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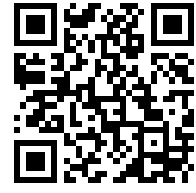

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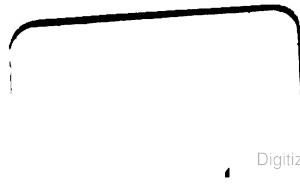

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HAND-BOOK

OF THE

LAW OF SALES

By FRANCIS B. TIFFANY
Author of Death by Wrongful Act

St. Paul, Minn.
WEST PUBLISHING CO.
1895

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PREFACE.

The object of this handbook is to present concisely the general principles of the law of the sale of personal property. The arrangement is in the main that of Benjamin. The statement of rules and principles in the black-letter text has to a considerable extent, though with many modifications, necessitated by the differences between the American and English law, or by other reasons, been taken from the English Sale of Goods Bill, as drafted by his Honor, Judge Chalmers, and published together with his invaluable notes under the title of "The Sale of Goods." This bill, which was purely a codifying measure, has since been substantially enacted as "An act for codifying the law relating to the sale of goods" (56 & 57 Vict. c. 71; February 20, 1894). The writer has made frequent use both of the notes of Judge Chalmers and of the text of Benjamin on Sales. The references to Benjamin are to the sections as found in the sixth American edition, of Messrs. Edmund H. and Samuel C. Bennett.

F. B. T.

St. Paul, June 1, 1895.

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1-5. In General.
6. Capacity of Parties.
7. Capacity of Infants.
8. Capacity of Lunatics and Drunken Men.
9. Capacity of Married Women.
10. Who May Sell.
11-13. The Thing Sold.
14. Mutual Assent.
15. Form of Contract.
16-17. The Price.

IN GENERAL.

1. SALE DEFINED—A sale is the transfer of the property in a thing for a price in money.[1]

[1] The following are some of the definitions of "sale": "A transmutation of property from one man to another in consideration of some price." 2 Bl. Comm. 446. "A contract for the transfer of property from one person to another for a valuable consideration." 2 Kent, Comm. (12th Ed.) 468. "A transfer of the absolute or general property in a thing for a price in money." Benj. Sales (6th Am. Ed.) § 1. "Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." Indian Contract Act 1872, § 77. "Sale is an exchange of property for a price in money. It involves the transfer of the ownership of the thing sold by the seller to the buyer." Kerr, Dig. Law Sale, § 2. See Blackb. Sales, Introduction; Chalm. Sale, § 1; Williamson v. Berry, 8 How. 544.

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2. HOW EFFECTED—The sale of personal property is effected by a contract of sale.

3. EXECUTED CONTRACT—A contract whereby the owner (the seller) of the thing which is the subject-matter of the contract and another person (the buyer) agree that the property in the thing is transferred from the seller to the buyer, for a price in money which the buyer pays or agrees to pay, is called a "bargain and sale," a "sale," or an "executed contract of sale."

4. EXECUTORY CONTRACT—A contract whereby the seller and the buyer agree that the property in the thing shall be transferred to the buyer at a future time or on the performance of a condition, for a price in money which the buyer pays, or agrees to pay, is called an "executory contract of sale."

5. ELEMENTS OF CONTRACT—To constitute a sale there must be:

(a) Parties (seller and buyer) competent to contract.

(b) A thing, the property in which is in the seller.

(c) An agreement by the parties that the property in the thing is transferred from the seller to the buyer.

(d) Payment, or an agreement for payment, of a price in money by the buyer to the seller.

Distinguishing Features of Sale.

The essence of a sale is the transfer of the property in the thing from buyer to seller for a price. The elements which distinguish a sale from other transfers are (1) that the transfer is of the property, and (2) that it is for a price.

The transfer must be of the general property or ownership, as distinguished from a special property,[2] or from the right to possession; for the general property may be in one person, and a special

[2] As to the distinction between "the" property (that is, the general property) and "a" property (that is, a special property), see Burdick v. Sewell, 13 Q. B. Div. at page 175, 10 App. Cas., at page 93.

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property in another. Thus, in the case of a pledge the pledgee has only a special property, and the general property remains in the pledgor,[3] who can transfer the general property to a third person, subject to the special property in the pledgee.[4] Again, the entire right of property may be in one person, while the right to possession may be in another. Thus, a man may sell goods, and retain a lien for their price.[5] It is transfer of ownership which distinguishes a sale from a bailment, of which a pledge is only an example. In a bailment, at most, only a special property passes to the bailee, who receives possession for a special purpose, and is bound to return the thing received;[6] or, as in the case of a con-

[3] Halliday v. Holgate, L. R. 3 Exch. 299; Donald v. Suckling, L. R. 1 Q. B. 585; Harper v. Godsell, L. R. 5 Q. B. 424; Cortelyou v. Lansing, 2 Caines, Cas. (N. Y.) 200. A chattel mortgage differs from a pledge in that by a mortgage the general title is transferred. Jones, Chat. Mortg. § 4. It differs from a sale in that the transfer is defeasible on performance of the condition. Jones, Chat. Mortg. § 8. Ex parte Hubbard, 17 Q. B. Div., at page 698; In re Morritt, 18 Q. B. Div., at page 232; Jones v. Baldwin, 12 Pick. 316; Parshall v. Eggart, 52 Barb. 367.

[4] Franklin v. Neate, 13 Mees. & W. 481; Jenkyns v. Brown, 14 Q. B. 496; Whitaker v. Sumner, 20 Pick. 399.

[5] Post, p. 204 et seq.

[6] The general test of bailment or sale is whether or not it is the intention of the parties that the thing received shall be returned. If the identical thing is to be returned, though in altered form, as in the case of logs to be made into boards, leather into shoes, or wheat into flour, the transaction is a bailment. Pierce v. Schenck, 3 Hill, 28; Foster v. Pettibone, 7 N. Y. 433; Westcott v. Thompson, 18 N. Y. 363; Eldridge v. Benson, 7 Cush. 483; Mansfield v. Converse, 8 Allen, 182; Schenck v. Saunders, 13 Gray, 37; Barker v. Roberts, 8 Greenl. (Me.) 101; Brown v. Hitchcock, 28 Vt. 452; Bulkley v. Andrews, 39 Conn. 70; Irons v. Kentner, 51 Iowa, 88, 50 N. W. 73. But, if the identical thing is not to be returned, it is a sale or an exchange, according to the nature of the consideration. South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Powder Co. v. Burkhardt, 97 U. S. 110; Sturm v. Boker, 150 U. S. 330, 14 Sup. Ct. 99; McCabe v. McKinstry, 5 Dill. 509, Fed. Cas. No. 8,667; Ewing v. French, 1 Blackf. 354; Smith v. Clark, 21 Wend. 83; Norton v. Woodruff, 2 N. Y. 153; Crosby v. Delaware & H. Canal Co., 119 N. Y. 334, 23 N. E. 736; Chase v. Washburn, 1 Ohio St. 244; Butterfield v. Lathrop, 71 Pa. St. 225; Bailey v. Bensley, 87 Ill. 556; Jones v. Kemp, 49 Mich. 9, 12 N. W. 890; Woodward v. Semans, 125 Ind. 330, 25 N. E. 444; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244; Barnes v. McCrea, 75 Iowa, 267, 39 N. W. 392;

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signment, to dispose of the thing according to his agreement with the consignor.[7]

The transfer must be for a price in money; for if there be no valuable consideration the transfer is a gift,[8] and if the consideration consists of other goods the transfer is an exchange or a barter.[9] The legal effect of a contract of exchange is, however, generally the same as that of a contract of sale.[10]

Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542; Reherd's Adm'r v. Clem, 86 Va. 374, 10 S. E. 504. Of course, the transaction need not be either a sale or a bailment, but may create still other rights, according to the contract of the parties. A difficult case, which need not here be discussed, arises where grain is deposited in an elevator or storehouse on an understanding, express or implied, that the warehouseman may mix it with the grain of other persons, and draw from the mass to meet the orders of receipt holders. See Benj. Sales (6th Ed.) Bennett's note, p. 6; Chase v. Washburn, 6 Am. Law Rev. 450; 2 Kent, Comm. 590.

[7] Ayres v. Sleeper, 7 Metc. (Mass.) 45; Brown v. Holbrook, 4 Gray (Mass.) 102; Blood v. Palmer, 11 Me. 414; Morss v. Stone, 5 Barb. 516; Pam v. Vilmar, 54 How. Prac. 235; Conable v. Lynch, 45 Iowa, 84.

[8] Benj. Sales, § 2.

[9] Harrison v. Luke, 14 Mees. & W. 139; Read v. Hutchinson, 3 Camp. 352; Williamson v. Berry, 8 How. 495, 544; Mitchell v. Gile, 12 N. H. 390; Fuller v. Duren, 36 Ala. 73; Dowling v. McKenney, 124 Mass. 480.

[10] Com. v. Clark, 14 Gray, 367, per Bigelow, J., 372. See Emanuel v. Dane, 3 Camp. 299 (Warranty); La Neuville v. Nourse, Id. 351 (Caveat Emptor); Chalm. Sale, p. 87; Benj. Sales (6th Am. Ed.) § 2. The principal difference is in respect to the form of pleading and the measure of damages, since in the case of an exchange the declaration must be for damages for breach of the special agreement, and not in assumpsit for goods sold, or goods sold and delivered. Harris v. Fowle, cited in Barbe v. Parker, 1 H. Bl. 287; Mitchell v. Gile, 12 N. H. 390; Vail v. Strong, 10 Vt. 457; Slayton v. McDonald, 73 Me. 50. Otherwise where the contract of exchange is for goods at a stipulated price, Forsyth v. Jervis, 1 Starkie, 437; Hands v. Burton, 9 East, 349; Harrison v. Luke, 14 Mees. & W. 139; Way v. Wakefield, 7 Vt. 228; Picard v. McCormick, 11 Mich. 69; or where the exchange is only partly for goods, and the action is to recover the money balance after delivery of the goods, Sheldon v. Cox, 3 Barn. & C. 420. An exchange has, however, been held to be a sale, within the meaning of a statute prohibiting the sale of liquor, Howard v. Harris, 8 Allen, 297; Com. v. Clark, 14 Gray, 367; but not within the meaning of a statute declaring illegal the sale of a slave by a trader without a license, Gunter v. Leckey, 30 Ala. 596. And proof of barter has been held not to support an indictment charging sale of liquor. Stevenson v. State, 65 Ind. 409;

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Sale of Personal Property Effected by Contract.

At common law the sale of personal property, unlike that of real property, is effected by the mere contract or agreement, verbal or written, of the parties. If the present transfer of the thing for a price be agreed upon, the property passes from seller to buyer, without delivery, by their mere mutual assent.[11] The transaction is in fact well described by the term "bargain and sale." The bargain struck, the sale results by implication of law.

Distinction between Executed and Executory Contracts of Sale.

It is important to distinguish between executed contracts of sale, or actual sales, and executory contracts of sale, or agreements to sell. An executory contract of sale is a contract, pure and simple, whereas an executed contract of sale is in the nature of a conveyance. "By an agreement to sell, a jus in personam is created; by a sale, a jus in rem is transferred. If an agreement to sell be broken the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken on execution for his debts, and if he becomes bankrupt they pass to his trustee. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as the actions for conversion and detinue. In most cases, too, he can follow the goods into the hands of third parties. Again, if there be an agreement for sale, and the goods perish, the loss falls on the seller, while, if there has been a sale, the loss, as a rule, falls on the buyer, though the goods have not come into his possession."[12]

Massey v. State, 74 Ind. 368. Nor does an instrument giving authority to sell give authority to exchange. Williamson v. Berry, 8 How. 495, 544; Edwards v. Cottrell, 43 Iowa, 194.

[11] Post, p. 83 et seq.

[12] Chalm. Sale, 3.

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CAPACITY OF PARTIES.

6. Capacity to buy and sell is coextensive with capacity to contract.

EXCEPTION—Where necessaries are sold to an infant, lunatic, or drunken man, he must pay a reasonable price therefor.

The capacity of persons to buy and sell is generally determined by their capacity to contract, upon which subject the reader is referred to works upon contract. "Capacity to contract must be distinguished from authority to contract. Capacity means power to bind oneself; authority means power to bind another. Capacity is usually a question of law; authority is usually a question of fact. As regards authority to buy and sell on behalf of another, there appears to be nothing peculiar in the law of sales, except the provisions of the factors' acts." [13] On this subject, therefore, the reader is referred to works on the law of agency and partnership. There are, however, certain classes of persons, in part incapable of contracting, who, under special circumstances, may make valid purchases. The persons embraced in this exception are infants, lunatics, and intoxicated persons.

CAPACITY OF INFANTS.

7. Contracts of sale and purchase by an infant are voidable, at his option, either before or after he has attained his majority. But—

(a) The contract ceases to be voidable if it be ratified upon the attainment of his majority.

(b) The contract cannot be avoided if it be for necessaries.

The general rule of the common law is that an infant's contract is voidable, at his option, either before or after he has attained his

[13] Chalm. Sale, 6.

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majority.[14] Thus an infant may maintain an action on the contract against the seller during infancy.[15] He may buy and sell, but either sale[16] or purchase[17] may be avoided by him, and if he avoids either he may recover back the consideration.[18] In case of avoidance he must, however, return the consideration which he received, if he still has it; though if he has consumed, lost, or sold it during minority, he may nevertheless avoid the purchase or sale.[19] Such at least is the law generally recognized in America,[20] though in England his right to avoid an executed sale and recover back the price is denied.[21]

[14] Gibbs v. Merrill, 3 Taunt. 307; Hunt v. Massey, 5 Barn. & Adol. 902; Holt v. Clarencieux, 2 Strange, 938; Zouch v. Parsons, 3 Burrows, 1794; King v. Inhabitants of Chillesford, 4 Barn. & C., at page 100; Tucker v. Moreland, 10 Pet. 64. See Pol. Cont. 52 et seq. Emancipation by his father does not enlarge the infant's liability. Mason v. Wright, 13 Metc. (Mass.) 306. See Clark, Cont. 221, et seq.

[15] Warwick v. Bruce, 2 Maule & S. 205; Holt v. Clarencieux, 2 Strange, 937.

[16] Shipman v. Horton, 17 Conn. 481; Stafford v. Roof, 9 Cow. 626; Carr v. Clough, 26 N. H. 280; Towle v. Dresser, 73 Me. 252.

[17] Riley v. Mallory, 33 Conn. 201; Price v. Furman, 27 Vt. 268; Whitcomb v. Joslyn, 51 Vt. 79; Chandler v. Simmons, 97 Mass. 508; McCarthy v. Henderson, 138 Mass. 310; Robinson v. Weeks, 56 Me. 102; House v. Alexander, 105 Ind. 109, 4 N. E. 891; Lemmon v. Beeman, 45 Ohio St. 505, 15 N. E. 476.

[18] Cases cited supra, notes 16, 17; Clark, Cont. 258.

[19] Price v. Furman, 27 Vt. 268; Whitcomb v. Joslyn, 51 Vt. 79; Chandler v. Simmons, 97 Mass. 508; Walsh v. Young, 110 Mass. 396; Morse v. Ely, 154 Mass. 458, 28 N. E. 577; Green v. Green, 69 N. Y. 553; Miller v. Smith, 26 Minn. 248, 2 N. W. 942; Carpenter v. Carpenter, 45 Ind. 142; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Eureka Co. v. Edwards, 71 Ala. 248; Brantley v. Wolf, 60 Miss. 420; Lemmon v. Beeman, 45 Ohio St. 505, 15 N. E. 476.

[20] The decisions on this point, however, are not uniform. See Heath v. Stevens, 48 N. H. 251, where it is held that the infant's right to avoid the contract is conditional on his restoring what he received in specie, or, if not, on his accounting for the value of it. See, also, Hall v. Butterfield, 59 N. H. 354; Bartlett v. Bailey, Id. 408; Riley v. Mallory, 33 Conn. 201. But it is believed that the rule stated in the text is the prevailing one, and that it is correct on principle. Tyler, Inf. (2d Ed.) § 36 et seq.; Ewell, Lead. Cas. 123. See Adams v. Beall, 67 Md. 53, 8 Atl. 664; Clark, Cont. 254.

[21] "If an infant pays money under a contract, in consideration of which it is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding when he comes of age." Pol. Cont. 60; Leake, Cont. 553. The authorities principally relied on are Holmes v. Blogg, 8 Taunt. 508, which is generally repudiated by the American cases above cited.

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The power of an infant to bind his father by his purchases relates to his authority to contract, and belongs to the law of agency.

Ratification.

The contract of an infant ceases to be voidable if it be ratified by him after attaining his majority.[22] By statute in some states the ratification is required to be in writing;[23] but in most states no writing is necessary, and the ratification may be either by express language amounting to a new promise,[24] as distinguished from a mere acknowledgment of the debt, or by conduct, as by using or selling the thing sold.[25] Mere silence or failure to disaffirm does not constitute ratification.[26]

Contract for Necessaries.

An infant may purchase necessaries, and be held liable for their reasonable value.[27] The necessaries of an infant are stated in Co.

and Ex parte Taylor, 8 De Gex, M. & G. 258. See, also, Williams v. Pasquali, Peake, Add. Cas. 197, per Kenyon, C. J.; Valentini v. Canali, 24 Q. B. Div. 166. In Ex parte Taylor, Lord Justice Turner said: "If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority he cannot, on attaining his majority, recover the money back." Adams v. Beall, 67 Md. 53, 8 Atl. 664; Moley v. Brine, 120 Mass. 324; Page v. Morse, 128 Mass. 99. But see Dube v. Beaudry, 150 Mass. 448, 23 N. E. 222.

[22] Williams v. Moor, 11 Mees. & W. 256; Anson, Cont. 105; Clark, Cont. 258.

[23] Previous to the infants' relief act of 1874 (37 & 38 Vict. c. 62), by which radical changes are made in the law governing contracts by infants, a writing was required in England. See Benj. Sales (6th Am. Ed.) § 27 et seq.

[24] Ford v. Phillips, 1 Pick. 202; Thompson v. Lay, 4 Pick. 48; Proctor v. Sears, 4 Allen, 95; Wilcox v. Roath, 12 Conn. 550; Catlin v. Haddox, 49 Conn. 492.

[25] Boyden v. Boyden, 9 Metc. (Mass.) 519; Lawson v. Lovejoy, 8 Greenl. (Me.) 405; Boody v. McKenney, 23 Me. 517; Deason v. Boyd, 1 Dana, 45; Robinson v. Hoskins, 14 Bush, 393; Cheshire v. Barrett, 4 McCord, 241; Minock v. Shortridge, 21 Mich. 304; Philpot v. Sandwich Manuf'g Co., 18 Neb. 54, 24 N. W. 428; Clark, Cont. 247.

[26] Smith v. Kelley, 13 Metc. (Mass.) 309; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Clark, Cont. 251.

[27] It has sometimes been laid down, in general terms, that, if an agreement be for the benefit of the infant, it is binding. See Pol. Cont. 66. In America the exception is confined to necessaries. But see Hall v. Butterfield, 59 N. H. 354; Bartlett v. Bailey, Id. 408. See, as to contracts for necessaries, Clark, Cont. 231-239.

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Litt. 172, to be "his necessary meat, drinke, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But the term includes also articles purchased for real use, although ornamental, as distinguished from such as are merely ornamental;[28] and it has been said "that articles of mere luxury are always excluded, though articles of luxurious utility are in some cases allowed."[29] The word "necessaries" must, therefore, be regarded as a relative term, to be construed with reference to the infant's age, state, and condition.[30] An infant, being considered in law as

[28] Peters v. Fleming, 6 Mees. & W. 42; Ryder v. Wombwell, L. R. 3 Exch. 90.

[29] Chapple v. Cooper, 13 Mees. & W. 256, per Alderson, B.

[30] Peters v. Fleming, 6 Mees. & W. 46; Wharton v. Mackenzie, 5 Q. B. 606; Davis v. Caldwell, 12 Cush. 513; Tyler, Inf. (2d Ed.) § 69 et seq. An enumeration of the various things which have been decided to be necessary or not necessary would be of comparatively little value, since the question, though to a great extent for the court, is one of judicial common sense in each particular case. The subjoined cases are cited for illustration. The following articles have been held not to be necessaries: A silver goblet for a gift. Ryder v. Wombwell, L. R. 3 Exch. 90, L. R. 4 Exch. 32. A collegiate education, in the absence of special circumstances. Middlebury College v. Chandler, 16 Vt. 686. Traveling expenses for pleasure. McKanna v. Merry, 61 Ill. 177. A bicycle used in going home from the infant's place of work to dinner. Pyne v. Wood, 145 Mass. 558, 14 N. E. 775. It has been decided that the following things might be necessaries: A livery for a servant. Hands v. Slaney, 8 Term R. 578. A regimental uniform for a member of a volunteer corps. Coates v. Wilson, 5 Esp. 152. A horse, when required by the infant's position or health, Hart v. Prater, 1 Jur. 623; but not generally, Smithpeters v. Griffin, 10 B. Mon. 259; Beeler v. Young, 1 Bibb. 519; Harrison v. Fane, 1 Man. & G. 550. A watch and jewelry, relatively to the infant's position. Peters v. Fleming, 6 Mees. & W. 46. See Berolles v. Ramsay, Holt, N. P. 77. A wedding suit. Sams v. Stockton, 14 B. Mon. 232. A lawsuit. Thrall v. Wright, 38 Vt. 494. Attorney's fees for defense in a bastardy process, Barker v. Hibbard, 54 N. H. 539; or in prosecuting an action for seduction, Munson v. Washband, 31 Conn. 303; or in defending criminal prosecution, Askey v. Williams, 74 Tex. 294, 11 S. W. 1101; or in litigation relative to the infant's property, Epperson v. Nugent, 57 Miss. 45 (Phelps v. Worcester, 11 N. H. 51, contra). It has been decided that the following things were not necessaries: Dinners supplied to an undergraduate at his rooms, in the absence of special circumstances. Brooker v. Scott, 11 Mees. & W. 67; Wharton v. Mackenzie, 5 Q. B. 606. Cigars and tobacco, prima facie. Bryant v. Richardson, L. R. 3 Exch. 93, note 3, 14 Law T. (N. S.) 24.

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devoid of sufficient discretion to carry on a trade or business, is not liable for goods supplied to him for his trade or business, whether he is trading alone or in partnership.[31] But, if married, his duties as husband and father are the same as if he were of full age, and things necessary for his wife and children are deemed necessaries for himself.[32]

It is obvious that an article such as a diamond or a race horse may be intrinsically incapable of being a necessary, and that another article, though not intrinsically incapable of being a necessary, may fail of being such by reason of the circumstances of the case; for example, the age or condition of the buyer, the quantity in which it is supplied,[33] or the fact that the wants of the infant are suitably supplied by his parent or guardian, or from any other source.[34] The principal difficulty in respect to necessaries consists in determining the province of the court and jury in ascertaining them. It is frequently stated in the American cases that the question whether articles come within the class of necessaries is for the

[31] Whywall v. Champion, 2 Strange, 1083; Dilk v. Keighley, 2 Esp. 480; Merriam v. Cunningham, 11 Cush. 40; Mason v. Wright, 13 Metc. (Mass.) 306; Rainwater v. Durham, 2 Nott & McC. 524; Decell v. Lewenthal, 57 Miss. 331. But in Mohney v. Evans, 51 Pa. St. 80, the question whether farming supplies were necessaries was left to the jury, and, if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable on what is so used. Turberville v. Whitehouse, 1 Car. & P. 94.

[32] Turner v. Trisby, 1 Strange, 168; Rainsford v. Fenwick, Cart. 215; Tupper v. Cadwell, 12 Metc. (Mass.) 559, 562; Davis v. Caldwell, 12 Cush. 512; Cantine v. Phillips, 5 Har. (Del.) 428; Price v. Sanders, 60 Ind. 311.

[33] Johnson v. Lines, 6 Watts & S. 80; Nicholson v. Wilborn, 13 Ga. 467.

[34] Cook v. Deaton, 3 Car. & P. 114; Bainbridge v. Pickering, 2 W. Bl. 1325; Brooker v. Scott, 11 Mees. & W. 67; Swift v. Bennett, 10 Cush. 436, 437; Hoyt v. Casey, 114 Mass. 397; Trainer v. Trumbull, 141 Mass. 527, 16 N. E. 761; Wailing v. Toll, 9 Johns. 141; Guthrie v. Murphy, 4 Watts, 80; Connolly v. Hull, 3 McCord, 6; Kline v. L'Amoureux, 2 Paige, 419; Atchison v. Bruff, 50 Barb. 381; Perrin v. Wilson, 10 Mo. 451; McKanna v. Merry, 61 Ill. 117. If the infant was already sufficiently supplied, it is immaterial that the seller was ignorant of the fact. Brayshaw v. Eaton, 7 Scott, 183; Barnes v. Toye, 13 Q. B. Div. 414; Johnstone v. Marks, 19 Q. B. Div. 509; Johnson v. Lines, 6 Watts & S. 80. But having an income out of which the infant might keep himself supplied is not equivalent to being actually supplied. Burghart v. Hall, 4 Mees. & W. 727; Nicholson v. Wilborn, 13 Ga. 469; Rivers v. Gregg, 5 Rich. Eq. 274.

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court, and that the question whether they were necessaries in fact is for the jury.[35] In England it has been settled that the question whether the articles were necessaries is one of fact, and therefore for the jury; but that, like other questions of fact, it should not be left to the jury unless there is evidence on which they can reasonably find in the affirmative.[36] Practically, there is little difference in the two rules, for the cases involving articles intrinsically incapable of being necessaries are rare, and the question in most cases depends on the particular circumstances. It is impossible, therefore, in most cases, for the judge to say whether articles are within the class of necessaries, without taking into consideration the circumstances of the case; and if he determines that the articles do not, under the circumstances, come within the class, he in effect determines that there is not evidence on which the jury could reasonably find them to be necessaries. The burden of proving that the articles were necessaries is on the plaintiff.[37]

The amount for which the infant can be held liable is not the contract price, but the reasonable value of the goods.[38] Even if he gives his note in payment, the seller can recover thereon no more than what the goods were worth.[39]

[35] Tupper v. Cadwell, 12 Metc. (Mass.) 559, 563; Merriam v. Cunningham, 11 Cush. 40, 44; Bent v. Manning, 10 Vt. 225; Stanton v. Willson, 3 Day, 37, 56; Glover v. Ott, 1 McCord, 572; Beeler v. Young, 1 Bibb. 519; Grace v. Hale, 2 Humph. 27; McKanna v. Merry, 61 Ill. 117.

[36] Ryder v. Wombwell, L. R. 3 Exch. 93, L. R. 4 Exch. 32. See, also, Peters v. Fleming, 6 Mees. & W. 42; Wharton v. Mackenzie, 5 Q. B. 606; Davis v. Caldwell, 12 Cush. 512, per Shaw, C. J.; Johnson v. Lines, 6 Watts & S. 80; Mohney v. Evans, 51 Pa. St. 80.

[37] Thrall v. Wright, 38 Vt. 494; Wood v. Losey, 50 Mich. 475, 15 N. W. 557; Nicholson v. Wilborn, 13 Ga. 467, 475.

[38] Stone v. Dennison, 13 Pick. 1; Vent v. Osgood, 19 Pick. 572, 575; Locke v. Smith, 41 N. H. 346; Beeler v. Young, 1 Bibb. 519; Bouchell v. Clary, 3 Brev. 194.

[39] Earle v. Reed, 10 Metc. (Mass.) 387; Bradley v. Pratt, 23 Vt. 378; Guthrie v. Morris, 22 Ark. 411. Some cases hold the note void. Swasey v. Vanderheyden's Adm'r, 10 Johns. 33; McMinn v. Richmonds, 6 Yerg. 9; Ayers v. Burns, 87 Ind. 245. See Byles, Bills (7th Am. Ed.) 61.

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CAPACITY OF LUNATICS AND DRUNKEN MEN.

8. Contracts of sale and purchase by a lunatic or drunken man, or other person non compos mentis, are voidable at his option, if at the time of making the contract he was incapable of understanding its effect.

EXCEPTIONS—(a) The sale or purchase is not voidable if the other party did not know, or have reasonable cause to know, the condition of the lunatic or drunken man, and if the contract has been so far executed that the other party cannot be restored to his former position.

(b) The contract, if fair, cannot be avoided if it be for necessaries purchased by the lunatic or drunken man.

Lunatics.

The general rule of the common law is that the contract of a lunatic or other person non compos mentis, like that of an infant, is not void, but is voidable at his option.[40] Thus, it may be ratified or disaffirmed by the lunatic on recovery of his sanity,[41] or by his guardian or other representative,[42] but not by the other party.[43]

The principal difference between the contract of a lunatic and that of an infant is that if the other party did not know, or have reasonable cause [44] to know, of the lunatic's condition of mind, and acted in good faith, and the contract has been so far executed that the parties cannot be placed in statu quo, it cannot be avoided.

[40] Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Matthews v. Baxter, L. R. 8 Exch. 132; Seaver v. Phelps, 11 Pick. 304; Carrier v. Sears, 4 Allen, 336; Chew v. Bank of Baltimore, 14 Md. 299; Ingraham v. Baldwin, 9 N. Y. 45; Pol. Cont. 91; Bish. Cont. 618; Clark, Cont. 263; 2 Kent, Comm. 451.

[41] Allis v. Billings, 6 Metc. (Mass.) 415; Arnold v. Richmond Iron Works, 1 Gray, 434; Gibson v. Soper, 6 Gray, 279; Turner v. Rusk, 53 Md. 65.

[42] McClain v. Davis, 77 Ind. 419; Halley v. Troester, 72 Mo. 73; Moore v. Hershey, 90 Pa. St. 196; Flint v. Valpey, 130 Mass. 385.

[43] Allen v. Berryhill, 27 Iowa, 534.

[44] Beavan v. McDonnell, 10 Exch. 184; Lincoln v. Buckmaster, 32 Vt. 652; Matthiessen & W. R. Co. v. McMahon's Adm'r, 38 N. J. Law, 536, 544.

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The leading case on this point is Molton v. Camroux,[45] the principle of which has generally, though not universally, been followed in this country.[46] This has been called a decision of necessity, as a contrary doctrine would render all ordinary dealings between man and man unsafe.[47] If, however, the lunatic restores, or offers to restore, the consideration which he has received, the necessity ceases, and he may avoid the contract.[48] The contractual capacity of a lunatic or insane person under guardianship depends upon statute, and differs in different states.[49]

Drunken Men.

The rules in regard to the contracts of a man who is so intoxicated as not to know what he is doing are the same.[50] His contracts are voidable, but not void, and hence may be ratified by him when sober.[51]

[45] 2 Exch. 487, 4 Exch. 17, Ewell, Lead. Cas. 614. See, also, Beavan v. McDonnell, 9 Exch. 309, 10 Exch. 184; Elliot v. Ince, 7 De Gex, M. & G. 475, 487; Drew v. Nunn, 4 Q. B. Div. 661; Imperial Loan Co. v. Stone [1892] 1 Q. B. 599; Niell v. Morley, 9 Ves. 478, Ewell, Lead. Cas. 628.

[46] Young v. Stevens, 48 N. H. 133; Beals v. See, 10 Pa. St. 56; Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407; Mutual Life Ins. Co. v. Hunt, 14 Hun, 169, 79 N. Y. 541; Ballard v. McKenna, 4 Rich. Eq. 358; Matthiessen & W. R. Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Wilder v. Weakley, 34 Ind. 181; Fay v. Burditt, 81 Ind. 433; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535; Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115; Alexander v. Haskins, 68 Iowa, 73, 25 N. W. 935; Rusk v. Fenton, 14 Bush, 490; Riggan v. Green, 80 N. C. 236; Burnham v. Kidwell, 113 Ill. 425; Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584; Leavitt v. Files, 38 Kan. 26, 15 Pac. 891. The leading case against this doctrine is Seaver v. Phelps, 11 Pick. 304, Ewell, Lead. Cas. 610. See, also, Gibson v. Soper, 6 Gray, 279; Brigham v. Fayerweather, 144 Mass. 52, 10 N. E. 735; Hovey v. Hobson, 53 Me. 451; Edwards v. Davenport, 20 Fed. 756. In Crawford v. Scovell, 94 Pa. St. 48, Trunkey, J., says: "In this country that rule is not universally extended to sales of personalty, and is not applied to conveyances of real estate." In several of the cases above cited, however, it is applied to conveyances.

[47] Elliot v. Ince, 7 De Gex, M. & G. 475, per Lord Cranworth.

[48] Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Myers v. Knabe, 51 Kan. 720, 33 Pac. 602; Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383; Eaton v. Eaton, 37 N. J. Law, 108.

[49] Bish. Cont. § 977; Clark, Cont. 268.

[50] Pol. Cont. 87; Bish. Cont. § 979; Clark, Cont. 274.

[51] Matthews v. Baxter, L. R. 8 Exch. 132. Pointing out that "void," as used in Gore v. Gibson, 13 Mees. & W. 623, Ewell, Lead. Cas. 734, must be taken to

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Necessaries.

So far as relates to the contracts of a lunatic for necessaries, where no advantage is taken of his condition by the seller, the purchases will be held valid.[52] As in the case of an infant, "necessaries" embrace articles suitable to his condition and degree,[53] but in the case of a lunatic the term would probably be more liberally construed.[54] It seems that a drunken man also is liable for necessaries.[55]

CAPACITY OF MARRIED WOMEN.

9. At common law contracts of sale and purchase by married women are in general void; but the capacity of married women to contract has generally been extended by statute.

Although the common-law capacity, or rather incapacity, of a married woman to buy and sell is coextensive with her general capacity or incapacity to contract, and the subject therefore falls rather within the law of contract and of married women than of sale, a few words on the subject may not be out of place. At common law a married woman is incompetent to contract.[56] A contract with her is not, as in the case of an infant or lunatic, merely

mean "voidable." Molton v. Camroux, 4 Exch. 17; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156; Broadwater v. Darne, 10 Mo. 277; Bish. Cont. § 985; Clark, Cont. 274.

[52] Baxter v. Earl of Portsmouth, 5 Barn. & C. 170; Bagster v. Same, 7 Dow. & R. 614; Manby v. Scott, 1 Sid. 112; Dane v. Kirkwall, 8 Car. & P. 679; Wentworth v. Tubb, 1 Younge & C. Ch. 171; Williams v. Wentworth, 5 Beav. 325; Nelson v. Duncombe, 9 Beav. 211; Richardson v. Strong, 13 Ired. 106; La Rue v. Gilkyson, 4 Pa. St. 375; Sawyer v. Lufkin, 56 Me. 308; Hallett v. Oakes, 1 Cush. 296; Kendall v. May, 10 Allen, 59; Skidmore v. Romaine, 2 Bradf. (Sur.) 122; Barnes v. Hathaway, 66 Barb. 453; Blaisdell v. Holmes, 48 Vt. 492; McCormick v. Littler, 85 Ill. 62.

[53] Baxter v. Earl of Portsmouth, 5 Barn. & C. 170; Bagster v. Same, 7 Dow. & R. 614; La Rue v. Gilkyson, 4 Pa. St. 375; Richardson v. Strong, 13 Ired. 106.

[54] Kendall v. May, 10 Allen, 59. See In re Persse, 3 Malloy, 94.

[55] Gore v. Gibson, 13 Mees. & W. 623, per Pollock, C. B., and Alderson, B.

[56] Co. Litt. 112d.

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voidable, but is void,[57] and hence is incapable of ratification upon termination of coverture.[58] She cannot, even while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase, on her own account, even of necessaries.[59] To the general rule of her incapacity to contract, however, there are several exceptions: (1) When the husband is civiliter mortuus (that is, dead in law, as when he is under sentence of penal servitude, transportation, or banishment), her disability is suspended,[60] and, according to some authorities, it is suspended when he is an alien and resident abroad.[61] (2) By the custom of the city of London, a married woman might trade, and for that purpose might make valid contracts.[62] (3) In equity, when a married woman has separate property, she may, under certain circumstances, contract so as to render it liable.[63] It is to be noticed that the exceptions to the incapacity of married women to contract are not confined, as is the exception in the case of infants and lunatics, simply to purchases of necessaries, but that it extends to their general contractual capacity.

The power of a married woman, when living with her husband, to bind him by contract for necessaries for herself and her household, relates rather to her implied authority than to her capacity to contract.[64]

The common law in regard to the contractual capacity of married women has been radically changed by legislation in England [65] and

[57] Anson, Cont. (4th Ed.) 117; Bish. Cont. § 949; Clark, Cont. 276; Schouler, Husb. & Wife, §§ 97, 98.

[58] Zouch v. Parsons, 3 Burrows, 1794; Schouler, Husb. & Wife, § 99. There are, however, some authorities which hold that the moral consideration is sufficient to support a promise after termination of coverture. Lee v. Muggeridge, 5 Taunt. 36. Ewell, Lead. Cas. 322, 331; Stew. Husb. & Wife, § 366.

[59] Marshall v. Rutton, 8 Term R. 545.

[60] Benj. Sales, § 32; Stew. Husb. & Wife, § 358.

[61] Benj. Sales, §§ 33, 34; Stew. Husb. & Wife, § 358; Gregory v. Paul, 15 Mass. 31; McArthur v. Bloom, 2 Duer, 151. So where the husband was a citizen and resident in another state. Abbot v. Bayley, 6 Pick. 89.

[62] Beard v. Webb, 2 Bos. & P. 93.

[63] Anson, Cont. (4th Ed.) 118; Clark, Cont. 279; Schouler, Husb. & Wife, § 189 et seq.

[64] Schouler, Husb. & Wife, § 100 et seq.

[65] Benj. Sales, § 37 et seq.

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in most of the states of this country,[66] and in many states her disability to contract has been wholly removed. These statutory provisions differ greatly among themselves, and a consideration of the statutory capacity of married women to buy and sell cannot be here attempted.

WHO MAY SELL.

10. As a rule, no person can sell personal property unless he be the owner.

EXCEPTIONS—(a) In England, but not in the United States, where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of defect of title.[67]

(b) Where promissory notes, bills of exchange, or other negotiable securities are transferred by the holder before maturity to a bona fide purchaser, for value, the purchaser may acquire a good title.

(c) A person, not being the owner of goods, may sell them, so as to pass a good title thereto, if he acts under authority or power given by the owner, or conferred by law, and duly exercises such authority or power.

(d) By statute in England and in many states, purchasers from factors and other persons intrusted with and in the possession of goods or the documents of title may, under certain circumstances, acquire good title, though the factor or other person was not authorized to sell.

[66] Stim. Am. St. Law, § 6482.

[67] The Case of Market-Overt, 5 Coke, 83b; Tud. Merc. Cas. (3d Ed.) p. 274; Crane v. London Dock Co., 5 Best & S. 313, 33 Law J. Q. B. 224, 229; Benj. Sales, § 8 et seq.

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(e) When the seller of goods has a voidable title, but his title has not been avoided at the time of sale, the buyer, in general, acquires a good title, provided he buys them in good faith and without notice of the seller's defect of title.

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

Not only must the parties to a sale be capable of contracting, but one of them, the seller, must (subject to the exceptions mentioned) be the owner of the thing sold, for, as a rule, no one can pass to the buyer a better title than he himself possesses. "Nemo dat quod non habet." [68] A person, therefore, however innocent, who buys goods from one not the owner, obtains, in general, no property in them whatever; and even if, in ignorance that the goods were lost or stolen, he resells them in good faith to a third person, he remains liable in trover to the original owner.[69] It is to be observed that, in the cases covered by the first and second exceptions, the buyer, like one who in good faith receives money in payment,[70] obtains a good title as against all the world,—that is, even against one who has lost the thing sold, or from whom it has been stolen,—while in the cases covered by the other exceptions the buyer simply obtains the title (if any) of a particular person, who

[68] Peer v. Humphrey, 2 Adol. & E. 495; Whistler v. Forster, 32 Law J. C. P. 161; Cooper v. Willomatt, 1 C. B. 672, 14 Law J. C. P. 219; Cundy v. Lindsay, 3 App. Cas. 459; Stanley v. Gaylord, 1 Cush. 536; Chapman v. Cole, 12 Gray, 141; Parsons v. Webb, 8 Greenl. (Me.) 38; Galvin v. Bacon, 11 Me. 28; Prime v. Cobb, 63 Me. 200; Riford v. Montgomery, 7 Vt. 418; Bryant v. Whitcher, 52 N. H. 158; Barrett v. Warren, 3 Hill, 348; Williams v. Merle, 11 Wend. 80; Saltus v. Everett, 20 Wend. 267. The cases cited under the exceptions may also generally be cited under the rule. Benj. Sales, § 6; Chalm. Sale, § 24.

[69] Stone v. Marsh, 6 Barn. & C. 551; Marsh v. Keating, 1 Bing. N. C. 198, 2 Clark & F. 250; White v. Spettigue, 13 Mees. & W. 603; Lee v. Bayes, 18 C. B. 599; Hoffman v. Carow, 20 Wend. 21; Courtis v. Cane, 32 Vt. 232; Gilmore v. Newton, 9 Allen, 171; Riley v. Boston Water-Power Co., 11 Cush. 11.

[70] Miller v. Race, 1 Burrows, 452; Saltus v. Everett, 20 Wend. 267; Chapman v. Cole, 12 Gray, 141.

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may or may not be the true owner, without prejudice to the rights of any person who may in fact have a superior title.

Market Overt.

The rules of market overt apply only to a limited class of retail transactions.[71] All shops in the city of London are market overt, for the purpose of their own trade;[72] but a sale by sample is not within the custom, because the whole transaction, and not merely the formation of the contract, must take place within the open market.[73] Outside the city of London, markets overt may exist by grant or prescription.[74] The exception in favor of sales in market overt has never existed in the United States.[75]

Negotiable Instruments.

For the rules relating to the transfer of negotiable securities, the reader is referred to the works upon bills and notes.

Sale under Power.

The owner may, of course, make a sale by an agent thereto authorized; and he may, as in the case of a mortgage, expressly confer on another the power of making a sale upon a certain contingency. But, besides these cases of express authorization, there are many cases where the authority is implied by law from the relation of the parties. Thus a pawnee of goods has authority, implied by law, in case of default, to sell the goods pledged;[76] and the master of a ship has implied authority, in case of necessity, to sell the goods of the shippers of the cargo.[77] So a landlord distraining for rent may sell the goods of his tenant.[78] And a sheriff, as an officer on whom the law confers a power, may sell the goods of the

[71] Benj. Sales, § 8; Chalm. Sale, § 25.

[72] See Wilkinson v. Rex, 2 Camp. 335.

[73] Crane v. London Dock Co., 5 Best & S. 313, 33 Law J. Q. B. 224.

[74] Chalm. Sale, 40.

[75] Dame v. Baldwin, 8 Mass. 518; Towne v. Collins, 14 Mass. 500; Wheelwright v. Depeyster, 1 Johns. 471; Hoffman v. Carow, 22 Wend. 285; Hosack v. Weaver, 1 Yeates, 478; Easton v. Worthington, 5 Serg. & R. 130; Browning v. Magill, 2 Har. & J. 308; Rolan v. Gundy, 5 Ohio, 202; Ventress v. Smith, 10 Pet. 161, 2 Kent, Comm. 324.

[76] 2 Kent, Comm. 582; Schouler, Bailm. § 227 et seq.

[77] 3 Kent, Comm. 173.

[78] Woodf. Landl. & Ten. (13th Ed.) 479–481; Tayl. Landl. & Ten. (8th Ed.) § 57 et seq.

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defendant in execution; nor will the title to them be affected if the execution was voidable,[79] though, if the defendant had no title, the sheriff can, of course, give none.[80] It would be useless to multiply illustrations of the cases in which property may be sold, without the consent of the owner, under process of law.

Factors' Acts.

As the earlier English factors' acts have been, to a great extent, the models of the various enactments on the same subject in the United States, it will be sufficient for the present purpose to refer briefly to the history and effect of the English acts.

The factors' act (6 Geo. IV. c. 94, § 2) enacted that "persons intrusted with and in the possession of any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be deemed and taken to be the true owner of the goods so far as to give validity to sales" by them to buyers without notice that such vendors were not owners; and by 5 & 6 Vict. c. 39, this section was amended so as to give the same effect to the possession of the goods themselves as to the bill of lading, "or other documents of title." The fourth section of the earlier act provided that purchasers from "any agent or agents intrusted with any goods, wares, or merchandise," or to whom the same might be consigned, should be protected in their purchases notwithstanding notice that the vendors were agents, provided that the purchase and payment were made in the usual course of business and the buyer had not notice of the absence of authority of the agent. These acts applied solely to persons intrusted as factors or commission merchants, and not to persons to whose employment a power of sale is not ordinarily incident; for example, a wharfin-

[79] Turner v. Felgate, 1 Lev. 95; Manning's Case, 8 Coke, 94b; Emmett v. Thorn, 1 Maule & S. 425; Bank of U. S. v. Bank of Washington, 6 Pet. 9; Park v. Darling, 4 Cush. 197; Jackson v. Cadwell, 1 Cow. 623; Woodcock v. Bennet, Id. 711; Stinson v. Ross, 51 Me. 556. Otherwise where the judgment or execution is void. Lock v. Sellwood, 1 Q. B. 736; Camp v. Wood, 10 Watts, 118; Caldwell v. Walters, 18 Pa. St. 79; Kennedy v. Duncklee, 1 Gray, 65.

[80] Farrant v. Thompson, 5 Barn. & Ald. 826; Shearick v. Huber, 6 Bin. 2; Griffith v. Fowler, 18 Vt. 390; Buffum v. Deane, 8 Cush. 41; Champney v. Smith, 15 Gray, 512; Williams v. Miller, 16 Conn. 146; Symonds v. Hall, 37 Me. 354; Coombs v. Gorden, 59 Me. 111; Bryant v. Whitcher, 52 N. H. 158.

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ger.[81] They were limited in their scope to mercantile transactions, and did not embrace sales of furniture or goods in possession of a tenant or bailee for hire.[82]

It might be supposed that the effect of these enactments was that if the owner of goods intrusted their possession or their indicia of title to a person who, from the nature of his employment, might be taken prima facie to have the right to sell, a sale by such person to a purchaser without notice would bind the true owner.[83] But in Fuentes v. Montis,[84] where the plaintiff consigned wine for sale to a factor, who, after revocation of his authority, pledged it as security for advances made by defendant, it was held that though the revocation was unknown to the defendant, and the wine was still in the factor's possession, the latter was no longer "intrusted with and in possession" of the goods, the courts also held that, to constitute a person "an agent intrusted with the possession of goods," he must have been intrusted in the character of such agent; that is, for the purpose of sale.[85] They also held that the acts did not cover the case of a seller left in possession of the goods or documents of title,[86] or of a buyer thus left in possession so as to defeat the rights of an unpaid seller.[87] The effect of the decisions was partly annulled by 40 & 41 Vict. c. 39, which provided that a secret revocation of agency should not be operative, and which extended the scope of the acts to buyers and sellers left in possession of the documents of title. Finally, the recent factors' act (1889) still further extends the effect of the former acts.

It would be beyond the scope of an elementary book upon sales

[81] Monk v. Whittenbury, 2 Barn. & Adol. 484; Wood v. Rowcliffe, 6 Hare, 183; Lamb v. Attenborough, 1 Best & S. 831; Jaulerry v. Britten, 5 Scott, 655, 4 Bing. N. C. 242; Hellings v. Russell, 33 Law T. (N. S.) 380.

[82] Loeschman v. Machin, 2 Starkie, 311; Cooper v. Willomatt, 1 C. B. 672.

[83] Benj. Sales, §§ 19, 20.

[84] L. R. 3 C. P. 268, 37 Law J. C. P. 137, L. R. 4 C. P. 93. See, also, Sheppard v. Union Bank of London, 7 Hurl. & N. 661, 31 Law J. Exch. 154.

[85] Cole v. North Western Bank, L. R. 9 C. P. 470, affirmed L. R. 10 C. P. 354; Johnson v. Credit Lyonnais Co., 2 C. P. Div. 224, affirmed 3 C. P. Div. 32; Hellings v. Russell, 33 Law T. (N. S.) 380.

[86] Johnson v. Credit Lyonnais Co., 3 C. P. Div. 32.

[87] Jenkyns v. Usborne, 7 Man. & G. 678, 8 Scott, N. R. 505; McEwan v. Smith, 2 H. L. Cas. 309.

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to consider the varying provisions of the different factors' acts passed in the United States.[88] Enough has been said, however, to illustrate the struggle which has existed between the common law rule, "nemo dat quod non habet," and the contention of the mercantile community, now partially embodied in legislation, that, if a person is put in possession of goods or documents of title, he ought, as regards innocent third persons, to be regarded as the owner of the goods.[89]

Sale under Voidable Title.

"Where goods have been obtained by means amounting to larceny, the thief has, of course, no title; but where goods have been obtained by fraud the person who so obtains them may have no title

[88] Factors' acts have been passed in the following states: Kentucky, Laws 1880, May 5; Maine, Rev. St. c. 31; Maryland, Rev. Code, art. 34; Massachusetts, Pub. St. c. 71; Missouri, Rev. St. § 6281; New York, Acts 1830, c. 179; Ohio, Rev. St. §§ 3215–3219; Pennsylvania, Brightly, Purd. Dig. p. 773; Rhode Island, Pub. St. c. 136; Wisconsin, Rev. St. §§ 3345, 3346. A warehouseman, who is also a broker, with authority only to receive offers for merchandise stored with him as warehouseman, and report them to his principal, is not a "factor or other agent intrusted with the possession of merchandise for the purpose of sale," or "a person intrusted with merchandise, and having authority to sell or consign the same," or a "consignee or factor having possession of merchandise with authority to sell the same," within the provisions of the Massachusetts factors' act. Thacher v. Moors, 134 Mass. 156. See, also, Nickerson v. Darrow, 5 Allen, 419; Stollenwerck v. Thacher, 115 Mass. 224; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 25 N. E. 100. The New York factors' act, which declares that one intrusted with the possession of the goods of another, for the purpose of sale, shall be deemed the true owner, so far as to give validity to a disposition thereof for money advanced, does not protect a party who has made advances on goods to a factor, with knowledge that he was not the true owner. Stevens v. Wilson, 3 Denio, 472. As to what amounts to "intrusting": Collins v. Ralli, 20 Hun, 246, 85 N. Y. 637; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864; Kinsey v. Leggett, 71 N. Y. 387, 395; Mechanics' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank, 60 N. Y. 40. A factor has no power to pledge, unless the power is conferred by statute. Cole v. North Western Bank, L. R. 10 C. P. 354; Johnson v. Credit Lyonnais Co., 3 C. P. Div. 32; Warner v. Martin, 11 How. 209; Allen v. St. Louis Bank, 120 U. S. 20, 7 Sup. Ct. 460; Commercial Bank v. Hurt, 99 Ala. 130, 12 South. 568, 572; Michigan State Bank v. Gardner, 15 Gray, 362; Gray v. Agnew, 95 Ill. 315; Wright v. Solomon, 19 Cal. 64. See Williston, Cas. Sales, p. 603, note.

[89] See Chalm. Sale, 97 et seq.

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at all, or may have a voidable title, according to the nature of the transaction. If the nature of the fraud be such that there was never a contract between the parties, as if A. obtains goods from B. by falsely pretending to be C., then A. has no title at all, and can give none.[90] But if the person defrauded really intended to part with the property in, and possession of, the goods, though induced to do so by fraud, there is a contract which he may affirm or disaffirm at his election."[91] Hence the person who obtains the goods has a voidable title, and can give a good title to an innocent purchaser before the other party has disaffirmed.[92] And the same rule prevails where the sale is voidable in favor of creditors.[93]

Estoppel.

Where the owner of goods, by his words or conduct, willfully causes another to believe that the goods belong to a third person, and to buy them from such person in that belief, he is estopped to assert his title against such buyer.[94]

THE THING SOLD.

11. The thing which forms the subject-matter of a sale must be in existence and owned by the seller.

12. A contract to sell goods not yet in existence or acquired by the seller can only operate as an agreement to sell.

EXCEPTIONS—(a) A contract to sell goods which have a "potential existence"—that is, which

[90] Higgons v. Burton, 26 Law J. Exch. 342; Hardman v. Booth, 32 Law J. Exch. 105; Cundy v. Lindsay, 3 App. Cas. 459.

[91] Chalm. Sale, 41; Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26.

[92] White v. Garden, 10 C. B. 919, 20 Law J. C. P. 166; Kingsford v. Merry, 25 Law J. Exch. 166; Pease v. Gloahec, L. R. 1 P. C. 219, 229; Hoffman v. Noble, 6 Metc. (Mass.) 68; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. 388; Chalm. Sale, § 26; post, p. 122.

[93] Green v. Tanner, 8 Metc. (Mass.) 411; Sleeper v. Chapman, 121 Mass. 404; Neal v. Williams, 18 Me. 391; Comey v. Pickering, 63 N. H. 126; Gordon v. Ritenour, 87 Mo. 54; post, p. 128.

[94] Pickard v. Sears, 6 Adol. & E. 469; Gregg v. Wells, 10 Adol. & E. 90; Waller v. Drakeford, 22 Law J. Q. B. 274; Freeman v. Cooke, 2 Exch. 654; Knights v. Wiffen, L. R. 5 Q. B. 660; post, p. 212.

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are the expected product or increase of something owned by the seller — may operate to pass the property in the goods upon their coming into existence.

(b) A contract to sell goods not yet acquired by the seller may operate to pass the equitable interest of the seller in the goods upon their acquisition by him.

13. Goods not yet in existence or acquired by the seller, or the acquisition of which by him is dependent on a contingency which may or may not happen, may be the subject of an agreement to sell.

Sale of Thing Which has Ceased to Exist.

From the very definition of a sale, it follows that there can be no sale without the existence of the thing sold.[95] Accordingly, if there is a contract for the present sale of specific goods, and the goods, unknown to the parties, have ceased to exist at the time of the contract, the contract is void. Thus in the leading case of Hastie v. Couturier,[96] where a bought note had been signed for a cargo of corn on a vessel not yet arrived, but before the sale, and unknown to the parties, the cargo had been discharged and sold at an intermediate port, it was held in the house of lords that what the parties contemplated was that there was an existing something to be sold and bought, and that, no such thing existing, there was no contract which could be enforced. The rule may be based both on the ground of mutual mistake and on the ground of impossibility of performance.[97] And upon the latter ground, when the contract is for the future sale of specific goods, and, without the fault of

[95] Hastie v. Couturier, 9 Exch. 102, 5 H. L. Cas. 673, reversing 8 Exch. 40; Strickland v. Turner, 7 Exch. 208; Allen v. Hammond, 11 Pet. 63; Thompson v. Gould, 20 Pick. 134; per Wilde, J., 139; Rice v. Dwight Manuf'g Co., 2 Cush. 80, 86; Franklin v. Long, 7 Gill & J. 407; Gibson v. Pelkie, 37 Mich. 380. Partial loss does not avoid the contract. The question is whether the article has been so far destroyed as no longer to answer the description. Barr v. Gibson, 3 Mees. & W. 390.

[96] 9 Exch. 102, 5 H. L. Cas. 673.

[97] Pol. Cont. (4th Ed.) 370. Cf. Farrer v. Nightingal, 2 Esp. 639.

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buyer or seller, the goods perish before the property has passed, the contract is avoided.[98]

The necessity of ownership by the seller of the thing sold has already been considered.[99]

Sale of Thing not yet in Existence or Acquired.

A contract for the sale of goods not yet in existence or acquired by the seller can obviously have no greater effect, as a present sale, than a contract for the sale of goods that have ceased to exist. Nor can a contract purporting to effect a present sale of goods to be acquired operate so as to pass the property in the goods upon their acquisition by the seller, or have any greater force than an agreement to sell.[100] In such case, therefore, though the contract be in the form of a present sale, the legal property in the goods does not pass to the buyer unless the seller, after his acquisition of the goods, and before the rights of third persons, such as bona fide purchasers or attaching creditors, have intervened, does some act clearly showing his intention of giving effect to the original agreement,[101] or the buyer takes possession of them under authority to seize, which is equivalent to a delivery.[102]

[98] Post, p. 160.

[99] Ante, p. 16.

[100] Lunn v. Thornton, 1 C. B. 379, 14 Law J. C. P. 161; Gale v. Burnell, 7 Q. B. 850; Congreve v. Evetts, 10 Exch. 298, 23 Law J. Exch. 273; Hope v. Hayley, 5 El. & Bl. 830, 25 Law J. Q. B. 155; Chidell v. Galsworthy, 6 C. B. (N. S.) 471; Allatt v. Carr, 27 Law J. Exch. 385; Jones v. Richardson, 10 Metc. (Mass.) 481; Moody v. Wright, 13 Metc. (Mass.) 17; Rice v. Stone, 1 Allen, 566; Head v. Goodwin, 37 Me. 182; Emerson v. European & N. A. Ry. Co., 67 Me. 387; Williams v. Briggs, 11 R. I. 476; Gardner v. McEwen, 19 N. Y. 123; Cressey v. Sabre, 17 Hun, 120; Hamilton v. Rogers, 8 Md. 301; Gittings v. Nelson, 86 Ill. 591; Hunter v. Bosworth, 43 Wis. 586.

[101] Langton v. Higgins, 28 Law J. Exch. 252.

[102] Congreve v. Evetts, 10 Exch. 298, 23 Law J. Exch. 273; Hope v. Hayley, 5 El. & Bl. 830, 25 Law J. Q. B. 155; Chidell v. Galsworthy, 6 C. B. (N. S.) 471; Allatt v. Carr, 27 Law J. Exch. 385; Rowan v. Sharps' Rifle Manuf'g Co., 29 Conn. 283; Rowley v. Rice, 11 Metc. (Mass.) 333; Chase v. Denny, 130 Mass. 566; Cook v. Corthell, 11 R. I. 482; Chapman v. Weimer, 4 Ohio St. 481; McCaffrey v. Woodin, 65 N. Y. 459. See, also, cases cited in preceding note. Contra: Allen v. Goodnow, 71 Me. 420; Deering v. Cobb, 74 Me. 334. As to the revocability of the license to seize: Chynoweth v. Tenney, 10 Wis. 341; McCaffrey v. Woodin, supra; Jones, Chat. Mortg. (3d Ed.) § 165 et seq.

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Potential Existence.

If, however, the goods have a "potential existence," as defined in the first exception, the property in them passes upon their coming into actual existence. In this way a man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows may yield the coming month, but not the wool of any sheep, or the milk of any cows, that he may buy within the year.[103] The exception in favor of goods having a "potential existence" is doubted by Chalmers, J., who says that there is no rational distinction between one class of future goods and another, and that the supposed rule appears never to have been acted on.[104] But the dicta of the English cases have been repeatedly acted on in the United States, and the exception is here generally recognized.[105]

Rule in Equity.

Similarly in equity, which treats as done what ought to be done, a contract for the sale of goods afterwards to be acquired, provided they are sufficiently described to be identified, transfers the beneficial interest in them to the buyer as soon as they are acquired.[106] But it is only the equitable interest which passes, and

[103] Grantham v. Hawley, Hob. 132; Robinson v. MacDonnell, 5 Maule & S. 228; 14 Vin. Abr. tit. "Grant," p. 50; Shep. Touch. "Grant," 241; Perk. §§ 65, 90. See, also, Foster's Case, 1 Leon. 42.

[104] Chalm. Sale, 10.

[105] Unborn offspring of animals: Fonville v. Casey, 1 Murph. 389; Hall v. Hall, 24 Conn. 358. During gestation: McCarty v. Blevins, 5 Yerg. 195; Sawyer v. Gerrish, 70 Me. 254. Butter and cheese to be made: Conderman v. Smith, 41 Barb. 404. Crop not yet sown: Briggs v. U. S., 143 U. S. 346, 12 Sup. Ct. 391; Watkins v. Wyatt, 9 Baxt. 250; Andrew v. Newcomb, 32 N. Y. 417, 421; Rawlings v. Hunt, 90 N. C. 270; Cotten v. Willoughby, 83 N. C. 75 (already sown); McCown v. Mayer, 65 Miss. 537, 5 South. 98; Moore v. Byrum, 10 S. C. 452; Arques v. Wasson, 51 Cal. 620; Headrick v. Brattain, 63 Ind. 438. But not where the grant covered an indefinite time. Shaw v. Gilmore, 81 Me. 396, 17 Atl. 314; Pennington v. Jones, 57 Iowa, 37, 10 N. W. 274. See, also, Lewis v. Lyman, 22 Pick. 437; Heald v. Builders' Ins. Co., 111 Mass. 38; Van Hoozer v. Corey, 34 Barb. 9; Smith v. Atkins, 18 Vt. 461. Contra: Comstock v. Scales, 7 Wis. 159; Gittings v. Nelson, 86 Ill. 591; Hutchinson v. Ford, 9 Bush, 318.

[106] Holroyd v. Marshall, 10 H. L. Cas. 191, 33 Law J. Ch. 193; Tailby v. Official Receiver, 13 App. Cas. 523; Collyer v. Isaacs, 19 Ch. Div. 342;

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if, before the buyer gets the legal property, the seller disposes of the goods to a bona fide purchaser without notice, the rights of the buyer are defeated.[107]

Wagering Contract—Sale of Chance.

It was once held that a contract for the sale of goods to be delivered at a future day, when the seller had not the goods, but intended to go into the market and buy them, was a mere wager on the price of the commodity, and was hence invalid.[108] But this doctrine has been exploded.[109] Nor is an executory contract of sale invalid because the acquisition of the thing by the seller is uncertain, as in the case of goods to arrive by a certain ship.[110] It is only in this sense that there can be the sale of a chance, known to the civil law as "venditio spei."[111] Thus it has been held that a sale of fish to be caught had no effect to pass the property in the fish when caught,[112] but there seems no reason why a contract by a fisherman to sell all the fish he might catch on a particular voyage should not be good as an executory agreement.

Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Pennock v. Coe, 23 How. 117; Beall v. White, 94 U. S. 382; Brett v. Carter, 2 Low. 458, Fed. Cas. No. 1,844; Barnard v. Norwich & W. R. R. Co., 4 Cliff. 351, Fed. Cas. No. 1,007; McCaffrey v. Woodin, 65 N. Y. 459; Benjamin v. Elmira, J. & C. R. Co., 49 Barb. 441; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. St. 366; Smithurst v. Edmunds, 14 N. J. Eq. 408; Williams v. Winsor, 12 R. I. 9; Apperson v. Moore, 30 Ark. 56; Sillers v. Lester, 48 Miss. 513. In Massachusetts the rule appears to be the same in equity as at law. Moody v. Wright, 13 Metc. (Mass.) 17, 30; Blanchard v. Cooke, 144 Mass. 225, 11 N. E. 83. So, also, in Wisconsin, Hunter v. Bosworth, 43 Wis. 583. The cases cited generally relate to chattel mortgages, but the principles discussed apply equally to sales. See Jones, Chat. Mortg. (3d Ed.) § 173.

[107] Joseph v. Lyons, 15 Q. B. Div. 280, 54 Law J. Q. B. 3; Hallas v. Robinson, 15 Q. B. Div. 288; Morrill v. Noyes, 56 Me. 458, 466.

[108] Bryan v. Lewis, Ryan & M. 386.

[109] Hibblewhite v. McMorine, 5 Mees. & W. 462; Mortimer v. McCallan, 6 Mees. & W. 58; Appleman v. Fisher, 34 Md. 551; Stanton v. Small, 3 Sandf. 230; Clarke v. Foss, 7 Biss. 541, Fed. Cas. No. 2,852; post, p. 44.

[110] Hale v. Rawson, 27 Law J. C. P. 189.

[111] Poth. Cont. de Vente, No. 61. See Buddle v. Green, 27 Law J. Exch. 33, 34, per Martin, B.; Hitchcock v. Giddings, 4 Price, 135, 140, per Richards, C. B.; Hanks v. Palling, 6 El. & Bl. 659, 669, 25 Law J. Q. B. 375, per Lord Campbell, C. J.

[112] Low v. Pew, 108 Mass. 347.

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MUTUAL ASSENT AND FORM OF CONTRACT.

14. The transfer of the property is effected by the mutual assent of the parties to the contract of sale.

15. At common law a contract of sale may be made in writing (either with or without seal), or by word of mouth, or may be implied from the conduct of the parties.

Mutual Assent.

If there be parties capable of contracting, and a thing in existence and owned by one of them, the property in the thing may be transferred whenever the parties mutually assent to the transfer. Neither delivery of the thing nor payment of the price is necessary to perfect the transfer.[113] The parties may make whatever bargain they please. They may agree that the transfer shall take effect at once, or they may agree that it shall not take effect until after delivery or payment, or the happening of some other condition; and if they express their intentions clearly, the law will give effect to them.

The contract of sale, like other contracts, is founded on mutual assent. The principles of law which govern the formation of the contract are the same as those which govern the formation of contracts generally, and little need be said in regard to them. Thus an offer to buy or to sell, in order to ripen into a binding agreement, must be accepted, and the acceptance must be unconditional;[114] and until acceptance, but not after, the offer may be withdrawn.[115]

[113] Benj. Sales, § 3; Chalm. Sale, 3; post, p. 83.

[114] Hutchison v. Bowker, 5 Mees. & W. 535; Hyde v. Wrench, 3 Beav. 334; Jordan v. Norton, 4 Mees. & W. 155; Felthouse v. Bindley, 11 C. B. (N. S.) 869, 31 Law J. C. P. 204; Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. 168; Carr v. Duvall, 14 Pet. 77; Myers v. Smith, 48 Barb. 614; Potts v. Whitehead, 23 N. J. Eq. 512; Hutcheson v. Blakeman, 8 Metc. (Ky.) 80; Smith v. Gowdy, 8 Allen, 566; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Maclay v. Harvey, 90 Ill. 525; Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Maynard v. Tabor, 53 Me. 511; McIntosh v. Brill, 20 U. C. C. P. 426.

[115] Cooke v. Oxley, 3 Term R. 653; Routledge v. Grant, 4 Bing. 653; Paine v. Cave, 3 Term R. 148; Head v. Diggon, 3 Man. & R. 97; Smith v.

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Effect of Mistake.

From the principle that contracts can be effected only by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no valid agreement, notwithstanding the apparent mutual assent.[116]

Mistake as to Parties.

Such a mistake may arise as to the person with whom the contract is made. Thus if C. substitutes himself for B., so that A. contracts with C. under the belief that he is contracting with B., the contract is void. For example, if a buyer sends an order for goods to a firm, and the order is filled by a different firm, which has succeeded the firm to which the order was sent, and the buyer supposes it to have been filled by the firm to whom he gave the order, there is no contract.[117] In such a case the seller could recover the goods from the supposed buyer, if he refused to pay for them, provided they were unconsumed, but he could not recover the price.

Hudson, 6 Best & S. 431, 34 Law J. Q. B. 145; Dickinson v. Dodds, 2 Ch. Div. 463; Byrne v. Van Tienhoven, 5 C. P. Div. 344; Stevenson v. McLean, 5 Q. B. Div. 346; Craig v. Harper, 3 Cush. 158; Boston & M. R. Co. v. Bartlett, Id. 224; Fisher v. Seltzer, 23 Pa. St. 308; Johnston v. Fessler, 7 Watts, 48; Grotenkemper v. Achtermeyer, 11 Bush, 222; Tucker v. Woods, 12 Johns, 190; Faulkner v. Hebard, 26 Vt. 452; Falls v. Gaither, 9 Port. (Ala.) 605; Eskridge v. Glover, 5 Stew. & P. 264; Larmon v. Jordan, 56 Ill. 204; Johnson v. Filkington, 39 Wis. 62. As to contracts by letter, see Benj. Sales, § 44 et seq; Pol. Cont. (4th Ed.) 31 et seq; Id. 640 et seq; Langd. Cas. Cont. 993; "Contract by Letter," by Prof. Langdell, 7 Am. Law Rev. 432.

[116] Benj. Sales, § 50; Utley v. Donaldson, 94 U. S. 29, 47. Although the general rule of law is "ignorantia juris haud excusat," when the word jus is used in the sense of a private right, that maxim has no application. For example, private right of ownership is a matter of fact; and, though it may also be the result of matter of law, if parties contract under a mistake as to their relative rights, the agreement is liable to be set aside as having proceeded upon a common mistake. Jones v. Clifford, 3 Ch. Div. 779, per Lord Westbury.

[117] Boulton v. Jones, 2 Hurl. & N. 564, 27 Law J. Exch. 117; Boston Ice Co. v. Potter, 123 Mass. 28. As to fraudulent impersonation, post, 122. Where the plaintiffs consigned wool to a broker to whom they would not sell, on the understanding that it was sold to an undisclosed principal in good credit with the plaintiffs, there was no sale to the broker, and he had no power to convey a good title to a bona fide purchaser. Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805.

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Mistake as to Thing Sold.

Mistake may arise as to the identity or existence of the thing sold. When a person has entered into a contract, the nature of which he understands, he will not generally be heard to say that his meaning was not expressed in his words, and that he intended to contract for something different from that which his words naturally indicate.[118] But a contract may be void for mistake when two things have the same names, and the parties, owing to the identity of names, mean different things;[119] for example, where the buyer agreed to buy a cargo "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one, and the seller the other.[120] Or the seller, having goods of two sorts, may undertake to sell goods of one sort which he mistakenly supposes are contained in a particular package; and if, under this common mistake, the parties agree to buy and sell the goods in that package, there is no contract.[121] Or the mistake may arise by the fault of a broker who makes the sale, and describes a different article to each party.[122]

As we have seen, if the subject of sale is not in existence there is no contract, and this both upon the ground of impossibility of performance and of mutual mistake.[123]

[118] Benj. Sales, § 417.

[119] Raffles v. Wichelhaus, 2 Hurl. & C. 906, 33 Law J. Exch. 160; Kyle v. Kavanagh, 103 Mass. 356.

[120] Raffles v. Wichelhaus, cited in preceding note.

[121] Harvey v. Harris, 112 Mass. 32. See, also, Sheldon v. Capron, 3 R. I. 171.

[122] Thornton v. Kempster, 5 Taunt. 786.

[123] Ante, p. 23. Mistake as to the situation of the goods may avoid the contract. Ketchum v. Catlin, 21 Vt. 191. Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; March v. Wright, 46 Ill. 487; Gross v. Jordan, 83 Me. 380, 22 Atl. 250; Summerson v. Hicks, 134 Pa. St. 566, 19 Atl. 808; Greer v. Church, 13 Bush, 430; Singer Manuf'g Co. v. Cole, 4 Lea, 439; Hays v. Jordan, 85 Ga. 749, 11 S. E. 833; National Car & Locomotive Builder v. Cyclone Steam-Plow Co. (Minn.) 51 N. W. 657. "Sale or return," or contract of del credere agency. Ex parte White, 6 Ch. App. 397; Nutter v. Wheeler, 2 Low. 346, Fed. Cas. No. 10,384; In re Linforth, 4 Sawy. 370, Fed. Cas. No. 8,369. Sale or agency: First Nat. Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681; Braun v. Keally (Pa. Sup.) 23 Atl. 389; Columbus Construction Co. v. Crane Co., 3 C. C. A. 216, 9 U. S. App. 46, 52 Fed. 635; National Bank v.

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Mistake as to Price.

As price is an essential element in a contract of sale, a mistake in respect to the amount to be paid may avoid the contract,[124] as when the price named was $3.25, and one party thought this meant per bunch, and the other per 1,000.[125]

Mistake must go to the Root of the Contract.

Mistake, however, to have the effect of invalidating the contract, must go to the root of the contract, and must be such as to negative the idea that the parties were ever ad idem;[126] for, if the buyer purchases the very article at the very price and on the very terms intended by him and by the seller, the sale is completed by mutual assent, even if it may be liable to be avoided for fraud, illegality, or some other cause,[127] or even though the buyer and the seller may be totally mistaken in the motive which induces the assent.[128]

Goodyear (Ga.) 16 S. E. 962. Contract of sale or of guaranty: Hutton v. Lippert, 8 App. Cas. 309. Transaction held to be executed sale, though bill of sale read, "I agree to sell." Bangs v. Friezen, 36 Minn. 423, 32 N. W. 173.

[124] Phillips v. Bistolli, 2 Barn. & C. 511; Rupley v. Daggett, 74 Ill. 351; Rovegno v. Defferari, 40 Cal. 459.

[125] Greene v. Bateman, 2 Woodb. & M. 359, Fed. Cas. No. 5,762. Where the seller, intending to offer cattle for $261.50, by a lapsus linguae offered them for $161.50, and the buyer, having good reason to suppose that the offer was a mistake, accepted it, and paid $20 on account, and the seller tendered back the $20 and repudiated the sale, the buyer was not entitled to maintain replevin. Harran v. Foley, 62 Wis. 584, 22 N. W. 837.

[126] Pol. Cont. (4th Ed.) 411.

[127] Post, cc. 5, 6.

[128] Benj. Sales, § 54. Mistaken belief that thing would answer a certain purpose: Chanter v. Hopkins, 4 Mees. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Prideaux v. Bunnett, 1 C. B. (N. S.) 613. Mistake as to condition of horse: Wheat v. Cross, 31 Md. 99. Mistake as to solvency of maker of note bought through broker: Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651; Taylor v. Fleet, 4 Barb. 95. Where a woman sold an uncut diamond for $1 to a jeweler, both being ignorant of its value, and it proved to be worth $1,000, she could not rescind. Wood v. Boynton, 64 Wis. 265, 25 N. W. 42. It is difficult to reconcile with the current of authority the case of Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919, where the subject of sale was a blooded cow, believed by the parties to be barren, and hence worth only $80, which was the price, but actually capable of breeding, and hence worth $750 or $1,000, and it was held that the seller could rescind on the ground that the mistake affected the substance of the whole consideration.

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Form of Contract.

Aside from the provisions of the statute of frauds, which will be considered later, no writing or other formality is necessary to effect a sale or contract for sale. If the contract is in writing, the ordinary rules of evidence apply. If the assent of the parties is not clearly expressed, it may be implied from their language [129] or conduct, as if a customer takes goods from a counter, and nothing is said as to price, a contract to pay their reasonable value is implied.[130] In the same way, where there is an express contract, and goods are sent which are not in accordance with it, but which nevertheless the buyer keeps, a contract to pay for them is implied. This doctrine is most frequently applied where the contract is for a certain quantity of goods, only a part of which are delivered.[131]

Sale by Suit.

There is one case where a sale takes place by implication of law rather than by the mutual assent of the parties, either express or implied. Where in an action for trespass to goods, or the detention or wrongful conversion thereof, the plaintiff recovers the value of the goods, as damages, and the defendant satisfies the judgment, the transaction operates as a sale of the goods by the plaintiff to the defendant.[132] An unsatisfied judgment does not pass the property.[133]

[129] A "grumbling" assent. Joyce v. Swann, 17 C. B. (N. S.) 84, 101.

[130] Bl. Comm. bk. 2, c. 30; Hoadly v. McLaine, 10 Bing. 482, 487, per Tindal, C. J. Using goods sent without order, with knowledge that the sender expects payment, constitutes an implied sale. Wellauer v. Fellows, 48 Wis. 105, 4 N. W. 114; Indiana Manuf'g Co. v. Hayes, 155 Pa. St. 160, 26 Atl. 6.

[131] Oxendale v. Wetherell, 9 Barn. & C. 386; Colonial Ins. Co. of New Zealand v. Adelaide Mar. Ins. Co., 12 App. Cas. 128, 138; Richardson v. Dunn, 2 Q. B. 218; Hart v. Mills, 15 Mees. & W. 85; Bowker v. Hoyt, 18 Pick. 555; Sentell v. Mitchell, 28 Ga. 196; Richards v. Shaw, 67 Ill. 222; Flanders v. Putney, 58 N. H. 358; Booth v. Tyson, 15 Vt. 515, 518. Oxendale v. Wetherell, supra, has sometimes been disapproved. Champlin v. Rowley, 13 Wend. 258, 18 Wend. 187; Kein v. Tupper, 52 N. Y. 555; Witherow v. Witherow, 16 Ohio, 238. See post, p. 190.

[132] Jenk. 4 Cent. 88; Cooper v. Shepherd, 3 C. B. 266, 15 Law J. C. P. 237. On principle, the recovery would only have this effect where the value of the thing converted is included in the judgment. Benj. Sales, § 49.

[133] Brinsmead v. Harrison, L. R. 6 C. P. 584, affirmed in L. R. 7 C. P. 547; Ex parte Drake, 5 Ch. Div. 866; Hepburn v. Sewell, 5 Har. & J. 211; Love-

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Whether the Contract be of Sale a Question of Intention.

Whether a contract be a contract of sale, or some other kind of a contract, is a question of substance, not of form, and depends on the intention of the parties. Thus, as has been seen, it is a question of the real meaning of the parties, whether a contract is to be construed as a contract of sale or of bailment;[134] and the law will look to the substance of the transaction, and not to the name by which the parties designate it.[135] And if the mutual intention to buy and sell be wanting there is no sale. Thus the sale of an article containing a hidden treasure is no sale of the treasure;[136] and if, by mistake, other goods than those agreed upon be delivered, the property in the goods is not transferred.[137]

THE PRICE.

16. The price may be fixed by the contract of sale, or may be left to be fixed in a manner thereby agreed, or may be left to subsequent arrangement.

17. When the price is not determined by the contract of sale, the law implies an agreement to pay a reasonable price.

As has been stated, the consideration for a sale must be a price in money, paid or promised. Where the price has been expressly agreed on, no question can arise. But the price need not be specified, if it can be ascertained in accordance with the contract.[138]

joy v. Murray, 3 Wall. 1, 16; Osterhout v. Roberts, 8 Cow. 43; Marsden v. Cornell, 62 N. Y. 215; Brady v. Whitney, 24 Mich. 154. Contra: Floyd v. Brown, 1 Rawle, 121; Marsh v. Pier, 4 Rawle, 273; Merrick's Estate, 5 Watts & S. 17.

[134] Ante, p. 3.

[135] Sale or lease. Hervey v. Rhode Island Locomotive Works, 93 U. S. 664. Post, 3.

[136] Merry v. Green, 7 Mees. & W. 623; Huthmacher v. Harris' Adm'rs, 38 Pa. St. 491; Durfee v. Jones, 11 R. I. 588; Bowen v. Sullivan, 62 Ind. 281; Ray v. Light, 34 Ark. 421. Cf. Gardner v. Lane, 9 Allen, 492.

[137] Gardner v. Lane, 9 Allen, 492.

[138] Valpy v. Gibson, 4 C. B. 837, at page 864, per Wilde, C. J.; Joyce v. Swann, 17 C. B. (N. S.) 84, 100; Holbrook v. Setchel, 114 Mass. 435; Chalm. Sale, § 9.

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"Id certum est quod certum reddi potest."[139] For example, the price may be left to be fixed by the market price of the commodity,[140] or by the price another article shall fetch at auction,[141] or by the price the thing sold may afterwards fetch,[142] or by future arrangement,[143] or by the valuation of a third person.[144] If such third person cannot or does not make the valuation, the agreement is avoided,[145] though if the goods, or any part of them, have been delivered, and appropriated by the buyer, he must pay a reasonable price for them.[146] But as the assent to the sale may be implied, as well as express, so the assent to the payment of a reasonable price may be implied from the circumstances.[147] This implication arises naturally when the sale has been executed, but an agreement to pay a reasonable price may also be implied in an executory contract.[148] Such cases are, of course, to be distin-

[139] Brown v. Bellows, 4 Pick. 179, 189.

[140] Price 10 cents less than Milwaukee price on any day seller might name. McConnell v. Hughes, 29 Wis. 537. Market price when buyer should demand payment. McBride v. Silverthorne, 11 U. C. Q. B. 545; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672. Price to be regulated by the price of gold. Ames v. Quimby, 96 U. S. 324. Cf. Acebal v. Levy, 10 Bing. 376, 382.

[141] Cunningham v. Brown, 44 Wis. 72.

[142] Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

[143] Where the sale is for a reasonable price, to be afterwards agreed upon, the title passes, if such is the mutual intention, though no price is afterwards agreed upon. Greene v. Lewis, 85 Ala. 221, 4 South. 740. Otherwise where the intention is to defer the passing of title till the price shall be agreed on. Wittkowsky v. Wasson, 71 N. C. 451.

[144] Brown v. Bellows, 4 Pick. 179, 189.

[145] Thurnell v. Balbirnie, 2 Mees. & W. 786; Cooper v. Shuttleworth, 25 Law J. Exch. 114; Vickers v. Vickers, L. R. 4 Eq. 529; Milnes v. Gery, 14 Ves. 400; Wilks v. Davis, 3 Mer. 507; Benj. Sales, § 87; Chalm. Sale, § 10.

[146] Clarke v. Westrope, 25 Law J. C. P. 287. Valuation prevented by seller. Humaston v. Telegraph Co., 20 Wall. 20; Henniston v. Ham, 9 Fost. (N. H.) 501. The same rule was applied where the goods had been constructively, but not actually, delivered, and the seller prevented the valuation, on the ground that prevention was equivalent to performance. Smyth v. Craig, 3 Watts & S. 14.

[147] Acebal v. Levy, 10 Bing. 376; Bennett v. Adams, 2 Cranch, C. C. 551, Fed. Cas. No. 1,316; Taft v. Travis, 136 Mass. 95; James v. Muir, 33 Mich. 223; Lovejoy v. Michels, 88 Mich. 15, 49 N. W. 901; McEwen v. Morey, 60 Ill. 32.

[148] Hoadly v. McLaine, 10 Bing. 482; Valpy v. Gibson, 4 C. B. 837.

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guished from cases in which the contract of sale has never been completed, by reason of failure to agree upon a price.[149] What is a reasonable price is a question of fact, dependent on the circumstances of each particular case; for, while a reasonable price is ordinarily the market price, the market price may be unreasonable, from accidental circumstances, as on account of the commodity having been kept back by the seller himself.[150]

[149] Bigley v. Risher, 63 Pa. St. 152; Foster v. Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. 898.

[150] Acebal v. Levy, 10 Bing. 376, per Tindal, C. J., 383; James v. Muir, 33 Mich. 223; Lovejoy v. Michels, 88 Mich. 15, 49 N. W. 901.

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CHAPTER II.

FORMATION OF CONTRACT (Continued)—UNDER THE STATUTE OF FRAUDS.

18–20. What Contracts are Within the Statute.
21–22. What are Goods, Wares, and Merchandise.
23. What is a Contract for the Price or Value of £10 ($50).
24–26. Acceptance and Receipt.
27–29. Acceptance.
30–31. Actual Receipt.
32–33. Earnest or Part Payment.
34–36. The Note or Memorandum.
37–38. Signature of the Party.
39–40. Agents Authorized to Sign.
41. Effect of Noncompliance with the Statute.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

18. The seventeenth section of the English statute of frauds, which has been substantially followed in most of the states and territories of the United States, enacts that "no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except

(a) The buyer shall accept part of the goods so sold, and actually receive the same,

(b) Or give something in earnest to bind the bargain, or in part payment,

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

19. The statute of frauds applies to executory as well as executed contracts of sale.

20. The statute does not apply to contracts for work, labor and materials. The rule for determining whether

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the contract is for work, labor and materials, or a contract of sale, varies in different jurisdictions.

(a) ENGLISH RULE—The English rule, which is followed in some states, is that a contract whereby the property in a chattel is to be transferred for a price from one person to another is a contract of sale, and is within the statute, although the chattel is to be the product of the work, labor, and materials of the person who is to transfer the property.

(b) MASSACHUSETTS RULE — The Massachusetts rule, which is followed in some states, is the same, except that if the chattel is to be manufactured especially for the buyer, upon his special order, and is not such as the seller in his ordinary business manufactures for the general market, the contract is for work, labor, and materials, and is not within the statute.

(c) NEW YORK RULE—The New York rule, which is followed in some states, is that a contract for the sale of a chattel not in existence, which the seller is to manufacture, is a contract for work, labor, and materials, and is not within the statute; but, if the chattel is in existence, the contract is one of sale, and is within the statute, although the seller is to adapt it to the use of the buyer.

The common law, which recognized the validity of verbal contracts of sale of personal property for any amount, and however proved, was greatly modified by the seventeenth section of the statute of 29 Car. II. c. 3, known as the "statute of frauds," which has been quoted above. To reproduce here the language of the various similar enactments in the United States would be impossible,[1]

[1] This section is not in force in Rhode Island, Delaware, Pennsylvania, Virginia, North Carolina, Mississippi, Kentucky, Tennessee, Ohio, Illinois, Kansas, or Texas. See Browne, St. Frauds, § 117.

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nor is it necessary to do so, as their provisions are in the main substantially the same as those of the English original. The latter will therefore serve as the basis of discussion.

Executed and Executory Contracts.

A question arose at an early day, on which in England the cases were conflicting, whether the words "contract of sale," as used in the statute, applied to executory contracts, or merely to executed contracts, of sale.[2] The question was settled in England by "Lord Tenterden's Act," [3] so called, which enacted that the provisions of the seventeenth section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The two enactments must be construed together,[4] and Lord Tenterden's act appears to be merely declaratory of the true construction of the statute of frauds.[5] In the United States, it has been universally held, without the intervention of the legislature, and in conformity with the apparent policy and natural construction of the statute, that it applies as well to executory as to executed sales.[6]

Contract of Sale or Contract for Work, Labor, and Materials—English Rule.

Another question has arisen as to the meaning of "contract of sale," on which there was long a conflict of opinion in England,

[2] That executory contracts were not within the statute, see Towers v. Osborne, 1 Strange, 506; Clayton v. Andrews, 4 Burrows, 2101; Groves v. Buck, 3 Maule & S. 178. Contra, Rondeau v. Wyatt, 2 H. Bl. 63; Cooper v. Elston, 7 Term R. 14; Garbutt v. Watson, 5 Barn. & Ald. 613.

[3] 9 Geo. IV. c. 14, § 7.

[4] Chalm. Sale, 8; Scott v. Eastern Counties Ry. Co., 12 Mees. & W. 33; Harman v. Reeve, 18 C. B. 587, 25 Law J. C. P. 257.

[5] Langd. Cas. Sales, 1025.

[6] Newman v. Morris, 4 Har. & McH. 421; Bennett v. Hull, 10 Johns. 364; Crookshank v. Burrell, 18 Johns. 58; Jackson v. Covert, 5 Wend. 139; Ide v. Stanton, 15 Vt. 685; Waterman v. Meigs, 4 Cush. 497; Hight v. Ripley, 19 Me. 137; Edwards v. Grand Trunk Ry. Co., 48 Me. 379; Atwater v. Hough, 29 Conn. 508; Carman v. Smick, 15 N. J. Law, 252; Finney v. Apgar, 31 N. J. Law, 266; Cason v. Cheely, 6 Ga. 554.

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and on which different conclusions have been reached in the United States, namely, whether a contract for the sale of goods to be afterwards manufactured is a "contract of sale," or a mere contract for work and labor done and materials furnished, to which the statute does not apply.[7] The conclusion which has finally been reached in England, and in several states in America, is that if the contract is intended to result in transferring for a price a chattel it is a contract for the sale of a chattel, notwithstanding that the chattel is not in existence at the time of the contract, and is to be the product of the labor and materials of the seller, and that unless the contract is intended to result in the transfer of a chattel the contract is not one of sale. This test was first clearly stated and applied in the leading case of Lee v. Griffin,[8] decided in the queen's bench in 1861. That action was brought by a dentist to recover for two sets of artificial teeth ordered by a deceased lady of whom the defendant was executor, and it was held that the contract was one of sale, and not for work, labor, and materials. Blackburn, J., said: "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy."

Before the case of Lee v. Griffin, three other principles had been suggested in England as affording a test in such cases, and as the earlier English views have been influential in shaping the decisions in this country, and throw light upon the question involved, they may be briefly stated: First. It was suggested that, if the subject-matter of the contract is not in existence, the contract is not for the sale of goods.[9] Thus in Groves v. Buck [10] it was held on this ground that a contract for the sale of oak pins to be cut by the

[7] Benj. Sales, §§ 94–107.

[8] 1 Best & S. 272, 30 Law J. Q. B. 252.

[9] Groves v. Buck, 3 Maule & S. 178; Garbutt v. Watson, 5 Barn. & Ald. 613, per Abbott, C. J.; Rondeau v. Wyatt, 2 H. Bl. 63, per Lord Loughborough; Cooper v. Elston, 7 Term R. 14, per Lord Kenyon, C. J.

[10] 3 Maule & S. 178.

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plaintiff out of slabs owned by him was not within the statute. Second. It was suggested that, if the materials be furnished by the employer, the contract is for work and labor, and not of sale; but that if the materials be furnished by the workman, who makes the chattel, he cannot maintain work and labor, because his labor is bestowed on his own materials and for himself.[11] The first branch of this rule falls within Lee v. Griffin, because, if the materials are furnished by the employer, there can be no sale of them to him. But the second branch of the rule is inaccurate, since a man may be employed to do work on his own materials without an intention on the part of himself and his employer to transfer the property in the completed article; for example, to expend work and materials in perfecting an invention.[12] Third. It was suggested that the true test was "whether the work and labor is the essence of the contract, or whether it is the materials that are found."[13] But the fatal objection to this test, as pointed out by Benjamin,[14] and indeed to any test except that applied in Lee v. Griffin, is that, however small the relative value of the materials to the labor, as in the case of a painting, the employer cannot get title to the thing except through the transfer of the property in it from the maker. And it is the acquisition of the thing by the employer which the contract really contemplates. It is true that extreme cases may be put, such as that of an attorney employed to draw a deed and using his own paper and ink, or that of a man sending a button to be used by his tailor in making a coat. But such trifling matters cannot be considered as having entered into the contemplation of the parties, nor as forming part of the real consideration, and are to be disposed of by the rule, "De minimis non curat lex."[15]

[11] Smith v. Surman, 9 Barn. & C. 568, per Bayley, J.; Atkinson v. Bell, 8 Barn. & C. 277, per Bayley, J.

[12] Grafton v. Armitage, 2 C. B. 336, 15 Law J. C. P. 20. Or if a farrier be employed professionally, using his own medicines, there is no sale of the medicine, but the contract is for work, labor, and materials. Clark v. Mumford, 3 Camp. 37; Langd. Cas. Sales, 1039.

[13] Clay v. Yates, 1 Hurl. & N. 73, 25 Law J. Exch. 237.

[14] Benj. Sales, § 106.

[15] Benj. Sales, § 107.

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Same—Massachusetts Rule.

In the English case of Garbutt v. Watson,[16] where a contract for the sale of flour to be manufactured was held to be within the statute, Abbott, C. J., remarked: "In Towers v. Osborne [1 Strange, 506], the chariot which was ordered to be made would never, but for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purpose of general sale, and sold this flour to the defendant as part of their general stock." In accordance with this dictum, though not expressly upon its authority, it was held in Mixer v. Howarth [17] that a contract to build a buggy for the defendant out of materials partly wrought, but not put together, was not a contract of sale within the statute, and Shaw, C. J., said that "when the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies." In Gardner v. Joy,[18] on the other hand, where the defendant ordered 100 boxes of candles, at 21 cents a box, which the plaintiff was to manufacture, the same judge held that the case was not distinguishable from Garbutt v. Watson. And in a later case [19] he laid down the distinction that "when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made and finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Goddard v. Binney,[20] in which the facts are similar to those in Mixer v. Howarth, the court refers to Lee v. Griffin, but adheres to the Massachusetts rule, the correctness and justice of which it approves.

Same—New York Rule.

The principle acted on in the earlier English cases, that a contract for the sale of an article not in existence is not within the

[16] 5 Barn. & Ald. 613.

[17] 21 Pick. 205.

[18] 9 Metc. (Mass.) 177.

[19] Lamb v. Crafts, 12 Metc. (Mass.) 356.

[20] 115 Mass. 450. See, also, Spencer v. Cone, 1 Metc. (Mass.) 283; Waterman v. Meigs, 4 Cush. 497; Clark v. Nichols, 107 Mass. 547; Dowling v. McKenney, 124 Mass. 480; May v. Ward, 134 Mass. 127.

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statute,[21] is the foundation of the so-called New York rule. Thus in Crookshank v. Burrell [22] it was held that a contract to manufacture the woodwork of a wagon was not within the statute, and in Sewall v. Fitch [23] the same decision was reached in regard to a contract to sell rails which were to be made by the seller; and the rule was enunciated that a contract for the sale of goods existing in solido is within the statute, but that a contract for the sale of goods not yet made, and to be delivered at a future day, is a contract for work and labor, and is not within the statute. In Downs v. Ross,[24] however, a limitation of this rule was introduced, and it was held that a contract to sell wheat, part of which was to be cleaned and part threshed, was within the statute, Bronson, J., observing that, "if the thing exist at the time in solido, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute." The rule [25] and the limitation [26] have been followed in the later New York cases. The cases are discussed and reconciled in Cooke v. Millard,[27] in which it was held that a contract for the sale of lumber which the seller was to dress and put in condition to fill the order of the buyer was within the statute. The rule is there stated that an agreement for the sale of a commodity not in existence, but which the seller is to manufacture or put in condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale; but that, when the chattel is in existence, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon

[21] Ante, p. 38.

[22] 18 Johns. 58.

[23] 8 Cow. 215.

[24] 23 Wend. 270.

[25] Robertson v. Vaughn, 5 Sandf. 1; Bronson v. Wiman, 10 Barb. 406; Parker v. Schenck, 28 Barb. 38; Parsons v. Loucks, 48 N. Y. 17; Warren Chemical & Manufacturing Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908. See Hinds v. Kellogg (Com. Pl. N. Y.) 13 N. Y. Supp. 922.

[26] Smith v. New York Cent. R. Co., *43 N. Y. 180; Cooke v. Millard, 65 N. Y. 352; Alfred Shrimpton & Sons v. Dworsky, 2 Misc. Rep. 123, 21 N. Y. Supp. 461.

[27] 65 N. Y. 352.

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it to adapt it to the use of the purchaser. Dwight, C., who delivered the opinion, observed in regard to Lee v. Griffin that, if the subject were open, no more convenient rule than that of Lee v. Griffin, which is at once so philosophical and comprehensible, could be adopted, but that it was too late to adopt it in full.

Same—Rule Elsewhere in United States.

It would be difficult, if not impossible, to classify the American cases as falling within the English, the New York, or the Massachusetts rule.[28] The later rule has, however, met with most general approval.[29] The New York rule has been followed in Maryland.[30] The English rule seems to prevail in Minnesota,[31] and has in a recent case been expressly adopted in Missouri.[32]

Chattel Intended for a Fixture.

Contracts for furnishing an article, and fixing it to the freehold, are to be distinguished from contracts of sale.[33] In such

[28] In Prescott v. Locke, 51 N. H. 94, it was held that a contract to buy what spokes plaintiff should saw at his mill was within the statute, and the opinion cites Lee v. Griffin, 1 Best. & S. 272, 30 Law J. Q. B. 252; but the court draws a distinction like that at one time suggested in England (supra) between contracts of sale and those in which the labor and skill of the workman are the essence of the contract. See, also, Pitkin v. Noyes, 48 N. H. 294. Cf. Gilman v. Hill, 36 N. H. 311. A contract to cut all the trees on defendant's land, and to deliver the logs with others already cut at plaintiff's mill, is within the statute. Ellison v. Brigham, 38 Vt. 64. A contract to paint a portrait is not within the statute. Turner v. Mason, 65 Mich. 662, 32 N. W. 846.

[29] Hight v. Ripley, 19 Me. 137; Abbott v. Gilchrist, 38 Me. 260; Edwards v. Grand Trunk Ry., 48 Me. 379, 54 Me. 105; Crockett v. Scribner, 64 Me. 447; Finney v. Apgar, 31 N. J. Law, 271 (Cf. Pawelski v. Hargreaves, 47 N. J. Law, 334); Bird v. Muhlinbrink, 1 Rich. Law, 199; Meincke v. Falk, 55 Wis. 427, 13 N. W. 545, distinguishing Hardell v. McClure, 1 Chand. (Wis.) 271, 2 Pin. 289, in which the modern English rule was approved; Cason v. Cheely, 6 Ga. 554; O'Neil v. New York & Silver Peak Min. Co., 3 Nev. 141; Orman v. Hager, 3 N. M. 331, 9 Pac. 363; Mighell v. Dougherty, 86 Iowa, 480, 53 N. W. 402. See, also, Allen v. Jarvis, 20 Conn. 38; Atwater v. Hough, 29 Conn. 509.

[30] Eichelberger v. McCauley, 5 Har. & J. 213; Rentch v. Long, 27 Md. 188.

[31] Brown v. Sanborn, 21 Minn. 402.

[32] Pratt v. Miller, 109 Mo. 78, 18 S. W. 965; Burrell v. Highleyman, 33 Mo. App. 183. Also in Wolfenden v. Wilson, 33 U. C. Q. B. 442.

[33] Benj. Sales, § 108.

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cases the intention is not to make a sale of movables, but to make improvements on the real property of which the article furnished, upon being affixed, becomes a part; and the consideration to be paid is, not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land.[34]

Similarly, a contract to make improvements upon a chattel belonging to the employer is a contract for work, labor, and materials.[35]

Auction Sales.

Although it was questioned by Lord Mansfield whether the statute applied to sales of goods at auction,[36] it is universally held that it applies to them as well as to private sales.[37]

WHAT ARE GOODS, WARES, AND MERCHANDISE.

21. "Goods, wares, and merchandise" comprehend:

(a) All corporeal movable property.

(b) In the United States, generally, (but not in England), incorporeal property, such as shares, promissory notes, bank bills, etc.

(c) Fructus naturales and fructus industriales, the ownership whereof is to pass to the buyer after severance thereof from the soil.

(d) Fructus industriales (perhaps) also when such ownership is to pass before severance.

22. "Goods, wares, and merchandise" do not comprehend:

(a) Fructus naturales, the ownership whereof is to pass before severance [and from the fur-

[34] Tripp v. Armitage, 4 Mees. & W. 687; Clark v. Bulmer, 11 Mees. & W. 243.

[35] Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271.

[36] Simon v. Motivos, 3 Burrows, 1921, 1 Wm. Bl. 599.

[37] Hinde v. Whitehouse, 7 East, 558, per Lord Ellenborough; Kenworthy v. Schofield, 2 Barn. & C. 945; Davis v. Rowell, 2 Pick. 64; Morton v. Dean, 13 Metc. (Mass.) 385; Pike v. Balch, 38 Me. 302; Johnson v. Buck, 35 N. J. Law, 338; Davis v. Robertson, 1 Mill, Const. 71; Sanderlin v. Trustees, R. M. Charlt. (Ga.) 551.

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ther growth whereof the buyer is to derive benefit].[38]

(b) Tenants' fixtures sold while unsevered.

Incorporeal Property—Choses in Action.

In England the term "goods, wares, and merchandise" has been limited to corporeal movable property, and is held not to include shares, stock, documents of title, choses in action, and other incorporeal rights and property.[39] In the United States, however, the term is as a rule held to include incorporeal property, such as stock,[40] bills and notes,[41] bank bills,[42] and accounts.[43] In some states a broader rule is required by the language of the statute, as in New York, California, Wisconsin, and Minnesota, where the

[38] If Marshall v. Green, 1 C. P. Div. 35, and the similar decisions in this country, be good law, the words within the brackets must stand. See post, p. 46.

[39] Humble v. Mitchell, 11 Adol. & E. 205; Knight v. Barber, 16 Mees. & W. 66, 16 L. J. Exch. 18; Bradley v. Holdsworth, 3 Mees. & W. 422; Duncuft v. Albrecht, 12 Sim. 189; Colonial Bank v. Whinney, 30 Ch. Div. 261, 286; Benj. Sales, § 111. See Evans v. Davies [1893] 2 Ch. Div. 216.

[40] Tisdale v. Harris, 20 Pick. 9; Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430; Fine v. Hornsby, 2 Mo. App. 61; Bernhardt v. Walls, 29 Mo. App. 206. See Somerby v. Buntin, 118 Mass. 279; Meehan v. Sharp, 151 Mass. 564, 24 N. E. 907; Green v. Brookins, 23 Mich. 48, 54; Gadsden v. Lance, 1 McMul. Eq. 87. "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." Somerby v. Buntin, supra, per Gray, C. J., and Meehan v. Sharp, supra. But Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, follows the English rule, notwithstanding a dictum to the contrary in Colvin v. Williams, 3 Har. & J. 38.

[41] Baldwin v. Williams, 3 Metc. (Mass.) 367; Gooch v. Holmes, 41 Me. 523; Pray v. Mitchell, 60 Me. 430, 435; Hudson v. Weir, 29 Ala. 294; Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134 (bond and mortgage). Contra, Whittemore v. Gibbs, 24 N. H. 484; Beers v. Crowell, Dud. (Ga.) 28 (United States treasury checks on Bank of U. S.); Vawter v. Griffin, 40 Ind. 600.

[42] Riggs v. Magruder, 2 Cranch, C. C. 143, Fed. Cas. No. 11,828; Gooch v. Holmes, 41 Me. 523. Gold coin, when the subject of a contract of sale, is within the statute. Peabody v. Speyers, 56 N. Y. 230.

[43] Walker v. Supple, 54 Ga. 179.

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provision expressly includes choses in action,[44] and in Florida, where it uses the term "personal property."[45]

Interest in Land—Fourth Section of the Statute.

The fourth section of the statute of frauds, which has been substantially enacted in most states of this country, provides that "no action shall be brought * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." When a contract of sale is made, the subject-matter of which is something attached to the soil, the question frequently arises whether such sale is of an interest in land, and hence whether it is within the fourth section, or whether it is a sale of goods, wares, and merchandise, and hence within the seventeenth section, or whether it is neither. The question which section governs may be of vital importance, because the fourth section requires a written memorandum or note under all circumstances and whatever the amount, while under the seventeenth section the necessity of a writing does not exist if the amount is under £10, or if the provisions in respect of performance or payment have been satisfied.

Fructus Naturales and Fructus Industriales.

Inasmuch as "goods, wares, and merchandise" comprehends all movable corporeal property, an executory contract for the sale of a thing attached to the soil, for example, trees, if the thing is to be severed from the soil before the sale, is within the seventeenth section, and is not within the fourth section, of the statute; for, though the subject of sale be an interest in land when the contract is made, it has, by severance from the soil, become "goods, wares, and merchandises" when the sale is executed.[46] But, if the con-

[44] Artcher v. Zeh, 5 Hill, 200; Peabody v. Speyers, 56 N. Y. 230; Allen v. Aguirre, 7 N. Y. 543; Mayer v. Child, 47 Cal. 142; Spear v. Bach, 82 Wis. 192, 52 N. W. 97.

[45] Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359.

[46] Smith v. Surman, 9 Barn. & C. 561; Washbourn v. Burrows, 1 Exch. 107, per curiam; Watts v. Friend, 10 Barn. & C. 446; Parker v. Staniland, 11 East, 362; Sainsbury v. Matthews, 4 Mees. & W. 343; Whitmarsh v. Walker,

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tract contemplates a present sale, a different question arises, which is to be determined in the case of growing crops upon a somewhat artificial distinction.

A distinction exists between what are known as "fructus naturales," which are the natural product of the soil, as trees and grass, and "fructus industriales," which are the product of annual labor, as wheat or potatoes. Fructus naturales are an interest in land, but fructus industriales are chattels, and not an interest in land. From the character of fructus naturales as an interest in land, it follows that an agreement vesting a present interest in them before severance is within the fourth section. Such, at least, is the prevailing rule in this country,[47] and was supposed to be the law under all circumstances in England[48] until the case of Marshall v. Green,[49] in 1875, in which it was held that a sale of standing timber, to be cut by the purchaser as soon as possible, was within the seventeenth, and not within the fourth, section. It is said by the English editors of Benjamin[50] that this decision is open to criticism, and must be supported either on the ground that title was not to pass until severance, which would bring it within the

1 Metc. (Mass.) 313; Claflin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Drake v. Wells, 11 Allen, 141; White v. Foster, 102 Mass. 375, 378; Fletcher v. Livingston, 153 Mass. 388, 390, 26 N. E. 1001; Banton v. Shorey, 77 Me. 48, 51; Kilmore v. Howlett, 48 N. Y. 569; Boyce v. Washburn, 4 Hun, 792; Upson v. Holmes, 51 Conn. 500. See, also, Slocum v. Seymour, 36 N. J. Law, 138, per Bedle, J.; Green v. North Carolina R. Co., 73 N. C. 524; Owens v. Lewis, 46 Ind. 488; Cool v. Peters Box & Lumber Co., 87 Ind. 531; Brown v. Sanborn, 21 Minn. 402; Benj. Sales, §§ 118, 119; Blackb. Sales, p. 5.

[47] White v. Foster, 102 Mass. 375; Putney v. Day, 6 N. H. 430; Olmstead v. Niles, 7 N. H. 522; Kingsley v. Holbrook, 45 N. H. 313; Howe v. Batchelder, 49 N. H. 204; Green v. Armstrong, 1 Denio, 550; Thomson v. Poor, 10 N. Y. Supp. 597, 57 Hun, 288; Id., 22 N. Y. Supp. 570, 67 Hun, 653; Slocum v. Seymour, 36 N. J. Law, 138; Harrell v. Miller, 35 Miss. 700; Owens v. Lewis, 46 Ind. 489; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90.

[48] Rodwell v. Phillips, 9 Mees. & W. 501; Crosby v. Wadsworth, 6 East, 602; Teal v. Auty, 2 Brod. & B. 99 (trees); Scorell v. Boxall, 1 Younge & J. 396; Anonymous, 1 Ld. Raym. 182, contra.

[49] 1 C. P. Div. 35.

[50] Benj. Sales, § 126. See, also, Kerr, Dig. Law Sales, p. 5 (s).

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principle governing executory contracts of sale above stated, or that it must be taken to have introduced the limitation that, even when the property in fructus naturales passes before severance, if the intention is that the buyer is to derive no benefit from their further growth, the sale is within the seventeenth, and not within the fourth, section. Apparently the judges who decided Marshall v. Green took the latter view of the case, and the same has been taken by some courts in the United States.[51] In a later English case,[52] Chitty, J., refused to apply the limitation to the sale of building materials in a building to be removed by the buyer, and his criticisms apply equally to Marshall v. Green and to the American cases referred to. "It is sold," he says, "as building materials, and, if the intention of the parties prevailed, it might mean that it is sold as a chattel, but the point still is that it is not a chattel at the time of the sale, and the statute of frauds, so far as I can see, does not enable parties to say: 'We will agree to treat this thing as a chattel, when in point of law it is a hereditament.'" In Massachusetts, where the above limitation of the rule is not recognized, the courts construe contracts for the sale of trees and other fructus naturales, even if the trees are to be cut by the purchaser, as executory contracts in which the title is not to pass until severance and conversion into personalty and by which the purchaser has until severance only a revocable license to enter and remove the trees.[53]

[51] Sterling v. Baldwin, 42 Vt. 306; McClintock's Appeal, 71 Pa. St. 365; Cain v. McGuire, 3 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372. See, also, Bostwick v. Leach, 3 Day, 476; Purner v. Piercy, 40 Md. 212; Smith v. Bryan, 5 Md. 141; Foster v. Mabe, 4 Ala. 402; Scoggin v. Slater, 22 Ala. 687. If the timber is to be taken off by the purchaser without specification as to time, the contract is within the fourth section. Huff v. McCauley, 53 Pa. St. 206; Pattison's Appeal, 61 Pa. St. 294; Miller v. Stevens, 100 Mass. 518.

[52] Lavery v. Pursell, 39 Ch. Div. 508, 57 L. J. Ch. Div. 570.

[53] White v. Foster, 102 Mass. 375, 379, and Massachusetts cases cited in note supra. Usher, Sales, § 96. The Massachusetts cases construe in this way contracts which elsewhere would perhaps be construed as intended to pass title before severance, and as hence within the fourth section, but the peculiarity of the Massachusetts cases concerns, at most, the construction of the contract, and not the application of the statute. If the contract grants

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From the character of fructus industriales as chattels, on the other hand, it follows that a sale of them is not within the fourth section.[54] But, though they are chattels,[55] it is an open question whether they are "goods, wares, and merchandises," and consequently within the seventeenth section.[56] Whether fructus industriales include a crop which is neither annual nor permanent, but which affords a crop either the second or third year, or a succession of crops for several years, is a question on which there is little authority; but it would seem that the crop of the first year would be fructus industriales, and that the crops of subsequent years would be fructus naturales, unless, like hops, they require cultivation for each successive crop, in which case they would be fructus industriales till exhausted.[57]

Removable Fixtures.

Removable fixtures are neither within the fourth section[58] nor the seventeenth section;[59] though an executory contract for the

an estate in the trees while growing, the fourth section applies. White v. Foster, supra.

[54] Evans v. Roberts, 5 Barn. & C. 836; Jones v. Flint, 10 Adol. & E. 753; Warwick v. Bruce, 2 Maule & S. 205; Dunne v. Ferguson, Hayes, 540; Backenstoss v. Stahler, 33 Pa. St. 251, 255; Marshall v. Ferguson, 23 Cal. 66; Davis v. McFarlane, 37 Cal. 634; Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Graff v. Fitch, 58 Ill. 373.

[55] Whipple v. Foot, 2 Johns. 418; Newcomb v. Ramer, Id. 421, note a; Brittain v. McKay, 1 Ired. 265; Penhallow v. Dwight, 7 Mass. 34; Westbrook v. Eager, 16 N. J. Law, 81; Bricker v. Hughes, 4 Ind. 146; Bull v. Griswold, 19 Ill. 631.

[56] For dicta in the affirmative: Evans v. Roberts, 5 Barn. & C. 836, per Bayley, J., and Littledale, J.; Marshall v. Green, 1 C. P. Div. 35, 42, per Brett, J.; Dunne v. Ferguson, Hayes, 540, per Joy, C. B.; Marshall v. Ferguson, 23 Cal. 66, per Crocker, J.; Sherry v. Picken, 10 Ind. 375, per Perkins, J. See, also, Ross v. Welch, 11 Gray, 235. Lord Blackburn says that the proposition is "exceedingly questionable." Blackb. Sales (2d Ed.) p. 13; Benj. Sales, § 127; Langd. Cas. Sales, 1031.

[57] Benj. Sales, §§ 128, 129, citing Graves v. Weld, 5 Barn. & Adol. 105. "A growing crop of peaches or other fruit, requiring periodical expense, industry, and attention, * * * may be well classed as fructus industriales." Purner v. Piercy, 40 Md. 212, 223, per Stewart, J.

[58] Heysham v. Dettre, 89 Pa. St. 506; Powell v. McAshan, 28 Mo. 70. "In

[59] Hallen v. Runder, 1 Cromp., M. & R. 266; Lee v. Gaskell, 1 Q. B. Div. 700, 45 Law J. Q. B. 540. See Benj. Sales, § 127.

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sale of fixtures to be severed before the title passed would doubtless be held an executory sale of goods, within the principle previously stated.[60]

WHAT IS A CONTRACT FOR THE PRICE OR VALUE OF £10 ($50).

23. The statute of frauds includes:

(a) An entire contract for the sale of goods and for other objects not within the statute, where the value of the goods exceeds the statutory amount.

(b) An entire contract for the sale of different goods, the joint value whereof exceeds the statutory amouut.

(c) A contract for the sale of goods of unascertained value at the date of the contract, the value whereof is afterwards ascertained to exceed the statutory amount.[61]

The rule that an entire contract for the sale of goods, and for other matters not within the statute, is invalid, if the value of the goods exceeds the statutory amount, was established by Harman v. Reeve,[62] in which the plaintiff agreed to sell to the defendant a mare and foal, which were above the value of £10, and also to agist them and another mare and foal for £30. The statute was held to apply, but the court said that the plaintiff might recover the value of the agistment. In the Massachusetts case of Irvine v. Stone,[63] however, in which a contract for the purchase of a cargo of

the case of fixtures which are not incorporated with, but merely annexed to, the freehold, the rule is well settled that the statute does not apply." Strong v. Doyle, 110 Mass. 92, per Colt, J. But see Conner v. Coffin, 22 N. H. 538.

[60] Kerr, Dig. Sales, p. 6 (t).

[61] See Kerr, Dig. Sales, § 7.

[62] 18 C. B. 587, 25 Law J. C. P. 257. See, also, Astey v. Emery, 4 Maule & S. 262; Cobbold v. Caston, 1 Bing. 399, 8 Moore, 456.

[63] 6 Cush. 508. See, also, McMullen v. Riley, 6 Gray, 500.

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coal at Philadelphia at an agreed price per ton, and for the payment of the freight, was held within the statute, the contract was held also to be unenforceable as to the freight.

The leading case upon the rule that an entire contract for the sale of various articles, neither of which is of the statutory value, but whose value in gross exceeds it, is within the statute, is Baldey v. Parker.[64] In this case the defendant bought at the plaintiff's shop a number of articles, each at a separate price less than £10, the whole amount being £70, and the case was decided upon the ground that the transaction constituted one entire contract. The cases in this country are in harmony with Baldey v. Parker,[65] and they even extend the rule to an auction, where the articles are struck off separately at distinct prices,[66] though in England in such a case a distinct contract arises for each lot.[67]

The rule that the statute applies, although it be not ascertained till after the date of the contract that the value exceeds the statutory amount, was involved in Watts v. Friend,[68] where the sale was of a future crop of turnip seed at a guinea a bushel, and the value of the crop when produced exceeded £10. The point was not argued or mentioned by the court, but the decision has been followed in the United States.[69]

[64] 2 Barn. & C. 37.

[65] Gilman v. Hill, 36 N. H. 318; Gault v. Brown, 48 N. H. 183; Allard v. Greasert, 61 N. Y. 1.

[66] Mills v. Hunt, 17 Wend. 333, 20 Wend. 431; Coffman v. Hampton, 2 Watts & S. 377; Tompkins v. Haas, 2 Pa. St. 74; Kerr v. Shrader, 1 Wkly. Notes Cas. 33; Jenness v. Wendell, 51 N. H. 63. But separate sales of real estate are distinct contracts. Van Eps v. Schenectady, 12 Johns. 436; Robinson v. Green, 3 Metc. (Mass.) 159; Wells v. Day, 124 Mass. 38.

[67] Emmerson v. Heelis, 2 Taunt. 38. See, also, Rugg v. Minett, 11 East, 218, per Le Blanc, J.; Roots v. Dormer, 4 Barn. & Adol. 77; Couston v. Chapman, L. R. 2 H. L. Sc. 250.

[68] 10 Barn. & C. 446.

[69] Carpenter v. Galloway, 73 Ind. 418; Bowman v. Conn, 8 Ind. 58; Brown v. Sanborn, 21 Minn. 402.

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ACCEPTANCE AND RECEIPT.

24. In order to satisfy the exception, in case "the buyer shall accept part of the goods so sold, and actually receive the same," there must be both acceptance and actual receipt.

25. Acceptance may precede, be contemporaneous with, or subsequent to, receipt, and both may be subsequent to the contract of sale.

26. A sample constitutes a "part of the goods," if it be considered by the parties as part of the bulk sold.

Having considered the meaning of the words, "no contract for the sale of goods, wares, or merchandise for the price of £10 or upwards," it remains to consider under what circumstances such contracts "shall be allowed to be good." The section provides that they shall not be allowed to be good, "except (1) the buyer shall accept part of the goods so sold, and actually receive the same; (2) or give something in earnest to bind the bargain, or in part payment; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." [70]

Acceptance and Receipt.

Referring to the first exception, Lord Blackburn says: [71] "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: The buyer must accept, and he must actually receive part of the goods, and the contract will not be good unless he does both; and this is to be borne in mind, for, as there may be an actual receipt without an acceptance, so there may be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the

[70] Benj. Sales, § 138 et seq. [71] Blackb. Sales, 16.

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contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted, them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not. It may even be reasonable to try part of the goods by using them; but, though this is a very actual receipt, it is no acceptance, so long as the buyer can consistently object to the goods as not answering his order."

It is to be observed that the two questions of acceptance and receipt are frequently confused in the cases, and it has sometimes been questioned whether any distinction existed between them.[72] It is clearly established, however, that they are distinct, and that both acceptance and receipt are essential.[73] Acceptance may precede receipt,[74] or receipt may precede acceptance,[75] and both may be subsequent to the contract of sale.[76] Their effect is to prove

[72] Castle v. Sworder, 6 Hurl. & N. 832, 30 Law J. Exch. 310, per Crompton, J., and Cockburn, C. J.

[73] Smith v. Hudson, 6 Best & S. 431, 34 Law J. Q. B. 145; Cusack v. Robinson, 1 Best & S. 299, 30 Law J. Q. B. 261; Bill v. Bament, 9 Mees. & W. 36; Baldey v. Parker, 2 Barn. & C. 37; Saunders v. Topp, 4 Exch. 390; Caulkins v. Hellman, 47 N. Y. 449; Cooke v. Millard, 65 N. Y. 352, 367; Maxwell v. Brown, 39 Me. 98.

[74] Post, p. 54.

[75] Post, p. 55.

[76] Gault v. Brown, 48 N. H. 183, 188; McKnight v. Dunlap, 5 N. Y. 537; Marsh v. Hyde, 3 Gray, 331; Bush v. Holmes, 53 Me. 417; Field v. Runk,

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that there was a contract, the terms of which may then be proved by parol.[77]

Acceptance and Receipt of Part—Sample.

As the statute requires an acceptance and receipt simply of a part, it is immaterial how small such part is.[78] Thus acceptance and receipt of a sample is sufficient, provided it be considered by the parties as part of the bulk sold.[79] It is not sufficient if the sample be not so considered.[80] So, also, acceptance and receipt of a part is sufficient, though the rest of the goods are still unmade,[81] or though the contract embraces different kinds of goods, only one of which is accepted and received.[82]

SAME—ACCEPTANCE.

27. Acceptance is an assent by the buyer that the goods are to be taken by him under and in performance of the contract of sale. Whether the buyer has accepted is a question of his intention, as evidenced by his words and acts. In England (but not in the United States) any dealing with the goods which recognizes a pre-existing contract of sale constitutes an acceptance.

28. If the contract be for the sale of specific goods, the acceptance takes place when the contract is entered into,

22 N. J. Law, 525, 530; McCarthy v. Nash, 14 Minn. 127 (Gil. 95); Ricky v. Tenbroeck, 63 Mo. 563. Acceptance can have no effect after the seller has disaffirmed. Taylor v. Wakefield, 6 El. & Bl. 765. See Washington Ice Co. v. Webster, 62 Me. 341, 361; Brand v. Focht, *42 N. Y. 409.

[77] Tomkinson v. Staight, 25 Law J. C. P. 85, 17 C. B. 697; Garfield v. Paris, 96 U. S. 557, 566.

[78] Garfield v. Paris, 96 U. S. 557 (labels deliverable under a contract for liquors as part of the goods sold); Damon v. Osborn, 1 Pick. 476; Farmer v. Gray, 16 Neb. 401, 20 N. W. 276.

[79] Hinde v. Whitehouse, 7 East, 558; Talver v. West, Holt, 178; Klinitz v. Surry, 5 Esp. 267; Gardner v. Grout, 2 C. B. (N. S.) 340; Brock v. Knower, 37 Hun, 609.

[80] Cooper v. Elston, 7 Term R. 14; Simonds v. Fisher, cited in Gardner v. Grout, 2 C. B. (N. S.) 340; Moore v. Love, 57 Miss. 765. See Carver v. Lane, 4 E. D. Smith, 168.

[81] Scott v. Eastern Counties Ry. Co., 12 Mees. & W. 33.

[82] Elliott v. Thomas, 3 Mees. & W. 170.

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and is proved by the same evidence which proves the contract.

29. CONSTRUCTIVE ACCEPTANCE—If the goods have been received by the buyer, any dealing with them by him as owner is evidence of acceptance.

Lord Blackburn adds at the close of the passage quoted on a preceding page that "on the whole the cases are pretty consistent with these suggestions and with each other, as to what forms an acceptance within the statute, though not as to the strength of the proof required to establish it." [83] The American cases also are pretty consistent with this statement of the law, but in England, as will be seen, an artificial construction has since the passage was written been put upon "acceptance," which is quite inconsistent with the views there expressed. The nature of an acceptance can best be understood by a consideration of the circumstances under which it is held to take place.

If the contract of sale is for specified goods, an acceptance necessarily takes place when the contract is entered into.[84] Thus in Cusack v. Robinson,[85] where the buyer was shown a lot of 156 firkins of butter and agreed to buy the lot, and the goods were forwarded to him, it was held that there was sufficient evidence to justify the jury in finding an acceptance. Blackburn, J., said: "There was sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific goods to be sent to London. This was certainly evidence of an acceptance." In such cases the acceptance of course precedes the receipt. If the goods are ready for deliv-

[83] Blackb. Sales, 17.

[84] Cusack v. Robinson, 1 Best & S. 299, 30 Law J. Q. B. 261; Bog Lead Min. Co. v. Montague, 10 C. B. (N. S.) 481, 489; Cross v. O'Donnell, 44 N. Y. 661; United States Reflector Co. v. Rushton, 7 Daly, 410; Vietor v. Stroock (City Ct. N. Y.) 3 N. Y. Supp. 801; Id. (Com. Pl. N. Y.) 5 N. Y. Supp. 659. See, also, Ex parte Safford, 2 Low. 563, 565, Fed. Cas. No. 12,212; Knight v. Mann, 118 Mass. 143, 145; Hewes v. Jordan, 39 Md. 472, 484; Simpson v. Krumdick, 28 Minn. 352, 355, 10 N. W. 18; Langd. Cas. Sales, 1021.

[85] 1 Best & S. 299, 30 Law J. Q. B. 261.

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ery, an acceptance will readily be implied, for example, from marking the goods with the name of the buyer by his consent,[86] although such marking would not constitute an actual receipt; but, if the goods are not ready for delivery, an acceptance will not readily be implied.[87]

If the contract of sale be for goods which are not specific when the contract is entered into, there can be no acceptance till the seller has indicated to the buyer what goods he proposes to deliver in performance of the contract,[88] and it seems that the buyer is then entitled to a reasonable time to examine the goods before deciding whether to accept them,[89] though he may doubtless waive his right of examination.[90] After the goods have been received by the buyer, his acceptance may be proved by any dealing with

[86] Bill v. Bament, 9 Mees. & W. 36; Hodgson v. Le Bret, 1 Camp. 233; Proctor v. Jones, 2 Car. & P. 532, per Best, C. J.; Saunders v. Topp, 4 Exch. 390, per Alderson, B.; Benj. Sales, § 166, note y; Rappleye v. Adee, 1 Thomp. & C. 127.

[87] Maberley v. Sheppard, 10 Bing. 99.

[88] Langd. Cas. Sales, 1021.

[89] Hunt v. Hecht, 8 Exch. 814; Nicholson v. Bower, 1 El. & El. 172; Smith v. Hudson, 6 Best & S. 431, 34 Law J. Q. B. 145, per Cockburn, C. J.; Langd. Cas. Sales, 1021. In Morton v. Tibbett, post, Lord Campbell says: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." This view may be required by the artificial construction put on "acceptance" by Lord Campbell and the latest English decisions. But, where the term is construed in its natural sense, the right to examine before acceptance or rejection would seem to exist of necessity. See Kent v. Huskinson, 3 Bos. & P. 233.

[90] "It [acceptance] means some act done after the vendee has exercised, or had the means of exercising, his right of rejection." Hunt v. Hecht, 8 Exch. 814, 22 Law J. Exch. 293, per Martin, B. "According to Lord Campbell [Morton v. Tibbett, cited post], there may be an acceptance and receipt of goods by a purchaser within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. I agree with that. But in such case the party must have done something to waive his right to reject the goods." Per Bramwell, B., in Coombs v. Bristol & E. Ry. Co., 3 Hurl. & N. 510, 27 Law J. Exch. 401. Of course, the buyer may waive the right to examine. Currie v. Anderson, 2 El. & El. 592.

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the goods on his part as owner,[91] for example by a resale,[92] and even by his retaining them for such time as to lead to the presumption that he intended to keep them as owner.[93] And a dealing with the goods, such as to constitute an acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves.[94] An acceptance implied from the conduct of the buyer is called a constructive acceptance. Whether the acts or omissions of the buyer amount to a constructive acceptance is a question of fact for the jury, though the question is, of course, to be determined by the court, if the evidence is capable of only one construction.[95] It is sometimes said that an acceptance must be established by some act of the buyer, and that mere words are not enough, but the cases in which such statements occur generally involve simply the proposition that mere words are not enough to constitute acceptance and receipt,[96] and there is on principle no reason why the acceptance may not be evidenced by

[91] Beaumont v. Brengeri, 5 C. B. 301; Parker v. Wallis, 5 El. & Bl. 21; Garfield v. Paris, 96 U. S. 557, 563; Vincent v. Germond, 11 Johns. 282; Gray v. Davis, 10 N. Y. 285; Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279; Townsend v. Hargraves, 118 Mass. 325, 332; Ex parte Safford, 2 Low. 563, Fed. Cas. No. 12,212; Barkalow v. Pfeiffer, 38 Ind. 214; Bacon v. Eccles, 43 Wis. 227, 238; Sullivan v. Sullivan, 70 Mich. 583, 38 N. W. 472.

[92] Chaplin v. Rogers, 1 East, 195; Hill v. McDonald, 17 Wis. 100; Phillips v. Ocmulgee Mills, 55 Ga. 633; Marshall v. Ferguson, 23 Cal. 66.

[93] Bushel v. Wheeler, 15 Q. B. 442; Coleman v. Gibson, 1 Moody & R. 168; Currie v. Anderson, 2 El. & El. 592; Farina v. Home, 16 Mees. & W. 119; Borrowscale v. Bosworth, 99 Mass. 379; Spencer v. Hale, 30 Vt. 314; Downs v. Marsh, 29 Conn. 409; Gaff v. Homeyer, 59 Mo. 345; Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495.

[94] Currie v. Anderson, 2 El. & El. 592, 29 Law J. Q. B. 87; Meredith v. Meigh, 2 El. & Bl. 364, 22 Law J. Q. B. 401. See Quintard v. Bacon, 99 Mass. 185; Rodgers v. Phillips, 40 N. Y. 519.

[95] Edan v. Dudfield, 1 Q. B. 302, per Denman, C. J.; Bushel v. Wheeler, 15 Q. B. 442, per Coleman and Williams, JJ.; Garfield v. Paris, 96 U. S. 557, 563; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369; Stone v. Browning, 68 N. Y. 598; Shepherd v. Pressey, 32 N. H. 49, 57.

[96] Shindler v. Houston, 1 N. Y. 261; Bailey v. Ogden, 3 Johns. 421; Kellogg v. Witherhead, 6 Thomp. & C. 525; Dole v. Stimpson, 21 Pick. 384; Edwards v. Grand Trunk Ry. Co., 54 Me. 105; Kirby v. Johnson, 22 Mo. 354; Northrup v. Cook, 39 Mo. 208; Clark v. Labreche, 63 N. H. 397.

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the buyer's declarations.[97] The receipt of goods by a carrier or wharfinger appointed by the buyer does not constitute an acceptance. These agents have authority to receive, but not to accept.[98]

Whether Acceptance must be in Performance of the Contract—In England.

Beginning with the case of Morton v. Tibbett,[99] a different construction began in England to be placed on "acceptance," and it has become established that the acceptance need not be in performance of the contract, but that any dealing with the goods which recognizes a pre-existing contract of sale constitutes an acceptance.[100] In Morton v. Tibbett, the defendant had made a verbal agreement with the plaintiff for the purchase of 50 quarters of wheat according to sample, each quarter to be of a specified weight, and the wheat was received on the defendant's lighter for conveyance to its destination, where it duly arrived, but in the meantime the defendant resold it on the same understanding as to weight. The wheat on arrival was rejected by the second purchaser for short weight, and was thereupon rejected by the defendant on the same ground. It was held that the defendant had accepted, and Lord Campbell, after observing that it would be open to the buyer, after acceptance of a part, "to object at all events to the quantity and quality of the residue," announced: "We are of the opinion that * * * there may be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different

[97] Caulkins v. Hellman, 47 N. Y. 449; Shepherd v. Pressey, 32 N. H. 49, 58; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771; Galvin v. MacKenzie, 21 Or. 184, 27 Pac. 1039. See Stone v. Browning, 68 N. Y. 598. Acceptance is evidence by mere words, where the contract is for specific goods, supra.

[98] Hanson v. Armitage, 5 Barn. & Ald. 557; Norman v. Phillips, 14 Mees & W. 276; Hunt v. Hecht, 8 Exch. 814; Meredith v. Meigh, 2 El. & Bl. 370, 22 Law J. Q. B. 401, overruling Hart v. Sattley, 3 Camp. 528; Allerd v. Greasert, 61 N. Y. 1, 5; Jones v. Mechanics' Bank, 29 Md. 287; Johnson v. Cuttle, 105 Mass. 447; Kelwert v. Meyer, 62 Ind. 587; Grimes v. Van Vechten, 20 Mich. 410; Billin v. Henkel, 9 Colo. 394, 13 Pac. 420; Fontaine v. Bush, 40 Minn. 141, 41 N. W. 465; Spencer v. Hale, 30 Vt. 314, contra.

[99] 15 Q. B. 428, 19 Law J. Q. B. 382.

[100] Chalm. Sale, 121; Kerr, Dig. Sales, § 10.

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acceptance from that which affords exclusive evidence of the contract having been fulfilled. We are therefore of the opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." It would seem that the resale before examination was such an act of ownership as was inconsistent with the continuance of the right of property in the seller, that the defendant had thereby waived his right to reject the wheat, and that his conduct was sufficient evidence of an acceptance.[101] But the construction announced by Lord Campbell, that acceptance does not preclude rejection, has, after some dissent,[102] prevailed, and was adopted by the court of appeals in the recent case of Page v. Morgan,[103] in which the natural meaning of "accept" is entirely abandoned. There the buyer examined the goods simply to see if they agreed with the sample, and rejected them as not equal to sample, and it was held that this constituted an acceptance. Brett, M. R., in giving judgment, said: "All that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and the goods were sent to fulfill that contract." "I rely * * * on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods, involving an admission that there was a contract."

[101] Benj. Sales, § 150.

[102] Hunt v. Hecht, 8 Exch. 814, 22 Law J. Exch. 293; Coombs v. Bristol & E. Ry. Co., 3 Hurl. & N. 510, 27 Law J. Exch. 401. See, also, Smith v. Hudson, 6 Best & S. 431, 34 Law J. Q. B. 145; Castle v. Sworder, 6 Hurl. & N. 832, 30 Law J. Exch. 310, per Cockburn, C. J.

[103] 15 Q. B. Div. 228. See, also, Cusack v. Robinson, 1 Best & S. 299, 30 Law J. Q. B. 261, per Blackburn, J.; Currie v. Anderson, 2 El. & El. 592, 29 Law J. Q. B. 87, per Crompton, J.; Kibble v. Gough, 38 Law T. (N. S.) 204; Rickard v. Moore, Id. 841. But where the buyer inspected the goods at the carrier's wharf on arrival, and wrote across the note of advice, "Refused, not according to representation," and 10 days later notified his refusal to the seller, it was held no acceptance, and Page v. Morgan, 15 Q. B. Div. 228, was distinguished. Taylor v. Smith [1893] 2 Q. B. 65.

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Same—In the United States.

In the United States, however, the later artificial construction of the English courts has never been adopted, and it is clearly established, in accordance with the statement of the law made by Lord Blackburn,[104] and with the earlier English cases,[105] that the acceptance must be in performance of the contract; that is, "there must be an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract." [106] As was observed in Phillips v. Bistolli,[107] in a passage frequently quoted in the American cases: "There must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner." And in the leading case of Caulkins v. Hellman, Rapallo, J., said: "Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required." [108] This view is not inconsistent with the statement of Lord Campbell in Morton v. Tibbett that it would be open to the buyer, after acceptance of a part, to object to the quantity or quality of the residue,—a principle which is fully recognized by the American cases.[109] It is enough if the part re-

[104] Ante, p. 51.

[105] Howe v. Palmer, 3 Barn. & Ald. 321; Hanson v. Armitage, 5 Barn. & Ald. 557; Phillips v. Bistolli, 2 Barn. & C. 511; Smith v. Surnam, 9 Barn. & C. 561; Acebal v. Levy, 10 Bing. 376; Norman v. Phillips, 14 Mees. & W. 277.

[106] Caulkins v. Hellman, 47 N. Y. 449; Stone v. Browning, 51 N. Y. 211, 68 N. Y. 598; Cooke v. Millard, 65 N. Y. 352, 370; Knight v. Mann, 118 Mass. 143, 120 Mass. 219; Meehan v. Sharp, 151 Mass. 564, 24 N. E. 907; Shepherd v. Pressey, 32 N. H. 49; Gorham v. Fisher, 30 Vt. 428; Smith v. Fisher, 59 Vt. 53, 7 Atl. 816; Hewes v. Jordan, 39 Md. 472; Bacon v. Eccles, 43 Wis. 227; Scotten v. Sutter, 37 Mich. 526; Simpson v. Krumdick, 28 Minn. 352, 354, 10 N. W. 18; Jamison v. Simon, 68 Cal. 17, 8 Pac. 502; Garfield v. Paris, 96 U. S. 567; Meyer v. Thompson, 16 Or. 194, 18 Pac. 16; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771.

[107] 2 Barn. & C. 511.

[108] 47 N. Y. 449.

[109] Garfield v. Paris, 96 U. S. 557, 562; Hewes v. Jordan, 39 Md. 472, 483. In Remick v. Sandford, 120 Mass. 309, 316, it is said by Devens, J., that "if

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ceived is accepted as a partial fulfillment of the contract. It must, however, distinctly appear that the goods were accepted under the contract.[110] This was strongly illustrated in Atherton v. Newhall,[111] where a small part of the goods was delivered by an expressman, and the buyer, having learned that the rest of the goods had been destroyed by fire, at once notified the seller that he would pay only for the part received. It was held that there was no acceptance. Gray, C. J., said: "The acceptance by the buyer of the part brought by the expressman was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with the intention to perform the whole contract, and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received."

SAME—ACTUAL RECEIPT.

30. Actual receipt is the taking possession of the goods by the buyer with the seller's consent. It implies such a transfer of possession as to divest the seller's lien, and may be effected:

(a) By the actual delivery of the goods by the seller to the buyer or to his agent; or

(b) By agreement.

31. BY AGREEMENT—An actual receipt takes place by agreement:

(a) When the goods are in the actual possession of the seller, if he becomes bailee of the goods for the buyer.

the buyer accepts the goods as those which he purchased he may afterwards reject them if they are not what they were warranted to be, but the statute is satisfied." This, however, must rest on the rule peculiar to Massachusetts, and some other states, that the buyer may avoid the sale for breach of warranty. See post, p. 244.

[110] Davis v. Eastman, 1 Allen, 422; Townsend v. Hargraves, 118 Mass. 325; Atherton v. Newhall, 123 Mass. 141; Van Woert v. Albany & S. R. Co., 67 N. Y. 538; Matthiessen & W. Refining Co. v. McMahon, 38 N. J. Law, 538.

[111] 123 Mass. 141.

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(b) When the goods are in the custody of a third person as bailee of the seller, if such third person, with the consent of the seller, becomes bailee of the buyer.

(c) When the goods are in the custody of the buyer, as bailee of the seller, if with the consent of the seller he ceases to hold them as bailee, and holds them as owner.

Where acceptance is shown, a very liberal construction is placed on actual receipt.[112] The simplest way in which a transfer of possession may be effected is by the removal of the goods by the buyer or his agent.[113] Receipt, however, implies delivery,[114] and the receipt must be with the seller's consent, and with the intention on his part of transferring possession to the buyer as owner. The test for determining whether there has been such a transfer of possession is whether the seller has parted with his lien.[115] If the goods are to be forwarded to the buyer, the time when the possession is transferred depends on the character of the person by whom the goods are carried. If they are carried by the seller's servant or agent, there is, of course, no transfer of possession so long as they remain in his hands.[116] If they are forwarded by a carrier designated by the buyer, an actual receipt takes place when they are delivered to him for carriage.[117] And, where goods are forwarded by a common car-

[112] Chalm. Sale, 121.

[113] Blackb. Sales, 25; Benj. Sales, § 180; Rodgers v. Jones, 129 Mass. 420, 422.

[114] Saunders v. Topp, 4 Exch. 390, per Parke, B.

[115] Phillips v. Bistolli, 2 Barn. & C. 511; Baldey v. Parker, Id. 37, per Holroyd, J.; Bill v. Bament, 9 Mees. & W. 37; Cusack v. Robinson, 30 Law J. Q. B. 264, 1 Best. & S. 299; Castle v. Sworder, 29 Law J. Exch. 235, 30 Law J. Exch. 310, 6 Hurl. & N. 832; Safford v. McDonough, 120 Mass. 290; Rodgers v. Jones, 129 Mass. 420; Ex parte Safford, 2 Low. 563, Fed. Cas. No. 12,212; Green v. Merriam, 28 Vt. 801; Marsh v. Rouse, 44 N. Y. 643; Stone v. Browning, 51 N. Y. 211; Maxwell v. Brown, 39 Me. 98, 103; Gardet v. Belknap, 1 Cal. 399; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369; post, p. 210.

[116] Grey v. Cary, 9 Daly, 363; Agnew v. Dumas, 64 Vt. 147, 23 Atl. 634.

[117] Bullock v. Tschergi, 4 McCrary, 184, 13 Fed. 345; Cross v. O'Donnell, 44 N. Y. 661; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17. See, also, cases cited ante, p. 57, note 98, and post, p. 195.

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rier, the carrier is, in the absence of special agreement, regarded as the agent of the buyer, and the result is the same as if the carrier were specially designated by him.[118] The seller may, however, preserve his lien by reserving to himself the jus disponendi, as by taking from the carrier a bill of lading to his own order, and in such a case delivery to the carrier does not constitute an actual receipt.[119]

Actual Receipt by Agreement.

The possession of the goods may, however, be transferred and an actual receipt take place, by agreement, without the physical delivery of the goods.

Same—When Goods are in Possession of Seller.

If the goods are in the possession of the seller at the time of the contract, an actual receipt takes place if the parties agree that the seller shall cease to hold as owner, and shall assume the character of bailee or agent of the buyer in respect to the custody of the goods, the possession of the seller being by the agreement converted into the possession of the buyer.[120] A leading case on this point is Elmore v. Stone,[121] where the buyer of horses left them with the seller at livery. It was held that as soon as the seller consented to keep them at livery his possession was changed, and that from that time he held, not as owner, but as any other liveryman might do. But an agreement to hold in this changed character will not readily be presumed, and it must distinctly appear that the seller has consented to abandon his lien.[122] Some cases even hold that a mere agreement that the seller shall hold as bailee is not enough,

[118] Post, p. 195.

[119] Post, p. 104.

[120] Elmore v. Stone, 1 Taunt. 458; Beaumont v. Brengeri, 5 C. B. 301; Marvin v. Wallis, 6 El. & Bl. 726, 25 Law J. Q. B. 369; Castle v. Sworder, 29 Law J. Exch. 235, 30 Law J. Exch. 310, 6 Hurl. & N. 832; Cusack v. Robinson, 1 Best & S. 299, per Blackburn, J.; Green v. Merriam, 28 Vt. 801; Means v. Williamson, 37 Me. 556; Ex parte Safford, 2 Low. 563, Fed. Cas. No. 12,212; Janvrin v. Maxwell, 23 Wis. 51; Rodgers v. Jones, 129 Mass. 420, 422; Safford v. McDonough, 120 Mass. 290, 291; Webster v. Anderson, 42 Mich. 554, 4 N. W. 288. Post, p. 180.

[121] 1 Taunt. 458.

[122] Tempest v. Fitzgerald, 3 Barn. & Ald. 680; Carter v. Toussaint, 5 Barn. & Ald. 855; Holmes v. Hoskins, 9 Exch. 753. See Blackb. Sales, 26; post, p. 210.

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and that some act is necessary to establish the changed character of the ownership;[123] but on principle it would seem that the only question is whether the agreement is distinctly established.[124]

Same—When Goods are in Possession of Third Person.

If the goods at the time of the contract are in the custody of a third person as bailee, an actual receipt takes place when the buyer, the seller, and the bailee agree that the latter shall cease to hold for the seller, and shall hold for the buyer, or, as is sometimes said, when the bailee, with the seller's consent, attorns to the buyer.[125] The possession of the agent being, in contemplation of law, the possession of the principal, a transfer of possession is thus effected by simply constituting the custodian the agent of the buyer. The consent of all parties is, of course, essential, and therefore an order from the seller to a warehouseman, wharfinger, carrier, or other bailee to deliver the goods to the buyer will be inoperative to transfer the possession, unless the bailee attorns.[126]

[123] Matthiessen & W. Refining Co. v. McMahon, 38 N. J. Law, 536; Kirby v. Johnson, 22 Mo. 354; Bowers v. Anderson, 49 Ga. 143; Malone v. Plato, 22 Cal. 103. It is said in Shindler v. Houston, 1 N. Y. 261, and some other cases (ante, p. 56), that mere words cannot constitute acceptance and receipt, and that superadded to the language of the contract there must be some acts of the parties amounting to a change of possession. See, also, Bailey v. Ogden, 3 Johns. 399; Ely v. Ormsby, 12 Barb. 570; Hallenbeck v. Cochran, 20 Hun, 416. In those cases there was nothing to show a change of possession from that of owner to that of bailee. But in Rappleye v. Adee, 65 Barb. 589, where the sheep sold were separated from the rest of the seller's flock, the buyer's mark put upon them, and the parties agreed to let them run with the seller's sheep for a few days, it was held that the evidence warranted the jury in finding delivery and acceptance, and that the rule of Shindler v. Houston was properly applied. See, also, Wylie v. Kelly, 41 Barb. 594.

[124] Benj. Sales, § 182.

[125] Bentall v. Burn, 3 Barn. & C. 423; Farina v. Home, 16 Mees. & W. 119; Simmonds v. Humble, 13 C. B. (N. S.) 258; Townsend v. Hargraves, 118 Mass. 325, 332; Bassett v. Camp, 54 Vt. 232; post, p. 210.

[126] Cases cited in note 125, supra. But where the goods were in a United States bonded warehouse, and the duties were unpaid, it was held that an attornment by the warehouseman could have no effect to change the possession, since the goods were in possession of the United States, and the warehouseman was not the bailee of the seller. In re Clifford, 2 Sawy. 428, Fed. Cas. No. 2,893.

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If, however, the goods are on the premises of a third person, who is not bailee, as timber lying at the disposal of the seller on land of a person from whom he bought it, or at a public wharf, it seems that possession may be transferred by the mere agreement of the buyer and seller.[127]

Same—When Goods are in Possession of Buyer.

If the goods, at the time of the contract, are already in the possession of the buyer, an actual receipt takes place when the parties agree that the latter shall cease to hold them as bailee, and shall hold them as owner.[128] Thus, in Lillywhite v. Devereux,[129] it is said that if the buyer, under such circumstances, deals with the goods in a manner inconsistent with the supposition that his former possession remains unchanged, he may be said to have accepted and actually received them; the court apparently taking the view that the consent of the seller to the transfer of possession was given by entering into the contract, and that the same acts on the part of the seller which were evidence of an acceptance were also evidence that he had begun to hold in the character of owner.

EARNEST OR PART PAYMENT.

32. Earnest is something of value, not forming part of the price given, and received to mark the final assent of the parties to the bargain.

33. Part payment may be made at or subsequently to the time of the contract of sale, either in money or any-

[127] Tansley v. Turner, 2 Bing. N. C. 151; Cooper v. Bill, 3 Hurl. & C. 722; Marshall v. Green, 1 C. P. Div. 35, per Grove, J.; Leonard v. Davis, 1 Black, 476; Thompson v. Baltimore & O. R. Co., 28 Md. 396; Brewster v. Leith, 1 Minn. 56 (Gil. 40); Langd. Cas. Sales, 1023; Benj. Sales, § 178. So of logs floating in the river. Post, p. 180.

[128] Edan v. Dudfield, 1 Q. B. 306; Lillywhite v. Devereux, 15 Mees. & W. 285; Snider v. Thrall, 56 Wis. 674, 14 N. W. 814; Langd. Cas. Sales, 1023; Benj. Sales, § 173; Cf. Markham v. Jaudon, 41 N. Y. 235, 242; Brown v. Warren, 43 N. H. 430; Dorsey v. Pike, 50 Hun, 534, 3 N. Y. Supp. 730. Post, p. 210.

[129] 15 Mees. & W. 285.

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thing of value, or by the actual extinguishment of an existing indebtedness by means of an agreement independent of the contract of sale.

Earnest.

The giving of earnest was formerly a prevalent custom in England, but it has fallen so much into disuse that the provision in respect to it is of little practical importance. Earnest may be money or some gift or token given [130] by the buyer to the seller to mark the final assent of both to the bargain.[131] It follows that earnest and part payment are distinct.[132] In a Massachusetts case,[133] however, it was said that earnest is regarded as part payment of the price,—a dictum which was hardly necessary to support the decision that money deposited with a third person by the parties, to be paid to either as a forfeiture if the other should neglect to fulfil his part of the contract, was not given in earnest. The thing must have some value, and on this ground a note given by the buyer for the price, and void for want of consideration, could not be regarded as given in earnest.[134]

Part Payment.

The part payment, like the acceptance and receipt, may be subsequent to the contract of sale,[135] unless, as in some states, the statute expressly provides that it must be at the time of the contract.[136] The payment must, of course, be accepted.[137]

[130] Where the buyer drew a shilling across the seller's hand, which was called "striking a bargain," but kept the coin, the statute was not satisfied. Blenkinsop v. Clayton, 7 Taunt. 597.

[131] Brac. 1, 2, c. 27.

[132] Benj. Sales, § 189; Kerr, Dig. Sale, § 16; Howe v. Smith, 27 Ch. Div. 89, 101, per Fry, L. J.

[133] Howe v. Hayward, 108 Mass. 54. See, also, Noakes v. Morey, 30 Ind. 103.

[134] Krohn v. Bantz, 68 Ind. 277.

[135] Walker v. Nussey, 16 Mees. & W. 302, per Parke, B.; Thompson v. Alger, 12 Metc. (Mass.) 428, 435; Marsh v. Hyde, 3 Gray, 331.

[136] Hunter v. Wetsell, 57 N. Y. 375, 84 N. Y. 549; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65; Bates v. Cheesbro, 32 Wis. 594; Kerkhof v. Atlas Paper Co., 68 Wis. 674, 32 N. W. 766.

[137] Edgerton v. Hodge, 41 Vt. 676.

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Payment need not be in money, but may be by means of anything of value which by mutual agreement is given by the buyer, and accepted by the seller, on account or in part satisfaction of the price.[138] Thus it would seem that the transfer of a bill or note would suffice;[139] and, under the New York statute requiring payment at the time, the delivery of a check has been held sufficient.[140] But the delivery of the buyer's note does not operate as payment.[141] Nor does a mere agreement, forming part of the contract of sale, to set off a debt due to the buyer constitute payment.[142] Such an agreement, to be effective, must be by independent contract,[143] and many cases even hold that mere words are not sufficient, and that some act, such as the surrender or cancellation of the evidence of the indebtedness, or a receipt, is requisite.[144] But, on principle, any independent verbal agreement, whereby the indebtedness is extinguished, would seem to be sufficient.[145]

THE NOTE OR MEMORANDUM.

34. The note or memorandum must state:

(a) The names or descriptions of the parties in their respective capacities as seller and buyer.

[138] White v. Drew, 56 How. Pr. 53. Surrender of note of seller held by buyer. Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832; Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24; Benj. Sales, § 194.

[139] Chamberlyn v. Delarive, 2 Wils. 353; Kearslake v. Morgan, 5 Term R. 513; Griffiths v. Owen, 13 Mees. & W. 58.

[140] Hunter v. Wetsell, 84 N. Y. 549.

[141] Krohn v. Bantz, 68 Ind. 277; Combs v. Bateman, 10 Barb. 573; Hooker v. Knab, 26 Wis. 511.

[142] Walker v. Nussey, 16 Mees. & W. 302; Artcher v. Zeh, 5 Hill, 200; Mattice v. Allen, *42 N. Y. 493; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6; Matthiessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536.

[143] Walker v. Nussey, 16 Mees. & W. 302, per Parke, B.; Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

[144] See Artcher v. Zeh, Mattice v. Allen, Pitney v. Glen's Falls Ins. Co., Matthiessen & W. Refining Co. v. McMahon's Adm'r, cited in note 142.

[145] Dow v. Worthen, 37 Vt. 108. An agreement that the buyer shall pay a debt due by the seller to a third person assented to by the latter. Cotterill v. Stevens, 10 Wis. 366; Langd. Cas. Sales, 1037.

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(b) The price, if agreed on.

(c) The goods sold.

(d) Any other material terms of the contract, except that it need not state the consideration of the promise of the party to be charged.

35. The note or memorandum may be made at any time before action brought, and may be written on separate papers, provided they are all signed by the party to be charged or his agent, or that such as are not so signed are attached to or referred to in a signed paper.

36. The note or memorandum need not be delivered to the party seeking to enforce the contract; it is sufficient if it admits the contract.

Difference between Contract in Writing and Note or Memorandum.

At common law, the parties to a contract may reduce it to writing, or may agree upon some existing writing as containing the terms of contract, and when they do so they are bound by the terms of the written contract, and are not allowed to offer proof of different or additional terms. The same rule applies to a writing which they agree upon as containing part of the terms of the contract; for example, the specifications of an article to be manufactured. In all such cases the contract, so far as it is reduced to writing, cannot, in general, be proved by any other means than by the writing. This result takes place, of course, only when the writing is by the consent of both parties agreed upon as containing their contract, in whole or in part.[146] The statute of frauds leaves the common-law rule in respect to contracts in writing as it was before. If the contract be in writing, the writing must be proved as containing the only legal evidence of the terms of the contract, even though the statute has been satisfied by acceptance and receipt, or by earnest or part payment, and although, for lack of the signature of the party to be charged, the writing would not be sufficient as a statutory note or memorandum.[147] The note or memorandum differs from a contract in writing, in that under the

[146] Blackb. Sales, 40–42; Benj. Sales, §§ 201–206.

[147] Sievewright v. Archibald, 17 Q. B. 103, per Erle, J.

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statute any writing which contains the terms of the contract is sufficient, if it be signed by the party to be charged. A contract in writing, indeed, if signed by the party to be charged, will satisfy the statute, but a mere admission in writing of an antecedent oral contract is sufficient.[148] In other words, the statute may be satisfied in writing in two ways: By putting the contract in writing, or by furnishing evidence in writing of an oral contract.[149] A mere note or memorandum, however, unlike a contract in writing, need not be introduced in evidence at all, if the contract can be brought within the first or second exceptions, though in such a case it may still be introduced as an admission of the terms of the contract, of which it would be strong, though not conclusive, evidence.[150]

Note or Memorandum in the Nature of an Admission.

The note or memorandum is in the nature of an admission of the contract by the party to be charged. Thus it may be in the form of a letter, and it is immaterial to whom the letter is addressed,—whether to a third person [151] or to the writer's own agent.[152] The memorandum is sufficient though never delivered; [153] for example, if it be in the form of a resolution of a corporation sought to be charged.[154] It is even sufficient if it is in the form of a letter repudiating,[155] but not denying, the existence of the contract.[156] It

[148] Sievewright v. Archibald, 17 Q. B. 103, per Patteson, J.; Saunderson v. Jackson, 2 Bos. & P. 238, per Lord Eldon; Parton v. Crofts, 33 Law J. C. P. 189, per Erle, C. J.; Bailey v. Sweeting, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150; Lerned v. Wannemacher, 9 Allen, 412, 416; Townsend v. Hargraves, 118 Mass. 325, 334; Bird v. Munroe, 66 Me. 337.

[149] Langd. Cas. Sales, 1032.

[150] Blackb. Sales, 42.

[151] Peabody v. Speyers, 56 N. Y. 230; Moore v. Mountcastle, 61 Mo. 424.

[152] Gibson v. Holland, L. R. 1 C. P. 1, 35 Law J. C. P. 5; Kleeman v. Collins, 9 Bush, 460, 467; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835.

[153] Drury v. Young, 58 Md. 546.

[154] Johnson v. Trinity Church, 11 Allen, 123; Tufts v. Plymouth Gold Min. Co., 14 Allen, 407; Argus Co. v. Mayor, etc., of Albany, 55 N. Y. 495.

[155] Bailey v. Sweeting, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150; Wilkinson v. Evans, L. R. 1 C. P., at page 411; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 8 S. E. 8; Drury v. Young, 58 Md. 546.

[156] Bacon v. Eccles, 43 Wis. 227.

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is enough if the memorandum be in existence at the time the action is brought.[157] But the memorandum cannot be regarded as being nothing more than evidence of the contract, since it is held that its existence is a condition precedent to the right of action.[158]

What the Note or Memorandum must Contain—Names of Parties.

The statute itself expressly provides that the name of the party to be charged must be signed, and it has been settled by the decisions that the name or description of the other party must appear, since it takes two to make a bargain, and otherwise no contract is shown. The memorandum must not only contain the names or descriptions of the buyer[159] and of the seller,[160] but must show which is buyer and which is seller.[161] A description of the parties, however, instead of their names, is sufficient, and parol evidence is admissible to identify the persons described.[162] Thus, when an agent signs his name without mentioning a principal, the other party may show that the contract was really made with the principal, who has chosen to describe himself by the name of his

[157] See cases cited in next note.

[158] Bill v. Bament, 9 Mees. & W. 36. See, also, Gibson v. Holland, L. R. 1 C. P. 1, 35 Law J. C. P. 5, per Willes, J.; Lucas v. Dixon, 22 Q. B. Div. 357; Bird v. Munroe, 66 Me. 337; Phillips v. Ocmulgee Mills, 55 Ga. 633.

[159] Champion v. Plummer, 1 Bos. & P. (N. R.) 252. See, also, Sanborn v. Flagler, 9 Allen, 474, 476; Williams v. Robinson, 73 Me. 186; McConnell v. Brillhart, 17 Ill. 354; Mayer v. Adrian, 77 N. C. 83; Harvey v. Stevens, 43 Vt. 657.

[160] Klinitz v. Surry, 5 Esp. 267; Vandenbergh v. Spooner, L. R. 1 Exch. 316, 35 Law J. Exch. 201; Grafton v. Cummings, 99 U. S. 100; Sherburne v. Shaw, 1 N. H. 157; McElroy v. Seery, 61 Md. 389; Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044.

[161] Vandenbergh v. Spooner, L. R. 1 Exch. 316, 35 Law J. Exch. 201; Bailey v. Ogden, 3 Johns. 399; Calkins v. Falk, 1 Abb. Dec. 291; Nichols v. Johnson, 10 Conn. 192; Sanborn v. Flagler, 9 Allen, 474, 477. The requirement that the writing should show which is seller and which buyer has been relaxed in some cases, where parol evidence—for example, proof of the occupation of the parties—has been admitted to raise an inference on this point. Newell v. Radford, L. R. 3 C. P. 52, 37 Law J. C. P. 1; Salmon Falls Manuf'g Co. v. Goddard, 14 How. 446. But see dissenting opinion of Curtis, J., in the latter case, and Grafton v. Cummings, 99 U. S. 100, 111.

[162] Commins v. Scott, L. R. 20 Eq. 11; Catling v. King, 5 Ch. Div. 660; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950; Jones v. Dow, 142 Mass. 130, 7 N. E. 830.

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agent, just as it would be admissible to show his identity if he had used a feigned name.[163] But the converse of the proposition does not hold true, and an agent so contracting cannot show by parol that he did not intend to bind himself, since this would be to contradict the memorandum.[164]

Same—Price.

The fourth section of the statute requires that "the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," while the seventeenth section simply requires that "some note or memorandum in writing of the said bargain be made." A fine distinction has been drawn in some cases between "agreement" and "bargain," the cases which maintain the distinction holding that "agreement" includes all the stipulations of the contract, and that, since the promise of one party is the consideration for the promise of the other, the memorandum must contain both promises.[165] But it is held, even by the courts which hold that a memorandum under the fourth section must state the consideration, that under the seventeenth section it is enough if the memorandum contain the promise or undertaking of the party to be charged, and that it need make no express reference to the promise of the other party.[166] And this rule is applied even where the memorandum is in the form of a mere offer, the acceptance of which is verbal,[167] though it is diffi-

[163] Trueman v. Loder, 11 Adol. & E. 589; Dykers v. Townsend, 24 N. Y. 57; Sanborn v. Flagler, 9 Allen, 474, 477; Gowen v. Klous, 101 Mass. 449; Briggs v. Munchon, 56 Mo. 467.

[164] Higgins v. Senior, 8 Mees. & W. 834. See, also, Nash v. Towne, 5 Wall. 689; Chandler v. Coe, 54 N. H. 561; Coleman v. First Nat. Bank, 53 N. Y. 388.

[165] The leading case holding that under the fourth section the memorandum must state the consideration is Wain v. Warlters, 5 East, 10, 2 Smith, Lead. Cas. (8th Ed.) 251. Many states have refused to follow it. See Packard v. Richardson, 17 Mass. 122, the leading case against the rule there decided. Benj. Sales (Corbin's 6th Am. Ed.) § 232, and note; Id. § 248.

[166] Egerton v. Mathews, 6 East, 307; Sarl v. Bourdillon, 1 C. B. (N. S.) 188; Smith v. Ide, 3 Vt. 290; Williams v. Robinson, 73 Me. 186; Kerr, Dig. Sale, § 18; Langd. Cas. Sales, 1032. In some states there is an express provision either that the consideration must, or that it need not, be stated. See Browne, St. Frauds, §§ 376, 377.

[167] Warner v. Willington, 3 Drew, 523, 25 Law J. Ch. 662; Reuss v. Picks-

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cult to comprehend how a writing can be called a "memorandum" of a bargain when the bargain was not yet made at the time the writing was signed.[168] But the price constitutes a material part of the bargain, and must be stated;[169] though if the price be not agreed upon, but is implied, a memorandum which states no price is sufficient.[170]

Same—Subject-Matter and Other Terms.

The memorandum must designate the goods sold,[171] and all the other terms and conditions of the contract, so far as to enable the court to ascertain what they were.[172] But parol evidence is admissible, as in the case of other writings, to identify the subject-

ley, L. R. 1 Exch. 342, 35 Law J. Exch. 218; Sanborn v. Flagler, 9 Allen, 474; Justice v. Lang, 42 N. Y. 493; Farwell v. Lowther, 18 Ill. 252; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

[168] See Watts v. Ainsworth, 1 Hurl. & C. 83, 31 Law J. Exch. 448, per Bramwell, B.; Banks v. Chas. P. Harris Manuf'g Co., 20 Fed. 667.

[169] Elmore v. Kingscote, 5 Barn. & C. 583; Acebal v. Levy, 10 Bing. 376; Goodman v. Griffiths, 1 Hurl. & N. 574, 26 Law J. Exch. 145; Ide v. Stanton, 15 Vt. 685; Ashcroft v. Butterworth, 136 Mass. 511; James v. Muir, 33 Mich. 223; Stone v. Browning, 68 N. Y. 598; Phelps v. Stillings, 60 N. H. 505; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841. Contra, O'Neil v. Crain, 67 Mo. 250. If the price is to be determined in a manner agreed upon, a memorandum stating the agreement on this point is sufficient. Atwood v. Cobb, 16 Pick. 227; Argus Co. v. Mayor, etc., of Albany, 55 N. Y. 495; Norton v. Gale, 95 Ill. 533.

[170] Hoadly v. M'Laine, 10 Bing. 482; Ashcroft v. Morrin, 4 Man. & G. 450; Benj. Sales, § 249.

[171] Thornton v. Kempster, 5 Taunt. 786; Waterman v. Meigs, 4 Cush. 497; May v. Ward, 134 Mass. 127; Johnson v. Delbridge, 35 Mich. 436.

[172] McLean v. Nicoll, 7 Jur. (N. S.) 999; Pitts v. Beckett, 13 Mees. & W. 743; Archer v. Baynes, 5 Exch. 625; Coddington v. Goddard, 16 Gray, 436, 442; Riley v. Farnsworth, 116 Mass. 223 (a memorandum containing a clause that the vendor shall "fulfill the conditions of sale," but not setting forth the conditions, is defective); Callanan v. Chapin, 158 Mass. 113, 32 N. E. 941; Williams v. Robinson, 73 Me. 186; Stone v. Browning, 68 N. Y. 598; Johnson v. Buck, 35 N. J. Law, 338, 343; James v. Muir, 33 Mich. 223; Norris v. Blair, 39 Ind. 90; Reid v. Kentworthy, 25 Kan. 701. Terms of payment: Davis v. Shields, 26 Wend. 341; Wright v. Weeks, 25 N. Y. 153; O'Donnell v. Leeman, 43 Me. 158. Time of delivery, if agreed: Kriete v. Myer, 61 Md. 558; Smith v. Shell, 82 Mo. 215; Hawkins v. Chase, 19 Pick. 502 (otherwise, if not agreed, since it will be presumed to be on demand).

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matter,[173] to show the situation of the parties and the circumstances, and to explain the meaning of words and latent ambiguities.[174]

Parol Evidence to Show that the Writing is not a Note or Memorandum.

Since the note or memorandum implies the existence of a parol contract, it may be shown, for the purpose of proving the insufficiency of the memorandum, that it is not the record of any parol contract; either that no contract in fact existed,[175] or that the actual contract was different from that evidenced by the memorandum,—for example, that it omitted a material term.[176] As was said by Lord Selborne, the statute of frauds "is a weapon of defense, and not offense, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."[177]

Parol Evidence as to Subsequent Agreement to Modify Original Contract.

At common law a written contract, not under seal, may be waived, annulled, changed, or qualified by means of a subsequent parol contract, written or unwritten. But this rule is not applica-

[173] Macdonald v. Longbottom, 28 Law J. Q. B. 293, on appeal 1 El. & El. 977, 29 Law J. Q. B. 256 ("your wool"); Barry v. Coombe, 1 Pet. 640; Tallman v. Franklin, 14 N. Y. 584; Mead v. Parker, 115 Mass. 413.

[174] Salmon Falls Manuf'g Co. v. Goddard, 14 How. 446; Benj. Sales, §§ 213–215. In Doherty v. Hill, 144 Mass. 465, 11 N. E. 581, it was held that, under the fourth section, a memorandum describing equally two pieces of real estate could not be supplemented by introducing a letter from the owner to the agent, showing which estate he had authority to sell, nor by evidence that the purchaser only knew of one estate owned by the seller. There are few cases involving the description under the seventeenth section, and those under the fourth section are conflicting. See Wood, St. Frauds, § 353; Williston, Cas. Sales, p. 994, note.

[175] Hussey v. Horne-Payne, 4 App. Cas. 315, per Lord Cairns, at page 320.

[176] Pitts v. Beckett, 13 Mees. & W. 743 (that the wool sold should be dry); McMullen v. Helberg, 4 L. R. Ir. 94, 6 L. R. Ir. 463 (that the sale was by sample); McLean v. Nicoll, 7 Jur. (N. S.) 999 (that glass should be of best quality); Peltier v. Collins, 3 Wend. 459 (warranty); Boardman v. Spooner, 13 Allen, 353 (that the goods are to be subject to approval); Remick v. Sandford, 118 Mass. 102 (that sale was by sample). See, also, Jenness v. Mt. Hope Iron Co., 53 Me. 20; Lang v. Henry, 54 N. H. 57; Frank v. Miller, 38 Md. 450; Lee v. Hills, 66 Ind. 474, and see note 27 ante.

[177] Hussey v. Horne-Payne, 4 App. Cas. 311, 323.

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ble to a contract which has been satisfied by a statutory note or memorandum. If the original contract be thus satisfied, a subsequent contract, not evidenced by a sufficient note or memorandum, to modify the original contract, is invalid.[178] The subsequent contract being invalid, the original contract may be enforced.[179] But whether parol evidence is admissible to prove a subsequent contract for a waiver or abandonment of the entire contract is an open question.[180] Parol evidence is admissible, however, to prove substantial performance when the performance is completed and accepted, and such performance is a defense by way of accord and satisfaction.[181]

Separate Papers.

It is immaterial whether the note or memorandum be written at one time, or at different times, and it may consist of any number of letters, telegrams, or other pieces of paper. If the connection between the papers be physical, it is enough if they were attached at the time of signature, and this may be shown by parol.[182] If they were never attached, the signed paper must make such a reference to the other as to enable the court to construe the whole together, as containing all the terms of the bargain.[183] If they are

[178] Stead v. Dawber, 10 Adol. & E. 57, overruling Cuff v. Penn, 1 Maule & S. 21; Marshall v. Lynn, 6 Mees. & W. 109; Swain v. Seamens, 9 Wall. 254, 269; Ladd v. King, 1 R. I. 224; Dana v. Hancock, 30 Vt. 616; Blood v. Goodrich, 9 Wend. 68; Hill v. Blake, 97 N. Y. 216; Carpenter v. Galloway, 73 Ind. 418. Contra: Cummings v. Arnold, 3 Metc. (Mass.) 486; Stearns v. Hall, 9 Cush. 31; Whittier v. Dana, 10 Allen, 326; Negley v. Jeffers, 28 Ohio St. 90. See, also, Richardson v. Cooper, 25 Me. 450.

[179] Moore v. Campbell, 10 Exch. 323, 23 Law J. Exch. 310; Noble v. Ward, L. R. 1 Exch. 117, 35 Law J. Exch. 81.

[180] Goss v. Lord Nugent, 5 Barn. & Adol. 65, per Denman, C. J.; Harvey v. Graham, 5 Adol. & E. 61, 73. The affirmative was held in Buel v. Miller, 4 N. H. 196.

[181] Moore v. Campbell, 10 Exch. 323, per Parke, B.; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Long v. Hartwell, 34 N. J. Law, 116, 127; Ladd v. King, 1 R. I. 224, 231; Swain v. Seamens, 9 Wall. 254; Langd. Cas. Sales, 1034.

[182] Kenworthy v. Schofield, 2 Barn. & C. 945, per Holroyd, J.

[183] Saunderson v. Jackson, 2 Bos. & P. 238; Jackson v. Lowe, 1 Bing. 9; Salmon Falls Manuf'g Co. v. Goddard, 20 Curt. Dec. 376; 14 How. 446; Newton v. Bronson, 13 N. Y. 587; Fisher v. Kuhn, 54 Miss. 480; Olson v.

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not connected by attachment or reference, they cannot be connected by parol.[184] Parol evidence is, however, admissible to explain an ambiguous reference, and to identify the document to which the signed paper refers.[185] Papers connected by reference must be consistent, for otherwise it would be impossible to determine what the bargain was without parol evidence to show which stated it correctly.[186] The memorandum may be in pencil.[187]

SAME—SIGNATURE OF THE PARTY.

37. Only the signature of the party against whom the contract is sought to be enforced is required.

Sharpless (Minn.) 55 N. W. 125; Ryan v. U. S., 136 U. S. 68, 10 Sup. Ct. 913; Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. 521. But if all the separate papers are signed, reference in the one to the other need not be made, if by inspection and comparison it appears that they severally form part of the same transaction. Thayer v. Luce, 22 Ohio St. 62. The paper referred to need not be in existence when the signed paper is executed. Freeland v. Ritz, 154 Mass. 257, 28 N. E. 226.

[184] Hinde v. Whitehouse, 7 East, 558; Kenworthy v. Schofield, 2 Barn. & C. 945; Pierce v. Corf, L. R. 9 Q. B. 210; Boydell v. Drummond, 11 East, 142; Johnson v. Buck, 35 N. J. Law, 338; O'Donnell v. Leeman, 43 Me. 158; Morton v. Dean, 13 Metc. (Mass.) 385; Coe v. Tough, 116 N. Y. 273, 22 N. E. 550; Frank v. Miller, 38 Md. 450; Brown v. Whipple, 58 N. H. 229; North v. Mendel, 73 Ga. 400. But in Lerned v. Wannemacher, 9 Allen, 412, it was held that, when a memorandum is drawn up in duplicate, one signed by the seller and the other by the buyer, they may be read together as if signed by both. See, also, Rhoades v. Castner, 12 Allen, 130. In Ridgway v. Ingram, 50 Ind. 145, where the memorandum was indorsed on an order of sale, but, without referring to it, the court held that there was no connection. Followed in Wilstach v. Heyd, 122 Ind. 574, 23 N. E. 963.

[185] Ridgway v. Wharton, 6 H. L. Cas. 238 (instructions); Baumann v. James, 3 Ch. App. 508 ("terms agreed upon"); Long v. Millar, 4 C. P. Div. 450 ("purchase"); Cave v. Hastings, 7 Q. B. Div. 125 ("our arrangement"); Beckwith v. Talbot, 95 U. S. 289 (but see Grafton v. Cummings, 99 U. S. 100, 112). An extreme application of the rule admitting parol evidence was made in Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 8 S. E. 8. The late case of Oliver v. Hunting, 44 Ch. Div. 205, seems irreconcilable with the earlier decisions.

[186] Smith v. Surman, 9 Barn. & C. 561; Thornton v. Kempster, 5 Taunt. 786. Calkins v. Falk, 1 Abb. Dec. 291; Phippen v. Hyland, 19 U. C. C. P. 416.

[187] Clason's Ex'rs v. Bailey, 14 Johns. 484; Merritt v. Clason, 12 Johns. 102.

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38. The signature may be by mark or initials, and may be written in pencil. Unless the statute requires the name to be "subscribed," the signature may be printed, and may be at the beginning or in the body of the document.

Although the seventeenth section requires the writing to be signed by the "parties" [188] to be charged, the memorandum is sufficient if signed only by the party against whom the contract is sought to be enforced.[189] It follows that the contract is good or not at the option of the party who has not signed.

The signature may be by mark,[190] though not by mere description,[191] or may be by initials, if they are intended as a signature.[192] It may be written in pencil; [193] or it may be printed, provided there is sufficient evidence of the adoption of the printed name, as where the seller fills out and gives the buyer a bill of parcels, with the name of the seller printed thereon.[194] Some statutes require the name to be "sub-

[188] The language of the fourth section is "by the party to be charged."

[189] Allen v. Bennet, 3 Taunt. 169; Thornton v. Kempster, 5 Taunt. 786; Clason's Ex'rs v. Bailey, 14 Johns. 484; McCrea v. Purmort, 16 Wend. 460; Justice v. Lang, 42 N. Y. 493; Old Colony R. R. v. Evans, 6 Gray, 25, 31; Williams v. Robinson, 73 Me. 186; Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280; Cunningham v. Williams, 43 Mo. App. 629. See, also, Reuss v. Picksley, L. R. 1 Exch. 342, and other cases cited in note 167, ante, which hold that a written offer accepted by parol is a sufficient memorandum. Contra, Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139.

[190] Baker v. Dening, 8 Adol. & E. 94 (under fifth section). See, also, Zacharie v. Franklin, 12 Pet. 151.

[191] A letter by a mother to her son, beginning, "My dear Robert," and ending, "Your affectionate mother," with a full direction containing the son's name and address, is not sufficiently signed. Selby v. Selby, 3 Mer. 2.

[192] Sanborn v. Flagler, 9 Allen, 474; Salmon Falls Manuf'g Co. v. Goddard, 14 How. 446. See Palmer v. Stephens, 1 Denio, 471; Benj. Sales, § 257. The omission of a middle name is immaterial. Fessenden v. Mussey, 11 Cush. 127.

[193] Merritt v. Clason, 12 Johns. 102; Clason's Ex'rs v. Bailey, 14 Johns. 484.

[194] Saunderson v. Jackson, 2 Bos. & P. 238; Schneider v. Norris, 2 Maule & S. 286; Drury v. Young, 58 Md. 546; Com. v. Ray, 3 Gray, 441, 447. Otherwise where the statute requires the name to be "subscribed." Viele v. Osgood, 8 Barb. 130.

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scribed," and under them the signature must be at the end.[195] Under the original enactment, however, and generally in the absence of express provisions requiring a different construction, the signature is good, though it be at the beginning or in the body of the document; but, if the name is put in an unusual place, it is a question of fact whether it was so written for the purpose of authenticating the document.[196] As was said by Lord Westbury, in a case[197] under the fourth section, where it was held that the name, which occurred in the body of the instrument, referred only to the particular part in which it was found, and was insufficient: "The signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument."

SAME—AGENTS AUTHORIZED TO SIGN.

39. The authority of an agent to sign the memorandum may be conferred by parol, and may be proved by subsequent ratification.

40. The agent must be a third person, and not one of the parties; but a person who acts as the agent of one party in making the contract may act as the agent of both parties in making the memorandum.

The statute simply provides that the note or memorandum shall be signed by the parties to be charged, "or their agents thereunto

[195] Davis v. Shields, 26 Wend. 341; James v. Patten, 6 N. Y. 9; Doughty v. Manhattan Brass Co., 101 N. Y. 644, 4 N. E. 747.

[196] Johnson v. Dodgson, 2 Mees. & W. 653; Durrell v. Evans, 1 Hurl. & C. 174, 31 Law J. Exch. 337; Clason's Ex'rs v. Bailey, 14 Johns. 484; Hawkins v. Chase, 19 Pick. 502; Penniman v. Hartshorn, 13 Mass. 87; Coddington v. Goddard, 16 Gray, 436; Batturs v. Sellers, 5 Har. & J. 117; Drury v. Young, 58 Md. 546; Anderson v. Harold, 10 Ohio, 400; McConnell v. Brillhart, 17 Ill. 354; Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, and 33 Pac. 1055. Defendants' clerk by their authority drew up a letter addressed to them, containing the terms on which plaintiff was to serve them, which plaintiff signed. Held, that the letter was a sufficient memorandum to bind defendants. Evans v. Hoare [1892] 1 Q. B. 593. See, also, Smith v. Howell, 11 N. J. Eq. 349; Adams v. Field, 21 Vt. 256.

[197] Caton v. Caton, L. R. 2 H. L. 127.

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lawfully authorized." The manner in which their agents may be authorized is left to the rules of the common law. Thus the agent need not be authorized in writing, and subsequent ratification is equivalent to prior appointment.[198] And, as we have seen, it is immaterial whether the agent sign his own name or that of his principal.[199] Authority to contract implies authority to sign the memorandum, and the memorandum may be made subsequently to the contract, if the authority has not been revoked.[200]

Who May be Agent to Sign.

The agent to sign must be a third person, and not the other party to the contract.[201] This rule does not, however, exclude the agent of the seller from acting as the agent of buyer,[202] but such agency must be clearly proved. For example, the mere fact that the seller's salesman signs his own name to the memorandum at the request of the buyer is not proof of agency to sign the buyer's name.[203]

The auctioneer at a public sale is the agent of the buyer as well as of the seller to sign the memorandum.[204] "The technical ground is,"

[198] Maclean v. Dunn, 4 Bing. 722; Soames v. Spencer, 1 Dowl. & R. 32; Hawkins v. Chase, 19 Pick. 502, 505; Batturs v. Sellers, 5 Har. & J. 117; Yerby v. Grigsby, 9 Leigh, 387; Conaway v. Sweeney, 24 W. Va. 643; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Wiener v. Whipple, 53 Wis. 298, 302, 10 N. W. 433.

[199] Ante, p. 69. See, also, Williams v. Bacon, 2 Gray, 387; Yerby v. Grigsby, 9 Leigh, 387; Conaway v. Sweeney, 24 W. Va. 649; Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16.

[200] Williams v. Bacon, 2 Gray, 387, per Merrick, J.; Farmer v. Robinson, cited in note to Heyman v. Neale, 2 Camp. 337.

[201] Sharman v. Brandt, L. R. 6 Q. B. 720; Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 Barn. & Ald. 333 (memorandum signed by auctioneer, suing as seller); Smith v. Arnold, 5 Mason, 414, Fed. Cas. No. 13,004; Bent v. Cobb, 9 Gray, 397; Johnson v. Buck, 35 N. J. Law, 338, 342; Tull v. David, 45 Mo. 444.

[202] Durrell v. Evans, 30 Law J. Exch. 254, 6 Hurl. & N. 660; Benj. Sales, §§ 267, 267a.

[203] Graham v. Musson, 5 Bing. N. C. 603; Graham v. Fretwell, 3 Man. & G. 368; Murphy v. Boese, L. R. 10 Exch. 126. See, also, Sewall v. Fitch, 8 Cow. 215; Ijams v. Hoffman, 1 Md. 423; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609.

[204] Simon v. Metivier, 1 Wm. Bl. 599; Hinde v. Whitehouse, 7 East, 558; Morton v. Dean, 13 Metc. (Mass.) 385; McComb v. Wright, 4 Johns. Ch. 659;

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as was said by Shaw, C. J., "that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers on the auctioneer or his clerk authority to sign his name, and this is the whole extent of his authority." [205] It follows that the auctioneer's authority to sign the memorandum ends with the sale, and that a memorandum subsequently signed is invalid,[206] and that he is not the agent to sign for the buyer at a private sale.[207] The auctioneer's clerk, as well as the auctioneer himself, may make the memorandum, provided, at least, that he acts openly in entering the bids, so that the assent of the bidder may be implied.[208]

The signature of a clerk of a telegraph company to a dispatch, the sending of which is authorized by either party, is sufficient.[209] An agent must sign as such, and his signature as a mere witness is inoperative.[210]

Same—Broker.

Brokers are as a rule agents for both parties. When so acting, they have authority to do all that is necessary to bind the bargain, and hence may sign the requisite memorandum.[211] In this country

Harvey v. Stevens, 43 Vt. 653; Johnson v. Buck, 35 N. J. Law, 338; Gill v. Hewett, 7 Bush, 10.

[205] Gill v. Bicknell, 2 Cush. 355, at page 358. See, also, Emmerson v. Heelis, 2 Taunt. 38, per Sir James Mansfield. The inference of agency to sign for the bidders may be rebutted. Bartlett v. Purnell, 4 Adol. & E. 792.

[206] Horton v. McCarty, 53 Me. 394. Cf. Smith v. Arnold, 5 Mason, 414, Fed. Cas. No. 13,004, per Story, J.; Bamber v. Savage, 52 Wis. 110, 113, 8 N. W. 609.

[207] Mews v. Carr, 1 Hurl. & N. 486, 26 Law J. Exch. 39. Cf. Bartlett v. Purnell, 4 Adol. & E. 792.

[208] Bird v. Boulter, 4 Barn. & Adol. 443; Johnson v. Buck, 35 N. J. Law, 338; Cathcart v. Kiernaghan, 5 Strob. 129; Gill v. Bicknell, 2 Cush. 355, 358; Frost v. Hill, 3 Wend. 386; Coate v. Terry, 24 U. C. C. P. 571. But it seems that there is no general custom by which the clerk as such is the bidder's agent. Pierce v. Corf, L. R. 9 Q. B. 210, 215, per Blackburn, J. Cf. Cathcart v. Keirnaghan, 5 Strob. 129, per Waldlaw, J.

[209] Godwin v. Francis, L. R. 5 C. P. 295; Smith v. Easton, 54 Md. 138; Howley v. Whipple, 48 N. H. 487; Gray, Communication, Tel. §§ 138-142.

[210] Gosbell v. Archer, 2 Adol. & E. 500.

[211] Coddington v. Goddard, 16 Gray, 436.

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it is customary for the broker to make an entry of the sale in a book kept for that purpose, and such an entry, if it contains the terms of the bargain, is a sufficient memorandum,[212] nor need it be signed by the broker.[213] A note containing the terms of the bargain, and delivered by him to either party, is also sufficient,[214] though, if he delivers to buyer and seller notes which materially differ, there is no valid memorandum.[215]

In England it is customary for the broker, when he makes a contract, to reduce it to writing, and to deliver to each party a copy of the terms as reduced to writing by him, and also to enter them in his book and to sign the entry.[216] As to the effect of the entry in the broker's book, there has been great difference of opinion. The view which seems to have prevailed, unlike that adopted in this country, and founded, perhaps, in some measure on the fact that brokers in London were until recently required by law to make such entries, is that the entry constitutes the contract itself, and is a contract in writing.[217] It is natural, therefore, that difficult ques-

[212] Coddington v. Goddard, 16 Gray, 436; Clason's Ex'rs v. Bailey, 14 Johns. 484; Merritt v. Clason, 12 Johns. 102; Sale v. Darragh, 2 Hilt. 184; Williams v. Woods, 16 Md. 220; Bacon v. Eccles, 43 Wis. 227.

[213] Coddington v. Goddard, 16 Gray, 436; Merritt v. Clason, 12 Johns. 102; Clason's Ex'rs v. Bailey, 14 Johns. 484.

[214] Butler v. Thompson, 92 U. S. 412; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950; Remick v. Sandford, 118 Mass. 102; Newberry v. Wall, 84 N. Y. 576; Weidmann v. Champion, 12 Daly, 522; Bacon v. Eccles, 43 Wis. 227.

[215] Peltier v. Collins, 3 Wend. 459; Suydam v. Clark, 2 Sandf. 133; Bacon v. Eccles, 43 Wis. 227; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, per Jackson, J.

[216] Benj. Sales, § 276.

[217] Heyman v. Neale, 2 Camp. 337, per Lord Ellenborough; Thornton v. Charles, 9 Mees. & W. 802, per Parke, B.; Sievewright v. Archibald, 17 Q. B. 115, 20 Law J. Q. B. 529, per Lord Campbell, C. J., and Patterson, J.; Thompson v. Gardiner, 1 C. P. Div. 777; Thornton v. Meux, Moody & M. 43, per Abbott, C. J.; Townend v. Drakeford, 1 Car. & K. 20, per Denman, C. J.; Thornton v. Charles, supra, per Lord Abinger. But these authorities are overruled by Sievewright v. Archibald, supra. Benj. Sales, § 294. See Langd. Cas. Sales, 1035. The view was held by some judges that the entry not only did not constitute the contract, but was not even admissible in evidence, at least not without proof that it was seen by the parties when they contracted or was assented to by them. Cumming v. Roebuck, Holt, 172, per Gibbs, C. J.

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tions have arisen in England, where the sold note and the bought note differ from each other or from the entry in the broker's book. The result of the English decisions on this point, which owing to the difference in the law and the custom are of comparatively little value as precedents in this country, may be briefly stated as follows:[218] (1) If the broker make and sign an entry of the agreement in his books, the entry so signed constitutes the original agreement between the parties, and is the primary evidence thereof,[219] to the exclusion of any notes which may be delivered to the parties.[220] But if such notes correspond with one another, and differ from the entry, it becomes a question of fact for the jury whether their acceptance by the parties constitutes a new contract, as evidenced by the notes.[221] (2) If there be no signed entry, the notes, if they correspond with one another and state all the terms of the bargain, together constitute a memorandum of the contract.[222] But if they do not correspond, or are insufficient, no memorandum at all exists.[223] (3) Either note by itself constitutes a memorandum, in the absence of evidence that the signed entry or the other note differs therefrom.[224]

EFFECT OF NONCOMPLIANCE WITH THE STATUTE.

41. Failure to comply with the provisions of the statute in respect to acceptance and receipt, earnest or part payment, or note or memorandum, [probably] does not render the contract void, but merely prevents its enforcement.

[218] The statement is taken from Kerr, Dig. Sales, § 20. Cf. Benj. Sales, § 292.

[219] Cases cited in note 217, ante.

[220] The notes do not constitute the contract. Thornton v. Charles, 9 Mees. & W. 802, per Parke, B.; Heyman v. Neale, 2 Camp. 337, per Lord Ellenborough; Sievewright v. Archibald, 20 Law J. Q. B. 529, 17 Q. B. 115.

[221] Thornton v. Charles, 9 Mees. & W. 802; Sievewright v. Archibald, supra.

[222] Goom v. Aflalo, 6 Barn. & C. 117; Sievewright v. Archibald, supra.

[223] Thornton v. Kempster, 5 Taunt. 786; Grant v. Fletcher, 5 Barn. & C. 436; Sievewright v. Archibald, supra.

[224] Hawes v. Forster, 1 Moody & R. 368; Parton v. Crofts, 16 C. B. (N. S.) 11; Thompson v. Gardiner, 1 C. P. Div. 777.

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The seventeenth section declares that, if there be no acceptance and receipt, no earnest or part payment, and no note or memorandum, the contract shall not "be allowed to be good." As to the meaning of these words, there are in England conflicting dicta, but no direct decision; some judges assuming that the words of the seventeenth section (unlike those of the fourth section, which declares that "no action shall be brought") go to the existence of the contract,[225] and others that there is no difference in the effect of the two sections, and that the provision affects only the remedy.[226] The latter view is sustained by the weight of opinion,[227] and is certainly in conformity with the construction of the section in other respects,—for example, that, if one party has signed the contract, it may be enforced against him, though not against the other; that a mere written admission at any time before action brought, even if it repudiates the contract, is sufficient, because it is evidence of the existence of the contract; that acceptance and receipt or part payment before action brought satisfies the section. This view has been affirmed by decision in Massachusetts,[228] though the opposite view has been taken in Missouri.[229] In some states, however, the statute declares that the contract shall be "void."

[225] Leroux v. Brown, 12 C. B. 809; Laythoarp v. Bryant, 2 Bing. N. C. 735, 747.

[226] Bailey v. Sweeting, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150, per Williams, J.; Maddison v. Alderson, 8 App. Cas. 467, 488, per Lord Blackburn; Britain v. Rossiter, 11 Q. B. Div. 123, 127, per Brett, L. J.

[227] Pol. Cont. (2d Am. Ed.) 605; Anson, Cont. 67; Clark, Cont. 128, 145. See Browne, St. Frauds, c. 8; 9 Am. Law Rev. 434.

[228] Townsend v. Hargraves, 118 Mass. 325; Amsinck v. American Ins. Co., 129 Mass. 185; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877. See, also, Jackson v. Stanfield (Ind. Sup.) 37 N. E. 14.

[229] Houghtaling v. Ball, 20 Mo. 563. To the same effect, Green v. Lewis, 26 U. C. Q. B. 618.

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CHAPTER III.

EFFECT OF THE CONTRACT IN PASSING THE PROPERTY—SALE OF SPECIFIC CHATTEL.

42. In General.
43. Unconditional Sale.
44. Rules for Ascertaining Intention.
45. Conditional Sale Accompanied by Delivery.
46. Sale on Trial or Approval.
47. Sale or Return.

IN GENERAL.

42. When there is a contract for the sale of specific goods, the property in them is transferred at such time as the parties to the contract intend it to be transferred.

Executed and Executory Sales.

The distinction between executed and executory sales has been already pointed out.[1] As we have seen, in an executed sale the property passes at once, and in an executory sale it does not pass until the contract is executed. In the one case the seller sells; in the other, he promises to sell. We have also seen that the thing which is the subject of sale must be owned by the seller, and that a contract to sell goods not yet in existence or acquired by the seller can only take effect as an executory sale.[2] Moreover, even if the goods which are the subject of sale are actually owned by the seller, it is clear that if they are part of other similar goods, as 10 sheep out of a flock of 20, the property in the part sold cannot pass unless the particular goods are designated; in other words, unless the goods are specific.[3] But provided the goods are specific, the rule holds universally that the property in them will pass whenever the parties so intend.[4] And, therefore, whether a

[1] Ante, p. 5.

[2] Ante, p. 22.

[3] Post, p. 94.

[4] Seath v. Moore, 11 App. Cas. 350, 370, 380; Shepherd v. Harrison, L. R. 5 H. L. 116, 127; Hatch v. Oil Co., 100 U. S. 124, 130; Elgee Cotton Cases,

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sale be executed or executory, and, if originally executory, when it will become executed, depends solely upon the intention of the parties. If the intention is clear, no question can arise. But because the parties often fail to make clear their intention, frequently for lack of clearness in the intention itself, the courts have established certain rules of construction for the purpose of determining what is to be deemed the intention of the parties.

UNCONDITIONAL SALE.

43. When there is a contract for the sale of specific goods, unless a different intention appears, the property in the goods passes to the buyer when the contract is made.

By the modern English rule, when an unconditional bargain is made for the sale of specific goods in a deliverable state, if nothing is said about payment or delivery, the property passes immediately, so as to cast upon the buyer all future risk, though he is not entitled to the possession without payment of the price.[5] In other words, the property passes subject to the seller's lien. This rule rests upon the presumed intention of the parties. The earlier English law was different, for it was formerly the rule that, unless payment was made or credit given, the contract was presumably executory; that is, that the intention of the parties was to transfer the property in consideration of actual payment, and not merely of the buyer's promise to pay.[6] The rule, being one of presumption, must, of course, yield to circumstances from which a

22 Wall. 180, 187; Merchants' Exch. Bank v. McGraw, 8 C. C. A. 420, 59 Fed. 972; Terry v. Wheeler, 25 N. Y. 520, 525; Callaghan v. Myers, 89 Ill. 566, 570; Winslow v. Leonard, 24 Pa. St. 14; Kent Iron & H. Co. v. Norbeck, 150 Pa. St. 559, 24 Atl. 737; Lingham v. Eggleston, 27 Mich. 324; Blackb. Sales, 123; Benj. Sales, § 309.

[5] Tarling v. Baxter, 6 Barn. & C. 360; Simmons v. Swift, 5 Barn. & C. 862, per Bayley, J.; Dixon v. Yates, 5 Barn. & Adol. 313, per Park, J.; Barr v. Gibson, 3 Mees. & W. 390; Martindale v. Smith, 1 Q. B. 389; Gilmour v. Supple, 11 Moore, P. C. 566; Seath v. Moore, 11 App. Cas. 350, 370; Benj. Sales, §§ 313, 317.

[6] Noy, Max. pp. 87–89; Blackb. Sales, 171; Benj. Sales, § 315; 2 Kent, Comm. 492.

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contrary intention is to be inferred; and therefore even to-day a sale by a tradesman in his shop is presumed to be executory.[7] The general rule in this country coincides with the modern English rule.[8] A fortiori, if payment be made at the time the bargain or credit is given, the property passes immediately. It is, indeed, frequently said that in a cash sale (and all sales where no time is agreed upon for payment are presumed to be cash sales) [9] the property does not pass until payment. But this is not a correct statement of the law, since the seller's lien which arises in such cases can only exist provided the property is in the buyer, and the risk of loss, which always accompanies the right of property, falls upon him, and not upon the seller.[10] It is true, however, that the buyer does not acquire a complete title, since until payment he has not the right to possession. And even if the seller delivers possession, if he does so upon the understanding, express or implied, that he is to receive immediate payment, he may reclaim the goods in case of nonpayment.[11]

[7] Bussey v. Barnett, 9 Mees. & W. 312; Blackb. Sales, 173. Cf. Paul v. Reed, 52 N. H. 136.

[8] Leonard v. Davis, 1 Black, 476, 483; Blunt v. Little, 3 Mason, 107, 110, Fed. Cas. No. 1,578; Morse v. Sherman, 106 Mass. 430; Haskins v. Warren, 115 Mass. 514, 533; Goddard v. Binney, Id. 450, 455; Townsend v. Hargraves, 118 Mass. 325, 332; Wing v. Clark, 24 Me. 366; Phillips v. Moor, 71 Me. 78; Olyphant v. Baker, 5 Denio, 379–383; Bissell v. Balcom, 39 N. Y. 275, 279; Johnson v. Elwood, 53 N. Y. 431; Morey v. Medbury, 10 Hun, 540; Brock v. O'Donnell, 45 N. J. Law, 441; Jenkins v. Jarrett, 70 N. C. 255; Sweeney v. Owsley, 14 B. Mon. 413; Barrow v. Window, 71 Ill. 214; Bertelson v. Bower, 81 Ind. 512; Powers v. Dellinger, 54 Wis. 389, 11 N. W. 597; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471; Towne v. Davis (N. H.) 22 Atl. 450; Thompson v. Brannin (Ky.) 21 S. W. 1057; 2 Kent, Comm. 492.

[9] Scudder v. Bradbury, 106 Mass. 422, 427; Goodwin v. Boston & L. R. Co., 111 Mass. 487, 489; Riley v. Wheeler, 42 Vt. 528; Ward v. Shaw, 7 Wend. 404; Pickett v. Cloud, 1 Bailey, 362; Wabash Elevator Co. v. First Nat. Bank of Toledo, 23 Ohio St. 311; Michigan C. R. Co. v. Phillips, 60 Ill. 190; Allen v. Hartfield, 76 Ill. 358; Fenelon v. Hogoboom, 31 Wis. 172, 176; Southwestern Freight & Cotton Exp. Co. v. Stannard, 44 Mo. 71; Beauchamp v. Archer, 58 Cal. 431; 2 Kent, Comm. 497; post, p. 178.

[10] See cases cited in notes 5 and 8, supra.

[11] Haskins v. Warren, 115 Mass. 514, 534, per Wells, J.; Goodwin v. Boston & L. R. Co., 111 Mass. 487, 489; Palmer v. Hand, 13 Johns. 434, 435; Leven

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RULES FOR ASCERTAINING INTENTION.

44. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer:

RULE 1—When there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, — that is, into a state in which the buyer is bound to accept them,—the property does not pass until such thing is done.

RULE 2—When there is a contract for the sale of specific goods in a deliverable state, but the seller [or the buyer] is bound to weigh, measure, test, or do some other act with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act is done.

v. Smith, 1 Denio, 571; Hayden v. Demets, 53 N. Y. 426, 431; Morey v. Medbury, 10 Hun, 540; Allen v. Hartfield, 76 Ill. 358, 361; Fenelon v. Hogoboom, 31 Wis. 172, 176; Riley v. Wheeler, 42 Vt. 528, 532. See, also, Tyler v. Freeman, 3 Cush. 261; Whitney v. Eaton, 15 Gray, 225; Hirschorn v. Canney, 98 Mass. 149; Adams v. O'Connor, 100 Mass. 515; Stone v. Perry, 60 Me. 48; Seed v. Lord, 66 Me. 580; Peabody v. Maguire, 79 Me. 572, 575, 12 Atl. 630; Paul v. Reed, 52 N. H. 136; Dows v. Kidder, 84 N. Y. 121; Harris v. Smith, 3 Serg. & R. 20; Lester v. McDowell, 18 Pa. St. 91; Wabash Elevator Co. v. First Nat. Bank of Toledo, 23 Ohio St. 311; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244; 2 Kent, Comm. 497. In many of these cases it is said that the "property" had not passed, and in some of them it is clear that it had not, either because at the time of the bargain the goods were not in a deliverable state or were not specific, or because delivery was to be made by the buyer at a particular place, or for some other reason. But in others it is clear that it must have been held, had the question been raised, that the risk of loss was by the contract cast upon the buyer, and hence that the property passed. In all such cases, where the question is simply whether the buyer acquired a good "title," it is immaterial to determine whether the sale was conditional, or whether only the delivery was conditional, since in either case the title of the buyer is conditional upon payment. See Benj. Sales (Corbin's 6th Am. Ed.) § 318 et seq.

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Although an agreement for the sale of a specific chattel is prima facie an executed sale, the presumption may, as we have seen, be rebutted; and, if it appears that the parties have agreed that the property shall pass on the performance of a condition, the property will not pass until the condition is performed; and, if nothing has occurred in the meantime to defeat the transfer, it will then take place. When the parties have not expressed their intention clearly, it must be collected from the whole agreement. For the purpose of ascertaining the intention, the two rules of construction stated at the head of this paragraph have been adopted by the courts. These rules, of which there is no trace in the reports before the time of Lord Ellenborough, appear to have been adopted from the civil law.[12]

Rule 1.

Blackburn observes that the first rule is founded in reason. Inasmuch as it is for the benefit of the seller that the property should pass and the risk of loss be thereby transferred from the seller, who may still retain possession of the goods as security for the price, it is reasonable that, where the seller is bound to do something before he can call upon the buyer to accept the goods, the intention of the parties should be presumed to be that the seller is to do the thing before obtaining the benefit of the transfer.[13] The rule is firmly established both in England [14] and in America.[15] Thus, where trees are to be trimmed,[16] cotton to be ginned and baled,[17] fish to be dried,[18] grain to be threshed,[19] or hops to be

[12] Blackb. Sales, 174.

[13] Blackb. Sales, 175; Benj. Sales, § 318 et seq; Chalm. Sale, § 21.

[14] Rugg v. Minett, 11 East, 210; Acraman v. Morrice, 8 C. B. 449, 19 Law J. C. P. 57; Tansley v. Turner, 2 Scott, 238, 2 Bing. N. C. 151; Boswell v. Kilborn, 15 Moore, P. C. 309, 8 Jur. 443; Seath v. Moore, 11 App. Cas. 350, 370.

[15] Elgee Cotton Cases, 22 Wall. 180, 188; Foster v. Ropes, 111 Mass. 10; Sumner v. Hamlet, 12 Pick. 76, 82; North Pacific L. & M. Co. v. Kerron, 5 Wash. 214, 31 Pac. 595. See, also, cases cited in the succeeding notes to this paragraph.

[16] Acraman v. Morrice, 8 C. B. 449, 19 Law J. C. P. 57.

[17] Elgee Cotton Cases, 22 Wall. 180, 193; Bond v. Greenwald, 4 Heisk. 453.

[18] Foster v. Ropes, 111 Mass. 10.

[19] Groff v. Belch, 62 Mo. 400; Thompson v. Conover, 32 N. J. Law, 466.

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baled,[20] by the seller, the doing of these things is presumptively a condition precedent to the transfer of the property. And if the parties contract for the sale of an unfinished chattel, as a partly-built carriage or ship, in the absence of anything to show a contrary intention, the property will not pass until the chattel is completed.[21] It is also within the principle of this rule that, if the goods are to be paid for on delivery at a particular place, the property will not pass until delivery,[22] unless a contrary intention is expressed [23] or is inferable.[24] But the fact that something is to be done to the goods by the seller after delivery will not prevent the property from passing.[25]

Rule 2.

Blackburn states the second rule without confining it to acts to be done by the seller, and regards it as hastily adopted from the civil law, where it was a logical deduction from the principle that there could be no sale until the price was fixed.[26] But the court of exchequer, in 1863, reviewed the English authorities,[27] and concluded that the rule should be modified by confining it to acts to be done by the seller, thus bringing it within the principle of the first

[20] Keeler v. Vandervere, 5 Lans. 313.

[21] Halterline v. Rice, 62 Barb. 593; Pritchett v. Jones, 4 Rawle, 260. As to contracts for chattels to be manufactured by the seller, see post, 103.

[22] Calcutta & B. S. Nav. Co. v. De Mattos, 32 Law J. Q. B. 322, 335, per Cockburn, C. J.; The Venus, 8 Cranch, 253, 275; Suit v. Woodhall, 113 Mass. 391; McNeal v. Braun, 53 N. J. Law, 617, 23 Atl. 687; Sneathen v. Grubbe, 88 Pa. St. 147; Braddock Glass Co. v. Irwin, 153 Pa. St. 440, 25 Atl. 490; Devine v. Edwards, 101 Ill. 138.

[23] Lynch v. O'Donnell, 127 Mass. 311.

[24] Weld v. Came, 98 Mass. 152; Terry v. Wheeler, 25 N. Y. 520; Bethel Steam-Mill Co. v. Brown, 57 Me. 9, 18; Lingham v. Eggleston, 27 Mich. 324, 329; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.

[25] Hammond v. Anderson, 1 Bos. & P. (N. R.) 69; Greaves v. Hepke, 2 Barn. & Ald. 131; Mount Hope Iron Co. v. Buffinton, 103 Mass. 62; Morrow v. Reed, 30 Wis. 81.

[26] Blackb. Sales, 175.

[27] Hanson v. Meyer, 6 East, 614; Zagury v. Furnell, 2 Camp. 240; Withers v. Lyss, 4 Camp. 237; Simmons v. Swift, 5 Barn. & C. 857; Logan v. Le Mesurier, 6 Moore, P. C. 116.

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rule.[28] Such a modification appears to rest upon sound principle; for, as Blackburn observes, there is little reason in supposing it to be the intention of the parties to render beneficial to the buyer the delay of an act in which he is to concur. The rule is generally laid down in the United States without qualification,[29] though it is sometimes confined to acts to be done by the seller or by the seller in connection with the buyer.[30] If, however, the goods are actually delivered, this shows an intention to complete the sale; and in such case a provision that they are to be weighed or measured will not prevent the property from passing.[31] If they have been weighed or measured, the mere arithmetical calculation of the price is immaterial.[32]

[28] Turley v. Bates, 2 Hurl. & C. 200, 33 Law J. Exch. 43; Chalm. Sale, p. 31. The point was not necessary to the decision of Turley v. Bates.

[29] Macomber v. Parker, 13 Pick. 175, 183; Riddle v. Varnum, 20 Pick. 280; Barnard v. Poor, 21 Pick. 378; Sherwin v. Mudge, 127 Mass. 547; Smart v. Batchelder, 57 N. H. 140; Nesbit v. Burry, 25 Pa. St. 208; Nicholson v. Taylor, 31 Pa. St. 128; Frost v. Woodruff, 54 Ill. 155; Rosenthal v. Kahn, 19 Or. 571, 24 Pac. 989.

[30] Elgee Cotton Cases, 22 Wall. 180, 188, et seq.; Olyphant v. Baker, 5 Denio, 379, 381; Kein v. Tupper, 52 N. Y. 550; Russell v. Carrington, 42 N. Y. 118, 124; Lingham v. Eggleston, 27 Mich. 324; Boswell v. Green, 25 N. J. Law, 390, 398; Haxall v. Willis, 15 Grat. 434, 442; McClung v. Kelley, 21 Iowa, 508, 511; King v. Jarman, 35 Ark. 190.

[31] Macomber v. Parker, 13 Pick. 175, 183; Riddle v. Varnum, 20 Pick. 280; Odell v. Boston & M. R. R., 109 Mass. 50; Burrows v. Whittaker, 71 N. Y. 291; Boswell v. Green, 25 N. J. Law, 390; Scott v. Wells, 6 Watts & S. 357; Leonard v. Davis, 1 Black, 476, 483; Upson v. Holmes, 51 Conn. 500; Baldwin v. Doubleday, 59 Vt. 7, 8 Atl. 576; Haxall v. Willis, 15 Grat. 434, 445; Shealy v. Edwards, 73 Ala. 175; Cunningham v. Ashbrook, 20 Mo. 553; Morrow v. Reed, 30 Wis. 81; Foster v. Magill, 119 Ill. 75, 8 N. E. 771; Sedgwick v. Cottingham, 54 Iowa, 512, 6 N. W. 738; King v. Jarman, 35 Ark. 190.

[32] Tansley v. Turner, 2 Bing. N. C. 151; Bradley v. Wheeler, 44 N. Y. 495.

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CONDITIONAL SALE ACCOMPANIED BY DELIVERY.

45. Where the buyer is by the contract bound to do something as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods have been actually delivered into the possession of the buyer.

The commonest condition precedent to the passing of the property is the payment of the price. Such a condition is frequently expressed,[33] as where goods are sold upon the installment plan;[34] and it may be implied from the circumstances, as where goods are ordered to be sent by the seller, to be paid for on delivery, either in cash or by note or acceptance.[35] If the goods are delivered without payment, the presumption is that the condition is waived, or that none originally existed.[36] But this presumption may be rebutted by evidence of the acts or declarations of the parties, or of other facts, tending to show an intention to assert the condition.[37] If the sale is conditional, no title passes to the buyer; and, where the

[33] Mires v. Solebay, 2 Mod. 243.

[34] Ex parte Crawcour, 9 Ch. Div. 419. See cases cited in notes 39 and 40, post.

[35] Bishop v. Shillito, 2 Barn. & Ald. 329, note a; Brandt v. Bowlby, 2 Barn. & Adol. 932. And see cases cited in note 11, supra, and notes 36 and 37, post.

[36] Smith v. Dennie, 6 Pick. 262; Farlow v. Ellis, 15 Gray, 229; Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Wigton v. Bowley, 130 Mass. 252; Peabody v. Maguire, 79 Me. 572, 585, 12 Atl. 630; Paul v. Reed, 52 N. H. 136; Ward v. Shaw, 7 Wend. 404; Smith v. Lynes, 5 N. Y. 41; Parker v. Baxter, 86 N. Y. 586; Cole v. Berry, 42 N. J. Law, 308; Bowen v. Burk, 13 Pa. St. 146; Mackaness v. Long, 85 Pa. St. 158; Thompson v. Wedge, 50 Wis. 642, 7 N. W. 560; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244; Warder, Mitchell & Co. v. Hoover, 51 Iowa, 491, 1 N. W. 795.

[37] Tyler v. Freeman, 3 Cush. 261; Whitney v. Eaton, 15 Gray, 225; Farlow v. Ellis, 15 Gray, 229; Peabody v. Maguire, 79 Me. 572, 585, 12 Atl. 630; Langd. Cas. Sales, 1026; and cases cited in last note.

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question is unaffected by statute,[38] none can be acquired by his creditors,[39] or by bona fide purchasers from him.[40]

But, although the property does not pass, the buyer acquires a defeasible interest, which before breach of condition he may sell,[41] and which is subject to attachment by his creditors,[42] and which upon the performance of the condition becomes perfect. And, like other bailees, he may maintain an action of trover against one who wrongfully invades his possession.[43] The seller also may sell or

[38] Under statutes enacted in many states making chattel mortgages void against creditors and purchasers from the mortgagor unless filed or recorded, conditional sales are frequently held to be chattel mortgages. Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; Murch v. Wright, 46 Ill. 487; Heryford v. Davis, 102 U. S. 235. See Benj. Sales (Corbin's 6th Am. Ed.) § 452 et seq. In some states, also, statutes have been enacted providing that conditional sales, where possession is delivered and the property reserved by the seller to secure the price, shall be void against creditors of the buyer or purchasers from him unless filed or recorded. See Benj. Sales (Corbin's 6th Am. Ed.) § 461.

[39] Hussey v. Thornton, 4 Mass. 404; Barrett v. Pritchard, 2 Pick. 512; Forbes v. Marsh, 15 Conn. 384; Mack v. Story, 57 Conn. 407, 18 Atl. 707; Armington v. Houston, 38 Vt. 448; Rogers v. Whitehouse, 71 Me. 222; Strong v. Taylor, 2 Hill, 326; Herring v. Hoppock, 15 N. Y. 409; Goodell v. Fairbrother, 12 R. I. 233; Call v. Seymour, 40 Ohio St. 670; Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379; City Nat. Bank v. Tufts, 63 Tex. 113.

[40] Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51; Coggill v. Hartford & N. H. R. Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 149; Zuchtmann v. Roberts, 109 Mass. 53; Ballard v. Burgett, 40 N. Y. 314; Weeks v. Pike, 60 N. H. 447; Cole v. Berry, 42 N. J. Law, 308; Sanders v. Keber, 28 Ohio St. 630; Bradshaw v. Warner, 54 Ind. 58; Sumner v. Cottey, 71 Mo. 121; Fairbanks v. Eureka Co., 67 Ala. 109; Sumner v. Woods, Id. 139; National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N. W. 342, 560; McComb v. Donald's Adm'r, 82 Va. 903, 5 S. E. 558; Standard Imp. Co. v. Parlin & Orendorff Co. (Kan. Sup.) 33 Pac. 360. A different rule, however, appears to prevail in Pennsylvania, Illinois, Kentucky, and Maryland. See Benj. Sales (Corb. 6th Am. Ed.) § 446 et seq.

[41] Day v. Bassett, 102 Mass. 445; Chase v. Ingalls, 122 Mass. 381; Carpenter v. Scott, 13 R. I. 477; Nutting v. Nutting, 63 N. H. 221. See Winchester v. King, 46 Mich. 102, 8 N. W. 722.

[42] Newhall v. Kingsbury, 131 Mass. 445; Denny v. Eddy, 22 Pick. 535; Hurd v. Fleming, 34 Vt. 169. But the seller may retain the right to possession notwithstanding delivery. Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519.

[43] Harrington v. King, 121 Mass. 269.

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mortgage his interest, and it may be attached by his creditors.[44] The property being in the seller, the risk of loss remains in him.[45]

Upon breach of the condition, the right of possession revests in the seller,[46] and he may replevin the goods or sue to recover their value.[47] It is generally held that he need not, in a suit to recover the value, allow for partial payments, or, in replevin, refund the same,[48] and that, although the seller reclaims the goods, the buyer cannot recover for installments paid;[49] but some courts, upon equitable principles, require the seller to account for payments received.[50]

SALE ON TRIAL OR APPROVAL.

46. Where goods are delivered to the buyer on trial or on approval, the property therein passes to him—

(a) When he signifies his approval; or

(b) On the expiration of the time limited for trial; or

(c) If no time is limited, on the expiration of a reasonable time.

47. SALE OR RETURN—Where goods are delivered to the buyer with the understanding that the property is to pass to him immediately, but that he may afterwards re-

[44] Burnell v. Marvin, 44 Vt. 277; Everett v. Hall, 67 Me. 497; McMillan v. Larned, 41 Mich. 521, 2 N. W. 662.

[45] Randle v. Stone & Co., 77 Ga. 501; Stone v. Waite, 88 Ala. 599, 7 South. 117; Swallow v. Emery, 111 Mass. 355. See Kortlander v. Elston, 2 C. C. A. 657, 52 Fed. 180. Contra, Tufts v. Griffin, 107 N. C. 49, 12 S. E. 68; Burnley v. Tufts, 66 Miss. 49, 5 South. 627; Tufts v. Wynne, 45 Mo. App. 42.

[46] Hubbard v. Bliss, 12 Allen, 590.

[47] Hill v. Freeman, 3 Cush. 257; Salomon v. Hathaway, 126 Mass. 482; Hughes v. Kelly, 40 Conn. 148; Stone v. Perry, 60 Me. 48; Whitney v. McConnell, 29 Mich. 12; Wiggins v. Snow, 89 Mich. 476, 50 N. W. 991. But see Wheeler & Wilson Manuf'g Co. v. Teetzlaff, 53 Wis. 211, 10 N. W. 155, where a provision authorizing the seller on default to take the machine at his option was held to require demand.

[48] Angier v. Taunton Paper Co., 1 Gray, 621; Brown v. Haynes, 52 Me. 578; Duke v. Shackleford, 56 Miss. 552; Fleck v. Warner, 25 Kan. 492.

[49] Haviland v. Johnson, 7 Daly, 297; Latham v. Sumner, 89 Ill. 233.

[50] Preston v. Whitney, 23 Mich. 260; Hine v. Roberts, 48 Conn. 267; Guilford v. McKinley, 61 Ga. 230; Third Nat. Bank v. Armstrong, 25 Minn. 530; Snook v. Raglan, 89 Ga. 251, 15 S. E. 364.

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turn the goods if he sees fit, the property passes to the buyer, and, in case of a return of the goods, revests in the seller.

Conditions postponing the transfer of the property may exist for the benefit of the buyer as well as of the seller. Instances of such conditions are afforded in sales "on trial" or "on approval." Such a transaction amounts to a bailment, with the right in the buyer to convert the bailment into a sale, at his option. In such cases there is no sale until the buyer signifies to the seller his approval or acceptance, or does some act adopting the transaction as a sale.[51] If he does not signify his approval or acceptance, but retains the goods without giving notice of rejection, it is generally held that the property passes on the expiration of the time limited for trial,[52] or, if no time is limited, on the expiration of a reasonable time,[53] although some cases hold that failure to return is merely evidence of intention on the buyer's part to exercise his right to purchase.[54]

Sale or return.

A bailment with an option in the bailee to buy is, however, essentially different from a sale with the right of return. It is, of course, competent for the parties to agree that the property in the goods shall pass to the buyer on delivery, and that, if he does not approve of the goods, he may return them. In the latter case the transaction is a sale defeasible on the fulfillment of a condition sub-

[51] Swain v. Shepherd, 1 Moody & R. 223; Elphick v. Barnes, 5 C. P. Div. 321, 326; Hunt v. Wyman, 100 Mass. 198; Pitts' Sons Manuf'g Co. v. Poor, 7 Ill. App. 24; Mowbray v. Cady, 40 Iowa, 604; Pierce v. Cooley, 56 Mich. 552, 23 N. W. 310.

[52] Humphries v. Carvalho, 16 East, 45; Elphick v. Barnes, 5 C. P. Div. 321; Waters Heater Co. v. Mansfield, 48 Vt. 378; Butler v. School Dist., 149 Pa. St. 351, 24 Atl. 308; Spickler v. Marsh, 36 Md. 222; Delamater v. Chappell, 48 Md. 244, 253; Prairie Farmer Co. v. Taylor, 69 Ill. 440; Aultman v. Theirer, 34 Iowa, 272. A sale on condition that the buyer may return on a certain contingency becomes absolute if he disables himself from performing the condition by mortgaging the goods. Lynch v. Willford (Minn.) 59 N. W. 311.

[53] Moss v. Sweet, 16 Q. B. 493, 20 Law J. Q. B. 167; Dewey v. Erie Borough, 14 Pa. St. 211.

[54] Hunt v. Wyman, 100 Mass. 198, per Wells, J.; Kahn v. Klabunde, 50 Wis. 235, 6 N. W. 888. See Sturm v. Boker, 150 U. S. 312, 331, 14 Sup. Ct. 99.

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sequent.[55] The property vests in the buyer, and, upon the exercise of his right of return, it revests in the seller. In case the buyer disables himself from performing, the sale becomes absolute. The difficulty lies in ascertaining the intention, and different constructions would probably be placed upon the same transaction by different courts.[56] Thus, in several cases where goods were delivered to the buyer upon his agreement to return them on a specified day, or else to pay for them, the transaction has been construed as an executed sale with the right of return;[57] but it is perhaps open to doubt whether it would not be more in accordance with the intention of the parties to construe such a transaction as a bailment with the right to purchase. The terms "sale on trial," "sale on approval," and "sale or return" are generally used without much distinction;[58] but the term "sale or return" is in this country often confined to sales defeasible upon the return of the goods, in distinction to the terms "sale on trial" and "sale on approval," which are confined to cases in which the approval of the buyer is a condition precedent to the transfer of the property;[59] and the distinction is a convenient one.

[55] Ray v. Thompson, 12 Cush. 281; Schlesinger v. Stratton, 9 R. I. 578, 580; Hotchkiss v. Higgins, 52 Conn. 205; Robinson v. Fairbanks, 81 Ala. 132, 1 South. 552. Cf. Head v. Tattersall, L. R. 7 Exch. 7; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99. See Clark, Cont. 621–624.

[56] Ray v. Thompson, 12 Cush. 281.

[57] Dearborn v. Turner, 16 Me. 17; Buswell v. Bicknell, 17 Me. 344; Crocker v. Gullifer, 44 Me. 491, 494; McKinney v. Bradlee, 117 Mass. 321; Martin v. Adams, 104 Mass. 262.

[58] Cf. Moss v. Sweet, 16 Q. B. 493, 20 Law J. Q. B. 167; Kahn v. Klabunde, 50 Wis. 235, 238, 6 N. W. 888; Spickler v. Marsh, 36 Md. 222; Benj. Sales, § 595; Chalm. Sale, pp. 29, 32.

[59] Cf. Schlesinger v. Stratton, 9 R. I. 578, 580; Hotchkiss v. Higgins, 52 Conn. 205; Robinson v. Fairbanks, 81 Ala. 132, 1 South. 552; Benj. Sales (Bennett's 6th Am. Ed.) pp. 568, 569; Id. (Corbin's Ed.) p. 796, note 30.

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CHAPTER IV.

EFFECT OF THE CONTRACT IN PASSING THE PROPERTY (Continued) —SALE OF CHATTEL NOT SPECIFIC.

48–49. In General.
50–53. Subsequent Appropriation.
54–56. Reservation of Right of Disposal.

IN GENERAL.

48. Where the contract is for the sale of unascertained goods, the contract is executory, and no property is thereby transferred.

49. Where the goods which are the subject-matter of a contract of sale are part of a specific stock from which they have not been separated, no property passes until separation.

EXCEPTION—In some states it is held that, where the goods sold are a part of a specific bulk of uniform character, the property in an undivided part is transferred by the contract, and without separation, if such be the intention of the parties.

The rule that the parties must be agreed on the specific goods which are to be the subject of the sale is founded, as Blackburn says, on the very nature of things; for, until the parties are agreed on the specific goods, the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfill his contract by furnishing any goods answering the description, and the buyer could not object to them, provided they answered the description, it is clear that there can be no intention to transfer the property in any particular goods.[1]

Where Goods are Part of Specific Stock.

But, where the goods are so far ascertained that the parties have agreed to take them from a particular stock owned by the seller,

[1] Blackb. Sales, 124; Benj. Sales, 352; 2 Kent, Comm. 496.

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a different question may arise. If the goods are part of a specific stock, consisting of units of varying quality or value, as a number of sheep out of a flock, it is clear that a selection must take place before the property in any particular units can pass. But if the goods are part of a uniform mass, such as grain or oil or coal, it is possible that the parties may intend that the property in an undivided part shall pass, the parties becoming quasi tenants in common of the mass; and such an intention may be inferable although the contract is not in terms for the sale of an undivided interest, as a half or a third, but where it is for the sale of a certain number of bushels or gallons or tons of the mass of grain or oil or coal.

In England no such distinction is recognized, and the general rule is applied, even though the mass be of uniform quality and value.[2] But in the United States, while many cases maintain strictly the older rule,[3] others hold that if the sale be of a certain quantity, by weight or measure or count, its separation from a specific, uniform mass is not necessary to pass the property, when the intention to do so is otherwise manifested.[4] Upon the ques-

[2] Wallace v. Breeds, 13 East, 522; Austen v. Craven, 4 Taunt. 644; White v. Wilks, 5 Taunt. 176; Busk v. Davis, 2 Maule & S. 397; Shepley v. Davis, 5 Taunt. 617; Gillett v. Hill, 2 Cromp. & M. 530; Gabarron v. Kreeft, L. R. 10 Exch. 274. Whitehouse v. Frost, 12 East, 614, may, perhaps, rest upon this distinction. See Busk v. Davis, 2 Maule & S. 397. But the case has been much questioned in England. Benj. Sales, § 354. It is, however, frequently cited as an authority in the American cases which recognize the distinction.

[3] Woods v. McGee, 7 Ohio, 127 (but see Newhall v. Langdon, 39 Ohio St. 87); Scudder v. Worcester, 11 Cush. 573; Ropes v. Lane, 9 Allen, 502; Messer v. Woodman, 22 N. H. 172; Reeder v. Machen, 57 Md. 56; Ferguson v. Louisville City Nat. Bank, 14 Bush, 555; Courtright v. Leonard, 11 Iowa, 32; McLaughlin v. Piatti, 27 Cal. 451; Dunlap v. Berry, 4 Scam. 327; Warten v. Strane, 82 Ala. 311, 8 South. 231; Commercial Nat. Bank v. Gillette, 90 Ind. 268. See, also, Golden v. Ogden, 15 Pa. St. 528; Haldeman v. Duncan, 51 Pa. St. 66. Some cases cited as authorities on this point, perhaps, rest on the ground that the mass was not uniform. Woods v. McGee, supra; Hutchinson v. Hunter, 7 Pa. St. 140; McLaughlin v. Piatti, 27 Cal. 451 (see Horr v. Barker, 8 Cal. 603, 11 Cal. 393). See Stone v. Peacock, 35 Me. 385, 388.

[4] Kimberly v. Patchin, 19 N. Y. 330; Russell v. Carrington, 42 N. Y. 118; Pleasants v. Pendleton, 6 Rand. (Va.) 473; Hurff v. Hires, 40 N. J. Law, 581; Chapman v. Shepard, 39 Conn. 413; Waldron v. Chase, 37 Me. 414 (but see Morrison v. Dingley, 63 Me. 553); Newhall v. Langdon, 39 Ohio St. 87;

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tion of intention, the payment of the price, and particularly the undertaking of the seller to hold as bailee of the buyer, are material; and it has also been held that the delivery of the mass to the buyer, with power to make the separation, is evidence of an intention to pass the property.[5] While, on principle, there is no reason why the intention of the parties to transfer an undivided interest should not be given full effect, in many of the cases where such an interest was held to have passed, it is very doubtful whether any such intention existed.[6]

Elevator Cases.

Analogous to the cases last mentioned are the so-called "Elevator Cases," which hold that grain delivered by the owners at an elevator, and stored in a common mass, is owned by the depositors as tenants in common, and that the interest of any one of them may be transferred without separation.[7] There is, however, in the Elevator Cases, this essential distinction: that the tenancy in common is created by the original deposit and mixture of goods, so that in case of a sale by one owner there can be no question that the intention is to transfer the property in an undivided interest.

Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974; Young v. Miles, 20 Wis. 646; Horr v. Barker, 8 Cal. 603, 11 Cal. 393; Kingman v. Holmquist, 36 Kan. 735, 14 Pac. 168; Nash v. Brewster, 39 Minn. 530, 41 N. W. 105; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Phillips v. Ocmulgee Mills, 55 Ga. 633; Watts v. Hendry, 13 Fla. 523. Where the contract was for "merchantable brick," to be sorted from the kiln by the buyer, the title did not pass; it being impossible to determine either what brick, or what relative portion of the kiln, were sold. Kimberly v. Patchin, supra, distinguished on the ground that it did not appear that the brick were uniform and of equal value. Anderson v. Crisp, 5 Wash. 178, 31 Pac. 638.

[5] Page v. Carpenter, 10 N. H. 77; Lamprey v. Sargent, 58 N. H. 241; Weld v. Cutler, 2 Gray, 195. But see Kimberly v. Patchin, 19 N. Y. 330, per Comstock, J., commenting on Crofoot v. Bennett, 2 N. Y. 258.

[6] Pleasants v. Pendleton, 6 Rand. (Va.) 473, a leading case, of which it was observed by Grimke, J., in Woods v. McGee, 7 Ohio, 127, that "it was a hard case, and hard cases make shipwreck of principles."

[7] Cushing v. Breed, 14 Allen, 376; Keeler v. Goodwin, 111 Mass. 490; Dole v. Olmstead, 36 Ill. 150, 41 Ill. 344; Warren v. Milliken, 57 Me. 97.

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SUBSEQUENT APPROPRIATION.

50. When there is a contract for the sale of unascertained goods, no property is transferred until there has been an appropriation of goods to the contract,—that is, a designation by the seller and buyer of the goods which are to be the subject-matter of the sale, with the intention of passing the property in them; and, when goods are so appropriated to the contract, the property in them is transferred.

51. HOW EFFECTED—Appropriation to the contract can only take place by the concurrence of buyer and seller, unless one of them has been authorized by the other to act on behalf of both.

52. BY ACT OF ONE PARTY—Appropriation by the act of one of the parties takes place when, in pursuance of express or implied authority conferred by the other, he does an act in respect to the goods which, from its nature, he cannot do until the goods are appropriated.

53. BY DELIVERY TO CARRIER—An appropriation takes place by the act of the seller when, in pursuance of the contract, he delivers goods to a carrier for transmission to the buyer, and does not reserve the right of disposal.

Although no property can pass until the goods have been ascertained, it does not necessarily follow that because they have been ascertained the property passes. The transfer of the property, in such case, as well as in the case of a contract for the sale of goods originally specific, depends solely on the intention of the parties, and, while in both cases the presumption is that the parties intend the property to pass,[8] it may well happen that, though they subsequently agree upon the specific goods, they intend that the property shall remain in the seller until the performance of a condition. To effect a transfer of the property, it is necessary, not only that the

[8] Blackb. Sales (2d Ed.) 128.

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goods be ascertained, but that they be appropriated to the contract. The term "appropriation to the contract," as has been observed by Chalmers, J.,[9] is unfortunate; for it sometimes means simply that the goods have been specified as the subject-matter of the contract, so that the seller would break it by delivering any other goods, though the property still remains in him, while, on the other hand, it may, and usually does, mean that the goods have been designated with the intention of passing the property in them to the buyer,—that is, finally appropriated to the contract, so as to pass the property in them.[10] For the sake of clearness, the term will here be confined to the latter meaning.

How Effected.

An appropriation can only take place by the assent of both parties,[11] but the assent may be implied as well as express;[12] and it may be given by either party after[13] or before a selection by the other. When the goods are afterwards selected by the buyer with the assent of the seller, or, if selected by the seller, are approved by the buyer, no difficulty arises.[14] As was said by Holroyd, J., "The selection of the goods by the one party, and the adoption of the act by the other, converts that which was before a mere agreement to sell into an actual sale, and the property thereby passes."[15]

Appropriation by Act of Seller.

The difficulty arises when the seller makes the selection pursuant to authority derived from the buyer; and it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or

[9] Chalm. Sale, 32.

[10] Walt v. Baker, 2 Exch. 1, 8, per Parke, B.

[11] Campbell v. Mersey Docks & Harbour Board, 14 C. B. (N. S.) 412, per Willes, J.; Godts v. Rose, 17 C. B. 229, per Willes, J.; Jenner v. Smith, L. R. 4 C. P. 270, per Brett, J.; Reeder v. Machen, 57 Md. 56; Home Ins. Co. v. Heck, 65 Ill. 111.

[12] Campbell v. Mersey Docks & Harbour Board, 14 C. B. (N. S.) 412, per Erle, J.; Alexander v. Gardner, 1 Bing. N. C. 671; Sparkes v. Marshall, 2 Bing. N. C. 761.

[13] Rohde v. Thwaites, 6 Barn. & C. 388.

[14] Benj. Sales, § 358.

[15] Rohde v. Thwaites, 6 Barn. & C. 388. See, also, Hatch v. Oil Co., 100 U. S. 124, 136.

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whether they show an irrevocable determination of a right of election.[16] Authority to make the appropriation is generally conferred upon the seller by implication upon the ground that he is by the contract authorized or required to do an act in respect to the goods on behalf of the buyer which, from the nature of the act, he cannot do until the goods are appropriated.[17] Until he performs the act, he may change his mind as often as he will as to what goods he will select, for the contract gives him till then to make the choice; but, when once he has performed the act, his election is determined, and the property in the goods passes to the buyer.[18] Thus where, by the contract, the seller is to sell a certain number of barrels of flour, and to load them into the wagon or vessel of the buyer, who is to fetch them away, the seller has implied authority to appropriate the goods, and he may select any goods he pleases, provided they conform to the contract, and he may select first one lot, and then another, without affecting the property in them; but when once he loads the barrels into the buyer's wagon or vessel the appropriation is final, and the property passes.[19] So when the seller is to deliver the goods at a place designated by the contract, the property passes upon the delivery.[20]

Appropriation by Delivery to Carrier.

The commonest form of appropriation by act of the seller is by the delivery of the goods to a carrier as agent for the buyer. Thus

[16] Chalm. Sale, 32.

[17] Langd. Cas. Sales, 1028; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017, per Holmes, J.

[18] Blackb. Sales, 128; Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295.

[19] Benj. Sales, § 359; Gill v. Benjamin, 64 Wis. 362, 25 N. W. 445 (to be delivered over the rail of the buyer's vessel). A foreign merchant contracted for several cargoes of lumber, to be delivered, seasoned, f. o. b., within seven months of May 1st; certain advances to be made before June 1st. The advances were made, and the first cargo was prepared by August, piled by itself, and the buyer notified. The buyer had difficulty in chartering ships, and the lumber was burned. Held, that the title had not passed. Schreyer v. Kimball Lumber Co., 4 C. C. A. 547, 54 Fed. 653.

[20] National Bank v. Dayton, 102 U. S. 59; Hyde v. Lathrop, 2 Abb. Dec. 436; Claflin v. Boston & L. R. Co., 7 Allen, 341; Veazie v. Holmes, 40 Me. 69; Bloyd v. Pollocks, 27 W. Va. 75; Sedgwick v. Cottingham, 54 Iowa, 512, 6 N. W. 738.

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if the buyer orders goods to be sent to him at his expense, and the seller delivers goods conforming to the contract to a carrier for transmission to the buyer, the appropriation is complete upon such delivery, provided that the seller does not reserve the right of disposal.[21] The right to make the appropriation springs from the authority to deliver to the carrier as agent for the buyer, which is equivalent to delivery to him personally, and such authority may either be conferred by the express terms of the contract, or may be implied from the course of trade. If, however, the seller is to deliver to the buyer at the place of destination, delivery to the carrier is not delivery to him as agent of the buyer, but as agent of the seller, and hence does not pass the property.[22] Whether delivery to the carrier in pursuance of an order to that effect from the buyer, with directions to collect the price on delivery to the buyer, or, as the transaction is usually designated, "shipment C. O. D.," operates as an appropriation to the contract is a question on which the authorities differ. On the one hand, it is held, with what appears to be the better reason, that in such a case the carrier is the

[21] Fragano v. Long, 4 Barn. & C. 219; Browne v. Hare, 4 Hurl. & N. 822, 29 Law J. Exch. 6; affirming 3 Hurl. & N. 484, 27 Law J. Exch. 372; Tregelles v. Sewell, 7 Hurl. & N. 574; Calcutta & B. S. Nav. Co. v. De Mattos, 32 Law J. Q. B. 322, 328, per Blackburn, J.; The Mary and Susan, 1 Wheat. 25; Blum v. The Caddo, 1 Woods, 64, Fed. Cas. No. 1,573; Low v. Andrews, 1 Story, 38, Fed. Cas. No. 8,559; Fenton v. Braden, 2 Cranch, C. C. 550, Fed. Cas. No. 4,730; Finch v. Mansfield, 97 Mass. 89; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Odell v. Boston & M. R. Co., 109 Mass. 50; Frank v. Hoey, 128 Mass. 263; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Torrey v. Corliss, 33 Me. 333; Arnold v. Prout, 51 N. H. 587; Hobart v. Littlefield, 13 R. I. 341; Krulder v. Ellison, 47 N. Y. 36; Bailey v. Hudson R. R. Co., 49 N. Y. 70; Pacific Iron Works v. Long Island R. Co., 62 N. Y. 272; Schmertz v. Dwyer, 53 Pa. St. 335; Kelsea v. Ramsey & Gore Manuf'g Co., 55 N. J. Law, 320, 26 Atl. 907; Magruder v. Gage, 33 Md. 344; Watkins v. Paine, 57 Ga. 50; Pilgreen v. State, 71 Ala. 368; Diversy v. Kellogg, 44 Ill. 114; Ellis v. Roche, 73 Ill. 280; Ranney v. Higby, 4 Wis. 174; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541; Garretson v. Selby, 37 Iowa, 529; Burton v. Baird, 44 Ark. 556.

[22] Calcutta & B. S. Nav. Co. v. De Mattos, 32 Law J. Q. B. 322, per Blackburn, J.; Dunlop v. Lambert, 6 Clark & F. 600, per Lord Cottenham; Suit v. Woodhall, 113 Mass. 391; McNeal v. Braun, 53 N. J. Law, 617, 23 Atl. 687; Bloyd v. Pollocks, 27 W. Va. 75; Congar v. Galena & C. U. R. Co., 17 Wis. 477.

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seller's agent, and hence that the property does not pass until delivery by the carrier to the buyer;[23] but other cases hold that the condition as to payment is intended merely to reserve the seller's lien for the price, and that the delivery of the goods to the carrier, being made in pursuance of the instructions of the buyer, passes the property.[24]

Other Forms of Appropriation by Act of Seller.

Appropriation by the act of the seller may take place even before the goods are forwarded, as where they are to be sent in sacks furnished by the buyer. Under such circumstances, unless the seller retains the right of disposal, the appropriation is complete as soon as the seller puts the goods into the sacks.[25]

Another common form of appropriation by act of the seller is where, in pursuance of the contract, he incorporates his own materials with the property of the buyer, as where a carpenter is employed to repair a chattel or to erect a building on land of his employer. As soon as the incorporation takes place, the property in the materials passes; but up to that moment the carpenter has the right to use any materials he sees fit, and the mere fact that he has selected materials with the intention of incorporating them confers upon the employer no right of property in them.[26]

[23] State v. O'Neil, 58 Vt. 140, 2 Atl. 586 (see, also, dissenting opinion of Harlan, J., in O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, in which a writ of error was dismissed on the ground that no federal question was involved); Lane v. Chadwick, 146 Mass. 68, 15 N. E. 121; Baker v. Bourcicault, 1 Daly, 23; U. S. v. Shriver, 23 Fed. 134; Wagner v. Hallack, 3 Colo. 176.

[24] Com. v. Fleming, 130 Pa. St. 138, 18 Atl. 622; Higgins v. Murray, 73 N. Y. 252, semble; State v. Intoxicating Liquors, 73 Me. 278; Pilgreen v. State, 71 Ala. 368; State v. Carl, 43 Ark. 353; Hunter v. State, 55 Ark. 357, 18 S. W. 374; Norfolk S. R. Co. v. Barnes, 104 N. C. 25, 10 S. E. 83.

[25] Aldridge v. Johnson, 7 El. & Bl. 885, 26 Law J. Q. B. 296; Langton v. Higgins, 4 Hurl. & N. 402, 28 Law J. Exch. 252. In Ogg v. Shuter, 1 C. P. Div. 47, reversing L. R. 10 C. P. 159, it was held that, by taking a bill of lading to his own order, the seller reserved the right of disposal, notwithstanding the fact that he had put the goods in the buyer's sacks.

[26] Tripp v. Armitage, 4 Mees. & W. 687; Wood v. Bell, 6 El. & Bl. 355, affirming 5 El. & Bl. 772; Seath v. Moore, 11 App. Cas. 350, 381; Johnson v. Hunt, 11 Wend. 135; Wilkins v. Holmes, 5 Cush. 147; Langd. Cas. Sales, 1029.

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Seller must Act in Conformity with Authority.

Where the appropriation is to be made by the seller, no property in the goods selected by him will pass unless he exercises his authority in conformity with the contract. Thus no property will pass if the goods do not conform to the description,[27] or unless he ships the goods within the time specified,[28] or unless he delivers to the carrier designated, if a particular carrier be designated by the contract.[29] Again, no property will pass if he sends a greater quantity of goods than the buyer has ordered; and if he does so there must be a subsequent acceptance by the buyer, in order to pass the property.[30]

Appropriation by Act of Buyer.

Although cases in which authority to make the appropriation is conferred on the buyer are comparatively rare, the same principle applies to him as to the seller, if by the contract an act which necessarily determines the selection is to be performed by the buyer. For example, suppose that by the contract the seller sells out of a stack of bricks 1,000, to be selected by the buyer, who is to send

[27] Wait v. Baker, 2 Exch. 1, per Parke, B.; Gardner v. Lane, 12 Allen, 39 (cf. 9 Allen, 492, 98 Mass. 517); Wolf v. Dietzsch, 75 Ill. 205; Brown v. Berry, 14 N. H. 459; Aultman, Miller & Co. v. Clifford, 55 Minn. 159, 56 N. W. 593.

[28] Rommel v. Wingate, 103 Mass. 327. Where the order requires shipment on a specified day, shipment before the day does not pass the property. Hoover v. Maher, 51 Minn. 269, 53 N. W. 646.

[29] Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787.

[30] Cunliffe v. Harrison, 6 Exch. 903; Downer v. Thompson, 2 Hill, 137 (cf. 6 Hill, 208); Rommel v. Wingate, 103 Mass. 327; Barton v. Kane, 17 Wis. 38; Bailey v. Smith, 43 N. H. 141. Where earthenware was ordered, and additional earthenware, entirely different, was sent in the same crate, held, that the property had not passed. Levy v. Green, 1 El. & El. 969, 28 Law J. Q. B. 319. Some American cases hold that the seller "may satisfy the contract by tendering a greater quantity, from which the buyer may select, provided the mass does not vary in quality." Benj. Sales (Corbin's 6th Am. Ed.) §§ 512, 531. This is said to be a sequence from Kimberly v. Patchin, supra, and other cases holding that where the goods sold are part of a specific bulk, of uniform character, the property in an undivided part may be transferred without separation. But, admitting the correctness of those cases, it would be an undue extension of the principle governing them to hold that a delivery of a greater amount than that ordered, out of which the buyer is to select, is a delivery in conformity with the contract.

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his cart and fetch them away. Here the buyer may choose first one part of the stack, and then another, until he has done the act determining his election; that is, until he has put the bricks into his cart. When he has done that, his election is determined, and he cannot put back the bricks and take others from the stack.[31]

Chattel Made to Order.

Where a chattel is made to order out of the materials of the maker, it seems, on principle, that the ordinary rule should apply; that is, that unless the maker is authorized or required to do in respect to it, after it is completed, some act necessarily involving its appropriation to the contract,—for example, to forward it to the buyer,—the property will not pass until it is accepted by him. In making the chattel, as in procuring goods in any other way to fulfill a contract, the seller is acting for himself, and not for the buyer, and he can satisfy his contract equally well by making and tendering another chattel within the stipulated time as by tendering the chattel first made. This view has been sustained in England, and in many of the courts of this country;[32] but in others it is held that the property passes as soon as the seller finishes the chattel, and sets it apart for the buyer.[33]

Chattel to be Paid for in Installments as Work Progresses.

In shipbuilding contracts, where it is provided that the payments shall be made in installments at particular stages in the progress of the work, a peculiar rule of construction has been adopted in England, by which the parties are held, by implication, to have

[31] Benj. Sales, § 359; Valentine v. Brown, 18 Pick. 549. Cf. Inhabitants of Westfield v. Mayo, 122 Mass. 100.

[32] Mucklow v. Mangles, 1 Taunt. 318; Atkinson v. Bell, 8 Barn. & C. 277; Moody v. Brown, 34 Me. 107; Tufts v. Grewer, 83 Me. 407, 22 Atl. 382; Shaw v. Smith, 48 Conn. 306; Rider v. Kelley, 32 Vt. 268; Scudder v. Calais Steamboat Co., 1 Cliff. 370, 378, Fed. Cas. No. 12,565, per Clifford, J.; Butterworth v. McKinly, 11 Humph. 206, per Totten, J.; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165. See Goddard v. Binney, 115 Mass. 450, 456; Whitcomb v. Whitney, 24 Mich. 485; Pratt v. Peck, 70 Wis. 620, 36 N. W. 410; Langd. Cas. Sales, 1029.

[33] Bement v. Smith, 15 Wend. 493; Ballentine v. Robinson, 46 Pa. St. 177; Shawhan v. Van Nest, 25 Ohio St. 490; Higgins v. Murray, 4 Hun, 565. See, also, West Jersey R. Co. v. Trenton Car-Works Co., 32 N. J. Law, 517; Gordon v. Norris, 49 N. H. 376.

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evinced an intention that the property in the uncompleted vessel shall pass on the payment of the first installment.[34] It follows that, as new materials are incorporated in the unfinished vessel, they become the property of the buyer. This rule of construction has not met with approval in the United States, and it is generally [35] held that the intention of the parties as to the time when the property is to be transferred is to be determined, as in other cases, from the terms of the contract and the circumstances of the transaction.[36] Therefore, unless a contrary intention appears, the ordinary rule will prevail,—that no property passes before the chattel is completed.[37]

RESERVATION OF RIGHT OF DISPOSAL.

54. When there is a contract for the sale of unascertained goods, and the seller, in pursuance thereof, delivers goods to a carrier for transmission to the buyer, but reserves the right of disposal until certain conditions are fulfilled, notwithstanding the shipment, the appropriation does not become absolute, and the property does not pass until the conditions are fulfilled.

55. BY BILL OF LADING—When the goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.[38]

56. When the seller, upon shipment, takes a bill of lading to his own order, and deals with it so as to secure the

[34] Woods v. Russell, 5 Barn. & Ald. 942; Clarke v. Spence, 4 Adol. & E. 448. See, also, Seath v. Moore, 11 App. Cas. 350, 380.

[35] The English rule was followed in Scudder v. Calais Steamboat Co., 1 Cliff. 370, Fed. Cas. No. 12,565, and Sandford v. Wiggins Ferry Co., 27 Ind. 522.

[36] Clarkson v. Stevens, 106 U. S. 505, 1 Sup. Ct. 200, affirming Stevens v. Shippen, 29 N. J. Eq. 602.

[37] Andrews v. Durant, 11 N. Y. 35; Williams v. Jackman, 16 Gray, 514; Briggs v. Light Boat, 7 Allen, 287; Wright v. Tetlow, 99 Mass. 397; Elliott v. Edwards, 35 N. J. Law, 265, Edwards v. Elliott, 36 N. J. Law, 449; Derbyshire's Estate, 81 Pa. St. 18; Green v. Hall, 1 Houst. 506, 546.

[38] Chalm. Sale, 33.

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contract price, either by sending to an agent the bill of lading, together with a bill of exchange drawn on the buyer for the price, with instructions to deliver the bill of lading only on acceptance or payment of the bill of exchange, or by delivering the bill of lading as security to a banker who has discounted the bill of exchange, the appropriation is conditional on the acceptance or payment of the bill of exchange, as the case may be.

The rule that the seller who delivers goods to a carrier in pursuance of authority derived from the buyer is presumed thereby to appropriate the goods to the contract, like other rules for determining when the property has passed, is simply a rule of construction adopted for the purpose of ascertaining the real intention of the parties, which they have failed to express.[39] And therefore, if it appears that the seller, though authorized to make the appropriation, has failed to do so, or has done so upon condition, the presumption must yield to the facts. The commonest way of rebutting this presumption is by showing that he has reserved the right of disposal, or, as it is frequently called, the "jus disponendi."

Reservation of Right of Disposal by Bill of Lading.

A bill of lading is a writing signed on behalf of the carrier to whom goods are delivered for transportation, acknowledging their receipt, and undertaking to deliver them at their place of destination to the person named therein. When a bill of lading is given, no one is entitled to receive the goods except the person therein named, or one to whom the bill of lading has been properly indorsed. During the transit the bill of lading is the symbol of property, and the indorsement and delivery of the bill of lading operate as a symbolical delivery of the goods, and by such indorsement and delivery the property passes, if such is the intention of the parties. When, therefore, the seller ships the goods which he intends to deliver under the contract, but takes a bill of lading to his own order, not as agent of the buyer, but on his behalf, he thereby reserves the power of disposing of the property in the goods; and consequently there is no final appropriation, but, at most, a conditional appropriation, and the property does not, on shipment,

[39] Benj. Sales, § 381.

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pass to the buyer.[40] The fact that the seller takes the bill of lading to his own order is almost decisive to show his intention to reserve the right of disposal.[41] The presumption that he thereby reserves such right may, indeed, be rebutted by proof that in so doing he acted as agent of the buyer, and did not intend to retain control of the property; and it is for the jury to determine, as a question of fact, what the real intention was.[42] But the mere fact that the seller sends to the buyer an invoice describing the goods as shipped on his account and at his risk is not enough to rebut the presumption;[43] and the presumption arises although the seller ships the goods in the buyer's own vessel, and the bill of lading states that the goods are freight free, and the buyer's own property.[44]

Dealing with Bill of Lading to Secure Contract Price.

A common method of dealing with the bill of lading, when the seller reserves the right of disposal so as to secure the payment of the contract price, is to send the bill of lading, together with a bill of exchange drawn on the buyer for the price, to an agent of the seller, with instructions that the bill of lading is not to be delivered to the buyer until acceptance or payment of the bill of

[40] Mirabita v. Imperial Ottoman Bank, 3 Exch. Div. 164, 172, per Cotton, L. J.; Wait v. Baker, 2 Exch. 1; Brandt v. Bowlby, 2 Barn. & Adol. 932; Moakes v. Nicholson, 19 C. B. (N. S.) 290, 34 Law J. C. P. 273; Ogg v. Shuter, 1 C. P. Div. 47, reversing L. R. 10 C. P. 159; Ellershaw v. Magniac, 6 Exch. 570; Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295; Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568, 578; Erwin v. Harris, 87 Ga. 333, 13 S. E. 513; Alabama, G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 South. 356; Forcheimer v. Stewart, 65 Iowa, 593, 22 N. W. 886; Bergman v. Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992. See, also, Stollenwerck v. Thacher, 115 Mass. 224. Where the seller delivers goods to a carrier, consigned to himself, in care of the buyer, the property does not pass. Ward v. Taylor, 56 Ill. 494.

[41] Shepherd v. Harrison, L. R. 5 H. L. 116; Dows v. National Exchange Bank, 91 U. S. 618; Newcomb v. Boston & L. R. Co., 115 Mass. 230.

[42] Joyce v. Swann, 17 C. B. (N. S.) 84; Van Casteel v. Booker, 2 Exch. 691; Browne v. Hare, 4 Hurl. & N. 822, 29 Law J. Exch. 6; Moakes v. Nicholson, 19 C. B. (N. S.) 290, 34 Law J. C. P. 273; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Hobart v. Littlefield, 13 R. I. 341.

[43] Cases cited in note 41, supra.

[44] Turner v. Trustees of Liverpool Docks, 6 Exch. 543; Gabarron v. Kreeft, L. R. 10 Exch. 274.

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exchange. In such a case the appropriation does not become absolute, and the property does not pass, until the buyer accepts or pays the bill of exchange, as the case may be.[45] And if the seller transmits the bill of exchange and the bill of lading directly to the buyer, upon condition that he is not to retain the bill of lading unless he honors the bill of exchange, the buyer is bound to return the bill of lading if he does not comply with the condition; and if he wrongfully retains the bill of lading the property in the goods does not pass to him.[46] More frequently still, the seller obtains a discount of the bill of exchange from a banker to whom he delivers it with the indorsed bill of lading attached. Under these circumstances, the banker acquires a special property in the goods to secure his advances, and the appropriation of the goods to the contract is conditional upon the buyer's payment of the bill of exchange,[47] but upon payment or tender by him the property vests in him.

[45] Mirabita v. Imperial Ottoman Bank, 3 Exch. Div. 164, per Cotton, L. J.; Shepherd v. Harrison, L. R. 4 Q. B. 196; Id. 493, in the house of lords, L. R. 5 H. L. 116; Ogg v. Shuter, 1 C. P. Div. 47; Alderman v. Eastern R. R., 115 Mass. 233; Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568, 578; Seeligson v. Philbrick, 30 Fed. 600; Jones v. Brewer, 79 Ala. 545. A bill of lading deliverable to order, when attached to and forwarded with a time draft, without special instructions, to an agent, for collection, may be surrendered to the drawee on acceptance of the draft. National Bank of Commerce v. Merchants' Nat. Bank, of Memphis, 91 U. S. 92. But where the seller delivered goods to a carrier, consigned to the buyer, and took a shipping receipt in the name of the buyer, which he sent with a draft to a bank, with directions to deliver the receipt on acceptance of the draft, a finding that the property passed to the buyer on delivery to the carrier was warranted. Wigton v. Bowley, 130 Mass. 252.

[46] Shepherd v. Harrison, L. R. 4 Q. B. 196; Id. 493, L. R. 5 H. L. 116, 133, per Lord Cairns; Cayuga County Nat. Bank v. Daniels, 47 N. Y. 631. Where the seller deposited in the mail, directed to the buyer, an unindorsed bill of lading, attached to a draft for the price, the question whether the property had passed was for the jury. Alabama G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 South. 356. See Ex parte Banner, 2 Ch. Div. 278.

[47] Mirabita v. Imperial Ottoman Bank, 3 Exch. Div. 164; Jenkyns v. Brown, 14 Q. B. 496, 19 Law J. Q. B. 286; Dows v. National Exchange Bank, 91 U. S. 618; Forty Sacks of Wool, 14 Fed. 643; First Nat. Bank of Cairo v. Crocker, 111 Mass. 163; Fifth Nat. Bank of Chicago v. Bayley, 115 Mass. 228; Bank of Rochester v. Jones, 4 N. Y. 497; Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568; Hieskell v. Farmers' & Mechanics' Nat. Bank, 89 Pa. St. 155; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Halsey v. Warden, 25 Kan. 128; Merchants' Exchange Bank v. McGraw, 8 C. C. A. 420, 59 Fed. 972.

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CHAPTER V.

MISTAKE, FAILURE OF CONSIDERATION, AND FRAUD.

57–58. Mistake.
59. Failure of Consideration.
60–61. Fraud.
62–66. Election to Affirm or Rescind for Fraud.
67–69. Fraud on Creditors.
70. How Far Delivery is Essential to the Transfer of the Property against Creditors and Purchasers.

MISTAKE.

57. The effect of mistake, when it has any operation at all, is to render the contract void.

58. A person who has entered into a contract of sale, void on the ground of mistake, may, if it is still executory, repudiate it, and successfully defend an action upon it. If he has paid money or delivered goods under the contract, he may, upon returning what he has received under it, recover the money or the goods.

As has been previously explained, when a contract has been entered into by the parties under a material mistake of fact of such a character that there was no mutual assent, the contract is void.[1] The effect of the mistake is to prevent the contract from ever coming into existence, and hence to prevent its enforcement. A party to such an apparent agreement may wait until the other party seeks to enforce it, and then assert its nullity by way of defense; or he may, if he prefers, come forward actively as plaintiff.[2] If

[1] Ante, p. 28 et seq. It is sometimes said that a party to an apparent agreement, void by reason of mistake, may elect to treat it as subsisting, but, strictly speaking, the agreement which he so elects to treat as subsisting is a new agreement, based on the state of facts which he has subsequently discovered to exist. Pol. Cont. 450.

[2] He may, where the facts warrant such a course, sue in equity to have the transaction declared void, and to be relieved from any possible claims in respect to it. Pol. Cont. 450.

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the contract has been executed under a continuance of the mistake, a party who has performed his part may repudiate it on discovering his mistake, and may then recover the money paid or the goods delivered by him under the contract, unless he has done something to render impossible a restitutio in integrum; that is, a restoration of the other party to the condition he was in before the supposed contract was entered into.[3] In such a case the buyer can maintain an action for money had and received, and the seller can maintain an action of replevin; and, since the sale is void, the buyer acquires no title under it, and can pass no title, even to a bona fide purchaser.[4]

FAILURE OF CONSIDERATION.

59. When the buyer has paid the price in whole or in part, and the consideration for such payment totally fails, he may rescind the contract, and recover the money so paid.

When the seller fails entirely to perform his part of the contract, the buyer may put an end to it, and recover in an action for money had and received any part of the price which he has advanced.[5] In this respect, as will be seen, a greater effect is given to failure of performance on the part of the seller than on the part of the buyer.[6] The same right of action arises in favor of the buyer when it turns

[3] Cox v. Prentice, 3 Maule & S. 344; Grymes v. Sanders, 93 U. S. 55, 62; Harris v. Hanover Nat. Bank, 15 Fed. 786; Benj. Sales, § 415, and see post, p. 121, where the same rule is applied to rescission for fraud. Inasmuch as mistake, unlike fraud, renders the contract void, and not merely voidable, there can, strictly speaking, be no rescission but simply a repudiation of the supposed contract.

[4] Chapman v. Cole, 12 Gray, 141; Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805; Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433, and 5 N. E. 908.

[5] Giles v. Edwards, 7 Term R. 181; Hill v. Rewee, 11 Metc. (Mass.) 268, 271; Miner v. Bradley, 22 Pick. 457, 458; Howe Mach. Co. v. Willie, 85 Ill. 333; Benj. Sales, § 423. Money paid for shares in a projected company, which is not formed, may be recovered back. Kempson v. Saunders, 4 Bing. 5. In some states the buyer may avoid the sale for breach of an express warranty. Post, p. 244.

[6] Post, p. 234. But see p. 229.

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out that the seller had no title to the thing sold.[7] So if the thing sold be a bill or note or other security, and it turn out to be invalid because of forgery,[8] or material alteration,[9] or for any other cause,[10] the buyer may rescind for failure of consideration. So, on the sale of a patent, if the patent be void, the consideration fails.[11] But, though the thing sold turn out to be worthless, if it be what the buyer intended to buy, there is no failure of consideration.[12]

The Failure must be Total.

To authorize rescission, if the contract be entire, the failure of consideration must be total. The buyer is not obliged, indeed, to accept a partial performance, and, if such performance only is tendered, he may rescind the contract, and recover back the price.[13] But, if he has accepted a partial performance, he cannot, at least without returning what he has received, afterwards rescind, but

[7] Post, p. 167.

[8] Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 El. & Bl. 133, 24 Law J. Q. B. 46; Terry v. Bissell, 26 Conn. 23; Aldrich v. Butts, 5 R. I. 218; Merriam v. Wolcott, 3 Allen, 258. See, also, Whitney v. National Bank of Potsdam, 45 N. Y. 303; Bell v. Dagg, 60 N. Y. 528.

[9] Burchfield v. Moore, 3 El. & Bl. 683, 23 Law J. Q. B. 261.

[10] Gompertz v. Bartlett, 2 El. & Bl. 849, 23 Law J. Q. B. 65 (a bill of exchange purporting to be a foreign bill, which turned out to be a domestic bill, and invalid because unstamped; Wood v. Sheldon, 42 N. J. Law, 421 (scrip illegally and fraudulently issued); Paul v. City of Kenosha, 22 Wis. 257 (bonds void for want of power in the city to issue them). But in Littauer v. Goldman, 72 N. Y. 506, it was held that the buyer of a note void for usury could not recover for failure of consideration.

[11] Nash v. Lull, 102 Mass. 60; Harlow v. Putnam, 124 Mass. 553; Shepherd v. Jenkins, 73 Mo. 510; Green v. Stuart, 7 Baxt. 418. But where the plaintiff bought the exclusive right to use a patent in a foreign country, being aware that no such right could legally be obtained, but desiring an ostensible grant of the right, with the object of floating a company, it was held that, having obtained what he intended to buy, he could not recover the purchase money on the ground that the consideration had failed. Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 491, affirmed in 1 Q. B. Div. 679. And see, also, Taylor v. Hare, 1 Bos. & P. N. R. 260; Lawes v. Purser, 6 El. & Bl. 930, 26 Law J. Q. B. 25.

[12] Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Blattenberger v. Holman, 103 Pa. St. 555; Neidefer v. Chastain, 71 Ind. 363; Wheat v. Cross, 31 Md. 99.

[13] Giles v. Edwards, 7 Term R. 181. See Smith v. Lewis, 40 Ind. 98.

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must sue for breach of the contract.[14] If he has enjoyed part of the consideration, there can be no rescission.[15] Nevertheless, although the contract be entire, if it is for a definite quantity of goods all of one quality at a fixed price per ton or pound, and the seller delivers only a part and makes default in delivering the remainder, it is held that the buyer who has advanced the price of the whole may recover back the price of the part which is deficient.[16] In this case the entirety of the contract is broken by the concurrent act of the parties.[17] But, if the failure is merely as to the quality of a part of the goods, the buyer cannot rescind unless he rescinds as to the whole.[18]

FRAUD.

60. When a party to a contract of sale has been induced to enter into it by the fraud of the other party, the contract is voidable at his option.

61. CHARACTERISTICS—Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it.

Fraud renders all contracts voidable both at law and in equity. A man is not bound by a contract to which his consent has been obtained by fraud, because but for the fraud he would not have consented.[19]

[14] Harnor v. Groves, 15 C. B. 669, 24 Law J. C. P. 53; Miner v. Bradley, 22 Pick. 457; Clark v. Baker, 5 Metc. (Mass.) 452.

[15] Taylor v. Hare, 1 Bos. & P. N. R. 260; Lawes v. Purser, 6 El. & Bl. 930, 26 Law J. Q. B. 25; Benj. Sales, § 427.

[16] Devaux v. Conolly, 8 C. B. 640; Hill v. Rewee, 11 Metc. (Mass.) 268, 272. This is in the nature of a total failure of consideration for part of the price paid, not a partial failure for the whole. Benj. Sales, § 426. As to what constitutes a severable contract, see Norris v. Harris, 15 Cal. 226; McGrath v. Cannon (Minn.) 57 N. W. 150; Potsdamer v. Kruse (Minn.) 58 N. W. 983.

[17] Mansfield v. Trigg, 113 Mass. 350, 352, per Wells, J.

[18] Harnor v. Groves, 15 C. B. 669, 24 Law J. C. P. 53; Clark v. Baker, 5 Metc. (Mass.) 452; Morse v. Brackett, 98 Mass. 205, 104 Mass. 494; Mansfield v. Trigg, 113 Mass. 350.

[19] Benj. Sales, § 428 et seq.

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Fraud is commonly said to be so subtle in its nature and manifold in its forms as to be impossible of definition. Nevertheless the statement of its essential characteristics which has been given above in the language of Sir William R. Anson [20] sufficiently indicates the nature of such fraud as will render voidable a contract of sale. The same state of facts which is ground for avoidance also gives rise to an action at common law for deceit, in which the defrauded party may recover such damages as he has suffered by reason of the false representation. And a practical test of fraud, as opposed to misrepresentation which is not fraudulent, is that the first does, and the second does not, give rise to an action ex delicto.[21]

Fraud is a False Representation.

A mistaken belief in the facts may be created by active means, as by fraudulent concealment or misrepresentation, or passively, by mere nondisclosure. But it is only when a man is under some obligation to disclose facts that mere silence will be considered as a means of deception. In contracts of sale, disclosure is not ordinarily incumbent on the parties.[22] The rule is caveat emptor. It has even been held that the seller is under no obligation to communicate the existence of latent defects, such as a hidden disease in an animal, unless by act or implication he represents such defects not to exist; [23] but it is generally held in this country that the intentional nondisclosure of such a defect by the seller, when he knows that it is unknown to the buyer, is fraudulent.[24] On the other hand, the buyer is not bound to disclose to the seller facts

[20] Anson, Cont. 145. His discussion of fraud has been closely followed. And see Clark, Cont. 324.

[21] Anson, Cont. 129; Clark, Cont. 324.

[22] Smith v. Hughes, L. R. 6 Q. B. 597; Laidlaw v. Organ, 2 Wheat. 178; People's Bank v. Bogart, 81 N. Y. 101; Kintzing v. McElrath, 5 Pa. St. 467; Cogel v. Kniseley, 89 Ill. 598.

[23] Ward v. Hobbs, 3 Q. B. Div. 150, 4 App. Cas. 13; Beninger v. Corwin, 24 N. J. Law, 257; Paul v. Hadley, 23 Barb. 521; Morris v. Thompson, 85 Ill. 16.

[24] Paddock v. Strobridge, 29 Vt. 471; Maynard v. Maynard, 49 Vt. 297; Jeffrey v. Bigelow, 13 Wend. 518; Hanson v. Edgerly, 29 N. H. 343; Barron v. Alexander, 27 Mo. 530; Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421; Cardwell v. McClelland, 3 Sneed, 150; Armstrong v. Huffstatler, 19 Ala. 51; Marsh v. Webber, 13 Minn. 109 (Gil. 99); Turner v. Huggins, 14 Ark. 21; Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552; Stewart v. Wyoming Cat-

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as to which information is equally open to both; for example, facts which would enhance the price.[25] As a rule, to charge a party to a contract of sale with fraud, there must be some active attempt to deceive either by statement which is false, or, at least, by representation which, though true as far as it goes, is accompanied by such a suppression of the facts as to convey a misleading impression.[26] If the buyer wishes to protect himself further, he must require of the seller a warranty of any matter the risk of which he is unwilling to assume.[27] Any device, however, used by the seller to induce the buyer to omit inquiry or examination into defects, is as much a fraud as active concealment.[28]

The Representation must be of Fact.

Fact is here used in distinction from opinion, intention, and law.

Same—Not Matter of Opinion.

A mere representation of opinion which turns out to be unfounded will not invalidate a contract.[29] Thus statements of value are generally immaterial,[30] though representations of facts affecting the value,[31] for example that a third person gave so much for a thing,[32]

tle Ranche Co., 128 U. S. 383, 388, 9 Sup. Ct. 101; Clark, Cont. 329, and cases there cited.

[25] Fox v. Mackreth, 2 Brown, C. C. 400; Turner v. Harvey, Jac. 170, per Lord Eldon; Laidlaw v. Organ, 2 Wheat. 178; Blydenburgh v. Welsh, Baldw. 331, Fed. Cas. No. 1,583; Kintzing v. McElrath, 5 Pa. St. 467.

[26] Peek v. Gurney, L. R. 6 H. L. 377, 403, per Lord Cairns; Newell v. Randall, 32 Minn. 171, 19 N. W. 972; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832; Clark, Cont. 326, and cases cited.

[27] Veasey v. Doton, 3 Allen, 380, 381; Morrison v. Koch, 32 Wis. 254, 261.

[28] Matthews v. Bliss, 22 Pick. 48, 52; Smith v. Countryman, 30 N. Y. 665, 681; Roseman v. Canovan, 43 Cal. 110; Croyle v. Moses, 90 Pa. St. 250; Clark, Cont. 328, and cases cited.

[29] Belcher v. Costello, 122 Mass. 189; Homer v. Perkins, 124 Mass. 431; Holbrook v. Connor, 60 Me. 578; Lyons v. Briggs, 14 R. I. 222; Watts v. Cummins, 59 Pa. St. 84; Buschman v. Codd, 52 Md. 207, Clark, Cont. 331, and cases cited.

[30] Gordon v. Butler, 105 U. S. 553; Poland v. Brownell, 131 Mass. 138; Uhler v. Semple, 20 N. J. Eq. 288; Schramm v. O'Connor, 98 Ill. 539; Kennedy v. Richardson, 70 Ind. 524.

[31] Chrysler v. Canaday, 90 N. H. 272, 278; Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Coolidge v. Goddard, 77 Me. 578, 1 Atl. 831.

[32] Belcher v. Costello, 122 Mass. 189. Market value: Manning v. Albee,

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are material. By a somewhat fine distinction, however, statements of what the seller gave or was offered for the thing sold are by some courts deemed to be mere statements of value, on which the buyer is not entitled to rely.[33] In like manner, commendatory expressions, such as men habitually use to induce others to enter into a bargain, known as "dealer's talk," are not deemed representations of fact.[34] Simplex commendatio non obligat. The line between fact and opinion is a narrow one, and, when a statement may be taken in either sense, it is for the jury to determine which it is.[35]

Same—Not Matter of Intention—Intention not to Pay.

Again, an expression of intention does not amount to a statement of fact, nor does a promise; and a representation that a thing is must be distinguished from a promise that it shall be.[36] Yet there is a distinction between a promise which the promisor intends to perform and one which he intends to break. In the first place, he represents his intention that something shall take place in the future; in the second case, he not only makes a promise which is ultimately broken, but he represents his existing intention,—that is, he represents his state of mind to be other than it really is.[37] And accordingly it is held that if a man buys goods on credit not intending to pay for them, he makes a fraudulent misrepresentation, and that the seller may rescind the sale.[38]

11 Allen, 520; Richardson v. Noble, 77 Me. 390. Contra, Graffenstein v. Epstein, 23 Kan. 443. See, also, Ives v. Carter, 24 Conn. 392; Somers v. Richards, 46 Vt. 170.

[33] Medbury v. Watson, 6 Metc. (Mass.) 249, 259; Hemmer v. Cooper, 8 Allen, 334; Holbrook v. Connor, 60 Me. 578. Contra, Sandford v. Handy, 23 Wend. 260; Van Epps v. Harrison, 5 Hill, 63. See, also, Page v. Parker, 43 N. H. 363, 368; Smith v. Countryman, 30 N. Y. 655; Kenner v. Harding, 85 Ill. 264. See Clark, Cont. 334.

[34] Morse v. Shaw, 124 Mass. 59; Teague v. Irwin, 127 Mass. 217; Sledge v. Scott, 56 Ala. 202; Jackson v. Collins, 39 Mich. 557, 561.

[35] Homer v. Perkins, 124 Mass. 431, 433; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; Dawson v. Graham, 48 Iowa, 378.

[36] Long v. Woodman, 58 Me. 49; Clark, Cont. 332, and cases there cited.

[37] Anson, Cont. 148; Clark, Cont. 333.

[38] Load v. Green, 15 Mees. & W. 216; Ferguson v. Carrington, 9 Barn. & C. 59; Donaldson v. Farwell, 93 U. S. 631; Byrd v. Hall, *41 N. Y. 646; Johnson v. Monell, Id. 655; Stewart v. Emerson, 52 N. H. 301; Dow v.

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Same—Not Matter of Law.

Finally, a misrepresentation of law does not ordinarily give rise to an action of deceit or make a contract voidable.[39]

The Representation must be Made with Knowledge of Its Falsity, or in Reckless Disregard of the Truth.

A false statement made by one who believes the truth of what he asserts, though it may warrant avoidance for mistake,[40] or may amount to a warranty or condition,[41] is not fraudulent.[42] A representation to be fraudulent must not only be false, but it must be made with knowledge of its falsity,[43] or at least without belief in its truth. The mere absence of belief is enough; for, if a man

Sanborn, 3 Allen, 181; Parker v. Byrnes, 1 Low. 539, Fed. Cas. No. 10,728; Burrill v. Stevens, 73 Me. 395; Stoutenbourgh v. Konkle, 15 N. J. Eq. 33; Powell v. Bradlee, 9 Gill & J. 220; Shipman v. Seymour, 40 Mich. 274, 283; Talcott v. Henderson, 31 Ohio St. 162; Allen v. Hartfield, 76 Ill. 358; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Fox v. Webster, 46 Mo. 181; Lane v. Robinson, 18 B. Mon. 623; Belding v. Frankland, 8 Lea, 67; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900. In Pennsylvania it is held that insolvency and the knowledge of it are not sufficient, but that there must be artifice, trick, or false pretense to avoid the sale. Smith v. Smith, 21 Pa. St. 367; Rodman v. Thalheimer, 75 Pa. St. 232; Bughman v. Central Bank, 159 Pa. St. 94, 28 Atl. 209. And in Alabama it is held that there must be fraudulent concealment or representation. Le Grand v. Eufaula Nat. Bank, 81 Ala. 123, 1 South. 460. See, also, Wilson v. White, 80 N. C. 280. And see Clark, Cont. 327.

[39] Upton v. Tribilcock, 91 U. S. 45, 49; Starr v. Bennett, 5 Hill, 303; Townsend v. Cowles, 31 Ala. 428; Fish v. Cleland, 33 Ill. 237; Clem v. Newcastle & D. R. Co., 9 Ind. 488; People v. Board of Sup'rs, 27 Cal. 655; Clark, Cont. 333, and cases cited.

[40] Ante, p. 28 et seq.

[41] Post, p. 150 et seq.

[42] Benj. Sales, § 429; Clark, Cont. 338.

[43] Collins v. Evans, 5 Q. B. 820; Ormrod v. Huth, 14 Mees. & W. 651; Lord v. Goddard, 13 How. 198; King v. Eagle Mills, 10 Allen, 548; Pettigrew v. Chellis, 41 N. H. 95; Allen v. Wanamaker, 31 N. J. Law, 370; Bigler v. Flickinger, 55 Pa. St. 279; Lamm v. Port Deposit H. Ass'n, 49 Md. 233; Mason v. Chappell, 15 Grat. 572; Kimbell v. Moreland, 55 Ga. 164; Parmlee v. Adolph, 28 Ohio St. 10; Tone v. Wilson, 81 Ill. 529; Gregory v. Schoenell, 55 Ind. 101; Rawson v. Harger, 48 Iowa, 269; Mamlock v. Fairbanks, 46 Wis. 415, 1 N. W. 167; Merriam v. Pine City Lumber Co., 23 Minn. 314; Rightor v. Roller, 31 Ark. 171; Clark, Cont. 338.

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states as true that of which he is ignorant, he must be held as responsible as if he had asserted what he knew to be untrue. Therefore, if a man in reckless disregard of the truth makes a statement which is actually false, his liability is the same as if he knew it was false;[44] and, if he represents a fact as true of his own knowledge when he has no knowledge, it is immaterial that he believed it to be true.[45]

Motive.

If the representation was fraudulent as the term has above been explained, it is immaterial that the motive was innocent.[46]

[44] Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; Weir v. Bell, 3 Exch. Div. 238, 242; Nettleton v. Beach, 107 Mass. 499; Fisher v. Mellen, 103 Mass. 503; Cole v. Cassidy, 138 Mass. 437; Hammond v. Pennock, 61 N. Y. 145; Meyer v. Amidon, 45 N. Y. 169; Bower v. Fenn, 90 Pa. St. 359; Cowley v. Smyth, 46 N. J. Law, 380; Smith v. Newton, 59 Ga. 113; Foard v. McComb, 12 Bush, 723; Frenzel v. Miller, 37 Ind. 1; Parmlee v. Adolph, 28 Ohio St. 10; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473; Walsh v. Morse, 80 Mo. 569. It was formerly held that a false representation, though the party making it was charged neither with fraud nor negligence, was actionable. Evans v. Collins, 5 Q. B. 804. To such a misrepresentation the term "legal fraud" or "constructive fraud," as opposed to "moral fraud," was applied, but in the present state of the law the term "legal fraud" has become meaningless. The term was condemned by Bramwell, L. J., in Weir v. Bell, 3 Exch. Div. 238, 242, in which case, after saying that moral fraud must be proved, he observes: "I do not understand legal fraud. It has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. And, when these exist, it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty." See Clark, Cont. 338.

[45] Litchfield v. Hutchinson, 117 Mass. 195; Cabot v. Christie, 42 Vt. 121; Marsh v. Falker, 40 N. Y. 562; Dulaney v. Rogers, 64 Mo. 201; Clark, Cont. 339.

[46] Polhill v. Walter, 3 Barn. & Adol. 114; Peek v. Gurney, L. R. 6 H. L. 409; Hammond v. Pennock, 61 N. Y. 145; Cowley v. Smyth, 46 N. J. Law, 380; Clark, Cont. 343.

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The Representation must have been Made with the Intention that It should be Acted On.

Another statement of this rule is that the representation must be made as part of the same transaction.[47] Therefore, if a representation is made by one of the parties to the contract, the intention that it should be acted on will generally be manifest. It is in cases where the representation has caused injury to a third person that the question of such intention will generally arise. That a representation, in order to give grounds for an action of deceit, need not be made directly to the injured party is well settled.[48] Thus where the defendant sold a gun to the father of the plaintiff for the use of the buyer and his sons, falsely representing that it was safe, and the plaintiff used it and it exploded and injured him, it was held that he could recover.[49] But in such cases it must appear that the representation was made with the intention that it should be acted upon by such third person in the manner that occasioned the injury.[50] The right of action is based solely on tort, for no action can be maintained on the contract except by parties and proxies.[51]

The Representation must be Material and must Induce the Sale.

A material representation is one which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business on hand.[52] If such an untrue statement has been made and was in fact an inducement to the other party to enter into the contract, it is unimportant that it was not the sole inducement; but it is enough if it was a material element in influencing him to enter into it.[53] Moreover,

[47] Pol. Cont. 533.

[48] Barry v. Croskey, 2 Johns. & H. 1, 17, per Wood, V. C., at page 22; Langridge v. Levy, 2 Mees. & W. 519; Peek v. Gurney, L. R. 6 H. L. 377; Wells v. Cook, 16 Ohio St. 67; Bank of Montreal v. Thayer, 7 Fed. 623; Clark, Cont. 341.

[49] Langridge v. Levy, 2 Mees. & W. 519.

[50] Cases cited in note 48.

[51] Gerhard v. Bates, 2 El. & Bl. 476, 22 Law J. Q. B. 364.

[52] Pol. Cont. 528.

[53] Safford v. Grout, 120 Mass. 20; McAleer v. Horsey, 35 Md. 439; Ruff v. Jarrett, 94 Ill. 475; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323; Clark, Cont. 344.

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if the representation was such that it might induce the other party to enter into the contract on the faith of it, he will be presumed to have acted in reliance upon it.[54] And, if he actually relies upon the representation, the fact that he had means of knowledge which, if used, would have led to a discovery of the untruth will not bar him of his remedy.[55]

But, however false or dishonest the representations may be which are used to induce a party to enter into a contract, they do not constitute a fraud if he is not deceived; for under such circumstances the inducement or motive is not the representations, which are not believed, but some independent motive.[56] The representations must be relied upon.[57] For the same reason, if the attempted fraud does not come to the knowledge of the other party, it will not avail him in avoidance of the contract. Thus where the seller inserted a metal plug to conceal a weak spot in a gun manufactured to the order of the buyer, who took it without inspection, it was held that the attempted fraud did not exonerate him from paying for the gun; since, although the seller intended to deceive him, he had in fact not been deceived.[58] If the action is for deceit, damages from the fraud must be proved.[59]

[54] Redgrave v. Hurd, 20 Ch. Div. 1; Holbrook v. Burt, 22 Pick. 546; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241.

[55] Redgrave v. Hurd, 20 Ch. Div. 1; Jackson v. Collins, 39 Mich. 557; Kendall v. Wilson, 41 Vt. 567; Stewart v. Stearns, 63 N. H. 99; Union Nat. Bank v. Hunt, 76 Mo. 439; Clark, Cont. 336.

[56] Gunby v. Sluter, 44 Md. 237; Phipps v. Buckman, 30 Pa. St. 401; Gregory v. Schoenell, 55 Ind. 101; Sledge v. Scott, 56 Ala. 202; Smith v. Newton, 59 Ga. 113. If the buyer accepts the goods with knowledge of the fraud, he cannot repudiate the contract. Baird v. Mayor, etc., of New York, 96 N. Y. 567; Thompson v. Libby, 36 Minn. 287, 31 N. W. 52.

[57] Ming v. Woolfolk, 116 U. S. 599, 6 Sup. Ct. 489; Hanna v. Rayburn, 84 Ill. 533; Holdom v. Ayer, 110 Ill. 448; Clark, Cont. 344.

[58] Horsfall v. Thomas, 1 Hurl. & C. 90. See remarks on this case in Anson, Cont. 152.

[59] Pasley v. Freeman, 3 Term R. 51; 2 Smith, Lead. Cas. (8th Ed.) 66; Brown v. Blunt, 72 Me. 415; Weaver v. Wallace, 9 N. J. Law, 251.

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SAME—ELECTION TO AFFIRM OR RESCIND FOR FRAUD.

62. The defrauded party may:

(a) Affirm the contract.

(b) Rescind the contract within a reasonable time after discovery of the fraud, unless it has become impossible to restore the other party to the condition in which he would have been if the contract had not been made, or unless a third person has in good faith and for value acquired an interest in the goods.

63. The contract must be affirmed or rescinded in toto, and the election once exercised is final.

64. If the defrauded party affirm, he may recover damages for the fraud in an action of deceit, or, if sued for the price, he may set up the fraud in reduction thereof.

65. If the defrauded party rescind, he may:

(a) Set up the rescission in defense of an action on the contract.

(b) If he be the buyer and has paid the price, he may maintain an action to recover the amount. If he be the seller, and has delivered the goods, he may maintain an action of trover or replevin.

66. A bona fide purchaser for value from the fraudulent buyer acquires an indefeasible title.

A contract induced by fraud is not void, but only voidable, at the option of the party defrauded; in other words, it is valid until rescinded. It is for the party defrauded to elect whether he will be bound.[60] But, if he affirms the contract, he must affirm it in all its terms. Thus a seller who has been induced by fraud to sell on credit cannot sue on the contract price before the expiration of the credit, but

[60] Rawlins v. Wickham, 3 De Gex & J. 304, 322; Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26; Clark, Cont. 346.

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must rescind, and sue in trover or replevin.[61] When the contract is once affirmed, the election is completely determined.[62] After affirmance, the sole remedy of the defrauded party for the fraud is by way of damages, which he may recover in an action of deceit; or, if he be the seller, he may set up the fraud by way of recoupment in an action by the seller for the price.[63] It is not necessary that the affirmance should be express. Any acts which unequivocally treat the contract as subsisting, such as dealing with the goods as his own on the part of the buyer or taking security for the price on the part of the seller, will have the same effect.[64] Bringing suit on the contract is a conclusive affirmance.[65] Bringing an action for deceit, if the buyer retains the goods, and asks damages for the difference between the goods as represented and as they actually were, is an affirmance.[66] Where the election to affirm has once

[61] Ferguson v. Carrington, 9 Barn. & C. 59; Emma Silver Min. Co. v. Emma Silver Min. Co. of New York, 7 Fed. 401; Adler v. Fenton, 24 How. 407; Butler v. Hildreth, 5 Metc. (Mass.) 49; Dellone v. Hull, 47 Md. 112; Stewart v. Emerson, 52 N. H. 301, 310; Bulkley v. Morgan, 46 Conn. 393; Kellogg v. Turpie, 93 Ill. 265; Stoutenbourgh v. Konkle, 15 N. J. Eq. 33; Weed v. Page, 7 Wis. 503. Otherwise in New York, where it is held that the seller may waive the tort, and sue in assumpsit. Wigand v. Sichel, *42 N. Y. 120; Roth v. Palmer, 27 Barb. 652. See, also, Dietz v. Sutcliffe, 80 Ky. 650.

[62] Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26, 34; Moller v. Tuska, 87 N. Y. 166; Pence v. Langdon, 99 U. S. 578, 582.

[63] Harrington v. Stratton, 22 Pick. 510; Perley v. Balch, 23 Pick. 283; Foulk v. Eckert, 61 Ill. 318.

[64] Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26, 34; Grymes v. Sanders, 93 U. S. 55, 62; Joslin v. Gowee, 52 N. Y. 90; Seavy v. Potter, 121 Mass. 297; Cross v. Hayes, 45 N. J. Law, 565; Davis v. Betz, 66 Ala. 206; Evans v. Montgomery, 50 Iowa, 325, 337; Bridgeford v. Adams, 45 Ark. 136.

[65] Cases cited in note 61, supra. But obtaining judgment in ignorance of the fraud does not amount to an affirmance. Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26, 35; Kraus v. Thompson, 30 Minn. 64, 14 N. W. 266.

[66] Emma Silver Min. Co. v. Emma Silver Min. Co. of New York, 7 Fed. 401, 402. It has indeed been laid down broadly that bringing action for deceit affirms the sale. Kimball v. Cunningham, 4 Mass. 505. Cf. Whiteside v. Brawley, 152 Mass. 133, 134, 24 N. E. 1088. But the action for deceit does not necessarily imply an affirmance, as where the seller reclaims such goods as he can reach, and as to the remainder sues the buyer to recover damages for the fraud. Hersey v. Benedict, 15 Hun, 282. See, also, Hub-

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been exercised, the subsequent discovery of a new incident in the fraud will not revive the right to rescind.[67]

If, on the other hand, the defrauded party elects to rescind, he must manifest his election by distinctly communicating to the other party his intention to repudiate the contract.[68] It is not necessary to a rescission that the contract should be judicially set aside.[69] Thus, if the defrauded party be the buyer, he may refuse to accept the goods if he discover the fraud before delivery, or may return them if the discovery be not made till after delivery; and, if he has paid the price, he may recover it back on offering to return the goods.[70] On the other hand, the defrauded party may set up the rescission as a defense in an action by the other on the contract;[71] or he may, if the remedy at law is inadequate, institute proceedings in equity to have the contract set aside.[72] Election to rescind waives the right to sue on the contract.[73]

Restitutio in Integrum.

The right of a party to rescind for fraud, as for other causes, is conditional upon his restoring the other party to the position in which he was before the contract. Thus the seller must return or offer to return the price, and the buyer must return or offer to return the goods,[74] though he need not do so if they are absolutely

bell v. Meigs, 50 N. Y. 480, 487; Miller v. Barber, 66 N. Y. 558, 564; Lenox v. Fuller, 39 Mich. 268.

[67] Campbell v. Fleming, 1 Adol. & E. 40; Pratt v. Philbrook, 41 Me. 132. But see Pierce v. Wilson, 34 Ala. 596.

[68] Ashley's Case, L. R. 9 Eq. 263; Hammond v. Pennock, 61 N. Y. 145, 155; Potter v. Taggart, 54 Wis. 395, 400, 11 N. W. 678; Gates v. Bliss, 43 Vt. 299.

[69] Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64, 73.

[70] Clarke v. Dickson, El. Bl. & El. 148; Coolidge v. Brigham, 1 Metc. (Mass.) 547. See, also, cases cited in note 56, ante.

[71] Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26, 36.

[72] Anson, Cont. 154; Clark, Cont. 348; Fetter, Eq. 130.

[73] Farwell v. Myers, 59 Mich. 179, 26 N. W. 328; Wright v. Zeigler, 70 Ga. 501. Cf. Powers v. Benedict, 88 N. Y. 605.

[74] Clarke v. Dickson, El. Bl. & El. 148; Grymes v. Sanders, 93 U. S. 55; Kimball v. Cunningham, 4 Mass. 502; Thayer v. Turner, 8 Metc. (Mass.) 550; Cook v. Gilman, 34 N. H. 560; Hammond v. Buckmaster, 22 Vt. 375; Tisdale v. Buckmore, 33 Me. 461; Burton v. Stewart, 3 Wend. 236; Masson

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worthless.[75] Accordingly, if the buyer has consumed or sold any part of the goods, he cannot rescind; though, if he is the guilty party, he cannot prevent a rescission if the seller elects to take a partial restoration.[76] But mere depreciation in value of the thing sold before the buyer's discovery of the fraud will not defeat rescission on his part.[77] And if in the meantime he has incurred expenses for repairs he may on rescission and return recover the cost,[78] but if he is the guilty party he cannot exact a payment of such cost as a condition of rescission.[79]

Bona Fide Purchasers from Fraudulent Buyer.

It follows from the principle that the contract is voidable, and not void, that, when innocent third persons have for value acquired rights under the sale, their rights are indefeasible. The rule is also stated to be an application of the principle of convenience that, when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.[80] Thus, when a sale is procured by fraud, the property in the goods is transferred by the contract, subject to the seller's right of rescission, and a purchaser in good faith from the fraudulent buyer before the sale is rescinded acquires a good title.[81] The purchase must be for value, and hence the pro-

v. Bovet, 1 Denio, 69; Babcock v. Case, 61 Pa. St. 427; Haase v. Mitchell, 58 Ind. 213; Herman v. Haffenegger, 54 Cal. 161; Clark, Cont. 350.

[75] Kent v. Bornstein, 12 Allen, 342; Brewster v. Burnett, 125 Mass. 68; Smith v. Smith, 30 Vt. 139; Dill v. O'Ferrall, 45 Ind. 268; Clark, Cont. 351.

[76] Hammond v. Pennock, 61 N. Y. 145; Harper v. Terry, 70 Ind. 264.

[77] Veazie v. Williams, 8 How. 134, 158; Neblett v. Macfarland, 92 U. S. 101, 104; Clark, Cont. 352.

[78] Canada v. Canada, 6 Cush. 15; Farris v. Ware, 60 Me. 482; Clark, Cont. 852.

[79] Guckenheimer v. Angevine, 81 N. Y. 394; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832.

[80] Pol. Cont. 544; Clark, Cont. 352.

[81] White v. Garden, 10 C. B. 919, 20 Law J. C. P. 167; Stevenson v. Newnham, 13 C. B. 285, 22 Law J. C. P. 110; Pease v. Gloahec, L. R. 1 P. C. 220, 3 Moore, P. C. (N. S.) 556; Rowley v. Bigelow, 12 Pick. 307; Hoffman v. Noble, 6 Metc. (Mass.) 68; Easter v. Allen, 8 Allen, 7; Kingsbury v. Smith, 13 N. H. 109; Titcomb v. Wood, 38 Me. 561; Williamson v. Russell, 39 Conn. 406; Paddon v. Taylor, 44 N. Y. 371; Stevens v. Brennan, 79 N. Y.

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tection does not extend to attaching creditors,[82] to an assignee in bankruptcy,[83] or to a person taking the goods in payment of an existing indebtedness.[84]

Same—Fraudulent Impersonation.

A sale, however, is to be distinguished from a mere delivery of possession induced by fraud; for in the latter case the person obtaining possession acquires no property in the goods, and can pass none to a third person, however innocent. Thus where a person obtains goods by fraudulently impersonating a third person,[85] or by pretending to be the agent of a third person,[86] to whom the owner supposes he is selling the goods, the person thus obtaining the goods acquires no title, and a bona fide purchaser from him stands in no better position. In such a case there is no contract at all, as the seller never consented to sell to the person to whom he delivered the goods.

254; Sinclair v. Healy, 40 Pa. St. 417; Hall v. Hinks, 21 Md. 406; Williams v. Given, 6 Grat. 268; Kern v. Thurber, 57 Ga. 172; Wood v. Yeatman, 15 B. Mon. 270; Hawkins v. Davis, 8 Baxt. 506; Chicago Dock Co. v. Foster, 48 Ill. 507; Holland v. Swain, 94 Ill. 154; Bell v. Cafferty, 21 Ind. 411; Singer Manuf'g Co. v. Sammons, 49 Wis. 316, 5 N. W. 788; Wineland v. Coonce, 5 Mo. 296; Cochran v. Stewart, 21 Minn. 435; Sargent v. Sturm, 23 Cal. 259; Clark, Cont. 352.

[82] Buffington v. Gerrish, 15 Mass. 158; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 199, 25 N. E. 100; Thompson v. Rose, 16 Conn. 71; Jordan v. Parker, 56 Me. 557; Oswego Starch Fact. v. Lendrum, 57 Iowa, 573, 10 N. W. 900; Henderson v. Gibbs, 39 Kan. 679, 684, 18 Pac. 926.

[83] Donaldson v. Farwell, 93 U. S. 631; Bussing v. Rice, 2 Cush. 48; Singer v. Schilling, 74 Wis. 369, 43 N. W. 101.

[84] Barnard v. Campbell, 58 N. Y. 73; Stevens v. Brennan, 79 N. Y. 258; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201; Poor v. Woodman, 25 Vt. 235; McGraw v. Solomon, 83 Mich. 442, 47 N. W. 345. Contra, Shufeldt v. Pease, 16 Wis. 659; Butters v. Haugwout, 42 Ill. 18. And see Clark, Cont. 355.

[85] Cundy v. Lindsay, 3 App. Cas. 459; Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283; Loeffel v. Pohlman, 47 Mo. App. 574.

[86] Higgons v. Burton, 26 Law J. Exch. 342; Hardman v. Booth, 1 Hurl. & C. 803, 32 Law J. Exch. 105; Moody v. Blake, 117 Mass. 23; Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805; Barker v. Dinsmore, 72 Pa. St. 427; Hamet v. Letcher, 37 Ohio St. 356; McCrillis v. Allen, 57 Vt. 505; Peters Box & Lumber Co. v. Lesh, 119 Ind. 98, 20 N. E. 291. See, also, Kinsey v. Leggett, 71 N. Y. 387.

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Rescission must be Within a Reasonable Time.

What is a reasonable time after the discovery of the fraud depends on the circumstances of the case. Mere lapse of time will furnish evidence, and, when the lapse of time is great, probably conclusive evidence, of affirmance. If in the meantime the superior rights of third persons have intervened, or the position of the other party has altered to his disadvantage, the buyer would be deprived of his right to rescind.[87]

FRAUD ON CREDITORS.

67. Sales made with the intent on the part of seller and buyer to delay, hinder, or defraud creditors of the seller are fraudulent, and may be avoided by such creditors, unless a third person has in good faith and for value acquired an interest in the thing sold.

68. Sales fraudulent as to creditors are valid as between the parties.

69. A bona fide purchaser for value from the fraudulent buyer acquires an indefeasible title.

The foundation of the law on this subject is usually considered to be the statute of 13 Eliz. c. 5,[88] made perpetual by the statute

[87] Clough v. London & N. W. Ry. Co., L. R. 7 Exch. 26, 35; Pence v. Langdon, 99 U. S. 578; Grymes v. Sanders, 93 U. S. 55, 62; Williamson v. New Jersey S. R. Co., 28 N. J. Eq. 277, 293, 29 N. J. Eq. 311, 319; Willoughby v. Moulton, 47 N. H. 205; Burton v. Stewart, 3 Wend. 239; Herrin v. Libbey, 36 Me. 357; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832; Wilson v. Fisher, 5 Houst. 395; Bassett v. Brown, 105 Mass. 551, 557; Evans v. Montgomery, 50 Iowa, 325; Hall v. Fullerton, 69 Ill. 448; Parmlee v. Adolph, 28 Ohio St. 10; Collins v. Townsend, 58 Cal. 608; Clark, Cont. 348.

[88] "For the avoiding and abolishing of feigned, covinous, and fraudulent feaffments, gifts, grants, aleinations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, * * * devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts: * * * be it therefore declared, ordained and enacted that all and every feoffment, gift, grant, aleination, bargain, and conveyance of land, tenements, hereditaments,

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of 29 Eliz. c. 5, although earlier statutes had been previously passed, and it has been said upon high authority that the principles of the common law are so strong against fraud that without these statutes every end proposed by them would have been obtained.[89] The statute of 13 Eliz. c. 5, provides in substance that all conveyances and sales of land or chattels made with intent to delay, hinder, or defraud creditors shall be utterly void and of no effect against them, with a proviso that the act shall not extend to defeat any estate or interest conveyed upon good consideration and bona fide to any person not having at the time of such conveyance notice of the fraud. The statute has been substantially re-enacted in many of the states of the Union, but its principles have been adopted even in states where no such statute has been passed.[90]

Mutual Intent to Defraud.

A sale is not fraudulent against creditors unless the intent to delay, hinder, or defraud them is shared by the grantee as well as by the debtor. Therefore the mere intent on the part of the debtor to defeat a creditor will not avoid a sale as fraudulent, if it be made bona fide and for a valuable consideration.[91] It is sufficient if the consideration be a past indebtedness. For it is not fraudulent at common law to prefer one creditor to another. If the debtor is unable to pay all his debts, he commits no fraud (in the absence of statutory provisions regulating the distribution of in-

goods, and chattels, * * * and also every bond, suit, judgment, and execution * * * had or made to or for any intent or purpose before declared and expressed shall be from henceforth deemed and taken (only against that person or persons, * * * whose actions, suits, debts, * * * by such guileful, covinous, or fraudulent devices and practices, * * * are * * * in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void. * * *" 13 Eliz. c. 5.

[89] Cadogan v. Kennett, 1 Cowp. 432, per Lord Mansfield; Hamilton v. Russell, 1 Cranch, 309, 316, per Marshall, C. J.; Sturtevant v. Ballard, 9 Johns. 337, 338, per Kent, C. J.

[90] Dyer v. Homer, 22 Pick. 258; Butler v. Moore, 73 Me. 151. By force of the common law, transfers of goods and chattels with intent to defraud creditors are voidable, though "goods and chattels" are not named in the Minnesota statute. Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942.

[91] Wood v. Dixie, 7 Q. B. 892; Darvill v. Terry, 6 Hurl. & N. 807, 30 Law J. Exch. 355; Beurmann v. Van Buren, 44 Mich. 496.

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solvent estates) by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others.[92] Nor does it make any difference that both debtor and creditor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtor's property by legal process in satisfaction of their claims, or that such is actually the intention of the debtor; provided there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, and that the sole object of the latter is to obtain payment or security for his debt.[93] But if the purpose of the debtor is to defraud his creditors, and that purpose is participated in by the preferred creditors, although the principal purpose of the conveyance is to secure a bona fide debt of the latter, the conveyance is wholly void as to the creditors intended to be defrauded.[94]

In respect to the necessity of mutual fraudulent intent, conveyances for a valuable consideration differ from voluntary conveyances. The latter may be avoided where a fraudulent intent on the part of the debtor exists, although the grantee did not share it.[95]

Fraud a Question of Fact—Retention of Possession.

Whether a transfer of goods is bona fide or fraudulent is now generally held to be a question of fact for the jury. Few questions in the law, however, have given rise to greater conflict of authority than that of the effect of retention of possession by the grantor upon the bona fides of the transaction. Retention of pos-

[92] Holbird v. Anderson, 5 Term R. 235; Marbury v. Brooks, 7 Wheat. 556, 11 Wheat. 78; Smith v. Skeary, 47 Conn. 47; Ferguson v. Spear, 65 Me. 277; York Co. Bank v. Carter, 38 Pa. St. 446; Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881; Butler v. White, 25 Minn. 432.

[93] Banfield v. Whipple, 14 Allen, 13, 15; Carr v. Briggs, 156 Mass. 78, 81, 30 N. E. 470; Dudley v. Danforth, 61 N. Y. 626; Hessing v. McCloskey, 37 Ill. 341; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564; Hirsch v. Richardson, 65 Miss. 227; Jewell v. Knight, 123 U. S. 426, 434, 8 Sup. Ct. 193.

[94] Harris v. Sumner, 2 Pick. 137; Crowninshield v. Kittridge, 7 Metc. (Mass.) 520; Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174.

[95] Blake v. Sawin, 10 Allen, 340; Young v. Heermans, 66 N. Y. 374; Laughton v. Harden, 68 Me. 208.

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session and use by the grantor was resolved in Twyne's Case,[96] the leading case upon the subject of fraudulent conveyances, to be a sign of fraud. In Edwards v. Harben,[97] it was held that if there be nothing but the absolute conveyance without transfer of possession, the transaction is in point of law fraudulent; but later decisions in England establish the proposition that continued possession is a fact to be considered by the jury as evidence of fraud, but it is not fraud per se.[98] This view is perhaps the prevailing one in the United States, where the question is unaffected by statute,[99] but statutes have been passed in many states, some declaring sales without transfer of possession fraudulent, and others declaring them merely prima facie fraudulent. A consideration of the conflicting decisions on this point and of the various statutory provisions cannot be attempted in an elementary book.[100]

In some jurisdictions the rule prevails that delivery, actual or constructive, is necessary to perfect the title of the buyer as against bona fide subsequent purchasers and attaching creditors,[101] and the question how far delivery is essential to transfer title is to be distinguished from the question how far retention of possession by the seller is fraudulent.

Who are Creditors.

A sale may be fraudulent as to subsequent as well as existing creditors; and, if it is fraudulent as to existing creditors, it may

[96] 3 Coke, 80; 1 Smith, Lead. Cas. 1.

[97] 2 Term. R. 587.

[98] Martindale v. Booth, 3 Barn. & Adol. 498; Cookson v. Swrle, 9 App. Cas. 653, 664, per Lord Blackburn, who points out that it was to put a stop to the evils growing out of this rule that the bills of sales acts were passed, —acts of similar character to the chattel-mortgage acts in this country.

[99] Warner v. Norton, 20 How. 448, 460.

[100] A full collection of the cases has been made by Judge Bennett, who says that three views seem to prevail in the United States as to the effect of continued possession: (1) That such possession, use, and apparent ownership is a conclusive badge of fraud, as a rule of law. (2) That such possession is prima facie a fraud in law, and, if unexplained, becomes conclusive as a rule of law. (3) That such possession is prima facie evidence of fraud for the jury, sufficient to warrant, but not to require, them to find the sale fraudulent. Benj. Sales (6th Ed.) p. 458.

[101] Post, p. 128.

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be avoided by subsequent creditors.[102] The term "creditors" includes persons having claims sounding in tort.[103]

Effect of Fraud.

Sales which are fraudulent as to creditors are nevertheless valid between the parties, who are not allowed to defeat them by alleging their own fraud.[104] And, although the statute declares that such sales shall be void, they are in fact merely voidable, at the option of the defrauded creditors. And, therefore, as in the case of sales voidable by one of the parties for the fraud of the other, bona fide purchasers for value from the fraudulent buyer before avoidance acquire an indefeasible title.[105] A further illustration of the voidable character of the transaction is the right which the buyer has to purge it of the fraud by the payment, before avoidance, of an adequate consideration.[106]

HOW FAR DELIVERY IS ESSENTIAL TO THE TRANSFER OF THE PROPERTY AGAINST CREDITORS AND PURCHASERS.

70. In some states, in exception to the general principle that delivery is not essential to the transfer of the

[102] Day v. Cooley, 118 Mass. 524; McLane v. Johnson, 43 Vt. 48; Hook v. Monre, 17 Iowa, 195; Jones v. King, 86 Ill. 225; Plunkett v. Plunkett, 114 Ind. 484, 16 N. E. 612, and 17 N. E. 562; Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942.

[103] Damon v. Bryant, 2 Pick. 411; Jackson v. Myers, 18 Johns. 425. A wife suing for a divorce and alimony is a "creditor." Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942. See, also, Livermore v. Boutelle, 11 Gray, 217.

[104] Dyer v. Homer, 22 Pick. 253; Harvey v. Varney, 98 Mass. 118; Osborne v. Moss, 7 Johns. 161; Telford v. Adams, 6 Watts, 429; Carpenter v. McClure, 39 Vt. 9; Springer v. Drosch, 32 Ind. 486; Clemens v. Clemens, 28 Wis. 637; Butler v. Moore, 73 Me. 151; Gary v. Jacobson, 55 Miss. 204. Contra, Nellis v. Clark, 20 Wend. 24, 4 Hill, 424; Church v. Muir, 33 N. J. Law, 318.

[105] Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174; Green v. Tanner, 8 Metc. (Mass.) 411; Anderson v. Roberts, 18 Johns. 515; Neal v. Williams, 18 Me. 391; Comey v. Pickering, 63 N. H. 126; Gordon v. Ritenour, 87 Mo. 54.

[106] Oriental Bank v. Haskins, 3 Metc. (Mass.) 332; Hutchins v. Sprague, 4 N. H. 469; Bean v. Smith, 2 Mason, 252, 278, Fed. Cas. No. 1,174. Contra: Merrill v. Meachum, 5 Day, 341; Preston v. Crofut, 1 Conn. 527, note; Roberts v. Anderson, 3 Johns. Ch. 371.

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property, a rule prevails that delivery is essential to such transfer as against bona fide purchasers and attaching creditors without notice.

While it is universally held that delivery is not necessary to transfer the property in the goods sold as between seller and buyer,[107] a rule prevails in some states, as has already been pointed out, that delivery is necessary to transfer the property as against subsequent purchasers and attaching creditors without notice of the prior sale. A discussion of this rule, though logically falling under the head of the transfer of the property, can more conveniently be made here.

The question how far delivery is essential to a transfer of the property against purchasers and attaching creditors is to be distinguished from the question how far retention of possession is fraudulent. Even in jurisdictions which agree upon the rule that delivery is necessary for a transfer of the property against purchasers and attaching creditors, varying rules prevail as to the effect of retention of possession as evidence of fraud.[108] The lead-

[107] Ante, p. 82 et seq.

[108] For example, in Massachusetts, the continuance of the seller in possession is not of itself enough to render the sale void as fraudulent, but is a fact to be considered as evidence of fraud, which may be rebutted by proof that it was a sale for value and in good faith, and that possession was retained under an agreement not inconsistent with honesty in the transaction. Brooks v. Powers, 15 Mass. 247; Shurtleff v. Willard, 19 Pick. 202, 211; Green v. Rowland, 16 Gray, 58; Usher, Sales, § 292; and cf. Id. § 140 et seq. The rule in Maine is the same. Reed v. Jewett, 5 Greenl. (Me.) 96. In New Hampshire, if the seller fails to explain the want of change, it is conclusive evidence of fraud. Coburn v. Pickering, 3 N. H. 428; Coolidge v. Melvin, 42 N. H. 516. In Pennsylvania, retention of possession, where the goods are capable of delivery, is fraud in law, and a technical delivery, such as consent by the seller to hold as bailee, is not enough; the cases insisting on visible, rather than legal, change of possession. In other words, these cases turn upon fraud, and do not involve the question whether delivery is essential to transfer the property. Clow v. Woods, 5 Serg. & R. 275; McKibbin v. Martin, 64 Pa. St. 352; Stephens v. Gifford, 137 Pa. St. 219, 20 Atl. 542. As has been already said, the subject of the effect of confirmed possession as evidence of fraud is too extensive for consideration in this book. See Benj. Sales (6th Am. Ed., Bennett's note) p. 458.

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ing case in support of the rule that delivery is necessary to transfer the property as against subsequent purchasers and attaching creditors is Lanfear v. Sumner,[109] in which an assignment of tea then on a ship at sea was made to a bona fide creditor, and upon its arrival, and before the assignee could take possession, the tea was attached by a second creditor without notice of the prior assignment. In an action of trover by the assignee against the sheriff, who levied the attachment, it was held that the want of delivery was fatal to the plaintiff's title. The court said: "Delivery of possession is necessary in a conveyance of personal chattels as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold against the other." This case has been followed in Massachusetts[110] and some other states,[111] though the rule is opposed to the general principle, elsewhere recognized, that delivery is not essential to a transfer of the property.[112] A leading case against this rule is Meade v. Smith,[113] in which the seller gave a bill of sale to the buyer, both parties being in New York, and the buyer went at once to Connecticut, where the goods were, to take possession, but in the meantime they had been attached by a creditor of the seller without notice of the prior sale, and it was held that the sale was not invalid for lack of delivery, there being no want of diligence on the part of the buyer in taking possession. "This claim proceeds," said Storrs, J., "on the ground, not that the want of a change of possession furnishes evidence of fraud in the sale, and that but for such fraud the property would pass to the vendee, as against such purchasers and creditors, but that, as to them, there is no transfer

[109] 17 Mass. 110.

[110] Dempsey v. Gardner, 127 Mass. 381; Hallgarten v. Oldham, 135 Mass. 1.

[111] Fairfield Bridge Co. v. Nye, 60 Me. 372; Reed v. Reed, 70 Me. 504; Crawford v. Forristall, 58 N. H. 114; Burnell v. Robertson, 5 Gilman, 282; Huschle v. Morris, 131 Ill. 587, 23 N. E. 643. See, also, Jewett v. Lincoln, 14 Me. 116; Winslow v. Leonard, 24 Pa. St. 14.

[112] Ante, p. 83. See Meyerstein v. Barber, L. R. 2 C. P. 38, 51; Hallgarten v. Oldham, 135 Mass. 1, per Holmes, J.

[113] 16 Conn. 346. This case seems not inconsistent with the rule prevailing in Connecticut that retention of possession is usually conclusive evidence of fraud. See Hatstat v. Blakeslee, 41 Conn. 301.

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of the property notwithstanding there be no fraud by reason of such want of possession; in other words, that as to them, before such change of possession, the title of the vendee is merely inchoate and incomplete." And the decision rests upon the ground that "want of delivery to, or of the continuance of possession by, the vendee, is in no case considered in any other light than as furnishing evidence of fraud in the sale; and where, for want of such delivery or continuance of possession, the sale has been pronounced void, it was only on the ground of such fraud."

The rule requiring delivery, unlike that which makes retention of possession evidence of fraud, does not operate in favor of purchasers or creditors who have notice of the sale.[114]

What Constitutes Delivery.

Where the rule of Lanfear v. Sumner prevails, very slight evidence is necessary to give a preference to a bona fide buyer as against an attaching creditor of the seller.[115] If the buyer obtains possession before any attachment or second sale, the transfer is complete without formal delivery.[116] A delivery of a part in token of the whole is a sufficient constructive delivery, although the goods are in the possession of various persons.[117] And where there can be no manual delivery, as in the case of goods at sea, a symbolical delivery, as of a bill of sale or an invoice, is a good delivery.[118] So the delivery of a bill of sale of a ship at sea is valid, provided the buyer takes actual possession as soon as he reasonably can.[119] The delivery of the key of a warehouse where the goods are stored is a good delivery.[120] If the goods are in the possession of the seller, it is enough if he agrees to hold as bailee

[114] Ludwig v. Fuller, 17 Me. 162; Haskell v. Greely, 3 Greenl. (Me.) 425. But notice to the officer holding the writ before service, but uncommunicated to the attaching creditor, is not notice to such creditor. McKee v. Garcelon, 60 Me. 165.

[115] Shumway v. Rutter, 8 Pick. 443; Hardy v. Potter, 10 Gray, 89; Stinson v. Clark, 6 Allen, 340; Ingalls v. Herrick, 108 Mass. 351.

[116] Shumway v. Rutter, 8 Pick. 443.

[117] Legg v. Willard, 17 Pick. 140; Hobbs v. Carr, 127 Mass. 532.

[118] Pratt v. Parkman, 24 Pick. 42.

[119] Carter v. Willard, 19 Pick. 1, 9, 11; Conard v. Atlantic Ins. Co., 1 Pet. 386, 389; Wheeler v. Sumner, 4 Mason, 183, Fed. Cas. No. 17,501.

[120] Packard v. Dunsmore, 11 Cush. 282; Vining v. Gilbreth, 39 Me. 496.

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for the buyer.[121] If they are in the possession of a third person, it is enough if notice of the sale is given to him.[122] But the mere delivery of a bill of sale without delivery, actual or constructive, is not enough.[123] Some of these cases are hard to reconcile with the statement of Holmes, J., in a recent case,[124] that the delivery required by the rule in Lanfear v. Sumner is delivery in its natural sense,—that is, change of possession,—for it is generally held, in connection with other branches of sale, that mere notice to a bailee without his attornment does not constitute delivery. In the latter case it was held that the indorsement and delivery by the bailor of a receipt for goods stored in a private warehouse, making the goods deliverable to the bailor on the payment of charges, but not to his order, did not pass the title as against a creditor attaching the goods before notice to and attornment by the bailee.

121 Ingalls v. Herrick, 108 Mass. 351.
122 Carter v. Willard, 19 Pick. 1; Russell v. O'Brien, 127 Mass. 349.
123 Dempsey v. Gardner, 127 Mass. 381; Farrar v. Smith, 64 Me. 74.
124 Hallgarten v. Oldham, 135 Mass. 1.

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CHAPTER VI.

ILLEGALITY.

71–72. In General.
73–75. Sales Prohibited by Common Law.
76. Sales Prohibited by Public Policy.
77. Sales Prohibited by Statute.
78–81. Effect of Illegality.
82. Conflict of Laws.

IN GENERAL.

71. A contract of sale which is prohibited by law is void.

72. CLASSIFICATION OF UNLAWFUL SALES—Unlawful sales may be classified as sales prohibited by:

(a) The common law.

(b) Public policy.

(c) Statute.

Certain limitations are imposed by law upon the freedom of contract. Certain contracts of sale, either because of the subject-matter of the sale, or because of the purpose for which the sale is entered into, or because certain requirements of the law have not been complied with, or because the contract is made upon Sunday, or because of other reasons, are prohibited. And if for any reason, a contract falls within a prohibited class, it is void.

The modes in which the law expresses its disapproval of certain contracts may be roughly described as prohibition (1) by express rules of the common law; (2) through the interpretation of the courts of the policy of the law; and (3) by statute. The first two are not easy to distinguish because certain of the rules which have been formulated by the courts on matters of public policy have become in effect rules of the common law.[1]

[1] Anson, Cont. 163; Clark, Cont. 375.

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SALES PROHIBITED BY COMMON LAW.

73. A contract of sale is illegal at common law if the thing sold is in itself contrary to good morals or decency.

74. Although the thing sold is innocent in itself, the contract of sale is illegal—

(a) If it provides that the thing is to be applied to an illegal purpose.

(b) If the buyer intends to apply the thing to an illegal purpose, and the seller does some act in aid of such purpose.

(c) If the buyer intends to apply the thing to a purpose involving a heinous crime, and the seller knows of such intention.

(d) In some states, if the sale is made by the seller with a view to the buyer's illegal purpose.

75. In most jurisdictions, mere knowledge on the seller's part that the buyer intends to apply the thing to an illegal purpose does not render the sale illegal.

Sale of Thing Contrary to Good Morals.

A general rule of the common law is summed up in the maxim, "Ex turpi causa non oritur actio." Therefore the sale of a thing which is in itself contrary to good morals or public decency cannot become the basis of an action. Sales of an obscene book,[2] and of indecent prints or pictures,[3] have been declared illegal and void at common law,[4] although upon this point there have been few decisions.

Sale of Innocent Thing for Unlawful Purpose.

Whether the sale of a thing in itself an innocent and proper article of commerce, when the seller knows that it is intended to be used for an immoral or illegal purpose, is valid, is a question on which the authorities disagree, although the decisions in this country are fairly reconcilable.

[2] Poplett v. Stockdale, Ryan & M. 337.

[3] Fores v. Johnes, 4 Esp. 97.

[4] Benj. Sales, § 504.

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The earlier English cases held that something more than mere knowledge on the part of the seller of the illegal purpose was necessary, and that there must be evidence of an intention on his part to aid in the illegal purpose or to profit by the immoral act.[5] Thus, where clothes were sold to a prostitute, with knowledge that they were for the purpose of enabling her to pursue her calling, it was held that this was not enough, but that it must appear that the seller expected to be paid out of the profits of her 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.[6] And so, in an action for the price of spirits sold with knowledge that the defendant intended to use them illegally, it was held that the plaintiff could recover, since to deprive him of his right to payment, it was necessary that he should be a sharer in the illegal transaction.[7] But the later English cases overrule this distinction, and hold that the sale is void if both parties know of the illegal purpose.[8] Thus, where the plaintiff supplied a brougham to a prostitute, it was held not necessary to show that he expected to be paid from the proceeds of her calling; that his knowledge of her calling justified the jury in inferring knowledge of her purpose; and that this knowledge rendered the contract void.[9]

In the United States the cases, on the whole, follow substantially the earlier English doctrine, and hold that mere knowledge of the buyer's unlawful purpose does not invalidate the sale,[10] though all

[5] Benj. Sales, § 506 et seq.

[6] Bowry v. Bennet, 1 Camp. 348.

[7] Hodgson v. Temple, 5 Taunt. 181.

[8] Cannan v. Bryce, 3 Barn. & Ald. 179; McKinnell v. Robinson, 3 Mees. & W. 435; Pearce v. Brooks, L. R. 1 Exch. 213; Anson, Cont. 192; Clark, Cont. 478.

[9] Pearce v. Brooks, L. R. 1 Exch. 213.

[10] Tracy v. Talmage, 14 N. Y. 162; Sortwell v. Hughes, 1 Curt. 244, Fed. Cas. No. 13,177; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Hill v. Spear, 50 N. H. 253; Tuttle v. Holland, 43 Vt. 542; Cheney v. Duke, 10 Gill & J. 11; Wallace v. Lark, 12 S. C. 576; Bickel v. Sheets, 24 Ind. 1; Webber v. Donnelly, 33 Mich. 469; Michael v. Bacon, 49 Mo. 474; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318, 46 N. W. 558; J. M. Brunswick & Balke Co. v. Valleau, 50 Iowa, 120; McKinney v. Andrews, 41 Tex. 363. McIntyre v. Parks, 3 Metc. (Mass.) 207, is in line with these decisions. See, also, Dater v. Earl, 3 Gray, 482. But there are strong intimations in the

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agree that the sale is void if it be a part of the contract of sale that the goods are to be used for an illegal purpose,[11] or if the seller does any act in aid of the buyer's unlawful intention, as when he packs goods in a manner convenient for smuggling, or conceals the form of liquor so as to enable the buyer to evade the law,[12] or marks domestic sardines as French to assist the buyer in selling them as such.[13] It is frequently said, however, that knowledge of the buyer's purpose to use the goods in the commission of a crime which is not merely malum prohibitum or of inferior criminality stands on a different footing.[14] Thus knowledge that goods were to be used in aid of rebellion has been held to avoid their sale.[15] A few authorities, which are scarcely to be reconciled with the weight of authority in this country, hold that the sale is void if made "with a view to" the illegal purpose, or with the intention of enabling the buyer to accomplish it;[16] but if the contract does

later Massachusetts cases that the law is the other way. Suit v. Woodhall, 113 Mass. 391, 395; Finch v. Mansfield, 97 Mass. 89, 92; Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, per Holmes, J.; Clark, Cont. 482.

[11] Tracy v. Talmage, 14 N. Y. 162, 176; Green v. Collins, 3 Cliff. 494, 501, Fed. Cas. No. 5,755; Clark, Cont. 481.

[12] Gaylord v. Soragen, 32 Vt. 110; Aiken v. Blaisdell, 41 Vt. 655; Skiff v. Johnson, 57 N. H. 475; Banchor v. Mansel, 47 Me. 58; Kohn v. Melcher, 43 Fed. 641; Tracy v. Talmage, 14 N. Y. 162; Arnot v. Pittston & E. Coal Co., 68 N. Y. 566; Waymell v. Reed, 5 Term R. 599; Clark, Cont. 481.

[13] Materne v. Horwitz, 50 N. Y. Super. Ct. 41; 101 N. Y. 469, 5 N. E. 331.

[14] Hanauer v. Doane, 12 Wall. 342; Tracy v. Talmage, 14 N. Y. 162; Howell v. Stewart, 54 Mo. 400; Clark, Cont. 482.

[15] Hanauer v. Doane, 12 Wall. 342; Tatum v. Kelley, 25 Ark. 209. By the common law, sales to an alien enemy are void. Brandon v. Nesbitt, 6 Term R. 23; Potts v. Bell, 8 Term R. 548; U. S. v. Lapene, 17 Wall. 601; Bank of New Orleans v. Mathews, 49 N. Y. 12.

[16] Webster v. Munger, 8 Gray, 584; Graves v. Johnson, 156 Mass. 211, 30 N. E. 818; Davis v. Bronson, 6 Iowa, 410 "When a sale of intoxicating liquors in another state has just so much greater approximation to a breach of the Massachusetts law as is implied in the statement that it is made with a view to such a breach, it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. * * * If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale. * * * We assume that the sale would have taken place whatever the buyer had been expected to do with the goods.

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not provide for such purpose, and the seller's connection with the transaction is confined to a sale of the goods, it is difficult to see how any line between mere knowledge of the purpose and conduct in aid of it can practically be drawn.

SALES PROHIBITED BY PUBLIC POLICY.

76. Sales prohibited by public policy include:

(a) Sales of offices.

(b) Sales by which the seller is unreasonably restrained in carrying on his trade.

(c) Sales of law suits.

Modern decisions, while maintaining the duty of the courts to consider public policy, have tended to limit the sphere within which the duty should be exercised. Certain contracts, however, are prohibited as against public policy, and among them are included the contracts of sale which have been enumerated.[17]

Sale of Offices.

Contracts for the sale of a public office or of the fees or emoluments of office are held to be subversive of public policy, as opposed to the interests of the people and the proper administration of government.[18] This applies to the sale of office by the appointing

* * * The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. * * * If the sale is made with the desire to help him (the buyer) to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller while aware of his intent is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. It appears to us not unreasonable to draw the line as was drawn in Webster v. Munger, 8 Gray, 584, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale, as just explained, the sale is void." Graves v. Johnson, supra, per Holmes, J. And see Clark. Cont. 481.

[17] Benj. Sales, § 512 et seq.; Anson, Cont. 175; Clark, Cont. 414.

[18] Garforth v. Fearon, 1 H. Bl. 328; Hanington v. Du Chatel, 1 Brown, C. C. 124; Gray v. Hook, 4 N. Y. 449; Filson v. Himes, 5 Pa. St. 452; Eddy v. Capron, 4 R. I. 394; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; Morse v. Ryan, 26 Wis. 356; Clark, Cont. 416.

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power, as well as by the incumbent of the office.[19] And the rule has been applied in England to the sale of a quasi public office, as the sale by the owners of a ship of the position of master.[20] The same rule governs the assignment of the salary of a public officer,[21] and of a pension unless exclusively for past services.[22]

Contracts in Restraint of Trade.

A contract of sale, by the terms of which the seller is restrained unreasonably in carrying on his trade, is against public policy, and is void.[23] Such contracts arise frequently where merchants or mechanics sell out their business, including the good will, and where the buyer desires to guard against the competition of the seller. This subject relates only indirectly to the law of sales, and a consideration of it will not here be attempted. The general rules may be briefly stated as follows: (1) A restraint is not unreasonable if it is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. (2) The restraint may be unlimited as to time; but it was formerly thought, and is still held in come jurisdictions, that it must not be unlimited as to space, though modern decisions raise a doubt on this question.[24]

[19] Corporation of Liverpool v. Wright, 28 Law J. Ch. 868, 1 Johns. Eng. Ch. 359; Town of Meredith v. Ladd, 2 N. H. 517; Alvord v. Collin, 20 Pick. 418, 428; Groton v. Waldoborough, 11 Me. 306; Town of Thetford v. Hubbard, 22 Vt. 441, 446; Hall v. Gavit, 18 Ind. 390.

[20] Blachford v. Preston, 8 Term R. 89; Card v. Hope, 2 Barn. & C. 661. A contract by which a shareholder in a corporation, in consideration of the purchase of his stock, agrees to secure to the purchaser the office of treasurer is void as against public policy. Guernsey v. Cook, 120 Mass. 501.

[21] Wells v. Foster, 8 Mees. & W. 149; Flarty v. Odlum, 3 Term R. 681; Bliss v. Lawrence, 58 N. Y. 442; Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 25 N. E. 855; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263; Field v. Chipley, 79 Ky. 260; State v. Williamson (Mo. Sup.) 23 S. W. 1054; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Clark, Cont. 419. Contra, State v. Hastings, 15 Wis. 78. Cf. Brackett v. Blake, 7 Metc. (Mass.) 335.

[22] Wells v. Foster, 8 Mees. & W. 149. The assignment of pensions is declared void by Act Cong. Feb. 28, 1883; Clark, Cont. 419. See Loser v. Board, 92 Mich. 633, 52 N. W. 956.

[23] Benj. Sales, § 530 et seq.; Anson, Cont. 179; Clark, Cont. 446.

[24] Clark, Cont. 446, where the law is clearly stated.

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Sales of Lawsuits.

Champerty is the maintenance of another in a suit for a share in the proceeds.[25] Champerty was an offense at common law, and is generally so recognized to-day in this country,[26] though in many states it is not recognized as such,[27] or been abolished as an offense by statute.[28] Where champerty is an offense, it cannot form the subject of a contract.[29] The subject of champerty is not very closely connected with the law of sales, except as in its less obvious form it affects the question whether the sale of a right of action is valid. The authorities cannot all be reconciled, but the distinction which runs through them is in effect that it is not unlawful to purchase an interest in property, though adverse claims exist which make litigation necessary for the realization of the interest purchased, but that it is unlawful to purchase an interest merely for the purpose of litigation; in other words, that the sale of an interest to which the right to sue is incident is valid, but the sale of a mere right of action is bad.[30]

SALES PROHIBITED BY STATUTE.

77. Among statutes prohibiting sales the following are the most important:

(a) Statutes regulating the conduct of trades in certain commodities, or requiring a license of persons engaged in certain kinds of business, and, by

[25] 4 Bl. Comm. 135.

[26] Ackert v. Barker, 131 Mass. 436; Martin v. Clarke, 8 R. I. 389; Thompson v. Reynolds, 73 Ill. 11; Greenman v. Cohee, 61 Ind. 201; Stearns v. Felker, 28 Wis. 594.

[27] Richardson v. Rowland, 40 Conn. 565; Schomp v. Schenck, 40 N. J. Law, 195; Danforth v. Streeter, 28 Vt. 490; Wright v. Meek, 3 G. Greene, 472; Lytle v. State, 17 Ark. 663.

[28] Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169; Wildey v. Crane, 63 Mich. 720, 30 N. W. 327; Clark, Cont. 433.

[29] Stanley v. Jones, 7 Bing. 369; cases cited in note 26, supra.

[30] Prosser v. Edmonds, 1 Younge & C. Exch. 499; Norton v. Tuttle, 60 Ill. 130; Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931; Brush v. Sweet, 38 Mich. 574; Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758; Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co., 20 Wis. 174; Foy v. Cochran, 88 Ala. 353, 6 South. 685; Pol. Cont. 298.

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implication, prohibiting sales where the statutory provisions have not been complied with.

(b) Statutes prohibiting absolutely or conditionally the sale of intoxicating liquors.

(c) Statutes prohibiting sales on Sunday.

(d) Statutes prohibiting wagers. This subdivision includes statutes prohibiting the selling of goods for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price.

Where contracts are prohibited by statute, the prohibition is sometimes express and sometimes implied, and in either case the contract cannot be enforced. The usual way by which contracts are prohibited by implication is by the imposition of a penalty. Some cases hold that, whenever a statute imposes a penalty for an act or omission, it impliedly prohibits the same;[31] but, by the weight of authority, the imposition of a penalty is only prima facie evidence of the intention to prohibit. The intention of the legislature will always govern, and the court will look to the language and subject-matter of the act and to the evil which it seeks to prevent.[32] A consideration which receives great weight is whether the object of the penalty is protection to the public as well as revenue; for, if the penalty is designed to further the interests of public policy, it amounts to a prohibition;[33] but, if it is designed solely for revenue purposes, the contract is not necessarily prohibit-

[31] Miller v. Post, 1 Allen, 434; Pray v. Burbank, 10 N. H. 377; Hallett v. Novion, 14 Johns. 273; Durgin v. Dyer, 68 Me. 143; Bancroft v. Dumas, 21 Vt. 456; Mitchell v. Smith, 1 Bin. 110; Bacon v. Lee, 4 Iowa, 490.

[32] Cope v. Rowlands, 2 Mees. & W. 149; Miller v. Ammon, 145 U. S. 421, 426, 12 Sup. Ct. 884; Harris v. Runnels, 12 How. 79, 84; Bowditch v. New England Ins. Co., 141 Mass. 292, 295, 4 N. E. 798; Pangborn v. Westlake, 36 Iowa, 546; Niemeyer v. Wright, 75 Va. 239; Clark, Cont. 385.

[33] Cope v. Rowlands, 2 Mees. & W. 149; Cundell v. Dawson, 4 C. B. 376; Griffith v. Wells, 3 Denio, 226; Seidenbender v. Charles, 4 Serg. & R. 150; Penn v. Bornman, 102 Ill. 523; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Clark, Cont. 386.

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ed.[34] A second consideration is whether the penalty is recurrent upon every breach of the provisions of the statute, for, if it is recurrent, the inference is that the penalty amounts to a prohibition.[35]

Statutes Regulating Trade.

There are numerous statutes enacted for the purpose of protecting the public in business dealings, which generally impose a penalty for noncompliance with their provisions, and which are construed as prohibiting sales on the part of dealers who have failed to comply with them. Among these statutes may be mentioned statutes requiring dealers to have their weights, measures, or scales approved or sealed;[36] statutes requiring goods to be marked in a particular way,[37] or to be inspected,[38] or to conform to a certain weight or to certain dimensions,[39] or to be officially weighed or measured,[40] or to be sold by weight and not by measure, or vice versa;[41] and statutes requiring dealers to take out a license.[42] The effect of noncompliance by the seller with such statutes is to preclude him from recovering the price.

Statutes Regulating Sale of Intoxicating Liquor.

Where a statute prohibits the sale of liquor absolutely, a contract of sale is, of course, invalid. But, whether absolutely prohibitory or not, such statutes are construed as intended, not merely for revenue, but to diminish the evils of intemperance. Therefore,

[34] Brown v. Duncan, 10 Barn. & C. 93; Larned v. Andrews, 106 Mass. 435; Corning v. Abbott, 54 N. H. 469; Aiken v. Blaisdell, 41 Vt. 655; Ruckman v. Bergholz, 37 N. J. Law, 437; Rahter v. First Nat. Bank, 92 Pa. St. 393; Mandlebaum v. Gregovich, 17 Nev. 87, 28 Pac. 121.

[35] Ritchie v. Smith, 6 C. B. 462; Benj. Sales, § 538.

[36] Miller v. Post, 1 Allen, 434; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566. See, generally, as to statutes regulating a trade or business, Clark, Cont. 390.

[37] Forster v. Taylor, 5 Barn. & Adol. 887; McConnell v. Kitchens, 20 S. C. 430.

[38] Baker v. Burton, 31 Fed. 401; Conley v. Sims, 71 Ga. 161; Campbell v. Segars, 81 Ala. 259, 1 South. 714.

[39] Law v. Hodson, 11 East, 300; Wheeler v. Russell, 17 Mass. 258.

[40] Pray v. Burbank, 10 N. H. 377; Libby v. Downey, 5 Allen. 299.

[41] Eaton v. Keegan, 114 Mass. 433.

[42] Cope v. Rowlands, 2 Mees. & W. 149; Johnson v. Hulings, 103 Pa. St. 498; Buckley v. Humason, 50 Minn. 195, 52 N. W. 385.

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where the statute simply imposes a penalty for selling without license, the sale is void.[43]

Statutes Prohibiting Sunday Sales.

At common law, sales, like other contracts entered into on Sunday, are valid.[44] In later times, however, statutes have been passed in England, and in most of the states, prohibiting certain acts on Sunday, and whether sales are included in the prohibition depends upon the terms of the particular act. Where the statute prohibits the making of contracts, sales are, of course, included. And sales are included where the prohibition is against labor, work, and business, since the making of contracts is secular business;[45] but they are not included if the prohibition is merely against labor.[46] Again, if the prohibition is confined to labor, work, or business of a man's "ordinary calling," a sale not in the exercise of such calling is valid.[47] If the law prohibits exposure of merchandise for sale, the prohibition extends only to public sales.[48]

Same—Ratification of Sunday Sale.

Whether a Sunday sale is capable of ratification is a question on which there is much conflict of authority. A leading case on the

[43] Griffith v. Wells, 3 Denio, 226; Aiken v. Blaisdell, 41 Vt. 655; Lewis v. Welch, 14 N. H. 294; Cobb v. Billings, 23 Me. 470; Melchoir v. McCarty, 31 Wis. 252; O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. 527; Bach v. Smith, 2 Wash. T. 145, 3 Pac. 831. And see Clark, Cont. 392.

[44] Drury v. Defontaine, 1 Taunt. 131; Richardson v. Goddard, 23 How. 29, 42; Adams v. Gay, 19 Vt. 358; Bloom v. Richards, 2 Ohio St. 387; Richmond v. Moore, 107 Ill. 429; Brown v. Browning, 15 R. I. 423, 7 Atl. 403.

[45] Pattee v. Greely, 13 Metc. (Mass.) 284; Northrup v. Foot, 14 Wend. 249; Towle v. Larrabee, 26 Me. 464; Varney v. French, 19 N. H. 233; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Troewert v. Decker, 51 Wis. 46, 8 N. W. 26; Durant v. Rhener, 26 Minn. 362, 4 N. W. 610; Clark, Cont. 393.

[46] Richmond v. Moore, 107 Ill. 429; Birks v. French, 21 Kan. 238. Contra, Reynolds v. Stevenson, 4 Ind. 619.

[47] Drury v. Defontaine, 1 Taunt. 131; Bloxsome v. Williams, 3 Barn. & C. 232; Scarfe v. Morgan, 4 Mees. & W. 270; Allen v. Gardiner, 7 R. I. 22; Hazard v. Day, 14 Allen, 487; Swann v. Swann, 21 Fed. 299; Amis v. Kyle, 2 Yerg. 31; Sanders v. Johnson, 29 Ga. 526; Mills v. Williams, 16 S. C. 593; Clark, Cont. 395. But see Fennell v. Ridler, 5 Barn. & C. 406; Smith v. Sparrow, 4 Bing. 84.

[48] Boynton v. Page, 13 Wend. 425; Batsford v. Every, 44 Barb. 618; Clark, Cont. 395.

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point is Williams v. Paul,[49] in which there was a subsequent promise to pay for the goods, on the strength of which it was held that an action could be maintained; but this decision was questioned by Parke, B.,[50] on the ground that the contract was incapable of ratification, and that the property in the goods having passed by delivery, the promise to pay for them was without consideration. If it is correct to say that the property passes in such case, this criticism appears to be unanswerable; but there is some authority to the effect that the property does not pass, and that, if the goods have not been paid for, the seller can maintain replevin or trover,[51] in which case sufficient consideration for the new promise may be found. In this country the cases are in direct conflict, some holding that a Sunday contract can be ratified [52] and others holding that it cannot.[53] So also the cases are conflicting on the question whether an action can be maintained when there is a subsequent promise to pay.[54] If the sale is made on Sunday, but the goods are not delivered until a week day, the buyer is liable, not on the original promise, but on an implied promise to pay for the goods.[55]

Wagering Contracts.

At common law, wagers that did not violate any rule of public decency or morality or any recognized principle of public policy were not prohibited,[56] although in many of the states of the Union

[49] 6 Bing. 653.

[50] Simpson v. Nicholls, 3 Mees. & W. 244, as corrected 5 Mees. & W. 702.

[51] Post, p. 146.

[52] Adams v. Gay, 19 Vt. 360; Flinn v. St. John, 51 Vt. 334, 345; Sayles v. Wellman, 10 R. I. 465; Banks v. Werts, 13 Ind. 203; Tucker v. West, 29 Ark. 386; Campbell v. Young, 9 Bush, 240; Gwinn v. Simes, 61 Mo. 335; Smith v. Case, 2 Or. 190.

[53] Day v. McAllister, 15 Gray, 433; Tillock v. Webb, 56 Me. 100; Plaisted v. Palmer, 63 Me. 576; Grant v. McGrath, 56 Conn. 333, 15 Atl. 370; Butler v. Lee, 11 Ala. 885; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Clark, Cont. 398, collecting cases.

[54] Harrison v. Colton, 31 Iowa, 16; Melchoir v. McCarty, 31 Wis. 252. See Winchell v. Cary, 115 Mass. 560. Contra, Boutelle v. Melendy, 19 N. H. 196; Kountz v. Price, 40 Miss. 341.

[55] Bradley v. Rea, 14 Allen, 20, 103 Mass. 188; Foreman v. Ahl, 55 Pa. St. 325.

[56] Anson, Cont. 166; Benj. Sales, § 542; Clark, Cont. 405.

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wagering contracts on matters in which the parties have no interest have been held contrary to public policy and unenforceable.[57] By statute to-day, in England, and in most, if not all, of the states, contracts by way of wagering and gaming are declared void. Therefore, a bet in the form of a sale, as the sale of a horse for $150 if H. G. is elected president, and for $500 if U. S. G. is elected, is invalid.[58]

Same—Futures.

The principal question that arises in the law of sales in connection with the subject of wagers is whether an executory contract for the sale of goods is not a device for gaming. As has been stated,[59] a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods or any means of getting them except that of buying them in the market. But such a contract is valid only provided the parties really intend and agree that the goods are to be delivered by the seller, and that the price is to be paid by the buyer. If under the guise of such a contract, the real intent is merely to speculate in the rise and fall of prices, and the actual agreement is that the goods are not to be delivered, but that one party is to pay to the other the difference between the contract price and the market price of the goods, at the date fixed for the performance of the contract, then the whole contract constitutes nothing more than a wager, and is null and void.[60] But the contract does not become a wagering contract simply because one or both of the parties intend, when the time for

[57] Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. 160, 166, and cases cited; Clark, Cont. 407, 408.

[58] Harper v. Crain, 36 Ohio St. 338; Bates v. Clifford, 22 Minn. 52.

[59] Ante, p. 26.

[60] Grizewood v. Blane, 11 C. B. 526; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; White v. Barber, 123 U. S. 392, 8 Sup. Ct. 221; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49; Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; Rumsey v. Berry, 65 Me. 570; Hatch v. Douglas, 48 Conn. 116; Flagg v. Gilpin, 17 R. I. 10, 19 Atl. 1084; Kingsbury v. Kirwan, 77 N. Y. 612; Brua's Appeal, 55 Pa. St. 294; Maxton v. Gheen, 75 Pa. St. 166; Burt v. Myer, 71 Md. 467, 18 Atl. 796; Lawton v. Blitch, 83 Ga. 663, 10 S. E. 353; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Pickering v. Cease, 79 Ill. 328; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Whitesides v. Hunt, 97 Ind. 191; Gregory v.

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performance arrives, not to require performance, but to substitute a settlement by payment of the difference between the contract price and the market price, so long as it is agreed that the contract shall be performed according to its terms if either party requires it.[61] If either party intends an actual sale, he may enforce the contract, though the other intends a wager.[62]

EFFECT OF ILLEGALITY.

78. The effect of the illegality is to render the contract of sale void, and therefore neither party can maintain an action to enforce an illegal contract.

79. If the contract has been performed by both parties, the court will not lend its aid to either party to recover what he has paid or delivered.

80. If money has been paid or goods have been delivered under a contract of sale, the object of which, though illegal, has not been carried out, and the contract is unperformed by the other party, the party who has performed may disaffirm and recover the goods or the money.

81. If the contract is for the sale for an entire price of various articles, some of which may and others of which may not be lawfully sold, the whole contract is void; but, if a separate price is named for each article, the contract may be enforced so far as it relates to the articles lawfully sold.

The effect of illegality is generally to render the contract void. Neither party can maintain an action upon it,—neither the seller

Wendell, 39 Mich. 337; Cockrell v. Thompson, 85 Mo. 510; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Tomblin v. Callen, 69 Iowa, 229, 28 N. W. 573; Clark, Cont. 410.

[61] Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, per Field, J.; Clark, Cont. 411.

[62] Pixley v. Boynton, 79 Ill. 351; Whitesides v. Hunt, 97 Ind. 191; Gregory v. Wendell, 39 Mich. 337; Bangs v. Hornick, 30 Fed. 97; Clark, Cont. 412.

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for the price, nor the buyer for the goods.[63] Nor can either set it up as a defense, for, as Lord Mansfield said:[64] "No man shall set up his own iniquity as a defense any more than as a cause of action." Neither can the seller, although the goods are delivered, recover on an implied promise, since there is no ground on which a promise can be implied.[65] The contract is void for all purposes, and neither party can maintain an action on a warranty or for fraudulent representations inducing the contract.[66] But though the contract is void, if it has been executed by the delivery of the goods and the payment of the price, the court will not aid either party in disaffirming it. The seller cannot recover his goods, nor the buyer his money.[67] In this way possession acquired under illegal sales will often avail the buyer as a sufficient title. Neither party is allowed to impeach its validity by asserting the invalidity of his own act, and the transaction takes effect from the inability of either party to impeach it.[68] The rule applies: "In pari delictu potior est conditio defendentis."

It is not clear, however, that if the goods have been delivered, but not paid for, the seller cannot maintain an action founded on his right of property of which he has never been divested, though the authorities are conflicting. Thus, it has been held in the case of a Sunday sale that the seller can under such circumstances main-

[63] Holman v. Johnson, 1 Cowp. 341, per Lord Mansfield; Foster v. Thurston, 11 Cush. 322; Roby v. West, 4 N. H. 285; Materne v. Horwitz, 50 N. Y. Super. Ct. 41, 101 N. Y. 469, 5 N. E. 331; Penn v. Bornman, 102 Ill. 523; Randon v. Toby, 11 How. 493, 520.

[64] Monteflori v. Monteflori, 1 Wm. Bl. 363.

[65] Ladd v. Rogers, 11 Allen, 209; Foreman v. Ahl, 55 Pa. St. 325; O'Donnell v. Sweeney, 5 Ala. 467; Pike v. King, 16 Iowa, 49.

[66] Hulet v. Stratton, 5 Cush. 539; Robeson v. French, 12 Metc. (Mass.) 24; Northrup v. Foot, 14 Wend. 249; Plaisted v. Palmer, 63 Me. 576; Finley v. Quirk, 9 Minn. 194 (Gil. 179); Gunderson v. Richardson, 56 Iowa, 56, 8 N. W. 683; Smith v. Bean, 15 N. H. 577, 578.

[67] Myers v. Meinrath, 101 Mass. 366; Horton v. Buffinton, 105 Mass. 399; Green v. Godfrey, 44 Me. 25; Chestnut v. Harbaugh, 78 Pa. St. 473; Ellis v. Hammond, 57 Ga. 179; Block v. McMurry, 56 Miss. 217; Kinney v. McDermott, 55 Iowa, 674, 8 N. W. 656; Moore v. Kendall, 2 Pin. 99.

[68] Myers v. Meinrath, 101 Mass. 366, per Wells, J.

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tain replevin, since he can make out a case founded on property and prior right of possession without referring to the void contract.[69] And it has also been intimated that he could sue for the conversion.[70]

Disaffirmance before Execution of Illegal Purpose.

It is a general rule that where money has been paid upon a contract whose object, although illegal, has not been carried out by performance, the party who has paid the money may disaffirm the contract, and recover the money in an action for money had and received.[71] This rule is applicable to certain classes of illegal sales.[72] Thus, where a corporation passed a resolution increasing its capital stock in violation of the law, and the plaintiff agreed to take certain shares of the new stock when issued, and paid an installment thereon, but the stock was never actually increased, nor were certificates issued, the court held that, conceding the illegality of the contract, the plaintiff was entitled to recover the money paid by him in part performance, the defendant not having performed any part of the contract, and both parties having abandoned the illegal agreement before it was consummated.[73] The rule was stated in a leading English case [74] as follows: "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."

[69] Tucker v. Mowray, 12 Mich. 378; Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906. See, also, Magee v. Scott, 9 Cush. 148. Contra, Smith v. Bean, 15 N. H. 577, 578; Kinney v. McDermott, 55 Iowa, 674, 8 N. W. 656.

[70] Ladd v. Rogers, 11 Allen, 209. See, also, Myers v. Meinrath, 101 Mass. 366, 369; Hall v. Corcoran, 107 Mass. 251; Cranson v. Goss, Id. 439, 441.

[71] Taylor v. Bowers, 1 Q. B. Div. 291; Barclay v. Pearson [1893] 2 Ch. 154; Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49; White v. Franklin Bank, 22 Pick. 181, 189; Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356; Clarke v. Brown, 77 Ga. 606; Peters v. Grim, 149 Pa. St. 163, 24 Atl. 192; Souhegan Nat. Bank v. Wallace, 61 N. H. 24; Adams Exp. Co. v. Reno, 48 Mo. 264. Contra, Knowlton v. Congress & Empire Spring Co., 57 N. Y. 518, Dwight, C., dissenting.

[72] Benj. Sales, § 503a; Clark, Cont. 494.

[73] Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49.

[74] Taylor v. Bowers, 1 Q. B. Div. 291, per Mellish, L. J.

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Separable Contract.

As a general rule governing all contracts, if any part of the consideration is illegal, the whole contract is void.[75] This rule applies to sales, and, where such illegality exists, the seller cannot recover the price.[76] But if the contract is separable, so that it is clear that the parties intend it to be carried into effect piecemeal, the illegality of one part will not prevent the legal part from being enforced.[77] Thus, when each article is sold for a separate price, the price of those articles which it was lawful to sell may be recovered.[78] If, however, a note is given for the price of all the articles, there can be no recovery upon it, since the note is based in part upon an illegal consideration.[79] But if more than one note is given, and the legal items equal the amount of one of the notes, a recovery can be had upon it, because the plaintiff has the right to appropriate the other note to the illegal items.[80]

The rule that the illegality does not avoid the entire contract if it is divisible applies whether the illegality exists by statute or by common law,[81] although it was formerly held that it did not apply where the illegality was created by statute, which it was said "is like a tyrant,—where he comes, he makes all void."

[75] Waite v. Jones, 1 Bing. N. C. 656; Jones v. Waite, 5 Bing. N. C. 341; Trist v. Child, 21 Wall. 441; Clark, Cont. 471.

[76] Holt v. O'Brien, 15 Gray, 311; Woodruff v. Hinman, 11 Vt. 592; Laing v. McCall, 50 Vt. 657; Filson v. Himes, 5 Pa. St. 452; Ladd v. Dillingham, 34 Me. 316.

[77] Odessa Tramways Co. v. Mendel, 8 Ch. Div. 235.

[78] Boyd v. Eaton, 44 Me. 51; Carleton v. Woods, 28 N. H. 290; Walker v. Lovell, Id. 138; Barrett v. Delano (Me.) 14 Atl. 288; Chase v. Burkholder, 18 Pa. St. 48; Clark, Cont. 472. See, also, Shaw v. Carpenter, 54 Vt. 155.

[79] Deering v. Chapman, 22 Me. 488; Coburn v. Odell, 30 N. H. 540; Kidder v. Blake, 45 N. H. 530; Allen v. Pearce, 84 Ga. 606, 10 S. E. 1015; Cotten v. McKenzie, 57 Miss. 418; Widoe v. Webb, 20 Ohio St. 431; Braitch v. Guelick, 37 Iowa, 212; Clark, Cont. 473. See, also, Shaw v. Carpenter, 54 Vt. 155.

[80] Crookshank v. Rose, 5 Car. & P. 19; Warren v. Chapman, 105 Mass. 87. See, also, Hynds v. Hays, 25 Ind. 31.

[81] Pickering v. Ilfracombe Ry. Co., L. R. 3 C. P. 250; U. S. v. Bradley, 10 Pet. 343; Rand v. Mather, 11 Cush. 1, 7; Anson, Cont. 189; Clark, Cont. 472.

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CONFLICT OF LAWS.

82. The legality of a contract of sale is determined by the law in force where the sale is executed.

As a rule, the validity of a contract of sale is determined by the law of the state where the sale is executed. If the sale is valid where executed, it will be enforced, even in a state where it could not be lawfully executed.[82] But the comity which induces a state to enforce a foreign contract does not extend to the enforcement of a contract entered into with the design of evading its laws. Accordingly, a sale of intoxicating liquors or other goods, executed with the mutual design of reselling in violation of the laws of another state, will not be enforced in the state whose laws are sought to be violated,[83] or even in the state where the sale is made,[84] though it seems that the courts will not recognize the revenue laws of another country.[85]

The validity of a sale is determined by the law in force at the time of its execution, and a subsequent change in the law will not validate an invalid sale.[86]

[82] Greenwood v. Curtis, 6 Mass. 358; Orcutt v. Nelson, 1 Gray, 536; Torrey v. Corliss, 33 Me. 333; Dame v. Flint, 64 Vt. 533, 24 Atl. 1051; Braunn v. Keally, 146 Pa. St. 519, 23 Atl. 389; Wagner v. Breed, 29 Neb. 720, 46 N. W. 286.

[83] Waymell v. Reed, 5 Term R. 599; Webster v. Munger, 8 Gray, 584; Gaylord v. Soragen, 32 Vt. 110; Fisher v. Lord, 63 N. H. 514, 3 Atl. 927; Davis v. Bronson, 6 Iowa, 410; Clark, Cont. 502.

[84] Graves v. Johnson, 156 Mass. 211, 30 N. E. 818.

[85] Story, Confl. Law, §§ 245, 256, 257; Clark, Cont. 502.

[86] Roby v. West, 4 N. H. 285; Banchor v. Mansel, 47 Me. 58; Bailey v. Mogg, 4 Denio, 60; Handy v. Publishing Co., 41 Minn. 188, 42 N. W. 872.

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CHAPTER VII.

CONDITIONS AND WARRANTIES.

83-84. In General.
85. Performance of Conditions Precedent.
86. Condition in Sale by Description.
87-89. Excuses for Nonperformance of Conditions.
90-91. Warranties.
92-93. Express Warranties.
94. Implied Warranty of Title.
95. Implied Warranties of Quality.

IN GENERAL.

83. CONDITIONS—A statement or promise which forms the basis of a contract, and the untruth or nonperformance of which discharges the contract, is termed a "condition." The fulfillment of the condition is a condition precedent to the obligation of the party in whose favor it exists to perform.

84. WARRANTIES—An agreement with reference to the subject of the contract, but collateral to its main purpose, is termed a "warranty."

The subjects of representation, condition, and warranty run so closely together that it is difficult to treat them separately. A representation made at the time a contract is entered into may be false and fraudulent, and thus, as we have seen,[1] prevent the contract from ever being effectually formed, or it may form a term of the contract, and amount either to a condition or a warranty.[2] The promises of the parties to a contract may be independent or may be conditional upon one another. If they are independent, failure by one of the parties to perform his promise does not discharge the contract; that is, does not exonerate the other party

[1] Ante, p. 111 et seq.

[2] Benj. Sales, § 561 et seq; Clark, Cont. 661, 671.

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from liability to perform his promise. Where the promise of one party is conditional upon the promise of the other, the performance of the latter promise is either a condition precedent or a condition concurrent, as the case may be, to the obligation of the other party to perform. If it is a condition precedent, it must be performed before the obligation of the other party to perform can arise; if it is a condition concurrent, it must be performed simultaneously with the promise of the other party, or, in point of fact, since simultaneous performance is impossible except in contemplation of law, there must be concurrent willingness to perform the two promises.[3] In either case, the nonperformance of the condition discharges the contract.

A promise upon the performance of which the promise of the other party is conditional may go to the whole consideration, that is, it may form the entire consideration for the promise of the other party. The term "condition," however, is more commonly used in a narrower sense, as meaning a single term in a contract, but possessing a peculiar character. In this sense, a "condition" may be defined as a statement or promise which forms the basis of the contract, and the untruth or nonperformance of which discharges the contract.[4] "Conditions" are to be distinguished from "warranties," although both terms are often loosely, and even interchangeably, used.[5] A "warranty" differs from a "condition," in that its fulfillment is not a condition precedent, and its breach does not discharge the contract, but in general simply gives to the injured party

[3] Anson, Cont. 289; Clark, Cont. 664.

[4] Paragraph 83, ante; Anson, Cont. 294; Clark, Cont. 674; Dorr v. Fisher, 1 Cush. 271, 273. "A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded a 'warranty,' in the sense in which that term is used in insurance and maritime laws; that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12, per Gray, J. See, also, Behn v. Burness, 3 Best & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346.

[5] Chalm. Sales, p. 94; Clark, Cont. 673. Sir William Anson has collected six different senses in which the term "warranty" is used in the cases. Anson, Cont. 295; post, p. 155.

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a right of action for such damages as he has sustained by failure of the other to perform his promise; although, as we shall see in considering the remedies of the buyer, some courts permit him to rescind the sale for a breach of an express warranty.

The difficulty lies in discovering whether the parties regarded a particular term as essential to the contract. If they did, it is a condition; its performance is a condition precedent, and its failure discharges the contract. If they did not, it is a warranty; its failure can only give rise to an action for damages. The question whether a particular term in a contract is a condition or a warranty is a question of intention, and depends upon the construction of each individual contract. Various rules of construction for ascertaining the intention have been attempted; but the only rule that can safely be laid down is that the intention is to be ascertained from the language of the parties and the circumstances under which the contract is made.[6] As was said by Blackburn, J.: "Parties may think some matter, apparently of very little importance, essential; and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of some importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."[7]

PERFORMANCE OF CONDITIONS PRECEDENT.

85. Where the promise of a party to a contract of sale is conditional upon the fulfillment of a condition precedent, the other party cannot sue upon the contract until the condition has been fulfilled or its nonfulfillment excused.

[6] Graves v. Legg, 9 Exch. 709, 23 Law J. Exch. 228; Behn v. Burness, 32 Law J. Q. B. 204, 205; Watchman v. Crook, 5 Gill & J. 239; Maryland Fertilizing & Manuf'g Co. v. Lorentz, 44 Md. 218; Grant v. Johnson, 5 N. Y. 247; Knight v. New England Worsted Co., 2 Cush. 271, 287; Mill-Dam Foundery v. Hovey, 21 Pick. 417, per Shaw, C. J.; Anson, Cont. 135, 296; Clark, Cont. 652, 661.

[7] Bettini v. Gye, 1 Q. B. Div. 187.

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From the very nature of a condition precedent, it results that it must be strictly performed before the party on whom its performance is incumbent can call on the other party to fulfill his promise. Thus, as we shall see,[8] even impossibility of performance is, as a rule, no excuse for nonperformance. The strictness with which conditions precedent are enforced will be illustrated by reference to several of the conditions which frequently occur in sales. The principal questions in the law of sales relating to conditions are connected with delivery and payment, and will be discussed hereafter.

Suspensory Conditions.

It is to be observed that there is a distinction between conditions precedent the nonfulfillment of which effects a discharge of the contract by breach, and conditions precedent which merely suspend the operation of the promise until they are fulfilled. Conditions of the latter class are called "suspensive" or "suspensory." A promise is conditional in this sense when it is conditional, not upon some statement to be made good or promise to be performed by the other party, but upon the occurrence of something beyond his control, as where a sale is dependent on the act of a third person, or upon the buyer's approval of the goods.[9]

Sale Dependent on Act of Third Person.

Where the performance of a contract is made dependent on the act of a third person, the act must be performed before the rights dependent on it can be enforced,[10] even though the third person unreasonably refuses to act. Thus where the seller sold his horse for one shilling cash, and a further payment of £200, provided the horse should trot 18 miles an hour within a month, "J. N. to be the judge of the performance," it was held no defense to the buyer's action for the delivery of the horse that J. N. refused to be present at the trial.[11] So where the contract is for the sale of goods at a valuation to be made by two persons, one in behalf of each party,

[8] Post, p. 158.

[9] Anson, Cont. 277; Clark, Cont. 665; Chalm. Sale, p. 4.

[10] U. S. v. Robeson, 9 Pet. 319, 327; Johnson v. Phoenix Ins. Co., 112 Mass. 49; Leadbetter v. Etna Ins. Co., 13 Me. 265; Smith v. Briggs, 3 Denio, 73; Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269.

[11] Brogden v. Marriott, 2 Bing. N. C. 473.

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the refusal of the person who was to act in behalf of the buyer to proceed with the valuation was held to be a bar to the seller's action, unless the refusal was caused by the buyer.[12] If, however, the buyer consumes the goods pending the valuation, the seller may recover on a quantum valebant.[13]

Sale of Goods to be Satisfactory.

Where the contract is for the sale of goods to be made by the seller according to the buyer's order, and it is a term of the contract that the goods shall be satisfactory to the buyer, the satisfaction of the buyer is a condition precedent to the buyer's obligation to accept and pay for the goods. It is immaterial that the goods are such that the buyer ought to have been satisfied with them. Although the compensation of the seller may thus be dependent on the caprice of the buyer, who unreasonably refuses to accept the goods, yet the seller cannot be relieved from the contract into which he voluntarily entered.[14] Of course, the parties may agree that the satisfactoriness is to be determined by the mind of a reasonable man, and not by the mere taste or liking of the defendant.[15]

Stipulations as to Time—When Time of Essence.

In determining whether stipulations as to time are conditions precedent, the court seeks to discover what the parties really intended, and if time appears, 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.[16] In mercantile transactions, however, such as the sale of goods, time is

[12] Thurnell v. Balbirnie, 2 Mees. & W. 786.

[13] Clarke v. Westrope, 18 C. B. 765, 25 Law J. C. P. 287; Humaston v. Telegraph Co., 20 Wall. 20, 28.

[14] McCarren v. McNulty, 7 Gray, 139; Brown v. Foster, 113 Mass. 136; Zaleski v. Clark, 44 Conn. 218; McClure v. Briggs, 58 Vt. 82, 2 Atl. 583; Seeley v. Welles, 120 Pa. St. 69, 13 Atl. 736; Gibson v. Cranage, 39 Mich. 49; Goodrich v. Van Nortwick, 43 Ill. 445; McCormick Harvesting Mach. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; Warder, Bushnell & Glessner Co. v. Whitish, 77 Wis. 430, 46 N. W. 540; D. M. Osborne & Co. v. Francis, 38 W. Va. 312, 18 S. E. 591; Clark, Cont. 606.

[15] Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312.

[16] Benj. Sales, § 593. Cited with approval by Folger, J., in Higgins v. Delaware, L. & W. R. Co., 60 N. Y., at page 557; and see Clark, Cont. 596.

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generally held to be the essence of the contract; and, where one of the terms of the contract provides for the time of shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the entire contract.[17] But it seems that, unless a contrary intention appears, stipulations as to the time of payment, inasmuch as payment as a rule follows delivery, are not usually deemed to be of the essence of the contract.[18]

CONDITION IN SALE BY DESCRIPTION.

86. Where there is a contract for the sale of goods by description, there is an implied condition (sometimes called a "warranty") that the goods shall correspond with the description.

When goods are sold by description, it is a condition precedent to the seller's right of action on the contract that the goods should conform to the description. Properly speaking, the undertaking that the goods shall so conform is a "condition," as distinguished from a "warranty," and Benjamin and the English writers so describe it,[19] though the cases are not free from confusion arising from the application to it of the term "warranty." This was pointed out in Chanter v. Hopkins [20] by Lord Abinger, who observed: "Two things are confounded together. * * * If a man offer to buy peas of another, and he send him beans, he does not perform his contract. But that is not a warranty. There is no warranty that he should

[17] Reuter v. Sala, 4 C. P. Div. 239, 246, 249; Bowes v. Shand, 2 App. Cas. 455, 463; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12; Cleveland Rolling Mills v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882; Jones v. U. S., 96 U. S. 24; Camden Iron Works v. Fox, 34 Fed. 200; Rouse v. Lewis, 4 Abb. Dec. 121; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Rommel v. Wingate, 103 Mass. 327; Clark, Cont. 597, 598.

[18] Martindale v. Smith, 1 Q. B. 389, 395; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, 444; Chalm. Sale, § 12; Clark, Cont. 596. See Norrington v. Wright, cited in preceding note, per Gray, J.

[19] Benj. Sales, § 600; Chalm. Sale, § 16; Kerr, Dig. Sales, § 75.

[20] 4 Mees. & W. 399. See, also, Bowes v. Shand, 2 App. Cas. 455, 480, per Lord Blackburn.

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sell him peas; the contract is to sell peas, and, if he sells him anything else in their stead, it is a nonperformance of it." But, whatever the confusion in terms, the law is clear: If the sale is of a described article, the tender of an article answering the description is a condition precedent to the buyer's liability, and, if the condition is not performed, the buyer is entitled to reject the article, and, if he has paid for it, to recover the price as money had and received for his use.[21] Thus, where the contract was for turnip seed described as "Skirvings Swedes," it was not satisfied by a tender of turnip seed of a different sort.[22] And, although the sale is by sample, it is not sufficient that the bulk corresponds with the sample if it does not also correspond with the description.[23] For example, where the sale was of "foreign refined rape oil, warranted only equal to sample," and the oil corresponded with the sample, but the jury found that it was not "foreign refined rape oil," it was held that the buyer was not bound to receive it.[24]

Rule in United States.

In the United States the cases generally declare that words of description imply a warranty that the goods shall conform to the description.[25] "There is no doubt," says Shaw, C. J., "that, in a case of sale, words of description are held to constitute a warranty that the articles sold are of the species and quality so described." [26] Thus, where the article sold was described in the bill of parcels as "blue paint," it was held that this amounted to a warranty that the article should be blue paint, and not a different article; [27] and, where

[21] Josling v. Kingsford, 32 Law J. C. P. 94; Mody v. Gregson, L. R. 4 Exch., at page 53; Borrowman v. Drayton, 2 Exch. Div. 15.

[22] Allan v. Lake, 18 Q. B. 560.

[23] Nichol v. Godts, 10 Exch. 191, 23 Law J. Exch. 314; Azemar v. Casella, L. R. 2 C. P. 677.

[24] Nichol v. Godts, 10 Exch. 191, 23 Law J. Exch. 314.

[25] Hastings v. Lovering, 2 Pick. 214; Henshaw v. Robins, 9 Metc. (Mass.) 83; Borrekins v. Bevan, 3 Rawle, 23; Holloway v. Jacoby, 120 Pa. St. 583, 15 Atl. 487; Osgood v. Lewis, 2 Har. & G. 495; Hawkins v. Pemberton, 51 N. Y. 198; White v. Miller, 71 N. Y. 118; Lewis v. Rountree, 78 N. C. 323; Whitaker v. McCormick, 6 Mo. App. 114; Flint v. Lyon, 4 Cal. 17.

[26] Hogins v. Plympton, 11 Pick. 97, 99; Winsor v. Lombard, 18 Pick. 57, 60.

[27] Borrekins v. Bevan, 3 Rawle, 23.

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seed was sold as "Bristol Cabbage" seed, this was held to be a warranty that the seed was of the kind mentioned.[28]

It seems, however, that the rule of law differs little, if at all, from that prevailing in England; for, although there is, as we shall see, in considering the buyer's remedies, some disagreement as to his remedy for breach of warranty in certain cases,[29] all the authorities agree that he may decline to accept the goods if they fail to conform to the description.[30] The law is clearly stated in Pope v. Allis,[31] a recent case in the supreme court of the United States. The point decided was that the buyer could recover the price of iron paid for before delivery, and rejected after inspection, for failure to conform to the grade required by the contract. Woods, J., said: "When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an understanding 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."

EXCUSES FOR NONPERFORMANCE OF CONDITIONS.

87. WAIVER—The performance of a condition precedent may be waived.

88. RENUNCIATION OF CONTRACT—A party to a contract of sale, on whom the performance of a condition precedent rests, is excused from performance, if before or

[28] White v. Miller, 71 N. Y. 118.

[29] Post, p. 244.

[30] Pope v. Allis, 115 U. S. 363, 371, 6 Sup. Ct. 69. See, also, Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12, per Gray, J.; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19; Avery v. Miller, 118 Mass. 500; Dailey v. Green, 15 Pa. St. 118; Woodle v. Whitney, 23 Wis. 55, and cases cited in following note; Wolcott v. Mount, 36 N. J. Law, 262 (pointing out that if the buyer has accepted part performance the buyer may treat the breach of condition as a breach of warranty); Haase v. Nonnemacher, 21 Minn. 486, 490, per Gilfillan, C. J.; Jones v. George, 61 Tex. 345, 349; Bagley v. Cleveland Rolling-Mill Co., 21 Fed. 159, 162; Morse v. Moore, 83 Me. 473, 479, 22 Atl. 362.

[31] 115 U. S. 363, 371, 6 Sup. Ct. 69.

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at the time of performance the other party absolutely refuses to perform or incapacitates himself from performance.

89. IMPOSSIBILITY OF PERFORMANCE—Impossibility arising after the formation of the contract is not an excuse from performance, unless the impossibility results either—

(a) From the destruction of the specific goods which are the subject of sale, or

(b) From a change in the law.

Waiver.

The performance of a condition may be waived by the party in whose favor it exists, either expressly or by implication. For example, the condition of payment on delivery implied in every sale not on credit is waived by the delivery of the goods without requiring payment.[32] And a party may waive a condition by refusing or obstructing performance.[33] Another example of waiver occurs when the buyer elects to treat nonperformance of a condition for his benefit, not as a ground for rescission, but as a breach of warranty; that is, when he elects to go on with the contract, and to seek his remedy in an action for damages.[34]

Renunciation of Contract.

The performance of a condition precedent is not necessary if the other party, before the time for performance arrives, absolutely refuses to perform, or incapacitates himself from performing, his promise. "Lex neminem ad vana cogit."

The renunciation must amount to an absolute refusal to perform.[35] Such a renunciation is generally held to be equivalent to a

[32] Ante, p. 89. See Clark, Cont. 676.

[33] Hotham v. East India Co., 1 Term R. 645; Cort v. Ambergate, N. & B. & E. J. Ry. Co., 17 Q. B. 127; Hosmer v. Wilson, 7 Mich. 294; Butler v. Butler, 77 N. Y. 472, 475; Allen v. Jarvis, 20 Conn. 38; Borden v. Borden, 5 Mass. 67; U. S. v. Peck, 102 U. S. 65.

[34] Behn v. Burness, 32 Law J. Q. B. 204; Heilbutt v. Hickson, L. R. 7 C. P. 438, 450; post, p. 246.

[35] Johnstone v. Milling, 16 Q. B. Div. 460; Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850; Smoot's Case, 15 Wall. 36. As to renunciation, see Clark,

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breach of the contract, and to entitle the other party to sue for the breach without waiting for the time fixed by the contract for performance.[36] But the other party may refuse to accept the renunciation, and may insist upon the performance of the contract.[37] The effect of the renunciation, however, if not withdrawn, is to excuse him from tendering performance of the conditions incumbent upon him.[38] The rule applies equally to a renunciation after partial performance. Thus, if after a partial delivery the buyer gives notice to the seller that he will accept no further deliveries, the seller may sue for breach of contract without averring performance, and upon the simple averment that he was ready and willing to perform, and had been prevented from so doing by the buyer.[39]

A fortiori the contract is discharged when one of the parties makes it impossible to perform his promise. Thus where the seller agrees to sell a specified ox, and before the time for delivery consumes it,[40] or contracts to sell specific goods, and before the day

Cont. 645; and as to impossibility created by act of party, see Clark, Cont. 649.

[36] Hochster v. De la Tour, 2 El. & Bl. 678; Frost v. Knight, L. R. 7 Exch. 111; Roper v. Johnson, L. R. 8 C. P. 167; Dingley v. Oler, 11 Fed. 372; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Eckenrode v. Chemical Co., 55 Md. 51; James v. Adams, 16 W. Va. 245; Kadish v. Young, 108 Ill. 170; Platt v. Brand, 26 Mich. 173; McCormick v. Basal, 46 Iowa, 235. Contra, Daniels v. Newton, 114 Mass. 530. Whether an absolute refusal to perform gives a right of action to sue for breach before the expiration of the time for performance is still an open question in the United States supreme court. Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850.

[37] Avery v. Bowden, 5 El. & Bl. 714; Johnstone v. Milling, 16 Q. B. Div. 460; Smoot's Case, 15 Wall. 36; Zuck v. McClure, 98 Pa. St. 541; Kadish v. Young, 108 Ill. 170; Howard v. Daly, 61 N. Y. 362.

[38] Bunge v. Koop, 48 N. Y. 225; Crist v. Armour, 34 Barb. 378; McPherson v. Walker, 40 Ill. 372; Daniels v. Newton, 114 Mass. 530, 533. See, also, cases cited in note 41, post.

[39] Cort v. Ambergate, N. & B. & E. J. Ry. Co., 17 Q. B. 127; Hosmer v. Wilson, 7 Mich. 294; Clement & Hawkes Manuf'g Co. v. Meserole, 107 Mass. 362; Parker v. Russell, 133 Mass. 74; Haines v. Tucker, 50 N. H. 307, 311; Canda v. Wick, 100 N. Y. 127, 2 N. E. 381; Textor v. Hutchings, 62 Md. 150.

[40] Benj. Sales, § 567; Clark, Cont. 649.

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for delivery sells them to another,[41] the buyer may sue for the breach without tendering the price.

Impossibility of Performance.

As we have seen, impossibility of performance, which arises from the nonexistence of the thing sold at the time of the formation of the contract, avoids the contract.[42] The question now under consideration is how far impossibility arising subsequently to the formation of the contract discharges it, and therefore constitutes an excuse for nonperformance.

The general rule is that no impossibility arising subsequently to the formation of the contract is an excuse for nonperformance.[43] The promisor who promises unconditionally takes the risk of being unable to perform, even though his inability should be caused by inevitable accident or other circumstances beyond his control. Thus, where the seller has contracted to deliver goods, he is liable for failure to deliver, notwithstanding that delivery was rendered impossible by frosts or freshets or other causes obstructing navigation or transportation,[44] or by pestilence,[45] or by the destruction of the seller's factory by fire,[46] or by droughts stopping his mill.[47]

Same—Destruction of Thing Sold.

An exception to the general rule arises when the impossibility is caused by the destruction of the subject-matter of the contract before breach, and without default of the contractor. The contract is said to be subject to an implied condition to this effect. Therefore, where the contract is for the sale of specific goods which perish without the seller's fault before the day appointed for delivery, the seller is excused from the obligation to deliver, and the

[41] Bowdell v. Parsons, 10 East, 359; Hawley v. Keeler, 53 N. Y. 114; Parker v. Pettit, 43 N. J. Law, 512; Smith v. Jordan, 13 Minn. 264 (Gil. 246); Newcomb v. Brackett, 16 Mass. 161.

[42] Ante, p. 23.

[43] Anson, Cont. 322; Clark, Cont. 678.

[44] Kearon v. Pearson, 7 Hurl. & N. 386, 31 Law J. Exch. 1; Harmony v. Bingham, 12 N. Y. 99; Bacon v. Cobb, 45 Ill. 47 (seizure of railroad by government to transport troops).

[45] Barker v. Hodgson, 3 Maule & S. 267.

[46] Jones v. U. S., 96 U. S. 24; Booth v. Spuyten Duyvill Mill Co., 60 N. Y. 487.

[47] Eddy v. Clement, 38 Vt. 486.

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buyer from obligation to pay.[48] If, however, the property has already passed, although the goods are still in the possession of the seller, the buyer must pay the price.[49]

The distinction between cases in which the destruction of the thing sold is held to be an excuse, and those in which the performance is prevented by other causes beyond the promisor's control, is also sometimes placed upon the ground that in the former cases the performance is physically impossible, "quod natura fieri non concedit," and that in the latter cases performance is in its nature possible, notwithstanding that the promisor is unable to perform it.[50]

Same—Legal Impossibility.

A second exception arises where the impossibility results from a change in the law. If, after the contract is entered into, a statute is passed rendering it illegal, the promisor is no longer bound.[51]

WARRANTIES.

90. A contract of sale may be accompanied by one or more warranties, express or implied, given by the seller to the buyer.

91. A warranty may be either—

(a) Included in the contract of sale, or

(b) Given after the contract of sale is completed; but, in the latter case, it must be supported by a fresh consideration.

A warranty is not one of the essential elements of a contract of sale. It is, as we have seen, an agreement with reference to the

[48] Rugg v. Minett, 11 East, 210; Howell v. Coupland, L. R. 9 Q. B. 462, 1 Q. B. Div. 258; Dexter v. Norton, 47 N. Y. 62; Thompson v. Gould, 20 Pick. 134, 139; Wells v. Calnan, 107 Mass. 514; Gould v. Murch, 70 Me. 288; Clark, Cont. 682.

[49] Taylor v. Caldwell, 3 Best & S. 826, 32 Law J. Q. B. 164, per Blackburn, J. Ante, p. 83.

[50] Jones v. U. S., 96 U. S. 24, per Clifford, J.; Benj. Sales, § 570.

[51] Baily v. De Crespigny, L. R. 4 Q. B. 180; Brick Presbyterian Church v. Mayor, etc., of City of New York, 5 Cow. 538; Cordes v. Miller, 39 Mich. 581; Mississippi & T. R. Co. v. Green, 9 Heisk. 588; Clark, Cont. 681.

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goods which are the subject of the contract, but collateral to its main purposes. It must form part of the contract, unless it be given after the contract is entered into and is supported by new consideration.[52] A subsequent warranty not on new consideration is void.[53] An antecedent representation, though made by the seller as an inducement to the buyer, if it does not form part of the contract when it is concluded, is not a warranty.[54]

Inasmuch as, by the rules of evidence, when once a contract has been reduced to writing, the entire contract is deemed to be expressed in the instrument, parol evidence is inadmissible to prove a warranty where none is contained in the instrument, or to vary the terms of a warranty therein expressed.[55] Of course this rule does not exclude such proof if the writing is not the contract, as where it is a mere receipt or bill of parcels.[56] Nor does an express warranty necessarily exclude an implied warranty.

EXPRESS WARRANTIES.

92. Whether the language of the parties amounts to an express warranty depends in each case upon the construction of the contract.

93. An express warranty may include existing defects, known as well as unknown, and future defects.

How Created.

No form of words is necessary to create a warranty. Whether the words amount to a warranty is a question of the intention of the parties. The affirmation of a fact made by the seller as an

[52] Congar v. Chamberlain, 14 Wis. 258; Porter v. Pool, 62 Ga. 238.

[53] Roscorla v. Thomas, 3 Q. B. 234; Hogins v. Plympton, 11 Pick. 97; Summers v. Vaughan, 35 Ind. 323; Morehouse v. Comstock, 42 Wis. 626; C. Aultman & Co. v. Kennedy, 33 Minn. 339, 23 N. W. 528.

[54] Hopkins v. Tanqueray, 15 C. B. 130, 23 Law J. C. P. 162; Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139.

[55] Kain v. Old, 2 Barn. & C. 627; Randall v. Rhodes, 1 Curt. 90, Fed. Cas. No. 11,556; Frost v. Blanchard, 97 Mass. 155; Merriam v. Field, 24 Wis. 640; Shepherd v. Gilroy, 46 Iowa, 193.

[56] Allen v. Pink, 4 Mees. & W. 140; Atwater v. Clancy, 107 Mass. 369; Filkins v. Whyland, 24 N. Y. 338; Irwin v. Thompson, 27 Kan. 643.

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inducement to the sale, if the buyer relies upon it, will amount to a warranty.[57] A statement of opinion or a mere commendatory expression will not.[58] Whether a statement is an affirmation of fact, or whether it is simply a statement of opinion or a commendatory expression, often depends on the nature of the sale and the circumstances of the case. If the language is not unmistakable, the question is for the jury; [59] though, if the warranty is contained in a written contract, the construction of the warranty is for the court.[60] Of course, the question whether the language is unmistakable will be decided differently by different courts. Thus in a case where two pictures were sold at auction by a catalogue, in which one was said to be by Claude Lorraine, and the other by Teniers, Lord Kenyon held this no warranty that the pictures were genuine works of those masters, but merely an expression of opinion.[61] But where the seller sold, by a bill of parcels, "four pictures, views in Venice, Canaletti," it was left to the jury to say whether the seller meant to warrant them as genuine works of Canaletti, and Lord Denman distinguished the case from the preceding one by the suggestion that Canaletti was a comparatively modern painter of whose works it would be possible to make proof as a matter of fact,

[57] Pasley v. Freeman, 3 Term R. 57, per Holt, C. J.; Henshaw v. Robins, 9 Metc. (Mass.) 83, 88; Randall v. Thornton, 43 Me. 226; Chapman v. Murch, 19 Johns. 290; Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139; Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416; Mason v. Chappell, 15 Grat. 573; Warren v. Philadelphia Coal Co., 83 Pa. St. 437, 440; Thorne v. McVeagh, 75 Ill. 81; Grieb v. Cole, 60 Mich. 397, 27 N. W. 579; Watson v. Roode, 30 Neb. 264, 46 N. W. 491.

[58] Power v. Barham, 4 Adol. & E. 473; Henshaw v. Robins, 9 Metc. (Mass.) 83, 88; Warren v. Philadelphia Coal Co., 83 Pa. St. 437, 440; Kenner v. Harding, 85 Ill. 264; Robinson v. Harvey, 82 Ill. 58; Austin v. Nickerson, 21 Wis. 542, 543; Mason v. Chappell, 15 Grat. 572, 583; James v. Bockage, 45 Ark. 284.

[59] Stucley v. Baily, 1 Hurl. & C. 405, 417, 31 Law J. Exch. 483; Power v. Barham, 4 Adol. & E. 473; Edwards v. Marcy, 2 Allen, 486, 490; Tuttle v. Brown, 4 Gray, 457; Osgood v. Lewis, 2 Har. & G. 495; Kingsley v. Johnson, 49 Conn. 462; Crenshaw v. Slye, 52 Md. 140; Claghorn v. Lingo, 62 Ala. 230; Thorne v. McVeagh, 75 Ill. 81; McDonald Manuf'g Co. v. Thomas, 53 Iowa, 558, 5 N. W. 737.

[60] Osgood v. Lewis, 2 Har. & G. 495; Rice v. Codman, 1 Allen, 377, 380.

[61] Jendwine v. Slade (1797) 2 Esp. 572.

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but that in the case of very old masters the assertion was necessarily matter of opinion.[62] It would be beyond the scope of this book to consider in detail particular expressions which have been held to be warranties.

Known Defects.

As a rule a general warranty is held not to extend to known defects or to defects apparent on a simple inspection.[63] This rule rests on the presumed intention of the parties, who cannot be supposed the one to assert, and the other to rely on, the truth of what they know to be untrue. But the warranty may be so expressed as to protect the buyer against the consequences of patent defects, and an intention to include them will readily be inferred in doubtful cases, where the buyer may naturally prefer to rely on the warranty rather than on his own judgment.[64]

Future Events.

Blackstone says that "the warranty can only reach to things in being at the time the warranty was made, and not to things in future; as that a horse is sound at the buying of him, not that he will be sound two years hence."[65] But the law is now different, and the seller may undertake to indemnify the buyer against defects which may arise in the future.[66]

[62] Power v. Barham (1836) 4 Adol. & E. 473. Canaletti died in 1768, Claude Lorraine in 1682, and Teniers (the younger) in 1694.

[63] Margetson v. Wright, 7 Bing. 603, 8 Bing. 454; Schuyler v. Russ, 2 Caines, 202; Bennett v. Buchan, 76 N. Y. 386; Hill v. North, 34 Vt. 604; Leavitt v. Fletcher, 60 N. H. 182; McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675. The rule does not apply if the seller artificially conceals the objects from the buyer. Chadsey v. Greene, 24 Conn. 562; Kenner v. Harding, 85 Ill. 264.

[64] Hill v. North, 34 Vt. 604; Brown v. Bigelow, 10 Allen, 242; Sherwalter v. Ford, 34 Miss. 417; Marshall v. Drawhorn, 27 Ga. 275, 279; McCormick v. Kelly, 28 Minn. 135, 138, 9 N. W. 675; Branson v. Turner, 77 Mo. 489.

[65] 3 Bl. Comm. 166.

[66] Eden v. Parkison, 2 Doug. 735; Osborn v. Nicholson, 13 Wall. 654.

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IMPLIED WARRANTY OF TITLE.

94. By a contract of sale, the seller impliedly warrants his right to sell the goods, unless the circumstances of the sale or agreement to sell are such as to show that the seller is transferring only such property as he may have in the goods.

EXCEPTION—In some states the implied warranty of title is confined to cases in which the seller is in possession of the goods.

There has never been any question that in an executory contract of sale the seller warrants by implication the title to the goods which he promises to sell; or that in the sale of a specific chattel an affirmation by the seller that the chattel is his is equivalent to a warranty of title; or that such an affirmation, with the consequent warranty, may be implied from the conduct of the seller as well as from his words, and may also result from the nature and circumstances of the sale.[67] But it was formerly held that there was no warranty of title implied in the mere act of sale.[68] This view was strongly supported in the opinion in Morley v. Attenborough [69] of Parke, B., who, however, recognized so many exceptions to the rule, founded upon declarations or conduct equivalent to warranty, that, as Lord Campbell said,[70] the exceptions "well might eat up the rule." The old rule was substantially altered in 1864 by Eichholz v. Bannister,[71] upon the strength of the opinion of the judges in which case, Benjamin, after reviewing the authorities, argues conclusively that the exceptions have become the rule, and that the old rule has dwindled into the exceptions. He states the rule as follows: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore

[67] Morley v. Attenborough, 3 Exch. 500, per Parke, B.
[68] Noy, Max. c. 42; Co. Litt. 102a.
[69] 3 Exch. 500.
[70] Sims v. Marryat, 17 Q. B. 281, 291, 20 Law J. Q. B. 454.
[71] 17 C. B. (N. S.) 708, 34 Law J. C. P. 105.

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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." [72]

Rule in America.

In the United States a distinction between goods in possession of the seller and goods not in possession has been somewhat upheld; and the rule has been said to be that as to goods in possession there is an implied warranty, but that when the goods are in the possession of a third person there is no warranty.[73] That there is an implied warranty of title when the seller is in possession of the goods is universally held,[74] the implication resting on the theory that possession is equivalent to an affirmation of title.[75] But, though the other branch of the rule has been frequently approved and sometimes applied,[76] the tendency of the later decisions is against the recognition of such a distinction, and favorable to the modern English rule.[77] Thus, in a Massachusetts case,[78] Dewey, J., said: "Possession here must be taken in its broadest sense, and the excepted cases must be substantially cases of sales of

[72] Benj. Sales, § 639. This rule was approved and followed by Stephen, J., in Raphael v. Burt, 1 Cab. & El. 325.

[73] 2 Kent, Comm. 478. This distinction was upheld by Lord Holt in Medina v. Stoughton, 1 Salk. 210, Ld. Raym. 593, but repudiated by Buller, J., in Pasley v. Freeman, 3 Term R. 51, and by the judges in Morley v. Attenborough, 3 Exch. 500, and in Eichholz v. Bannister, 17 C. B. (N. S.) 708.

[74] Shattuck v. Green, 104 Mass. 42; Maxfield v. Jones, 76 Me. 135, 137; Starr v. Anderson, 19 Conn. 338; Sargent v. Currier, 49 N. H. 311; Cohn v. Ammidown, 120 N. Y. 398, 24 N. E. 944; Gould v. Bourgeois, 51 N. J. Law, 361, 18 Atl. 64; Rice v. Forsyth, 41 Md. 389; Williamson v. Sammons, 34 Ala. 691; Morris v. Thompson, 85 Ill. 16; Marshall v. Duke, 51 Ind. 62; Hunt v. Sackett, 31 Mich. 18; Edgerton v. Michels, 66 Wis. 124, 26 N. W. 748, and 28 N. W. 408; Davis v. Smith, 7 Minn. 414 (Gil. 328); Gross v. Kierski, 41 Cal. 111.

[75] Shattuck v. Green, 104 Mass. 42, per Morton, J.

[76] Huntington v. Hall, 36 Me. 501; Scranton v. Clark, 39 N. Y. 220; Long v. Hickingbottom, 28 Miss. 773.

[77] Gould v. Bourgeois, 51 N. J. Law, 361, 373, 18 Atl. 64, per Depue, J.; 1 Smith, Lead. Cas. (Edson's Ed.) 344. The cases are collected in Willist. Cas. Sales, 630.

[78] Whitney v. Heywood, 6 Cush. 82, 86.

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the mere naked interest of persons having no possession, actual or constructive." And, in a later case [79] in the same court, Morton, J., observed: "If the vendor has either actual or constructive possession, and sells the chattels, and not merely his interest in them, such sale is equivalent to an affirmation of title,"—a distinction which, as Mr. Corbin observes,[80] differs little from that established in Eichholz v. Bannister.

No Warranty in Official Sales.

Sales by a judicial officer, sheriff, executor or administrator, mortgagee, or auctioneer fall within the exception, the circumstances in such sales being such as to indicate that the seller sells only such interest as he may have in the goods.[81]

When Action for Breach Accrues.

Whether an action for breach of warranty of title will lie upon mere proof that a superior title or an incumbrance exists, or whether proof of eviction or of interference with possession is necessary, is a question on which the decisions conflict. Those which maintain the first alternative adopt the analogy of covenants of right to convey or against incumbrances,[82] while those which maintain the other alternative adopt the analogy of covenants for quiet possession.[83]

IMPLIED WARRANTIES OF QUALITY.

95. Subject to the exceptions hereinafter mentioned, there is at common law no implied warranty of the quality, fitness, or condition of goods supplied under a contract of sale.

[79] Shattuck v. Green, 104 Mass. 42, 45.

[80] Benj. Sales (Corbin's Ed.) § 962, note 21.

[81] Chapman v. Speller, 14 Q. B. 621, 19 Law J. Q. B. 241; The Monte Allegre, 9 Wheat. 616; Mockbee v. Gardner, 2 Har. & G. 176; Baker v. Arnot, 67 N. Y. 448; Corwin v. Behmam, 2 Ohio St. 36; Bingham v. Maxcy, 15 Ill. 295.

[82] Wanser v. Messler, 29 N. J. Law, 256; Krumbhaar v. Birch, 83 Pa. St. 426; Linton v. Porter, 31 Ill. 107; Gross v. Kierski, 41 Cal. 111; Burt v. Dewey, 40 N. Y. 283.

[83] Perkins v. Whelan, 116 Mass. 542; Chancellor v. Wiggins, 4 B. Mon. 201; Matheny v. Mason, 73 Mo. 677; Word v. Cavin, 1 Head, 506.

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EXCEPTIONS—

(a) Where goods are purchased from the manufacturer, a warranty is (perhaps) implied that they are free from latent defects resulting from the process of manufacture.

(b) Where the buyer, relying on the seller's skill or judgment, orders goods for a particular purpose known to the seller, and the goods are of a description which it is in the course of the seller's business to supply, there is an implied warranty that the goods are reasonably fit for such purpose.

(c) Where goods are ordered by description, and the buyer has no opportunity of examining them, there is an implied warranty that the goods are merchantable.

(d) On a sale of provisions for domestic consumption, it is held in some states that there is an implied warranty that they are fit for food.

(e) In the case of a contract of sale by sample, there is an implied warranty that the bulk shall correspond with the sample in quality and condition.

Caveat Emptor.

The maxim of the common law, "caveat emptor," is the general rule, so far as quality is concerned, applicable to sales. The buyer, in the absence of fraud, purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale.[84] The rule of caveat emptor probably had its origin in the fact that in early times nearly all sales of goods took place in market overt.[85] The tendency of modern cases is to diminish its scope by implying war-

[84] Miller v. Tiffany, 1 Wall. 298; Barnard v. Kellogg, 10 Wall. 383; Winsor v. Lombard, 18 Pick. 57; Hargous v. Stone, 5 N. Y. 73; Moore v. McKinlay, 5 Cal. 471. See, also, cases cited post, note 96.

[85] Morley v. Attenborough, 3 Exch., at page 511, per Parke, B.

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ranties in certain cases, where the circumstances indicate that such was the intention of the parties.

Whether Warranty may be Implied from Usage.

Benjamin says that an implied warranty may result from usage,[86] but this statement is somewhat misleading. He cites Jones v. Bowden,[87] an action of deceit, in which it appeared that in auction sales of certain drugs, as pimento, it was usual to state in the broker's catalogue whether they were sea damaged; and upon the evidence of the usage, and of the absence in the sale in question of a statement that they were sea damaged, it was held that the buyer could maintain an action for fraud. As the writer elsewhere observes,[88] the grounds are not very intelligently given, but it may be fairly inferred from the language of Mansfield, C. J., that he considered the verdict as establishing a usage which imposed on the seller the duty of disclosing the defect; thus bringing the case within the principle that the suppression of that which is true, and which it is the duty of the seller to make known, constitutes fraud.

As observed by Davis, J., in the leading case of Barnard v. Kellogg,[89] in the supreme court of the United States, the proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence; but it does not go beyond this, and is used on the theory that the parties knew of its existence, and contracted with reference to it. But evidence of a usage to imply a warranty where none is implied by the common law,[90] or evidence of a usage against a warranty where a warranty is implied by law,[91] is inadmissible. Custom cannot be admitted to control the general rules of the law. Thus

[86] Benj. Sales, § 655.

[87] 4 Taunt. 847. Cf. Syers v. Jonas, 2 Exch. 111; Chalm. Sale, § 17.

[88] Benj. Sales, § 480.

[89] 10 Wall. 383.

[90] Barnard v. Kellogg, 10 Wall. 383; Dickinson v. Gay, 7 Allen, 29; Dood v. Farlow, 11 Allen, 426; Snelling v. Hall, 107 Mass. 134. See, also, Coxe v. Heisley, 19 Pa. St. 243; Wetherill v. Neilson, 20 Pa. St. 448.

[91] Whitmore v. South Boston Iron Co., 2 Allen, 52.

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in Barnard v. Kellogg,[92] where the buyer purchased in Boston certain wool, after having examined four bales and declined to examine the rest, and it turned out that some of the bales, unknown to the seller, were falsely packed, it was held that the seller was not bound by warranty against false packing, which by the custom of dealers in wool in New York and Boston was implied from the fact of sale. Davis, J., said: "The usage was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sale of personal property." In concluding, he remarked that it was proper to add that the parties did not know of the custom, and could not, therefore, have dealt with reference to it. Whether the result would have been different if the custom had been known to the parties the opinion does not intimate; but it seems that something more than mere knowledge of the custom would be necessary to show that they intended to make it a term of the contract.

Sale of Specific Chattel.

So far as concerns the sale of an ascertained chattel which the buyer has inspected or has had an opportunity of inspecting, and of which the seller is not the manufacturer or grower, the rule caveat emptor admits of no exceptions by implied warranty of quality.[93] Benjamin states the rule without any qualification in respect to goods of which the seller is the manufacturer,[94] but this qualification occurs generally in the statement of the rule in this country,[95] and it has sometimes been held that in such sales there is an implied warranty that the goods are free from latent

[92] 10 Wall. 383.

[93] Parkinson v. Lee, 2 East, 314; Chanter v. Hopkins, 4 Mees. & W. 399; Barnard v. Kellogg, 10 Wall. 383; Salisbury v. Stainer, 19 Wend. 159; Hight v. Bacon, 126 Mass. 10; Weimer v. Clement, 37 Pa. St. 147; Sellers v. Stevenson, 163 Pa. St. 262, 29 Atl. 715; Rice v. Forsyth, 41 Md. 389; Barnett v. Stanton, 2 Ala. 195; Kohl v. Lindley, 39 Ill. 195. The rule of caveat emptor is probably universal in the United States, except in South Carolina. Barnard v. Yates, 1 Nott & McC. 142.

[94] Benj. Sales, § 644.

[95] Barnard v. Kellogg, 10 Wall. 383, and cases cited in note 93.

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defects resulting from the process of manufacture.[96] In the rule of caveat emptor there is no hardship, for, if the buyer mistrusts his judgment, he can require of the seller a warranty. If he inspects, or declines to do so, and is satisfied without a warranty, he takes upon himself the risk of the goods being unmerchantable, or otherwise failing to possess the qualities which he desires.

Sale by Description.

It must be borne in mind, however, that if a specific chattel is sold by description, even though the buyer has an opportunity for examination, the rule of caveat emptor does not apply. In such case, if the article does not correspond with the description, the seller fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of condition precedent,[97] as already explained.[98]

Warranty of Fitness for Purpose.

Where a buyer orders an article, to be applied to a particular purpose made known to the seller, and the article is of a kind manufactured by the seller or in which he deals, if the buyer relies

[96] Hoe v. Sanborn, 21 N. Y. 552; Beers v. Williams, 16 Ill. 69; White v. Miller, 71 N. Y. 118 (latent defects in seeds arising from improper cultivation). Where the buyer bought a bull for breeding purposes to the knowledge of the seller, paying full price, and the bull proved impotent, no warranty was implied. McQuaid v. Ross, 85 Wis. 492, 55 N. W. 705.

[97] Benj. Sales, § 645, citing Josling v. Kingsford, 13 C. B. (N. S.) 447, 32 Law J. C. P. 94. See, also, Lewis v. Rountree, 78 N. C. 323. It would seem, however, that where the sale is by description, but the buyer inspects and accepts the specific article sold, the undertaking of the seller arising from the description is an express warranty, such as results from any affirmation of fact intended to be an inducement to the sale, and on which the buyer relies. It would then be a question for the jury whether the description was intended by the parties as a warranty. Thus where the buyer, after examination, bought what the auctioneer erroneously stated to be blue vitriol, it was held that it was a question for the jury whether the representation at the sale amounted to a warranty. Hawkins v. Pemberton, 51 N. Y. 198; Wolcott v. Mount, 36 N. J. Law, 262. See Winsor v. Lombard, 18 Pick. 57, 60; Stedman v. Lane, 19 Pick. 547, 551; Borrekins v. Bevan, 3 Rawle, 23; Van Wyck v. Allen, 69 N. Y. 61.

[98] Ante, p. 155.

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on the judgment or skill of the seller, an implied warranty arises that the article shall be fit for its purpose.[99] The rule rests upon the ground that the buyer trusts to the seller to supply a suitable article, and not to his own inspection or instructions as to its character. Therefore, if the buyer orders a specific article, or a known, described, and defined article, although he informs the seller that he wants it for a particular purpose, there is no implied warranty.[100] The warranty of fitness for a particular purpose has been held to extend even to latent defects undiscoverable by the seller.[101] Thus where a carriage builder supplied a carriage pole which broke and injured the buyer's horses, it was held immaterial that the defect could not have been discovered by the exercise of reasonable skill.[102]

[99] Jones v. Bright, 5 Bing. 533; Jones v. Just, L. R. 3 Q. B. 197, 203, 37 Law J. Q. B. 89; Randall v. Newson, 2 Q. B. Div. 102; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537; Hoe v. Sanborn, 21 N. Y. 552; Van Wyck v. Allen, 69 N. Y. 61; Bixler v. Saylor, 68 Pa. St. 149; Harris v. Waite, 51 Vt. 480; Brenton v. Davis, 8 Blackf. 317; Byers v. Chapin, 28 Ohio St. 300; Gerst v. Jones, 32 Grat. 518; Cunningham v. Hall, 1 Sprague, 404, Fed. Cas. No. 3,482; Dawes v. Peebles, 6 Fed. 856; Merrill v. Nightingale, 39 Wis. 247; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211.

[100] Chanter v. Hopkins, 4 Mees. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 12 Sup. Ct. 46; Ottawa Bottle & Flint-Glass Co. v. Gunther, 31 Fed. 209; Dounce v. Dow, 64 N. Y. 411; Deming v. Foster, 42 N. H. 165; Bixler v. Saylor, 68 Pa. St. 149; Warren Glass-Works Co. v. Keystone Coal Co., 65 Md. 547, 5 Atl. 253; Mason v. Chappell, 15 Grat. 572; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150; McCray Refrigerator & C. S. Co. v. Woods, 99 Mich. 269, 58 N. W. 320; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232. There is no implied warranty that bricks to be furnished of a specified grade, and of good quality equal to sample, shall be fit for their purpose, though the seller have notice of it. Wisconsin Red Pressed-Brick Co. v. Hood, 54 Minn. 543, 56 N. W. 165.

[101] Randall v. Newson, 2 Q. B. Div. 102; Rodgers v. Niles, 11 Ohio St. 48. Contra, Hoe v. Sanborn, 21 N. Y. 552; Bragg v. Morrill, 49 Vt. 45.

[102] Randall v. Newson, 2 Q. B. Div. 102.

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Warranty of Merchantableness.

In a sale of goods by description, where the buyer has not had an opportunity to examine them, there is, in addition to the implied condition or warranty that the goods shall answer the description, an implied warranty that they shall be salable or merchantable.[103] Where the goods are to be shipped to the buyer, this warranty does not extend to the depreciation which results necessarily from the transit.[104]

Warranty in Sale of Provisions.

Blackstone says that in contracts for provisions it is always implied that they are wholesome, and that if they are not an action on the case lies against the seller.[105] But in England it is now held that they are governed by the same rules as other commodities; that is, that, in the sale of provisions in which the buyer has an opportunity for inspection, no warranty is implied;[106] but that, if the buyer trusts to the seller's judgment to select them, there is an implied warranty that they are fit for their purpose, viz. human food.[107]

In the United States it has been held in some cases that on a sale of provisions there is an implied warranty that they are fit for consumption;[108] but the rule is generally confined to sales

[103] Jones v. Just, L. R. 3 Q. B. 197, 37 Law J. Q. B. 89; Drummond v. Van Ingen, 12 App. Cas. 284, 290; Howard v. Hoey, 23 Wend. 350; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207; Warner v. Arctic Ice Co., 74 Me. 475; Fitch v. Archibald, 29 N. J. Law, 160; Hood v. Bloch, 29 W. Va. 244, 11 S. E. 910; Babcock v. Trice, 18 Ill. 420; Merriam v. Field, 39 Wis. 578; McClurg v. Kelley, 21 Iowa, 508; English v. Spokane Com. Co., 6 C. C. A. 416, 57 Fed. 451.

[104] Bull v. Robison, 10 Exch. 342, 24 Law J. Exch. 165; Leggat v. Sands' Ale Brewing Co., 60 Ill. 158; Mann v. Everston, 32 Ind. 355; English v. Spokane Com. Co., 6 C. C. A. 416, 57 Fed. 451; post, p. 197.

[105] 3 Bl. Comm. 166.

[106] Burnby v. Bollett, 16 Mees. & W. 644; Emmerton v. Mathews, 7 Hurl. & N. 586, 31 Law J. Exch. 139; Smith v. Baker, 40 Law T. (N. S.) 261.

[107] Bigge v. Parkinson, 7 Hurl. & N. 955, 31 Law J. Exch. 301; Beer v. Walker, 46 Law J. C. P. 677, 25 Wkly. Rep. 880.

[108] Van Bracklin v. Fonda, 12 Johns. 468; Divine v. McCormick, 50 Barb. 116; Hoover v. Peters, 18 Mich. 51. See, also, Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459; Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690.

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where the goods are bought for domestic use,—that is, it does not apply where they are sold as merchandise.[109]

Warranty in Sale by Sample.

It is not to be assumed that every sale where a sample is shown is a sale by sample. There must be an understanding, express or implied, that the sale is by sample.[110]

Where, however, the sale is by sample, a warranty is implied that the bulk shall correspond in quality with the sample.[111] The reason for the implication is that there is no opportunity for a personal examination of the bulk.[112] If the sample contains latent defects not apparent on reasonable examination, a further warranty is implied that the goods are free from such defects.[113] Such, at least, is the rule when the seller is the manufacturer, though it has been held otherwise when he is not the manufacturer.[114]

[109] Moses v. Mead, 1 Denio, 378, 5 Denio, 617; Winsor v. Lombard, 18 Pick. 57, 62, per Shaw, C. J.; Humphreys v. Comline, 8 Blackf. 516; Ryder v. Neitge, 21 Minn. 70. See, also, Emerson v. Brigham, 10 Mass. 197; Howard v. Emerson, 110 Mass. 320. But see Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 267, 23 N. E. 372. If a farmer, not a dealer, kills a hog, and sells it, knowing that the purchaser intends to eat it, there is no implied warranty that the hog is fit for food. Giroux v. Stedman, 145 Mass. 438, 14 N. E. 538.

[110] Gardiner v. Gray, 4 Camp. 144; Meyer v. Everth, Id. 22; Hargous v. Stone, 5 N. Y. 73; Beirne v. Dord, Id. 99; Gunther v. Atwell, 19 Md. 157; Day v. Raguet, 14 Minn. 273 (Gil. 203); Barnard v. Kellogg, 10 Wall. 383.

[111] Parker v. Palmer, 4 Barn. & Ald. 387, 391; Carter v. Crick, 4 Hurl. & N. 412, 28 Law J. Exch. 238; Schuchardt v. Allans, 1 Wall. 359, 370; Bradford v. Manly, 13 Mass. 139; Williams v. Spafford, 8 Pick. 250; Gould v. Stein, 149 Mass. 570, 22 N. E. 47; Boothby v. Plaisted, 51 N. H. 436; Merriman v. Chapman, 32 Conn. 146; Waring v. Mason, 18 Wend. 425; Gunther v. Atwell, 19 Md. 157; Hanson v. Busse, 45 Ill. 496; Hubbard v. George, 49 Ill. 275; Graff v. Foster, 67 Mo. 512; Brigham v. Retelsdorf, 73 Iowa, 712, 36 N. W. 715. It seems that in Pennsylvania the warranty implied in a sale by sample, unless there are circumstances to indicate that the sample is to be taken as a standard of quality, is only a guaranty that the bulk shall correspond in kind and be merchantable. Boyd v. Wilson, 83 Pa. St. 319. See Benj. Sales (Corbin's Ed.) § 969, note 26.

[112] Barnard v. Kellogg, 10 Wall. 383, per Davis, J.

[113] Heilbutt v. Hickson, L. R. 7 C. P. 438, 456; Drummond v. Van Ingen, 12 App. Cas. 284.

[114] Parkinson v. Lee, 2 East, 314 (doubted by Brett, J. A., in Randall v. Newson, 2 Q. B. Div. 102); Dickinson v. Gay, 7 Allen, 29.

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Warranty that Goods are of Seller's Manufacture.

Where there is a contract for the sale of goods by a manufacturer, as such, it seems that in England there is, in the absence of any trade usage to the contrary, an implied warranty that the goods are of the seller's own manufacture.[115] This question does not appear to have been raised in the United States.

Implied Warranty of Quality Strictly a Condition.

On a sale by sample, if the goods do not correspond with the sample, the buyer may return them, unless he has accepted them or the contract relates to specific goods the property in which has passed,[116] and he is entitled to a reasonable opportunity of comparing them with the sample. Benjamin says that it is an implied condition that the buyer shall have such an opportunity, and that a breach of the condition justifies him in repudiating the contract.[117] Inasmuch as the buyer may reject them if they do not correspond with the sample, it seems logically that the undertaking that the goods shall correspond is a condition, and not a warranty, as much as is the implied understanding that the goods shall conform to the description.[118] Such is the view taken by Blackburn, J., who, in a case where the goods were guarantied "about equal to the sample," says: "Generally speaking, when the contract is as to any goods such a clause is a condition going to the essence of the contract, but where the contract is as to specific goods, the clause is only collateral to the contract."[119] Text writers and the cases generally, English as well as American, however, generally speak of the term that "the bulk shall agree with the sample" as a warranty, collateral to the agreement.[120]

The same observations apply to the other so called implied warranties of quality, fitness, and condition. Logically they are con-

[115] Johnson v. Raylton, 7 Q. B. Div. 438, per Brett, L. J., Cotton, L. J., and Bramwell, L. J., dissenting. Chalm. Sale, § 17.

[116] Heilbutt v. Hickson, L. R. 7 C. P. 438; Couston v. Chapman, L. R. 2 Sc. App. 250, at page 254; Butler v. Northumberland, 50 N. H. 33; Boothby v. Plaisted, 51 N. H. 436, 438; Magee v. Billingsley, 3 Ala. 679; post, p. 243.

[117] Benj. Sales, § 594.

[118] Chalm. Sale, 24.

[119] Heyworth v. Hutchinson, L. R. 2 Q. B. 447, 451.

[120] Benj. Sales, § 648.

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ditions, though generally spoken of as warranties.[121] The courts in different jurisdictions differ as to whether such a condition is waived by acceptance of the goods, a question which will be considered in connection with the subject of the buyer's remedies. But all cases agree that the buyer may reject the goods in the first place, if on reasonable inspection it appears that they do not correspond with the quality warranted.[122]

Whether an Express Excludes an Implied Warranty.

Where a warranty arises by implication of law, it may of course be negatived or varied by express agreement.[123] The parties may alter at will the obligations which the law implies from the general nature of the contract. And it is frequently said that, upon the principle, "expressum facit cessare tacitum," an express warranty excludes an implied one, at least upon the same subject.[124] But this statement is somewhat blind. An express warranty may exclude an implied warranty upon the same subject, but it will not be held to have this effect if, upon a construction of the contract, such does not appear to have been the intention of the parties. In estimating the effect of an express stipulation, it must be borne in mind that "the doctrine that an express provision excludes implication does not affect cases in which the express provision appears, on the true construction of the contract, to have been superadded for the benefit of the buyer."[125] Thus a warranty that the goods shall pass inspection has been held not to exclude an implied warranty of merchantableness.[126] And on a sale by sample, where the goods were unmerchantable by reason of a latent defect which also existed in the sample, it was held that the warranty that the

[121] Chalm. Sale, 95.

[122] Post, p. 242.

[123] Chalm. Sale, 13.

[124] Dickson v. Zizinia, 10 C. B. 602, 20 Law J. C. P. 73; Deming v. Foster, 42 N. H. 165, 175; McGraw v. Fletcher, 35 Mich. 104; Johnson v. Latimer, 71 Ga. 470; International Pavement Co. v. Smith, Beggs & Rankin Mach. Co., 17 Mo. App. 264.

[125] Mody v. Gregson, L. R. 4 Exch., at page 53, per Willes, J. See Merriam v. Field, 24 Wis. 640; Boothby v. Scales, 27 Wis. 626; Wilcox v. Owens, 64 Ga. 601; Austin v. Cox, 60 Ga. 521.

[126] Bigge v. Parkinson, 7 Hurl. & N. 955, 31 Law J. Exch. 301.

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goods should conform to the sample did not exclude an implied warranty that they were merchantable.[127]

[127] Drummond v. Van Ingen, 12 App. Cas. 284; Mody v. Gregson, L. R. 4 Exch. 49. See, also, Jones v. Padgett, 24 Q. B. Div. 650. It is perhaps open to doubt whether these cases can be reconciled with De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536. The contract was for the sale of varnish, and provided: "These goods to be exactly the same quality as we make" for certain third persons, "and as per sample bbls. delivered"; and continued: "Turpentine copal varnish at 65 cents per gallon; turpentine japan dryer at 55 cents per gallon." It was held that the latter terms were but stipulations as to price, and imported no warranty that the goods delivered should be known to the trade by those names and of a certain standard of quality. It is to be observed that the quality of the goods was expressly fixed by reference to certain other goods, and this express warranty might well be construed as excluding any implied warranty of quality. Lamar, J., observes, however, "that there are numerous well-considered cases that an express warranty of quality excludes an implied warranty that the articles sold are merchantable or fit for their intended use." In a sale of brick by description merely, which is known in the market, there is an implied warranty that the bricks should be of good material, and made according to the description, but none that they would answer the purpose for which they were purchased. Wisconsin Red Pressed-Brick Co. v. Hurd Refrigerator Co. (Minn.) 62 N. W. 550.

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CHAPTER VIII.

PERFORMANCE OF CONTRACT.

96–97. In General.
98. Meaning of "Delivery."
99–100. Place and Time of Delivery.
101–103. Delivery of Wrong Quantity.
104. Delivery of Installments.
105. Delivery to Carrier.
106. Duty to Insure Safe Arrival.
107. Buyer's Right of Examination.
108. Acceptance.
109–110. Payment.

IN GENERAL.

96. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.[1]

97. PAYMENT AND DELIVERY CONCURRENT CONDITIONS—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.[2]

As we have seen, where specific goods are sold, and nothing is said as to the time of payment, the presumption is that the sale is for cash, and not on credit. The property passes,[3] but subject to the seller's lien; and neither is the seller bound to deliver possession of the goods, nor is the buyer bound to pay the price, except

[1] Chalm. Sale, § 30.
[2] Chalm. Sale, § 31; Clark. Cont. 664.
[3] Ante, p. 83.

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upon performance by the other party.[4] In executory contracts of sale, where the parties have not otherwise agreed, the rule as to the concurrent duty of delivery and payment is the same. Neither party can enforce the contract against the other without showing readiness and willingness to perform.[5] It is not necessary, in order to maintain an action on the contract, to show actual tender; readiness and willingness is enough.[6]

While the presumption is in favor of a cash sale, and hence that delivery and payment are concurrent conditions, the parties may, of course, make whatever bargain they please; and, if the bargain is that the sale is on credit, the buyer is entitled to the immediate delivery of the goods;[7] though, as we shall see, if he fails to take the goods, and afterwards becomes insolvent, or if the term of credit expires before he exercises his right to take the goods, the seller's lien revives.[8]

MEANING OF "DELIVERY."

98. "Delivery" means voluntary transfer of possession, actual or constructive, from the seller to the buyer.

"Delivery," in general, may be defined as the voluntary transfer of possession from one person to another.[9] Benjamin points out[10] that the word "delivery" is unfortunately used in very different

[4] Bloxam v. Sanders, 4 Barn. & C. 941, 948, per Bayley, J.; Leonard v. Davis, 1 Black, 476; Tipton v. Feitner, 20 N. Y. 423; Allen v. Hartfield, 76 Ill. 358.

[5] Morton v. Lamb, 7 Term R. 125; Rawson v. Johnson, 1 East, 203; Porter v. Rose, 12 Johns. 209; Cook v. Ferral, 13 Wend. 285; Robison v. Tyson, 46 Pa. St. 286; Hapgood v. Shaw, 105 Mass. 276; Phelps v. Hubbard, 51 Vt. 489; Hough v. Rawson, 17 Ill. 588; Stoolfire v. Royse, 71 Ill. 223; Posey v. Scales, 55 Ind. 282; Simmons v. Green, 35 Ohio St. 104; Sousely v. Burns, 10 Bush, 87.

[6] Rawson v. Johnson, 1 East, 203; Waterhouse v. Skinner, 2 Bos. & P. 447; Jackson v. Allaway, 6 Man. & G. 942.

[7] Bloxam v. Sanders, 4 Barn. & C. 941, 948, per Bayley, J.; ante, p. 84; post, p. 207.

[8] Post, p. 207.

[9] See Chalm. Sale, 91; Pol. Poss. 43, 46.

[10] Benj. Sales, § 674 et seq.

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senses: (1) In the sense of transfer of title or property; (2) in the sense of delivery of possession, as the correlative of the "actual receipt" required by the statute of frauds; (3) in the sense of delivery of possession in performance of the contract; and (4) in the sense of delivery of possession sufficient to destroy the seller's lien, or even his right of stoppage in transitu. Much confusion is caused by the varying senses in which this term is employed. "But," as Chalmers, J., remarks,[11] "it would perhaps be more correct to say that a delivery which is effective for one purpose is ineffectual for other purposes. For instance, delivery to a carrier generally passes the property to the buyer, but does not defeat the right of stoppage in transitu, while delivery by the carrier to the consignee does defeat that right." As we have seen,[12] mere delivery does not of itself ever effect a transfer of the title or property; whether the property passes depends solely upon the intention of the parties. Delivery under the statute of frauds has already been considered.[13] Delivery as affecting the seller's lien [14] and the right of stoppage in transitu [15] will be considered later. The question with which we are here concerned is what delivery is effectual in performance of the contract, so as to enable the seller to defend an action for nondelivery.

Constructive Delivery—By Agreement.

Delivery by agreement or attornment has already been discussed in considering what delivery is necessary to constitute "actual receipt" under the statute of frauds.[16] As we have seen, such delivery may take place in three classes of cases: (1) Where the seller is in possession of the goods, and after the sale attorns to the buyer, and continues to hold the goods as his bailee; (2) when the buyer is in possession of the goods as bailee, and after the sale, with the seller's assent, continues to hold on his own account; (3) where a third person is in possession of the goods as bailee of the seller, and such third person, with the consent of the seller, attorns to the buyer, and continues to hold as his bailee. To these classes may perhaps be added a fourth; that is, where the goods are not in the custody of any person, as timber lying at the disposal of

[11] Chalm. Sale, 91.
[12] Ante, p. 83.
[13] Ante, p. 60 et seq.
[14] Post, p. 210.
[15] Post, p. 220 et seq.
[16] Ante, p. 60.

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the seller on the premises of a person from whom he bought it, or at a public wharf, or logs floating in a river.[17] In these cases, a constructive delivery may be made by mere agreement of the parties. It seems that whatever will constitute such a delivery as to satisfy the statute of frauds will constitute delivery in performance of the contract.

Symbolical Delivery.

Lord Ellenborough said in Chaplin v. Rogers [18] that "where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by what is tantamount, such as the delivery of a key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property." Although delivery by giving a key of the place where the goods are stored is frequently classed as symbolical delivery,[19] Sir F. Pollock shows that the key is not the symbol of the goods, but that the transaction "consists of such a transfer as the nature of the case admits, and as will practically suffice for causing the new possession to be recognized as such." [20] But the bill of lading is universally recognized as the symbol of the goods, and the transfer of the bill of lading operates as a symbolical delivery of them.[21] So, also, the transfer of the grand bill of sale of a vessel at sea constitutes a sufficient delivery of the vessel.[22] The common law draws a sharp line between the transfer of the bill of lading and other documents, such as dock and wharf warrants, and warehouse receipts, the transfer of which operates only as a token of authority to take possession, and not as a transfer of possession.[23] It is

[17] Ante, p. 64. See Leonard v. Davis, 1 Black, 476; Jewett v. Warren, 12 Mass. 300; Boynton v. Veazie, 24 Me. 286; Hutchins v. Gilchrist, 23 Vt. 82; Kingsley v. White, 57 Vt. 565.

[18] 1 East, 192. See, also, Ellis v. Hunt, 3 Term R. 464, per Lord Kenyon; Packard v. Dunsmore, 11 Cush. 282.

[19] Vining v. Gilbreth, 39 Me. 496; Barr v. Reitz, 53 Pa. St. 256.

[20] Pol. Poss. 61.

[21] Sanders v. Maclean, 11 Q. B. Div. 327, 341; ante, p. 105; post, p. 223.

[22] Atkinson v. Maling, 2 Term R. 462; Crapo v. Kelly, 16 Wall. 610, 640. See ante, p. 131.

[23] Ante, p. 63; post, p. 211. Many of the cases which discuss the question of symbolical delivery turn simply upon the transfer of the property from seller to buyer,—a fact which must always be carefully borne in mind.

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possible, however, that the transfer of such a document, making the goods deliverable to order, if the goods represented by the instrument were subject to no liens or charges, would be sufficient in performance of the contract, on the ground of an attornment in advance.[24]

PLACE AND TIME OF DELIVERY.

99. PLACE—Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and, if not, his residence; provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.[25]

100. TIME—Where, under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.[26]

See Leonard v. Davis, 1 Black, 476; Bethel Steam-Mill Co. v. Brown, 57 Me. 1. Other cases turn on the question whether there was such a retention of possession by the seller as to render the sale fraudulent as against creditors, without involving the question of delivery, pure and simple. Wilkes v. Ferris, 5 Johns. 335; Barr v. Reitz, 53 Pa. St. 256; Benford v. Schell, 55 Pa. St. 393; Adams v. Foley, 4 Iowa, 44; Puckett v. Read, 31 Ark. 131. This seems to be the explanation of Gibson v. Stevens, 8 How. 384, in which the title of the transferee of a warehouse receipt (not undertaking to deliver to the order of the bailor) was sustained as against an attaching creditor of the bailor, although the court says that the transfer "passed the title and possession." See Hallgarten v. Oldham, 135 Mass. 1, 9, per Holmes, J., commenting on this case.

[24] Benj. Sales, § 697; post, pp. 183, 212.

[25] See Sale of Goods Act, 56 & 57 Vict. c. 71, § 29. Cf. Chalm. Sale, § 32.

[26] Chalm. Sale, § 32.

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Seller not Bound to Send Goods.

In the absence of a contrary agreement, the seller is not bound to send or carry the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that he may remove them without lawful obstruction.[27] If the goods are on the premises of a third person, the seller must obtain the license of such person for the buyer to come and remove the goods, and, if the goods are in the custody of such person as bailee, his attornment to the buyer,[28] but such license or attornment may be given in advance. Thus, where the defendant sold at auction a rick of hay on the premises of J., who had given a license to remove it, and the license was read at the auction, and the defendant gave the buyer a note to J., requesting him to permit the buyer to remove the hay, it was held that, although permission was refused, the delivery was complete.[29]

Place of Delivery.

Where the contract does not otherwise provide, the place of delivery is the seller's place of business, or, if he have no place of business, his residence.[30] If the goods are to be grown or manufactured, the place of delivery is the farm or factory.[31] "The store of the merchant, the shop of the mechanic, and the farm or granary of the farmer, at which the articles sold are deposited or kept, must be the place where demand and delivery are to be made, when the contract is to buy upon demand, and is silent as to the place." [32] A distinction is made, however, in some of the cases where, though the place is not fixed, the seller is bound to deliver on or before a certain day, and it is held that under such a contract

[27] Wood v. Tassell, 6 Q. B. 234; Smith v. Chance, 2 Barn. & Ald. 753; Middlesex Co. v. Osgood, 4 Gray, 447; Phelps v. Hubbard, 51 Vt. 489; Smith v. Gillett, 50 Ill. 290; Dakota Stock & Grazing Co. v. Price, 22 Neb. 96, 34 N. W. 97 (sale of ranch and cattle on range).

[28] Smith v. Chance, 2 Barn. & Ald. 753.

[29] Salter v. Woollams, 2 Man. & G. 650. See, also, Wood v. Manley, 11 Adol. & E. 34.

[30] Sousely v. Burns, 10 Bush, 87; Janney v. Sleeper, 30 Minn. 473, 16 N. W. 365; Lobdell v. Hopkins, 5 Cow. 516; Rice v. Churchill, 2 Denio, 145.

[31] Middlesex Co. v. Osgood, 4 Gray, 447; Goddard v. Binney, 115 Mass. 450; Hamilton v. Calhoun, 2 Watts, 139; Bragg v. Beers, 71 Ala. 151.

[32] 2 Kent, Comm. 505.

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the seller must seek the buyer, and tender the goods, or, if they are cumbersome, ask him within a reasonable time before delivery to appoint a place.[33] These cases proceed on the analogy of certain cases which hold that, in contracts for the payment of a debt in goods, if the goods are deliverable on demand the creditor must be the actor, but that if they are deliverable at or within a certain time the debtor must be the actor; but it seems that even where the time, and not the place, is fixed, the better rule is that passive readiness to allow the buyer to take the goods is all that is required of the seller.[34]

If the contract is for the sale of specific goods, the place of delivery, in the absence of express agreement, is fixed by the situation of the goods at the time of the contract, at least if the situation is known to the parties.[35]

The seller may be bound, however, either expressly or by implication, to notify the buyer of the place of delivery or of the readiness of the goods, in which case the buyer is not in default until after he has received notice. Thus, in a contract for the sale of goods "ex quay or warehouse," there is an implied condition that the seller shall give notice of the place of storage.[36]

On the other hand, the buyer may be bound to notify the seller of the place of delivery before the seller can be called on to deliver. Thus, if the agreement is to deliver on board the buyer's ship, the buyer must name the ship, and give notice of his readiness to receive the goods, before he can complain of the nondelivery.[37] So,

[33] Barr v. Myers, 3 Watts & S. 295; Allen v. Woods, 24 Pa. St. 76. Cf. Hapgood v. Shaw, 105 Mass. 276.

[34] 2 Kent, Comm. 506; Benj. Sales, § 682.

[35] Gray v. Walton, 107 N. Y. 254, 14 N. E. 191; Smith v. Gillett, 50 Ill. 290. The qualification as to the knowledge of the parties is found in the English sale of goods act. It would seem, however, that, on general principles, if the goods were at a place other than the seller's residence or place of business, the parties would not be presumed to contract with reference to such place, unless it appeared that the situation of the goods was known to them. Delivery to a carrier at the place where the goods are at the time of sale is delivery under a contract silent as to the place of delivery. Perlman v. Sartorius, 162 Pa. St. 320, 29 Atl. 852.

[36] Davies v. McLean, 21 Wkly. Rep. 264, 28 Law T. (N. S.) 113.

[37] Armitage v. Insole, 14 Q. B. 728; Walton v. Black, 5 Houst. 149. But, if the time or place is at the seller's option, he must give notice thereof

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where the buyer is to provide cars, he must notify the seller, before the latter can be put in default.[38] Where the buyer is bound to designate the place, but fails to do so, it is enough to constitute performance by the seller if he has the goods ready at the time fixed by the contract.[39]

Time of Delivery—Reasonable Time.

Where the seller is bound to send the goods, but the contract is silent as to the time, he is allowed a reasonable time. If he delays unreasonably, the buyer is relieved of his obligation to receive delivery.[40] What is a reasonable time is a question of fact in view of all the circumstances attending the sale.[41] If the contract is in writing, parol evidence of the facts and circumstances attending the sale is admissible in order to determine what is reasonable time.[42] Where the contract expresses the time, the

before the buyer is under any obligation to name the ship. Dwight v. Eckert, 117 Pa. St. 490, 12 Atl. 32.

[38] Kunkle v. Mitchell, 56 Pa. St. 100; Hocking v. Hamilton, 158 Pa. St. 107, 115, 27 Atl. 836; Bolton v. Riddle, 35 Mich. 13. But see Council Bluffs Iron Works v. Cuppey, 41 Iowa, 104, where the seller was to deliver railroad ties on cars to be furnished by the buyer, and it was held that the seller must haul the ties to the station, and, if no cars were ready to receive them, deposit them near the track, the usual place of receiving such property, before he could show performance. On the other hand, in Smith v. Wheeler, 7 Or. 49, it was held that the seller, not having been notified, need not haul machinery to the station, as he would not be justified in leaving it by the wayside.

[39] Lucas v. Nichols, 5 Gray, 311; Hunter v. Wetsell, 84 N. Y. 549; Lockhart v. Bonsall, 77 Pa. St. 53; Boyd v. Gunnison, 14 W. Va. 1. Where the seller was to deliver a ship at Portland, and the buyer after notice failed to designate a wharf or other place, tender of delivery at a safe and usual anchorage in the harbor was sufficient. Lincoln v. Gallagher, 79 Me. 189, 8 Atl. 883.

[40] Ellis v. Thompson, 3 Mees. & W. 445; Blydenburgh v. Welsh, Baldw. 331, Fed. Cas. No. 1,583; Pope v. Terre Haute Car & Manuf'g Co., 107 N. Y. 61, 13 N. E. 592; Boyd v. Gunnison, 14 W. Va. 1; Grant v. Merchants' & Manufacturers' Bank, 35 Mich. 515; Tufts v. McClure, 40 Iowa, 317.

[41] Ellis v. Thompson, 3 Mees. & W. 445; Pinney v. First Division St. P. & P. R. Co., 19 Minn. 251 (Gil. 211); Stange v. Wilson, 17 Mich. 342; Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183. Contra, Echols v. New Orleans, J. & G. N. R. Co., 52 Miss. 610.

[42] Ellis v. Thompson, 3 Mees. & W. 445. But where the contract is in writing, and does not state the time, evidence of a contemporaneous parol

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question is one of construction, and therefore for the court. When the seller is to deliver at a designated place, but the time is not fixed, the seller must notify the buyer of his readiness to deliver;[43] but, if the buyer is to designate the time, the seller cannot be put in default until it has been designated.[44]

Where the seller is not bound to send the goods, it would seem that the buyer has a reasonable time to come and fetch them.[45] But when the delivery is to be on demand, or as required, the buyer is not in default until after the seller has called on him to accept delivery.[46] If the goods are to be manufactured, it seems that before the buyer can be put in default the seller must notify him that the goods are ready.[47]

When Time is Fixed.

Although at common law "month" generally means "lunar month," in mercantile contracts it is construed as meaning "calendar month."[48] When a certain number of days is allowed for delivery, they are counted as consecutive days, and include Sundays,[49] though if the last day falls on Sunday it is not generally counted.[50] The day of the contract is not included in counting the number of days.[51]

When the time and place are fixed, a delivery at such time and

agreement fixing the time is inadmissible. Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183.

[43] Cullum v. Wagstaff, 48 Pa. St. 300.

[44] Posey v. Scales, 55 Ind. 282.

[45] Mowry v. Kirk, 19 Ohio St. 375.

[46] Jones v. Gibbons, 8 Exch. 920; Cameron v. Wells, 30 Vt. 633.

[47] Where the seller was to build a vessel, and deliver it at one of several places to be designated by the buyer, it was the seller's duty to give notice when it was finished, so that the buyer might designate the place. Spooner v. Baxter, 16 Pick. 409.

[48] Webb v. Fairmaner, 3 Mees. & W. 473; Churchill v. Merchants' Bank, 19 Pick. 532; Thomas v. Shoemaker, 6 Watts & S. 179. This is sometimes regulated by statute.

[49] Brown v. Johnson, 10 Mees. & W. 331. See, also, cases cited in note 50.

[50] Salter v. Burt, 20 Wend. 205; Sands v. Lyon, 18 Conn. 18; Barrett v. Allen, 10 Ohio, 426.

[51] Webb v. Fairmaner, 3 Mees. & W. 473; Bemis v. Leonard, 118 Mass. 502; Weeks v. Hull, 19 Conn. 376.

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place is good though the buyer be absent.[52] A tender of delivery on the last day at the place designated is good, even in the absence of the buyer, provided it be made within such time before sunset that the delivery can be completed by daylight.[53] A tender at a later hour is good if the buyer be found at the designated place, or in cases where delivery may be made to the buyer wherever he happens to be, provided the delivery can be completed before midnight;[54] though even in the latter case, if daylight is necessary to enable the buyer to make a proper inspection, it seems that the delivery must be made in time to enable him to make such examination by daylight.[55]

DELIVERY OF WRONG QUANTITY.

101. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract, and reject the rest, or [if he cannot sever the goods included in the contract from the other goods without incurring trouble or expense] he may reject the whole. If he accepts the whole, he must pay for them at the contract rate.[56]

102. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract, and reject the rest, or, if he cannot sever the goods included in the contract from the other goods without incurring trouble and expense, he may reject the whole.

103. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them; but, if the buyer accepts them, it is generally

[52] Barton v. McKelway, 22 N. J. Law, 165; Case v. Green, 5 Watts, 262.

[53] Startup v. Macdonald, 6 Man. & G. 593, 624, per Parke, B.

[54] Startup v. Macdonald, 6 Man. & G. 593; Berry v. Nall, 54 Ala. 446.

[55] Croninger v. Crocker, 62 N. Y. 151, 158.

[56] Chalm. Sale, § 33. The qualification introduced by the words included in brackets applies only in certain jurisdictions. See post, p. 188.

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held that he must pay for them at the contract price, though some courts hold that he need not pay for them unless he has otherwise waived his right to a performance of the whole contract.[57]

Delivery of Too Much.

The seller does not comply with his contract by a tender or delivery of a greater quantity than the contract requires. Thus it was held that, where the contract called for 200 bales, an allegation that the seller shipped 206 bales and that the buyer refused to receive the same or any part thereof was bad, for want of an allegation that the seller was ready to deliver 200 only.[58] And where the order was for 2 dozen wine, and 4 dozen were sent, it was held that the buyer might return the whole.[59] So where the order was for 10 hogsheads of claret, and the seller sent 15, it was held that the contract was not performed; the court saying that the buyer cannot tell which are the 10 that are to be his, and that it is no answer to the objection to say that he may choose which 10 he likes, for that would be to force a new contract upon him.[60]

In this country, while the buyer is, as a general rule, entitled to refuse the whole, if the quantity tendered exceeds the quantity specified,[61] some cases hold that, if no additional trouble or expense is cast upon the buyer by the selection or separation, the delivery of a greater amount, with the request to select or separate the amount required, is sufficient.[62] Thus where the contract was

[57] Chalm. Sale, § 33. Cf. Sale of Goods Act, § 30.

[58] Dixon v. Fletcher, 3 Mees. & W. 146.

[59] Hart v. Mills, 15 Mees. & W. 85.

[60] Cunliffe v. Harrison, 6 Exch. 903.

[61] Rommel v. Wingate, 103 Mass. 327; Stevenson v. Burgin, 49 Pa. St. 36; Norrington v. Wright, 115 U. S. 188, 204, 6 Sup. Ct. 12, per Gray, J.; Perry v. Mt. Hope Iron Co., 16 R. I. 318, 15 Atl. 87; Clark v. Baker, 11 Metc. (Mass.) 186; Croninger v. Crocker, 62 N. Y. 151; Hoffman v. King, 58 Wis. 314, 17 N. W. 136 (lumber must be so assorted and separated from lumber of other dimensions or of inferior quality as to be capable of identification).

[62] Lockhart v. Bonsall, 77 Pa. St. 53; Brownfield v. Johnson, 128 Pa. St. 254, 268, 18 Atl. 543; Iron Cliffs Co. v. Buhl, 42 Mich. 86, 3 N. W. 269 (deposit of greater amount of ore from which buyer could take contract

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for 5,000 barrels of oil to be delivered in cars in bulk, but it was not the seller's duty to pump the oil from the cars, it was held that a tender of 5,891 barrels in bulk from which the buyer could take the required amount was good.[63]

If a greater amount is sent in performance of the contract, and not for the purpose of charging the buyer with the excess, the delivery may be good.[64] But if a greater amount is tendered for the purpose of charging the buyer with the excess, and he accepts the whole, he must pay for the excess at the contract price, such a delivery operating as a proposal for a new contract.[65]

Delivery of Goods Mixed with Other Goods.

If the goods ordered are sent mixed with other goods, the same principles govern. Where Ruabon coals were ordered, and a certain quantity of Ruabon coals were shot into a heap with coals of a different sort, the delivery was held bad.[66] And where crockery was sent packed in a crate with other crockery, although the crockery ordered was perfectly distinguishable, the same rule was applied, upon the ground that the seller had no right to impose on the buyer the onus of unpacking and separating.[67] The rule applies where damaged goods or goods of an inferior quality are mixed with the bulk.[68]

Delivery of Too Little.

It is universally conceded that the buyer need not accept less than the entire quantity of the goods contracted for, and that if the seller delivers a smaller quantity the buyer may reject them.[69]

quantity); Ganson v. Madigan, 9 Wis. 146, 13 Wis. 67. See, also, Croninger v. Crocker, 62 N. Y. 151.

[63] Lockhart v. Bonsall, 77 Pa. St. 53.

[64] Downer v. Thompson, 6 Hill, 208.

[65] Cunliffe v. Harrison, 6 Exch. 903, 906, per Parke, B.

[66] Nicholson v. Bradfield Union, L. R. 1 Q. B. 620, 35 Law J. Q. B. 176.

[67] Levy v. Green, 8 El. & Bl. 575, 27 Law J. Q. B. 111, 28 Law J. Q. B. 319.

[68] Clark v. Baker, 11 Metc. (Mass.) 186; Hoffman v. King, 58 Wis. 314, 17 N. W. 136. See, also, Walker v. Davis, 65 N. H. 170, 172, 18 Atl. 196.

[69] Cleveland Rolling-Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882; Salmon v. Boykin, 66 Md. 541, 7 Atl. 701; Rockford, R. I. & St. L. R. Co. v. Lent, 63 Ill. 288; Smith v. Lewis, 40 Ind. 98; Hill v. Heller, 27 Hun, 416. See, also, cases cited in note 70.

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But it is held in most jurisdictions that, if the buyer accepts a partial delivery, he must pay for the goods accepted at the contract rate, although the seller fails to deliver the rest of the goods.[70] The seller may not sue for the price of the portion of the goods delivered before the time fixed for the delivery of the rest,[71] but after the expiration of such time he may sue.[72] The buyer may, however, reduce the amount of the seller's recovery by way of recoupment, by showing that he has sustained damages by the seller's failure fully to perform the contract.[73]

Some courts, however, deny the seller's right to recover for a partial delivery. This was held in an early case[74] in New York, in which the contract was for 100 tons of hay, to be delivered between certain dates, and to be paid for at a certain price per ton, part in advance, and the residue when the whole should be delivered. The seller delivered only 52 tons, and after the expiration of the time fixed for the delivery of the whole brought action to recover for the quantity delivered at the stipulated price, but it was held that there could be no recovery, the buyer not having waived or prevented a full performance. This case has been followed in New York and in some other jurisdictions.[75] A limitation of the doctrine enunciated in that case has, however, been introduced in a later New York case,[76] in which the contract was for the delivery of 699 boxes of glass at one time, and the buyer accepted the delivery of a part, without knowledge that the rest was not to

[70] Shipton v. Casson, 5 Barn. & C. 378, 382, per Lord Tenterden; Oxendale v. Wetherell, 4 Man. & R. 429; Morgan v. Gath, 3 Hurl. & C. 748, 34 Law J. Exch. 165; Bowker v. Hoyt, 18 Pick. 555; Hedden v. Roberts, 134 Mass. 40; Roberts v. Beatty, 2 Pen. & W. 63; Clark v. Moore, 3 Mich. 55; Booth v. Tyson, 15 Vt. 515; Richards v. Shaw, 67 Ill. 222; Polhemus v. Heiman, 45 Cal. 573.

[71] Waddington v. Oliver, 2 Bos. & P. (N. R.) 61.

[72] Oxendale v. Wetherell, 4 Man. & R. 429; Colonial Ins. Co. v. Adelaide M. Ins. Co., 12 App. Cas. 128, at page 138.

[73] Bowker v. Hoyt, 18 Pick. 555; Richards v. Shaw, 67 Ill. 222.

[74] Champlin v. Rowley, 18 Wend. 187, 13 Wend. 258.

[75] Catlin v. Tobias, 26 N. Y. 217; Haslack v. Mayers, 26 N. J. Law, 284; Witherow v. Witherow, 16 Ohio, 238. See Holden Steam Mill v. Westervelt, 67 Me. 446.

[76] Avery v. Willson, 81 N. Y. 341. See Churchill v. Holton, 38 Minn. 519, 38 N. W. 611.

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be delivered, but without any reservation. It was held that the seller could recover for the glass delivered. The case was distinguished on the ground that in the earlier case, the hay being deliverable in parcels, the buyer could not reject a partial delivery, and hence there was no waiver of the condition that the whole must be delivered; but that in the case at bar, the delivery of the whole being required to be made at one time, the buyer could decline to receive a partial delivery, and that consequently acceptance of a partial delivery operated as a waiver of the condition.

"*More or Less*"—"*About.*"

When the contract states the amount to be delivered with the qualification of the words "more or less," "about," or words of similar import, the seller is allowed a certain latitude in respect to the quantity. The following rules have been laid down by the supreme court of the United States:[77] (1) When the goods are identified by reference to independent circumstances, such as an entire lot in a certain warehouse, or all that may be manufactured in a certain establishment, or that may be shipped in a certain vessel, and the quantity is named with such words of qualification, the contract applies to the specific lot, and the naming of the quantity is not regarded as a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required by the party making it.[78] (2) Where no such independent circumstances are referred to, and the agreement is to furnish goods to a certain amount, the quantity specified is material, and governs the amount; and the words of qualification are only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies.[79] (3) In the last case, however, if the words of qualification are supplemented by other stipulations or conditions which give them a broader scope, or more extensive significance, the contract is governed by such added stipulations or conditions. The case in which these rules were stated

[77] Brawley v. U. S., 96 U. S. 168.

[78] McConnel v. Murphy, L. R. 5 P. C. 203; McLay v. Perry, 44 Law T. (N. S.) 152.

[79] Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12; Creighton v. Comstock, 27 Ohio St. 548; Clap v. Thayer, 112 Mass. 296; Cockerell v. Aucompte, 26 Law J. C. P. 194.

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fell under the last rule.[80] The contract was with the government for 880 cords of wood, "more or less," as should be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the garrison of a certain post for one year, and the post commander at once notified the seller that only 40 cords would be required, and it was held that the government was liable for only 40 cords.

DELIVERY BY INSTALLMENTS.

104. Where there is a contract for the sale of goods to be delivered in installments, which are to be separately paid for, and the seller makes defective deliveries in respect to one or more installments, or the buyer neglects or refuses to take delivery or to pay for one or more installments, the authorities differ.

(a) According to the more recent English decisions and to some decisions in this country, it is a question, in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

(b) According to the weight of authority in the United States, a breach in respect to the delivery of any installment gives the buyer a right to repudiate the whole contract.

Rule in England.

It is impossible to reconcile the English decisions on this subject,[81] some of which have held that the refusal to deliver or to accept a particular installment is a breach going to the root of the

[80] Brawley v. U. S., 96 U. S. 168. See, also, Callmeyer v. Mayor, etc., 83 N. Y. 116.

[81] Benj. Sales, §§ 593, 593a; Chalm. Sale, p. 50.

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contract,[82] and others of which have held the contrary.[83] The leading case in the affirmative is Hoare v. Rennie.[84] In that case 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, and the plaintiff shipped only 20 tons in June, which the defendant refused to accept. It was held that delivery at the time specified was a condition precedent, and that the plaintiff could not maintain an action against the defendant for not accepting. The leading case in the negative is Simpson v. Crippin.[85] In that case the defendant had agreed to supply the plaintiff with 6,000 or 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery in equal monthly quantities during the period of 12 months from July 1st. During July the plaintiff sent wagons for 158 tons only, and on the 1st of August the defendant wrote that the contract was canceled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. It was held, in an action on the defendant's refusal to go on with the contract, that the breach in failing to send wagons in sufficient numbers in the first month, though a ground for compensation, did not justify the defendant in rescinding the contract. The rule has been finally settled in England as above stated by Mersey Steel & Iron Co. v. Naylor,[86] in which the point decided was that failure of the buyer to pay for the first installment upon delivery, unless the circumstances evince an intention on his part to be bound no longer by the contract, does not entitle the seller to rescind.

Rule in the United States.

In this country the same conflict of authority has existed, some cases substantially following Hoare v. Rennie,[87] and others Simpson

[82] Withers v. Reynolds, 2 Barn. & Adol. 882; Hoare v. Rennie, 5 Hurl. & N. 19, 29 Law J. Exch. 73; Honck v. Muller, 7 Q. B. Div. 92.

[83] Jonassohn v. Young, 4 Best & S. 296, 32 Law J. Q. B. 385; Simpson v. Crippin, L. R. 8 Q. B. 14; Freeth v. Burr, L. R. 9 C. P. 208.

[84] 5 Hurl. & N. 19, 29 Law J. Exch. 73.

[85] L. R. 8 Q. B. 14.

[86] 9 App. Cas. 434, affirming 9 Q. B. Div. 648.

[87] Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Clark v. Wheeling Steel Works, 3 C. C. A. 600, 53 Fed.

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v. Crippin.[88] The recent case of Norrington v. Wright,[89] in the supreme court of the United States, however, has gone far to establish the rule in this country in conformity with the first of these cases. In Norrington v. Wright the contract was for the sale of "5,000 tons of iron rails, for shipment from European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August, 1880, at $45 per ton, ex ship Philadelphia, settlement cash on presentation of bills," etc. It was held that the seller was bound to ship 1,000 tons in each month, and that only 400 tons having been shipped in February, and 885 tons in March, the buyer, although he had paid for the February shipment in ignorance of the defective shipments in that month and in March, had the right to rescind the whole contract for the defective deliveries in respect to the first installments. The decision rests on the ground that in contracts of merchants time is of the essence, and that the shipment at the time specified in the contract was a condition precedent, on failure of which the buyer might rescind the whole contract. The court reviews the later English cases, and prefers the doctrine of Hoare v. Rennie to that of Simpson v. Crippin, both on principle and authority. It is to be noted that Gray, J., in commenting on Mersey Steel & Iron Co. v. Naylor, observes that the grounds of decision in that case, as stated by the lord chancellor, are applicable to the failure of the buyer to pay for, and not to the failure of the seller to deliver, the first installment;[90]

494; Peace River Phosphate Co. v. Grafflin, 58 Fed. 550; King Philip Mills v. Slater, 12 R. I. 82; Rugg v. Moore, 110 Pa. St. 236, 1 Atl. 320; Reybold v. Voorhees, 30 Pa. St. 116. See, also, Dwinel v. Howard, 30 Me. 258; Walton v. Black, 5 Houst. 149; Bradley v. King, 44 Ill. 339; Stokes v. Baars, 18 Fla. 656; Higgins v. Delaware, L. & W. R. Co., 60 N. Y. 553.

[88] Bollman v. Burt, 61 Md. 415; Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27; Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Hansen v. Consumers' Steam-Heating Co., 73 Iowa, 77, 34 N. W. 495. See, also, an article by Mr. Landreth, 21 Am. Law Reg. 398, in which he concludes that the weight of American authority supports the English rule.

[89] 115 U. S. 188, 6 Sup. Ct. 12.

[90] The English editor of Benjamin on Sales, commenting on Norrington v. Wright, says that "this appears to be an entire misapprehension of that case [Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434] both in the house

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but whether a different decision would have been reached in the supreme court had the question turned on a failure to pay does not appear. In a later case [91] in the supreme court the same rule was applied where the first installment had been delivered and paid for, and the default consisted in failure to deliver the rest of the quantity within the time specified.

DELIVERY TO CARRIER.

105. Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is prima facie deemed to be a delivery to the buyer.[92]

As we have already seen,[93] when the seller is bound to send the goods to the buyer, a delivery to a common carrier is delivery to the buyer himself, the carrier becoming the bailee of the person to whom the goods are sent.[94] If, however, the seller is bound to deliver at the buyer's residence or at a distant place, the carrier is the seller's bailee for the purpose of carriage, and delivery to the carrier is not delivery to the buyer.[95] And, although the seller may be authorized to deliver to a carrier, he may nevertheless reserve the right of disposal, and, if he does so, delivery to the carrier is not delivery

of lords and in the court of appeal, which lies in the application of a general principle equally applicable whether the breach of contract is committed by one or other of the parties to the contract." Benj. Sales (Bennett's 6th Am. Ed.) § 593a.

[91] Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882.

[92] Chalm. Sale, § 35.

[93] Ante, pp. 61, 99.

[94] Wait v. Baker, 2 Exch. 1; Dunlop v. Lambert, 6 Clark & F. 600; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Strong v. Dodds, 47 Vt. 348; Stafford v. Walter, 67 Ill. 83; Pennsylvania Co. v. Holderman, 69 Ind. 18; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541. But though the carrier is the buyer's agent to receive, he is not his agent to accept. Ante, p. 57.

[95] Dunlop v. Lambert, 6 Clark & F. 600; Thompson v. Cincinnati, W. & Z. R. Co., 1 Bond, 152, Fed. Cas. No. 13,950; Bloyd v. Pollocks, 27 W. Va. 75; Devine v. Edwards, 101 Ill. 138; Braddock Glass Co. v. Irwin, 153 Pa. St. 440, 25 Atl. 490.

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to the buyer.[96] If the buyer designates a particular carrier or a particular route, delivery to a different carrier or to a carrier for shipment by a different route is not delivery to the buyer.[97]

SAME—DUTY TO INSURE SAFE ARRIVAL.

106. Unless otherwise authorized by the buyer, the seller must take such steps as may be reasonable to make the carrier responsible for the safe carriage and arrival of the goods; and if the seller fails to do so, and the goods are lost or damaged in transit, the buyer may decline to treat the delivery to the carrier as delivery to himself.[98]

"Delivery of goods to a carrier or wharfinger, with due care and diligence, is sufficient to charge the purchaser, but he has a right to require that in making the delivery due care and diligence shall be exercised by the seller."[99] The seller must use the usual precaution to insure delivery.[100] Thus where the seller neglected to apprise the carrier that the value of the goods exceeded £5, although the carriers had published, and it was notorious in the place of shipment, that they would not be responsible for a package above that value unless entered and paid for as such, and the package was lost, it was held, in an action for goods sold and delivered, that there had been no delivery.[101] If the goods are misdirected

[96] Ante, p. 104.

[97] Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19; Wheelhouse v. Farr, 141 Mass. 593, 6 N. E. 787; Iasigi v. Rosenstein, 65 Hun, 591, 20 N. Y. Supp. 491.

[98] See Chalm. Sale, 35; Sale of Goods Act, § 32.

[99] Buckman v. Levi, 3 Camp. 414, per Lord Ellenborough. If the dealings of the parties show that the seller is bound under the contract to insure when requested, and the seller on request fails to insure, and the goods are lost, he cannot recover payment. New York Tartar Co. v. French, 154 Pa. St. 273, 26 Atl. 425.

[100] Clarke v. Hutchins, 14 East, 475; Ward v. Taylor, 56 Ill. 494. Where the order was to ship by rail immediately, and the railroad company refused to transport without a release of liability, a delivery on these terms was good. Stafford v. Walter, 67 Ill. 83.

[101] Clarke v. Hutchins, 14 East, 475.

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by the seller, so as to prevent their receipt by the buyer, the delivery is bad.[102] But the buyer must take any risks of deterioration necessarily incident to the transit.[103]

BUYER'S RIGHT OF EXAMINATION.

107. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.[104]

An offer of delivery, accompanied with refusal to permit examination, or without reasonable opportunity to inspect, is invalid.[105]

The buyer is not deemed to have accepted until he has had a reasonable opportunity to inspect. He may, however, waive inspection.[106] And if he fails to inspect within a reasonable time he cannot afterwards reject the goods.[107] The right of inspection carries

[102] Finn v. Clark, 10 Allen, 479, 12 Allen, 522; Garretson v. Selby, 37 Iowa, 529.

[103] Bull v. Robison, 10 Exch. 342, 24 Law J. Exch. 165; Leggat v. Sands' Ale Brewing Co., 60 Ill. 158. And see ante, p. 173.

[104] Chalm. Sale, § 37.

[105] Isherwood v. Whitmore, 11 Mees. & W. 347, 10 Mees. & W. 757; Lorymer v. Smith, 1 Barn. & C. 1; Croninger v. Crocker, 62 N. Y. 151. Where goods are sent by carrier, the buyer has a right to examine when they reach their destination. Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349. Where delivery of hides was to be on payment of draft, an offer to allow examination at the railway station was sufficient. Sawyer v. Dean, 114 N. Y. 469, 21 N. E. 1012. A purchaser of lumber, sent to his yard in box cars in which it cannot be examined, may unload, inspect, and examine before acceptance. Holmes v. Gregg (N. H.) 28 Atl. 17.

[106] Castle v. Sworder, 30 Law J. Exch. 310, 312, per Cockburn, C. J. The circumstances of the sale may be such that the law will not imply the right to inspect before delivery and payment. Pettitt v. Mitchell, 4 Man. & G. 819.

[107] Toulmin v. Hedley, 2 Car. & K. 157; Lincoln v. Gallagher, 79 Me. 189, 8 Atl. 883; Doane v. Dunham, 79 Ill. 131; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657; Boothby v. Scales, 27 Wis. 626; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777; Knoblauch v. Kronschnabel, 18 Minn. 300 (Gil. 272); Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196.

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with it the right, if necessary for the purpose of testing, to use a reasonable quantity of the goods.[108]

ACCEPTANCE.

108. The buyer is deemed to have accepted the goods

(a) When he intimates to the seller that he has accepted them, or

(b) When the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or

(c) When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.[109]

Duty to Accept.

Acceptance and delivery being concurrent conditions, the duty to accept does not arise unless the delivery or offer of delivery is sufficient. Therefore the buyer is not bound to accept unless he has had an opportunity to inspect,[110] or, on a sale by sample, unless he has had an opportunity to compare the bulk with the sample,[111] or unless the offer of delivery is made at a proper time,[112] or if the delivery is of too great or too small a quantity.[113] On the other hand, if the delivery or offer of delivery is good, the buyer is bound to accept. If the contract of sale is such that the seller need not

[108] Philadelphia Whiting Co. v. Detroit White-Lead Works, 58 Mich. 29, 24 N. W. 881. But, where the buyer has notified the seller of his rejection, he cannot use a portion of the goods in making a test, for the purpose of determining the question of their fitness, or of providing evidence of their unfitness, and still insist on his right to reject them. Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28.

[109] Chalm. Sale, § 38.

[110] Ante, par. 107.

[111] Lorymer v. Smith, 1 Barn. & C. 1; Toulmin v. Hedley, 2 Car. & K. 157. Ante, p. 175.

[112] Ante, p. 185 et seq.

[113] Ante, p. 188 et seq.

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send the goods, the buyer is bound to accept if the seller affords him reasonable facilities to remove the goods.[114]

Meaning of "Acceptance."

"Acceptance" in performance of the contract is an assent by the buyer that the goods are to be taken by him in performance of the contract.[115] Acceptance may, however, be implied from the buyer's conduct, in which case he is deemed to have assented. Acceptance in performance of the contract appears to be identical with the acceptance necessary to satisfy the statute of frauds, as the statute is construed in the United States.[116] But in England, where any dealing with the goods which recognizes a pre-existing contract of sale is now held to constitute an acceptance under the statute,[117] an acceptance in performance of the contract is, of course, quite different from a statutory acceptance.

Same—Express Acceptance.

Of express acceptance,—that is, acceptance where the buyer intimates to the seller that he accepts the goods,—little need be said. Any form of words that expresses assent is enough.[118] As we have seen, acceptance may precede delivery; and where the sale is of a specific chattel in a deliverable state, in which the property passes at once, the acceptance is expressed by the contract itself.[119]

Same—Implied Acceptance—Acts of Ownership.

Acceptance is implied from a resale or from any act on the part of the buyer which he would not have a right to perform if he were not the owner of the goods.[120] The rule in this respect is the same as under the statute of frauds.[121] Thus where the bulk was inferior to the sample, but the buyer offered the goods on sale at a limited

[114] Ante, p. 183.

[115] Ante, p. 51.

[116] Ante, p. 54.

[117] Ante, p. 57.

[118] Saunders v. Topp, 4 Exch. 390, 18 Law J. Exch. 374.

[119] Ante, p. 54.

[120] Parker v. Palmer, 4 Barn. & Ald. 387; Chapman v. Morton, 11 Mees. & W. 534; Harnor v. Groves, 15 C. B. 667; Warden v. Marshall, 99 Mass. 305; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Delamater v. Chappell, 48 Md. 245; Hill v. McDonald, 17 Wis. 97.

[121] Ante, p. 55.

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price at auction, although the limit was not reached, it was held that he could not afterwards reject.[122] A sale of a part constitutes an acceptance of the whole.[123]

Same—Failure to Reject.

Although receipt is totally distinct from acceptance, receipt will become acceptance if the right to reject is not exercised within a reasonable time.[124] What is a reasonable time is a question of fact depending on the circumstances of the case. A usage of the Liverpool corn market, allowing the buyer one day to object on the ground that the corn is not equal to sample, has been held reasonable and binding on the buyer.[125] The same has been held of a usage not to examine goods sold at wholesale until opened for sale to consumers in due course of trade.[126] But, if the buyer rightfully rejects, he is not bound to return the goods, but need do no more than notify the seller of his refusal to accept.[127]

PAYMENT.

109. IN CASH—Unless the contract of sale otherwise provides, the buyer must pay in cash.

[122] Chapman v. Morton, 11 Mees. & W. 534.

[123] Parker v. Palmer, 4 Barn. & Ald. 387.

[124] Sanders v. Jameson, 2 Car. & K. 557; Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Gaylord Manuf'g Co. v. Allen, 53 N. Y. 515; Mason v. Smith, 130 N. Y. 474, 29 N. E. 749; Treadwell v. Reynolds, 39 Conn. 31; Boughton v. Standish, 48 Vt. 594; Watkins v. Paine, 57 Ga. 50; Carondelet Iron Works v. Moore, 78 Ill. 65; Pratt v. Peck, 70 Wis. 620, 36 N. W. 410; Gaff v. Homeyer, 59 Mo. 345; Mackey v. Swartz, 60 Iowa, 710, 15 N. W. 576; Knoblauch v. Kronschnabel, 18 Minn. 300 (Gil. 272); Berthold v. Seevers Manuf'g Co. (Iowa) 56 N. W. 669; Foss-Schneider Brewing Co. v. Bullock, 8 C. C. A. 14, 59 Fed. 83. But where articles not corresponding with the sample were retained with the understanding that the seller should make them correspond, and not be paid till he had done so, no acceptance could be implied. Mahoney v. McLean, 26 Minn. 415, 4 N. W. 784.

[125] Sanders v. Jameson, 2 Car. & K. 557.

[126] Doane v. Dunham, 79 Ill. 131.

[127] Grimoldby v. Wells, L. R. 10 C. P. 391; McCormick H. M. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; Exhaust Ventilator Co. v. Chicago, M. & St. P. Ry. Co., 69 Wis. 454, 34 N. W. 509.

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110. BY NEGOTIABLE SECURITY—Where a negotiable security to which the buyer is a party is received in payment of the price, the presumption in most jurisdictions is that such payment is conditional, though in some jurisdictions the presumption is that it is absolute.

Since delivery and payment are, unless the contract provides otherwise, concurrent conditions, the duty of the buyer to pay does not ordinarily arise unless the seller is ready and willing to deliver.[128] But at common law a debtor has no right to wait until demand made, but must pay as soon as the money is due, at the peril of being sued; and since the seller is not bound, in the absence of express agreement, to carry the goods to the buyer,[129] it follows that in such cases, as soon as the sale is completed, if the seller is ready and willing to deliver the goods, the buyer's duty to fetch and pay for them arises, and an action is at once maintainable against him for the price.[130] If the property has passed, he must pay for them, even if they have been destroyed while in the seller's possession.[131] If credit is given, he has a right to their possession without payment.[132]

Tender of Payment.

The buyer discharges his duty by a tender as well as by actual payment. To be a defense, the tender must be kept good, and the money in most jurisdictions must be actually paid into court. When this is done, and the plea is sustained, although the tender does not discharge the debt, it is a bar to the action; that is, the seller is entitled to the money paid into court, while the buyer recovers judgment with costs.[133] Upon the subject of tender there is noth-

[128] See ante, p. 178.

[129] Ante, p. 183.

[130] Ante, p. 183; Benj. Sales, § 707.

[131] Ante, p. 83 et seq.

[132] Leonard v. Davis, 1 Black, 476; ante, pp. 83, 179; post, p. 207.

[133] James v. Vane, 2 El. & El. 883, 29 Law J. Q. B. 169; Pennypacker v. Umberger, 22 Pa. St. 492; Wheeler v. Woodward, 66 Pa. St. 158; Taylor v. Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. 1106.

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ing peculiar to the law of sales, and the reader is referred elsewhere for the rules as to what constitutes a valid tender.[134]

Payment by Negotiable Security—Conditional Payment.

Where the contract is silent as to the manner of payment, it is always implied that the payment shall be in cash.[135] The contract may, however, provide for payment by a negotiable security, as a promissory note or a bill of exchange, and such payment may be absolute or conditional, according to the agreement of the parties. But in the absence of any agreement to the contrary, express or implied, a payment by negotiable security is in most jurisdictions presumed to be conditional, so that if the security is not duly honored the seller's right to the price revives. This is the general rule where payment of an indebtedness is made by a bill or a note,[136] and it ordinarily applies although the debtor is not a party to the security, as drawer, acceptor, maker, or indorser.[137] But, where at the time of the sale the paper of a third person is taken in payment without indorsement or guaranty of the buyer, the presumption is that the note is taken in absolute payment;[138] though, if such paper is taken with the indorsement or guaranty of the buyer, the presumption is that it is only conditional payment.[139] Payment by check or draft is presumed to be conditional.[140] These various presumptions may

[134] Clark, Cont. pp. 639–643; Benj. Sales (6th Am. Ed.) § 712 et seq., and Bennett's note, p. 732.

[135] Ante, p. 84.

[136] 2 Daniel, Neg. Inst. (4th Ed.) § 1260; Ames, Cas. Bills & N. p. 571, note 2, p. 874, par. 6; Benj. Sales, § 729 et seq., and Bennett's note, p. 724. An intention to take a bill or a note in absolute payment must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods or in discharge of the price. Stedman v. Gooch, 1 Esp. 5; Maillard v. Duke of Argyle, 6 Man. & G. 40; Kemp v. Watt, 15 Mees. & W. 672.

[137] Ames, Cas. Bills & N. 571, note 2.

[138] Whitbeck v. Van Ness, 11 Johns. 409; Breed v. Cook, 15 Johns. 241; Noel v. Murray, 13 N. Y. 167; Bicknall v. Waterman, 5 R. I. 43; Eaton v. Cook, 32 Vt. 58; Bayard v. Shunk, 1 Watts & S. 92; 2 Daniel, Neg. Inst. (4th Ed.) § 1264.

[139] Monroe v. Hoff, 5 Denio, 360; Butler v. Haight, 8 Wend. 535; Whitney v. Goin, 20 N. H. 354. This presumption may be rebutted. Soffe v. Gallagher, 3 E. D. Smith, 507; 2 Daniel, Neg. Inst. (4th Ed.) § 1265.

[140] 2 Daniel, Neg. Inst. (4th Ed.) § 1623.

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all be rebutted by evidence showing a different intention on the part of the parties. In Massachusetts, Maine, Vermont, Indiana, and Louisiana, on the other hand, the ordinary rule is reversed; and, where a promissory note or bill of exchange is given in payment of an indebtedness, the payment is presumed to be absolute, though this presumption may be rebutted.[141] The effect of the giving of a promissory note or bill of exchange in payment belongs to the law of negotiable instruments, and the reader is referred to the books upon that subject.

Payment to Agent.

Whether an agent is authorized to receive payment depends upon the law of agency, and need not here be considered. It is to be noted, however, that a factor, and generally an agent who is intrusted with the possession of goods with authority to sell them, is entitled to receive payment;[142] but that a broker, and generally an agent who is not intrusted with the possession of the goods, is not entitled to receive payment.[143] "If a shopman, who is authorized to receive payment over the counter only, receives payment elsewhere than at the shop, the payment is not good."[144] Payment to an agent employed to sell must be in money, in the usual course of business.[145]

[141] Daniel, Neg. Inst. (4th Ed.) § 1260; Ames, Cas. Bills & N. p. 571, note 2.

[142] Hornby v. Lacy, 6 Maule & S. 166; Fish v. Kempton, 7 C. B. 687; Whiton v. Spring, 74 N. Y. 169, 173; Seiple v. Irwin, 30 Pa. St. 513, 515; Butler v. Dorman, 68 Mo. 298, 300; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89.

[143] Baring v. Corrie, 2 Barn. & Ald. 137; Higgins v. Moore, 34 N. Y. 417; Seiple v. Irwin, 30 Pa. St. 513; Law v. Stokes, 32 N. J. Law, 249; Butler v. Dorman, 68 Mo. 298; Clark v. Smith, 88 Ill. 298; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485.

[144] Kaye v. Brett, 5 Exch. 269, per Parke, B.

[145] Catterall v. Hindle, L. R. 1 C. P. 186, 35 Law J. C. P. 161, per Keating, J.; McCulloch v. McKee, 16 Pa. St. 289; Trudo v. Anderson, 10 Mich. 357; Wheeler v. Givan, 65 Mo. 89; Aultman v. Lee, 43 Iowa, 404.

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CHAPTER IX.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

111. In General.
112–116. Seller's Lien.
117–121. Stoppage in Transitu.
122. Right of Resale.

IN GENERAL.

111. Subject to the provisions of §§ 112–122, the unpaid seller of goods, as such, has by implication of law:

(a) A lien on the goods for the price while he is in possession of them.

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.

(c) A right of resale.[1]

When the property in goods passes by a sale, it does not follow necessarily that the right of possession also passes. So long as the goods remain in the seller's possession he has, unless he has waived it, a lien for the payment of the price. Even if they have passed out of his actual possession into the hands of a carrier for delivery to the buyer, he has the right, in case of the latter's insolvency, to intercept the goods, and to prevent them from coming into his actual possession. When he has exercised his right of lien or of stoppage in transitu, he has, under certain circumstances, the right to resell the goods.[2]

SELLER'S LIEN.

112. The unpaid seller of goods, who is in possession of them, is entitled to a lien for the price, unless he has, expressly or by implication, waived it; that is, he is enti-

[1] Chalm. Sale, § 42.

[2] Benj. Sales, § 766.

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tled to retain possession of the goods until payment or tender of the price.

113. WAIVER BY GIVING CREDIT—The seller waives his lien by implication, unless there is an agreement to the contrary:

(a) If he sells the goods on credit.

(b) If he takes a bill of exchange or other negotiable instrument in conditional payment.

114. REVIVAL—The lien of a seller who is still in possession of the goods revives:

(a) When the goods have been sold on credit, but the term of credit has expired.

(b) When the seller has taken a bill of exchange or other negotiable instrument in conditional payment, and the condition on which it was received has not been fulfilled, by the dishonor of the instrument or otherwise.

(c) When the goods have been sold on credit, or the seller has taken a negotiable instrument in conditional payment, and the buyer becomes insolvent, although the term of credit has not expired or the instrument received in conditional payment has not matured, and notwithstanding that the seller is in possession of the goods as agent or bailee for the buyer.

115. TERMINATION—The seller loses his lien:

(a) When he unconditionally delivers the goods to the buyer or his agent; subject, however, to the revival of the lien if he continues in possession of the goods as agent or bailee for the buyer and the buyer becomes insolvent, as stated in the last section (c).

(b) When he assents to a subsale.

116. DELIVERY OF PART—When the seller has made a delivery of part of the goods, he may exercise his right

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of lien on the remainder, unless such delivery has been made under such circumstances as to show an intention of waiving his lien.[3]

A "lien," in general, may be defined as a right to retain the possession of a thing until a debt due to the person retaining possession is satisfied.[4] The origin of the seller's lien is doubtful, but it is probably founded on the custom of merchants.[5] It has been said that "the term 'lien' is unfortunate, because the seller's rights, arising out of his original ownership, in all cases exceed a mere lien."[6] That his rights exceed a mere lien will appear from a consideration of the peculiar rights which arise in case of the buyer's insolvency.[7] But as the rule is that when there is no agreement, express or implied, to the contrary, the seller has a right to retain the goods until the payment of the price, he has in all cases, at least, a lien, unless he has waived it.[8]

The lien extends only to the price. If, by reason of the buyer's default in payment, the seller incurs warehouse charges or other expenses in keeping the goods, his lien does not extend to such charges, which are incurred for his own benefit, and not for the benefit of the buyer; and his remedy, if any, is a personal one against the buyer.[9]

[3] Chalm. Sale, § 44.

[4] Benj. Sales, § 796.

[5] Blackb. Sales, 453.

[6] Chalm. Sale, p. 57.

[7] Post, p. 208.

[8] Miles v. Gorton, 2 Cromp. & M. 504; Arnold v. Delano, 4 Cush. 33, 39; Ware River R. R. v. Vibbard, 114 Mass. 447; Cornwell v. Haight, 8 Barb. 327; Owens v. Weedman, 82 Ill. 409; Bradley v. Michael, 1 Ind. 551; Southwestern Freight & Cotton Exp. Co. v. Stannard, 44 Mo. 71; Conrad v. Fisher, 37 Mo. App. 352.

[9] See British Empire Shipping Co. v. Somes, El., Bl. & El. 353, 27 Law J. Q. B. 397; in exchequer chamber, El., Bl. & El. 367, 28 Law J. Q. B. 220; in house of lords, 8 H. L. Cas. 338, 30 Law J. Q. B. 229; Crommelin v. New York & H. R. Co., *43 N. Y. 90. If the buyer refuses to accept the goods sold until the seller recovers judgment for the price, the buyer cannot recover for the care of the goods between the sale and the delivery, since the care of them in the meantime is for his own benefit. Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81.

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A special interest in the goods may continue to exist in the seller by agreement, even after delivery; but such an interest is not strictly a lien, which is always determinable on the loss of possession.[10]

Waiver of Lien.

"Lien is not the result of an express contract; it is given by implication of law."[11] The lien may, of course, be waived expressly. It may also be waived by implication,[12] as by reserving an express lien for the price, which excludes an implied one.[13]

The lien is waived by implication when time is given for payment, and nothing is said as to delivery,—in other words, when the sale is on credit;[14] although the parties may, of course, agree that notwithstanding the credit the goods are not to be delivered until payment, and the same term may be introduced into the contract by a usage to that effect.[15] The seller also waives his lien by taking a bill or note payable at a distant day,[16] though the lien revives on its dishonor or on the insolvency of the buyer.[17]

Revival of Lien—Expiration of Credit.

Although the sale is on credit, if the buyer permits the goods to remain in the seller's possession till the credit has expired, the lien which was waived by the giving of credit revives, even though the

[10] Dodsley v. Varley, 12 Adol. & E. 632; Gregory v. Morris, 96 U. S. 619; Sawyer v. Fisher, 32 Me. 28.

[11] Chambers v. Davidson, L. R. 1 P. C. 296, 4 Moore, P. C. (N. S.) 158, per Lord Westbury.

[12] When the seller of standing wood permitted the buyer to cut it, he waived his lien. Douglas v. Shumway, 13 Gray, 499.

[13] In re Leith's Estate, L. R. 1 P. C., at page 305. An agreement inconsistent with the existence of the lien is a waiver of it. Pickett v. Bullock, 52 N. H. 354.

[14] Spartali v. Benecke, 10 C. B. 212, 19 Law J. C. P. 293; Leonard v. Davis, 1 Black, 476; Arnold v. Delano, 4 Cush. 33, 39; McGraw v. Gilmer, 83 N. C. 162; Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113; ante, p. 179.

[15] Field v. Lelean, 6 Hurl. & N. 617, 30 Law J. Exch. 168.

[16] Valpy v. Oakeley, 16 Q. B. 941, 951; Griffiths v. Perry, 28 Law J. Q. B. 204, 207. See, also, Hewison v. Guthrie, 2 Bing. (N. C.) 755; Horncastle v. Farran, 3 Barn. & Ald. 497. Giving a promissory note, payable on demand, for the price, does not divest the lien. Clark v. Draper, 19 N. H. 419.

[17] Post, p. 208.

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buyer may not be insolvent.[18] And the rule is the same where bills or notes are given for the price, which are dishonored while the goods are still in the seller's possession.[19]

Insolvency of Buyer.

If the buyer becomes insolvent while the goods are in possession of the seller, the lien revives notwithstanding that the goods were sold on credit, and that the credit has not expired.[20] The lien also revives on insolvency, when conditional payment was made by bill or note, although the instrument has not yet matured.[21] This right to revive the lien is analogous to the right of stoppage in transitu, and has sometimes been called the right of "stoppage ante transitum." [22] "The vendor's right in respect of his price," said Bailey, J., in the leading case of Bloxam v. Sanders,[23] "is not a mere lien

[18] New v. Swain, 1 Dan. & L. 193; Bunney v. Poyntz, 4 Barn. & Adol. 568; Martindale v. Smith, 1 Q. B., at page 395; Owens v. Weedman, 82 Ill. 409; Benj. Sales, § 825.

[19] Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204.

[20] Bloxam v. Sanders, 4 Barn. & C. 941; Bloxam v. Morley, Id. 951; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204; Gunn v. Bolckow, 10 Ch. App. 491; Arnold v. Delano, 4 Cush. 33; Parks v. Hall, 2 Pick. 206, 212; Parker v. Byrnes, 1 Lowell, 539, Fed. Cas. No. 10,728, per Lowell, J.; Haskell v. Rice, 11 Gray, 240, per Thomas, J.; Wanamaker v. Yerkes, 70 Pa. St. 443; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Southwestern Freight & Cotton Exp. Co. v. Stannard, 44 Mo. 71; Conrad v. Fisher, 37 Mo. App. 352; Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113; Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899; Bohn Manuf'g Co. v. Hynes, 83 Wis. 388, 53 N. W. 684. Contra, Barrett v. Goddard, 3 Mason, 107, Fed. Cas. No. 1,046. It is immaterial whether the sale is of specific chattels or whether the contract is executory. Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204.

[21] Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204; Arnold v. Delano, 4 Cush. 33, 41; Parker v. Byrnes, 1 Lowell, 539, Fed. Cas. No. 10,728, per Lowell, J.; Milliken v. Warren, 57 Me. 46. It is immaterial whether the notes are taken in payment or as security. In re Batchelder, 2 Lowell, 245, Fed. Cas. No. 1,099; Hunter v. Talbot, 3 Smedes & M. 754. Where payment is to be on delivery in notes of a third person, who becomes insolvent, the seller need not deliver on tender of such notes. Benedict v. Field, 16 N. Y. 595.

[22] Benj. Sales, § 767.

[23] 4 Barn. & C. 941.

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which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If the goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property 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 same principle was clearly stated in a Pennsylvania case:[24] "Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage in transitu on account of the insolvency of the vendee; because these terms refer to the same right, only at different stages of performance and execution of the contract of sale. If the vendor has a right to stop in transitu, a fortiori he has a right of retainer before any transit has commenced."

Even if the seller has broken his contract to deliver while the buyer is solvent, the lien revives on the buyer becoming insolvent.[25]

It follows naturally, from the principle on which this right rests, that the seller does not lose his right to revive the lien on the insolvency of the buyer, although he may have agreed to hold the goods as the buyer's bailee.[26] As in the case of stoppage in transitu, the right is not lost by a technical delivery, so long as the

[24] White v. Welsh, 38 Pa. St. 396, per Lowrie, C. J.

[25] Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204.

[26] Townley v. Crump, 4 Adol. & E. 58; Grice v. Richardson, 3 App. Cas. 319; Arnold v. Delano, 4 Cush. 33, 38; Thompson v. Baltimore & O. R. Co., 28 Md. 396; Conrad v. Fisher, 37 Mo. App. 353; Hamburger v. Rodman, 9 Daly, 93, 96.

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seller is in a position to prevent the goods from coming into the buyer's actual possession.

Termination of Lien—Delivery.

Inasmuch as the right of lien is a right incident to possession, the seller ordinarily loses his lien when he delivers the goods,[27] even constructively, to the buyer. "When the buyer is solvent, the cases as to what constitutes an 'actual receipt', within the meaning of the statute of frauds, appear to furnish the test whether the seller's lien is gone or not."[28] "The principle," says Blackburn, J.,[29] "is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, so as to preserve his lien." When the buyer is insolvent, since the lien revives notwithstanding that the seller holds the goods as bailee for the buyer, the cases as to what constitutes an actual receipt no longer furnish a test.

If the goods are in possession of the seller, a delivery takes place, and the seller's lien is divested, whenever the parties agree that the seller shall thenceforth hold as the bailee of the buyer.[30]

If the goods are in the possession of the buyer, the effect of the contract being to transfer the right of possession as well as that of property, the delivery becomes complete, by necessity, without further act on either side.[31]

If the goods are in the possession of a third person as bailee of

[27] Gregory v. Morris, 96 U. S. 619, 623; Arnold v. Delano, 4 Cush. 33, 39; Haskins v. Warren, 115 Mass. 514, 533; Lupin v. Marie, 6 Wend. 77; Bowen v. Burk, 13 Pa. St. 146; Johnson v. Farnum, 56 Ga. 144; Cook v. Perry, 43 Mich. 629, 5 N. W. 1054; Thompson v. Wedge, 50 Wis. 642, 7 N. W. 560. Delivery is not effected by merely marking the goods with the buyer's name or setting them aside. Goodall v. Skelton, 2 H. Bl. 316; Dixon v. Yates, 5 Barn. & Adol. 313; Townley v. Crump, 4 Adol. & E. 58. Or by boxing them by the buyer's orders, so long as the seller holds them as his, and has not given credit. Boulter v. Arnott, 1 Cromp. & M. 333.

[28] Chalm. Sale, 62.

[29] Cusack v. Robinson, 30 Law J. Q. B., at page 264, per Blackburn, J.; ante, p. 60.

[30] Ante, p. 62.

[31] In re Batchelder, 2 Lowell, 245, Fed. Cas. No. 1,099; Warden v. Marshall, 99 Mass. 305; Martin v. Adams, 104 Mass. 262; Benj. Sales, § 802; ante, p. 64.

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the seller, a delivery takes place whenever such third person, with the seller's assent, attorns to the buyer, and not before.[32] Thus the transfer of a delivery order, dock warrant, or other document, which operates only as a token of authority to take possession, and not as a transfer of possession, does not divest the seller's lien, but the person in whose custody the goods are must first accept the order, or in some way attorn to the buyer, and until such attornment the seller may countermand his authority; and, even though the seller may have waived his lien by a sale on credit or by accepting conditional payment, he may nevertheless, upon the occurrence of the buyer's insolvency before such attornment, countermand the authority, and revive his lien.[33] Under the factors' acts and other enactments, however, certain other documents are in many jurisdictions put on the same footing as bills of lading, and a transfer of such documents excludes the lien, if the documents get into the hands of a holder for value.[34]

Same—Delivery to Carrier.

Delivery to a common carrier for conveyance to the buyer is prima facie such a delivery of possession as puts an end to the seller's lien.[35] The right of lien becomes changed into a right of stoppage in transitu should the buyer become insolvent. The seller may, however, retain his lien by reserving the right of disposal.[36]

Same—Assent to Subsale.

At common law, the seller's lien is not affected by any sale, pledge, or other disposition of the goods which the buyer may have

[32] McEwan v. Smith, 2 H. L. Cas. 309; Farina v. Home, 16 Mees. & W. 119; Keeler v. Goodwin, 111 Mass. 490; In re Batchelder, 2 Lowell, 245, Fed. Cas. No. 1,099; ante, p. 63.

[33] McEwan v. Smith, 2 H. L. Cas. 309; Arnold v. Delano, 4 Cush. 33, 39, per Shaw, C. J.; Parker v. Byrnes, 1 Lowell, 539, Fed. Cas. No. 10,728; Keeler v. Goodwin, 111 Mass. 490.

[34] In some states, warehouse receipts are by statute put on the same footing as bills of lading. In others they have been given the same effect by the courts without legislation. See Merchants' Bank v. Hibbard, 48 Mich. 118, 11 N. W. 834; Davis v. Russell, 52 Cal. 611; Allen v. Maury, 66 Ala. 10. As to factor's acts, ante, p. 19.

[35] Ante, p. 61.

[36] Ante, p. 104.

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made, unless he has assented thereto.[37] This follows, as we have seen, from the general principle, "Nemo dat quod non habet." [38] Thus where goods lying in a warehouse of a third person were sold, but not delivered, and were paid for in the buyer's acceptances, which were subsequently dishonored, and before they became due the buyer sold to a second purchaser, it was held that the second purchaser, who had not obtained actual or constructive possession, was in the same position as the original buyer, and got his title defeasible on nonpayment of the price by the latter.[39] Nor is such second person in a better position by reason of the transfer to him of a delivery order or other document the transfer of which does not operate as a delivery of the goods, unless he obtains an actual or constructive delivery from the warehouseman before the original seller has countermanded the authority and asserted his lien.[40]

On the other hand, the seller may be estopped from asserting his lien by assenting to the subsale, either subsequently [41] or in advance.[42] Thus when the second purchaser of timber lying on the premises of the original seller informed him of the subsale, and the latter said, "Very well," and allowed him to mark the timber with his name, this was held a sufficient subsequent assent.[43] A seller

[37] Dixon v. Yates, 5 Barn. & Adol. 313; Palmer v. Hand, 13 Johns. 434; Milliken v. Warren, 57 Me. 46; Haskell v. Rice, 11 Gray, 240, 241.

[38] Ante, p. 17.

[39] Dixon v. Yates, 5 Barn. & Adol. 313.

[40] McEwan v. Smith, 2 H. L. Cas. 309; Farmeloe v. Bain, 1 C. P. Div. 445; Gunn v. Bolckow, 10 Ch. App. 496; Keeler v. Goodwin, 111 Mass. 490; Anderson v. Read, 106 N. Y. 333, 13 N. E. 292.

[41] Stoveld v. Hughes, 14 East, 308; Pearson v. Dawson, El., Bl. & El. 448, 27 Law J. Q. B. 248; Woodley v. Coventry, 2 Hurl. & C. 164, 32 Law J. Exch. 185; Knights v. Wiffen, L. R. 5 Q. B. 660; Voorhis v. Olmstead, 65 N. Y. 113. But see Southwestern Freight & Cotton Exp. Co. v. Plant, 45 Mo. 517.

[42] Merchant Banking Co. of London v. Phoenix Bessemer Steel Co., 5 Ch. Div. 205. Where the original seller showed the goods as the goods of the buyer, without claim of lien, to another, who afterwards bought them, the latter's title was sustained against the seller's assignee in bankruptcy. Hunn v. Bowne, 2 Caines, 38.

[43] Stoveld v. Hughes, 14 East, 308. But the fact that the seller, after notice of a subsale, inquires of the buyer whether he shall ship to the subpurchaser, and asks for a shipping order both from him and from the sub-

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may assent in advance by issuing to the buyer documents of title which contain such representations of fact as will amount to an estoppel against a second purchaser.[44]

Same—Delivery of Part.

Generally speaking, a delivery of a part is not equivalent to a delivery of the whole, so as to destroy the seller's lien. He may give up part, and retain the rest, and maintain a lien on the part retained for the whole price.[45] 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 a part operates as delivery of the whole.[46] If the delivery is to be by installments, and one installment has been delivered, but not paid for, the seller may withhold delivery of the others until he has been paid for the installment delivered.[47] Any installment which has been paid for must be delivered, even though the buyer be bankrupt.[48]

STOPPAGE IN TRANSITU.[49]

117. When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods so long as they are in course of transit, and may retain them until payment or tender of the price.

118. WHO MAY EXERCISE THE RIGHT—The right of stoppage in transitu may be exercised by any person

purchaser, does not show a waiver of the lien. Stoveld v. Hughes, supra. distinguished, Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899.

[44] Merchant Banking Co. v. Phoenix Bessemer Steel Co., 5 Ch. Div. 205.

[45] Dixon v. Yates, 5 Barn. & Adol. 313, 341; Miles v. Gorton, 2 Cromp. & M. 504; Haskell v. Rice, 11 Gray, 240; Hamburger v. Rodman, 9 Daly, 93; Buckley v. Furniss, 17 Wend. 504 (stoppage in transitu). See Parks v. Hall, 2 Pick. 206. A carrier may retain his lien for the whole of his charges, notwithstanding delivery of part. Potts v. New York & N. E. R. Co., 131 Mass. 455.

[46] Benj. Sales, § 805.

[47] Ex parte Chalmers, 8 Ch. App. 289.

[48] Merchant Banking Co. v. Phoenix Bessemer Steel Co., 5 Ch. Div. 205.

[49] Chalm. Sale, §§ 46–48.

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who stands in a position substantially analogous to that of an unpaid seller.

119. DURATION OF TRANSIT—Goods are deemed to be in course of transit from the time they are delivered to a carrier by land or water, for the purpose of transmission to the buyer, until:

(a) The buyer or his agent in that behalf takes delivery of the goods from the carrier, either before or after their arrival at the appointed destination. Or

(b) After the arrival of the goods at their appointed destination the carrier attorns to the buyer, and continues in possession as bailee for the buyer. Or

(c) The carrier wrongfully refuses to deliver the goods to the buyer or his agent in that behalf. Or

(d) The seller waives his right of stoppage in transitu.

120. HOW THE RIGHT IS EXERCISED—The unpaid seller may exercise his right of stoppage in transitu either:

(a) By taking actual possession of the goods. Or

(b) By giving notice of his claim to the carrier or other bailee in actual possession of the goods, or to his principal.

121. HOW THE RIGHT MAY BE DEFEATED—The right of stoppage in transitu is defeasible in one way only, viz. when the goods are represented by a bill of lading, and the buyer, being in possession thereof with the seller's assent, transfers it to a bona fide purchaser for value.

The right of stoppage in transitu is founded upon mercantile rules, and is borrowed from the custom of merchants. The doctrine was first recognized in equity, and was subsequently introduced into the courts of common law.[50] The right arises only on the insolvency of the buyer, and is based on the plain reason of justice and

[50] Gibson v. Carruthers, 8 Mees. & W. 337, per Lord Abinger; Blackb. Sale, 315–317.

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equity that one man's goods shall not be applied to the payment of another man's debts.[51] It does not arise until the seller's lien is gone, for it presumes that the seller has parted with the possession as well as the property in goods. It is often said to be a mere extension of the seller's lien;[52] and, as has been shown,[53] it is closely analogous to the right of the seller in actual possession to reassert his lien, notwithstanding a previous waiver of it, upon the insolvency of the buyer.

Who may Exercise the Right.

On account of its intrinsic justice, the courts are inclined to look with favor on the right of stoppage in transitu, and to extend the right to any one whose position is substantially analogous to that of an unpaid seller.[54] The right may be exercised by a consignor or factor who has bought goods for his principal with his own money or credit;[55] by an agent of the seller to whom the bill of lading has been indorsed;[56] by the seller of an interest in an executory contract;[57] by a surety who has paid the price;[58] by a principal consigning goods to his factor, though the factor has made advances or has a joint interest with the consignor.[59] It may be exercised by an agent who has power to act in behalf of the seller;[60] but,

[51] D'Aquila v. Lambert, 2 Eden, at page 77, 1 Amb. 399, per Lord Northington.

[52] Rowley v. Bigelow, 12 Pick. 307, 313, per Shaw, C. J.

[53] Ante, p. 208.

[54] Benj. Sales, § 830.

[55] Feise v. Wray, 3 East, 93; Tucker v. Humphrey, 4 Bing. 516; Newhall v. Vargas, 13 Me. 93; Seymour v. Newton, 105 Mass. 272, 275; Muller v. Pondir, 55 N. Y. 325; Gossler v. Schepeler, 5 Daly, 476. Otherwise where an agent having a lien for advances ships at his principal's request to a buyer. Gwyn v. Richmond & D. R. Co., 85 N. C. 429.

[56] Morison v. Gray, 2 Bing. 260.

[57] Jenkyns v. Usborne, 7 Man. & G. 678, 8 Scott, N. R. 505.

[58] Imperial Bank v. London & St. K. Docks Co., 5 Ch. Div. 195 (having regard to the mercantile law amendment act, by which a surety is given the remedies of the creditor). In Siffken v. Wray, 6 East, 371, it was held that a mere surety for the buyer had no right to stop in transitu. Benj. Sales, § 831.

[59] Kinloch v. Craig, 3 Term R. 119; Newsom v. Thornton, 6 East, 17.

[60] Whitehead v. Anderson, 9 Mees. & W. 518; Bell v. Moss, 5 Whart. 189; Reynolds v. Boston & M. R. R., 43 N. H. 580.

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if the agent acts without authority, it seems that ratification after the buyer has demanded the goods of the carrier is too late.[61] The right of stoppage is not impaired by partial payment,[62] or by the receipt of a bill of exchange or other negotiable instrument in conditional payment, even though the buyer may have negotiated the bill so that it is outstanding, unmatured, in the hands of a third person.[63]

Against Whom the Right may be Exercised.

The right may be exercised only against a buyer who is insolvent. Insolvency means general inability to pay one's debts in the usual course of business.[64] The fact that the buyer has stopped payment has generally been considered as a matter of course to be such insolvency as to justify stoppage in transitu.[65]

If the seller stops in transitu before the buyer has become insolvent, he does so at his peril; but if, on the arrival of the goods at their destination, the buyer is then insolvent, the premature stoppage will avail for the protection of the seller.[66] The seller may

[61] Bird v. Brown, 4 Exch. 786. Ratification before stoppage is sufficient. Durgy Cement & U. Co. v. O'Brien, 123 Mass. 12. A power of attorney dispatched before the stoppage, which the agent did not receive till afterwards, and of which he was ignorant, was a sufficient ratification. Hutchings v. Nunes, 1 Moore, P. C. (N. S.) 243.

[62] Feise v. Wray, 3 East, 93; Edwards v. Brewer, 2 Mees. & W. 375.

[63] Benj. Sales, § 835, citing Feise v. Wray, 3 East, 93; Patten v. Thompson, 5 Maule & S. 350; Edwards v. Brewer, 2 Mees. & W. 375; Miles v. Gorton, 2 Cromp. & M. 504. See, also, Hays v. Mouille, 14 Pa. St. 48; Moses v. Rasin, 14 Fed. 772, 774; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124. But see Arnold v. Delano, 4 Cush. 33, 39.

[64] Biddlecombe v. Bond, 4 Adol. & E. 332; Durgy Cement & U. Co. v. O'Brien, 123 Mass. 12, 13; Benedict v. Scaettle, 12 Ohio St. 515; Reynolds v. Boston & M. R. R., 43 N. H. 580; Loeb v. Peters, 63 Ala. 243; Secombe v. Nutt, 14 B. Mon. 324; Crummey v. Raudenbush (Minn.) 56 N. W. 1113. Cf. Millard v. Webster, 54 Conn. 415, 8 Atl. 470 (the inability of the buyer to pay all his debts, if his creditors had pressed for payment, does not show insolvency).

[65] Dixon v. Yates, 5 Barn. & Adol. 313; Bird v. Brown, 4 Exch. 786; O'Brien v. Norris, 16 Md. 122. It is enough if it be shown that the seller would have had no prospect of receiving payment when the debt should fall due. Bloomingdale v. Memphis & C. R. Co., 6 Lea, 616.

[66] The Constantia, 6 C. Rob. Adm. 321, per Lord Stowell.

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stop for insolvency which existed at the time of the sale, provided he did not then know of it.[67]

The right of stoppage is paramount to the claims of all persons claiming under the buyer, except against one who claims the goods by virtue of a transfer for value of the bill of lading;[68] and it is therefore superior to the rights of a creditor of the buyer who attaches the goods while in transit.[69] It is subject, however, to the lien of the carrier for his charges on the goods.[70] The right of stoppage is simply against the goods, and hence does not extend to insurance money due to the buyer for damage to the goods.[71]

Meaning of "Transit."

The right of stoppage in transitu does not arise unless the seller has transferred the property and the right of possession to the buyer, and the actual possession to the carrier.[72] The essential feature of stoppage in transitu is that the goods shall be at the time in the possession of a middleman, or of some person intervening between the seller, who has parted with, and the buyer, who has not yet received, them.[73] Whether there is a transitus at all will depend, therefore, on whether there is a delivery of the goods by the seller to an intermediary for the purpose of transmission to the

[67] Reynolds v. Boston & M. R. R., 43 N. H. 580; Benedict v. Scaettle, 12 Ohio St. 515; O'Brien v. Norris, 16 Md. 122; Loeb v. Peters, 63 Ala. 243; Buckley v. Furniss, 15 Wend. 137; Kingman v. Denison, 84 Mich. 608, 48 N. W. 26. Contra, Rogers v. Thomas, 20 Conn. 54.

[68] Post, p. 223.

[69] Smith v. Goss, 1 Camp. 282; Hays v. Mouille, 14 Pa. St. 48; Durgy Cement & U. Co. v. O'Brien, 123 Mass. 12; Calahan v. Babcock, 21 Ohio St. 281.

[70] Potts v. New York & N. E. R. Co., 131 Mass. 455; Hays v. Mouille, 14 Pa. St. 48; Rucker v. Donovan, 13 Kan. 251. But the carrier cannot assert a lien for a general balance between himself and the consignee. Oppenheim v. Russell, 3 Bos. & P. 42; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671. Where a creditor of the buyer attaches in transit, the seller, though he may still stop the goods, must pay the freight money advanced by the creditor. Greve v. Dunham, 60 Iowa, 108, 14 N. W. 130.

[71] Berndtson v. Strang, 3 Ch. App. 588, 591.

[72] See Gibson v. Carruthers, 8 Mees. & W. 321, 334, per Parke, B.; Rowley v. Bigelow, 12 Pick. 307, per Shaw, C. J.

[73] Schotsmans v. Lancashire & Y. Ry. Co., 2 Ch. App. 332, per Lord Cairns.

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buyer. If the delivery is directly to the buyer, or to a servant or agent authorized to accept delivery, who is to hold the goods for him or to deliver them subject to his further orders, no transitus arises.

Delivery on Buyer's Ship.

As a rule, if the buyer sends his own servant for the goods, delivery to him is delivery to the master, and if he sends his own cart or ship, delivery into the cart or on board the ship is prima facie delivery to the buyer,[74] though, even where he sends his own ship, the seller may restrain the effect of the delivery by taking from the captain a bill of lading to his own order,[75] in which case, as we have seen,[76] the property does not pass, and the seller retains, not strictly speaking the right of stoppage in transitu, but the right of disposal. It has been held, however, in England and in Pennsylvania, that if by the terms of the bill of lading the goods are deliverable to the buyer or his assigns, delivery on the buyer's own ship is delivery to him, and therefore precludes any right of stoppage in transitu;[77] although a distinction is made between a ship owned by the buyer and one merely chartered by him. In the case of a chartered vessel, the master is regarded as an intermediary interposed between the seller and the buyer, and not as the buyer's servant; and hence delivery on board the ship, notwithstanding that by the bill of lading the goods are deliverable to the buyer or assigns, or that no bill of lading is issued, does not preclude the seller from stopping in transitu.[78]

In this country the courts of several states have refused to rec-

[74] Van Casteel v. Booker, 2 Exch. 691; Berndtson v. Strang, L. R. 4 Eq. 481, at page 489.

[75] Van Casteel v. Booker, 2 Exch. 691; Turner v. Trustees of Liverpool Docks, 6 Exch. 543, 20 Law J. Exch. 394; Gossler v. Schepeler, 5 Daly, 476.

[76] Ante, p. 104.

[77] Schotsmans v. Lancashire & Y. Ry. Co., 2 Ch. App. 332; Bolin v. Huffnagle, 1 Rawle, 9; Thompson v. Stewart, 7 Phila. 187.

[78] Bohtlingk v. Inglis, 3 East, 381; Berndtson v. Strang, L. R. 4 Eq. 481, 3 Ch. App. 588; Ex parte Rosevear China Clay Co., 11 Ch. Div. 560; Brindley v. Cilgwyn Slate Co. (1886) 55 Law J. Q. B. Div. 68. But, if the charter party is such that the ship is demised to the buyer, so that the captain is his agent, the vessel is considered the buyer's own ship. Benj. Sales, § 843.

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ognize a different rule as applying to a ship owned by the buyer.[79] "The true distinction," says Parsons, C. J., in an early Massachusetts case,[80] "is whether any actual possession by the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bill of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stoppage in transitu remains after the shipment. * * * The same rule must govern if the consignee be such owner. If the goods are delivered on board his ship, to be carried to him, an actual possession by him after the delivery is provided for by the terms of the instrument; but, if the goods are put on board the ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bill of lading." The distinction here drawn is, in effect, between delivery to the master, not as the servant of the buyer, but as an intermediary for the purpose of conveying the goods to him, and delivery on board the ship as the place of delivery appointed by him. In the one case the seller may stop in transitu; in the other no transitus ever arises. This distinction is reasonable and in accordance with that recognized in respect to the termination of the transit, viz. that delivery to an agent to convey the goods to the buyer does not terminate the transit, but that delivery to an agent to hold the goods subject to his further orders does terminate it.[81] That no transitus ever arises where the goods are delivered on board the ship as the place of delivery appointed by the buyer has been recognized on both sides of the Atlantic. Such is the character of the delivery where the buyer orders the goods put on board in order that they may be sent on a mercantile venture or roving voyage,[82] or in order that they may be shipped from his place of business, not to be delivered to him or to his use, but to a third person.[83]

[79] Stubbs v. Lund, 7 Mass. 453; Ilsley v. Stubbs, 9 Mass. 65; Newhall v. Vargas, 13 Me. 93; Moore v. Hamilton, 44 N. Y. 661, 666, per Earle, J. But see Sturtevant v. Orser, 24 N. Y. 538, 539.

[80] Stubbs v. Lund, 7 Mass. 453.

[81] Post, p. 221.

[82] Fowler v. McTaggart, cited in Hodgson v. Loy, 7 Term R. 442; Berndtson v. Strang, L. R. 4 Eq. 481, at page 489.

[83] Rowley v. Bigelow, 12 Pick. 307.

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Termination of Transit—Delivery to Buyer.

"Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance." [84] The transit does not terminate until the goods pass into the actual or constructive possession of the buyer.[85] So long as the buyer declines or fails to take delivery the transit continues.[86] What will amount to a taking of possession is a question in relation to which much of the law referred to in connection with actual receipt under the statute of frauds [87] and delivery in performance of the contract [88] will be found applicable. As in the case of the seller's lien, a mere delivery of a part does not amount to a delivery of the whole, so as to defeat the seller's right as to the remainder, unless the delivery is made under such circumstances as to show an agreement to give up the whole of the goods.[89] The buyer may anticipate the end of the transit, and thereby put an end to the right of stoppage, by taking the goods into his actual possession before they reach their appointed destination.[90]

Same—Delivery after Bankruptcy.

The bankruptcy of the buyer not being a rescission of the contract, delivery to him after bankruptcy, or to his trustee or assignee

[84] Kemp v. Falk, 7 App. Cas., at page 588, per Lord Fitzgerald.

[85] Whitehead v. Anderson, 9 Mees. & W. 518; Crawshay v. Eades, 1 Barn. & C. 181; Kitchen v. Spear, 30 Vt. 545; Seymour v. Newton, 105 Mass. 272; White v. Mitchell, 38 Mich. 390; Greve v. Dunham, 60 Iowa, 108, 14 N. W. 130; Symns v. Schotten, 35 Kan. 310, 10 Pac. 828.

[86] Bolton v. Lancashire & Y. Ry. Co., L. R. 1 C. P. 431; James v. Griffin, 2 Mees. & W. 623; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Kingman & Co. v. Denison, 84 Mich. 608, 48 N. W. 26; Mason v. Wilson, 43 Ark. 172.

[87] Ante, p. 60 et seq.

[88] Ante, p. 179 et seq.

[89] Bolton v. Lancashire & Y. Ry. Co., L. R. 1 C. P., at page 440; Ex parte Cooper, 11 Ch. Div. 68; Kemp v. Falk, 7 App. Cas., at page 586, per Lord Blackburn; Buckley v. Furniss, 17 Wend. 504. Cf. ante, p. 213.

[90] Whitehead v. Anderson, 9 Mees. & W. 518, 534; London & N. W. Ry. Co. v. Bartlett, 7 Hurl. & N. 400, 31 Law J. Exch. 92; Stevens v. Wheeler, 27 Barb. 658; Mohr v. Boston & A. R. R., 106 Mass. 72, per Morton, J.; Wood v. Yeatman, 15 B. Mon. 270.

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in bankruptcy, terminates the transit.[91] If the property has passed, and the goods have come into the possession of the insolvent buyer, he cannot afterwards rescind the sale, and thus give a preference to the seller over the general creditors.[92] But before the goods have come into his possession he may, with the assent of the seller, rescind the sale, or else refuse to take possession, and thus leave unimpaired the right of stoppage in transitu, unless his assignee succeeds in getting possession before the right is exercised.[93]

Same—Delivery to Agent.

Delivery of the goods at their appointed destination to an agent authorized to receive delivery is delivery to the buyer, and ends the transit. But delivery to his agent before they have reached their destination does not necessarily end the transit.

The goods may be in transit although they have left the hands of the person to whom the seller intrusted them for transmission; it is immaterial how many agents they may have passed through, if they have not reached their destination. The term "transit" does not necessarily imply that the goods are in motion. "If the goods are deposited with one who holds them merely as agent to forward, and has custody as such, they are as much in transitu as if they were actually moving." [94] Thus goods may still be in transitu, though lying in a warehouse to which they have been sent by the seller's orders. Goods sold in Chicago to a merchant in Liverpool, and lying in a warehouse in New York awaiting shipment to Liverpool in pursuance of the buyer's original order to send them to Liverpool,

[91] Ellis v. Hunt, 3 Term R. 467; Inglis v. Usherwood, 1 East, 515; Conyers v. Ennis, 2 Mason, 236, Fed. Cas. No. 3,149; Millard v. Webster, 54 Conn. 415, 8 Atl. 470; McElroy v. Seery, 61 Md. 389.

[92] Barnes v. Freeland, 6 Term R. 80.

[93] Atkin v. Barwick, 1 Strange, 165; Salte v. Field, 5 Term R. 211; Grout v. Hill, 4 Gray, 361; Tufts v. Sylvester, 79 Me. 213, 9 Atl. 357; Ash v. Putnam, 1 Hill, 302; Sturtevant v. Orser, 24 N. Y. 538; Cox v. Burns, 1 Iowa, 64; Mason v. Wilson, 43 Ark. 172.

[94] Smith v. Goss, 1 Camp. 282; Ex parte Watson, 5 Ch. Div. 35; Ex parte Rosevear China Clay Co., 11 Ch. Div. 560; Bethell v. Clark, 19 Q. B. Div. 553, affirmed 20 Q. B. Div. 615; Covell v. Hitchcock, 23 Wend. 611; Harris v. Pratt, 17 N. Y. 249; Cabeen v. Campbell, 30 Pa. St. 254; Aguirre v. Parmelee, 22 Conn. 473; White v. Mitchell, 38 Mich. 390; Blackman v. Pierce, 23 Cal. 509; Blackb. Sales, 353; Chalm. Sale, 64.

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are still in transit, even though the person in possession may be the general agent of the buyer for selling as well as for forwarding the goods. But if the goods are once deposited with one who holds them as agent of the buyer, subject to his further orders, they are no longer in transit.[95] In each case the question is: "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." [96] It is often impossible to reconcile the decisions in cases arising upon substantially similar facts. The difficulty lies not in the statement, but in the application, of the principles.

Same—Attornment of Carrier.

When the goods have reached their appointed destination, the transitus may be terminated by a constructive as well as by an actual delivery of possession to the buyer. Unless there be a delivery of actual possession, something must occur to change the actual possession of the carrier into the constructive possession of the buyer; in other words, the carrier must attorn. As in other cases, the attornment must be founded on mutual assent.[97] If the carrier does not consent to hold the goods as bailee for the buyer,[98] or if the buyer does not assent to his so holding them,[99] there is no attornment.

The carrier's change of character into that of warehouseman or bailee for the buyer is not necessarily inconsistent with his main-

[95] Dixon v. Baldwen, 5 East, 175; Valpy v. Gibson, 4 C. B. 837; Ex parte Gibbes, 1 Ch. Div. 101; Kendal v. Marshall, 11 Q. B. Div. 356; Ex parte Miles, 15 Q. B. Div. 39, 54 Law J. Q. B. 567; Guilford v. Smith, 30 Vt. 49; Becker v. Hallgarten, 86 N. Y. 167; Rowley v. Bigelow, 12 Pick. 307, 313; Biggs v. Barry, 2 Curt. 259, Fed. Cas. No. 1,402; Brooke Iron Co. v. O'Brien, 135 Mass. 442, 447.

[96] Blackb. Sales, 353.

[97] James v. Griffin, 2 Mees. & W. 623; Ex parte Cooper, 11 Ch. Div. 68; Kemp v. Falk, 7 App. Cas. 573, per Lord Blackburn; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; McFetridge v. Piper, 40 Iowa, 627; Harding Paper Co. v. Allen, 65 Wis. 576, 27 N. W. 329; Langstaff v. Stix, 64 Miss. 171, 1 South. 97; Williams v. Hodges, 113 N. C. 38, 18 S. E. 83; Blackb. Sales, 364.

[98] Whitehead v. Anderson, 9 Mees. & W. 518; Coventry v. Gladstone, L. R. 6 Eq. 44.

[99] Ex parte Barrow, 6 Ch. Div. 783; O'Neil v. Garrett, 6 Iowa, 479.

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tenance of his carrier's lien;[100] but the continuance of the lien, and the fact that his charges are unpaid, is strong, though not conclusive, evidence that he is still in possession as carrier.[101]

Wrongful Refusal to Deliver.

Since the buyer has the right of possession subject only to the right of stoppage in transitu, if the buyer is solvent or the seller has failed to exercise his right of stoppage the buyer's right of possession is not affected by the refusal of the carrier to deliver; and, if the carrier wrongfully refuses possession, the right of stoppage is gone.[102]

Waiver.

Since the right of stoppage in transitu arises by implication of law, the seller may waive it, expressly or by implication.[103]

How the Right may be Defeated.

The seller may stop in transit notwithstanding that he has delivered to the buyer a bill of lading by which the goods are deliverable to his order. But if the buyer transfers the bill of lading to a bona fide purchaser for value, and in such case only, the right of stoppage is defeated.[104] It must be borne in mind, however, that a bill of lading is not like a bill of exchange, and that the transferee obtains no greater rights under the instrument than his transferer possessed. The bill of lading represents the goods, and the transfer of the instrument operates simply as a delivery of the goods. Therefore the transfer by one who has no title to the goods conveys none to the transferee, and a transfer of the bill of lading by way of pledge by one who, like a factor, has no authority to pledge confers no greater rights than would the pledge of the goods themselves by an agent acting without authority.[105]

[100] Allan v. Gripper, 2 Cromp. & J. 218; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423.

[101] Kemp v. Falk, 7 App. Cas. 573, per Lord Blackburn. Where the captain promised to deliver, when satisfied as to freight, it was held the transit was not ended. Whitehead v. Anderson, 9 Mees. & W. 518.

[102] Bird v. Brown, 4 Exch. 786.

[103] Ante, p. 207; Chalm. Sale, § 47 (8).

[104] Lickbarrow v. Mason, 2 Term R. 63, 1 H. Bl. 357, 2 H. Bl. 211, 6 East, 20, note, 5 Term R. 683, 1 Smith Lead. Cas. (Ed. 1887) 737, and notes.

[105] Lickbarrow v. Mason, 1 Smith, Lead. Cas. (Ed. 1887) 737, notes. In

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To entitle the transferee to hold the goods free from the right of stoppage in transitu, he must take without notice; not, indeed, without notice that the goods have not been paid for, since that would not affect the buyer's right to sell, but without notice of the buyer's insolvency,[106] or of any other circumstance which would render the bill of lading not fairly and honestly assignable.[107] The transfer must be for value, but an antecedent debt is sufficient.[108] The purchaser will, however, take subject to the right of stoppage, unless he actually gets a transfer of the bill of lading.[109]

The right of stoppage may be defeated in part by a transfer of the bill of lading by way of pledge or mortgage. In such case, the buyer still retains the general property, and the seller may in equity exercise his right of stoppage subject to the incumbrance; and he may also compel the incumbrancer to exhaust any other securities he may hold in satisfaction of his claim before proceeding on the goods represented by the bill of lading.[110]

some states bills of lading are by statute made negotiable, like bills of exchange and promissory notes.

[106] Vertue v. Jewell, 4 Camp. 31, per Lord Ellenborough; Stanton v. Eager, 16 Pick. 467, 476; Loeb v. Peters, 63 Ala. 243. A transfer of the bill of lading, after notice of stoppage has been served on the carrier, to a purchaser for value, without notice of the stoppage or of the insolvency, defeats the seller's right. Newhall v. Central P. R. Co., 51 Cal. 345.

[107] Cuming v. Brown, 9 East, 506; Salomons v. Nissen, 2 Term R. 681.

[108] Leask v. Scott, 2 Q. B. Div. 376, dissenting from Rodger v. Comptoir d'Escompte, L. R. 2 P. C. 393; St. Paul Roller-Mill Co. v. Great Western Dispatch Co., 27 Fed. 434; Lee v. Kimball, 45 Me. 172. See, also, Clementson v. Grand Trunk Ry. Co., 42 U. C. Q. B. 263. But it has been held that a transfer of the bill of lading, as mere collateral to previous obligations, does not defeat the seller's right. Lesassier v. The Southwestern, 2 Woods, 35, Fed. Cas. No. 8,274; Loeb v. Peters, 63 Ala. 243.

[109] Kemp v. Falk, 7 App. Cas. 573, per Lord Blackburn; Walter v. Ross, 2 Wash. 283, Fed. Cas. No. 17,122; Stanton v. Eager, 16 Pick. 467, 476; Pattison v. Culton, 33 Ind. 240; Clapp v. Sohmer, 55 Iowa, 273, 7 N. W. 639. The transfer of a "duplicate" bill of lading does not defeat the right of stoppage. Castanola v. Missouri Pac. R. Co., 24 Fed. 267. But see note to that case by Adelbert Hamilton, citing Caldwell v. Ball, 1 Term R. 205; Meyerstein v. Barber, L. R. 2 C. P. 38, 661, L. R. 4 H. L. 317; Glyn v. East & W. I. Dock Co., 7 App. Cas. 591, affirming 6 Q. B. Div. 475, reversing 5 Q. B. Div. 129; Benj. Sales, § 861.

[110] In re Westzinthus, 5 Barn. & Adol. 817; Spalding v. Ruding, 6 Beav.

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Whether, when the bill of lading has been transferred by the buyer to a subpurchaser for value, but the purchase money is wholly or in part unpaid by the subpurchaser, the seller may stop to the extent of such unpaid purchase money, is a question not free from doubt.[111]

How Stoppage in Transitu is Effected.

It has been said that the vendor is so much favored in exercising his right as to be justified in getting the goods back by any means not criminal before they reach the possession of the insolvent vendee.[112] "The law is clearly settled," says Parke, B., "that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come into the actual or constructive possession of the vendee." [113]

Any notice clearly countermanding delivery is enough. Such notice may be given to the person in actual possession of the goods or to his principal or employer.[114] But, if the notice be to a prin-

376, 12 Law J. Ch. 503, affirmed 15 Law J. Ch. 374; Berndtson v. Strang, L. R. 4 Eq. 481, affirmed 3 Ch. App. 588; Kemp v. Falk, 7 App. Cas. 573. But if the goods come into the hands of pledgees of the buyer, holding them under his title and setting up a possession adverse to that of the seller with the buyer's assent, at a place where the seller contemplated and agreed it should be done, the transit is at an end, and the principle of Spalding v. Ruding does not apply. Brooke Iron Co. v. O'Brien, 135 Mass. 442, 447.

111 The affirmative was substantially held in Ex parte Golding, 13 Ch. Div. 628, which was followed in Ex parte Falk, 14 Ch. Div. 446. The latter case was affirmed, but on a different ground (7 App. Cas. 573), where Lord Selbourne doubted the rule, and said: "I assent entirely to the proposition that, where the subpurchasers get a good title as against the right of stoppage in transitu, there can be no stoppage in transitu as against the purchase money payable by them to their vendor." See Benj. Sales, § 865a; Chalm. Sale, 72.

112 Snee v. Prescot, 1 Atk. 245, 250, per Lord Hardwicke.

113 Whitehead v. Anderson, 9 Mees. & W. 518.

114 Litt v. Cowley, 7 Taunt. 169; Reynolds v. Boston & M. R. R., 43 N. H. 580; Newhall v. Vargas, 13 Me. 93; Jones v. Earl, 37 Cal. 630; Rucker v. Donovan, 13 Kan. 252. The notice need not state the reason. Allen v. Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895. The seller may exercise his right by demanding the bills of lading from the shipowner who has retained them as security. Ex parte Watson, 5 Ch. Div. 35. But a notice to hold the proceeds of the goods is ineffectual. Phelps v. Comber, 29 Ch. Div. 813.

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cipal not in actual possession, the notice, to be effectual, must be given at such time and under such circumstances that the principal, in the exercise of reasonable diligence, can communicate with his servant or agent in time to prevent delivery to the buyer; but if the principal receives notice he is bound to use reasonable diligence in forwarding the notice to the proper agent, and if he does so he will be excused if the goods are delivered before the arrival of the notice.[115]

The seller exercises his right of stoppage at his peril. When notice of stoppage is lawfully given to the carrier, the latter must redeliver the goods according to the directions of the seller.[116] In case of real doubt, the carrier must deliver at his peril or resort to an interpleader.[117]

Effect of Stoppage in Transitu.

The effect of exercising the right is simply to restore the goods into the possession of the seller, so as to enable him to exercise his rights as unpaid seller, and not to rescind the sale. He is replaced in the position he was in before he parted with the possession.[118]

RIGHT OF RESALE.

122. The unpaid seller, who has exercised his right of lien or of stoppage in transitu, may, upon the failure of

[115] Whitehead v. Anderson, 9 Mees. & W. 518; Kemp v. Falk, 7 App. Cas. 573, 585, per Lord Blackburn; Mottram v. Heyer, 5 Denio, 629. But see Ex parte Falk, 14 Ch. Div. 446, 455, per Bramwell, L. J.

[116] The Tigress, 32 Law J. P. M. & Adm. 97; The E. H. Pray, 27 Fed. 474; The Vidette, 34 Fed. 396; Jones v. Earl, 37 Cal. 630; Allen v. Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895.

[117] Glyn v. East & W. I. Dock Co., 7 App. Cas. 591, per Lord Blackburn; The Tigress, 32 Law J. P. M. & Adm. 97, 102; Benj. Sales, § 861.

[118] Martindale v. Smith, 1 Q. B. 389; Wentworth v. Outhwaite, 10 Mees. & W. 436; Schotsmans v. Lancashire & Y. Ry. Co., 2 Ch. App. 332, 340, per Lord Cairns; Kemp v. Falk, 7 App. Cas. 573, 581, per Lord Blackburn; Babcock v. Bonnell, 80 N. Y. 244; Rowley v. Bigelow, 12 Pick. 307, 312; Newhall v. Vargas, 15 Me. 314; Patten's Appeal, 45 Pa. St. 151; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124; Bloomingdale v. Memphis & C. R. Co., 6 Lea, 616; Rucker v. Donovan, 13 Kan. 251.

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the buyer to pay the price, resell the goods, acting as agent of the buyer, and recover from him the difference between the contract price and the proceeds of the resale.

In England.

In England the exact extent of the right of the unpaid seller in possession of the goods to resell them upon the buyer's default appears not to be entirely free from doubt. He may resell and give a good title to the buyer as against the original purchaser.[119] And if he resells he may recover from the original purchaser as damages the actual loss on the resale;[120] and the buyer cannot maintain trover against him, being deprived by his default of that right of possession without which trover will not lie.[121] But it is said by Benjamin [122] that such resale, even on the buyer's default, is a breach of contract for which damages may be recovered against him, though only the actual damages suffered,—that is, the difference between the contract price and the market value on the resale; and that, if there be no proof of such difference, the recovery will be for nominal damages only.

In United States.

In this country the right of resale is universally recognized and clearly defined. In making the resale the seller acts as the agent of the buyer, and, if the goods sell for less than the contract price, the seller may recover the difference, together with the expenses of sale, in an action against the buyer.[123] It must appear that the sale was

[119] Milgate v. Kebble, 3 Man. & G. 100. Cf. Lord v. Price, L. R. 9 Exch. 54.

[120] Maclean v. Dunn, 4 Bing. 722.

[121] Milgate v. Kebble, 3 Man. & G. 100; Lord v. Price, L. R. 9 Exch. 54.

[122] Benj. Sales, § 794, citing Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204. And see Benj. Sales, §§ 782–795, for a discussion of the English cases. "Where the goods are of a perishable nature, or where the unpaid seller gives notice of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods, and recover from the original buyer damages for any loss occasioned by his breach of contract." Chalm. Sale, § 50 (3), citing Page v. Eduljee, L. R. 1 P. C., at page 145; Lord v. Price, supra; Ex parte Stapleton, 10 Ch. Div. 586; Maclean v. Dunn, supra.

[123] Sands v. Taylor, 5 Johns. 395; Dustan v. McAndrew, 44 N. Y. 73; Sawyer v. Dean, 114 N. Y. 469, 21 N. E. 1012; Whitney v. Boardman, 118

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within a reasonable time,[124] and that it was fairly conducted,[125] or else the seller can only recover the difference between the contract price and the amount which the goods would have realized upon a proper sale.[126] Whether the sale should be private or by auction would depend on what was the customary manner of selling the commodity in question and the manner most likely to produce the best price.[127] Notice of intention to exercise the right of sale should be given, though cases may arise where, owing to the

Mass. 242; Phelps v. Hubbard, 51 Vt. 489; Atwood v. Lucas, 53 Me. 508; Young v. Mertens, 27 Md. 114; Bell v. Offutt, 10 Bush. 632; Bagley v. Findlay, 82 Ill. 524; Roebling's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Van Horn v. Rucker, 33 Mo. 391. Some cases hold that the amount obtained on resale is only evidence of the value, and not necessarily conclusive against the buyer. Girard v. Taggart, 5 Serg. & R. 19; Andrews v. Hoover, 8 Watts, 239; McCombs v. McKennan, 2 Watts & S. 216. This is inconsistent with the theory that the seller resells as the buyer's agent, which would only require good faith and reasonable diligence. In these cases it seems that the property had passed to the buyer, and they are therefore to be distinguished from those in which the property has not passed, and the resale is resorted to simply as a means of determining the market value for the purpose of establishing the amount of the seller's damages. See Chapman v. Ingram, 30 Wis. 295; Ricky v. Tenbroeck, 63 Mo. 563; Black River Lumber Co. v. Warner, 93 Mo. 374, 386, 6 S. W. 210; Haskell v. McHenry, 4 Cal. 411. Upon default of a purchaser of an undivided interest in a partnership, the vendor may resell and recover the deficiency from the first purchaser. Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415.

[124] Smith v. Pettee, 70 N. Y. 13; Camp v. Hamlin, 55 Ga. 259. See Rosenbaums v. Weeden, 18 Grat. 785.

[125] Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415; Camp v. Hamlin, 55 Ga. 259; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657; Saladin v. Mitchell, 45 Ill. 79; Penn v. Smith, 98 Ala. 560, 12 South. 818. A sale elsewhere than at the place of delivery is good, if made in good faith, and in the exercise of a reasonable discretion. Lewis v. Greider, 51 N. Y. 231; Sawyer v. Dean, 114 N. Y. 469, 481, 21 N. E. 1012. But see Chapman v. Ingram, 30 Wis. 290; Ricky v. Tenbroeck, 63 Mo. 563. The buyer cannot complain that the goods are bought in the name of a third person for the seller, if the full market price is obtained. Lindon v. Eldred, 49 Wis. 305, 5 N. W. 862. It seems that the seller should follow any reasonable instructions as to the time and manner of sale which he can follow without sacrificing his lien. Smith v. Pettee, 70 N. Y. 13, 18.

[126] Pickering v. Bardwell, 21 Wis. 563.

[127] Pollen v. Le Roy, 30 N. Y. 549; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Whitney v. Boardman, 118 Mass. 242, 248.

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perishable character of the goods, or other circumstances, notice might be dispensed with.[128] Notice of the time and place of sale, however, is not essential.[129]

Choice of Remedies—Right to Rescind.

It is held in England that the seller has no right to rescind the sale because the buyer is in default for the price,[130] his choice of remedies, except for the right of lien, being either to sue for the price or to resell. In some cases in this country, it is said that the seller has a third remedy. "The vendor of personal property," says the court, in the leading case of Dustan v. McAndrew,[131] "in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of one of three remedies: (1) He may store or retain the property for the vendee, and sue him for the entire price; (2) 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 (3) 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." Substantially the same statement of the law has been made in other cases.[132] While the first and second of these remedies is exercised in affirmance of the contract, the latter since it permits the seller to keep the goods as his own notwithstanding that the property had passed, must rest on the theory of rescission, although the seller is inconsistently allowed to maintain an action on the contract for

[128] Holland v. Rea, 48 Mich. 218, 224, 12 N. W. 167; McClure v. Williams, 5 Sneed, 717; Saladin v. Mitchell, 45 Ill. 79; Redmond v. Smock, 28 Ind. 365.

[129] Pollen v. Le Roy, 30 N. Y. 549; Holland v. Rea, 48 Mich. 218, 12 N. W. 167; Ullmann v. Kent, 60 Ill. 271. It is not "essential that notice of the time and place of sale should be given to the vendee. Still as the sale must be fair, and such as is most likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit it." Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415, per Finch, J.

[130] Post, p. 234.

[131] 44 N. Y. 73.

[132] Hayden v. Demets, 53 N. Y. 426; Mason v. Decker, 72 N. Y. 595; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Barr v. Logan, 5 Har. (Del.) 52; Young v. Mertens, 27 Md. 114, 126; Cook v. Brandeis, 3 Metc. (Ky.) 555; Bagley v. Findlay, 82 Ill. 524; Ames v. Moir, 130 Ill. 582, 22 N. E. 535. See, also, Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81.

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the difference between the market value of the goods and the price. The exercise of the third remedy was not involved in any of the cases cited. It would seem, on principle, that the only case in which the seller may keep the goods, and sue for the difference between the contract price and the value of the goods, is where the property has not passed.[133]

[133] See Ganson v. Madigan, 15 Wis. 144, 151.

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CHAPTER X.

ACTION FOR BREACH OF THE CONTRACT.

123-124. Remedies of Seller—Where Property has not Passed.
125. Measure of Damages for Nonacceptance.
126. Where Property has Passed.
127. Remedies of the Buyer—Action for Nondelivery.
128. Measure of Damages.
129. Specific Performance.
130. Action for Conversion.
131. Breach of Warranty of Quality—Right to Reject.
132. Rights after Acceptance.
133. Measure of Damages for Breach of Warranty.

REMEDIES OF SELLER—WHERE PROPERTY HAS NOT PASSED.

123. If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

124. Where the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed.

125. MEASURE OF DAMAGES FOR NONACCEPTANCE. The measure of damages for nonacceptance is the estimated loss directly and naturally resulting from the breach of contract in the natural course of events, and, when there is an available market for the goods, is prima facie to be ascertained by the difference between the contract price and the market price at the agreed time and place of delivery.

When the property in the goods has not passed, as where the contract is for the sale of unascertained goods or of goods which are not in a deliverable state, the buyer's breach of his promise

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to accept and pay for them can only affect the seller by way of damages. The goods are still his. He may resell them or not, at his pleasure. His only remedy, therefore, is an action against the buyer for nonacceptance.[1] To this general rule there is only the one exception, which has been above stated, that, if by the terms of the contract the price is payable irrespective of delivery, the seller may sue for the price at the time agreed upon, leaving the buyer to his cross action in case the seller, after receiving the price, should fail to deliver the goods.[2]

Damages for Nonacceptance.

The proper measure of damages for nonacceptance is generally the difference between the contract price and the market price at the place of delivery at the time when the contract is broken, because the seller may take his goods into the market, and obtain the current price for them.[3] If the goods have no market price, the damages must, of course, be otherwise ascertained;[4] and if they have no money value the measure of damages would be equal to the whole contract price.[5] The date at which the contract is deemed to be broken is that fixed by the contract for the delivery, and not that at which the buyer may give notice that he intends to break the contract and refuse accepting the goods.[6] If the

[1] Laird v. Pim, 7 Mees. & W. 474, 478; Collins v. Delaporte, 115 Mass. 159, 162; Gordon v. Norris, 49 N. H. 376; Danforth v. Walker, 37 Vt. 239; Atwood v. Lucas, 53 Me. 508; Brand v. Henderson, 107 Ill. 141; Ganson v. Madigan, 13 Wis. 68; Chapman v. Ingram, 30 Wis. 290, 294; Peters v. Cooper, 95 Mich. 191, 54 N. W. 694; Benj. Sales, § 758.

[2] Dunlop v. Grote, 2 Car. & K. 153.

[3] Barrow v. Arnaud, 8 Q. B. 595, 608, per Tindal, C. J.

[4] Chicago v. Greer, 9 Wall. 726; McCormick v. Hamilton, 23 Grat. 561. Where there was no market, the proper measure of damages was the actual loss which the sellers, acting as reasonable men in the ordinary course of business, had sustained. Dunkirk Colliery Co. v. Lever, 9 Ch. Div. 20, 25.

[5] Allen v. Jarvis, 20 Conn. 38. Cf. Chicago v. Greer, 9 Wall. 726.

[6] Boorman v. Nash, 9 Barn. & C. 145; Phillpotts v. Evans, 5 Mees. & W. 475; Thompson v. Alger, 12 Metc. (Mass.) 428, 443; Schramm v. Boston Sugar-Refining Co., 146 Mass. 211, 15 N. E. 571; Gordon v. Norris, 49 N. H. 376; Girard v. Taggart, 5 Serg. & R. 19; Dana v. Fiedler, 12 N. Y. 40; Camp v. Hamlin, 55 Ga. 259; Williams v. Jones, 1 Bush, 621; Pittsburgh, C. & St. L. Ry. Co. v. Heck, 50 Ind. 303; Sanborn v. Benedict, 78 Ill. 309; Kadish v. Young, 108 Ill. 170.

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contract is for the sale of goods to be manufactured, or otherwise procured by the seller, and the buyer refuses to accept or gives notice that he intends to refuse acceptance, so that the seller is excused from procuring and tendering the goods, he will be entitled to such damages as will put him in the same position as if he had been permitted to complete the contract.[7] Thus where the contract was for the sale of rails to be rolled by the seller, "and to be drilled as he may be directed," at $58 per ton, and the buyer refused to give directions for drilling, and at his request the seller delayed rolling until after the time prescribed for their delivery, and then the buyer advised the seller that he should decline to take any of the rails under the contract, it was held that the seller was not bound to roll the rails and tender them, and that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and $58.[8]

When the contract is for the sale of a chattel to be made to order, there is, as we have seen, a conflict of authority as to whether the property passes on completion, or whether acceptance by the buyer is essential to the appropriation; and in such cases, whether an action can be maintained for the price or whether the seller is confined to an action for damages for nonacceptance will depend on the rule adopted in the particular jurisdiction as to what is necessary to transfer the property.[9]

SAME—WHERE PROPERTY HAS PASSED.

126. Where, under a contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for them according to the terms of the contract, the seller may maintain an action against him for the price of the goods.[10]

[7] Cort v. Ambergate N. & B. & E. J. Ry. Co., 17 Q. B. 127, 20 Law J. Q. B. 460; Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 Sup. Ct. 875; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Muskegon Curtain-Roll Co. v. Keystone Manuf'g Co., 135 Pa. St. 132, 19 Atl. 1008; Hosmer v. Wilson, 7 Mich. 295; Haskell v. Hunter, 23 Mich. 305; Butler v. Butler, 77 N. Y. 472; ante, p. 158.

[8] Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 Sup. Ct. 875.

[9] Ante, p. 103, and cases cited in notes 32, 33.

[10] Chalm. Sale, § 51.

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When the property in the goods has passed, unless the sale is on credit or payment is made to depend on some contingency, the seller may maintain an action for the price.[11] He may recover the price under the common indebitatus counts: When the contract has been completed in all respects except delivery, and delivery is not a condition precedent to the payment of the price, under the count for goods bargained and sold; when the goods have been delivered, and the price is payable at the time of action brought, under the count for goods sold and delivered. If the sale is on credit, he must, of course, await the termination of the credit before bringing suit.[12] And if the price is payable by a bill or other security, and the security is not given, the seller cannot sue for the price until the bill would have matured, though he may sue at once for damages for breach of the agreement, in which case the measure of his damages will be prima facie the amount of the sum to be secured.[13]

In England it is held that the seller is not entitled, under any circumstances, to rescind the contract for default in the payment of the price;[14] but in this country it has been frequently declared that the unpaid seller, who is in possession of the goods, has, among other remedies, the right to keep the goods as his own, and recover the difference between the market price at the time and place of delivery and the contract price.[15]

[11] Scott v. England, 2 Dowl. & L. 520; Stearns v. Washburn, 7 Gray, 187, 189; Morse v. Sherman, 106 Mass. 430; Frazier v. Simmons, 139 Mass. 531, 535, 2 N. E. 112; Hayden v. Demets, 53 N. Y. 426; Doremus v. Howard, 23 N. J. Law, 390; Armstrong v. Turner, 49 Md. 589; Ganson v. Madigan, 13 Wis. 67.

[12] Calcutta & B. Steam Nav. Co. v. De Mattos, 32 Law J. Q. B. (N. S.) at page 328; Keller v. Strasberger, 90 N. Y. 379; Dellone v. Hull, 47 Md. 112. Mere insolvency of one of the parties is not equivalent to a rescission or a breach. It simply relieves the seller from his agreement to give credit. Pardee v. Kanady, 100 N. Y. 121, 126, 2 N. E. 885. Cf. New England Iron Co. v. Gilbert Elevated R. Co., 91 N. Y. 153, 168.

[13] Paul v. Dod, 2 C. B. 800; Rinehart v. Olwine, 5 Watts & S. 157; Hanna v. Mills, 21 Wend. 90; Barron v. Mullin, 21 Minn. 374. But see Foster v. Adams, 60 Vt. 392, 15 Atl. 169.

[14] Martindale v. Smith, 1 Q. B. 389.

[15] Ante, p. 229.

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REMEDIES OF THE BUYER—ACTION FOR NONDELIVERY.

127. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery.

128. MEASURE OF DAMAGES. The measure of damages is the estimated loss directly and naturally resulting from the seller's breach of contract, and, when there is an available market for the goods in question, is prima facie to be ascertained by the difference between the contract price and the market price of the goods at the agreed time and place of delivery.[16]

The breach of contract of which the buyer complains may arise from the seller'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 the delivery of possession or of a collateral contract of warranty. The buyer's remedies for breach of the contract may be treated in the order of time in which they naturally arise—First, his remedies before obtaining possession of the goods, which may be subdivided into the cases where the contract is executory and the cases where the property has passed; and, second, his remedies after having received possession of the goods.[17]

Damages for Nondelivery.

Before the property has been transferred to the buyer, his only remedy is an action for breach of contract. If he has paid the price, and the goods are not delivered, he may, as has been shown, rescind the contract, and recover what he has paid upon an implied contract in an action for money had or received.[18] If he has not paid the price, his only remedy, where the seller fails to deliver, is to sue for damages for breach of the contract. His position is the converse of that of the seller who is suing the buyer for non-

[16] See Chalm. Sale, § 53.

[17] Benj. Sales, § 869.

[18] Nash v. Towne, 5 Wall. 689; Cleveland v. Sterrett, 70 Pa. St. 204; ante, p. 109.

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acceptance. He has the money in his hands, and may go into the market and buy. The loss which he sustains by the nondelivery of the goods is therefore, under ordinary circumstances, simply the difference between the contract price and the market price of the goods at the time and place of delivery, and this is the measure of his damages.[19] If he has prepaid the price, he may still sue for nondelivery, and is entitled to recover the market price of the goods without deduction.[20] If there is no difference between the contract price and the market price, he is entitled only to nominal damages.[21]

Even if the seller repudiates the contract before the date of delivery, so that the buyer may sue at once, the damages are to be assessed as of the agreed date of delivery, unless it appears that the buyer could have supplied himself in the market on such terms

[19] Barrow v. Arnaud, 8 Q. B. 604, at page 609; Shaw v. Nudd, 8 Pick. 9; Dana v. Fiedler, 12 N. Y. 40; Cahen v. Platt, 69 N. Y. 348; Fessler v. Love, 48 Pa. St. 407; Kribs v. Jones, 44 Md. 396; Miles v. Miller, 12 Bush, 134; McKercher v. Curtis, 35 Mich. 478; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502; Olson v. Sharpless, 53 Minn. 91, 55 N. W. 125; Hewson-Herzog Supply Co. v. Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129. In case of a total failure to deliver, the buyer may recover the amount with which he could have purchased machines of equal value. If those delivered were defective, the measure of his damages is the cost of supplying the deficiency. Marsh v. McPherson, 105 U. S. 709. See, also, Stillwell & Bierce Manuf'g Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601. When the market value is unnaturally inflated by unlawful means, it is not the true test. Kountz v. Kirkpatrick, 72 Pa. St. 376. Where goods are purchased to be shipped abroad, and the fact is known to the seller, and it is impossible for the buyer to discover the inferiority of the goods till they reach their ultimate destination, the measure of damages is the difference between the market price of the goods contracted for at the date of arrival and the price afterwards realized on a sale of the goods, with costs and expenses of sales. Camden Consolidated Oil Co. v. Schlens, 59 Md. 31.

[20] Startup v. Cortazzi, 2 Cromp. M. & R. 165; Smethurst v. Woolston, 5 Watts & S. 106; Humphreysville Copper Co. v. Vermont Copper Min. Co., 33 Vt. 92. Some courts allow the buyer to recover the highest market price between the breach and the action. Clark v. Pinney, 7 Cow. 681; Gilman v. Andrews, 66 Iowa, 116, 23 N. W. 291; Suydam v. Jenkins, 3 Sandf. 614; Benj. Sales (Bennett's 6th Am. Ed.) 901, note.

[21] Valpy v. Oakeley, 16 Q. B. 941; Moses v. Rasin, 14 Fed. 772; Fessler v. Love, 48 Pa. St. 407; Wire v. Foster, 62 Iowa, 114, 17 N. W. 174.

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as to mitigate his loss.[22] But, if the time of delivery is extended at the seller's request, damages will be assessed according to the market price at the date to which delivery is postponed.[23]

Damages where there is no Market Price.

To the rule of market price there are some exceptions, depending on particular circumstances. The goods may have no market price at the place of delivery for lack of a market, in which case the market value may be determined by ascertaining the market price in the nearest available market, and adding the expense of fetching the goods to the place of delivery;[24] or, if there is no available market, the market value may be determined by ascertaining the cost of manufacturing the goods, if that is the natural and reasonable way to procure them;[25] or, if the exact description of goods cannot be obtained, the damages may be fixed by the price of the best substitute obtainable, if it is reasonable for the buyer to take that course.[26] If no substitute is obtainable, the buyer may be entitled to special damages.[27]

Special Damages.

As in other classes of contracts, the damages may be special as well as general. The measure of general damages is the loss di-

[22] Roper v. Johnson, L. R. 8 C. P. 167; Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50.

[23] Ogle v. Earl Vane, L. R. 3 Q. B. 272; Hickman v. Haynes, L. R. 10 C. P. 598; Roberts v. Benjamin, 124 U. S. 64, 8 Sup. Ct. 393; Hill v. Smith, 34 Vt. 535; McDermid v. Redpath, 39 Mich. 372.

[24] Grand Tower Co. v. Phillips, 23 Wall. 471; Furlong v. Polleys, 30 Me. 491; Cahen v. Platt, 69 N. Y. 348; Johnson v. Allen, 78 Ala. 387.

[25] Paine v. Sherwood, 21 Minn. 225.

[26] Hinde v. Liddell, L. R. 10 Q. B. 265. The buyer must always make reasonable exertions to mitigate his damages. Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

[27] Parsons v. Sutton, 66 N. Y. 92; Richardson v. Chynoweth, 26 Wis. 656. Some courts, however, permit the buyer to recover his actual loss by way of general damages, on the ground that, where an article of similar quality cannot be procured, this is a contingency which must be considered to have been within the contemplation of the parties, who are presumed to know whether the article is of limited production or not. McHose v. Fulmer, 73 Pa. St. 365; Culin v. Woodbury Glass Works, 108 Pa. St. 220; Bell v. Reynolds, 78 Ala. 511. See, also, Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co., 5 C. C. A. 190, 55 Fed. 451.

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rectly and naturally resulting from the breach of the contract, under ordinary circumstances. The rule as to market price flows naturally from this general principle. The measure of special damages is the loss directly and naturally resulting from the breach of contract under the special circumstances of the case as contemplated by the parties. In the leading case of Hadley v. Baxendale,[28] the rule as to the measure of damages in cases of contract was laid down as follows: "Where the 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 be fairly and reasonably considered either as arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in 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." Substantially the same statement of the rule was made in New York in the leading case of Griffin v. Colver,[29] and these principles have been repeatedly affirmed.

It will be seen that the measure of both general and special damages really depends on the same principle, viz.: That a party is charged with the damages which a reasonable man would contemplate as the probable result of the breach, if he directed his mind to it. It has been objected "that, when parties enter into a contract, they contemplate its performance, and not its breach; but the answer is that the standard of the law is always an objective

[28] 9 Exch. 341, 354, 23 Law J. Exch. 179.

[29] 16 N. Y. 489. See, also, Cassidy v. Le Fevre, 45 N. Y. 562.

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one. The question is always, not what the particular parties had actually in contemplation, but what a reasonable man with their knowledge would have contemplated as the likely result, if he had directed his attention to it." [30] Each case involving special damages must be determined by its own merits. Special damages are not recoverable, unless alleged with sufficient particularity to enable the defendant to meet the demand.[31]

Communication of Special Circumstances.

The seller cannot be charged with special damages, unless he had knowledge of the special circumstances from which the special loss would be likely to result; [32] and while, if he had such knowledge, he will generally be charged,[33] it is important to bear in mind that mere communication of the special circumstances is not enough unless it be given under such circumstances as reasonably to imply that it formed the basis of the agreement,—that is, unless the circumstances are such that it must be supposed that a reasonable man would have had them in contemplation as a probable result of the breach of the contract.[34]

[30] Chalm. Sale, 78–80, 85, 86.

[31] Smith v. Thomas, 2 Bing. N. C. 372; Parsons v. Sutton, 66 N. Y. 92; Furlong v. Polleys, 30 Me. 491.

[32] Cory v. Thames Iron Works & Ship Bldg. Co., L. R. 3 Q. B. 181, 37 Law J. Q. B. 68; British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship, L. R. 3 C. P. 499, 37 Law J. C. P. 235; Bartlett v. Blanchard, 13 Gray, 429; Fessler v. Love, 48 Pa. St. 407; Billmeyer v. Wagner, 91 Pa. St. 92; Paine v. Sherwood, 19 Minn. 315 (Gil. 270); Mihills Manuf'g Co. v. Day, 50 Iowa, 250; Peace River Phosphate Co. v. Grafflin, 58 Fed. 550.

[33] Smeed v. Foord, 1 El. & El. 602, 28 Law J. Q. B. 178 (loss of crop from delay in furnishing threshing machine). A seller who contracts to supply a butcher with ice, knowing it is required to preserve meat, is liable if the meat spoils in consequence of his failure to supply, and the buyer is unable to supply himself elsewhere. Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129. The full amount of damage to lettuce growing in a greenhouse, and frozen by reason of failure to supply water for steam heating, is the measure of damages for such failure. Watson v. Inhabitants of Needham, 161 Mass. 404, 37 N. E. 204.

[34] British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship, cited in note 32; Horne v. Midland Ry. Co., L. R. 7 C. P. 583, 591, L. R. 8 C. P. 131, per Willes, J.; Booth v. Spuyten Duyvill Rolling Mill Co., 60 N. Y. 487, 496.

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A seller is usually bound for such damages as result to the buyer from being deprived of the ordinary use of a chattel, but not for such damages as result to him from being deprived of its use for a special or extraordinary purpose, which was not communicated.[35] So the buyer is not usually entitled to damages arising from loss of profits on a subsale, or from penalties or expenses incurred by him from inability to execute such subsale;[36] but he may recover such damages if the subsale and the other special circumstances necessary to advise him of the probable consequences of a breach were communicated to the seller.[37] For a full discussion of the rules of damages common to sales and other classes of contracts, the reader is referred to works upon damages.

SAME—SPECIFIC PERFORMANCE.

129. Where an action for damages will not afford an adequate compensation for breach of the seller's agreement to deliver the goods, the buyer may maintain a suit in equity for the specific performance of the contract.

As a general rule, where a party has a plain, adequate, and complete remedy at law, equity will not assume jurisdiction. Under ordinary circumstances, the buyer can go into the market and buy other goods in place of those which the seller fails to deliver, and therefore an action for damages affords the buyer an adequate remedy. In exceptional cases, however, as where goods similar to those contracted for cannot be obtained, equity will interfere.[38]

[35] Cory v. Thames Iron Works & Ship Bldg. Co., L. R. 3 Q. B. 181, 37 Law J. Q. B. 68.

[36] Williams v. Reynolds, 6 Best & S. 495, 34 Law J. Q. B. 221; Devlin v. Mayor, etc., 63 N. Y. 8; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 627, 12 N. W. 49. See, also, Fox v. Harding, 7 Cush. 516.

[37] Elbinger Actien-Gesellschafft fur Fabrication von Eisenbahn Materiel v. Armstrong, L. R. 9 Q. B. 473; Hydraulic Engineering Co. v. McHaffie, 4 Q. B. Div. 670; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85; Messmore v. New York Shot & Lead Co., 40 N. Y. 422; Booth v. Spuyten Duyvill Rolling Mill Co., 60 N. Y. 487.

[38] Cuddee v. Rutter, 1 White & T. Lead. Cas. Eq. (Am. Ed. 1876) p. 1063, and notes

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For example, specific performance has been granted where the articles purchased were of unusual beauty, rarity, and distinction, such as objects of virtu;[39] where the subject of sale was a patent right,[40] or a slave;[41] and in a recent case even where the goods were indispensable to the buyer's business, and could not otherwise be obtained in the city where he was engaged in business.[42]

SAME—ACTION FOR CONVERSION.

130. Where under a contract of sale the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action for conversion of the goods against the seller.[43]

When the property has passed, if the seller refuses to deliver, the buyer has the same right of action for nondelivery as if the property had not passed; but he has, in addition to his right of action on the contract, the rights of an owner. He has not only the property in the goods, but the right of possession, defeasible in the case of his failure to pay for the goods.[44] If he is not in default, therefore, he may, on the refusal of the seller to deliver, maintain an action for conversion. As a rule, the measure of the buyer's damages in such an action, either against the seller[45] or a third person, who has dealt with the goods under such circumstances as to amount to a conversion,[46] is the value of the goods at the time of the conversion. But he cannot recover greater damages against the seller by suing in tort than by suing on the contract; and, if he has not paid for the goods, the measure of his

[39] Falcke v. Gray, 4 Drew. 658, 29 Law J. Ch. 28.

[40] Somerby v. Buntin, 118 Mass. 279; Hapgood v. Rosenstock, 23 Fed. 86. So of a patented article. Adams v. Messinger, 147 Mass. 185, 17 N. E. 491.

[41] Young v. Burton, 1 McMul. Eq. 255.

[42] Equitable Gaslight Co. v. Baltimore Coal Tar & Manuf'g Co., 63 Md. 285.

[43] See Chalm. Sale, § 54.

[44] Benj. Sales, §§ 883, 886.

[45] Kennedy v. Whitwell, 4 Pick. 466; Philbrook v. Eaton, 134 Mass. 398.

[46] Chinery v. Viall, cited in following note; France v. Gaudet, L. R. 6 Q. B. 199.

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damages will be the difference between the contract price and the market value.[47]

In virtue of his ownership, the buyer may also maintain an action of replevin for the recovery of possession of the goods, but actions for the recovery of possession are generally regulated by statute.[48]

SAME—BREACH OF WARRANTY OF QUALITY—RIGHT TO REJECT.

131. Where, under an executory contract of sale, there is a warranty of the quality, fitness, or condition of the goods, and the goods do not fulfill the warranty, the buyer may reject the goods.

If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as already explained, because it is a condition of the contract that the goods shall answer the description, and the seller does not fulfill his contract by delivering different goods.[49] For the same reason, in an executory contract, the buyer may reject the goods if they fail to conform to the quality which the seller warranted they should possess;[50] for an undertaking that the goods shall possess certain qualities, whether in form of a description or of a warranty, "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 these 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."[51]

[47] Chinery v. Viall, 5 Hurl. & N. 288, 29 Law J. Exch. 180.

[48] See Esson v. Tarbell, 9 Cush. 407; Freelove v. Freelove, 128 Mass. 190.

[49] Ante, p. 155 et seq.

[50] Street v. Blay, 2 Barn. & Adol. 456; Syers v. Jonas, 2 Exch. 111, 117; Heilbutt v. Hickson, L. R. 7 C. P. 438, 451; Dailey v. Green, 15 Pa. St. 126; Doane v. Dunham, 65 Ill. 512, 79 Ill. 131; Cox v. Long, 69 N. C. 7, 9; Lewis v. Rountree, 78 N. C. 323; Byers v. Chapin, 28 Ohio St. 300; Bigger v. Bovard, 20 Kan. 204; Polhemus v. Heiman, 45 Cal. 573.

[51] 2 Smith, Lead. Cas. (8th Am. Ed.) *31; Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69; Benj. Sales, § 895.

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SAME—RIGHTS AFTER ACCEPTANCE.

132. Where the buyer has accepted the goods, or where the contract was for the sale of specific goods and the property therein has passed to the buyer, the buyer is not entitled, in most jurisdictions, to return the goods (though in some states he may rescind the contract, and return the goods for breach of an express warranty); but

(a) He may maintain an action against the seller for damages for breach of warranty. Or

(b) He may set up against the seller the breach of warranty in diminution or extinction of the price.

133. MEASURE OF DAMAGES FOR BREACH OF WARRANTY. The measure of damages for breach of warranty of fitness, quality, or condition is the estimated loss, directly resulting from the breach of warranty. Such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty.

If the buyer accepts the goods, it is held in England and in many jurisdictions in this country that he cannot afterwards rescind the contract, and return the goods on account of a mere breach of warranty.[52] By accepting, he waives his right to reject them, and must seek his remedy either by action on the warranty or by setting up the breach in diminution of the price. And this applies equally whether the sale is of a specific chattel unconditionally,

[52] Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Denton, 1 Cromp. & M. 207; Poulton v. Lattimore, 9 Barn. & C. 259; Dawson v. Collis, 10 C. B. 523, 533; Thornton v. Wynn, 12 Wheat. 183; Matteson v. Holt, 45 Vt. 336; Freyman v. Knecht, 78 Pa. St. 141; Muller v. Eno, 14 N. Y. 597; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 269, 23 N. E. 372; Hoover v. Sidener, 98 Ind. 290; Lightburn v. Cooper, 1 Dana, 273; Allen v. Anderson, 3 Humph. 581; Merrick v. Wiltse, 37 Minn. 41, 33 N. W. 3; Wright v. Davenport, 44 Tex. 164. The buyer cannot rescind after using part of the goods. Lyon v. Bertram, 20 How. 149. See, also, Benj. Sales, §§ 888–892, commenting on conflicting dicta in Heyworth v. Hutchinson, L. R. 2 Q. B. 447, 36 Law J. Q. B. 270.

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in which case acceptance takes place when the contract is entered into, or whether the sale is of unascertained goods, which are subsequently accepted.

In some states, however, where there is an express warranty, a different rule applies, and it is held that in such case the buyer may rescind the contract for breach of the warranty, notwithstanding acceptance, and may return the goods.[53]

Breach of Warranty—Action for Damages.

That the buyer, after receiving and accepting the goods, may still bring an action for damages in case the goods are inferior in quality to that warranted, follows from the general rule that an action for damages lies in every case of a breach of contract.[54] Such an action may be maintained by the buyer without giving notice to the seller of the defects and without offer to return,[55]

[53] Bryant v. Isburgh, 13 Gray, 607; Smith v. Hale, 158 Mass. 178, 33 N. E. 493; Marshall v. Perry, 67 Me. 78; Franklin v. Long, 7 Gill & J. 407; Sparling v. Marks, 86 Ill. 125; Branson v. Turner, 77 Mo. 489; Johnson v. Whitman Agricultural Co., 20 Mo. App. 101; Rogers v. Hanson, 35 Iowa, 283; Upton Manuf'g Co. v. Huiske, 69 Iowa, 557, 29 N. W. 621; Boothby v. Scales, 27 Wis. 626. "In 1816, when the case of Bradford v. Manly, 13 Mass. 139, was before this court, and afterwards, until 1831, the law of England on the point raised in the present case was supposed to be as we now hold it to be here. Lord Eldon had said in Curtis v. Hannay, 3 Esp. 82, that he took it to be 'clear law,' and so it was laid down in 2 Selw. N. P. (1st Ed.) 586, in 1807, and in Long, Sales, 125, 126, in 1821, and in 2 Starkie, Ev. (1st Ed.) 645, in 1825. In 1831, in Street v. Blay, 2 Barn. & Adol. 461, Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of king's bench. Yet our court subsequently (in 1839) decided the case of Perley v. Balch, 23 Pick. 283. The doctrine of that decision prevents circuity of action and multiplicity of suits, and at the same time accomplishes all the ends of justice." Bryant v. Isburgh, supra, per Metcalf, J.

[54] Poulton v. Lattimore, 9 Barn. & C. 259; Day v. Pool, 52 N. Y. 416; Scott v. Raymond, 31 Minn. 437, 18 N. W. 274; Cox v. Long, 69 N. C. 7; Polhemus v. Heiman, 45 Cal. 573. As to warranty of title, ante, p. 165.

[55] Poulton v. Lattimore, 9 Barn. & C. 259; Fielder v. Starkin, 1 H. Bl. 17; Pateshall v. Tranter, 3 Adol. & E. 103; Douglass Axe Manuf'g Co. v. Gardner, 10 Cush. 88; Vincent v. Leland, 100 Mass. 432; Richards v. Grandy, 49 Vt. 22; Best v. Flint, 58 Vt. 543, 5 Atl. 192; Babcock v. Trice, 18 Ill. 420; Ferguson v. Hosier, 58 Ind. 438; English v. Spokane Commission Co., 48 Fed. 196; Id., 6 C. C. A. 416, 57 Fed. 451; Morse v. Moore, 83 Me. 473, 22 Atl. 362.

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though failure to give notice or to return raises a presumption that the goods were not actually defective.[56] Some courts, however, as we shall see, apply a different rule in cases of warranty by description.[57]

Diminution of Damages—Recoupment.

Instead of bringing an action for damages, the buyer may wait till he is sued for the price, and then set up the breach of warranty in diminution pro tanto of the damages.[58] And at common law this was his only way of availing himself of a breach of warranty as a defense. The rule was stated by Parke, B., in the leading case of Mondel v. Steel,[59] as follows: "Formerly it was the practice, when an action was brought for an agreed price of a specific chattel sold with a warranty, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty; in which action as well the difference between the price contracted for and the real value of the articles as any consequential damage might have been recovered. * * * The performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and

[56] Poulton v. Lattimore, 9 Barn. & C. 259, 265; Babcock v. Trice, 18 Ill. 420; Morse v. Moore, 83 Me. 473, 22 Atl. 362; Tacoma Coal Co. v. Bradley, 2 Wash. St. 600, 27 Pac. 454; Benj. Sales, § 900. Some courts, however, draw a distinction between patent and latent defects, and hold that, if the defects are so visible that it is apparent the buyer knew of them when he received the goods, the buyer, by accepting the goods in fulfillment of the contract, waives his right to avail himself of the warranty. See Buffalo Barb-Wire Co. v. Phillips, 67 Wis. 129, 30 N. W. 295; Locke v. Williamson, 40 Wis. 377; Morehouse v. Comstock, 42 Wis. 626; Nye v. Iowa City Alcohol Works, 51 Iowa, 129, 50 N. W. 988.

[57] Post, p. 246.

[58] Street v. Blay, 2 Barn. & Adol. 456; Parson v. Sexton, 4 C. B. 899; Poulton v. Lattimore, 9 Barn. & C. 259; Withers v. Greene, 9 How. 213; Lyon v. Bertram, 20 How. 149, 154; Bradley v. Rea, 14 Allen, 20; Dailey v. Green, 15 Pa. St. 118, 126; Dayton v. Hooglund, 39 Ohio St. 671; Doane v. Dunham, 65 Ill. 512, 79 Ill. 131; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598; Morehouse v. Comstock, 42 Wis. 626; Polhemus v. Heiman, 45 Cal. 573; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Central Trust Co. v. Arctic Ice Mach. Manuf'g Co., 77 Md. 202, 26 Atl. 493.

[59] 8 Mees. & W. 858.

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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. * * * But, after the case of Basten v. Butter (7 East, 479), a different practice began to prevail, and, being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattels, by reason of the noncompliance with the warranty, 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."

This case also determined that the buyer must bring a cross action if he desired to claim consequential or special damages; but, under the changed procedure now generally prevailing, the buyer may recover such damages by way of counterclaim.[60] And today in most states such damages may be set up by way of defense or counterclaim in an action on a note given for the price.[61]

Breach of Condition as Breach of Warranty.

It is said in Benjamin on Sales that "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 defense to an action, but giving a right to counterclaim for damages."[62] We have already seen that, in an executory sale, an undertaking that the goods shall

[60] See Zabriskie v. Central Vt. R. Co., 131 N. Y. 72, 29 N. E. 1006.

[61] Withers v. Greene, 9 How. 213; Ruff v. Jarrett, 94 Ill. 475; Wentworth v. Dows, 117 Mass. 14, per Colt, J.; Wright v. Davenport, 44 Tex. 164.

[62] Benj. Sales, § 564, citing Ellen v. Topp, 6 Exch. 424; Behn v. Burness, 3 Best & S. 751, 32 Law J. Q. B. 204. See, also, Chalm. Sale, § 14.

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possess a certain quality may be treated as a condition,[63] and also that a warranty survives the acceptance of the goods notwithstanding that the buyer has notice of defects which constitute a breach of the warranty.[64] There seems no reason why the same rule should not be applied whether the undertaking that the goods shall possess a certain quality is in the form of a condition such as is implied from the description of the goods, or whether it is the form of a warranty. And the cases very generally so hold, and allow the buyer, where the goods do not conform to the description specified, to accept the goods, notwithstanding such nonconformity, and in effect to treat the breach of condition as a breach of warranty.[65] Some cases, however, draw a distinction between conditions and warranties, and hold that, while a warranty survives acceptance even as to known defects, a condition that the goods shall be of a certain description does not survive acceptance, so far as concerns visible defects, when the buyer has had an opportunity to inspect; but that if, after opportunity for inspection, the buyer accepts the goods, he is precluded from recovering damages for any variation between the goods delivered and the goods described in the contract.[66]

[63] Ante, p. 242.

[64] Ante, p. 244.

[65] Bagley v. Cleveland Rolling Mill Co., 21 Fed. 159; English v. Spokane Commission Co., 48 Fed. 197; Id. 6 C. C. A. 416, 57 Fed. 451; Reynolds v. Palmer, 21 Fed. 433; Wolcott v. Mount, 36 N. J. Law, 262; Holloway v. Jacoby, 120 Pa. St. 583, 15 Atl. 487; Lewis v. Rountree, 78 N. C. 323; Eagan Co. v. Johnson, 82 Ala. 233, 2 South. 302; Dayton v. Hooglund, 39 Ohio St. 671; Morse v. Moore, 83 Me. 473, 22 Atl. 362; Tacoma Coal Co. v. Bradley, 2 Wash. St. 600, 27 Pac. 454. See, also, Marsh v. McPherson, 105 U. S. 709.

[66] Haase v. Nonnemacher, 21 Minn. 486; Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150 (implied condition of merchantableness does not survive acceptance in respect to visible defects); Comstock v. Sanger, 51 Mich. 497, 16 N. W. 872. It is difficult to reconcile all the New York cases on this point, but the result of the later decisions may be gathered from the following extracts and citations: "An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection to visible defects and imperfections, whether discovered or not, unless such delivery and

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Measure of Damages.

Prima facie the measure of damages, in case of a breach of warranty, is the difference between the value of the goods as they in fact were and the value of the goods as it would have been if they had been as warranted.[67] This is because, in ordinary cases, the

acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance. Reed v. Randall, 29 N. Y. 358; Gaylord Manuf'g Co. v. Allen, 53 N. Y. 515; Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608." Studer v. Bleistein, 115 N. Y. 316, 325, 22 N. E. 243, per Ruger, C. J. "Upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection. Kent v. Friedman, 101 N. Y. 616, 3 N. E. 905; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51; Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358. * * * The cases of Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Studer v. Bleistein, 115 N. Y. 316; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, and other cases of like character,—are clearly distinguishable, inasmuch as one is a contract concerning a sale by sample, and the others were executory contracts for the manufacture and sale or delivery of goods of a particular description. In cases of the latter character, where the quality of the goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted, and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract." Zabriskie v. Central Vt. R. Co., 131 N. Y. 72, 29 N. E. 1006, per Ruger, C. J. See, also, Day v. Pool, 52 N. Y. 416; Parks v. Morris Axe & Tool Co., 54 N. Y. 586; Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660. "Where the purchaser of goods delivered on an executory contract, with full knowledge, or with full opportunity for examination and knowledge, of their defects, which are open and apparent upon mere inspection, takes them into his possession, and appropriates them to his own use, without notifying the vendor at the time of receiving them, or within a reasonable time thereafter, that they are not accepted as fulfilling the contract, he cannot recoup damages for such defects or failures in an action for the contract price." McClure v. Jefferson (Wis.) 54 N. W. 777, per Cassidy, J.

[67] Jones v. Just, L. R. 3 Q. B. 197; Dingle v. Hare, 7 C. B. (N. S.) 145, 29 Law J. C. P. 144; Reggio v. Braggiotti, 7 Cush. 166; Case v. Stevens, 137 Mass. 551; Thoms v. Dingley, 70 Me. 100; Rutan v. Ludlam, 29 N. J. Law, 398; Freyman v. Knecht, 78 Pa. St. 141; Porter v. Pool, 62 Ga. 238; Herring v. Skaggs, 62 Ala. 180; Ferguson v. Hosier, 58 Ind. 438; Case

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difference is the loss which results directly from the breach of warranty. But the buyer may recover whatever other losses directly result from the breach. Thus where the seller warranted seed as of a particular description, and delivered inferior seed, he was held liable for the loss of crop which thereby resulted to the buyer;[68] and, where the buyer resold, the seller was held liable for the loss of crop which resulted to the subpurchaser, and for which the buyer, having resold with a warranty, was liable to the subpurchaser.[69]

The rules in respect to special damages which have already been stated are applicable.[70] The question is what a reasonable man,

Threshing Mach. Co. v. Haven, 65 Iowa, 359, 21 N. W. 677; Aultman & Taylor Co. v. Hetherington, 42 Wis. 622; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Merrick v. Wiltse, 37 Minn. 41, 33 N. W. 3; Wheeler & W. Manuf'g Co. v. Thompson, 33 Kan. 491, 6 Pac. 902.

[68] Wolcott v. Mount, 38 N. J. Law, 496, affirming 36 N. J. Law, 262; White v. Miller, 71 N. Y. 118, 78 N. Y. 393. See, also, Passenger v. Thorburn, 34 N. Y. 634; Van Wyck v. Allen, 69 N. Y. 61. Contra, Butler v. Moore, 68 Ga. 780. Where a druggist sold Paris green to a planter for the known purpose of killing cotton worms, but the article was not Paris green, and failed to kill the worms on being applied to the buyer's crop, the measure of damages for the breach of the contract, if it resulted in the loss of the crop, was the value of the crop as it stood, with the cost of the article, the expense of applying it, and interest. Jones v. George, 56 Tex. 149, 61 Tex. 345.

[69] Randall v. Raper, El., Bl. & El. 84, 27 Law J. Q. B. 266.

[70] Thoms v. Dingley, 70 Me. 100; Parks v. Morris Axe & Tool Co., 54 N. Y. 586; Thorne v. McVeagh, 75 Ill. 81; Herring v. Skaggs, 62 Ala. 180 (seller not liable for valuables stolen from safe warranted burglar proof); McCormick v. Vanatta, 43 Iowa, 389; Aultman v. Stout, 15 Neb. 356, 19 N. W. 464; English v. Spokane Commission Co., 6 C. C. A. 416, 57 Fed. 451. Buyer reselling with warranty may recover costs of defense against subpurchaser, where seller declines to defend. Lewis v. Peake, 7 Taunt. 153; Hammond v. Bussey, 20 Q. B. Div. 79. Where the seller sold a refrigerator to a poultry dealer with knowledge that he intended to use it to preserve chickens for the May market, and warranted that it would keep them in perfect condition, which it failed to do, and many chickens were lost, the buyer was entitled to recover, in addition to the difference between the value of the refrigerator as constructed and as warranted, the market value of the chickens lost, less expenses of sale. Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887. Where a manufacturer of ice cream bought coloring matter, which the seller, knowing its purpose, represented to be

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with the knowledge of the parties, would have contemplated as the probable result of a breach of the warranty had he applied his mind to it. "When one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such use, a certain loss to the buyer will be the probable result if the warranty is untrue, * * * the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in the contemplation of the parties when making the contract." [71]

pure and harmless, but which in fact was poisonous, and the buyer's customers who ate ice cream containing the matter were made sick, and the buyer destroyed the ice cream, held, that the buyer could recover the value of the goods so destroyed, and the damage caused by the resulting loss of customers. Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025. The buyer, suing for breach of warranty of a tackle block, cannot recover a sum paid by him without suit, and without communication with the defendant, to a servant for personal injuries caused by the breaking of the block, unless the servant might have recovered from the plaintiff. Roughan v. Boston & L. Block Co., 161 Mass. 24, 36 N. E. 461.

[71] Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88, per Berry, J. See, also, Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153.

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