of cases."

In Bolden *v.* Brogden,[3] which it is submitted was overruled in Kiddell *v.* Burnard, Coleridge J. had told the jury that the question on such a warranty was whether the animal had upon him a disease calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness.[5]

§ 825. *It may be convenient to state some of the [*614] defects which have been held to constitute unsoundness. Any *organic* defect, such as that a horse had been *nerved;*[1] bone-spavin in the hock;[2] ossification of the car-

[3] 2 Moo. & Rob. 113.

[4] Elton *v.* Brogden, 4 Camp. 281; Elton *v.* Jordan, 1 Stark. 127.

[5] See, also, Onslow *v.* Eames, 2 Stark. 81; Garment *v.* Barrs, 2 Esp. 673, which seem also to be overruled by Kiddell *v.* Burnard.

Breach of warranty of soundness.— It is not necessary that the disease should be permanent in order to constitute a breach of warranty of soundness. It would seem that any temporary ailment, which renders the animal less fit for present use and convenience, is sufficient to constitute a breach. Thomson *v.* Bertrand, 23 Ark. 730; Burton *v.* Young, 5 Harr. (Del.) 233; Kornegay *v.* White, 10 Ala. 255; Brown *v.* Bigelow, 92 Mass. (10 Allen) 242; Roberts *v.* Jenkins, 21 N. H. 116; s. c. 53 Am. Dec. 169. But where the ailment or injury is merely temporary and curable and does not render a horse less available for present use it does not constitute unsoundness. Roberts *v.* Jenkins, 21 N. H. 116; s. c. 53 Am. Dec. 169; Springsted *v.* Lawson, 23 How. (N. Y.) Pr. 302. In every case the defects must be in existence at the time of the sale. Booman *v.* Clemmer, 50 Ind. 10; Merrick *v.* Bradley, 19 Md. 50; Woodbury *v.* Robbins, 64 Mass. (10 Cush.) 520; Fondren *v.* Durfee, 39 Miss. 324; Shewalter *v.* Ford, 34 Miss. 417; Stephens *v.* Chappell, 3 Strobh. (S. C.) 80; Miller *v.* McDonald, 13 Wis. 673. And it would appear that it is not necessary that the disease should be fully developed, it is sufficient if it be in its incipient or latent stage. Woodbury *v.* Robbins, 64 Mass. (10 Cush.) 520; Fondren *v.* Durfee, 39 Miss. 324; Shewalter *v.* Ford, 34 Miss. 417.

[1] Best *v.* Osborne, Ry. & Moo. 290.

[2] Watson *v.* Denton, 7 Car. & P. 85.

tilages;[3] the navicular disease;[4] and thick wind[5] have been held to constitute unsoundness in horses, and goggles in sheep.[6] But roaring has been held not to be,[7] and in a later case to be,[8] unsoundness. Crib-biting[9] has been held to be not unsoundness, but to be covered by a warranty against vices.[10]

Mere badness of shape that is likely to produce unsoundness, and which really does produce unsoundness, is not a breach of warranty of soundness if the unsoundness does not exist at the time of the sale. As where a horse's leg was so ill-formed that he could not work for any length of time without cutting, so as to produce lameness;[11] or had curby hocks, that is, hocks so formed as to render him very liable to throw out a curb, and thus produce lameness;[12] or thin-soled feet, also likely to produce lameness.[13]

But a horse may have a congenital defect, which, in itself, is unsoundness. In Holliday *v.* Morgan,[14] a horse sold with a warranty of soundness had an unusual convexity in the corner of the eye, which caused short-sightedness, and a habit of shying. The direction to the jury was that "if they thought the habit of shying arose from defectiveness of vision, caused by natural malformation of the eye, this was

[3] Simpson *v.* Potts, Oliphant, Law of Horses, ed. 1882 (by C. E. Lloyd), 467, Appendix.

[4] Matthews *v.* Parker, Oliphant, Law of Horses, 471, Appendix; and Bywater *v.* Richardson, 1 A. & E. 598.

[5] Atkinson *v.* Horridge, Oliphant, Law of Horses, 472, Appendix.

[6] Joliff *v.* Bendell, Ryan & Moo. 136.

[7] Bassett *v.* Collis, 2 Camp. 523.

[8] Onslow *v.* Eames, 2 Stark. 81.

[9] Brœnnenburgh *v.* Haycock, Holt, N. P. 630.

[10] Scholefield *v.* Robb, 2 Mood. & Rob. 210.

Unsoundness in horses. — *What is.* — Crib-biting is unsoundness if it affects the health of the horse and renders him less serviceable as well as detracts from his value. Washburn *v.* Cuddihy, 74 Mass. (8 Gray) 430. See Walker *v.* Haisington, 43 Vt. 608. Glanders in a horse is unsoundness. Woodbury *v.* Robbins, 64 Mass. (10 Cush.) 520.

[11] Dickinson *v.* Follett, 1 M. & Rob. 299.

[12] Brown *v.* Elkington, 8 M. & W. 132.

[13] Bailey *v.* Forrest, 2 Car. & K. 131.

Warranty of soundness. — The fact that a mare is with foal is no breach of a warranty of her general soundness for livery purposes. Whitney *v.* Taylor, 54 Barb. (N. Y.) 536. Soundness of mind as well as of body is included in a warranty of the soundness of a slave. Caldwell *v.* Wallace, 4 Stew. & P. (Ala.) 282; Simpson *v.* McKay, 12 Ired. (N. C.) L. 141. But see Nelson *v.* Biggers, 6 Ga. 205.

[14] 1 E. & E. 1; 28 L. J. Q. B. 9.

unsoundness." All the judges held this direction correct, and concurred in the doctrine of Kiddell *v.* Burnard,[15] that * the true test of unsoundness is, as expressed [*615] by Hill J., "whether the defect complained of *renders the horse less than reasonably fit for present use.*" [16]

§ 826. Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter, by inference or implication.

In Kain *v.* Old,[1] the bill of sale in the usual form, contained no warranty that the vessel sold was copper-fastened; there had been a previous written representation by the vendor that she was copper-fastened. Held, that this prior representation formed no part of the contract, and was not a warranty. Abbott C. J. thus expounded the law: — "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always; because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as showing the inducement to the contract, such as a representation of some particular quality or incident to the thing sold; but the buyer is not at liberty to show such a representation, unless he can also show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist." [2]

[15] 9 M. & W. 668.

[16] On this subject the reader is referred to the 4th chapter of Oliphant's Law of Horses, ed. 1882, pp. 70 *et seq.*

[1] B. & C. 627.

[2] See, also, Pickering *v.* Dowson, 4 Taunt. 779; Wright *v.* Crookes, 1 Scott, N. R. 685.

American authorities. — Mullain *v.* Thomas, 43 Conn. 252; Galpin *v.* Atwater, 29 Conn. 93; Dean *v.* Mason, 4 Conn. 432; s. c. 10 Am. Dec. 162; Shepherd *v.* Gilroy, 46 Iowa, 193; Rice *v.* Forsyth, 41 Md. 389; Frost *v.* Blanchard, 97 Mass. 155; Boardman *v.* Spooner, 95 Mass. (13 Allen) 353; Cunningham *v.* Hall, 86 Mass. (4 Allen) 268; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52;

§ 827. But where the written paper was in the nature of an informal receipt merely, held, that parol evidence of a warranty was admissible.[1]

In Dickson *v.* Zizania,[2] there was an express warranty that a cargo of Indian corn, sold to the plaintiff, should be equal to the average of shipments of Salonica of that sea-
[*616] son, * and should be shipped in good and merchantable condition, and the Court refused to allow the warranty to be extended by evidence or implication, so as to render the defendant answerable that the corn should be in fit condition for a foreign voyage.

But in Bigge *v.* Parkinson,[3] where the vendor gave a written guaranty that stores furnished for a troop-ship should pass survey by the East India Company's officers, this was held not to dispense the vendor from the warranty implied by law,[4] that the provisions should be reasonably fit for use for the intended purpose.

Dutton *v.* Gerrish, 63 Mass. (9 Cush.) 94; s. c. 55 Am. Dec. 45; Lamb *v.* Crafts, 53 Mass. (12 Metc.) 353; Salem India Rubber Co. *v.* Adams, 40 Mass. (23 Pick.) 265; Thompson *v.* Libby, 34 Minn. 374; Jones *v.* Alley, 17 Minn. 292; Wilson *v.* Marsh, 1 Johns. (N. Y.) 503; Mumford *v.* M'Pherson, 1 Johns. (N. Y.) 415; s. c. 3 Am. Dec. 339; Vandenheuvel *v.* United Ins. Co., 1 Johns. (N. Y.) 406; s. c. 1 Am. Dec. 180; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; Linsley *v.* Lovely, 26 Vt. 123; Davis *v.* Bradley, 24 Vt. 55; Reed *v.* Wood, 9 Vt. 286; Merriam *v.* Field, 24 Wis. 640; Randall *v.* Rhodes, 1 Curt. C. C. 99; Morrow *v.* The Waterous Engine Co., 2 Pugs. & B. (N. B.) 509.

[1] Allen *v.* Pink, 4 Mees. & W. 140.

American authorities. — Perrine *v.* Cooley, 39 N. J. L. (10 Vr.) 449; Filkins *v.* Whyland, 24 N. Y. 338; Gordon *v.* Waterous, 36 Up. Can. Q. B. 321; Bennet *v.* Tregent, 24 C. P. 565; Tisdale *v.* Connell, 1 Kerr (N. B.) 401. Parol testimony is admissible to prove a warranty where a bill of parcels has been given. Irwin *v.* Thompson, 27 Kans. 643; Atwater *v.* Clancy, 107 Mass. 369; Stacey *v.* Kemp, 97 Mass. 166; Boardman *v.* Spooner, 95 Mass. (13 Allen) 353; Hildreth *v.* O'Brien, 92 Mass. (10 Allen) 104; Schenck *v.* Saunders, 79 Mass. (13 Gray) 37; Hazard *v.* Loring, 64 Mass. (10 Cush.) 267; Fletcher *v.* Willard, 31 Mass. (14 Pick.) 464; Bradford *v.* Manly, 13 Mass. 139; s. c. 7 Am. Dec. 124; Hersom *v.* Henderson, 21 N. H. 224; Wallace *v.* Rodgers, 2 N. H. 506; Foot *v.* Bentley, 44 N. Y. 166; s. c. 4 Am. Rep. 652; Cassidy *v.* Begoden, 38 N. Y. Super. Ct. (6 J. & S.) 180; Koop *v.* Handy, 41 Barb. (N. Y.) 454; Filkins *v.* Whyland, 24 Barb. (N. Y.) 379; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; Harris *v.* Johnston, 7 U. S. (3 Cr.) 311; bk. 2, L. ed. 450; Buchtel *v.* Mason, L. Co. 1 Flip. C. C. 640; McMullen *v.* Williams, 5 Ont. App. 578.

[2] 10 C. B. 602; 20 L. J. C. P. 72.

[3] 7 H. & N. 955; 31 L. J. Ex. 301, in Ex. Ch.

[4] *Post*, Implied Warranty of Quality.

In Bywater *v.* Richardson,[5] there was a warranty of soundness, but the purchase was made at a repository, where there was a rule painted on a board fixed to the wall, that a warranty of soundness, when given there, was to remain in force only until twelve o'clock at noon, on the day next after the sale; and the Court held, on proof of the buyer's knowledge of the rules, that the warranty was limited, and it was the same as if the seller had told him that he would warrant the horse against such defects only as might be pointed out within twenty-four hours.

§ 828. Blackstone says: that "The warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro:* as that a horse is sound at the buying of him, not that he will be sound two years hence."[1] But the law is now different, as is explained by Mr. Justice Coleridge in his notes on this passage. Lord Mansfield, also, in a case,[2] where this passage was cited, said: "There is no doubt but you may warrant a future event."[3]

§ 829. Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his * agency, and it is a question for the jury to deter- [*617] mine what is usual.[1] If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.[2]

[5] 1 A. & E. 508.

[1] 3 Bl. Com. 166.

[2] Eden *v.* Parkinson, 2 Doug. 735.

[3] Upton *v.* Suffolk Co. Mills, 65 Mass. (11 Cush.) 586; s. c. 59 Am. Dec. 163; Fatman *v.* Thompson, 2 Disn. (Ohio) 482; Osborn *v.* Nicholson, 80 U. S. (13 Wall.) 654. See, also, Richardson *v.* Mason, 53 Barb. (N. Y.) 601.

[1] Bayliffe *v.* Butterworth, 1 Ex. 425; Graves *v.* Legg, in Ex. Ch. 2 H. & N. 210; 26 L. J. Ex. 316; Pickering *v.* Busk, 15 East, 38.

[2] *American Authorities.* — Herring *v.* Skaggs, 62 Ala. 180; Cocke *v.* Campbell, 13 Ala. 286; Bradford *v.* Bush, 10 Ala. 386; Gaines *v.* McKinley, 1 Ala. 446; Skinner *v.* Gunn, 9 Port. (Ala.) 305; Woodford *v.* McClenahan, 9 Ill. (4 Gilm.) 85; Murray *v.* Brooks, 41 Iowa, 45; Randall *v.* Kehlor, 60 Me.

Thus, in Alexander *v.* Gibson,[3] a servant who was sent to sell a horse *at a fair*, and receive the price, was held by Lord Ellenborough to be authorized to give a warranty of soundness, because "this is the common and usual manner in which the business is done."

37; s. c. 11 Am. Dec. 169; Bryant *v.* Moore, 26 Me. 84; s. c. 45 Am. Dec. 96; Upton *v.* Suffolk Co. Mills, 65 Mass. (11 Cush.) 586; s. c. 59 Am. Dec. 163; Shaw *v.* Stone, 55 Mass. (1 Cush.) 228; Goodenow *v.* Tyler, 7 Mass. 36; Palmer *v.* Hatch, 46 Mo. 585; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Ahern *v.* Goodspeed, 72 N. Y. 108; Smith *v.* Tracy, 36 N. Y. 79; Milburn *v.* Belloni, 34 Barb. (N. Y.) 607; Nelson *v.* Cowing, 6 Hill (N. Y.) 336; Hunter *v.* Jameson, 6 Ired. (N. C.) L. 252; Ezell *v.* Franklin, 2 Sneed (Tenn.) 236; Deming *v.* Chase, 48 Vt. 382; Boothby *v.* Scales, 27 Wis. 626; Schuchardt *v.* Allens, 68 U. S. (1 Wall.) 359; bk. 17, L. ed. 642; The Monte Allegre, 22 U. S. (9 Wheat.) 616; bk. 6, L. ed. 174.

Extent of agent's authority to warrant. — The agent's authority is confined to the warranty usually given in sales of the kind and quality of goods. Thus in Upton *v.* Suffolk Co. Mills, 65 Mass. (11 Cush.) 583; s. c. 59 Am. Dec. 163; it was held that a general selling agent would not warrant against a contingency to happen after the completion of the sale. See, also, Palmer *v.* Hatch, 46 Mo. 585. In Cooley *v.* Perrine, 41 N. J. L. (12 Vr.) 322; s. c. 32 Am. Rep. 210; it was held that a special agent authorized to sell a horse is not thereby authorized to warrant the quality. And auctioneers have not, in that capacity, an implied authority to warrant. Blood *v.* French, 75 Mass. (9 Gray) 198; Schell *v.* Stephens, 50 Mo. 375; The Monte Allegre, 22 U. S. (9 Wheat.) 616, 647; bk. 6, L. ed. 174. Ratification of the warranty will, of course, bind the principal, but the authorities seem to be divided on the question whether an acceptance of the price is a sufficient ratification. In Eadie *v.* Ashbaugh, 44 Iowa, 519, 521, the court held that acceptance of notes and an attempt to collect them was sufficient to bind the principal. In thus deciding they based their decision upon the ground that it was the duty of the principal to make inquiries as to the terms of the sale, before accepting the notes, failing to do this, and blindly accepting the notes without any inquiry, the principal must be deemed to have adopted whatever contract was made. See, also, Victor, &c., Co. *v.* Rheinschild, 25 Kans. 534; Churchill *v.* Palmer, 115 Mass. 310.

New Jersey doctrine. — In Cooley *v.* Perrine, 41 N. J. L. (12 Vr.) 322, 331; s. c. 32 Am. Rep. 210, the court takes a contrary view. They say: "What the principal does in pursuance of a bargain, which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is no ratification of such contract, and if when he acquires knowledge he cannot in justice to himself disavow the whole of the agent's contract he is entitled to stand upon what he authorized, and repudiate the rest. The purchaser who dealt with a special agent, without knowing the bounds of his power, must suffer, rather than the innocent principal. See, also, Croom *v.* Shaw, 1 Fla. 211; Titus *v.* Phillips, 18 N. J. Eq. (3 C. E. Gr.) 541; Bryant *v.* Moore, 26 Me. 84; s. c. 45 Am. Dec. 96; Combs *v.* Scott, 94 Mass. (12 Allen) 493; Gulick *v.* Grover, 33 N. J. L. (4 Vr.) 463; Smith *v.* Tracy, 36 N. Y. 79.

[3] 2 Camp. 555. See, also, Helyear *v.* Hawke, 5 Esp. 72.

In Dingle *v.* Hare,[4] an agent selling guano, was held authorized to warrant it to contain 30 per cent. of phosphate of best quality, the jury having found as a fact, that ordinarily these manures were sold with such a warranty, all the judges agreeing, and Byles J. saying, "It is clear law that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it was usual in the trade for the seller to warrant, Wilson (the agent) had authority to warrant."

§ 830. In Brady *v.* Todd,[1] the Common Pleas had before it the subject of warranty of a horse, by a servant authorized to sell, and Erle C. J. gave the unanimous decision of the judges after advisement. As this is the most authoritative exposition of the present state of the law on this point, full extracts are given. The facts were, that the plaintiff applied to the defendant, who was *not a dealer in horses*, but a tradesman in London, having also a farm in Essex, in order to buy the horse, and the defendant thereupon sent his farm-bailiff with the horse to the plaintiff, with authority to sell, but none to warrant. The bailiff warranted the horse to be sound and quiet in harness; and it was contended that "an authority to an agent to sell and deliver imports an authority to warrant," which the Court held to be an undecided point. After referring to Helyear *v. Hawke, and Alexander *v.* [*618] Gibson, *supra*, and Fenn *v.* Harrison,[2] the learned Chief Justice said: "We understand those judges to refer to a *general* agent employed for his principal to carry on his business, that is, the business of horse dealing, *in which case there would be by law, the authority here contended for.* . . . It is also contended that a *special* agent, without any express authority, in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority as against the party who believed

[4] 7 C. B. N. S. 145; 29 L. J. C. P. 144.

[1] 9 C. B. N. S. 592; 30 L. J. C. P. 223.

[2] 3 T. R. 759.

what was held out and acted on it (see Pickering *v.* Busk[3]), but the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale, and that the question of warranty is, in the usual course of a sale, required to be answered; and that, therefore, the defendant by implication gave to Greigg (the farm bailiff) an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point, also, the plaintiff has, in our judgment, failed.

"We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty, or even an inquiry about warranty. If we laid down for the first time that the *servant of a private owner*, intrusted to sell and deliver a horse on *one particular occasion*, is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence. For the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons inexperienced in law: and as everything said by the seller [*619] in * bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold, that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law does not in our opinion create it from the circumstances. . . . It is unnecessary to add, that if the seller should repudiate the warranty made by his agent, it follows that the sale would be void, there being no question raised upon this point."

[3] 15 East, 38.

§ 831. In Howard *v.* Sheward,[1] the general rule that the agent of a horse-dealer has an implied authority to warrant soundness when making sale of a horse was recognized, and it was further held, that a purchaser under such a warranty would be protected even though the agent had been privately instructed not to warrant; and therefore that evidence was not admissible to show a custom of horse-dealers, not to warrant in cases where a horse sold has been examined by a competent veterinary surgeon, and pronounced sound.

Section II. — IMPLIED WARRANTY OF TITLE.

§ 832. The law in relation to the implied warranty of title in chattels sold was in an unsettled state until a recent decision in the Common Pleas, which has gone far towards establishing a satisfactory rule.

In the examination of the subject, it will be found that on some points there is no conflict of opinion.

First. — It is well settled that in an executory agreement, the vendor warrants, by implication, his title in the goods which he promises to sell. Plainly, nothing could be more untenable than the pretension that if A. promised to sell 100 quarters of wheat to B., the contract would be fulfilled by the transfer, not of the *property* in the wheat, but of the *possession* of another man's wheat.

* *Secondly.* — It is also universally conceded, that [*620] in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel *is his*, is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale.

But it has been said, *thirdly*, that in the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title and ability to sell, though all again admit,

Fourthly. — That if in such case the vendor *knew* he had no title, and concealed that fact from the buyer, he would be liable on the ground of *fraud*.

[1] L. R. 2 C. P. 148.

§ 833. The one controverted question is thus narrowed to this point, whether in the sale of a chattel an innocent vendor by the mere act of sale asserts that he is the owner — for, if so, he warrants according to the second of the foregoing rules.

The negative is stated to be the true rule or law on this point in recent text-books of deservedly high repute.[1] Undoubtedly, in some of the ancient authorities on the common law, the rule is substantially so stated. In Noy's Maxims, c. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*:" and in Co. Lit. 102 a, Coke says: "Note, that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor*." Blackstone, however, gives the contrary rule,[2] "if the vendor sells them as his own." But the authority mainly relied on by the learned authors mentioned in the note, is the elaborate opinion given by Parke B. in the case of Morley *v.* Attenborough,[3] where [*621] *the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case.

§ 834. It is, however, the fact that no direct decision has ever been given in England to the effect that where a man sells a chattel he does not thereby warrant the title.[1] It has been often said in cases that such was the rule of law, but no case has been decided directly to that effect. Since the decision in Morley *v.* Attenborough, there have been repeated references to the *dicta* contained in the opinion of Parke B. on this point, and dissatisfaction with them has been more than once suggested. It will be quite sufficient to confine

[1] Chitty on Cont. 413 (11th ed.); Broom's Legal Max. 799–801 (5th ed.); Leake, Dig. of Law of Cont. 402; 2 Taylor on Ev. 984; Bullen and Leake, Prec. of Pl. 342 (ed. 1882).

[2] 2 Bl. C. 451.

[3] 3 Ex. 500.

[1] *Per* Byles J. in Eichholz *v.* Banister, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

the review of the decisions to Morley *v.* Attenborough and the subsequent cases, as they contain a full discussion of the whole subject, and reference to the old authorities, except one to be specially noticed.

§ 835. Morley *v.* Attenborough[1] was the case of an auction-sale, by order of a pawnbroker, of unredeemed pledged goods, *eo nomine*, and the Court decided that in the absence of an express warranty, all that the pawnbroker asserted by his offer to sell was, that the thing had been pledged to him and was unredeemed, not that the pawnor had a good title; not professing to sell *as owner*, he did not warrant ownership. The following language contains the *dicta*: —

"The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey. With respect to *executory contracts* of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be *transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery: and if he did, and the goods were recovered from him, he would not be bound to pay, or having paid, he would be entitled to recover back the price, as on *a consideration which had failed*. But where there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily im- [*622]

[1] 3 Ex. 500.

port, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? . . . The result of the older authorities is, that there is by the law of England no *warranty of title in the actual contract of sale, any more than there is of quality.* The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a; 3 Rep. 22 a; Noy, Max. 42; Fitz. Nat. Brev. 94 c; in Springwell *v.* Allen, Aleyn, 91, cited by Littledale J. in Early *v.* Garrett, 9 B. & C. 932, and in Williamson *v.* Allison, 2 East, 449, referred to in the argument. . . . It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bonâ fide* purchaser without notice obtained a good title as against all except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. VIII. c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. *In recent times a different notion appears to have been gaining ground* (see note of the learned editor to 3 Rep. 22 a; and Mr. Justice Blackstone says, 'In contracts for [*623] *sale, it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

§ 836. "At all times, however, the vendor was liable, if there was a warranty *in fact;* and at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in Medina *v.* Stoughton (1 Salk. 210; Ld. Raymond, 593), says that 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty.' And Mr. Justice Buller, in Pasley

v. Freeman (3 T. R. 57), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. . . . From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in Ormerod *v.* Huth (14 M. & W. 664), it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, *by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as will be equivalent to such a warranty.* Usage of trade, if proved as a matter of fact, would of course be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. . . . We do not suppose that there would be any doubt if the articles are bought in a shop professedly carried on for the sale of goods, that *the shopkeeper must be considered as warranting, that those who purchase will have a good * title to keep the goods purchased.* In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. [*624]

§ 837. "But in the case now under consideration, the defendant can be made responsible only *as on a sale of a forfeited pledge eo nomine*, . . . and the question is, whether, on such a sale, accompanied with possession, there is *any assertion of an absolute title to sell*, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." Held, that the latter was the true meaning of the contract. The learned judge continued as follows: "It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser

may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to, if the purchaser should not have a good title. But if there is no implied warranty of title, *some circumstances must be shown* to enable the plaintiff to recover *for money had and received.* This case was not made at the trial, and the only question is whether there was an implied warranty."

§ 838. In the foregoing review of the older authorities by Parke B., the case of L'Apostre *v.* L'Plaistrier escaped the research of his lordship.[1] The case is mentioned in 1 Peere Williams, 317, as a decision by Holt C. J. on a different point. But when it was cited as an authority in Ryall *v.* Rowles,[2] Lee C. J., sitting in bankruptcy with Lord Chancellor Hardwicke, said, "*My* account of that case is different from that in Peere Williams. . . . It was held by the Court that *offering to sell generally was sufficient evidence of offering to sell as owner*, but no judgment was given, it being adjourned for further argument."[3]

[*625] § 839. *Next came Hall *v.* Condor.[1] The written sale stated that the plaintiff had obtained a certain patent in this country, and had already sold "an interest of one-half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby *declares that he has full right and title*," and he thereupon conveyed to the defendant "the above-mentioned one-half of the English patent hereinbefore referred to." In an action for the price the defendant pleaded, *first*, that the alleged invention was worthless, of no public utility, and not new in England; and *secondly*, that the plaintiff was not the true and first inventor thereof. The Court held that there was no warranty that the patent right was a good right, saying:

[1] It had likewise escaped the research of the author of this Treatise when the first edition was published.

[2] 1 Ves. sen. at p. 351. Also reported *sub nom.* Ryall *v.* Rolle, 1 Atk. 165.

[3] See the case of Ryall *v.* Rowles, 2 W. & Tud. L. C. in Eq. (5th ed.) at p. 733, for this report by Lee C. J. of the decision in L'Apostre *v.* L'Plaistrier.

[1] 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288.

"Did the plaintiff *profess to sell*, and the defendant to buy, a good and indefeasible patent right? or was the contract merely to place the defendant in the same situation as the plaintiff was in, with reference to the alleged patent?" Held, that the latter was the true nature of the contract. In this case, again, there is nothing to show that a sale of a chattel does not imply an affirmation of ownership, for there was an *express* warranty of ownership; but the subject-matter and true construction of the warranty were the points in question, and the warranty was held to mean that the patent, *such as it was*, belonged to the plaintiff, and to no one else, not that the patent was free from intrinsic defects that might make it voidable or defeasible. The *dicta*, however, were strongly in support of those in Morley *v.* Attenborough.

So, in Smith *v.* Neale,[2] the same Court, on facts almost identical with those of the preceding case, held, that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that her Majesty had granted to the vendor the letters patent, which were the thing sold.

§ 840. In Chapman *v.* Speller,[1] the plaintiff gave the defendant *5*l.* profit on a purchase made by the [*626] defendant at a sheriff's sale under a writ of *fi. fa.*, and the defendant handed to the plaintiff the receipt, which he had got from the auctioneer, in order to enable the plaintiff to claim the goods. The goods were afterwards taken under a superior title, and the plaintiff brought action, alleging a warranty of title by the defendant; but the Court refused to consider the point of law, saying that the defendant had only sold "the right, whatever it was, that he had acquired by his purchase at the sheriff's sale." The Court, however, added: "We wish to guard ourselves *against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel*, where the purchaser does not have that for which he paid."

[2] 2 C. B. N. S. 67; 26 L. J. C. P. 143.

[1] 14 Q. B. 621; 19 L. J. Q B. 241.

§ 841. In Sims *v.* Marryat,[1] there were affirmations by the defendant, which were construed to amount to an express warranty, and the question now under consideration was not decided; but Lord Campbell said: "It does not seem necessary to inquire what is the general law as to implied warranty of title on sales of personal property, *which is not quite satisfactorily settled.* According to Morley *v.* Attenborough, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawnor. Beyond that the decision does not go, but *a great many questions are suggested in the judgment, which still remain open.*"

§ 842. Then came Eichholz *v.* Banister,[1] in which one of the open questions at least was expressly decided by the Common Pleas in Michaelmas, 1864. The facts were very simple. The plaintiff went to the warehouse of the defendant, a "job-warehouseman" in Manchester, and bought certain goods, which the defendant said were "a job-lot just received by him." The following was the invoice, which was in print, except the words in italics:

[*627] * 20, Charlton Street, Portland Street,
Manchester, April 18, 1864.

Mr. *Eichholz*,

Bought of R. Banister, job-warehouseman.

Prints, grey fustians, &c., job and perfect yarns, in hanks, cops, and bundles.

17 *pieces of prints*, 52 *yards*, *at* 5¼*d. per yard*	£19	6	0
1½ *per cent. for cash.*	0	6	0
	19	0	0

The price was paid and the goods delivered, but it turned out that they had been stolen, and the buyer was compelled to restore them to the true owner, and brought action on the *common money counts*, to which the defendant pleaded *never*

[1] 17 Q. B. 281; 20 L. J. Q. B. 454.

[1] 17 C. B. N. S. 708; 34 L. J. C. P. 105.

indebted. Defendant insisted at the trial that he had not warranted title, and the point was reserved. The judges gave separate opinions, all concurring in the existence of a warranty of title.

Erle C. J. said that the rule was taken on a point of law that "a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. . . . I decide in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, *or by his conduct gives the purchaser to understand that he is such owner*, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." After quoting a passage from the opinion in Morley *v.* Attenborough, his Lordship continued: "I think where the sale is as it was in the present case, the shopkeeper does by his conduct affirm that he is the owner of the article sold, and he therefore contracts that he is such owner; and if he be not in fact the owner, the price paid for the purchase can be recovered back from him. So much for the present case." His Lordship, then referring to
* the old authorities cited, said of the passage from [*628]
Noy, quoted *ante*, p. 620, that "at first sight, this would shock the understanding of ordinary persons; but I take the meaning of the principle which it enunciates to be that where the transaction is of this nature, that I have the manual *possession* of a chattel, and without my affirming that I am the owner or not, you choose to buy it of me *as it is*, and give me the money for it, you the purchaser taking it on those terms cannot afterwards recover back what you have paid because it turns out that I was not the true owner." His Lordship then pointed out that Morley *v.* Attenborough, Chapman *v.* Speller, and Hall *v.* Condor, had all been decided on this principle; and that in "all these cases I think that the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had; but *in all ordinary sales the party who undertakes to sell, exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and*

would, therefore, as I think, commonly lead the purchaser to believe that he was the owner of the chattel. In almost all ordinary transactions in modern times the vendor, in consideration of the purchaser paying the price, *is understood to affirm that he is the owner of the article sold.* . . . The present case shows, I think, the wisdom of Lord Campbell's remark on the judgment of Parke B. in Morley *v.* Attenborough, when he said:[2] 'It may be that the learned Baron is correct in saying, that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule.'"

Byles J. concurred, and said: "It has been stated over and over again, that the mere sale of chattels does not involve a warranty of title, *but certainly such statement stands on barren ground, and is not supported by one single decision;* and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title. [*629] Lord * Campbell was right when he said that the exceptions to the application of *caveat emptor* had well nigh eaten up the rule."

Keating J. concurred.

§ 843. It is impossible to read the judgment of Erle C. J. in this case without yielding assent to the assertion that in modern times, in all ordinary sales, the vendor by exercising the high act of dominion over the thing in offering it for sale, thereby leads a purchaser to believe that he is owner, and this dictum is fully supported by the report by Lee C. J. of the decision given in L'Apostre *v.* L'Plaistrier, *ante*, p. 624. This being equivalent to a warranty, the result would be, in modern times, that as a general rule the mere sale of a chattel implies a warranty of title, whereas the old rule is accounted for by Parke B., on the ground that in the olden days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market overt, where the title obtained by the buyer was good against

[2] In Sims *v.* Marryat, 17 Q. B. 281; 20 L. J. Q. B. 454.

everybody but the sovereign. It should also be remembered, when inferences are drawn from very ancient decisions, that there formerly existed statutory provisions which have long grown obsolete. The laws passed in the times of Ethelbert and Edgar specially prohibited the sale of anything above the value of 20*d.* unless in open market, and directed every bargain and sale to be made in the presence of credible witnesses.[1]

§ 844. The question was alluded to by the Lord Chancellor (Chelmsford) in delivering the opinion of the Court in Page *v.* Cowasjee Eduljee,[1] where, in the case of the sale of a stranded vessel by the master, he said: "But supposing the plaintiff to have acted upon a mistaken view of the necessity of the case, the defendant could not insist upon there being any implied warranty of title. The plaintiff sold the vessel in the special character of master *and not as owner*, and acted upon a *bonâ fide* belief of his authority to sell."

§ 845. The subject was again considered in the Common Pleas * in Trinity Term, 1867, in Bagueley [*630] *v.* Hawley,[1] but with no satisfactory progress towards a final settlement of the point. The defendant bought a boiler, at auction, under distress for a poor-rate. The boiler was set in brickwork, and was too large to be taken away without taking down part of the outer wall of the boiler-house. The defendant agreed to sell it to the plaintiff at an advanced price as it stood. The plaintiff knew that the boiler had been bought at the auction by the defendant, and went with him to the auctioneer to obtain an extention of time for taking away the boiler; and this was conceded to him, but when he went to remove it, persons claiming to be mortgagees had it at work, and refused to allow its removal, stating that it had been illegally distrained. The plaintiff insisted that there was a warranty of title, and a warranty

[1] Wilkins' Leg. Anglo-Sax. Ll. Ethel. 10, 12; Eadg. 80.

[1] L. R. 1 P. C. 127–144; Moo. P. C. N. S. 499.

[1] L. R. 2 C. P. 625; 36 L. J. C. P. 328.

that he should be allowed to remove the boiler; the defendant contended that he merely sold such title as he had. Blackburn J. left it as a question of fact to the jury, who found that the sale was absolute and unconditional, and that there was an understanding that the plaintiff was to have effectual possession of the boiler, and they gave a verdict for the plaintiff. On leave reserved, a rule was made absolute for a nonsuit, by Bovill C. J. and M. Smith J.; *dissentiente* Willes J., Bovill C. J. put his opinion on the ground that by the general rule of law no warranty is implied in the sale of goods; but Smith J. on the principle of Chapman *v.* Speller; while Willes J. agreed with the jury and Blackburn J. that "the thing which the defendant sold was a boiler and not a law-suit." The circumstances were so peculiar and the opinions of the judges so little in accord, that the case has not much value as a precedent.

§ 846. On the whole, it is submitted that, since the decision in Eichholz *v.* Banister, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, "of having been well nigh eaten away." The rule at present would seem to be stated more in accord with [*631] the * recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.*

Eichholz *v.* Banister was on the money counts, and therefore, strictly speaking, only decides that the price paid may be recovered back by the buyer on the failure of title in the thing sold; but as the *ratio decidendi* was that there was a warranty implied *as part of the contract*, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty.

§ 847. Before leaving this subject it should be noted that in Dickenson *v.* Naul,[1] and in Allen *v.* Hopkins,[2] it was de-

[1] 4 B. & Ad. 638. [2] 13 M. & W. 94.

cided that where a party had bought and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first vendor for the price; these decisions being directly opposed to the maxim in Noy, quoted *ante*, p. 620.

§ 848. In America, the distinction between goods in possession of the vendor and those not in possession, so decisively repudiated by Buller J. in Pasley *v.* Freeman,[1] and by the judges in Eichholz *v.* Banister,[2] and in Morley *v.* Attenborough,[3] seems to be fully upheld; and the rule there is, that as to goods in possession of the vendor there is an implied warranty of title;[4] but where the goods sold are in

[1] 3 T. R. 58.

[2] 17 C. B. N. S. 708.

[3] 3 Ex. 500.

[4] Bennett *v.* Bartlett, 60 Mass. (6 Cush.) 225; Vibbard *v.* Johnson, 19 Johns. (N. Y.) 78; Case *v.* Hall, 24 Wend. (N. Y.) 102; Dorr *v.* Fisher, 55 Mass. (1 Cush.) 273; Burt *v.* Dewey, 40 N. Y. 483.

American authorities.—See Williamson *v.* Sammons, 34 Ala. 691; Ricks *v.* Dillahunty, 8 Port. (Ala.) 134; Cozzins *v.* Whitaker, 3 Stew. & P. (Ala.) 322; Lindsay *v.* Lamb, 24 Ark. 224; Boyd *v.* Whitfield, 19 Ark. 447; Gross *v.* Kierski, 41 Cal. 111; Miller *v.* Van Tassel, 24 Cal. 458; Starr *v.* Anderson, 19 Conn. 341; Lines *v.* Smith, 4 Fla. 47; Morris *v.* Thompson, 85 Ill. 16; Marshall *v.* Duke, 51 Ind. 62; Barton *v.* Faherty, 3 G. Greene (Iowa) 327; s. c. 54 Am. Dec. 503; Payne *v.* Rodden, 4 Bibb (Ky.) 304; s. c. 7 Am. Dec. 739; Richardson *v.* Tipton, 2 Bush (Ky.) 202; Chism *v.* Woods, Hard. (Ky.) 531; s. c. 3 Am. Dec. 740; Scott *v.* Scott, 2 A. K. Marsh. (Ky.) 217; Forsythe *v.* Ellis, 4 J. J. Marsh. (Ky.) 298; s. c. 20 Am. Dec. 218; Chancellor *v.* Wiggins, 4 B. Mon. (Ky.) 201; s. c. 39 Am. Dec. 499; Thurston *v.* Spratt, 52 Me. 202; Huntingdon *v.* Hall, 36 Me. 501; s. c. 58 Am. Dec. 765; Butler *v.* Tufts, 13 Me. 302; Eldridge *v.* Wadleigh, 12 Me. (3 Fairf.) 372; Hale *v.* Smith, 6 Me. (6 Greenl.) 420; Rice *v.* Forsyth, 41 Md. 389; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495; s. c. 18 Am. Dec. 317; Mockbee *v.* Gardner, 2 Har. & G. (Md.) 176; Shattuck *v.* Green, 104 Mass. 42; Brown *v.* Pierce, 97 Mass. 46; Bennett *v.* Bartlett, 60 Mass. (6 Cush.) 225; Whitney *v.* Heywood, 60 Mass. (6 Cush.) 82; Dorr *v.* Fisher, 55 Mass. (1 Cush.) 273; Coolidge *v.* Brigham, 42 Mass. (1 Metc.) 551; Perley *v.* Balch, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; Bucknam *v.* Goddard, 38 Mass. (21 Pick.) 71; Emerson *v.* Brigham, 10 Mass. 202; s. c. 6 Am. Dec. 109; Hunt *v.* Sackett, 31 Mich. 18; Davis *v.* Smith, 7 Minn. 414, 418; Storm *v.* Smith, 43 Miss. 497; Long *v.* Hickingbottom, 28 Miss. 772; s. c. 64 Am. Dec. 118; Lile *v.* Hopkins, 20 Miss. (12 Smed. & M.) 299; s. c. 51 Am. Dec. 115; Matheny *v.* Mason, 73 Mo. 677, 682; s. c. 39 Am. Rep. 541; Donaldson *v.* Newman, 9 Mo. App. 235; Dryden *v.* Kellogg, 2 Mo. App. 87; Sargent *v.* Currier, 49 N. H. 310; s. c. 6 Am. Rep. 524; Wood *v.* Sheldon, 42 N. J. L. (13 Vr.) 421; s. c. 36 Am. Dec. 523; Wanser *v.* Messler, 29 N. J. L. (5 Dutch.) 256; McGriffin *v.* Baird, 62 N. Y. 329; McKnight *v.* Devlin, 52 N. Y. 401; s. c. 11 Am. Rep. 715; Burt *v.* Dewey, 40 N. Y.

possession of a third party at the time of the sale, there is no such warranty, and the vendee buys at his peril.[5] And in the note of the learned editor of the last edition of [*632] Story *on Sales,[6] it is said that "this distinction has now become so deeply rooted in the decisions of Courts, in the *dicta* of judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated." And Kent sustains this view of the law of the United States.[7]

§ 849. By the civil law, the warranty against eviction exists in all cases. The law 3 ff. de act. empt. gives the maxim in the words of Pomponius as follows: "*Datio possessionis quæ a venditore fieri debet talis est ut si quis eam possessionem jure avocaverit, tradita possessio non intelligatur.*"

Pothier gives the rule in these words: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale, to warrant and

283; Hoe *v.* Sanborn, 21 N. Y. 556; s. c. 78 Am. Dec. 163; McCoy *v.* Archer, 3 Barb. (N. Y.) 323; Rew *v.* Barber, 3 Cow. (N. Y.) 272; s. c. *sub nom.* Rew *v.* Barker, 2 Cow. (N. Y.) 408; 14 Am. Dec. 515; Swett *v.* Colgate, 20 Johns. (N. Y.) 196; s. c. 11 Am. Dec. 266; Vibbard *v.* Johnson, 19 Johns. (N. Y.) 78; Heermance *v.* Vernoy, 6 Johns. (N. Y.) 5; Defreeze *v.* Trumper, 1 Johns. (N. Y.) 274; s. c. 3 Am. Dec. 329; Case *v.* Hall, 24 Wend. (N. Y.) 102; s. c. 35 Am. Dec. 605; Inge *v.* Bond, 3 Hawks. (N. C.) 101; Darst *v.* Brockway, 11 Ohio, 462; Krumbhaar *v.* Birch, 83 Pa. St. 426; Whitaker *v.* Eastwick, 75 Pa. St. 229; Flynn *v.* Allen, 57 Pa. St. 482; Swanzey *v.* Parker, 50 Pa. St. 441; McCabe *v.* Morehead, 1 Watts & S. (Pa.) 513; Colcock *v.* Goode, 3 McC. (S. C.) 513; Word *v.* Cavin, 1 Head (Tenn.) 507; Gookin *v.* Graham, 5 Humph. (Tenn.) 480; Trigg *v.* Faris, 5 Humph. (Tenn.) 343; Boyd *v.* Anderson, 1 Overt. (Tenn.) 438; s. c. 3 Am. Dec. 762. Scott *v.* Hix, 2 Sneed (Tenn.) 192; s. c. 62 Am. Dec. 458; Gilchrist *v.* Hilliard, 53 Vt. 592; s. c. 38 Am. Rep. 706; Patee *v.* Pelton, 48 Vt. 182; Sherman *v.* Champlain Trans. Co., 31 Vt. 162; Thrall *v.* Newell, 19 Vt. 202; s. c. 47 Am. Dec. 682; Bank of St. Albans *v.* Farmers', &c., Bank, 10 Vt. 145; s. c. 33 Am. Dec. 188; Byrnside *v.* Burdett, 15 W. Va. 718; Croninger *v.* Paige, 48 Wis. 229; Costigan *v.* Hawkins, 22 Wis. 74; Lane *v.* Romer, 2 Chand. (Wis.) 61; Utley *v.* Donaldson, 94 U. S. (4 Otto) 29, 45; bk. 24, L. ed. 54; Boyd *v.* Bopst, 2 U. S. (2 Dall.) 91; bk. 1, L. ed. 302.

[5] Huntingdon *v.* Hall, 36 Me. 501; McCoy *v.* Archer, 3 Barb. (N. Y.) 323; Dresser *v.* Ainsworth, 9 Barb. (N. Y.) 619; Edick *v.* Crim, 10 Barb. (N. Y.) 445; Long *v.* Hickingbottom, 28 Miss. 772.

[6] § 367, p. 436, 4th ed.

[7] Vol. 2, p. 478, 12th ed.

defend the buyer against eviction from that possession. This obligation is called warranty."[1]

§ 850. In the French law, so deeply implanted is the obligation of warranty against eviction, that it exists so far as to compel return of the price, even though it has been expressly agreed that there shall be no warranty. The articles of the Civil Code are as follows: — 1625. The warranty due by the vendor to the purchaser has two objects: *first*, the peaceful possession of the thing sold: *secondly*, the concealed defects or redhibitory vices of the thing.

1626. Although at the time of sale there may have been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (charges prétendues sur cet objet), and not mentioned at the time of the sale.

1627. The parties may by special convention, add to this legal obligation, or diminish its effect, and may even stipulate that the vendor shall be liable to no warranty.

1628. Although it be stipulated that the vendor shall be * liable to no warranty, he remains bound to [*633] a warranty against his own act: any contrary agreement is void.

1629. In the same case, of a stipulation of no warranty, the vendor remains bound to return the price to the purchaser in the event of eviction, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril.

This subject, however, is more fully treated *ante*, Book II. Ch. 7, on the Nature and Effect of a Sale by the Civil Law.

Section III. — IMPLIED WARRANTY OF QUALITY.

§ 851. The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty,

[1] Vente, 2 Part, Ch. 1, Sec. 2, No. 82.

or unless a warranty be implied from the nature and circumstances of the sale.

A representation anterior to the sale, and forming no part of the contract when made, is, as already shown (*ante*, p. 605), no warranty; but a representation, even though only an inducement to the contract, and forming no part of it, will, if false to the knowledge of the vendor, be a ground for rescinding the contract as having been effected through fraud.

So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied* warranty of quality.[1]

§ 852. But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given, as is shown by the authorities now to be reviewed. If the specific existing chattel, however, is sold by description, and does not correspond with that [*634] description, * the vendor fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent, as explained *ante*, p. 595. This was strongly exemplified in Josling *v.* Kingsford,[1] where the vendor was held bound, as on a condition precedent, to deliver "oxalic acid," although he had exhibited the bulk of the article sold to the buyer, and written to him that he would not warrant its strength, in order to "avoid any unpleasant differences," and suggested to him to make a fresh examination if he thought proper.

§ 853. On the other hand, a severe application of the rule of *caveat emptor*, where the thing sold answers the description, together with a lucid statement of the law, and the dis-

[1] Parkinson *v.* Lee, 2 East, 314; Chanter *v.* Hopkins, 4 M. & W. 64. See, also, cases cited *ante*, p. 606, sec. 215, note 2.

[1] 13 C. B. N. S. 447; 32 L. J. C. P. 94.

tinction between warranty of quality and description of the thing, may be found in the decision of the Exchequer of Pleas, delivered by Parke B. in Barr *v.* Gibson.[1] The defendant sold to the plaintiff, on the 21st of October, 1836, "all that ship or vessel, called the Sarah, of Newcastle, &c.," covenanting in the deed-poll by which the conveyance was made, that he "had good right, full power, and lawful authority," to sell. It turned out that the ship, which was on a distant voyage, had got ashore on the coast of Prince of Wales's Island on the 13th of October, eight days *before* the sale; on a survey, on the 14th, it was recommended that she should be sold as she lay, because, under the circumstances of the winter coming on, and the want of facilities and assistance, the ship could not be got off so as to be repaired there: but if in England she might easily have been got off. At the sale, on the 24th of October, the hull produced only 10*l.* Patteson J. left it to the jury to say whether at the time of the sale to the plaintiff, the vessel was or was not a *ship*, or a mere bundle of timber, and the jury found that she was *not* a ship. On a rule to set aside the verdict, which was thereupon given for the plaintiff, Parke B. said (at p. 399): "The question is not what passed by the deed, but what is the meaning of the covenant contained in it."

§ 854. "In the bargain and sale of an existing chattel, by which * the property passes, the law does [*635] not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship *does not imply a contract that it is then seaworthy, or in a serviceable condition;* and the express covenant that the defendant has full power to bargain and sell, does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, *does imply a contract that the article sold is of that description;* for which the cases of Bridge *v.* Wain,[1] and Shepherd *v.* Kain,[2] and other cases, are authorities; and therefore the sale in this case of *a ship, im-*

[1] 3 M. & W. 390.
[1] 1 Stark, 504.
[2] 5 B. & Ald. 240.

plies a contract, that the subject of the transfer did exist in the character of a ship; and the *express covenant* that the defendant had power to make the bargain and sale of the subject before mentioned must operate as an *express covenant to the same effect.* That covenant, therefore, was broken if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, *although the ship was damaged, unseaworthy, or incapable of being beneficially employed.* The contract is for the sale of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so, it might happen that the same identical thing in the same state of structure, might be a ship in one place, and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect. . . . We are of opinion upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. . . . Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was a *ship*, though at the time incapable of being, from the want of local incon-
[*636] veniences *and facilities, beneficially employed as such." New trial ordered.[3]

§ 855. Of implied warranties in sales of chattels. there are several recognized by law.

The first and most general is, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. The rule is so universally taken for granted that it is hardly necessary to give direct authority for it. The cases are very numerous in which it has been applied as a matter of course. In Parker *v.* Palmer,[1] Abbott

[3] See cases cited *ante*, pp. 595 *et seq.* [1] 4 B. & Ald. 387.

C. J. stated it in this language: "The words, per sample, introduced into this contract, may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale." And in Parkinson *v.* Lee,[2] Lawrence J., in a sale of hops by sample, said, that the contract was "No more than that the bulk should agree with the sample," and the latter is the phrase used by the judges, *passim*.[3]

[2] 2 East, 314. See *per* Montague Smith J. in Azémar *v.* Casella L. R. 2 C. P. 446; and *per* Fitzgerald J. in McMullen *v.* Helberg, 4 L. R. Ir. 94, at p. 100.

[3] *American Authorities.* — Magee *v.* Bellingsley, 3 Ala. 679; Hughes *v.* Bray, 60 Cal. 284; Moore *v.* McKinlay, 5 Cal. 471; Merriman *v.* Chapman, 32 Conn. 146; Wilcox *v.* Howard, 51 Ga. 298; Webster *v.* Granger, 78 Ill. 230; Hubbard *v.* George, 49 Ill. 275; Hanson *v.* Busse, 45 Ill. 499; Shields *v.* Reibe, 9 Ill. App. 598; Gatling *v.* Newell, 9 Ind. 572; Myer *v.* Wheeler, 65 Iowa, 390; Home Lightning-rod Co. *v.* Neff, 60 Iowa, 138; Gill *v.* Kaufman, 16 Kans. 571; Hall *v.* Plassan, 19 La. An. 11; Gunther *v.* Atwell, 19 Md. 157; Schnitzer *v.* Oriental Print Works, 114 Mass. 123; Lothrop *v.* Otis, 89 Mass. (7 Allen) 435; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52, 58; Henshaw *v.* Robins, 50 Mass. (9 Metc.) 86, 87; s. c. 43 Am. Dec. 367; Williams *v.* Spafford, 25 Mass. (8 Pick.) 250; Hastings *v.* Lovering, 19 Mass. (2 Pick.) 219; s. c. 13 Am. Dec. 420; Bradford *v.* Manly, 13 Mass. 139; s. c. 7 Am. Dec. 122; Day *v.* Raquet, 14 Minn. 273; Graff *v.* Foster, 67 Mo. 512, 521; Hollender *v.* Koetter, 20 Mo. App. 79; Voss *v.* McGuire, 18 Mo. App. 477; Boothby *v.* Plaisted, 51 N. H. 436; s. c. 12 Am. Rep. 140; Morrill *v.* Wallace, 9 N. H. 116; Osborn *v.* Gantz, 60 N. Y. 540; Leonard *v.* Fowler, 44 N. Y. 289; Foot *v.* Bentley, 44 N. Y. 166; s. c. 4 Am. Rep. 652; Beirne *v.* Dord, 5 N. Y. 95; s. c. 55 Am. Dec. 321; Hargous *v.* Stone, 5 N. Y. 73; Brower *v.* Lewis, 19 Barb. (N. Y.) 574; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Oneida Manuf. Soc. *v.* Lawrence, 4 Cow. (N. Y.) 440; Moses *v.* Mead, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; Messenger *v.* Pratt, 3 Lans. (N. Y.) 234; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; s. c. 27 Am. Dec. 158; Beebee *v.* Robert, 12 Wend. (N. Y.) 413; s. c. 27 Am. Dec. 132; Gallagher *v.* Waring, 9 Wend. (N. Y.) 20; Dayton *v.* Hooglund, 39 Ohio St. 671; West. Rep. M. Co. *v.* Jones, 108 Pa. St. 55; Selser *v.* Roberts, 105 Pa. St. 242; Boyd *v.* Wilson, 83 Pa. St. 319; s. c. 24 Am. Rep. 176; Fraley *v.* Bispham, 10 Pa. St. 320; Jennings *v.* Gratz, 3 Rawle (Pa.) 168; s. c. 23 Am. Dec. 111; Borrekins *v.* Bevan, 3 Rawle (Pa.) 23; s. c. 23 Am. Dec. 85; Rose *v.* Beatie, 2 Nott & McC. (S. C.) 538; Whittaker *v.* Hueske, 29 Tex. 355; Brantley *v.* Thomas, 22 Tex. 270; s. c. 73 Am. Dec. 264; Merriam *v.* Field, 24 Wis. 640; Getty *v.* Rountree, 2 Chand. (Wis.) 28; s. c. 54 Am. Dec. 138; Schuchardt *v.* Allens, 68 U. S. (1 Wall.) 359; bk. 17, L. ed. 642; Ramsdell *v.* United States, 2 Ct. of Cl. 508; Reynolds *v.* Palmer, 21 Fed. Rep. 433.

In Pennsylvania the rule seems to be somewhat different from that which prevails in England and throughout

In a sale of goods by sample, it is an implied condition, as shown *ante*, p. 590, that the buyer shall have a fair opportunity of comparing the bulk with the sample; and an improper refusal by the vendor to allow this, will justify the buyer in rejecting the contract.[4]

§ 856. It must not be assumed that in all cases where a sample is exhibited, the sale is a sale "by example." The vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk;[1] or the buyer may decline to trust to the sample and the implied warranty, and require an express warranty, in which case there is no implied warranty, for "*expressum facit cessare tacitum.*"[2]

Thus, in Tye *v.* Fynmore,[3] where the vendor exhibited a sample of "sassafras wood," and the buyer inspected [*637] it, * and had skill in the article, and the vendor then warranted the goods to be "fair merchantable sassa-

the rest of the states. A sale of chattels by the production of a sample, but without fraud or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality. The sample under such circumstances, pure and simple, becomes a guaranty only after the article to be delivered shall follow its kind and be simply merchantable. Boyd *v.* Wilson, 83 Pa. St. 319, 324; s. c. 16 Am. Rep. 176, and cases there cited.

[4] Lorymer *v.* Smith, 1 B. & C. 1.

[1] *Sale by sample.* — *What constitutes.* — The mere exhibition of samples at the time of sale is not of itself evidence of a sale by sample; it is for the jury to say under all the circumstances of the case whether the sale was intended by the parties as a sale by sample. Waring *v.* Mason, 18 Wend. (N. Y.) 425. See, also, Gunther *v.* Atwell, 19 Md. 157; Ames *v.* Jones, 77 N. Y. 614; Cousinery *v.* Pearsall, 40 N. Y. Super. Ct. (8 J. & S.) 113; Beirne *v.* Dord, 5 N. Y. 95, 98; s. c. 55 Am. Dec. 321; Hargous *v.* Stone, 5 N. Y. 73, 91; Selser *v* Roberts, 105 Pa. St. 242; Jones *v.* Wasson, 3 Baxt. (Tenn.) 211; Proctor *v.* Spratley, 78 Va. 254. It must appear that the parties contracted solely in reference to the sample exhibited. Bay *v.* Ragnet, 14 Minn. 273; Graff *v.* Foster, 67 Mo. 512; Beirne *v.* Dord, 5 N. Y. 95, 98; s. c. 55 Am. Dec. 321; Hargous *v.* Stone, 5 N. Y. 73, 91; Salisbury *v.* Stainer, 19 Wend. (N. Y.) 159; Proctor *v.* Spratley, 78 Va. 254; Borthwick *v.* Young, 12 Ont. App. 671. Where the seller drew bunches of tobacco out of some of the cases and said he would warrant it to be like them all through, and the buyer thereupon concluded a purchase, this was held to be sufficient to establish a sale by sample. Atwater *v.* Clancy, 107 Mass. 369. See, also, Williams *v.* Spafford, 25 Mass. (8 Pick.) 250; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374.

[2] And see *per* May C. J. in McMullen *v.* Helberg, *ubi supra*, at p. 121.

[3] 3 Camp. 462.

fras wood," it was held not to be a sale by sample with implied warranty, but a sale with express warranty.

§ 857. So in Gardner *v.* Gray,[1] the sale was of waste silk, and a sample was shown, but Lord Ellenborough said it was not a sale "by sample." "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity."

So in Powell *v.* Horton,[2] where a sample of the goods sold was exhibited, but the written contract was construed to contain a warranty that they should be "Scott and Co.'s mess pork," it was held not to be a sale "by sample," but a sale with express warranty.

So also have we seen in the very stringent case of Josling *v.* Kingsford,[3] where the buyer not only inspected the samples, but the bulk; and the vendor said he would not warrant the strength of the "oxalic acid" sold; yet the purchaser was held not bound to accept the article, because by adulteration with sulphate of magnesia, a defect not visible to the naked eye, the article had lost the distinctive character required by the terms of the written contract, to wit, that of being "oxalic acid."

§ 858. So, on the other hand, where the sold note in writing was silent as to quality, the buyer was not permitted by Lord Ellenborough,[1] to show that a sample had been exhibited to him before he bought, because it was not a sale "by sample."

§ 859. In Carter *v.* Crick,[1] the sale was by sample of an article which the vendor called seed barley, but said he did not know what it really was, and the bulk corresponded with the sample. Held, that the buyer took at his own risk, whether it was seed barley or some other kind of barley, the vendor's *warranty being confined to a [*638] correspondence between the bulk and the sample.

[1] 4 Camp. 144.
[2] 2 Bing. N. C. 668.
[3] 13 C. B. N. S. 447; 32 L. J. C. P. 94; and see Mody *v.* Gregson, *post*, p. 658.
[1] Meyer *v.* Everth, 4 Camp. 22.
[1] 4 H. & N. 412; 28 L. J. Ex. 238.

In Russell *v.* Nicolopulo,[2] there was a written sale in London of a cargo of wheat then lying in Queenstown, which closed with these words: "The above cargo is accepted on the report and samples of Messrs. Scott and Co., of Queenstown." Mellish, in arguing a demurrer to the declaration, insisted that this clause only warranted that the report of Scott and Co. was a genuine report, and the samples the genuine samples taken by them, but was not a warranty either that the statements in the report were true, or that the cargo was equal to the samples. But all the judges held that the true meaning of the clause was that the samples shown to the buyer were really samples drawn from the cargo, as represented in the report of Scott and Co., and that the bulk corresponded with the samples so drawn.

§ 860. [And in a sale of guano, where the buyer had asked for a "guaranteed analysis" to accompany the sample, and a printed analysis signed by the vendor had been sent with the sample, the vendor was held to have warranted not only that the bulk was equal to sample, but that the analysis, at the time it was made, was a fair analysis of the bulk, out of which the guano was supplied.[1]

§ 861. A curious mistake in a sale by sample occurred in the case of Megaw *v.* Molloy,[1] decided by the Court of Appeal in Ireland in 1878. A cornbroker, by the plaintiff's instructions, put up a quantity of maize for sale by auction. Under the conditions of sale, the maize was to be "sold as it now lies in store (sellers being irresponsible)." The advertisement of the sale also announced that purchasers were required to examine bulk for themselves, as sellers would accept no responsibility. In the auction-room samples of the maize to be sold were handed about in bags labelled "Ex Emma Peasant," the name of the ship whose [*639] cargo *the plaintiff had directed to be sold. The defendant, who had not inspected the bulk, became

[2] 8 C. B. N. S. 362.

[1] Towerson *v.* Aspatria Agricultural Society, 27 L. T. N. S. 276, Ir. Ex. Ch. reversing Court of Exchequer on the question whether there was any warranty of the bulk being equal to the analysis.

[1] 2 L. R. Ir. 530, C. A.; and see *ante*, p. 59, on mutual mistake as to the subject-matter of the contract.

the purchaser, but afterwards refused to accept delivery of the cargo on account of its inferior quality. It was proved that the sample shown at the sale had been taken by mistake, not from the cargo of the "Emma Peasant," but from that of the "Jessie Parker," which was of superior quality. The plaintiff resold the maize, "Ex Emma Peasant," and sued the defendant for the loss on the resale. Held, that as the plaintiff intended to sell one bulk, and the defendant to buy another, there was no contract between them; and by Christian L. J. that assuming a contract to have existed, it must be a contract for the purchase of that cargo of which a sample had been shown at the sale.]

§ 862. A very full discussion of the law as to sales by samples is found in Heilbutt *v.* Hickson,[1] decided on the 5th of July, 1872; and a further authority on the subject is Couston *v.* Chapman, *infra*, decided in the House of Lords on the 19th of the same month.

In Heilbutt *v.* Hickson, the plaintiffs, merchants in London, on the 30th of December, 1870, contracted in behalf of correspondents at Lille, in France, with the defendants, *manufacturers* of shoes, for the purchase of 30,000 pairs of back army shoes, *as per sample*, at four shillings and eightpence per pair, less 2½ per cent. discount, to be delivered free at a wharf in weekly quantities; *to be inspected and quality approved before shipment;* payment in *cash on each delivery.* Both parties knew that the shoes were required for the French army for a winter campaign. A sample shoe was deposited.

The plaintiffs appointed a skilled person to inspect the shoes on their behalf. A number were rejected, but a large number were inspected and approved. On the inspection, the soles were not opened, and it is not usual to open them; but without opening, it could not be known of what substance the fillings of the soles had been made.

Before the first delivery, it had been publicly reported *that a contractor in France had been impris- [*640] oned for using paper as fillings for the soles, and the

[1] L. R. 7 C. P. 438.

plaintiffs' agent at the wharf asked that a shoe might be cut open to see if there was any paper in the sole; the defendants' foreman assented, saying that the plaintiffs might cut open as many as they pleased, and would not find paper in any of them. One shoe was accordingly cut open, and no paper was found in it. The plaintiffs' evidence also went to show that many assurances had been given to them by the defendants that there was no paper in the soles of the shoes. The plaintiffs accordingly accepted and paid for 4950 pairs, which were shipped to destination at Lille, where they arrived on the 10th of February.

In the meantime the plaintiffs had sent in advance, to Lille, one pair, which was there cut open and found to contain pieces of pasteboard as fillings of the soles. This was communicated to the defendants on the 9th of February, when they asserted that it must be a mistake, and several more pairs were opened and found not to contain paper. The *sample shoe* was opened at the same time, *and it did contain paper in the sole.* Thereupon several of the cut pairs which did *not* contain paper fillings, and the sample shoe which did, were taken to Lille by the plaintiffs' agent (the plaintiffs having in the meantime declined to receive further deliveries), and after communication with the plaintiffs' correspondent at Lille, the agent, on the 10th of February, telegraphed to the plaintiffs, "Pay for and ship all of Hickson's goods ready at wharf and warehouse." On receipt of this telegram the plaintiffs accepted and paid for a further quantity, which had been inspected, approved and delivered at the wharf, but which they had previously declined to accept.

The defendants knew that the shoes had to be passed by the French authorities, and that the sample shoe and the first pair sent to Lille had been found to contain paper; and, after some discussion, they, on the 13th of February, signed a letter, dated on the 11th of February, addressed to the plaintiffs, agreeing to take back any shoes that [*641] might * be rejected by the French authorities in consequence of containing paper, it being understood that they could not take back any large number if paper should be found in only a few pairs.

Upon this letter being given to the plaintiffs, they accepted and paid for further deliveries, amounting to over 12,000 pairs.

On the 26th of February, information was received that some of the shoes had been found to contain paper; and on the 28th, when the entire quantity was tendered to the French authorities, some were opened and found to contain paper, and the whole were rejected. They were sent to a public warehouse, where they remained deposited when the action was tried.

From subsequent examination of a number of the shoes, it appeared that a large proportion — in one instance, seventeen out of eighteen pairs examined — and in another instance, more than half of 100 pairs taken from different cases — were found to contain paper, canvas shavings, or asphalte roofing-felt in the soles; and other similar examinations showed the same result.

The jury found that the shoes delivered and those ready for delivery *were not equal to sample*, and that the defects *could not have been discovered by any inspection which ought reasonably to have been made.*

The damages were assessed under the direction of Brett J., and were composed, 1st, of the *whole costs* of the shoes, with freight, charges, and insurance, till arrival at Lille; 2dly, of expenses for cartage and warehouse at Lille; 3dly, of loss of profit on the quantity delivered; and 4thly, of loss of profit on the quantity remaining to be delivered. And a verdict was entered for the whole amounting to 4,214*l.* 5*s.*, leave being reserved to the defendants to move to reduce the damages by any sum that the Court might think right.

It will be seen by this statement that the principal questions involved, turned upon the assessment of damages, and the case as to this point will again be referred to in the * concluding chapter of this treatise; but it is [*642] convenient to state the facts here fully, in order to avoid repetition, and then to extract from the opinions of the judges the principles applicable to the subject now under consideration.

§ 863. Bovill C. J. delivered the judgment of the Court, and upon the point in relation to the sample shoe, said: "It was contended for the defendants that as the sample shoe contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect, the damages, and especially the loss of profits, did not result from the breach of warranty in the shoes not being equal to the sample. But the fact of the improper fillings in the sole of the sample shoe *was a hidden defect*, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes, and the letter of the 11th of February was directed expressly to the point of paper being in the shoes, and in our opinion gave the right to reject the shoes on that ground, and entitles the plaintiffs to recover the loss of profit which would have accrued if the shoes had been accepted by the French authorities."

Semble, therefore, that if a *manufacturer* agrees to furnish goods according to sample, the sample is *to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties.*[1]

§ 864. The judgment of the Court was put by the Chief Justice on the interpretation of the whole contract as originally made and as subsequently modified by the letter of the 11th of February; but Brett J., while agreeing in the judgment, expressed a decided opinion that the rights of the plaintiffs would have been the same under the original bargain, independently of the letter, and he made the following important observations, which seem to be, in some points, justified by the decision of the House of Lords, in Couston *v.* Chapman, *infra*, and by Mody *v.* Gregson, *infra*

[1] *Where the seller is not also the manufacturer* the rule is different. "If there is a defect in the bulk and in the sample itself as a part thereof, and this defect is unknown and cannot be discovered by examination, there is no implied warranty against this defect, and the seller is not responsible." Story on Sales, § 376; citing Parkinson *v.* Lee, 2 East, 313; quoted with approval in Dickinson *v.* Gay, 89 Mass. (7 Allen) 29, 31; see, also, Bradford *v.* Manly, 13 Mass. 139, 145; s. c. 7 Am. Dec. 124; Bayard *v.* Malcolm, 2 Johns. (N. Y.) 550; s. c. 3 Am. Dec. 450.

(not cited in Heilbutt *v.* Hickson). "Besides the incidents attaching to a contract of sale by sample, which have been enumerated by my lord, I think there is also the following, * that such contract *always contains an im-* [*643] *plied term that the goods may, under certain circumstances, be returned;* that such term necessarily contains certain varying or alternative applications, and amongst them the following, — that *if the time of inspection, as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them* THEN AND THERE on the hands of the seller.[1] . . . The defect in the shoes was the consequence of acts of the defendants' servants, the defendants being the manufacturers of the goods, and the defect though known to the defendants' servants, was a secret defect not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London — an inefficacy caused by this kind of fault, viz., a secret defect of manufacture which the defendants' servants committed — the apparent inspection in London could be of no more practical effect, than no inspection at all. If it could be of no practical effect, there could not be any effective, and therefore any real practical inspection until an inspection at Lille. . . . The *apparent* inspection in London being then, *by the act of the defendants' servants*, no inspection at all, and consequently a *real* inspection at Lille being, by the act of the defendants' servants, the first possibly effective inspection, it seems to me that such inspection was by the acts of persons for whose acts the defendants are responsible, substituted for the first inspection stipulated by the contract, and that the rights of the plaintiffs accrued upon that inspection as if it were the first, and therefore they were entitled to throw the shoes upon the hands of the defendants *at Lille.*

[1] Affirmed and restated by Brett J. in his judgment in Grimoldby *v.* Wells, L. R. 10 C. P. at p. 396, vide *post*, p. 645.

§ 865. In Couston *v.* Chapman,[1] the respondent Chapman, who was plaintiff in the Court below, sold to Couston, at public auction, various lots of wine, *as per sample*, on [*644] the 19th of * March, 1870, and the delivery was completed on the 11th of April. The purchasers had the wine examined, and on the 31st of May wrote to say that they were "agreeable to pay for the rest of the goods," but objected to two lots, for which they would pay "when supplied according to the sample"; and they added that they "considered themselves entitled to the difference between the price of purchase and the price at which they could be bought in the market." The vendors rejected this proposal. Further discussion ensued, but nothing was done till the 13th of June, when action was brought. The purchaser had kept all the lots of wine, and had paid for none of them when the action was brought. He was of course condemned to pay for the whole, and it was stated in the various opinions given —

1st, that the sale of each lot was a separate contract.

2d, that although it was clearly proved that the quality of the two lots objected to was inferior to sample, the purchaser was bound to a "timeous rejection and return of the goods if unwilling to keep them."

3d, that if the vendor will not acquiesce in the rejection, the purchaser ought to place the goods in neutral custody, giving notice to the vendor.

4th, that the purchaser has no right to hold to the contract and ask for other goods than those which he rejects.

Lord Chelmsford said, "Reference has been made to the difference between the law of England and that of Scotland, as to the right of a purchaser to rescind a contract, and therefore I will say a few words on that subject.

"In England, if goods are sold by sample, and they are delivered *and accepted* by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods a sufficient time to enable him to give them

[1] L. R. 2 Sc. App. 250.

a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them.

"As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they * do not correspond with the sample, he [*645] has an absolute right to return them. . . .

"With regard to the wine not corresponding with the sample, there can be no doubt whatever that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to conform to the sample; and, therefore, upon the discovery of that fact, the appellants had a clear right *not* (as appeared to be contended in the course of the argument) *to retain the good wine and return the bad, but to rescind the contract for those lots altogether.* The contracts being entire *for each lot*, the only way in which the appellants could discharge themselves from their obligation was by returning or offering to return the whole of [each of] the lots."

His lordship then held that there had been improper delay, because the condition of the wine could have been discovered in the course of a week. And then went on to say, "Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is *his duty to make a distinct offer to return, or, in fact, to return the goods, by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that the purchaser rejects them, that he throws them back on the vendor's hands, and that the contract is rescinded.*"[2]

[2] *If the goods do not correspond to the sample,* the purchaser may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract; but if he keeps the goods and use them as his own after the time allowed for inspection, he cannot repudiate the purchase, though he may maintain an action for the breach of the warranty. Magee *v.* Billingsley, 3 Ala. 679; Gill *v.* Kaufman, 16 Kans. 571; Field *v.* Kinnear, 4 Kans. 476; Guerney *v.* Atlantic & Great Western R. R. Co., 58 N. Y. 358; Day *v.* Pool, 52 N. Y. 416; s. c. 11 Am. Rep. 719; Marshuetz *v.* McGreevy, 23 Hun (N. Y.) 408; Brantley *v.* Thomas, 22 Tex. 270; s. c. 73 Am. Dec. 264; Pennock *v.* Stygles, 54 Vt. 226. In Smith *v.* Love, 64 N. C. 439, it was laid down that the general rule which requires the buyer to return, or offer to

§ 866. [In Grimoldby *v.* Wells,[1] the Court of Common Pleas laid down the rule that the buyer is under no obligation either to return or to offer to return goods to the seller, or to place them in neutral custody when, upon inspection, the bulk proves to be inferior to sample; it is sufficient for him to give clear notice to the seller that he rejects the goods, and that they are at the seller's risk, and it then rests with the seller to remove them. The Court explained Lord Chelmsford's meaning in the above-cited passage from his judgment in Couston *v.* Chapman, to be, not that [*646] the buyer was bound * to return or to offer to return the goods, but that he might have effectually declared his intention of rejecting them in either of those ways.

Brett J. adhered to the opinion which he had before expressed in Heilbutt *v.* Hickson (*ante*, p. 643). "The defendant has a right to inspect the goods, and it seems to me that where the sale is by sample, and inspection is to be at some place after delivery, the true proposition is, that if the purchaser on such inspection finds the goods are, in fact, not equal to sample, he has a right to reject them then and there, and is not bound to do more than reject them. There are several modes in which he may reject them. . . . He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract, and they are at the vendor's risk. No particular form is essential: it is sufficient if he does any unequivocal act showing that he rejects them."]

As to the effect of a sale, per sample, in modifying the implied warranty that goods are merchantable, the case of Mody *v.* Gregson, *infra*, p. 658, may be consulted.

return, the article in a reasonable time after the defects have been discovered, does not apply if the article has been necessarily destroyed in making the discovery, or if it be wholly without mercantile value. Thus it has been said that where wheat was sold by sample to be delivered at a future time, and the buyer upon delivery of the first load inspected it, expressed himself satisfied, he was not prevented from rejecting the remainder of the wheat as not being equal to the sample. Hubbard *v.* George, 49 Ill. 275.

[1] L. R. 10 C. P. 391, and see the dicta of Martin and Bramwell BB., in Lucy *v.* Monflet, 5 H. & N. 223, at p. 233.

§ 867. In the case of Barnard, appellant *v.* Kellogg, respondent,[1] decided by the Supreme Court of the United States, in December, 1870, the facts were these. The appellant, a commission merchant, residing in Boston, placed a lot of foreign wool received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of brokers for sale, *with instructions not to sell unless the purchaser came to Boston and examined the wool for himself.* The brokers sent to the respondents, who resided in Hartford, in the state of Connecticut, at their request, samples of the wool, and the latter offered to purchase it at 50 cents a pound, all round, *if equal to the samples furnished*, and this offer was accepted, *provided that the respondents examined the wool on the succeeding Monday, and reported on that day whether or not they would take it.* The respondents agreed to this, and went to Boston *and examined four bales in the [*647] brokers' office, as fully as they desired, and were offered an opportunity to examine all the bales and to have them opened for inspection. They declined to do this, and concluded the purchase. Some months afterwards, on opening the bales, it was found that some were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, concealed by an outer covering of fleeces in good condition. The purchasers, therefore, demanded indemnity for the loss, and it was conceded that the vendor had acted in good faith and knew nothing of the false packing of the bales.

§ 868. On action brought by the respondents there were three counts: 1, upon sale by sample; 2, upon a promise, express or implied, that the bales should not be falsely packed; 3, upon a promise, express or implied, that the inside of the bales should not differ from the samples by reason of false packing. It was held in the lower Court that there was no express warranty that the bales not examined should correspond with those exhibited at the brokers' office, and that the law, under the circumstances, would not imply a warranty; but that, as matter of fact,

[1] 77 U. S. (10 Wall.) 383; bk. 19, L. ed. 987.

the examination of the interior of the bulk of bales of wool generally, put up like these, is not customary in the trade, and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons impracticable; that by the custom of merchants and dealers in foreign wools, in Boston and New York, the principal markets of the country where such wool is sold, there is an implied warranty against false packing, and that as matter of law the custom was binding on the parties to this contract; and judgment was given for the purchaser. But the judgment was reversed on appeal, the Supreme Court holding —

1st, That the sale was not by sample, as shown by the fact that the purchaser went to Boston to inspect the goods for himself, — which was unnecessary if the sale was by sample, — and had assented to the condition that the sale was only to take place after his own examination of the goods.

2d, That by the rule of the common law, where [*648] a *purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and *is neither the manufacturer nor grower* of the goods sold, the maxim of *caveat emptor* applies.

3d, That inasmuch as the law in such a case implies no warranty of quality, evidence of custom that such warranty is implied is inadmissible, and the custom or usage is invalid and void, especially so in the case before the Court, as the parties were shown to have had no knowledge of the custom, and could not have dealt with reference to it.

§ 869. Where an average sample was taken of a large quantity of goods (beans) contained in a number of packages, by drawing samples from many of the packages and then mixing them together, it was held by the Court of Appeals of the State of New York, in Leonard *v.* Fowler,[1] that the purchaser could not reject any of the packages on the ground that *they* were inferior to the average, nor recover for the difference in value on that ground; that the true test was whether, if the contents of all the packages were mixed

[1] 44 N. Y. 289.

together, the quality of the bulk so formed was equal to that of the average sample drawn.

[And, in Massachusetts, evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represented the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately.[2]]

§ 870. An implied warranty may result from the usage of a particular trade.[1] Thus, in Jones *v.* Bowden,[2] it was shown that in auction sales of certain drugs, as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. The Court held on this evidence that freedom from sea-damage was an implied warranty in the sale. And Heath J. in that case mentioned a Nisi Prius decision by himself, that where sheep were sold as stock, there * was an [*649] implied warranty that they were sound, proof having been given that such was the custom of the trade; and said that this ruling was not questioned when the case was argued before the King's Bench. The case referred to by the learned judge was probably Weall *v.* King,[3] decided on a different point.

§ 871. In a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the *condi-*

[2] Schnitzer *v.* Oriental Print Works, 114 Mass. 123.

[1] *Usage will not be given effect* to, where it would engraft on a contract of sale, a stipulation or obligation, which is different from or inconsistent with the rule of the common law on the same subject. Boardman *v.* Spooner, 95 Mass. (13 Allen) 353, 359; Dodd *v.* Farlow, 93 Mass. (11 Allen) 426, 429: Dickinson *v.* Gay, 89 Mass. (7 Allen) 31. See, also, Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52. In the last case it was held that if manufactured goods are sold by sample by a merchant who is not a manufacturer, and both the sample and the bulk of the goods contain a latent defect, a usage cannot be proved to render the seller liable therefor. But a warranty may be implied from the usage of a particular trade. Thus in Fatman *v.* Thompson, 2 Dis. (Ohio) 482, it was held that a warranty among tobacco dealers and of sales of tobacco of a certain description, that the article would remain sound and merchantable for the space of four months after the sale, might be implied from the trade custom. See, also, Atwater *v.* Clancy, 107 Mass. 369.

[2] 4 Taunt. 847.

[3] 12 East, 452.

tion precedent that the goods shall answer the description, an *implied warranty* that they shall be salable or merchantable. The rule was first clearly stated by Lord Ellenborough, in Gardner *v.* Gray,[1] where the defendant made a sale of twelve bags of "waste silk." The declaration contained a count alleging a sale by sample, but on this the proof failed. There were other counts, charging the promise to be that the silk should be of a good and merchantable quality. Lord Ellenborough said: "Under such circumstances the purchaser has a right to expect a *salable article*, answering the description in the contract. Without any particular warranty, this is an *implied term* in every such contract. *Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply.* He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be *salable in the market* under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

§ 872. This rule has been followed in a long series of decisions,[1] and the law on the subject was reviewed, and the cases

[1] 4 Camp. 144.

[1] Jones *v.* Bright, 5 Bing. 533; Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108; Brown *v.* Edgington, 2 M. & G. 279; Shepherd *v.* Pybus, 3 M. & G. 868; Camac *v.* Warriner, 1 C. B. 356; Stancliffe *v.* Clarke, 7 Ex. 439; Bigge *v.* Parkinson, 7 H. & N. 955; 31 L. J. Ex. 301, in Ex. Ch.

American authorities. — Wilcox *v.* Hall, 53 Ga. 635; Gammell *v.* Gunby, 52 Ga. 504; Weiger *v.* Gould, 86 Ill. 180; Kohl *v.* Lindley, 39 Ill. 195; Babcock *v.* Trice, 18 Ill. 420; s. c. 68 Am. Dec. 560; Misner *v.* Granger, 9 Ill. (4 Gilm.) 69; McClung *v.* Kelley, 21 Iowa, 508; Hanks *v.* McKee, 2 Litt. (Ky.) 227; s. c. 13 Am. Dec. 265; Hyatt *v.* Boyle, 5 Gill & J. (Md.) 110; s. c. 25 Am. Dec. 276; Swett *v.* Shumway, 102 Mass. 365, 369; French *v.* Vining, 102 Mass. 132; s. c. 3 Am. Rep. 440; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52, 59; Baker *v.* Frobisher, Quincy (Mass.) 4; Fitch *v.* Archibald, 29 N. J. L. (5 Dutch.) 160; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 518; Newberry *v.* Wall, 35 N. Y. Super. Ct. (3 J. & S.) 106; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Cleu *v.* McPherson, 1 Bosw. (N. Y.) 480; Oneida Manuf. Co. *v.* Lawrence, 4 Cow. (N. Y.) 444; Howard *v.* Hoey, 23 Wend. (N. Y.) 350; s. c. 35 Am. Dec. 572; Salisbury *v.* Stainer, 19 Wend. (N. Y.) 159; s. c. 32 Am. Dec. 317; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; s. c. 27 Am. Dec. 158; Beebe *v.* Robert, 12 Wend. (N. Y.) 413; s. c. 27 Am. Dec. 132; Gallagher *v.* Waring, 9 Wend. (N. Y.) 20; Cullen *v.* Bimm, 37 Ohio St. 236; Boyd *v.* Wilson, 83 Pa. St. 319; Edwards *v.* Hathaway, 1

classified, in Jones *v.* Just,[2] decided in the Queen's Bench, in February, 1868. The plaintiffs in that case *bought from the defendant certain "bales Manilla [*650] hemp," expected to arrive on ships named. The vessels arrived, and the hemp was delivered, damaged, so as to be unmerchantable, but being still properly described as Manilla hemp. *Held*, that the vendor was liable, and that in such a sale the goods must not only answer the description, but must be salable or merchantable under that description. Mellor J., in delivering the judgment, reviewed the whole of the decisions, giving this as the result: "The cases which bear on the subject do not appear to be in conflict when the circumstances of each are considered. They may, we think, be classified as follows:

§ 872*a*. *First.* — Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer. Parkinson *v.* Lee, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter: and if the result of the inspection be unsatisfactory, or if he distrusts his own judgments, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of a sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied. Emmerton *v.* Matthews, 7 H. & N. 586; 31 L. J. Ex. 139.

Phila. (Pa.) 547; Jennings *v.* Gratz, 3 Rawle (Pa.) 168; s. c. 23 Am. Dec. 111; Dodd *v.* Kirk, 2 W. N. C. (Pa.) 260; Brantley *v.* Thomas, 22 Tex. 270; s. c. 73 Am. Dec. 264; Morehouse *v.* Comstock, 42 Wis. 626; Merriam *v.* Field, 24 Wis. 640; Magee *v.* Street, 1 Allen (N. B.) 242.

[2] L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

§ 873. *Secondly.* — Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. Barr *v.* Gibson, 3 M. & W. 390.

§ 873*a*. *Thirdly.* — Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually [*651] supplied, there is no * warranty that it shall answer the particular purpose intended by the buyer. Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288.[1]

§ 873*b*. *Fourthly.* — Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. Brown *v.* Edging-

[1] *American authorities.* — Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Armstrong *v.* Bufford, 51 Ala. 410; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Miller *v.* Ferguson, 37 Ga. 558; Cogel *v.* Kinisley, 89 Ill. 598; Chicago Packing Co. *v.* Tilton, 87 Ill. 547; Kohl *v.* Lindley, 39 Ill. 196; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Percival *v.* Harger, 40 Iowa, 286; Scott *v.* Renick, 1 B. Mon. (Ky.) 63; s. c. 35 Am. Dec. 177; Walker *v.* Pue, 57 Md. 155, 167; Warren Glass Works *v.* Keystone Coal Co., 65 Md. 547; s. c. 22 Rep. 551; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52, 58; McGraw *v.* Fletcher, 35 Mich. 104; Brown *v.* Murphee, 31 Miss. 91; Deming *v.* Foster, 42 N. H. 165; Wolcott *v.* Mount, 36 N. J. L. (7 Vr.) 262, 267; s. c. 13 Am. Rep. 438; 38 N. J. L. (9 Vr.) 496; 20 Am. Rep. 425; White *v.* Miller, 71 N. Y. 118; s. c. 27 Am. Rep. 13; 78 N. Y. 393; 34 Am. Rep. 544; Hargous *v.* Stone, 5 N. Y. 73; Ballou *v.* Parsons, 11 Hun (N. Y.) 602; Wright *v.* Hart, 18 Wend. (N. Y.) 449; Rodgers *v.* Niles, 11 Ohio St. 48; s. c. 78 Am. Dec. 290; Shisler *v.* Baxter, 109 Pa. St. 443; s. c. 58 Am. Rep. 738; Palmer's Appeal, 96 Pa. St. 106; Carbon Iron Co. *v.* Groves, 68 Pa. St. 149; Matthews *v.* Hartson, 3 Pitts. (Pa.) 86; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83, 88; Pease *v.* Sabim, 38 Vt. 432; Gerst *v.* Jones, 32 Gratt. (Va.) 518; s. c. 34 Am. Rep. 773; Mason *v.* Chappell, 15 Gratt. (Va.) 572; Kreuger *v.* Blanck, L. R. 5 Ex. 179; Wilson *v.* Dunville, 4 L. R. Ir. 249; Chisholm *v.* Proudfoot, 15 Up. Can. Q. B. 203; Bunnel *v.* Whitlaw, 14 Up. Can. Q. B. 241; Simcoe Co. A. Society *v.* Wade, 12 Up. Can. Q. B. 614; Colton *v.* Good, 11 Up. Can. Q. B. 153; Grant *v.* Cadwell, 8 Up. Can. Q. B. 161; Morrow *v.* Waterous Engine Co., 2 Pugs. & B. (N. B.) 509.

ton, 2 M. & G. 279; Jones *v.* Bright, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own.[1]

§ 873*c*. *Fifthly.* — Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108.[1] And this doctrine has been held to

[1] See Randall *v.* Newson, 2 Q. B. D. 102, C. A., *post*, p. 653. See, also, Johnson *v.* Raylton, 7 Q. B. D. 438, C. A., *ante*, pp. 62 and 602, as to an implied warranty by a manufacturer that the goods are *his own make*.

American authorities. — Snow *v.* Schomacker Manuf. Co., 69 Ala. 111; s. c. 44 Am. Rep. 509; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Wilcox *v.* Owens, 64 Ga. 601; Wilcox *v.* Hall, 53 Ga. 601; Gammell *v.* Gunby, 52 Ga. 504; Beers *v.* Williams, 16 Ill. 69; Poland *v.* Miller, 95 Ind. 387; s. c. 48 Am. Rep. 730; Robinson Machine Works *v.* Chandler, 56 Ind. 575; Street *v.* Chapman, 29 Ind. 142; Brenton *v.* Davis, 8 Blackf. (Ind.) 317; s. c. 44 Am. Dec. 769; Lukens *v.* Freiund, 27 Kans. 664; s. c. 41 Am. Rep. 429; Craver *v.* Hornburg, 26 Kans. 94; Field *v.* Kinnear, 4 Kans. 476; Rice *v.* Forsyth, 41 Md. 389; Downing *v.* Dearborn, 77 Me. 457; Taylor *v.* Cole, 111 Mass. 363; French *v.* Vining, 102 Mass. 132; s. c. 3 Am. Rep. 440; Cunningham *v.* Hall, 86 Mass. (4 Allen) 270; Whitmore *v.* South Boston Ice Co., 84 Mass. (2 Allen) 52; Lamb *v.* Crafts, 53 Mass. (12 Metc.) 355; Brown *v.* Murphee, 31 Miss. 91; White *v.* Miller, 71 N. Y. 118, 131; s. c. 27 Am. Rep. 13; 78 N. Y. 393; 34 Am. Rep. 544; Van Wyck *v.* Allen, 69 N. Y. 61; s. c. 25 Am. Rep. 136; Dounce *v.* Dow, 64 N. Y. 411; Hoe *v.* Sanborn, 21 N. Y. 552; s. c. 78 Am. Dec. 163; Gautier *v.* Douglass Mfg. Co., 13 Hun (N. Y.) 514; Howard *v.* Hoey, 23 Wend. (N. Y.) 350; s. c. 35 Am. Dec. 572; Salisbury *v.* Stainer, 19 Wend. (N. Y.) 159; s. c. 32 Am. Dec. 437; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Beebee *v.* Roberts, 12 Wend. (N. Y.) 413; s. c. 27 Am. Dec. 132; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; s. c. 27 Am. Dec. 158; Byers *v.* Chapin, 28 Ohio St. 300, 306; Rodgers *v.* Niles, 11 Ohio St. 48, 54; s. c. 78 Am. Dec. 290; Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149; Hylton *v.* Symes, 7 Phila. (Pa.) 96; Matthews *v.* Harston, 3 Pittsb. L. J. (Pa.) 86; Robson *v.* Miller, 12 S. C. 586; s. c. 23 Am. Rep. 518; Overton *v.* Phelan, 2 Head (Tenn.). 445; Best *v.* Flint, 58 Vt. 543; Harris *v.* Waite, 51 Vt. 480; s. c. 31 Am. Rep. 694; Bragg *v.* Morrill, 49 Vt. 45; s. c. 24 Am. Rep. 102; Pease *v.* Sabin, 38 Vt. 432; Brown *v.* Sayles, 27 Vt. 227; Beals *v.* Olmstead, 24 Vt. 114; s. c. 58 Am. Dec. 150; Gerst *v.* Jones, 32 Gratt. (Va.) 518, 523; s. c. 34 Am. Rep. 773; Merrill *v.* Nightingale, 39 Wis. 247, 251; Leopold *v.* Van Kirk, 27 Wis. 152; Ketchum *v.* Wells, 19 Wis. 26; Fisk *v.* Tank, 12 Wis. 276; s. c. 78 Am. Dec. 737; Walton *v.* Cody, 1 Wis. 420; Cunningham *v.* Hall, 1 Sprague (U. S. D. C.) 404; Dawes *v.* Peebles, 6 Fed. Rep. 856; Wilson *v.* Danville, 4 L. R. Ir. 249; s. c. 2 L. R. Ir. 210; Bigelow *v.* Boxall, 38 Up. Can. Q. B. 452; Spurr *v.* Albert Mining Co., 2 Hannay (N. B.) 361.

[1] Wilcox *v.* Hall, 53 Ga. 635; Gam-

apply to the sale by the builder of an existing barge, which was afloat, but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. Shepherd *v.* Pybus, 3 M. & G. 868."

§ 874. In the same case the learned judge explained the *ratio decidendi* of Turner *v.* Mucklow,[1] decided by himself at Liverpool, in 1862, and in which his ruling had been affirmed by the Exchequer of Pleas. That was a sale of a boat-load of "spent madder," being refuse of madder roots that the vendors had used in dyeing goods, and which lay in a heap in their yard, *open to vendee's inspection* if he chose to avail himself of it. On this ground, and because the vendors did not manufacture it for sale, it was held that there was no implied warranty of quality.

[*652] § 875. * But in Bull *v.* Robinson,[1] it was held that this warranty only extended to the condition of the goods when they leave the vendor's possession, and that in the absence of express stipulation, he is not liable for any deterioration of quality rendering them unmerchantable at the place of delivery, if such deterioration result necessarily from the transit. The case was that of a sale of hoop iron, to be sent from Staffordshire, the place of making it, to Liverpool, where the buyer ordered it to be delivered in January and February. The iron was clean and bright when it left the vendor's premises to be forwarded by canal boats, vessels, and carts, and was rusted before it reached Liverpool, but not more so than was the necessary result of the transit. *Held*, that the vendor was not responsible if it thereby became unmerchantable when received in Liverpool.[2]

mell *v.* Gunby, 52 Ga. 504; Rice *v.* Forsyth, 41 Md. 389; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 52; Hoe *v.* Sanborn, 21 N. Y. 552; s. c. 78 Am. Dec. 163; Brown *v.* Sayles, 27 Vt. 227; Ketchum *v.* Wells, 19 Wis. 25.

[1] 8 Jur. N. S. 870; 6 L. T. N. S. 690.

[1] 10 Ex. 342; 24 L. J. Ex. 165.

[2] *Implied warranty of perishable goods.* — A warranty is implied that perishable goods sold, to be shipped to a distant market, are properly

§ 876. In Gower *v.* Van Dedalzen,[1] an attempt was made to extend this implied warranty to the packages or vessels in which the merchandise was contained. The dispute arose out of a sale of a cargo of oil, alleged in the declaration to be good merchantable Gallipoli oil, *the said cargo consisting of* 240 *casks*, and the defendant pleaded that the casks "were not well seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement." On special demurrer, held ill, Tindal C. J. saying, however, "I can conceive cases in which the state of the receptacle of the article sold might furnish a defence; as if it were a pipe of wine in bottles, with the cork of every bottle oozing: but in such case the plea would be that the wine was not in a merchantable state."[2]

§ 877. If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter* if the buyer purchases on his own judgment.[1]

This rule was stated by Tindal C. J. in Brown *v.* Edgington,[2] to be the result of the authorities as [*653] they then stood. Jones *v.* Bright,[3] had previously settled the rule that a manufacturer impliedly warranted an article sold by him to be fit for the purpose stated by the buyer to be intended; and Chanter *v.* Hopkins[4] had settled

packed and fit for shipment, but not that they will continue sound for any particular or definite period. Mann *v.* Everston, 32 Ind. 355; Leopold *v.* Van Kirk, 27 Wis. 152. But see, Cushman *v.* Holyoke, 34 Me. 289.

[1] 3 Bing. N. C. 717.

[1] Gammell *v.* Gunby, 52 Ga. 504; Rice *v.* Forsyth, 41 Md. 389; Gossler *v.* Eagle Sugar Ref., 103 Mass. 331; French *v.* Vining, 102 Mass. 135; s. c. 3 Am. Rep. 440; Whitmore *v.* South Boston Iron Co., 84 Mass. (2 Allen) 58; Dutton *v.* Gerrish, 63 Mass. (9 Cush.) 89; s. c. 55 Am. Dec. 45; Van Wyck *v.* Allen, 69 N. Y. 61; s. c. 25 Am. Rep. 136; Dounce *v.* Dow, 64 N. Y. 411; Bartlett *v.* Hoppock, 34 N. Y. 118; Hoe *v.* Sanborn, 21 N. Y. 553; s. c. 78 Am. Dec. 163; Brown *v.* Sayles, 27 Vt. 227; Stevens *v.* Smith, 21 Vt. 90; Baker *v.* Lyman, 38 Up. Can. Q. B. 498.

[2] 2 M. & G. 279.

[3] 5 Bing. 533.

[4] 4 M. & W. 399; followed by the Q. B. in Ollivant *v.* Bayley, 5 Q. B. 288.

that where the buyer had bought a specific article from the manufacturer on his own judgment, believing it would answer a particular purpose, he was bound to pay for it although disappointed in the intended use of it. In Brown *v.* Edgington,[5] the judges all intimated that there was no difference in the case of a sale by a manufacturer or any other vendor in such cases, but the point was not necessary to the decision of the controversy then before the Court, for the vendor had undertaken to have the goods manufactured for the purpose needed by the buyer.[6]

§ 878. [The warranty extends to latent defects unknown to and even undiscoverable by the vendor which render the article sold unfit for the purpose intended.[1] Thus, in Ran-

[5] 2 M. & G. 279. See, also, Laing *v.* Fidgeon, 6 Taunt. 108; Gray *v.* Cox, 4 B. & C. 108; Okell *v.* Smith, 1 Stark. 107; Gardiner *v.* Gray, 4 Camp. 144; Bluett *v.* Osborne, 1 Stark. 384.

[6] See authorities in preceding note. See, also, the observations of the judges on this general principle, in Readhead *v.* Midland Railway Co., L. R. 2 Q. B. 412; and the remarks of Brett J. A. thereon in Randall *v.* Newson, 2 Q. B. D. at pp. 110, 111; and the cases *ante*, pp. 389–391, as to the liability of the vendor, when manufacturer, to *third* persons for negligent and improper manufacture.

[1] *Responsibility for defects in articles manufactured for a special purpose.* — In Rodgers *v.* Niles, 11 Ohio St. 48; s. c. 78 Am. Dec. 290, the defendant had agreed to manufacture steam boilers for use in the plaintiff's mill. It was held that the defendants were responsible for defects, latent or otherwise, both in the materials used by them, and in the construction. See, also, Dayton *v.* Hooglund, 39 Ohio St. 671; Leopold *v.* Van Kirk, 27 Wis. 152. The Vermont Court in Bragg *v.* Morrill, 49 Vt. 45; s. c. 24 Am. Rep. 102, take a contrary view. In that case the defendant sold a shaft to the plaintiff at a fixed price per pound, and agreed to turn and make fit for use in the plaintiff's factory for an additional sum. It was held that the defendant was not liable for latent defects existing in the shaft when it was purchased by him. See Cunningham *v.* Hall, 86 Mass. (4 Allen) 268, 274. In Hoe *v.* Sanborn, 21 N. Y. 552; s. c. 78 Am. Dec. 163, it was held that the vendor was not liable for latent defects in the materials used in the manufacture of circular saws where it was not proved that he was aware of the defect. The Ohio Court in Rodgers *v.* Mills, 3 W. L. M. 262, distinguished Hoe *v.* Sanborn, *supra*, from the case. They said, "A reference to that case will show that whatever the terms of the contract before the court may have been, it has been pleaded as an executed sale, not as an executory contract. Under the pleadings, therefore, that case was properly regarded by the court as raising only a question as to the extent of the manufacturer's implied warranty, in a case of a executed sale of specific goods. Indeed, the court fully recognized the distinction between the case before

dall *v.* Newson,[2] the defendant, a carriage-builder, supplied a pole for the plaintiff's carriage, which broke when the plaintiff was driving, in consequence of which his horses were injured. The jury found that the pole was not reasonably fit and proper for the carriage, at the same time absolving the defendant from any negligence, but, acting under a misapprehension, they assessed the damages at the value of the pole only. *Held*, by the Court of Appeal, that the defendant must be taken to have warranted the pole to be reasonably fit for the particular purpose, and that it was immaterial that the fracture was caused by a latent defect in the wood which he could not by the exercise of any reasonable care or * skill have discovered. The case was therefore sent to be retried, in order that a jury might determine whether the damage caused to the horses was the natural consequence of the fracture, in which event the defendant would be liable for such damage. All the cases are collected and discussed in the judgment of Brett L. J., who delivered the opinion of the Court, and the limitation as to latent defects which was introduced by the decision in Readhead *v.* The Midland Railway Company,[3] is confined to contracts of carriage. The Lord Justice says (at page 109), "If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale." [4] [*654]

§ 879. In Shepherd *v.* Pybus,[1] where the sale was of a barge by the *builder*, although the purchaser had inspected it after it was built, yet as he had no opportunity of inspecting

them, and the case of executory contracts, and said what is evidently true, that the rule of *caveat emptor* was wholly inapplicable to the latter class of cases. This authority, therefore, confirms instead of conflicting with the conclusion we have arrived at in this case."

[2] 2 Q. B. Div. 102, C. A.

[3] L. R. 2 Q. B. 412; in error, L. R. 4 Q. B. 379.

[4] See the observation of Kelly C. B. at p. 111 of the report, on the language reported to have been used by him in Francis *v.* Cockerell, L. R. 5 Q. B. at p. 103.

[1] 3 M. & G. 868.

it during its progress, it was held that there was an implied warranty by the vendor, as the manufacturer, against such defects, not apparent by inspection, as rendered the barge unfit for use as an ordinary barge,[2] but that there was no implied warranty that the barge was fit for the precise use for which the buyer intended it, but which was not communicated by him to the vendor. In this case the reporter states that it was proved that the defendant *knew* the purpose for which the plaintiff wanted the barge (p. 871), but Tindal C. J. said in the judgment, that there was not "any evidence of distinct notice or of a declaration to the defendant at the time the plaintiff inspected the barge or entered into the contract, of the precise service or use for which the barge was purchased by the plaintiff."

§ 880. Next came Burnby *v.* Bollett,[1] in 1847. [*655] The defendant, * a farmer, bought a pig exposed for sale by a butcher: the plaintiff, another farmer, went to the defendant and offered to purchase the pig which the latter had just bought, and the sale was made without any express warranty. The meat turned out to be diseased, and it was held that there was no implied warranty that it was fit for food (although the vendor must have known it was intended for that purpose), because the vendor was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent and who is bound to supply a good and merchantable article. Here, plainly, the purchaser bought on his own judgment.

§ 881. In 1862, Emmerton *v.* Matthews [1] was decided in the same Court, where the vendor *was* a general dealer. The defendant was a salesman in Newgate Street, selling, on commission, meat consigned to him, and the plaintiff was a butcher or retailer of meat. The plaintiff bought a carcase from the defendant, which appeared to be good meat. The plaintiff saw it exposed for sale, bought it on his own inspec-

[2] See, also, Camac *v.* Warriner, 1 C. B. 356.

[1] 16 M. & W. 644.

[1] 7 H. & N. 586; 31 L. J. Ex. 139, approved and followed by the Common Pleas Division in Smith *v.* Baker, 40 L. T. N. S. 261.

tion, and there was no warranty. The defect was such that it could not be detected till the meat was cooked, and then it proved to be unfit for human food. The Court held, that there was no implied warranty, the sale being of a specific article, the buyer having had an opportunity to examine and select it. Here, again, the purchaser bought the specific chattel on his own judgment.

§ 882. In the same year the case of Bigge *v.* Parkinson[1] was decided in the Exchequer Chamber, the Court being composed of Cockburn C. J., and Wightman, Crompton, Byles, and Keating, JJ. The defendant, a provision dealer, had made a written offer to the plaintiff in these words: "I hereby undertake to supply your ship, the Queen Victoria, to Bombay, with troop stores, viz., dietary, mess utensils, coals, &c., at 6*l.* 15*s.* 6*d.* per head, *guaranteed to pass survey of the Honorable East India Company's officers, and also guarantee the qualities as per invoice.* The plaintiff accepted * this offer, which was made under an ad- [*656] vertisement in which the plaintiff invited tenders for the supply of provisions and stores for troops which he had contracted with the East India Company to convey from London to Bombay. It was contended by the defendant, *first*, that the express warranty in the contract excluded any implied warranty; but this was overruled, the Court holding it to be an express condition annexed to the ordinary implied warranty, for the benefit of the buyer, to guard himself against any rejection of the goods by the officers of the East India Company: *secondly*, that there was no warranty implied by law in such a sale; but the Court held that the rule now under consideration (and which was quoted from Chitty on Contracts[2]) is the correct rule of law, and that "where a buyer buys a specific article, the rule *caveat emptor* applies, but where the buyer orders goods to be supplied and trusts to the judgment of the sellers to select the goods which shall be applicable to the purpose for which they are intended, which is known to both parties . . . there is an implied

[1] 7 H. & N. 955; 31 L. J. Ex. 301, Ex. Ch.

[2] Page 417, ed. 1881.

warranty that they are fit for that purpose; and there is no reason why such a warranty should not be implied in the case of a sale of provisions."

§ 883. [In Beer *v.* Walker,[1] there was a contract by the plaintiff, a wholesale provision dealer, to send rabbits weekly by rail from London to Brighton to the defendant, who was a retail dealer there. The rabbits were sound when delivered to the railway company in London, but unfit for human food when they reached the defendant. It was held, on the authority of Bigge *v.* Parkinson, that there was an implied warranty that the rabbits should be fit for human food, and further, that this warranty extended until in the ordinary course of transit they should reach the defendant at Brighton, and he should have had a reasonable opportunity of dealing with them in the usual way of business.

§ 884. It may be useful to refer here to the case of a sale of animals suffering from disease. It has been decided by the highest authority that a person who sends animals to a public market for sale does not impliedly represent [*657] that they are * free from contagious diseases dangerous to animal life; and will not, when they are sold "with all faults," be liable in an action either for breach of warranty or for false representation. The mere act of sending the infected animals to the market, although a statutory offence under the Contagious Diseases (Animals) Act, does not amount to a representation by conduct on the vendor's part that the animals are in fact free from disease.[1]

§ 885. In Macfarlane *v.* Taylor,[1] which was a Scotch appeal, the House of Lords decided, under the 5th section of the Act 19 & 20 Vict. c. 60, which places the law of Scotland upon this subject on the same footing as our own, that a vendor was responsible in damages under the following facts. Taylor & Co. bought of Macfarlane & Co., distillers, of Glasgow, a quantity of spirits, intended by the purchasers

[1] 46 L. J. C. P. 677; 25 W. R. 880.

[1] Ward *v.* Hobbs, 4 App. Cass. 13; and 3 Q. B. D. 150, C. A., overruling s. c. 2 Q. B. D. 331.

[1] L. R. 1 Sc. App. 245.

to be used in barter with the natives on the coast of Africa, which purpose was communicated to the distillers, and they agreed to give to the spirits a specified shade of color, to make them resemble rum. In producing this color they made use of logwood, which, although not proved to cause any positive injury to health, dyed the secretions of those drinking it, so as to make them of the color of blood, and so to alarm the natives that the spirits were unsalable. *Held*, that this was a breach of the implied warranty that the goods should be fit for the specified purpose.

§ 886. But to this general rule there is this exception, that no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound.[1] Thus, in the early leading case of Parkinson *v.* Lee,[2] where the goods were hops, sold by a fresh sample drawn from the bulk, it was held that the warranty resulting from the sale by sample, and which was satisfied when the * bulk equalled the sample, could not be sup- [*658] plemented by a further implied warranty that the goods were merchantable. And in Dickson *v.* Zizania,[3] where there was an express warranty that a cargo of Indian corn should be equal to the average of the shipments of Salonica, of that season, and should be shipped in good and merchantable condition; it was held that this warranty could not be extended by implication, so as to make the

[1] Mullain *v.* Thomas, 43 Conn. 252; Jackson *v.* Langston, 61 Ga. 392; McGraw *v.* Fletcher, 35 Mich. 104; Deming *v.* Foster, 42 N. H. 165; Lanier *v.* Auld, 1 Murph. (N. C.) 138; s. c. 3 Am. Dec. 680; Walton *v.* Cody, 1 Wis. 420. But in some states there seems to be a disposition to relax this rule. In South Carolina the court holds that an implied warranty of soundness is not excluded by an express warranty of title. Trimmier *v.* Thomson, 10 S. C. 164; Hughes *v.* Bank, 1 McC. (S. C.) 537; Wells *v.* Spears, 1 McC. (S. C.) 262; Wood *v.* Ashe, 3 Strob. (S. C.) 64. In Wisconsin the court holds that an express warranty of title and against incumbrances does not exclude an express warranty that the goods are merchantable. Merriam *v.* Field, 24 Wis. 640. In Boothby *v.* Scales, 27 Wis. 626, an express warranty of quality was held not to exclude an implied warranty of fitness for the purpose.

[2] 2 East, 314. See, however, Randall *v.* Newson, 2 Q. B. D. 102, C. A., where Brett J. A. says, at p. 106, "It is sufficient to say of Parkinson *v.* Lee that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled."

[3] 10 C. B. 602; 20 L. J. C. P. 72.

vendor answerable that the corn was in a good and merchantable condition *for a foreign voyage*, although the contract stated that the corn was bought for that purpose. "*Expressum facit cessare tacitum.*"

§ 887. But although goods sold by sample are not in general deemed to be sold with an implied warranty that they are merchantable, the facts and circumstances of the case may justify the inference that this implied warranty is superadded to the contract. In Mody *v.* Gregson,[1] the defendants agreed to *manufacture* and supply 2500 pieces of gray shirting according to sample, at 18*s.* 6*d.* per piece, each piece to weigh 7 lbs. The goods were manufactured, delivered and accepted by the plaintiffs' agent as being according to sample, and they probably were so, although the fact did not very distinctly appear. But the goods contained a substance called china clay to the extent of fifteen per cent of their weight, introduced into their texture by the manufacturer for the *purpose only of making them weigh the contract weight of* 7 *lbs.*, and the goods, which otherwise would not have reached the required weight, were thus rendered unmerchantable. The defect was discovered on their arrival at Calcutta, but when the goods were accepted from the vendors in Manchester the purchasers could not tell, by examination or inspection, whether they, or the samples, contained any foreign ingredient introduced to increase their weight, or any other than the usual quantity of size employed in making such goods. Under these circumstances the vendors insisted, in defence, on the general proposition that "upon a sale of goods by sample, no warranty that they were merchantable could be implied." The Court held that [*659] neither inspection * of bulk nor use of sample absolutely exclude an inquiry whether the thing supplied was otherwise in accordance with the contract: that if the sellers in this case had *expressly* agreed to deliver *merchantable* gray shirting according to sample, without disclosing that the goods were rendered unmerchantable by the mixture of the foreign ingredient, they would have been liable: and

[1] L. R. 4 Ex. 49.

that the facts that the goods were not specific, ascertained, nor inspected, and that the sample did not disclose the defect, but, on the contrary, falsely represented on its face a merchantable article,[2] taken in connection with the stipulation that the goods should be of a specified weight, which, if properly complied with, would have ensured a merchantable article, amounted altogether to a contract *describing* the goods, and *asserting* their merchantable quality. The vendors were held bound, the opinion (by Willes J.) containing these further significant observations: "The contract, if truly fulfilled, would have given the buyer a merchantable article: and we need not consider whether the direction to the jury might not also be sustained upon the ground that the *seller himself made the sample, and must be taken to have warranted that it was one which so far as his, the seller's, knowledge went, the buyer might safely act upon.*" [3]

§ 888. Before leaving this point the case of Longmeid *v.* Holliday [1] must be noticed. It was an attempt to make a vendor responsible to a *third person*, the wife of the purchaser, for injury resulting from the bursting of a lamp, alleged not to be fit for the purpose for which it was bought. The jury negatived fraud on the part of the vendor, or any knowledge that the lamp was unfit for use. The case was put on the ground of a breach of duty in the shop-keeper in selling a dangerous article, which was said to give a right of action in favor of any person injured by its use, though not a party to the contract. But the Court held that the action was not maintainable, unless the facts showed such a fraudulent or * deceitful representation as would [*660] bring it within the authority of Langridge *v.* Levy,[2] referred to *ante*, p. 389, such action by third persons being an action of *deceit*, founded on *tort*, and not on *contract.*

§ 889. It is said that there is an implied warranty that the subject-matter of the sale exists, and is capable of trans-

[2] See, however, the remarks of Grove J. on the state of the sample, in Smith *v.* Baker, 40 L. T. N. S. 262.

[3] At page 57 of the report. Compare *dicta* of the judges in Heilbutt *v.* Hickson, *ante*, 642, 643.

[1] 6 Ex. 761.

[2] 2 M. & W. 519.

fer to the purchaser, but this seems rather to come under the definition of a condition precedent than a warranty, for clearly it is not *collateral* to a contract of sale that there should be a subject-matter on which it can take effect. The cases have already been referred to *ante*, Book I., Part 1, Ch. 4, Of the Thing Sold.

§ 890. Blackstone says,[1] in contracts for provisions it is always implied that they are wholesome, and that if they be not, an *action on the case for deceit* lies against the vendor. He gives no authority, and the proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, as settled in Pasley *v.* Freeman,[2] and the cases there cited, and others which have since been determined on its authority. In Chitty on Contracts,[3] the learned author says, that "it appears that in contracts for the sale of *provisions*, by dealers and common traders in provisions, there is an implied warranty that they are wholesome." The above-quoted passage, from Blackstone, is given as the authority for this statement, and in the note it is suggested that Emmerton *v.* Matthews,[4] so far as it contradicts this proposition, is not law.

§ 891. In Burnby *v.* Bollett,[1] however, all the old authorities are collected, and were cited in argument, and Rolfe B. said, that the cases in the Year Books turned on the *scienter* of the seller, or on the peculiar duty of a taverner. In rendering judgment in that case, the point decided was, that the farmer who sold the pig was not liable on an implied warranty, because none of the authorities suggested [*661] the * existence of such a warranty except in cases of "victuallers, butchers, and other common dealers in victuals;" but Parke B. intimated quite plainly that in his opinion the general proposition was not maintainable. The notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which make the

[1] Vol. 3, p. 166.
[2] 3 T. R. 51, and 2 Sm. L. C. 66, ed. 1879.
[3] Page 419, ed. 1881.
[4] 7 H. & N. 586; 31 L. J. Ex. 139.
[1] 16 M. & W. 644.

sale of unsound food punishable. The learned Baron, after explaining this, said: "The statute 51 Henry III., of the Pillory and Tumbril, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such as is not wholesome for man's body; and if any butcher sells contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, &c. Lord Coke goes on to say, that Britton, who wrote after the statute 51 Henry III., and following the same, saith: 'Puis soit inquise de ceux queux achatent per un manner de measure et vendent per meinder measure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys et auxi les macegriebes (macellarii,[2] butchers), et les gents vue de usage vendent a tres-passants (passengers) mauvaise vians corrumpus et wacrus et autrement perillous a la saunty de home, encountre le forme de nous statutes.'

"This view of the case explains what is said in the Year Book, 9 Hen. VI. 53, that 'the warranty is not to the purpose, for it is *ordained* that none shall sell corrupt victuals;' and what is said by Tanfield C. B., and Altham B., Cro. Jac. 187, 'that if a man sell corrupt victuals without warranty, an action lies, because it is against *the commonwealth;*' and also explains the note of Lord Hale, in 1st Fitzherbert's Natura Brevium, 94, that there is a diversity between selling corrupt wines as *merchandise, for there an action on the case does not lie without warranty;* otherwise, if it be for a taverner or victualler, *if it prejudice any.*"[3]

§ 892. *It is submitted that it results clearly from [*662] these authorities that the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute,[1] that they shall

[2] Macellarii, rather, sellers of meat in shambles; but "macegriefs," by Termes de la Ley, means those who sell *wittingly* stolen meat.

[3] See, also, remarks of Mellor J. on Emmerton *v.* Matthews, *ante*, p. 650.

[1] All the old statutes referred to by Parke B. and many others of a

make good any *damage caused* by their sale of unwholesome food. Emmerton *v.* Matthews, therefore, when applying the maxim of *caveat emptor* to the sale of an article of food, even when the vendor is a general dealer, if the buyer has bought on his own judgment, without express warranty, does not seem to be at all in contradiction with the earlier authorities, as explained in Burnby *v.* Bollett, by Parke B. [And the correctness of the decision has been since confirmed by the Common Pleas Division.[2]

§ 893. An instance of such a statutory responsibility is that imposed upon sellers of food by the 38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), which, by the 6th section, inflicts a penalty upon any person who sells, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance or quality of the article demanded by such purchaser; and, by the 27th section, makes it a misdemeanor to give false warranties in writing or to supply false labels on the sale of food or drugs.[1]]

§ 894. An implied warranty has been imposed on the vendor in certain sales by the "Merchandise Marks Act, 1862" (25 & 26 Vict. c. 88), of which the 19th and 20th sections are in the following language: —

"In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell, or contract to sell (whether by writing or not), to any other person any chattel or article with any trade mark thereon, or upon any cask, [*663] bottle, * stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor

similar kind, were swept away by the Repealing Act, 7 & 8 Vict. c. 24.

[2] See Smith *v.* Baker, 40 L. T. N. S. 261.

[1] The statute is amended by the 42 & 43 Vict. c. 30. The following are some of the decisions under the principal Act: Barnes *v.* Chipp, 3 Ex. D. 176; Rook *v.* Hopley, ibid. 209; Francis *v.* Maas, 3 Q. B. D. 341; Sandys *v.* Small, ibid. 449; Hoyle *v.* Hitchman, 4 Q. B. D. 233; Webb *v.* Knight, 26 W. R. 14; Horder *v.* Scott, 42 L. T. N. S. 660; Rough *v.* Hall, 6 Q. B. D. 17.

to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

§ 895. In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not), to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."

§ 896. [In America, upon the question of implied warranty on the sale of provisions, it has been laid down, in the State of New York, that to render a vendor liable they must be sold *for domestic use or immediate consumption.* The ground given for this implied warranty is, that it is a "principle not only salutary but necessary to the preservation of health and life." The warranty will only be implied where the vendor is a *dealer or trader in [*664] provisions who sells *directly* to the consumer for domestic use.[1]

[1] Van Brachlin *v.* Fonda, 12 Johns. (N. Y.) 468; Divine *v.* McCormick, 50 Barb. (N. Y.) 116. See, however, the limits of the implication laid down

In other respects the law as to implied warranty of quality seems to be the same in America as in England.[2]]

by Bronson C. J. in Moses *v.* Mead, 1 Den. (N. Y.) 378, 387; by Shaw C. J. in a case in the Supreme Court of Massachusetts, Winsor *v.* Lombard, 35 Mass. (18 Pick.) 57, 61; and by Morton J. in Howard *v.* Emerson, 110 Mass. 321.

An implied warranty of wholesomeness of provisions, extends only to cases where they are sold for immediate consumption, and has no application to sales of provisions as merchandise. Humphreys *v.* Comline, 8 Blackf. (Ind.) 521; Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83; Rocchi *v.* Schwabacher, 33 La. An. 1364; Emerson *v.* Brigham, 10 Mass. 197; s. c. 6 Am. Dec. 109; Ryder *v.* Neitge, 21 Minn. 70; Rinschler *v.* Jeliffe, 9 Daly (N. Y.) 469; Moses *v.* Mead, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; aff'm. 5 Den. (N. Y.) 617; Goldrich *v.* Ryan, 3 E. D. Smith (N. Y.) 324; Hyland *v.* Sherman, 2 E. D. Smith (N. Y.) 234. Where the sale is by a provision dealer for immediate consumption, there is an implied warranty of wholesomeness. Humphreys *v.* Comline, 8 Blackf. (Ind.) 516, 521; French *v.* Vining, 102 Mass. 152; s. c. 3 Am. Rep. 440; Sinclair *v.* Hathaway, 57 Mich. 60; Hoover *v.* Peters, 18 Mich. 51; Ryder *v.* Neitge, 21 Minn. 70; Hoe *v.* Sanborn, 21 N. Y. 561; s. c. 78 Am. Dec. 163; Miller *v.* Scherder, 2 N. Y. 267; Divine *v.* McCormick, 50 Barb. (N. Y.) 116; Moses *v.* Mead, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; Burch *v.* Spencer, 15 Hun (N. Y.) 504; Hart *v.* Wright, 17 Wend. (N. Y.) 267; Wright *v.* Hart, 18 Wend. 449. In French *v.* Vining, 102 Mass. 152; s. c. 3 Am. Rep. 440, it was held that there is an implied warranty of wholesomeness and fitness for use in the sale of food for domestic animals. *Contra*, Lukens *v.* Freiund, 27 Kans. 664; s. c. 41 Am. Rep. 429.

[2] Story on Sales, § 366 *et seq.*

*CHAPTER II. [*665]

DELIVERY.

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§ 897. AFTER the contract of sale has been completed, the chief and immediate duty of the vendor, in the absence of contrary stipulations, is to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent, if any, incumbent on him.

There is no branch of the law of sale more confusing to the student than that of delivery. This results from the fact that the word is unfortunately used in very different senses, and unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles.

[*666] § 898. * *First.* — The word delivery is sometimes used with reference to the passing of *the property in* the chattel,[1] sometimes to the change of *the possession of* the chattel: in a word, it is used in turn to denote transfer of *title*, or transfer of *possession.*

Secondly. — Even where "delivery" is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract; the other to the *performance* of the contract. When questions arise as to the "actual receipt" which is necessary to give validity to a parol contract for the sale of chattels exceeding 10*l.* in value, the judges constantly use the word "delivery" as the correlative of that "actual receipt." After the sale has been proven to *exist*, by delivery and actual receipt, there may arise a second and distinct controversy upon the point whether the vendor has *performed* his completed bargain by delivery of possession of the bulk to the purchaser.

Thirdly. — Even when the subject under consideration is the vendor's delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings attached to the word "possession." In general it would be perfectly proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the vendor. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them at his pleasure, and maintain trover for them. Yet, if he become insolvent, the vendor is said to have retained possession. Again, if the vendor has delivered the goods to a carrier for

[1] As for instance, in the opinion of Parke J. in Dixon *v.* Yeats, 5 B. & Ad. at p. 340.

conveyance to the purchaser, he is said to have lost his lien, because the goods are in the buyer's possession, the carrier being the agent of the buyer; but if the vendor claim to exercise the right of stoppage *in transitu*, while the carrier is conveying them, the goods are said to be only in the *constructive*, *not* in the *actual possession* of the buyer.

§ 899. * Delivery in the sense of a transfer of [*667] *title* has been considered *ante*, Book II., Of the Effect of the Contract.

Delivery of *possession*, as required under the Statute of Frauds, as the correlative of the buyer's "actual receipt" in order to prove the *formation* of the contract, has been considered in Book I., Part 2, Ch. 4, Of Acceptance and Actual Receipt.

Delivery into the buyer's possession, sufficient to destroy the vendor's lien, or even his right of stoppage *in transitu*, will be discussed *post*, Book V.

This chapter is confined to a consideration of the vendor's duty of delivering the goods in *performance* of his contract, so as to enable him to defend an action by the buyer for non-delivery.[1]

[1] *Actual, symbolical, and constructive delivery.* — On a sale of personal property delivery may be actual, or symbolical, or constructive. It is actual where the property sold is delivered manually by the seller to the buyer, or placed by agreement in the room, vessel, or store, of the buyer, or other designated place. It is symbolical, where the key of the room, store, or warehouse containing the property, is delivered to the purchaser with intent thereby to deliver the property sold. It is constructive or symbolical, where a receipt, sale-note, bill of sale, dock-warrant, or the like, relating to the property sold, is delivered to the purchaser, with intent thereby to deliver the property. Delivery by either of these modes is effectual between the parties. Cartright *v.* Phœnix, 7 Cal. 281; Calkins *v.* Lockwood, 17 Conn. 154; s. c. 41 Am. Dec. 143; Vining *v.* Gilbreth, 39 Me. 496; Ludwig *v.* Fuller, 17 Me. 162; s. c. 35 Am. Dec. 359; Stinson *v.* Clark, 88 Mass. (6 Allen) 340; Packard *v.* Dunsmore, 65 Mass. (11 Cush.) 282; Clark *v.* Draper, 19 N. H. 419; Ricker *v.* Cross, 5 N. H. 570; s. c. 22 Am. Dec. 480; Gray *v.* Davis, 10 N. Y. 285; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; s. c. 4 Am. Dec. 364; Shindler *v.* Houston, 1 Den. (N. Y.) 48; s. c. 19 Am. Dec. 316; Benford *v.* Schell, 55 Pa. St. 393.

Thus where the property at the time of sale is held under execution, or attachment, or the like, so that manual delivery cannot be made, a symbolical or constructive delivery is sufficient. A receipted bill of sale, or other assignment in writing, and the order of the vendor for the goods, would be effective as a delivery, at

§ 900. Generally the purchaser in a bargain and sale of goods, where the property has passed, is entitled to take

least as between the parties. See Pope *v.* Cheney, 68 Iowa, 563; Wheeler *v.* Nichols, 32 Me. 233; Whipple *v.* Thayer, 33 Mass. (16 Pick.) 25; s. c. 26 Am. Dec. 626; Klinck *v.* Kelly, 63 Barb. (N. Y.) 622; Garcia *v.* Gray, 67 Tex. 282; Sharp *v.* Carroll, 66 Wis. 62. See, also, Foster *v.* Magill, 119 Ill. 75; Wood *v.* Manley, 11 Ad. & E. 34; Ford *v.* Yates, 2 Man. & Gr. 550; Wood *v.* Leadbitter, 13 Mees. & W. 838.

In case of bulky or ponderous articles. — In case of a sale of ponderous or bulky articles, or where a manual delivery would be inconvenient if not impossible, an actual manual delivery is not usually essential to a valid transfer of personal property by a contract of sale; but a symbolical or typical delivery on the part of the seller, and an acceptance on the part of the buyer, is sufficient to convey the title and possession of the property. Puckett *v.* Reed, 31 Ark. 131; Montgomery *v.* Hunt, 5 Cal. 366; Calkins *v.* Lockwood, 17 Conn. 154; s. c. 41 Am. Dec. 143; Taylor *v.* Richardson, 4 Houst. (Del.) 300; People's Bank *v.* Gridley, 91 Ill. 457; Adams *v.* Foley, 4 Iowa, 52; Newcomb *v.* Cabell, 10 Bush (Ky.) 460; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9; Leisherness *v.* Berry, 38 Me. 80; Boynton *v.* Veazie, 24 Me. 286; Jewett *v.* Warren, 12 Mass. 300; s. c. 7 Am. Dec. 74; Cessna *v.* Nimick, 113 Pa. St. 70; Hayden *v.* Demets, 53 N. Y. 426; Tucker *v.* Ross, 19 Up. Can. Q. B. 295; Calcutt *v.* Ruttan, 13 Up. Can. Q. B. 146.

Symbolical delivery, by receipt, ticket, sale-note, &c. The delivery "of the receipt, ticket, sale-note, dock-warrant, certificate, bill of parcels, or other usual type and evidence of goods, in the situation of those sold, will be sufficient symbolic delivery of them to pass the title." Puckett *v.* Reed, 31 Ark. 131; Mitchell *v.* McLean, 7 Fla. 329; Adams *v.* Foley, 4 Iowa, 44; Van Brunt *v.* Pike, 4 Gill. (Md.) 270; s. c. 45 Am. Dec. 126; Packard *v.* Dunsmore, 65 Mass. (11 Cush.) 282; Pratt *v.* Parkman, 41 Mass. (24 Pick.) 46; Whitaker *v.* Sumner, 37 Mass. (20 Pick.) 405; Tuxworth *v.* Moore, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; Glasgow *v.* Nicholson, 25 Mo. 29; Hayden *v.* Demets, 53 N. Y. 426; Hollingsworth *v.* Napier, 3 Cai. (N. Y.) 182; s. c. 2 Am. Dec. 268; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; s. c. 4 Am. Dec. 364; Story on Sales, § 311.

Constructive delivery in general. — In general it may be said that a constructive delivery is sufficient where the property sold is not accessible at the time, for the purpose of manual delivery; or where it is not practicable to take possession of the same; or where, from the nature and character of the property, or its situation, it is inconvenient if not impossible to do so. In such cases it is sufficient if such possession be given as the circumstances will allow, and a symbolical or constructive delivery is authorized and valid. Thus where logs and boards, particularly marked, and floating in a river, were sold, a delivery of one raft of boards upon the water, having the same mark as the logs upon it, for the whole number of rafts thus marked, was held to be a constructive or symbolical delivery of the whole, and sufficient evidence of such delivery. Boynton *v.* Veazie, 24 Me. 286. See, also, Beller *v.* Block, 19 Ark. 566; Cartwright *v.* Phœnix, 7 Cal. 281; Montgomery *v.* Hunt, 5 Cal. 366; Mills *v.* Camp, 14 Conn. 219; s. c. 36 Am. Dec. 488; May *v.* Tallman, 20 Ill. 443; Pope *v.* Cheney, 68 Iowa, 563; Leisherness *v.* Berry, 38 Me. 80; Carter *v.* Willard, 36 Mass.

possession of them, and it is the vendor's duty to deliver this possession. But this right is only *primâ facie*, and it may

(19 Pick.) 1; Thompson *v.* Baltimore & O. R. Co., 28 Md. 396; Birge *v.* Edgerton, 28 Vt. 291; Hutchins *v.* Gilchrist, 23 Vt. 88; Sanborn *v.* Kittredge, 20 Vt. 632; s. c. 50 Am. Dec. 58; Stephenson *v.* Clark, 20 Vt. 624; Sharp *v.* Carroll, 266 Wis. 62; Leonard *v.* Davis, 66 U. S. (1 Black) 476; bk. 17, L. ed. 222. A vendor, on the sale of certain logs, lying within a boom, took the purchaser in sight of them, and pointed them out to him. This was held to be a sufficient delivery. Jewett *v.* Warren, 12 Mass. 300; s. c. 7 Am. Dec. 74; see, also, Morgan *v.* King, 28 W. Va. 1; s. c. 57 Am. Rep. 633. So there may be a sufficient delivery of a large quantity of property or number of articles, by delivery of a part or a sample, as a symbolical delivery of the whole, and this is especially the case where the sale is of bulky or ponderous articles, or where manual delivery is not practicable or is impossible; or where the property embraced in the contract of sale is in different and distinct places, and it is the intention of the parties that the whole property shall be thereby delivered. Pratt *v.* Chase, 40 Me. 269; Wheeler *v.* Nichols, 32 Me. 233; Mitchell *v.* Cunningham, 29 Me. 376; Phelps *v.* Cutler, 70 Mass. (4 Gray) 137; Shurtleff *v.* Willard, 36 Mass. (19 Pick.) 202; Legg *v.* Willard, 34 Mass. (17 Pick.) 140; s. c. 28 Am. Dec. 282; Whipple *v.* Thayer, 33 Mass. (16 Pick.) 25; s. c. 26 Am. Dec. 626; Fettyplace *v.* Dutch, 30 Mass. (13 Pick.) 388; s. c. 23 Am. Dec. 688; Mills *v.* Hunt, 17 Wend. (N. Y.) 333. See Kent *v.* Friedman, 101 N. Y. 616; s. c. 1 Cent. Rep. 718.

A delivery by the vendor to the vendee of an order on a warehouseman or other bailee of the vendor, with whom the goods are deposited, is a sufficient delivery as between the parties to pass the title. Davis *v.* Jones, 3 Houst. (Del.) 68; McCormick *v.* Hadden, 37 Ill. 370; Sigerson *v.* Harker, 15 Mo. 101; De Wolf *v.* Gardner, 66 Mass. (12 Cush.) 25; s. c. 59 Am. Dec. 165; Carpenter *v.* Clark, 2 Nev. 243; Anthony *v.* Wheatons, 7 R. I. 490; Gibson *v.* Stevens, 49 U. S. (8 How.) 384; bk. 12, L. ed. 123. Any act done by the seller expressive of an intention to surrender to the buyer the title to the goods sold, would be a constructive delivery. Thus the cutting of the spiles of a wine cask, or affixing particular marks to the goods sold, has been held to be a sufficient delivery to vest the title in the purchaser. Hall *v.* Richardson, 16 Md. 396; s. c. 77 Am. Dec. 303; Woodford *v.* Patterson, 32 Barb. (N. Y.) 630; Anderson *v.* Scott, 1 Campb. 235 note; Stoveld *v.* Hughes, 14 East, 308. Where a bureau was sold at an agreed price, and was at the request of, and in the presence of, the purchaser marked with her name, and the price agreed upon, but was not removed from the shop, the purchaser promising to come in a short time and take it, and pay for it, but did not do so, it was held that the title passed to her, and that the seller could recover the price. Merrill *v.* Parker, 24 Me. 89. See, also, Squires *v.* Payne, 6 Cal. 654; Sutton *v.* Ballou, 46 Iowa, 517; Brown *v.* Wade, 42 Iowa, 647; McClung *v.* Kelley, 21 Iowa, 508; Hall *v.* Richardson, 16 Md. 396; s. c. 77 Am. Dec. 303; Lingham *v.* Eggleston, 27 Mich. 324; Stephens *v.* Santee, 49 N. Y. 35; Dows *v.* Morewood, 10 Barb. (N. Y.) 183; Banchor *v.* Warren, 33 N. H. 183; Chamberlain *v.* Farr, 23 Vt. 268; Barney *v.* Brown, 2 Vt. 374; s. c. 19 Am. Dec. 720.

General rule as to marking and depositing goods sold. — Generally, if the

well be bargained that the possession shall remain with the vendor until the fulfilment of certain conditions precedent by the purchaser. Where nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions, as is explained in Book IV. Part 1, On Conditions. The vendor cannot insist on payment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price.[1] But it constantly happens that there is a stipula-

contract of sale is completed and the property sold is set aside, or deposited, or marked as sold, at the request of the purchaser, who may take manual possession thereof at any time when he may desire to do so, and especially where he has paid the price, the delivery is sufficient and the title of the property is vested in him. If the price is not paid the seller may recover it; and if the property is damaged or destroyed, without his fault, the purchaser must sustain the loss. Rattary *v.* Cook, 50 Ala. 352; Partridge *v.* Wooding, 44 Conn. 277; Denman *v.* Cherokee Iron Co., 56 Ga. 319; Sanborn *v.* Benedict, 78 Ill. 309; Sedgwick *v.* Cottingham, 54 Iowa, 512; Hotchkiss *v.* Hunt, 49 Me. 222; Means *v.* Williamson, 37 Me. 556; Philbrook *v.* Eaton, 134 Mass. 400; Washburn Iron Co. *v.* Russell, 130 Mass. 543; Dugan *v.* Nichols, 125 Mass. 43; Pratt *v.* Maynard, 116 Mass. 388; Goddard *v.* Binney, 115 Mass. 450; s. c. 15 Am. Rep. 112; Morse *v.* Sherman, 106 Mass. 430; Nichols *v.* Morse, 100 Mass. 523; Weld *v.* Came, 98 Mass. 152; Beecher *v.* Mayall, 82 Mass. (16 Gray) 376; Macomber *v.* Parker, 30 Mass. (13 Pick.) 175; Hening *v.* Powell, 33 Mo. 468; Barton *v.* McKelway, 22 N. J. L. (2 Zab.) 165; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; McNamara *v.* Edmister, 11 Hun (N. Y.) 597; Bradley *v.* Wheeler, 4 Robt. (N. Y.) 19; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Phelps *v.* Hubbard, 51 Vt. 489; Bemis *v.* Morrill, 38 Vt. 153; Hunt *v.* Thurman, 15 Vt. 336; s. c. 40 Am. Dec. 683; Bloyd *v.* Pollock, 27 W. Va. 75; Tarling *v.* Baxter, 6 B. & C. 360; Bloxam *v.* Sanders, 4 B. & C. 941; Hinde *v.* Whitehouse, 7 East, 571.

[1] *Presumptions as to payment of the price.* — In the absence of an agreement to the contrary, the law presumes, on a sale of property, that the price is payable at the time of the delivery, or that the sale was made for cash; and the purchaser will not be entitled to the property until payment is made or tendered. The promise to deliver, and the promise to pay the price, are mutually dependent. Robbins *v.* Harrison, 31 Ala. 160; Davis *v.* Adams, 18 Ala. 264; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Metz *v.* Albrecht, 52 Ill. 491; Freeman *v.* Nichols, 116 Mass. 309; Haskins *v.* Warren, 115 Mass. 514; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Scudder *v.* Bradbury, 106 Mass. 422; Knight *v.* New Eng. Worsted Co., 56 Mass. (2 Cush.) 271; South Western Freight Co. *v.* Plant, 45 Mo. 517; Brehen *v.* O'Donnell, 34 N. J. L. (5 Vr.) 408; Coil *v.* Willis, 18 Ohio, 28; Mackaness *v.* Long, 85 Pa. St. 158; Phelps

tion to the contrary of this, and that the parties agree that the buyer is to take possession of the goods before paying for them, or in the usual phrase, that the goods are sold on credit. The legal effect then is, that there has been an actual transfer of *title*, and an actual transfer of the *right of*

v. Hubbard, 51 Vt. 489; Goldsmith *v.* Bryant, 26 Wis. 34; Hefferman *v.* Berry, 32 Up. Can. Q. B. 518. In Haskins *v.* Warren, *supra*, Wells J. says "in a sale of chattels when the articles are set apart, or identified for the purpose, and there is no stipulation for credit, the sale, as between the parties, takes effect at once to pass the title to the purchaser, unless there is some agreement to the contrary; and the price is also due at the same time. The seller may maintain assumpsit for the goods bargained and sold, without any further delivery. Until the delivery is complete and absolute he has a lien for the purchase-money, and he may retain possession until payment." See, also, Morse *v.* Sherman, 106 Mass. 430; Arnold *v.* Delano, 58 Mass. (4 Cush.) 33; s. c. 50 Am. Dec. 754; Rowley *v.* Bigelow, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; Cassell *v.* Backrack, 42 Miss. 56; s. c. 2 Am. Rep. 590; Matthews *v.* Hobby, 48 Barb. (N. Y.) 167; Mackaness *v.* Long, 85 Pa. St. 158; Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15.

Where the delivery and payment are concurrent. — If, by express or implied agreement, the delivery and payment are to be concurrent and simultaneous acts, and the purchaser is inadvertently allowed to get possession of the property without payment of the price, or if it is placed in the possession of the purchaser with the expectation that the price will be immediately paid, no title passes to the purchaser if he fails or refuses to pay the price, unless the seller elects to regard it as a sale. In such a case he may either treat it as a sale, and sue for the price or value of the property, or he may, in a proper action, recover the property if the purchaser fails to return the same on demand. Owens *v.* Weedman, 82 Ill. 409; Turner *v.* Langdon, 112 Mass. 265; Paul *v.* Reed, 52 N. H. 136; Ferguson *v.* Clifford, 37 N. H. 86; Luey *v.* Bundy, 9 N. H. 298; s. c. 32 Am. Dec. 359; Gardner *v.* Clark, 21 N. Y. 399; Miller *v.* Jones, 66 Barb. (N. Y.) 148; Conway *v.* Bush, 4 Barb. (N. Y.) 564; Leven *v.* Smith, 1 Den. (N. Y.) 571; Palmer *v.* Hand, 13 Johns. (N. Y.) 434; s. c. 7 Am. Dec. 393; Russell *v.* Minor, 22 Wend. (N. Y.) 659; Henderson *v.* Lauck, 21 Pa. St. 359; Harris *v.* Smith, 3 Serg. & R. (Pa.) 20; Hodgson *v.* Barrett, 33 Ohio St. 63; s. c. 31 Am. Rep. 527; Riley *v.* Wheeler, 42 Vt. 528. Payment of the price being the condition upon which the purchaser can require the seller to complete the sale by delivery of the property, the former cannot recover the property unless he tenders, or was ready and willing in due season to pay the price. See authorities in last note and, also, Davis *v.* Adams, 18 Ala. 264; Toledo W. & W. R. Co. *v.* Gilvin, 81 Ill. 511; Metz *v.* Albrecht, 52 Ill. 491; Thomas *v.* Winters, 12 Ind. 322; Blanchard *v.* Child, 67 Mass. (7 Gray) 155; Brehen *v.* O'Donnell, 34 N. J. L. (5 Vr.) 408; Herring *v.* Hoppock, 15 N. Y. 409; Pierson *v.* Hoag, 47 Barb. (N. Y.) 243; Whitcomb *v.* Hungerford, 42 Barb. (N. Y.) 177; Fleeman *v.* McKean, 25 Barb. (N. Y.) 474; Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; McDonald *v.* Hewett, 15 Johns. (N. Y.) 349; s. c. 8 Am. Dec. 241; Coil *v.* Willis, 18 Ohio St. 28.

possession by the bargain, so that in pleading, and for all purposes, save that of the vendor's lien for the price, the buyer is considered as being in possession, by virtue of the general rule of law, that "the property of personal [*668] chattels draws to it the possession."[2] *But although the buyer has thus acquired the *right of possession* not to be questioned for any legal purpose by any one save his vendor, the latter may refuse to part with the goods, and may exercise his lien as vendor to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession.

§ 901. The law on this whole subject was very perspicuously stated in the case of Bloxam *v.* Sanders,[1] which may be considered the leading case, always cited when these points are under discussion. The decision turned upon the following facts: — One Saxby bought several parcels of hops of the defendants in August, 1823, the bought notes being as follows: "Mr. J. R. Saxby, of Sanders, eight pockets, at 155*s.* 8th of August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights; and samples were given to Saxby, and invoices delivered, in which he was made debtor for six different parcels, amounting to 739*l.* The usual time of payment in the trade was the second Saturday subsequent to a purchase. Saxby did not pay for the hops, and on the 6th of September the defendants wrote to him a notice that if he did not pay for them before the next Tuesday they would resell and hold him bound for any deficiency in price. They did accordingly resell some parcels with Saxby's express assent, and refused to deliver another parcel (that Saxby himself sold) without being paid. Saxby became bankrupt in November, and the defendants sold other hops afterwards on his account, and delivered account sales of them, charging him commissions, and *warehouse rent from the 30th of August.* The plaintiffs were assignees of the bank-

[2] 2 Wms. Saund. 47, note 1.

[1] 4 B. & C. 941. See, further, as to effect of the buyer's insolvency, Ex parte Chalmers, 8 Ch. 289, *per* Mellish L. J. at p. 291; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Morgan *v.* Bain, L. R. 10 C. P. 15; Ex parte Stapleton, 10 Ch. D. 586, C. A.; *post,* Book V. Part I. Chap. I.

rupt, and they demanded of the defendants the hops remaining in their hands, tendering at the same time the warehouse rent and charges; and the action was trover not only for the hops remaining unsold, but for the proceeds of all those resold by the defendants after Saxby's failure to pay. Bayley J. delivered the * judgment. He said: "Where [*669] goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price:* but the buyer has no right to have possession of the goods *till he pays the price*. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a *condition precedent* on the buyer's part; and until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the *right of possession* and the *right of property* vest at once in him: but his *right of possession* is not absolute; it is liable to be defeated if he becomes insolvent before he *obtains* possession. Tooke *v.* Hollingworth, 5 T. R. 215. Whether default in payment when the credit expires will destroy his *right of possession*, if he has not before that time obtained *actual possession*, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. Hanson *v.* Meyer, 6 East, 614. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*.[2] Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an *indefeasible right to the possession*, and his insolvency without

[2] Mason *v.* Lickbarrow, 1 H. Bl. 357; Ellis *v.* Hunt, 3 T. R. 464; Hodgson *v.* Loy, 7 T. R. 440; Inglis *v.* Usherwood, 1 East, 515; Bothlingk *v.* Inglis, 3 East, 381.

payment of the price defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu*, *à fortiori* is it, where he has never parted [*670] with the goods, and where no transitus has * begun.

The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or *they may still act upon their right of* PROPERTY *if any thing unwarrantable is done to that right.* If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are *both* requisite, unless they have both those rights. Gordon *v.* Harper, 7 T. R. 9. Trover is an action of that description. It requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. . . . Then, as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price.[3]"

[And, in accordance with this view, it was held in Lord *v.* Price,[4] that the purchaser of goods which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase-money, cannot maintain an action of trover against one who has wrongfully removed them.[5]]

[3] See, also, *per* cur. in Spartali *v.* Benecke, 10 C. B. 212; 19 L. J. C. P. 293.

[4] L. R. 9 Ex. 54.

[5] *Insolvency of the purchaser.* — The vendor of personal property usually has a lien upon it for the unpaid purchase-money so long as he retains it in his possession. This is especially the case where there is an express or implied agreement that delivery of the property and payment of the price shall be concurrent. See authorities cited *ante*, sec. 900, note 1.

§ 902. Keeping in view this lucid exposition of the circumstances under which a vendor may decline delivery of possession, we will now inquire what he is bound to do where no legal ground exists for refusing to deliver.

In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. He does all * that he is bound to do by leaving or placing [*671] the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction.

And if the delivery by the vendor is to take place upon the doing of certain acts by the purchaser, the vendor is not in default for non-delivery, until notice from the purchaser of the performance of the acts on which the delivery is to take place.

Thus, if the vendor agrees to deliver on board of the purchaser's ship, as soon as the latter is ready to receive the goods, the purchaser must name the ship and give notice of his readiness to receive the goods on board before he can complain of non-delivery.[1]

If there has been a sale on credit and the buyer has become bankrupt or insolvent while the goods are still in the possession of the vendor, the English as well as American authorities, hold that the vendor has a lien thereon for the price, although the term of credit has not expired. And although he waives his lien by the credit it is restored by the vendee's bankruptcy or insolvency. The waiver is on condition that the vendee keeps his credit good, so long as the vendor retains the possession of the property. Milliken *v.* Warren, 57 Me. 50; Ware River R. Co. *v.* Vibbard, 114 Mass. 447; Keeler *v.* Goodwin, 111 Mass. 490; Arnold *v.* Delano, 58 Mass. (4 Cush.) 33; s. c. 50 Am. Dec. 754; Riddle *v.* Varnum, 37 Mass. (20 Pick.) 280; South Western Freight Co. *v.* Stanard, 44 Mo. 71; Sigerson *v.* Kahmann, 39 Mo. 206; Coil *v.* Wil lis, 18 Ohio, 28; White *v.* Welsh, 38 Pa. St. 421; Gill *v.* Pavenstedt, 7 Am. L. Reg. (N. S.) 672; Reader *v.* Knatchbull, 5 T. R. 218, n; Morgan *v.* Bain, L. R. 10 C. P. 15; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Ex parte Stapleton, 10 Ch. Div. 586; Ex parte Chalmers, L. R. 8 Ch. app. 289; McEwan *v.* Smith, 2 H. L. C. 309. But see, distinguishing where the purchaser has expended money upon the property, Douglas *v.* Shumway, 79 Mass. (13 Gray) 502; also Barrett *v.* Goddard, 3 Mason C. C. 107.

Insolvency of purchaser. — Where goods are sold to be paid for in the notes of the buyer, or of a third party, and he becomes insolvent before the goods are delivered, the seller may refuse delivery and rescind the sale; and this, even though the note may not be entirely worthless. Benedict *v.* Field, 16 N. Y. 595; Roget *v.* Merrit, 2 Cai. (N. Y.) 117.

[1] Armitage *v.* Insole, 14 Q. B. 728; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Davies *v.* M'Lean, 21 W. R. 264; 28 L. T. N. S. 113; Stanton *v.* Austin, L. R. 7 C. P. 651.

[And, conversely, the same principle applies where the acts are to be performed by the *vendor*. Thus, in a contract for the sale of goods "Ex quay or warehouse," there is an implied condition that the vendor shall give notice to the purchaser of the place of storage, and until such notice has been given, the purchaser is not in default for non-acceptance.[2]]

§ 903. In Salter *v.* Woollams,[1] the defendant, an auctioneer, sold a rick of hay, then on the premises of one Jackson who had given a license to remove it. The license was read at the auction, and the auctioneer delivered to the buyer a note addressed to Jackson, requesting him to permit the buyer to remove the hay. Jackson refused, and the buyer brought action for non-delivery; but the Court held that the delivery was complete, the auctioneer having made the only delivery the nature of the case permitted, and Tindal C. J. said he saw no reason why the buyer could not maintain trover against Jackson.

Wood *v.* Manley[2] was another action growing out of the same sale, of a second rick of hay to another purchaser. The delivery was the same as in the previous case, and [*672] the * buyer, on Jackson's refusal to let him take the hay, broke open the gate of Jackson's close, and entered and took the hay. Thereupon trespass was brought against the buyer, but the King's Bench held that Jackson's license was irrevocable,[3] and that the delivery to the buyer by the auctioneer's order was a complete delivery, in performance of his contract.

§ 904. It might seem at first sight that the decision in Salter *v.* Woollams[1] is in conflict with the class of decisions exemplified in Bentall *v.* Burn,[2] and discussed *ante*, pp. 152 *et seq.*, in which the principle is established that there is no delivery where the goods are in possession of a third person,

[2] Davies *v.* M'Lean, *ubi supra*.

[1] 2 M. & G. 650; and see Smith *v.* Chance, 1 B. & Ald. 753, for an *incomplete* delivery in a similar sale.

[2] 11 A. & E. 34.

[3] See Wood *v.* Leadbitter, 13 M. & W. 838; and Taplin *v.* Florence, 10 C. B. 765.

[1] 2 M. & G. 650.

[2] 3 B. & C. 423.

unless that third person assent to attorn to the buyer and become his bailee instead of that of the vendor. But a little reflection will show that there is really no such conflict; for in Salter *v.* Woollams, the third person, although refusing to deliver to the buyer on the vendor's order *after* the sale, had assented *in advance* of the sale to become bailee for any person who might buy, and the Court held this assent not to be revocable *after the sale.* The consequence then was that the third person in possession became, by the completion of the sale, bailee for the buyer, and his refusal to deliver to the buyer was not a refusal to *become* bailee, but to do his duty as bailee, after assenting to assume that character.

§ 905. In Wood *v.* Tassell,[1] the plaintiff sued for non-delivery of certain hops sold to him by the defendant. The hops were parcel of a larger quantity lying at the warehouse of one Fridd, where they had been deposited by a former owner, who sold them to the defendant. After the sale to the plaintiff, he was informed that the hops were at Fridd's, and went there, had them weighed, and took away part. Some days after, when the plaintiff sent for the remainder, they were gone, having been claimed and taken away by a creditor of the defendant's vendor. Held that the
* defendant had done all that he was bound to do in [*673] making delivery, and was not responsible.

In this case it is worth remarking that Lord Denman, in delivering the judgment, said: "I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought not to have given the plaintiff a delivery order, though not expressly required, in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that under the circumstances Fridd held the hops as agent for the plaintiff."

§ 906. As to the *place* where delivery is to be made, when nothing is said about it in the bargain, it seems to be taken

[1] 6 Q. B. 234.

for granted almost universally, that the goods are to be at the buyer's disposal, at the place where they are when sold. No cases have been met with on this point. Lord Coke says:[1] "If the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty loads of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor before the day must go to the feoffee and know where he will appoint to receive it, and there it must be delivered." But this refers to estates held upon condition and to the duty of a *debtor*, and is not applicable to cases where the party bound to deliver, as a vendor, is only held to the obligation of keeping the thing at the disposal of the buyer, and is not bound to more than a *passive* readiness to allow the buyer to take the goods. Kent says:[2] "If no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place." This appears to be a very reasonable rule, and it would of course result as a consequence that the vendor would [*674] be * responsible for removing the goods before delivery to a place where the buyer would be subjected to inconvenience or increased expense in taking possession of them.[3]

[1] Co. Lit. 210 b.

[2] Vol. 2, p. 505 (12th ed.).

[3] *Time and place of delivery.* — When a sale is made without any express stipulation as to the time and place of delivery, the law would imply that the delivery should be made without unnecessary delay, on the request of the purchaser, and at the place where the property is at the time of the sale; and a readiness to deliver there at any time when requested would be a fulfilment of the contract on the part of the seller. McKay *v.* Hamblin, 40 Miss. 472; Story on Sales, sec. 301. See Allen *v.* Hartfield, 76 Ill. 358; Smith *v.* Gillett, 50 Ill. 290; Means *v.* Williamson, 37 Me. 556; Goddard *v.* Binney, 115 Mass. 450; s. c. 15 Am. Rep. 112; Middlesex Co. *v.* Osgood, 70 Mass. (4 Gray) 447; Kraft *v.* Hurtz, 11 Mo. 109; Miles *v.* Roberts, 34 N. H. 253; Lobdell *v.* Hopkins, 5 Cow. (N. Y.) 516; Rice *v.* Churchill, 2 Den. (N. Y.) 145; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 380; Barr *v.* Myers, 3 Watts & S. (Pa.) 299; 2 Kent Com. 505.

§ 907. If, however, the contract impose on the vendor the obligation of sending the goods, questions may arise as to

When delivery must be within a reasonable time. — If the seller is required by the contract, or custom, to deliver the property at the house, store, or vessel of the buyer, or at any other place, he cannot recover the price until he has performed his duty in this respect, and it must be done within a reasonable time. Corwith *v.* Colter, 82 Ill. 585; Council Bluffs Iron Works *v.* Cuppey, 41 Iowa, 104; Steel Works *v.* Dewey, 37 Ohio St. 242; Cocker *v.* Franklin Hemp Co., 3 Sumn. C. C. 530. See Taylor *v.* Cole, 111 Mass. 363.

Delivery at particular place. — If the seller agrees to deliver the property as a part of the contract of sale, at some place designated, the title passes only on delivery or deposit at the place designated; and the price cannot be recovered until delivery, in the absence of agreement to the contrary. Denman *v.* Cherokee Iron Co., 56 Ga. 319; Sanborn *v.* Benedict, 78 Ill. 309; Sedgwick *v.* Cottingham, 54 Iowa, 512; Washburn Iron Co. *v.* Russell, 130 Mass. 543; Woodbury *v.* Long, 25 Mass. (8 Pick.) 543; s. c. 19 Am. Dec. 345; Hening *v.* Powell, 33 Mo. 468; Pac. Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Rochester Oil Co. *v.* Hughey, 56 Pa. St. 322; Phelps *v.* Hubbard, 51 Vt. 489; Hunt *v.* Thurman, 15 Vt. 336; s. c. 40 Am. Dec. 683; Bloyd *v.* Pollock, 27 W. Va. 75; Thomas *v.* Tolford, (Wis.) 35 N. W. Rep. 295. But if the contract of sale is complete, and the article purchased set apart and designated from other articles of the same kind, and especially if the price is paid, this would usually constitute a sale and delivery of the property, although the seller may have promised to carry the property to some designated place. Terry *v.* Wheeler, 25 N. Y. 520; see *ante*, sec. 899, note 1. The ordinary risk of the property in such a case would be with the purchaser; but the vendor would be liable for any injury, too, if arising from his carelessness. Terry *v.* Wheeler, 25 N. Y. 520; Taylor *v.* Cole, 111 Mass. 363. And see *post*, sec. 926, note 2.

Excuse for non-delivery. — If it becomes impossible to deliver the property at the place designated, as where the property was to be delivered on a vessel, or car, and none was provided; or if the agreement is that the buyer shall designate a place for delivery, and he neglects, within a reasonable time after the request to do so, the seller will be excused for non-delivery, and may recover the price, and for care required, and expenses necessarily incurred in taking care of the property, from the time it should have been received by the purchaser. Posey *v.* Scales, 55 Ind. 282; Weld *v.* Came, 98 Mass. 152; Lucas *v.* Nichols, 71 Mass. (5 Gray) 309; Bolton *v.* Riddle, 35 Mich. 13; Hunter *v.* Wetsell, 84 N. Y. 549; s. c. 38 Am. Rep. 544; Higgins *v.* Murray, 73 N. Y. 252; Kunkle *v.* Mitchell, 56 Pa. St. 100; Leonard *v.* Wall, 5 Up. Can. C. P. 9; Story on Sales, sec. 110.

Non-delivery because of fault of buyer. — If through the fault of the buyer, the seller is unable to deliver, and there has been an unreasonable delay by the buyer to receive it, and the price has not been paid, the seller would be no longer bound by the contract, and could regard it as cancelled, and retain the property or sell it to another. See authorities last cited, and also, Coon *v.* Spaulding, 47 Mich. 162; Bolton *v.* Riddle, 35 Mich. 13; England *v.* Martland, 3 Mo. App. 490; Kellam *v.* McKinstry, 69 N. Y. 264; Higgins *v.* Delaware L. & W. R. Co., 60 N. Y. 553; Smith *v.* Wheeler,

the time and manner in which he is to fulfil this duty. If nothing is said as to time, he must send within a *reasonable*

7 Oreg. 49; s. c. 33 Am. Rep. 698; Boyd *v.* Gunnison, 14 W. Va. 1 Stanton *v.* Austin, L. R. 7 C. P. 651; Armitage *v.* Insole, 14 C. B. 721.

Delivery as between the parties.— As between the parties to a contract of sale, if the seller has performed all that is required of him by the terms of the contract, as to all of the goods, the property vests in the buyer, so as to subject him to the risk of all accidents which may befall them. See *post*, § 926, note 2. Sweeney *v.* Owsley, 14 B. Mon. (Ky.) 413; Crawford *v.* Smith, 7 Dana (Ky.) 61; Wing *v.* Clark, 24 Me. 366; Merrill *v.* Parker, 24 Me. 89; Weld *v.* Came, 98 Mass. 152; Packard *v.* Wood, 70 Mass. (4 Gray) 307; Martin *v.* Hurlbut, 9 Minn. 142; Sigerson *v.* Kahmann, 39 Mo. 206; Gilman *v.* Hill, 36 N. H. 311; Thompson *v.* Conover, 32 N. J. L. (3 Vr.) 466; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Waldron *v.* Roumaine, 22 N. Y. 368; Hurlburt *v.* Simpson, 3 Ired. (N. C.) L. 233; Hooban *v.* Bidwell, 16 Ohio, 509; s. c. 47 Am. Dec. 386. Delivery is not always essential for this purpose. See *ante*, sec. 899, note 1. Middlesex Co. *v.* Osgood, 70 Mass. (4 Gray) 447; Dixon *v.* Yates, 5 Barn. & Ad. 313.

The property at the time may be in the actual possession of another, wrongfully claiming it. It may at the time be withheld tortiously by the wrongdoer, and still pass to a purchaser without delivery. O'Keefe *v.* Kellogg, 15 Ill. 347; Henline *v.* Hall, 4 Ind. 189; Willis *v.* Willis, 6 Dana (Ky.) 48; Lafon *v.* De Armas, 12 Rob. (La.) 598; Webber *v.* Davis, 44 Me. 147; Cartland *v.* Morrison, 32 Me. 190; Hall *v.* Richardson, 16 Md. 396; s. c. 77 Am. Dec. 303; Hubbard *v.* Bliss, 94 Mass. (12 Allen) 590; Carpenter *v.* Hale, 74 Mass. (8 Gray) 157; Boynton *v.* Willard, 27 Mass. (10 Pick.) 166; Zabriske *v.* Smith, 13 N. Y. 322; s. c. 64 Am. Dec. 551; Hassell *v.* Borden, 1 Hilt. (N. Y.) 128; Potter *v.* Coward, Meigs (Tenn.) 22; Fletcher *v.* Howard, 2 Aik. (Vt.) 115; s. c. 16 Am. Dec. 686; Tome *v.* Dubois, 73 U. S. (6 Wall.) 554; bk. 18, L. ed. 943.

Setting aside article and payment of price.—The acceptance of possession, by setting aside the article purchased at the request of the purchaser, and the payment of the price, is sufficient to pass the title, and the keeping of the possession of the same by the seller at the request of the buyer, subject to delivery on the request of the latter, or suffering it to remain in the custody or under the control of the seller, but in a way that the buyer may take possession at any time, is equivalent to a delivery, and a loss thereof by casualty devolves upon the buyer. Rattary *v.* Cook, 50 Ala. 352; Magee *v.* Billingsley, 3 Ala. 679; Beller *v.* Block, 19 Ark. 566; Cartwright *v.* Phœnix, 7 Cal. 281; Montgomery *v.* Hunt, 5 Cal. 366; Partridge *v.* Wooding, 44 Conn. 277; Calkins *v.* Lockwood, 17 Conn. 154; s. c. 42 Am. Dec. 729; Mills *v.* Camp, 14 Conn, 219; s. c. 36 Am. Dec. 488; Sibley *v.* Tie, 88 Ill. 287; Toledo, W. & W. R. Co. *v.* Gilvin, 81 Ill. 511; Sanborn *v.* Benedict, 78 Ill. 309; May *v.* Tallman, 20 Ill. 443; Webber *v.* Minor, 6 Bush (Ky.) 463; Hotchkiss *v.* Hunt, 49 Me. 213; Coe *v.* Bicknell, 44 Me. 163; Means *v.* Williamson, 37 Me. 556; Waldron *v.* Chase, 37 Me. 414; Stone *v.* Peacock, 35 Me. 385; Cushman *v.* Holyoke, 34 Me. 289; Houdlette *v.* Tallman, 14 Me. 400; Thompson *v.* Baltimore & O. R. R., 28 Md. 396; Hobbs *v.* Carr, 127 Mass. 532; Thorndike *v.* Bath, 114 Mass. 118; s. c. 19 Am. Rep. 318; Turner *v.* Langdon, 112 Mass. 265; Nichols *v.* Morse, 100 Mass. 523; Warden *v.* Marshall, 99 Mass. 306;

time; and when the sale is in writing, if nothing is said as to time, parol evidence is admissible of the facts and circumstances attending the sale in order to determine what is a reasonable time.

Thus in Ellis *v.* Thompson,[1] where there was a sale of lead, deliverable in London, parol evidence was admitted to show that the defendant had asked the broker whether the lead was ready for shipment, and had been informed that it was, before the bought and sold notes were made out. And it was held that the defendant was relieved from the obligation of receiving delivery by reason of a long delay in getting the lead in barges from the mine down the Severn to Gloucester, from which port it was shipped to London.

§ 908. But where the contract expresses the time, the question is one of construction, and therefore one of law for the Court, not of fact for the jury. (See Conditions, *ante*, p. 547.)

The word "month," although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a *calendar* month.[1] And the Court will look at the the context in all cases, to see whether a calendar month was not intended, and if so, will adopt that construction.[2]

And now by statutes 13 & 14 Vict. c. 21 s. 4, it is enacted, "that in all Acts the word 'month' shall be taken to mean

Bullard *v.* Wait, 82 Mass. (16 Gray) 55; Richmond Iron Works *v.* Woodruff, 74 Mass. (8 Gray) 447; Phelps *v.* Cutler, 70 Mass. (4 Gray) 137; Hatch *v.* Bayley, 66 Mass. (12 Cush.) 27; Riddle *v.* Varnum, 37 Mass. (20 Pick.) 280; Carter *v.* Willard, 36 Mass. (19 Pick.) 1; Macomber *v.* Parker, 30 Mass. (13 Pick.) 183; Jewett *v.* Warren, 12 Mass. 300; s. c. 7 Am. Dec. 74; England *v.* Martland, 3 Mo. App. 490; Fuller *v.* Bean, 34 N. H. 290; Hayden *v.* Demets, 53 N. Y. 426; Marsh *v.* Rouse, 44 N. Y. 643; Russell *v.* Carrington, 42 N. Y. 118; s. c. 1 Am. Rep. 498; Kimberly *v.* Patchin, 19 N. Y. 330; s. c. 75 Am. Dec. 334; Crowfoot *v.* Bennett, 2 N. Y. 260; Durbrow *v.* McDonald, 5 Bosw. (N. Y.) 130; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Hyde *v.* Lathrop, 3 Keyes (N. Y.) 600; White *v.* Welsh, 38 Pa. St. 396; Bemis *v.* Morrill, 38 Vt. 153; Hutchins *v.* Gilchrist, 23 Vt. 88; Leonard *v.* Davis, 66 U. S. (1 Black) 476; bk. 17, L. ed. 222. See, also, *post*, sec. 926, note 2.

[1] 3 M. & W. 445; and see Jones *v.* Gibbons, 8 Ex. 920; Sansom *v.* Rhodes, 8 Scott, 544.

[1] Reg. *v.* Chawton, 1 Q. B. 247; Hart *v.* Middleton, 2 C. & K. 9; Webb *v.* Fairmaner, 3 M. & W. 473.

[2] Simpson *v.* Margitson, 11 Q. B. 23; Webb *v.* Fairmaner, 3 M. & W. 473.

calendar months, unless words be added, showing lunar months to be intended."

Where a certain number of "days" is to be allowed for the delivery, they are to be counted as consecutive days, and include Sundays, unless the contrary be ex-
[*675] pressed,[3] or an * usage to that effect be shown.[4] And as to the odd day in leap year, see 40 Henry III., at p. 4, Vol. 1 of Statutes Revised, [which enacted that the extra day in leap year and the preceding day shall be reckoned as one day, but this statute has been repealed by the 42 & 43 Vict. c. 59, and the effect is that the extra day will in future count by itself.]

And the rule, though long in doubt, seems now to be settled by the decision in Webb *v.* Fairmaner,[5] that if a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract. A promise to deliver goods in two months from the 5th of October, is fulfilled by delivery at any time on the whole day of the 5th of December, so that an action against the vendor would be premature, if brought before the 6th.

In Coddington *v.* Paleologo,[6] the Court of Exchequer on a contract for the delivery of goods, "delivering on April 17th, complete 8th of May," was equally divided on the question whether the vendor was bound to commence delivery on the 17th of April.[7]

[3] Brown *v.* Johnson, 19 M. & W. 331.

[4] Cochrane *v.* Retberg, 3 Esp. 121.

[5] 3 M. & W. 473; and see Lester *v.* Garland, 15 Ves. 247; Pellew *v.* Wonford, 9 B. & C. 134; Young *v.* Higgin, 6 M. & W. 49; Blunt *v.* Heslop, 8 A. & E. 557; Isaacs *v.* Royal Insurance Co., L. R. 5 Ex. 296.

[6] L. R. 2 Ex. 193. In Bergheim *v.* Blaenavon Iron Co., L. R. 10 Q. B. 319, the judges of the Q. B. showed the same difference of opinion as to the time when delivery ought to take place.

[7] *Time of delivery.* — If no time is expressed for delivery, the law implies that it must be within a reasonable time. *Ante*, sec. 906, note 3; and sec. 829, note 2; Coon *v.* Spalding, 47 Mich. 162; Bolton *v.* Riddle, 35 Mich. 13; Steel Works *v.* Dewey, 37 Ohio St. 242; Danforth *v.* Walker, 40 Vt. 257; Blydenburgh *v.* Welsh, 1 Baldw. C. C. 331; Cocker *v.* Hemp & Flax Manf. Co., 3 Sumn. C. C. 530. See, also, Adams *v.* Adams, 26 Ala. 272; Tufts *v.* McClure, 40 Iowa, 317; Atwood *v.* Cobb, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 657; Grant *v.* Merchant's Bank, 35 Mich. 515; Mowry *v.* Kirk, 19 Ohio St. 375; Molson *v.* Bradburn, 25 Up. Can. Q. B. 457; Cox *v.* Jones, 24 Up. Can. Q. B. 81; Brunskill *v.* Mair, 15 Up. Can. Q. B. 213; George *v.* Glass, 14 Up. Can. Q.

§ 909. In relation to the *hour* up to which a vendor can make a valid delivery, on the last day fixed by the contract, the whole subject is fully discussed, in the carefully considered case of Startup *v.* McDonald,[1] in the Exchequer Chamber.

In that case the plaintiff had sold to the defendant ten tons of linseed oil, "to be free delivered within the last fourteen days of March, and paid for at the expiration of that time, in cash." The defendant pleaded to an action for not receiving the oil, that the tender was made on the last of the fourteen days, at nine o'clock at night, which was an unreasonable and improper time, &c., &c. The jury found as a special verdict, that the plaintiff made the tender at half-past eight o'clock at night on the 31st of March, that * day being *Saturday, that there was full time before* [*676] *twelve o'clock at night for the defendants to examine,*

B. 514; Wright *v.* Weed, 6 Up. Can. Q. B. 140.

If the property purchased is to be sent by the vendor to a place agreed upon as a part of the contract without stating the time, this must also be done within a reasonable time. What is a reasonable time must always depend upon the facts and circumstances of the case, which may be shown by extraneous evidence. See authorities cited in last note, and also, Chaffin *v.* Doub, 14 Cal. 384; Tufts *v.* McClure, 40 Iowa, 317; Howe *v.* Huntington, 15 Me. 350; Coates *v.* Sangston, 5 Md. 121; Randall *v.* Johnson, 59 Miss. 317; s. c. 42 Am. Rep. 365; Bass *v.* White, 65 N. Y. 565; Nunan *v.* Bourquin, 7 Phila. (Pa.) 239; Cameron *v.* Wells, 30 Vt. 633; Boyd *v.* Gunnison, 14 W. Va. 1; Ford *v.* Cotesworth, L. R. 4 Q. B. 127; Ellis *v.* Thompson, 3 M. & W. 445; *post*, sec. 926, note 2.

If the contract is silent about a delivery, the facts and circumstances may be shown to determine what is a reasonable time to deliver, but not an oral agreement fixing the time. Cumberland Bone Co. *v.* Atwood Lead Co., 63 Me. 167; Atwood *v.* Cobb, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 657; Coon *v.* Spalding, 47 Mich. 162; Stange *v.* Wilson, 17 Mich. 342. If the facts are not disputed what is a reasonable time is a question for the court to determine. Greene *v.* Dingley, 24 Me. 131; Hill *v.* Hobart, 16 Me. 164; Howe *v.* Huntington, 15 Me. 350; Atwood *v.* Cobb, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 657; Echols *v.* New Orleans, J. & G. N. R. Co., 52 Miss. 610; Webb *v.* Fairmaner, 3 Mees. & W. 473.

Failure to deliver, recision of contract. — A failure to deliver property at the time agreed would justify the vendee in refusing to accept, and in that case his obligations given for the price would be without consideration. Corwith *v.* Colter, 82 Ill. 585, Welsh *v.* Gossler, 89 N. Y. 540; Croninger *v.* Crocker, 62 N. Y. 151; Conawingo Pet. Co. *v.* Cunningham, 75 Pa. St. 138; Cleveland *v.* Sterrett, 70 Pa. St. 204; Clark *v.* Wright, 5 Phila. (Pa.) 439; Jones *v.* United States, 96 U. S. (6 Otto) 24; bk. 24, L. ed. 644.

[1] 6 M. & G. 593.

and weigh, and receive the oil, but that he objected on the ground that the tender was at an *unreasonable hour;* that the plaintiff then kept the oil, and tendered it again on Monday morning, at seven o'clock; and that the hour of half-past eight on Saturday night *was an unreasonable and improper time of that day* for the tender and delivery of the oil. On these facts the Court of Common Pleas had been unanimous in favor of the defendant,[2] but the judgment was reversed in Cam. Scac. The judges, Denman C. J., Abinger C. B., Patteson and Williams JJ., and Parke, Gurney, Rolfe, and Alderson, BB. were unanimously of opinion that the defendant was not bound to be present at the hour when the tender was made; but all were also of opinion (with the exception of Lord Denman, who dissented), that *being there*, he was bound by the tender; and that the verdict of the jury, declaring that the tender was at an unreasonable and improper time, was an erroneous finding of the *law*, inconsistent with their finding of the *fact* that the tender was made in full time for the defendant to examine, weigh, and receive the oil, before midnight. Parke B. gave an instructive statement of the whole law on the subject in these words: — "The question in this case is merely, what is the proper time of the day for a tender of goods, under a contract to sell and deliver to another within a certain number of days, the mode of tender being in other respects reasonable and proper (for it is found to be unreasonable only in respect of the *lateness*), the tender being made to the *vendee personally*, and there being no usage of trade as to the time for delivery, to qualify or explain the contract. . . . Upon a reference to the authorities, and due consideration of them, it appears to me that there is no doubt upon this question. *It is not to be left to a jury* to be determined as a question of practical convenience or reasonableness in each case, but the *law appears to have fixed the rule*, and it is this, that a party who is by contract to pay money or to do a
[*677] * thing *transitory* to another, anywhere, on a certain day, has the whole of the day, and if on one of

[2] 2 M. & G. 395.

several days, the whole of the days for the performance of his part of the contract; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of such a contract. In such a case, the party bound must find the other at his peril (Kidwelly *v.* Brand, Plowden, 71), and within the time limited if the other be within the four seas (Shepp. 136, Ed. 1651), and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act; and that at a convenient time *before midnight*, such time varying according to the quantum of the payment or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete.[3]

[3] *Interpretation of contract as to time.* — If the contract is to deliver property on or before a certain day, the buyer is obliged to accept it if tendered him in such time on that day as will enable him to examine and receive it before midnight; or, perhaps, where the circumstances or custom require it before sundown, as where daylight is necessary to examine the property. Adams *v.* Dale, 29 Ind. 273; Croninger *v.* Crocker, 62 N. Y. 151; Startup *v.* Macdonald, 6 Man. & G. 593. In this country as well as in England, the word "month," in mercantile transactions, is held to mean a *calendar* month, unless it appears otherwise from the contract, or from the circumstances relating to it. Churchill *v.* Merchant's Bank, 36 Mass. (19 Pick.) 532; State *v.* King, 44 Mo. 238; Rives *v.* Guthrie, 1 Jones (N. C.) L. 87; Shapley *v.* Garey, 6 Serg. & R. (Pa.) 529; Thomas *v.* Shoemaker, 6 Watts & S. (Pa.) 179; Barnes *v.* Boomer, 10 Grant (Ont.) 532. If delivery is expressed to be made within a certain number of days, the day of making the contract is excluded in the computation of time. Weeks *v.* Hull, 19 Conn. 376; s. c. 50 Am. Dec. 249; Sands *v.* Lyon, 18 Conn. 28; Oatman *v.* Walker, 33 Me. 71; Buttrick *v.* Holden, 62 Mass. (8 Cush.) 233; Farwell *v.* Rogers, 58 Mass. (4 Cush.) 460; Cornell *v.* Moulton, 3 Den. (N. Y.) 12.

If a certain number of days are allowed for delivery they are counted consecutively, including Sundays, unless the last day to tender or make payment fall on Sunday, in which case the delivery on tender must be made on or before the following day, as the case may require. See authorities above cited, and also, Avery *v.* Stewart, 2 Conn. 69; Stebbins *v.* Leowolf, 57 Mass. (3 Cush.) 137; Salter *v.* Burt, 20 Wend. (N. Y.) 205; s. c. 32 Am. Dec. 530; Barrett *v.* Allen, 10 Ohio, 426; Marks *v.* Russell, 40 Pa. St. 372; Harker *v.* Addis, 4 Pa. St. 515.

§ 910. "But where the thing is to be performed *at a certain place*, on or before a certain day to another party to a contract, there the tender must be to the other party, *at that place;* and as the attendance of the other party is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain: and, therefore, it fixes a particular part of the day for his presence; *and it is enough if he be at the place at such a convenient time before sunset on the last day, as that the act may be completed by daylight;* and if the party bound tender to the party there, if present, or if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made *to the other party, at the place at any time of the day*, the contract is performed; and though the law gives the [*678] uttermost convenient time on the *last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and *if it happen that both parties meet at the place at any other time of the last day*, or upon any other day within the time limited, and a tender is made, the tender is good. *See Bacon's Abr. tit. Tender D. (a); Co. Lit.* 202, *a.* This is the distinction which prevails in all the cases, — where a thing is to be done

Same. — Limitations as to time. — The expressions "between July 1st and December 1st" and "at any time from this date to December 31st" as a limitation of time for delivery, have been held to include the last day named. Conawingo Pet. Co. *v.* Cunningham, 75 Pa. St. 138; Cleveland *v.* Sterritt, 70 Pa. St. 204. And a contract giving one "until" a certain day to accept an offer, was held to include that day. Houghwout *v.* Boisaubin, 18 N. J. Eq. (3 C. E. Gr.) 315. A contract to decline "on or before" a certain day includes the day named. Phelps *v.* McGee, 18 Ill. 155. On the other hand, it has been held, where the period allowed for performance was indicted by such expressions as "between" certain days, or "up to" a certain day, that both the days in the first instance and in the two last instances, the last day should be excluded. Newby *v.* Rogers, 40 Ind. 9; Cook *v.* Gray, 6 Ind. 335; Atkins *v.* Boylston Fire & M. Ins. Co., 46 Mass. (5 Metc.) 439; People *v.* Walker, 17 N. Y. 502; Stadacona Ins. Co. *v.* Mackenzie, 29 Up. Can. C. P. 10. See, also, Gray *v.* Walton, 107 N. Y. 254; s. c. 14 N. E. Rep. 191.

anywhere, a tender at a convenient time *before midnight* is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time *before sunset*. . . . I therefore think that the tender was good in this case in point of time, and consequently that the plaintiff *having been able to meet with the defendant, and actually to tender* the oil to him a sufficient time before midnight to enable the defendant to receive, examine, and weigh the oil, performed as far as he could his part of the contract, and was entitled to recover for the breach of it by the defendant."

§ 911. In Duncan *v.* Topham,[1] the declaration alleged an order for goods to be delivered to the defendant within a *reasonable time*, but the proof showed a written order for "five tons, &c.: but it must be put on board *directly*," to which the plaintiff replied, "I shall ship you five tons, &c., *to-morrow*." Held, that the proof did not support the declaration; and that a *reasonable time* was a more protracted delay than *directly*.

In Attwood *v.* Emery,[2] the agreement of the vendor, who was a *manufacturer*, to deliver goods "as soon as possible," was construed to mean "as soon as the *vendors* could," with reference to *their* ability to furnish the article ordered, consistently with the execution of prior orders in hand. A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th of November, was held to be reasonably complied with by tender in the February following.

§ 912. [But in the latter case of the Hydraulic Engineering * Company *v.* McHaffie,[1] this construc- [*679] tion of the words "as soon as possible" was not adopted, and they were interpreted to mean within a reasonable time, with an undertaking to do it in the shortest practicable time. "By the words 'as soon as possible,'" said Cotton L. J., "the defendants must be taken to have meant

[1] 8 C. B. 225.
[2] 1 C. B. N. S. 110; 26 L. J. C. P. 73.
[1] L. R. 4 Q. B. Div. 670, C. A.

that they would make the gun as quickly as it could be made in the largest establishment with the best appliances." The delay arose solely from the seller's want of a competent workman, and he was held liable for a breach of contract: Attwood *v.* Emery being distinguished upon the ground that the possibility of a delay caused by the seller's execution of prior orders was one which the purchaser might reasonably be presumed to have taken into account.[2]

§ 913. For the meaning of the words *reasonable time*, see Brightly *v.* Norton,[1] and Toms *v.* Wilson,[2] *post*, p. 699.

Where the contract was to deliver goods "forthwith," the price being made payable within fourteen days from the making of the contract, it was held manifest that the goods were intended to be delivered within the fourteen days.[3]

§ 914. Where by the terms of a contract of sale the vendor was to deliver to the purchaser a bill of lading for

[2] *Constructions of terms of contract.* — For construction of terms "directly," "within a reasonable time," "immediate delivery," "as soon as possible," see following cases. Rommel *v.* Wingate, 103 Mass. 327; Atwood *v.* Cobb, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 657; Neldon *v.* Smith, 36 N. J. L. (7 Vr.) 148; Danforth *v.* Walker, 40 Vt. 257; Blydenburgh *v.* Welsh, 1 Baldw. C. C. 331; Crocker *v.* Franklin, &c. Co., 3 Sumn. C. C. 530; *ante*, sec. 906, note 3.

Delivery by endorsement and transfer of bill of lading. — The endorsement or transfer of a bill of lading to a purchaser of a cargo of merchandise on a vessel, is a delivery of the merchandise, and a performance by the seller in this respect, which would defeat any action by the buyer for non-delivery. Ezell *v.* English, 6 Port (Ala.) 311; King *v.* Jarman, 35 Ark. 190; s. c. 37 Am. Rep. 11; Puckett *v.* Reed, 31 Ark. 131; Davis *v.* Russell, 52 Cal. 611; s. c. 28 Am. Rep. 647; Davis *v.* Jones, 3 Houst. (Del.) 68; Law *v.* Hatcher, 4 Blackf. (Ind.) 364; McKee *v.* Garcelon, 60 Me. 167; s. c. 11 Am. Rep. 200; Smith *v.* Davenport, 34 Me. 520; Ludwig *v.* Fuller, 17 Me. 166; s. c. 35 Am. Dec. 245; Russell *v.* O'Brien, 127 Mass. 349; Quintard *v.* Bacon, 99 Mass. 185; Pratt *v.* Parkman, 41 Mass. (24 Pick.) 42; Stone *v.* Swift, 21 Mass. (4 Pick.) 389; Peters *v.* Ballister, 20 Mass. (3 Pick.) 495; First Nat. Bank *v.* Railroad Co., 58 N. H. 203; Patrick *v.* Meserve, 18 N. H. 300; Klinck *v.* Kelly, 63 Barb. (N. Y.) 622; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Jordan *v.* James, 5 Ohio, 88; Tilden *v.* Minor, 45 Vt. 196; Gibson *v.* Stevens, 49 U. S. (8 How.) 399; bk. 12, L. ed. 1123; Conard *v.* Atlantic Ins. Co., 27 U. S. (1 Pet.) 386; bk. 7, L. ed. 189; Ruffee *v.* United States, 15 Ct. Cl. 291. *Post*, sec. 928, note 2.

[1] 3 B. & S. 305; 32 L. J. Q. B. 38.

[2] 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.

[3] Stainton *v.* Wood, 16 Q. B. 638. See, also, Roberts *v.* Brett, 11 H. L. C. 337, and 34 L. J. C. P. 241, as to interpretation of "forthwith."

the cargo which had been bought on the purchaser's orders, it was held that the delivery of the *bill of lading* within a reasonable time after its receipt, and without reference to the unloading of the *cargo*, was incumbent on the vendor, and that the buyer was justified in rejecting the purchase on the refusal to deliver the bill of lading.[1]

§ 915. The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for,[1] or by sending the goods sold * mixed with other goods. As a general rule, the [*680] buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered.[2]

In Dixon *v.* Fletcher,[3] the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton, and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton, or "any part thereof." The Court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of an averment that the plaintiffs were ready and willing to deliver the 200 bales only.

So in Hart *v.* Mills,[4] where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned.

§ 916. In Cunliffe *v.* Harrison,[1] a purchase was made of ten hogsheads of claret, and the vendor sent fifteen. Held, that the contract of the vendor was not performed, "for the person to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him.[2]

[1] Barber *v.* Taylor, 5 M. & W. 527.

[1] The rule is less rigid where goods are ordered from a correspondent who is an *agent* for buying them. See Ireland *v.* Livingston, L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; L. R. 5 Q. B. 516; 5 H. L. 395, *ante*, p. 573; Johnston *v.* Kershaw, L. R. 2 Ex. 82; 36 L. J. Ex. 44; Jefferson *v.* Querner, 30 L. T. N. S. 867.

[2] Reuter *v.* Sala, 4 C. P. D. 239, C. A.

[3] 3 M. & W. 146.

[4] 15 M. & W. 85.

[1] 6 Ex. 903.

[2] *Per* Parke B.

In Nicholson *v.* Bradfield Union,[3] the plaintiffs, under a contract for the sale of Ruabon coals, sent one lot of 15 tons 9 cwt. of real Ruabon coals on the 1st of July, and another lot of 7 tons 8 cwt. of coals, which were not Ruabon coals, on the 2d of July, and the two parcels were shot into one heap, and it was held a bad delivery *for the whole.*

In Levy *v.* Greene,[4] the goods ordered were sent, but they were packed in a crate with other goods not ordered, though perfectly distinguishable, the articles in excess being crockery-ware of a different pattern. And Coleridge and Erle JJ. considered that the case was distinguishable on that [*681] ground * from the cases already cited; but Campbell C. J. and Wightman J. thought it clear that the vendor had no right to impose on the purchaser the *onus* of unpacking the goods and separating those that he had bought from the others; and this latter view was held right by the unanimous decision of the Exchequer Chamber.[5]

[3] L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.

[4] 8 E. & B. 575; 27 L. J. Q. B. 111; in Ex. Ch. 28 L. J. Q. B. 319. See, also, Tarling *v.* O'Riordan, 2 Ir. L. R. 82, C. A.

[5] *Delivery of larger quantity than purchased.* — If a greater quantity of goods, than the contract specifies, is tendered or delivered, the contract is not complied with, and the buyer may refuse to receive them, or more than he purchased. Rommel *v.* Wingate, 103 Mass. 327; Rodman *v.* Guilford, 112 Mass. 405; Marlan *v.* Stanwood, 101 Mass. 470; Clark *v.* Baker, 52 Mass. (11 Metc.) 186; s. c. 45 Am. Dec. 199. See, also, Wright *v.* Barnes, 14 Conn. 518; Rockford, R. I. & St. L. R. R. Co. *v.* Lent, 63 Ill. 288; Smith *v.* Lewis, 40 Ind. 98; Wilson *v.* Wagar, 26 Mich. 452; Croninger *v.* Crocker, 62 N. Y. 151; Stevenson *v.* Burgin, 49 Pa. St. 36. The contract in this case called for a certain quantity of washed wool, and the tender was of both washed and unwashed wool, which imposed upon the purchaser the necessity of assorting it if the tender was accepted. The court said: "A tender of a larger bulk from which plaintiffs might with great labor have selected the quantity, and of the quality they had purchased, was an insufficient tender; and a refusal to perform the contract, except by a delivery of wool in bulk, the good and bad mingled together, requiring labor to separate them, was a breach of the agreement." See, Dunlap *v.* Berry, 5 Ill. (4 Scam.) 327; Cleveland *v.* Williams, 29 Tex. 204. But a tender or delivery in excess of the amount required would be good, where the required amount could be readily separated from the balance without involving labor or expense, or where the separation would impose no burden upon the buyer. See authorities last cited, and, also, Kingman *v.* Holmquist, 36 Kans. 735. Where the seller contracts to deliver 5000 barrels of oil, in a bulk, at a certain place on a railroad, which the buyer agreed to pump into cars, and the whole quantity which he delivered, from which the buyer could pump, was 5981 barrels, which was all of

§ 917. If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser: and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the latter deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold.[1] But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment, until the vendor makes delivery of the rest.

Thus, in Waddington *v.* Oliver,[2] the plaintiff delivered on the 12th of December twelve bags of hops in part performance of a contract to deliver 100 bags on or before the 1st of January, and demanded immediate payment for them, and brought his action on the buyer's refusal. Held, that no such action could be maintained *prior* to the expiration of the time fixed for delivery of the remainder.

§ 918. But in Oxendale *v.* Wetherell,[1] the plaintiff was held entitled to recover for 130 bushels of wheat delivered and kept by the buyer on a contract for the sale of 250 bushels in an action brought *after* the expiration of the time fixed for the delivery of remainder.

In Hoare *v.* Rennie,[2] where the contract was to deliver 667 tons of iron in four equal parts, in four successive

the same quality, it was held to be a good tender, as a sufficient quantity was tendered, and the seller was not bound to set apart or furnish the precise quantity, and did not insist or require the buyer to take more than the contract called for. Lockhart *v.* Bonsall, 77 Pa. St. 53. See, also, Kingman *v.* Holmaquist, 36 Kans. 735; Larkin *v.* Mitchell, 42 Mich. 296; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86; Page *v.* Carpenter, 10 N. H. 77; Downer *v.* Thompson, 6 Hill (N. Y.) 208; Ganson *v.* Madigan, 9 Wis. 146; s. c. 13 Wis. 67. If the buyer does not object to the excess, but makes objection on other grounds, this would be a waiver of the excess. Smith *v.* Pettee, 70 N. Y. 13. See, also, Foot *v.* Marsh, 51 N. Y. 288.

[1] *Per* Parke J., in Oxendale *v.* Wetherall, 9 B. & C. 386; Brandt *v.* Lawrence, 1 Q. B. D. 344, C. A.; Bowes *v.* Shand, 2 App. Cas. 455; Reuter *v.* Sala, 4 C. P. D. 230, 244, C. A., considered *ante*, p. 679.

[2] 2 B. & P. N. R. 61. See, also, a decision of Lord Hale's at the Norfolk Assizes, 1662, reported 1 Comyn, Dig. Action, F. 2.

[1] 9 B. & C. 386. See, also, Mavor *v.* Pyne, 3 Bing. 285.

[2] 5 H. & N. 19; 29 L. J. Ex. 73.

months, the vendor having tendered delivery of only [*682] 21 tons * in the first month, was held to have broken his contract so as to justify the purchaser's rejection of the whole bargain. But this case is strongly questioned. See *ante*, p. 584.

In Morgan *v.* Gath,[3] the purchase was of 500 piculs of cotton, and only 420 were delivered. The jury having found on the facts that the buyer had consented to receive the 420 piculs, and had had them weighed, and accepted them, held that he could no longer object that the whole 500 piculs had not been delivered.[4]

[3] 3 H. & C. 748; 34 L. J. Ex. 165.

[4] *Delivery of less quantity than purchased.* — The seller cannot require the buyer to take a less quantity than the contract calls for, and if the delivery is in parcels at different times, but the whole is not delivered, the buyer may return the part delivered. Marland *v.* Stanwood, 110 Mass. 470. See Polhemus *v.* Heiman, 45 Cal. 573; Rockford R. I. & St. L. R. R. Co. *v.* Lent, 63 Ill. 288; Hausman *v.* Nye, 62 Ind. 485; s. c. 30 Am. Rep. 199; Cash *v.* Hinkle, 36 Iowa, 623; Salmon *v.* Boykin, 66 Md. 541; Rommel *v.* Wingate, 103 Mass. 327; Murphy *v.* St. Louis, 8 Mo. App. 483; Pope *v.* Porter, 102 N. Y. 366; s. c. 3 Cent. Rep. 451; Cleveland Rolling Mills *v.* Rhodes, 121 U. S. 255; bk. 30, L. ed. 920; Norrington *v.* Wright, 115 U. S. 188; bk. 29, L. ed. 366. See *post*, sec. 927, note 2.

Buyer must pay for property retained. — The general rule in this country is that if a party has failed to fully deliver property according to contract, he may recover of the purchaser the price or value of that delivered, less the damage sustained by the purchaser by the non-delivery according to contract, unless the purchaser restores the property delivered to the seller, and the general rule is applied to all cases of part performance of contracts. Leonard *v.* Dyer, 26 Conn. 72; Byan *v.* Dayton, 25 Conn. 188; Nicklaus *v.* Roach, 3 Ind. 78; Wolf *v.* Gerr, 43 Iowa, 339; Byerlee *v.* Mendel, 39 Iowa, 382; McClay *v.* Hedge, 18 Iowa, 66; Pixler *v.* Nichols, 8 Iowa, 106; s. c. 74 Am. Dec. 298; Duncan *v.* Baher, 21 Kans. 99; Bowker *v.* Hoyt, 35 Mass. (18 Pick.) 555; Wilson *v.* Wager, 26 Mich. 452; Wildey *v.* School Dist., 25 Mich. 419; Lamb *v.* Erolaski, 38 Mo. 51; Lee *v.* Ashbrook, 14 Mo. 378; s. c. 55 Am. Dec. 110; Horn *v.* Batchelder, 41 N. H. 86; Britton *v.* Turner, 6 N. H. 481; s. c. 26 Am. Dec. 713; Blood *v.* Enos, 12 Vt. 625; s. c. 36 Am. Dec. 363; Fenton *v.* Clark, 11 Vt. 560; Bast *v.* Byrne, 51 Wis. 531; s. c. 37 Am. Rep. 841. This general doctrine was stated as follows in Wolf *v.* Gerr, 43 Iowa, 339; "It is now the settled doctrine of this state that a party, who has failed to perform in full his contract, may recover compensation for the part performed, less the damages occasioned by the failure." See, also, Girdner *v.* Boswick, 69 Cal. 112; Polhemus *v.* Hieman, 45 Cal. 573; Richards *v.* Shaw, 67 Ill. 222; Parcell *v.* McComber, 11 Neb. 209; Bush *v.* Jones, 2 Tenn. Ch. 190; Hollis *v.* Chapman, 36 Tex. 1; Carroll *v.* Welch, 26 Tex. 149; Phillips &c. Co. *v.* Seymour, 91 U. S. (1 Otto) 646; bk. 23, L. ed. 341; Dermott *v.* Jones, 69 U. S. (2 Wall.) 1; bk. 17, L. ed. 762.

New York rule. — A contrary rule

[In the State of New York the qualification, that a recovery may be had for the portion delivered, if retained by the vendee until after the time for the full performance of the contract, has been expressly repudiated.[5]]

§ 919. The quantity to be delivered is, however, sometimes stated in the contract with the addition of words, such as "about," or "more or less," which show that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance.

In Cross *v.* Eglin,[1] the purchase was of "about 300 quarters (more or less) of foreign rye, . . . shipped on board the Queen Elizabeth, &c., also about 50 quarters of foreign red wheat, &c., &c." The vessel arrived, having on board 345 quarters of rye and 91 of wheat. The plaintiffs, the buyers, had paid by bill of exchange for 50 quarters of wheat and 300 quarters of rye; but the defendants, making no dispute about the wheat, insisted that the plaintiffs should take the whole 345 quarters of rye, and refused to deliver any unless they would accept all. The plaintiffs thereupon, after making a formal demand of 300 quarters of rye and 50 of wheat, abandoned the contract, and sued for the amount of the bill of exchange which they had paid. Evidence was offered [and admitted, subject to objection] to show that it * was contrary to the custom of merchants [*683]

has been adopted in New York and various other states, namely: that where there is not a complete performance of an entire contract to deliver, no compensation can be recovered for the part delivered, unless the delivery has been waived. Holden Steam Mill Co. *v.* Westerveltt, 67 Me. 446; Haslack *v.* Mayer, 26 N. J. L. (2 Dutch.) 284; Avery *v.* Wilson, 81 N. Y. 341; s. c. 37 Am. Rep. 503; Crane *v.* Knubel, 61 N. Y. 645; Kein *v.* Tupper, 52 N. Y. 550; Catlin *v.* Tobias, 26 N. Y. 217; Smith *v.* Brady, 17 N. Y. 173; s. c. 72 Am. Dec. 442; Timmons *v.* Nelson, 66 Barb. (N. Y.) 594; Chaplin *v.* Rowley, 18 Wend. (N. Y.) 187; Witherow *v.* Witherow, 16 Ohio, 238; Larkin *v.* Buck, 11 Ohio St. 561; Jennings *v.* Lyons, 39 Wis. 553; s. c. 20 Am. Rep. 57. This case somewhat modifies the harsh rule of New York on this subject.

[5] *Per* Spencer J. in M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) at p. 167; *per* Nelson J. in Champlin *v.* Rowley, 13 Wend. (N. Y.) at p. 260; *per* Bronson J. in Mead *v.* Degolyer, 16 Wend. (N. Y.) at p. 636; *per* Church C. J. in Kein *v.* Tupper, 52 N. Y. at p. 555.

[1] 2 B. & Ad. 106.

to require a buyer to receive so large an excess as was offered to the plaintiffs, under the expression "more or less." [The question of admissibility was not decided, though there were doubts expressed whether it was admissible, and the case was decided without reference to this evidence.] The plaintiffs had a verdict and the Court refused to disturb it, Lord Tenterden C. J. and Littledale J. both thinking that the excess was too great to be covered by the words "more or less"; Parke and Patteson JJ. expressing a doubt on that point, but holding, that the expressions being obscure, the burthen of proof lay on the vendors, who were seeking to enforce the contract, and that they had failed to show clearly what was the meaning of the parties.[2]

§ 920. In Cockerell *v.* Aucompte,[1] the Court refused to give consideration to an objection against paying for 127

[2] *Construction of terms "about" and "more or less."* — If the quantity of property to be delivered is stated to be "about" a specified amount or number, or a certain quantity or kind "more or less," these terms have been held to qualify the statement of the quantity, sum, or amount stated, and there should be a reasonable latitude allowed in the performance. See Pembroke Iron Co. *v.* Parsons, 71 Mass. (5 Gray) 589; Creighton *v.* Comstock, 27 Ohio St. 548; Brawley *v.* United States, 96 U. S. (6 Otto) 168; bk. 24, L. ed. 624; Merriam *v.* United States, 14 Ct. Cl. 289. But a wide variance should not be allowed. A contract to deliver 23,000 feet, "more or less" of lumber for $5,000, and only 16,000 feet were delivered, was held not to be a sufficient compliance with the contract. Creighton *v.* Comstock, 27 Ohio St. 548. See, also, Melick *v.* Dayton, 34 N. J. Eq. (7 Stew.) 245. But where the contract was to deliver 500,000 feet of lumber, "more or less," and 473,000 feet were tendered, out of which the buyers took 300,000 feet the balance being refused as not complying with the contract as to quality, it was held that the buyers were liable for the amount accepted. Holland *v.* Rea, 48 Mich. 218; Robinson *v.* Noble, 33 U. S. (8 Pet.) 181; bk. 8, L. ed. 910.

Whether there has been a substantial fulfilment of the contract in such cases would seem to be a proper question for the jury, under all the facts and circumstances of the case. Clapp *v.* Thayer, 112 Mass. 296. See Patterson *v.* Judd, 27 Mo. 563; Callmeyer *v.* Mayor, 83 N. Y. 116; Harrington *v.* Mayor, 10 Hun (N. Y.) 248; s. c. 70 N. Y. 604; Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173. Where A. ordered of B. 14 pieces of cloth of 30 to 40 yards to a piece, and B. shipped 13 pieces containing 118 yards more than would have been contained in 14 pieces of 14 yards each, and before the invoice was presented to A. and before he had agreed to accept, the goods were burned after being taken from the vessel on which they were shipped and while on the dock, it was held that B. must sustain the loss. Winterbotham *v.* Paine, 53 N. Y. Super. Ct. (21 J. & S.) 186.

[1] 2 C. B. N. S. 440; 26 L. J. C. P. 194.

tons of coal, on a contract to deliver 100 tons "more or less"; but the coals had been supplied, and there was no offer to return them.

Bourne *v.* Seymour[2] was a contract for the sale of "about" 500 tons of nitrate of soda, but the terms of the written contract made out by the brokers were so obscure, that the case is of no value as a precedent. Creswell J. said that he did not think the parties understood the contract, "nor do I."[3]

In Moore *v.* Campbell,[4] the sale was of 50 tons of hemp, and the vendor offered the buyer two delivery orders from a warehouse for "about" 30 tons, and "about" 20 tons respectively, which the buyer declined, unless the vendor would guarantee that the whole quantity amounted to 50 tons. The vendor refused, and on the trial offered evidence that it was the usage of trade in Liverpool, where the contract was made, to insert the word "about" in delivery orders of goods warehoused. Held, that if this evidence had been offered in reference to the purchase of fifty tons of *goods [*684] contracted to be sold and delivered simply, the evidence would be inadmissible; but if the contract be to sell and deliver *goods in a warehouse*, and there is a known usage of the place that warehousemen will not accept delivery orders in any other form, by reason of objecting to make themselves responsible for any particular quantity, the delivery warrants made in that form would, if tendered, be a sufficient compliance with the vendor's duty under the contract.

§ 921. In McConnell *v.* Murphy,[1] where the sale was of "all of the spars manufactured by A., say about 600, averaging 16 inches: the above spars will be out of the lot manufactured by J. B.," the Court held that a tender of 496 spars, which were all of the specified lot that averaged 16 inches, was a substantial performance of the contract by the vendor. These words "say about 600" were held to be words of expectation and estimate only, not amounting to an understanding that the quantity should be 600. The case of

[2] 16 C. B. 337; 24 L. J. C. P. 202.
[3] 24 L. J. C. P. 207.
[4] 10 Ex. 323; 23 L. J. Ex. 310.
[1] L. R. 5 P. C. C. 203.

Gwillim *v.* Daniell (2 C. M. & R. 61; 5 Tyr. 644) was approved and followed; and the effect of the word "say," when prefixed to the word "about," was considered as emphatically marking the vendor's purpose to guard himself against being supposed to have made any absolute promise as to quantity.[2]

§ 922. [In Morris *v.* Levison,[1] a charter-party provided that the ship should load "a full and complete cargo of iron ore, say about 1,100 tons." The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons. It was held that the words "say about 1,100 tons," were words of contract, and must have been intended as a guide to the charterer with regard to the amount of cargo which he would have to provide, that he was not therefore bound to load a full and complete cargo of 1,210 tons, but was bound to provide a reasonable margin over 1,100 tons; and that 3 per cent. being such a reasonable margin he ought to have loaded 1,133 tons.

[*685] § 923. * In McLay *v.* Perry,[1] the plaintiffs' agent, seeing in the defendants' yard a heap of scrap iron said "You seem to have about 150 tons there," to which one of the defendants replied, "Yes, or more." The plaintiffs were informed by their agent that the defendants had about 150 tons of old iron for sale, and thereupon wrote to them — "We are buyers of good wrought scrap iron, free of light and burnt iron, for our American house, and understand from Mr. Scott that you have for sale about 150 tons. We can offer you 80*s.* per ton." Some correspondence ensued relating to the place of delivery and the expense of cartage, and eventually the defendant wrote, "We accept your offer for old iron, viz. 80*s.* per ton, we delivering alongside vessel in one of the London docks. Please let me know when you can send a man here to see it weighed and also inform us where to send it." The defendants only delivered 44 tons,

[2] See, further, Leeming *v.* Snaith, 16 Q. B. 275; Barker *v.* Windle, 6 E. & B. 675; Hayward *v.* Scougall, 2 Camp. 56.

[1] 1 C. P. D. 155.

[1] 44 L. T. N. S. 152.

which was the weight of the heap in their yard. They were not dealers in iron. Held, in an action for damages for short delivery, that the words "about 150 tons" were words of estimate only, that the defendants had not warranted the quantity, and that the subject-matter of the contract was not 150 tons of iron, but the iron which the plaintiffs' agent had seen in the defendants' yard.

§ 924. In America, this question has been very recently discussed in a case before the Supreme Court of the United States,[1] and three rules were laid down for the guidance of the Courts in the construction of similar contracts. Firstly, — where the goods are identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable *amount, in reference to which good faith [*686] is all that is required of the party making it.

Secondly, — where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about" "more or less," and the like, in such cases is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

Thirdly, — in the last case, however, if the qualifying words "about," "more or less," and the like are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions.]

[1] Brawley *v.* The United States, 6 Otta. 168; *per* Bradley J. at p. 171, in delivering the opinion of the Court.

Where delivery is to be made according to bills of lading, the authorities have already been reviewed, *ante*, p. 579.

§ 925. Where the vendor is bound to send the goods to the purchaser, the rule is well established, as shown *ante*, p. 155, that delivery to a common carrier, *à fortiori*, to one specially designated by the purchaser, is a delivery to the purchaser himself; the carrier being, in contemplation of law in such cases, the bailee of the person *to* whom, not *by* whom, the goods are sent; the latter when employing the carrier being regarded as the agent of the former for that purpose.[1]

If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent.[2] Where goods are ordered from a distant place, the vendor's duty to deliver them in merchantable condition is complied with if the goods are in proper condition when de-
[*687] livered *to * the carrier*, provided the injury received during the transit does not exceed that which must necessarily result from the transit.

Where hoop-iron was sold in Staffordshire, deliverable, in Liverpool in the winter, the vendor was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, on proof that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire.[3]

§ 926. But the vendor is bound, when delivering to a carrier, to take the usual precautions for ensuring the safe delivery to the buyer. In Clarke *v.* Hutchins,[1] the vendor, in delivering goods to a trading vessel, neglected to apprise

[1] Dawes *v.* Peck, 8 T. R. 330; Waite *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 4 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364, and 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart *v.* Bush, E. B. & E. 494, and 27 L. J. Q. B. 271; Smith *v.* Hudson, 34 L. J. Q. B. 145.

[2] Dunlop *v.* Lambert, 6 Cl. & F. 600.

[3] Bull *v.* Robison, 10 Ex. 342; 24 L. J. Ex. 165.

[1] 14 East, 475. See, also, Buckman *v.* Levi, 3 Camp. 414; Cothay *v.* Tute, 3 Camp. 129.

the carrier that the value of the goods exceeded 5*l.*, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and on the vendor's action for goods sold and delivered, it was held by the King's Bench, Lord Ellenborough giving the decision, that the vendor had not made a delivery of the goods; not having "put them in such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers."[2]

[2] *Delivery to a carrier of property sold.* — In the absence of an express stipulation to the contrary, if goods are sold and delivered, or ready for delivery, and by agreement they are to be sent to the purchaser, it would be the duty of the seller to deliver the goods in good condition to the carrier designated by the purchaser, if any; or if there has been no direction or agreement as to the mode or manner in which the goods are to be sent, then the seller should deliver the same in a good condition to a common carrier in the usual and common course of business; and this would transfer the property and the risk to the buyer, and the carrier would be responsible to him. See Bradford *v.* Marbury, 12 Ala. 520; s. c. 46 Am. Dec. 264; Hall *v.* Gaylor, 37 Conn. 550; Watkins *v.* Paine, 57 Ga. 50; Maxwell *v.* Brown, 39 Me. 98; s. c. 63 Am. Dec. 605; Magruder *v.* Gage, 33 Md. 344; s. c. 3 Am. Rep. 177; Wilcox *v.* Green, 72 N. Y. 17; Cross *v.* O'Donnell, 44 N. Y. 661; s. c. 4 Am. Rep. 721; Strong *v.* Dodds, 47 Vt. 348; Spencer *v.* Hale, 30 Vt. 314; *ante*, sec. 906, note 7. The carrier in such a case becomes the agent of the vendee and the delivery to him is a delivery to the vendee. See authorities last cited, and also, Hall *v.* Gaylor, 37 Conn. 550; Stafford *v.* Walter, 67 Ill. 83; Moral Sch. Tp. *v.* Harrison, 74 Ind. 93; Pennsylvania Co. *v.* Holderman, 69 Ind. 18; Hunter *v.* Wright, 94 Mass. (12 Allen) 548; Boswell *v.* Green, 25 N. J. L. (1 Dutch.) 390; Strong *v.* Dodds, 47 Vt. 348; Shepardson *v.* Cary, 29 Wis. 34; Barton *v.* Kane, 17 Wis. 37. A delivery to the carrier or other person, by direction of the purchaser, is a delivery to the purchaser. Burton *v.* Baird, 44 Ark. 556; Redd *v.* Burrus, 58 Ga. 574; Ober *v.* Smith, 78 N. C. 313. If, however, the vendor undertakes as a part of the contract of sale to transmit the goods to the vendee, or to his agent, at some particular place designated or implied, the property will not usually pass to the purchaser until the delivery is complete. The carrier in such a case would be the agent of the vendor, and responsible to him for its proper carriage. As between the vendor and vendee the goods would be at the vendor's risk. Hall *v.* Gaylor, 37 Conn. 550; Higgins *v.* Murray, 73 N. Y. 252; See *v.* Bernheimer, 38 N. Y. Super. Ct. (6 J. & S.) 40; Hooper *v.* Chicago & N. W. R. Co., 27 Wis. 81; s. c. 9 Am. Rep. 439; Ranney *v.* Higby, 5 Wis. 62; Thompson *v.* Cincinnati, W. & Z. R. Co., 1 Bond C. C. 152. See, also, Girdner *v.* Beswick, 69 Cal. 112; Butler *v.* Lawshe, 74 Ga. 352; Charles *v.* Lasher, 20 Ill. App. 36. A carload of wheat sold to be delivered at the depot of a city, was held to be properly delivered when the carload of wheat arrived there. Bloyd *v.* Pollock, 27 W. Va. 75.

§ 927. In offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. Thus in Isherwood *v.* Whitmore,[1] the defendants having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods, were shown two closed casks said to contain them. The persons in charge refused to allow the casks to be opened. Held, that the plaintiff had not made a valid offer of delivery.[2]

§ 928. There may be a symbolical delivery of [*688] goods, divesting * the vendor's possession and lien. Lord Ellenborough said, in Chaplin *v.* Rogers,[1] that "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual deliv-

Due care of goods by the seller. — If the goods are sold and left with the vendor for delivery to a carrier or other person, it is his duty to take reasonable care or precautions against their injury, and for the safe delivery of the same, with reasonable despatch. And he would be liable for damages sustained by the vendee because of a neglect of this duty. Woodruff *v.* Noyes, 15 Conn. 335; Stafford *v.* Walter, 67 Ill. 83; Ward *v.* Taylor, 56 Ill. 494; Garretson *v.* Selby, 37 Iowa, 529; Finn *v.* Clark, 92 Mass. (10 Allen) 479; s. c. 94 Mass. (12 Allen) 522; Hart *v.* Tyler, 32 Mass. (15 Pick.) 171. See, also, Leggat *v.* Sands Brewing Ale Co., 60 Ill. 158; Taylor *v.* Cole, 111 Mass. 363; Higgins *v.* Murray, 73 N. Y. 252; Purcell *v.* Jaycox, 59 N. Y. 288.

[1] 11 M. & W. 347; and *per* Parke B. in Startup *v.* McDonald, 6 M. & G. 593.

[2] *Right of inspection.* — The buyer should have a reasonable opportunity to inspect goods tendered or delivered, on a contract of purchase, where he has no opportunity to examine them before, in order to determine whether they are the goods, or of the quality purchased. What is a reasonable time may depend upon the facts and circumstances of the case, and may be regulated by custom. An acceptance in such a case will not be inferred from the fact of delivery. Lincoln *v.* Gallagher, (Me.) 8 Atl. Rep. 883; Doane *v.* Dunham, 79 Ill. 131; Stone *v.* Browning, 68 N. Y. 598; Croninger *v.* Crocker, 62 N. Y. 151; Boothby *v.* Scales, 27 Wis. 626. And he cannot reject the goods after an unreasonable delay, and without objection. Mackay *v.* Swartz, 60 Iowa, 710; Comstock *v.* Sanger, 51 Mich. 497; Brownlee *v.* Bolton, 44 Mich. 218. See, also, Merchin *v.* Ball, 68 Cal. 205; Pierson *v.* Crooks, 42 Hun (N. Y.) 571; Hickman *v.* Shimp, 109 Pa. St. 16. The receipt of merchandise sent to a purchaser is not equivalent to acceptance; but a reasonable time is allowed to examine it. Calhoun *v.* Paule, 26 Mo. App. 274; Osborne *v.* McQueen, 67 Wis. 392. Acceptance is not a waiver of quality. Forcheimer *v.* Stewart, 65 Iowa, 593; s. c. 54 Am. Rep. 30; Hollfield *v.* Black, 20 Mo. App. 328.

[1] 1 East, 192.

ery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property." And there was a like *dictum* by Lord Kenyon in Ellis *v.* Hunt.[2] On this principle the delivery of the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel.[3]

§ 928 *a*. So the endorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are known as representing the goods, would form a good delivery in *performance of the contract*, so as to defeat any action by the buyer against the vendor for non-delivery of the goods, according to the principles settled in Salter *v.* Woollams[1] and Wood *v.* Manley;[2] but the effect of transferring such documents of title upon the rights of the unpaid vendor is discussed hereafter in the chapters on Lien and Stoppage *in Transitu*. The transfer of such documents would of course not be a sufficient delivery by the vendor, if the goods represented by the documents were subject to liens or charges in favor of the bailees.[3]

[2] 3 T. R. 464.

[3] Atkinson *v.* Maling, 2 T. R. 462.

[1] 2 M. & G. 650.

[2] 11 A. & E. 34.

[3] *Delivery of deed, bill of lading, &c., when symbolical.* — A deed, or bill of sale of personal property, delivered by the owner to the purchaser, with intent thereby to transfer the property and possession thereof to him, operates as a delivery of the property; and this is especially the case where the property is incapable of immediate manual delivery, as where the property consists of a vessel at sea. Morgan *v.* Smith, 29 Ala. 283; Trieber *v.* Andrews, 31 Ark. 163; Goodenow *v.* Dunn, 21 Me. 86; Brinley *v.* Spring, 7 Me. (7 Greenl.) 241; Turner *v.* Coolidge, 43 Mass. (2 Metc.) 350; Joy *v.* Sears, 26 Mass. (9 Pick.) 4; Tucker *v.* Buffington, 15 Mass. 477; Southworth *v.* Sebring, 2 Hill (S. C.) 587; Gibson *v.* Stevens, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1123; Harper *v.* Dougherty, 2 Cr. C. C. 284. The assignment, or endorsement, of a bill of lading, will constitute a valid delivery of the goods or merchandise covered by the bill, so as to enable the assignor to maintain an action for the price, or defeat an action by the buyer against him for non-delivery. And the same rule would apply to wharf-warrants, delivery warehouse receipts, orders, and other like investments, which represent the goods therein mentioned as an assignment of such instruments is a symbolic or constructive delivery of the property therein referred to; and the possession of such instruments duly assigned is, by custom, equivalent to

§ 929. [In Borrowman *v.* Free,[1] it has been decided that the seller has a right, within the time limited by the contract, to tender a second delivery, although the first tender has been properly rejected by the buyer as being not in accordance with the contract.

In Playford *v.* Mercer,[2] where a cargo was sold "from the deck," it was held to mean that the seller should pay all that was necessary in order to enable the buyer to remove the cargo from the deck.]

§ 930. In a case in the State of Vermont,[1] where [*689] wool lying in *bulk on the vendor's premises was sold, payable on delivery by weight, the vendor was not allowed, in the absence of an express agreement, to recover the cost of labor, &c., in putting the wool into sacks furnished by the purchaser, the wool not having been weighed till after being put into the sacks.

In Robinson *v.* The United States,[2] the Supreme Court of the United States held parol evidence admissible to prove, in a sale of 100,000 bushels of barley, a usage to deliver in *sacks*, not in *bulk*.

[In the State of New York evidence was held inadmissible to prove a usage for the vendor of sheep to shear them and appropriate the wool before delivery.[3]]

possession of the property. Puckett *v.* Reed, 31 Ark. 131; Horr *v.* Barker, 8 Cal. 609; s. c. 70 Am. Dec. 791; Davis *v.* Jones, 3 Houst. (Del.) 68; Bailey *v.* Bensley, 87 Ill. 556; Broadwell *v.* Howard, 77 Ill. 305; McPherson *v.* Gale, 40 Ill. 368; Newcomb *v.* Cabell, 10 Bush (Ky.) 469; McKee *v.* Garcelon, 60 Me. 167; s. c. 11 Am. Rep. 200; Warren *v.* Milliken, 57 Me. 97; Smith *v.* Davenport, 34 Me. 520; Russell *v.* O'Brien, 127 Mass. 349; Newcomb *v.* Boston & Lowell R. R. Co., 115 Mass. 230; First Nat. Bank of Green Bay *v.* Dearborn, 115 Mass. 219; First Nat. Bank of Cairo *v.* Crocker, 111 Mass. 163; Cushing *v.* Breed, 96 Mass. (14 Allen) 376; Pratt *v.* Parkman, 41 Mass. (24 Pick.) 46; Gallop *v.* Newman, 24 Mass. (7 Pick.) 283; Gardner *v.* Howland, 19 Mass. (2 Pick.) 599; Glasgow *v.* Nicholson, 25 Mo. 29; First Nat. Bank Peoria *v.* Northern Railroad, 58 N. H. 203; Patrick *v.* Meserve, 18 N. H. 300; Hayden *v.* Demets, 53 N. Y. 426; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Dunham *v.* Pettee, 1 Daly (N. Y.) 112; Jordan *v.* James, 5 Ohio, 88; Tilden *v.* Minor, 45 Vt. 196; In re Batchelder, 2 Low. C. C. 245. See, also, Cessna *v.* Nimick, 113 Pa. St. 70; Sharp *v.* Carroll, 66 Wis. 62; *ante*, § 899, note 1; § 914, note 2.

[1] 4 Q. B. D. 500, C. A.

[2] 22 L. T. N. S. 41.

[1] Cole *v.* Kew, 20 Vt. 21.

[2] 13 Wallace, 363.

[3] Groat *v.* Gile, 51 N. Y. 431.

*Part III. [*690]

BUYER'S DUTIES.

CHAPTER I.

ACCEPTANCE.

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§ 931. The vendor having done or tendered all that his contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he ACCEPTS, and PAYS the price.

As to ACCEPTANCE, little need be said. When the vendor has tendered delivery, if there be no stipulated place, and no special agreement that the vendor is to send the goods, the buyer must fetch them; for it is settled law that the vendor need not aver nor prove in an action against the buyer anything more than his readiness and willingness to deliver on payment of the price.[1]

[1] Jackson *v.* Allaway, 6 M. & G. 942; Boyd *v.* Lett, 1 C. B. 222; Lawrence *v.* Knowles, 5 Bing. N. C. 399; De Medina *v.* Norman, 9 M. & W. 820; Spotswood *v.* Barrow, 1 Ex. 804; Cort *v.* Ambergate Railway Co., 17 Q. B. 127; 20 L. J. Q. B. 460; Baker *v.* Firminger, 28 L. J. Ex. 130; Cutter *v.* Powell, 2 Sm. L. C. 1, and notes. See, also, Barton *v.* McKelway, 22 N. J. L. (2 Zab.) 135.

Delivery at place agreed.—In an

[*691] § 932. *And if the vendee make default in fetching away the goods within a *reasonable time* after the sale, upon request made by the vendor, the vendee will be liable for warehouse rent and other expenses growing out of the custody of the goods, or in an action for damages if the vendor be prejudiced by the delay.[1]

The question of what is a reasonable time is one of fact for a jury under all the circumstances of the case.[2]

In Jones *v.* Gibbons[3] it was held no defence to an action by the buyer for non-delivery "as required" that he had not requested delivery within a reasonable time. If the vendor wanted to get rid of his obligation because of unreasonable delay in taking the goods, or in requiring delivery, it was for him to offer delivery, or to inquire of the buyer whether he would take the goods, and he had no right to treat the contract as rescinded by mere delay.[4]

§ 933. It has already been seen, in the chapter on Delivery, that the buyer is entitled before acceptance to a fair

action of goods sold and delivered, if the vendor shows a delivery at the place agreed, and that there remains nothing further for him to do, he need not show an acceptance by the vendee. Nichols *v.* Morse, 100 Mass. 523; Pacific Iron Works *v.* Long Island R. R. Co., 62 N. Y. 272; Krulder *v.* Ellison, 47 N. Y. 36; s. c. 4 Am. Rep. 721. Where a seller is to deliver specified goods on shipboard at the place of shipment within a certain period, the buyer must name the ship and give the seller notice of his readiness to receive the goods on board. Walton *v.* Black, 5 Houst. (Del.) 149.

[1] *Per* Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426; also *per* Bayley J. in Bloxam *v.* Sanders, *ante*, p. 668.

[2] Buddle *v.* Green, 3 H. & N. 996; 27 L. J. Ex. 33. See Denman *v.* Cherokee Iron Co., 56 Ga. 319; Howe *v.* Huntington, 15 Me. 350; Coon *v.* Spaulding, 47 Mich. 162; Chadwick *v.* Butler, 28 Mich. 349; Stange *v.* Wilson, 17 Mich. 342; Pinney *v.* St. Paul & Pac. R. R. Co., 19 Minn. 253; Derosia *v.* Winona & St. Peter R. R. Co., 18 Minn. 133; Cochran *v.* Toher, 14 Minn. 385; Cameron *v.* Wells, 30 Vt. 633.

[3] 8 Ex. 920.

[4] In Cameron *v.* Wells, 30 Vt. 633, the defendant in 1850 made an agreement with the plaintiff in the following terms: "Received of Ira Cameron $50 in part for 200 bushels of corn this day sold him, of which I have delivered 20 bushels, and the balance 180 bushels is due him on demand at my mill, at 75 cents per bushel, to be paid for on delivery." The court held that to free the seller from obligations of the contract he must call upon the buyer to take delivery within a reasonable time, but interpreted the contract as giving the buyer the right to take at his option 200 bushels more or less, and that he exercised that option by taking certain goods thereunder. See, also, Edwards *v.* Hartt, 66 Ill. 71.

opportunity of inspecting the goods, so as to see if they correspond with the contract.[1] He is not bound to accept goods in a closed cask which the vendor refuses to open:[2] nor to comply with the contract at all, but may rescind it, if the seller refuse to let him compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time;[3] nor to remain at his place of business after sunset on the day fixed for delivery, nor even if he happens to be there after sunset, to accept, unless there be time before midnight for inspecting and receiving the goods;[4] nor to select the goods bought out of a larger quantity, or a mixed lot that the vendor has sent him.[5] In a word, as delivery *and acceptance are [*692] concurrent conditions, it is enough so say that the vendee's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor.[6]

Thus in a sale of rice in "double bags," the purchaser was held not bound to accept the goods in single bags, in Makin *v.* The London Rice Mills Company.[7] In this case there was proof that this mode of packing rice made a difference in the sale.

§ 934. But in Pettitt *v.* Mitchell,[1] it was held that the buyer had not the right to *measure* goods sold *by the yard*

[1] Avery *v.* Stewart, 2 Conn. 69; s. c. 18 Am. Dec. 195; Shields *v.* Reibe, 9 Ill. App. 598; Thoubboron *v.* Lewis, 43 Mich. 635; s. c. 38 Am. Rep. 218; Croninger *v.* Crocker, 62 N. Y. 151; Pease *v.* Copp. 67 Barb. (N. Y.) 132; Osborne *v.* McQueen, 67 Wis. 392; Pew *v.* Lawrence, 27 Up. Can. C. P. 402.

[2] Isherwood *v.* Whitmore, 10 M. & W. 757; 11 M. & W. 347.

[3] Lorymer *v.* Smith, 1 B. & C. 1; Toulmin *v.* Headley, 2 C. & K. 157.

[4] Startup *v.* McDonald, 6 M. & G. 593.

[5] Dixon *v.* Fletcher, 3. M. & W. 146; Hart *v.* Mills, 15 M. & W. 85; Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; Levy *v.* Green, 8 E. & B. 575; 1 E. & E. 969; 27 L. J. Q. B. 111; 28 L. J. Q. B. 319; Tarling *v.* O'Riorden, 2 Ir. L. R. 82.

[6] Goodwin *v.* Wells, 49 Ala. 309; Downs *v.* Marse, 29 Conn. 409; Murphy *v.* Toner, 19 Ind. 228; Tufts *v.* McClure, 40 Iowa, 317; Hollfield *v.* Black, 20 Mo. App. 328; Reed *v.* Randall, 29 N. Y. 358; Swift *v.* Opdyke, 43 Barb. (N. Y.) 274; Downer *v.* Thompson, 2 Hill N. Y. 137; Hill *v.* Heller, 27 Hun (N. Y.) 416; Osborne *v.* McQueen, 67 Wis. 392; Cleveland Rolling Mills *v.* Rhodes, 121 U. S. 255; bk. 30, L. ed. 920; Fenton *v.* Braden, 3 Cr. C. C. 550.

[7] 20 L. T. N. S. 705.

[1] 4 M. & G. 819.

under the special circumstances of the case. The sale was at auction and the conditions were that the purchasers were to pay an immediate deposit of 5*s.* in the pound in part payment; that the lots must be taken away with all "faults, imperfections, or errors of description," by the following Saturday; that the remainder of the purchase-money was to be paid *before delivery:* and the catalogue also announced that "the stock comprised in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue." The goods remained open for public inspection two days *before* the sale. The defendant bought several lots, and went on the proper day to take the goods, but claimed a right to inspect and measure them *before paying*, which was refused. The action was for damages in special assumpsit, and the defendant pleaded a breach by plaintiff of conditions precedent, to wit, that the purchaser should be entitled "to *inspect and examine* the lot purchased by him, for the purpose of ascertaining whether the same was of the proper *quantity*, *quality*, *and description*," &c., &c.; and in another plea, breach of a condition, that the purchaser "should be entitled to *measure* the lot."

Held, that the law did not imply the conditions [*693] stated in *the pleas; and that under the contract as made, the buyer was bound to pay before delivery, but that he had the right *after delivery*, and *before taking away the goods*, to measure them and claim an allowance for deficient measure, if any.

§ 935. When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing and acceptance another.[1] But receipt will become acceptance if the right of rejection is not exercised within a reasonable

[1] Calhoun *v.* Paule, 26 Mo. App. 274. As to what acts will constitute acceptance, see Edwards *v.* Grand Trunk Ry., 54 Me. 105; Jones *v.* Mechanic's Bank, 29 Md. 287; Frostburg Mining Co. *v.* New England Glass Co., 63 Mass. (9 Cush.) 115.

time,[2] or if any act be done by the buyer which he would have no right to do unless he were owner of the goods.[3] The following cases illustrate these rules, in addition to the authorities reviewed, *ante*, pp. 128 *et seq.*

§ 936. In Parker *v.* Palmer,[1] the purchaser, after seeing fresh samples drawn from the bulk of rice purchased by him, which were inferior in quality to the original sample by which he bought it, offered the rice for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but held, that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

In Sanders *v.* Jameson,[2] it was proven that by the custom of the Liverpool corn-market, the buyer was only allowed one day for objecting that corn sold was not equal to sample, after which delay the right of rejection was lost. Rolfe B. held that this was a reasonable usage, binding on the purchaser.

[2] Bianchi *v.* Nash, 1 M. & W. 545; Beverley *v.* Lincoln Gas Light Co., 6 A. & E. 829; Couston *v.* Chapman, L. R. 2 Sc. App. 250, *ante*, p 643. See, also, Watkins *v.* Paine, 57 Ga. 50; Doane *v.* Dunham, 79 Ill. 131; Hirshhorn *v.* Stewart, 49 Iowa, 418; Henkel *v.* Welsh, 41 Mich. 665; Reed *v.* Randall, 29 N. Y. 358; Stafford *v.* Pooler, 67 Barb. (N. Y.) 143; Pease *v.* Copp, 67 Barb. (N. Y.) 132; Greenthal *v.* Schneider, 52 How. (N. Y.) Pr. 133; Neaffie *v.* Hart, 4 Lans. (N. Y.) 4; Boughton *v.* Standish, 48 Vt. 594.

[3] Merchin *v.* Ball, 68 Cal. 205; Treadwell *v.* Reynolds, 39 Conn. 31; Watkins *v.* Paine, 57 Ga. 50; Owens *v.* Sturges, 67 Ill. 366; Hadley *v.* Prather, 64 Ind. 137; Mackey *v.* Swartz, 60 Iowa, 710; Hershhorn *v.* Stewart, 49 Iowa, 418; Delamater *v.* Chappell, 48 Md. 244; Brownlee *v.* Bolton, 44 Mich. 218; Gaff *v.* Homeyer, 59 Mo. 345; Adams *v.* Helm, 55 Mo. 468; Philloe *v.* Sandwich Manuf. Co., 15 Neb. 625; Cahen *v.* Platt, 69 N. Y. 348; s. c. 25 Am. Rep. 203; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515; Reed *v.* Randall, 29 N. Y. 358; Reimers *v.* Ridner, 17 Abb. (N. Y.) Pr. 292; Bock *v.* Healy, 8 Daly (N. Y.) 156; Kipp *v.* Meyer, 5 Hun (N. Y.) 111; Clark *v.* Wright, 5 Phila. (Pa.) 439; Vanderhorst *v.* McTaggart, 2 Bay (S. C.) 498; Baldwin *v.* Doubleday, 59 Vt. 7; Dennis *v.* Stoughton, 55 Vt. 371; Proctor *v.* Spratley, 78 Va. 254; Gammon *v.* Abrams, 53 Wis. 323; Kahn *v.* Klabunde, 50 Wis. 235; Paige *v.* McMillan, 41 Wis. 337; Baker *v.* Henderson, 24 Wis. 509; Hill *v.* McDonald, 17 Wis. 97; Bartou *v.* Kane, 17 Wis. 37; s. c. 18 Wis. 262; Ruffee *v.* United States, 15 Ct. of Cl. 291; Hughes *v.* United States, 4 Ct. of Cl. 64; Gibbons *v.* United States, 2 Ct. of Cl. 421.

[1] 4 B. & Ald. 387.

[2] 2 C. & K. 557.

§ 937. In Chapman *v.* Morton,[1] a cargo of oil-cake was shipped by the plaintiffs, from Dieppe to the defendant, a merchant, at Wisbeach, in Cambridgeshire. On its arrival, in December, 1841, the defendant made complaint that it did not correspond with the sample. He, however, landed a part for the purpose of examination, and considering it [*694] not equal * to sample, landed the whole, lodged it in the public granary, and on the 24th of January, 1842, wrote to the plaintiffs that it lay there at their risk, and required them to take it back, which they refused to do. Some intervening negotiations took place without result, and in May, 1842, the defendant wrote to the plaintiffs that the oil-cake was lying in the granary at their disposal, and that if no directions were given by them, he would sell it for the best price he could get, and apply the proceeds in part satisfaction of his damage. The defendant had paid for the cargo by acceptances, before its arrival, and had taken up these acceptances, which were held by third parties. The plaintiffs replied that they considered the transaction closed. In July following, the defendant advertised the cargo for sale in *his own name*, and sold it in *his own name*, to a third person. On these facts it was held, that the defendant had accepted the cargo. Lord Abinger said: "We must judge of men's intentions by their acts, and not by expressions in letters, which are contrary to their acts. If the defendant intended to repudiate the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called on the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs." Parke B. thought that there was no acceptance by the defendant down to the month of May, "but the subsequent circumstances of his offering to sell, and selling the

[1] 11 M. & W. 534.

cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him, which may be considered as having been offered to him by the plaintiffs' letter in the month of May." Alderson and Rolfe BB. concurred.

§ 938. * The question whether on the sale of [*695] specific goods the purchaser may refuse acceptance because they do not correspond with sample, is discussed *post*, Book V. Part II. Ch. 1.

The cases of Heilbutt *v.* Hickson, *ante*, p. 638, are authorities to show under what circumstances an acceptance may be retracted, if the sample itself is deceptive.

[*696] *CHAPTER II.

PAYMENT AND TENDER.

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§ 939. The chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on. The terms of the sale may require, 1st, an *absolute* payment in cash, and

this is always implied when nothing is said; or, secondly, a *conditional* payment in promissory notes or acceptances; or, 3dly, it may be agreed that credit is given for a stipulated time, without payment, either absolute or conditional. In the first two cases, the buyer is bound to pay, if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last case he has a right to demand possession of the goods without payment.

[Frequently, also, the terms of payment are "cash less discount at a fixed date, with option of bill," or vice versâ, "bill, with option of cash less discount." In the former case, the seller can sue for the price of goods sold and delivered immediately on the buyer's refusal to accept at the date fixed. In the latter, the seller cannot sue for the price of goods sold and delivered, until the due date of the bill drawn by him, even although the buyer has refused to accept it, but he may bring a special action against the buyer for non-acceptance of the bill.[1]]

[*698] § 940. * The rule of the common law is that a man bound to pay has no right to delay till demand made, but must pay as soon as the money is due, under peril of being sued: and it has already been stated[1] that the vendor, in the absence of a stipulation to the contrary, is not bound to send or carry the goods, nor to allege or prove in an action against the buyer anything more than a readiness and willingness to deliver. It therefore follows that as soon as a sale is completed by mutual assent, and no time given, the buyer ought at once to make payment, if the goods are ready for delivery, without waiting for a demand, and that an action is maintainable against him for the price if he fails to do so.[2]

[1] This was, in effect, the ruling of Cockburn C. J., at Nisi Prius, in Anderson *v.* The Carlisle Horse Clothing Co., 21 L. T. N. S. 760; where he explains the two earlier decisions of Mussen *v.* Price, 4 East, 147, and Rugg *v.* Weir, 16 C. B. N. S. 471.

[1] *Ante*, p. 670.

[2] 1 Wms. Saund. 33 b, n. 2.

See, also, Steamboat Thompson *v.* Lewis, 31 Ala. 497; Robbins *v.* Harrison, 31 Ala. 160; Falls *v.* Gaither, 9 Port. (Ala.) 605; Cole *v.* Swanston, 1 Cal. 51; s. c. 52 Am. Dec. 288; Barr *v.* Logan, 5 Harr. (Del.) 52; Kirby *v.* Studebaker, 15 Ind. 45; Bradley *v.* Michael, 1 Ind. 551; Robinson *v.* Marney, 5 Blackf. (Ind.) 329; Davis S. M. Co. *v.* McGinnis, 45

§ 941. In cases where the property has passed, the buyer must pay the price according to the terms agreed on, even if the goods are destroyed in the vendor's possession, as has already been pointed out, *ante*, pp. 264 *et seq.* The goods are at the buyer's risk; they are *his* goods from the moment the property passes, and the price is due to the vendor, who simply holds the goods as bailee for the buyer in such a case.[1] And even where the property has not passed, and the price is to become payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery[2] (*ante*, pp. 272–73).

In Briggs *v.* Calverley,[3] the vendor attempted to go one step further, and to reject a tender of the price because not made till after he had instructed his attorney to sue out a *latitat* against the buyer, and after the attorney had applied for the writ, but before the writ was actually issued. Lord Kenyon C. J. said it was impossible to contend that the tender came too late, "having been made before the commencement of the suit."

§ 942. But the contract sometimes provides that the payment is only to be made after demand or notice, and

Iowa, 538; Hundley *v.* Buckner, 14 Miss. (6 Smed. & M.) 70; Clarkson *v.* Carter, 3 Cow. (N. Y.) 84; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; Cook *v.* Ferral, 13 Wend. (N. Y.) 285; McCombs *v.* McKennan, 2 Watts & S. (Pa.) 216; s. c. 37 Am. Dec. 505; Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15.

Tender, under a contract of sale and delivery providing no place for payment, may be made at any place where the other party may meet during the whole time, and the obligor is bound to find him, if within the State. Smith *v.* Walton, 5 Houst. (Del.) 141; King *v.* Finch, 60 Ind. 420; Littell *v.* Nichols Adm'r, Hard. (Ky.) 66; Grussy *v.* Schneider, 55 How. (N. Y.) Pr. 188; Houbis *v.* Volkening, 49 How. (N. Y.) Pr. 169. See, also, Davis *v.* Adams, 18 Ala. 264; Allen *v.* Hartfield, 76 Ill. 358; Milliken *v.* Warren, 57 Me. 46; Southwestern Freight &c. Co. *v.* Plant, 45 Mo. 517; Southwestern Freight &c. Co. *v.* Stanard, 44 Mo. 71; Osborn *v.* Gantz, 38 N. Y. Super. Ct. (6 J. & S.) 148; New York Fireman Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56; Simmons *v.* Green, 35 Ohio St. 104; Mitchell *v.* Georgia Banking Co., 6 Rich. (S. C.) 198. But the vendor need not seek the buyer outside of the State. Gill *v.* Bradley, 21 Minn. 15.

[1] Rugg *v.* Minett, 11 East, 210; *ante*, p. 269.

[2] Castle *v.* Playford, L. R. 5 Ex. 165; 7 Ex. 98; Martineau *v.* Kitching, L. R. 7 Q. B. 436.

[3] 8 T. R. 629.

[*699] when this is *the case, a reasonable time must be allowed for the buyer to fetch the money.[1] In Brighty *v.* Norton,[2] where a bill of sale provided that payment should be made in ten years, or "at such earlier day or time as the defendant should appoint by notice in writing sent by post, or delivered to the plaintiff or left at his house or last place of abode," it was held that a notice served at noon to make payment in half an hour was not a reasonable notice, the judges concurring in this, though agreeing that it was difficult to say in general what would be a reasonable time.

§ 943. In Toms *v.* Wilson,[1] it was held by the Queen's Bench, and in error by the Exchequer Chamber, that a promise to pay "immediately on demand" could not be construed so as to deprive the debtor of an opportunity to get the money which he may have in bank or near at hand; and Blackburn J. said that "if a condition is to be performed immediately, or on demand, that means that a reasonable time must be given, according to the nature of the thing to be done."[2]

And in Massey *v.* Sladen[3] where the promise was to pay "instantly on demand and without delay on any pretence whatever," and demand might be made *by giving or leaving verbal or written notice for him at his place of business*, held, that in the party's absence, reasonable time must be given for the notice left at his place of business to reach him.

§ 944. As to the mode of payment, the buyer will be discharged if he make payment in accordance with the vendor's request, even if the money never reach the vendor's hands; as if it be transmitted by post in compliance with the vendor's directions and be lost or stolen.[1] But Lord Kenyon held

[1] Bass *v.* White, 65 N. Y. 565.

[2] 32 L. J. Q. B. 38; 3 B. & S. 305.

[1] 4 B. & S. 442, 455; 32 L. J. Q. B. 33, 382.

[2] Com. Dig. tit. Conditions, G. 5.

[3] L. R. 4 Ex. 13.

[1] Warwick *v.* Noakes, Peake, 68, 98. See, also, Williams *v.* Carpenter, 36 Ala. 9; Buell *v.* Chapin, 99 Mass. 596; Morgan *v.* Richardson, 95 Mass. (13 Allen) 410; Wakefield *v.* Lithgow, 3 Mass. 249; Palmer *v.* Phœnix Mutual Life Ins. Co., 84 N. Y. 63; Townsend *v.* Henry, 9 Rich. (S. C.) L. 318.

The buyer may make payment by mail, but unless that mode of remittance is authorized by the seller, either

that a direction to send by post was not complied with by the delivery of a letter, with the remittances enclosed, to the bellman or postman in the street, but should have been put into the general post-office or a receiving office authorized to receive letters with money.[2]

§ 945. * In Caine *v.* Coulson,[1] the plaintiff's attor- [*700] ney wrote to the defendant to *remit* the balance of the account due to the plaintiff, with 13*s.* 4*d.* costs. The defendant remitted by post a banker's bill payable at sight for the amount of the account without the costs. The next day the attorney wrote refusing to accept the bill unless the 13*s.* 4*d.* were also remitted. The defendant refused, and action was brought; but the attorney kept the banker's bill, although he did not cash it. The jury found that the attorney had waived any objection to the remittance not having been made in cash, and only objected because the costs were not paid. Held, that the payment was good, on the ground that it was the attorney's duty to return the banker's bill if he did not choose to receive it in payment. Martin B. said of the attorney's conduct, "he says one thing, but he does another; he kept the banker's draft. It seems to me to be common sense to look at what is done, and not to what is said." This case was distinguished by Pollock C. B., in giving his decision, from Gordon *v.* Strange,[2] and Hough *v.* May,[3] which will presently be noticed, on the ground that in this case the creditor ordered the money *remitted*, which the learned Chief Baron said was of the very essence of the question.

§ 946. In Eyles *v.* Ellis,[1] both parties kept an account at the same banker's, and the plaintiff directed the amount to be paid there. The defendant ordered the banker to put

by express direction or by the usual course of dealing between the parties, the buyer sends money by mail at his own risk. Holland *v.* Tyus, 56 Ga. 56; Crane *v.* Pratt, 78 Mass. (12 Gray) 348, 349; Gurney *v.* Howe, 75 Mass. (9 Gray) 404; First National Bank *v.* McManigle, 69 Pa. St. 156.

[2] Hawkins *v.* Rutt, Peake, 186, 248.

[1] 1 H. & C. 764; 32 L. J. Ex. 97. And see Hardman *v.* Bellhouse, 9 M. & W. 596.

[2] 1 Ex. 477.

[3] 4 A. & E. 994.

[1] 4 Bing. 112.

the amount to the plaintiff's credit on Thursday, which was done, and the defendant so wrote to the plaintiff on Friday, but the plaintiff did not get the letter till Sunday. On Saturday the banker failed. Held, a good payment, although the defendant, when the money was transferred on the banker's books, had already overdrawn his account.

In Gordon *v.* Strange,[2] the defendant sent a post-office order in payment of a debt due to the plaintiff, *without any direction* from the plaintiff. The order, by mistake, was made payable to Frederick Gordon instead of Francis Gordon. The plaintiff did not get it cashed, although [*701] he was * told by the person who kept the post-office that the money would be paid to him if he would sign the name of the payee, as there was no one of the same name in the neighborhood. The plaintiff brought action, without returning the post-office order. The sheriff told the jury that the plaintiff having kept the order, with a knowledge that he might get the money for it at any time, was evidence of payment, although he was not bound, when he first received it, to put any name on it but his own. Held, a wrong direction, "the defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him."

§ 947. If the buyer has stated an account with the vendor, in which the vendor has, by mutual agreement, received credit for the amount of the goods sold, as a set-off against items admitted to be due by the vendor to the buyer, this is equivalent to an actual cash payment by the buyer of the price of the goods. The principle was thus explained by Lord Campbell, in a case which involved the necessity of a stamp to a written agreement, offered in proof of a plea of payment.[1] "The way in which an agreement, to set one debt against another of equal amount, and discharge both, proves a plea of payment is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the cross debt,

[2] 1 Ex. 477.

[1] Livingstone *v.* Whiting, 15 Q. B. 722; 19 L. J. Q. B. 528.

both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect, because, in contemplation of law, a pecuniary transaction is supposed to have taken place by which each debt was then paid." A written memorandum of such transaction was therefore held to be a receipt requiring a stamp. The cases establishing the above principle as to accounts stated, are quite numerous;[2] but the rule is not applicable to ordinary accounts current, with no agreement to set off the items.[3]

§ 948. * In the absence of any of these special [*702] modes of payment, it is the buyer's duty, under the contract, to make actual payment in cash, or a tender of payment which is as much a performance and discharge of his duty as an actual payment.

§ 949. A tender is only validly made when the buyer produces and offers to the vendor an amount of *money equal* to the price of the goods. But the actual production of the money may be dispensed with by the vendor.[1] The Courts, however, have been rigorous in requiring proof of a dispensation with the production of the money.

§ 950. In Dickinson *v.* Shee,[1] the debtor went to the attorney of the creditor, saying he was ready to pay the balance of the account, 5*l.* 5*s.*, and the attorney said he could not take that sum, the claim being above 8*l.* Held, not a good

[2] Owens *v.* Denton, 1 Cr. M. & R. 711; Callendar *v.* Howard, 10 C. B. 290; Ashby *v.* James, 11 M. & W. 542; McKellar *v.* Wallace, 8 Moo. P. C. 378; Smith *v.* Page, 15 M. & W. 683; Sutton *v.* Page, 3 C. B. 204; Clark *v.* Alexander, 8 Scott N. R. 147; Scholey *v.* Walton, 12 M. & W. 510; Worthington *v.* Grimsditch, 7 Q. B. 479; Sturdy *v.* Arnaud, 3 T. R. 599.

[3] Cottam *v.* Partridge, 4 M. & G. 271; and see *ante*, pp. 163–165.

[1] Berry *v.* Nall, 54 Ala. 451; Rudulph *v.* Wagner, 36 Ala. 698; Sands *v.* Lyon, 18 Conn. 18; Rogers *v.* Rutter, 77 Mass. (11 Gray) 410; Hazard *v.* Loring, 64 Mass. (10 Cush.) 267; Town *v.* Trow, 41 Mass. (24 Pick.) 168; Breed *v.* Hurd, 23 Mass. (6 Pick.) 356; Potts *v.* Plaisted, 30 Mich. 149; Harmon *v.* Magee, 57 Miss. 410; Guthman *v.* Kearn, 8 Neb. 502; Sargent *v.* Graham, 5 N. H. 440; s. c. 22 Am. Dec. 469; Strong *v.* Blake, 46 Barb. (N. Y.) 227; Holmes *v.* Holmes, 12 Barb. (N. Y.) 137; Bakeman *v.* Pooler, 15 Wend. (N. Y.) 637, 647; Appleton *v.* Donaldson, 3 Pa. St. 381; Raines *v.* Jones, 4 Humph. (Tenn.) 490; Knight *v.* Abbott, 30 Vt. 577; Sheredine *v.* Gaul, 2 U. S. (2 Dall.) 190; bk. 1, L. ed. 344.

[1] 4 Esp. 68.

tender, because the money was not produced, and the defendant had not dispensed with the production; "if he saw it produced, he might be induced to accept of it."

In Leatherdale *v.* Sweepstone,[2] the defendant offered to pay the plaintiff, and put his hand into his pocket, but before the money could be produced the plaintiff left the room. Held, by Lord Tenterden, to be no tender.

In Thomas *v.* Evans,[3] the plaintiff called at his attorney's office to receive money, and was told by the clerk that he had 10*l.* for him, which had been left by the attorney to be paid to him. The plaintiff, who wrongly supposed that a larger sum had been collected for him, said he would not receive the 10*l.* The clerk did not produce the money. Held, no tender.

In Finch *v.* Brook,[4] in the Common Pleas, in 1834, the defendant's attorney called on the plaintiff and said: "I have come to pay you 1*l.* 12*s.* 5*d.*, which the defendant owes you," and put his hand in his pocket; whereupon the plaintiff said: "I can't take it; the matter is now in the hands of my attorney." The money was not produced. Held, no tender.

[*703] The facts were found on a special verdict, and the judges said that the * jury, on the facts, would have been justified in finding a dispensation, and the Court would not have interfered. Vaughan J. said that Sir James Mansfield, who had held, in Lockyer *v.* Jones,[5] that the creditor could not object to the non-production of the money if at the time of the tender he had refused to receive it on the ground that he claimed a larger amount, had in a subsequent case said, "that great importance was attached to the production of the money, as the sight of it might tempt the creditor to yield."

§ 951. The following are cases in which the Courts have held the acts or sayings of the creditor sufficient to dispense with the production of the money: — Douglas *v.* Patrick,[1]

[2] 3 C. & P. 342.
[3] 10 East, 101.
[4] 1 Bing. N. C. 253. See, however, Maber *v.* Maber, L. R. 2 Ex. 153.
[5] Peake, 239, n.
[1] 3 T. R. 683.

where the debtor said he had eight guineas and a half in his pocket which he had brought for the purpose of satisfying the demand, and the creditor said "he need not give himself the trouble of offering it, for he would not take it, as the matter was in the hands of his attorney;" Read *v.* Goldring,[2] where the debtor pulled out his pocket-book and told the creditor, whom he met in the street, that if he would go into a neighboring public-house with him, he would pay him 4*l.* 10*s.*, and the creditor said "he would not take it;" Alexander *v.* Brown,[3] where the person who made a tender of 29*l.* 19*s.* 8*d.* had in his hand two bank notes twisted up and enclosing four sovereigns and 19*s.* 8*d.* in change, making the precise sum, and told the plaintiff what it was, but did not open it before him, and it was objected that he ought to have *shown* him the money; Best C. J. saying in this last case, that if the debtor had not mentioned the amount to the creditor, the tender would not have been sufficient.

In Harding *v.* Davis,[4] the proof was that the defendant, at her own house, offered to pay the plaintiff 10*l.*, saying that she would go upstairs and fetch it, and the plaintiff said "she need not trouble herself for he could not take it." Held, by Best C. J. to be a good tender, the learned Chief Justice adding, however, "I agree that it [*704] would not do if a man said, I have got the money, but must go a mile to fetch it."

§ 952. The tender must of course be made in such a manner as will enable the creditor to examine and count the money, but it may be produced in a purse or bag ready to be counted by the creditor if he choose, provided the sum be the correct amount.[1]

The tender must, at common law, be made in the current coin of the realm,[2] or foreign money legally made current by proclamation.[3]

[2] 2 M. & S. 86.
[3] 1 C. & P. 288.
[4] 2 C. & P. 77. And see Jones *v.* Cliff, 1 C. & M. 540; Ex parte Danks, 2 De G. M. & G. 936; 22 L. J. Bank. 73; Jackson *v.* Jacob, 3 Bing. N. C. 869.

[1] Isherwood *v.* Whitmore, 11 M. & W. 347.
[2] Wade's case, 5 Rep. 114 a.
[3] Bac. Abr. Tender (B. 2); Wade's case, 5 Rep. 114; Case of Mixed Moneys, Davys, 18.

And by "The Coinage Act, 1870," s. 4, a tender of payment in coin is declared to be legal: —

In the case of gold coins for a payment of any amount.

In the case of silver coins for a payment not exceeding forty shillings.

In the case of bronze coins for a payment not exceeding one shilling.

By the 7th sect. of the same Act, all contracts, sales, payments, &c., "shall be made, executed, entered into, done, and had according to the coins which are current and legal tender pursuant to this Act, and not otherwise, unless the same be made, executed, entered into, done, or had according to the currency of some British possession, or some foreign State."

By the 3 & 4 Will. IV. c. 98, s. 6, tenders are valid for all sums in excess of five pounds, if made in notes of the Bank of England, payable to bearer on demand, so long as the Bank continues to pay on demand its notes in legal coin.[4]

§ 953. When the tender is made in a currency different from that required by the law, the Courts are much less rigorous in inferring a dispensation than in cases where no money is produced.[1] If the buyer should offer his vendor a country bank note, or a cheque, or silver coin for a debt

[4] *Under the United States legal tender act.* — Federal specie currency and federal paper currency are the only denominations available for legal tender. The constitutionality of this statute was sustained in the legal tender cases of Knox *v.* Lee and Parker *v.* Davis, 79 U. S. (12 Wall.) 457; bk. 20, L. ed. 287; overruling Hepburn *v.* Griswold, 75 U. S. (8 Wall.) 603; bk. 19, L. ed. 513. See Corbit *v.* Bank of Smyrna, 2 Harr. (Del.) 235; s. c. 30 Am. Dec. 635; Welch *v.* Frost, 1 Mich. 30; s. c. 48 Am. Dec. 692; Blount *v.* Windley, 68 N. C. 1; s. c. 12 Am. Rep. 616; McDowell *v.* Keller, 4 Coldw. (Tenn.) 266; Cooley *v.* Weeks, 10 Yerg. (Tenn.) 142; Ball *v.* Stanley, 5 Yerg. (Tenn.) 199; s. c. 26 Am. Dec. 263; Ward *v.* Smith, 74 U. S. (7 Wall.) 447; bk. 19, L. ed. 207; Bank of United States *v.* Bank of Georgia, 23 U. S. (10 Wheat.) 333; bk. 6, L. ed. 334.

[1] Seawell *v.* Henry, 6 Ala. 226; Towson *v.* Havre de Grace Bank, 6 Har. & J. (Md.) 47; s. c. 14 Am. Dec. 254; Harding *v.* Commercial Loan Co., 84 Ill. 251; Hoyt *v.* Byrnes, 11 Me. (2 Fairf.) 475; Snow *v.* Perry, 26 Mass. (9 Pick.) 542; Fosdick *v.* Van Husan, 21 Mich. 567; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Williams *v.* Rorer, 7 Mo. 556; Warren *v.* Mains, 7 Johns. (N. Y.) 476; Wheeler *v.* Knaggs, 8 Ohio, 169; Brown *v.* Dysinger, 1 Rawle (Pa.) 408; Noe *v.* Hodges, 3 Humph. (Tenn.) 162; Ball *v.* Stanley, 5 Yerg. (Tenn.) 199; s. c. 26 Am. Dec. 263; Ward *v.* Smith, 74 U. S. (7 Wall.) 447; bk. 19, L. ed. 207; Bank of United States *v.* Bank

exceeding 40*s*., and the vendor should refuse to receive payment, * alleging any other reason than the [*705] *quality* of the tender; as if he should say that more was due to him, and he would not accept the *amount* tendered, the inference would be readily admitted that he dispensed the buyer from offering the coin or Bank of England notes strictly requisite to make the tender valid.

In Polyglass *v.* Oliver,[2] all the earlier cases were reviewed, and it was held that a tender in country bank notes where the plaintiff made no objection on that account, but said "I will not take it, I claim for the last cargo of soap," was a valid tender. Bayley B. gave as a reason, that "if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money, and making a good and valid tender. But by not doing so, and claiming a larger sum, you delude him."

§ 954. A tender of more than is due is a good tender, for *omne majus continet in se minus*, and the creditor ought to take out of the sum tendered him as much as is due to him.[1] A tender, therefore, of 20*l*. 9*s*. 6*d*. in bank notes and silver, proves a plea of tender of 20*l*.[2] So, where the debtor put down 150 sovereigns on the attorney's desk, and told him to take out of it what was due to him, held, a good tender for 108*l*.[3]

§ 955. But a tender of a larger sum than is due, with a demand for change is not a good tender, if the creditor objects to giving change.

In Watkins *v.* Robb,[1] the proof in support of a plea of tender of 4*l*. 19*s*. 6*d*. was that the debtor tendered a five-pound note, and demanded sixpence change, but Buller J. was of opinion that the creditor was not bound to give change, and held the tender bad.

of Georgia, 23 U. S. (10 Wheat.) 333; bk. 6, L. ed. 334.

[2] 2 Cr. & J. 65. See, also, Jones *v.* Arthur, 8 Dowl. P. C. 442; Caine *v.* Coulson, 1 H. & C. 764; 32 L. J. Ex. 97, *ante*, 700.

[1] 2 Wade's case, 3d resolution, 5 Rep. 115.

[2] Dean *v.* James, 4 B. & Ad. 546.

[3] Bevans *v.* Rees, 5 M. & W. 306; and see Douglas *v.* Patrick, 3 T. R. 683; Black *v.* Smith, Peake, 88. See, also, Patterson *v.* Cox, 25 Ind. 261.

[1] 2 Esp. 711.

[*706] *So, a tender of a five-pound note in payment of 3*l.* 10*s.*, with a demand for the change, was held no tender by Le Blanc J. in Betterbee *v.* Davis,[2] the learned judge saying that if that was good, a tender of a 50,000*l.* note, with demand for change, would be equally good.

But in Tadman *v.* Lubbock, decided in M. Term, 1824 (and reported in the note to Blow *v.* Russell,[3] where a tender of 1*l.* 13*s.* was pleaded, the proof was that the party offered two sovereigns and asked for change, and that the other refused the tender, *on the ground* that more than 1*l.* 13*s.* was due. The Court of King's Bench held this a good tender.

§ 956. It is now settled that there can be no valid tender of part of an *entire* debt, though a debtor may make a valid tender of one of several distinct debts if he specify the debt on account of which he makes the tender; and if he makes a tender without specifying which of several debts is the subject of the tender, and the amount tendered be insufficient to cover all, it will not be good for *any*.[1]

In Dixon *v.* Clarke,[2] the authorities were all reviewed, and Wilde C. J. gave a very lucid exposition of the whole subject of tender, from which the following passages are extracted: "The argument further involved the general question, whether a tender of part of an entire debt is good. . . . On consideration, we are of opinion, upon principle, that such a tender is bad.

"In actions of debt and assumpsit the principle of the plea of tender in our apprehension is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able by tendering the requisite

[2] 3 Camp. 70. See Robinson *v.* Cook, 6 Taunt. 336.

[3] 1 C. & P. 366.

[1] *A tender of part of an entire* debt is invalid. Rose *v.* Duncan, 49 Ind. 269; Helphrey *v.* Chicago, &c. R. R. Co., 29 Iowa, 480; Wright *v.* Behrens, 39 N. J. L. (10 Vr.) 413. But if the deficiency in the amount is caused by the refusal of the creditor to inform the debtor of the amount payable, the tender may be held sufficient. Nelson *v.* Robson, 17 Minn. 284. The creditor must object at the time of tender to the insufficiency of the amount. Oakland Savings Bank *v.* Applegarth, 67 Cal. 86.

[2] 5 C. B. 365.

money; the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain his plea, although * he will not thereby [*707] bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action in the sense that he will recover judgment for his cost of defence against the plaintiff, in which respect the plea of tender is essentially different from that of payment of money into court. And as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

§ 957. "With respect to the averment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an *entire* performance of the contract was demanded, and refused *at any time*, when by the terms of it he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made, and refused, a subsequent tender of part of it is bad, *notwithstanding that by part payment or other means the debt may have been reduced in the interim to the sum tendered.* And this is the principle of the decision in Cotton *v.* Godwin.[1] If, however, the demand was of a larger sum than that originally due under the contract, a refusal to pay it would *not* falsify the *toujours prist*, even though the amount demanded were made up of the sum due under the contract and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of Brandon *v.* Newington[2] and Hesketh *v.* Fawcett,[3] which appear to overrule Tyler *v.* Bland.[4]

"This principle, however, we think is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the

[1] 7 M. & W. 147.
[2] 3 Q. B. 915.
[3] 11 M. & W. 356.
[4] 9 M. & W. 338.

time how the amount demanded is made up; for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *toujours prist* as to *each*.

§ 958. "But besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant so far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a *future day certain*, this branch of the plea can only be satisfied by *alleging a tender on the very day*. And this is the principle of the decisions of Hume *v.* Peploe[1] and Poole *v.* Tunbridge.[2] It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill or the maker of a note, of a performance *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in Hume *v.* Peploe), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by *alleging a tender of the whole sum* due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow." [*708]

§ 959. This thorough exposition of the subject was followed by the further decision in Hardingham *v.* Allen,[1] by the same Court, in the same year, deciding that where a demand was made of 1*l.* 7*s.* for several matters, including 10*s.* for a particular contract, a tender of 19*s.* 6*d.*, without specifying the appropriation to be made of it, did not sustain a plea of 10*s.* on the particular contract.

[1] 8 East, 168.
[2] 2 M. & W. 223.
[1] 5 C. B. 793.

§ 960. In Searles *v.* Sudgrove,[1] the defendant pleaded as to 55*l.* 6*s.* parcel, &c., tender. Plaintiff replied that a larger sum was due at the time of the tender than the account tendered, as *one entire sum* and on *one entire contract*, which larger sum the plaintiff demanded at the time of the tender, and the defendant refused. Rejoinder, that though a larger sum was due at the time of making the tender, yet before * making the tender the plaintiff was indebted [*709] to the defendant in an amount equal to the whole of the larger sum, except the said sum of 55*l.* 6*s.*, parcel, &c., for money payable, &c., which amount, &c., the defendant was and still is *ready to set off*, &c. Demurrer and joinder. The demurrer was sustained, Lord Campbell saying: that the statute 2 Geo. II. c. 22, did not cover the case, and that the defendant was bound to plead his set-off, and pay the residue into Court instead of tendering it. The defendant was, therefore, allowed amend on the usual terms.

§ 961. A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object.[1] Where there is no ambiguity in the language of the debtor, it is a question of law for the Court whether his

[1] 5 E. & B. 639; 25 L. J. Q. B. 15. See, also, Robinson *v.* Ward, 8 Q. B. 920; Phillpotts *v.* Clifton, 10 W. R. Ex. 135.

[1] Sanford *v.* Bulkley, 30 Conn. 344; Cothran *v.* Scanlan, 34 Ga. 556; Pulsifer *v.* Shepard, 36 Ill. 513; Storey *v.* Krewson, 55 Ind. 397; s. c. 23 Am. Rep. 668; Rose *v.* Duncan, 49 Ind. 269; Bickle *v.* Beseke, 23 Ind. 18; Latham *v.* Hartford, 27 Kans. 249; Shaw *v.* Sears, 3 Kans. 242; Walker *v.* Brown, 12 La. An. 266; Brown *v.* Gilmore, 8 Me. (8 Greenl.) 107; s. c. 22 Am. Dec. 223; Richardson *v.* Boston Chemical Laboratory, 50 Mass. (9 Metc.) 42; Loring *v.* Cooke, 20 Mass. (3 Pick.) 48; Johnson *v.* Cranage, 45 Mich. 14; Moynahan *v.* Moore, 9 Mich. 9; s. c. 77 Am. Dec. 468; Smith *v.* Nevitt, 1 Miss. (Walk.) 370; s. c. 12 Am. Dec. 571; Tompkins *v.* Batie, 11 Neb. 147; s. c. 38 Am. Rep. 361; Sargent *v.* Graham, 5 N. H. 440; s. c. 22 Am. Dec. 469; Strong *v.* Blake, 46 Barb. (N. Y.) 227; Roosevelt *v.* Bull's Head Bank, 45 Barb. (N. Y.) 579; Cashman *v.* Martin, 50 How. (N. Y.) Pr. 338; Cass *v.* Higenbotam, 27 Hun (N. Y.) 406; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342; s. c. 35 Am. Dec. 569; Wood *v.* Hitchcock, 20 Wend. (N. Y.) 47; Bakeman *v.* Pooler, 15 Wend. (N. Y.) 37; Wagenblast *v.* McKean, 2 Grant (Pa.) 393; Eastland *v.* Longshorn, 1 Nott & McC. (S. C.) 194; Smith *v.* Keels, 15 Rich. (S. C.) 318; Flake *v.* Nuse, 51 Tex. 98; Draper *v.* Hitt, 43 Vt. 439; s. c. 5 Am. Rep. 292; Holton *v.* Brown, 18 Vt. 224; s. c. 46 Am. Dec. 148; Elderkin *v.* Fellows, 60 Wis. 339; Perkins *v.* Beck, 4 Cr. C. C. 68.

tender was conditional or not, but if there be ambiguity, the question is properly left to the jury; as where a debtor said he had called to tender 8*l.* in *settlement* of an account, and Lord Denman C. J. left it to the jury whether that meant simply in *payment*, or involved a condition, and this was held right by the King's Bench.[2]

§ 962. The condition which the debtor is the most apt to impose, is one to which the law does not permit him to subject the creditor. The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made.[1] He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due.[2]

In Sutton *v.* Hawkins,[3] the money was tendered as "all that was due," and this was held bad.

In the Marquis of Hastings *v.* Thorley,[4] a tender of a sum "in payment of the half-year's rent, due at Lady Day last," was held bad, by Lord Abinger C. B., as putting on the creditor the condition of admitting that no more rent [*710] was * due. The rent claimed by the plaintiff was 23*l.*, and the tender was of 21*l.*

In Mitchell *v.* King,[5] a tender by the debtor, who said "I do not admit of its being taken in part, but as a settlement," was held no tender.

In Hough *v.* May,[6] the tender was in a cheque, in these words: "Pay Messrs. Hough and Co., balance account railing, or bearer, 8*l.* 11*s.*" This was held no tender, because, as Coleridge J. put it, "Suppose this cheque had been presented, and it had been afterwards a question for a jury

[1] *A tender upon condition* that the creditor will give a release or a discharge of all claims is valid. Sanford *v.* Bulkley, 30 Conn. 344; Richardson *v.* Boston Chemical Laboratory, 50 Mass. (9 Metc.) 42; Loring *v.* Cook, 20 Mass. (3 Pick.) 48; Thayer *v.* Brackett, 12 Mass. 450; Wood *v.* Hitchcock, 20 Wend. (N. Y.) 47; Hepburn *v.* Auld, 5 U. S. (1 Cr.) 321; bk. 2, L. ed. 122; Perkins *v.* Beck, 4 Cr. C. C. 68.

[2] Eckstein *v.* Reynolds, 7 A. & E. 80; Marsden *v.* Goode, 2 C. & K. 133.

[2] Bowen *v.* Owen, 11 Q. B. 131.

[3] 8 C. & P. 259.

[4] Ibid. 573.

[5] 6 C. & P. 237.

[6] 4 A. & E. 954.

whether the plaintiff had been paid in full; they would see that before the action was brought, the plaintiff had accepted and made use of a cheque professedly given for the then balance," and this condition vitiated the tender.

§ 963. But in Henwood *v.* Oliver,[1] where the defendant produced the money, saying: "I am come with the amount of your bill," and the plaintiff refused the money, saying: "I shall not take that. It is not my bill," the tender was held unconditional and good. Patteson J. said: "The defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect of it. How then would the plaintiff preclude himself from recovering more, by accepting an offer of part, accompanied by expressions that are *implied* in every tender. *Expressio eorum quæ tacite insunt nihil operatur.* If the defendant when he paid the money had called it *part* of the amount of the plaintiff's bill, he would thereby have admitted that more was due, and the effect of the tender would have been defeated."

Henwood *v.* Oliver was followed by Wightman J. in Bull *v.* Parker,[2] in a case where the witness who proved the tender, said: "I offered him 4*l.*, and I said I went by the direction of Mr. C. Parker, to pay him 4*l.*, in full discharge of his account. I did not say, I will pay the money, if you * will accept it in full discharge." The learned [*711] judge held, that there was no such condition annexed to the offer, as amounted to saying, "unless you accept this money in full discharge, I will not pay it at all."

§ 964. In Bowen *v.* Owen,[1] a tenant sent a person to his landlord with a letter, saying, "I have sent with the bearer, T. T., a sum of 26*l.* 5*s.* 7½*d.*, to settle one year's rent of *Nant-y-pair.*" The messenger told the landlord that he had the money with him to pay, but the latter refused, saying

[1] See, also, Evans *v.* Judkins, 4 Campb. 156; Strong *v.* Harvey, 3 Bing. 304; Ford *v.* Noll, 2 Dowl. N. S. 617; Bowen *v.* Owen, 11 Q. B. 131; Cheminant *v.* Thornton, 2 C. & P. 50; Griffith *v.* Hodges, 1 C. & P. 419; Huxham *v.* Smith, 2 Camp. 19; Read *v.* Goldring, 2 M. & S. 86.

[2] 1 Q. B. 409.

[1] 11 Q. B. 130.

more was due. The messenger went away, and returned, saying, he had a few pounds more in his pocket to pay, in addition to the 26*l.* 5*s.* 7½*d.*, certain arrears of duties, but the landlord again refused, saying there was more due. It was objected that these offers, coupled with the plaintiff's letter, were no more than a conditional tender, and Rolf B. so ruled, but the King's Bench held, that the letter did not contain a condition, Erle J. stating the general rule, as follows: "The person making a tender has a right to exclude presumptions against himself, by saying, 'I pay this as the whole that is due you;' but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender."

[The latest case on this point is Jones *v.* Bridgman,[2] where a tender of rent with the words, "Here is your quarter's rent," was held to be good as not imposing any condition on the receipt; and the decision in the Marquis of Hastings *v.* Thorley, *ante*, p. 709, was stated to be inconsistent with Bowen *v.* Owen, which was followed.]

§ 965. A tender accompanied by a protest that the amount is not due is a good tender. Lord Ellenborough was of a contrary opinion in Simmons *v.* Wilmot;[1] but this case must now be considered as overruled on this point by Scott *v.* Uxbridge Railway Company;[2] in which the Court of Common Pleas adopted and followed the ruling of Pollock C. B. in Manning *v.* Lunn.[3]

[*712] * Nor is a tender vitiated because the debtor says he considers it all that is due.[4]

A payment or tender, by one of several joint debtors or to one of several joint creditors, is valid.[5]

[2] 39 L. T. N. S. 500.

[1] 3 Esp. 91.

[2] L. R. 1 C. P. 596; 35 L. J. C. P. 293.

[3] 2 C. & K. 13.

[4] Robinson *v.* Ferrady, 8 C. & P. 752. A remark that the amount tendered settled the amount due may be made as a simple explanation of the tender and not as a condition. Foster *v.* Drew, 39 Vt. 51.

[5] Douglas *v.* Patrick, 3 T. R. 683; Wallace *v.* Kelsall, 7 M. & W. 264; Jones *v.* Yates, 9 B. & C. 532; Gordon *v.* Ellis, 7 M. & G. 607; Cooper *v.* Law, 6 C. B. N. S. 502; 28 L. J.

§ 966. Whether or not the debtor was entitled at common law to demand a receipt for money tendered seems to be considered an open question.[1]

In Cole *v.* Blake,[2] Lord Kenyon said that it had been determined that a party tendering money could not in general demand a receipt for the money, and quoted one case, in which he said that it had been held that the King's Receiver, as an exception to the general rule, was obliged to give a receipt.[3] And in Laing *v.* Mender,[4] where the defendant asked for a *stamped* receipt, Abbott C. J. said: "A party has no right to say I will pay you the money if you will give me a stamped receipt, but he ought, according to the 43 Geo. III. c. 126, to bring a receipt with him, and require the other party to sign it."

§ 967. But in Richardson *v.* Jackson,[1] where the Court held that the creditor could not object to the tender on the ground that a receipt was asked, because at the time of the offer he only refused it on the ground that a larger sum was due to him, Alderson and Rolfe BB. were careful in guarding themselves against countenancing the rule that a man who pays money is not entitled to demand a receipt, Rolfe B. saying: "I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death, the representatives may be deprived of all evidence of the payment."

§ 968. But now, by statute,[1] a stamp of one penny is required *on all receipts upon payment [*713]

C. P. 282; Brandon *v.* Scott, 7 E. & B. 234; 26 L. J. Q. B. 163.

[1] *Tender — demand of receipt.* — In Lockridge *v.* Lacey, 30 Up. Can. Q. B. 494, the court were of the opinion that so long as the receipt was a mere acknowledgment of the payment of money, and imposed no condition upon the creditor, the debtor was entitled to demand it when making a tender. In Saunders *v.* Frost, 22 Mass. (5 Pick.) 259, 270; s. c. 16 Am. Dec. 394; and Balme *v.* Wambaugh, 16 Minn. 116, it is laid down that where there is a statutory duty imposed upon the creditor to give a release or discharge, the debtor may demand it at the time of tender.

[2] Peake, 179.

[3] Bunbury, 348.

[4] 1 C. & P. 257.

[1] 8 M. & W. 298.

[1] 16 & 17 Vict. c. 59, ss. 3, 4.

of money amounting to 2*l*., and the debtor is empowered to tender a blank receipt, with the proper stamp, at the time of payment, which the creditor is bound to fill up, and to pay the amount of the stamp, under the penalty of 10*l*.[2]

§ 969. [The statutes 16 & 17 Vict. c. 59, ss. 3 and 4, and 43 Geo. III. c. 126, are repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), and receipt stamps are now regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 120–123. It is left open whether the person giving or the person taking a receipt is to pay the amount of the stamp, but any person giving any receipt liable to duty, and not duly stamped, is liable to a penalty. This, in practice, throws the obligation upon the creditor.

As to how far a receipt by a third party is admissible to prove payment, when the liability of the defendant depends upon the plaintiff having paid money to such third party, see The Carmarthen and Cardigan Railway Company *v.* The Manchester and Milford Railway Company.[1]]

In Jones *v.* Arthur,[2] where the tender was made by a cheque in a letter which requested a receipt in return, this request was held not to invalidate the tender.

§ 970. It is now settled by the decision of the Queen's Bench in 1860, in James *v.* Vane,[1] overruling Cooch *v.* Maltby,[2] and affirming the earlier case of Dixon *v.* Watkin,[3] that a tender is a *bar to the action* quoad its amount, and not merely a bar to damages.[4]

[2] 43 Geo. III. c. 126, ss. 5 and 6.

[1] L. R. 8 C. P. 685.

[2] 8 Dowl. 442.

[1] 2 E. & E. 883; 29 L. J. Q. B. 169.

[2] 23 L. J. Q. B. 305.

[3] 7 M. & W. 214.

[4] *When a tender has been made and refused*, the debt is not discharged or satisfied, and the creditor is entitled to recover at least the amount of the tender. Redington *v.* Chase, 34 Cal. 666; Fisher *v.* Moore, 19 Iowa, 84; Mohn *v.* Stoner, 11 Iowa, 30; Fridge *v.* State, 3 Gill & J. (Md.) 103; s. c. 20 Am. Dec. 463; Suffolk Bank *v.* Worcester Bank, 22 Mass. (5 Pick.) 106; Snyder *v.* Quarton, 47 Mich. 211; Chase *v.* Welsh, 45 Mich. 345; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Haynes *v.* Thom, 28 N. H. (8 Fost.) 386; Stowell *v.* Read, 16 N. H. 20; s. c. 41 Am. Dec. 714; Baker *v.* Fourth New Hampshire Turnpike, 8 N. H. 509; Kelly *v.* West, 36 N. Y. Super. Ct. (4 J. & S.) 304; Manny *v.* Harris, 2 Johns. (N. Y.) 25; s. c. 3 Am. Dec. 386; Hill *v.* Place, 7 Robt. (N. Y.) 389; Elliott *v.* Bass, 4 Baxt.

§ 971. The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the vendor's right to the price reviving on non-payment of the security. But if a dispute arise as to the intention of * the parties, the question is one [*714] of fact for the jury.[1] The intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods,[2] or "in discharge" of the price.[3] Lord Kenyon said, in Stedman *v.* Gooch, that "the law is clear that if in a payment of a debt the

(Tenn.) 354; Spaulding *v.* Warner, 57 Vt. 654; Preston *v.* Grant, 34 Vt. 201; Downer *v.* Sinclair, 15 Vt. 495.

If the tender has been kept good and the money is brought into court, it will save the debtor from any liability for interest or costs. Park *v.* Wiley, 67 Ala. 310; Hamlett *v.* Tallman, 30 Ark. 505; Woodruff *v.* Trapnall, 12 Ark. 640; Gray *v.* Angier, 62 Ga. 596; Aulger *v.* Clay, 109 Ill. 487; Thayer *v.* Meeker, 86 Ill. 474; Stow *v.* Russell, 36 Ill. 18; King *v.* Finch, 60 Ind. 420; Martin *v.* Whisler, 62 Iowa, 416; King *v.* Harrison, 32 Kans. 215; Nantz *v.* Lober, 1 Duv. (Ky.) 304; De Goer *v.* Kellar, 2 La. An. 496; Call *v.* Lothrop, 39 Me. 434; Berthold *v.* Reyburn, 37 Mo. 586; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Stowell *v.* Read, 16 N. H. 20; s. c. 41 Am. Dec. 714; Tuthill *v.* Morris, 81 N. Y. 94; Hill *v.* Place, 7 Robt. (N. Y.) 389; Logue *v.* Gillick, 1 E. D. Smith (N. Y.) 398; Tate *v.* Smith, 70 N. C. 685; Murray *v.* Windley, 7 Ired. (N. C.) L. 201; s. c. 47 Am. Dec. 324; Foote *v.* Palmer, Wright (Ohio) 336; Cornell *v.* Green, 10 Serg. & R. (Pa.) 14; McDowell *v.* Glass, 4 Watts (Pa.) 389; Wallace *v.* McConnell, 38 U. S. (13 Pet.) 136; bk. 10, L. ed. 95.

A tender made after action has been brought, if it includes the costs until the date of tender, is effectual against any costs after that date. Martin *v.* Whisler, 62 Iowa, 416; Barnes *v.* Greene, 30 Iowa, 114; Call *v.* Lothrop, 39 Me. 434; Emerson *v.* White, 76 Mass. (10 Gray) 351; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Thurston *v.* Blaisdell, 8 N. H. 367; Hatfield *v.* Baldwin, 1 Johns. (N. Y.) 506; Logue *v.* Gillick, 1 E. D. Smith (N. Y.) 398; Hay *v.* Ousterout, 3 Ohio, 384; Cornell *v.* Green, 10 Serg. & R. (Pa.) 14; Eaton *v.* Cook, 32 Vt. 58. Where the complaint has been filed but has not yet been served upon the defendant, the tender need not include costs. Hull *v.* Peters, 7 Barb. (N. Y.) 331. But see Call *v.* Lothrop, 39 Me. 434; Emerson *v.* White, 76 Mass. (10 Gray) 351.

[1] Goldshede *v.* Cottrell, 2 M. & W. 20.

[2] Stedman *v.* Gooch, 1 Esp. 5; Maillard *v.* Duke of Argyle, 6 M. & G. 40.

[3] Kemp *v.* Watt, 15 M. & W. 672.

creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable and default is made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effect of the drawer's in his hands, and who therefore refuses to accept it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor:" and this *dictum* was quoted by Tindal C. J. in Maillard *v.* The Duke of Argyle,[4] to show that the word "payment" does not necessarily mean payment in satisfaction and discharge.

§ 972. The authorities in support of the rule that in the absence of stipulation to the contrary the negotiable security is only considered to be a conditional payment, defeasible on the dishonor of the security, need not be reviewed, as there is no conflict on the point.[1]

The payment is absolute on the delivery of the bill, and takes effect from that date, but is defeated by the happening of the condition, *i.e.*, non-payment at maturity.[2]

[*715] § 973. * But if the buyer offer to pay in cash, and the vendor takes a negotiable security in preference, the security is deemed to be taken as an absolute, not a conditional payment.[1] And in Cowasjee *v.* Thompson,[2] where the vendor elected to take a bill at six months in preference

[4] 6 M. & G. 40.

[1] Owenson *v.* Morse, 7 T. R. 64; Kearslake *v.* Morgan, 5 T. R. 513; Puckford *v.* Maxwell, 6 T. R. 52; Kendrick *v.* Lomaz, 2 Cr. & Jervis, 405; Griffiths *v.* Owen, 13 M. & W. 58; James *v.* Williams, 13 M. & W. 328; Crowe *v.* Clay, 9 Ex. 604; Belshaw *v.* Bush, 11 C. B. 191; Ford *v.* Beech, 11 Q. B. 873; Simon *v.* Lloyd, 2 C. M. & R. 187; Helps *v.* Winterbottom, 2 B. & Ad. 431; Plimley *v.* Westley, 2 Bing. N. C. 249; Valpy *v.* Oakley, 16 Q. B. 941; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Gunn *v.* Bolckow, Vaughan & Co., 10 Ch. 491, *per* Mellish L. J. at p. 501; Currie *v.* Misa, L. R. 10 Ex. 153, *per cur.* at p. 163; Cohen *v.* Hale, 3 Q. B. D. 371, as to payment by a cheque; Ex parte Willoughby, 16 Ch. D. 604.

[2] Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24; Turney *v.* Dodwell, 3 E. & B. 136; 23 L. J. Q. B. 137.

[1] Marsh *v.* Pedder, 4 Camp. 257; Strong *v.* Hart, 6 B. & C. 160; Smith *v.* Ferrand, 7 B. & C. 19; Robinson *v.* Read, 9 B. & C. 449; Anderson *v.* Hillies, 12 C. B. 499; 21 L. J. C. P. 150; Guardians of Lichfield *v.* Green, 1 H. & N. 884, and 26 L. J. Ex. 140.

[2] 5 Moo. P. C. 165.

to the cash, less discount, it was held in the Privy Council that this was a "payment in substance," making it the vendor's duty to give up the ship's receipt for the goods, and thus depriving him of the right of stoppage *in transitu*.

§ 974. But a man who prefers a cheque on a banker to payment in money is not considered as electing to take a security instead of cash, for a cheque is accepted as a particular form of *cash payment*, and if dishonored, the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken.[1]

But if a cheque received in payment is not presented within reasonable time, and the drawer is injured by the delay, the cheque will operate as an *absolute* payment.[2]

[1] Everett *v.* Collins, 2 Camp. 515; Smith *v.* Ferrand, 7 B. & C. 19; *per* Patteson J. in Pearce *v.* Davis, 1 M. & Rob. 365; Hough *v.* May, 4 A. & E. 954; Caine *v.* Coulson, 1 H. & C. 764; 32 L. J. Ex. 97; and see Cohen *v.* Hale, 3 Q. B. D. 371. See, also, De Yampert *v.* Brown, 28 Ark. 166; Weaver *v.* Nixon, 69 Ga. 699; Phillips *v.* Bullard, 58 Ga. 256; Warriner *v.* People, 74 Ill. 346; Heartt *v.* Rhodes, 66 Ill. 351; Brown *v.* Leckie, 43 Ill. 497; Mordis *v.* Kennedy, 23 Kans. 408; Kermeyer *v.* Newby, 14 Kans. 164; Broughton *v.* Silloway, 114 Mass. 71; s. c. 19 Am. Rep. 312; Weddigen *v.* Boston Elastic F. Co., 100 Mass. 422; Small *v.* Franklin Mining Co., 99 Mass. 277; Kuhl *v.* Mayor of Jersey City, 23 N. J. Eq. (8 C. E. Gr.) 84; Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. (5 C. E. Gr.) 39; Hunter *v.* Wetsell, 84 N. Y. 549; s. c. 38 Am. Rep. 544; Thomson *v.* Bank of British N. A., 82 N. Y. 1; Bliss *v.* Shwarts, 65 N. Y. 444; Bradford *v.* Fox, 38 N. Y. 289; Hill *v.* Beebe, 13 N. Y. 566; Sweet *v.* Titus, 67 Barb. (N. Y.) 327; Turner *v.* Bank of Fox Lake, 4 Abb. App. Dec. (N. Y.) 434; Syracuse B. & N. Y. R. R. Co. *v.* Collins, 1 Abb. N. C. (N. Y.) 47; Bernheimer *v.* Herrman, 44 Hun (N. Y.) 110, 113; Parrott *v.* Colby, 6 Hun (N. Y.) 255; s. c. 71 N. Y. 597; Fleig *v.* Sleet, 43 Ohio St. 53; s. c. 2 West. Rep. 283; 1 West. Rep. 24; Hodgson *v.* Barrett, 33 Ohio St. 63; McIntyre *v.* Kennedy, 29 Pa. St. 448; Blair *v.* Wilson, 28 Gratt. (Va.) 165; Koones *v.* District of Columbia, 4 Mackey (D. C.) 339; s. c. 54 Am. Rep. 278. A check being a negotiable security will, if given and accepted in satisfaction of a larger debt, operate effectually to discharge it. Wells *v.* Morrison, 91 Ind. 51, 62; Fensler *v.* Prather, 43 Ind. 119, 122.

[2] Hopkins *v.* Ware, L. R. 4 Ex. 268; Byles on Bills, ed. 1879, p. 20. See, also, Thayer *v.* Peck, 93 Ill. 357; Warringer *v.* People, 74 Ill. 346; Stevens *v.* Park, 73 Ill. 387; Getchell *v.* Chase, 124 Mass. 366; Weddigen *v.* Boston Elastic F. Co., 100 Mass. 422; Small *v.* Franklin Mining Co., 99 Mass. 277; Cushman *v.* Libbey, 81 Mass. (15 Gray) 358; Taylor *v.* Wilson, 52 Mass. (11 Metc.) 44; s. c. 45 Am. Dec. 180; Barnard *v.* Graves, 33 Mass. (16 Pick.) 41; Smith *v.* Miller, 43 N. Y. 171; s. c. 3 Am. Rep. 690; Syracuse B. & N. Y. R. R. Co. *v.* Collins, 1 Abb. N. C. (N. Y.) 47; s. c. 3 Lans. (N. Y.) 33; Hodgson *v.* Bar-

[The presentment of cheques is dealt with by s. 74 of the new statute 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882). Under this section the holder of a cheque, which is not duly presented, is entitled to stand in the drawer's place as a creditor of the bank, and if the bank fail, to prove against the estate for the amount of the cheque. What amounts to due presentment of a foreign cheque was discussed in Heywood *v.* Pickering.[3]]

§ 975. Whenever it can be shown to be the intention of the parties that a bill or note should operate as immediate payment, then the buyer will no longer be indebted for the *price of the goods*, although he may be responsible on [*716] the *security: and the bill or note given in such case may be that of the buyer himself,[1] or that of a third person, on which the buyer has indorsed his name.[2]

§ 976. But although a bill or note be taken only as conditional payment, yet as it is *primâ facie* evidence of payment, the vendor who has received it must account for it before he can revert to the original contract and demand payment of the price.[1] In Price *v.* Price,[2] the defendant pleaded to an

rett, 33 Ohio St. 63; McIntyre *v.* Kennedy, 29 Pa. St. 448. But if the delay has not worked any injury to the buyer, the acceptance of a check will not operate to extinguish the original debt. Jones *v.* Heiliger, 36 Wis. 149.

[3] L. R. 9 Q. B. 428.

[1] Sibree *v.* Tripp, 15 M. & W. 23; Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J. Ex. 140.

[2] Sard *v.* Rhodes, 1 M. & W. 153; Brown *v.* Kewley, 2 B. & B. 518; Camidge *v.* Allenby, 6 B. & C. 381; Lewis *v.* Lyster, 2 C. M. & R. 704.

[1] *Vendor must account for the note received* before he can maintain a suit for the goods. Walsh *v.* Lennon, 98 Ill. 27, 31; Morrison *v.* Smith, 81 Ill. 221; Rayburn *v.* Day, 27 Ill. 46; Miller *v.* Lumsden, 16 Ill. 161; Estabrook *v.* Swett, 116 Mass. 303; McMurray *v.* Tayler, 30 Mo. 263; s. c. 67 Am. Dec. 611; Parrott *v.* Colby, 6 Hun (N. Y.) 55; aff'm. 71 N. Y. 597; Burdick *v.* Green, 15 Johns. (N. Y.) 34; Smith *v.* Lockwood, 10 Johns. (N. Y.) 366; Angel *v.* Felton, 8 Johns. (N. Y.) 149; Holmes *v.* DeCamp, 1 Johns. (N. Y.) 34; s. c. 3 Am. Dec. 293; Hays *v.* McClurg, 4 Watts (Pa.) 452; Street *v.* Hall, 29 Vt. 165.

[2] 16 M. & W. 232.

Where the note of a third party is received by the creditor it is generally held that the debt is not discharged. Bank of St. Marys *v.* St. John, 25 Ala. 566; Akin *v.* Peters, 45 Ark. 313; Brown *v.* Olmsted, 50 Cal. 162; Griffith *v.* Grogan, 12 Cal. 317; Wilhelm *v.* Schmidt, 84 Ill. 183; Kephart *v.* Butcher, 17 Iowa, 240; Jarman *v.* Davis, 4 T. B. Mon. (Ky.) 115; Graham *v.* Sykes, 15 La. An. 49; Haines *v.* Pearce, 41 Md. 221; Berry *v.* Griffin, 10 Md. 27; s. c. 69 Am. Dec. 123;

action of debt that he had given his promissory note at six months to the plaintiff, who took and received it "for and on account" of the debt. Replication, that the time had expired before the commencement of the action, &c., and that the defendant had not paid. Special demurrer, assigning for causes, that the replication did not show that the plaintiff held the note, and that it was consistent with the replication that the note might have been endorsed away, and payable to some other person. Joinder in Demurrer. Held, after consideration, Parke B. giving the judgment of the Court, that it lay on the defendant to make the first averment that the note had been endorsed away, it being *his own note*, which he was bound to pay, and not on the plaintiff to aver the negative in his replication; overruling Mercer *v.* Cheese;[3] but *secus*, if it had been the note of a third person.

Morgan *v.* Bitzenberger, 3 Gill (Md.) 350; Glenn *v.* Smith, 2 Gill & J. (Md.) 493; s. c. 20 Am. Dec. 452; Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. (Md.) 166; s. c. 14 Am. Dec. 268; Wadlington *v.* Covert, 51 Miss. 631; Guion *v.* Doherty, 43 Miss. 538; Appleton *v.* Kennon, 19 Mo. 637; Commiskey *v.* McPike, 20 Mo. App. 82; Caldwell *v.* Fifield, 24 N. J. L. (4 Zab.) 150; Middlesex *v.* Thomas, 20 N. J. Eq. (5 C. E. Gr.) 39; Shipman *v.* Cook, 16 N. J. Eq. (1 C. E. Gr.) 251; Youngs *v.* Stahelin, 34 N. Y. 258; Noel *v.* Murray, 13 N. Y. 167; Vail *v.* Foster, 4 N. Y. 312; Gibson *v.* Toby, 53 Barb. (N. Y.) 191; Crane *v.* McDonald, 45 Barb. (N. Y.) 354; Torry *v.* Hadley, 27 Barb. (N. Y.) 192; Van Eps *v.* Dillaye, 6 Barb. (N. Y.) 244; Cole *v.* Sackett, 1 Hill (N. Y.) 516; Darnall *v.* Morehouse, 36 How. (N. Y.) Pr. 511; Bates *v.* Rosekrans, 23 How. (N. Y.) Pr. 98; Johnson *v.* Weed, 9 Johns. (N. Y.) 310; s. c. 6 Am. Dec. 279; Tobey *v.* Barber, 5 Johns. (N. Y.) 68; s. c. 4 Am. Dec. 326; Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71; Hunter *v.* Moul, 98 Pa. St. 13; s. c. 42 Am. Rep. 610; League *v.* Waring, 85 Pa. St. 244; Hess *v.* Dille, 23 W. Va. 90; Merch't's Nat. Bank *v.* Good, 21 W. Va. 455; Slocomb *v.* Lurty, 1 Hempst. C. C. 431. But when the obligation of a third party is received at the time when the debt is contracted, it is presumed to be taken in payment. Partee *v.* Bedford, 51 Miss. 84; Gibson *v.* Tobey, 46 N. Y. 637; s. c. 7 Am. Rep. 397; Youngs *v.* Stahelin, 34 N. Y. 258; Noel *v.* Murray, 13 N. Y. 167; Torry *v.* Hadley, 27 Barb. (N. Y.) 192; Cole *v.* Sackett, 1 Hill (N. Y.) 516; Darnall *v.* Morehouse, 36 How. (N. Y.) Pr. 511; Bayard *v.* Shunk, 1 Watts & S. (Pa.) 92, 94; s. c. 37 Am. Dec. 441. In Massachusetts and Indiana the giving of the negotiable promissory note of a third party is *primâ facie* payment. Smith *v.* Bettger, 68 Ind. 254; s. c. 34 Am. Rep. 256; Ely *v.* James, 123 Mass. 36; Melledge *v.* Boston Iron Co., 59 Mass. (5 Cush.) 158; s. c. 51 Am. Dec. 59; Butts *v.* Dean, 43 Mass. (2 Metc.) 76; s. c. 35 Am. Dec. 389; French *v.* Price, 41 Mass. (24 Pick.) 13; Wiseman *v.* Lyman, 7 Mass. 286; Hudson *v.* Bradley, 2 Cliff. C. C. 130.

[3] 4 M. & G. 804.

§ 977. It will be perceived that it was taken for granted in the above case that the vendor could not recover the price if he had parted with the negotiable security, and the reason is obvious, for the buyer would thus be compelled to pay twice, once to the vendor, and again to the holder of the bill; and the vendor would thus receive payment twice, once when he passed away the bill, and again when he obtained the price. And on this principle it was held, in Bunney *v.* Poyntz,[1] that the vendor who had negotiated the bill [*717] without making *himself liable, had converted the conditional into an absolute payment. The facts were that his agent, who had received the buyer's notes in payment, discounted them with the agent's banker, giving his own endorsement. The vendor had not endorsed them. Held, that the vendor had received payment, and could not recover from the buyer, though the notes were not paid and the agent had become bankrupt. Plainly, if the vendor had been allowed to recover, the buyer would still have remained liable to pay a second time to the banker who held his notes.

§ 978. But where the vendor had endorsed the note received on paying it away, it was held, in Miles *v.* Gorton,[1] that on the bankruptcy of the buyer, his lien of unpaid vendor revived. The learned author of Smith's Mercantile Law[2] observes of this case, with what seems great propriety, that although the vendor was responsible for the bill he had endorsed and passed away, yet till he had actually paid it he ought not to have been allowed to sue for the price of the goods sold, on the general principle that it is a good defence to an action for any debt that a negotiable bill given for it is outstanding in other hands.[3]

§ 979. If the bill or note given in payment by the buyer be not his own, but that of some third person, on which he has not put his name, and is therefore only secondarily liable, then it lies upon the vendor to allege and prove the dishonor

[1] 4 B. & Ad. 568.
[1] 2 C. & M. 504.
[2] Page 541, ed. 1877.
[3] Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24.

of it in an action against the buyer for the price;[1] and the vendor in such a case is bound to use due diligence in taking all the steps necessary to obtain payment of the security, and to preserve the rights of the buyer against all the parties to the instrument who were liable for its payment to the buyer when he passed it to the vendor; and in default of the performance of this duty, the buyer is discharged from the obligation of paying either the price of the goods or the bill or note given as conditional payment.[2]

§ 980. The leading case on this subject is Camidge v. Allenby.[1] *The buyer gave the vendor in pay- [*718] ment for goods sold, at York, on Saturday, the 10th of December, country bank-notes of a bank at Huddersfield. The notes were given at three o'clock in the afternoon, and the bank had stopped payment at eleven o'clock the same morning, neither party knowing the fact when the payment

[1] Price v. Price, 16 M. & W. 323.

Waiver of lien. — A waiver of lien may be either actual or constructive. Thus the lien would be waived by giving time for payment, or by accepting a bill of exchange or promissory note in payment, or by a contract that the goods be delivered immediately without any stipulation as to the time of payment of the price. If a bill or note is given for the price payable at a future time, there would of course be a waiver of present payment, and a suspension of the lien for the term of credit, which would be revived in case of non-payment or dishonor of the bill or note. And if time for payment be given the purchaser would be entitled to immediate possession. Johnson v. Farnum, 56 Ga. 144; Owens v. Weedman, 82 Ill. 409; McNail v. Zeigler, 68 Ill. 224; Bradeen v. Brooks, 22 Me. 463; Davis v. Moore, 13 Me. 427; McCraw v. Gilmer, 83 N. C. 162; Coal v. Transportation Co., 26 Vt. 87; Thompson v. Wedge, 50 Wis. 642; Leonard v. Davis, 66 U. S. (1 Black) 476; bk. 17, L. ed. 222.

[2] Thomason v. Cooper, 57 Ala. 560; Brown v. Cronise, 21 Cal. 386; Goodnow v. Howe, 20 Me. 164; s. c. 37 Am. Dec. 46; Briggs v. Parsons, 39 Mich. 400; Lear v. Friedlander, 45 Miss. 559; Kenniston v. Avery, 16 N. H. 117; Cochran v. Wheeler, 7 N. H. 202; s. c. 26 Am. Dec. 732; Middlesex v. Thomas, 20 N. J. Eq. (5 C. E. Gr.) 39; Shipman v. Cook, 16 N. J. Eq. (1 C. E. Gr.) 251; Copper v. Powell, Anth. (N. Y.) 49; Bradford v. Fox, 39 Barb. (N. Y.) 203; Dayton v. Trull, 23 Wend. (N. Y.) 345; Hunter v. Moul, 98 Pa. St. 13; s. c. 42 Am. Rep. 610; Girard Fire & M. Ins. Co. v. Marr, 46 Pa. St. 504; Allan v. Eldred, 50 Wis. 132; Jones v. Heiliger, 36 Wis. 149; Mehlberg v. Fisher, 24 Wis. 607.

But the creditor need not prove that he has given notice of dishonor, or taken any other steps, where the want of such proceedings does not affect the debtor's rights. Bradford v. Fox, 39 Barb. (N. Y.) 203.

[1] 6 B. & C. 373.

was made. The vendor did not circulate the notes, nor present them to the bankers for payment, and on the following Saturday, the 17th of December, asked the vendee to pay him the amount of the notes, offering at the same time to return them. Held, that the notes were either taken as money, in which case the risk of everything but forgery was assumed by the party receiving them,[2] or that they were received as negotiable instruments, in which case the vendor had discharged the buyer by his laches.[3]

§ 981. In Smith *v.* Mercer,[1] the buyer gave a bill drawn by Barned's Bank in Liverpool, on London, on the 20th of February. The vendor put it in circulation, and the bill was not presented for acceptance in London till the 23d of April, when it was dishonored, Barned's Bank having failed on the 19th of April. *No notice of dishonor was given to the buyer*, and it was held, that he was discharged; the Court holding, as in Camidge *v.* Allenby, that the vendor either took the bill as cash, in which case there was no liability; or as a negotiable security, and then the buyer could not be in a worse position than if he had endorsed the bill, and was therefore entitled to notice as an endorser, in default whereof, he was discharged.

§ 982. But in the case of country bank-notes there would be no laches in the mere failure to present the notes for payment at the bankers' on finding that they had failed, if the notes were returned to the buyer within a reasonable time.[1]

§ 983. In Crowe *v.* Clay,[1] in the Exchequer Cham-
[*719] ber, it was * held, reversing the judgment of the Exchequer of Pleas,[2] that the vendor could not recover the price of the goods sold when he had lost the acceptance given by the buyer, and could not return it. Of

[2] See, on this point, Guardians of Lichfield *v.* Green, 1 H. & N. 884; 26 L. J. Ex. 140.

[3] See, also, as to laches, Bishop *v.* Rowe, 3 M. & S. 362; Bridges *v.* Berry, 3 Taunt. 130; Soward *v.* Palmer, 8 Taunt. 277.

[1] L. R. 3 Ex. 51; 37 L. J. Ex. 24. But see Swinyard *v.* Bowes, 5 M. & S. 62; Van Wart *v.* Woolley, 3 B. & C. 439; and Hitchcock *v.* Humfrey, 5 M. & G. 563.

[1] Robson *v.* Oliver, 10 Q. B. 104; Rogers *v.* Langford, 1 C. & M. 637.

[1] 9 Ex. 604.

[2] 8 Ex. 295.

course if the lost bill were afterwards found, the right would revive.[3]

In Alderson *v.* Langdale,[4] the vendor was held to have lost his right to recover against the buyer by altering the bill given in payment so as to vitiate it, and thus destroying the buyer's recourse against antecedent parties, Lord Tenterden agreeing with the rest of the Court that his ruling to the contrary, at Nisi Prius, was erroneous. But where the buyer is the party *primarily* liable, so that he is not injured by losing recourse on any antecedent parties in consequence of the alteration, the vendor may recover on the original contract after the term of credit has expired,[5] notwithstanding the alteration.

It was held, in Rolt *v.* Watson,[6] that the vendor could recover on the original contract, even without producing a negotiable security given to him by the buyer in payment, on proof that the bill drawn to the vendor's order had been lost without endorsement by him, and could not therefore be negotiated. But this case was overruled in Ramuz *v.* Crowe,[7] and the rule now is that if the instrument was negotiable in form, there can be no recovery on the original contract without producing it; otherwise if the bill or note was not negotiable in form.[8] [But although the seller cannot recover on the original contract, when he has lost the buyer's bill of exchange for the price, he may bring an action upon the lost bill and recover from the drawer the amount for which it was drawn, on providing an indemnity against any claims that may be made in respect of the bill. And now, when the seller has lost a bill of exchange before it is * overdue, he will be entitled, on giving security [*720]

[3] Dent *v.* Dunn, 3 Camp. 296.

[4] 3 B. & Ad. 661. Followed in Sykes *v.* Gerber, 98 Pa. St. 179.

[5] Atkinson *v.* Handon, 2 A. & E. 628. See Clute *v.* Small, 17 Wend. (N. Y.) 238; Merrick *v.* Boury, 4 Ohio St. 60; Matteson *v.* Ellsworth, 33 Wis. 488. *Contra*, Smith *v.* Mace, 44 N. H. 553; Martendale *v.* Follet, 1 N. H. 95.

[6] 4 Bing. 273.

[7] 1 Ex. 167; and see Hansard *v.* Robinson, 7 B. & C. 90.

[8] Wain *v.* Bailey, 10 A. & E. 616; Ramuz *v.* Crowe, 1 Ex. 167; Price *v.* Price, 16 M. & W. 232–243; Hansard *v.* Robinson, 7 B. & C. 90. And see National Savings Bank Association *v.* Tranah, L. R. 2 C. P. 556.

against any claims in respect of the lost bill, to insist upon the drawer's giving him a duplicate bill.[9]]

§ 984. If a bill or note be endorsed, and given by the buyer to the vendor, merely as a collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment; and if he neglect to present, or to give notice of dishonor to the buyer, the buyer will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount.[1]

§ 985. In one case where goods were sold for cash, the buyer refused to pay cash, and gave the vendor his own dishonored acceptance, past due, and the payment was held good, in the absence of fraud. But the decision proceeded on the ground of an implied assent to this mode of payment by the vendor, who had not returned his dishonored acceptance when sent to him in lieu of cash.[1]

§ 986. When the agreement is that the price of the goods sold shall be paid in a negotiable security, held by the buyer, to which he is no party, and for the payment of which he is not to be answerable, this may be considered as a species of barter, as was said by Lord Ellenborough in Read *v.* Hutchinson.[1] Or the bills given by the buyer may be deemed to have passed as cash, just as if they were Bank of England notes, as was said in Camidge *v.* Allenby,[2] and in Guardians of Lichfield *v.* Green.[3] If the securities thus passed, however, were forged or counterfeited; or if not what on their face they purport to be, as if they appeared to be foreign bills needing no stamp, but were really domestic bills, invalid for want of a stamp, the seller would have the right to rescind the sale for failure of consideration, as explained in the Chapter on that subject.[4] And if the securities, though

[9] 45 & 46 Vict. c. 61, ss. 69, 70, (Bills of Exchange Act, 1882).

[1] Peacock *v.* Pursell, 14 C. B. N. S. 728; 32 L. J. C. P. 266.

[1] Mayer *v.* Nyas, 1 Bing. 311.

[1] 3 Camp. 352.

[2] 6 B. & C. 373.

[3] 1 H. & N. 884; 29 L. J. Ex. 140. And see Fydell *v.* Clark, 1 Esp. 447.

[4] *Ante*, Book III. Ch. 1. Where the creditor accepts a negotiable instrument he must exercise reasonable diligence to ascertain its genuineness. Lawrenceburgh Nat. Bank *v.* Stevenson, 51 Ind. 594; Samuels *v.* King, 50

genuine, were known to the buyer to be worthless when he *passed them, his conduct would be deemed [*721] fraudulent,[5] and the seller would be entitled to rescind the sale, and being trover for the goods, as shown in the Chapter on Fraudulent Sales.[6]

§ 987. In Hodgson *v.* Davies,[1] Lord Ellenborough held, where a sale was made on credit for bills at two and four months:

1st. That the vendor must accept or reject the bills offered within a reasonable time, and five days were held too long a time to reserve the right of rejection.

Ind. 527; Wingate *v.* Neidlinger, 50 Ind. 526; Simms *v.* Clark, 11 Ill. 137; Atwood *v.* Cornwall, 28 Mich. 342; s. c. 15 Am. Rep. 219; Kenny *v.* First Nat. Bank, 50 Barb. (N. Y.) 114; Thomas *v.* Todd, 6 Hill (N. Y.) 340; Crucier *v.* Pennock, 14 Serg. & R. (Pa.) 51; Pindall *v.* Northwestern Bank, 7 Leigh (Va.) 617.

In Semmes *v.* Wilson, 5 Cr. C. C. 285, it is laid down that the creditor can sue on the original indebtedness, whether the debtor knew the note to be forged or not. See Goodrich *v.* Tracy, 43 Vt. 314. The creditor must offer to return the forged note, or exhaust his remedies upon it with due diligence. But the note need not be returned if it appears that it is absolutely worthless. Pope *v.* Nance, Minor (Ala.) 299; s. c. 12 Am. Dec. 51.

[5] Read *v.* Hutchinson, 3 Camp. 352; Noble *v.* Adams, 7 Taunt. 59; Stedman *v.* Gooch, 1 Esp. 3; Hawse *v.* Crowe, R. & Mood. 414; *per* Bayley J. in Camidge *v.* Allenby, 6 B. & C. 373–382.

[6] *Ante*, p. 392 *et seq.* See Thayer *v.* Peck, 93 Ill. 357; Warriner *v.* People, 74 Ill. 346; Benedict *v.* Field, 16 N. Y. 595; Roget *v.* Merritt, 2 Cai. (N. Y.) 117. Where a worthless note has been accepted, the creditor can affirm the sale, surrender the note, and sue on the original debt. Brewster *v.* Bours, 8 Cal. 501; Little *v.* American Button Hole O. S. S. Co., 67 Ind. 67; Vallier *v.* Ditson, 74 Me. 553; Hussey *v.* Sibley, 66 Me. 192; s. c. 22 Am. Rep. 557; Hoopes *v.* Strasburger, 37 Md. 390; s. c. 11 Am. Rep. 538; Ramsdell *v.* Soule, 29 Mass. (12 Pick.) 126; Watkins *v.* Hill, 25 Mass. (8 Pick.) 522; Stebbins *v.* Smith, 21 Mass. (4 Pick.) 97; Dennie *v.* Hart, 19 Mass. (2 Pick.) 204; Thurston *v.* Percival, 18 Mass. (1 Pick.) 415; Johnson *v.* Johnson, 11 Mass. 359; Roberts *v.* Fisher, 43 N. Y. 159; s. c. 11 Am. Rep. 538; Smith *v.* Rogers, 17 Johns. (N. Y.) 340; Pierce *v.* Drake, 15 Johns. (N. Y.) 475; Breed *v.* Cook, 15 Johns. (N. Y.) 241; Whitbeck *v.* Vanness, 11 Johns. (N. Y.) 409; s. c. 6 Am. Dec. 383; Willson *v.* Force, 6 Johns. (N. Y.) 110; People *v.* Howell, 4 Johns. (N. Y.) 296; Martin *v.* Pennock, 2 Pa. St. 376; Patton *v.* Ash, 7 Serg. & R. (Pa.) 116; Beard *v.* Brandon, 2 Nott & McC. (S. C.) 102; Scruggs *v.* Gass, 8 Yerg. (Tenn.) 175; s. c. 29 Am. Dec. 114. If unknown to both debtor and creditor the maker of the note be insolvent, the creditor can sue upon the debt, even though the note was accepted in full payment and discharge, this being a case of mutual mistake of fact. Roberts *v.* Fisher, 43 N. Y. 159; s. c. 3 Am. Rep. 680.

[1] 2 Camp. 530.

2d. That a sale of bills, does not mean *approved bills*, and parol evidence to that effect is not admissible when the written contract mentions "bills" only.

3d. That an *approved bill* means a bill to which no reasonable objection could be made, and which ought to be approved.

§ 988. Payment properly made to a duly-authorized agent of the vendor is, of course, the same as if made to the vendor himself. Without entering into the general doctrines of the law of agency, it may be convenient to point out that in contracts of sale certain agents have been held entitled to receive payment from their known general authority. Thus, a factor is an agent of a general character, entitled to receive payment and give discharge of the price;[1] but a broker is not, for he is not entrusted with the possession of the goods.[2] In Kaye *v.* Brett,[3] Parke B. delivering the judgment of the Court, said: "If a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the

[1] Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

[2] Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassel, 1 Stark. 233.

An agent intrusted with personal property for the purpose of selling it has an implied authority to receive payment of the price. Butler *v.* Dorman, 68 Mo. 298; s. c. 30 Am. Rep. 795; Rice *v.* Groffmann, 56 Mo. 434; Sumner *v.* Saunders, 51 Mo. 89; Law *v.* Stokes, 32 N. J. L. (3 Vr.) 249; Whiton *v.* Spring, 74 N. Y. 169; Higgins *v.* Moore, 34 N. Y. 418; Seiple *v.* Irwin, 30 Pa. St. 513. However, agents who have authority to sell are not intrusted with the goods, have no implied authority to accept payment. Clark *v.* Smith, 88 Ill. 298; Abrahams *v.* Weiller, 87 Ill. 179; Greenhood *v.* Keator, 9 Ill. App. 183; Hirshfield *v.* Waldron, 54 Mich. 649; Kornemann *v.* Monaghan, 24 Mich. 36; Chambers *v.* Short, 79 Mo. 204; Butler *v.* Dorman, 68 Mo. 298; s. c. 30 Am. Rep. 795; Cupples *v.* Whelan, 61 Mo. 583; Law *v.* Stokes, 32 N. J. L. (3 Vr.) 250; Harrison *v.* Ross, 44 N. Y. Super. Ct. (12 J. & S.) 230; Higgins *v.* Moore, 34 N. Y. 417; Dunn *v.* Wright, 51 Barb. (N. Y.) 244; Seiple *v.* Irwin, 30 Pa. St. 513; McKindly *v.* Dunham, 55 Wis. 515; s. c. 42 Am. Rep. 740. *Contra* Putnam *v.* French, 53 Vt. 402.

An agent to solicit orders has no implied authority to receive payment. McKindly *v.* Dunham, 55 Wis. 515; s. c. 42 Am. Rep. 740. Nor has an agent selling goods by sample. Butler *v.* Dorman, 68 Mo. 298; s. c. 38 Am. Rep. 682. An agent who has authority to accept a note for goods sold has no implied authority to receive payment thereof, after he has delivered the note to his principal. Draper *v.* Rice, 56 Iowa, 114.

[3] 5 Ex. 269; Jackson *v.* Jacob, 5 Scott, 79.

shop, the payment is not good." In Barrett *v.* Deere,[4] Lord Tenterden held, that payment to a person sitting in a counting-room, and appearing to be entrusted with the conduct of the business, is a good payment; and the same learned judge held a tender under similar circumstances to be valid.[5]

* [In Finch *v.* Boning[6] a tender to a clerk in a [*722] solicitor's office of a debt due to the solicitor was held to be a good tender, and by Lord Coleridge C. J. that the clerk's refusal to receive the money, on the ground that he had "no instructions" in the matter, did not amount to a disclaimer of his authority to receive it.]

§ 989. An auctioneer employed to sell goods in his possession for ready money, has in general authority to receive payment for them, but the conditions of the sale may be such as show that the vendor intended payment to be made to himself, and in such case a payment to the auctioneer would not bind the vendor;[1] and it is plain that if the auctioneer acts as a mere cryer, or broker, for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price.

§ 990. A wife has no general authority to receive payment for a husband, and a payment to her of money even earned by herself will not bind the husband, without proof of authority express or implied.[1] [But the plea of payment to the wife, which was held to be bad in Offley *v.* Clay, would, since the Married Women's Property Acts, be a good defence in an action by the husband. Under the provisions of those statutes the earnings of a married woman are made her separate property, and her receipt alone is a good discharge for the same.[2]]

§ 991. The general rule of law is, that an agent who makes a sale may maintain an action against the buyer in respect of

[4] M. & M. 200.

[5] Willmott *v.* Smith, M. & M. 238.

[6] 4 C. P. D. 143; and see Bingham *v.* Allport, 1 Nev. & M. 398.

[1] Sykes *v.* Giles, 5 M. & W. 645; see Capel *v.* Thornton, 3 C. & P. 352; Williams *v.* Millington, 1 H. Bl. 81; Williams *v.* Evans, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

[1] Offley *v.* Clay, 2 M. & G. 172.

[2] 33 & 34 Vict. c. 93, s. 1 (Married Women's Property Act, 1870), and 45 & 46 Vict. c. 75, s. 2 (Married Women's Property Act, 1882).

his privity, and the principal may also maintain an action, in respect of his interest;[1] but where the agent has himself an interest in the sale, as for example, a factor or auctioneer, for his lien, a plea of payment to the principal is no defence of an action for the price by the agent, unless it show that the lien of the agent has been satisfied.[2]

[*723] § 992 * In Catterall *v.* Hindle,[1] a full exposition of the law as to the authority to receive payment conferred on agents to sell, was given in the decision pronounced by Keating J. It is not necessary to give the facts, somewhat complicated, to which the law was applied. The principles were thus stated: "That a broker or agent employed to sell, has *primâ facie* no authority to receive payment, otherwise than in money, according to the usual course of business, has been well established; and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent: see the judgment of Abbott C. J., Russell *v.* Bangley, 4 B. & A. 398; Todd *v.* Reid, 4 B. & A. 210; the authority of which, upon this point, is not affected by the correction as to a fact by Parke B. in Stewart *v.* Aberdeen, 4 M. & W. 224. It has also been held by this Court in the case of Underwood *v.* Nicholls,[2] that the return to the agent of his cheque, cashed for him by the debtor a few days before, was not part payment as against the principal. 'It amounts to no more,' said Jervis C. J., 'than the debtor seeking to discharge his debt to the principal, by writing off a debt due to him from the agent, which he has no right to do.' We think the

[1] Per Lord Abinger, in Sykes *v.* Giles, 5 M. & W. 645.

[2] Williams *v.* Millington, 1 H. Bl. 81; Drinkwater *v.* Goodwin, Cowp. 252; Robinson *v.* Rutter, 4 E. & B. 954; 24 L. J. Q. B. 250, in which Coppin *v.* Walker, 7 Taunt. 237, and Coppin *v.* Craig, ibid. 243, are reviewed. See, also, Grice *v.* Kendrick, L. R. 5 Q. B. 340.

[1] L. R. 1 C. P. 186; 35 L. J. C. P. 161. The decision in this case was reversed on appeal, the Exchequer Chamber being of opinion that the case involved a question of fact which had not been submitted to the jury. L. R. 2 C. P. 368.

[2] 17 C. B. 239; 25 L. J. C. P. 79.

present case the same in principle with Underwood *v.* Nicholls. . . ."

§ 993. "It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent selling upon a *del credere* commission,[1] * receives an additional consideration for [*724] extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent as to receiving payments on account of his principal." [2]

§ 994. In Williams *v.* Evans,[1] the terms of an auction sale were that purchaser should pay down into the hands of the auctioneer a deposit of 5*s.* in the pound in part payment of

[1] *A del credere commission* was defined by Lord Ellenborough in Morris *v.* Cleasby, 4 M. & S. 566, as "the premium or price given by the principal to the factor for a guarantee." Disapproval was expressed by his Lordship of the *dicta* in Grove *v.* Dubois, 1 T. R. 112, and in Houghton *v.* Matthews, 3 Bos. & P. 489. See, also, Story on Agency, § 33, p. 36, ed. 1882; Hornby *v.* Lucy, 6 M. & S. 166; Couturier *v.* Hastie, 8 Ex. 40; Ex parte White, 6 Ch. 397; s. c. in H. of L. 21 W. R. 465.

[2] See, also, Bartlett *v.* Pentland, 10 B. & C. 760; Underwood *v.* Nicholls, 17 C. B. 239; 25 L. J. C. P. 79; Favenc *v.* Bennett, 11 East, 36; Pierson *v.* Scott, 47 L. J. Ch. 705; 26 W. R. 796; Story on Agency, § 98. As to the evidence required of an agent's authority to take a bill or note in payment, see Hogarth *v.* Wherley, L. R. 10 C. P. 630.

[2] *An agent who is authorized to receive payment* has no implied authority to accept anything except money. Mudgett *v.* Day, 12 Cal. 139; Reynolds *v.* Ferree, 86 Ill. 570; Padfield *v.* Green, 85 Ill. 529; Bevis *v.* Heflin, 63 Ind. 129; Kirk *v.* Hiatt, 2 Ind. 322; Corning *v.* Strong, 1 Ind. 329; Aultman *v.* Lee, 43 Iowa, 404; Drain *v.* Doggett, 41 Iowa, 682; Graydon *v.* Patterson, 13 Iowa, 256; McCarver *v.* Nealey, 1 G. Greene (Iowa) 26; Waterhouse *v.* Citizens' Bank, 25 La. An. 77; Kendall *v.* Wade, 5 La. An. 157; Sangston *v.* Maitland, 11 Gill & J. (Md.) 286; Burger *v.* Limbach, 42 Mich. 162; Trudo *v.* Anderson, 10 Mich. 357; Woodbury *v.* Larned, 5 Minn. 339; Wheeler & Wilson *v.* Givan, 65 Mo. 89; McCulloch *v.* McKee, 16 Pa. St. 289; Scoby *v.* Woods, 3 Baxt. (Tenn.) 66; Rodgers *v.* Bass, 46 Tex. 505; Ward *v.* Smith, 74 U. S. (7 Wall.) 451; bk. 19, L. ed. 207. The agent, however, is not confined to such money as is required to constitute a legal tender, he may accept anything that passes current in the district for money. Westbrook *v.* Davis, 48 Ga. 471; Robinson *v.* International L. A. Society, 42 N. Y. 54; s. c. 1 Am. Rep. 490; Hale *v.* Wall, 22 Gratt. (Va.) 424; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251; Rodgers *v.* Bass, 46 Tex. 505.

[1] L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

each lot, remainder on or before the delivery of the goods. The sale was on the 2d of November, and the goods to be taken away by the evening of the 3d. A purchaser of some of the goods at first sale having failed to comply with the conditions, his lot was resold on the 4th on the same conditions, and bought by the defendant, and delivered to him on the 7th. On that day the plaintiff, doubting the auctioneer's solvency, told the defendant not to pay him any money. The defendant proved that he had paid the auctioneer on the 4th a part of the price in money, and had given him for the remainder a bill of exchange for 15*l.* 7*s.* on the 5th of November, accepted by a third person, which was paid on the 9th, and that the auctioneer had agreed to take this bill as cash. The jury found the payment to be a good one. Held, not a good payment for the 15*l.* 7*s.*, the auctioneer having no authority to accept the bill as cash, but *semble*, it might have been a good payment if made by cheque, if the jury had found it to be so; in accordance with the *dictum* of Holt C. J. in Thorold *v.* Smith.[2]

§ 995. In Ramazotti *v.* Bowring,[1] the facts were that [*725] the * plaintiff in an action of debt for wine and spirits supplied to the defendants, gave evidence that he was the owner of a business carried on under the name of "The Continental Wine Company," and that the goods had been delivered by that company to the defendants. It was proven, however, that one Nixon, the plaintiff's son-in-law, had been employed by him as clerk and manager in the business, and had told the defendants that the business was his own, and had agreed to furnish the goods to the defendants in part payment of a debt due by Nixon to the defendants. The goods were receipted for as follows: —

18th October, 1858.

Mr. Bowring. — Please receive twelve bottles Martell's brandy. R. A. ARUNDELL.

From the Continental Wine Company. J. RAMAZOTTI.

[2] 11 Mod. 87. And see on this point, Bridges *v.* Garrett, L. R. 4 C. P. 580; reversed in Ex. Ch. L. R. 5 C. P. 451.

[1] 7 C. B. N. S. 851; 29 L. J. C. P. 30.

Arundell, who signed the receipt, was one of the defendants in the action. Invoices were sent for other goods, not containing the plaintiff's name, but headed "The Continental Wine Company," and in one, the words "J. Nixon, Manager," were written underneath. The learned Common Serjeant left to the jury the question whether Nixon or the plaintiff was the owner of the business, telling them that if Nixon was the owner, the verdict should be for the defendants, but that if the plaintiff was the owner, he was entitled to recover. The Court held this a misdirection, Erle C. J. saying: "The proper question to have asked the jury would have been, whether they were of opinion that the plaintiff had enabled Nixon to hold himself out as being the owner of these goods, and whether Nixon did in fact so hold himself out to the defendants as such owner. Then, if the jury should find that such was the case, I am of opinion that an undisclosed principal, adopting the contract which the agent has so made, must adopt it *in omnibus*, and take it, therefore, subject to any right of set-off which may exist." The learned judges all intimated, that there had been no contract of sale at all, that the goods had been misappropriated by the agent, and that the plaintiff might have recovered in trover for the * tort, but that in an action on the contract, he [*726] was bound to adopt the whole contract.[2]

§ 996. In Pratt *v.* Willey,[1] it appeared that the defendant, a tailor, made a bargain with one Surtees to furnish him clothes on credit, for which Surtees agreed to furnish the defendant on credit coals, which he represented as belonging to himself, and gave a card, on which was written, "Surtees, coal merchant, &c." The coals really belonged to the plaintiff, who had employed Surtees as his agent to sell them, and when the coals were sent, *the name of the plaintiff was on the the tickets as the seller.* On these facts, Best C. J. told the jury that the defendant ought to have made inquiries into the nature of the situation of Surtees, and should not have

[2] See, also, Semenza *v.* Brinsley, 18 C. B. N. S. 467; 34 L. J. C. P. 161; Drakeford *v.* Piercy, 7 B. & S. 515; Ex parte Dixon, 4 Ch. D. 133, C. A.

[1] 2 C. & P. 350.

dealt with him as principal. The question was left to the jury, who found for the plaintiff.

§ 997. Where the purchaser owes more than one debt to the vendor, and makes a payment, it is his right to apply, or, in technical language, appropriate, the payment to whichever debt he pleases.[1] If the vendor is unwilling to apply it to the debt for which it is tendered, he must refuse it, and stand upon his rights, as given to him by law, whatever they may be. And it makes no difference that the creditor may say he will not accept the payment as offered, if he actually receive it, for the law regards what he *does*, not what he *says*.[2] And if money be received by the creditor on account of the debtor, without the latter's knowledge, the right of the debtor to appropriate it cannot be affected by the creditor's attempt to apply it as he chooses before the debtor has an opportunity of exercising his election.[3]

§ 998. The debtor's election of the debt to which he applies a payment may be shown otherwise than by ex-
[*727] press words.[1] * A payment of the exact amount of

[1] Sherwood *v.* Haight, 26 Conn. 432; Whitaker *v.* Groover, 54 Ga. 174; Semmes *v.* Boykin, 27 Ga. 47; Hansen *v.* Rounsavell, 74 Ill. 238; Jackson *v.* Bailey, 12 Ill. 159; Forelander *v.* Hicks, 6 Ind. 448; Robson *v.* McKoin, 18 La. An. 544; Adams *v.* Bank of Louisiana, 3 La. An. 351; Bloodworth *v.* Jacobs, 2 La. An. 24; Irwin *v.* Paulett, 1 Kans. 418; Treadwell *v.* Moore, 34 Me. 112; Lee *v.* Early, 44 Md. 80; Calvert *v.* Carter, 18 Md. 73; Mitchell *v.* Dall, 2 Har. & G. (Md.) 159; s. c. 4 Gill & J. (Md.) 361; Reed *v.* Boardman, 37 Mass. (20 Pick.) 441; Bonaffe *v.* Woodberry, 29 Mass. (12 Pick.) 463; Hussey *v.* Manuf. &c., Bank, 27 Mass. (10 Pick.) 415; Hall *v.* Marston, 17 Mass. 575; Gilchrist *v.* Ward, 4 Mass. 692; Solomon *v.* Dreschler, 4 Minn. 278; Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226; Stewart *v.* Hopkins, 30 Ohio St. 502; Gaston *v.* Barney, 11 Ohio St. 506; Jamison *v.* Collins, 83 Pa. St. 359; Pennypacker *v.* Umberger, 22 Pa. St. 492; Martin *v.* Draher, 5 Watts (Pa.) 544; McDonald *v.* Pickett, 2 Bail. (S. C.) 617; Black *v.* Shooler, 2 McC. (S. C.) 293; McKee *v.* Stroup, 1 Rice (S. C.) 291; Jones *v.* Williams, 39 Wis. 300; Jones *v.* United States, 48 U. S. (7 How.) 681; bk. 12, L. ed. 87; United States *v.* Januury, 11 U. S. (7 Cr.) 572; bk. 3, L. ed. 443; Mayor of Alexandria *v.* Patten, 8 U. S. (4 Cr.) 317; bk. 2, L. ed. 633.

[2] Peters *v.* Anderson, 5 Taunt. 596; Simson *v.* Ingham, 2 B. & C. 65; Mills *v.* Fowkes, 5 Bing. N. C. 455; Croft *v.* Lumley, 5 E. & B. 648; 25 L. J. Q. B. 73; and in error, 27 L. J. Q. B. 321; and 6 H. L. C. 672; Waller *v.* Lacy, 1 M. & G. 54; Jones *v.* Gretton, 8 Ex. 773.

[2] Wetherell *v.* Joy, 40 Me. 325.

[3] Waller *v.* Lacy, 1 M. & G. 54.

[1] Adams Express Co. *v.* Black, 62 Ind. 128; Howland *v.* Rench, 7

one of several debts was said by Lord Ellenborough [2] to be "irrefragable evidence" to show that the payment was intended for that debt: and in the same case, where the circumstances were that the debtor owed one debt passed due, and another not yet due, but the latter was guarantied by a security given by his father-in-law, these facts, connected with proof of an allowance of discount by the creditor on a payment made, were held conclusive to show that the debtor intended to favor his surety, and to appropriate the payment to the debt not yet due.

So if a debtor owe a sum personally, and another as executor, and make a general payment, he will be presumed to have intended to pay his personal debt.[3]

§ 999. Where an account current is kept between parties, as a banking account, the leading case is Clayton's case,[1] in which Sir William Grant, the Master of the Rolls, said: "There is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out: it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." This case was followed and approved in Bodenham *v.* Purchas;[2] but although the rule was recognized as sound in Simson *v.* Ingham,[3] and Henniker *v.* Wigg,[4] it was held that the cir-

Blackf. (Ind.) 236; Mitchell *v.* Dall, 2 Har. & G. (Md.) 159; Terhune *v.* Colton, 12 N. J. Eq. (1 Beas.) 233, 312; Stewart *v.* Keith, 12 Pa. St. 238; Moorehead *v.* West Branch Bank, 3 Watts & S. (Pa.) 550; West Branch Bank *v.* Moorehead, 5 Watts & S. (Pa.) 542; Tayloe *v.* Sandiford, 20 U. S. (7 Wheat.) 13; bk. 5, L. ed. 384.

[2] Marryatt *v.* White, 2 Starkie, 101. See, also, Shaw *v.* Picton, 4 B. & C. 715; Newmarch *v.* Clay, 14 East, 239; Plumer *v.* Long, 1 Stark. 153; Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71.

[3] Goddard *v.* Cox, 2 Str. 1194.

[1] 1 Merivale, 572, 608. See, also, Brown *v.* Adams, 4 Ch. 764; Thompson *v.* Hudson, 6 Ch. 320.

[2] 2 B. & A. 39; see, also, Hooper *v.* Keay, 1 Q. B. D. 178.

[3] 2 B. & C. 65.

[4] 4 Q. B. 792. See, also, Stoveld *v.* Eade, 4 Bing. 154; City Discount

cumstances of the case may afford grounds for inferring that the transactions of the parties were not intended to [*728] come * under the general rule. [As an instance of which it has been decided that when a trustee pays into his private account at a bank money which is partly his own and partly trust money, it is to be inferred that he intends to draw against his own fund, and not against the trust fund, and this inference is sufficient to exclude the application of the rule.[5]]

In Field *v.* Carr,[6] the Court said that the rule had been adopted in all the Courts of Westminster Hall.[7]

§ 1000. The cases already cited on this point also establish the rule that whenever a debtor makes a payment without appropriating it expressly or by implication, he thereby yields to his creditor the right of election in his turn.[1] In the exer-

Co. *v.* McLean, L. R. 9 C. P. 692, Ex. Ch.

[6] In re Hallett's Estate, 13 Ch. D. 696, C. A.

[6] 5 Bing. 13.

[7] Harrison *v.* Johnston, 27 Ala. 445; Wendt *v.* Ross, 33 Cal. 650; Mackey *v.* Fullerton, 7 Colo. 556; Sanford *v.* Clark, 29 Conn. 457; Fairchild *v.* Holly, 10 Conn. 175; Horne *v.* Planters Bank, 32 Ga. 1; Cushing *v.* Wyman, 44 Me. 131; Thurlow *v.* Gilmore, 40 Me. 378; Crompton *v.* Pratt, 105 Mass. 255; Upham *v.* Lefavour, 52 Mass. (11 Metc.) 174; Hill *v.* Robbins, 22 Mich. 475; Scott *v.* Cleveland, 33 Miss. 447; Goetz *v.* Piel, 26 Mo. App. 634; Bancroft *v.* Holton, 59 N. H. 141; Thompson *v.* Phelan, 22 N. H. 339, 350; Parks *v.* Ingram, 22 N. H. 283, 295; s. c. 55 Am. Dec. 153; Truscott *v.* King, 6 N. Y. 147; Dows *v.* Morewood, 10 Barb. (N. Y.) 183; Wheeler *v.* Cropsey, 5 How. (N. Y.) Pr. 288; Berrian *v.* Mayor, &c., New York, 4 Robt. (N. Y.) 538; State *v.* Chadwick, 10 Oreg. 423; McKee *v.* Commonwealth, 2 Grant (Pa.) 23; Berghaus *v.* Alter, 9 Watts (Pa.) 386; Shedd *v.* Wilson, 27 Vt. 478; United States *v.* Kirkpatrick, 22 U. S. (9 Wheat.) 720; bk. 6, L. ed. 199.

[1] Levystein *v.* Whitman, 59 Ala. 345; Bobes' Heirs *v.* Stickney, 36 Ala. 482; Gates *v.* Burkett, 44 Ark. 90; Byrnes *v.* Claffey, 69 Cal. 120; Mackey *v.* Fullerton, 7 Colo. 556; Blinn *v.* Chester, 5 Day (Conn.) 166; Randall *v.* Parramore, 1 Fla. 409; Greer *v.* Burnam, 71 Ga. 31; Holmes *v.* Pratt, 34 Ga. 558; Johnson *v.* Johnson, 30 Ga. 857; Hargroves *v.* Cooke, 15 Ga. 321; Rackley *v.* Pearce, 1 Ga. 241; Howland *v.* Rench, 7 Blackf. (Ind.) 236; Fargo *v.* Buell, 21 Iowa 292; Blackstone Bank *v.* Hill, 27 Mass. (10 Pick.) 129; Brewer *v.* Knapp, 18 Mass. (1 Pick.) 332; Crisler *v.* McCoy, 33 Miss. 445; Middleton *v.* Frame, 21 Mo. 412; Brady *v.* Hill, 1 Mo. 315; s. c. 13 Am. Dec. 503; Livermore *v.* Rand, 26 N. H. 85; Sawyer *v.* Tappan, 14 N. H. 352; Bird *v.* Davis, 14 N. J. Eq. (1 McCar.) 467; Van Sickle *v.* Ayres, 6 N. J. Eq. (2 Halst.) 29; California Bank *v.* Webb, 94 N. Y. 467; National Bank of Newburgh *v.* Bigler, 83 N. Y. 51; Harding *v.* Tifft, 75 N. Y. 461; Sheppard *v.* Steele, 43 N. Y. 53; s. c. 3 Am. Rep.

cise of this right, the creditor may apply the payment to a debt which he could not recover by action against the defendant, as a debt barred by limitation,[2] and even a debt of which the consideration was illegal,[3] as a debt contracted in violation of the Tippling Acts.[4] But if no appropriation be made by either party in a case where there are two debts, one legal and the other void for illegality, as where one debt was for goods sold, and the other for money lent on a usurious contract, the law will apply the payment to the legal contract.[5]

§ 1001. It has been held, however, that this doctrine will not apply in cases where there never was but *one* debt between the parties, as in the case of a building contract with a corporation not competent to contract save under seal, where it was held that the builder who had supplied extra work on verbal orders could not apply any of the general payments to the discharge of his claim for the extra work, that not being a debt at all against the corporation, either equitable or legal.[1]

§ 1002. * It was held by the King's Bench, in [*729] Simson *v.* Ingham,[1] that creditors who had appropri-

660; Seymour *v.* Marvin, 11 Barb. (N. Y.) 80; Stone *v.* Seymour, 15 Wend. (N. Y.) 20; Long *v.* Miller, 93 N. C. 233; Vick *v.* Smith, 83 N. C. 80; Wittkowsky *v.* Reid, 82 N. C. 116; s. c. 84 N. C. 21; Sprinkle *v.* Martin, 72 N. C. 92; Watt *v.* Hoch, 25 Pa. St. 411; Logan *v.* Mason, 6 Watts & S. (Pa.) 9; Smith *v.* Screven, 1 McC. (S. C.) 368; Stone *v.* Talbot, 4 Wis. 442; Mayor of Alexandria *v.* Patten, 8 U. S. (4 Cr.) 317; bk. 2, L. ed. 633; United States *v.* Bradbury, Dav. (2 Ware) 146; Field *v.* Holland, 1 Am. L. Cas. 362; Simson *v.* Ingham, 2 Barn. & Cres. 65; Philpott *v.* Jones, 4 Nev. & Man. 14.

[2] Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Ashby *v.* James, 11 M. & W. 542.

[3] Armistead *v.* Brooke, 18 Ark. 521; Carroll *v.* Forsyth, 69 Ill. 127; Ramsay *v.* Warner, 97 Mass. 8, 13; Pond *v.* Williams, 67 Mass. (1 Gray) 630; Krone *v.* Krone, 38 Mich. 661; Harper *v.* Fairley, 53 N. Y. 442; McMullen *v.* Rafferty, 24 Hun (N. Y.) 363; Sitterly *v.* Gregg, 22 Hun (N. Y.) 258; Kaufman *v.* Broughton, 31 Ohio St. 424; Moore *v.* Kiff, 78 Pa. St. 96; Taylor *v.* Coleman, 20 Tex. 772.

[4] Dawson *v.* Remnant, 6 Esp. 24, approved in Laycock *v.* Pickles, 4 B. & S. 507; 33 L. J. Q. B. 43; Philpot *v.* Jones, 2 A. & E. 41; Crookshank *v.* Rose, 5 C. & P. 19; s. c. 1 Mood. & R. 100.

[5] Wright *v.* Laing, 3 B. & C. 165.

[1] Lamprell *v.* Billericay Union, 3 Ex. 283.

[1] 2 B. & C. 65.

ated a payment by entries in account in their own books, they being the bankers of the debtor, were at liberty to change the appropriation within a reasonable time if they had not rendered accounts in the interval to the debtor, their right of election not being determined by such entry till communicated to the debtor.

[It follows, that if the creditor has appropriated payments by entries in account, and has furnished the debtor with a copy of the account, his right of election is gone.[2]]

§ 1003. In a case where the buyer had bought from a broker two parcels of goods belonging to different principals, and had made a payment to the broker on account, larger than either debt, but not sufficient to pay both, without any specific appropriation, the King's Bench held, that on the insolvency of the broker, the loss must be borne proportionably by his two principals, and that the appropriation must be made by apportioning the payment *pro ratâ* between them according to the amount due to them respectively, leaving to each a claim against the buyer for the unpaid balance of the price of his own goods.[1]

§ 1004. In America, the common law rule is reversed in some of the States, and in Massachusetts, Vermont, Maine, Arkansas, [Louisiana, Illinois, Indiana, Wisconsin and Oregon,[1]] is held that where a promissory note or bill of ex-

[2] Hooper *v.* Keay, 1 Q. B. D. 178. See, also, Bank of North America *v.* Meredith, 2 Wash. C. C. 47.

[1] Favenc *v.* Bennett, 11 East, 36.

[1] Re Clap, 2 Low, at p. 230; Hutchins *v.* Olcutt, 4 Vt. 549; Ward *v.* Bourne, 56 Me. 161; Hunt *v.* Boyd, 2 Miller, 109; Camp *v.* Gullett, 7 Ark. (2 Eng.) 514; Morrison *v.* Smith, 81 Ill. 221; Mehilberg *v.* Tucker, 24 Wis. 607; Matasce *v.* Hughes, 7 Oreg. 39.

The statement of the text is scarcely law in some of the states named.

Arkansas. — Contrary to the opinion of the author, the giving of a bill of exchange or promissory note by the debtor only operates as a conditional payment, unless otherwise expressly or impliedly agreed. Akin *v.* Peters, 45 Ark. 313; Brugman *v.* McGuire, 32 Ark. 733, 740; Costar *v.* Davies, 8 Ark. (3 Eng.) 213, 217; s. c. 16 Am. Dec. 311; but see Carlton *v.* Buckner, 28 Ark. 66. The case of Camp *v.* Gullett, 7 Ark. (2 Eng.) 524, seems to have been cited by the author under a misapprehension. The question whether a note decepted by a creditor amounted to payment did not arise. The plaintiff brought a suit against the defendants on a note, and the defendants pleaded an account by way of set-off. The items of the account were furnished previous to the execution of the note. The question argued was whether it

was to be presumed that there had been an adjustment of accounts between the parties when the note was executed in which the account pleaded in set-off was included. It will be observed that in this case the plaintiff was creditor in the note and debtor under the account, instead of being creditor in both as required to support the text.

Illinois. — The *dicta* of the judges in this state seems to be conflicting, but must in the main be regarded as agreeing with the English doctrine. In Hoodless *v.* Reid, 112 Ill. 105, 111, the court say: "Undoubtedly, the giving a promissory note for an open account is *primâ facie* payment of the account. It is merged in the higher form of security, but it is no actual payment. The note when due may be surrendered, and the action maintained on the original cause of action." In Walsh *v.* Lennon, 98 Ill. 27, 31; s. c. 38 Am. Dec. 75; the court say: "The giving of a note for a debt does not pay or discharge the debt, unless it be agreed that it shall be accepted as payment and satisfaction, and assumpsit may be maintained for the debt, if the note be produced on the trial to be cancelled." In Yates *v.* Valentine, 71 Ill. 643, 644, the court held that: "When a subsequent promissory note is given for the same consideration as a former one, it is a question of fact for the determination of the jury, whether the former note is thereby discharged," and in Archibald *v.* Argall, 53 Ill. 307, it was laid down that the established doctrine of the Illinois court is that the mere giving of a note does not of itself extinguish a precedent debt, whether it be an account or of a demand. See, also, Hough *v.* Ætna Life Ins. Co., 57 Ill. 318; s. c. 11 Am. Rep. 18; White *v.* Jones, 38 Ill. 159, 162. On the other hand, in Morrison *v.* Smith, 81 Ill. 221, 224, the court laid down that the giving of a note is a *primâ facie* settlement of an account and no recovery can be had on the old indebtedness without some explanation or giving of proper account of the note. This dictum is supported by the decisions in Cox *v.* Reed, 27 Ill. 434; Smalley *v.* Edey, 19 Ill. 207, 211; McConnell *v.* Stettinius, 7 Ill. (2 Gilm.) 707.

Indiana. — The giving of a negotiable promissory note, governed by the law merchant, for a precedent debt, will operate as a payment and discharge of such precedent debt, unless it be shown that the parties did not intend the transaction to have that effect. Nixon *v.* Beard, 111 Ind. 139, 143; Teal *v.* Spangler, 72 Ind. 380; Smith *v.* Bettger, 68 Ind. 254; s. c. 34 Am. Rep. 256; Schneider *v.* Kolthoff, 59 Ind. 568; Hill *v.* Sloan, 59 Ind. 181; Alford *v.* Baker, 53 Ind. 279; White *v.* Carlton, 52 Ind. 371; Maxwell *v.* Day, 45 Ind. 509; Jewett *v.* Pleak, 43 Ind. 368; Gaskin *v.* Wells, 15 Ind. 253; Thornton *v.* Williams, 14 Ind. 518. But if the note is not governed by the law merchant, the acceptance of it does not operate as payment. Travellers' Ins. Co. *v.* Chappelow, 83 Ind. 429; Grant *v.* Monticello, 71 Ind. 58; Smith *v.* Bettger, 68 Ind. 254; Bristol Milling & Manuf. Co. *v.* Probasco, 64 Ind. 406; Romine *v.* Romine, 59 Ind. 346; Hill *v.* Sleeper, 58 Ind. 221; Alford *v.* Baker, 53 Ind. 279; Maxwell *v.* Day, 45 Ind. 509; Stevens *v.* Anderson, 30 Ind. 391; Judah *v.* Potter, 18 Ind. 224; Tyner *v.* Stoops, 11 Ind. 22; s. c. 71 Am. Dec. 341; Bennett *v.* Buchanan, 3 Ind. 47; Pitzer *v.* Harmon, 8 Blackf. (Ind.) 112; s. c. 44 Am. Dec. 738. By the Indiana statute, an ordinary promissory note, not payable in a bank in the state, is not commercial paper. Travellers' Ins. Co. *v.* Chappelow, 83 Ind. 429.

Louisiana. — The law applicable to this state is not as laid down in the text. The rule there is, that unless it is expressly agreed that the note is given in payment, it does not operate a novation of the debt. Jor-

dan *v.* Anderson, 29 La. An. 749; Gails *v.* Schooner Osceola, 14 La. An. 54; Walton *v.* Bemiss, 16 La. 140; Glasgow *v.* Stevenson, 6 La. N. S. 568; Cox *v.* Baldwin, 1 La. 410. In order to operate as novation, there must be evidence that the note has been received in payment. Walton *v.* Bemiss, 16 La. 140; Abat *v.* Nolte, 6 La. N. S. 637; Barron *v.* How, 2 La. N. S. 144; Hunt *v.* Boyd, 2 La. 111; Gardner *v.* Levasseur, 28 La. An. 679; Gails *v.* Schooner Osceola, 14 La. An. 54; White *v.* McDowell, 4 La. An. 543. Hunt *v.* Boyd, 2 La. 109, cited by the author, turns expressly on the ground that the draft was given in payment and receipted as such.

The law of Maine is correctly stated by the author. Mehan *v.* Thompson, 71 Me. 492; Crosby *v.* Redman, 70 Me. 56; Ward *v.* Bourne, 56 Me. 161; Paine *v.* Dwinel, 53 Me. 52; Milliken *v.* Whitehouse, 49 Me. 527; Kidder *v.* Knox, 48 Me. 551; Coburn *v.* Kerswell, 35 Me. 126; Shumway *v.* Reed, 34 Me. 560; s. c. 56 Am. Dec. 679; Fowler *v.* Ludwig, 34 Me. 455; Bangor *v.* Warren, 34 Me. 324; s. c. 56 Am. Dec. 657; Comstock *v.* Smith, 23 Me. 202; Perrin *v.* Keene, 19 Me. 355; s. c. 36 Am. Dec. 759; Newall *v.* Hussey, 18 Me. 249; s. c. 36 Am. Dec. 717; Gilmore *v.* Bussey, 12 Me. (3 Fairf.) 418; s. c. 36 Am. Dec. 717; Descadillas *v.* Harris, 8 Me. (8 Greenl.) 298; Wilkins *v.* Reed, 6 Me. (6 Greenl.) 220; s. c. 19 Am. Dec. 211; Varner *v.* Nobleborough, 2 Me. (2 Greenl.) 121; s. c. 11 Am. Dec. 48; Wallace *v.* Agry, 4 Mason C. C. 342. But whenever it appears that the creditor has other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon the note. Mehan *v.* Thompson, 71 Me. 492, 562; Parkhurst *v.* Cummings, 56 Me. 155; Kidder *v.* Knox, 48 Me. 555.

A note given in a foreign country for a debt contracted there, will not be payment of the debt, unless it is made so by the laws of the country. Descadillas *v.* Harris, 8 Me. (8 Greenl.) 298; see, also, Wallace *v.* Agry, 4 Mason C. C. 342.

In Massachusetts, the author's statement is supported by numerous decisions. Dodge *v.* Emerson, 131 Mass. 467; Ely *v.* James, 123 Mass. 36; Parham Sewing Machine Co. *v.* Brock, 113 Mass. 194; Melledge *v.* Boston Iron Co., 59 Mass. (5 Cush.) 158; s. c. 51 Am. Dec. 59; Curtis *v.* Hubbard, 50 Mass. (9 Metc.) 328; Ilsley *v.* Jewett, 43 Mass. (2 Metc.) 168; Huse *v.* Alexander, 43 Mass. (2 Metc.) 157; Butts *v.* Dean, 43 Mass. (2 Metc.) 76; s. c. 35 Am. Dec. 389; Scott *v.* Ray, 35 Mass. (18 Pick.) 360; Reed *v.* Upton, 27 Mass. (10 Pick.) 525; s. c. 20 Am. Dec. 545; Cornwall *v.* Gould, 21 Mass. (4 Pick.) 444; Maneely *v.* McGee, 6 Mass. 143; s. c. 4 Am. Dec. 105; Thacher *v.* Dinsmore, 5 Mass. 299; s. c. 4 Am. Dec. 61; Hudson *v.* Bradley, 2 Cliff. C. C. 130; Kimball *v.* The Anna Kimball, 2 Cliff. C. C. 4. But the courts have shown a disposition to relax the rule rather than to stringently maintain it. Thus it has been uniformly held that the presumption of payment is controlled, where its effect would be to deprive the party who takes the note, of his collateral security of any other substantial benefit. Parham S. M. Co. *v.* Brock, 113 Mass. 194, 195; Butts *v.* Dean, 43 Mass. (2 Metc.) 76; s. c. 35 Am. Dec. 389; Maneely *v.* McGee, 6 Mass. 143; s. c. 4 Am. Dec. 105. It is to be observed that the question is to be governed by the law of the state where the transaction takes place. Connecticut Trust & S. D. Co. *v.* Melendy, 119 Mass. 449.

Oregon. — The law in this state cannot be considered as settled. Matasce *v.* Hughes, 7 Oreg. 39; s. c. 33 Am. Rep. 696; cited by the author is the only authority that a promissory note is *primâ facie* evidence of an accounting between the parties. There is nothing in the report upon the ques-

change is given for the price of goods, it is *primâ facie* an absolute payment, though the presumption may be rebutted.[2]

[On the other hand, in New York the rule seems to be the same as in England, and the taking of the debtor's promissory note or bill of exchange operates only to suspend the right of action until the maturity of the instrument, and successive renewal notes are held to be simply extensions from * date to date of the time of payment.[3] [*730] In California, Pennsylvania and West Virginia, a promissory note or bill of exchange will not be regarded as absolute payment unless it be so expressly agreed.[4] In New York and these States, as in England, the creditor cannot recover on the original debt without giving up the negotiable security or proving satisfactorily that it has been lost or destroyed.[5]]

tion whether the note operates as payment and discharge.

In Vermont, a note is *primâ facie* an absolute payment as stated by the author. Wemet *v.* Missisquoi Lime Co., 46 Vt. 458; Arnold *v.* Sprague, 34 Vt. 402; Wait *v.* Brewster, 31 Vt. 516; Collamer *v.* Langdon, 29 Vt. 32; Dickinson *v.* King, 28 Vt. 378; Farr *v.* Stevens, 26 Vt. 303; Follett *v.* Steele, 16 Vt. 30; Torrey *v.* Baxter, 13 Vt. 452; Hutchins *v.* Olcutt, 4 Vt. 549; s. c. 24 Am. Dec. 634. But it has been held that if the note is taken under misunderstanding of the facts, supposing the credit of other parties was given and bound thereby, the presumption is rebutted. Wemet *v.* Missisquoi Lime Co., 46 Vt. 458; Wait *v.* Brewster, 31 Vt. 516.

Wisconsin. — Notwithstanding Mehlberg *v.* Tisher, 24 Wis. 607, cited by the author, the Wisconsin courts have in a long series of decisions followed the rule of the common law. Racine Bank *v.* Case, 63 Wis. 504; Hoeflinger *v.* Wells, 47 Wis. 628; American Buttonhole O. & S. Machine Co. *v.* Gurnee, 44 Wis. 49; Matteson *v.* Ellsworth, 33 Wis. 502; s. c. 14 Am. Rep. 766; Paine *v.* Voorhees, 26 Wis. 522; Lindsey *v.* McClelland, 18 Wis. 481; Ford *v.* Mitchell, 15 Wis. 304, 308; Eastman *v.* Porter, 14 Wis. 39; Blunt *v.* Walker, 11 Wis. 334; s. c. 78 Am. Dec. 709.

[2] Story on Sales (ed. 1871), § 219, where the cases are cited.

[3] Jagger Iron Co. *v.* Walker, 76 N. Y. 521, where an earlier decision of the Supreme Court of New York, Fisher *v.* Marvin, 47 Barb. (N. Y.) 169, is expressly overruled by the Court of Appeals.

[4] Brown *v.* Olmsted, 50 Cal. 162; Hays *v.* M'Clurg, 4 Watts (Pa.) 452; Poole *v.* Rice, 9 W. Va. 73.

[5] Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Hays *v.* M'Clurg, 4 Watts (Pa.) 452. The judgment of Huston J., in this latter case, is well worth perusal.

The rule of the common law as interpreted by the English Courts appears to be followed in all the States except those noted above. The following is a list of authorities on the point.

In Alabama. — Keel *v.* Larkin, 72 Ala. 493; Day *v.* Thompson, 65 Ala. 269; Marshall *v.* Marshall, 42 Ala. 149; Myatts *v.* Bell, 41 Ala. 222; Fickling *v.* Brewer, 38 Ala. 685; McCrary *v.* Carrington, 35 Ala. 698;

§ 1005. By the French Civil Code, Art. 1271, it is declared that "novation" takes place "when a debtor contracts towards his creditor a new debt which is substituted for the old one that is extinguished." Novation is included in Ch. V. as being one of the modes by which debts become extinct. Under this article, and the Article 1273, which provides that

Crocket *v.* Trotter, 1 Stew. & P. (Ala.) 446.

In California. — Brown *v.* Olmsted, 50 Cal. 162; Welch *v.* Allington, 23 Cal. 322; Brown *v.* Cronise, 21 Cal. 386; Smith *v.* Owens, 21 Cal. 11; Higgins *v.* Wortell, 18 Cal. 330; Griffith *v.* Grogan, 12 Cal. 317; Brewster *v.* Bours, 8 Cal. 506.

In Connecticut. — Clark *v.* Savage, 20 Conn. 258; Hill *v.* Porter, 9 Conn. 23; Dougal *v.* Cowles, 5 Day (Conn.) 511.

In Florida. — Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374; May *v.* Gamble, 14 Fla. 467.

In Iowa. — Farwell *v.* Grier, 38 Iowa, 83; Edwards *v.* Trulock, 37 Iowa, 244; McLaren *v.* Hall, 26 Iowa, 297; Kephart *v.* Butcher, 17 Iowa, 240; Gower *v.* Halloway, 13 Iowa, 154, 156.

In Kentucky. — Kibbey *v.* Jones, 7 Bush (Ky.) 243; Harlan *v.* Wingate, 2 J. J. Marsh. (Ky.) 138.

In Maryland. — Haines *v.* Pearce, 41 Md. 231; Hoopes *v.* Strasburger, 37 Md. 401; s. c. 11 Am. Rep. 538; Hurley *v.* Hollyday, 35 Md. 472; Lewis *v.* Brehme, 33 Md. 430; s. c. 3 Am. Rep. 190; Warfield *v.* Booth, 33 Md. 74; Myers *v.* Smith, 27 Md. 91; Folk *v.* Wilson, 21 Md. 551; Berry *v.* Griffin, 10 Md. 27; s. c. 69 Am. Dec. 123; Yates *v.* Donaldson, 5 Md. 389; s. c. 61 Am. Dec. 283; Mudd *v.* Harper, 1 Md. 110; s. c. 54 Am. Dec. 644; Larrabee *v.* Talbott, 5 Gill (Md.) 426; s. c. 46 Am. Dec. 637; Morgan *v.* Bitzenberger, 3 Gill (Md.) 350; Wyman *v.* Rae, 11 Gill & J. (Md.) 416; s. c. 37 Am. Dec. 70; Patapsco Ins. Co. *v.* Smith, 6 Har. & J. (Md.) 166; s. c. 14 Am. Dec. 268; Glenn *v.* Smith, 2 Gill & J. (Md.) 493; s. c. 20 Am. Dec. 452.

In Michigan. — Brown *v.* Dunckel, 46 Mich. 29; Case *v.* Seass, 44 Mich. 195; Breitung *v.* Lindauer, 37 Mich. 217; Gardner *v.* Gorham, 1 Doug. (Mich.) 507; Allen *v.* King, 4 McL. C. C. 128; Weed *v.* Snow, 3 McL. C. C. 265.

In Mississippi. — Wadlington *v.* Covert, 51 Miss. 631; Partee *v.* Bedford, 51 Miss. 84; Lear *v.* Friedlander, 45 Miss. 559; Guion *v.* Doherty, 43 Miss. 538.

In Missouri. — Wiles *v.* Robinson, 80 Mo. 47; Hughes *v.* Israel, 73 Mo. 538; Brooks *v.* Mastin, 69 Mo. 63; Leabo *v.* Goode, 67 Mo. 126; Doebling *v.* Loos, 45 Mo. 152; Howard *v.* Jones, 33 Mo. 583; Citizens' Bank *v.* Carson, 32 Mo. 191; McMurray *v.* Taylor, 30 Mo. 263; s. c. 77 Am. Dec. 611; Appleton *v.* Kennon, 19 Mo. 637.

In Nebraska. — Young *v.* Hibbs, 5 Neb. 433.

In New Hampshire. — Whitcher *v.* Dexter, 61 N. H. 91; Weymouth *v.* Sanborn, 43 N. H. 171; s. c. 80 Am. Dec. 144; Foster *v.* Hill, 36 N. H. 526; Coburn *v.* Odell, 30 N. H. 540; Barnet *v.* Smith, 30 N. H. 256; s. c. 64 Am. Dec. 290; Smith *v.* Smith, 27 N. H. (7 Fost.) 244; Whitney *v.* Goin, 20 N. H. 354; Clark *v.* Draper, 19 N. H. 419; Johnson *v.* Cleaves, 15 N. H. 332; Jaffrey *v.* Cornish, 10 N. H. 505.

In New Jersey. — Ayres *v.* Van Lieu, 5 N. J. L. (2 South.) 765; Sayre *v.* Sayre, 3 N. J. L. (2 Penn.) 1034; Coxe *v.* Hankinson, 1 N. J. L. (Coxe) 85; Swain *v.* Frazier, 35 N. J. Eq. (8 Stew.) 326; Freeholders of

"novation is not presumed, and the intention to novate must result clearly from the act," there has been quite a divergence of opinion among the commentators on the Code, and a conflict in the judicial decisions as to the effect of giving a negotiable instrument for the price of goods sold where the vendor has given an unqualified receipt for the price; but

Middlesex *v.* Thomas, 20 N. J. Eq. (5 C. E. Gr.) 39.

In New York. — National Bank of Newburgh *v.* Bigler, 83 N. Y. 51; Thomson *v.* North America Bank, 82 N. Y. 1; Feldman *v.* Beier, 78 N. Y. 293; Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Smith *v.* Ryan, 66 N. Y. 352; s. c. 23 Am. Rep. 60; Noel *v.* Murray, 13 N. Y. 167; Vail *v.* Foster, 4 N. Y. 312; Geller *v.* Seixas, 4 Abb. (N. Y.) Pr. 103; Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290; s. c. 13 Am. Dec. 533; Colville *v.* Besly, 2 Den. (N. Y.) 143; Waydell *v.* Luer, 5 Hill (N. Y.) 448; Cole *v.* Sackett, 1 Hill (N. Y.) 516; Parrott *v.* Colby, 6 Hun (N. Y.) 55; s. c. 71 N. Y. 597; Johnson *v.* Weed, 9 Johns. (N. Y. 310; s. c. 6 Am. Dec. 279; Schemerhorn *v.* Loines, 7 Johns. (N. Y. 313; Tobey *v.* Barber, 5 Johns. (N. Y.) 68; s. c. 4 Am. Dec. 326; Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438; s. c. 1 Am. Dec. 177; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17; Rodman *v.* Hedden, 10 Wend. (N. Y.) 502; Lewis *v.* Lozee, 3 Wend. (N. Y.) 82; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; s. c. 19 Am. Dec. 529.

In North Carolina. — Gordon *v.* Price, 10 Ired. (N. C.) L. 385; Spear *v.* Atkinson, 1 Ired. (N. C.) L. 262; Smitherman *v.* Kidd, 1 Ired. (N. C.) Eq. 86.

In Ohio. — Emerine *v.* O'Brien, 36 Ohio St. 491; Sutliff *v.* Atwood, 15 Ohio St. 186; Merrick *v.* Boury 4 Ohio St. 60.

In Pennsylvania. — Kemmerer's Appeal, 102 Pa. St. 558; Hunter *v.* Moul, 98 Pa. St. 13; s. c. 42 Am. Rep. 610; Brown *v.* Scott, 51 Pa. St. 363; McIntyre *v.* Kennedy, 29 Pa. St. 451; Covely *v.* Fox, 11 Pa. St. 174; Hart *v.* Boller, 15 Serg. & R. (Pa.) 162; s. c. 16 Am. Dec. 536; Weakly *v.* Bell, 9 Watts (Pa.) 280; s. c. 36 Am. Dec. 116; Hays *v.* McClurg, 4 Watts (Pa.) 454; Lishy *v.* O'Brien, 4 Watts (Pa.) 142; Jones *v.* Shawhan, 4 Watts & S. (Pa.) 263; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276; Estate of Davis, 5 Whart. (Pa.) 530; s. c. 34 Am. Dec. 574.

In Rhode Island. — Nightingale *v.* Chafee, 11 R. I. 609; s. c. 23 Am. Rep. 531; Wilbur *v.* Jernegan, 11 R. I. 113; Wheeler *v.* Schroeder, 4 R. I. 383; Sweet *v.* James, 2 R. I. 270.

In South Carolina. — Ex parte Williams, 17 S. C. (N. S.) 396; Thomas *v.* Kelly, 3 S. C. (N. S.) 210; Costelo *v.* Cave, 2 Hill (S. C.) 528; s. c. 27 Am. Dec. 404; Barelli *v.* Brown, 1 McC. (S. C.) 449; s. c. 10 Am. Dec. 683; Printems *v.* Helfried, 1 Nott & McC. (S. C.) 187; Commercial Bank *v.* Bobo, 9 Rich. (S. C.) 31; Townsends *v.* Stevenson, 4 Rich. (S. C.) 59; Kelsey *v.* Rosborough, 2 Rich. (S. C.) 244; Watson *v.* Owens, 1 Rich. (S. C.) L. 111; Dogan *v.* Ashby, 1 Rich. (S. C.) 36; Judge *v.* Fiske, 2 Spears (S. C.) L. 436; s. c. 42 Am. Dec. 380; Fraser *v.* Hext, 2 Strobh. (S. C.) Eq. 250.

In Tennessee. — Kennel *v.* Muncey, Peck (Tenn.) 273.

In Texas. — McGuire *v.* Bidwell, 64 Tex. 43; McNeil *v.* McCamley, 6 Tex. 163.

In Utah. — Heath *v.* White, 3 Utah 474.

In Virginia. — Morriss *v.* Harveys, 75 Va. 726; Lewis *v.* Davisson, 29 Gratt.

in the absence of an unreserved and unconditional receipt, all agree that the buyer's obligation to pay the price is not novated.[1]

§ 1006. The French Code gives the debtor the right to "impute" a payment to the debt that he chooses, Art. 1253; but he cannot apply money towards payment of the capital of a debt while arrearages of interest are due, and if a general payment is made on a debt bearing interest, the excess only, after satisfying interest already due, will be appropriated to payment of the capital. Art. 1254. And where no appropriation is made at the time of payment, [*731] the law *applies the money to that debt, amongst such as are past due, which the debtor is most interested in discharging; but to a debt past due in preference to one not yet due, even if the debtor has a greater interest in discharging the latter than the former: if the debts are of the same nature, the appropriation is made to the oldest: if all are of the same nature and the same date, the appropriation is made proportionably. The creditor is never allowed to elect without the debtor's assent. Art. 1255.

§ 1007. The law of tender is quite different on the Continent from our law. There, a debtor is allowed to make payment to his creditor by depositing the amount which he admits to be due in the public treasury, in a special department, termed Caisse des Consignations. This is as much an actual payment as if made to the creditor in person, and the money thus deposited bears interest at a rate fixed by the

(Va.) 216; Moses *v.* Trice, 21 Gratt. (Va.) 556; s. c. 8 Am. Rep. 609; McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

In West Virginia.— Hess *v.* Dille, 23 W. Va. 90; Merchants Nat. Bank *v.* Good, 21 W. Va. 455; Bantz *v.* Basnett, 12 W. Va. 772; Feamster *v.* Withrow, 12 W. Va. 611; Dunlap *v.* Shanklin, 10 W. Va. 662; Poole *v.* Rice, 9 W. Va. 73.

In United States Courts. — The Kimball, 70 U. S. (3 Wall.) 37; bk. 18, L. ed. 50; Lyman *v.* Bank of United States, 53 U. S. (12 How.) 225; bk. 13, L. ed. 965; s. c. 1 Blatchf. C. C. 297; Peter *v.* Beverly, 35 U. S. (10 Pet.) 532; bk. 9, L. ed. 522; Bank of United States *v.* Daniel, 37 U. S. (12 Pet.) 32; bk. 9, L. ed. 989; Sheehy *v.* Mandeville, 10 U. S. (6 Cr.) 253; bk. 3, L. ed. 215; Allen *v.* King, 4 McL. C. C. 128; The Chusan, 2 Story C. C. 455; Gallagher *v.* Roberts, 2 Wash. C. C. 191.

[1] See the cases and authors cited and compared in Sirey, Code Civ. Annoté, Art. 1271.

state. This deposit or "consignation" is made extra-judicially, but the debtor must cite his creditor to appear at the public treasury at a fixed time, and notify him of the amount he is about to deposit; and the public officer draws up a report or "procès-verbal" of the deposite, and if the creditor is not present, sends him a notice to come and withdraw it. Cod. Civ., Arts. 1257 *et seq.* This system is derived from the Roman law, in which the word "obsignatio" had the same meaning as the French "consignation."

§ 1008. The ancient civil law rules bore a strong resemblance to those of the common law, in regard to payment and tender. Whenever the sum due was fixed, and the date of the payment specified either by the law or by force of the contract, it was the debtor's duty to pay without demand,[1] according to the maxim that in such cases, dies interpellat pro homine; and the default of payment was said to arise *ex re*.[2] But in all other cases, a demand (*interpellatio*) * by the creditor was necessary, which was re- [*732] quired to be at a suitable time and place, of which the judge (or prætor) was to decide in case of dispute, and the default in payment on such demand was said to arise *ex persona*.[3]

On the refusal of the creditor to receive (creditoris mora), when the debtor made a tender (oblatio), the discharge of the debtor took place by his payment of the debt (obsignatio) into certain public offices or to certain ministers of public worship: "Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est," the obsignatio being made in *sacratissmas ædes*, or if the debtor preferred, he might apply to the prætor to name the place of deposite.[4]

§ 1009. And payment by *whomsoever made* liberated the debtor. "Nec tamen interest quis solvat utrum ipse qui

[1] Dig. 13. 3 de Condict. Trit. 4, Gaius: 19. 1 de Act. Emp. et Vend. 47, Paul: 45. 1 de Verb. obl. 114, Ulp.: Code 4. 49. de Act. Empt. 12 Const. Justin.

[2] Dig. 40. 5. de Fidei-com. libert. 26, § 1, Ulp.. 22. 32. Marcian.

[3] Dig. 40. 5. de Fidei-com. libert. 26, § 1, Ulp.: 22. 32. Marcian.

[4] Cod. 4. 32. de Usuris, 19, Const. Philipp.: 8. 43. de Sòlution. 9, Const. Diocl. et Max.

debet, an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorante debitore vel invito solutio fiat."[1] On this point the law of England is not yet settled, as stated by Willes J. in Cook *v.* Lister,[2] and the rule would rather seem to be that payment by a third person, a stranger to the debtor, without his knowledge, would not discharge the debtor.[3]

In Walter *v.* James,[4] Martin B. declared the true rule to be, that if a payment be made by a stranger, not as making a *gift* for the benefit of the debtor, but as an agent who intended to claim reimbursement, — though without authority from the debtor at the time of payment, — it is competent for the creditor and the agent to annul the payment at any time before ratification by the debtor, and thus to prevent his discharge.

§ 1010. Mr. Smith, in his book on Mercantile Law,[1] also calls attention to the very singular sham or imagin- [*733] ary payment * used in Rome — as a substitute for a common law release — known as acceptilatio. "Est acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, si id velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere: *quod ego tibi promisi, habes ne acceptum?* et Titius respondeat, *habeo.* Quo genere ut diximus tantum exsolvuntur obligationes quæ ex verbis consistunt, non etiam cæteræ. Consentaneum enim visum est, verbis factum obligationem, aliis posse dissolvi."[2] The learned author adds, that though this sort of sham payment was applicable only to a debt due by express contract, "an acute person," called Gallus Aquilius, devised a means of converting all other contracts into express contracts to pay money, and then get rid of them by the acceptilatio, a device termed in honor of its inventor, the Aquiliana stipulatio. This statement is quite accurate,

[1] Inst. lib. 3, tit. 29, 1.

[2] 13 C. B. N. S. 543; 32 L. J. C. P. 121.

[3] See Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24; Simpson *v.* Eggington, 10 Ex. 845; 24 L. J. Ex. 312; Lucas *v.* Wilkinson, 26 L. J. Ex. 13; 1 H. & N. 420.

[4] L. R. 6 Ex. 124, at p. 128.

[1] Page 535, note (*e*), ed. 1877.

[2] Inst. 3, 30, 1.

the Aquilian stipulation being recognized in the Institutes of Justinian.[3] This "acute person" was a very eminent lawyer, the colleague in the prætorship, and friend of Cicero (collega et familiaris meus),[4] and of great authority among the jurisconsults of his day, "Ex quibus, Gallum maxime auctoritatis apud populum fuisse;"[5] especially for his ingenuity in devising means of evading the strict rigor of the Roman law, — which was quite as technical as the common law ever was, — and of tempering it with equitable principles and remedies.[6]

[3] Lib. 3. 29. 2. [4] De Officiis, lib. 3, § 14.
[5] Dig. 1, 2. de Orig. Jur. 2, § 42, Pomp.
[6] See, for another example, Dig. 28. 2. 29. pr. f. Scævola.

[*734] # *BOOK V.

BREACH OF THE CONTRACT.

PART I.

RIGHTS AND REMEDIES OF THE VENDOR.

CHAPTER I.

PERSONAL ACTIONS AGAINST THE BUYER.

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Section I. — WHERE THE PROPERTY HAS NOT PASSED.

§ 1011. WHEN the vendor has not transferred to the buyer the property in the goods which are the subject of the con-

tract as has been explained in Book II.: as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery: the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not * at his pleasure.[1] But his only [*735] action against the buyer is for damages for non-

[1] *Vendee's remedy.* — It is said in Dustan *v.* McAndrew, 44 N. Y. 72, 78, that "the vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily either one of three methods to indemnify himself. 1. He may store or retain the property for the vendee and sue him for the entire purchase-price; 2. He may sell the property acting as agent for this purpose for the vendee, and recover the difference between the contract price and the price obtained on such resale; 3. He may keep the property as his own and recover the difference of the market price at the time and place of delivery and the contract price." See Bagley *v.* Findlay, 82 Ill. 524; Pittsburg C. & St. L. R. Co. *v.* Heck, 50 Ind. 303; s. c. 19 Am. Rep. 713, 717; Holland *v.* Rea, 48 Mich. 218; Mason *v.* Decker, 72 N. Y. 595; s. c. 28 Am. Rep. 190; Des Arts *v.* Leggett, 16 N. Y. 582; Shawhan *v.* Van Nest, 25 Ohio St. 490; s. c. 18 Am. Rep. 313; Sedg. on Dam. (5th ed.) 333; 3 Pars. on Cont. (5th ed.) 208.

Right of resale. — If the vendee refuses to fulfil his contract, the vendor may sell the goods without any notice to him and look to him for the loss that he may have sustained by reason of the refusal. West *v.* Cunningham, 9 Port. (Ala.) 104; s. c. 33 Am. Dec. 300; Bagley *v.* Findlay, 82 Ill. 524; Pittsburg C. & St. L. R. Co. *v.* Heck, 50 Ind. 303, 308; s. c. 19 Am. Rep. 713, 715; Gilly *v.* Henry, 8 Mart. (La.) 402; s. c. 13 Am. Dec. 291; Holland *v.* Rea, 48 Mich. 218; Van Horn *v.* Rucker, 33 Mo. 391; s. c. 84 Am. Dec. 52; Hunter *v.* Wetsell, 84 N. Y. 549, 559; s. c. 38 Am. Rep. 544; Mason *v.* Decker, 72 N. Y. 598; s. c. 28 Am. Rep. 190; Hayden *v.* Demets, 53 N. Y. 426, 431; Dustan *v.* McAndrew, 44 N. Y. 78; Pollen *v.* LeRoy, 30 N. Y. 556; Shawhan *v.* Van Nest, 25 Ohio St. 490; s. c. 18 Am. Rep. 313; Andrews *v.* Hoover, 8 Watts (Pa.) 239. See, also, Camp *v.* Hamlin, 55 Ga. 259; McLean *v.* Richardson, 127 Mass. 339; Rickey *v.* Tenbroeck, 63 Mo. 563; Smith *v.* Pettee, 70 N. Y. 13; Stevenson *v.* Burgin, 49 Pa. St. 36; Phelps *v.* Hubbard, 51 Vt. 489; Chapman *v.* Ingram, 30 Wis. 290.

Respecting notice of resale to vendee. — See Ullmann *v.* Kent, 60 Ill. 271; Saladin *v.* Mitchell, 45 Ill. 79; Holland *v.* Rea, 48 Mich. 218; Lewis *v.* Greider, 51 N. Y. 231; Pollen *v.* Le Roy, 30 N. Y. 549. A resale made after vendee's refusal to complete his purchase, however, is not conclusive in fixing the extent of his liability; he may show that the sale was unfair, or was under circumstances calculated to prevent a full price. West *v.* Cunningham, 9 Port. (Ala.) 104; s. c. 33 Am. Dec. 300; Haskell *v.* McHenry, 4 Cal. 411; Allen *v.* Jarvis, 20 Conn. 38; Pittsburg C. & St. L. R. Co. *v.* Heck, 50 Ind. 303; s. c. 19 Am. Dec. 713; Porter *v.* Travis, 40 Ind. 556; Beard *v.* Sloan, 38 Ind. 128; Gatling *v.* Newell, 12 Ind. 116, 118, 125; Williams *v.* Jones, 1 Bush (Ky.) 621; Old Colony R. R. Co. *v.*

acceptance:[2] he can in general only recover the damages that he has sustained:[3] not the full price of the goods. The

Evans, 72 Mass. (6 Gray) 25; s. c. 66 Am. Dec. 394; Thompson *v.* Alger, 53 Mass. (12 Metc.) 428, 443; Rickey *v.* Tenbroeck, 63 Mo. 567; Northrup *v.* Cook, 39 Mo. 108; Griswold *v.* Sabin, 51 N. H. 167; Gordon *v.* Norris, 49 N. H. 376; McConihe *v.* New York & E. R. R. Co., 20 N. Y. 495; Kountz *v.* Kirkpatrick, 72 Pa. St. 376; s. c. 13 Am. Rep. 687; Ballentine *v.* Robinson, 46 Pa. St. 177; Tompkins *v.* Haas, 2 Pa. St. 75; Ashcom *v.* Smith, 2 Pen. & W. (Pa.) 211; s. c. 1 Am. Dec. 437; Coffnan *v.* Hampton, 2 Watts & S. (Pa.) 377, 390; s. c. 37 Am. Dec. 511; McCombs *v.* McKennan, 2 Watts & S. (Pa.) 216, 219; s. c. 37 Am. Dec. 505; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; Andrews *v.* Hoover, 8 Watts (Pa.) 239; Ganson *v.* Madigan, 13 Wis. 144.

[2] Haskell *v.* McHenry, 4 Cal. 411; Allen *v.* Jarvis, 20 Conn. 38, 50; Camp *v.* Hamlin, 55 Ga. 259; Fell *v.* Miller, 78 Ind. 507, 512; Indianapolis, P. & C. R. R. *v.* Maguire, 62 Ind. 140; Pittsburg, C. & St. L. R. Co. *v.* Heck, 50 Ind. 303, 306; s. c. 17 Am. Rep. 568; Sanborn *v.* Benedict, 78 Ill. 309; Ullmann *v.* Kent, 60 Ill. 271; Williams v. Jones, 1 Bush (Ky.) 621; Moody *v.* Brown, 34 Me. 107, 109; s. c. 56 Am. Dec. 640; Collins *v.* Delaporte, 115 Mass. 159, 162; Stearns *v.* Washburn, 73 Mass. (7 Gray) 187; Thompson *v.* Alger, 53 Mass. (12 Metc.) 428; Hart *v.* Tyler, 32 Mass. (15 Pick.) 171; Hosmer *v.* Wilson, 7 Mich. 294, 303, 304; s. c. 74 Am. Dec. 616; Northrup *v.* Cook, 39 Mo. 108; Gordon *v.* Norris, 49 N. H. 376; Bailey *v.* Smith, 43 N. H. 141; Messer *v.* Woodman, 22 N. H. 172; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395; Perdicaris *v.* Trenton, &c. Co., 29 N. J. L. (5 Dutch.) 367, 370; Butler *v.* Butler, 77 N. Y. 472; s. c. 33 Am. Rep. 648; McConihe *v.* New York & E. R. R., 20 N. Y. 495; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 34; s. c. 9 Am. Dec. 327; Danforth *v.* Walker, 37 Vt. 239; McCormick *v.* Hamilton, 23 Gratt. (Va.) 561, 577; James *v.* Adams, 16 W. Va. 245, 267; Ganson *v.* Madigan, 13 Wis. 67, 75; McNaughter *v.* Cassally, 4 McL. C. C. 530; Atkinson *v.* Bell, 8 Barn. & C. 277; Elliott *v.* Heginbotham, 2 Car. & K. 545; Laird *v.* Pim, 7 Mees. & W. 474; Boswell *v.* Kilborn, 15 Moore P. C. 309; Auger *v.* Thompson, 3 Ont. App. 19; Cort *v.* Ambergate, N. & B. E. G. R. Co., 17 C. B. 127; Alexander *v.* Gardner, 1 Scott, 630, 640.

[3] Laird *v.* Pim, 7 M. & W. 478. See, also, Rand *v.* White Mountains R. R. Co., 40 N. H. 79, 86; Thompson *v.* Alger, 53 Mass. (12 Metc.) 482; Pearson *v.* Mason, 120 Mass. 53, 58; Thorndike *v.* Locke, 98 Mass. 240; Moore *v.* Logan, 5 Up. Can. C. P. 294, 296; Phillips *v.* Merritt, 2 Up. Can. C. P. 513. The damages the seller is entitled to under such circumstances is the difference between the contract price and the market price of the goods at the time and place of breach. Brownlee *v.* Bolton, 44 Mich. 218. See Camp *v.* Hamlin, 55 Ga. 259; Foos *v.* Sabin, 84 Ill. 565; Bagley *v.* Findlay, 82 Ill. 524; Sanborn *v.* Benedict, 78 Ill. 309; Phelps *v.* McGee, 18 Ill. 158; Harris Manufacturing Co. *v.* Marsh, 49 Iowa, 11; Thurman *v.* Wilson, 7 Ill. App. 312, 314; Williams *v.* Jones, 1 Bush (Ky.) 621; Haines *v.* Tucker, 50 N. H. 307; Gordon *v.* Norris, 49 N. H. 376, 385; Bridgford *v.* Crocker, 60 N. Y. 627; James *v.* Adams, 16 W. Va. 245, 267; Chicago *v.* Greer, 76 U. S. (9 Wall.) 726; bk. 19, L. ed. 769; McNaughter *v.* Cassally, 4 McL. C. C. 530; Langdell's Cases on Sales, 700, 702; Kershaw *v.* Ogden, 3 Hurl. & C. 717; Turley *v.* Bates, 2 Hurl. &

law, with the reason for it, was thus stated by Tindal C. J. in delivering the opinion of the Exchequer Chamber in Barrow *v.* Arnaud:[4] "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy.[5] So if a contract to accept and pay for goods is broken, the same rule may be

C. 200. In those cases, however, where the goods are especially manufactured to the order of the purchaser and are wholly worthless in the hands of the seller, the amount of damages will be the whole price agreed to be paid, the elements of special damages is the essence of the damage. See Allen *v.* Jarvis, 20 Conn. 38, 49; Gordon *v.* Norris, 49 N. H. 376, 383; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 410, 411; s. c. 4 Am. Dec. 374; Bement *v.* Smith, 15 Wend. (N. Y.) 493, 497; Knowlton *v.* Oliver, 28 Fed. Rep. 516.

The difference between the actual market value and the price agreed to be paid for the goods is a matter of unliquidated damages to be ascertained by the verdict of the jury, or the finding of some other tribunal. McCord *v.* Williams, 2 Ala. 71; Rand *v.* White Mountains R. R. Co., 4 N. H. 79, 86; Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 287; s. c. 8 Am. Rep. 562; Butts *v.* Collins, 13 Wend. (N. Y.) 139; Freeman *v.* Hyett, 1 W. Bl. 394.

[4] 8 Q. B. 604–609. See, also, Maclean *v.* Dunn, 4 Bing. 722; Busk *v.* Davis, 2 M. & S. 403; Phillpotts *v.* Evans, 5 M. & W. 475; Gainsford *v.* Carroll, 2 B. & C. 624; Boorman *v.* Nash, 9 B. & C. 145; Valpy *v.* Oakley, 16 Q. B. 941; 20 L. J. Q. B. 381; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Lamond *v.* Duvall, 9 Q. B. 1030; Boswell *v.* Kilborn, 15 Moo. P. C. C. 309; Silkstone and Dodsworth Coal and Iron Co. *v.* Joint Stock Coal Co., 35 L. T. N. S. 668.

[5] But this is not always the rule as to purchaser's damages. See *post*, Part II. Ch. 1. See, also, Harralson *v.* Stein, 50 Ala. 347; West *v.* Pritchard, 19 Conn. 212; Wells *v.* Abernethy, 5 Conn. 222; Foos *v.* Sabin, 84 Ill. 564; Sanborn *v.* Benedict, 78 Ill. 309; McNaught *v.* Dodson, 49 Ill. 446; Fell *v.* Muller, 79 Ind. 507; Marchesseau *v.* Chaffee, 4 La. An. 24; Smith *v.* Berry, 18 Me. 122; Cannell *v.* McClean, 6 Har. & J. (Md.) 297; Dalby *v.* Stearns, 132 Mass. 230; Clement Manuf. Co. *v.* Meserole, 107 Mass. 362; Cutting *v.* Grand Trunk R. R. Co., 95 Mass. (13 Allen) 381; Quarles *v.* George, 40 Mass. (23 Pick.) 400; Swift *v.* Barnes, 33 Mass. (16 Pick.) 194, 196; Shaw *v.* Nudd, 25 Mass. (8 Pick.) 9; Whitmore *v.* Coats, 14 Mo. 9; Gordon *v.* Norris, 49 N. H. 376; Deming *v.* Grand Trunk R. R. Co., 48 N. H. 455; s. c. 2 Am. Rep. 267; Stevens *v.* Lyford, 7 N. H. 360; Dana *v.* Fiedler, 12 N. Y. 40; s. c. 62 Am. Dec. 130; Clark *v.* Dales, 20 Barb. (N. Y.) 42; Clark *v.* Pinney, 7 Cow. (N. Y.) 687; Lattin *v.* Davis, Hill & Den. (N. Y.) 9, 12; Brackett *v.* McNair, 14 Johns. (N. Y.) 170; s. c. 7 Am. Dec. 447; Pitcher *v.* Livingston, 4 Johns. (N. Y) 15; s. c. 4 Am. Dec. 229; Beals *v.* Terry, 2 Sandf. (N. Y.) 127; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Dey *v.* Dox, 9 Wend. (N. Y.) 129; s. c. 24 Am. Dec. 137; Gregory *v.* McDowel, 8 Wend. (N. Y.) 435; Davis *v.* Richardson, 1 Bay (S. C.) 106; Atkinson *v.* Scott, 1 Bay (S. C.)

properly applied, for the seller may take his goods into the market and obtain the current price for them." [6]

§ 1012. The date at which the contract is considered to have been broken, is that at which the goods were to have been delivered, not that at which the buyer may give notice that he *intends* to break the contract and to refuse accepting the goods.[1]

307; McDonald *v.* Hodge, 5 Hayw. (Tenn.) 85; Worthen *v.* Wilmot, 30 Vt. 555, 557; Ferris *v.* Barlow, 2 Aik. (Vt.) 106; Bailey *v.* Clay, 4 Rand. (Va.) 346; Shepherd *v.* Hampton, 16 U. S. (3 Wheat.) 200, 204; bk. 16, L. ed. 369; Douglass *v.* McAllister, 7 U. S. (3 Cr.) 298; bk. 2, L. ed. 445; Pope *v.* Filley, 3 McCr. C. C. 190; Willings *v.* Consequa, Pet. C. C. 172, 176.

[6] Allen *v.* Jarvis, 20 Conn. 38; Camp *v.* Hamlin, 55 Ga. 259; Thurman *v.* Wilson, 7 Ill. App. 312; Pittsburg, C. & St. L. R. R. Co. *v.* Heck, 50 Ind. 303; Harris Manufacturing Co. *v.* Marsh, 49 Iowa, 11; Williams *v.* Jones, 1 Bush (Ky.) 621, 627; Thompson *v.* Alger, 53 Mass. (12 Met.) 428; Haskell *v.* Hunter, 23 Mich. 305; Northrup *v.* Cook, 39 Mo. 208; Whitmore *v.* Coats, 14 Mo. 9; Brownlee *v.* Bolton, 44 Mich. 218; Griswold *v.* Sabin, 51 N. H. 167; s. c. 12 Am. Dec. 76; Haines *v.* Tucker, 50 N. H. 307; Gordon *v.* Norris, 49 N. H. 376, 385; Rand *v.* White Mountains R. Co., 40 N. H. 79; Orr *v.* Bigelow, 14 N. Y. 556; Dana *v.* Fiedler, 12 N. Y. 41; s. c. 62 Am. Dec. 130; Whelan *v.* Lynch, 65 Barb. (N. Y.) 329; Hewitt *v.* Miller, 61 Barb. (N. Y.) 571; Mallory *v.* Lord, 29 Barb. (N. Y.) 454, 465; Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Dey *v.* Dox, 9 Wend. (N. Y.) 129; s. c. 24 Am. Dec. 137; Laubach *v.* Laubach, 73 Pa. St. 392; Ballentine *v.* Robinson, 46 Pa. St. 177; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; Cockburn *v.* Lumber Co., 54 Wis. 619; Chapman *v.* Ingram, 30 Wis. 290; Ganson *v.* Madigan, 13 Wis. 67; Brunskill *v.* Mair, 15 Up. Can. Q. B. 213; Shawhan *v.* Van Nest, 15 Am. Law Reg. (N. S.) 153.

[1] Phillpotts *v.* Evans, 5 M. & W. 475; Leigh *v.* Patterson, 8 Taunt. 540; Ripley *v.* M'Clure, 4 Ex. 345; Boswell *v.* Kilborn, *ubi supra*. See, also, Thurman *v.* Wilson, 7 Ill. App. 312; Keller *v.* Strasburger, 90 N. Y. 379; Brownlee *v.* Bolton, 44 Mich. 218; Zuck *v.* McClure, 98 Pa. St. 541; Grau *v.* McVicker, 8 Biss. C. C. 13.

Where right of action accrues. — The refusal of one party to a contract to perform gives the other party an immediate right of action, and he need not wait until the time of performance. Follansbee *v.* Adams, 86 Ill. 13; Chamber of Commerce *v.* Sollitt, 43 Ill. 523; McPherson *v.* Walker, 40 Ill. 371; Wolf *v.* Willits, 35 Ill. 89; Fox *v.* Kitton, 19 Ill. 519; Holloway *v.* Griffith, 32 Iowa, 409; Crabtree *v.* Messersmit, 19 Iowa, 179; Burtis *v.* Thompson, 42 N. Y. 246; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Traver *v.* Halsted, 23 Wend. (N. Y.) 66. See, also, Hochster *v.* De la Tour, 17 Jur. 972; s. c. 20 Eng. L. & Eq. 157; 22 L. J. (Q. B.) 455; Danube & B. S. R. R. Co. *v.* Xenos, 11 C. B. (N. S.) 152; s. c. 103 Eng. C. L. 152; Cort *v.* Abergate N. B. & E. J. R. R. Co., 15 Jur. 877; s. c. 6 Eng. L. & Eq. 230; Ripley *v.* McClure, 4 Ex. 345. But where a credit is given while the vendor may sue at once for a breach of agreement to accept at once upon the breach, he cannot sue for the price until the expiration of the credit

And on this principle was decided the case of Boorman *v.* Nash,[2] in which the facts were that in November, 1825, the plaintiff sold goods to the defendant, deliverable in the months of February and March following. The defendant became bankrupt in January. The goods were tendered and not accepted at the dates fixed by the contract, and resold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, as soon as the buyer became bankrupt. Held, that the contract was not rescinded by the bankruptcy;[3] that the assignees had the right to adopt it; that the vendor was not bound to resell before the time for * delivery, and that the true measure of [*736] damages was to be calculated according to the market price at the dates fixed by the contract for performing the bargain.

§ 1013. But although the buyer's insolvency does not *per se* put an end to the contract, yet if the buyer has given notice to the seller of his insolvency,[1] the latter is justified in treating the notice as a declaration of intention to repudiate the contract, and, after the lapse of a reasonable time to allow the buyer's trustee to elect to complete the contract by paying the price *in cash*, the seller may, without tendering the goods to the trustee, consider the contract as broken, and prove against the insolvent's estate for the damages arising from the breach.[2]

given. Keller *v.* Strasburger, 90 N. Y. 379. See McCormick *v.* Basal, 46 Iowa, 235; Hosmer *v.* Wilson, 7 Mich. 294; s. c. 74 Am. Dec. 716; James *v.* Adams, 16 W. Va. 245; Silliman *v.* McLean, 13 Up. Can. Q. B. 544, 545, 546; Magrath *v.* Tinning, 6 Up. Can. Q. B. (O. S.),484, 485; Wakefield *v.* Gorrie, 5 Up. Can. Q. B. 159, 163; 2 Schouler on Pers. Prop. sec. 527; Story on Sales, sec. 434.

[2] 9 B. & C. 145.

[3] It was held by the Supreme Court of Illinois in the case of Follansbee *v.* Adams, 86 Ill. 13, that where a party has contracted for the sale and future delivery of grain, and before the time of delivery arrives becomes insolvent and informs the purchaser of his inability to perform, that the insolvency will not work a rescission of the contract, but that the vendor may act upon the information given and adjust the matter by the then market price which will work a rescission of the contract. This decision rests upon the former cases of Chamber of Commerce *v.* Sollitt, 43 Ill. 523, and Fox *v.* Kitton, 19 Ill. 519. See, also, Bingham *v.* Mullholland, 25 Up. Can. C. P. 210; Morgan *v.* Bain, L. R. 10 C. P. 26.

[1] There must be notice of "an inability to pay avowed either in act or word," see In re Phœnix Bessemer Steel Co., 4 Ch. D. 108, C. A.

[2] In Ex parte Chalmers, 8 Ch. 289,

It would seem that a sub-purchaser from the insolvent buyer would also be entitled to complete the contract by paying the price in cash within a reasonable time.[3]

When the trustee omits to disclaim the debtor's contract under the 23d section of the Bankruptcy Act, 1869, and, after carrying it on for a time, then gives notice that he intends to abandon it, the seller cannot recover the amount of the damages resulting from the breach against the trustee either personally or as representing the insolvent's estate: his only remedy is to prove against the estate under the 31st section of the Act.[4]

§ 1014. If goods are deliverable by successive instalments, the trustee of the bankrupt purchaser cannot adopt the contract and claim further deliveries under it, without paying the price of the goods delivered prior to the bankruptcy.[1]

§ 1015. In Morgan *v.* Bain [1] the plaintiffs sought to recover damages for the defendants' breach of contract to [*737] deliver * 200 tons of pig iron. The contract was made on the 5th of February, 1872, and provided that the iron should be delivered in monthly instalments of 25 tons at a time. It was admitted that by the usage of the iron trade the first instalment would not have become due until the first of April. The plaintiffs were insolvent at the date of the contract, but it was not until the 14th of March that they gave the defendants notice of their intention to suspend payment. On the 16th of March they filed a liquidation petition. At the first meeting of the creditors, on the fifth of April, a composition was accepted. The contract with the defendants was then referred to, and it was known to the creditors present, but it was not included in the plaintiffs' statement of affairs nor was any claim made in respect of it. On the 13th of May the plaintiffs wrote to the defendants claiming delivery of the iron, when the defend-

per Mellish L. J.; Ex parte Stapleton, 10 Ch. D. 586, C. A.; *per* Brett. J. in Morgan *v.* Bain, L. R. 10 C. P. 15, at pp. 25–6.

[3] *Per cur.* in Ex parte Stapleton, *ubi supra*, at p. 590.

[4] Ex parte Davis, 3 Ch. D. 463, C. A.

[1] Ex parte Chalmers, *ubi supra*.

[1] L. R. 10 C. P. 15; see, also, Bloomer *v.* Bernstein, L. R. 9 C. P. 588.

ants at once repudiated all liability under the contract. Before that date the plaintiffs had never demanded delivery and no delivery had been made. Held, that the contract had been rescinded before the 13th of May; that the fact that the plaintiffs were insolvent, and had given notice of their insolvency to the defendants, justified the latter, in the absence of any steps on the plaintiffs' part to enforce the contract, in concluding that they had abandoned the contract upon their insolvency; and that the consent of the defendants to the abandonment was established by their having made no deliveries of iron in April and May, and having at once repudiated their liability when called upon to deliver.

§ 1016. The rules of law on this subject were fully discussed in Cort *v.* Ambergate Railway Company,[1] in which the cases were reviewed, and the judgment of the Queen's Bench delivered by Lord Campbell C. J. The case was an action for damages by a manufacturer against a railway company for breach of a contract to accept and pay for certain railway chairs, part of which had been delivered, when the * plaintiff received orders from the defend- [*738] ant to make and send no more. The plaintiff, thereupon, discontinued making them, although he was in a position to continue the supply according to the contract. The manufacturer had made a sub-contract for a part of the goods which he had promised to supply to the defendants, and was compelled to pay 500*l.* to be released from this sub-contract; and had made contracts for supplies of the necessary iron, and had built a large foundry for the manufacture of chairs. Two questions were presented: *first*, whether the plaintiff could recover without actual making and tendering the remainder of the goods, the declaration alleging that they were ready and willing to perform their contract until a refusal and wrongful discharge by the defendants, and that the defendants had wholly and wrongfully prevented and discharged the plaintiff from supplying the said residue;

[1] 17 Q. B. 127; 20 L. J. Q. B. 460; and see Hochster *v.* De la Tour, 2 E. & B. 678; 22 L. J. Q. B. 455; *ante*, Conditions, pp. 549 *et seq.*; Frost *v.* Knight, L. R. 5 Ex. 322; 7 Ex. 111.

secondly, what was the proper measure of damages. Lord Campbell said, in relation to Phillpotts *v.* Evans,[2] that it had been properly decided, but that the Exchequer of Pleas had not determined in that case that the vendor would not have the right of treating the bargain as broken, *if he chose to do so*, as soon as the buyer gave him notice that he would not accept the goods, without being compelled afterwards to make a tender of them; and that the true point, decided in Ripley *v.* McClure,[3] was that a refusal by the buyer to accept in advance of the arrival of the cargo he had agreed to purchase was not necessarily a breach of contract, but that if unretracted down to the time when the delivery was to be made, it showed a *continuing refusal*, dispensing the vendor from the necessity of making tender. His Lordship then said that a like *continuing refusal*, unretracted, appeared in the facts of the case under consideration, and then laid down the following rule (at p. 148): —

"Upon the whole, we think we are justified, on principle and without trenching on any former decision, in hold-
[*739] ing * that where there is an executory contract for the manufacturing and supply of goods from time to time to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods,[4] maintain an action against the purchaser for breach of contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." [5]

[2] 5 M. & W. 475.

[3] 4 Ex. 345; and see Avery *v.* Bowden, and Reid *v.* Hoskins, 6 E. & B. 953, 961; 25 L. J. Q. B. 49, 55; 26 ib. 3, 5.

[4] See, also, on this point, Silkstone Coal Co. *v.* Joint Stock Coal Co., 35 L. T. N. S. 668.

[5] See Smith *v.* Lewis, 24 Conn. 624; s. c. 63 Am. Dec. 180; 26 Conn. 110; Lyon *v.* Culbertson, 83 Ill. 33, 49; s. c. 25 Am. Rep. 349; Chamber of

§ 1017. On the question of damages, Coleridge J. had told the jury at Nisi Prius that the plaintiff ought to be put in the same position as if he had been permitted to complete the contract. This direction was approved, the learned Chief Justice saying, that "the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept."[1]

§ 1018. Although in general the vendor's recovery in damages is limited to the difference between the price fixed in the contract and the market value on the day appointed for delivery, — according to the rule as stated by Parke B., in Laird *v.* Pim,[1] that "a party cannot recover the full value of a chattel, unless under circumstances which import that the *property has passed* to the defendant, as in the case of goods sold and delivered where they have been absolutely parted with and cannot be sold again," — there may be special terms agreed on, in conflict with this rule. A vendor may well say to a buyer, "I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods;" and if these terms be accepted, the vendor may recover the whole price of goods the property of which remains vested in * himself. In such a case the buyer would [*740] be driven to his cross action if the vendor, after receiving the price, should refuse delivery of the goods.[2]

§ 1019. The seller may in some cases, under an executory contract partially performed, be entitled to consider the contract *as rescinded*, and recover on a *quantum valebant* for the

Commerce *v.* Sollitt, 43 Ill. 519, 523; McPherson *v.* Walker, 40 Ill. 371, 373; Fox *v.* Kitton, 19 Ill. 519, 534; Stephenson *v.* Cady, 117 Mass. 6; Collins *v.* Delaporte, 115 Mass. 159, 162; Daniels *v.* Newton, 114 Mass. 539; s. c. 19 Am. Rep. 384; Clement Manuf. Co. *v.* Meserole, 107 Mass. 362; Hosmer *v.* Wilson, 7 Mich. 294, 304; s. c. 74 Am. Dec. 716; Haines *v.* Tucker, 50 N. H. 307, 311; Clark *v.* Marsiglia, 1 Den. (N. Y.) 317; s. c. 43 Am. Dec. 670; Derby *v.* Johnson, 21 Vt. 21; Yates *v.* United States, 15 Ct. Cl. 119; Hughes *v.* United States, 4 Ct. Cl. 64; Moore *v.* Logan, 5 Up. Can. C. P. 294; Frost *v.* Knight, L. R. 7 Ex. 111; Hochster *v.* De la Tour, 2 E. & B. 678. See, also, Begole *v.* McKenzie, 26 Mich. 470; Platt *v.* Brand, 26 Mich. 173.

[1] *Vide ante*, sec. 1011, note 3.

[1] 7 M. & W. 478.

[2] Dunlop *v.* Grote, 2 Car. & K. 153.

goods actually delivered. Thus, in Bartholomew *v.* Markwick,[1] the plaintiffs had contracted to supply the defendant with such furniture as he should require to the amount of 600*l.* or 700*l.*, payable half in cash and half by bill at six months. After some of the goods had been delivered, the defendant became displeased, and wrote to the plaintiffs, — "I now close all further orders, and desire what I have not purchased be taken off my premises, — I will not be responsible for them, &c., &c.," The defendant kept goods of the value of 88*l.* 17*s.* 6*d.*, and on action brought for goods sold and delivered, insisted that the plaintiffs ought to have declared specially, and could not recover on the common counts before the expiration of the six months for which a bill was to have been given, but *held* by the whole Court, that the plaintiffs on receiving the defendant's letter had "a right to elect, if they would treat the contract as rescinded, and to sue for the value of the goods which had been delivered," on the authority of Hochster *v.* De la Tour,[2] and cases of a like character, referred to *ante*, pp. 549 *et seq.*, in the chapter on Conditions.

§ 1020. [In Wayne's Merthyr Steam Company *v.* Morewood and Company,[1] the plaintiffs had contracted to supply the defendants with coke bars of a particular quality by successive deliveries, payment to be made in cash for discount within a month, or by bills at four months, at the defendants' option. The plaintiffs delivered coke bars which were inferior to sample; but it was only after the defendants [*741] had worked * all the bars up into plates that they discovered their inferior quality, and they then refused to accept the residue. Before the discovery the defendants had been ready to pay for the bars by bill. The plaintiffs thereupon, and *before the expiration of the period of credit*, brought an action for the price of goods sold and delivered. It was contended, on the authority of Bartholomew *v.* Mark-

[1] 15 C. B. N. S. 710; 33 L. J. C. P. 145.

[2] 2 E. & B. 678; 22 L. J. Q. B. 455; and see Inchbald *v.* The Western Neilgherry Coffee Co., 17 C. B. N. S. 733; 34 L. J. C. P. 15.

[1] 46 L. J. Q. B. 746.

wick, that they were entitled to treat the original contract as rescinded, but it was held that as *the goods had been delivered and accepted under the original contract*, and it was owing solely to the plaintiffs' breach of contract in delivering inferior goods that the defendants had withheld the bill for the price, the plaintiffs were not entitled before the expiration of the time of credit to sue on a *quantam valebant* for the value of the goods delivered.]

Section II. — WHERE THE PROPERTY HAS PASSED.

§ 1021. When by the contract of sale the property in the goods has passed to the buyer, the vendor may, under certain circumstances hereafter to be considered, exercise rights on the goods themselves, if the buyer make default in payment; but whenever the goods have reached the actual possession of the buyer, the vendor's *sole* remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favor *qua* vendor are gone.[1]

By the law of England, differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved.[2]

[1] *Where the delivery of the property is not denied,* the vendee's remedy is an action on the common counts to recover for the property sold. See Overstreet *v.* Gallagher, 42 Ark. 208; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167; McAlister *v.* Safley, 65 Iowa, 719, 723; s. c. 20 Rep. 6, 7; Moline Scale Co. *v.* Beed, 52 Iowa, 307; Coit *v.* Schwartz, 29 Kans. 344; Cheney-Bigelow Wire Works *v.* Sorrell, 142 Mass. 442; s. c. 8 N. E. Rep. 332; Rodman *v.* Guilford, 112 Mass. 405, 406, 407; Moulton *v.* Trask, 50 Mass. (9 Metc.) 577; Hosley *v.* Scott, 59 Mich. 420; s. c. 26 N. W. Rep. 659, 660; Gage *v.* Meyers, 59 Mich. 300; s. c. 26 N. W. Rep. 522; Wineman *v.* Walters, 53 Mich. 470, 472; McLennan *v.* McDermid, 52 Mich. 468, 470; Mitchell *v.* Scott, 41 Mich. 108; s. c. 1 N. W. Rep. 968; Moon *v.* Harder, 38 Mich. 566; McQueen *v.* Gamble, 33 Mich. 344; Begole *v.* McKenzie, 26 Mich. 470; Compton *v.* Parsons, 76 Mo. 455, 457; Horn *v.* Batchelder, 41 N. H. 86; Flanders *v.* Putney, 58 N. H. 358; Britton *v.* Turner, 6 N. H. 481; s. c. 26 Am. Dec. 713; Dubois *v.* Delaware, &c. Canal Co., 4 Wend. (N. Y.) 285; McBain *v.* Austin, 16 Wis. 87; s. c. 82 Am. Dec. 705; Bullock *v.* Finley, 28 Fed. Rep. 514, 515.

[2] See Hickock *v.* Hoyt, 33 Conn. 553; Salomon *v.* Hathaway, 126 Mass. 482; Hirschorn *v.* Canney, 98 Mass. 149; Farlow *v.* Ellis, 81 Mass. (15 Gray) 229; Hill *v.* Freeman, 57 Mass. (3 Cush.) 257. The vendor of goods may rescind a contract of sale for

§ 1022. The principle at common law is, that the goods have become the property of the buyer, and that the vendor has agreed to take for them the buyer's *promise* to pay the price. If then the buyer fail to pay, the vendor's remedy is limited to an action for the breach of *that* promise, the damages for the breach being the amount of the price promised, to which may be added interest.

[*742] * The leading case on the subject is Martindale *v.* Smith,[1] in which Lord Denman C. J. delivered the opinion of the Queen's Bench after advisement. His Lordship said: "Having taken time to consider our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and reinvest the property in himself, by reason of the vendee's failure to pay the price at the appointed time, *we are clearly of opinion that he had no such right*, and that the action (trover) is well brought against him. For the sale of a specified chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the creditor a right of action for the price, and a lien upon the goods if they remain in his possession till that price be paid. But that *default of payment does not rescind the contract*."

It has been already shown (*ante*, p. 735) that the bankruptcy of the buyer gives to the vendor no right of rescission, because the assignee has by law the right either to disclaim, or to adopt and carry out the contracts of the bankrupt.[2]

fraud, even after judgment procured for the price of the goods. Kraus *v.* Thompson, 30 Minn. 64; s. c. 44 Am. Rep. 182. See, also, Pratt *v.* Philbrook, 41 Me. 132; Lloyd *v.* Brewster, 4 Paige Ch. (N. Y.) 537; Clough *v.* London & N. W. R. Co., L. R. 7 Ex. 26. But where the defendant bought the goods in good faith supposing he would be able to pay for them when the credit expired, even if he knew he would not be able to pay all his debts at the time, but expected he would be able to work his way out, there is no such fraud as will enable the vendor to rescind the sale. Keller *v.* Strasburger, 23 Hun (N. Y.) 625. See, also, Anonymous, 67 N. Y. 598; Nichols *v.* Pinner, 18 N. Y. 295; Roebling *v.* Duncan, 8 Hun (N. Y.) 502; Johnson *v.* Monell, 2 Keyes (N. Y.) 655; Chaffee *v.* Fort, 2 Lans. (N. Y.) 81.

[1] 1 Q. B. 395. See, also, Tarling *v.* Baxter, 6 B. & C. 360; Dixon *v.* Yates, 5 B. & Ad. 313.

[2] Bankruptcy Act, 1869, sect. 23.

§ 1023. It is not proposed in this treatise to enter into any discussion of questions of procedure, but it may be stated generally, that the vendor may recover the price of goods sold, either where the goods have been *sold and delivered* to the buyer, or where they have been only *bargained and sold* to him;[1] but that where the property has not passed, the vendor's claim must be special for damages for non-acceptance.[2]

The claim must also be special where the payment is to be made by bill or note, or partly in cash and partly by bill, and the vendee refuses to give either, unless the vendor chooses to wait until the time of credit has expired, in which case he can then recover the full price of the goods, or the sum which was to be paid in cash.[3]

[1] Morse *v.* Sherman, 106 Mass. 430; Nichols *v.* Morse, 100 Mass. 523; Thompson *v.* Alger, 53 Mass. (12 Metc.) 428, 443, 444; Gordon *v.* Norris, 49 N. H. 376; Bailey *v.* Smith, 43 N. H. 144; Ockington *v.* Richey, 41 N. H. 279; Messer *v.* Woodman, 22 N. H. 172; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 411; s. c. 4 Am. Dec. 374; Bement *v.* Smith, 15 Wend. (N. Y.) 493, 495, 497; Ganson *v.* Madigan, 13 Wis. 67; Sedg. on Dam. (5th ed.) 312, 316; Mayne Damages (2d Eng. ed.) 116. See Atwood *v.* Lucas, 53 Me. 508; Stern *v.* Filene, 96 Mass. (14 Allen) 9; Ross *v.* Welch, 77 Mass. (11 Gray) 235; Stearns *v.* Washburn, 73 Mass. (7 Gray) 187; Hart *v.* Tyler, 32 Mass. (15 Pick.) 171; Jenness *v.* Wendell, 51 N. H. 63; Davis *v.* Hill, 41 N. H. 329; Brackett *v.* Crooks, 24 N. H. 175; Wilson *v.* Eaton, 5 N. H. 141; Barrett *v.* Goddard, 3 Mason C. C. 107.

[2] Chitty on Contracts, p. 408, ed. 1881. See, also, Atwood *v.* Lucas, 53 Me. 508; Stearns *v.* Washburn, 73 Mass. (7 Gray) 187; Hart *v.* Tyler, 32 Mass. (15 Pick.) 171; Gordon *v.* Norris, 29 N. H. 376; Bailey *v.* Smith, 43 N. H. 141; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395; Messer *v.* Woodman, 22 N. H. 172; Parker *v.* Mitchell, 5 N. H. 165; Ward *v.* Shaw, 7 Wend. (N. Y.) 404.

[3] Chitty on Contracts, p. 409, ed. 1881.

As to when right of action accrues, see *ante*, sec. 112, note 1.

Option to pay in cash. — Where the buyer has an option to pay in cash, if he neglects to pay in that mode at the proper time he may be sued on the common counts for the price of the articles sold, and such suit affirms the contract. County of Jackson *v.* Hall, 53 Ill. 440; Childs *v.* Fischer, 52 Ill. 205; Bicknell *v.* Buck, 58 Ind. 354; Davis Sewing Machine Co. *v.* McGinnis, 45 Iowa, 538; Stone *v.* Nichols, 43 Mich. 16; Moore *v.* Kiff, 78 Pa. St. 96, 100.

Goods obtained on credit by fraud. — Where goods are obtained on a term of credit by fraud, the remedy of the vendor if he wishes to avail himself of the buyer's fraud is to bring a special action for damages for fraud or trover, or replevin for the goods. Kellogg *v.* Turpie, 2 Ill. App. 55; Bicknell *v.* Buck, 58 Ind. 354; Dellone *v.* Hull, 47 Md. 112; Auger *v.* Thompson, 3 Ont. App. 19; Sheriff *v.* McCoy, 27 Up. Can. Q. B. 597; Silliman *v.* McLean, 13 Up. Can. Q. B. 544; Magrath *v.* Tinning, 6 Up. Can. Q. B.

§ 1024. But if the vendee give notice on a partially-
[*743] executed * contract for a sale on credit that he will not carry it out, and yet retain the goods already sent, the vendor having the legal right to consider the contract as rescinded, may at once bring action on the new contract resulting from the buyer's conduct, and recover the value of the goods delivered.[1]

Where the buyer has given a bill in payment, the vendor must account for the bill if dishonored, and cannot recover the price if the bill be outstanding.[2]

(O. S.) 484; Wakefield *v.* Gorrie, 5 Up. Can. Q. B. 159; Ferguson *v.* Carrington, 9 B. & C. 59; Strutt *v.* Smith, 1 C. M. & R. 312; s. c. 4 Tyrw. 1019. But see Dietz's Assignee *v.* Sutcliffe, 80 Ky. 650; s. c. 15 Rep. 713. At common law a vendor has a lien on goods sold so long as they remain in his possession and are unpaid for according to the terms of the contract. Milliken *v.* Warren, 57 Me. 46. But to establish a lien the party must have actual possession of the property sold; as soon as he surrenders that possession the lien is gone forever. Gay *v.* Hardeman, 31 Tex. 245. See, also, Obermier *v.* Core, 25 Ark. 562.

[1] Bartholomew *v.* Markwick, 15 C. B. N. S. 711; 33 L. J. C. P. 145; but see Wayne's Merthyr Steam Co. *v.* Morewood & Co., 46 L. J. Q. B. 746.

[2] *Ante*, p. 716.

* CHAPTER II. [*744]

UNPAID VENDOR'S REMEDIES AGAINST THE GOODS — GENERAL PRINCIPLES.

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§ 1025. WHERE the property in goods has passed by a sale, the *right of possession* also passes, but is, as we have seen, defeasible on the insolvency of the buyer, or the non-performance of conditions precedent or concurrent imposed on him by the contract.

[*745] If the goods have been delivered into the *actual possession* * of the buyer, all right on them is gone as has been stated in a preceding chapter; but if not so delivered, the goods may be placed in two different conditions of fact as regards their actual custody. They may be still in the actual possession of the vendor, (or of his agents or bailees, which amounts to the same thing,) or they may have been put *in transit* for delivery to the buyer, and thus in the *actual possession* of neither party to the contract. When thus in transit, the law gives to the unpaid vendor the right of intercepting them if he can, and thereby of preventing them from reaching the actual possession of an *insolvent* buyer. This is the right well known in the law of sale as that of stoppage *in transitu.*[1]

§ 1026. When the goods have not yet left the actual possession of the vendor, he has at common law *at least* a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro.* Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose, that after a bargain in which the lien has thus been unequivocally waived, the buyer for his convenience, or any other motive, has left the goods in the custody of the vendor, until the credit has expired, and has then made default in payment, or has become insolvent *before* the credit has expired, What are the vendor's rights? He has agreed to relinquish his lien, and the goods are not

[1] *Vide infra,* ch. V., "Stoppage in Transitu."

yet in transit. Does his lien revive, on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*, — a right that might perhaps be termed a stoppage *ante-transitum*?[1] The true nature and * extent of the vendor's rights in this interme- [*746] diate state of things have not yet perhaps been in all cases precisely defined; but they have been considered by the Courts under such a variety of circumstances, that in practice there is now but little difficulty in advising on cases as they arise.[2]

§ 1027. Before reviewing the authorities, attention must be recalled to the different meanings of the word "delivery," as pointed out in Book IV. Part 2, Ch. 2. For it will appear in the investigation of the present subject, that the vendor is frequently considered by the Courts as being in actual possession of the goods, when he has made so complete a delivery as to be able to maintain an action for goods sold and delivered. Thus, for instance, in the whole class of cases where the delivery has been effected by the consent of the vendor to assume the changed character of bailee for the buyer, it will be seen that the unpaid vendor is still deemed to be in the *actual possession* of the goods for the purpose of exercising his remedies on them, in order to obtain payment of the price: and this, even in a case where the vendor gave a written paper acknowledging that he held the goods for the buyer, and subject to the buyer's orders.[1]

§ 1028. It will be convenient to review, in the first place, the cases which establish the existence of this peculiar right in the unpaid vendor who has waived his lien, and then to

[1] This is termed the right of *retention* in the Scotch law; see *ante*, p. 367.

[2] See Milliken *v.* Warren, 57 Me. 46; Newhall *v.* Vargas, 15 Me. 314; s. c. 33 Am. Dec. 617; Haskell *v.* Rice, 77 Mass. (11 Gray) 240; Arnold *v.* Delano, 58 Mass. (4 Cush.) 41; s. c. 50 Am. Dec. 754; Riddle *v.* Varnum, 37 Mass. (20 Pick.) 280, 285; Young *v.* Austin, 23 Mass. (6 Pick.) 280; Barrett *v.* Pritchard, 19 Mass. (2 Pick.) 515; s. c. 13 Am. Dec. 449; Parks *v.* Hall, 19 Mass. (2 Pick.) 211; Marston *v.* Baldwin, 17 Mass. 606; Hussey *v.* Thornton, 4 Mass. 405; s. c. 3 Am. Dec. 224; Welsh *v.* Bell, 32 Pa. St. 12.

[1] Townley *v.* Crump, 4 A. & E. 58, and other cases examined, *post*, p. 747.

treat separately his remedies, 1st, of resale; 2dly, of lien; and 3dly, of stoppage *in transitu*.

§ 1029. The leading cases of Bloxam *v.* Sanders,[1] and Bloxam *v.* Morley,[2] (which were said by Blackburn J., in 1866,[3] to be still correct expositions of the "peculiar law" as to unpaid vendors,) were decided by the King's Bench in 1825. Bayley J. stated the principles as follows: "The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of de-
[*747] livering the *goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but *his right of possession is not absolute;* it is liable to be defeated if he become insolvent before he obtains possession. Tooke *v.* Hollingworth, 5 T. R. 215. If the seller has despatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the *possession*, and his insolvency, without payment of the price, defeats that right. The buyer, or *those who stand in his place*, may still obtain the right of possession if they will pay or tender the price, or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights." The assignees of the insolvent buyer were therefore held not entitled to maintain trover against the unpaid vendor, who had sold the goods on credit, but still who held them in his own warehouse.

[1] 4 B. & C. 941, *ante*, p. 668.
[2] 4 B. & C. 951.
[3] In Donald *v.* Suckling, 35 L. J. Q. B. at p. 237.

§ 1030. In 1833, Miles *v.* Gorton[1] was decided in the Exchequer. The vendor sold hops on credit, and kept them in his warehouse *on rent charged to the buyer.* The buyer dealt with the hops as his own, and sold part of them, which were delivered to the sub-vendee on the buyer's order. The buyer then became bankrupt, and his assignees brought trover for the remainder in the vendor's warehouse; but the Court held that as against them the vendor had the right to retain possession till payment of the price.

§ 1031. In Townley *v.* Crump,[1] decided in 1836, the defendants, wine merchants in Liverpool, sold to one Wright a parcel of wine held by them in their own bonded warehouse there, for * an acceptance at three months, [*748] and gave him an invoice describing the wines by marks and numbers, and handed him the following delivery order: — "Liverpool, 29th of September, 1834. Mr. Benjamin Wright. We *hold to your order* 39 pipes and 1 hhd. red wine marked J C J M. No. 41 a 67—69 a 80 — pipe, No. 105 hhd., rent free to 29 November next. John Crump & Co." The bill accepted by Wright was dishonored; a fiat in bankruptcy issued against him on the 28th of January, 1835, and his assignees brought trover against the vendor. It was admitted "that the invariable mode of delivering goods sold while in warehouses in Liverpool is by the vendors handing to the vendees delivery orders." Lord Abinger C. B., before whom the cause was tried at the Liverpool Assizes, refused to receive evidence that the order in question was equivalent to an accepted delivery order, or that the witness (a broker and merchant holding bonded vaults in Liverpool) would consider the possession of such an order as possession of the property; but permitted him to say that, in his opinion, the possession of the order would obtain credit for the holder with a purchaser, and that, as a matter of custom, the goods specified in such an order would be considered the property of the person holding the order. His Lordship

[1] 2 C. & M. 504. See, also, Grice *v.* Richardson, 3 App. Cas. 319 (Privy Council).

[1] 4 A. & E. 58.

directed a nonsuit, which the King's Bench, in Banc, refused to set aside, Lord Denman giving the opinion of the Court, composed of himself and Patteson, Williams and Coleridge, JJ. in these words: "There was a total failure of proof that where a vendor, who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates by reason of this custom to prevent a lien from attaching, and I think it is not contended that there is any general usage which could divest the right in such a case, *upon the insolvency of the vendee*. Cases have been cited, but none where the question arose between the *original vendor and vendee*." It is impossible to imagine a clearer case than this of the vendor's agreement to change the character of his possession into that of bailee for the buyer; but this sort of delivery was [*749] not allowed so to * operate as to force the vendor to give up the goods to the buyer's assignees in bankruptcy. Yet it cannot be doubted that the vendor had done all that he was bound to do in performance of his contract before the buyer's insolvency, and that he could have maintained an action for goods sold and delivered.[2]

§ 1032. Next came, in 1840, the case of Dodsley *v.* Varley,[1] which arose under the Statute of Frauds, and the question was whether the vendor had lost his lien, for if not, it was conceded that there was no actual receipt to take the case out of the statute. The facts were that a parcel of wool was bought by the defendant while it was in the plaintiff's possession: the price was agreed on, but the wool would have to be weighed: it was then *removed to the warehouse of a third person*, where the defendant collected wool purchased from various persons, and packed it in sheeting provided by himself. There it was weighed, together with other wools, and packed, but not paid for. It was the usual course for the wool to remain at this place till paid for. On these facts

[2] *Agreement to hold goods in storage.* — It is held in the case of Weld *v.* Came, 98 Mass. 152, that an agreement of the vendor to hold the goods sold in storage for the vendee is equivalent to a delivery, citing Chapman *v.* Searle, 20 Mass. (3 Pick.) 38; Farina *v.* Home, 16 Mees. & W. 119.

[1] 12 A. & E. 632.

it was held that the wool in the warehouse was in the *defendant's* warehouse, "and that he was in *actual possession* of it there as soon as it was weighed and packed. . . . Consistently with this, however, the plaintiff had, not what is commonly called a lien determinable on the loss of possession, but a *special interest*, sometimes, but improperly, called a lien, *growing out of his original ownership, independent of the actual possession*, and consistent with the *property* being in the defendant." [2]

§ 1033. In 1851, Valpy *v.* Oakeley [1] was decided in the Queen's Bench. The defendant sold 500 tons of iron to one Boydell, to be delivered in three parcels of 100, 200, and 200 tons, and to be paid for by Boydell's acceptance of the vendor's bills drawn on him. Invoices of the iron *to be* delivered were sent to the buyer, with bills drawn on him for the price, which bills he accepted and returned to the vendor. The first bill was paid; the other two were not paid, and *the buyer subsequently became bankrupt. [*750] These two bills were proven under the fiat, one by the vendor, and the other by a transferee of the vendor, but no dividend was received under either proof. There remained in the vendor's possession 185½ tons of the iron at the time of the bankruptcy of Boydell, and this action was brought by his assignees in *assumpsit* on the contract for the non-delivery of this portion. *Held*, that the plaintiffs could only recover such damages as the bankrupt might

[2] It is said by the Supreme Judicial Court of Massachusetts in Safford *v.* McDonough, 120 Mass. 290, that in those cases where the goods remain in the possession of the vendor but have been accepted by the vendee, that the vendor held possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relation of the parties are changed. Citing Dodsley *v.* Varley, 12 A. & E. 632; Cusack *v.* Robinson, 1 Best & S. 299, 308; Castle *v.* Sworder, 6 Hurl. & N. 828. It is said in Arnold *v.* Delano, 58 Mass. (4 Cush.) 33, 41; s. c. 50 Am. Dec. 754; that the giving of a promissory note in payment for goods purchased, even if in form negotiable whilst it remains in the hands of the vendee and not negotiable but ready to be delivered up on the discharge of the lien, is regarded as evidence in writing on the forms of the goods purchased and does not vary the right of the parties. Citing Thurston *v.* Blanchard, 39 Mass. (22 Pick.) 18; s. c. 33 Am. Dec. 700. See, also, Kimball *v.* Cunningham, 4 Mass. 502; s. c. 3 Am. Dec. 230.

[1] 16 L. B. 941; 20 L. J. Q. B. 380.

have recovered; and that he could only have recovered the difference between the contract price and the market price; and only nominal damages where no such difference is proven. The *ratio decidendi* in this case was distinctly, that on the dishonor of the bills given for the price, the parties were placed *in the same condition as if the bills had never been given, and the contract had been to pay in ready money.* All the judges treated the case as one of lien, reviving on the non-payment of the bills. Wightman J. said: "I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running, they may be taken to have been *primâ facie* payment, but they were dishonored before the iron was delivered, and in that case I have no doubt *that the vendor's lien attaches*, and that he may retain his goods until he is paid." The other judges took the same view of this point, though not expressed perhaps as distinctly as by Wightman J.

§ 1034. This point came again before the same Court in Griffiths *v.* Perry,[1] in 1859, the judges being Crompton and Hill, neither of whom was on the bench when Valpy *v.* Oakeley was decided. The circumstances were precisely the same as in the last-named case. Crompton J. said: "I apprehend that where there is a sale of specific chattels, to begin with, and a bill is given, there is no lien in the strict sense of the word; but if afterwards an insolvency happens, and the bill is dishonored, then the party has in my opinion a right *analogous to that which a vendor who exercises* [*751] *the right of* * *stoppage in transitu has.* . . . When goods are left in the hands of a vendor, it cannot properly be said to be a stoppage *in transitu*, for it is one of those cases in which the *transitus* has not commenced. . . . It has always seemed to me, and I think it has been established in a great many cases, that there is a similar right where the *transitus* has not commenced; and although no right to a strict lien has ever existed, yet where goods remain in the party's hands and insolvency occurs, and the bill is dishonored, there a right analogous to that of stoppage *in*

[1] 1 E. & E. 680; 28 L. J. Q. B. 204.

transitu arises, and there is a right to withhold delivery of the goods." It was accordingly held, 1st. That the plaintiff was only entitled to nominal damages, in accordance with the decision in Valpy *v.* Oakeley. 2dly. That it makes no difference in such cases whether the sale is of specific chattels, or an executory contract to supply goods.[2]

§ 1035. [The subject was again considered in Ex parte Chalmers [1] in 1873 before the Court of Appeal in Chancery. Hall & Co. had contracted to sell goods to Edwards by monthly instalments, payment to be by cash in fourteen days from the date of each delivery. Deliveries were made and duly paid for under the contract. Edwards became insolvent, and there was then one instalment of goods already delivered which was unpaid for, and a final instalment remaining to be delivered. Hall & Co., upon notice of the insolvency, refused to deliver the remaining instalment, whereupon Edwards's trustees in bankruptcy sued them for damages for breach of contract. *Held*, that Hall & Co. had a right to refuse delivery of the goods until the price of both instalments had been paid. In delivering the opinion of the Court (composed of Lord Selborne C., James L. J., and himself), Mellish L. J. said, "The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract of sale has
*been completely performed? I am of opinion that [*752]
the result of the authorities is this — that in such a
case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that if a debt is due to him for goods already delivered he is entitled to refuse to deliver any more till he is paid the debt due for those already de-

[2] It was also held that the endorsement to a third person of a delivery order for the goods given by the vendor to the buyer did not confer on such third person any greater rights than the buyer had. This last point had been previously settled by a direct decision of the House of Lords in M'Ewan *v.* Smith, 2 H. L. C. 309, *post*, p. 755, which was not cited in the case. See now, however, Factors Act, 1877, s. 5, *post*, p. 763.

[1] 8 Ch. 289.

livered as well as the price of those still to be delivered." His lordship then reviews the authorities, and decides in accordance with the view of Crompton J. in Griffiths *v.* Perry, that the seller's right exists as well on a contract to sell goods to be delivered by instalments as on a sale of specific goods.

§ 1036. Grice *v.* Richardson[1] was decided in the Privy Council in 1877. The facts were precisely similar to those presented in Miles *v.* Gorton *ante*, p. 747. The sellers were warehousemen, as well as importers, of tea. They gave to the buyers delivery orders for the tea, which provided that the buyers should pay warehouse rent, and they made a transfer entry of the tea into the buyers' names in their warehouse books. The price was to be paid by the buyers' notes or acceptances. The buyers became insolvent during the period of credit, and their trustee brought an action of trover for the parcels of tea remaining in the warehouse; but it was held, upon the authority of Miles *v.* Gorton, that as the goods remained in the possession of the sellers, and no actual delivery had been made to the buyers, the sellers' lien revived upon the buyers' insolvency.[2]]

§ 1037. The rights of the unpaid vendor, under the circumstances which we are now considering, are not affected by a resale to a third person,[1] unless the vendor has by his conduct *estopped* himself from asserting his own rights, and we must now turn to the class of cases where the conflict of pretensions on the goods not paid for, arose between the original vendor and the sub-vendee.[2]

[1] 3 App. Cas. 319.

[2] *As to the rights of unpaid seller in possession where the buyer becomes insolvent.* See Toledo W. & W. R. Co. *v.* Gilvin, 81 Ill. 513, 520; Arnold *v.* Delano, 58 Mass. (4 Cush.) 33, 41; s. c. 50 Am. Dec. 754; Damon *v.* Osborn, 21 Mass. (1 Pick.) 476; s. c. 11 Am. Dec. 229; Allen *v.* Smith, 10 Mass. 308; Hunn *v.* Bowne, 2 Cai. (N. Y.) 38; Wanamaker *v.* Yerkes, 70 Pa. St. 443; White *v.* Welsh, 38 Pa. St. 396, 420; Winslow *v.* Leonard, 24 Pa. St. 14; Hodgson *v.* Barrett, 33 Ohio St. 63; Gates *v.* Winooski Lumber Co., 18 Nat. Bank Reg. 31; Parker *v.* Byrnes, 1 Low. C. C. 539; DeWolf *v.* Babbett, 4 Mason C. C. 289, 293; Barrett *v.* Goddard, 3 Mason C. C. 107.

[1] But see now 40 & 41 Vict. c. 39, s. 5, Factors Act, 1877, *post*, p. 763.

[2] *Rights against vendee of seller in possession.* — See Chapman *v.* Shepard,

Without referring specially to the early cases,[3] we *may pass to the decision of the King's Bench in [*753] Stoveld *v.* Hughes,[4] in 1811. There the defendants had sold timber lying at their wharf to one Dixon, and the timber was marked by mutual assent with the initials of the buyer; and the vendors promised to send it to Shoreham. The buyer gave acceptances at three months for the price. A small part was delivered, and the remainder, while still lying on the vendors' premises, was sold by Dixon to the plaintiff, who paid the price. The plaintiff's agent informed one of the defendants of the sale by Dixon to which the defendant answered, "Very well;" and the plaintiff and the defendant then went together on the wharf of the defendants, and the plaintiff's agent there marked the timber with the plaintiff's own initials and told the defendants to send no more of the timber to Dixon, and the defendants made no objection. Dixon became insolvent, his bills were protested, and the defendants refused delivery. Lord Ellenborough said, on these facts: "The defendants were the only persons who could contravene the sale and delivery to the plaintiff from the Dixons. And when that sale was made known to the defendant Hughes, he assented to it by saying 'Very well,' and to the marking of the timber by the plaintiff's agent, which took place at the same time. If that be not an executed delivery, I know not what is so." The other judges, Grose, Le Blank, and Bayley, concurred.

§ 1038. In Craven *v.* Ryder,[1] in 1816, the vendors undertook to deliver the goods free on board to the vendee. They delivered the goods on board, and took a receipt in their own name, thereby entitling themselves to demand the bill of lading. The purchaser resold and received payment, and became insolvent without paying the original vendors. The

39 Conn. 413; Parker *v.* Crittenden, 37 Conn. 148; Millicen *v.* Warren, 57 Me. 46; Haskell *v.* Rice, 77 Mass. (11 Gray) 240; Arnold *v.* Delano, 58 Mass. (4 Cush.) 41; s. c. 50 Am. Dec. 754; Parks *v.* Hall, 19 Mass. (2 Pick.) 211; Hunn *v.* Bowne, 2 Cai. (N. Y.) 38.

[3] Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Hanson *v.* Meyer, 6 East, 626; Green *v.* Haythorne, 1 Stark. 447.

[4] 14 East, 308.

[1] 6 Taunt. 433.

sub-vendee obtained a bill of lading, *without the assent* of the original vendors, and it was held that he had acquired no rights against the first vendors who had never delivered the property out of their own control.

§ 1039. The next in date, and the leading case, [*754] is Dixon *v.* Yates,[1] *in 1833. The plaintiff Dixon had bought a large number of puncheons of rum belonging to Yates, and lying in the latter's warehouse at Liverpool. He paid for them, thus becoming possessor as well as owner. He afterwards sold forty-six puncheons, parcel of his purchase, to one Collard, a clerk in Yates's service, and gave him an invoice specifying the number and marks of each puncheon, and took Collard's acceptances for the amount of the invoice. By invariable usage in Liverpool the mode of delivering goods sold while in warehouse is that the vendor hands to the buyer a delivery order for the goods. On a former occasion, Collard had made in the same manner a similar purchase of another parcel of the rums, and Dixon gave him delivery orders for them: but when Collard applied for delivery orders for this second purchase, Dixon refused, but said if he wanted one or two puncheons he, Dixon, would let him have them. Collard then drew two orders on Dixon for one puncheon each, and the latter gave corresponding orders on Yates, and these two puncheons were delivered to a purchaser from Collard. One of Collard's bills became due on the 16th of November, and was dishonored; and Dixon, on the 18th of November, gave notice to Yates not to deliver the remaining forty-four puncheons to any one but himself, and on the 19th made a verbal, and on the 21st a written, demand on Yates for the rum, but the latter refused to deliver it to Dixon. Collard had had the puncheons which he bought coopered at Yates's warehouse, and marked with the letter C. On the 28th of October, before Collard's bill was due, he sold twenty-six puncheons of the rum bought from Dixon to one Kaye, receiving in payment Kaye's acceptances, which were duly honored. On the 31st of October, Kaye's cooper went to Yates's premises, and

[1] 5 B. & Ad. 313.

got Yates's warehouseman to go with him to the warehouse, and there marked the casks, (which were described in Collard's invoice to Kaye by marks and numbers,) with the letters J. A. K., and got the casks ready for Kaye's gauger who gauged them, and the casks were then coopered by Kaye's cooper. When the gauger first came to Yates's office, a clerk of Yates repeatedly refused permission that he should gauge *the casks for Kaye, but Collard [*755] came afterwards, and had it done. Collard had taken samples of the rum when first landed on the quay, but not after it was in the warehouse.

It was held by all the judges that the possession of the vendor Dixon had never been divested: *not* by Collard's *taking the samples*, for they were not taken as part of the bulk: *not* by his *taking possession of the two puncheons* which were actually delivered to him, because it is only when delivery of part is intended to operate as delivery of the whole, that it can have that effect: *not* by the *marking*, for that is an equivocal act, and may be merely for the purpose of identifying the goods, besides which, usage required delivery orders, which had been expressly refused: *not* by the *coopering and gauging*, because that had been objected to by Yates's clerk, and was only accomplished through the unauthorized interference of Collard, availing himself of his position as clerk. Parke J. in delivering his opinion, said: "There was no delivery to the sub-vendees, and the rule is clear *that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title defeasible on the non-payment of the price by the first vendee.* Craven *v.* Ryder, 6 Taunton, 433."[2]

§ 1040. McEwan *v.* Smith[1] was decided in the House of Lords in 1849. The facts were that certain sugars were imported by the respondents Smith, and warehoused for

[2] See Griffiths *v.* Perry, *ante*, p. 750.

[1] 2 H. L. C. 309. See, also, followed in Keeler *v.* Goodwin, 11 Mass. 490; Ropes *v.* Lane, 91 Mass. (9 Allen) 502, 510; s. c. 93 Mass. (11 Allen) 591; Merrill *v.* Hunnewell, 30 Mass. (13 Pick.) 213; Weld *v.* Cutler, 68 Mass. (2 Gray) 195; Scudder *v.* Worster, 65 Mass. (11 Cush.) 573; Young *v.* Austin, 23 Mass. (6 Pick.) 280.

their account by their agent at Greenock, named James Alexander, in a bonded warehouse of Little and Co. The entry on the warehouse book was, "Received from James Alexander for J. and A. Smith." The respondents sold the sugar to Bowie and Co., and gave them an order dated 15th of August, 1843, *on Alexander*, directing him to deliver to the purchasers "the under-noted 42 hhds. of sugar, ex St. Mary, from Jamaica, in bond." The sale was for a bill at four months. Bowie and Co. never claimed the delivery, and on the 26th of September one of the vendors [*756] wrote to their agent * Alexander, "I have just heard of Bowie and Co.'s failure. Take immediate steps to secure our 42 hhds. of sugar ex St. Mary, lately sold them, if they are still in warehouse." In the meantime, however, the appellants McEwan had bought the sugar from Bowie and Co., and on the 25th of September they sent to the office of Alexander and produced there the original delivery order of Smith and Co., which had been endorsed to them by Bowie and Co. Alexander's clerk, thereupon, gave them this note: "Delivered to the order of Messrs. McEwan and Sons, this date, forty-two hogsheads of sugar, ex St. Mary. James Alexander, *per* J. Adams." Alexander, when he received Smith's letter, removed the sugar to another warehouse, and wrote to them on the 27th of September: "The order for these sugars was presented on the evening of the 25th inst. in the usual way; but the young man that came with it from the agents of Messrs. McEwan said that he wished them put in my books as delivered to those gentlemen; and from the order of delivery being transferred to them, my young man (for I was not within at the time) noted in the little book in which the weights are taken when weighing over, 'delivered to Messrs. McEwan *per* order of 25th of Sept. 1843,' and at their request he gave them a slip of paper to this effect." On these facts Messrs. McEwan claimed that the goods had been delivered to them, and brought their action in Scotland for the goods.

§ 1041. It seems manifest, on the face of the transaction, that Messrs. McEwan acted under the mistaken impression

that Alexander held the goods as a warehouseman, for they only applied to have the entry of delivery *made on his books*, which they could not possibly have considered to be a delivery to them, if they had known that the sugar was in the warehouse of Little and Co. It was accordingly held by the House of Lords that nothing had been done to change the possession of the sugar up to the 26th of September, when the vendor exercised his lien. Several of the learned Lords gave expositions of the nature and effect of delivery orders, and of dealings between vendors and sub-vendee, in * constituting delivery of possession, and [*757] in vesting title in a sub-vendee as against the unpaid original vendor.

§ 1042. The Lord Chancellor (Lord Cottenham) first said of the note given by Alexander's clerk, that it was "nonsense to say, that by that memorandum the goods were delivered." His Lordship then said: "First, it is said that though the delivery note does not pass the property as a bill of lading would have passed it, by being endorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that . . . merely puts the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effects of a bill of lading. But as the nature and effects of these two documents are quite different from each other, it seems to me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading. . . . It was contended that, assuming the delivery note given to the first vendee to have no effect in changing the property, yet if the *second vendee* comes to the *original vendor* and obtains a new order, the vendor *cannot afterwards say* that he has not been paid by the first vendee, and so defeat the title of the second vendee, the sale to whom he had in fact sanctioned by making that second note, and

dealing with him as a party entitled to the custody of the goods. But this argument is answered by the observation that Mr. Alexander is here assumed to have an authority which in fact he never possessed; for in truth he possessed no authority but that which the first delivery note given to Bowie and Co. had conferred upon him. . . . Supposing the note of the 25th of September to have been signed by Alexander himself, I am of opinion that it gave the second vendee no better title than the first delivery note gave to Bowie and Co. It is not possible to construe this note *as a dealing between the vendors and the second vendee*, [*758] * when in fact there was no communication whatever between them."

§ 1043. Lord Campbell said: "The single point in this case is, whether Smith and Co., the respondents, the original vendors of the goods, retained their lien upon them. . . . If a bill of lading is given, and that is endorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. . . . It is said that the delivery order and the subsequent payment of the price by the second vendee take away the lien of the vendors. These acts do not seem to me to do so; for, first, this price was not paid to the original owners, and then to treat what passed between *other people as an estoppel to the original owners*, is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to that point for which no authority in the usage of trade or in the law can be shown." [1]

As to the true nature of the unpaid vendor's right on the goods in such circumstances, his Lordship was very emphatic

[1] See, also, Dixon *v.* Bovill, 3 McQueen, H. L. C. 1; Imperial Bank *v.* London and St. Katharine Docks Co., 5 Ch. D. 195; Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., *ib.* 205; Farmeloe *v.* Bain, 1 C. P. D. 445. Now, however, by the Factors Act, 1877 (40 & 41 Vict. c. 39, s. 5), the transfer of a delivery order by a vendee to a *bonâ fide* holder for value has the same effect for defeating the vendor's lien as the transfer of a bill of lading. See *post*, p. 763. See Mohr *v.* Boston & A. R. R. Co., 106 Mass. 67; Rowley *v.* Bigelow, 29 Mass. (12 Pick.) 307, 312; s. c. 23 Am. Dec. 607.

in repudiating any supposed analogy with stoppage *in transitu*. He said: "Several of the judges in the Court below discuss at great length the question of Stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case *than the doctrine of contingent remainders*." It was in his Lordship's opinion clearly the revival of the lien, which entitles the vendor to exercise his right on goods sold originally with a waiver of lien, if the buyer becomes insolvent before the credit expires.

§ 1044. In Pearson *v.* Dawson,[1] the facts were that the defendant sold sugar, held in his own bonded warehouse, to one Askew, and took an acceptance for the price. Askew resold 20 hogsheads of the sugar to the plaintiffs, and gave them a delivery *order in the following [*759] words:—"Mr. John Dawson: Please deliver to Messrs. Pearson and Hampton, or order, twenty hogsheads of sugar, ex Orontes [here were specified the marks, numbers, &c.] James Askew." This order was handed by the plaintiffs to the defendant, who wrote in pencil on his "sugar book" the plaintiffs' name opposite the particular hogsheads resold. No one could take the hogsheads out of the warehouse without paying duty, and the plaintiffs having sold two of the hogsheads, gave their own delivery order to the defendant for them, and the defendant gave the plaintiffs an order to his warehouseman to deliver them, and the plaintiffs paid the duty and took them away. In the like manner other hogsheads, making altogether eight out of the twenty, had been taken from the warehouse by the plaintiffs when Askew became insolvent; his bills were dishonored, and the defendant then claimed his lien on the twelve remaining hogsheads. But the judges, Lord Campbell C. J. and Coleridge and Erle JJ. were unanimously of opinion that the original vendor was bound to state to the plaintiffs his objections, if he had any, to recognizing the delivery order given by Askew when made known to him, and that having by his conduct given an implied assent to the resale, he had lost possession and right of lien, and could not contest the title of the subvendee.

[1] E. B. & E. 448; 27 L. J. Q. B. 248.

§ 1045. In Woodley *v.* Coventry,[1] the defendants, corn-factors, sold 350 barrels of flour, to be taken out of a larger quantity, to one Clarke, who obtained advances from the plaintiff on the security of the flour, giving to the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse, and lodged it there, the granary clerk saying, "It is all right," and showing the plaintiff samples of the flour sold to Clarke. The plaintiff sold the flour to different persons, and the defendants delivered part of it, but Clarke having in the meantime absconded and become bankrupt, the defendants refused, as unpaid vendors, to part with any more of the flour. The plaintiff brought *trover*, and it was contended for the [*760] defendants, that the estoppel set * up against them by the plaintiff could not prevail against the rule that trover will not lie where the property is not vested; and that by the contract between the defendants and Clarke no property had passed, because the sale was not of any specific flour, but of flour to be supplied generally, in accordance with the samples. But the Court held that the defendants were estopped also from denying that the property had passed, and refused to set aside the verdict given in the plaintiff's favor.

Under very similar circumstances, the Queen's Bench held in Knights *v.* Wiffen,[2] that the estoppel took place, even where the buyer had paid the price before presenting the delivery order, the Court holding that the buyer's position was nevertheless altered through the defendant's conduct, because the buyer was thereby induced to rest satisfied that the property had passed, and to take no further steps for his own protection.[3]

§ 1046. [In Gunn *v.* Bolckow, Vaughan & Company,[1] the defendants had contracted to make and sell to the Aberdare

[1] 2 H. & C. 164; 32 L. J. Ex. 185.

[2] L. R. 5 Q. B. 660. Distinguished in Barnard *v.* Campbell, 55 N. Y. 456, 464; followed in Voorhis *v.* Olmstead, 66 N. Y. 113, 117. See, also, The Continental Bank *v.* Nat. Bank, 50 N. Y. 575, where Knights *v.* Wiffen, L. R. 5 Q. B. 660, is cited with approval.

[3] See Farmeloe *v.* Bain, L. R. 1 C. P. Div. 445.

[1] 10 Ch. 491.

Iron Company, for shipment to Russia, a large quantity of iron rails, and in pursuance of the contract delivered to the Aberdare Company in exchange for their acceptances, certain wharfinger's certificates in the following form: —

"I hereby certify that there are lying at the works of Messrs. Bolckow, Vaughan & Co., Limited, of Middlesborough . . . tons of iron rails which are ready for shipment, and which have been rolled under contract dated . . . between the said company and the Aberdare Iron Company.

W. Roe, *Wharfinger.*

The Aberdare Company obtained advances from the plaintiff on the security of these certificates, which they called warrants. Subsequently the Aberdare Company filed a liquidation petition, and their acceptances were dishonored. The plaintiff claimed a lien on the rails mentioned in the certificates, upon the ground that they were equivalent to warrants or documents * of title, and were [*761] negotiable according to the custom of the iron trade.
But this contention was repudiated by the Court of Appeal in Chancery. "To say that," says James L. J. (at p. 499), "is in truth to say a thing which cannot be. No custom of the trade can make a certificate a bill of exchange or a warrant. What is evidently meant by that allegation, giving the most liberal interpretation to it in favor of the pleader, is that people deposit the certificates as if they were warrants." And Mellish L. J. says (at p. 502), "It is utterly impossible, in my opinion, to make this out to be a document of title. A document of title is something which represents the goods, and from which, either immediately or at some future time, the possession of the goods may be obtained." He then proceeds to point out the distinction between such a document and a bill of lading, or a delivery order. The case was, therefore, brought within the general principle, and the sellers' lien revived upon the buyer's insolvency.

§ 1047. In Farmeloe *v.* Bain,[1] the defendants, under a contract for the sale of 100 tons of zinc, gave to the buyers,

[1] 1 C. P. D. 445.

Messrs. Burrs & Co., four undertakings in the following form: —

"We hereby undertake to deliver *to your order indorsed hereon* twenty-five tons merchantable sheet zinc off your contract of this date."

The contract was not for the sale of any specific zinc, but of 100 tons to be taken from a quantity which the defendants had on their wharf at the time. The plaintiffs bought from Burrs & Co. on the faith of these documents; but it was admitted that the documents were not known documents amongst merchants. Burrs & Co. failed without paying the contract price. Held, in trover, that these "undertakings" must be construed as any other written instruments, and did not contain any representation that the goods were the goods of Burrs & Co. free from lien; that the defendants, therefore, were not estopped from setting up their right as unpaid vendors to withhold delivery.

[*762] *In the Merchant Banking Company of London *v.* Phœnix Bessemer Steel Company,[2] the defendants, under a contract of sale to Messrs. Gilead Smith & Co. for steel rails to be delivered in monthly quantities, invoiced the rails to Messrs. Smith & Co., and at their request sent in addition warrants for the monthly quantities in the following form, mutatis mutandis: —

"*The undermentioned iron will not be delivered to any party but the holder of this warrant.*

"PHŒNIX BESSEMER STEEL COMPANY, LIMITED.

"No. 88. *Dec.* 19, 1874.

"Stacked at the works of the Phœnix Bessemer Steel Company, The Ickles, Sheffield.

"Warrant for 403 tons, 2 qrs. 9 lbs. steel rails. Iron deliverable (f. o. b.) to Messrs. Gilead A. Smith & Co., of London, *or to their assigns by endorsement hereon.*"

Smith & Co. indorsed the warrants to the plaintiffs for value, and on the failure of Smith & Co. and the defendants, the plaintiffs claimed a first charge upon the iron mentioned in the warrants.

[2] 5 Ch. D. 205.

It was proved that, by the usage of the iron trade, warrants in the above form passed from hand to hand without any notice being given to the person issuing the warrant, and were taken to give to the holders for value a title free from any vendor's lien;[3] and in the case before him, Jessel M. R. drew the inference that the sellers must have intended these warrants to be used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued the warrants in addition to the ordinary invoices of the goods. He held, therefore, that they were estopped from afterwards setting up their claims as unpaid vendors.

This decision shows clearly the distinction between warrants which are documents of title transferable by endorsement, and which represent, and are intended [*763] to represent, the goods, and wharfingers' certificates which, as in Gunn *v.* Bolckow, Vaughan & Co., are not documents of title at all, and are not intended to represent the goods.

The law as laid down by the foregoing decisions, so far as relates to the effect of the transfer of delivery orders or dock warrants, has been altered by the last Factors Act (40 & 41 Vict. c. 39). The 5th section provides, that "where any document of title to goods has been lawfully endorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by endorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect *for defeating any vendor's lien* or right of stoppage in transitu, *as the transfer of a bill of lading has for defeating the right of stoppage in transitu.*"

The expression "documents of title" is, it is submitted, to

[3] The form of these warrants had been settled in 1866 by counsel Mr. (afterwards Chief Justice) Bovill and Mr. Lloyd. Jessel M. R. suggested that it would have been better to have stated on the face of the warrant that it was free from any vendor's lien, and he advised the insertion of words to that effect for the future.

be interpreted by the definition given of such documents in the earlier Factors Act (5 & 6 Vict. c. 39, s. 4); see *post*, page 794. If this view be correct, the decision in the Merchant Banking Company *v.* Phœnix Bessemer Steel Company is covered by this section, the iron-warrants in that case being clearly documents of title within the definition of the Factors Act, 1842; on the other hand, the section does not enlarge the effect of a transfer of documents such as the wharfinger's certificates in Gunn *v.* Bolckow, Vaughan and Company, or the "undertakings" in Farmeloe *v.* Bain.]

§ 1048. Having regard to the foregoing authorities [and the 5th section of the Factors Act, 1877] an unpaid vendor in actual possession of the goods sold, even where he has relinquished his lien by the terms of his contract, has the following rights, of which he is not deprived by assenting to hold the goods as bailee of the buyer: —

First. — If the controversy be between the unpaid vendor and the insolvent buyer, or the latter's trustee, the vendor may refuse to give up possession of the goods with- [*764] out * payment of the price.[1] (And see *ante*, p. 736, as to antecedent partial deliveries not paid for.)

Secondly. — The vendor's remedy will not be impaired by his giving a delivery order [or other document of title] for the goods if countermanded before his bailee attorns to the buyer.[2]

[*Thirdly.* — As against a sub-vendee or pledgee the right of the unpaid vendor to retain possession of the goods depends upon whether he has or has not transferred to the buyer, and the latter transferred to the sub-vendee or pledgee a document of title to the goods. If a document of title has been so transferred, the effect of the 5th section of the Factors

[1] Tooke *v.* Hollingworth, 5 T. R. 215; Bloxam *v* Sanders, 4 B. & C. 941; Miles *v.* Gorton, 2 Cr. & M. 504; Townley *v.* Crump, 4 A. & E. 58; Craven *v.* Ryder, 6 Taunt. 433; Dodsley *v.* Varley, 12 A. & E. 632; Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204; Ex parte Chalmers, 8 Ch. 289; Grice *v.* Richardson, 3 App. Cas. 319.

[2] McEwan *v.* Smith, 2 H. L. C. 309; Griffiths *v.* Perry, *ubi supra;* see, also, Pooley *v.* Great Eastern Railway Co., 34 L. T. N. S. 537, where it was argued that the attornment was on the facts conditional but the Court held otherwise.

Act, 1877, is to destroy the vendor's lien. But if a document of title has not been so transferred, or if the document issued to the buyer is not a document of title, then the rights of the unpaid vendor are the same against a sub-vendee or pledgee as against the original buyer,[3] unless he be precluded by the estoppel resulting from his assent, express or implied, to the sub-sale or pledge when informed of it.[4]

Fourthly. — The assent may be impliedly given by the conduct of the seller before the sub-sale or pledge has taken place;[5] but will not be implied from the mere fact that the seller has issued to the buyer documents other than documents of title which the buyer has dealt with by way of sale or pledge, unless such documents contain some representation of fact creating an estoppel.[6]]

* These rights taken in connection with the remedy [*765] by re-sale, and the vendor's lien, treated of in the two succeeding chapters, cover almost every conceivable controversy that can arise relative to the rights of an unpaid vendor before the buyer has obtained actual possession of the goods.

§ 1049. It will be again necessary to refer more particularly (*post*, Ch. IV. On Lien) to the effect of delivery orders, but before leaving the subject of estoppel, attention may properly be directed to the cases in which it has been applied to warehousemen and bailees, who may by their conduct make themselves responsible to sub-vendees without relieving themselves of liability towards the unpaid vendor. For the doctrine of estoppel in general, the reader is referred to the notes appended to the case of Doe *v.* Oliver,[1] in Mr. Smith's very valuable book. The principle was thus stated by Lord Denman in Pickard *v.* Sears:[2] "Where one by his words or con-

[3] Craven *v.* Ryder, 6 Taunt. 433; *per* Parke B. in Dixon *v.* Yates, 5 B. & A. 313; McEwan *v.* Smith, and Griffiths *v.* Perry, *ubi supra*.

[4] Stoveld *v.* Hughes, 14 East, 308; Pearson *v.* Dawson, E. B. & E. 448; 27 L. J. Q. B. 248; Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

[5] Merchant Banking Co. *v.* Phœnix Bessemer Steel Ch., *ubi supra*.

[6] Gunn *v.* Bolckow, Vaughan & Co., 10 Ch. 491; Farmeloe *v.* Bain, 1 C. P. D. 445.

[1] 2 Sm. L. C. pp. 775 *et seq.* ed. 1879.

[2] 6 A. & E. 475. See the remarks of Lord Blackburn on the doctrine of estoppel *in pais* in Burkinshaw *v.*

duct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But in Freeman *v.* Cooke,[3] Parke Baron said, — and this dictum was approved by Chelmsford L. C. in Clarke *v.* Hart,[4] — that "in most cases the doctrine in Pickard *v.* Sears, is not to be applied unless the representation is such as to amount to the contract or license of the party making it."[5]

§ 1050. In Stonard *v.* Dunkin,[1] the defendant, a warehouseman, gave a written acknowledgment that he held a parcel of malt for the plaintiff, who had advanced money on a pledge of it to one Knight. Knight became bankrupt, and the defendant attempted to show that the malt had not [*766] been measured, and *that the property in it therefore passed to Knight's assignees; but Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff the malt is not yours, after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title."

Nicholls, 3 App. Cas. at p. 1026, and the definition of estoppel offered by Bramwell L. J. in Simm *v.* Anglo-American Telegraph Co., 5 Q. B. D. 188, C. A. at p. 202, and the observations of Brett L. J. at p. 206.

[3] 2 Ex. 654.

[4] 6 H. L. C. at p. 656. See *per* Lord Cranworth L. C. in Jorden *v.* Money, 5 H. L. C. at pp. 213, 214.

[5] Whitaker *v.* Williams, 20 Conn. 98; Noyes *v.* Ward, 19 Conn. 250; Roe *v.* Jerome, 18 Conn. 138; Kinney *v.* Farnsworth, 17 Conn. 355; Copeland *v.* Copeland, 28 Me. 528; Fall River Nat. Bank *v.* Buffinton, 97 Mass. 498, 500, 501; Andrews *v.* Lyons, 93 Mass. (11 Allen) 349; Langdon *v.* Doud, 92 Mass. (10 Allen) 437; Plumer *v.* Lord, 91 Mass. (9 Allen) 455; Audenried *v.* Betteley, 87 Mass. (5 Allen) 384; Drew *v.* Kimball, 43 N. H. 282; s. c. 80 Am. Dec. 163; Marshall *v.* Pierce, 12 N. H. 127; Erie County Savings Bank *v.* Roop, 48 N. Y. 292, 298; Storrs *v.* Barker, 6 Johns. Ch. (N. Y.) 166; s. c. 10 Am. Dec. 316; Brookman *v.* Metcalf, 4 Robt. (N. Y.) 568; Maple *v.* Kussart, 53 Pa. St. 348; Montpelier & Wells River R. R. *v.* Langdon, 45 Vt. 137; Halloran *v.* Whitcomb, 43 Vt. 306, 312; Spiller *v.* Scribner, 36 Vt. 245; Wooley *v.* Chamberlain, 24 Vt. 270, 276; Hicks *v.* Cram, 17 Vt. 449, 455; Ex parte Rocksford R. I. & St. L. R. R. Co., 1 Low R. C. C. 345.

[1] 4 Camp. 344.

This case was followed by Hawes *v.* Watson,[2] in the King's Bench in 1824, and by Gosling *v.* Birnie,[3] in the Common Pleas in 1831, the assent of the wharfinger in the latter case being by parol. Tindal C. J. said: "The defendant is estopped by his own admissions, for unless they amount to an estoppel the word may as well be blotted from the law."[4]

The rule has since been applied in very many cases, among which may be cited, Gillett *v.* Hill,[5] Holt *v.* Griffin,[6] Lucas *v.* Dorrien,[7] and Woodley *v.* Coventry;[8] and it was recognized in Swanwick *v.* Sothern,[9] in the elaborate judgment delivered by Blackburn J. in the Queen's Bench, in Biddle *v.* Bond,[10] and in Knights *v.* Wiffen.[11]

[The rules as to estoppels *in pais*[12] were very fully and carefully laid down by Brett J. in delivering the judgment of the Court of Common Pleas in Carr *v.* The London and North Western Railway Company.[13]]

[2] 2 B. & C. 540.

[3] 7 Bing. 339.

[4] *As to the liability of warehousemen to vendee* see Holton *v.* Sanson, 11 Up. Can. C. P. 606; Davis *v.* Browne, 9 Up. Can. Q. B. 193; Hegan *v.* Fredericton Boom Co., 2 Pugs. & B. (N. B.) 165; Twining *v.* Oxley, 2 Thomp. (N. S.) 18.

[5] 2 C. & M. 536.

[6] 10 Bing. 246.

[7] 7 Taunt. 278.

[8] 2 H. & C. 164, and 32 L. J. Ex. 187.

[9] 9 A. & E. 895.

[10] 6 B. & S. 225, and 34 L. J. Q. B. 137. See the same principle applied in other cases: as in delivering certificates of shares, In re Bahia and San Francisco Railway Co., L. R. 3 Q. B. 584; Hart *v.* Frontino Gold Mining Co., L. R. 5 Ex. 111; or in issue of debentures, Webb. *v.* Herne Bay Commissioners, L. R. 5 Q. B. 642. See, however, the limits of the principle in such cases laid down by the Court of Appeal in Simm *v.* Anglo-American Telegraph Co., 5 Q. B. D. 188, where some criticisms are passed upon Hart *v.* Frontino Gold Mining Co., by Bramwell L. J. at p. 204, and upon Knights *v.* Wiffen, by Brett L. J. at p. 212; and see Waterhouse *v.* London and South Western Railway Co., 41 L. T. N. S. 553.

[11] L. R. 5 Q. B. 660, *ante*, p. 760. See, also, Farmeloe *v.* Bain, 1 C. P. D. 445, *ante*, p. 761.

[12] It is held in Adams *v.* Gorham, 6 Cal. 68, that a warehouseman is estopped from denying title of one to whom he has delivered a receipt. Goodwin *v.* Scannell, 6 Cal. 541; Chapman *v.* Searle, 20 Mass. (3 Pick.) 38, 43. See, also, Hurff *v.* Hires, 40 N. J. L. (11 Vr.) 581, 591; s. c. 29 Am. Rep. 282 *et seq.*

[13] L. R. 10 C. P. 307, at pp. 316–318.

[*767] * CHAPTER III.

REMEDIES AGAINST THE GOODS — RESALE.

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§ 1051. We have seen that the vendor has no right to rescind the sale when the buyer is in default for the payment of the price,[1] and this suggests at once other important questions. What is a vendor to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods are perishable, like a cargo of fruit; or expensive to keep, as cattle or horses? May the vendor resell? and if so, under what circumstances? with what legal effect? Before attempting to give an answer to these questions, let us see how the

[1] *Ante*, p. 741.

law stood when Blackburn on Sales was published, in 1845. The following is the statement of the learned author: —

"Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed to the assent of the purchaser, under the contract of sale, the question arises, how much greater than *a lien are they? and this is a question that, in [*768] the present state of the law, no one will venture to answer positively, but as has already been said, the better opinion seems to be, that *in no case do they amount to a complete resumption of the right of property*, or, in other words, *to a right to rescind the contract of sale*, but perhaps come nearer to the rights of a *pawnee with a power of sale*, than to any other common law rights. At all events it seems, that a resale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover."[2]

§ 1052. There has been a great deal of authority on the point since the publication of Blackburn on Sales, and it will be convenient first to refer succinctly to the decisions cited by that learned author. Martindale *v.* Smith[1] may be at once distinguished from all the other cases cited, by the circumstance that the resale in that case was made *after the buyer had tendered the price*, a proceeding to which no countenance has been given by any *dictum* or any decided case. To the later case of Chinery *v.* Viall,[2] to be examined *post*, the same remark applies, the vendor having resold, *before* the buyer was in default.

In Langfoot *v.* Tyler,[3] Hold C. J. ruled, in 1705, that "after earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore if the

[2] Blackburn on Sales, p. 325.

[1] 1 Q. B. 395.

[2] 5 H. & N. 288; 29 L. J. Ex. 180.

[3] 1 Salk. 113, cited by Lord Ellenborough, in Hinde *v.* Whitehouse, 7 East, 571, and by Littledale J. in Bloxham *v.* Sanders, 4 B. & C. 945.

vendee does not come and pay and take the goods, the vendor ought to go and request him, and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." We have already seen that by the law as now settled, the agreement is not dissolved, according to the *dictum* in this old case.

[*769] § 1053. * In Hore *v.* Milner,[1] at Nisi Prius in 1797, Lord Kenyon held, that a vendor who had resold had estopped himself from alleging the contract to have been an executed bargain and sale, and could only recover on a count for damages, as on an executory agreement.

In Mertens *v.* Adcock,[2] in 1813, Lord Ellenborough held, in a case of goods sold at auction, with deposit of part of the price, and *express reservation* of power to resell, that the resale was not a rescission of the contract, and that the vendor might recover on a count for goods bargained and sold. This case has since been overruled. See Lamond *v.* Duvall, p. 771, *infra*.

In Hagedorn *v.* Laing,[3] the Common Pleas expressed a doubt of the correctness of Lord Ellenborough's ruling, in cases where there is an *express* reservation of the power to resell.

In Greaves *v.* Ashlin,[4] in 1813, the facts were, that the defendant sold the plaintiff fifty quarters of oats at 45*s.* 6*d.*, and resold them, on the buyer's default, at 51*s.* per quarter. Lord Ellenborough held the sale not to be rescinded by the resale, and the plaintiff recovered the profit on the resale.

§ 1054. Next came Maclean *v.* Dunn, in 1828. The vendor in that case resold the goods at a loss, after repeated requests that the buyer would take them. Best C. J. gave the decision of the Court that the original sale was not thereby rescinded, and that the buyer might be sued in assumpsit on the original contract; and the reasoning was as follows: "It is admitted that *perishable articles* may be

[1] 1 Peake, 42, n. (58, n. in ed. 1820).
[2] 4 Esp. 251.
[3] 6 Taunt. 162.
[4] 3 Camp. 426.

resold. It is difficult to say what may be considered as perishable articles and what not; but if articles are not perishable, *price is*, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself * affords some evidence of [*770] the law, and we ought not to oppose it except on the authority of decided cases. Those which have been decided do not apply. . . . *We are anxious to confirm a rule consistent with convenience and law.* It is most convenient that when a party refuses to take goods he had purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower." [1]

In Blackburn on Sales, it is said of this case, that "the *dictum* of the Court goes to the extent that the resale was perfectly legal and justifiable; — *probably it may be so*, but there has never been a decision to that extent." [2]

§ 1055. In Acebal *v.* Levy,[1] the Common Pleas, in 1834, when Best C. J. had been succeeded by Tindal C. J., and when Vaughan, Bosanquet, and Alderson, JJ. had become members of the Court, subsequently to the decision in Maclean *v.* Dunn, said that it was unnecessary to decide "whether the plaintiff can or cannot maintain the count for goods bargained and sold, after he has resold the goods to a stranger, before the action brought. A question which does not go to the merit, but is a question as to the pleading only, for *there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count framed upon the refusal to accept and pay for the goods bought.*"

§ 1056. In Milgate *v.* Kebble,[1] decided in the Common Pleas, in 1841, the plaintiff brought trover upon the follow-

[1] 4 Bing. 722.
[2] Blackburn, p. 337.
[1] 10 Bing. 376.
[1] 3 M. & G. 100. See, also, Bloxam

ing facts. The defendant sold to the plaintiff his crop of apples, for 38*l.*, to be paid by instalments *before* the buyer took them away. The buyer paid 33*l.* on account, and gathered the apples on the 1st of October, leaving them in the defendant's kiln. On the 27th of December, the defendant wrote to the plaintiff a notice to pay for them and [*771] take them away, and * this not being done, the defendant resold the apples for 6*l.*, on the 22d of January. The jury found that a reasonable time had *not* elapsed before the resale, and gave a verdict for 5*l.* damages to the plaintiff. On leave reserved, a motion for nonsuit was successful, on the ground that the vendors right of *possession* was not lost, so as to enable the plaintiff to maintain *trover* against him. In this case, Tindal C. J. said the buyer was in the condition of a *pledger*, who cannot bring trover.

In Fitt *v.* Cassanet,[2] the subject again came before the same Court, in 1842, but the facts did not require a direct decision on it, though the judges all assumed it to be settled law that a resale would be legal, after a refusal to accept on the part of the purchaser.

Thus stood the authorities in 1845, and one of the points in dispute was settled very speedily afterwards.

§ 1057. In Lamond *v.* Duvall,[1] decided in 1847, the vendor brought *assumpsit* for shares bargained and sold, and sold and delivered. At an auction sale the defendant had become the buyer, at 79*l.*, of certain shares, one of the conditions of the sale being that the goods might be resold unless the purchase-money was paid on the following day, the bidder so making default being answerable for the loss on the resale. The vendor resold for 63*l.* Erle J. nonsuited the plaintiff, on the ground that this reservation of the power of resale was in effect a condition for making void the sale on default of the buyer, and that the actual resale had rescinded the original contract, so that *assumpsit* could not be maintained on it. This nonsuit was upheld after advisement, the Court overruling Mer-

v. Sanders, 4 B. & C. 948, and Felthouse *v.* Bindley, 11 C. B. N. S. 869; 31 L. J. C. P. 204, *ante*, p. 42; Lord *v.* Price, L. R. 9 Ex. 54.

[2] 4 M. & G. 898.

[1] 9 Q. B. 1030.

tens *v.* Adcock,[2] and confirming the *dictum* of Gibbs C. J. in Hagedorn *v.* Laing.[3] Lord Denman C. J. said: "It appears to us that a power of resale implies a power of annulling the first sale, and that therefore the first sale is *on a condition, and not absolute.* There might be inconvenience to the vendor if the resale was held to be by him as *agent for the * defaulter*, and there is injustice to the purchaser [*772] in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses. . . . In Maclean *v.* Dunn,[4] the action for damages for the loss on resale is spoken of as the proper course, where the power of resale is exercised without an express stipulation for it."

The *point* here decided is, that where there is a resale on the buyer's default, in accordance with an express reservation of that right in the original contract, the sale is rescinded.

The *dicta* are, that the vendor's remedy in case of resale at a loss is a special action for damages for the difference in price and the expenses, whether there has or has not been an express reservation of the right of resale.

§ 1058. When the sale is thus conditional, the vendee's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is *in duriori casu.* He runs all the risk of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale.[1] But where such express reservation does not exist, the effect of a resale not being to rescind the sale, the goods are sold by the unpaid vendor, *qua* pledgee, and as though the goods had been pawned to him: they are sold as being the property of

[2] 4 Esp. 251.
[3] 6 Taunt. 162.
[4] 4 Bing. 722.

[1] Sugd. on Vendors, p. 39, ed. 1862.

the buyer, who is of course entitled to the excess if they sell for a higher price than he agreed to give.[2]

§ 1059. The cases of Valpy *v.* Oakeley,[1] and Griffiths *v.* Perry,[2] cited in the preceding chapter, pp. 749–50, decide that in an action by the buyer, *on the contract*, against the unpaid vendor for non-delivery, whether the sale [*773] was of specific *goods, or of goods to be supplied, the buyer can only recover the actual damages, that is, the difference between the contract price and the market value; and to this extent the buyer's right is plain, because the effect of his default was not to rescind the contract, and he is entitled to any profit on the resale. But the cases go further, and decide expressly that the vendor has no right to resell, for they determine that he is responsible for nominal damages where there is no difference in these values.

§ 1060. In the United States the law is somewhat different, and in Dustan *v.* McAndrew[1] was thus stated: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of one of three remedies: 1st, He may store or retain the property for the vendee and sue him for the entire price; 2d, He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or, 3d, He may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.

§ 1061. Where an unpaid vendor, *after delivery* of the goods to the buyer, tortiously retakes and resells them, the law is equally well settled that the contract is not rescinded, and the vendor may still recover the price, while the buyer may maintain an action in trover for the conversion. In these cases neither party could, previous to the Judicature Acts, set up his own right as a defence in an action by the

[2] Ashlin *v.* Greaves, 3 Camp. 426; Valpy *v.* Oakeley, and Griffiths *v.* Perry, *ante*, pp. 749–50.

[1] 16 Q. B. 941; 20 L. J. Q. B. 380.

[2] 1 E. & E. 680; 28 L. J. Q. B. 204.

[1] 44 N. Y. 72; Hayden *v.* Demetz, 53 N. Y. 426, *per* Church C. J. at p. 431; 2 Kent, 504, ed. 1873.

other, but was obliged to bring his cross-action, but now either party can obtain relief by counter-claim. If, however, from the nature of the contract or the dealings between the parties, the vendor who has resold is in such a condition as to be unable to maintain an action or set up a counter-claim for the price, then the buyer's damages in trover will not be the whole value of the goods converted, but only the actual damages, namely, the value of the goods, * after [*774] deducting the price due. The authorities in support of these conclusions are the following: —

§ 1062. In Stephens *v.* Wilkinson,[1] to an action on a bill of exchange, the defence was that the bill was given for goods sold, which the plaintiff had tortiously retaken from the defendant two months after the delivery. This defence was held bad because the tortious retaking did not authorize the buyer to consider the contract as rescinded; he must pay the price, and seek his remedy by action in trespass for the retaking of his goods, inasmuch as the consideration for the bill of exchange had not wholly failed, the buyer having enjoyed the consideration for some time after the sale. Lord Tenterden said: "The person who bought the goods paid part of the purchase-money, and gave this bill for the residue; had possession of the goods delivered to him; kept them for two months, and was then dispossessed by the vendor; and it is said that entitles the defendant to refuse to pay the bill. I am, however, inclined to think that in point of law that is not so, but that the vendee's remedy is by an action of trespass. In that action he will be entitled to recover a full compensation for the injury which he sustained by the wrongful seizure of the goods, and their value will be the measure of damages." Parke J. also held, that there was not a total failure of consideration, so that of course the defence was unavailing against a bill of exchange (because no partial failure of consideration, except for an ascertained liquidated sum, is a good defence in an action on a negotiable instrument,[2] but that great judge

[1] 2 B. & Ad. 320.

[2] Byles on Bills, 132, ed. 1879; but now unliquidated damages may be set up in a counter-claim. Ord. XIX. r. 3; Ord. XXII. r. 10.

gave the following as the rule of law: "No case has been cited, and no *dictum* which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract. If the goods are delivered by the vendor, and taken possession of by the vendee, his title to them is complete; the consideration for the price is then perfect. If they are afterwards [*775] forcibly * taken by the vendor, the vendee may maintain trespass, and the measure of the damages would be the value of the goods at the time of the retaking; whereas, if he may treat the retaking of the goods as a rescinding of the contract, it follows as a consequence that he would be entitled to recover the whole purchase-money, or the value of the goods as agreed upon at the time of the sale, notwithstanding he may have had the use of them in the interval between the sale and the retaking, and though they may be actually deteriorated in value, as they would be if they were of a perishable nature. *In point of law the situation is this: the vendee has had all he was entitled to by the contract of sale, and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken.*"

§ 1063. The converse of this case came before the Exchequer in 1841. In Gillard *v.* Brittan,[1] the action was by the buyer for damages in trespass *de bonus asportatis*. The facts were that the defendant, to whom the plaintiff was indebted for goods sold, went in pursuit of the latter (who had sold off his furniture and left his home secretly), and having traced him to a distant place, went into the premises of the plaintiff's brother-in-law, accompanied by some police officers, and retook some of the goods sold, which he identified. The learned judge at Nisi Prius (Wightman J.) told the jury that in estimating the damages, they must take into consideration the plaintiff's debt to the defendant, which would be reduced *pro tanto* by the value of the goods retaken. The jury found a verdict for the defendant. This ruling was

[1] 8 M. & W. 575.

held wrong. Lord Abinger C. B. said: "It would lead to the consequence that a party may set off a debt due in one case against damages in another. *The verdict in this case does not at all affect the right of the defendant to recover the whole* 67*l. due to him from the plaintiff.* The learned judge was therefore clearly in error." Alderson B. said that the debt due by the plaintiff * "ought to have [*776] been excluded altogether, otherwise it is equivalent to allowing a set-off in trespass."

§ 1064. But in Chinery *v.* Viall,[1] in 1860, the Exchequer of Pleas held the contrary, on the following state of facts. The defendant had made a tortious resale of certain sheep sold by him to the plaintiff, and the buyer's declaration contained two counts, one on the contract, for non-delivery, and the other in trover. On the first count there was a verdict for 5*l.*, being the excess in the market value of the sheep over the price at which they had been bought. On the second count there was a formal verdict for 118*l.* 19*s.*, the whole value of the sheep, without deducting the unpaid price, with leave reserved to the defendant to move for a verdict in his favor on that count, or to reduce the damages. The Court held the count in trover maintainable, in which opinion it was stated by Bramwell B., when delivering the judgment, that Blackburn J. concurred: and on the question of damages it was held that the plaintiff could only recover the actual loss sustained, not the whole value of the sheep for which he had not paid; and the damages were reduced to 5*l.*

In this case, Gillard *v.* Brittan [2] was cited by counsel, and not overruled. The two cases, however, are quite distinguishable. In Gillard *v.* Brittan, each party was entitled to his cross-action, the vendor for the price, the buyer for the goods, which had passed into his ownership and actual possession. But in Chinery *v.* Viall the *ratio decidendi* was that the vendor could not, by reason of his conversion *before* delivery, maintain a cross-action for the price, and therefore *ex necessitate* it must be allowed for in calculating the buyer's

[1] 5 H. & N. 288; 29 L. J. Ex. 180. [2] 8 M. & W. 575.

damages in his action, for otherwise the buyer would get the goods for nothing.[3]

§ 1065. On the point decided in Chinery *v.* Viall, namely, that in an action of trover the measure of damages is not always the full value of the goods, and that a party [*777] cannot recover * more * by suing on the tort than on the contract, but that the actual damage only ought to be given in either action, the case has met with full approval in subsequent decisions. It was followed by the Common Pleas (*dissentiente* Williams J.), in Johnson *v.* Stear,[1] which was an action in trover for a conversion of the pledge by the pawnee, the Court holding that only nominal damages could be recovered, the pledge being insufficient to satisfy the debt: and Johnson *v.* Stear was followed in its turn by the Queen's Bench in Donald *v.* Suckling,[2] and by the Exchequer Chamber in Halliday *v.* Holgate,[3] with this modification, that not even nominal damages are recoverable in such an action, if the pledgee has not received full payment.

§ 1066. [But the case of a *pledge* giving a right of property in the goods must be distinguished from that of a *lien* giving a mere right of detainer. Where a third person has only a lien over the goods, and has then tortiously sold them so that his lien is destroyed, he is liable in an action for conversion by the unpaid vendor for the full value of the goods, and is not entitled to deduct the amount which was due to him in respect of his lien.[1]

§ 1067. The qualification of the primâ facie rule as to the measure of damages in an action of trover is confined to

[3] See *per* Denman J. in Johnson *v.* Lancashire and Yorkshire Railway Co., 3 C. P. D. at p. 507.

[1] 15 C. B. N. S. 330; 33 L. J. C. P. 130. Reflected upon in Mulliner *v.* Florence, 3 Q. B. D. 484, C. A., *per* Bramwell L. J. at p. 490 and Brett L. J. at p. 493: — "Johnson *v.* Stear would require great consideration before it was acted upon."

[2] 7 B. & S. 783; L. R. 1 Q. B. 585; Blackburn J. (at p. 618) seems to doubt the correctness of the decision in Johnson *v.* Stear.

[3] L. R. 3 Ex. 299.

[1] Mulliner *v.* Florence, 3 Q. B. D. 484, C. A., where Johnson *v.* Stear, Donald *v.* Suckling, and Halliday *v.* Holgate, *ubi supra*, are distinguished on this ground.

cases where the relationship of seller and buyer exists between the plaintiff and defendant, and does not apply to a case where the defendant is a mere stranger to the plaintiff. Thus, where there had been an arrangement that the seller should receive payment direct from a third person to whom the buyer was under contract to deliver the goods, and the seller converted the goods, it was held, in an action for conversion brought by the third person against the seller, that the latter * was liable for the full value [*778] of the goods, and was not entitled to deduct the contract price.[1]

If, after the conversion, a return, or the equivalent of a return, of the goods has been made to the plaintiff, he can only recover the damages sustained by the wrongful act, and not the full value of the goods.[2]

It is to be observed that the Judicature Acts have not altered the law as to what constitutes a conversion, although they have substituted a new form of action in place of the old count in trover and conversion.[3]]

§ 1068. In Page *v.* Cowasjee,[1] the cases were all reviewed, and the Court, after determining, as a matter of fact, that the buyer of a vessel was not in default under the circumstances as proven in the case, and that the vendor had acted tortiously in retaking the vessel out of the buyer's possession and re-selling it, held the legal effect to be, that the contract was not rescinded, that the vendor could recover the price, and that the buyer *could not set up the resale in defence*, but must bring his cross action for damages for the tortious retaking and resale, which damages would probably be measured by the price obtained at the resale.

§ 1069. [The above-cited decisions are of little importance since the Judicature Acts. The forms of action are no longer

[1] Johnson *v.* Lancashire and Yorkshire Railway Co., 3 C. P. D. 499, where the cases are reviewed by Denman J.

[2] Hiort *v.* London and North Western Railway Co., 4 Ex. D. 188, C. A.

[3] See Appendix A. to the Act of 1875, pt. ii. s. 4, and *per* Bramwell L. J. in Hiort *v.* London and North Western Railway Co., *supra*, at p. 194.

[1] L. R. 1 P. C. 127; 3 Moo. P. C. C. N. S. 499.

material, and by Ord. XIX. r. 3, of the Act of 1875, it is provided, that "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." In cases like Stephens *v.* Wilkinson, *ante*, *p. 774, Gillard *v.* Brittan, *ante*, p. 775, and Page *v.* Cowasjee, *ante*, p. 778, the defendant might now obtain relief by way of counter-claim.]

[*779]

§ 1070. The following summary of the law is submitted as fairly resulting from the foregoing authorities, [having regard to the effect of the Judicature Acts: —]

First. A resale by the vendor *on default* of the purchaser rescinds the original sale, when the right of sale was expressly reserved in the original sale;[1] but not in the absence of such express reservation.[2]

§ 1071. *Secondly.* The vendor's remedy, after a resale under *an express reservation of that right*, against a purchaser in default, is an action for damages for the loss of price and expenses of the resale.[1] If the goods fetch a profit on the resale, the buyer derives no benefit from it, except as showing, by way of defence, that his default has caused no damage to the vendor.[2]

§ 1072. *Thirdly.* The vendor's remedy, after a resale made in the absence of an express reservation of that right, is an action on the original contract, which was not rescinded by the resale. And in this action he may either recover as damages the actual loss on the resale composed of the difference in price and expenses,[1] or he may refuse to give credit for the

[1] Lamond *v.* Duvall, 9 Q. B. 1030.
[2] Maclean *v.* Dunn, 4 Bing. 722; Stephens *v.* Wilkinson, 2 B. & Ad. 320; Gillard *v.* Brittan, 8 M. & W. 575; Page *v.* Cowasjee, L. R. 1 P. C. 127; 3 Moo. P. C. N. S. 499.

[1] Lamond *v.* Duvall, *ubi supra.*
[2] Sugd. on Vendors, p. 39.
[1] Maclean *v.* Dunn, *ubi supra.*

proceeds of the resale, and claim the whole price,[2] leaving the buyer to his counter-claim for damages for the resale.

And this rule prevails even in cases where the vendor has tortiously retaken and resold the goods after their delivery to the purchaser.[2]

§ 1073. *Fourthly.* In the case of resale, a buyer *in default* cannot maintain trover against the vendor, being deprived by his default of that right of *possession* without which trover will not lie.[1]

§ 1074. * *Fifthly.* A buyer, even if *not in default*, [*780] has no right to treat the sale as rescinded by reason of the vendor's tortious resale; and cannot get back any part of the price paid, nor refuse to pay the remainder when due. His remedy is an action for damages,[1] or a counter-claim in the vendor's action for the price.

§ 1075. *Sixthly.* A buyer, *not in default*, may maintain trover against a vendor who has tortiously resold, but the vendor may set up a counter-claim for the amount of the unpaid price; but if the vendor, by reason of his conversion before delivery, is unable to maintain an action, or set up a counter-claim, for the price, then the buyer's recovery in trover will be limited to the actual damage suffered, namely, the difference between the market value of his goods which have been resold, and the unpaid price.[1]

§ 1076. *Seventhly.* An unpaid vendor, with the goods in his possession, has more than a mere lien on them; he has a special property analogous to that of a pawnee. But it is a breach of his contract to resell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damage suffered, that is, the difference between the contract price and the market value on the

[2] Stephens *v.* Wilkinson, and Page *v.* Cowasjee, *ubi supra*.

[1] Milgate *v.* Kebble, 3 M. & G. 100; Lord *v.* Price, L. R. 9 Ex. 54.

[1] Martindale *v.* Smith, 1 Q. B. 395; Stephens *v.* Wilkinson, 2 B. & Ad. 320; Page *v.* Cowasjee, L. R. 1 P. C. 127; 3 Moo. P. C. N. S. 499.

[1] Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.

resale; and if there be no proof of such difference, the recovery will be for nominal damages only.[1]

§ 1077. Where there has been a resale, the title of the second purchaser depends on the fact, whether the first buyer was in default, for if not, we have seen that he may maintain trover. The subject was touched on in Gosling *v.* Birnie,[1] which went off on the point of estoppel, so that nothing was decided on it.[2]

[1] Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204.

[1] 7 Bing. 339.

[2] In the United States the decisions show that the seller has a right of resale on the default of the buyer, and may recover the difference between the contract price and the amount realized on sale. In carrying out such sale the seller is considered to act as agent for the purchaser. Lamkin *v.* Crawford, 8 Ala. 153; Barr *v.* Logan, 5 Harr. (Del.) 52; Cook *v.* Brandeis, 3 Met. (Ky.) 557; Bartley *v.* New Orleans, 30 La. An. pt. 1, 264; Young *v.* Mertens, 27 Md. 114, 126; McLean *v.* Richardson, 127 Mass. 339, 345; Whitney *v.* Boardman, 118 Mass. 242, 248; Van Horn *v.* Rucker, 33 Mo. 391; Hunter *v.* Wetsell, 84 N. Y. 549, 555; s. c. 38 Am. Rep. 544; Smith *v.* Pettee, 70 N. Y. 13; Lewis *v.* Greider, 51 N. Y. 231, 236; Schultz *v.* Bradley, 4 Daly (N. Y.) 29, 32; McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; Williams *v.* Godwin, 4 Sneed (Tenn.) 567; Phelps *v.* Hubbard, 51 Vt. 489; Jones *v.* Marsh, 22 Vt. 144; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 792; Ganson *v.* Madigan, 13 Wis. 67; s. c. 15 Wis. 144. See Bagley *v.* Findlay, 82 Ill. 524; Ullmann *v.* Kent, 60 Ill. 271; Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Bell *v.* Offutt, 10 Bush (Ky.) 632; Holland *v.* Rea, 48 Mich. 218; Haines *v.* Tucker, 50 N. H. 313; Porter *v.* Wormser, 94 N. Y. 431, 442; Mason *v.* Decker, 72 N. Y. 595, 599; s. c. 28 Am. Rep. 190; Hayden *v.* Demets, 53 N. Y. 426; Dustan *v.* McAndrew, 44 N. Y. 72; Mills *v.* Gould, 42 N. Y. Super. Ct. (10 J. & S.) 119, 123; Pollen *v.* LeRoy, 30 N. Y. 549; Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Passaic Manuf. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 528; Shawan *v.* Van Nest, 25 Ohio St. 490; s. c. 18 Am. Rep. 313; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; Walker *v.* Gooch, 10 Biss. C. C. 159. Such resale must, however, be shown to have been fairly made and also to be made within a reasonable time. Camp *v.* Hamlin, 55 Ga. 259; Saladin *v.* Mitchell, 45 Ill. 79; Thurman *v.* Wilson, 7 Ill. App. 312; Brownlee *v.* Bolton, 44 Mich. 218; Smith *v.* Pettee, 70 N. Y. 13; Tilt *v.* La Salle S. Co., 5 Daly (N. Y.) 19; Rosenbaums *v.* Weeden, 18 Gratt. (Va.) 785; Pickering *v.* Bardwell, 21 Wis. 562; George *v.* Glass, 14 Up. Can. Q. B. 514. Where a resale has taken place, the price realized is usually considered to be a fair test of the market value of the goods, provided always that such sale has been fairly made. Lamkin *v.* Crawford, 8 Ala. 153; Haskell *v.* McHenry, 4 Cal. 411; Bell *v.* Offutt, 10 Bush (Ky.) 632; Bartley *v.* New Orleans, 30 La. An. 264; Young *v.* Mertens, 27 Md. 126; McLean *v.* Richardson, 127 Mass. 339; Whitney *v.* Boardman, 118 Mass. 242;

Rickey *v.* Tenbroeck, 63 Mo. 563; Van Horn *v.* Rucker, 33 Mo. 391; Hunter *v.* Wetsell, 84 N. Y. 549; s. c. 38 Am. Rep. 544; Lewis *v.* Greider, 51 N. Y. 231; Schultz *v.* Bradley, 4 Daly (N. Y.) 29; McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; Andrews *v.* Hoover, 8 Watts (Pa.) 239; Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377; s. c. 37 Am. Dec. 511; McCombs *v.* McKennan, 2 Watts & S. (Pa.) 216; s. c. 37 Am. Dec. 505; Williams *v.* Godwin, 4 Sneed (Tenn.) 557; Phelps *v.* Hubbard, 51 Vt. 489; Jones *v.* Marsh, 22 Vt. 144; Rosenbaums *v.* Weeden, 18 Gratt. (Va.) 785; Chapman *v.* Ingram, 30 Wis. 290. It is the duty of the seller to give notice to the buyer of his intention to make the resale. Bagley *v.* Findlay, 82 Ill. 524; Ullmann *v.* Kent, 60 Ill. 271; Saladin *v.* Mitchell, 45 Ill. 76; Redmond *v.* Smock, 28 Ind. 365; Holland *v.* Rea, 48 Mich. 218; Haines *v.* Tucker, 50 N. H. 313; Babcock *v.* Bonnell, 80 N. Y. 244; Lewis *v.* Greider, 51 N. Y. 231; Pollen *v.* LeRoy, 30 N. Y. 556; Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32; McClure *v.* Williams, 5 Sneed (Tenn.) 718; Rosenbaums *v.* Weeden, 18 Gratt. (Va.) 785; Chapman *v.* Ingram, 30 Wis. 290; Hughes *v.* United States, 4 Ct. of Cl. 64, 74; George *v.* Glass, 14 Up. Can. Q. B. 514. But it is not essential that he should notify the buyer of the time and place of sale. Ullman *v.* Kent, 60 Ill. 271; Lewis *v.* Greider, 51 N. Y. 231; Pollen *v.* LeRoy, 30 N. Y. 556; McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297; Lindon *v.* Eldred, 49 Wis. 305; Chapman *v.* Ingram, 30 Wis. 290.

[*781] *CHAPTER IV.

REMEDIES AGAINST THE GOODS — LIEN.

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§ 1078. A LIEN in general may be defined to be a right of retaining property, until a debt due to the person retaining it has * been satisfied;[1] and as the rule of [*782] law is, that in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right to retain the goods until payment of the price,[2] he has in all cases *at least* a lien, unless he has waived it.

But this lien extends only to the price. If by reason of the vendee's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, *if any*, is personal against the buyer. In Somes *v.* The British Empire Shipping Company,[3] it was held by the unanimous judgment of the Queen's Bench, the Exchequer Chamber, and the House of Lords, that a shipwright who kept a ship in his dock after repairing her, in order to preserve his lien, had *no claim at all* for dock charges against the owner of the ship for the time that elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default in payment. Cockburn C. J. in the Exchequer Chamber,[4] said: "It is not for us sitting here judicially to attach to the right of lien which a *vendor* or bailee has in certain cases, a new right which it is now sought to enforce for the first time." In the House of Lords, Lord Wensleydale said: "The first point is whether if a person who has a

[1] Hammonds *v.* Barclay, 2 East, 235.

[2] Miles *v.* Gorton, 2 C. & M. 504.

[3] 1 E. B. & E. 353; 27 L. J. Q. B. 397; in Ex. Ch. E. B. & E. 367; 28 L. J. Q. B. 220; in the house of Lords, 8 H. L. C. 338; 30 L. J. Q. B. 221.

[4] 28 L. J. Q. B. 221.

lien on any chattel, chooses to keep it for the purpose of enforcing his lien, he can make *any claim* against the proprietor of that chattel for so keeping it. . . . I am clearly of opinion that no person has by law a right to add to his lien upon a chattel, a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession." Lord Cranworth, who concurred, said, however, that he gave no opinion "as to what would have been the right of Messrs. Somes, *if they had claimed no* [*783] *lien*, but * had said to the owners of the ship, when the repairs were completed, 'Your ship is fit to be taken away; it encumbers our dock, and you must take it away immediately.' If after that the shipowners had not taken it away, but had left it an unreasonable time, namely, twenty-seven days, occupying the dock, neither the Court of Queen's Bench, nor the Court of Exchequer Chamber, has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock, for the time it was so improperly left there.[5] But the short question is only this, whether Messrs. Somes retaining the ship, *not for the benefit of the owners* of the ship, *but for their own benefit*, in order the better to enforce the payment of their demand, could then say, 'We will add our demand for the use of the dock during that time to our lien for the repairs.' The two Courts held, and I think correctly held, that they had no such right."

In the case of Crommelin *v.* The New York and Harlem R. Co.,[6] the Court of Appeals of New York held, in like manner, that a railway company had no lien for a claim in respect of the delay of a consignee in taking away goods, which therefore remained in their cars for a considerable time; that the lien was for freight only, and the claim for demurrage was only personal, and could not be enforced by a detention of the goods.[7]

[5] See *per* Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426.

[6] 4 Keyes (N. Y.) 90.

[7] *Import of lien.* — A lien is not a right of property in the thing itself, as that would be to have a lien upon

§ 1079. The vendor's lien may of course be waived expressly. It may also be waived by implication at the time of the *formation* of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the *performance* of the contract, by the vendor's actually parting with the goods before payment.

The lien is waived by implication, when time is given for payment, and nothing is said as to delivery; in other words, when goods are sold on credit. It is of course competent for the parties to agree expressly that the goods, though sold * on credit, are not to be delivered till paid for; [*784] but unless this special agreement, or an established usage to the same effect in the particular trade of the parties, can be shown, selling goods on credit means *ex vi terminorum* that the buyer is to take them into his possession, and the

one's own property. A lien for the purchase-money or price, imports that the property has vested in the purchaser. A vendor has a lien on personal property sold for the price, so long as he retains possession of it, where there has been no stipulation for credit or other waiver of the lien. Barr *v.* Logan, 5 Harr. (Del.) 52; Owens *v.* Weedman, 82 Ill. 409; Bradey *v.* Michael, 1 Ind. 551; Milliken *v.* Warren, 57 Me. 46; Safford *v.* McDonough, 120 Mass. 291; Ware River R. R. Co. *v.* Vibbard, 114 Mass. 447; Arnold *v.* Delano, 58 Mass. (4 Cush.) 39; s. c. 50 Am. Dec. 754; Parks *v.* Hall, 19 Mass. (2 Pick.) 212; Southwestern &c. Co. *v.* Plant, 45 Mo. 517; Southwestern &c. Co. *v.* Stanard, 44 Mo. 71; Clark *v.* Draper, 19 N. H. 419; Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363; Cornwall *v.* Haight, 8 Barb. (N. Y.) 328; Palmer *v.* Hand, 13 Johns. (N. Y.) 434; s. c. 7 Am. Dec. 392; Lupin *v.* Marie, 6 Wend. (N. Y.) 77; s. c. 21 Am. Dec. 256; Welsh *v.* Bell, 32 Pa. St. 12; Bowen *v.* Burk, 13 Pa. St. 146; United States *v.* Lutz, 2 Blatchf. C. C. 383; Moore *v.* Newbury, 6 McL. C. C. 472; Hawes *v.* Watson, 2 Barn. & Cres. 540; Tanner *v.* Scovell, 14 Mees. & W. 28; Hudson *v.* Loy, 7 T. R. 445; Brown on Sales, sec. 548; Story on Sales, sec. 282.

The vendor is not required to surrender possession to the vendee, after the latter has become bankrupt or insolvent, without payment of the price. And in those cases where the vendee has given a note or other obligation for the property, and is entitled to a delivery, if the note or other obligation has been dishonored, the vendor has a lien for the price. Milliken *v.* Warren, 57 Me. 46; Arnold *v.* Delano, 58 Mass. (4 Cush.) 39; s. c. 50 Am. Dec. 754; Clark *v.* Draper, 19 N. H. 419; Benedict *v.* Field, 16 N. Y. 595; Roget *v.* Merrit, 2 Cai. (N. Y.) 117; Morgan *v.* Bain, L. R. 10 C. P. 15; Ex parte Chalmer, L. R. 8 Ch. 289. See Hunter *v.* Talbot, 11 Miss. (3 Smed. & M.) 754; Southwestern F. Co. *v.* Stanard, 44 Mo. 71; Babcock *v.* Bonnell, 80 N. Y. 244; White *v.* Welsh, 38 Pa. St. 396; Noad *v.* Tompson, 11 Low. Can. 29; Robertson *v.* Farguson, 8 Low. Can. 239.

vendor is to trust to the buyer's promise for the payment of the price at a future time.

§ 1080. In Spartali *v.* Benecke,[1] the sale was of thirty bales of wool, "to be paid for by cash in one month, less five per cent. discount." The vendors insisted that they were not bound to deliver the goods till payment, and tendered evidence of usage of the wool trade that under such a contract the vendors were not bound to deliver without payment. Both contentions were overruled by Talfourd J. at Nisi Prius, and it was held by the Court in Banc, *first*, that "it was clear law that where by the contract the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment;"[2] and, *secondly*, that parol evidence of usage was inadmissible to contradict the terms of the written contract, which implied if indeed they did not express, that delivery was to be made before payment.

§ 1081. But on this second point, Spartali *v.* Benecke has been overruled by the Exchequer Chamber in Field *v.* Lelean.[1] There the sale was by one broker in mining-shares to another. The contract was, "Bought, Thomas Field, Esq., 250 shares, &c., at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment, half in two, half in four months." It was held by the Court, unanimously, that parol evidence was admissible of a usage [*785] * among dealers in such shares, that the delivery was to take place concurrently with, and at the time agreed on for payment. Williams J. made some remarks with the view of suggesting a distinction between this case and Spartali *v.* Benecke, but added: "If Spartali *v.* Benecke

[1] 10 C. B. 212; 19 L. J. C. P. 293. See, also, Ford *v.* Yates, 2 M. & G. 549; Lockett *v.* Nicklin, 2 Ex. 93; Greaves *v.* Ashlin, 3 Camp. 426, referred to *ante*, p. 769.

[2] Chase *v.* Westmore, 5 M. & S. 180; Crawshay *v.* Homfray, 4 B. & Ald. 50; Cowell *v.* Simpson, 16 Ves. Jr. 275.

[1] 6 H. & N. 617; 30 L. J. Ex. 168. See, also, cases cited in notes to Wigglesworth *v.* Dollison, 1 Sm. L. C. 594, ed. 1879.

cannot be distinguished in this way, I agree it ought to be overruled." Wightman J., however, delivered the judgment of the whole Court, declining to make any distinction, so that upon *this point* Spartali *v.* Benecke must be treated as an overruled case. But its authority is unshaken in support of the principle, that a sale on credit, in the absence of a contrary stipulation express or implied from usage is a waiver of the vendor's lien, and entitles the purchaser to delivery before payment.

§ 1082. A vendor also waives his lien by taking from the buyer a bill of exchange or other security payable at a distant day;[1] and in Chambers *v.* Davidson,[2] Lord Westbury, in giving the decision of the Privy Council, said: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.*"[3]

§ 1083. The vendor's lien is abandoned when he makes delivery of the goods to the buyer. At what precise state of the dealings between the parties, the acts of the vendor in

[1] Hewison *v.* Guthrie, 2 Bing. N. C. 755; 3 Scott, 298; Horncastle *v.* Farran, 3 B. & Ald. 497; Pooley *v.* Great Eastern Railway Co., 34 L. T. N. S. 537.

[2] L. R. 1 P. C. 296; 4 Moo. P. C. C. N. S. 158.

[3] *What constitutes a waiver.* — If the vendor should enter into a special contract, or do any act or thing, inconsistent with the right of lien, it would be a constructive waiver of it. Pickett *v.* Bullock, 52 N. H. 354; Dempsey *v.* Carson, 11 Up. Can. C. P. 462. See Douglas *v.* Shumway, 79 Mass. (13 Gray) 498; Smith *v.* Lynes, 5 N. Y. 41; Thompson *v.* Wedge, 50 Wis. 642. An absolute delivery without requiring performance of a condition of payment of cash, or commercial paper, or security, it would be a constructive waiver. See authorities last cited, and also Smith *v.* Dennie, 23 Mass. (6 Pick.) 262; s. c. 17 Am. Dec. 368; Carleton *v.* Sumner, 21 Mass. (4 Pick.) 516; Hussey *v.* Thornton, 4 Mass. 405; s. c. 3 Am. Dec. 224; Husted *v.* Ingraham, 75 N. Y. 251; Chapman *v.* Lathrop, 6 Cow. (N. Y.) 110; s. c. 16 Am. Dec. 433; People *v.* Haynes, 14 Wend. (N. Y.) 546; s. c. 28 Am. Dec. 530; Furniss *v.* Hone, 8 Wend. (N. Y.) 247; Goldsmith *v.* Byrant, 26 Wis. 34.

performance of his contract will amount to a delivery *sufficient to divest his lien*, is in some cases a matter very difficult to determine. As soon as a bargain and sale are completed, we have already seen that the buyer becomes at once vested with the ownership and the *right of possession*, but [*786] that * *actual possession* does not pass by the mere contract. Something further is required, unless, indeed, the buyer had been previously in actual possession as bailee of the vendor, in which case, of course, the vendor's assent that the buyer shall thenceforth possess in his own right as proprietor of the thing would make a complete delivery for all purposes.[1]

§ 1084. The "actual receipt" required by the Statute of Frauds, being possible only when the vendor has made delivery, our present inquiry has been anticipated to some extent in Book I. Part 2. Ch. 4. But that inquiry had reference to the *formation* of the contract, and we must now seek for some guiding principles in the great mass of authorities for determining when the delivery by the vendor is so far advanced that he has lost his lien, and may maintain a count for goods sold and delivered.

§ 1085. As there must always be a delivery of possession of *part* of the goods at least to satisfy the clause of the Statute of Frauds which relates to "actual receipt," it would

[1] *Effect of voluntary, unconditional delivery.* — The lien is generally waived by a voluntary and unconditional delivery of the property to the purchaser. Blackshear *v.* Burke, 74 Ala. 239; Obermeir *v.* Core, 25 Ark. 562; Barnett *v.* Mason, 7 Ark. (2 Eng.) 253; Johnson *v.* Farnum, 56 Ga. 144; McNail *v.* Ziegler, 68 Ill. 224; Flint *v.* Rawlings, 20 La. An. 557; Freeman *v.* Nichols, 116 Mass. 309; Haskins *v.* Warren, 115 Mass. 514; Scudder *v.* Bradbury, 106 Mass. 422; Booming Co. *v.* Underhill, 43 Mich. 629; Lupin *v.* Marie, 6 Wend. (N. Y.) 77; s. c. 21 Am. Dec. 256; Bowen *v.* Burk, 13 Pa. St. 146; Boyd *v.* Mosley, 2 Swan (Tenn.) 661; Gay *v.* Hardeman, 31 Tex. 245; Thompson *v.* Wedge, 50 Wis. 642; Singer Man. Co. *v.* Sammons, 49 Wis. 316. But a right of lien for the price may, by agreement between the parties, continue after delivery, and the property be subjected to the lien so far as the vendor and vendee are concerned. But third parties could not generally be prejudiced by such agreement. Sawyer *v.* Fisher, 32 Me. 28; Husted *v.* Ingraham, 75 N. Y. 251; Hale *v.* Omaha Nat. Bank, 64 N. Y. 555; Bunn *v.* Valley Lumber Co., 51 Wis. 376; Gregory *v.* Morris, 96 U. S. (6 Otto) 619; bk. 24, L. ed. 740. See, also, Southwestern F. Co. *v.* Plant, 45 Mo. 517.

seem to be a natural inference that the same acts which have been held sufficient under that statute to constitute an actual receipt by the purchaser, would, if done in respect of the *whole* of the goods sold, have the like effect in determining the vendor's lien, and justifying an action for goods sold and delivered.

This was the impression of the learned author of the Treatise on Mercantile Law, as shown in an elaborate note, in which the authorities are reviewed:[1] and this view of the law is believed to be sound, so far as regards the ability of the vendor to maintain an action for goods sold and delivered. But we have seen in a preceding chapter[2] that in cases where the vendor retains possession of the chattel in the changed character of bailee for the buyer, there is a clear distinction between such a delivery as would suffice under the Statute of Frauds, and a delivery sufficient to divest the vendor's lien.

§ 1086. Where the goods are at the time of the contract already in possession of the buyer, as agent of the vendor, the mere * completion of the contract oper- [*787] ates as a delivery of possession. There is nothing further that can be done to transfer the actual possession. If the question were as to the *formation* of the contract under the Statute of Frauds, evidence would of course be required to show that the buyer's possession had become changed from that of bailee to that of purchaser.[1] But after a sale has been shown to exist, the goods being already in *actual* possession, and the effect of the contract being to transfer the *right of possession* as well as that of property, the delivery becomes complete of necessity, without further act on either side; though of course in this, as in all other cases, the parties may, by agreement, provide that this effect shall not take place. If A. has consigned to B. goods for sale, there is nothing in the law to prevent a contract between them by which

[1] Sm. Mer. Law, note (*s*), p. 497, ed. 1877.

[2] *Ante*, p. 748.

[1] Eden *v.* Dudfield, 1 Q. B. 306; Lillywhite *v.* Devereux, 15 M. & W. 285; Taylor *v.* Wakefield, 6 E. & B. 765.

A. sells the goods to B., coupled with a stipulation that B.'s possession shall continue to be that of a bailee for A., until the price is paid.[2]

§ 1087. When the goods are at the time of sale in possession of a third person, an actual delivery of possession takes place, and the vendor's lien is lost as soon as the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor, and shall become

[2] *Delivery by endorsement and delivery of warehouse receipts.* — A warehouse-keeper's receipts, transferred by the vendor to the vendee, and assented to by the warehouse-keeper, changes the control and dominion of the property, and makes the bailee the agent of the vendee. But any lien of the bailee would remain unchanged. Sansee *v.* Wilson, 17 Iowa, 582; Bullard *v.* Wait, 82 Mass. (16 Gray) 55; Tuxworth *v.* Moore, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; Gardner *v.* Howland, 19 Mass. (2 Pick.) 599; Williams *v.* Gray, 39 Mo. 201; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Linton *v.* Butz, 7 Pa. St. 89; s. c. 47 Am. Dec. 501. It seems that the warehouseman should have notice, or the seller will retain his lien. In re Bachelder, 2 Low. C. C. 245. See Boardman *v.* Spooner, 95 Mass. (13 Allen) 353. The order of the bailor of goods, given to the vendee, directing the bailee to deliver the goods to the vendee, or hold them subject to his order, will not effect a change of possession amounting to actual receipt, unless the bailee assents to it; and until then the bailee remains the agent of the vendor. Burge *v.* Cone, 88 Mass. (6 Allen) 412; Bullard *v.* Wait, 82 Mass. (16 Gray) 55; Rourke *v.* Bullens, 74 Mass. (8 Gray) 549; Appleton *v.* Bancroft, 51 Mass. (10 Metc.) 236; Carter *v.* Willard, 36 Mass. (19 Pick.) 1; Tuxworth *v.* Moore, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; Deady *v.* Goodenough, 5 Up. Can. C. P. 163; Blackburn on Sales, 28. If the bailee accepts the order, and agrees to hold the goods for the vendee, the possession is absolutely changed. See Chase *v.* Willard, 57 Me. 157; Warren *v.* Milliken, 57 Me. 97; Townsend *v.* Hargraves, 118 Mass. 327; Cushing *v.* Breed, 96 Mass. (14 Allen) 376; Hatch *v.* Lincoln, 66 Mass. (12 Cush.) 31; Hollingsworth *v.* Napier, 3 Cai. (N. Y.) 185; s. c. 2 Am. Dec. 268; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; s. c. 4 Am. Dec. 364; Bassett *v.* Camp, 54 Vt. 232; Allen *v.* Ferguson, 1 Hannay (N. B.) 149.

A transfer of a warehouse receipt is, in various states, equivalent to a delivery of the title to the goods embraced in it, and operates the same as the assignment of a bill of lading. This is sometimes regulated by custom or provided for by statute. See Allen *v.* Maur, 66 Ala. 10; Davis *v.* Russell, 52 Cal. 611; s. c. 28 Am. Rep. 647; Burton *v.* Curyea, 40 Ill. 320; Cochran *v.* Ripy, 13 Bush (Ky.) 495; Merchants' Bank *v.* Hibbard, 48 Mich. 118; s. c. 42 Am. Rep. 465; Hazard *v.* Fiske, 83 N. Y. 287; Whitlock *v.* Hay, 58 N. Y. 484; Walls *v.* Bailey, 49 N. Y. 468; s. c. 10 Am. Rep. 407; Bower *v.* Peabody, 13 N. Y. 121; Second Nat. Bank *v.* Walbridge, 19 Ohio St. 424; s. c. 2 Am. Rep. 408; Farmers' & Mechanics' Bank *v.* Champlan Trs. Co., 16 Vt. 52; s. c. 42 Am. Dec. 491; New York Law 1858, Ch. 326, § 6, p. 532; Massachusetts Pub. St. c. 72, p. 1.

the agent of the buyer in retaining custody of them.[1] The cases have been reviewed, *ante*, pp. 151 *et seq.*; 755 *et seq.*[2]

§ 1088. The goods are generally in the vendor's possession at the time of sale, and the modes by which delivery can be effected are so various as fully to justify Chancellor Kent's remark,[1] that "it is difficult to select those leading principles which are sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law." Many points, however, are free from doubt.

§ 1089. A delivery of the goods to a common carrier for * conveyance to the buyer is such a delivery [*788] of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien.[1]

§ 1090. Generally, a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien. He may, if he choose, give up part, and

If the vendee has not paid the price, and fails before actual delivery, the vendor may revoke the order. Keeler *v.* Goodwin, 111 Mass. 490.

[1] Harman *v.* Anderson, 2 Camp. 244; Bentall *v.* Burn, 3 B. & C. 423; Lackington *v.* Atherton, 7 M. & G. 360; Farina *v.* Home, 16 M. & W. 119; Godts *v.* Rose, 17 C. B. 229; 25 L. J. C. P. 61; Bill *v.* Bament, 9 M. & W. 36; Lucas *v.* Dorrien, 7 Taunt. 278; Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. Ex. 185.

[2] *When formal delivery not necessary.* — Where the property sold is in the possession of the vendee, no formal act of delivery is required. The title and possession pass to the vendee. Lake *v.* Morris, 30 Conn. 201; Wells *v.* Miller, 37 Ill. 276; Nichols *v.* Patten, 18 Me. 231; s. c. 36 Am. Dec. 713; Martin *v.* Adams, 104 Mass. 262; Warden *v.* Marshall, 99 Mass. 305; Shurtleff *v.* Willard, 36 Mass. (19 Pick.) 209; Carrington *v.* Smith, 25 Mass. (8 Pick.) 419; Messer *v.* Woodman, 22 N. H. (2 Fost.) 172.

[1] 2 Kent (ed. 1873) 510.

[1] Dawes *v.* Peck, S. T. R. 330; Waite *v.* Baker, 2 Ex. 1; Fragano *v.* Long, 4 B. & C. 219; Dunlop *v.* Lambert, 6 Cl. & F. 600; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; 22 L. J. Q. B. 401; Cusack *v.* Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261; Hart *v.* Bush, E. B. & E. 494; 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145. But see Clarke *v.* Hutchins, 14 East, 475.

Delivery to a common carrier in the usual course of business is sufficient to pass the title, although the right of stoppage *in transitu* remains in the vendor. The carrier becomes the agent of the vendee. Hunter *v.* Wright, 94 Mass. (12 Allen) 550; Merchant *v.* Chapman, 86 Mass. (4 Allen) 362; Orcutt *v.* Nelson, 68 Mass. (1 Gray) 536; Putnam *v.* Tillotson, 54 Mass. (13 Metc.) 517; Stanton *v.* Eager, 33 Mass. (16 Pick.) 467; Wolsey *v.* Bailey, 7 N. H. (7 Frost.) 217; Waldron *v.* Romaine, 22 N. Y. 368;

retain the rest: and then his lien will remain on the part retained in his possession for the price of *the whole;* but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole, and puts an end to the vendor's possession, and consequently to his lien. The rule was stated conversely by Parke J. in Dixon *v.* Yates,[1] where he said "that if part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole;" and by Taunton J. in Betts *v.* Gibbons,[2] where, in answer to counsel who maintained that a delivery of part amounts to a delivery of the whole, only when circumstances show that it is meant as such, the learned judge said, "No; on the contrary, a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant;" but these *dicta* were strongly questioned by Pollock C. B., in Tanner *v.* Scovell,[3] and it is submitted that the cases support the principle above stated, in accordance with the opinion of Pollock C. B. The point is not, however, of much practical importance, as it always resolves itself into a question of intention to be determined by the jury according to all the facts and circumstances of the particular case.

§ 1091. In Slubey *v.* Heyward,[1] the defendants being in possession of bills of lading which had been endorsed [*789] to them as *sub-vendees of a cargo of wheat, had ordered the vessel to Falmouth, with the consent of the vendor, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original vendor attempted to stop the further delivery because his buyer had become insolvent. Held, that "the transitus was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of, delivery to separate part of the cargo from the rest."

Ranney *v.* Higby, 5 Wis. 62; Mason *v.* Hatten, 41 Up. Can. Q. B. 610. See Seymour *v.* Newton, 105 Mass. 272.

[1] 5 B. & Ad. 313–341.

[2] 2 A. & E. 73.

[3] 14 M. & W. 28.

[1] 2 H. Bl. 504.

Hammond *v.* Anderson,[2] followed in the same Court. It was the case of a delivery order for all the goods given to the purchaser, and possession taken by him of part at the wharfinger's premises, and a subsequent attempt by the vendor to stop delivery of the rest.

It seems very plain that in these two cases there was a delivery of the whole, not because a part was carried away, but because the vendor's agent and bailee in each case had attorned to the buyer, and become the buyer's bailee. There was, in the case of the bill of lading, and of the delivery order, an agreement between the vendor, the buyer, and the bailee, that the last-named should henceforth hold for account of the buyer.

§ 1092. [Slubey *v.* Heyward and Hammond *v.* Anderson were explained in this way by Brett L. J. in Ex parte Cooper,[1] and do not, therefore, form exceptions to the general rule, that *in the absence of evidence to the contrary* it is to be assumed that the delivery of a part of the goods is intended to operate only as a delivery of that part and not of the whole.]

§ 1093. In Bunney *v.* Poyntz,[1] the vendee of a parcel of hay asked the vendor's permission to take a part, and this was granted, and it was held not to be a delivery of the whole.

*So in Dixon *v.* Yates,[2] the delivery by the vendor [*790] of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the vendor having refused a delivery order for the whole.

In Simmons *v.* Swift,[3] the delivery of part of a stack of bark was held not to be a delivery of the whole, but the decision was on the ground that the sale was by weight, and the part remaining had not been *weighed*.[4]

[2] 1 B. & P. N. R. 69. See, also, Tansley *v.* Turner, 2 Bing. N. C. 151; [1] 11 Ch. D. 68, C. A. at p. 74. See, also, the observations on these cases by Bramwell L. J. in Ex parte Falk, 14 Ch. D. 446, C. A. at p. 455. Ex parte Cooper and Ex parte Falk are noticed *post*, Chapter on Stoppage in Transitu.

[1] 4 B. & Ad. 568.

[2] 5 B. & Ad. 313.

[3] 5 B. & C. 857.

[4] See Hanson *v.* Meyer, 6 East, 614.

§ 1094. In Miles *v.* Gorton,[1] the vendors sold a parcel of hops consisting of two kinds, twelve pockets of one, and ten pockets of the other. They rendered one invoice for the whole, which expressed that the goods remained at rent for account of the buyer. A bill of exchange was given in payment. The buyer sold the ten pockets of one kind, and they were delivered to his sub-vendee. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the vendors for the twelve pockets remaining on hand. Follett, for the plaintiffs, declined to contend that a vendor loses his lien by merely delivering part; and he admitted the rule to be that a part delivery only operates as a constructive delivery of the whole when so intended, but he insisted that the intention was to deliver the whole. It was held by all the judges that the delivery of part did not constitute delivery of the whole, and Harman *v.* Anderson was distinguished on the ground that the goods were in the possession of a *third person*, Bayley B. saying: "Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee as between him and the vendor. I do not think that the payment of warehouse rent to the vendor has the effect of a constructive delivery of the whole in a case where the goods remain in the possession of the vendor."

§ 1095. In Tanner *v.* Scovill,[1] the facts were that [*791] one McLaughlin *bought of Boutcher and Co. certain goods on board of a vessel lying at a wharf of defendants, and the vendors gave an order for the delivery to McLaughlin, addressed to the defendants, in the following terms: "Please weigh and deliver to Mr. McLaughlin 48 bales glue pieces." The defendants, on receipt of the order,

[1] 2 Cr. & M. 504; and see Grice *v.* Richardson, 3 App. Cas. 319.

[1] 14 M. & W. 28. See, also, Jones *v.* Jones, 8 M. & W. 431; Whitehead *v.* Anderson, 9 M. & W. 518; Wentworth *v.* Outhwaite, 10 M. & W. 436; Crawshay *v.* Ede, 1 B. & C. 181; Bolton *v.* Lancashire and Yorkshire Railway Co., L. R. 1 C. P. 431; 35 L. J. C. P. 137.

weighed and sent a return of the weight to Boutcher and Co., who thereupon made an invoice, which they sent to McLaughlin, showing the price to amount to 168*l.* 1*s.* 6*d.* About a month later, the defendants delivered five of these bales to a sub-vendee of McLaughlin on the latter's order. Other vessels arrived with further goods, which were treated in the same way, by handing delivery orders to the buyer, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendant's books to McLaughlin, nor any rent charged to him. Another partial delivery was made to a sub-vendee of McLaughlin, and the vendors then notified the defendants to make no further deliveries, McLaughlin having failed to make them a payment according to promise, and being then in debt to them about 700*l.* McLaughlin afterwards became bankrupt, and his assignees brought this action in trover against the defendants. There was evidence at the trial in relation to some objection made by McLaughlin to the weights. *Held*, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and secondly, that the delivery of the part removed from the wharf was not intended to be and did not operate as, a delivery of the whole, but was a separation for the purpose of that part only, leaving all the rest *in statu quo*.

§ 1096. No case has been met with where the delivery of part has been held to constitute a delivery of the remainder when kept in the *vendor's own custody*.[1]

[1] See Lord Ellenborough's remarks in Payne *v.* Shadbolt, 1 Camp. 427; and as to effect of partial delivery on the carrier's lien, see Moeller *v.* Young, 5 E. & B. 7; 24 L. J. Q. C. 217; 25 L. J. Q. B. 94.

Vendor's lien where part of property is delivered. — If part of the property is delivered the balance will usually be subject to the lien. Haskell *v.* Rice, 77 Mass. (11 Gray) 240; Arnold *v.* Delano, 58 Mass. (4 Cush.) 39; s. c. 50 Am. Dec. 754; Parks *v.* Hall, 19 Mass. (2 Pick.) 212; Buckley *v.* Furniss, 17 Wend. (N. Y.) 504. The rule should be the same in such cases as with common carriers, who may deliver part of the goods carried and retain a lien for carriage on the balance. Potts *v.* New York & N. E. R. Co., 131 Mass. 455; s. c. 41 Am. Rep. 247; New Haven & N. Co. *v.* Campbell, 128 Mass. 104; s. c. 35 Am. Rep. 360; Lane *v.* Old Col. & F. R. R. Co., 80 Mass. (14 Gray) 143.

[*792] § 1097. *A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name, or setting them aside,[1] or boxing them up by the purchaser's orders, and putting his name on them,[2] so long as the vendor holds the goods, and has not agreed to give credit on them.

§ 1098. On the same principle which permits the vendor to remain in custody of the goods in the changed character of bailee for the purchaser, it would seem that the buyer may be let into possession of the goods for a special purpose, or in a different character from that of buyer. Thus, A. might refuse to deliver a horse sold to B., *qua* purchaser, but lend it to him for a day or a week:[1] might sell his horse to the stable keeper, who already has the horse at livery, and stipulate that the buyer's possession should continue that of bailee, until payment of the price. So in one case where a watch was transferred by the master of a vessel to the owners as pledgees, and they then lent the watch to the pawnor, it was held that the pawnor possessed as agent of the pawnees, and that they could recover the watch in trover against third persons, to whom the pawnor had pledged it a second time.[2]

§ 1099. If the vendor consent to give delivery to the buyer, only on a condition, it is of course incumbent on the buyer to perform the condition before he can claim the possession. As where a vendor gave the buyer an order for goods lying in a bonded warehouse, with the understanding that the buyer was to pay the duties, it was held that on the buyer's insolvency, his assignees could not take possession of the goods without refunding the duties which the vendor had advanced on default of the buyer.[1] So, also, if anything is to be done to the goods before delivery, as in

[1] Goodall *v.* Skelton, 2 H. Bl. 316; Dixon *v.* Yates, 5 B. & Ad. 313; Simmons *v.* Swift, 5 B. & C. 857; Townley *v.* Crump, 4 A. & E. 58; Proctor *v.* Jones, 2 C. & P. 532.

[2] Boulter *v.* Arnott, 1 C. & M. 333.

[1] Tempest *v.* Fitzgerald, 3 B. & A. 680; Marvin *v.* Wallace, 6 E. & B. 726; 25 L. J. Q. B. 369.

[2] Reeves *v.* Capper, 5 Bing. N. C. 136.

[1] Winks *v.* Hassall, 9 B. & C. 372.

* Hanson *v.* Meyer [2] (where the goods were to be [*793] weighed), and the cases [3] decided on its authority.[4]

§ 1100. It is now necessary to examine the question as to the effect on the vendor's lien, of the transfer and endorsement to the buyer of the instruments known in commerce as documents of title. The statutory law will first be referred to, and it consists of the enactments known as the Factors' Acts, The Bills of Lading Act, The Legal Quays Act for the port of London, and the Sufferance Wharves Act, also for the port of London.

The Factors' Acts, 1823 to 1877, namely, the 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39, are intended to afford security to persons dealing with factors. The Act 5 & 6 Vict. c. 39, provides substantially as follows: —

By the 1st section, that any agent entrusted with the possession of goods, *or of the documents of title to goods*, shall be *deemed and taken* to be *the owner of such goods and documents*, so far as to give validity to any contract or agreement by way of pledge, lien or security, *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and that such contract or agreement shall be binding upon and good against the owner of such goods, and all persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.

§ 1101. By the 2d section it is enacted, that where any such contract or agreement for pledge, lien or security, shall

[2] 6 East, 614.

[3] Wallace *v.* Breeds, 13 East, 522; Busk *v.* Davis, 2 M. & S. 396; Shepley *v.* Davis, 5 Taunt. 617; and see Swanwick *v.* Sothern, 9 A. & E. 895.

[4] So long as the seller retains possession of the goods, or a third person holds them for him, he retains a right of lien. Sloan *v.* Kingore, 3 Ind. 549; Milliken *v.* Warren, 57 Me. 46; Bates *v.* Conkling, 10 Wend. (N. Y.) 389; Brown on Sales, 458; Whitaker on Lien, 70. Marking and setting aside the goods will not deprive him of it, so long as he holds the goods. Arnold *v.* Delano, 58 Mass. (4 Cush.) 39; s. c. 50 Am. Dec. 754.

be made in consideration of the delivery or transfer to such agent of any other goods or merchandise or document of title or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien, and security for, or in respect of a previous advance, by [*794] virtue of some contract *or agreement made with such agent, such contract or agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance, within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money, provided that the lien so acquired shall not exceed in amount the value of whatever may be delivered up or exchanged.

§ 1102. By the 3d section it is provided, "That this Act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances and exchanges, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandise; and nothing herein shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt[1] owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid, in deviating from any express orders or authority received from the owner, but that for the purpose and to the intent of protecting all such *bonâ fide* loans, advances and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose,

[1] This must be taken subject to 6 Geo. 4, c. 94, s. 3, by which a pledge by a factor for an antecedent debt stands good to the amount of the factor's interest in the goods; and see Jewan *v.* Whitworth, 2 Eq. 692; and Macnee *v.* Gorst, 4 Eq. 315.

such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

§ 1103. By the 4th section, a "document of title" is stated to mean "*any bill of lading*, *India warrant*, *dock warrant*, *warehouse-keeper's certificate*, *warrant*, or *order for the delivery of goods*, or * any other document [*795] used in the ordinary course of business as *proof of the possession* or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods *thereby represented*."[1]

§ 1104. The same section defines an "agent" as "intrusted," whether he has the goods or documents in his actual custody, or they are held by any other person subject to his control, or for him or on his behalf; and provides that, where any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing, to consign, deposit, transfer, or deliver them, and they shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, though not actually received by the person making such loan or advance till the period subsequent thereto.[1]

[1] The Stamp Act, 1870 (ss. 87–92), requires delivery orders and warrants for goods to be stamped, and contains a definition of those instruments.

[1] As to these last words there is a dictum of Lord Hatherley (then Wood V.-C.) in Portalis *v.* Tetley, L. R. 5 Eq. at p. 148, that they were meant to apply to "the case where the factor being advised that goods are coming forward to him agrees that as soon as he gets them, and as soon as the bills of lading come to hand, he will pledge them." The point was again raised but not decided in Cole *v.* The North Western Bank, L. R. 9 C. P. 470. See *per* Coleridge C. J. at pp. 486 and 487. The editors submit, although with diffidence, that these words were meant to apply such a state of facts as arose in Bonzi *v.* Stewart, 4 M. & G. 295, where a factor obtained an advance on a *Saturday*, upon promising to deposit dock warrants to cover the advance. The dock warrants were not then in existence, but were afterwards made out and deposited on the *Monday*. The

[*796] § 1105. * The 4th section further provides that any payment made, whether by money or bills of exchange, or other negotiable security, shall be an advance: and that the agent in possession of such goods *or documents* shall be taken to have been entrusted with them by the owner, *unless the contrary can be shown in evidence.*[1]

The antecedent Act of 6 Geo. IV. c. 94, provided in the 2d section, that the possession of these documents of title should suffice "to give validity to *any sale or* disposition of the goods," by the factor, and the amending Act during the reign of her Majesty was intended to extend the powers of factors, to increase the security of those dealing with them, and to meet decisions in which, by the stringent construction of the Courts,[2] cases supposed to be within the former statutes had been excluded. These purposes are stated in the preamble.

§ 1106. [By the Factors Act, 1877 (40 & 41 Vict. c. 39), it is provided substantially as follows: —

By the 2d section, that where any agent has been entrusted with and continues in the possession of any goods or documents of title to goods within the meaning of the previous Acts, as amended by that Act, any revocation of his entrustment or agency shall not affect the rights of any other person who, *without notice of such revocation*, purchases such goods or makes advances upon the faith or security of such goods or documents.

This alters the law as laid down in Fuentes *v.* Montis,[1] *post*, p. 806.

goods represented by the dock warrants were in dock on the *Saturday*, consigned to the factor who held bills of lading for them. The question was not properly raised on the pleadings, but the Court intimated their opinion that this was the real question between the parties, and that such a transaction was not protected by the then Factors Act, 6 Geo. 4, c. 94, s. 2, because the factor was not *entrusted with and in possession of the warrants* at the time of the advance, and leave was given to amend the pleadings.

[1] Baines *v.* Swainson, *post*, p. 806.

[2] The most important of these decisions were Evans *v.* Trueman, 1 Moo. & R. 10; Taylor *v.* Kymer, 3 B. & Ad. 320; Fletcher *v.* Heath, 7 B. & C. 517; Phillips *v.* Huth, 6 M. & W. 572; 9 M. & W. 647; Bonzi *v.* Stewart, 4 M. & G. 295.

[1] L. R. 3 C. P. 268; aff. in Ex. Ch. 4 C. P. 93.

§ 1107. By the 3d section, that where any goods have been sold, and *the vendor or any person on his behalf continues or is in possession of the documents of title thereto*, any sale, pledge, or other disposition of the goods or documents, made by such vendor, or any person or agent entrusted by the vendor * with the goods or documents, shall be as [*797] effectual as if such vendor or person were *an agent entrusted by the vendee* with the goods or documents within the meaning of the previous Acts, as amended by that Act, provided that the person to whom the sale or pledge is made has not notice that the goods have been previously sold.

This alters the law as laid down in the cases of Johnson *v.* The Credit Lyonnais Company and Johnson *v.* Blumenthal,[1] which came before the Courts immediately before the passing of the Act.

§ 1108. By the 4th section, that where any goods have been sold or contracted to be sold, and *the vendee or any person on his behalf obtains the possession of the documents of title thereto from the vendor or his agents*, any sale or pledge of such goods, or documents by such vendee so in possession, or by any other person or agent entrusted by the vendee with the documents within the meaning of the Acts, shall be as effectual as if such vendee or other person were an *agent entrusted by the vendor* with the documents within the meaning of the previous Acts, as amended by that Act, provided the person to whom the sale or pledge is made has not notice of any lien or other right of the vendor in respect of the goods.

This alters the law as laid down in the cases of Jenkyns *v.* Usborne,[1] and Van Casteel *v.* Booker.[2]

§ 1109. By the 5th section, that where any document of title to goods has been *lawfully* endorsed or otherwise trans-

[1] 2 C. P. D. 224; aff. on appeal, 3 C. P. D. 32. Cockburn C. J., at p. 36, in delivering his judgment in the Court of Appeals, refers to this section of the Act which had received the Royal Assent pending the appeal. The Act is not retrospective in its operation (s. 6).

[1] 7 M. & G. 678, 699; s. c. 8 Scott, N. R. 505.

[2] 2 Ex. 691; s. c. 18 L. J. Ex. 9.

ferred to any person *as a vendee or owner of the goods*, and such person transfers such document by endorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for valuable consideration, *the last-mentioned transfer shall have the same effect for defeating any vendor's lien or* [*798] *right of * stoppage in transitu, as the transfer of a bill of lading has for defeating the right of stoppage in transitu.*

The effect of this section is to assimilate all documents of title when in the hands of a *bonâ fide* transferee for value from the original purchaser, that is to say, documents of title as defined by the previous Act (5 & 6 Vict. c. 39, s. 4),[1] to bills of lading for the purposes mentioned in the section, viz. of defeating the vendor's lien or his right of stoppage *in transitu*. It thus, to some extent, gives effect to the remarks of Mr. Benjamin in the earlier editions of this work, and is in accordance with the understanding of London merchants with regard to these documents, see *post*, pp. 803–5.[1]]

§ 1110. Under the Factors Acts it has been decided —

1st, That a factor may lawfully consign the goods consigned to him to another factor and obtain an advance on them,[1] and,

2dly, That the factor's authority is not exhausted by the first pledge made of the goods, but that he may lawfully obtain a second advance from a different person by a pledge of the surplus remaining after satisfying the holder of the first pledge.[2]

§ 1111. By the 9 & 10 Vict. c. 399, entitled "An Act for the Regulation of the Legal Quays within the Port of London," and the 11 & 12 Vict. c. 18, entitled "An Act of Regulation of certain Sufferance Wharves in the Port of

[1] *Ante*, p. 794.

[1] Navulshaw *v.* Brownrigg, 21 L. J. Ch. 57; s. c. 1 Sim. N. S. 573; 2 De G. M. & G. 441, where an elaborate judgment of Lord St. Leonards upon the wording and effect of the earlier statutes will be found.

[2] Portalis *v.* Tetley, 5 Eq. 140.

London,"[1] regulations are provided for the unloading of ships in the port of London, into warehouses, at the wharves, whenever the owner of the goods fails to make entry at the Custom House within forty-eight hours after due report, and for the preservation of the lien of the shipowner for the freight, and the statutes also provide as follows: "and the *said wharfinger, his servants and agents are [*799] hereby required, upon due notice in writing in that behalf given by such master, or owner or other person aforesaid, to the said wharfinger, or left for him at his office or counting-house for the time being, to detain such goods in the warehouse of the said wharfinger, until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage, rent, and other charges to which the same shall have become subject and liable." (Sect. 4.) "Provided always and be it enacted, that no such notice as hereinbefore mentioned to detain any goods for payment of freight shall be available unless the same be given or left as hereinbefore provided, *before the issue by the said wharfinger of the warrant for the delivery of the same goods, or an order given by the importer, proprietor or consignee, or his agent, to and accepted by the wharfinger for the delivery of the same:* but nothing herein contained shall authorize any wharfinger to deliver or issue any warrant, or accept any order for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give, on payment or tender of the freight to which the goods shall be liable." (Sect. 5.) It will be remarked that in these Acts,

[1] These two Acts, although published among the Local Acts are declared by a clause annexed to each to be Public Acts, that are to be judicially noticed.

the wharfinger's *warrant* for the delivery of the goods is treated as equivalent to an *accepted* delivery order.

§ 1112. The next statute to be referred to in this connection is the Bills of Lading Act, 18 & 19 Vict. c. 111, which, after reciting in the preamble, that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in [*800] the original shipper * or owner," proceeds to enact by the 1st section, that "every consignee[1] of goods named in a bill of lading, and every indorsee of a bill of lading to whom the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."[2]

The foregoing, together with such similar provisions as are found in the Acts incorporating the several dock companies, being the only statutory law on the subject of delivery by *indicia* of title, these different commercial instruments will now be considered separately.

§ 1113. Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; *divests the vendor's lien;* and has now by the statute just quoted the further effect of vesting in the vendee all the vendor's rights of action against the ship, master, and owner. But though the vendor's lien is thus divested by reason of the complete delivery of the *indicia* of

[1] A consignee who retains the bill of lading for goods, but has parted with the beneficial interest in them, is still a "consignee" within the meaning of the Act. Fowler *v.* Knoop, 4 Q. B. D. 299, C. A.

[2] It was decided in the case of "The Freedom," L. R. 3 P. C. 594, that under the above statute the transferee of a bill of lading might sue in his own name for damage to the goods under the 6th section of the Admiralty Act, 1861 (24 Vict c. 10).

property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu*. These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of Lickbarrow *v.* Mason,[1] on the authority of which very numerous decisions have since *been made, and will be found collected in [*801] Smith's Leading Cases.[1] On this mode of delivery the law is free from doubt.[2]

The law in relation to bills of lading is more fully discussed *post*, in Chapter on Stoppage in Transitu.

§ 1114. In regard to delivery orders there is also little room for controversy, where by these words are meant orders given by the vendor on a bailee who holds possession as agent of the vendor. The decisions which settle that in

[1] 2 T. R. 63; 1 H. Bl. 357; 6 East, 20; 1 Sm. L. C. 753, ed. 1879.

[2] *Delivery of bill of lading. — Stoppage in transitu.* — The assignment and delivery of a bill of lading is a transfer of the title and possession of the property described in it, although the right of stoppage *in transitu* may continue. The Thames, 81 U. S. (14 Wall.) 98; bk. 20, L. ed. 804; The Sally Magee, 70 U. S. (3 Wall.) 451; bk. 18, L. ed. 197; Conrad *v.* Atlantic Ins. Co., 26 U. S. (1 Pet.) 386; bk. 7, L. ed. 189; Backus *v.* The Marengo, 6 McL. C. C. 487; D'Wolf *v.* Harris, 4 Mason C. C. 515. See McTyer *v.* Steele, 26 Ala. 487; Bissel *v.* Price, 16 Ill. 408; Robinson *v.* Stuart, 68 Me. 61; McKee *v.* Garcelon, 60 Me. 167; O'Brien *v.* Gilchrist, 34 Me. 554; s. c. 56 Am. Dec. 676; Shepherd *v.* Naylor, 71 Mass. (5 Gray) 591; Sayward *v.* Stevens, 69 Mass. (3 Gray) 97; Dows *v.* Cobb, 12 Barb. (N. Y.) 310; Ward *v.* Whitney, 3 Sandf. (N. Y.) 399; Creery *v.* Holly, 14 Wend. (N. Y.) 26; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360. A delivery of a bill of lading seems to be sufficient, without endorsement, if it was intended thereby to pass the title to the property. Brown *v.* Brown, 18 Conn. 410; s. c. 16 Am. Dec. 328; First Nat. Bank *v.* Northern R. R. Co., 58 N. H. 203; Merchant's Bank *v.* Union R. R. Co., 69 N. Y. 373; Cayuga Co. Bank *v.* Daniels, 47 N. Y. 631; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360; Holmes *v.* Bailey, 92 Pa. St. 57; Holmes *v.* German Sec. Bank, 87 Pa. St. 525. As to the effect of a transfer and delivery of a bill of lading, see Stone *v.* Swift, 21 Mass. (4 Pick.) 389; Skilling *v.* Bollman, 6 Mo. App. 76; Hazard *v.* Fiske, 83 N. Y. 287; Tilden *v.* Minor, 45 Vt. 196; Davis *v.* Bradley, 28 Vt. 118; s. c. 65 Am. Dec. 226; Royal Canadian Bank *v.* Grand Trunk R. Co., 23 Up. Can. C. P. 225; Glynn *v.* East Ind. Dock Co., L. R. 5 Q. B. Div. 129.

such cases the delivery is not complete until the bailee attorns to the buyer, and thus becomes the latter's agent as custodian of the goods, have been reviewed.[1] It was also decided in M'Ewan *v.* Smith,[2] and Griffiths *v.* Perry,[3] that such a delivery order differed in effect from a bill of lading: that the endorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor, and that his lien remained unaffected when neither the first buyer nor the sub-vendee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded [but, as we have already seen, the law on this point is now altered by the 5th section of the Factors Act, 1877.[4]]

§ 1115. In treating of the effect of endorsing and delivering dock warrants, and warehouse warrants, or certificates, Blackburn J. remarks,[1] "that these documents are generally written contracts by which the holder of the endorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order [*802] or dock * warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is therefore a very sufficient reason

[1] Book I. Part 2, Ch. 4, *ante*, p. 150, "On Actual Receipt."

[2] 2 H. L. C. 309.

[3] 1 E. & E. 680; 28 L. J. Q. B. 208.

[4] See sec. 1087, note 2. The order may be revoked by the vendor, in case of the insolvency of the vendee, at any time before actual delivery. Keeler *v.* Goodwin, 111 Mass. 490; but not if the vendee has sold the goods to a *bonâ fide* purchaser, and the bailee has been informed of the sale and assumed to act for the second vendee. Hollingsworth *v.* Napier, 3 Cai. (N. Y.) 182; s. c. 2 Am. Dec. 268; In re Batchelder, 2 Low. C. C. 245. As to effects of transfer of such orders, see Chicago Dock Co *v.* Foster, 48 Ill. 507; Burton *v.* Curyea, 40 Ill. 320; Southern F. Co. *v.* Stanard, 44 Mo. 71; Mottram *v.* Heyer, 5 Den. (N. Y.) 630.

[1] Blackburn on Sales, p. 297.

why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.

"Besides this substantial difference between them, there is the more technical one that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established." After reviewing the authorities then extant, the learned author concluded by saying: "It is therefore submitted, that the endorsement of a delivery order or dock warrant *has not* (independently of the Factors Acts) *any effect beyond that of a token of an authority to receive possession.*"

§ 1116. This view of the law was confirmed, immediately after the publication of the Treatise on Sales, by the Exchequer of Pleas, in Farina *v.* Home.[1] There the defendant had retained in his possession for many months a delivery warrant, signed by a wharfinger, whereby the goods were made deliverable to the plaintiff, *or his assignee by indorsement*, on payment of rent and charges from the 25th of July; the document was dated on the 21st of July, and forthwith endorsed to the defendant as vendee; but the latter refused to take the goods or return the warrant, saying, that he had sent it to his solicitor, and meant to defend the action, for he had never ordered the goods. Held, that there had been an acceptance, but no actual receipt of the goods; no delivery to the defendants. Parke B. in giving the judgment of the Court, said: "This warrant is no more than an *engagement by the wharfinger* to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (*sic*, consignee?), who is the vendor's * agent, and his possession is that of the consignee, until an assignment has taken place, and the wharfinger *has attorned*, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then [*803]

[1] 16 M. & W. 119.

the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and *then only is there a constructive delivery to him.* In the meantime the warrant, and the endorsement of the warrant, is nothing more than *an offer* to hold the goods as the warehouseman of the assignee. The case is the same in principle as that of Bentall *v.* Burn, and others which are stated and well discussed in a recent able work of Mr. Blackburn, 'On the Contract of Sale,' pp. 27, 41, and 297, and in Mr. C. Addison's work, p. 70. We all therefore think, that though there was sufficient evidence of the acceptance, there is none of the *receipt.*"

This decision has never been overruled, and before proceeding further, it is useful to remark how completely opposed to each other are the interpretations put on these documents by the Courts and the law-givers. In the decided cases between vendor and vendee, the judges construe these documents as mere "tokens of authority to receive possession;" as mere "offers" by the warehouseman to hold the goods for an endorsee of the warrant, inchoate and incomplete, till the vendee has obtained the warehouseman's assent to attorn to him.

§ 1117. The Legislature, on the other hand, bases its enactments on the assumption that "dock warrants, warehouse-keeper's certificates, warrants, or orders for the delivery of goods," are "*instruments used in the ordinary course of business as proof of the possession or control of goods*," and as "authorizing the *possessor* of such document to transfer *goods thereby represented*" (4th section of Factors Act); and on the further assumption, that a wharfinger's *warrant* for the delivery of goods is equivalent in effect to an *accepted* delivery order. (Legal Quays Act, and Sufferance Wharves Act.) In a word, the Legislature deals with these documents, in the Acts above referred to, as *symbols* of the goods.

[*804] It is not matter for surprise, when the *ratio decidendi* * of the Courts on the one hand, and the *ratio legis ferendæ* of the Legislature on the other, are so much at variance in regard to the *meaning* of these instruments, that the law should be in an anomalous and unsatisfactory state.

It is perhaps to be regretted that the Courts did not give to these papers originally the same meaning as the law-giver attached to them; a meaning which might have been given without doing violence to their language.

§ 1118. No doubt a warehouseman or wharfinger in possession of goods is the bailee of the owner alone from whom he received them, and cannot be forced to become the bailee of any one else without his own consent. But what is there in the law to prevent this assent from being given *in advance?*[1] or to prohibit the bailee from giving *authority* to the owner of the goods to assent in the bailee's behalf to a change in the bailment? If a warehouseman gives a written paper to the owner, saying, "I hold ten hogsheads of sugar belonging to you. I authorize you to assent in my behalf that I will be the bailee of any one else to whom you may sell these goods, and your endorsement on this paper shall be accepted by me as full proof that you have given this assent for me, and shall be taken as my assent;" it is submitted that there is no principle of law which would prevent this paper from taking effect according to its import. But, in truth, special juries of London merchants have repeatedly volunteered statements that this is what they understand the paper to mean: that it is not a mere *offer* or *token of authority to receive possession*, but is meant by the parties to be an actual transfer of the possession. In Lucas *v.* Dorrien (7 Taunt. 278), Dallas J. C. said, in relation to a West India Dock warrant, "I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by the endorsement of these instruments. All special juries cry out with one voice that the practice is that the produce lodged in the docks is transferred by endorsing over * the certificates and dock warrants." And [*805] at Nisi Prius, it was directly decided by Parke J. in one case,[2] and by Dallas C. J., in another,[3] that such was

[1] See the cases of Salter *v.* Woollams and Wood *v.* Manley, cited *ante*, p. 671, in the former of which cases Tindal C. J. said that Jackson had, in advance, "attorned to the sale."

[2] Zwinger *v.* Samuda, 7 Taunt. 265.

[3] Keyser *v.* Suze, Gow, 58.

the true construction of these mercantile "documents of title."

§ 1119. But the law was settled in opposition to this construction, for the cases above referred to and others were all before the Court when Farina *v.* Home was decided, and were reviewed by the learned author of the Treatise on Sales, when he reached the conclusion above quoted. The reader's attention must therefore be directed to the subsequent decisions, and to the anomalous results that followed from them; results for which the judges in Fuentes *v.* Montis,[1] declared there was then no remedy, save further legislation.[2]

[And now by the Factors Act, 1877, these mercantile documents of title are, when in the possession of a *bonâ fide* transferee for value from the buyer, placed on the same footing with bills of lading.]

§ 1120. By the decisions under the earlier Factors Acts already referred to,[1] it was settled that the words "an agent entrusted with goods or documents of title" did not include a vendee, because he held in *his own right*, and not as agent.[2] The singular anomaly thus existed, that if a merchant, buying goods and paying the price, received a transfer of the dock warrant, he would be safe if his vendor was *not owner*, but only agent of the assignor of the warrant, and would not be safe if the vendor *was owner*, because the price might remain unpaid to the assignor of the warrant; and this was the necessary result of the conflicting interpretations put on the dock warrant by the Legislature and the Courts. The original owner was held by the statute to have abandoned his *actual possession* by giving the document of title to his

[1] L. R. 3 C. P. 268; 37 L. J. C. P. 137.

[2] Such instruments have by statutes been made negotiable by indorsement, unless otherwise expressed on their face, in Massachusetts, New York, Illinois, and other States. See Allen *v.* Maury, 66 Ala. 10; Davis *v.* Russell, 52 Cal. 611; s. c. 28 Am. Rep. 647; Burton *v.* Curyea, 40 Ill. 320; Merchant's Bank *v.* Hibbard, 48 Mich. 118; s. c. 42 Am. Rep. 465; Voorhis *v.* Olmstead, 66 N. Y. 113; Whitlock *v.* Hay, 58 N. Y. 484; Wilmot *v.* Maitland, 3 Grant (Ont.) 107; *ante*, sec. 1087, note 2.

[1] *Ante*, pp. 15–22.

[2] Jenkyns *v.* Usborne, 7 M. & G. 678; Van Casteel *v.* Booker, 2 Ex. 691; Fuentes *v.* Montis, *supra*.

agent, although he retained *ownership and right of possession:* he was held by the Courts to have retained his *actual* **possession* when he gave the document to a pur- [*806] chaser, although he had abandoned *both ownership and right of possession.*

[But, as we have already seen, *ante*, p. 797, this anomaly is now removed by the 4th section of the Factors Act, 1877.]

§ 1121. The safety of the man who buys goods from a *factor* is not affected by the fact that the document of title only came into the factor's hands in consequence of his false and fraudulent representations to the owner, if it appear that the owner really *entrusted* the factor or his agent with the document:[1] but if a person gets possession of a document of title by fraud, without having been *entrusted* with it *as agent of the owner*, or as vendee, he has no title at all, either as principal or agent, and can convey none to anybody else.[2] This was really the point decided by the Exchequer Chamber in Kingsford *v.* Merry,[2] a case which created some excitement among the city merchants, who did not at first understand its true import.

§ 1122. In Baines *v.* Swainson,[1] Blackburn J. first pointed attention to the clause at the end of the 4th section of the Factors Act, 1842, "unless the contrary can be shown in evidence," and attributed to it the effect of enabling the owner to set aside a sale, if he could succeed in disproving the ostensible entrusting.

This view was deliberately adopted by Willes J. in delivering the opinion in Fuentes *v.* Montis,[2] decided in 1868, which settled the very important point, that a secret revocation of the agent's power would defeat the rights of *bonâ fide* pledgees (and it would *seem* of purchasers), although the goods

[1] Sheppard *v.* The Union Bank of London, 7 H. & N. 661; 31 L. J. Ex. 154; Baines *v.* Swainson, 4 B. & S. 270; 32 L. J. Q. B. 283.

[2] Kingsford *v.* Merry, 11 Ex. 577; 25 L. J. Ex. 166; and in Ex. Ch. 1 H. & N. 503; 26 L. J. Ex. 83; Hollins *v.* Fowler, L. R. 7 H. L. 757, *per* Blackburn J. at p. 763.

[1] 4 B. & S. 270; 32 L. J. Q. B. 281.

[2] L. R. 3 C. P. 268; 37 L. J. C. P. 137; and in error, L. B. 4 C. P. 93.

remained in the hands of the agent. The language of the learned judge is as follows: —

"In the case of an agent for sale, whose general business it is to sell, intrusted for a purpose other than sale, [*807] as, for * instance, if he were intrusted upon an advance against the goods, but with directions not to sell, being a mere lender, and upon his pledge of them; or, if he happen to have a warehouse, though his general business was that of a factor, and not that of a warehouseman, and on the particular occasion the goods were put in his warehouse at a rent, in both cases he would be a person who, *primâ facie*, would be justified in dealing with goods under the Factors Act; and yet there is an express provision with respect to such a person — because one cannot doubt that the judges in the case of Baines *v.* Swainson were right in so expounding the section — there is an express provision, as it appeared to them, and as it appears to me, that with respect to such a person, he should only be *primâ facie* in the situation of being able to deal with the principal's goods more generally than the principal had authorized him; *that the principal on proving the true nature of the transaction between them, should be able to rebut the presumption of his enlarged authority under the Factors Acts, and should be entitled to call for a better account from a third person dealing with his goods without his authority, than that they were obtained from an agent, and that the Factors Act applied.* That provision is the last in the 4th section of 5 & 6 Vict. c. 39: 'An agent in possession as aforesaid of such goods or documents shall be taken for the purposes of this Act to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' I believe that that provision in the 4th section has been applied to that extent in the judgment of my brother Blackburn in the case in 4 B. & S. 285, where he expressed an opinion that it was sufficient for the person making the advance upon the goods to show that the agent who was in apparent possession of them was an agent whose general business was one that would bring him within the operation of the Factors Act, and thereby to *throw upon the principal the burthen of proving that in the par-*

ticular transaction, with respect to the goods in question, the agent was not such agent. I should, therefore, but for that statement, have been rather disposed to read that last clause * (the 4th section) as applicable to the [*808] cases expressly provided for in the previous Act, and say that by this Act a factor or agent is held to become intrusted with the possession of documents which he has been enabled to obtain by reason of having been intrusted with the possession of other documents which led to the former being obtained, entirely, as it were, as a key to them. But I will not criticize the judgment of my brother Blackburn, and the other judges in that case, but adopt it for the purpose of the present. Here is a case in which an agent whose general business has been within the Act, being in possession of goods, is supposed to have pledged them. What is the result? Is it that the person who dealt with such agent is by reason of his general employment, and by reason of his having been a *bonâ fide* agent, the principal being innocent of the transaction, to take advantage of the apparent ownership of the agent in a sale in market overt, or be entitled to take advantage of the sale, or is it open to after claim or proof, if the principal can make out that there was no real intrusting within the meaning of the Act? Let the Act speak for itself. 'An agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' The inevitable conclusion is, that if the contrary be shown in evidence, 'an agent in possession as aforesaid of such goods or documents' is not to be taken to have been 'intrusted therewith by the owner thereof.' I draw my conclusions from that state of the law of which I have endeavored to give a summary, not dwelling upon the precise language of the Act for the present, but dwelling upon the construction which has been put upon the Acts with a view to see whether that construction comes, in reality, to a decision of this case. The conclusion to which the course of decisions compels me to arrive is that expressed by Blackburn J. in the case 4 B. & S., namely, *that the authority given by the Factors Acts,*

quoad third persons, is an authority superadded and accessory to the ordinary authority given by a principal to his [*809] *factor;* or to such authority * given by the principal to his agent as would fall within the provisions of the Factors Acts. It is not intended by these Acts of Parliament to provide a remedy for those hardships which have accrued to innocent persons by dealing with people in the apparent ownership of goods as if they were the real owners; but the intention of the Legislature was only to deal with cases in which *innocent persons had been taken in such dealings by the agents of the owners of the goods — the agents 'intrusted and in possession.'* Much argument was bestowed, and properly, upon those words, 'intrusted and in possession;' but it appears to me that before you can deal with either the state of being 'intrusted,' or the state of being 'in possession,' you must first get hold of your substantive, namely, 'agent' — the person who is to give the title as against the principal must be an agent, and if he is not an agent he is not a person to whom the provisions of the Act apply."

But this decision seems not to have met the approval of Lord Westbury, whose remarks on it in Vickers *v.* Hertz,[3] have been referred to *ante*, p. 21; [and the law is now expressly altered by the 2d section of the Factors Act, 1877, *ante*, p. 796.]

§ 1123. The recent cases in which this question has been referred to, independently of the Factors Acts, will now be presented.

It was held, in Bartlett *v.* Holmes,[1] that a delivery order by which a warehouseman acknowledged to hold goods deliverable to A., "on the *presentation* of this document duly endorsed by you," did not authorize the endorsee to claim the goods by merely *showing* the order, but that he must deliver it up to the warehouseman *before* the latter could be required to part with the goods. The reasoning of the Court in this case would seem to cover all "documents of title." The

[3] L. R. 2 Sc. App. 113. See, however, note (*e*), *ante*, p. 21.

[1] 13 C. B. 630; 22 L. J. C. P. 182.

grounds given by Jervis C. J., and concurred in by Williams and Cresswell JJ., were two. 1st. That confidence must be placed by one of the parties in the other, where the article is bulky, and the exchange of the * goods for [*810] the document cannot possibly be simultaneous. 2dly. That if the party having the goods were to make the delivery before receiving the documents, he would *expose himself to the risk of the document's being transferred to third persons by a second sale.*

§ 1124. In Johnson *v.* Stear,[1] the action was trover by the asssignee of one Cumming, who had pledged goods to the defendant by delivering him the dock warrant, with authority to sell the goods, if the loan for which they were pledged was not repaid on the 29th of January. In the middle of January, Cumming became bankrupt, and the defendant, Stear, sold the goods on the *28th*, and handed over the dock warrant to the vendee on the *29th*, and the latter took the goods on the *30th*. The Court held this a conversion by Stear, the defendant; Erle C. J. saying, that "by delivering over the dock warrant to the vendee . . . he interfered with the right which Cumming had, of taking possession on the 29th if he repaid the loan, for which purpose the dock warrant would have been an important instrument." Williams J. said: "The handing over of the dock warrant to the vendee, before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was *tanta-mount to a delivery. Not that the warrant is to be considered in the light of a symbol*, but because, according to the doctrines applied in donations *mortis causâ*, it is the *means* of coming into possession of a thing, which will not admit of corporal delivery."

§ 1125. In 1870, the case of Meyerstein *v.* Barber,[1] was decided by the House of Lords, and the point determined excited great interest in the City. The consignee of certain

[1] 15 C. B. N. S. 330; 33 L. J. C. P. 130.

[1] L. R. 4 H. L. 317; 2 C. P. 38 and 661.

cotton, which arrived on the 31st of January, 1865, entered it at the Custom House, to be landed at a sufferance wharf, with a stop for freight, under the Sufferance Wharves Act;[2] and the cotton was so landed. On the 4th of March, [*811] the * consignee obtained an advance from the plaintiff on the pledge of the bills of lading, but gave up only two of the bills; the plaintiff, who did not know that the vessel had arrived, believing that the third was in the captain's hands. The consignee fraudulently pledged the third bill on the 6th of March to the defendant for advances, and on that day the stop for freight was removed; and the defendant obtained the wharfinger's warrant, and sold the cotton, and received the proceeds. The action was for money had and received, and in trover. It was contended on behalf of the defendants, that goods are not represented by bills of lading after they have been landed, and the master has performed his contract; that the bill of lading ceases to be negotiable after this is done: and upon this contention the case turned. The judges in the lower Courts had however held unanimously that the *bills of lading continued to represent the goods at the sufferance wharf, until replaced by the wharfinger's warrant;* and that the plaintiff was therefore entitled to maintain his verdict. Martin B., in delivering the judgment of the Exchequer Chamber, said: "For many years past there have been *two symbols of property* in goods imported; the one the bill of lading, *the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger*, the former remains the *only symbol* of property in the goods." These *dicta*, however, which would seem, at least so far as the London quays and sufferance wharves are concerned, to be in opposition to the ruling in Farina *v.* Home, in relation to the effect of documents of title, must be taken in connection with the fact, that Blackburn J., who was a member of the Court, is reported to have said, when the passage from the Treatise on Sales,[3] above quoted (p. 801), was cited in argument: "That was published twenty-two years ago, and I have not changed my opinion."

[2] *Ante*, p. 798.

[3] Blackburn on Sales, pp. 297, 298.

§ 1126. In the House of Lords the judgment was also unanimous in affirmance of that given in the Exchequer Chamber, and it was pointed out that,

1st. The person who first gets *one* bill of lading out of * the set of *three* (the usual number) gets the [*812] property which it represents, and needs do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate; and

2d. That though the shipowner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivery to the holder of another bill of the set acquired subsequently, that fact will not affect the legal ownership of the goods as between the holders of the two bills of lading.[1]

[Upon this last point, which, it is to be observed, did not arise in Meyerstein *v.* Barber, and which is only referred to by Lord Westbury in his opinion in that case in order to show that it was still *res non judicata*, the reader is referred to the important case of Glyn *v.* The East and West India Dock Company,[2] which is noticed *post*, in the Chapter on Stoppage in Transitu.]

§ 1127. It is to be inferred from the foregoing authorities that by the law as now settled, the endorsement and transfer of a dock warrant, warehouse certificate, or other like document of title, by a vendor to a vendee, *is not such a delivery of possession as divests the vendor's lien;* [nor prior to the Factors Act, 1877, did the transfer of such documents by the vendee to a *bonâ fide* holder for value enlarge their effect, except on satisfactory proof that, by the usage of the trade and the intention of the parties, the documents in question were meant to be negotiable;[1] but by the 5th section of that

[1] "The person who first gets one bill of lading out of a set of three, gets the property it represents, and need do nothing more to secure his title." Skilling *v.* Ballman, 6 Mo. App. 76. See Seymour *v.* Newton, 105 Mass. 272; Ontario Bank *v.* Hanlon, 23 Hun (N.Y.) 283; The Thames, 81 U.S. (14 Wall.) 98; bk. 20, L. ed. 804.

[2] 7 App. Cas. 591; s. c. 6 Q. B. D. 475, C. A.; 5 Q. B. D. 129.

[1] See Merchants' Banking Company of London *v.* Phœnix Bessemer Company, 5 Ch. D. 205. As to the materiality of such proof when the documents are not documents of title, see Gunn *v.* Bolckow, Vaughan & Co., L. R. 10 Ch. 491.

statute, the transfer by endorsement or delivery of such documents by a vendee to a *bonâ fide* holder for value divests the vendor's lien.]

Whether, *as between the vendor and vendee*, this result would be affected by proof of *usage in the particular trade*, that the delivery of such documents is intended by both parties to constitute a delivery of *actual possession*, is a point [*813] that does * not seem to have arisen since the decision in Farina *v.* Home, and may perhaps be deemed still an open question.

§ 1128. The vendor's lien is not lost by sending goods on board of a vessel in accordance with the buyer's instructions, even though by the contract the goods are to be delivered free on board to the buyer, if the vendor on delivering the goods takes[1] or demands[2] a receipt for them in his own name, for this is evidence that he has not yet parted with his control; the possession of the receipt entitles him to the bill of lading; and the goods, represented by their symbol the bill of lading, are still in his possession, which can only be divested by his parting with the bill of lading. But if the vessel belonged to the purchaser, the delivery would be complete under such circumstances, and the lien lost.[3]

§ 1129. When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. The point was directly decided at Nisi Prius by Bayley J. in New *v.* Swain,[1] and by Littledale J. in Bunney *v.* Poyntz,[2] and has ever since been treated as settled law, though there has been no case decided in Banc. Among the numerous *dicta* where the law is assumed to be undoubted on this point, are those of Lord Campbell, *ante*, p. 758; of Parke B. in Dixon *v.* Yates;[3] of the Court, in Martindale *v.* Smith;[4] of the

[1] Craven *v.* Ryder, 6 Taunt. 433.
[2] Ruck *v.* Hatfield, 5 B. & Ald. 632.
[3] Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.
[1] 1 Dans. & L. 123.
[2] 4 B. & Ad. 568.
[3] 5 B. & Ad. at p. 341.
[4] 1 Q. B. at p. 395.

Barons of the Exchequer, in Castle *v.* Sworder,[5] and in Miles *v.* Gorton,[6] and of the Judges of the Queen's Bench, in Valpy *v.* Oakeley.[7]

§ 1130. As the vendor's lien is a right granted to him by law solely for the purpose of enabling him to obtain payment of the price, it follows that a tender of the price puts an end * to the lien even if the vendor decline to re- [*814] ceive the money; and this was the decision in Martindale *v.* Smith.[1]

§ 1131. Where the vendor allows the purchaser to mark, or spend money upon, the goods sold, which are lying at a public wharf, or on the premises of a third person, *not the bailee of the vendor*, and to take away part of the goods, this is so complete a delivery of possession as to divest the lien, although the vendor might, under the same circumstances, have had the right to retain the goods, if they had been on his own premises.[1]

[5] 5 H. & N. 281; 29 L. J. Ex. 235.
[6] 2 C. & M. at p. 510.
[7] 16 Q. B. 941; 20 L. J. Q. B. 380.
[1] 1 Q. B. 389.
[1] Tansley *v.* Turner, 2 Bing. N. C. 151; Cooper *v.* Bill, 3 H. & C. 722; 34 L. J. Ex. 161; *ante*, p. 153.

[*815] * CHAPTER V.

REMEDIES AGAINST THE GOODS — STOPPAGE IN TRANSITU.

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§ 1132. THE last remedy which an unpaid vendor has against the goods, is stoppage *in transitu*. This is a right which arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.[1] If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer — (which, as we have seen in the preceding chapter is such a constructive delivery as divests the vendor's lien) — he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people.[2]

§ 1133. The history of the law of stoppage *in transitu* is given very fully by Lord Abinger, in Gibson *v.* Carruthers,[1] to which the reader is referred. It now prevails almost universally among commercial nations, and may best be considered by dividing the inquiry into the following sections:

1. Who may exercise the right?
2. Against whom may it be exercised?
3. When does the transit begin? when does it end?
4. How is the vendor to exercise the right?

[1] *Per* Lord Northington (then Lord Henley), L. C. in D'Aquila *v.* Lambert, 2 Eden at p. 77; s. c. Amb. 399.

[2] Right of stoppage in transitu is considered to be an equitable extension of the vendor's lien, under which he can repossess himself of the goods after delivery to the carrier. Loeb *v.* Petess, 63 Ala. 243; s. c. 35 Am. Rep. 17; Rogers *v.* Thomas, 20 Conn. 53; Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Blum *v.* Marks, 21 La. An. 261; Grout *v.* Hill, 70 Mass. (4 Gray) 361; Arnold *v.* Delano, 58 Mass. (4 Cush.) 33; s. c. 50 Am. Dec. 754; Stanton *v.* Eager, 33 Mass. (16 Pick.) 467; Rowley *v.* Bigelow 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; Atkins *v.* Colby, 20 N. H. 154; Babcock *v.* Bonnell, 80 N. Y. 244; Harris *v.* Pratt, 17 N. Y. 249; People *v.* Haynes, 14 Wend. (N. Y.) 546; s. c. 28 Am. Dec. 530; Benedict *v.* Schaettle, 12 Ohio St. 515; Jordan *v.* James, 5 Ohio, 88; White *v.* Welsh, 38 Pa. St. 420.

[1] 8 M. & W. 337. The earliest reported case in which the right is recognized is Wiseman *v.* Vandeputt, 2 Vern. 202, in Chancery, temp. 1690. It became settled as an equitable doctrine by the subsequent cases of Snee *v.* Prescott, 1 Atk. 245, and D'Aquila *v.* Lambert, *ubi supra*, and

[*818] *5. How may the right be defeated when the goods are represented by a bill of lading [or other document of title]?

6. What is the legal effect of the exercise of the right?

Section I. — WHO MAY EXERCISE THE RIGHT?

§ 1134. Stoppage *in transitu* is so highly favored, on account of its intrinsic justice, that it has been extended by the courts to quasi vendors: to persons in a position similar to that of vendors.[1]

In Feise *v.* Wray,[2] Lord Ellenborough and the other judges of the King's Bench held the right to exist in favor of a consignor who had bought goods, on account and by order of his principal, on the factor's own credit, in a foreign port, and had shipped the goods to London, drawing bills on the merchant here, who had ordered the goods and become bankrupt during the transit. The bankrupt's assignee contended that the factor was but an *agent* with a lien, but the Court held that he might be considered as a vendor who had first bought the goods, and then sold them to his correspondent at cost, plus his commission. The principle of this case has been recognized in numerous subsequent decisions.[3]

§ 1135. The transfer of the bill of lading by the vendor to his agent, vests a sufficient special property in the latter

was introduced as such into the Courts of Common Law by Lord Mansfield; Assignees of Burghall *v.* Howard, 1 Hy. Bl. 366, n. (*a*).

[1] If goods are purchased by a factor or agent upon the order of his principal, but are paid for with his own money, or bought upon his own credit, he is entitled to stoppage *in transitu*. Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Seymour *v.* Newton, 105 Mass. 272. A third person, who advances the price on behalf of the purchaser, and takes an assignment of the bill of lading, may also exercise the right. Gossler *v.* Schepeler, 5 Daly (N. Y.) 476.

[2] 3 East, 93.

[3] The Tigress, 32 L. J. Adm. 97; Patten *v.* Thompson, 5 M. & S. 350; Ogle *v.* Atkinson, 5 Taunt. 759; Oakford *v.* Drake, 2 F. & F. 493; Tucker *v.* Humphrey, 4 Bing. 516; Turner *v.* Trustees of Liverpool Dock Co., 6 Ex. 543; 20 L. J. Ex. 393; Ellershaw *v.* Magniac, 6 Ex. 570; Ireland *v.* Livingstone, L. R. 5 H. L. 395, *per* Blackburn J. at p. 408; Ex parte Banner, 2 Ch. D. 278, C. A. As to how far the commission agent is vendor, and how far agent, see Cassaboglou *v.* Gibbs, 9 Q. B. D. 220.

to entitle him to stop *in transitu* in his own name. This was held to be the law, even before the Bills of Lading Act.[1]

§ 1136. The vendor of an interest in an executory agreement may also stop the goods, as if he were owner of them. In Jenkyns *v.* Usborne,[1] the plaintiff was agent of a foreign house, which had shipped a cargo of beans to London; a portion of the cargo had been ordered by Hunter & Co., of London, but only one bill of lading had been taken for the whole cargo, and this was given to Hunter & Co., they giving to * the plaintiff a letter, acknowledging [*819] that 1,442 sacks of the beans were his property, together with a delivery order, addressed to the master of the vessel, requesting him to deliver to bearer 1,442 sacks, out of the cargo on board. Before the arrival of the vessel, plaintiff sold these 1,442 sacks, on credit, to one Thomas, giving him the letter and delivery order of Hunter & Co. Thomas obtained an advance from the defendant on this delivery order and letter, together with other securities. Thomas stopped payment before the arrival of the vessel, and before paying for the goods, and the plaintiff gave notice to the master, on the arrival of the goods, not to deliver them. Held, that although at the time of the stoppage the property in the 1,442 sacks had not vested in the plaintiff, but only the right to take them after being separated from the portion of the cargo belonging to Hunter & Co., yet the interest of the plaintiff in the goods was sufficient to entitle him to exercise the vendor's rights of stoppage.

§ 1137. It was said by Lord Ellenborough, in Siffkin *v.* Wray,[1] that a mere surety for the buyer had no right to stop *in transitu:* but if a surety for an insolvent buyer should pay the vendor, it would seem that he would now have the right of stoppage *in transitu*, if not in his own name, at all events in the name of the vendor, by virtue of the provisions of the 5th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), which provides that "every person, who being surety for the debt or duty of another, or being

[1] Morrison *v.* Gray, 2 Bing. 260. [1] 6 East, 371.
[1] 7 M. & G. 678; 8 Scott, N. R. 505.

liable with another for any debt or duty shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and *such person shall be entitled to stand in the place of the creditor*, and *to use all the remedies*, and if need be, and upon a proper indemnity, to *use the name* of the creditor in any action *or other proceeding at law or in* [*820] *equity*, in *order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, &c."[2]

§ 1138. [The opinion submitted in the text is confirmed by the decision of Jessel M. R. in the case of The Imperial Bank *v.* The London and St. Katharine Dock Company.[1] Goods had been purchased by a broker without disclosing the name of his principals. By the custom of the market, the broker on the buyers' default became personally liable to the seller for the price. The buyers stopped payment, and the broker thereupon paid the vendors the price, and obtained from them a delivery order for the goods. Held, that, by reason of the custom of the trade, the broker stood in the position of surety for the buyers, and that, "having regard to the terms of the Mercantile Law Amendment Act, and to the justice of the case," the lien of the unpaid vendors was a

[2] The only decisions met with as to the construction of this section are Lockhart *v.* Reilly, 1 De G. & J. 464; 25 L. J. Ch. 54; Batchelor *v.* Lawrence, 9 C. B. N. S. 543; 30 L. J. C. P. 39; Brandon *v.* Brandon, 28 L. J. Ch. 150; De Wolf *v.* Lindsell, 5 Eq. 209; and Phillips *v.* Dickson, 8 C. B. N. S. 391; and 29 L. J. C. P. 223.

[1] 5 Ch. D. 195. In an earlier case of Hathesing *v.* Laing, 17 Eq. 92, 101, Bacon V.-C. intimated an opinion that a broker who, on behalf of his principal, purchases and pays for goods, which he ships in his principal's name, is not entitled to stop them *in transitu*. The case, however, was decided on other grounds, and the dictum of the learned judge seems to be irreconcilable with the authorities above referred to.

security which subsisted for the benefit of the surety, so as to entitle him to stop the goods in the vendors' name.]

§ 1139. The right of stoppage *in transitu* does not depend on the fact that the vendor having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods *qua* vendor, which is greater than a lien. Other persons, therefore, entitled to liens, as factors,[1] fullers,[2] who have fulled cloths, have no right to stop *in transitu*, before obtaining or after having lost possession.

§ 1140. * A principal consigning goods to a factor [*821] has the right of stoppage *in transitu*, on the latter becoming insolvent, even if the factor have made advances on the faith of the consignment,[1] or have a joint interest with the consignor.[2]

§ 1141. An agent of the vendor may make a stoppage in behalf of his principal,[1] but attempts have been made occasionally by persons who had no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions.[2]

§ 1142. Where the stoppage *in transitu* is effected in behalf of the vendor, by one who has at no time had any authority to act for him, a subsequent ratification of the vendor will be too late if made after the transit is ended. In Bird *v.* Brown,[1] the holder of some bills of exchange, drawn by the vendor on the purchaser, for the price of the goods, assumed to act in behalf of the vendor in stopping the goods *in transitu*, and the assignees of the bankrupt buyer also demanded the goods. After this demand by the as-

[1] Kinloch *v.* Craig, 3 T. R. 119; and in the House of Lords, ib. 786, and 4 Bro. P. C. 47.

[2] Sweet *v.* Pym, 1 East, 4.

[1] Kinloch *v.* Craig, 3 T. R. 119.

[2] Newsom *v.* Thornton, 6 East, 17.

[1] Whitehead *v.* Anderson, 9 M. & W. 518.

[2] *Any agent who has power to act for the consignor, either generally or with reference to the particular consignment, may stop goods in transitu.* Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Reynolds *v.* Boston & M. R. R., 43 N. H. 580. See, also, Durgy C. & U. Co. *v.* O'Brien, 123 Mass. 12.

[1] 4 Ex. 786.

signees, the vendor adopted and ratified the stoppage made in his behalf by the holder of the bills of exchange, but the Court held that the property in the goods had vested in the assignees, by their demand of delivery, and this ownership could not be altered retrospectively by the vendor's subsequent ratification.

§ 1143. But in Hutchings *v.* Nunes,[1] the stoppage was made by the defendant, who had previously done business for the vendor as his agent. The defendant had written to the vendor, informing him of the insolvency of the buyer, on the 26th of March, and the vendor on the 16th of April enclosed to the defendant a power of attorney to act for him. The defendant, before receiving this power, to wit, on the 21st of April, assumed to act for the vendor, and effected the stoppage. Held, by the Privy Council, distinguishing this case from Bird *v.* Brown, that the power actually despatched on the 16th of April was a sufficient ratification of the agent's * act done on the 21st, although the agent was not then aware of the existence of the authority.

[*822]

§ 1144. The vendor's right exists, notwithstanding partial payment of the price;[1] [but when the contract is apportionable, and payment has been made in respect of a part of the goods, the vendor can only exercise his right of stoppage over the goods which remain unpaid;[2]] neither is the vendor's right lost by his having received conditional payment by bills of exchange or other securities,[3] even though he may have negotiated the bills so that they are outstanding in third hands, unmatured.[4]

It has already been shown, however,[5] that a vendor is not

[1] 1 Moo. P. C. N. S. 243.

[1] Hodgson *v.* Loy, 7 T. R. 440; Feise *v.* Wray, 3 East, 93; Edwards *v.* Brewer, 2 M. & W. 375; Van Casteel *v.* Booker, 2 Ex. 702. See, also, Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Howatt *v.* Davis, 5 Munf. (Va.) 34; s. c. 7 Am. Dec. 681.

[2] Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

[3] Dixon *v.* Yates, 5 B. & Ad. 345; Feise *v.* Wray, *ubi supra;* Edwards *v.* Brewer, *ubi supra.*

[4] Feise *v.* Wray, *ubi supra;* Patten *v.* Thompson, 5 M. & S. 350; Edwards *v.* Brewer, *ubi supra;* Miles *v.* Gorton, 2 Cr. & M. 504.

[5] *Ante*, p. 715.

unpaid, if he have taken bills or securities in *absolute* payment. He must in such cases seek his remedy on the securities, having no further right on the goods.

§ 1145. In Wood *v.* Jones,[1] it was held that the consignor, whose bill drawn against a cargo had been dishonored by an insolvent consignee, was not deprived of the right of stoppage because he had in his own hands goods belonging to his consignee unaccounted for, and the account current between them had not been adjusted, and the balance was uncertain.

But in Vertue *v.* Jewell,[2] it was held by Lord Ellenborough, and confirmed by the Court in Banc, that a consignor who was indebted to the consignee on a balance of accounts, in which were included acceptances of the consignee outstanding and unmatured, and who, under these circumstances, shipped a parcel of barley on account of that balance, had no right of stoppage on the insolvency of the consignee, although the acceptances were afterwards dishonored. Lord Ellenborough said, that "the circumstance of Bloom (the consignor) being indebted to them on the balance of accounts, *divested him of all control over the barley from the [*823] moment of the shipment. The non-payment of the bills of exchange cannot be taken into consideration." The Court held, in Banc, that under these circumstances the consignees were to be considered as purchasers for a valuable consideration.

§ 1146. This case has never been overruled, but, if correctly reported, is very questionable law. Lord Blackburn, in the Treatise on Sales (p. 220), suggests as an explanation, that the position of the consignor was not such as to allow him to be considered as a vendor, and that the case would therefore be an authority for the proposition that the right of stoppage is peculiar to a vendor. But it happens, unfortunately for this explanation, that the report states in express terms that the ground of the decision in Banc was, that the consignees "were to be considered the purchasers of the goods for a valuable consideration;" a ground which would

[1] 7 D. & R. 126. [2] 4 Camp. 31.

prove the right of stoppage to *exist;* for it had already been held by the same Court, in Feise *v.* Wray,[1] that a vendor's right of stoppage was not taken away by the fact that he had received acceptances for the price of the goods, which were outstanding and unmatured at the time of the stoppage.

§ 1147. When this case was pressed on the Court by the counsel in Patten *v.* Thompson,[1] Lord Ellenborough did not suggest that it was good law *as reported*, but said: "*I have looked also into that case of* Vertue *v.* Jewell, and *find* that there the bill of lading was endorsed and sent by the consignor on account of a balance due from him, including several acceptances then running; *so that it was the case of a pledge to cover these acceptances.*" There was an interval of only two years between the cases, and this explanation scarcely renders Vertue *v.* Jewell more intelligible; for it was recognized as settled law in Patten *v.* Thompson, that a consignor may stop the *specific* goods on which his consignee has made advances, on learning the consignee's insolvency;[2] and it is very hard to understand how a consignor's [*824] right of stoppage * can be greater against the very goods on the faith of which an advance has been made to him, than against goods on which the consignee has made no special advance, but which are sent to him to meet unmatured acceptances given in general account; or why the latter is a pledge, and not the former.

§ 1148. The unpaid vendor's right of stoppage is higher in its nature than a carrier's lien for a *general balance*,[1] though not for the special charges on the goods sold:[2] and he may

[1] 3 East, 93.

[1] 5 M. & S. 350.

[2] This had been settled in Kinloch *v.* Craig, in the House of Lords, 3 T. R. 786.

[1] Oppenheim *v.* Russell, 3 B. & P. 42.

[2] Rucker *v.* Donovan, 13 Kans. 251; s. c. 19 Am. Rep. 84; Hause *v.* Judson, 4 Dana (Ky.) 7; s. c. 29 Am. Dec. 377; Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Potts *v.* New York & N. E. R. R. Co., 131 Mass. 455; s. c. 41 Am. Rep. 247.

The vendor's right of stoppage cannot be defeated by any attachment, execution or other lien against the purchaser. Mason *v.* Wilson, 43 Ark. 173; Blackman *v.* Pierce, 23 Cal. 509; Greve *v.* Dunham, 60 Iowa, 108; O'Neil *v.* Garrett, 6 Iowa, 480; Rucker *v.* Donovan, 13 Kans. 251; s. c. 19 Am. Rep. 84; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; O'Brien *v.*

also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods while in transit, by process out of the Mayor's Court of the City of London.[3]

In the case of the Mercantile and Exchange Bank *v.* Gladstone,[4] it was held that the consignor's right of stoppage was paramount to a demand for freight under the following circumstances. The goods were ordered by Fernie and Co. of Liverpool from the defendants' house in Calcutta, and were shipped on board of Fernie and Co.'s own vessel, the master signing bills of lading "freight for the said goods free on owner's account." This bill of lading was such as the master had authority from the owners to sign, but *before* it was signed in Calcutta, the owners in Liverpool had transferred the vessel with "all the profits and all the losses, as the case might be," though this transfer was unknown to the consignors or to the captain when the bills of lading were signed. It was held, under these circumstances, that the consignor's right of stopping the goods "free of freight," could not be affected by the sale in England, which was unknown to him. Kelly C. B. expressed the opinion also, that the master of a vessel in distant seas retains all the authority given to him by the owner who appointed him, notwithstanding an intervening transfer, until such transfer is made known to him; and on that ground also held that the transferee of the ship was bound by the terms of the bill of lading.

Norris, 16 Md. 122; Durgy C. & U. Co. *v.* O'Brien, 123 Mass. 12; Seymour *v.* Newton, 105 Mass. 272; White *v.* Mitchell, 38 Mich. 390; Morris *v.* Shryock, 50 Miss. 590; Chicago B. & Q. R. R. Co. *v.* Painter, 15 Neb. 394; More *v.* Lott, 13 Nev. 376; Inslee *v.* Lane, 57 N. H. 454; Atkins *v.* Colby, 20 N. H. 154; Clark *v.* Lynch, 4 Daly (N. Y.) 83; Covell *v.* Hitchcock, 23 Wend. (N. Y.) 611; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Calahan *v.* Babcock, 21 Ohio St. 281; Benedict *v.* Schaettle, 12 Ohio St. 515; Hays *v.* Mouille, 14 Pa. St. 48; Allen *v.* Mercier, 1 Ash. (Pa.) 103; Pottinger *v.* Hecksher, 2 Grant (Pa.) 309; Kitchen *v.* Spear, 30 Vt. 545; Sherman *v.* Rugee, 55 Wis. 346; Smith *v.* Goss, 1 Campb. 282.

[3] Smith *v.* Goss, 1 Campb. 282.

[4] L. R. 3 Ex. 233.

[*825] * *Section II.* — AGAINST WHOM MAY IT BE EXERCISED?

§ 1149. The vendor can only exercise this right against an *insolvent* or *bankrupt* buyer. By the word "insolvency" is meant a general inability to pay one's debts:[1] and of this inability, the failure to pay one just and admitted debt would probably be sufficient evidence.[2] And in a number of the cases, the fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage *in transitu*.[3]

§ 1150. If the vendor stop *in transitu* where the vendee has not yet become insolvent, he does so at his peril. If, on the arrival of the goods at destination, the vendee is then insolvent the premature stoppage will avail for the protection of the vendor; but if the vendee remain solvent, the vendor

[1] Parker *v.* Gossage, 2 C. M. & R. 617; Biddlecombe *v.* Bond, 4 A. & E. 322, 696; and see Billson *v.* Crofts, 15 Eq. 314.

[2] Sm. Merc. Law, note, p. 550, ed. 1877.

[3] Vertue *v.* Jewell, 4 Camp. 31; Newsom *v.* Thornton, 6 East, 17; Dixon *v.* Yates, 5 B. & Ad. 313; Bird *v.* Brown, 4 Ex. 736. And see a discussion by Willes J. as to meaning of "insolvency" in the Queen *v.* The Saddlers' Co., 10 H. L. C. 404, 425.

To justify stoppage in transitu it is sufficient, if the debtor be unable to pay his debts in the usual course of business. O'Brien *v.* Norris, 16 Md. 122; s. c. 77 Am. Dec. 284; Durgy C. & U. Co. *v.* O'Brien, 123 Mass. 12; Hays *v.* Mouille, 14 Pa. St. 48; Chandler *v.* Fulton, 10 Tex. 2; s. c. 60 Am. Dec. 188; In Durgy C. & U. Co. *v.* O'Brien, 123 Mass. 12, it was held that the fact that the notes of the buyer had gone to protest was sufficient to prove insolvency. In Naylor *v.* Dennie, 25 Mass. (8 Pick.) 198; s. c. 19 Am. Dec. 319, it was laid down, that it was sufficient that the affairs of the consignee were so involved that he was unable to pay for the goods, if he were to pay on delivery. See, also, Inslee *v.* Lane, 57 N. H. 454. Insolvency may be proved by any competent evidence, and may be inferred from circumstances. Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; More *v.* Lott, 13 Nev. 376; Reynolds *v.* Boston & M. R. R., 43 N. H. 580. The right of stoppage can be exercised, though the buyer was insolvent when he purchased, provided the seller was ignorant of his insolvency. Loeb *v.* Peters, 63 Ala. 243; s. c. 35 Am. Rep. 17; Blum *v.* Marks, 21 La. An. 268; O'Brien *v.* Norris, 16 Md. 122; s. c. 77 Am. Dec. 284; Naylor *v.* Dennie, 25 Mass. (8 Pick.) 198; s. c. 19 Am. Dec. 319; White *v.* Mitchell, 38 Mich. 390; Reynolds *v.* Boston & M. R. R., 43 N. H. 580; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Benedict *v.* Chaettle, 12 Ohio St. 515. But the seller has no right of stoppage, where such insolvency was known to him at the time of the sale and he contracted with such knowledge. Rogers *v.* Thomas, 20 Conn. 68; O'Brien *v.* Norris, 16 Md. 122; s. c. 77 Am. Dec. 284.

would be bound to deliver the goods, with an indemnification for expenses incurred.[1]

In "The Tigress,"[2] Dr. Lushington, in delivering judgment, said: "Whether the vendee is insolvent may not transpire till afterwards (*i.e.* after the stoppage), when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent." But this was a case between the vendor and the owners of the vessel, not between vendor and vendee, and will be more fully referred to, *post.*

Section III. — WHEN DOES THE TRANSIT BEGIN: AND END?

§ 1151. The transit is held to continue from the time the vendor parts with the possession, until the purchaser acquires it; * that is to say, from the time when the [*826] vendor has so far made delivery, that his right of retaining the goods, and his right of lien, as described in the antecedent chapters, are gone, to the time when the goods have reached the *actual* possession of the buyer.

§ 1152. And here the reader must be reminded that the vendor's right in the goods is very frequently not ended on their arrival at their ultimate destination, because of his having retained *the property* in them. The mode by which the vendor may guard himself against the buyer's insolvency through the reservation of the *jus disponendi*, of the *title* to the goods, has been treated, *ante*, Book II. Ch. 6. The stoppage *in transitu* is called into existence for the vendor's benefit, after the buyer has acquired *title*, and *right of possession*, and *even constructive possession*, but not yet *actual possession.*

§ 1153. In James *v.* Griffin,[1] which was twice before the Exchequer of Pleas, Parke B., giving his opinion on the second occasion, thus stated the general principles: "Of

[1] *Per* Lord Stowell, in The Constantia, 6 Rob. Adm. R. 321.

[2] 32 L. J. Adm. 97.

[1] 1 M. & W. 20; 2 M. & W. 633.

the law on this subject to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold, to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods, — before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, — and thereby to *replace the vendor* in the same situation, as if he had not parted with the actual possession. . . . The actual delivery to the vendee or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; Scott *v.* Petit (3 B. & B. 469), Rowe *v.* Pickford (8 Taunt. 83); or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself; Dixon *v.* Baldwin (5 East, 175); or it may [*827] be by *the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

It is obvious from this clear statement of the law, that each case must be determined according to its own circumstances, the inquiry being whether at the time of the stoppage the transit of the goods had or had not been determined. An attempt will be made to classify the cases, so as to afford examples of the controversies most frequently arising in the business of merchants.

§ 1154. Goods are liable to stoppage as long as they remain in possession of the carrier, *quâ carrier*[1] (a qualifica-

[1] Mills *v.* Ball, 2 B. & P. 457; James *v.* Griffin, 2 M. & W. 633; Lickbarrow *v.* Mason, 1 Sm. L. C. (ed. 1879) 753, and notes, and the cases on Stoppage *passim*.

The general rule is that goods are in transit until the consignee or his agent has taken possession of them by some positive act. Blackman *v.* Pierce, 23 Cal. 509; Aguirre *v.* Parmelee, 22 Conn. 473; McFetridge *v.* Piper, 40 Iowa, 627; Keeler *v.* Goodwin, 111 Mass. 490; Mohr *v.* Boston & A. R. R. Co., 106 Mass. 67; Rowley *v.* Bigelow, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; Naylor *v.* Dennie, 25 Mass. (8 Pick.) 198; s. c. 19 Am. Dec. 319; Stubbs *v.* Lund, 7

tion to be kept in view, for, as we shall presently see, he may become bailee for the buyer, as warehouseman or wharfinger, after his duties as carrier have been discharged), and it makes no difference that the carrier has been named or appointed by the vendee.[2]

§ 1155. But when the owner sends his own servant for the goods, the delivery to the servant is a delivery into the actual possession of the master. If, therefore, the buyer send his own cart, or his own vessel for the goods, they have reached the buyer's *actual possession*, as soon as the vendor has delivered them into the cart or vessel.[1]

[So in a case where the goods were loaded in trucks sent by the agents of the purchaser, it was held that, *under the circumstances*, the transit ceased upon the loading.[2] But Jessel M. R. expresses the opinion (at p. 219) that the determination of the transit does not follow as a proposition of law, from the fact of the purchaser having sent his own cart for the goods, and received them in the cart, but is a * question of inference from known facts as [*828] to what the real intention of the parties was, and, therefore, when the trial is by a judge and jury, a question for the jury.]

§ 1156. But if the vendor desire to restrain the effect of a delivery of goods on board the vendee's own vessel, he may do so, by taking bills of lading so expressed as to indicate

Mass. 453; s. c. 5 Am. Dec. 63; More *v.* Lott, 13 Nev. 376; Harris *v.* Pratt, 17 N. Y. 249; Covell *v.* Hitchcock, 23 Wend. 611; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Cabeen *v.* Campbell, 30 Pa. St. 254; Hays *v.* Mouille, 14 Pa. St. 48; Donath *v.* Broomhead, 7 Pa. St. 301; Chandler *v.* Fulton, 10 Tex. 2; s. c. 60 Am. Dec. 188; Sawyer *v.* Joslin, 20 Vt. 172; s. c. 49 Am. Dec. 768; Hoover *v.* Tibbits, 13 Wis. 79; In re Foot, 11 Blatchf. C. C. 530.

[2] Holst *v.* Pownall, 1 Esp. 240; Northey *v.* Field, 2 Esp. 613; Hodgson *v.* Loy, 7 T. R. 440; Jackson *v.* Nicholl, 5 Bing. N. C. 508; *per* Buller J. in Ellis *v.* Hunt, 3 T. R. 466; Stokes *v.* La Riviere, reported by Lawrence J. in giving the judgment of the Court in Bohtlingk *v.* Inglis, 3 East, 397; Berndtson *v.* Strang, 4 Eq. 481; 36 L. J. Ch. 879; s. c. 3 Ch. 588; Ex parte Rosevear China Clay Co., 11 Ch. D. 560, C. A.

[1] Blackburn on Sales, 242; Ogle *v.* Atkinson, 5 Taunt. 759; *per cur.* in Turner *v.* Trustees of Liverpool Docks, 6 Ex. 543; 20 L. J. Ex. 394; Van Casteel *v.* Booker, 2 Ex. 691.

[2] Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205.

that the delivery is to the master of the vessel as an *agent for carriage*, not *an agent to receive possession for the purchaser.* This point was decided in Turner *v.* Trustees of the Liverpool Docks,[1] the facts of which are fully reported, *ante*, p. 338, and that case was recognized as settled law in Schotsman *v.* Lancashire and Yorkshire Railway Company,[2] decided by the full court of Chancery Appeals. Lord Cairns, then Lord Justice, said: "The Londos was the ship of Cunliffe, and indicated as such for the delivery of the goods. The master was his servant. *No special contract* was entered into by the master to *carry the goods for or to deliver them to any person other than Cunliffe, the purchaser.* In point of fact no contract of affreightment was entered into, for the person to sue on such a contract would be Cunliffe, in whom was vested the property in the goods, and the person to be sued would be the same Cunliffe, as owner of the Londos. The *essential feature* of a stoppage *in transitu* as has been remarked in many of the cases, is that *the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them.* It was suggested here that the master of the ship was a person filling this character, but the master of the ship is the servant of the owner: and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal." Lord Chelmsford C. gave an opinion to the same effect, and pointed out that if the vendor had desired to restrain the effect of the delivery, he should have taken a bill of lading with the proper endorsement, as was established in Turner *v.* Trustees of Liverpool Docks.

[*829] * In the foregoing case it was further held by both the learned lords, reversing Lord Romilly's judgment at the Rolls,[3] that there was no difference in the effect of the delivery, whether the buyer's ship was expressly sent for the goods, or whether it was a general ship belonging to the

[1] 6 Ex. 543; 20 L. J. Ex. 394.
[2] 2 Ch. 332; 36 L. J. Ch. 361.
[3] 1 Eq. 349.

buyer, and the goods were put on board without any previous special arrangement.

§ 1157. Whether a vessel chartered by the buyer is to be considered his own ship, depends on the nature of the charter-party. If the charterer is, in the language of the law-merchant, owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then a delivery on board of such a chartered ship would be a delivery to the buyer: but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the vendor of goods on board, is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be determined by the terms of the charter-party.[1]

§ 1158. In Berndtson *v.* Strang,[1] the subject was elaborately discussed, and all the cases reviewed by Lord Hatherly (then V.-C.). The buyer had sent a vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f. o. b.), and the vendor took a bill of lading, deliverable to "order or assigns," and indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held, that the effect of taking the bill of lading in that form, from the master of the chartered ship, was to interpose him, as a carrier, * between the vendor and the vendee, and [*830] to preserve the right of stoppage to the former. The following instructive passages are extracted from the opinion

[1] Blackburn on Sales, 242; Fowler *v.* McTaggart, cited 7 T. R. 442, and 10 East, 522; Inglis *v.* Usherwood, 1 East, 515; Bohtlingk *v.* Inglis, 3 East, 381; see the cases collected in Maude and Pollock on Shipping (ed. 1881 by Pollock and Bruce), vol. i. p. 418; and a further discussion of the subject in Sandeman *v.* Scurr, L. R. 2 Q. B. 86; 36 L. J. Q. B. 58, and the Omoa Coal and Iron Co. *v.* Huntley, 2 C. P. D. 464. As to what amounts to a demise of a ship, see Meiklereid *v.* West, 1 Q. B. D. 428.

[1] 4 Eq. 481; 3 Ch. 588; and see Ex parte Rosevear China Clay Co., 11 Ch. D. 560, C. A. *post*, p. 838.

of the learned lord: "Now there are two criteria, as it appears to me, with respect to the stoppage *in transitu*, viz., whether there is a transitus at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board of his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery, and the transitus is at an end just as much (as was said in Van Casteel *v.* Booker, 2 Ex. 691), as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further transitus after the goods are in the purchaser's own cart.[2] There they are at home, in the hands of the purchaser, and the whole delivery is at an end. The next thing to be looked to is, *whether there is any intermediate person interposed between the vendor and the purchaser*. Cases may no doubt arise where the transitus may be at an end, although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself, and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done, for the goods have been put in the place indicated by the purchaser, and there is an end of the transitus. But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name, and being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the *master is a person interposed between vendor and purchaser*, in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession until the voyage is terminated and the [*831] freight paid, * according to the arrangement in the charter-party. . . . The whole case here appears to me to turn upon whether or not it is the man's own ship that

[2] But see *per* Jessel M. R. in Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 Ch. D. at p. 219.

receives the goods, or whether he has contracted with some one else, *qua carrier*, to deliver the goods, so that according to the ordinary rule as laid down in Bohtlingk *v.* Inglis, 3 East, 381, and continually referred to as settled law upon the subject, the *transitus* is only at an end when the carrier has arrived at the place of destination, and has delivered the goods."

§ 1159. On the appeal in this case,[1] it was affirmed on the point argued before the lower Court, but the decree was varied on a new point which had passed *sub silentio* in that Court. The goods were injured in transit, and were also made to contribute to a general average, and for these two claims the purchaser was entitled to indemnity from underwriters under policies effected by him. The vendor claimed a right of stoppage as to the insurance money thus accruing to the purchaser, which had been brought into Court, but Lord Cairns C. held the pretension to be utterly untenable.[2]

§ 1160. Before a bill of lading is taken, the vendor preserves his lien, and is not driven to the exercise of his right of stoppage, if he has taken or demanded the receipts for the goods in his own name: though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage.[1] If, however, the vessel were the purchaser's own vessel, and the receipts contained nothing to

[1] 3 Ch. 588. See, also, Fraser *v.* Witt, 7 Eq. 64.

[2] This distinction between the right to goods, and to the proceeds of a policy of insurance effected upon them, was recognized in Latham *v.* The Chartered Bank of India, 17 Eq. 205, 216. And for the distinction between the right to goods and to the proceeds arising from their subsale, see Kemp *v.* Falk, 7 App. Cas. 573, *post*, p. 861.

[1] Craven *v.* Ryder, 6 Taunt. 433; Ruck *v.* Hatfield, 5 B. & Ald. 632.

The consignor may in general retain the property in the goods, by making the bill of lading deliverable to his own order. Newcomb *v.* Boston & L. R. R. Corp., 115 Mass. 230; Fifth National Bank of Chicago *v.* Bayley, 115 Mass. 228; National Bank of Green Bay *v.* Dearborn, 115 Mass. 219; Seymour *v.* Newton, 105 Mass. 272; Farmers' & Mechanics' Nat. Bank *v.* Logan, 74 N. Y. 568; Bank of Commerce *v.* Bissell, 72 N. Y. 615; Marine Bank of Buffalo *v.* Fisk, 71 N. Y. 353; First National Bank *v.* Shaw, 61 N. Y. 283; s. c. 69 N. Y. 624; Mechanics' & Traders' Bank *v.* Farmers' & Mechanics' Bank, 60 N. Y. 40; Dows *v.* Perrin, 16 N. Y. 325; Bank of Rochester *v.* Jones, 4 N. Y. 497; Dows *v.* National Exchange Bank, 91 U. S. (1 Otto) 618; bk. 23, L. ed. 214.

show that a bill of lading was to be delivered by which the vendor's control over the goods was to be retained, the principle in Schotsman *v.* Lancashire and Yorkshire Railway Company,[2] would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage.[3]

[*832] § 1161. * Goods may be still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's orders. Goods sold in Manchester to a merchant in New York, may be still in transit while lying in a warehouse in Liverpool. The question, and the sole question for determining whether the transitus is ended, is, In what capacity the goods are held by him who has the custody? Is he the buyer's agent to *keep* the goods? or the buyer's agent to *forward* them to the destination intended at the time the goods were put in transit? If, in the case supposed, the goods in the Liverpool warehouse are there awaiting shipment to New York, in pursuance of the purchaser's original order to send him the goods to New York, they are still in transit, even though the parties in possession in Liverpool may be the general agents of the New York merchant for selling as well as forwarding goods. But if the buyer ordered his goods to Liverpool only, and they are kept there awaiting his further instructions, they are no longer in transit. They are in his own possession, being in possession of his agent, and may be sold in Liverpool or shipped to the East, or disposed of at the will and pleasure of the buyer. And it is well observed in the Treatise on Sales,[1] that "it then becomes a question depending upon what was done, and what was the intention with which it was done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point:" and "that the acts accompanying the transport of goods are

[2] 2 Ch. 332; 26 L. J. Ch. 361.

[3] Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

[1] Blackburn on Sales, 224.

less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same,— Has the person who has the custody of the goods got possession as an agent to *forward* from the vendor to the buyer, or as an agent to hold for the buyer? "[2]

§ 1162. A few of the cases offering the most striking illustrations of the distinction will now be presented.

* In Leeds *v.* Wright,[1] the London agent of a Paris [*833] firm had in the packer's hands in London, goods sent there by the vendor from Manchester, under the agent's orders; but it appeared that the goods were, at the agent's discretion, to be sent where he pleased, and not for forwarding to Paris; and it was held that the transitus was ended.

In Scott *v.* Pettit,[2] the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own; and there was no *ulterior* destination. Held, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders.

§ 1163. In Dixon *v.* Baldwin,[1] the facts were, that Battier and Son, of London, ordered goods of the defendants at Manchester, to be forwarded "to Metcalfe and Co. at Hull,

[2] Ibid. p. 244.

In Mohr *v.* Boston & A. R. R. Co., 106 Mass. 67, the goods were in the hands of a warehouseman at the time of the sale, and were transferred to the purchaser's name in his books, the seller was to have the goods forwarded and to pay charges, &c., it was held that the goods were to be deemed in transit until they reached their ultimate destination. And where the goods come into the possession of a wharfinger or warehouseman at an intermediate stage, they are to be deemed as still in transit, such person being merely an agent to expedite the carriage. Blackman *v.* Pierce, 23 Cal. 508; Markwald *v.* Their Creditors, 7 Cal. 213; Covell *v.* Hitchcock, 23 Wend. (N. Y.) 611; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; s. c. 17 Wend. (N. Y.) 504; Smith *v.* Goss, 1 Camp. 282. But where the goods have reached the destination agreed upon between the buyer and the seller, and are there delivered to the buyer's agent the right of stoppage is gone, and is not revived or prolonged by his ordering them to be despatched to a new point of destination. Brooke Iron Co. *v.* O'Brien, 135 Mass. 442, 447; Mohr *v.* Boston & A. R. R. Co., 106 Mass. 67, 71; Guilford *v.* Smith, 30 Vt. 49.

[1] 3 B. & P. 320.

[2] Ibid. 469.

[1] 5 East, 17.

to be shipped for Hamburgh as usual;" — the course of dealing of the Battiers being to ship such goods to Hamburgh. Part of the goods were ordered in March, and part in May, and were sent to Hull as directed. The Battiers became bankrupt in July, and the vendors stopped the goods at Hull, including four bales actually shipped for Hamburgh, which were relanded on the vendor's application, they giving an indemnity to Metcalfe. The latter, as witness, said "that at the time of the stoppage he held the goods for the Battiers, *and at their disposal;* that he accounted with the Battiers for the charges. The witness described his business to be merely an *expeditor* agreeable to the distinctions of the Battiers, — a *stage* and *mere instrument* between buyer and seller; that he had no authority to sell the goods, and frequently shipped them without seeing them; that the bales in question were to remain at his warehouse for the orders of Battier and Son, and he had no other authority than to forward them; that at the time the goods were stopped, he was waiting for the orders of the Battiers; that he had shipped the four bales, expecting to receive such orders, and relanded them because none had arrived." Lord Ellenborough held, on these facts,

"that the goods had so far gotten to the end of their [*834] journey, **that they waited for new orders from the purchaser to put them again in motion*, to communicate to them *another* substantive destination; and that *without such orders they would continue stationary.* Lawrence and Le Blanc JJ. concurred, but Grose J. dissented on this point.

§ 1164. In Valpy *v.* Gibson,[1] which was a case very similar to the foregoing, the goods were ordered of the Manchester vendor, and sent to a forwarding house in Liverpool, by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward till receiving orders from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the vendor, with orders to repack them into eight packages instead of four; and the vendors accepted the instructions,

[1] 4 C. B. 837.

writing — "We are now repacking them in conformity with your wishes." Held, that the right of stoppage was lost; that the transitus was at an end; and that the re-delivery to the vendor for a new purpose could give him no lien.

§ 1165. [In Ex parte Gibbes,[1] the vendors were cotton merchants at Charleston, in America, and the purchasers cotton-spinners at Luddenden Foot, in Yorkshire. Their mode of transacting business was as follows: — the vendors consigned the cotton to their agents at Liverpool, at the same time transmitting to them the shipping documents, with bills of exchange drawn upon the purchasers for the price. The agents sent the bills to the purchasers for acceptance, and, upon their returning them accepted, sent them the shipping documents. The purchasers endorsed the bills of lading, and sent them to the manager of the railway company at Liverpool, who, after paying any sea-charges, took possession of the cotton and forwarded it by the company's line of rail to Luddenden Foot station. The invoice of the cotton described it as shipped by the vendors by steamer to Liverpool consigned to order, for account and risk of the purchasers, Luddenden Foot; and the bill of lading, provided for the shipment of the cotton to Liverpool, "there to be delivered unto order or assigns, he or they paying *freight immediately on landing the goods." Upon [*835] these facts, Bacon C. J. held that the transit was at an end when the goods reached Liverpool. The manager of the railway company then took possession of the cotton as agent to hold it for the purchasers, it was there and then at the purchasers' order and disposition, and the subsequent transit from Liverpool to Luddenden Foot was one prescribed by them. The company, no doubt, were forwarding agents and would, in the ordinary course, forward the goods to the purchasers at Luddenden Foot; but it was at the purchasers' option to countermand that destination and substitute another, or to direct that the goods should remain in the company's possession to await further instructions.]

See, also, Wentworth *v.* Outhwaite,[2] Dodson *v.* Went-

[1] 1 Ch. D. 101. [2] 10 M. & W. 436.

worth,[3] Cooper *v.* Bill,[4] Smith *v.* Hudson,[5] and Rowe *v.* Pickford.[6]

§ 1166. Reference will now be made to some of the cases in which the transitus was considered *not* at an end, where the goods had reached the custody of the buyer's agent, the agent's duty being merely to forward them.

In Smith *v.* Goss,[1] the buyer at Newcastle wrote to the vendor at Birmingham, to send him the goods by way of London or Gainsborough; — "if they are sent to London, address them to the care of J. W. Goss, with directions to send them by the first vessel for Newcastle." Lord Ellenborough said, that "the goods were merely at a stage upon their transit;" and the vendor's right of stoppage remained.

§ 1167. In Coates *v.* Railton,[1] it appeared that the course of business was, that Railton at Manchester should purchase goods on account of Butler of London, and forward them to a branch of Butler's house in Lisbon, by whom the goods were ordered through the London house; neither of the Butler firms had any warehouse at Manchester; and [*836] the * vendor was told that the goods were to be sent to Lisbon as on former occasions. The goods were delivered at the warehouse of Railton, who had them calendared and made up, and was then to forward them to Liverpool for shipment to Lisbon. Held, that the transitus was not ended by the delivery to Railton. Bayley J. said: "It is a general rule that where goods are sold to be sent to a particular *destination named by the vendee*, the right of the vendor to stop them continues until they arrive at that place of destination." After reviewing all the previous cases, the learned judge said: "The principle deduced from these cases is, that the *transitus is not at an end until the goods have reached the place named by the buyer to the seller as the place of destination.*" In this case it will be remarked, that Railton's agency from the beginning was to buy *and forward*

[3] 4 M. & G. 1080.
[4] 3 H. & C. 722; 31 L. J. Ex. 151.
[5] 4 B. & S. 431; 34 L. J. Q. B. 145.
[6] 8 Taunt. 83.
[1] 1 Camp. 282.
[1] 6 B. & C. 422.

to Lisbon to the vendee; and the goods were not to be held by him to await orders, or any other disposal of them.

§ 1168. So in Jackson *v.* Nichol,[1] where the goods were placed by the vendors, at Newcastle, at the disposal of Crawhall, an agent of the buyers, by a delivery order. Crawhall was a general agent of the buyers, who had been in the habit of receiving goods for them, and awaiting their orders, but in this particular instance had received instructions to forward the goods to the buyers in London, *before the goods left the vendor's possession;* and on receiving the delivery order, he at once endorsed it to a wharfinger, "to go on board the Esk," and the wharfinger gave the order to a keelman, who went for the goods and put them on board the Esk. The Esk arrived in the port of London with the goods, and while moored in the Thames, the goods were put on board a lighter sent for them by the defendants, who were the wharfingers of the Esk, and the stoppage was made while the goods were on the lighter. The Court held that "the lead never came into the actual possession of Crawhall, the agent," that the series of Acts done at Newcastle were but "links in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the
* seller's premises in Newcastle to the buyers' in Lon- [*837]
don." Tindal C. J. said also, "if the goods had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, *such possession would have been the constructive possession* of the buyers themselves, and the right to stop *in transitu* at an end."

§ 1169. [In Ex parte Watson,[1] an agreement had been entered into between one Love, a China merchant in London, and Watson, a Yorkshire manufacturer, that Watson should supply Love with goods, Watson drawing upon Love and Love accepting bills of exchange for the invoice price. *By the terms of the agreement Love was to ship the goods to his correspondents, Rothwell, Love & Co., in Shanghai,* and on

[1] 5 Bing. N. C. 508.

[1] 5 Ch. D. 35, C. A.

receipt of the bills of lading was to send them to Rothwell, Love & Co., to whose order they were to be made out. Watson was to have a lien upon the bills of lading and each shipment of goods in transit outwards, which lien was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. Love had undertaken to give notice to Rothwell, Love & Co. of this agreement and its terms, but he never in fact gave such notice. In pursuance of the agreement Love ordered a parcel of goods from Watson. The goods were packed by Watson's packer, who forwarded them by rail to London in bales marked "*Shanghai*," and addressed to a ship called the *Gordon Castle* designated by Love, which was loading in the West India Docks for Shanghai. The carriage to London was paid by Watson. The packer, in advising Love of the dispatch of the goods, stated that they were "at his disposal." Love accepted a six months' bill of exchange drawn upon him by Watson for the invoice price. The railway company, on the arrival of the goods at their Poplar Dock Station, sent an advice-note to Love, informing him that the goods remained at his order and were held by the company as warehousemen at his risk, adding, however, "will be sent to the *Gordon Castle*." The goods were [*838] afterwards * shipped on board that vessel. The bills of lading were, by Love's directions, made out to the order of himself or assigns, but were retained by the shipowners, as the freight was not paid by Love. The ship sailed for Shanghai, with the goods on board. Love became bankrupt while the goods were at sea, and Watson telegraphed to Rothwell, Love & Co. at Shanghai, requesting them to deliver the goods to his agents there; he also demanded the bills of lading from the shipowners in London. It was held by the Court of Appeal on this state of facts — *first*, that the agreement did not destroy or diminish the vendor's right of stoppage in transitu; *secondly*, that the transit continued, and was intended to continue, from the railway station in Yorkshire up to Shanghai, inasmuch as Watson could have obtained an injunction to restrain Love from sending the goods to any other destination; and *thirdly*,

that the demand by Watson of the bills of lading from the shipowners was an effectual exercise of the right of stoppage.

§ 1170. In Ex parte Rosevear China Clay Company,[1] the vendors had contracted to deliver a cargo of china clay f. o. b. a vessel in the harbor of Fowey. The destination of the cargo was not disclosed at the date of the contract. The cargo was delivered by the vendors at Fowey, on board a vessel chartered by the purchaser for the purpose of being carried to Glasgow. Before the vessel left the harbor, the vendors gave the ship's master notice to stop the cargo. Held, by the Court of Appeal, reversing the decision of Bacon C. J. that the transitus was not at an end. The Court adopted the rule, as stated by Lord Cairns in Berndtson *v.* Strang (*ante*, p. 829). "The authorities show" (says James L. J.) "that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere * intermediary." It was con- [*839] tended in the course of the argument, that as the vessel itself was the only destination for the cargo which had been communicated to the vendors, the transit ceased upon shipment. The Court, however, refused to draw this distinction, holding that the mere circumstance of the port of destination not having been disclosed at the date of the execution of the contract did not affect the vendor's right to stop the goods.]

§ 1171. Next come the cases where the goods have reached their ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *quâ carrier*, or if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive them and hold them for the buyer's

[1] 11 Ch. D. 560, C. A.; and see Kendall *v.* Marshall, 46 L. T. N. S. 693.

account. Blackburn on Sales has this passage:[1] "In none of these cases, it may be observed, was there any doubt as to the law: the question was one of fact, viz., in what capacity did the different agents hold possession? This question becomes still more difficult to answer when the party holding the goods acts in two capacities, as, for instance, a carrier who also acts as a warehouseman, and who may therefore have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer: or a wharfinger who sometimes receives goods as agent of the shipowner, and sometimes as agent of the consignee. In all such cases, as the leading fact, viz., the possession of the goods, is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts. If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end: but I apprehend that both these intents must concur, and that neither can the carrier, of his own will, convert himself into a warehouseman, so as to terminate the transitus, without the agreeing mind of the buyer (James *v.* Griffin, 2 M. & W. 623), nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no [*840] right *whatsoever to retain possession against the buyer. (Jackson *v.* Nichol, 5 Bing. N. C. 508.)"[2]

§ 1172. This view of the law has received full confirmation in subsequent cases.

[1] Page 248.

[2] The right of stoppage *in transitu* continues so long as the goods remain in the carrier's possession, in his character as a carrier. To put an end to the right, it is necessary that the carrier should have agreed with the buyer to hold them as his bailee. Seymour *v.* Newton, 105 Mass. 272; Naylor *v.* Dennie, 25 Mass. (8 Pick.) 198; s. c. 19 Am. Dec. 319; Inslee *v.* Lane, 57 N. H. 454. Where the goods are transferred to a warehouse at the end of the voyage, to await payment of charges, there is no such delivery as will defeat the right of stoppage. Calahan *v.* Babcock, 21 Ohio St. 281; Hoover *v.* Tibbits, 13 Wis. 79. But the landing of goods upon a wharf will defeat the right, when by such landing the goods were subjected to the control and direction of the consignee only, and the duty or responsibility was cast upon the wharfinger. Sawyer *v.* Joslin, 20 Vt. 172; s. c. 49 Am. Dec. 768. The right of stoppage

In James *v.* Griffin above quoted and decided in 1837, the buyer, knowing himself to be insolvent, determined that he would not receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead: and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, Bolland, and Anderson, BB., held the transitus not ended, and that the buyer's intention not to receive being proven, the wharfingers could not receive as his agents without his assent. Abinger C. B. dissented, on the ground that the intention of the buyer not having been communicated to the wharfingers, the agency of the latter could not be affected by it, and that the transitus was therefore ended. But all agreed that the sole question was whether the wharfingers were in possession *qua agents of the buyer*. And in Jackson *v.* Nichol,[1] repeated demands were made by the buyers for the goods after the arrival of the Esk in the Thames[2] before there was a stoppage, but the master of the vessel refused delivery, and the Court of Common Pleas held that the goods had not come into possession of the buyer. Nothing was here wanting to possession but the carrier's

has ceased when the goods have arrived at the railroad depot at the end of the destination, and remain there merely for the consignee's convenience in removing them, even though the railroad company has a lien on the goods for freight. Hall *v.* Dimond, 63 N. H. 565. But see Symns *v.* Schotten, 35 Kans. 310. In Fraschieris *v.* Henriques, 6 Abb. (N. Y.) Pr. N. S. 251, it was held that the right of stoppage continues, in default of an entry, after the goods have been removed to the government warehouse, under general orders, and, also, where a formal entry has been made, but the goods have not been properly bonded; but the right is at an end if there is a proper entry, and the goods are regularly bonded and warehoused. But the transitus continues although the goods have been entered by the purchaser at the Custom House without payment of the duties. Mottram *v.* Heyer, 5 Den. (N. Y.) 629; Donath *v.* Broomhead, 7 Pa. St. 301. But see Wilds *v.* Smith, 2 Up. Can. App. Cas. 8; Wiley *v.* Smith, 1 Up. Can. App. Cas. 179; s. c. 2 Can. Supr. Ct. 1. Overruling Graham *v.* Smith. 27 Up. Can. C. P. 1; Howell *v.* Alport, 12 Up. Can. C. P. 375.

[1] 5 Bing. N. C. 508.

[2] *Ante*, p. 836.

assent to put an end to the transitus,[3] and the principle seems to be exactly that of Bentall *v.* Burn, and the class of cases like it, reviewed, *ante*, pp. 152, 153.

§ 1173. This question was considered by the Common Pleas in the singular case of Bolton *v.* The Lancashire and Yorkshire Railway Company.[1] The facts stated in [*841] the special case *were that Wolstencroft, of Manchester, sold to Parsons, of Brierfield, certain goods lying at the defendants' station at Salford, and sent the buyer an invoice, and delivered part of them. Parsons then wrote refusing to take any more on account of the alleged bad quality. Wolstencroft had, on the same day, ordered the defendants to deliver another portion of the goods to Parsons, and wrote to the latter that he had done so, "according to your wish; the other four are lying at Salford awaiting your instructions." Parsons wrote back returning the invoice and refusing the goods, saying: "We shall not have any more of it." Wolstencroft then sent a letter through his solicitor demanding payment of all the goods undelivered, and sent an order to the railway company, the defendants, to deliver the rest of the goods to Parsons. Some of the goods were taken by the carter of Parsons from the station at Brierfield without the knowledge of Parsons, and he at once returned them, and ordered all the goods to be sent back to Wolstencroft. The latter refused to receive them, and ordered them back to Parsons. The defendants then wrote to Parsons asking what they were to do with the goods, and Parsons replied: "We shall have nothing to do with them; they belong to Wolstencroft." Parsons afterwards became bankrupt, and the vendor sent a stoppage order to the defendants, in whose hands the goods still remained, and the goods were delivered to the vendee. The action was brought against the carriers by the assignees of the buyer. Held, that the transitus was not at an end. Erle J. said: "I am of opinion that these goods did not

* See Foster *v.* Frampton, 6 B. & C. 107, where the assent of both parties was given.

[1] L. R. 1 C. P. 431; 35 L. J. C. P. 137.

cease to be *in transitu* by being at the Brierfield station. Before they arrived there, notice had been given by Parsons to the vendor that he declined to receive them; and after their arrival Parsons gave the defendants orders to take them back again. The vendor at first refused to have anything to do with them; and thus, the goods *being rejected by both the vendor and by Parsons*, remained in the hands of the defendants. Under the circumstances, it seems to me the goods never ceased to be *in transitu*. It is clear, from the case of James *v.* Griffin (2 M. & W. 623), that the * intention of the vendee to take possession is a [*842] material fact." So in Whitehead *v.* Anderson (9 M. & W. at p. 529), Parke B. says, "the question is *quo animo* the act is done. My notion has always been whether the consignee has taken possession, not whether the captain has intended to deliver it. . . . It was urged by Mr. Holker, that being repudiated by both parties to the contract, the goods remained in the hands of the railway company as warehousemen for *the real owner*, that is, for Parsons. There is no doubt but the carrier may, and often does, become a warehouseman for the consignee; but that must be *by virtue of some contract or course of dealing between them* that when arrived at their destination the character of carrier shall cease, and that of warehouseman supervene." Willes J. laid stress on the circumstance that the goods were, at the time of the sale, in possession of the railway company as warehouseman and bailees of the vendor, and thought that this agency had never ended, because the order for delivery to the buyer must be considered as subject to the condition "if he will receive them," but not to an absolute abandonment, or authority to throw them away, if the buyer would not have them. And on the main question the learned judge said: "Mr. Holker is undoubtedly right when he says that the property in these goods passed to the vendee. Unless the property passed, there would be no need of the right of stoppage *in transitu*. The only effect of the property passing is that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession, unless he is prepared to pay for the goods.

. . . The right to stop *in transitu* upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu.* It must be observed that there is besides the propositions I have stated, and which are quite familiar, one other proposition which follows as [*843] deducible * from these, viz., that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such that the buyer has *taken actual or constructive possession of the goods, and that cannot be as long as he repudiates them.*"

§ 1174. This case is a complete confirmation of the principle that the carrier cannot change his character so as to become the buyer's agent to keep the goods for him, without the latter's assent.

[This is again illustrated by the case of Ex parte Barrow.[1] Goods were shipped in London to be delivered to the purchaser at Falmouth. Upon the arrival of the ship at Falmouth, the goods were transferred to and warehoused by the agents of the shipping company. It was their custom to notify to the consignee that the goods had arrived, and that they held them at the consignee's risk, and to forward them according to instructions on payment of the sea-charges. The arrival of the goods in question was never notified to the purchaser, as he had already absconded. The vendor stopped the goods. Held, by Bacon C. J. that the transit was not at an end. The only question to determine was, whether the shipping agents had divested themselves of their character of carriers, and were in possession of the goods as agents of the buyer; and this was concluded by the fact that, from the circumstances of the case, the buyer could never have given his assent to such an arrangement.]

[1] 6 Ch. D. 783. See p. 789 of the report, where the statement of the law given in the text is referred to with approval.

§ 1175. The case of Whitehead *v.* Anderson,[1] a leading one on this subject, is as direct an authority for the converse principle that the buyer cannot force the carrier to become his bailee to keep the goods without the latter's assent. In that case the buyer having become bankrupt, his assignee on the arrival of a vessel with a cargo of timber went on board, and told the captain that he had come to take possession of the cargo, and went into the cabin into which the ends of the timber projected, and saw and touched the * timber. The captain made no answer at first [*844] to the assignee's statement that he came to take possession, but afterwards told him at the same interview that he would deliver him the cargo when he was satisfied about his freight. They then went ashore together. The vendor then went on board and gave notice of stoppage to the mate who had charge of the vessel and cargo. Held, that no actual possession had been taken by the assignee, and that as the *captain had not contracted to hold as his agent*, the transitus was not at an end, and the stoppage was good.

§ 1176. In Coventry *v.* Gladstone,[1] the consignee on the arrival of the vessel sent a barge for the goods, and the lighterman was told that the goods could not be got at, but that they would be delivered to him when they could be got at, and Lord Hatherley (then V.-C.) held that this was not an attornment by the carrier to the consignee, that the character of the former as carrier was not changed into that of agent of the consignee, and that the goods were still liable to stoppage *in transitu*.

[The same principle was recently expressed by the Court of Appeal in the following terms: — "Where goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the transitus is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent;

[1] 9 M. & W. 518. Tud. L. C. on Mer. Law, 632, ed. 1868.

[1] 6 Eq. 44.

and the same principle will apply to a warehouseman or wharfinger." [2]]

[*845] § 1177. * The carrier's change of character into that of agent to keep the goods for the buyer, is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied.[1] Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods after arrival at destination as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid." The question is one of intention, and in Whitehead *v.* Anderson,[2] the captain was held not to have intended such an agreement by telling the assignee that he *would* deliver him the cargo when he was satisfied about the freight; Parke B. saying, "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise without a new consideration to *fulfil the original contract*, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. *After* the agreement he *remained* a mere agent for expediting the cargo to its original destination."

[But the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and, in order to rebut this presumption, there must be proof of some arrangement or agreement between the buyer and the car-

[2] Ex parte Cooper, 11 Ch. D. 68, C. A. This case also decides that the right to stop *in transitu* is not affected by the circumstance that the purchaser is a member of the vendor's firm. For cases where the transitus was held to have ceased upon notice of the arrival of the goods being given by the carrier to the purchaser, see Ex parte Catlin, Re Chadwick, 29 L. T. N. S. 431, and Ex parte Gouda, Re Millo, 20 W. R. 981. In both these cases there was evidence that the purchaser assented to the carrier no longer holding as carrier, but as warehouseman for him. In Chadwick's case it was expressly so stated in Chadwick's affidavit, and in Millo's case, on the advice note of the arrival of the goods being handed to the bankrupts, they signed for the goods, and afterwards paid the carrier's charges.

[1] Allan *v.* Gripper, 2 Cr. & J. 218; but see Crawshay *v.* Edes, 1 B. & C. 181, *post*, 847.

[2] 9 M. & W. 518.

rier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him.[3]]

§ 1178. The question whether the vendee may anticipate the end of the transitus, and thus put an end to the vendor's right of stoppage *in transitu*, was treated by most of the books,[1] as settled in the affirmative on the authority of the cases in * the note,[2] and in opposition to the [*846] ruling of Lord Kenyon, and the King's Bench in Holst *v.* Pownall.[3] And in Whitehead *v.* Anderson,[4] in which the judgment was prepared after advisement, Parke B. expressed no doubt upon the subject. He said: "The law is clearly settled that the unpaid vendor has a right to retake the goods *before* they have arrived at the destination originally contemplated by the purchaser, *unless in the mean time* they came to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of

[3] Ex parte Barrow, 6 Ch. D. 783; Ex parte Cooper, 11 Ch. D. 68, C. A.; Ex parte Falk, 14 Ch. D. 446, C. A. And see *per* Lord Blackburn in s. c. in the House of Lords, reported *sub nom.* Kemp *v.* Falk, 7 App. Cas. at p. 584.

[1] Sm. L. C. p. 821, ed. 1879. Tudor's L. C. Mer. Law, 664–5; Houston on Stoppage *in transitu*, 130 *et seq.*; 1 Griffith & Holmes on Bankruptcy, 352.

[2] Mills *v.* Ball, 2 Bros. & P. 457; Wright *v.* Lawes, 4 Esp. 82; Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 5 Bing. N. C. 508; Whitehead *v.* Anderson, 9 M. & W. 518; Foster *v.* Frampton, 6 B. & C. 107; James *v.* Griffin, 2 M. & W. 633.

The purchaser may defeat the right of stoppage in transitu by intercepting the goods at an intermediate point. Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; Mohr *v.* Boston & A. R. R. Co., 106 Mass. 67; Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658. It is sufficient to defeat the right if the goods are taken possession of by the vendee's agent at an intermediate point and diverted by him to another destination. Cabeen *v.* Campbell, 30 Pa. St. 254. But the interception must be in good faith. Thus where the vendee having learned that the carrier had instructions as to stoppage in transit, sent an agent to an intermediate point to get possession of them and mark them with a fictitious name, and forward them thereunder. It was held that both the agent and the company were responsible to the seller for the loss of the goods. Poole *v.* Houston & T. C. Ry. Co., 58 Tex. 134.

[3] 1 Esp. 240.

[4] 9 M. & W. 518.

action." There was, however, no direct decision on the point, and it rested on *dicta* till the case of The London and North-Western Railway Company *v.* Bartlett,[5] in which the Exchequer of Pleas held that the carrier and consignee might agree together for the delivery of goods at any place they pleased, and Bramwell B. said it would "probably create a laugh anywhere except in a court of law, if it was said a carrier could not deliver to the consignee short of the particular place specified by the consignor."

§ 1179. In Blackburn on Sales,[1] the learned author does not yield assent to that passage in the opinion of Parke B., above quoted, in which it is intimated that "the vendee can improve his position by a tortious taking of actual possession against the will of the carrier," in cases where the carrier has a right to refuse to allow the vendee to take possession.[2]

The doubt thus suggested seems to be justified by [*847] the decision * in Bird *v.* Brown,[3] which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case, the carrier tortiously refused possession to the purchaser when the goods had arrived at destination, and the Exchequer Court held, after advisement and in very decided language, that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver; that the transitus was at an end; and the right of stoppage gone.

§ 1180. Of course the mere arrival of the goods at destination will not suffice to defeat the vendor's rights. The vendee must take actual, if he has not obtained constructive, possession. What will amount to taking actual possession is a question in relation to which much of the law already referred to, in connection with actual receipt, under the Statute of Frauds,[1] and delivery sufficient to divest lien,[2] will be found applicable.[3]

[5] 7 H. & N. 400; 31 L. J. Ex. 92.

[1] Page 259.

[2] See the Civil law texts; Dig. Ulpian, l. 134, § 1, Æ Edict. Lib. xxi.; Broom's Legal Maxims, 279; Phillimore on Jurisprudence, 224.

[3] 4 Ex. 786.

[1] *Ante*, p. 105 *et seq.*

[2] *Ante*, p. 785 *et seq.*

[3] In Langstaff *v.* Stix, 64 Miss. 171, goods were deliverable to a purchaser at a railroad station. The pur-

§ 1181. In Whitehead *v.* Anderson,[1] it was held, as we have seen, that going on board the vessel and touching the timber was not taking it into possession, and *per cur.:* "It appears to us very doubtful, whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession unless accompanied by such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the nature of an agent for custody."

In Crawshay *v.* Edes,[2] the carrier having reached the consignee's premises, began unloading, and put a part of the goods on his wharf, but hearing that the consignee had absconded and was bankrupt, took them back again on board the barge; and it was held that the right of stoppage remained, and that there had been no delivery of any part of the goods.

§ 1182. Whether delivery of part, when not retracted under the peculiar circumstances shown in Crawshay *v.* Edes, amounts * to delivery of the whole, is always [*848] a question of intention, as shown *ante*, pp. 788 *et seq.*, where the cases mentioned in the note [1] have been reviewed; and the general rule was there deduced, that a delivery of part is not a delivery of the whole, unless the circumstances show that it was intended so to operate.

chaser learning that the goods had arrived, paid the freight, and said he would send for the goods. It was held that he had taken possession and that the seller could not exercise the right of stoppage *in transitu*.

[1] 9 M. & W. 518.

[2] 1 B. & C. 181.

[1] Dixon *v.* Yates, 5 B. & Ad. 313, *per* Parke J. at p. 341; Betts *v.* Gibbins, 2 A. & E. 73; Tanner *v.* Scovell, 14 M. & W. 28; Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Bunney *v.* Poyntz, 4 B. & Ad. 568; Simmons *v.* Swift, 5 B. & C. 857; Miles *v.* Gorton, 2 Cr. & M. 504; Jones *v.* Jones, 8 M. & W. 431; Wentworth *v.* Outhwaite, 10 M. & W. 436; Ex parte Gibbes, 1 Ch. D. 101; and observations upon Slubey *v.* Heyward, Hammond *v.* Anderson, and Jones *v.* Jones, *supra*, *per* Brett & Cotton L. JJ. in Ex parte Cooper, 11 Ch. D. 68, C. A. at pp. 74 and 77, and *per* Bramwell L. J. in Ex parte Falk, 14 Ch. D. C. A. at p. 455. See, also, *per* Lord Blackburn in s. c. in the House of Lords, reported *sub nom.* Kemp *v.* Falk, 7 App. Cas. at p. 586. See, also, Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; Buckley *v.* Furniss, 17 Wend. (N. Y.) 504.

§ 1183. [The rule to be gathered from recent decisions may be expressed as follows: — A delivery of part of the goods does not operate as a constructive delivery of the whole, unless the parties intended it so to operate, and it rests with the party who relies on the part delivery as a constructive delivery of the whole, to prove such intention. This proof may be established (1) from the circumstances under which the delivery took place, *e.g.*, the purchaser may at the time express his intention to take the whole of the goods, although he actually takes only a part; or, (2) possibly in some cases from the intrinsic nature of the goods delivered, as *e.g.*, where the cargo consists of an entire machine, and an essential portion of it is delivered to the purchaser.

Further, where the shipowner or carrier has not been paid in full his freight or charges, there is a strong presumption that he intends to retain his lien, and part delivery will not operate as a constructive delivery of the whole, unless it can be shown that the shipowner or carrier assented to the buyer's taking possession of the goods without payment of freight or charges.]

§ 1184. The bankruptcy of the buyer not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the [*849] buyer's warehouse *after his bankruptcy, or an actual possession of them taken by his trustee, will suffice to put an end to the transitus, and to determine the right of stoppage.[1]

Where the buyer has become insolvent after his purchase, he has a right to rescind the contract, with the assent of his vendor, while the goods are still liable to stoppage; and then the subsequent delivery of the goods into the buyer's possession cannot affect the vendor's rights because the *property* in the goods will not be in the buyer: or he may refuse to take *possession*, and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the buyer's trustee. The subject has

[1] Ellis *v.* Hunt, 3 T. R. 467; Scott *v.* Pettit, 3 B. & P. 469; Inglis *v.* Usherwood, 1 East, 515. Tooke *v.* Hollingworth, 5 T. R. 226;

been considered, *ante*, pp. 493 to 495, where the cases are referred to.

Section IV. — HOW IS THE RIGHT EXERCISED?

§ 1185. No particular form or mode of stoppage has been held necessary in any case; and Lord Hardwicke once said, that the vendor was so much favored in exercising it, as to be justifiable in getting his goods back by any means not criminal, before they reached the possession of an insolvent vendee.[1] All that is required is some act or declaration of the vendor countermanding delivery. The usual mode is a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders.[2]

§ 1186. In Litt *v.* Cowley,[1] where notice had been given to the carrier not to deliver the goods to the vendee, the carrier's clerk made a mistake, and delivered the package to the buyer, who opened it and sold part of the contents; and then became bankrupt. The assignees claimed to hold the goods, but were unsuccessful. Gibbs C. J., in delivering judgment, said: "It was formerly held, that unless the vendor recovered back actual possession of the goods by a corporeal seizure of them, he could not exercise his right of * stoppage *in transitu*. Latterly it has been [*850] held, that notice to the carrier is sufficient; and that if he deliver the goods after such notice, he is liable. That

[1] 1 Atk. 250.

[2] *Stoppage in transitu. — Notice to carrier.* — The right of stoppage *in transitu* is validly exercised by a notice to the carrier, in whose hands the goods are. Jones *v.* Earl, 37 Cal. 630; Rucker *v.* Donovan, 13 Kans. 251; s. c. 19 Am. Rep. 84; Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489; Reynolds *v.* Boston & M. R. R., 43 N. H. 580; Mottram *v.* Heyer, 5 Den. (N. Y.) 629. An action of replevin against the officer attaching the goods, brought after a demand, is a sufficient exercise of the right. Atkins *v.* Colby, 20 N. H. 154; Benedict *v.* Schaettle, 12 Ohio St. 515. In O'Brien *v.* Norris, 16 Md. 122; s. c. 77 Am. Dec. 284, it was held that filing a claim in an attachment case to the fund in Court, arising from the sale of goods under an interlocutory order, is a sufficient exercise of the vendor's right. It would seem to be essential that the notice should specify the goods so that the carrier could identify them. Clementson *v.* Grand Trunk Ry. Co., 42 Up. Can. Q. B. 263.

[1] 7 Taunt. 168; 2 Marsh. 457.

doctrine cannot be controverted, and is supported by all the modern decisions. In the present case, the plaintiff gave notice to the carriers at the place whence the boat sailed, and it would be monstrous to say that after such notice, a transfer made by their mistake should be such as to bind the plaintiffs, and to vest a complete title in the bankrupts and their representatives. . . . As soon as the notice was given, *the property returned to the plaintiffs*, and they were entitled to maintain trover, not only against the carriers, but against the assignees of the bankrupts, or any other persons." So far as the *dictum* is concerned, that the effect of the stoppage was to revest the *property*, the law is now otherwise;[2] but that it revests the *possession*, so as to restore to the vendor his lien, is undoubted.

§ 1187. In Bohtlingk *v.* Inglis,[1] a demand for the goods made by the vendor's agent on the master of the ship, was held a sufficient stoppage: and in Ex parte Walker and Woodbridge,[2] it was decided that an entry of the goods at the Custom House by the vendor, on the arrival of the vessel, in order to pay the duties, was a valid stoppage, as against the assignees of the bankrupt purchaser, who afterwards got forcible possession of the goods, when landed.

In Northey *v.* Field,[3] wine bought by the bankrupt was landed from the vessel and put in the King's cellars, according to the excise law, where it was to remain until the owner paid duty and charges; but if not paid within three months, then to be sold, and the excess of the proceeds, after payment of duty and charges, to be paid to the owner. The assignees petitioned to have the wine, and it was also claimed by the vendor's agent while in the King's cellar, but it was sold at the end of the three months under the law. Lord Kenyon held, that the claim made by the vendor was
[*851] a *good stoppage *in transitu*, the wine being *quasi in custodiâ legis*.[4]

[2] *Post*, Sect. V.
[1] 3 East, 397.
[2] Cited in Cooke's Bankrupt Law, 402.
[3] 2 Esp. 613.
[4] See Nix *v.* Olive, Abbott on Ship. (12th ed.) 424.

§ 1188. The notice of the stoppage must be given to the person in possession of the goods, or if to his employer, then under such circumstances and at such time as to give the employer opportunity by using reasonable diligence to send the necessary orders to his servant. In Whitehead *v.* Anderson,[1] the vendor attempted to effect a stoppage of a cargo of timber while on its voyage from Quebec to Port Fleetwood, in Lancashire, by giving notice to the shipowner in Montrose, who thereupon sent a letter to await the captain's arrival at Fleetwood. Parke B. delivering the judgment, said: "The next question is whether the notice to the shipowner, living at Montrose, is such a [valid] stoppage of the cargo, then being on the high seas, on its passage to Fleetwood. We think it was not: for to make a notice effective as a stoppage *in transitu* it must be given to the person who has *the immediate custody* of the goods: or if given to the principal, whose servant has the custody, it must be given as it was in the case of Litt *v.* Cowley, at such a time and under such circumstances, that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible from the distance and want of means of communication to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery, and in the present case such diligence was used."

§ 1189. [In his judgment in Ex parte Falk[1] Bramwell L. J. expressed doubt as to whether it is the shipowner's duty to communicate to the master of the ship the vendor's notice to stop goods *in transitu*. And James L. J. referring to *Whitehead *v.* Anderson, said, in the course of [*852] the argument: "That is not a judicial decision that any such duty is imposed on the shipowner, it is only a

[1] 9 M. & W. 518.

[1] 14 Ch. D. 446, C. A. at p. 455.

decision that, at the most, he could be under no further obligation."

Lord Blackburn, however, in his opinion in the same case in the House of Lords,[2] dissents from this view, and states his own view to be that the shipowner, who receives a notice to stop goods, is under an obligation to forward it, if he can, with reasonable diligence, to the ship's master; but that, provided he use reasonable diligence, he will be excused in the event of the master having delivered the goods before the arrival of the notice.

It has been held that the unpaid vendor may effectually exercise his right of stoppage by demanding the bills of lading from the shipowner when the latter has retained them in his possession as security for the unpaid freight.[3]]

§ 1190. The mode of exercising the right of stoppage underwent careful investigation in the Admiralty Court in the case of The Tigress.[1] It was there determined by Dr. Lushington:

First. That a vendor's notice to stop, made it the duty of the master of the vessel to refuse delivery to the vendee to whom a bill of lading had been endorsed, and was sufficient without any representation that the bill of lading had not been transferred by the vendee.

Secondly. That the master's refusal to acquiesce in the vendor's claim of stoppage was a *breach of duty*, giving jurisdiction to the Admiralty Court.

Thirdly. That the vendor's right included the right of demanding *delivery to himself*, and that the carrier has no right to say that he will retain the goods for delivery to the true owner, after the conflicting claims have been settled.

Fourthly. That the stoppage is at the vendor's peril, and it is incumbent on the master to give effect to a claim as soon as he is satisfied that it is made by the vendor, [*853] unless * *he is aware of a legal defeasance* of the vendor's claim; but it is not a matter ordinarily within

[2] 7 App. Cas. at p. 585. Reported *sub nom.* Kemp *v.* Falk.

[3] Ex parte Watson, 5 Ch. D. 35, C. A.

[1] 32 L. J. Adm. 97.

his cognizance, whether or not the buyer has endorsed over a bill lading to a third person.

Fifthly. That if bills of lading are presented to the master by two different holders, "he is not concerned to examine the best right in the different bills; all he has to do is to deliver upon one of the bills."

§ 1191. This last proposition was said by the learned judge to be unnecessary to the decision. It was stated on the authority of Fearon *v.* Bowers, reported in the notes to Lickbarrow *v.* Mason,[1] but is very doubtful law; for it is well settled that a bailee delivers at his peril, that he is bound to decide between conflicting claimants to goods in his possession, that he is liable in trover if he delivers to the wrong person, and that his only mode of protecting himself is to take an indemnity, and if that be refused, to bring an action of interpleader.[2] This was clearly the opinion of Lord Blackburn, for in the Treatise on Sales, he adverts to it as unquestionable law, in these words; "as the carrier obeys the stoppage *in transitu at his peril*, if the consignee be in fact solvent, it would seem no unreasonable rule to require that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act."[3] In the opinion delivered in "The Tigress," this suggestion is rejected, the judge saying distinctly, that the proof of the conditions on which the vendor's rights depend, would always be difficult, often impossible, at the time of their exercise; "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange given for the goods becomes due; for it is, as I conceive, clear law, that the right * to stop does not require the vendee to [*854] have been found insolvent." And see the decision

[1] 1 H. Bl. 364; 1 Sm. L. C. at p. 782, ed. 1879.

[2] Wilson *v.* Anderton, 1 B. & Ad. 450; Batut *v.* Hartley, L. R. 7 Q. B. 594. Under the Judicature Acts any person may, it would seem, after notice of conflicting claims, bring an action of interpleader in any division of the High Court, without waiting for legal proceedings to be taken against him. Wilson's Jud. Acts, Ord. I. *r.* 2, notes p. 181, ed. 1882.

[3] P. 266. See, also, Abbott on Shipping, Part 3, Chap. 9, sect. 25, ed. 1827.

of the House of Lords, in Meyerstein *v.* Barber, as stated *ante*, p. 810.

§ 1192. [The proposition was very fully discussed in the important case of Glyn *v.* The East and West India Dock Company.[1] The action was for conversion of a cargo of sugar. The goods in question had been consigned to Cottam & Co. The shipmaster signed a set of three bills of lading, marked "first," "second" and "third" respectively, by which the goods were deliverable "to Cottam & Co., or their assigns, freight payable in London, one of the bills being accomplished, the others to stand void." During the voyage Cottam & Co. indorsed the bill of lading marked "first" to the plaintiffs, who were a firm of bankers, as security for an advance. The plaintiffs had not inquired for, nor obtained the other two copies of the set. Upon the arrival of the ship in London, the goods were landed and placed in the custody of the defendants, a dock company, the master lodging with them a notice, under the provisions of the 68th section of the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. Cottam & Co. then produced to the defendants the bill of lading marked "second," unindorsed, and the defendants entered Cottam & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the defendants *bonâ fide*, and without notice or knowledge of the plaintiff's claim, delivered the goods to other persons upon delivery orders signed by Cottam & Co. Upon these facts, Field J. sitting without a jury, held the defendants liable. He refrained from deciding whether the master could have been exonerated by a delivery of the goods to the person who first presented the bill of lading; but he held that the defendants were not by receiving the goods, subject to the stop for freight, placed in the same position as the master, [*855] and entitled to his rights, and that, *by delivering the goods on the order of Cottam & Co., they had acted in a character beyond that of mere warehousemen,

[1] 7 App. Cas. 591, affirming s. c. 6 Q. B. D. 475, C. A., reversing s. c. 5 Q. B. D. 129.

and were guilty of a conversion. The majority of the Court of Appeal reversed this decision, upon the ground that the defendants had disposed of the goods according to the terms on which they had received them, having no notice of any claim, title or right, other than that of the person from whom they received them, and could not, therefore, be held guilty of a conversion.

Bramwell L. J.'s view was in favor of the non-liability of the master, on the authority of Fearon *v.* Bowers, and on the ground that it was the undoubted practice to deliver without inquiry to one who produces a bill of lading (page 492).

Baggallay L. J. hesitated to apply the rule laid down in Fearon *v.* Bowers to its full extent, and preferred to adopt the more guarded suggestion of Lord Westbury in Meyerstein *v.* Barber,[2] that the shipowner, *who is in ignorance of any previous dealing with the bill of lading*, may be justified in delivering the goods to the party presenting one part of the set (p. 504).

Brett L. J., in a dissentient opinion, maintained the view that the master delivers at his peril. He differed from the *dicta* of Dr. Lushington in "The Tigress," and of Lord Loughborough in Lickbarrow *v.* Mason, and declined to follow the decision in Fearon *v.* Bowers, even with the limitations suggested by Lord Westbury in Meyerstein *v.* Barber.

§ 1193. The case was taken on appeal to the House of Lords, who affirmed the decision of the Court of Appeal.[1] The *ratio decidendi* of their judgment, as expressed in the opinion of Lord Blackburn, to which all the other lords expressed their adhesion, is, that the master is excused for delivering goods according to his contract to the person appearing to be the assign of the bill of lading which is first produced to him, no matter which part it is, *so long as he has no notice or * knowledge of any dealing with* [*856] *either of the other two parts;* and that the defendants were for this purpose in the same position as the master. In the

[2] L. R. 4 H. L. at p. 336, *ante*, p. 810.

[1] 7 App. Cas. 591, only reported while the sheets of this edition were passing through the press.

case under consideration, the master had received no notice, and it was therefore unnecessary to decide what his duty would be in such an event; but Lord Blackburn, in the course of his opinion, takes occasion to say, "Where the master has notice, or probably even knowledge of the other endorsement, I think he must deliver at his peril to the rightful owner, or interplead." Their lordships, therefore, adopted the view taken by Baggallay L. J. in the Court of Appeal, and by Lord Westbury in Meyerstein *v.* Barber, and affirmed the authority of Fearon *v.* Bowers only to that extent.]

The stoppage to be effectual must be on behalf of the vendor, in the assertion of his rights as paramont to the rights of the buyer.[2]

Section V. — HOW MAY IT BE DEFEATED?

§ 1194. The vendor's right of stoppage *in transitu* is defeasible in one way only, and that is when the goods are represented by a bill of lading [or other document of title[1]], and when the vendee, being in possession of such document of title with the vendor's assent, transfers it to a third person, who *bonâ fide* gives value for it.[2]

§ 1195. The Bills of Lading Act, 18 & 19 Vict. c. 111 (referred to, *ante*, p. 799), and the Factors' Acts (*ante*, pp. 793 *et seq.*), have largely extended the effects of these mercantile instruments, and the rights of the holders of them. By the

[2] Siffkin *v.* Wray, 6 East, 371; Mills *v.* Ball, 2 B. & P. 457.

[1] See the 5th section of the Factors' Act, 1877, *ante*, p. 797.

[2] It would seem that the mere endorsement unaccompanied by a transfer of the bill of lading has no effect on the vendor's right of stoppage. Ex parte Golding Davis & Co., 13 Ch. D. 628, C. A., *post*, p. 860. See Becker *v.* Hallgarten, 86 N. Y. 167; Dows *v.* Perrin, 16 N. Y. 325; Rawls *v.* Deshler, 4 Abb. App. Dec. (N. Y.) 12; First Nat. Bank of Memphis *v.* Pettit, 9 Heisk. (Tenn.) 447; Chandler *v.* Fulton, 10 Tex. 2; s. c. 60 Am. Dec. 188; Halliday *v.* Hamilton, 78 U. S. (11 Wall.) 560; bk. 20, L. ed. 214; Conard *v.* Atlantic Ins. Co., 26 U. S. (1 Pet.) 386; bk. 7, L. ed. 189; Audenreid *v.* Randall, 3 Cliff. C. C. 99; Walter *v.* Ross, 2 Wash. C. C. 283. Where the transfer is made in good faith to one who has advanced money upon the goods, it will be effectual to defeat the right, though the seller has previously given notice of stoppage. Newhall *v.* Central Pacific R. R. Co., 51 Cal. 335; s. c. 21 Am. Rep. 317.

common law, as established in Lickbarrow *v.* Mason,[1] and the numberless cases since decided on the authority of that celebrated case, the right to stop *in transitu* was defeasible by the transfer of the bill of lading to a *bonâ fide* endorsee; but if the endorsement was by a factor or consignee, it was * only valid in case of sale, not of pledge: and [*857] even when by the vendor himself, the transfer operated as a conveyance of the property in the goods, but not as an *assignment of the contract* so that the endorsee was not empowered to bring suit on the bill of lading.[2] But now, by the effect of the Factors' Acts, the endorsement of a bill of lading by factors or consignees, entrusted with it as agents of the owners, is as effective as that of the vendor would be in giving validity to "any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents [including bills of lading], as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon, and *good against the owner of such goods*, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." So that as regards the effect of the transfer of the bill of lading, it now makes no difference whether the consignor was vendor, or merely consigning goods for sale, his right of stoppage will be defeated by the assignment of the bill of lading, even to a person not a vendee, but from whom money has been borrowed on the faith of it. And by the Bills of Lading Act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or *endorsee, to whom the property in the goods shall pass.*

For decisions upon the legal effect of the words just quoted in italics, reference may be made to the cases quoted in the note.[3]

[1] 1 Sm. L. C. 753, ed. 1879.

[2] Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 296.

[3] Fox *v.* Nott, 6 H. & N. 630; The Figlia Maggiore, L. R. 2 A. & E. 106; The Nepoter, L. R. 2 A. & E. 375;

[And by the recent Act to amend the Factors' Acts (40 & 41 Vict. c. 39, s. 5, *ante*, p. 797), the doctrine has been extended so as to include not only bills of lading, but [*858] all documents of * title that is, it is submitted, documents of title as defined by the previous Factors' Act (5 & 6 Vict. c. 39, s. 4).[4]]

§ 1196. It is not within the province of this treatise to examine the general law in relation to bills of lading, for which the authorities are collected in the notes to Lickbarrow *v.* Mason,[1] but only the effect of transferring these documents in defeating the right of stoppage.

The first point to be noticed is, that a bill of lading is not negotiable in the same sense as a bill of exchange, and that therefore the mere honest *possession* of a bill of lading endorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The *endorsement of a bill of lading gives no better right to the goods than the indorser himself had* (except in cases where an agent *entrusted with it* may transfer it to a *bonâ fide* holder under the Factors' Acts), so that if the owner should lose or have stolen from him a bill of lading endorsed in blank, the finder or the thief could confer no title upon an innocent third person.[2]

The Freedom, L. R. 3 P. C. 594; Dracachi *v.* The Anglo-Egyptian Navigation Co., L. R. 3 C. P. 690; Short *v.* Simpson, L. R. 1 C. P. 248, 252.

[4] In the very recent case of Kemp *v.* Falk, 7 App. Cas. 573, *post*, p. 861, it was argued that cash receipts given by vendees to their sub-purchasers, upon the presentation of which the latter received the goods from the master of the ship in which the goods lay, were documents of title, as equivalent to delivery orders; but the suggestion was repudiated by Lord Blackburn (at p. 584 of the report). This, so far as the editors are aware, is the only reported decision in which the 5th section of the Factors' Act, 1877, has been noticed.

[1] 1 Sm. L. C. 753, ed. 1879.

[2] Gurney *v.* Behrend, 3 E. & B. 622; 23 L. J. Q. B. 265; and see Coventry *v.* Gladstone, 6 Eq. 44; Blackburn on Sale, p. 279, and cases there cited.

As to the negotiability of bills of lading see Evansville & T. H. R. R. Co. *v.* Erwin, 84 Ind. 457; Tiedeman *v.* Knox, 53 Md. 612; Baltimore & O. R. R. Co. *v.* Wilkens, 44 Md. 11; Stollenwerk *v.* Thacher, 115 Mass. 224; Dows *v.* Perrin, 16 N. Y. 325; Brower *v.* Peabody, 13 N. Y. 131; Decan *v.* Shipper, 35 Pa. St. 239; s. c. 78 Am. Dec. 334.

[As to what constitutes "an agent entrusted with and in possession of a bill of lading or other document of title" within the meaning of the Factors' Acts, see *ante*, pp. 16 *et seq.* It had been held, previous to the Act of 1877, that a vendor left by his vendee in possession of the documents of title was not "an agent entrusted" within the meaning of the earlier Acts.[3]]

§ 1197. But the title of *bonâ fide* third persons will prevail against * the vendor who has *actually* trans- [*859] ferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so,[1] because, as we have seen,[2] a transfer obtained by fraud is only voidable, not void.

In Dracachi *v.* The Anglo-Egyptian Navigation Company,[3] the plaintiff proved that the consignor had endorsed the bill of lading to A., and that A. had endorsed it to the plaintiff for value, so as to pass the property; and it was objected by defendant that there was no proof that the first endorsement was for value *so as to pass the property* under the 1st section of the Bills of Lading Act; but the Court held that the transfer by the consignor was strong *primâ facie* evidence that the property had passed, sufficient to justify the jury in finding that the property in the goods was in the plaintiff.

§ 1198. If the consignor or vendor transfers the bill of lading as security for advances, and the bill of lading is then transferred back on the repayment of the advances, the rights of the original consignor or vendor return to him, and he is remitted to all his remedies under the original contract.[1]

But the vendor's rights of stoppage *in transitu* may be defeated in part only, for the bill of lading may be transferred as a pledge or security for the debt, and then in general the *property* in the goods remains in the vendee; but even if by agreement the *property* in the goods has been

[3] Johnson *v.* Credit Lyonnais Co., and Johnson *v.* Blumenthal, 3 C. P. D. 32, C. A.

[1] Pease *v.* Gloahec, L. R. 1 P. C. 219.

[2] *Ante*, pp. 393 *et seq.*

[3] L. R. 3 C. P. 190; 37 L. J. C. P. 71.

[1] Short *v.* Simpson, L. R. 1 C. P. 248; 35 L. J. C. P. 147.

assigned as well as the *possession*, it is only a *special* property that is thus transferred, and the *general* property remains in the vendee. On these grounds, therefore, the vendor's right of stoppage will remain so far as to entitle him to any surplus proceeds after satisfying the creditor to whom the bill of lading was transferred as security; and the vendor will have the further equitable right of insisting on *marshalling the assets;* that is to say, of forcing the creditor to exhaust any other securities held by him towards [*860] * satisfying his claim before proceeding on the goods of the unpaid vendor.[2]

§ 1199. [In Ex parte Golding Davis & Company,[1] the principle that, where there has been a pledge of the goods by the purchaser, the vendor may still render his right of stoppage effectual, so far as he does not thereby interfere with the special property of the pledgee in them, was applied to the case of a sub-sale of the goods by the original purchasers during the continuance of the transit. The purchasers had entered into a contract to re-sell the goods, and the bill of lading had been made out in the name of, *but not transferred to*, the sub-purchasers. The transit indicated by the contract between the original vendors and their vendees had not ceased at the time when the vendors gave notice of stoppage. It was held, that the vendors were equitably entitled to intercept, to the extent of their own unpaid purchase-money, the purchase-money which was due from the sub-purchasers to the original vendees. Cotton L. J., after laying down as the guiding principle that the vendor can exercise his right of stoppage *in transitu*, so far as he does not thereby defeat or interfere with the rights or interests of purchasers for value, continues, "Except so far as it is necessary to give effect to interests which other persons have acquired for

[2] In re Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; s. c. on App. 15 L. J. Ch. 374, and in the note to Berndtson *v.* Strang, 4 Eq. 486, and Kemp *v.* Falk, 7 App. Cas. 573, where the principle established by In re Westzinthus and Spalding *v.* Ruding is approved and adopted. See, as to marshalling assets in equity, Aldrich *v.* Cooper, and notes, 2 Tud. L. C. in Eq. 80, 93, ed. 1877.

[1] 13 Ch. D. 628, C. A.

value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase-money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can."

§ 1200. *In Ex parte Falk,[1] the facts, so far as mate- [*861] rial to the point under consideration, were as follows: —The buyer of goods, which had been shipped by the seller, consigned them abroad, and indorsed the bill of lading to a bank by way of security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to sub-purchasers who paid their purchase-money, but only took, as it afterwards appeared,[1] *cash receipts* in exchange. The buyer became bankrupt, and the unpaid seller thereupon gave the ship's master notice to stop the goods *in transitu*. The notice was affected after the date of the sub-sales, but before the goods had been delivered to the sub-purchasers.

It was held by the Court of Appeal, that, although the seller through the re-sale (accompanied as they understood it to be by the transfer to the sub-purchasers of *delivery orders*), had lost the right to stop the actual goods, yet that he was entitled to intercept, to the extent of his own unpaid purchase-money, so much of the sub-purchasers' purchase-money as had not reached the vendee's hands when the notice to stop was given. James and Baggallay L. JJ. rested their judgments upon the authority of Ex parte Golding Davis and Company, but Bramwell L. J. (at page 457 of the report) says: "I am not going to shelter myself under the authority of that case. In my opinion it

[1] 14 Ch. D. 446, C. A. The facts are taken from the agreed statement before the Court of Appeal, as modified by the supplementary statement laid before the House of Lords, 7 App. Cas. at p. 574. The statement of facts before the Court of Appeal was inaccurate as to the form of the documents given by the consignees to the sub-purchasers.

was rightly decided. What difference is there in principle between the case of a man selling goods on credit for 500*l.*, and their being resold for 600*l.*, and the case of the purchaser pledging the goods for 600*l.* with a right of sale by the pledgee? . . . The decisions in In re Westzinthus, and Spalding *v.* Ruding, seem to me to be applicable both to Ex parte Golding Davis and Company and to the present case."

§ 1201. Leave was given to appeal to the House [*862] of Lords,[1] * who affirmed the decision of the Court of Appeal, but upon a different ground. Their lordships pointed out that as the true effect of the sub-sales was not to displace the right of stoppage, that right being defeated only by the absolute transfer of the bill of lading (or other document of title) for valuable consideration, the fact that sub-sales had taken place was an immaterial one; and they held, therefore, that the right remained, subject only to the satisfaction of the bank's claim, according to the principle established by In re Westzinthus, and Spalding *v.* Ruding.

In this view it was unnecessary for their lordships to express any opinion as to the correctness of the decision in Ex parte Golding Davis and Company. Lords Blackburn and Watson (at pp. 581 and 588) distinctly refrain from offering any opinion upon it, whilst Lord Selborne (at p. 577), without expressly mentioning the case, states his opinion to be, that there can be no right of stoppage *in transitu* as against the purchase-money payable by sub-purchasers to their vendor. He there says: "I assent entirely to the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu* as against the purchase-money payable by them to the vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*. But when the right exists as against the goods which are *in transitu*, it is manifest that all other persons who have,

[1] Only reported while these sheets were passing through the press, *sub nom.* Kemp *v.* Falk, 7 App. Cas. 573.

subject to that right, any equitable interest in those goods by way of contract with the original purchaser, or otherwise, may come in, and if they satisfy the claim of the seller who has stopped the goods *in transitu*, they can of course have effect given to their rights: and I apprehend that a Court of justice, in administering the rights which arise in actions of this description, would very often find that the rights of all parties were properly given effect to, if so much of the purchase-money payable by the sub-purchasers were paid to the original vendor as might be sufficient to discharge his * claim; and, subject of course to that, the other [*863] contracts would take effect in their order, and in their priorities."

And as to the effect of a sub-sale, Lord Blackburn, at p. 582, expresses the same view: — "*No sale, even if the sale had been actually made with payment, would put an end to the right of stoppage in transitu, unless there were an endorsement of the bill of lading.*[2] Why any agreement, unless it was made in such a way as to pass the property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu*, I cannot understand. I am quite clear that it does not."

§ 1202. The view taken by Lord Selborne, in the passage above cited, is in strong contrast with that expressed by Cotton L. J. in Ex parte Golding Davis and Company, *ante*, p. 860. Lord Selborne's view is, that where there has been a resale of goods during the transit, *unaccompanied by a transfer of the bill of lading*, the rights of the sub-purchaser can only take effect after those of the unpaid vendor; that of Cotton L. J., on the other hand, being that the unpaid vendor can only exercise his rights, subject to the rights of the sub-purchaser, and that it would seem whether the sub-sale has or has not been accompanied by the transfer of the bill of lading. It is submitted, that while the *decision* in Ex parte Golding

[2] Lord Fitzgerald (at p. 590) reserves his opinion on this point. In point of fact, it appears that the sub-sales were for cash, although the purchase-money had not reached the vendee's hands when the notice to stop was given.

Davis and Company may be supported on the ground that, upon the sub-sale, there was a mere *endorsement* but no *transfer* of the bill of lading, the *dicta* of Cotton L. J. in that case, and of Bramwell L. J. in Ex parte Falk, to the effect that, on an absolute sub-sale of the goods, with transfer of the bill of lading, there may be a right of stoppage as against the purchase-money due to the vendee, are irreconcilable with the general principles of stoppage *in transitu*. The alleged right is stated to be only an extension of the principle of In re Westzinthus and Spalding *v.* Ruding, but the principle of those decisions, it is submitted, is entirely different, and is, that where the vendee has transferred only [*864] * a *special property* in the goods, *e.g.*, by pledging the bill of lading, it is possible to give effect to the right of stoppage *in transitu*, as against the *general property* in the goods, which remains in the vendee. But when the vendee has resold the goods, and transferred the bill of lading, or other document of title, to the sub-purchaser, *ex hypothesi* all the property in the goods has passed out of the vendee, and nothing remains, to which the right of stoppage can attach.]

The transfer of the bill of lading, in order to effect the vendor's right of stoppage *in transitu*, must be, both by the statute and the common law, to a *bonâ fide* third person. This means, not without notice that the goods have not been paid for, because a man may be perfectly honest in dealing for goods that he knows not to have been paid for,[1] but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable*.[2] Thus in Vertue *v.* Jewell,[3] where Lord Ellenborough held that the vendor had no right of stoppage, he said expressly that if such a

[1] Cuming *v.* Brown, 9 East, 506.

[2] Ib.; Salomons *v.* Nissen, 2 T. R. 681.

It is essential that the transfer should be made bonâ fide. — Harris *v.* Pratt, 17 N. Y. 249. If made to carry out a fraudulent transaction, entered into for the purpose of defeating the vendor's right, the indorsee will acquire no title. Rosenthal *v.* Dessau, 11 Hun (N. Y.) 49. It may be proved, for the purpose of showing that the sale was not *bonâ fide*, that the indorsee was aware that the consignee was insolvent. Loeb *v.* Peters, 63 Ala. 243; s. c. 35 Am. Rep. 17. See, also, Chandler *v.* Fulton, 10 Tex. 2; s. c. 16 Am. Dec. 188.

[3] 4 Camp. 31. See, also, Wright *v.* Campbell, 4 Burr. 2046.

right had existed against the consignee, he would have enforced it against Ayres, the endorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee.

§ 1203. On this principle it was decided, by the Judicial Committee of the Privy Council in Rodger *v.* The Comptoir d'Escompte,[1] that the forbearance or release of an antecedent claim is not a good consideration for the transfer of a bill of lading so as to defeat the right of stoppage *in transitu.*

[But in Leask *v.* Scott,[2] the Court of Appeal dissented from this decision of the Judicial Committee. The facts were, that the defendants had sold a cargo of nuts to Geen & Co., who were largely indebted to the plaintiff for past advances. Geen & Co. applied to the plaintiff for a further advance, which the plaintiff consented to make upon their promise to cover their account (*i.e.*, to deposit securities). * On Geen & Co.'s undertaking to do so, the [*865] plaintiff made the advance. *Some days after* Geen & Co., in fulfilment of their promise, deposited (among other securities) with the plaintiff the bill of lading for the cargo of nuts purchased from the defendants. Geen & Co. stopped payment, and the defendants claimed the right to stop the nuts *in transitu.* The jury found at the trial that the plaintiff received the bill of lading fairly and honestly. It was contended on behalf of the defendants, on the authority of Rodger *v.* The Comptoir d'Escompte, that the equitable right of stoppage must prevail against a legal title acquired by receiving the bill of lading for a consideration, no part of which was given *on the faith of* the bill of lading. The Court admitted that the *ratio decidendi* of Rodger *v.* The Comptoir d'Escompte justified this contention, but declined to adopt it, stating that there was "not a trace of such distinction between cases of past and present consideration to be found in the books." They held, therefore, that the defendants' right of stoppage was defeated by the transfer of

[1] L. R. 2 P. C. 393; and see The Chartered Bank of India *v.* Henderson, L. R. 5 P. C. 1.

[2] 2 Q. B. D. 376, C. A.

the bill of lading to the plaintiff, who had received it *bonâ fide* and for valuable consideration. The Court expressed a further opinion, that, from the nature of the case, the consideration, although past in time, had practically a present operation in "staying the hand of the creditor," *i.e.*, in inducing the plaintiff to forbear to enforce his debt.[3]]

Section VI. — WHAT IS THE EFFECT OF A STOPPAGE *IN TRANSITU.*

§ 1204. There can no longer be a reasonable doubt that the true nature and effect of this remedy of the vendor is simply to restore the goods to his *possession*, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale.

The point has never been directly decided, because the circumstances are rarely such as to raise the question, but if there should be a considerable advance in the price of the goods sold, it is obvious that the subject would acquire a practical importance.

The series of cases in which the question has been [*866] examined * may be found cited in 1 Smith's Leading Cases, 811, 813;[1] and in Wentworth *v.* Outhwaite,[2] where the point was raised and elaborately argued, Parke B. gave the judgment, in 1842, in which he declared that in his own opinion and that of his brethren, with the exception of Lord Abinger, who dissented, the effect of the stoppage was "to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods till the price is paid down."

§ 1205. In Martindale *v.* Smith,[1] however, as we have seen where the point was raised and determined after consideration

[3] *An assignment of a bill of lading as security for an antecedent debt* does not repudiate stoppage *in transitu*. Lee *v.* Kimball, 45 Me. 172; Chandler *v.* Fulton, 10 Tex. 2; s. c. 16 Am. Dec. 188; Lesassier *v.* Southwestern, 2 Woods. C. C. 35. See, also, Loeb *v.* Peters, 63 Ala. 243; s. c. 35 Am. Am. Rep. 17. As to the effect of the transfer, where it is made in satisfaction of an existing debt, see Lee *v.* Kimball, 45 Me. 172.

[1] Ed. 1879.

[2] 10 M. & W. 436.

[1] 1 Q. B. 389.

by the Queen's Bench, whether the vendor had a right to revest the property in himself by reason of the vendee's failure to pay the price at the appointed time, the Court concluded the expression of a very decided opinion in the negative by the statement, "the vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain."

§ 1206. In Valpy *v.* Oakeley,[1] where the assignees of bankrupts sued the defendant in assumpsit for non-delivery of goods bought by the bankrupts, of which the defendant stopped delivery after the bankrupts had become insolvent, although he had received from them acceptances for the price, the Court held that when the bills were dishonored, the parties were in the same position as if bills had never been given at all. It did not hold the contract rescinded, but decided that the assignees were entitled to recover the value of the goods less the unpaid price, that is, merely nominal damages unless the market has risen. And this case was followed by the same Court in Griffiths *v.* Perry,[2] in which, under similar circumstances, it was held, that the vendor's right was a right similar to that of stoppage *in transitu* (that is to say, that the vendor need not go through * the idle form of putting the goods into a [*867] cart and then taking them out, but had the right to retain them by a *quasi* stoppage *in transitu*), and the Court gave to the assignees of the bankrupt nominal damages for the vendor's stoppage of the delivery; a judgment only possible on the theory that the contract had not been rescinded.

§ 1207. But the strongest ground for holding the question to be now at rest is, that courts of equity have assumed regular jurisdiction of bills filed by vendors to assert their rights of stoppage *in transitu;* a jurisdiction totally incom-

[1] 16 Q. B. 941; 20 L. J. Q. B. 380.

[2] 1 E. & E. 680; 28 L. J. Q. B. 204. See, also, *per* Lord Blackburn in Kemp *v.* Falk, 7 App. Cas. at p. 581. "It is pretty well settled now that a stoppage *in transitu* would not have rescinded the contract."

patible with the theory of a rescission of the contract; for if the contract was rescinded, there would be no privity in a court of equity between the parties. This was pointed out by Lord Cairns, in Schotsman *v.* The Lancashire and Yorkshire Railway Company;[1] and in that case both his Lordship and Lord Chelmsford declared that they entertained no doubt of the jurisdiction of a court of equity, in the case of a bill filed, to enforce the vendor's right of stoppage.[2]

§ 1208. [The doctrine of stoppage *in transitu*, as established in the United States since their independence, accords in general with the principles of the law of England on the subject. "The English law", says Chancellor Kent,[1] "on the subject of this right, and the class of cases by which it is asserted and established, have been very generally recognized and adopted in our American Courts." A few of the leading American decisions, in which the English cases are referred to by way of illustration and authority, are collected in the note.[2]]

In the United States it has been decided that the legal effect of the stoppage *in transitu* is to entitle the vendor to enforce his right to be paid the price, not to give him the power to rescind the sale.[3]

[*868] § 1209. * [A long time elapsed before the doctrine of stoppage *in transitu* was embodied in the legal sys-

[1] 2 Ch. 332.

[2] *The contract of sale is not rescinded by the stoppage*, it simply restores the vendor to his lien, and places him in the same position as if he had never parted with the possession. Newhall *v.* Vargas, 13 Me. 93; s. c. 29 Am. Dec. 489. See, also, Rogers *v.* Thomas, 20 Conn. 53; Arnold *v.* Delano, 58 Mass. (4 Cush.) 33; s. c. 50 Am. Dec. 754; Rowley *v.* Bigelow, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; Stanton *v.* Eager, 33 Mass. (6 Pick.) 467; Harris *v.* Pratt, 17 N. Y. 249; Benedict *v.* Schaettle, 12 Ohio St. 515; Jordan *v.* James, 5 Ohio, 88; Patten's Appeal, 45 Pa. St. 151.

[1] 2 Kent Com. (ed. 1873) 543.

[2] Ludlow *v.* Bowne, 1 Johns. (N. Y.) 15; The St. Joze Indiano, 14 U. S. (1 Wheat.) 210; bk. 4, L. ed. 73; Stubbs *v.* Lund, 7 Mass. 453; Rowley *v.* Bigelow, 29 Mass. 306; Newhall *v.* Vargas, 13 Me. 93; s. c. 15 Me. 314; Bell *v.* Moss, 5 Whart. (Pa.) 189; Grout *v.* Hill, 70 Mass. 361; Reynolds *v.* Boston and Maine Railway, 43 N. H. 580; Seymour *v.* Newton, 105 Mass. 275; Mohr *v.* Boston and Albany Railroad Co., 106 Mass. 67.

[3] Cross *v.* O'Donnell, 44 N. Y. 661; Newhall *v.* Vargas. *ubi supra*.

tems of those countries whose jurisprudence is based upon the civil law. It was a well-known rule of the civil law that on a sale of goods for ready money the property in them did not pass to the buyer, even after delivery, until he had paid or had given security for the price.[1] The unpaid and unsecured vendor might pursue and retake the goods as his own property out of the possession of the buyer or even of third persons who had *bonâ fide* given value for them. And even where the sale was on credit (and credit was never presumed), although the property in the goods passed to the buyer from the time of delivery, the seller might still by the aid of a prætorian action establish a preferable claim over them so long as they remained in the buyer's possession, although having once lost his real right he had no remedy against third persons who had, in the meantime, *bonâ fide* given value for them.

§ 1210. These rules became established in France, Spain, Italy, Germany, Holland, and in fact in nearly all the states of the Continent. With the growth of commerce, however, and of credit, it was found necessary, first to modify and then to change the established law on this subject. Merchants were liable to be deprived of goods for which they had paid, by some original vendor who remained unpaid, and were exposed to ruin by giving credit on the faith of a large stock-in-trade, which was possibly subject to the latent but preferable claim of those from whom it had been bought. Hence it was, that towards the end of the last, and early in the present century, the right of stoppage *in transitu* was for reasons of mercantile convenience incorporated in the municipal codes of commercial states, and thenceforward formed a part of the mercantile law of Europe.

§ 1211. In France, for example, the Code de Commerce[1] in *1870 rejected the old law of *revendi-* [*869]

[1] The rule was as old as the Twelve Tables, "Venditæ vero res et traditæ non aliter emptori adquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. *Quod cavetur quidem et lege XII. Tabularum*, tamen recte dicitur et jure gentium, id est jure naturali, id effici." Inst. ii. § 41.

[1] Code de Commerce, Nos. 574–579. See, also, The Code Napoléon,

cation, whereby the unpaid vendor was enabled to reclaim goods from the possession of the buyer if they were capable of identification, and adopted instead the principles of the law of stoppage *in transitu*. The right may be exercised:—

1stly. Where the goods have been sold, so long as they are still in transit, and have not been delivered into the bankrupt purchaser's warehouse, or into the warehouse of his commission agent. They cannot, however, be stopped, if, before the end of the transit, they have been *bonâ fide* sold upon the faith of the invoices, bills of lading, or way-bills (sur factures, et connaissemens ou lettres de voiture), signed by the consignor of the goods. The vendor, if he exercises the right, must repay to the estate of the bankrupt any sums he may have received on account of the price, as well as all advances actually made by the bankrupt on account of the freight, carriage, commission, insurance, or other expenses, and must indemnify the estate against any sums that may be due for the above objects.[2] The committee of the bankrupt's creditors (les syndics) have the right to demand delivery of the goods on payment of the price.

2dly. Where the goods have been consigned to the bankrupt as bailee (à titre de depôt) or for sale on commission, they may be reclaimed so long as they exists in specie (en nature), wholly or in part. In this last case, if the goods have been sold by the bankrupt, the consignor may intercept so much of the price due from the purchaser to the bankrupt as remains unpaid or unaccounted for.

§ 1212. The right of stoppage *in transitu* was introduced into the law of Scotland just a century after its recognition by the English Courts. Down to the year 1790 the [*870] doctrine of *presumptive fraud, which empowered the unpaid vendor to retake possession of the goods, if

Arts. 1583, 1606, 1612–13, 1654–57. The doctrine would be introduced into Holland with the Code Napoléon in 1811; Vanderlinden's Institutes of Law of Holland (translated by Henry), Introd. p. xiii. It was adopted in Russia by Imperial Ukase in 1781, quoted and relied on in Inglis *v.* Usherwood, 1 East, 515, and Bothlingk *v.* Inglis, 3 East, 381. See, also, the Code Civil D'Italie (traduit par Gandolfi) tit. 6, cap. 5, art. 1513.

[2] This seems to assume that the effect of the exercise of the right is to rescind the sale.

the buyer became bankrupt within a period of three days (*intra triduum*) after their delivery, seems to have prevailed. This right was based on the assumption that the buyer must have secretly known of his impending bankruptcy and fraudulently concealed it from the vendor. In the year 1790 the House of Lords, in deciding an appeal from the Court of Session in Scotland,[1] overthrew the doctrine of presumptive fraud, and asserted that the right of stoppage *in transitu* was conformable to the law of Scotland. Since then the doctrine has been established in Scotland, and the English decisions on the subject have been recognized as directly authoritative, except in cases where they are traceable to principles peculiar to the law of England and inconsistent with those of the law of Scotland.[2]]

[1] The noted case of Jaffrey (Stein's Creditors) *v.* Allan, Stewart & Co., 3 Paton, 191. The judgment of the House was based on the opinion of Lord Thurlow.

[2] See Bell's Comm. vol. i. p. 226, ed. 1870, and Brown on the Law of Sale in Scotland, p. 434.

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*PART II.

RIGHTS AND REMEDIES OF THE BUYER.

CHAPTER I.

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§ 1213. *THE breach of contract of which the [*872] buyer complains may arise from the vendor's default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of the collateral contract of warranty either of quality or title.

The buyer's right to *avoid* the contract for mistake, failure of consideration, fraud, or illegality, has been discussed in the Third Book of this treatise. There remain therefore for consideration, 1st. The remedies of the buyer before obtaining possession of the goods sold; which must be subdivided into cases where the contract is executory only, and cases where the property has passed. 2dly. The remedies of the buyer after having taken actual possession of the goods.

Section I. — WHERE THE CONTRACT IS EXECUTORY.

§ 1214. Where by the terms of the contract the property has not passed to the buyer in the thing which the vendor

has agreed to sell, it is obvious that the buyer's remedy for the breach of the vendor's promise is the same as that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relations of vendor and vendee.

The damages which the buyer may recover in such an action are in general the difference between the contract price and the market value of the goods at the time when the contract is broken, as explained by Tindal C. J., in the opinion delivered in Barrow *v.* Arnaud, cited *ante*, p. 735; and numerous instances of the application of this rule are to be found in the reported cases.[1]

[1] Boorman *v.* Nash, 9 B. & C. 145; Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 381; Griffiths *v.* Perry, 1 E. & E. 680; 18 L. J. Q. B. 204; Peterson *v.* Eyre, 13 C. B. 353; Josling *v.* Irvine, 6 H. & N. 512; 30 L. J. Ex. 78; Boswell *v.* Kilborn, 15 Moo. P. C. C. 309; Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180; Wilson *v.* Lancashire and Yorkshire Railway Co., 9 C. B. N. S. 632; 30 L. J. C. P. 232; *per* Blackburn J. in Elbinger Co. *v.* Armstrong L. R. 9 Q. B. at p. 476; Silkstone Co. *v.* Joint Stock Coal Co., 35 L. T. N. S. 668.

General rule of damages. — Where the seller refuses to deliver property according to his contract, the general rule, as to the measure of the purchaser's damages is the difference between the contract price and the market value of the property at the time and place designated for delivery, and the interest thereon. Where the price has been paid this should be added with interest. Harraltson & Co. *v.* Stein, 50 Ala. 347; Cole *v.* Cheovenda, 4 Colo. 17; Smith *v.* Mayer, 3 Colo. 207; West *v.* Pritchard, 19 Conn. 212; Wells *v.* Abernethy, 5 Conn. 222; Atkins *v.* Cobb, 57 Ga. 96; Camp *v.* Hamlin, 55 Ga. 259; Sanburn *v.* Benedict, 78 Ill. 308; Kitzinger *v.* Sanborn, 70 Ill. 146; Burnham *v.* Roberts, 70 Ill. 19; Pittsburgh & St. L. R. R. Co. *v.* Heek, 50 Ind. 303; s. c. 19 Am. Rep. 713; Harrison *v.* Charlton, 37 Iowa, 134; Boles *v.* Vincent, 24 Iowa, 387; Stewart *v.* Power, 12 Kans. 596; Koch *v.* Godshaw, 12 Bush (Ky.) 318; Miles *v.* Miller, 12 Bush (Ky.) 134; Bush *v.* Holmes, 53 Me. 417; Berry *v.* Dwinel, 44 Me. 255; Furlong *v.* Polleys, 30 Me. 491; s. c. 50 Am. Dec. 635; Warren *v.* Wheeler, 21 Me. 484; Smith *v.* Berry, 18 Me. 122; Kribs *v.* Jones, 44 Md. 396; Pendergast *v.* Reed, 29 Md. 398; Barry *v.* Cavanagh, 127 Mass. 394; Somers *v.* Wright, 115 Mass. 292; Clement & H. Manuf. Co. *v.* Meserole, 107 Mass. 362; Cushing *v.* Wells, 98 Mass. 550; Cutting *v.* Grand T. R. Co., 95 Mass. (13 Allen) 381; Bartlett *v.* Blanchard, 79 Mass. (13 Gray) 429; Quarles *v.* George, 40 Mass. (23 Pick.) 400; McDermid *v.* Redpath, 39 Mich. 372; McKercher *v.* Curtis, 35 Mich. 478; Chadwick *v.* Butler, 28 Mich. 349; Paine *v.* Sherwood, 21 Minn. 225; Paxton *v.* Meyer, 58 Miss. 445; Northrup *v.* Cook, 39 Mo. 208; Whitmore *v.* Coats, 14 Mo. 9; Gordon *v.* Norris, 49 N. H. 376; Deming *v.* Grand Trunk R. R. Co., 48 N. H. 455; s. c. 2 Am. Rep. 267; Cahen *v.* Platt, 69 N. Y. 348; s. c. 25 Am. Dec. 203; Parsons *v.* Sutton, 66 N. Y. 92; Orr *v.* Bigelow, 14 N.

§ 1215. *But the law distinguishes the damages [*873] which may be claimed on a breach of contract, and allows not only *general* damages, that is, such as are the necessary and immediate result of the breach,[1] but *special* damages, which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effect.[2] It is by reason of this distinction, that damages of the latter class are not recoverable, unless alleged in the statement of claim with sufficient particularity to enable the defendant to prepare himself with evidence to meet the demand at the trial, while those of the former class are sufficiently particularized by the very statement of the breach.[3]

§ 1216. The rule on the subject of the measure of damages on breach of contract was thus laid down in Hadley *v.* Baxendale;[1] "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, either as arising naturally, *i.e.* according to the usual course of things,

Y. 556; Dana *v.* Fielder, 12 N. Y. 40; s. c. 62 Am. Dec. 130; Whelan *v.* Lynch, 65 Barb. (N. Y.) 329; York *v.* Ver Planck, 65 Barb. (N. Y.) 316; Giles *v.* Morrison, 50 Barb. (N. Y.) 50; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Mallory *v.* Lord, 29 Barb. (N. Y.) 454; Clark *v.* Dales, 20 Barb. (N. Y.) 42; Clark *v.* Pinney, 7 Cow. (N. Y.) 681; Smith *v.* Griffith, 3 Hill (N. Y.) 337; s. c. 38 Am. Dec. 639; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Dey *v.* Dox, 9 Wend. (N. Y.) 129; s. c. 24 Am. Dec. 137; Kountz *v.* Kirkpatrick, 72 Pa. St. 376; s. c. 13 Am. Rep. 687; Fesler *v.* Love, 48 Pa. St. 407; Trout *v.* Kennedy, 47 Pa. St. 387; Wilson *v.* Davis, 5 Watts & S. (Pa.) 523; Doak *v.* Snapp, 1 Coldw. (Tenn.) 180; Harris *v.* Rodgers, 6 Heisk. (Tenn.) 627; Stark *v.* Alford, 49 Tex. 260; Duncan *v.* McMahan, 18 Tex. 597; Randon *v.* Burton, 4 Tex. 289; Worthen *v.* Wilmot, 30 Vt. 555; Brent *v.* Richards, 2 Gratt. (Va.) 539; Bailey *v.* Clay, 4 Rand. (Va.) 346; Shepherd *v.* Hampton, 16 U. S. (3 Wheat.) 200; bk. 4, L. ed. 369; Brown *v.* Muller, L. R. 7 Ex. 319; Hinde *v.* Liddell, 32 L. T. N. S. 449; Watrous *v.* Bates, 5 Up. Can. C. P. 367; Colton *v.* Good, 11 Up. Can. Q. B. 153. O'Neill *v.* Rush, 12 Ir. L. 34.

[1] Boorman *v.* Nash, 9 B. & C. 145.

[2] Crouch *v.* Great Northern Railway Co., 25 L. J. Ex. 137; 11 Ex. 742; Hoey *v.* Felton, 11 C. B. N. S. 143; 31 L. J. C. P. 105.

[3] Smith *v.* Thomas, 2 Bing. N. C. 372; 1 Wms. Saund. 243 d. n. 5.

[1] 9 Ex. 341–354; 23 L. J. Ex. 179; see, also, Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A. *post*, p. 885, and Sawdon *v.* Andrew, 30 L. T. N. S. 23.

from such breach of contract itself; or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only [*874] *be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

§ 1217. Although this rule has generally been accepted as sound, it is not universally true that the *mere* communication of the special circumstances of the case made by one party to the other would impose on the latter an obligation to indemnify the former for all the damages that would ordinarily follow from the breach: and to produce such a result, it would require proof of an assent by the latter to assume such a responsibility, in many cases which might be suggested, in which the application of the rule now criticized would otherwise be productive of startling injustice.[1] The Courts have accordingly departed from this rule in many instances where the special circumstances required its modification in order to do justice between the parties. Some of the cases affording illustrations of the mode in which the Courts

[1] See the observations of Willes J. on this point in the British Columbia Sawmill Co. *v.* Nettleship, L. R. 3 C. P. 499, *post*, p. 880, and the cases collected in Mayne on Damages, ed. 1877, pp. 9–33. See, also, Vicars *v.* Wilcocks, and the notes to that case in 2 Sm. L. C. 552; the important case of Horne *v.* Midland Railway Co., in the Ex. Ch. L. R. 8 C. P. 131, *post*, p. 880; the remarks of Blackburn J. in Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. at p. 478; and Simpson *v.* London and North-Western Railway Co., 1 Q. B. D. 274.

deal with this difficult question will be given; but for a full discussion of the principles on which damages are measured, the reader must be referred to the Third Edition of Mayne on Damages (by the author and Mr. Lumley Smith, 1877) for the law of England; to the Treatise of Mr. Sedgwick on the same subject for the law prevalent in the United States, where an interesting and valuable note upon the rule in Hadley *v.* Baxendale will be found, Vol. 1, p. 218, ed. 1880; and to Mr. H. D. Sedgwick's Leading Cases on the Measure of Damages (New York, 1878).[2]

[2] *General rule as to special damages.* —The rule in Hadley *v.* Baxendale has a very wide application to all cases of breach of contract, other than for the payment of money, and permits a party injured by a total breach of such contract, to recover for losses sustained, and even for gains prevented, provided they are "such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as a probable result of a breach of it." In such a case the injured party may recover profits which would have accrued if the other party had performed the agreement; and proportionately in case of a partial breach. In estimating such damages all the facts and circumstances of the case may be taken into consideration, and expected profits should be shown with reasonable and sufficient certainty. Robinson *v.* Bullock, 66 Ala. 548; Coweta F. M. Co. *v.* Rogers, 19 Ga. 416; s. c. 65 Am. Dec. 602; Van Arsdale *v.* Rundel, 82 Ill. 63; Fultz *v.* Wycoff, 25 Ind. 321; Taft *v.* Tiede, 55 Iowa, 370; Mihills Manuf. Co. *v.* Day, 50 Iowa, 250; McCormick *v.* Vanatta, 43 Iowa, 389; Richmond *v.* Dubuque & S. C. R. R. Co., 40 Iowa, 264; Smith *v.* Chicago, &c. R. R. Co., 38 Iowa, 518; Hopkins *v.* Sanford, 41 Mich. 243; Sisson *v.* Cleveland, &c. R. R. Co., 14 Mich. 489; Burrell *v.* New York, &c. Salt Co., 14 Mich. 34; Frohreich *v.* Gammon, 28 Minn. 476; Farwell *v.* Price, 30 Mo. 587; Cockburn *v.* Lumber Co., 54 Wis. 619; Shepard *v.* Milwaukee Gas L. Co., 15 Wis. 318; Hydraulic Eng. Co. *v.* McHaffie, L. R. 4 Q. B. Div. 670; Lalor *v.* Burrows, 18 Up. Can. C. P. 321; Watrous *v.* Bates, 5 Up. Can. C. P. 366; Feehan *v.* Hallinan, 13 Up. Can. Q. B. 440. As to proof of market value at the time stipulated for delivery, evidence of value for a brief period before and after may be shown. Ferris *v.* Comstock, 33 Conn. 513; Morgan *v.* Hefler, 68 Me. 131; Frye *v.* Maine Cent. R. R. Co., 67 Me. 414; True *v.* International Tel. Co., 60 Me. 9; s. c. 11 Am. Rep. 156; Furlong *v.* Polleys, 30 Me. 493; s. c. 50 Am. Dec. 635; Palmer *v.* York Bank, 18 Me. 166; s. c. 36 Am. Dec. 710; Maynard *v.* Pease, 99 Mass. 555; Dickinson *v.* Boyle, 34 Mass. (17 Pick.) 78; s. c. 28 Am. Dec. 281; Holden *v.* Lake Co., 53 N. H. 552; Wolcott *v.* Mount, 36 N. J. L. (7 Vr.) 262; s. c. 13 Am. Rep. 438; Crater *v.* Binninger, 33 N. J. L. (4 Vr.) 513; Cahen *v.* Platt, 69 N. Y. 348; s. c. 25 Am. Rep. 203; Van Wyck *v.* Allen, 69 N. Y. 61; Hexter *v.* Knox, 63 N. Y. 561; Booth *v.* Spuyten Duyvil R. R. Co., 60 N. Y. 487; Ward *v.* New York Cent. R. R. Co., 47 N. Y. 29; s. c. 7 Am. Rep. 405; Cassidy *v.* Le Fever, 45 N. Y. 562; Messmore *v.* N. Y. Shot & L. Co., 40 N. Y. 422; Passinger *v.* Thorburn, 34 N. Y. 634; Griffin *v.* Colver, 16 N. Y. 489; s. c. 69 Am. Dec. 718;

Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61; s. c. 42 Am. Dec. 38; Billmeyer *v.* Wagner, 91 Pa. St. 92; McHose *v.* Fulmer, 73 Pa. St. 365; Pennsylvania R. R. Co. *v.* Titusville, &c. Co., 71 Pa. St. 350; Gerst *v.* Jones, 32 Gratt. (Va.) 518; s. c. 34 Am. Rep. 773; Peshine *v.* Shipperson, 17 Gratt. (Va.) 472; Cockburn *v.* Ashland L. Co., 54 Wis. 619.

Where there is no market value. — Where there is no market for the property at the place appointed for delivery, or where it is impracticable to show the price there, its value may be shown at the nearest available market, or other places not distant, or in nearest controlling markets. Berry *v.* Dwinel, 44 Me. 255. See Follansbee *v.* Adams, 86 Ill. 13; Douglas *v.* Merceles, 25 N. J. Eq. (10 C. E. Gr.) 144; Cahen *v.* Platt, 69 N. Y. 348; s. c. 25 Am. Rep. 203; Rice *v.* Manley, 66 N. Y. 82; s. c. 23 Am. Rep. 30; McHose *v.* Fulmer, 73 Pa. St. 365; Kount *v.* Kirkpatrick, 72 Pa. St. 376; s. c. 13 Am. Rep. 687; Grand Tower Co. *v.* Phillips, 90 U. S. (23 Wall.) 471; bk. 23, L. ed. 71.

When the price paid may be recovered. — Where the price of goods has been paid, and the vendor has failed to deliver according to his contract, the vendee may always recover back the price with interest. Cleveland *v.* Sterrett, 70 Pa. St. 204; Nash *v.* Towne, 72 U. S. (5 Wall.) 689; bk. 18, L. ed. 587. See Marston *v.* Knight, 29 Me. 341; Jagers *v.* Griffin, 43 Miss. 134; Butler *v.* Northumberland, 50 N. H. 33; Ralph *v.* Chicago, &c. Ry. Co., 32 Wis. 177; s. c. 14 Am. Rep. 725.

When the vendee may recover the value of property. — If, on making an executory contract for the sale of goods, the price has been paid by the purchaser, and there is a breach of the contract to deliver, the vendee is entitled to recover the market value of the goods at the time and place stipulated for delivery. Neel *v.* Clay, 48 Ala. 252; McGehee *v.* Posey, 42 Ala. 330; Rose *v.* Bozeman, 41 Ala. 678; Bozeman *v.* Rose, 40 Ala. 212; Moore *v.* Fleming, 34 Ala. 491; Leach *v.* Smith, 25 Ark. 246; Marshall *v.* Ferguson, 23 Cal. 65; West *v.* Pritchard, 19 Conn. 212; Kitzinger *v.* Sanborn, 70 Ill. 146; Morehead *v.* Hyde, 38 Iowa, 382; Bush *v.* Holmes, 53 Me. 417; Berry *v.* Dwinell, 44 Me. 255; Haywood *v.* Haywood, 42 Me. 229; Furlong *v.* Polleys, 30 Me. 491; s. c. 50 Am. Dec. 635; Warren *v.* Wheeler, 21 Me. 484; Smith *v.* Berry, 18 Me. 122; Kribs *v.* Jones, 44 Md. 396; Baltimore City, &c. R. R. Co. *v.* Sewell, 35 Md. 238; Wyman *v.* American Powder Co., 62 Mass. (8 Cush.) 168; Dyer *v.* Rich, 42 Mass. (1 Metc.) 180; Farwell *v.* Kennett, 7 Mo. 595; Fenton *v.* Perkins, 3 Mo. 23; Pinkerton *v.* Manchester, &c. R. R. Co., 42 N. H. 424; Rutan *v.* Hinchman, 29 N. J. L. (5 Dutch.) 112; Kerschmann *v.* Lediard, 61 Barb. (N. Y.) 573; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Dey *v.* Dox, 9 Wend. (N. Y.) 129; Whitsett *v.* Forehand, 79 N. C. 230; Butler *v.* Baker, 5 Ohio St. 584; Cleveland, &c. R. R. Co. *v.* Kelley, 5 Ohio St. 180; Bicknall *v.* Waterman, 5 R. I. 43; Doak *v.* Snapp, 1 Coldw. (Tenn.) 180; M'Donald *v.* Hodge, 5 Hayw. (Tenn.) 86; Copper Co. *v.* Copper Mining Co., 33 Vt. 92; Rider *v.* Kelley, 32 Vt. 268; s. c. 76 Am. Dec. 176; Grand Tower Co. *v.* Phillips, 90 U. S. (23 Wall.) 471; bk. 23, L. ed. 71.

Highest market value on failure to deliver. — Where the price of property purchased has been paid, and there has been a breach of contract to deliver, it has been held in various States that the measure of damages was not limited to the value of the property at the time and place appointed for delivery, but embraces the highest market value of the property between the time of the breach and the commencement of the action or the trial, if there was no unreasonable delay in commencing or prosecuting the suit. Maher *v.* Riley, 17 Cal. 445; West *v.* Pritch-

§ 1218. In Loder *v.* Kekulé,[1] the buyer had paid in advance for the goods to be supplied, and they were found on

[1] 3 C. B. N. S. 128; 27 L. J. C. P. 27.

ard, 19 Conn. 212; Kent *v.* Ginter, 23 Ind. 1; Stapleton *v.* King, 40 Iowa, 278; Davenport *v.* Wells, 3 Iowa, 242; Canton *v.* Folsom, 2 Iowa, 101; Lobdell *v.* Stowell, 51 N. Y. 70; Markham *v.* Jaudon, 41 N. Y. 235; Wilson *v.* Little, 2 N. Y. 443; s. c. 51 Am. Dec. 307; Clark *v.* Pinney, 7 Cow. (N. Y.) 681; West *v.* Wentworth, 3 Cow. (N. Y.) 82; Commerce Bank *v.* Kortright, 22 Wend. (N. Y.) 348; Gregg *v.* Fitzhugh, 36 Tex. 127; Cartwright *v.* McCook, 33 Tex. 612; Brasher *v.* Davidson, 31 Tex. 190; Calvit *v.* McFadden, 13 Tex. 334; Randon *v.* Barton, 4 Tex. 289.

In New York, and other States, there seems to be a tendency to limit this rule, rather than extend it; and it is held applicable in no case except where the full price has been paid, and where injustice would otherwise result. Baker *v.* Drake, 53 N. Y. 211; s. c. 13 Am. Rep. 507. See Wintermute *v.* Cooke, 73 N. Y. 107; Mechanics' & Traders' Bank *v.* Farmers' & Mechanics' Bank, 60 N. Y. 40; Tyng *v.* Com. Warehouse Co., 58 N. Y. 308; Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623.

In case of stocks. — A distinction has been drawn in some cases, as to the measure of damages, between corporate stocks and other property, on a breach of contract for delivery. And in case of stocks the rule of highest value up to the time of trial has been allowed as damages, where the rule in other cases has been to allow only the market value at the time and place of stipulated delivery. See late New York cases above cited. Also, Wells *v.* Abernethy, 5 Conn. 222; Kent *v.* Ginter, 23 Ind. 1; McKenny *v.* Haines, 63 Me. 74; Musgrave *v.* Beckendorff, 53 Pa. St. 310; Bank *v.* Reese, 26 Pa. St. 143.

The weight of American authorities seems to be in favor of the general rule of value at the time and place of delivery, whether it be for non-delivery of stocks or other property. Pinkerton *v.* Manchester, &c. R. R. Co., 42 N. H. 424. See Smith *v.* Dunlap, 12 Ill. 184; Columbia *v.* Amos, 5 Ind. 184; Coldren *v.* Miller, 1 Blackf. (Ind.) 296; Baltimore City Passenger Ry. Co. *v.* Sewell, 35 Md. 238; s. c. 6 Am. Dec. 402; Alexander *v.* Macauley, 6 Md. 359; Eastern R. R. Co. *v.* Benedict, 76 Mass. (10 Gray) 212; Sargent *v.* Franklin Ins. Co., 25 Mass. (8 Pick.) 90; s. c. 19 Am. Dec. 306; White *v.* Salisbury, 33 Mo. 150; Smethurst *v.* Woolston, 5 Watts & S. (Pa.) 106; Enders *v.* Board of Public Works, 1 Gratt. (Va.) 372; Noonan *v.* Lisley, 17 Wis. 314.

Where the property has no market value. — If the property to be delivered has no market value, its value is to be ascertained by such means and elements of value as are attainable; (Shelton *v.* French, 33 Conn. 489; Thomas *v.* Dickinson, 12 N. Y. 364; Kerschmann *v.* Lediard, 61 Barb. (N. Y.) 573); promissory notes are presumed to be worth their face; Sturges *v.* Keith, 57 Ill. 451; Child *v.* Pierce, 37 Mich. 155; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Neff *v.* Clute, 12 Barb. (N. Y.) 466; Baker *v.* Jordan, 5 Humph. (Tenn.) 485. See Bates *v.* Cherry Val. &c. R. R. Co., 59 N. Y. 641. If a sum of money is payable in specific articles, if there is a failure to deliver the articles, the sum stated would be the measure of damages. Marshall *v.* Ferguson, 23 Cal. 65; Heywood *v.* Heywood, 42 Me. 229; Alexander *v.* Macauley, 6 Md. 359; Moore *v.* Hudson R. R. Co., 12 Barb. (N. Y.) 156; Burr *v.* Brown, 5 W. Va. 241.

delivery to be of inferior quality, and were rejected, [*875] so that the amount * of the damages ought to have been fixed with reference to the market price on that day; and the buyer did not resell the goods till some time afterwards, when the market price had fallen; but the Court being of opinion that it was the vendor, who by his conduct had delayed the sale, and the jury having found that the resale was within a reasonable time, the buyer recovered as damages the full difference between the market value at the date of the breach and the price subsequently obtained on the resale.

§ 1219. So in Ogle *v.* Earl Vane,[1] decided in Hilary Term, 1868, where the defendant failed to make delivery of 500 tons of iron according to contract, owing to an accident to his furnaces, the general rule was not applied, because the Court and jury were of opinion that the plaintiff's delay in buying other iron, to replace that not delivered, had taken place at the defendant's request and for his benefit. The plaintiff was therefore entitled to claim the largely increased damages caused by a rise in price in the market during the delay. It was further held that the buyer's consent to wait at the vendor's request was no new contract which required to be proved under the Statute of Frauds, because the buyer retained the power of suing at any moment he pleased for breach of the original contract, but was an independent fact bearing only on the question of damages, and justifying an exception from the general rule.[2]

§ 1220. [The two cases of Tyers *v.* The Rosedale Iron Company,[1] and Hickman *v.* Haynes,[2] already considered *ante*, pp. 180, 181, afford illustrations of the same principle. In Tyers *v.* The Rosedale Iron Company, the defendants, under contract to deliver monthly quantities of iron over 1871, withheld delivery of various monthly quantities at the request of

See Brooks *v.* Hubbard, 3 Conn. 58; s. c. 8 Am. Dec. 154.

[1] L. R. 3 Q. B. 272; 37 L. J. Q. B. in Ex. Ch.; s. c. L. R. 2 Q. B. 275, *ante*, p. 179.

[2] On this latter point, see *ante*, pp. 179 *et seq.*

[1] L. R. 8 Ex. 305; s. c. in Ex. Ch. L. R. 10 Ex. 195.

[2] L. R. 10 C. P. 598.

the plaintiffs. In December, 1871, the last month of the contract time, the plaintiffs demanded delivery of the whole of the residue of the iron deliverable under the contract. The defendants * refused to deliver more than the [*876] monthly quantity for December. Martin B., whose dissentient opinion upon the main question, viz., that the defendants were not justified in refusing absolutely to deliver the residue of the iron, was adopted by the Exchequer Chamber, held, citing Ogle *v.* Earl Vane as an authority, that the damages should be the difference between the contract price and the market price at the date of the refusal to deliver, viz., December, and not, as was contended by the defendants' counsel, upon the principle of Brown *v.* Muller (*post*, p. 889), the sum of the differences between the contract price and the market price on the last day of each month during 1871.

§ 1221. In the Exchequer Chamber, this latter point was not taken by the defendants' counsel, and it seems to have been assumed that if the damages were not to be assessed at the market price in December, then they were to be assessed at the market price at later dates, because the defendants would remain liable to deliver at reasonable dates after December, 1871. As, however, the plaintiffs had assessed their damages at the market price in December, *and the market was a rising one*, the defendants agreed to pay the damages so assessed in the event of the plaintiffs succeeding upon the main question.

The judgment of Martin B. also decides, going upon this point a good deal further than Ogle *v.* Earl Vane, that it is immaterial that the postponement of deliveries has taken place at the request of *the plaintiff*, and for his benefit.

A consideration of this case shows how advisable it is that any agreement for the postponement of deliveries should specify the date to which postponement is made, and whether the instalments are to accumulate and be all delivered at that date, or the deliveries are to continue beyond that date, at the intervals fixed by the original contract.

§ 1222. In Hickman *v.* Haynes,[1] where the plaintiff, under contract to deliver 100 tons of iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873, postponed delivery from time to time at the request of the defendant, of the last 25 tons, the damages were [*877] assessed upon * the difference between the contract price and the market value *at the end of a reasonable time from the last request of the defendant for postponement of delivery;* Lindley J., who delivered the judgment of the Court of Common Pleas, referring with approval to the rule laid down in Ogle *v.* Earl Vane.

§ 1223. These three cases appear to determine:

1. That where delivery has been postponed to a *specified* date by agreement between the parties, or by forbearance of the one party at the request of the other, damages must be assessed according to the market price at the postponed date.

2. Where the postponement is *indefinite*, the damages must be assessed:—

(a.) Either according to the market price at the date when the plaintiff calls upon the defendant to accept or give delivery;

(b.) Or according to the market price at a reasonable time after the last request for postponement made by the defendant.

Ogle *v.* Earl Vane was again referred to with approval by Bacon C. J. in Ex parte Llansamlet Tin Plate Company,[1] where the contract was for the delivery of iron by monthly instalments, but was distinguished, there being no evidence that the forbearance to deliver had taken place at the sellers' request, and it being proved, on the other hand, that the purchasers had in some cases bought iron in the market to supply the monthly deficiencies. The damages were therefore assessed on the principle laid down in the cases of Brown *v.* Muller and Roper *v.* Johnson, *post*, p. 889.]

[1] L. R. 10 C. P. 598. [1] 16 Eq. 155.

§ 1224. In Fletcher *v.* Tayleur,[1] the plaintiffs claimed special damages for the non-delivery of a ship which the defendant had agreed to construct for them, and it was proved that the ship was intended for a passenger-ship to Australia; that the defendant knew this; that if the ship had been delivered according to contract the plaintiffs would have made a profit *of 7000*l.* on the voyage, [*878] but that in consequence of the fall in freight, they made only 4,280*l.* on the voyage when the vessel was delivered. The jury gave the plaintiff 2,750*l.* damages. Crowder J. read to the jury as the rule the passage above quoted (p. 873) from the opinion in Hadley *v.* Baxendale.[2] On motion for new trial, Hugh Hill insisted that the probable profits of a voyage were too vague a criterion by which to measure damages; but the Court refused to interfere, on the ground that both parties had agreed that the question for the jury was, What was the loss sustained by the non-delivery of the ship at the time stipulated for by the contract? and that this question was properly left to them by Crowder J. In the course of the trial, Jervis C. J. suggested that "it would be convenient if some general rule were established as to the measure of damages in all cases of breach of contract. Would not an average percentage of mercantile profits be the fair measure of damages for a breach of a mercantile contract? That is very much the result of the decision in Hadley *v.* Baxendale." This suggestion met the concurrence of Willes J. but no further notice was taken of it, on the ground that the question had not been raised at the trial.

§ 1225. In the case of The Columbus [1] will be found a discussion by Dr. Lushington of the Admiralty Rules which govern the allowance of freight as damages in cases of collision.

§ 1226. Cory *v.* Thames Iron works Company,[1] decided by the Queen's Bench in Hilary Term, 1868, was very similar in its features with Fletcher *v.* Tayleur, but the decision was

[1] 17 C. B. 21; 25 L. J. C. P. 65.
[2] 9 Ex. 341; 23 L. J. Ex. 179.
[1] 3 Wm. Robinson, 158.
[1] L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.

different, because the defendants were not made aware of the special purpose which the buyer had in view. The plaintiffs claimed damages for the non-delivery at the specified time, of the hull of a floating boom derrick, which they intended to use for working machinery in the discharge of coals; but the defendants were not aware of this, and believed that the hull was wanted for the storage of coals. It was contended for the defendants that no damages were due,
[*879] * because the two parties had not in contemplation the same results from the breach, but the Court held this an inadmissible construction of the rule in Hadley *v.* Baxendale;[2] that the true rule is that the vendor is always bound for such damages as result from the buyer's being deprived of the ordinary use of the chattel; but is not bound for the further special damage that the buyer may suffer, by being debarred from using it for some special and unusual purpose, not made known to the vendor, when he contracted for the delivery.

In the case of In re The Trent and Humber Company,[3] where damages were claimed for the breach of a contract to repair a ship within an agreed period, Cairns L. C. held the measure of damages to be *primâ facie* the sum which would have been earned in the ordinary course of employment of the ship during the delay.[4]

[2] 9 Ex. 341; 23 L. J. Ex. 179.

[3] 6 Eq. 396; 4 Ch. 112.

[4] *Damages for delay of delivery in general.* — The measure of damages for a delay in the delivery of personal property, according to contract, would depend upon the facts and circumstances of the case. If there is no evidence of special damage, and the price has been paid, interest on the price of the article from the time it would have been delivered, has been held to be the measure of damages. Edwards *v.* Sanborn, 6 Mich. 348. In another case the value of the use of the article was held to be the measure of damages for a delay in delivery, and that this was to be determined by the market value of the hire of the article. Griffin *v.* Colver, 16 N. Y. 489; s. c. 69 Am. Dec. 718. In other cases a proper measure of damages would be the difference in value between the article at the time it should have been delivered and the time when it was delivered. Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 302; Spiers *v.* Halstead, 74 N. C. 620. In other cases the seller would, under the rule in Hadley *v.* Baxendale (see *ante*, sec. 1316, note 2), be liable for a delay in delivery according to contract, for such losses as the purchaser sustained by the delay, as both parties at the time of making the contract may be reasonably supposed to have contemplated as a probable result of a breach of it. See

§ 1227. In Brady *v.* Oastler,[1] the Barons of the Exchequer decided (*dissentiente* Martin B.), that in an action for damages for non-delivery of goods at a specified time, under a written contract, parol evidence was inadmissible to show, with a view to estimate the damages, that the price fixed in the contract had been enhanced above the market value in consideration of the vendor's being allowed an unusually short time for the manufacture and delivery of the articles.

§ 1228. In Smeed *v.* Foord,[1] the defendant had contracted to furnish a steam threshing engine on a day fixed, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the engine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by the weather, and it was necessary to kiln-dry a part of it, and its market value was deteriorated. Held, that the defendant was responsible for these damages.

§ 1229. * In the case of the British Columbia Saw [*880] Mill Company *v.* Nettleship,[1] the plaintiff sued for damages for breach of contract for the carriage to Vancouver's Island of several cases of machinery intended for the erection of a saw-mill; one of the cases, which contained parts of the machinery without which the mill could not be erected, was missing when the vessel arrived at her destination. The defendant knew that the cases contained machinery. The plaintiff was obliged to send to England to replace the missing parts, and was delayed twelve months in the erection of his mill. Held, that the measure of damages was the cost of the missing parts, including freight and interest for the twelve months, but that the plaintiff could not

ante, sec. 1316, note 2; also Benton *v.* Fay, 64 Ill. 417; Ward *v.* New York Cent. R. R. Co., 47 N. Y. 29; Grand Tower Co. *v.* Phillips, 90 U. S. (23 Wall.) 471; bk. 23, L. ed. 71; Smeed *v.* Foord, 1 El. & El. 602; s. c. 28 L. J. Q. B. 178.

[1] 3 H. & C. 112; 33 L. J. Ex. 300.

[1] 1 E. & E. 602; 28 L. J. Q. B. 178. See, also, The Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A., *post*, p. 885; and Wilson *v.* The General Screw Collier Co., 47 L. J. Q. B. 239.

[1] L. R. 3 C. P. 499; 37 L. J. C. P. 235.

recover anything for the loss of the use of the saw-mill for twelve months, as the defendant had not been apprised that the cases contained such machinery as could not be replaced at Vancouver's Island, nor that all the cases actually delivered would be useless unless the missing part could be supplied. And, *semble*, that even with knowledge of these facts, the defendant would not have been liable without some proof that he assented to become responsible for these consequences, when he contracted to carry the goods.

§ 1230. In the case of Horne *v.* Midland Railway Company,[1] this question of the measure of damages for a breach of a carrier's duty to deliver in time (and in most but not all cases the vendor's breach of duty to deliver would be governed by the same rules) was fully discussed under the following circumstances: The plaintiffs were under contract for the delivery of a quantity of shoes at an unusually high price, to be delivered in London by the 3d of Feb-
[*881] ruary, 1871, and the *goods were delivered to the defendants for carriage in time for reaching London in the usual course on the afternoon of the 3d, and *the Company had notice of the contract of the plaintiffs, and that the goods would be rejected and thrown on their hands* if not delivered on the day fixed, but the defendants were not informed that the goods had been sold at an *exceptionally high price and not at the market rate.* The goods were not tendered for delivery till the 4th, and were rejected on that ground, and the question was, whether the damages payable by the defendants were to be measured with reference to the price at which the plaintiffs would have been paid for them if delivered in time, or to the market price.

It was held in the Common Pleas by Willes and Keating

[1] L. R. 7 C. P. 583; 8 C. P. 131. In actions against carriers for non-delivery of goods, it has been assumed in some instances to be within the contemplation of both parties, that the goods sent must have been intended for immediate sale, and damages for *loss of market* have been given, Collard *v.* South-Eastern Railway, 7 H. & N. 79. But this case has not been altogether approved, see The Parana, 2 P. D. 118, C. A., reversing S. C. 1 P. D. 452, where an attempt to extend the doctrine to carriers by sea failed, and the distinction between the carriage of goods by railway and by sea was pointed out at pp. 122–3.

JJ., that the latter was the true measure of damages, the defendants not having been notified of the exceptional price contracted for; and Willes J. repeated his opinion previously expressed in British Columbia Saw Mill Company *v.* Nettleship, *ante*, p. 880, by which the rule in Hadley *v.* Baxendale was to be taken with this qualification, that "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."[2]

The judgment was affirmed in the Exchequer Chamber by Kelly C. B., Blackburn and Mellor JJ., and Martin and Cleasby BB. (*dissentientibus* Lush J. and Pigott B.): and Martin and Cleasby BB., and Blackburn and Lush JJ., intimated in pretty distinct language their concurrence with Willes J. in the *dictum* above quoted, while none of the judges expressed dissent.

In this case reference will be found to all the antecedent authorities upon the subject under discussion.[3]

[2] L. R. 7 C. P. at p. 591.

[3] *Delay by carriers.* — Damages caused by a delay by a common carrier to deliver according to contract, or within a reasonable time in the absence of an express contract, governed by the same rule as in the case of delay by the vendee of goods. And a loss from a decline in the market has been held to be an element of damages in such cases. See Colvin *v.* Jones, 3 Dana (Ky.) 576; Weston *v.* Grand T. Ry. Co., 54 Me. 376; Cutting *v.* Grand T. Ry. Co., 95 Mass. (13 Allen) 381; Smith *v.* New Hampshire & N. R. R. Co., 94 Mass. (12 Allen) 531; Spring *v.* Haskell, 86 Mass. (4 Allen) 112; Ingledew *v.* Northern R. R., 73 Mass. (7 Gray) 86; Sisson *v.* Cleveland & T. R. R. Co., 14 Mich. 489; Cowley *v.* Davidson, 13 Minn. 92; Atkinson *v.* Steamboat Castle Garden, 28 Mo. 124; Ward *v.* New York C. R. R. Co., 47 N. Y. 29; Sturgess *v.* Bissell, 46 N. Y. 462; Briggs *v.* New York, &c. R. Co., 28 Barb. (N. Y.) 515; Medbury *v.* New York & E. R. R. Co., 26 Barb. (N. Y.) 564; Collins *v.* Baumgardner, 52 Pa. St. 461; Peet *v.* Chicago & N. W. Ry. Co., 20 Wis. 594.

Loss from delay and not the value of the good is the measure of damages when the goods have been delivered. United States Ex. Co. *v.* Haines, 67 Ill. 137; Illinois Cent. R. R. Co. *v.* McClellan, 54 Ill. 58; s. c. 5 Am. Rep. 83; Priestly *v.* Northern I. & C. R. R. Co., 26 Ill. 205; s. c. 79 Am. Dec. 369; Grindle *v.* Eastern Ex. 67 Me. 317; Vicksburg & M. R. R. Co. *v.* Ragsdale, 46 Miss. 458; Hackett *v.* B. C. & M. R. R., 35 N. H. 390; Favor *v.* Philbrick, 5 N. H. 358; Benson *v.* New Jersey R. R. & Trans. Co., 9 Bosw. (N. Y.) 412.

Depreciation in value. See Plummer *v.* Penobscot L. Assoc., 67 Me. 363; Weston *v.* Grand T. Ry. Co., 54 Me. 376; Scott *v.* Bostou & N. O. S. Co., 106 Mass. 468; Smith *v.* New Haven &

§ 1231. France *v.* Gaudet[1] was an action for conversion, but the considered opinion of the court delivered by Mellor J. contains *dicta* having an important bearing on [*882] the rules governing * the measure of damages. In that case the plaintiff had sold cases of champagne at a profit of 10*s.* per case, and was prevented by the defendant from making delivery, and no similar goods were procurable in the market, so that he lost the benefit of the resale. The question was, whether the damages were to be measured by reference to a fair usual market profit of 4*s.* per case, or to the exceptional profit of 10*s.* Held, that the true rule is to ascertain in *cases of tort* the actual value of the goods at the time of conversion, and that the plaintiff having made an actual sale at the profit of 10*s.*, the goods had acquired that special value under the circumstances, and he was entitled to recover on that basis: but the learned judge pointed out that there was no analogy between the case and that of a contract between two parties for the sale and delivery of a chattel, "where the vendee gives notice to the vendor of the precise object of the purchase."

§ 1232. In Borries *v.* Hutchinson,[1] the plaintiff had bought from defendant 75 tons of caustic soda, deliverable in three equal parts, in June, July, and August. The vendor knew that the soda was bought for sale on the Continent, and was to be shipped from Hull, and also knew before the end of August that it was to be shipped to Russia; but there was no evidence that the vendor knew this last fact at the time of making the contract. The buyer, at the time when he contracted for the purchase, made a like contract for resale, at a profit, to a St. Petersburg merchant. The latter, in his turn, made a sub-sale, at a profit, in St. Petersburg.

N. R. R. Co., 94 Mass. (12 Allen) 531; Whalon *v.* Aldrich, 8 Minn. 346; Sturgeon *v.* St. Louis, K. C. & N. Ry. Co., 65 Mo. 569: Deming *v.* Grand Trunk Railroad Co., 48 N. H. 455; King *v.* Woodbridge, 34 Vt. 565; Peet *v.* Chicago & N. W. R. R. Co., 20 Wis. 595.

[1] L. R. 6 Q. B. 199.

[1] 18 C. B. N. S. 445; 34 L. J. C. P. 169. See, also, Wilson *v.* Lancashire and Yorkshire Railway Co., 9 C. B. N. S. 632; 30 L. J. C. P. 232; and Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. 473, at p. 476.

None of the soda was delivered till between the 16th of September and the 26th of October, when a portion of it was received by the plaintiff in Hull, and shipped to St. Petersburg, at which season the rates of freight and insurance are always raised, so that plaintiff was put to increased cost in making delivery. The soda was an article manufactured * by the vendor, and there was no market [*883] in which the buyer could have supplied himself at the date of the breach, so as to be able to perform his contract of resale. The plaintiff had paid 159*l.* to his vendee in St. Petersburg as damages for non-delivery to him, and for his loss of profit on his sub-sale. Held, that the buyer was entitled to recover as damages his loss of profits on the resale, and all his additional expenses for freight and insurance, but not the damages paid to his vendee for the latter's loss on the sub-sale, those being too remote.

The ground on which the measure of damages in this case was held to form an exception to the general rule was, that there was no market in which the buyer could have replaced the soda at the time fixed for the delivery, so as to bring it within the principle on which the rule is based, namely, that the disappointed buyer can go into the market with the money which he had prepared for paying the first vendor, and replace the goods, subject only to damages arising out of the difference in price.[2]

§ 1233. But in Williams *v.* Reynolds[1] it was held that the buyer could not recover as damages the profit that he would have gained by delivering the goods under a resale made by him subsequently to the date of the original contract; and that the damages must be assessed according to the market value at the date of the breach; and Crompton J. said that the Common Pleas in deciding Borries *v.* Hutchinson, must

[2] See, on this point, O'Hanlan *v.* Great Western Railway Co., 6 B. & S. 484; 34 L. J. Q. B. 154; Rice *v.* Baxendale, 7 H. & N. 96; 30 L. J. Ex. 371.

[1] 6 B. & S. 495; 34 L. J. Q. B. 221; and see Gee *v.* Lancashire and Yorkshire Railway Co., 6 H. & N. 211; 30 L. J. Ex. 11; Great Western Railway Co. *v.* Redmayne, L. R. 1 C. P. 329; Portman *v.* Middleton, 4 C. B. N. S. 322; 27 L. J. C. P. 231; Mayne on Damages, pp. 43 *et seq.* ed. 1877.

be taken to have considered the sub-contract as contemporaneous, and known to the defendant at the time of his making his contract.

In Randall *v.* Roper,[2] however, which was for damages for breach of warranty, and will therefore be considered in the next chapter, the liability of the buyer for damages [*884] to * sub-vendees was taken into consideration in estimating his damages against the first vendor.

§ 1234. [In the Elbinger Company *v.* Armstrong[1] the defendant had agreed to supply the plaintiffs with certain sets of wheels and axles during the months of February, March, and April, 1872. This contract was subsidiary to one which the plaintiffs had made to supply a Russian railway company with wagons by two deliveries in May of the same year, under penalties for delay. The defendant had notice of this sub-contract, but not of the date of delivery, or of the amount of the penalties. By reason of the defendant's delay in delivering the wheels and axles, which, being made according to tracings, were not obtainable in the market, the plaintiffs had to pay 100*l.* to the Russian company by way of penalties under their sub-contract. Held, that the plaintiffs were not entitled, as a matter of law, to damages to the amount of the penalties paid to the Russian company, but that the jury might reasonably assess the damages at that amount, the proper direction for the jury being, "that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary."

§ 1235. In Hinde *v.* Liddell,[1] the defendants had contracted to supply the plaintiff with gray shirtings by the 20th

[2] E. B. & E. 84; 27 L. J. Q. B. 266.

[1] L. R. 9 Q. B. 473; see remarks of Cotton L. J. on this case in Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. at p. 677.

[1] L. R. 10 Q. B. 265; see, also, an earlier case at Nisi Prius (Bridge *v.* Wain, 1 Starkie, 504), where the contract was to supply scarlet cuttings in China, and the articles supplied

of October. They were informed generally, that the shirtings were intended for shipment, but had no notice of the particular sub-contract which the plaintiff had made. Shortly before the time for delivery, the defendants notified to the plaintiff that they would be unable to complete their
* contract. There being no market for the kind of [*885] shirting contracted for, the plaintiff procured shirtings of a better quality at a higher price, in order to fulfil his sub-contract, but he received no advance in price from his sub-vendee. It was admitted at the trial, that the shirtings which the plaintiff had bought were the nearest in quality and price that could be obtained in the market for delivery by the 20th of October. Held, that the plaintiff was entitled to recover the difference between the price paid for the substituted shirtings, and the defendants' contract price. Blackburn J. said, during the argument, "There was no market for this particular description of shirtings, and therefore no market price; in such a case, the measure of damages is the value of the thing at the time of the breach of contract, and that must be *the price of the best substitute procurable.* Borries *v.* Hutchinson is directly in point. How does this differ from the case of a carrier who fails to carry a passenger to a given place, in which case the passenger has been held over and over again to be entitled to take the best substitute in the shape of a conveyance he can get, no matter that it costs much more than the fare."

In the Dunkirk Colliery Company *v.* Lever,[2] which was the converse case, where the buyer had refused to accept goods, and there was no market for their resale, it was held that the proper measure of damages was *the actual loss which the sellers, acting as reasonable men in the ordinary course of their business, had in fact sustained by the buyer's default.*

§ 1236. In the Hydraulic Engineering Company *v.* McHaffie[1] the plaintiffs, being under a contract with Justice

were not scarlet cuttings. Lord Ellenborough held that the plaintiffs were entitled to the value of scarlet cuttings in China.

[2] 9 Ch. D. 20; see *per* James L. J. at p. 25; 41 L. T. N. S. 633, C. A.; 43 L. T. N. S. 706, in the House of Lords.

[1] 4 Q. B. D. 670, C. A.; see, also,

for the supply of a peculiar machine by the end of August, 1878, contracted with the defendants to make a part of the machine as soon as possible. The defendants were aware of the plaintiffs' contract with Justice and knew that the machine was wanted by Justice at the end of August, but did not complete their part of it until the end of [*886] September. Justice * then refused to accept the machine. Under these circumstances the plaintiffs were held entitled to recover damages for (1) loss of profit on their contract with Justice; (2) expenditure uselessly incurred in making other parts of the machine; and (3) cost of preserving and warehousing it.

In Thol *v.* Henderson,[2] the latest case on this subject, Grove J. held, distinguishing Borries *v.* Hutchinson, that when the buyer at the time of the sale has neither made known to the seller the sub-contract of sale, nor the specific purpose for which the goods are bought, but has merely informed him that the goods are purchased for the purpose of being resold, he cannot, on the seller's default, recover damages for the loss of profit on the sub-sale.[3]

§ 1237. It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them: —

I. If at the time of the sale the existence of a sub-contract is made known to the seller,[1] the buyer, on the seller's default in delivering the goods, has two courses open to him: —

Wilson *v.* The General Screw Collier Co., 47 L. J. Q. B. 239.

[2] 8 Q. B. D. 457.

[3] *Where the seller is advised of a contract to resell.* — If the seller of an article is advised at the time of a contract of the purchaser to resell, and the seller undertakes to furnish the article and deliver it in time to enable the purchaser to fulfil his contract for resale, and the seller fails to do so, he would usually be liable for the profits which his vendee thereby loses on his contract for such resale. See sec. 1217, note 2; also Stewart *v.* Power, 12 Kans. 596; Johnson *v.* Matthews, 5 Kans. 122; Morrison *v.* Lovejoy, 6 Minn. 319; Messmore *v.* New York Shot, &c. Co., 40 N. Y. 422; Watson *v.* Bales, 5 Up. Can. C. P. 366.

[1] In Thol *v.* Henderson, *supra*, Grove J. expresses the opinion that it would be sufficient if the seller, without knowing of the existence of any particular sub-contract, knew that the goods were being bought for a specific purpose.

(1) He may elect to fulfil his sub-contract, and for that purpose go into the market and purchase the best substitute obtainable charging the seller with the difference between the contract price of the goods and the price of the goods substituted.[2]

(2) He may elect to abandon his sub-contract, and in that case he may recover as damages against the seller (a) his loss of profits on the sub-sale, and (b) any penalties he may be liable to pay for breach of his sub-contract;[3] but if the *amount* of the penalties has not been made known to the seller, the buyer is not entitled to recover their amount as a matter of * right, but the jury may, if the [*887] penalties are reasonable, assess the damages at that amount.[4] It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a sub-sale, express notice of the amount of such profits must have been given to the seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it.[5]

II. If at the time of the sale the existence of a sub-contract is not made known to the seller, a knowledge on his part that the buyer is purchasing with a general intention to resell, or notice of the sub-contract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such sub-contract; the buyer may either procure the best substitute for the goods as before, and fulfil his sub-contract, charging the seller with the difference in price, or abandon the sub-contract and bring his action for

[2] Hinde *v.* Liddell, L. R. 10 Q. B. 265.

[3] Borries *v.* Hutchinson, 18 C. B. N. S. 445; Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. 473; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, C. A.

[4] Elbinger Co. *v.* Armstrong, L. R. 9 Q. B. 473.

[5] See *ante*, p. 881; opinion of Willes J. in British Columbia Saw Mill Co. *v.* Nettleship, and in Horne *v.* Midland Railway Co., and see, also, Sedgwick on Damages, vol. 1, p. 233, ed. 1880, and the case of Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487, in the Court of Appeals of the State of New York, noticed *post*, p. 893.

damages, when the ordinary rule, it would seem, will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price in the sense that there is no place where the buyer can readily procure the goods contracted for.[6]

III. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss.[7]]

§ 1238. It may be useful to the reader, before leaving this branch of the subject, to point out that, in the case [*888] of Dunlop *v.* *Higgins,[1] where it was decided that the purchaser might recover as damages any profit that he would have made on a resale, without reference to the market value at the time of the breach, the decision went exclusively on the Scotch authorities as showing what was the law of Scotland where the contract was made, and the case is not an authority on the English law, although the rule of the English Courts was mentioned with severe disapproval by Lord Cottenham.[2]

§ 1239. If the contract which has been broken provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should make this request either personally or by letter, unless there has been a waiver of compliance with this condition, resulting from the vendor's incapacitating himself from complying with the request by consuming, or reselling, or otherwise so disposing of the goods as to render a request idle and useless,[1] as heretofore explained in the Chapter on Conditions.[2]

[6] Williams *v.* Reynolds, 6 B. & S. 495; Thol *v.* Henderson, 8 Q. B. D. 457.

[7] Dunkirk Colliery Co. *v.* Lever, 9 Ch. D. 20; 41 L. T. N. S. 633, C. A.; 43 L. T. N. S. 706, in the House of Lords; Hinde *v.* Liddell, L. R. 10 Q. B. 265.

[1] 1 H. L. C. 381.

[2] See the remarks on this case in Mayne on Damages, p. 48, ed. 1877, quoted and approved by the judges in Williams *v.* Reynolds, 6 B. & S. 495, *per* Crompton J. at p. 501, and *per* Blackburn J. at p. 506.

[1] Bach *v.* Owen, 5 T. R. 409; Radford *v.* Smith, 3 M. & W. 254; Bowdell *v.* Parsons, 10 East, 359; Amory *v.* Brodrick, 5 B. & Ald. 712.

[2] *Ante*, p. 549.

§ 1240. If the buyer is unable to prove the existence of any actual damage resulting from the non-delivery, he will nevertheless be entitled to recover nominal damages,[1] on the general principle that every breach of contract imports some damage in law.

It must not be forgotten that even after the goods have been sent to the buyer, in the performance of an executory contract, his right of rejecting them is unaffected by the actual delivery to him, until he has had a reasonable opportunity of inspection and examination, as shown, *ante*, p. 691, in the Chapter on acceptance.[2]

§ 1241. Several cases have been decided as to the effect of a breach of contract of sale where the goods are to be delivered *in *futuro* by instalments. It has already [*889] been shown, *ante*, p. 585, that a partial breach of the contract by a refusal to accept or to deliver any particular parcel of the goods, was decided by the Queen's Bench, in Simpson *v.* Crippin,[1] not to give to the aggrieved party the right to rescind the whole contract, but only to a compensation in damages for the partial breach: and this decision was treated as settling the law on this point in Roper *v.* Johnson, *infra.*

§ 1242. The measure of damages to which the buyer is entitled on the breach of such a contract has been determined

[1] Valpy *v.* Oakeley, 16 Q. B. 941; 20 L. J. Q. B. 380; Griffiths *v.* Perry, 1 E. & E. 680; 28 L. J. Q. B. 204.

[2] *Right of inspection.* — On the delivery of goods on contract of sale, the vendee is entitled to an opportunity to inspect them that he ascertain whether they fulfil the requirements of the contract in respect to quality and quantity. Delivery does not affect the vendee's right in this respect. See Polhemus *v.* Heiman, 45 Cal. 573; Biard *v.* Matthews, 6 Dana (Ky.) 130; Dill *v.* O'Ferrell, 45 Ind. 268; Thomas *v.* Winters, 12 Ind. 322; Kimball &c. Co. *v.* Vroman, 35 Mich. 310; Wolcott *v.* Mount, 36 N. J. L. (7 Vr.) 262; s. c. 20 Am. Rep. 425; Dounce *v.* Dow, 57 N. Y. 16; Parks *v.* Morris Axe & Tool Co., 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416; s. c. 11 Am. Rep. 719; Foot *v.* Bentley, 44 N. Y. 166; s. c. 4 Am. Rep. 652; Hoe *v.* Sanborn, 21 N. Y. 532; s. c. 78 Am. Dec. 163; Murray *v.* Smith, 4 Daly (N. Y.) 277; Howard *v.* Hoey, 23 Wend. (N. Y.) 350; s. c. 35 Am. Dec. 572; Lewis *v.* Rountree, 78 N. C. 323; Howie *v.* Rea, 70 N. C. 559; Cox *v.* Long, 69 N. C. 7; Sigworth *v.* Laffel, 76 Pa. St. 476; Brantley *v.* Thomas, 22 Tex. 270; s. c. 73 Am. Dec. 264; Pease *v.* Sabin, 38 Vt. 432; Esty *v.* Read, 29 Vt. 279; Boothby *v.* Scales, 27 Wis. 626.

[1] L. R. 8 Q. B. 14; and see the cases reviewed *ante*, pp. 585–9.

in two cases — one in which the action was brought after the time fixed for the final delivery, and the other where the action was brought after partial breach but *before* the time fixed for the last delivery.

§ 1243. In Brown *v.* Muller,[1] the contract was for the delivery of 500 tons of iron in about equal proportions in September, October, and November, 1871, and action was brought in December by the buyer. The defendant had given notice soon after the contract that he "considered the matter off," and that he regarded the contract as cancelled, and had expunged the order from his books. It was held that the proper measure of damages was the sum of the difference between the contract and the market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November respectively. In this case the plaintiff had not elected to consider the defendant's repudiation of the contract as a breach, which he was at liberty to do under the decisions in Hochster *v.* De la Tour,[2] and Frost *v.* Knight,[3] but had insisted on the execution of the contract after that repudiation.

§ 1244. In Roper *v.* Johnson,[1] the defendants had contracted to sell to the plaintiffs 300 tons of coal, "to be taken during the months of May, June, July, and August;" [*890] and the * plaintiffs having taken no coals in May, the defendants on the 31st of that month wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendants positively refused delivery and the action was commenced on the 3d of July.

It was held, first, that on the authority of Simpson *v.* Crippin, the defendants had no right to rescind the contract by reason of the plaintiff's default in not sending to take the

[1] L. R. 7 Ex. 319. See, also, Ex parte Llansamlet Co., 16 Eq. 155, and Barmingham *v.* Smith, 31 L. T. N. S. 540, where the damages were assessed upon the same principle.

[2] 2 E. & B. 678; 22 L. J. Q. B. 455.

[3] L. R. 7 Ex. 111.

[1] L. R. 8 C. P. 167.

May delivery; and, 2dly, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th of June as a breach of the contract *on that day*, under the doctrine of the cases of Hochster *v.* De la Tour and Frost *v.* Knight; but although that was the date of the breach, it was also held,

3dly, that *in the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss*, the measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought, or the cause tried. The jury were to estimate, as best they could, the probable difference in respect of the future deliveries.

§ 1245. [It may be observed that where, as in Roper *v.* Johnson, the amount of the instalments is not specified in the contract, the *primâ facie* rule would seem to be that the deliveries should be ratably distributed over the contract period, but if it can be gathered from the terms of the contract or the circumstances of the contracting parties, that ratable deliveries were not intended, it then becomes a question for the jury, whether the tender of, or demand for, delivery is a reasonable one.[1]

Bergheim *v.* The Blaenavon Iron Company[2] was a somewhat different case. The defendants had entered into * a contract for the sale of iron rails to the plain- [*891] tiff, delivery to commence by the 15th of January, 1873, and to be completed by the 15th of May. *In the event of the defendants exceeding the time of delivery*, they were to pay, by way of fine, 7*s.* 6*d.* per ton per week. The defendants failed to deliver the iron within the time limited. In an action to recover damages for delay in delivery, it was held, that the fine ought to be calculated from the date at which the contract was to be completed, and not, as was con-

[1] See Calaminus *v.* Dowlais Iron Co., 47 L. J. Q. B. 575.

[2] L. R. 10 Q. B. 319.

tended by the plaintiffs, upon the strength of Roper *v.* Johnson, and Brown *v.* Muller, from the different dates at which the delivery of a parcel might reasonably have been expected. Of the judges of the Queen's Bench, Blackburn J. declined to express any opinion upon the construction of the delivery clause, while between Field and Mellor JJ. there was the same divergence of opinion which was shown by the judges of the Court of Exchequer who decided Coddington *v.* Paleologo (*ante*, p. 675), where the language of the contract was somewhat similar; but, upon the construction of the penalty clause, they were all unanimous in deciding that the parties intended the 15th of May to be the date from which the penalty for non-delivery was to be assessed.

§ 1246. The rules in America for the assessment of damages do not materially differ from those adopted in England.

The general rule is well established, that on the seller's failure to deliver the goods according to the contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when, and at the place where, they should have been delivered; and where there is no market at the place of delivery, then at the nearest available market, with the addition of the increased expense of transportation and hauling.[1]

§ 1247. With regard to special damages, it has been laid down in the leading case of Griffin *v.* Colver,[1] that [*892] "the broad * general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained;" and this rule is subject to but two conditions: —

1. *The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and*

[1] Dana *v.* Fielder, 12 N. Y. 40; Grand Tower Co. *v.* Phillips, 23 Wallace, 471, *per* Bradley J. at pp. 479-480.

[1] 16 N. Y. 489 (decided in 1858), *per* Selden J. in delivering the opinion of the Court of Appeals at p. 494.

2. *They must be certain, both in their nature and in respect to the cause from which they proceed.*

"The familiar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be, not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

The rules laid down in this case have been always referred to with approval, and have been recently re-affirmed by the same Court.[2]

§ 1248. In America, therefore, the second branch of the rule laid down in Hadley *v.* Baxendale, viz., that the damages must be "such as may fairly be supposed to have been in the contemplation of the parties at the time when they made the contract," has been generally accepted and adopted as a charge to juries. And the first branch of the rule, viz., "that the damages must be such as flow directly and naturally, *i.e.*, in the ordinary course of things, from the breach of the contract," has been treated as only another way of expressing the same rule.[1]

* Upon the question referred to *ante*, p. 883 *et seq.*, [*893] it was held in Messmore *v.* The New York Shot and Lead Company,[2] that if the vendor know that the purchase is made in order to enable the buyer to fulfil an existing contract for resale at a profit, the latter may claim as damages this profit if lost by the vendor's default.

And in Booth *v.* Spuyten Duyvil Mill Company,[3] this rule

[2] Messmore *v.* The New York Shot and Lead Co., 40 N. Y. 422, 427; Cassidy *v.* Le Fevre, 45 N. Y. 562, 567; Booth *v.* The Spuyten Duyvil Mill Co., 60 N. Y. 487, at p. 492; Devlin *v.* The Mayor and Aldermen of New York, 63 N. Y. 8, at p. 25.

[1] *Per* Selden J. in Griffin *v.* Colver, 16 N. Y. 489, at p. 494. Mr. Sedgwick (Sedgwick on Damages, Vol. 1, p. 233, ed. 1880) declares his preference for the first branch of the rule, upon the ground that it is possible to say with some definiteness, what would follow in the usual course of things; but what the intention of the parties *probably* was, is a very difficult matter to arrive at, and that parties usually contemplate the performance, and not the breach, of contracts.

[2] 40 N. Y. 422.

[3] 60 N. Y. 487. It should be noted, that in this case there was no notice to the vendor of the price provided

was accepted, subject to the limitation that to charge a party to a contract with responsibility for special consequences which may result from breaking it, notice of such consequences must have been given *under circumstances implying that it formed the basis of the agreement.*

Church C. J., in delivering the opinion of the Court at p. 494, says, after referring to Hadley *v.* Baxendale: "This case has been frequently referred to, and the rule, as laid down, somewhat criticised; but the criticism is confined to the *character* of the notice or communication of the special circumstances. Some of the judges, in commenting upon it, have held that a bare notice of special consequences which might result from a breach of the contract, *unless under such circumstances as to imply that it formed the base of the agreement*, would not be sufficient. I concur with the views expressed in these cases; and I do not think the Court in Hadley *v.* Baxendale intended to lay down any different doctrine."

§ 1249. The Supreme Court of Pennsylvania has gone somewhat further than any reported case in the State of New York, and in McHose *v.* Fulmer[1] decided that where the goods cannot be obtained in the market, the measure of damages is *the actual loss the buyer sustains.* The plaintiff, a manufacturer, contracted for iron from the defendant, who failed to deliver, and the plaintiff was unable to sup- [*894] ply *himself in the market. It was held that the measure of damages was the actual loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price on contracts he had entered into, relying on his contract with Fulmer.[2]]

for in the sub-contract, and it was insisted, therefore, that the contract was not made with reference to such price, and that, as there was no market for the goods in question, the defendant was liable only to nominal damages. But this contention was rejected by the Court, see p. 493.

[1] 73 Penn. 365. See, also, Bank of Montgomery *v.* Reese, 26 Penn. 143.

[2] The general rule in Hadley *v.* Baxendale has, as before noticed, a wide application to all cases of breach of contract, and the American cases supporting it are numerous. See *ante*, sec. 1217, note 2.

Section II. — WHERE THE PROPERTY HAS PASSED.

§ 1250. Where the contract which has been broken by the vendor is one in which the property has passed to the buyer, there arise in favor of the latter the rights of an owner; of one who has not only the property in the goods, but the *right of possession*, defeasible only on his own default in complying with his duty of accepting and paying for them. A buyer in this condition has of course the right of action for damages for breach of the contract, discussed in the preceding section; for that is a right common to all parties to contracts of every kind, and was formerly the *only* remedy at common law for such breach.

§ 1251. In equity, however, the Courts would in certain cases compel the vendor to deliver the specific chattel sold, and the cases on the subject are collected in White and Tudor's Leading Cases in Equity,[1] where the rule as deduced from the authorities is stated in these words: "The question in all cases is this, — Will damages at law afford an adequate compensation for breach of the argument? If they will, there is no occasion for the interference of equity; the remedy at law is complete: if they will not, specific performance of the agreement will be enforced."[2]

[1] Vol. I. p. 848, ed. 1877, notes to Cuddee *v.* Rutter.

[2] See, also, opinion of Kindersley, V.-C., in Falcke *v.* Gray, 4 Drew. 658; 29 L. J. Ch. 28, in which he held that a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of vertu, will be specifically enforced.

Specific performance. — A specific performance of a contract of sale of personal property will be compelled in equity only where the remedy at law is incomplete. The recovery of damages at law is usually a complete remedy. But when these cannot be estimated, owing to the peculiar nature of the property, or the circumstances of the case, and a specific performance is indispensable to justice, a court of equity will afford relief and decree a specific performance. Savery *v.* Spence, 13 Ala. 561; Justice *v.* Croft, 18 Ga. 473; Chamberlain *v.* Blue, 6 Blackf. (Ind.) 491; Sullivan *v.* Tuck, 1 Md. Ch. 59; Furman *v.* Clark, 44 N. J. Eq. (3 Stockt.) 306; Phillips *v.* Berger, 2 Barb. (N. Y.) 608; s. c. 8 Barb. (N. Y.) 527; Barnes *v.* Barnes, 65 N. C. 261; Mechanic's Bank *v.* Seton, 26 U. S. (1 Pet.) 299; bk. 7, L. ed. 152; Roundtree *v.* McLain, 1 Hempst. C. C. 245; Falcke *v.* Gray, 4 Drew. Ch. 651; s. c. 5 Jur. N. S. 645. See Leach *v.* Fobes, 77 Mass. (11 Gray) 510; Foll's Appeal, 91 Pa. St. 434; s. c. 36 Am. Rep. 671. Specific performance of agreement to transfer stocks has been decreed where its un-

§ 1252. But now, by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 2), it is provided, that "in all actions for breach of contract to deliver specific goods for a price in money, on application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury [*895] shall, if they * find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what, if any, is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages, if any, the plaintiff would have sustained if the goods should be delivered under execution as thereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the Court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, — on payment of such sum, if any, as shall have been found to be payable by the plaintiff as aforesaid, — of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed."

§ 1253. The buyer to whom the property has passed may, if not in default, maintain an action in trover for damages for the conversion, on the vendor's refusal to deliver, as well as an action on the contract; but he cannot recover greater damages by thus suing in tort, than by suing on the contract. If, therefore, the vendor's conversion was before delivery, so that he cannot maintain an action for the price, as

certain value rendered it difficult to do justice in an action for damages. Treasurer *v.* Commercial Coal Min. Co., 23 Cal. 390; Todd *v.* Taft, 89 Mass. (7 Allen) 371; Buckmaster *v.* Ice Co., 5 Daly (N. Y.) 313; White *v.* Scuyler, 31 How. (N. Y.) Pr. 38; s. c. 1 Abb. (N. Y.) Pr. N. S. 300; Taylor *v.* Neville, 3 Atk. 384; Doloret *v.* Rothchilds, 1 Sim. & Stu. 590. And for the sale of shares in a railway, Noyes *v.* Marsh, 123 Mass. 286; Ashe *v.* Johnson, 2 Jones' Eq. (N. C.) 149. And for the sale of a patent. Corbin *v.* Tracy, 34 Conn. 325; Somerby *v.* Buntin, 118 Mass. 287; s. c. 19 Am. Rep. 459; Binney *v.* Annan, 107 Mass. 94; s. c. 9 Am. Rep. 10. But generally a court will not decree a specific performance of a contract for the sale of goods. McGarvey *v.* Hall, 23 Cal. 140; City Fire Ins. Co. *v.* Olmsted, 33 Conn. 476; Scott *v.* Billgerry, 40 Miss. 119; Hall *v.* Joiner, 1 S. C. 186; Summers *v.* Bean, 13 Gratt. (Va.) 404.

if he has resold the goods to a third person, the damages recoverable would be only the difference between the contract price and the market value.[1] But if the vendor's right of action for the recovery of the price were not thus lost, as if he had delivered the goods and afterwards tortiously retaken and converted them, the buyer's right of recovery in trover was, prior to the Judicature Acts, for the whole value, and the vendor was driven to his cross-action,[2] but he may have set up a counter-claim for the price. The subject has already been discussed, in the examination of the vendor's right of resale, in Part I. Chap. 3, Book V.

§ 1254. After the property in the specific chattel has passed to the buyer, it may happen that he discovers the goods bought to be different in kind or quality from that which he he had a * right to accept according [*896] to the agreement. In such case it is necessary to distinguish whether the defect be one in the performance of a condition or of a warranty. In the former case he may refuse to accept the goods and reject the contract, but not in the latter.

The reason for this difference is, that in the one case, the contract itself depends on the performance of the condition precedent incumbent on the vendor, while in the other the principal contract has been performed, and the breach is only of the collateral undertaking of warranty.

§ 1255. If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as explained, *ante*, pp. *et seq.*, in the Chapter on Conditions, where the cases are cited and reviewed.

But where the property in the goods has passed to the buyer, *unconditionally*, the law gives him no right to rescind the contract in the absence of an express stipulation to that effect, and the property therefore remaining in him, he is bound to pay the price even if he reject the goods, which still remain his.[1] His proper remedy, therefore, is to receive

[1] Chinery *v.* Viall, 5 H. & N. 288; 29 L. J. Ex. 180.
[2] Gillard *v.* Brittan, 8 M. & W. 575.
[1] Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 C. & M. 205; Poulton *v.* Lattimore, 9 B. & C. 259;

the goods, and to exercise the rights explained in the next chapter.[2]

§ 1256. In Heyworth *v.* Hutchinson,[1] the buyer was held bound to accept the goods, *although the property had not passed to him, although he had not had an opportunity of inspection before purchase, and although the goods were much inferior in quality to the warranty in the written contract.* The case turned on the meaning of the written contract; but the *dicta* of the judges would *seem* to imply that the same decision would be given in the case of any contract for the sale of specific goods. The defendant bought a quantity of wool, "413 bales greasy Entre Rios, at $10\frac{1}{4}d.$ per pound, to arrive ex Stige, or any vessel that may be transshipped in, [*897] and subject to the wool *not being sold in New York, before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkin's and Robinson's possession, *and if any dispute arises it shall be decided by the selling* brokers, whose decision shall be final, &c."

Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 530; Cutter *v.* Powell, in notes, 2 Sm. L. C. 30, ed. 1879. Lord Eldon's decision to the contrary, in Curtis *v.* Hannay, 3 Esp. 83, is overruled by the later cases.

[2] Avery *v.* Miller, 118 Mass. 500. See *ante*, sec. 1240, note 2.

Failure of goods to comply with warranty. — If on inspection it is found that the goods do not comply with the warranty, the purchaser may generally avoid the sale, return the goods, and recover back the price paid. See Jack *v.* D. M. & Ft. D. R. Co., 53 Iowa, 399; Pearley *v.* Balch, 40 Mass. (23 Pick.) 283; Wright *v.* Davenport, 44 Tex. 164; Churchill *v.* Price, 44 Wis. 540. Whether he returns the goods or retains them he has a remedy in some states for a breach of warranty, and may recover damages therefor. If he has relied upon the vendor to furnish those required by the contract, a receipt of goods under a contract to deliver is not a waiver of any right to claim damages for a breach of warranty. Sessions *v.* Hartsook, 23 Ark. 519; Beers *v.* Williams, 16 Ill. 69; Robinson *v.* Chandler, 56 Ind. 575; Clarke *v.* McGetchie, 49 Iowa, 437; Gossler *v.* Eagle Sugar Ref., 103 Mass. 331; French *v.* Vining, 102 Mass. 135; s. c. 3 Am. Rep. 440; Kimball *v.* Veroman, 35 Mich. 310; Mandel *v.* Buttles, 21 Minn. 391; Brown *v.* Murphee, 31 Miss. 91; Parks *v.* Morris Axe & Tool Co., 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416; Reed *v.* Randall, 29 N. Y. 358; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Richardson *v.* Granby, 49 Vt. 22; Mayer *v.* Dwinell, 29 Vt. 298; Brown *v.* Sayles, 27 Vt. 227; Beals *v.* Olmstead, 24 Vt. 114; s. c. 58 Am. Dec. 150; Northwood *v.* Rennie, 28 Up. Can. C. P. 202; s. c. 3 Ont. App. 37. See Vincent *v.* Leland, 100 Mass. 432; Perrine *v.* Serrell, 30 N. J. L. (1 Vr.) 454.

[1] L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

On arrival it was found by the brokers that 180 bales were not as good as the original samples by 2*d.* a pound; 201 bales not as good by 1¼*d.* a pound; and 32 bales not as good by 1½*d.* per pound. The buyer on inspecting the wool refused to take it, and after due notice to, and under protest from him, the brokers awarded that he should take it at the above allowances. The second count of the declaration alleged this decision of the brokers as an *award after due arbitration.* One of the brokers deposed at the trial that the wool was not "about similar to samples," and that was the reason for making the allowances. The defendant was held bound to accept under the award. Among the *dicta*, however, were the following, some of which, if taken literally, go farther, it is submitted, than has yet been determined by any direct authority.

Cockburn C. J. said: "This contract is for the sale of specific wools to arrive by a particular ship; they are earmarked so as to prevent the contract applying to any other wools; and they are guaranteed as about similar to samples. If the matter stood there, this *being a sale of specific goods, though with a warranty, there would not be any right or power on the part of the buyer to reject the goods on the ground of their not being conformable to the samples;* but the buyer's remedy would be either by a cross-action on the warranty, or by giving the inferiority in evidence in reduction of damages."

Blackburn J. put his judgment on the ground of the written contract, and said as to the clause of warranty: "Now such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when *the contract is as to any goods*, such a clause is a *condition* going to the essence of the contract; but when the contract is as
* *to specific goods*, the clause is only collateral to the [*898]
contract, and is the subject of a cross-action, or matter in reduction of damages."

Lush J. said: "This was not a contract to supply *any* goods answering the description, but a contract to *sell specific goods*, with a warranty of their being about similar to sample; and *clearly by the general law there was no power in*

the buyer to reject them, because they did not answer the description."

When Heyworth *v.* Hutchinson was cited in Azémar *v.* Casella,[2] Blackburn J. said that the decision was quite consistent with the judgment in the latter case, because "the wool which was of the same kind or character as that contracted for, but inferior only in quality."

§ 1257. It is very difficult to understand the reason for the distinction suggested in the above *dicta* of the eminent judges of the Queen's Bench if intended to apply to cases where the specific chattels have never been in a condition to be inspected by the buyer, and where *the property has not passed to him.* The cases in which it has been held that on the sale of a specific chattel, the buyer's remedy is confined to a cross-action or to a defence by way of reduction of the price, are all cases of the *bargain and sale* of a special chattel *unconditionally*, where, consequently, the property had become vested in the buyer; but no similar case of an *executory contract* has been found; no case in which the buyer has been held bound to accept goods which required to be weighed before delivery, and in which, therefore, the property remained in the vendor, if they were not equal in quality to the sample by which they were bought.

In justice and principle there seems to be no difference between a vendor's saying, "I will sell you 100 bales of wool at 10*d.* a pound, warranted equal to this sample," and his saying, "I will sell you 100 bales of wool marked with my name, which I have on board the ship Stige, now at sea, at 10*d.* a pound, warranted equal to this sample." Why should the vendor have the right to reject the goods, if infe-
[*899] rior in * quality to the sample, in the former case, and not in the latter? In neither instance has he an opportunity to inspect, and in neither does the reason exist on which the opinion rested in Street *v.* Blay,[1] where the Court specially put the doctrine on the ground that the property

[2] L. R. 2 C. P. 677, in Ex. Ch.; 36 L. J. C. P. 263.

[1] 2 B. & Ad. 456; see, also, Heilbutt *v.* Hickson, L. R. 7 C. P. 438, *ante*, p. 639.

had passed. The language is as follows: "Where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and *revest the property in the vendor*, . . . but must sue upon the warranty unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract. . . . It is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, *revest the property in the seller* and recover the price, when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot by the same means protect himself from the payment of the price on the same ground. . . . It is to be observed that although the vendee of a specific chattel *delivered with a warranty*, may not have a right to return it, the *same reason does not apply to the case of executory contracts*, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. . . . *Nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk which may not agree with it.*"[2]

[2] *Sale by sample.* — A sale of goods by sample is an implied warranty, on the part of the seller with the buyer, that the goods sold are similar in nature and quality to the sample, and if those offered the purchaser are not equal to the sample, he may refuse to receive them, and rescind the contract, or he may keep them and recover damages on the implied warranty. See Magee *v.* Billingsley, 3 Ala. 679; Hanson *v.* Bussee, 45 Ill. 496; Gunther *v.* Atwell, 19 Md. 157; Lothrop *v.* Otis, 89 Mass. (7 Allen) 435; Henshaw *v.* Robins, 50 Mass. (9 Metc.) 86; s. c. 43 Am. Dec. 367; Williams *v.* Spafford, 25 Mass. (8 Pick.) 250; Bradford *v.* Manly, 13 Mass. 139; s. c. 7 Am. Dec. 124; Day *v.* Raguet, 14 Minn. 273; Gurney *v.* Atlantic, &c. R. Co., 58 N. Y. 358; Leonard *v.* Fowler, 44 N. Y. 289; Brower *v.* Lewis, 19 Barb. (N. Y.) 574; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; Beebee *v.* Robert, 12 Wend. (N. Y.) 413; s. c. 27 Am. Dec. 132; Carson *v.* Baillie, 19 Pa. St. 375; s. c. 57 Am. Dec. 659; Borrekins *v.* Bevan, 3 Rawle (Pa.) 37; s. c. 23 Am. Dec. 85; Whittaker *v.* Hueske, 29 Tex. 355; s. c. 73 Am. Dec. 264; Brantley *v.* Thomas, 22 Tex. 270; Grimoldby *v.* Wells, L. R. 10 C. P. 391; Parker *v.* Palmer, 4 Barn. & Ald. 387; Lorymer *v.* Smith, 1 Barn. & C. 1; *ante*, sec. 1354, note 2.

After examination and acceptance of the goods sold by sample, without objec-

§ 1258. In every one of the cases cited in the books as authority for the proposition that the buyer cannot refuse acceptance of a specific chattel sold, on the ground of breach of warranty of quality, the contract was a *bargain and sale*, and the property in the specific chattel had passed.[1]

[*900] * In Toulmin *v.* Hedley,[2] it was held by Cresswell J. that the purchaser of a *specific cargo* of guano had a right to inspect it on arrival and reject it, if not equal in quality to "average imports from Ichaboe" as warranted; and in Mondel *v.* Steel,[3] the well-considered opinion of the Court, as delivered by Parke B. (*post*, p. 905), gives as the reason why a purchaser is driven to a cross-action on a warranty, "that the property has vested in him indefeasibly."

§ 1259. It is unlimited, therefore, that the *dicta* of the learned judges, in Heyworth *v.* Hutchinson, must be taken as referring to cases of *bargain and sale*, not to *executory contracts*,[1] unless there be something in the terms of the agreement to show that the buyer had consented to take the goods at a reduced price, if they turned out to be inferior to the quality warranted.

tion, it will be presumed that they were satisfactory, and, generally, this would preclude the buyer from claims for damages on account of the defects in the goods. Gaylord Man. Co. *v.* Allen, 53 N. Y. 515; Dutchess Co. *v.* Harding, 49 N. Y. 321.

[1] Weston *v.* Downes, Doug. 23; Gompertz *v.* Denton, 1 C. & M. 207; Murray *v.* Mann, 2 Ex. 538; Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 523; 20 L. J. C. P. 116; Payne *v.* Whale, 7 East, 274; Cutter *v.* Powell, 2 Sm. L. C. at p. 30, ed. 1879.

[2] 2 C. & K. 157.

[3] 8 M. & W. 858.

[1] The learned editor of the last edition of Chitty on Contracts seems to take a different view, ed. 1881, p. 425.

*CHAPTER II. [*901]

AFTER RECEIVING POSSESSION OF THE GOODS.

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§ 1260. AFTER the goods have been delivered into the actual possession of the buyer, the performance of the vendor's duties may still be incomplete, by reason of the breach

of some of the warranties, expressed or implied, whether of title or quality, to which he has bound himself by the contract.

If the breach be a warranty of title, the buyer may either bring his action for the return of the price on the ground of failure of the consideration for which the price was paid, as in Eichholz *v.* Banister, *ante*, 629, or he may sue in [*902] damages * for breach of the vendor's promise as in all other cases of breach of contract.

§ 1261. Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer has the choice of three remedies: —

First. He may, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter, refuse to accept the goods, and return them, [or it is sufficient for him, without returning the goods, to give notice to the seller that he rejects them, and that they remain at the seller's risk.[1]]

Secondly. He may accept the goods and bring an action for the breach of the warranty.

Thirdly. If he has not paid the price, he may now set off or set up by way of counter-claim damages for breach of warranty in the vendor's action for the price.[2]

§ 1262. That the buyer, *where the property has not passed to him*, may reject the goods if they do not correspond in quality with the warranty seems to be the necessary result of the principles established heretofore in the chapters on Delivery and Acceptance. The buyer's obligation to accept depends on the compliance by the vendor with his obligation to deliver. In an executory agreement for sale with a warranty of quality, as, for example, in a sale by sample, it is part of the vendor's promise to furnish a bulk equal in quality to the sample; and in general this must operate as a con-

[1] Grimoldby *v.* Wells, L. R. 10 C. P. 391.

[2] By the Rules of the Supreme Court, Ords. XIX. r. 3, and XXII. r. 10, a defendant may recover his whole damages by way of counter-claim, and obtain judgment for the balance should it prove to be in his favor. Prior to the Judicature Acts the buyer could only plead the breach of warranty in diminution of the price. See *post*, p. 904.

dition precedent. If the buyer has inspected goods, and agreed to buy them, it may, perhaps, be inferred that a warranty of quality is an independent contract, collateral to the principal bargain, and only giving rise to an action for the breach, *ante*, pp. 545 *et seq.* But where the buyer has agreed to buy goods that he has never seen, nor had an opportunity of inspecting, on the vendor's warranting that they are of a * specified quality, nothing seems clearer than [*903] that this warranty is not an independent contract, but is a part of the original contract, operating as a condition, and that what the buyer intends when accepting the offer is, "I agree to buy IF the goods are equal to the quality you warrant." Accordingly, the learned author of the Leading Cases thus expresses the rules deduced from the authorities:[3] "A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, *so as to be capable of being inspected at the time of the contract*, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. . . . But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities being part of the description of the thing sold becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted." The same reasoning which applies to a thing not yet existing, or not yet ascertained, would seem equally applicable to goods in a distant country, or on the high seas, beyond the possible reach of the buyer's inspection.

§ 1263. In the absence of some such express stipulation as was contained in Heyworth *v.* Hutchinson, *ante*, p. 896, it

[3] Vol. II. p. 30, ed. 1879.

is therefore a complete defence for the buyer to show that in such a sale the delivery offered was not in accordance with the promise.[1] And the buyer may even reject the goods, if the vendor refuses him an opportunity for inspection when demanded at a reasonable time, although the vendor, [*904] a few * days afterwards, offers them for inspection; as was decided in Lorymer *v.* Smith, *ante*, p. 590.

In actual practice, the only difficulty which arises in these cases grows out of controversies whether the buyer has actually accepted the goods and thus become owner. On this point the cases show that acceptance does not take place by mere retention of the goods for the time necessary to examine or test them, nor by the consumption of so much as is necessary for such examination and testing; and it is always a question of fact for the jury, whether the goods were kept longer, or whether a larger quantity was consumed than was requisite to enable the buyer to decide whether he would accept or reject.[2]

§ 1264. The *second* proposition, that the buyer may, after receiving and accepting the goods, bring his action for damages, in case the quality is inferior to that warranted by the vendor, needs no authority. It is taken for granted in all the cases, there being nothing to create an exception from the general rule, that an action for damages lies in every case of a breach of promise made by one man to another, for a good and valuable consideration.[1]

§ 1265. The *third* remedy of the buyer is by a counter-claim for damages for breach of warranty in the vendor's action for the price. Before the Judicature Acts his only remedy was to plead the breach of warranty in diminution of the price. The law on the subject cannot be better presented than by extracts from the lucid decision given, in behalf of

[1] Street *v.* Blay, 2 B. & Ad. 456; Sanders *v.* Jameson, 2 C. & K. 557; Cook *v.* Riddelien, 1 C. & K. 561; Heilbutt *v.* Hickson, L. R. 7 C. P. 438.

[2] See the cases reviewed, *ante*, pp. *591, *592.

[1] See the opinions of the judges in Poulton *v.* Lattimore, 9 B. & C. 259. The same view has been taken by the American Courts. Day *v.* Pool, 52 N. Y. 416.

the Exchequer of Pleas, by Parke B. in Mondel *v.* Steel.[1] In that case the action was by the buyer for damages for breach of an express warranty in the quality of a ship built
* under written contract. The defendant pleaded in [*905]
effect, that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. The damages claimed in the declaration were special, and were alleged to result from defects in the fastenings, whereby the vessel was so much strained as to require fastening and repair, so that the plaintiff was deprived of the use of the vessel while undergoing the repairs. A general demurrer to the plea was sustained, and *per cur.* "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty; in which action, as well as the difference between the price contracted for, and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby *the property invested in him indefeasibly, and is incapable of returning it back;* he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the

[1] 8 M. & W. 858; but the decision is now of little practical importance, *infra*, p. 872. Parke B.'s exposition of the law, in Mondel *v.* Steel, was approved and acted upon in Towerson *v.* Aspatria Society, 27 L. T. N. S. 276, where see the observations of Willes J. on the report of Parke B.'s judgment in Meeson and Welsby; see, also, Rigg *v.* Banbridge, 15 M. & W. 598.

defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of Basten *v.* Butter,[2] a different practice began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now per-
[*906] mitted to show that the chattels, by reason of * the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. . . . The rule is, that it is competent for the defendant, *not to set off by a procedure in the nature of a cross-action*, the amount of damages which he has sustained by breach of the contract, but simply *to defend himself by showing how much less the subject-matter of the action was worth*, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action *to that extent, but no more*." [3]

[2] 7 East, 479.

[3] *Action for the price.* — The general doctrine stated in the text, as to the right to recover the price for the property in case of a failure of title, is sustained and illustrated by numerous American cases. Grose *v.* Hennessey, 95 Mass. (13 Allen) 389; Burt *v.* Dewey, 31 Barb. (N. Y.) 540; Armstrong *v.* Percy, 5 Wend. (N. Y.) 535. But where both parties to a sale knew that the horse sold was stolen, as they were in *pari delicto*, it was held that neither could have any remedy. Bixler *v.* Saylor, 68 Pa. St. 146. The price paid has been held to be the limit of damages, although the property has advanced in value. Arthur *v.* Moss, 1 Oreg. 193. This is the rule of damages in various states on breach of covenant of title to real estate. Shattuck *v.* Green, 104 Mass. 42; Crittenden *v.* Posey, 1 Head (Tenn.) 311; Goss *v.* Dysant, 31 Tex. 187. But a more liberal rule prevails in others, allowing the value of the property at time of dispossession. Boyd *v.* Whitfield, 19 Ark. 447; Dabovich *v.* Emeric, 12 Cal. 171; Grose *v.* Hennessey, 95 Mass. (13 Allen) 389; Burt *v.* Dewey, 40 N. Y. 283.

Where there is a breach of warranty, and the property is returned to the vendor, the vendee may recover the price paid and interest from the time of the return. Kuntzman *v.* Weaver, 20 Pa. St. 422; s. c. 59 Am. Dec. 740; Pope *v.* Allis, 115 U. S. 363; bk. 29, L. ed. 393. Usually an action cannot be maintained for failure of title, until the vendee has been deprived of the possession by a superior title in a third party, or been compelled to recognize such superior right. And this, also, is analogous to the rule in case of breach of covenant of warranty of peaceable possession, of real estate conveyed. See Sumner *v.* Gray, 4 Ark. 467; s. c. 38 Am. Dec. 39; Patrick *v.* Swinney, 5 Bush (Ky.) 421; Joslin *v.* Caughlin,

§ 1266. This case was, before the Judicature Acts, the leading one always cited for establishing —

First. That the buyer might set up the defective quality of the warranted article in diminution of the price; and,

Secondly. That he must bring a cross-action, if he desired to claim special or consequential damages, which action was

27 Miss. 852; Brown *v.* Smith, 6 Miss. (5 How.) 387; Matheny *v.* Mason, 73 Mo. 677; s. c. 39 Am. Rep. 541; Connor *v.* Eddy, 25 Mo. 72; Wood *v.* Sheldon, 42 N. J. L. (13 Vr.) 421; Wanser *v.* Messler, 29 N. J. L. (5 Dutch.) 256; Burt *v.* Dewey, 40 N. Y. 283; Sweetman *v.* Prince, 26 N. Y. 224; Byrnside *v.* Burdett, 15 W. Va. 702. A warranty of title, where the vendor has possession, is usually implied, on a sale of personal property, where there is no express warranty. Williamson *v.* Sammons, 34 Ala. 691; Miller *v.* Van Tassel, 24 Cal. 458; Thurston *v.* Spratt, 52 Me. 202; Shattuck *v.* Green, 104 Mass. 42; Hubbard *v.* Bliss, 94 Mass. (12 Allen) 590; Whitney *v.* Heywood, 60 Mass. (6 Cush.) 82; Scranton *v.* Clark, 39 Barb. (N. Y.) 273; 1 Smith's Lead. Cas. (6th Am. ed.) 242. Such warranty is to the purchaser and not to the vendee; and each vendor is responsible only to his immediate vendee for a failure of title to the property he sells. Bordwell *v.* Collie, 45 N. Y. 494; Burt *v.* Dewey, 40 N. Y. 283; Moser *v.* Hoch, 3 Pa. St. 230. But in case of a sale of city bonds by a bank, the issue of which was afterwards adjudged unconstitutional and void, the bank having obtained them in the usual course of business, it was held that the bank was not liable for the failure of title except upon an express warranty. Otis *v.* Cullum, 92 U. S. (2 Otto) 447; bk. 23, L. ed. 496.

Counter-claim or set-off in action for the price. — In case of breach of warranty, express or implied on the sale of personal property, whether relating to title, quantity, or quality, in an action by the seller to recover the price, the purchaser may generally in this country, set off or counter-claim the amount of damages sustained by the breach of warranty, and so reduce or defeat the claim. See Smith *v.* Mayer, 3 Colo. 207; Hitchcock *v.* Hunt, 28 Conn. 343; Kenworthy *v.* Stevens, 132 Mass. 123; Morse *v.* Brackett, 98 Mass. 205; Bradley *v.* Rea, 96 Mass. (14 Allen) 20; Cook *v.* Castner, 63 Mass. (9 Cush.) 266; Harrington *v.* Stratton, 39 Mass. (22 Pick.) 510; Stevens *v.* Johnson, 28 Minn. 172; Bouker *v.* Randles, 31 N. J. L. (2 Vr.) 335; McAlister *v.* Reab, 4 Wend. (N. Y.) 485; Howie *v.* Rea, 70 N. C. 559; Seigworth *v.* Leffel, 76 Pa. St. 476; Trimmier *v.* Thomson, 10 S. C. 164; Parker *v.* Pringle, 2 Strobh. (S. C.) 242; Merrill *v.* Nightingale, 39 Wis. 247; Marsh *v.* McPherson, 105 U. S. (15 Otto) 709; bk. 26, L. ed. 1139. See, also, Howe Machine Co. *v.* Reber, 66 Ind. 498; Kenworthy *v.* Stevens, 132 Mass. 123; Gurney *v.* Atlantic & G. W. Ry. Co., 58 N. Y. 358; Marshuetz *v.* McGreevy, 23 Hun (N. Y.) 408; Gautier *v.* Douglass Manuf. Co., 13 Hun (N. Y.) 514. If there be a total or partial failure of consideration, or breach of warranty, on a sale of goods, this may usually be set up as a total or partial defence in an action by the vendor for the price, or to recover on a note given for the price. Peden *v.* Moore, 1 Stew. & P. (Ala.) 71; Albertson *v.* Halloway, 16 Ga. 377; Ruff *v.* Jarrett, 94 Ill. 475; Wilson *v.* King, 83 Ill. 232; Aultman *v.* Theirer, 34 Iowa, 272; Carey *v.* Guillow, 105

not barred by reason of his having obtained a diminution of price in a previous action brought by his vendor.[1]

[But this restriction has been removed by the provisions of the new procedure. Under Order XIX. r. 3, a defendant may set up by way of set-off or counter-claim any claim, *whether sounding in damages or not*, which he has against the claim of the plaintiff; and under Order XXII. r. 10, the defendant is enabled to recover consequential damages which may far exceed the amount of the price sued for by the plaintiff.]

§. 1267. In Davis *v.* Hedges,[1] the Queen's Bench followed Mondel *v.* Steel, and further held that the buyer had the *option* of setting up the defective quality as a defence, or of maintaining a separate action.[2]

Mass. 18; s. c. 7 Am. Rep. 494; Stacy *v.* Kemp, 97 Mass. 166; Goodwin *v.* Morse, 50 Mass. (9 Metc.) 278; Perley *v.* Balch, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; Stevens *v.* Johnson, 28 Minn. 172; Raspberry *v.* Moye, 23 Miss. 320; Shepherd *v.* Temple, 3 N. H. 455; Wyckoff *v.* Runyon, 33 N. J. L. (4 Vr.) 107; Sawyer *v.* Chambers, 44 Barb. (N. Y.) 42; Gautier *v.* Douglass Manuf. Co., 13 Hun (N. Y.) 514; Judd *v.* Dennison, 10 Wend. (N. Y.) 513; Hill *v.* Southwick, 9 R. I. 299; Wright *v.* Davenport, 44 Tex. 164; Huff *v.* Broyles, 26 Gratt. (Va.) 283; Aultman *v.* Hetherington, 42 Wis. 622; Merrill *v.* Nightingale, 39 Wis. 247. But see Pulsifer *v.* Hotchkiss, 12 Conn. 234; Riddle *v.* Gage, 37 N. H. 519; s. c. 75 Am. Dec. 151; Drew *v.* Towle, 27 N. H. 412; s. c. 59 Am. Dec. 380; Burton *v.* Schermerhorn, 21 Vt. 289; Georgian Bay L. Co. *v.* Thompson, 35 Up. Can. Q. B. 64; Kellogg *v.* Hyatt, 1 Up. Can. Q. B. 445.

Fraud as a defence to action for price. — Damages sustained by the fraud of the vendor on a sale is a good cause of action, or a ground for defence in an action for the price. Coburn *v.* Ware, 30 Me. 202; Cook *v.* Castner, 63 Mass. (9 Cush.) 266; Harrington *v.* Strattan, 39 Mass. (22 Pick.) 510; Withers *v.* Greene, 50 U. S. (9 How.) 213; bk. 13, L. ed. 109.

[1] See, also, Rigge *v.* Burbidge, 15 M. & W. 598; Cutter *v.* Powell, 2 Sm. L. C. ed. 1879, notes, pp. 29, 30.

[1] L. R. 6 Q. B. 687.

[2] See *ante* sec. 1265, note 3. See, also, Stevens *v.* Johnson, 28 Minn. 172; Bouker *v.* Randles, 31 N. J. L. (2 Vr.) 335; Trimmier *v.* Thomson, 10 S. C. 164; Marsh *v.* McPherson, 105 U. S. (15 Otto) 709; bk. 26, L. ed. 1139.

The purchaser may recoup damages for a breach of warranty, in an action by the seller for the price. Smith *v.* Mayer, 3 Colo. 207; Wentworth *v.* Dows, 117 Mass. 14; Carey *v.* Guillow, 105 Mass. 18; s. c. 7 Am. Rep. 494; Bradley *v.* Rea, 96 Mass. (14 Allen) 20; Steigleman *v.* Jeffries, 1 Serg. & R. (Pa.) 477; s. c. 7 Am. Dec. 626; Croninger *v.* Paige, 48 Wis. 229; Aultman *v.* Jett, 42 Wis. 488; Withers *v.* Greene, 50 U. S. (9 How.) 213; bk. 13, L. ed. 109.

Return of property unnecessary. — If there is a breach of warranty on the

sale of property, this is a good cause of action against the vendor, or a ground of defence in a suit for the price, without a return or offer to return the property. *Ante*, sec. 1260, note 3; Polhemus *v.* Heiman, 45 Cal. 573; Ferguson *v.* Hosier, 58 Ind. 438; Vincent *v.* Leland, 100 Mass. 432; Camors *v.* Gomila, 9 Mo. App. 205; Gurney *v.* Atlantic & G. W. Ry. Co., 58 N. Y. 358; Day *v.* Pool, 52 N. Y. 416; s. c. 11 Am. Rep. 719; Marshuetz *v.* McGreevy, 23 Hun (N. Y.) 408; Lewis *v.* Rountree, 78 N. C. 323; Cox *v.* Long, 69 N. C. 7; Seigworth *v.* Leffel, 76 Pa. St. 476; Richardson *v.* Grandy, 49 Vt. 22; Warder *v.* Fisher, 48 Wis. 338; Morehouse *v.* Comstock, 42 Wis. 626; Fisk *v.* Tank, 12 Wis. 276.

Warranty with stipulation for return of goods. — A warranty of the quality of goods, with a stipulation of privilege to return them if they are not as warranted, has been held to give the purchaser a choice of remedies, namely, a right to recover for a breach of warranty, or to return the goods, and recover the price if it has been paid. If the price has not been paid, and the goods are retained, the purchaser could, of course, in such a case, set up the damages on the breach of warranty, as a total or partial defence. See *ante*, sec. 1364, note 3. Aultman *v.* Theirer, 34 Iowa, 272; Douglass Axe Manuf. Co. *v.* Gardner, 64 Mass. (10 Cush.) 88; Perrine *v.* Serrell, 30 N. J. L. (1 Vr.) 454.

Retention of goods after inspection. — If goods are delivered to the purchaser under an executory contract of sale, he should have a reasonable time in which to inspect them, to determine whether they are in quantity and quality such as the contract calls for, and an acceptance of the goods without objection made of defects, at the earliest opportunity, would, perhaps, usually be regarded as a waiver of any claim for defects. But the mere retention of goods delivered on an executory contract of sale, has been frequently held in this country not to bar a recovery on the breach of warranty, though kept after an inspection and discovery of defects. Milton *v.* Rowland, 11 Ala. 732; Polhemus *v.* Heiman, 45 Cal. 573; Kellogg *v.* Denslow, 14 Conn. 411; Doane *v.* Dunham, 65 Ill. 512; Ferguson *v.* Hosier, 58 Ind. 438; Marshall *v.* Perry, 67 Me. 78; Lane *v.* Lantz, 27 Md. 211; McCeney *v.* Duvall, 21 Md. 166; Vincent *v.* Leland, 100 Mass. 432; Douglass Axe Manuf. Co. *v.* Gardner, 65 Mass. (10 Cush.) 88; Frohreich *v.* Gammon, 28 Minn. 476; Martin *v.* Maxwell, 18 Mo. App. 176; Kent *v.* Friedman, 101 N. Y. 616; Dounce *v.* Dow, 57 N. Y. 16; Parks *v.* Morris Axe & Tool Co., 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416; s. c. 11 Am. Rep. 719; Passinger *v.* Thorburn, 34 N. Y. 634; Muller *v.* Eno, 14 N. Y. 597; Zuller *v.* Rogers, 7 Hun (N. Y.) 541; Waring *v.* Mason, 18 Wend. (N. Y.) 426; Lewis *v.* Rountree, 78 N. C. 323; Cox *v.* Long, 69 N. C. 7; Freyman *v.* Knecht, 78 Pa. St. 141; Youghiogheny Iron, &c. Co. *v.* Smith, 66 Pa. St. 340; Dailey *v.* Green, 15 Pa. St. 118; Gilson *v.* Bingham, 43 Vt. 410; Bonnell *v.* Jacobs, 36 Wis. 59; Fish *v.* Tank, 12 Wis. 276.

Whether the vendee has accepted goods with knowledge of defects and waived all claim for damages, would be a question of fact, and circumstances might warrant such an inference. See Defenbaugh *v.* Weaver, 87 Ill. 132; Dounce *v.* Dow, 64 N. Y. 411; Draper *v.* Sweet, 66 Barb. (N. Y.) 145.

The remedy, however, for a breach of warranty on a sale is not affected by the fact that the goods are not paid for, or that a note was given for the price. *Ante*, sec. 1264, note 3; Aultman *v.* Wheeler, 49 Iowa, 647; Thoreson *v.* Minneapolis, H. W. 29 Minn. 341; Creighton *v.* Comstock, 27 Ohio St. 548. Or that the purchaser has sold the goods, no claim has been made on him for defects.

§ 1268. In Poulton *v.* Lattimore,[1] the buyer's defence in an action for the price was successful for the *whole* [*907] *amount of the price.* * The vendor sued to recover the price of seed, warranted to be good new growing seed, part of which the buyer had sowed himself, and the remainder was sold to two other persons, who proved that the seed was worthless; that it had turned out to be wholly unproductive; and that they had neither paid, nor would pay for it.

It was further held in this case, that the buyer might insist on his defence without returning, or offering to return, the seed. And the cases cited in the note are authorities to the effect, that not only may the breach of warranty be so used in defence, but that a direct action by the buyer may be maintained for damages for the breach, without notice to the vendor.[2]

§ 1269. It has been said, however, by eminent judges, and the jury at the trial would no doubt be told, that the failure either to return the goods, or to notify the vendor of the defect in quality, raises a strong presumption that the complaint of defective quality is not well founded.[1]

§ 1270. In Adams *v.* Richards,[1] the Common Pleas held, that where a horse had been sold with express warranty and an agreement to take him back if found faulty, it was incumbent on the purchaser to return the horse *as soon as the faults*

Muller *v.* Eno, 14 N. Y. 598. But the purchaser could not recover damages caused by his own wrong, as where the article is purchased for manufacture into certain articles, and warranted suitable for that purpose, and he manufactures it knowing at the time its defects, and unsuitableness for the purpose, and thereby sustains loss, he would be regarded as contributing to the loss, and could not recover the consequential damages resulting therefrom. Milton *v.* Hudson R. S. Co., 37 N. Y. 210; Deyo *v.* New York C. R. R. Co., 34 N. Y. 9; Hamilton *v.* McPherson, 28 N. Y. 72; Draper *v.* Sweet, 66 Barb. (N. Y.) 145; Railroad Co. *v.* Aspell, 23 Pa. St. 147; Wilson *v.* Newport Dock Co., L. R. 1 Ex. 177.

[1] 9 B. & C. 259.

[2] Fielder *v.* Starkin, 1 H. Bl. 17; Pateshall *v.* Tranter, 3 A. & E. 103; Buchanan *v.* Parnshaw, 2 T. R. 745.

[1] *Per* Lord Ellenborough, in Fisher *v.* Samuda, 1 Camp. 190; *per* Lord Loughborough, in Fielder *v.* Starkin, *supra;* Poulton *v.* Lattimore, 9 B. & C. 259; Prosser *v.* Hooper, 1 Moo. 106.

[1] 2 H. Bl. 573.

were discovered, unless the seller by subsequent misrepresentation induced the purchaser to prolong the trial.

[In Hinchcliffe *v.* Barwick,[2] the plaintiff had purchased a horse warranted to be a good worker. It was one of the conditions of sale that if the horse did not answer to the warranty, the purchaser should return him within a given time. The plaintiff did not return the horse within the time, but sued on the warranty. Held, that the action was not maintainable, the plaintiff's only remedy being the return of the horse.]

But the right to return a horse for breach of warranty was * held by the Exchequer not to be affected [*908] by an accident to the horse after the sale without any default in the buyer;[3] [and, on the same principle, it was held that when a horse died during the time limited for its return, the seller must bear the loss, and could not maintain an action for goods sold and delivered.[4]]

§ 1271. The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, all of which acts show an agreement to accept the goods,[1] but do not constitute an abandonment of his remedy by cross-action,[2] or now by a counter-claim in the vendor's action for the price.

§ 1272. The buyer's right to insist on a reduction of price on the ground of breach of warranty could not, previous to the Judicature Acts, be made available if he had given a negotiable security. He was driven in such a case to a cross-action as his only remedy. The reason was that the law did not permit an unliquidated and uncertain claim to be set up in defence against the liquidated demand represented by a

[2] 5 Ex. D. 177, C. A.
[3] Head *v.* Tattersall, L. R. 7 Ex. 7.
[4] Elphick *v.* Barnes, 5 C. P. D. 321.
[1] *Ante*, pp. 693 *et seq.*
[2] Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; Allen *v.* Cameron, 1 C. & M. 832.

bill or note,[1] but now the buyer may set up unliquidated damages by counter-claim.[2]

§ 1273. In relation to the measure of damages which the buyer is entitled to recover for breach of warranty, the rules are substantially the same as those which govern in the case of the vendor's breach of his obligation to deliver.

In Dingle *v.* Hare,[1] cited *ante*, p. 617, it was held that the jury had properly allowed the purchaser the differ-
[*909] ence * of value between the article delivered and the article as warranted. And in Jones *v.* Just,[2] cited *ante*, p. 649, the same rule was applied, and the plaintiff recovered as damages 756*l.*, although by reason of a rise in the market the inferior article sold for nearly as much as the price given in the original sale.

In Lewis *v.* Peake,[3] the buyer of a horse, relying on a warranty, resold the animal with warranty, and being sued by his vendee, informed his vendor of the action, and offered him the option of defending it, to which offer he received no answer, and thereupon defended it himself, and failed. The Common Pleas held that the costs so incurred were recoverable as special damages against the first vendor.

§ 1274. In Randall *v.* Raper,[1] the plaintiffs had bought barley from the defendant as Chevalier seed barley, and in their trade as corn-factors resold it with a warranty that it was such seed barley. The sub-vendees sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy, but no particular sum was fixed, and nothing had yet been paid by the plaintiffs. The difference in the value of the barley sold by the defendant, and the barley as described, was 15*l.*, but the plaintiffs recovered 261*l.* 7*s.* 6*d.*, the excess being for such damages as the plaintiffs were deemed by the jury liable to

[1] See the exposition of the law, and citation of authorities, in Byles on Bills, p. 132, ed. 1879; Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56; 36 L. J. Ex. 33.

[2] Ords. XIX. r. 3; XXII. r. 10.

[1] 7 C. B. N. S. 145; 29 L. J. C. P. 144.

[2] L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

[3] 7 Taunt. 153.

[1] E. B. & E. 84; 27 L. J. Q. B. 266.

pay to their sub-vendees. All the judges of the Queen's Bench held the damages to the sub-vendees to be the necessary and immediate consequence of the defendant's breach of contract, and properly recoverable. Wightman J., however, expressed a doubt whether these damages were recoverable before the plaintiffs had actually paid the claims of their sub-vendees, but declined to dissent from his brethren on the point.[2]

[2] *Sale of seeds.* — In case of the sale of seeds or grain for reproduction, if there be an express warranty that they are "good, fresh, and such seed as will grow," and there is a breach of warranty by the seed not growing, it has been held that the purchaser's measure of damages was the amount paid for the seed, the expense incurred in preparing the ground for the seed (after deducting the benefit to the land by the preparation), the value of the labor of planting and cultivating the crop, with interest on the second amount. Ferris *v.* Comstock, 33 Conn. 513.

Where the warranty was that the seed was "early strap-leafed, red-top, turnip-seed," and the seed was, in fact, a different turnip-seed and the turnips of less value, the measure of damages was held to be the difference between the market value of crop raised, and one from the seed as stipulated for in the contract. Wolcott *v.* Mount, 38 N. J. L. (9 Vr.) 496; s. c. 13 Am. Rep. 438; Passinger *v.* Thornburn, 34 N. Y. 634.

Implied warranty of seed. — A sale of seed as (the same being placed upon the list of the sellers, who were growers of seed for the market, and sold as) "Large Bristol Cabbage," was held to be a sale with warranty that it was free from any latent defect which would result in producing an inferior article. The seed did not produce a genuine variety of Bristol cabbages. It had become impure from cultivation in the vicinity of other cabbage, and produced a worthless variety. The measure of the purchaser's damages was held to be the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage, such as would ordinarily have been produced that year. White *v.* Miller, 71 N. Y. 118; s. c. 27 Am. Rep. 13. See Wolcott *v.* Mount, 38 N. J. L. (9 Vr.) 496; s. c. 13 Am. Rep. 438; Dounce *v.* Dow, 64 N. Y. 411; Hawkins *v.* Pemberton, 51 N. Y. 198; s. c. 10 Am. Rep. 595; Milburn *v.* Belloni, 39 N. Y. 52; Hoe *v.* Sanborn, 21 N. Y. 552; s. c. 78 Am. Dec. 163; Flick *v.* Weatherbee, 20 Wis. 392.

Gains prevented, as well as losses sustained, may be recovered in such cases, where they can be rendered reasonably certain by evidence. White *v.* Miller, 71 N. Y. 118; s. c. 27 Am. Rep. 13. See Smith *v.* Vilie, 80 N. Y. 106; Messmore *v.* Shot & Lead Co., 40 N. Y. 422; Griffin *v.* Colver, 16 N. Y. 489; s. c. 69 Am. Dec. 718; Masteron *v.* Mayor, 7 Hill (N. Y.) 61; s. c. 43 Am. Dec. 38. The purchaser of paris green, for killing cotton-worms, which proved to be something else and ineffectual for the purpose intended, was allowed to recover the value of the crop of cotton to which it was applied, as it was before being destroyed by the worms, and the cost of the article bought, and of its application to the crop, together with the interest on the money thus expended, he having shown paris green would have destroyed the worms which destroyed the crop. Jones *v.* George, 61 Tex. 345; s. c. 48 Am. Rep. 280.

§ 1275. [The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63, s. 28), provides that in any action [*910] brought by any * person for a breach of contract on the sale of any article of food, or of any drug, such person may recover alone, or in addition to any other damages recoverable by him, *the amount of any penalty* in which he may have been convicted under this Act, *together with the costs* paid by him upon such conviction, and those incurred by him in and about his defence thereto, if he prove that the article or drug, the subject of such conviction, was sold to him as and for an article or drug of the same nature, substance and quality as that which was demanded of him, and that he purchased it not knowing it to be otherwise, and afterwards sold it in the same state in which he purchased it; the defendant in such action being nevertheless at liberty to prove that the conviction was wrongful, or that the amount of costs awarded or claimed was unreasonable.

§ 1276. In Wilson *v.* Dunville,[1] before the Exchequer Division in Ireland, the plaintiff had bought from the defendants, who were a firm of distillers, a quantity of grains, which the defendants warranted to be "distillers' grains," and which were ordinarily used for feeding cattle. The grains contained an admixture of lead, and several of the plaintiff's

Where seeds are bought for resale.— The doctrine of the case of Hadley *v.* Baxendale would be applicable to breaches of contracts on sales of seeds. If a producer or dealer in seeds sells to a person knowing that he is buying to sell again, and warrants the kind or quality, or both, this has been held to justify the latter in warranting them on a sale to his customers, and if there is a breach of contract, and the latter is required to respond in damages, by the rule above stated, he in turn may require his vendor to indemnify him for the loss he has thereby sustained. See Rose *v.* Wallace, 11 Ind. 112; Sherrod *v.* Langdon, 21 Iowa, 518; Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Bradley *v.* Rea, 96 Mass. (14 Allen) 20; Marsh *v.* Webber, 16 Minn. 418; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; s. c. 28 Am. Dec. 476; Brown *v.* Wood, 3 Coldw. (Tenn.) 182; Wintz *v.* Morrison, 17 Tex. 372; s. c. 67 Am. Dec. 653; Pinney *v.* Andrus, 41 Vt. 631; Mullett *v.* Mason, L. R. 1 C. P. 559; Hill *v.* Balls, 2 Hurls. & N. 299; s. c. L. J. Ex. 45.

A sale with warranty, and notice of the vendor that the vendee buys to sell again in another market, will be liable on his breach of warranty for losses actually sustained by the breach, including profits which the vendee would have made on a resale had the article been as warranted. Thorne *v.* McVeagh, 75 Ill. 81; Oldham *v.* Kerchner, 81 N. C. 430; Lewis *v.* Rountree, 78 N. C. 323.

[1] 6 L. R. Ir. 210; s. c. 4 L. R. Ir. 249.

cattle, which were fed upon them, were poisoned and died. The warranty was not fraudulent. Upon the finding of the jury that the substance did not reasonably answer the description of "distillers' grains," the Court held the defendants to be liable in damages for the value of the cattle which had died, on the ground that their death was the natural consequence of the defendants' breach of warranty.]

§ 1277. The damages recoverable by the buyer for a breach of warranty may be greatly augmented when they are the consequence of a fraudulent misrepresentation by the vendor. Thus in Mullett *v.* Mason,[1] the plaintiff, having placed with other cattle a cow bought from the defendant, which was fraudulently warranted to be sound, although known by the vendor to be affected with an infectious disease, was held entitled to recover as damages the value of such of his own * cattle as had died from [*911] the disease communicated to them by the infected animal, the Court distinguishing the case from Hill *v.* Balls,[2] on the ground that in this latter case there had been no misrepresentation to induce the buyer to put a glandered horse in the same stable with others.

[And even when the warranty was not proved to be fraudulent, the buyer was held equally entitled to recover when the seller knew him to be a farmer, who would, in the ordinary course of his business, place the infected animal with others.[3] The case then came within the rule laid down in Hadley *v.* Baxendale, and the only question for the jury to determine was, whether the infection of the herd followed as a natural consequence from the seller's breach of warranty.[4]]

§ 1278. In George *v.* Skivington,[1] it was held that the buyer might recover damages for personal injury resulting to him from the use of a deleterious compound furnished by a chemist and unfit for the purpose for which he professed to sell it; [but this case has been since disapproved, and is very questionable law.[2]]

[1] L. R. 1 C. P. 559.
[2] 2 H. & N. 299; 27 L. J. Ex. 45.
[3] Smith *v.* Green, 1 C. P. D. 92.
[4] Smith *v.* Green, *supra;* Randall *v.* Newson, 2 Q. B. D. 102, C. A.
[1] L. R. 5 Ex. 1; 39 L. J. Ex. 8.
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